Ontario Energy Board

P.O. Box 2319
2300 Yonge Street
27th Floor
Toronto ON M4P 1E4
Telephone: 416-481-1967
Facsimile: 416-440-7656
Toll free: 1-888-632-6273

Commission de l'énergie de l'Ontario

C.P. 2319
2300, rue Yonge
27e étage
Toronto ON M4P 1E4
Téléphone: 416-481-1967
Télécopieur: 416-440-7656
Numéro sans frais: 1-888-632-6273

Writer's Direct Line: 416-440-8117

February 15, 2013

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: Renewable Energy Supply Generators
Application to Review Market Rule Amendments MR-00381-R02, MR-00381-R03, MR-00381-R04, MR-00381-R05 and MR-00381-R06
Board File Number: EB-2013-0010/EB-2013-0029

Please find enclosed Board Staff's submission on confidentiality issues respecting the above proceeding.

Yours truly,

Original signed by

Martine Band
Associate General Counsel

Attachments

cc All parties to proceeding EB-2013-0029
James Rehob (Ministry of Energy)
Amanda Letourneau (Ministry of Energy)
Fred Cass (Aird & Berlis)
Michael Lyle (OPA)
Miriam Heinz (OPA)

ONTARIO ENERGY BOARD

BOARD STAFF SUBMISSION

APPLICATION BY RENEWABLE ENERGY SUPPLY GENERATORS TO REVIEW MARKET RULE AMENDMENTS

Board File No.: EB-2013-0010/EB-2013-0029

February 15, 2013

Introduction

On January 24, 2013, a number of entities that have renewable energy supply procurement contracts with the Ontario Power Authority ("OPA") in respect of wind generation facilities (the "Applicants") collectively filed with the Ontario Energy Board an application under section 33(4) of the *Electricity Act, 1998* seeking the review of certain amendments to the market rules made by the Independent Electricity System Operator ("IESO"). The market rule amendments in question deal with the dispatching of, and the establishment of floor prices for, variable generation facilities.

1. The Documents at Issue and Related Procedural Matters

On January 29, 2013, the IESO filed a number of documents in response to a Letter of Direction issued by the Board on January 22, 2013.[1] Certain of the documents produced by the IESO were redacted. By letter dated February 1, 2013, the IESO explained the redactions a follows: some of the redactions had been made for reasons of relevance (these were listed in Schedule A to the IESO's letter); nine of the documents had been redacted given the IESO's understanding that the OPA intended to assert confidential treatment over them (these were listed in Schedule B to the IESO's letter); and one of those nine documents had been redacted given the IESO's understanding that both the OPA and the Ministry of Energy intended to assert confidential treatment over it (this was listed in Schedule C to the IESO's letter, and also appears in Schedule B).

In its February 4, 2013 Procedural Order No. 2, the Board ordered the OPA to produce all nine documents listed in Schedules B and C to the IESO's February 1, 2013 letter, and to do so in accordance with Rule 10 of the Board's *Rules of Practice and Procedure* and the Board's *Practice Direction on Confidential Filings* (the "Practice Direction"). The Board also indicated that, if the Ministry of Energy wished to make a submission in respect of the confidentiality of the one document listed in Schedule C to the IESO's letter, the Ministry could do so directly or through the OPA.

[1] Proceeding EB-2013-0010, since combined with this proceeding. A revised filing was made on January 31, 2013 that included a supplementary document.

On February 6, 2013, the OPA filed and served on all parties redacted versions of the nine documents in question, together with its request for confidential treatment of eight of those documents. The OPA also filed un-redacted versions of the nine documents with the Board. In its confidentiality request, the OPA noted that a submission on the ninth document would be made by the Ministry of Energy. The Ministry of Energy's confidentiality request, including a non-confidential summary of the document in question, was also filed and served on all parties on February 6, 2013.

The Board's Procedural Order No. 2 also noted the Board's expectation that the issue of the confidentiality of the nine documents would be on the agenda for the February 8, 2013 Settlement Conference and that, failing settlement, the Board would hear submissions on that issue during the February 11, 2013 hearing of the Applicants' motion for the production of further materials from the IESO. At that hearing, the Board confirmed that submissions on the confidentiality issue would instead be made in writing, and established a schedule for that purpose.

Both the OPA and the Ministry of Energy filed submissions in support of their respective confidentiality claims on February 13, 2013. In its submissions, the OPA stated that its confidentiality claim, as well as the grounds for that claim, should be understood as extending to the document that is also the subject of the Ministry of Energy's claim for confidentiality.

For convenience, the nine documents that are the subject of the confidentiality requests filed to date are listed in a table set out in Appendix A to these Board staff submissions (using the document identification numbers from the IESO's February 1, 2013 letter). In that table and in the remainder of these submissions, the documents over which only the OPA is asserting confidential treatment are referred to as "OPA Claim Documents" and the document over which both the OPA and the Ministry are both asserting confidential treatment is referred to as the "Ministry/OPA Claim Document".

2. Document IESO0003476

On February 5, 2013, the IESO filed a letter with the Board indicating that a document over which the OPA has advised that it intends to assert confidential treatment had been inadvertently produced in un-redacted form in the IESO's

January 29, 2013 filing. That un-redacted document, covering bates nos. IESO0003476 to IESO0003496 ("Document 3476"), was not listed in Schedule B or C to the IESO's February 1, 2013 letter as being the subject of an intended confidentiality claim.

Un-redacted Document 3476 was attached to submissions that had been filed by the Applicants earlier in the day on February 5, 2013 and served on all of the parties. The Applicants subsequently re-filed their submissions on February 8, 2013 (but still dated February 5, 2013), attaching a redacted document identified as document bearing bates nos. IESO0003503.1 to IESO0003503.22 in lieu of un-redacted Document 3476. Counsel for the IESO has confirmed with Board staff that Document 3476 is the same as document IESO0003503.1, which itself was included in Schedule B to the IESO's letter.

Based on the redacted versions, there appears to be little difference between Document 3476 and document IESO0003503.1, on the one hand, and another document listed in Schedule B to the IESO's February 1, 2013 letter; namely, the document bearing bates nos. IESO0003497 to IESO0003503.

3. Other Redacted Documents

On February 6, 2013, the IESO made a further filing in response to the Board's Procedural Order No. 2. In the letter accompanying that filing, the IESO identified two further documents over which the IESO understands that the OPA intends to assert confidential treatment. Those two documents had initially been redacted by the IESO for reasons of relevance and were listed in Schedule A of its February 1, 2013 letter. They are identified in Appendix 1 to the IESO's February 6, 2013 letter as follows:

Document No.	Title
IESO0003589	Addressing Dispatch and Curtailment of Renewable Facilities – Joint OPA and IESO Presentation (July 13, 2010)
IESO0003634	Integration of Renewables: RES and FIT (October, 2010)

The OPA's submissions in respect of confidentiality refer to the nine documents that it produced on February 6, 2013, and do not refer to the above two documents. The OPA has not to date filed un-redacted versions of the above two documents, nor has it made a confidentiality request in respect of them specifically. Board staff submits that it would be appropriate for the OPA to file redacted and un-redacted versions of the two documents with the Board, and to confirm in its reply submissions due February 20, 2013 whether or not the basis for requesting confidential treatment over these two documents is the same as for the OPA Claim Documents. For the purposes of these submissions, Board staff assumes that this will be the case.

Board Staff Submission on OPA Claim Documents

The OPA's submissions on the confidential treatment of the OPA Claim Documents are two-fold: first, that the OPA Claim Documents are protected under the doctrine of settlement privilege; and second, that the disclosure of the OPA Claim Documents would prejudice settlement negotiations between the OPA and the Applicants.

In the submission of Board staff, a claim for privilege is distinct and different in law from a request for confidentiality. If a claim for privilege is made out in relation to information, then in accordance with the law pertaining to privilege the Board does not balance the confidentiality claim against the probative value of the information or its importance to the proper and informed determination of the proceeding before the court or tribunal. If the claim is one for confidentiality, then that balancing must take place. Similarly, in a claim for confidentiality, the court or tribunal has discretion to fashion a range of orders, including redaction and partial disclosure or disclosure subject to a confidentiality undertaking. If a claim for privilege is made out, the only proper order is to refuse disclosure and admissibility of the document.

1. Settlement Privilege

Under section 5.4(2) of the *Statutory Powers Procedure Act* (Ontario) (the "SPPA"), the scope of a tribunal's authority to make orders with respect to disclosure does not include the making of an order requiring disclosure of privileged information.

The Board has confirmed that it has the jurisdiction to hear and determine privilege claims.[2] Board staff has also noted in a recent proceeding that the Board is required to apply common law evidentiary principles in adjudicating privilege claims.[3] Although the cases at issue involved one or both of solicitor-client privilege and litigation privilege, Board staff submits that the same principles should apply to claims of settlement privilege.

Settlement privilege, where it applies, is a legal rule preventing the disclosure or introduction in evidence of communications relating to the settlement of litigation. The privilege applies to such communications as a category or class. As such, like other "class" privileges such as solicitor-client and police informer privilege, settlement privilege is strictly enforced by the courts, without any case-by-case balancing of the probative value or significance of the content of the communications, or its importance to the correct adjudication of the proceeding in which it is sought to be admitted. In this regard, Board staff agrees with paragraph 14 of the OPA's February 13, 2013 submissions, and with the statement of the law as quoted from the majority of the British Columbia Court of Appeal in the *Middlekamp* case.

Board staff also agrees with the OPA that the rationale for settlement privilege, and for its absolute class character, is the very strong public interest in encouraging settlement of litigious disputes, as outlined in the cases cited at paragraphs 7 to 9 of the OPA's February 13, 2013 submissions. However, Board staff submits that the same factors also account for the restrictions placed by the courts on the scope and duration of this privilege.

There is no disagreement between Board staff and the OPA that the three general conditions set out in paragraph 12 of the OPA's submissions must all be met before a claim for settlement privilege is made out in law. However, Board staff submits that the first requirement - that a litigious dispute be in existence or in contemplation - involves additional requirements as follows.

[2] Decision and Order dated June 8, 2011 in a proceeding to determine a motion by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1988* (EB-2010-0184). See also the February 22, 2012 Decision and Order in a proceeding on an application by Canadian Distributed Antenna Systems Coalition (EB-2011-0120).
[3] Decision and Order dated February 22, 2012, *supra.*

First, there must be a distinct threat of a particular litigious dispute or proceeding that is the subject of the settlement negotiations sought to be protected. The courts have imposed this requirement in order to distinguish true "settlement" negotiations in a litigious context from the more general and common "commercial" negotiations occurring in the ordinary course, where litigation may always be said to be a possibility. A leading case on this requirement, drawing the distinction between the settlement of a litigious dispute and commercial negotiation, is *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership*, 2007 BCSC 143 (in particular at paragraph 104).

Second, the privilege is normally found to arise in the context of court litigation, where a legal claim or cause of action between the negotiating parties is involved. It is at least questionable whether the privilege arises at all in the context of a potential application for statutory relief to an administrative tribunal such as the Board. Board Staff notes that, in its Decision and Order dated February 22,2012 in proceeding EB-2011-0120,[4] the Board determined that the Board proceeding in that case was not considered "litigation" for the purposes of litigation privilege (although the Board also noted that nothing turned on this determination in that case).

Further, in the context of court litigation, the courts normally require the party claiming privilege to file evidence, rather than submissions or argument, establishing that all of the relevant requirements pertaining to the privilege are met. The onus to prove an exception, referred to in paragraph 16 of the OPA's February 13, 2013 submission, only arises after this has been done.

The OPA's submissions assert that the redacted documents in this case make clear that litigation was within contemplation, referring as an example to a redacted document that explicitly refers to "litigation potential". However, the OPA's submissions do not identify the nature of the contemplated litigation in question (including whether it would be litigation in the courts or before the Board), nor do they identify the relationship between the contemplated litigation, the negotiations and the information contained in the OPA Claim Documents. As reflected in the OPA's submissions, in order to fall within settlement privilege

[4] *Supra,* note 2.

the communication must be made for the purpose of attempting to settle the litigation in whole or in part by negotiation and agreement, without adjudication.

As noted in section 2 of the Introduction above, the content of one of the OPA Claim Documents has been inadvertently disclosed. Board staff submits that, if a document is privileged as a matter of evidence law, the inadvertent disclosure does not operate as a waiver of the privilege. Where the inadvertent disclosure of a privileged document occurs, the courts have nonetheless ordered the return of the document and restricted the further disclosure or use of its content.[5] The same outcome would not necessarily be the case in respect of a claim based on confidentiality, as opposed to one based privilege.

The OPA Claim Documents have been shared with third parties (the IESO and/or the Ministry of Energy, as applicable). Board staff submits that the disclosure of privileged documents to third parties, when done subject to suitable restrictions, does not operate to waive or eliminate the privilege if the test for common interest privilege is met. For common interest to exist, the parties must share a common goal, seek a common outcome or have a selfsame interest. In addition, the common interest must be established at the time at which the information at issue is provided.[6] The concept of common interest could also be applied to a claim based on confidentiality.

2. Confidentiality

The OPA's second argument in respect of the OPA Claim Documents is that the Documents should be treated as confidential as their disclosure would prejudice settlement negotiations between the OPA and the Applicants. In this regard, the OPA makes reference to Appendix A of the Practice Direction.

Board staff notes first that the following policies or principles are reflected in the Practice Direction:

[5] See *Khadr v.Canada,* 2008 FC 549, at paragraphs 40-42 and 114-118.
[6] Hubbard, Magotiaux and Duncan, *The Law of Privilege in Canada* (Canada Law Book), at pages 11-57 to 11-58 and pages 12-50.12d to 12-50.19.

i. that proceedings should be open, transparent and accessible, and hence that the placing of materials on the public record is the rule and confidentiality is the exception;

ii. that the onus is on the person requesting confidentiality to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case;

iii. that parties should make every effort to limit the scope of their requests for confidentiality to an extent commensurate with the commercial sensitivity of the information at issue or with any legislative obligations of confidentiality or non-disclosure, and to prepare meaningful redacted documents or summaries so as to maximize the information that is available on the public record; and

iv. that the Board, through the application of the Practice Direction, will seek to strike a balance between the objectives of transparency and openness and the need to protect information that has been properly designated as confidential.[7]

Section 5.1.9 of the Practice Direction notes that some of the factors that the Board may consider in determining whether or not a request for confidentiality is warranted are listed in Appendix A to the Practice Direction. As noted by the OPA, among the factors identified in Appendix A is "the potential harm that could result from the disclosure of the information, including:…(iii) whether the information could interfere significantly with negotiations being carried out by a party…".

Board staff notes that the factors listed in Appendix A to the Practice Direction are just that – factors to be considered by the Board in making a determination on a request for confidentiality. Board staff therefore submits that, even if the disclosure of a document (or of information in a document) could result in the harm referred to above, it remains for the Board to determine whether the public interest in transparency and openness outweighs the harm that is being alleged (or vice versa).

[7] Practice Direction, sections 1 and 5.

Board staff submits that, to the extent that there is genuine potential harm in the disclosure of some or all of the information that has been redacted from the OPA Claim Documents, there is merit in according confidential treatment to that information, particularly if and to the extent that the information in question is not such as to be necessary to enable the parties to present their cases or to permit the Board to determine the issues in a proceeding or provide meaningful and well-documented reasons for its decision.

Board staff accepts that settlement negotiations may be occurring between the OPA and the Applicants in parallel with this proceeding. The OPA's submissions do not articulate with specificity how harm would ensue from the disclosure of the redacted information in the OPA Claim Documents, whether in whole or in respect of individual redactions, beyond the assertion that disclosure would prejudice negotiations between the OPA and the Applicants.

Based on the redacted documents themselves, it is not possible for Board staff to evaluate that assertion in a meaningful way, nor to assist the Board in its consideration of whether or not the redacted information appears to be necessary to enable the parties to present their cases or to permit the Board to determine the issues in this proceeding or provide meaningful and well-documented reasons for its decision. In many cases, the nature of the redacted information cannot be readily ascertained from the redacted version of the OPA Claim Documents. This is particularly the case where the entirety of a page (including the heading or title) has been redacted. Only in a more limited number of cases can the general nature of the information potentially be discerned from the un-redacted text.

As noted by the OPA, where a claim for confidentiality has been made, the Practice Direction states that the Board may make any of a number of specified orders, and may make any other order that the Board finds to be in the public interest.[8] If the Board determines that confidential treatment is warranted in respect of some or all of the redactions in the OPA Claim Documents, Board staff submits that the Board may wish to consider whether the OPA could be ordered to provide, for the public record, a non-confidential summary of the redacted

[8] This is also set out in Rule 10.4 of the Board's *Rules of Practice and Procedure.*

information. Board staff further submits that it would be of assistance if the OPA were to include submissions on this option in its reply submissions.

Questions of settlement privilege aside, Board staff does not believe that it is entirely clear from the OPA's submissions whether the OPA's claim for confidentiality hinges on the fact that the Applicants' counsel in this proceeding also represents one of the Applicants in their negotiations with the OPA. In other words, it is not clear, at least to Board staff, whether the OPA would object to un-redacted versions of the OPA Claim Documents being given to counsel that have signed a Declaration and Undertaking in this proceeding but for the dual role being performed by the Applicants' counsel. Board staff submits that, while unusual, it would be open to the Board to direct that un-redacted copies of the OPA Claim Documents be provided to counsel for all parties from whom the Board might accept a Declaration and Undertaking, other than counsel for the Applicants. While Board staff is aware of the information asymmetry that this approach would create, it would enable the other parties to have the benefit of the redacted information for the purpose of making their respective cases, and enable the Board to consider that information in a meaningful way in determining the issues in this proceeding. Board staff submits that it would be highly awkward, at best, for the Board to consider confidential information to which no parties to this proceeding were given access.

Board Staff Submission on Ministry/OPA Claim Document

The Ministry of Energy's submissions on the Ministry/OPA Claim Document largely makes the same claim to confidentiality based on interference with settlement negotiations as that made by the OPA in respect of the OPA Claim Documents (and on the Ministry/OPA Claim Document). The Ministry of Energy has submitted that disclosure of the information contained in the Ministry/OPA Claim Document has the potential to interfere with the on-going negotiations of the OPA with its counterparties, and could therefore be prejudicial to the OPA's interests, and may have broader implications for other entities involved in current and sensitive negotiations with the government or its agencies more broadly. Board staff's submissions regarding the application of the Practice Direction in the context of a claim pertaining to settlement negotiations are set out above.

The Ministry of Energy has, however, identified two other bases for its confidentiality claim in respect of the Ministry/OPA Claim Document:

i. the Document comprises advice to government and, in particular, advice to executive decision-makers on sensitive and developing policy matters; and

ii. disclosure of the Document could undermine the economic or other interests of Ontario, in part because negotiations between the OPA and various counterparties with vested interests in the outcome of this proceeding are ongoing and in part because other strategic positions of the government are at play.

Board staff submits that these arguments could be read as advancing a claim for "public interest immunity" in respect of the Ministry/OPA Claim Document. Public interest immunity has been described as follows:

> Unlike class privileges such as informer privilege and solicitor-client privilege…public interest privilege is not an absolute privilege: public interest privilege usually involves a weighing of the competing public and private interests that warrant secrecy on the one hand and disclosure on the other. Invoking public interest privilege inevitably means that a court must resolve the issue whether something should remain confidential by balancing the factors for and against disclosure. The factual and legal context in which the weighing process takes place determines the result. Not everything that falls within a confidential information category can be protected under the *Canada Evidence Act* or under the common law. Simply because the government *prefers* that documents remain confidential is not enough to protect documents or information from disclosure…
>
> Public interest privilege, whether protected under s. 37 [of the *Canada Evidence Act*] or the common law…involves a contextual analysis that must be applied on a case-by-case basis.[9]

The leading case on public interest immunity in Ontario is *Carey v. Ontario*,[10] which provides a history of the privilege at common law and guidance as to its

[9] Hubbard, Magotiaux and Duncan, *supra,* note 6, at pages 3-2 to 3-3.

modern application. It was applied by the Board in its Decision and Order dated June 8, 2011 in proceeding EB-2010-0184.[11]

In *Carey,* the Supreme Court of Canada accepted that the public interest in non-disclosure is not a Crown privilege but a public interest immunity and that, therefore, the resolution of the disclosure issue involves a weighing process. The Court also noted that "the most usual and appropriate way" to raise the issue of the application of public interest immunity is by means of a certificate by the affidavit of a Minister or, where a statute permits it or it is otherwise appropriate, of a senior public servant. Even then, however, the opinion of the Minister (or public servant) is not conclusive.

The Court in *Carey* stated as follows:

> Even Cabinet documents must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular content of the documents are, I would have thought, even more important…Revelations of cabinet discussions and planning at the development stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of cabinet government, but this can scarcely be the case when low level policy that has become of little public interest is involved.
>
> To these considerations, and they are not all, one must, of course, add the importance of producing the documents in the interests of the administration justice. On the latter question, such issues as the importance of the case and the need or desirability of producing the document to ensure that it can be adequately and fairly presented are factors to be placed in the balance. In doing this, it is well to remember that only the particular facts relating to the case are revealed…[12]

Board staff acknowledges that the Ministry of Energy has not, in their submissions, specifically identified public interest immunity as a basis for their

---

[10] [1986] 2 S.C.R. 637.
[11] *Supra,* note 2.
[12] *Supra,* note 10, at paragraphs 79 and 80.

confidentiality request. However, Board staff submits that the analytical approach to making a determination on public interest immunity, as described above, lends itself well to the determination of the Ministry of Energy's confidentiality claim under the Board's *Rules of Practice and Procedure* and the Practice Direction.

As noted by the Ministry of Energy, Appendix A of the Practice Direction includes, as a factor that may be considered by the Board in determining a request for confidential treatment, "any other matters relating to [*Freedom of Information and Protection of Privacy Act* ("FIPPA")] or FIPPA exemptions".

Section 13 of FIPPA allows (but does not require) the head of an institution to refuse to disclose a record where the disclosure would "reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution". However, under section 23 of FIPPA, an exemption from disclosure of a record under section 13 (among others) does not apply where a "compelling public interest" in the disclosure of the record clearly outweighs the purpose of the exemption. Whatever may be the test for determining what constitutes a "compelling public interest" under FIPPA, the point that Board staff notes is that FIPPA contemplates a balancing between a desire to promote the free flow of advice and recommendations within the deliberative process of government, on the one hand, and any countervailing public interest in disclosure, on the other. This is recognized by the Ministry of Energy, as appears from the section of its February 13, 2013 submissions entitled "Balance of Interests".

The same framework applies to section 18 of FIPPA, on which the Ministry of Energy also appears to rely in part. Section 18, which pertains to records that contain information the disclosure of which could reasonably be expected to be injurious to the economic and other interests of Ontario, is also a discretionary exemption and is also subject to the "compelling public interest" override.

For convenience of reference, sections 13, 18 and 23 of FIPPA are reproduced in Appendix B to these submissions.

Board staff submits that, to the extent that the Ministry/OPA Claim Document comprises information in the nature of advice or recommendations to the government (including the identification and assessment of different available options), there is a public interest in according confidential treatment to that information. In Board staff's view, the same holds true of information the

disclosure of which could reasonably be expected to be injurious to the economic or other interests of Ontario. If the Board were to accept this view, the Board would then need to consider whether the public interest in non-disclosure is outweighed by other factors, including notably the extent to which the information in question is considered necessary to enable the parties to present their cases or to permit the Board to determine the issues in a proceeding or provide meaningful and well-documented reasons for its decision. The Ministry/OPA Claim Document is redacted in its entirety, and Board staff is therefore not in a position to provide further assistance to the Board in that respect.

Board staff further submits that the public interest argument in relation to advice to government should not extend to information of a factual nature that is provided to support the policy decision-making process (such as statistical analyses or studies). With respect to this latter point, Board staff notes that the exemption under section 13 of FIPPA specifically does not apply to a record that contains factual material; a statistical survey; or a feasibility study or other technical study, including a cost estimate, relating to a government policy or project.

All of which is respectfully submitted.

Appendix A

Documents Subject to Confidentiality Requests

Documents shaded in grey are documents that appear to have been prepared jointly by the IESO and the OPA, whereas the others bear only the OPA's name.

OPA Claim Documents		**Ministry/OPA Claim Document**	
Document No.	Title	Document No.	Title
IESO0003497	Renewable Dispatch – Ministry of Energy (October 11, 2011)	IESO0003910	Managing Surplus Generation (May 14, 2012)
IESO0003503.1	Renewable Dispatch – Ministry of Energy (October 11, 2011)		
IESO0003548	Integration of Renewables and Recommendations for Dispatch Management – Update to Ministry of Energy – Confidential Advice to Government (August 13, 2012)		
IESO0003602	Integration of Renewables: RES and FIT – Ministry of Energy Update (October 29, 2010)		
IESO0003687	Integration of Renewables: RES and FIT Contracts – Ministry of Energy Update		

OPA Claim Documents		**Ministry/OPA Claim Document**	
Document No.	Title	Document No.	Title
	(November 25, 2010)		
IESO0003786	Potential Surplus Energy: A Summary – Briefing jointly prepared by IESO and OPA – Confidential (March 1, 2012)		
IESO0003854	Integration of Renewables and Recommendations for Dispatch Management – Update to Ministry of Energy – Confidential Advice to Government (August 15, 2012)		
IESO0003701	Integration of Renewables: RES and FIT Contracts – Ministry of Energy Update (November 29, 2010)		

Appendix B

Excerpts from *Freedom of Information and Protection of Privacy Act* (Ontario)

Advice to government

13. (1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

(b) a statistical survey;

(c) a report by a valuator, whether or not the valuator is an officer of the institution;

(d) an environmental impact statement or similar record;

(e) a report of a test carried out on a product for the purpose of government equipment testing or a consumer test report;

(f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

(g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;

(h) a report containing the results of field research undertaken before the formulation of a policy proposal;

(i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

(j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

(k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of

undertaking inquiries and making reports or recommendations to the institution;

(l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,

(i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or

(ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

Idem

(3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

Economic and other interests of Ontario

18. (1) A head may refuse to disclose a record that contains,

(a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

(b) information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

(g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

(h) information relating to specific tests or testing procedures or techniques that are to be used for an educational purpose, if disclosure could reasonably be expected to prejudice the use or results of the tests or testing procedures or techniques;

(i) submissions in respect of a matter under the *Municipal Boundary Negotiations Act* commenced before its repeal by the *Municipal Act, 2001*, by a party municipality or other body before the matter is resolved;

(j) information provided in confidence to, or records prepared with the expectation of confidentiality by, a hospital committee to assess or evaluate the quality of health care and directly related programs and services provided by a hospital, if the assessment or evaluation is for the purpose of improving that care and the programs and services.

Exception

(2) A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,

(a) the testing was done as a service to a person, a group of persons or an organization other than an institution and for a fee; or

(b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing.

Exemptions not to apply

23. An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Appendix C

Authorities Cited

Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership

Carey v. Ontario

Khadr v. Canada

Excerpts from Hubbard, Magotiaux and Duncan, *The Law of Privilege in Canada*

Please see documents attached.

2007 BCSC 143, [2007] B.C.W.L.D. 5288, [2007] B.C.W.L.D. 5289, [2007] B.C.W.L.D. 5286, [2007] B.C.W.L.D. 5287, [2007] B.C.W.L.D. 5292

C

2007 CarswellBC 208

Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership
Blue Line Hockey Acquisition Co., Inc., Northland Properties Corporation, Kery Ventures Limited Partnership, R. Thomas Gaglardi and Ryan K. Beedie (Plaintiffs) and Orca Bay Hockey Limited Partnership, Orca Bay Inc., Orca Bay Arena Limited Partnership, Orca Bay Arena Corp., John E. McCaw, Jr., Sportco Investments II, Inc., Francesco Aquilini and Aquilini Investments Group, Inc. (Defendants)

British Columbia Supreme Court
C.A. Wedge J.
Heard: December 6-8, 2006
Judgment: January 31, 2007
Docket: Vancouver S050342

Counsel: Murray A. Clemens, Q.C., Stephen R. Schachter, Q.C. for Plaintiffs

William C. Kaplan, Q.C., Peter L. Rubin for Defendants, Orca Bay, John E. McCaw Jr., Sportco

Hein Poulus, Q.C., David R. Brown for Defendants, Aquilini

Subject: Civil Practice and Procedure; Corporate and Commercial; Contracts

Civil practice and procedure --- Discovery -- Examination for discovery -- Range of examination -- Privilege -- Solicitor-client

In November 2004, "A" defendants entered into agreement to purchase from "O" defendants 50 percent interest in Vancouver Canucks, General Motors Place, and assets relating to both ("enterprise") -- Plaintiffs brought action claiming that interest purchased by A defendants belonged to plaintiffs -- Plaintiffs alleged that plaintiffs and A defendants formed partnership to pursue acquisition of interest in enterprise and agreed they would not pursue their objective without involvement of all partners -- Plaintiffs alleged that A owed fiduciary duty to other partners to refrain from diverting opportunities to acquire interest in enterprise to himself and to refrain from using confidential information of partnership for his own benefit -- Examinations for discovery were held -- Plaintiffs brought motion for answers to questions asked on discovery -- Motion granted in part -- A defendants were not required to answer whether A sought legal advice regarding whether he could enter into agreement with O defendants given his previous involvement with partnership, and whether witness at discovery spoke with counsel regarding absence of documents from data room -- Information sought was protected by solicitor-client privilege -- Crime/fraud limitation did not apply to question of whether A sought legal advice regarding entering agreement with O defendants -- A defendants were required to advise plaintiffs when they retained counsel to assist with acquisition of enterprise as this information was not protected by solicitor-client privilege.

Civil practice and procedure --- Discovery -- Examination for discovery -- Range of examination -- Relevance of questions

In November 2004, "A" defendants entered into agreement to purchase from "O" defendants 50 percent interest in Vancouver Canucks, General Motors Place, and assets relating to both ("enterprise") -- Plaintiffs brought action claiming that interest purchased by A defendants belonged to plaintiffs -- Plaintiffs alleged that plaintiffs and A defendants formed partnership to pursue acquisition of interest in enterprise and agreed they would not pursue their objective without involvement of all partners -- Plaintiffs alleged that A owed fiduciary duty to other partners to refrain from diverting opportunities to acquire interest in enterprise to himself and to refrain from using confidential information of partnership for his own benefit -- Examinations for discovery were held -- Plaintiffs and defendants brought motions for answers to questions asked on discovery -- Motions dismissed -- A defendants did not have to provide their financial records -- Financial records were not relevant, as A had acknowledged there was no change in financial position of defendants -- Defendants did not have to provide documents regarding terms of employment of M, who negotiated agreement on behalf of A defendants, as plaintiffs had not alleged that M acted in bad faith or outside scope of his employment -- Plaintiffs did not have to answer question of what alleged confidential information had been acquired by plaintiffs' representative while acting as solicitor in other matter involving acquisition of professional football team -- Question did not relate directly to matter in issue and representative had given detailed evidence regarding information he provided to A.

Civil practice and procedure --- Discovery -- Examination for discovery -- Range of examination -- Opinions -- Of examinee

In November 2004, "A" defendants entered into agreement to purchase from "O" defendants 50 percent interest in Vancouver Canucks, General Motors Place, and assets relating to both ("enterprise") -- Plaintiffs brought action claiming that interest purchased by A defendants belonged to plaintiffs -- Plaintiffs alleged that plaintiffs and A defendants formed partnership to pursue acquisition of interest in enterprise and agreed they would not pursue their objective without involvement of all partners -- Plaintiffs alleged that A owed fiduciary duty to other partners to refrain from diverting opportunities to acquire interest in enterprise to himself and to refrain from using confidential information of partnership for his own benefit -- Examinations for discovery were held -- Defendants brought motions for answers to questions asked on discovery -- Motions dismissed -- Plaintiffs were not required to answer questions regarding information they alleged defendants acquired from partnership and used in their acquisition of enterprise -- Plaintiffs were not required to review agreement and identify confidential information used by defendants to negotiate agreement -- Information sought was opinion evidence -- Plaintiffs were only required to answer questions relating to facts regarding information communicated to A defendants during earlier negotiations.

Civil practice and procedure --- Discovery -- Examination for discovery -- Range of examination -- Privilege -- Miscellaneous privileges

Litigation privilege -- Settlement privilege -- In November 2004, "A" defendants entered into agreement to purchase from "O" defendants 50 percent interest in Vancouver Canucks, General Motors Place, and assets relating to both ("enterprise") -- Plaintiffs brought action claiming that interest purchased by A defendants belonged to plaintiffs -- Plaintiffs alleged that plaintiffs and A defendants formed partnership to pursue acquisition of interest in enterprise and agreed they would not pursue their objective without involvement of all partners -- Plaintiffs alleged that A owed fiduciary duty to other partners to refrain from diverting opportunities to acquire interest in enterprise to himself and to refrain from using confidential information of partnership for his own be-

nefit -- Examinations for discovery were held -- Defendants brought motions for answers to questions asked on discovery -- Motions granted in part -- Plaintiffs were required to provide evidence or documentation regarding compensation paid to representative for his services on behalf of plaintiff in earlier negotiations as such evidence was relevant and not protected by settlement privilege -- Plaintiffs were not required to produce notes prepared by plaintiff regarding his involvement in earlier negotiations, as such notes were prepared for counsel at time litigation was in contemplation and were therefore protected by litigation privilege.

Civil practice and procedure --- Pleadings -- Application for particulars -- General principles

In November 2004, "A" defendants entered into agreement to purchase from "O" defendants 50 percent interest in Vancouver Canucks, General Motors Place, and assets relating to both ("enterprise") -- Plaintiffs brought action claiming that interest purchased by A defendants belonged to plaintiffs -- Plaintiffs alleged that plaintiffs and A defendants formed partnership to pursue acquisition of interest in enterprise and agreed they would not pursue their objective without involvement of all partners -- Plaintiffs alleged that A owed fiduciary duty to other partners to refrain from diverting opportunities to acquire interest in enterprise to himself and to refrain from using confidential information of partnership for his own benefit -- Defendants brought motion for particulars -- Motion granted in part -- Plaintiffs were required to provide particulars regarding identities of parties of contract of partnership alleged in statement of claim, any agency relationships alleged to have existed, confidential information allegedly conveyed to defendants, circumstances in which confidential information was conveyed to defendants, and information used by defendants to acquire interest in enterprise -- Plaintiffs were not required to provide further particulars of alleged close personal and business relationships between parties and families which resulted in A defendants owing fiduciary duty to plaintiffs -- Plaintiffs were not required to provide names of A defendants who allegedly carried on secret negotiations with O defendants, or nature and date of negotiations, as these particulars were best known, and likely only known, by defendants.

Cases considered by C.A. Wedge J.:

> Amway Corp. v. Eurway International Ltd. (1973), [1973] F.S.R. 213, [1974] R.P.C. 82 -- referred to
>
> Blank v. Canada (Department of Justice) (2006), 2006 CarswellNat 2704, 2006 CarswellNat 2705, 47 Admin. L.R. (4th) 84, 40 C.R. (6th) 1, 2006 SCC 39, (sub nom. Blank v. Canada (Minister of Justice)) 352 N.R. 201, 270 D.L.R. (4th) 280, 51 C.P.R. (4th) 1 (S.C.C.) -- considered
>
> Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership (2006), 2006 CarswellBC 2831, 2006 BCSC 1716 (B.C. S.C.) -- referred to
>
> Cadbury Schweppes Inc. v. FBI Foods Ltd. (1999), 235 N.R. 30, 83 C.P.R. (3d) 289, 42 B.L.R. (2d) 159, 117 B.C.A.C. 161, 191 W.A.C. 161, 59 B.C.L.R. (3d) 1, [1999] 5 W.W.R. 751, [1999] 1 S.C.R. 142, [2000] F.S.R. 491, 167 D.L.R. (4th) 577, 1999 CarswellBC 77, 1999 CarswellBC 78 (S.C.C.) -- referred to
>
> Can-Air Services Ltd. v. British Aviation Insurance Co. (1988), 30 C.P.C. (2d) 1, 1988 CarswellAlta 203, 63 Alta. L.R. (2d) 61, [1989] 1 W.W.R. 750, 91 A.R. 258 (Alta. C.A.) -- considered
>
> Cansulex Ltd. v. Perry (1982), 1982 CarswellBC 836 (B.C. C.A.) -- considered
>
> Carmichael v. Ontario Hydro-Electric Power Commission (1938), [1938] O.W.N. 467, 1938 Carswel-

lOnt 250, [1938] 4 D.L.R. 781 (Ont. H.C.) -- referred to

Cie Financière du Pacifique v. Peruvian Guano Co. (1882), 11 Q.B.D. 55, 52 L.J.Q.B. 181 (Eng. Q.B.) -- followed

Coco v. A.N. Clark (Engineers) Ltd. (1968), [1969] R.P.C. 41, [1968] F.S.R. 415 (Eng. Ch. Div.) -- considered

Cytrynbaum v. Gineaut Holdings Ltd. (2006), 2006 BCSC 468, 2006 CarswellBC 860 (B.C. S.C.) -- considered

Forliti (Guardian ad litem of) v. Woolley (2002), 2002 CarswellBC 1493, 2002 BCSC 858, 21 C.P.C. (5th) 246 (B.C. S.C. [In Chambers]) -- referred to

G.D. Searle & Co. v. Celltech Ltd. (1982), [1982] F.S.R. 92 (Eng. C.A.) -- followed

G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd. (1993), 79 B.C.L.R. (2d) 126, 14 C.P.C. (3d) 97, 1993 CarswellBC 120 (B.C. S.C. [In Chambers]) -- considered

Glegg c. Smith & Nephew inc. (2005), 2005 SCC 31, 2005 CarswellQue 2642, 2005 CarswellQue 2643, (sub nom. Glegg v. Smith & Nephew Inc.) 253 D.L.R. (4th) 193, [2005] 1 S.C.R. 724, (sub nom. Glegg v. Smith & Nephew Inc.) 334 N.R. 201 (S.C.C.) -- followed

Global Petroleum Corp. v. CBI Industries Inc. (1998), 172 N.S.R. (2d) 326, 524 A.P.R. 326, 1998 CarswellNS 447, 172 D.L.R. (4th) 689 (N.S. C.A.) -- considered

Goldman, Sachs & Co. v. Sessions (1999), 1999 CarswellBC 2772, 38 C.P.C. (4th) 143 (B.C. S.C.) -- considered

Hamalainen (Committee of) v. Sippola (1991), 1991 CarswellBC 320, 62 B.C.L.R. (2d) 254, 3 C.P.C. (3d) 297, [1992] 2 W.W.R. 132, (sub nom. Hamalainen v. Sippola) 9 B.C.A.C. 254, (sub nom. Hamalainen v. Sippola) 19 W.A.C. 254 (B.C. C.A.) -- considered

Keefer Laundry Ltd. v. Pellerin Milnor Corp. (2006), 59 B.C.L.R. (4th) 264, 2006 BCSC 1180, 2006 CarswellBC 1917 (B.C. S.C.) -- considered

Napier Environmental Technologies Inc. v. Vitomir (2001), 2001 CarswellBC 2961, 2001 BCSC 1704 (B.C. S.C.) -- followed

Northwest Mettech Corp. v. Metcon Services Ltd. (1997), 78 C.P.R. (3d) 86, 1997 CarswellBC 2619 (B.C. S.C. [In Chambers]) -- distinguished

Ontario (Securities Commission) v. Greymac Credit Corp. (1983), 41 O.R. (2d) 328, 21 B.L.R. 37, 33 C.P.C. 270, 146 D.L.R. (3d) 73, 1983 CarswellOnt 127 (Ont. Div. Ct.) -- referred to

Pax Management Ltd. v. A.R. Ristau Trucking Ltd. (1987), (sub nom. Pax Management Ltd. v. Canadian Imperial Bank of Commerce) [1987] 5 W.W.R. 252, (sub nom. Pax Management Ltd. v. Canadian Imperial Bank of Commerce) 14 B.C.L.R. (2d) 257, 1987 CarswellBC 158 (B.C. C.A.) -- referred to

Primex Investments Ltd. v. Northwest Sports Enterprises Ltd. (1995), 1995 CarswellBC 958, 13 B.C.L.R. (3d) 300, [1996] 4 W.W.R. 54 (B.C. S.C. [In Chambers]) -- considered

R. v. Cox (1884), 14 Q.B.D. 153, 33 W.R. 396, 15 Cox C.C. 611 (Eng. C.C.R.) -- considered

R. v. Shirose (1999), (sub nom. R. v. Campbell) 237 N.R. 86, 1999 CarswellOnt 948, 1999 CarswellOnt 949, 133 C.C.C. (3d) 257, (sub nom. R. v. Campbell) 42 O.R. (3d) 800 (note), 171 D.L.R. (4th) 193, (sub nom. R. v. Campbell) 119 O.A.C. 201, (sub nom. R. v. Campbell) 43 O.R. (3d) 256 (note), (sub nom. R. v. Campbell) [1999] 1 S.C.R. 565, 24 C.R. (5th) 365 (S.C.C.) -- considered

Reid v. British Columbia (Egg Marketing Board) (2006), 2006 CarswellBC 497, 2006 BCSC 346 (B.C. S.C.) -- referred to

Sinclair v. Roy (1985), 47 R.F.L. (2d) 15, 20 D.L.R. (4th) 748, 1985 CarswellBC 238, 65 B.C.L.R. 219 (B.C. S.C.) -- referred to

State ex rel. North Pacific Lumber Co. v. Unis (1978), 282 Or. 457, 579 P.2d 1291 (U.S. Or.) -- referred to

Werian Holdings Ltd. v. Prudential Assurance Co. (1995), 1995 CarswellBC 479, 58 B.C.A.C. 283, 96 W.A.C. 283, [1995] I.L.R. 1-3235 (B.C. C.A.) -- referred to

Westinghouse Canada Inc. c. Arkwright Boston Manufacturers Mutual Insurance Co. (1993), [1993] R.J.Q. 2735 (Que. C.A.) -- referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

R. 27(22) -- referred to

MOTIONS by plaintiffs and defendants for answers to questions asked on examinations for discovery and MOTION by defendants for particulars.

***C.A. Wedge J.*:**

I. Introduction

Nature of the Applications

1 The parties to this action have brought various pre-trial applications seeking orders for production of documents and particulars, and answers to questions asked of witnesses on examination for discovery.

Context of the Applications

2 The action concerns the sale of the Vancouver Canucks, General Motors Place and the assets relating to both (the "Enterprise"). The background to the dispute is contained in earlier reasons for judgment concerning severance of liability from damages: *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership*, 2006 BCSC 1716 (B.C. S.C.) .

3 In November 2004, Francesco Aquilini ("Aquilini") and companies in which he holds interests (collectively the "Aquilini Defendants") entered into an agreement (the "Investment Agreement") to purchase a 50 per cent interest in the Enterprise from its then owners (collectively the "Orca Bay Defendants"). Blue Line Hockey Acquisition Co. and its principals, R. Thomas Gaglardi ("Gaglardi") and Ryan K. Beedie ("Beedie") (collectively, "Blue Line") brought this action claiming that the interest in the Enterprise purchased by the Aquilini Defendants belongs to Blue Line.

Allegations by Blue Line against the Aquilini Defendants

4 Blue Line alleges that Gaglardi, Beedie and Aquilini formed a partnership (the "Partnership") to pursue the acquisition of an interest in the Enterprise. According to Blue Line, the three partners agreed they would not pursue their objective without the involvement of all partners. It is alleged that under the Partnership, Aquilini owed a fiduciary duty to the other partners to refrain from diverting opportunities to acquire an interest in the Enterprise to himself, and to refrain from using confidential information of the Partnership for his own benefit.

5 The Partnership entered into negotiations with the Orca Bay Defendants in November 2003. Blue Line alleges that Aquilini left the Partnership some months later and secretly pursued the acquisition of an interest in the Enterprise with the Orca Bay Defendants. Blue Line says that Aquilini, in the course of his secret negotiations with the Orca Bay Defendants, used confidential information he obtained from the Partnership.

6 Negotiations between Blue Line and the Orca Bay Defendants ended on or about November 5, 2005. On the same day, some of the Aquilini Defendants entered into the Investment Agreement with some of the Orca Bay Defendants to acquire a 50 per cent interest in the Enterprise. Blue Line says the Aquilini Defendants, by entering into the Investment Agreement:

a. acted contrary to the interests of the Partnership;

b. diverted an opportunity for their benefit;

c. used confidential information owned by the Partnership; and

d. obtained information concerning the Enterprise directly from the Orca Bay Defendants and concealed the information from the Partnership.

7 The Aquilini Defendants deny the existence of the Partnership or any other relationship that could give rise to fiduciary obligations. They deny having, taking, or using any confidential information, and say Aquilini was entitled to pursue the acquisition of an interest in the Enterprise to the exclusion of Gaglardi and Beedie.

Allegations by Blue Line against the Orca Bay Defendants

8 Blue Line says its negotiations with the Orca Bay Defendants led to the execution in August 2004, of a negotiating framework document (the "Term Sheet"). The Term Sheet describes certain business terms for the acquisition of the Enterprise. Blue Line alleges that negotiations thereafter proceeded as follows:

• On October 24, 2004, Blue Line advised the Orca Bay Defendants in writing of its position concerning the outstanding essential terms of the transaction.

• On October 30, 2004, the Orca Bay Defendants made a written offer based on the essential terms ac-

cepted to date, and their position on the outstanding essential terms.

• On November 2, 2004, Blue Line advised the Orca Bay Defendants of their response to the October 30 offer.

• On November 5, 2004, the Orca Bay Defendants advised Blue Line that the October 30 offer had been their final offer, and that negotiations were over; Blue Line then sought to accept the October 30 offer, but were told it was no longer open for acceptance.

• On the same day, the Aquilini Defendants and the Orca Bay Defendants entered into the Investment Agreement.

9 Blue Line alleges that the Orca Bay Defendants breached their obligations under the Term Sheet by abruptly ending negotiations and, immediately thereafter, entering into the Investment Agreement with the Aquilini Defendants.

10 Further, Blue Line alleges that the Orca Bay Defendants breached their obligation to act in good faith (implied under the Term Sheet) by entering into parallel negotiations with the Aquilini Defendants, knowing those defendants were using confidential information obtained by Blue Line in the course of its negotiations with the Orca Bay Defendants.

11 The Orca Bay Defendants deny entering into parallel negotiations. They say that negotiations with the Aquilini Defendants commenced after negotiations with Blue Line came to an end. They deny providing the Aquilini Defendants with confidential information or knowingly assisting the Aquilini Defendants in the alleged breach of their obligations to Blue Line.

Remedies sought by Blue Line

12 Blue Line seeks to have the sale of the Enterprise to the Aquilini Defendants set aside and an order for specific performance, compelling the sale of 100 per cent of the Enterprise to Blue Line on the terms offered by Orca Bay on October 30, 2004, just before ending the negotiations.

13 Alternatively, Blue Line seeks an order that the Aquilini Defendants and the Orca Bay Defendants, or, in the further alternative, the Aquilini Defendants only, hold their interests in the Enterprise on constructive trust for Blue Line.

14 In the further alternative, Blue Line seeks accounts on profit or damages against both groups of defendants.

II. The Applications

15 Blue Line applies for the following orders:

1) An order compelling Aquilini to provide, on discovery:

a. the date on which the Aquilini Defendants retained Lyall Knott ("Knott") to assist them in acquiring an interest in the Enterprise;

b. an answer as to whether Aquilini sought legal advice as to whether he could enter into the Invest-

ment Agreement in light of his previous involvement with the alleged Partnership;

c. the financial records of the Aquilini Defendants as at March 1, 2004, and as at November 1, 2004, to enable the plaintiff to test Aquilini's discovery evidence concerning his reasons for leaving the Partnership; and

d. answers to questions, and documents, concerning any representations made to the NHL concerning the acquisition of the Enterprise by Aquilini.

2) An order that the Orca Bay Defendants produce all documents dealing with the terms on which they employed, during the period October 31, 2003, to November 17, 2004, Stan McCammon ("McCammon"), who negotiated with Blue Line on behalf of the Orca Bay Defendants with respect to the acquisition of the Enterprise.

3) An order compelling McCammon to provide, on discovery, an answer as to whether he spoke with legal counsel for the Orca Bay Defendants (Joe Weinstein) concerning the absence of relevant documents from the data room.

16 The Aquilini Defendants apply for the following orders:

1) An order that Blue Line provide further and better particulars as to:

a. the identities of the parties to the contract of Partnership alleged in paragraph 34 of the Amended Statement of Claim;

b. whether any of the parties to the Partnership were acting as agents for one or more principals, and if so, who each agent's principals were;

c. the individual items of confidential information obtained by the Partnership which, according to paragraphs 35 and 45 of the Amended Statement of Claim, the Aquilini Defendants acquired, and when and from whom each item of confidential information was acquired by the Aquilini Defendants;

d. when, where, and of whom the Aquilini Defendants, according to paragraph 42 of the Amended Statement of Claim, requested confidential information from other members of the Partnership at the time the Aquilini Defendants left the Partnership, and what individual items of information were provided pursuant to such requests;

e. the individual items of confidential information obtained from the Partnership which, according to paragraph 67(c) of the Amended Statement of Claim, the Aquilini Defendants *used* when negotiating with the Orca Bay Defendants;

f. the close personal and business relationships between Aquilini, Gaglardi, and their families, which, according to paragraph 43(a) of the Amended Statement of Claim, resulted in the Aquilini Defendants owing a fiduciary duty to Gaglardi, Beedie and Blue Line;

g. the identity of any Aquilini Defendants who, according to paragraph 60 of the Amended Statement of Claim, carried on secret negotiations with the Orca Bay Defendants before and after

November 5, 2004, and the dates and nature of those negotiations;

h. the nature and dates of the acts of the Orca Bay Defendants which, according to paragraph 65(b) of the Amended Statement of Claim, amounted to negotiating with the Aquilini Defendants contrary to the Orca Bay Defendants' representation to Blue Line that it would not negotiate with the Aquilini Defendants, and the names of the individuals involved in those negotiations; and

i. the nature and dates of the acts of the Orca Bay Defendants which, according to paragraph 65(d) of the Amended Statement of Claim, amounted to negotiating with the Aquilini Defendants in breach of the Orca Bay Defendant's obligation to Blue Line, pursuant to paragraph 12(b)(ii) of the Term Sheet, to not negotiate with the Aquilini Defendants, at that time, and the names of the individuals involved in those negotiations.

2) An order requiring Blue Line to disclose correspondence between Ralph McRae ("McRae"), who assisted Blue Line in negotiations with the Orca Bay Defendants, and Gaglardi relating to McRae's compensation for his services on behalf of Blue Line.

3) An order compelling Gaglardi to provide, on discovery, the information that Blue Line alleges the Aquilini Defendants obtained from the Partnership and used in acquiring the Enterprise.

4) An order compelling McRae to provide, on discovery:

a. information he acquired while acting as solicitor on behalf of a client who sought to acquire a team in the Canadian Football League ("CFL"), including the name of his client, the identity of the potential vendor of the football team, and the representatives of the vendor that McRae dealt with;

b. an answer to the question of whether he sent a letter to Gaglardi threatening litigation concerning the compensation dispute;

c. an answer to the question of whether the settlement of the compensation dispute included a term requiring McRae to give evidence in this proceeding.

5) An order requiring McRae to:

a. prepare and produce an analysis of the Investment Agreement indicating any confidential information the Aquilini Defendants obtained from the Partnership; and

b. provide information regarding the transaction between the Aquilini Defendants and the Orca Bay Defendants which demonstrates that confidential information was exchanged between them on November 18, 2004.

17 The Orca Bay Defendants seek the following orders with respect to Blue Line:

1. An order that Gaglardi provide, on discovery, information relating to his review of the Investment Agreement and, specifically, to identify the confidential information he says the Aquilini Defendants used to negotiate the Investment Agreement.

2. An order that Robert Gaglardi provide, on discovery, information concerning McRae's compensation

for his role in negotiations with the Orca Bay Defendants.

3. An order that Blue Line produce all documents relating to negotiations for, and agreements on, the compensation McRae would receive for his role in negotiations with the Orca Bay Defendants.

4. An order that Blue Line produce the notes prepared by Gaglardi in late November, 2004, describing his involvement in the negotiations to acquire the Enterprise.

18 I will deal with these applications in turn.

III. Requests by Blue Line

Request 1(a) by Blue Line: An order compelling Aquilini to provide, on discovery, the date on which the Aquilini Defendants retained Lyall Knott ("Knott") to assist them in acquiring an interest in the Enterprise [Item 1(c) of Blue Line's Notice of Motion to the Aquilini Defendants, dated November 30, 2006 -- referring to question 2029 of the examination for discovery of Aquilini].

19 Aquilini's solicitor, Knott, negotiated the Investment Agreement concluded on November 5, 2004. The timing of Aquilini's entry into negotiations with the Orca Bay Defendants is a central issue in the litigation. The Aquilini Statement of Defence includes the following plea at paragraph 3:

> (f) In late October or early November 2004 the attempts of Gaglardi and Beedie to acquire an interest in the Canucks ended in failure;
>
> (g) Upon learning of that failure Aquilini entered into discussions for the acquisition of an interest in the Canucks, resulting in the transaction that was announced on November 17, 2004;
>
> (h) In connection with the November 2004 negotiations, Orca Bay once again gave Aquilini wide access to financial and other information about the Canucks [Aquilini had been given access for a 2001 bid].

20 Documents produced by the Orca Bay Defendants suggest that Knott's involvement on behalf of the Aquilini Defendants was known to the Orca Bay Defendants by November 2, 2004: an entry in McCammon's diary on November 2 states "If doing Francesco deal, include Lyall". On November 3, 2004, counsel for Orca Bay emailed Knott enclosing a draft agreement for review.

21 Aquilini was asked on discovery by counsel for Blue Line to disclose the date on which the Aquilini Defendants retained Knott to negotiate the acquisition of the Enterprise by the Aquilini Defendants. Counsel for the Aquilini Defendants objected on the basis that the information was protected by solicitor-client privilege.

22 Solicitor-client privilege protects communications between solicitor and client as distinct from evidence of acts or transactions: *Ontario (Securities Commission) v. Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Ont. Div. Ct.).

23 Blue Line argues that it seeks facts relating solely to the timing of legal advice, and not the contents of legal advice. Facts, it submits, are not protected by privilege.

24 Affidavit evidence filed in the application indicates that Knott had acted for the Aquilini family for many

years with respect to numerous transactions. The fact of the retainer concerning this particular transaction has already been disclosed. The question is the timing of the retainer.

25 The timing of Aquilini's negotiations leading to the Investment Agreement is an important fact in issue. The date on which Knott was retained may assist in establishing that fact.

26 I am satisfied that the question "When did you retain your solicitor to assist in acquiring an interest in the Enterprise" will not disclose the contents of any communications between Aquilini and Knot, and is not otherwise protected from disclosure. Accordingly, Aquilini must provide an answer to that question.

Request 1(b) by Blue Line: An order compelling Aquilini to provide, on discovery, an answer as to whether he sought legal advice regarding whether he could enter into the Investment Agreement in light of his previous involvement with the alleged Partnership [Item 1(c) of Blue Line's Notice of Motion to the Aquilini Defendants, dated November 30, 2006 -- referring to question 2208 of the examination for discovery of Aquilini].

27 Counsel for Blue Line asked Aquilini, in the course of his discovery, whether he obtained legal advice as to whether he could make an offer to purchase an interest in the Enterprise in light of his previous involvement with Beedie and Gaglardi. Counsel for the Aquilini Defendants objected on the basis that such information was protected by solicitor-client privilege.

Arguments of counsel

28 The Aquilini Defendants submit that in the event Aquilini answers in the affirmative to the question "Did you seek legal advice as to whether you could enter into the Investment Agreement?" his answer will disclose, to some extent, the content of the communications between Aquilini and his solicitor.

29 I accept that an answer to the question, if affirmative, would disclose to some extent the contents of communications between Aquilini and his solicitor. That being the case, the question is impermissible unless an exception to solicitor-client privilege applies in the circumstances.

30 Blue Line argued that the "crime/fraud exception" applies in this case because the communications are alleged to be in furtherance of unlawful conduct on the part of the Aquilini Defendants, that is, breach of fiduciary duty and breach of confidence.

31 The crime/fraud exception is a limitation on solicitor-client privilege: *Goldman, Sachs & Co. v. Sessions* (1999), 38 C.P.C. (4th) 143 (B.C. S.C.) at para. 9 [*Goldman Sachs*]. A client cannot consult a lawyer for the purpose of obtaining advice about a crime he or she intends to commit and expect the advice to be protected by privilege. The principle has been extended to civil fraud and is thus known as the "crime/fraud exception".

32 The Court in *Goldman Sachs* reviewed the case of *R. v. Shirose*, [1999] 1 S.C.R. 565 (S.C.C.) [*Shirose*] in which the Supreme Court of Canada discussed the requirements that must be established before this limitation on solicitor-client privilege will apply. In *Shirose* at para. 57, Binnie J., writing for the Court, noted that the key issue is the intention of the client who seeks the advice: "[The crime / fraud] exception can only apply where a client is knowingly pursuing a criminal purpose."

33 Because it is a requirement that the client *knows* the act on which advice is sought would be unlawful, "[t]he client must either conspire with his solicitor or deceive him" (*Shirose* at para. 56 citing *R. v. Cox* (1884), 14 Q.B.D. 153 (Eng. C.C.R.). In other words, since the client knows the act will be unlawful, the solicitor must

either conspire in the activity by giving advice, or fail to realize that advice is being sought regarding an unlawful act.

34 The client's intention is paramount because the law will not discourage clients from seeking legal advice in good faith regarding transactions which are ultimately found to be unlawful:

> The knowledge requirement minimizes the effect of the exception on proper communications; absent this requirement legitimate consultations would be inhibited by the risk that their subject matter might turn out to be illegal and therefore unprivileged (***Shirose*** at para. 58 citing "The Future Crime or Tort Exception to Communications Privileges" (1964), 77 Harv. L. Rev. 730 at 731).
>
> [T]he proponent of the evidence must show that the client, when consulting the attorney, knew or should have known that the intended conduct was unlawful. Good-faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the privilege, even if that action should later be held improper (***State ex rel. North Pacific Lumber Co. v. Unis***, 579 P.2d 1291 (U.S. Or. 1978)).

35 A mere assertion that the solicitor's advice was sought in furtherance of an illegal purpose will not be sufficient. Some evidence of the illegal purpose is required:

> [T]here must be more than a mere allegation - there must be "something to give colour to the charge", that is, "some prima facie evidence that it has some foundation in fact" (***Goldman Sachs*** at para 20 citing ***Pax Management Ltd. v. A.R. Ristau Trucking Ltd.*** (1987), 14 B.C.L.R. (2d) 257 (B.C. C.A.)).
>
> [I]t is not necessary for the court to weigh conflicting evidence and to make findings of fact, ...[but] the court must examine the applicant's case in the light shed by all of the evidence and the surrounding circumstances to determine if it "gives colour to the charge " (***Goldman Sachs*** at para 21).
>
> There must be clear and convincing evidence that the solicitor-client communication facilitated the unlawful act or that the solicitor otherwise became a dupe or conspirator (***Reid v. British Columbia (Egg Marketing Board)***, 2006 BCSC 346 (B.C. S.C.) at para. 17).

36 There is no evidence in this case that the Aquilini Defendants sought legal advice for the purpose of committing an unlawful act. Even if legal advice was sought as to the legality of the Aquilini Defendants' obtaining a share of the Enterprise for themselves, and the transaction is ultimately found to be unlawful, it is clear from *Shirose* that the solicitor-client privilege in relation to the advice sought will not be compromised.

37 Blue Line relies on the decision of this Court in *Northwest Mettech Corp. v. Metcon Services Ltd.* (1997), 78 C.P.R. (3d) 86 (B.C. S.C. [In Chambers]) [*Northwest Mettech*], in which it was held that the crime/fraud exception may apply where the alleged unlawful conduct is breach of fiduciary duty or breach of confidence.

38 In *Northwest Mettech*, an employee (the first defendant) left his previous employer (the plaintiff) and went to work for a new employer (the second defendant). The employee allegedly communicated confidential information to the new employer's solicitor for the purpose of enabling the solicitor to draft a patent application using the confidential information. The plaintiff argued that the information was communicated to the solicitor in breach of confidence. The trial judge agreed, concluding that the communication to the solicitor was the very communication that amounted to the breach of confidence. On that basis, the trial judge accepted that the crime/

fraud limitation ought to apply:

> .... The communication took place concurrently with the severance of employment with the plaintiff and the commencement of the employment with the defendants. It was a communication that is at the heart of the lawsuit. It relates to the plasma torch and axial injection technology which is the subject matter of the information alleged to have been wrongfully taken....
>
> ...I would hold that fairness requires that the plaintiff be entitled to see the communication because the communication may be the very gravamen of the lawsuit here, and if the plaintiff is precluded from seeing it by virtue of the application of solicitor/client privilege, the plaintiff would be precluded, perhaps, from proving its case
>
> (***Northwest Mettech*** at para. 13)

39 The result in *Northwest Mettech* is closely tied to the unique facts of the case. Those facts are clearly distinguishable from the present case. The impugned communication between Aquilini and his solicitor does not form the basis of the action. Aquilini is not alleged to have committed a breach of confidence in the course of seeking the legal advice in question.

40 I conclude that the crime/fraud limitation does not apply. Aquilini is not required to disclose whether he sought legal advice regarding his participation in negotiations concerning the Enterprise.

Request 1(c) by Blue Line: An order compelling Aquilini to provide, on discovery, the financial records of the Aquilini Defendants as at March 1, 2004, and as at November 1, 2004, to enable the plaintiff to test Aquilini's discovery evidence concerning his reasons for leaving the Partnership [Item 1(c) of Blue Line's Notice of Motion to the Aquilini Defendants, dated November 30, 2006 -- referring to questions 2333 (request 41) and 3253 - 3259 of the examination for discovery of Aquilini].

41 Paragraph 39 of the Amended Statement of Claim states as follows:

> In or about March 2004, Aquilini advised Gaglardi that he was unable to finance his share of the acquisition of an interest in the Enterprise by the Partnership and ceased to be a partner.

42 That allegation is denied generally in the Amended Statement of Defence, and paragraph 3 states in part as follows:

> (c) In March 2004, Aquilini advised Gaglardi and Beedie that he was no longer interested in participating with them in the attempt to acquire 50% of the Canucks;
>
> . . . . .
>
> (e) Such relationship as did exist between Aquilini and Gaglardi and Beedie ended in March 2004.

43 In the course of his examination for discovery, Aquilini was asked about his conversation with Gaglardi in March 2004, when he advised Gaglardi that he was no longer interested in pursuing an interest in the Enterprise. Aquilini said he recalled meeting with Gaglardi at a Vancouver restaurant. While he could not recall the specific details of the conversation, he did recall in general terms expressing the view that the negotiations were "going nowhere" and, as a result, he was no longer interested in participating. Aquilini recalled telling Gaglardi that if he liquidated assets to finance the transaction, and the transaction did not occur, he would incur significant tax

consequences with nothing to show for them.

44 Gaglardi, in his examination for discovery, asserted that Aquilini said, in March 2004, that he was leaving the Partnership because he was not able to finance the purchase of an interest in the Enterprise at that time. Aquilini has denied that assertion. Further, Aquilini says that such an assertion would have been untrue, because his financial circumstances in March 2004 were no different than they were in November 2004 when he entered into the Investment Agreement.

45 It is common ground that if there was a Partnership, it ended in March 2004, when Aquilini advised Gaglardi he was withdrawing from the venture. The only disputed fact is whether Aquilini told Gaglardi and Beedie that the reason he was no longer interested in pursuing the venture was because he could not finance his share of the acquisition.

46 Blue Line requested production of the financial statements of the Aquilini Defendants for the months of March and November 2004. Blue Line seeks the financial records to determine whether the Aquilini Defendants' financial position changed between March and November 2004, in order to undermine the reason Aquilini allegedly gave Gaglardi for leaving the Partnership. However, Aquilini has denied giving such a reason, and acknowledges there was no change in the financial position of the Aquilini Defendants between March and November 2004. The only question, therefore, is whether Aquilini gave such a reason for leaving the partnership knowing it was false. The issue is one relating solely to credibility. In the event that Blue Line wishes to rely at trial on the fact that Aquilini's financial circumstances were the same in March 2004 and as they were in November 2004, it does not require financial records to prove that fact. Blue Line has Aquilini's admission as proof of that fact.

47 Accordingly, the Aquilini Defendants are not required to produce the requested financial records.

Request 1(d) by Blue Line: An Order Compelling Aquilini to Provide, on Discovery, Answers to Questions, and Documents, Concerning Any Representations Made to the NHL Concerning the Acquisition of the Enterprise by Aquilini [Item 1(c) of Blue Line's Notice of Motion to the Aquilini Defendants, Dated November 30, 2006 -- Referring to Question 2395 of the Examination for Discovery of Aquilini].

48 Certain information requests listed in the notices of motion were resolved between the parties during the course of the three days of argument on these applications. After the hearing, the parties jointly provided me with a letter identifying the outstanding issues to be decided. This issue was listed as an outstanding issue. However, I have reviewed the written submissions filed by the Aquilini Defendants in response to the Blue Line applications, as well as my notes of the oral arguments of counsel. It does not appear that any submissions were made by the Aquilini Defendants concerning this request by Blue Line. I will assume, unless counsel advises otherwise, that there is no longer any objection to this request.

Request 2 by Blue Line: An order that the Orca Bay Defendants produce all documents dealing with the terms on which they employed, during the period October 31, 2003, to November 17, 2004, Stan McCammon ("McCammon"), who negotiated with Blue Line on behalf of the Orca Bay Defendants with respect to the acquisition of the Enterprise [Item 4 of Blue Line's Notice of Motion to the Orca Bay Defendants, dated November 30, 2006].

49 McCammon was the President and Chief Executive Officer of Orca Bay Hockey Limited Partnership and Orca Bay Limited Partnership. He was involved on behalf of Orca Bay in negotiations regarding the sale of the

Enterprise to Blue Line from October 2003 to the conclusion of the Term Sheet which was executed on August 13, 2004. McCammon also handled the negotiations with Gaglardi following execution of the Term Sheet, including the exchanges of proposals in late October and early November, 2004.

50 Blue Line seeks an order for production of any correspondence, agreements, or memoranda disclosing the terms of McCammon's employment with Orca Bay between October 2003 and November 2004. Blue Line says the documents are relevant to the issue of whether McCammon had an interest in the outcome of the negotiations for the sale of a 50 per cent interest in the Enterprise to the Aquilini Defendants as distinct from a sale of the entire Enterprise to Blue Line. As I understand Blue Line's submission, it wishes to determine whether McCammon would have retained his position with Orca Bay in the event that only 50 per cent of the Enterprise was acquired by a third party. If so, he may have favoured the Aquilini bid for a 50 per cent interest and conducted the negotiations with that in mind.

51 The Orca Bay defendants resist production of these documents on the basis that they are not relevant to the issues arising from the pleadings.

52 The scope of relevance on discovery is broader than at trial. The following observations are applicable:

> It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party ... either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party ... either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences (***Cie Financière du Pacifique v. Peruvian Guano Co.*** (1882), 11 Q.B.D. 55 (Eng. Q.B.) [***Peruvian Guano***]).

And:

> In the context of an examination on discovery or a disclosure of evidence that takes place while a case is being readied for trial, the concept of relevance is interpreted broadly. Being relevant means being useful for the conduct of an action, as Proulx J.A. noted in a case concerning the disclosure of a written document: ... "the [party seeking disclosure] must satisfy the court not that the evidence is relevant in the traditional sense of the word in the context of a trial, but that disclosure of the document will be useful, is appropriate, is likely to contribute to advancing the debate and is based on an acceptable objective that he or she seeks to attain in the case, and that the document to be disclosed is related to the dispute" (***Glegg c. Smith & Nephew inc.***, [2005] 1 S.C.R. 724 (S.C.C.) [***Glegg v. Smith & Nephew***] citing ***Westinghouse Canada Inc. c. Arkwright Boston Manufacturers Mutual Insurance Co.***, [1993] R.J.Q. 2735 (Que. C.A.) at 2741.

53 However, relevance must be assessed in the context of the pleadings. In this case, there is no plea by Blue Line that McCammon acted in bad faith in the negotiations with a view to advancing his own interests. Nor has Blue Line made any attempt to question McCammon on the issue to lay a proper foundation for this request.

54 If the theory of Blue Line is that McCammon undermined the negotiations because he did not want Blue Line to succeed in obtaining the entire Enterprise, then McCammon must have been acting against the interests

of his employer, Orca Bay, at the same time. Were that the case, McCammon would have been acting outside the scope of his employment.

55 I accept the submissions of the Orca Bay Defendants on this issue. The requested documents could only be relevant if Blue Line had alleged in its pleadings that McCammon acted in bad faith and outside the scope of his employment in order to advance his own interests. The pleadings contain no such allegation. The terms of employment of McCammon are not relevant to the issues in the action as currently disclosed by the pleadings.

Request 3 by Blue Line: An order compelling McCammon to provide, on discovery, an answer as to whether he spoke with legal counsel for the Orca Bay Defendants (Joe Weinstein) concerning the absence of relevant documents from the data room [Item 6 of Blue Line's Notice of Motion to the Orca Bay Defendants, dated November 30, 2006 -- referring to question 1175 of the examination for discovery of McCammon].

56 The Amended Statement of Claim alleges, at paragraph 49, that the exclusivity period stipulated in the Term Sheet for negotiations between Blue Line and Orca Bay was extended from October 1, 2004, to November 1, 2004, due to the delay by the Orca Bay Defendants in providing certain transaction documents to Blue Line.

57 On discovery, counsel for Blue Line asked McCammon whether he had a discussion with Joe Weinstein, counsel for the Orca Bay Defendants, about pursuing an email sent by Blue Line's solicitor concerning the absence of relevant documentation from the data room during the late stages of the negotiations. Counsel for the Orca Bay Defendants objected to the question on the basis that discussions between McCammon and his legal counsel are protected by solicitor-client privilege.

58 The Orca Bay Defendants do not object to Blue Line asking McCammon whether, to his knowledge, Weinstein called Blue Line's solicitor in response to the email request. However, they say Blue Line wants to ask questions about McCammon's discussion with Weinstein, which line of inquiry is impermissible.

59 This request raises similar legal issues to those discussed above in relation to request 1(a) by Blue Line. I agree that the discussion between McCammon and Weinstein, if it occurred at all, is protected by solicitor-client privilege. As such, McCammon cannot be asked questions about the contents of any such discussions.

IV. Applications of the Aquilini Defendants

60 As the Aquilini Defendants have made numerous requests for particulars, I will review the law regarding particulars before evaluating those requests.

The law regarding particulars

61 The function of particulars was described in *Cansulex Ltd. v. Perry* , [1982] B.C.J. No. 369 (B.C. C.A.) at para. 15 [*Cansulex*] as follows:

> (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;
>
> (2) to prevent the other side from being taken by surprise at the trial;
>
> (3) to enable the other side to prepare for trial

(4) to limit the generality of the pleadings;

(5) to limit and decide the issues to be tried, and as to which discovery is required, and

(6) to tie the hands of the party so that it cannot without leave go into any matters not included.

62 The fact that the particulars sought are known to the party demanding them is not a reason to refuse production of the particulars. The demanding party is entitled to know the case it must meet: *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.* (1993), 79 B.C.L.R. (2d) 126 (B.C. S.C. [In Chambers]) at para. 7 [*G.W.L. Properties*].

63 In breach of confidence cases, the plaintiff ought to specifically identify the information over which it claims a proprietary right, and the circumstances in which knowledge of the information came into the possession of the defendant such that use of the information by the defendant would be unconscionable: see *Napier Environmental Technologies Inc. v. Vitomir*, 2001 BCSC 1704 (B.C. S.C.) at para. 28 [*Napier*] citing *G.D. Searle & Co. v. Celltech Ltd.*, [1982] F.S.R. 92 (Eng. C.A.), at 109 [*Searle*]. Although *Napier* and *Searle* dealt with ex-employees allegedly using confidential information in the nature of trade secrets, I consider the level of particularity required in those cases to be equally applicable to the circumstances of the present case.

64 With these general principles in mind, I turn to the specific demands for particulars by the Aquilini Defendants.

Request 1(a) by the Aquilini Defendants: Further and better particulars as to the identities of the parties to the contract of Partnership alleged in paragraph 34 of the Amended Statement of Claim [Item 1(e) of Schedule A to the Aquilini Defendants' Particulars Motion to Blue Line dated December 1, 2006].

65 The Aquilini Defendants say it remains unclear as to precisely which parties are alleged to have been partners in the Partnership. They pose the following question: Are the partners alleged to be Gaglardi, Beedie and Aquilini, or the corporate entities for whom they acted, or some combination of the foregoing?

66 Blue Line has provided the following response to this request for particulars

Initial response

Tom Gaglardi was the individual representing the interests of Northland Properties Corporation. Ryan Beedie was the individual representing the interests of Kery Ventures Limited Partnership and other related companies included in the Beedie Group, and Francesco Aquilini was the individual representing the interests of the Aquilini Investment Group Inc.

Further response

In respect of Gaglardi, it was intended that the acquisition be made by partnerships which became the True North plaintiffs and that the units in those partnerships would be held by Northland. In and after October 2003, Gaglardi acted on behalf of himself and Northland.

In respect of Beedie, it was intended that the acquisition be made by partnerships which became the True North plaintiffs and that the units in those partnerships would be held by Kery. In and after October 2003, Beedie acted on behalf of himself and Kery.

> In respect of Aquilini, it was intended that the acquisition would be made by partnerships and that the units in those partnerships would be held by Aquilini Investment Group Inc. or others. In and after October 2003, Aquilini acted on behalf of himself, Aquilini Investment Group Inc. or other affiliates.
>
> (Set out under item 1(d)(ii) of Schedule A to the Aquilini Defendants Notice of Motion, Tab 16 of the Joint Chambers Record for the December 6-8, 2006, hearing)

67 Counsel for the Aquilini Defendants submits these responses do not answer the fundamental question "Who were the partners?"

68 The Amended Statement of Claim alleges the existence of a Partnership. I agree that despite the particulars already provided by Blue Line, the identity of the individuals and or corporate entities alleged to form the Partnership remains unclear. Accordingly, Blue Line must provide particulars as to the identities of the individuals and/or corporate entities it alleges were the members of the Partnership. If the constituency of the Partnership changed over time, Blue Line must so indicate.

Request 1(b) by the Aquilini Defendants: Further and better particulars as to whether any of the parties to the Partnership were acting as agents for one or more principals, and if so, who each agent's principals were [Item 1(d)(ii) of Schedule A to the Aquilini Defendants' Particulars Motion to Blue Line dated December 1, 2006].

69 This request overlaps with request 1(a) above. Blue Line must particularize any agency relationships alleged to exist within the Partnership.

Request 1(c) by the Aquilini Defendants: Further and better particulars as to the individual items of confidential information obtained by the Partnership which, according to paragraphs 35 and 45 of the Amended Statement of Claim, the Aquilini Defendants acquired, and when and from whom each item of confidential information was acquired by the Aquilini Defendants [Item 4 of Schedule A to the Aquilini Defendants' Particulars Motion to Blue Line dated December 1, 2006].

70 Paragraphs 35 and 45 of the Amended Statement of Claim contain allegations that the Aquilini Defendants received information from Blue Line and that the information received was confidential. The Aquilini Defendants have requested particulars identifying the specific pieces of information alleged by Blue Line to be confidential information.

71 Blue Line's initial response was that the request would be considered following examinations for discovery. Thereafter, Blue Line provided the following particulars:

> Everything that was disclosed by the Plaintiffs to the Aquilini Defendants in connection with the acquisition of the Enterprise, including the Plaintiffs' view or consideration of that information, constitutes Confidential Information as that term is used in the Statement of Claim, and all knowledge and information obtained by the Aquilini Defendants from the Plaintiffs with respect to the Enterprise constitutes Confidential Information. The demand for the identification of "each individual item of Confidential Information" is a matter of evidence, not pleadings.
>
> (Set out under item 4 of Schedule A to the Aquilini Defendants Notice of Motion, Tab 16 of the Joint Chambers Record for the December 6-8, 2006, hearing)

72 In a further response, Blue Line added the following:

> The Aquilini defendants acquired the following confidential information from Orca Bay: its positions in respect of the draft term sheets and offers exchanged between the parties on or about the following dates: November 13, 2003, November 28, 2003, January 15, 2004, February 22, 2004, March 15, 2004, and August 13, 2004. In addition, the Aquilini defendants obtained from Orca Bay the contents of the negotiations between Orca Bay and Gaglardi and Beedie which took place between July 2004 and November 4, 2004, and Orca Bay's desire to have Aquilini participate, as a partner, in a purchase with Gaglardi or Beedie or obtain its own interest in the Enterprise.
>
> The Aquilini defendants obtained from Gaglardi and Beedie and McRae to the end of March, 2004, their negotiating positions and strategies in respect of the matters reflected in the Term Sheets referred to above. After March 2004, Gaglardi provided Aquilini with information concerning the contents of the Term Sheets and the status of negotiations.
>
> (Set out under item 4 of Schedule A to the Aquilini Defendants Notice of Motion, Tab 16 of the Joint Chambers Record for the December 6-8, 2006, hearing)

73 In response to a separate request by the Aquilini Defendants for particulars of the confidential information allegedly requested by Aquilini, Blue Line initially provided the following particulars:

> Aquilini requested Confidential Information from Gaglardi and Beedie from time to time after he withdrew from the partnership. The Confidential Information included everything concerning the Vancouver Canucks discussed between Mr. Aquilini and either Mr. Gaglardi and Beedie including Mr. Gaglardi's description of the terms set out in the Term Sheet entered into between the Plaintiffs and the Orca Bay Defendants on August 13, 2003.
>
> (Set out under item 7 of Schedule A to the Aquilini Defendants Notice of Motion, Tab 16 of the Joint Chambers Record for the December 6-8, 2006, hearing).

74 Blue Line later provided the following further particulars:

> Aquilini requested information from Gaglardi in or about April 2004 in respect of the March 15, 2004, Term Sheet, in May and July with respect to the current status of the negotiations and in August and September after the Term Sheet dated August 13, 2004. In each case, Gaglardi responded to the request for information by advising Aquilini as to the status of the negotiations and, in the case of the August 13 Term Sheet, by providing Aquilini with the contents of the business terms contained in it.
>
> (Set out under item 7 of Schedule A to the Aquilini Defendants Notice of Motion, Tab 16 of the Joint Chambers Record for the December 6-8, 2006, hearing).

75 In response to a request for particulars of the confidential information allegedly *used* by the Aquilini Defendants to acquire an interest in the Enterprise, Blue Line provided the following:

> Aquilini used the confidential information received from Orca Bay or from the plaintiffs...particulars of which are knowledge of the negotiation positions and strategies of the parties in respect of the Term Sheets from November 2003 to August 13, 2004, knowledge of the negotiating positions of the parties post August 13, 2004; in particular, the plaintiff's position of October 26, 2004 and the Orca Bay reaction to it.

> (Set out under item 9 of Schedule A to the Aquilini Defendants Notice of Motion, Tab 16 of the Joint Chambers Record for the December 6-8, 2006, hearing).

76 The Aquilini Defendants say that missing from these responses is anything that would permit them to determine what specific information Blue Line says is confidential information, and, therefore, to assess whether that information (a) is worthy of protection; (b) was disclosed in circumstances importing confidentiality; and (c) was actually used by the Aquilini Defendants to conclude the Investment Agreement.

77 The argument of the Aquilini Defendants concerning the nature and scope of the particulars to which it says it is entitled is based on authorities concerning breach of confidence. In order to succeed in its breach of confidence claim, Blue Line must establish the following:

> (a) The information must be confidential in nature:
>
> > (i) It must have been otherwise inaccessible to the Aquilini Defendants: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.) at para. 62.
> >
> > (ii) It must have a quality of "originality or novelty or ingenuity": *Coco v. A.N. Clark (Engineers) Ltd.* (1968), [1969] R.P.C. 41 at 47 (Ch. D.) [*Coco*].
> >
> > (iii) It must not be in the nature of "know-how": *Amway Corp. v. Eurway International Ltd.* (1973), [1974] R.P.C. 82 at 86 (Ch. D.).
>
> (b) Blue Line must have conveyed the confidential information to the Aquilini Defendants in circumstances importing confidentiality: *Coco* at 47.
>
> (c) The Aquilini Defendants must have used the confidential information to the detriment of Blue Line: *Coco* at 47.

78 Blue Line says the confidential information is, in essence, the contents of the negotiations as embodied in the various drafts of the Term Sheet and the strategies of Blue Line in respect of them. Simply put, says Blue Line, Aquilini "knew the mind of the proposed purchasing group". Thus, argues Blue Line, it is not each individual piece of information that is important in this case, but the bargaining positions as a whole and the negotiating strategies behind them. If the offer was confidential, then so were its parts. As such, the plaintiffs are not required to particularize the constituent parts.

79 By way of response, the Aquilini Defendants say Blue Line has, in effect, invited the Aquilini Defendants to review all of the material to which Aquilini had access and identify for themselves those aspects alleged to be confidential and used by the Aquilini Defendants to conclude the Investment Agreement.

80 I accept Blue Line's argument that particularization of the information alleged to be confidential may be more difficult in this case than in many breach of confidence or "trade secret" cases. Nevertheless, at trial Blue Line will be required to establish more than simply that Aquilini "knew the mind of the purchasing group". With respect to its breach of confidence claim, Blue Line will be required to identify the information it says is confidential and establish the proprietary nature of that information. Blue Line will be required to prove facts establishing that Aquilini received the proprietary information in circumstances requiring that the information remain confidential, or facts from which such an inference can reasonably be drawn. Blue Line will also be required to establish facts which prove that the Aquilini Defendants used the information for purposes of concluding the In-

vestment Agreement, or facts from which that inference can reasonably be drawn.

81 I conclude that Blue Line must identify, by way of particulars, the information it says is confidential information, the circumstances in which the information was conveyed to the Aquilini Defendants, and the confidential information it says the Aquilini Defendants used to acquire its interest in the Enterprise.

82 By way of example, Blue Line may identify individual pieces of information which it says were confidential. Or, Blue Line may say an individual piece of information was not itself confidential, but that in combination with another piece, or other pieces, of information, it was confidential. Whatever the case, Blue Line must particularize the piece or pieces of information it alleges were confidential, or the combination of those pieces of information that rendered them confidential.

83 Blue Line has already demonstrated that the allegations concerning breach of confidence are, to some extent, capable of particularization. For example, it has identified certain concerns of John McCaw ("McCaw"), Orca Bay's owner, allegedly known only to the members of the Partnership. They include the following: McCaw was "not keen to sell a portion of the team with an option on the arena"; he was "concerned about governance"; he was "open to vendor financing"; and, he "might be open to providing financing at less than commercial rates".

84 All aspects of the breach of confidence claim must be amenable to such particularization, and the Aquilini Defendants are entitled to those particulars before trial.

Request 1(d) by the Aquilini Defendants: Further and better particulars as to when, where, and of whom, the Aquilini Defendants, according to paragraph 42 of the Amended Statement of Claim, requested confidential information from other members of the Partnership at the time the Aquilini Defendants left the Partnership, and what individual items of information were provided pursuant to such requests [Item 7 of Schedule A to the Aquilini Defendants' Particulars Motion to Blue Line dated December 1, 2006].

85 This request overlaps with request 1(c), with respect to which particulars have been ordered.

Request 1(e) by the Aquilini Defendants: Further and better particulars as to the individual items of confidential information obtained from the Partnership which, according to paragraph 67(c) of the Amended Statement of Claim, the Aquilini Defendants used when negotiating with the Orca Bay Defendants [Item 9 of Schedule A to the Aquilini Defendants' Particulars Motion to Blue Line dated December 1, 2006].

86 The Aquilini Defendants have requested particulars as to the individual items of confidential information that are alleged to have been *used* by the Aquilini Defendants to conclude the Investment Agreement. This request also overlaps with request 1(c). The particulars provided by Blue Line must delineate not only the confidential information allegedly possessed by the Aquilini Defendants, but the confidential information allegedly used by them to conclude the Investment Agreement.

Request 1(f) by the Aquilini Defendants: Further and better particulars as to the close personal and business relationships between Aquilini, Gaglardi, and their families, which, according to paragraph 43(a) of the Amended Statement of Claim, resulted in the Aquilini Defendants owing a fiduciary duty to Gaglardi, Beedie and Blue Line [Item 10 of Schedule A to the Aquilini Defendants' Particulars Motion to Blue Line dated December 1, 2006].

87 It is alleged that Aquilini owed a fiduciary duty to the Partnership, as well as Gaglardi and Beedie individually, to not divert any opportunity to acquire an interest in the Enterprise to himself and to not disclose any confidential information or use it for his own benefit, or otherwise act contrary to the interests of the Partnership. The Aquilini Defendants seek particulars as to the facts and circumstances on which this alleged fiduciary duty is based.

88 Blue Line has particularized the basis for the alleged fiduciary duty in its Amended Statement of Claim and in response to earlier demands by the Aquilini Defendants for particulars. Blue Line has advised that the fiduciary duty is based on the alleged existence of the Partnership and the obligations alleged to arise from the Partnership, as well as the close family and business relationships between the Gaglardi and Aquilini families. The following additional particulars have been provided by Blue Line:

> The relationship between the families is a longstanding business relationship which began in the 1980's when the Aquilini family provided assistance to the Gaglardi family in the Gaglardis' efforts to restructure Northland Properties. That spawned a close personal relationship between the parents, Luigi and Robert, which was combined with business transactions. The families were involved and remain involved in the Garabaldi ski development in Squamish which is proposed to be a billion dollar recreational, commercial and residential development.
>
> (Set out under item 10 of Schedule A to the Aquilini Defendants Notice of Motion, Tab 16 of the Joint Chambers Record for the December 6-8, 2006, hearing)

89 The Aquilini Defendants say that these particulars are deficient, but do not say how they are deficient. Their submissions focus on the scope of fiduciary duty as a matter of law.

90 Whether the particulars provided by Blue Line will be sufficient to establish a fiduciary duty on the part of Aquilini is a matter for legal argument. No further particulars are required with respect to this request.

Request 1(g) by the Aquilini Defendants: Further and better particulars as to the identity of any Aquilini Defendants who, according to paragraph 60 of the Amended Statement of Claim, carried on secret negotiations with the Orca Bay Defendants before and after November 5, 2004, and the dates and nature of those negotiations [Item 11 of Schedule A to the Aquilini Defendants' Particulars Motion to Blue Line dated December 1, 2006].

91 The Aquilini Defendants argue that even in circumstances where it is alleged that the particulars sought are best known to the demanding party, the party advancing the allegations must still provide particulars of the allegation.

92 Clearly, in the case of this allegation, the particulars are best known -- and likely only known -- by the Aquilini Defendants.

93 Blue Line has provided the following response to this demand:

> The particulars sought are within the knowledge of the Aquilini defendants and the Orca Bay defendants. Aquilini carried on negotiations with Orca Bay for an interest in the Enterprise from and after March 2004. In the period between March and July 2004, Aquilini advised Orca Bay, McCammon and McCaw that he was interested in acquiring such an interest. After July, 2004, McCammon kept Aquilini

> apprised of the negotiations with Gaglardi and Beedie and encouraged Aquilini to make an offer to acquire an interest. Discussions concerning the acquisition by the Aquilini Defendants of an interest in the Enterprise from Orca Bay continued during October and early November resulting in a November 5, 2004, investment agreement. After November 5, 2004, Aquilini carried on negotiations to conclude an acquisition of 50% of the Enterprise and thereafter, in 2006, carried on negotiations to conclude an acquisition for the remaining 50% of Orca Bay's interest in the Enterprise.
>
> (Set out under item 11 of Schedule A to the Aquilini Defendants Notice of Motion, Tab 16 of the Joint Chambers Record for the December 6-8, 2006, hearing)

94 Even bearing in mind the principles in *G.W.L. Properties*, I am satisfied that Blue Line is not in a position to provide any further particulars regarding this issue.

Request 1(h) by the Aquilini Defendants: Further and better particulars as to the nature and dates of the acts of the Orca Bay Defendants which, according to paragraph 65(b) of the Amended Statement of Claim, amounted to negotiating with the Aquilini Defendants contrary to the Orca Bay Defendants' representation to Blue Line that it would not negotiate with the Aquilini Defendants, and the names of the individuals involved in those negotiations [Item 13 of Schedule A to the Aquilini Defendants' Particulars Motion to Blue Line dated December 1, 2006].

Request 1(i) by the Aquilini Defendants: Further and better particulars as to the nature and dates of the acts of the Orca Bay Defendants which, according to paragraph 65(d) of the Amended Statement of Claim, amounted to negotiating with the Aquilini Defendants in breach of the Orca Bay Defendant's obligation to Blue Line, pursuant to paragraph 12(b)(ii) of the Term Sheet, to not negotiate with the Aquilini Defendants, at that time, and the names of the individuals involved in those negotiations [Item 14 of Schedule A to the Aquilini Defendants' Particulars Motion to Blue Line dated December 1, 2006].

95 These requests overlap with request 1(g). Blue Line is not required to provide further particulars concerning these issues.

Request 2 by the Aquilini Defendants: An order requiring Blue Line to disclose correspondence between Ralph McRae ("McRae"), who assisted Blue Line in negotiations with the Orca Bay Defendants, and Gaglardi relating to McRae's compensation for his services on behalf of Blue Line [Item 1 of Schedule A to the Aquilini Defendants' Discovery Motion to Blue Line and Orca Bay, dated December 1, 2006].

96 McRae was retained to assist Blue Line in negotiations with the Orca Bay Defendants concerning the acquisition of an interest in the Enterprise. He assisted in the negotiations from November 2003 until after the conclusion of the August 13, 2004 Term Sheet. He was responsible for drafting the various versions of the Term Sheet that lead to the final version signed in August of 2004. Thereafter, McRae did not play a role in the negotiations.

97 At the time the August 13, 2004, Term Sheet was executed, the corporate purchaser identified by the Partnership was an entity owned by McRae. It was, at the time, a numbered company; it is now known as Blue Line Hockey Acquisition Co. Inc. The ownership of the company was transferred by McRae to Gaglardi on January 14, 2005, after Gaglardi and Beedie threatened to commence an action against the Aquilini and Orca Bay Defendants.

98 Both the Aquilini and Orca Bay Defendants seek to compel Gaglardi and his father, Robert Gaglardi, to answer questions concerning McRae's compensation for the work he performed. They also seek production of all correspondence between Gaglardi and McRae relating to the issue. I will refer to this evidence collectively as the "Compensation Evidence."

Does the Compensation Evidence meet the threshold for relevance?

99 Earlier in these reasons I referred to the principles described in *Peruvian Guano* and *Glegg c. Smith & Nephew inc.* concerning the scope of relevance on the discovery of witnesses. Those principles are engaged here.

100 The Aquilini and Orca Bay Defendants argue that the Compensation Evidence may be relevant to a number of issues in dispute in the action. A summary of their arguments is as follows:

> • the correspondence may contain McRae's review of the events occurring in the months prior to August 2004. It may also contain expressions of the views of either McRae or Gaglardi concerning the state of the discussions with the Orca Bay Defendants and the prospects of a transaction being completed;
>
> • the Compensation Evidence may disclose evidence of the alleged Partnership: was McRae merely Gaglardi's agent or an agent of the Partnership, and, if the latter, who did he understand constituted the Partnership for purposes of compensating him for services rendered;
>
> • services rendered by McRae are alleged to involve confidential information of the Partnership, and thus his evaluation and review of those services, his description of them, and his valuation of the services is relevant to the issues in the action;
>
> • the Compensation Evidence may disclose whether McRae characterized himself as a member of the Partnership or as a potential equity owner;
>
> • the Compensation Evidence may disclose that McRae was engaged by Gaglardi and the Gaglardi family, and not as an agent of Beedie or the Partnership; and
>
> • the answers sought on discovery are relevant to the plea of the Orca Bay Defendants that none of the plaintiffs had any rights under the Term Sheet.

101 I am satisfied that the Compensation Evidence meets the threshold for relevance on discovery.

Does settlement privilege bar the discovery of the Compensation Evidence?

102 Blue Line resists disclosure on the basis that McRae's compensation was the subject of a dispute such that all evidence relating to it is protected by settlement privilege.

103 In order to successfully invoke settlement privilege, the party seeking the privilege must establish that a litigious dispute is in existence or within contemplation, and that the communications in question were for the purpose of attempting to effect a settlement of the litigious dispute: *Sinclair v. Roy* (1985), 65 B.C.L.R. 219 (B.C. S.C.), at 222.

104 The mere existence of a dispute or potential dispute does not give rise to the privilege. Only where the

dispute has become "litigious" does the privilege arise. A dispute is "litigious" where litigation is commenced or contemplated. The person who claims the privilege bears the onus of establishing it: *Cytrynbaum v. Gineaut Holdings Ltd.*, 2006 BCSC 468 (B.C. S.C.) at para. 26 [*Cytrynbaum*].

105 Any ruling with respect to privilege may be limited to disclosure for purposes of discovery and subject to further consideration by the trial judge: *Cytrynbaum* at paras. 11 and 15.

106 The facts concerning the Compensation Evidence are as follows. McRae, a friend of the Gaglardi family, initially agreed to assist the Partnership on a *pro bono* basis. He reconsidered his position as negotiations with Orca Bay wore on and he found himself contributing much more of his time to the transaction than he had originally planned. In the course of his discovery, McRae testified that from time to time between December 2003 and August 2004 he raised with Gaglardi the issue of receiving pay for his work, but nothing specific in the way of compensation was discussed. However, after the Term Sheet was finally signed on August 13, 2004, McRae decided to take some time to reflect on the issue of fair compensation for the work he had done. He advised Gaglardi of his intention. Gaglardi asked McRae to visit him to discuss the issue, but McRae told him he wanted to think about it and put something in writing for Gaglardi to consider.

107 McRae said that on August 20, 2004, after his exchange with Gaglardi, he prepared a memo outlining his position concerning compensation for his work and emailed it to Gaglardi. Although this was the first time he had set out the details of his position on the issue, McRae said that he had previously told Gaglardi that he wanted to be compensated for the work he had done. When asked by counsel for the Aquilini Defendants when the compensation issue became a dispute, McRae replied that a dispute arose when he delivered the August 20, 2004, memo.

108 McRae's discovery evidence on this issue is as follows:

> Q: And what was [Gaglardi's] reaction to that?
>
> A: He urged me not to put it in writing but to come over and talk about it and I said I wanted to put all the points down so we could have a fulsome discussion about it.
>
> Q: And is that the sum and substance of that discussion with Mr. Gaglardi?
>
> A: I believe so.
>
> Q: Did you have any other discussion with Mr. Gaglardi, before you delivered your memo on this subject I mean?
>
> A: I don't think so.
>
> Q: You then prepared a memo?
>
> A: Yes.
>
> Q: And delivered it?
>
> A: Yes.
>
> Q: When did you deliver it?

A: I believe it was August 20, 2004.

(Examination for Discovery of Ralph McRae, May 18, 2006, Q 149-156)

109 McRae was then asked whether, and, if so, when, a dispute arose regarding the compensation issue:

Q: Sir, your counsel has said at a prior discovery that a dispute arose about your remuneration; is that right?

. . . . .

A: Are you asking me if a dispute arose?

Q: Yes.

A: Yes.

Q: And it arose after you delivered your August 20 memo?

A: It arose when I delivered my August 20 memo.

Q: Did you deliver your August 20 memo in a face-to-face meeting?

A: No.

Q: How did you deliver it?

A: I believe it was via e-mail.

Q: And at the -- that August 20 memo I take it was the first time that you had laid out what you were looking for and why?

A: It was not -- it was the first time that I had laid out what I was looking for, but not the first time that I had laid out why.

Q: Well, as to the latter part of your answer I take it that the "why" that you had laid out you have already fully described for the record?

A: Yes.

Q: And then after you hit the send button on the e-mail that conveyed the August 20 memo to Mr. Gaglardi you learned that there was a dispute; isn't that right?

A: Yes.

(Examination for Discovery of Ralph McRae, May 19, 2006, Q. 159-166)

110 McRae testified that he retained legal counsel concerning the compensation issue at some point after August 20, but on the advice of his counsel in these proceedings refused to say precisely when he retained counsel. McRae has advised that a settlement was reached within a few months, and that no pleadings were exchanged before settlement was reached.

111 In an affidavit sworn on December 4, 2006, McRae deposed to the following:

> 2. Prior to August 2004, I mentioned to Tom Gaglardi that there would be substantial transaction fees involved in closing the purchase of an interest in the Enterprise which would include a fee for my work.
>
> 3. In August 2004, I offered a compromise position in respect of a fee for my work, expecting that there would be negotiations to arrive at a fee that was agreeable to all of the parties. I expected that the issue of my entitlement to a material fee and its quantum would be in dispute between myself and Messrs. Gaglardi and Beedie, and it was. Negotiations between us ultimately resulted in an agreement which settled the dispute over my fee.

112 Gaglardi was questioned on discovery about the McRae compensation issue. His evidence was that he had not promised McRae any compensation prior to receiving the August 20, 2004, memo.

113 Robert Gaglardi was also asked questions on discovery regarding the issue of McRae's compensation:

> Q: ...But you are aware that at a certain point in time there were discussions between Tom and Ralph about Ralph's potential compensation for assisting Northland and Beedie in negotiating with Orca Bay?
>
> A: Yes.
>
> Q: And you're aware that a dispute arose between Tom and Ralph concerning that? Maybe "dispute" is too high?
>
> A: I think so.
>
> Q: That a disagreement arose between the two of them as to what was appropriate?
>
> A: Maybe I'd call it a misunderstanding.
>
> . . . . .
>
> Q: Okay. And am I correct that whatever the misunderstanding was, it became resolved several months after it arose?
>
> A: Yes.
>
> (Examination for Discovery of Robert Gaglardi, May 29, 2006, Q. 379-384)

114 Whether settlement privilege applies turns on the nature of the dispute apprehended by the parties. Settlement privilege does not attach to the August 20, 2004, memo unless McRae was actually engaged in a litigious dispute with Gaglardi at the time, or litigation was contemplated at the time. It is only if subsequent discussions occurred in the context of a litigious dispute that the evidence of those discussions, and documents generated in the course of those discussions, are subject to the privilege.

115 If, on the other hand, this was simply a commercial dispute as to the basis on which McRae ought to be paid, settlement privilege does not apply.

116 With respect to the Compensation Evidence generally, and in particular with respect to the August 20,

2004 memo authored by McRae, there has been no evidence provided by Blue Line as to the following:

- whether the correspondence contained a threat of litigation;
- when McRae retained litigation counsel;
- whether the correspondence was drafted by, or on the advice of, legal counsel, or reviewed by litigation counsel;
- whether litigation counsel had been retained (by either party) at the time the correspondence was drafted; or
- whether the memorandum includes a proposal with respect to compensation for McRae's involvement going forward, or only for past involvement.

117 Having reviewed McRae's discovery evidence, I conclude there was no dispute -- much less a litigious dispute -- at the time McRae forwarded the August 20, 2004 memo to Gaglardi. There had, as yet, been no discussions about the amount McRae might be seeking for the work he had done. At that stage, Gaglardi was simply inviting McRae's views regarding the compensation issue. He had, in his words, promised McRae nothing to that point, and it was for McRae to set out the terms he considered to be fair. McRae acknowledged that the August 20 memo was the first occasion on which he had set out his position concerning compensation for his work.

118 In the affidavit sworn after his examination for discovery, McRae deposed that he "offered a compromise" in the August 20 memorandum. That assertion is not supported by any of the discovery evidence, including McRae's own evidence. No offer had yet been forthcoming from Gaglardi, who, at that stage, had only invited McRae over to discuss the matter. The August 20 memo was not a compromise; it was McRae's opening position. At most, he may have anticipated that Gaglardi would not be happy with the proposal, and that negotiations would ensue. That anticipation does not amount to a litigious dispute, either actual or contemplated.

119 The August 20, 2004 memorandum is relevant and is not privileged, and so must be produced. Questions with respect to it must be answered.

120 There has been no evidence advanced by Blue Line to establish that, following the August 20 memorandum, a litigious dispute occurred or was contemplated. McRae has stated that he retained litigation counsel, but has not disclosed when that occurred. For that reason, subsequent discussions and correspondence concerning McRae's compensation are not subject to settlement privilege at this stage of the proceedings. The Aquilini and Orca Bay Defendants are entitled to examine discovery witnesses with respect to the Compensation Evidence, and any documents relating to the issue must be produced.

121 Blue Line will be at liberty to revisit the admissibility of the evidence at trial.

Request 3 by the Aquilini Defendants: An order compelling Gaglardi to provide, on discovery, the information that Blue Line alleges the Aquilini Defendants obtained from the Partnership and used in acquiring the Enterprise [Item 9 of Schedule A to the Aquilini Defendants' Discovery Motion to Blue Line and Orca Bay, dated December 1, 2006 -- referring to Question 512 of the examination for discovery of Gaglardi].

122 Counsel for the Aquilini Defendants asked Gaglardi the following questions on discovery:

> Q: Sir, how many agreements do you think you've read in your career?
>
> . . . . .
>
> A: Hundreds, if not thousands.
>
> Q: And do you have a clear picture in your head of the information that you say the Aquilini defendants used in acquiring their interest in the Canucks?
>
> A: Do I have what, sorry?
>
> Q: A clear picture in your head of the information that you say the Aquilini Defendants used in acquiring the Canucks and that originated with you, Mr. Beedie, Mr. McRae or any of the advisors?
>
> Mr. Schachter: Well, you know, I have to object to that as well. You can ask him what was communicated but what definition it falls within or whether it's contained in a paragraph of that agreement or not I'm objecting to those. So whether he has a clear picture of what was used or not is not a question which gets at facts. So ask him a question which is factual and I won't object to it.
>
> (Examination for Discovery of Gaglardi, May 2, 2006, Q. 509-512)

123 Counsel for the Aquilini Defendants declined the invitation to reframe his questions.

124 Counsel for Blue Line submitted there was no objection to the pursuit of this line of inquiry so long as the questions were properly framed. For example, there would be no objection to the question "What do you say are the facts?"

125 The line of questioning pursued by counsel for the Aquilini Defendants raises the issue of whether opinion evidence can be elicited from a witness on discovery. It also raises the issue of whether questions designed to elicit statements of law and trial strategy are permissible.

126 Generally, witnesses are not compellable to give opinion evidence on discovery: *Forliti (Guardian ad litem of) v. Woolley*, 2002 BCSC 858 (B.C. S.C. [In Chambers]) at para. 9(c) [*Forlitti*], *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.* (1995), 13 B.C.L.R. (3d) 300 (B.C. S.C. [In Chambers]) [*Northwest Sports*], *Can-Air Services Ltd. v. British Aviation Insurance Co.* (1988), 63 Alta. L.R. (2d) 61 (Alta. C.A.) [*Can-Air*]. Nor can they be compelled to make statements of law or disclose matters of trial strategy (*Northwest Sports*; *Can Air*).

127 In *Northwest Sports*, K. Smith J. (as he then was) considered whether a corporate officer (representing the plaintiff) was required to answer questions calling for opinions and statements of law. The questions related to the value of shares and assets of the plaintiff corporation, and to the conduct of the defendant alleged to be "reprehensible conduct" in connection with the plaintiff's claims for punitive and aggravated damages.

128 Mr. Justice Smith said the following:

> [T]he general rule is that a witness cannot be asked for an expert opinion on an examination for discovery...where, by mere coincidence, the witness is qualified to express an opinion of value on a relevant matter, there is no reason why the party represented by the witness should be bound by the witness's opinion (***Northwest Sports*** at para. 15).

> To ask a witness on an examination for discovery to stipulate the heads of damages claimed is to ask him to state the legal elements of the claim he is making, that is, to state matters of law and of trial strategy. Those matters are for counsel to deal with and, in my view, [the witness] need not answer [such] question[s]. Of course, [the witness] must answer as to any facts within his knowledge relating to the claim for damages (***Northwest Sports*** at para. 15).
>
> The word "reprehensible" has legal significance in this context and it would be improper to require [the witness] to select facts that he considers amount to such conduct and to state them. What conduct will be advanced as "reprehensible" will depend on [counsel's] view of the available evidence and its proper characterization in law. Thus, the question asks for an answer involving legal opinion and trial strategy and need not be answered (***Northwest Sports*** at para. 22).

129 Mr. Justice Smith reiterated the exception to the rule concerning opinion evidence: Opinion evidence may be sought on the value of property where value is the sole issue in the action. However, he concluded the exception did not apply in the circumstances (*Northwest Sports* at para. 15), holding instead that the witness need not answer questions calling for opinions on the conduct of the directors or whether the alleged conduct amounted to reprehensible conduct. He held, further, that the witness was not required to describe the plaintiff's heads of damage.

130 In *Can-Air*, Cote J.A., writing for the Court, drew the important distinction between questions eliciting a witness's knowledge of the facts, and questions eliciting arguments or statements of law based on the facts. Cote J.A. also emphasized that a witness cannot be asked to review facts and to select the key facts upon which he or she relies:

> Many questions here were like this one: "Can you tell sir what facts you rely on to support that allegation" in paragraph 9(a) of the Statement of Defence? ... "On what facts do you rely..." does not ask for facts which the witness knows or can learn. Nor does it ask for facts which may exist. Instead it makes the witness choose from some set of facts, discarding those upon which he does not "rely" and naming only those on which he does "rely". (***Can-Air*** at 62-63)
>
> Because the question demands a selection, it demands a product of the witness' planning. How he is to select is unclear. He may have to decide what evidence is then available or is legally admissible. The question really asks how his lawyer will prove the plea. That may well be based on trial strategy. (***Can-Air*** at 63)
>
> The witness may know that his plea must lean heavily on a certain fact, but not know whether that fact is true, or can be proven. I see no reason why such a witness should be forced to swear whether he believes that such a fact exists. (***Can-Air*** at 63)
>
> Another fundamental rule is that an examination for discovery may seek only facts, not law: ... These questions try to evade that rule by forcing the witness to think of the law applicable or relied upon, then use it to perform some operation (selecting facts), and then announce the result. The result looks on the surface like a mere collection of facts, but it really is not... The witness cannot know what facts will help him in court until he knows the law. So what facts he relies on must be based upon his view of the law.
>
> Therefore, an examination for discovery may seek facts only, not argument. An astute witness might

properly answer a question about what facts suggest one of his pleas this way:

> "I am not here to make any suggestions at all. I am here only to answer relevant questions. What the conclusions to be drawn from my answers are is not for me, and as for suggestions, I venture to leave those to others."
>
> (***Can-Air*** at 63-64)

In my view, the question "upon what facts do you rely for paragraph X of your pleading?" is always improper. (***Can-Air*** at 64).

131 In the present case, the Aquilini Defendants seek to obtain from Gaglardi not only the facts that are within his knowledge, but his opinion (or, more likely, that of his legal counsel) as to what confidential information found its way into the Investment Agreement. On the authorities I have canvassed, that line of questioning is impermissible. Gaglardi was not involved in the creation of the Investment Agreement. Any evidence he could give would be in the nature of opinions or conclusions of law as to what confidential information found its way into that agreement. As Cote J.A. so aptly put it, "The question really asks how his lawyer will prove the plea".

132 I conclude that Gaglardi is required to answer only questions seeking facts regarding the information communicated to Aquilini during Blue Line's negotiations with the Orca Bay Defendants. He is not required to answer questions concerning his view as to the confidential information that found its way in the Investment Agreement.

Request 4(a) by the Aquilini Defendants: An Order Compelling McRae to Provide, on Discovery, Information He Acquired While Acting as Solicitor on Behalf of a Client Who Sought to Acquire a Team in the Canadian Football League ("CFL"), Including the Name of His Client, the Identity of the Potential Vendor of the Football Team, and the Representatives of the Vendor That McRae Dealt with [Item 1 of Schedule B to the Aquilini Defendants' Discovery Motion to Blue Line and Orca Bay, Dated December 1, 2006 -- Referring to Questions 341, 343 and 345 of the Examination for Discovery of McRae].

133 Blue Line has taken the position that the input of McRae in the negotiations was confidential information provided to Aquilini and misused by him. In his examination for discovery by counsel for the Aquilini Defendants, Gaglardi stated the following:

> Q: Okay. And can you tell me, please, sir, what confidential information do you believe that [Aquilini] utilized that he learned from Mr. McRae?
>
> A: He learned a lot of different things. He learned all of Mr. McRae's experience with the transaction from its -- from Mr. McRae's involvement, which stemmed on or about October '03 1st. He gained the knowledge of Ralph's advice pertaining to his meetings with various Orca Bay employees and their KPMG representatives and potentially others. He learned Mr. McRae's views on what issues in the negotiation were non-starters, which ones were sensitive, and which ones may not be as sensitive. He learned Mr. McRae's advice as to the best strategies and negotiation tactics to get a mutually-acceptable deal finalized. He learned the results from Mr. McRae's analysis, financial, legal, otherwise. He learned Mr. McRae's views on how the enterprise might be governed. I think I've captured the core of what he would have learned from Mr. McRae.

(Examination for Discovery of Gaglardi, March 29, 2006, Q. 289)

134 Blue Line asserts that McRae is an experienced negotiator who, as a result of his experience, provided valuable and confidential information to the Partnership in the course of its negotiations concerning the Enterprise. Counsel for the Aquilini Defendants asked questions of McRae on discovery about the extent of his experience and expertise. Among other things, McRae indicated that he had been involved in negotiations for the purchase of a CFL football team in the early 1990's. McRae said that he represented the purchaser, and that the transaction did not close. Counsel for the Aquilini Defendants sought further information, but was met with the objection that his questions would infringe upon Mr. McRae's obligation of confidence to his client. McRae was then asked whether any of the information he learned from the CFL negotiations was confidential information he provided Aquilini. His response was "Not information per se", but rather "how a team operated in the context of a professional sports league" (Examination for Discovery of Ralph McRae, May 19, 2006, Q. 519).

135 McRae went on to describe in some detail his views as to the manner in which teams operate generically in the context of a professional sports league, and the matters he learned from his experience in attempting to purchase an interest in the CFL team. Those matters included the following: how revenues of the team are derived; the role of facilities costs in the operation of the team; the level of financing of a sports franchise; and the marketing opportunities available. McRae was then asked by counsel for the Aquilini Defendants whether his views on those matters changed as a result of the information provided to him by Orca Bay in the course of negotiations concerning the Enterprise. McRae's response was as follows:

> I don't believe that [information received from the Orca Bay Defendants] changed any views, but they would have in part supplemented some information that I had, in some cases they would have confirmed some information that I would have had, but I don't think my views particularly changed about anything.
>
> (Examination for Discovery of Ralph McRae, May 19, 2006, Q. 532).

136 Counsel for the Aquilini Defendants now seeks to obtain the following information from McRae:

a) the name of the CFL team McRae's client was interested in buying;

b) the name of McRae's client or, alternatively, the name of the purchaser;

c) the name of the vendor; and

d) the identity of the individuals with whom McRae was instructed to negotiate.

137 Counsel for the Aquilini Defendants argues that the answers to the above questions are relevant for the following reasons. First, McRae's prior experience involving the attempted purchase of the CFL team informed his thinking when attempting to acquire the Enterprise, and some of that information may have been given to Aquilini. Second, the vendor, purchaser, and vendor's representative are potential witnesses who may be able to establish that McRae was given no information, or that he was given only information that was in the public domain or otherwise equally accessible to the Aquilini Defendants. As such, these individuals are persons "who might reasonably be expected to have knowledge relating to any matter in question in the action" (Rule 27(22) of *Rules of Court*, B.C. Reg. 221/90).

138 I have difficulty accepting these arguments. McRae has already described in detail all of the matters that

he asserts he learned from his involvement in negotiations concerning the CFL team. Whether that information is confidential information as a matter of law is an issue to be argued at trial.

139 McRae was not asked by counsel for the Aquilini Defendants whether he had provided to Aquilini any of the information obtained in the course of the CFL negotiations. Moreover, Gaglardi did not make any reference to McRae's involvement in the CFL transaction when giving evidence on discovery about the information he alleged was given by McRae to Aquilini. How the individuals involved in the CFL transaction could provide any evidence relevant to the alleged breach of confidence by the Aquilini Defendants is not apparent. They could only say what they told McRae regarding an unrelated transaction. They cannot say what McRae told the Aquilini Defendants, or what information Aquilini used in negotiations with the Orca Bay Defendants.

140 The purpose of canvassing McRae's assertions with the other persons involved in the CFL negotiations can only be for the purpose of impeaching McRae's credibility. Questions on examination for discovery going to the credibility of a witness are not appropriate unless they relate directly to a matter in issue. The scope of questioning on discovery, unlike cross-examination at trial, cannot go to character or credit, or relate solely to credibility: *Werian Holdings Ltd. v. Prudential Assurance Co.* (1995), 58 B.C.A.C. 283 (B.C. C.A.) at para 17.

141 McRae has given detailed evidence as to the information he provided to Aquilini. The questions the Aquilini Defendants seek to ask McRae do not relate directly to a matter in issue, and are impermissible on that basis.

142 In light of my conclusion on this issue, I have not addressed the question of whether client confidentiality bars production of the information requested by the Aquilini Defendants.

Request 4(b) by the Aquilini Defendants: An order compelling McRae, to provide, on discovery, an answer to the question of whether he sent a letter to Gaglardi threatening litigation concerning the compensation dispute [Item 2(d) of Schedule B to the Aquilini Defendants' Discovery Motion to Blue Line and Orca Bay, dated December 1, 2006 -- referring to Question 175 of the examination for discovery of McRae].

143 The McRae Compensation Evidence was discussed earlier in relation to request 2 of the Aquilini Defendants (paragraph 102 above). I have ordered that it be produced. If there is correspondence from McRae to Gaglardi threatening litigation, it will be among the documents that will be disclosed. Accordingly, an answer on discovery from McRae is not required.

Request 4(c) by the Aquilini Defendants: An order compelling McRae, to provide, on discovery, an answer to the question of whether the settlement of the compensation dispute included a term requiring McRae to give evidence in this proceeding [Item 2(e) of Schedule B to the Aquilini Defendants' Discovery Motion to Blue Line and Orca Bay, dated December 1, 2006 -- referring to Question 178 of the examination for discovery of McRae].

144 McRae is required to advise the Aquilini Defendants as to whether the settlement of the compensation dispute included such a term.

Request 5(a) by the Aquilini Defendants: An order requiring McRae to prepare and produce an analysis of the Investment Agreement indicating any confidential information the Aquilini Defendants obtained from the Partnership [Item 5 of Schedule B to the Aquilini Defendants' Discovery Motion to Blue Line and Orca Bay, dated December 1, 2006].

145 On discovery, counsel for the Aquilini Defendants asked McRae the following questions:

> Q: I left you yesterday with a question whether, amongst all of those inaccessible items that you listed yesterday, if there are any of which you can say that they can be found back in anything that Mr. Aquilini did?
>
> A: I didn't look.
>
> Q: Let me then just ask not just about this discussion, but generally, that with respect to any information that you would characterize as inaccessible as we defined that yesterday, you review the investment agreement and the closing documents and any other documents you need to review in order to answer the question, whether any of those items of information found their way into the transaction that Mr. Aquilini ultimately did. Is my question intelligible to you?
>
> A: I understand your question. I don't know if what you ask is possible.

(Examination for Discovery of Ralph McRae, May 19, 2006, Q. 550-551)

146 Later in McRae's discovery he was asked questions about alleged confidential information exchanged at a meeting of November 18, 2003, that formed the basis for the second draft of the Term Sheet completed by McRae. McRae identified, to the best of his recollection, the information discussed at the meeting. He was then asked the following question:

> Q: .... Can you point to anything in the transaction that Mr. Aquilini did in which inaccessible information exchanged on November 18th can be found?
>
> A: I haven't done the analysis.
>
> Q: I ask you to do so.

(Examination for Discovery of Ralph McRae, May 19, 2006, Q. 914)

147 Counsel for Blue Line objected to both lines of inquiry on the basis that McRae was being asked to provide his opinion, based on his review of all of the documents, as to what confidential information found its way into the transaction documents and the Investment Agreement.

148 Applying the principles discussed earlier regarding the opinion evidence sought from Gaglardi on discovery (Request 3 of the Aquilini Defendants), I have concluded that the questions asked of McRae are not permissible. The questions call for a review of the evidence and selection of key facts. They also call for expressions of opinion, including legal opinion, concerning the evidence (*Northwest Sports*; *Can-Air*).

149 McRae has given responsive answers concerning the information he provided Aquilini as a result of Aquilini's role in the alleged Partnership. It is not for McRae to prepare an analysis of the Investment Agreement or express his opinion as to whether confidential information was used by Aquilini to conclude that agreement.

Request 5(b) by the Aquilini Defendants: An order requiring McRae to provide information regarding the transaction between the Aquilini Defendants and the Orca Bay Defendants which demonstrates that confidential information was exchanged between them on November 18, 2004 [Item 6 of Schedule B to the Aquilini Defendants'

Discovery Motion to Blue Line and Orca Bay, dated December 1, 2006].

150 For the reasons given with respect to request 5(a) above, McRae is not required to provide this information.

V. Applications of the Orca Bay Defendants

Request 1 by the Orca Bay Defendants: An order that Gaglardi provide, on discovery, information relating to his review of the Investment Agreement and, specifically, to identify the confidential information he says the Aquilini Defendants used to negotiate the Investment Agreement [Item 1 of Orca Bay's Notice of Motion to Blue Line, dated December 1, 2006 -- referring to questions 240-241, 244 and 247 of the examination for discovery of Gaglardi].

151 In the Amended Statement of Claim, it is alleged that the Orca Bay Defendants assisted the Aquilini Defendants in the unlawful use of confidential information when concluding the Investment Agreement. The Orca Bay Defendants have asked Gaglardi on discovery to describe, based on his review of the Investment Agreement and the transaction documents, the confidential information allegedly used by Aquilini to acquire his interest in the Enterprise. On the advice of his counsel, Gaglardi refused to respond to the question.

152 Blue Line argues that in order to answer questions dealing with his review of the Investment Agreement, Gaglardi would be required to disclose the contents of confidential communications he had with his counsel regarding the Investment Agreement and reveal matters of trial strategy.

153 The Orca Bay Defendants argue that the Amended Statement of Claim contains the broad allegation that the defendants unlawfully used confidential information. As such, they say, Gaglardi must identify on discovery the facts upon which the allegation is based. In other words, Gaglardi must identify those elements of the Investment Agreement he alleges comprise confidential information taken by Aquilini and used by him to acquire his interest in the Enterprise. Gaglardi cannot, they say, refuse to answer the discovery questions on grounds of solicitor-client privilege.

154 Privilege cannot be used to protect facts from pre-trial disclosure: *Carmichael v. Ontario Hydro-Electric Power Commission*, [1938] 4 D.L.R. 781 (Ont. H.C.), *Global Petroleum Corp. v. CBI Industries Inc.* (1998), 172 D.L.R. (4th) 689 (N.S. C.A.) [*Global Petroleum*].

155 In *Global Petroleum* the Nova Scotia Court of Appeal held that privilege cannot be used to protect facts from pre-trial disclosure if those facts are relied on by a party in support of its case. In that case, counsel put questions to opposing witnesses in their examinations concerning the information they had about allegations of fraud, conspiracy to commit fraud, and breach of fiduciary duty. The witnesses refused to answer the questions, claiming privilege. Citing *Wigmore on Evidence*, 3rd ed., (1940) vol. 1, p. 3, and Ronald D. Manes and Michael P. Silver in *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) [*Manes and Silver*], the Court set out the law as follows at para. 24:

> It is beyond dispute that privilege cannot be used to protect facts from disclosure *if those facts are relied on by a party* in support of its case. It is immaterial that the fact was discovered through the solicitor or as a result of the solicitor's direction. *If it is relied on it must be disclosed*
>
> (emphasis in original).

156 I accept that Gaglardi must answer questions concerning the confidential information he provided to Aquilini in their various meetings and discussions. In so doing, he will be testifying to facts within his knowledge.

157 However, Gaglardi is not required to answer questions designed to elicit his views as to the confidential information used by Aquilini to conclude the Investment Agreement. For reasons I have already provided, Gaglardi cannot be asked questions designed to elicit his opinion and, more likely, the opinion of his solicitors, concerning the Investment Agreement. Nor can he be asked questions which invite him to review the facts and select the key facts upon which he relies to prove his claim (*Northwest Sports*; *Can-Air*).

158 Identification of the confidential information allegedly used by the Aquilini Defendants to conclude the Investment Agreement is properly the subject of particulars. The Orca Bay Defendants, like the Aquilini Defendants, must be provided with those particulars by Blue Line.

Request 2 by the Orca Bay Defendant: An order that Robert Gaglardi provide, on discovery, information concerning McRae's compensation for his role in negotiations with the Orca Bay Defendants [Item 2 of Orca Bay's Notice of Motion to Blue Line, dated December 1, 2006 - referring to questions 391, 392 and 394 of the examination for discovery of Robert Gaglardi].

Request 3 by the Orca Bay Defendants: An order that Blue Line produce all documents relating to negotiations for, and agreements on, the compensation McRae would receive for his role in negotiations with the Orca Bay Defendants [Item 3 of Orca Bay's Notice of Motion to Blue Line, dated December 1, 2006].

159 For the reasons expressed earlier regarding requests 4(a) and 4(b) of the Aquilini Defendants concerning the McRae's compensation issue, the questions put to the witnesses by counsel for the Orca Bay Defendants must be answered, and documents relating to the issue must be produced.

Request 4 by the Orca Bay Defendants: An order that Blue Line produce the notes prepared by Gaglardi in late November, 2004, describing his involvement in the negotiations to acquire the Enterprise [Item 5 of Orca Bay's Notice of Motion to Blue Line, dated December 1, 2006].

160 In the course of examination for discovery by counsel for the Orca Bay Defendants on October 12, 2006, Gaglardi acknowledged that he had made detailed notes concerning the events surrounding his efforts to acquire an interest in the Enterprise (the "Notes"). He was then asked a series of questions about the circumstances in which he made the Notes, and the purpose for which they were made. There was much debate between legal counsel as to the appropriate form of the questions to be put to Gaglardi by counsel for the Orca Bay Defendants concerning the making of the Notes. Counsel for Blue Line took the position that Gaglardi ought to be asked whether he had made the Notes:

- at the request of counsel;
- independently of counsel but later provided to counsel at his request; or
- because Gaglardi was anticipating that he may commence a lawsuit and wanted to have notes to provide to counsel.

(Examination for Discovery of Gaglardi, October 12, 2006, Q. 1246-1262)

161 Counsel for the Orca Bay Defendants ultimately decided he would simply ask Gaglardi why he made the Notes. The following exchange occurred:

> Q: Tell me why you made the notes?
>
> A: I made notes of, later November, made notes of pretty much everything stemming from the very beginning. I scoured every one of my files for everything and put together a series of notes, really from the -- really outlining my involvement from the very beginning to the very end. I did this on my own accord and I wanted to commit it to paper while it was still very fresh in my memory.

(Examination for Discovery of Gaglardi, October 12, 2006, Q. 1246-1262)

162 At the time of his discovery, Gaglardi said he recalled making the Notes after the November 17, 2005, announcement that the Aquilini Defendants had acquired a 50 per cent interest in the Enterprise. However, Gaglardi testified that he did not recall whether he made the Notes before or after meeting with William Berardino, the lawyer he initially consulted about Aquilini's purchase of the Enterprise. On October 23, 2004, soon after receiving the electronic transcript of Gaglardi's discovery, counsel for Blue Line sent a letter to counsel for the Orca Bay Defendants containing the following information: Gaglardi had consulted his diary following the discovery and determined, from his diary entries, that he had met with Mr. Berardino *before* preparing the Notes. While he did not prepare the Notes at the request of Mr. Berardino, Gaglardi decided after the meeting that it would be prudent to prepare comprehensive notes for Mr. Berardino in order to obtain legal advice on the litigation he and Mr. Beedie were contemplating. On that basis, counsel for Blue Line advised that the Notes were privileged and would not be produced.

163 Gaglardi subsequently swore an affidavit in which he deposed, in part, to the following:

> 1. Following my examination for discovery of October 12...I consulted my diary and determined that those notes were made following my meeting with Bill Berardino, one of the lawyers I consulted with initially in respect of this matter. After my first meeting with Mr. Berardino, I realized that it would be prudent to prepare comprehensive notes so that I could provide them to counsel in order to obtain legal advice on the litigation that I and Mr. Beedie wee contemplating. The first draft of these notes were provided to Mr. Berardino for the purposes of getting advice in respect of this litigation.
>
> 2. I had no other reason or purpose for the preparation of these notes other than to provide an organized statement of the events, as I recalled them, to my counsel.

164 The Orca Bay Defendants request production of the Notes. Blue Line resists production on the basis of litigation privilege.

The law of litigation privilege

165 The law concerning litigation privilege was recently discussed by Gray J. in *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 (B.C. S.C.) at paras. 96-101 [*Keefer Laundry*]:

> Litigation Privilege must be established document by document. To invoke the privilege, counsel must establish two facts for each document over which the privilege is claimed:

> 1. that litigation was ongoing or was reasonably contemplated at the time the document was created; and
>
> 2. that the dominant purpose of creating the document was to prepare for that litigation.
>
> (*Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada* (2005), 40 B.C.L.R. (4th) 245, 2005 BCCA 4 at paras. 43-44).
>
> The first requirement will not usually be difficult to meet. Litigation can be said to be reasonably contemplated when a reasonable person, with the same knowledge of the situation as one or both of the parties, would find it unlikely that the dispute will be resolved without it. (*Hamalainen v. Sippola* (1991), 62 B.C.L.R. (2d) 254, [1992] 2 W.W.R. 132 (C.A.)).
>
> To establish "dominant purpose", the party asserting the privilege will have to present evidence of the circumstances surrounding the creation of the communication or document in question, including evidence with respect to when it was created, who created it, who authorized it, and what use was or could be made of it. Care must be taken to limit the extent of the information that is revealed in the process of establishing "dominant purpose" to avoid accidental or implied waiver of the privilege that is being claimed.
>
> The focus of the enquiry is on the time and purpose for which the document was created. Whether or not a document is actually used in ensuing litigation is a matter of strategy and does not affect the document's privileged status. A document created for the dominant purpose of litigation remains privileged throughout that litigation even if it is never used in evidence.
>
> . . . . .
>
> *In my view, the preferable practice when asserting a claim of Litigation Privilege over a document is to provide an affidavit from the creator setting out in the creator's own words the circumstances and purpose of the creation of the document. If it involved preparing for contemplated litigation, the court can assess the reasonableness of the anticipation of litigation on the basis of all the evidence of the circumstances at the time.*
>
> (Emphasis added)

166 In *Blank v. Canada (Department of Justice)*, 2006 SCC 39 (S.C.C.) at para. 60, 270 D.L.R. (4th) 280 (S.C.C.), the Supreme Court of Canada confirmed that the dominant purpose test should not be replaced by a substantial purpose test:

> I see no reason to depart from the dominant purpose test. Though it provides narrower protection that would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.

167 Many of the cases dealing with litigation privilege address the issue of whether the disputed documents were prepared in the course of an investigation as distinct from being prepared for the purpose of litigation. In *Hamalainen (Committee of) v. Sippola* (1991), 62 B.C.L.R. (2d) 254 (B.C. C.A.)at para. 24 (*Hamalainen*),

Wood J.A. discussed the issue in the context of motor vehicle accidents:

> Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.

168 Whether counsel has been retained or consulted on the matter is relevant to, but not determinative of, whether litigation privilege applies.

Arguments of Counsel

169 Blue Line points to the fact that the Notes were made after Gaglardi's first meeting with Mr. Berardino, and says the purpose Gaglardi had in mind when he created the Notes was to instruct counsel.

170 Counsel for the Orca Bay Defendants submits that Gaglardi's evidence on his discovery makes clear that the dominant purpose he had in writing the Notes was not to instruct counsel, but to commit to paper certain facts while they were still fresh in his memory. He did so on his own accord and not at the request of counsel. The distinction between making notes for his own purposes and making notes at counsel's request or to later instruct counsel had been made clear to Gaglardi by the interjections of Blue Line's counsel, said counsel for the Orca Bay Defendants. Yet when asked why he prepared the Notes, his response was simply that he wanted to record the facts while they were fresh in his memory. He did not mention that he made the Notes for the purpose of instructing counsel.

171 Blue Line's response is that counsel for the Orca Bay Defendants, after obtaining Gaglardi's answer that the Notes were made to record events while his memory was still fresh, ought to have asked the "obvious" next question: "Why did you want to commit the events to paper while they were still very fresh in your memory?" Had Gaglardi been asked that question, argues Blue Line, he would have had the opportunity to provide a complete answer as to the purpose for which the Notes were made. Gaglardi subsequently gave the complete answer in his affidavit. Given the sequence of events, says Blue Line, what other possible purpose could Gaglardi have had to prepare the Notes than to instruct counsel?

Application of the law

172 I am satisfied that in this case part one of the two part test is met: litigation was reasonably contemplated at the time the Notes were created.

173 The second issue is whether the dominant purpose for creating the Notes was to prepare for the litigation that was contemplated. With respect to this issue, I have considered the following matters.

174 Gaglardi's response to the question "Why did you prepare the Notes?" cannot be viewed in isolation. It is not determinative of the privilege issue. The response indicates that Gaglardi took the question literally: He made the Notes in order to record events while they were fresh in his mind. Most notes are written for that pur-

pose. The inquiry does not end there. The next question is *why* the witness wanted to record events while they were fresh in his mind. In other words, what was the purpose of recording the events while they could still be remembered?

175 This is not a case in which a line must be drawn between notes taken in the course of an investigation and notes taken in contemplation of litigation. The circumstances of the case did not require investigation. Upon hearing that Aquilini had acquired an interest in the Enterprise, Gaglardi required legal advice as to his options. Gaglardi has deposed that he prepared the Notes following a meeting he had with legal counsel to discuss the legal action he and Beedie were contemplating with respect to Aquilini's purchase of the Enterprise.

176 Gaglardi's assertion in his affidavit that he made the Notes for the purpose of instructing counsel is not conclusive of the issue. The totality of the circumstances surrounding the creation of the Notes must be considered (*Keefer Laundry)*. However, I accept the affidavit evidence of Gaglardi that he made the Notes after his first meeting with Mr. Berardino. That being the case, the question is what possible purpose Gaglardi could have had in preparing the Notes other than to instruct counsel. Gaglardi's evidence on discovery was that he "scoured" all of his files to prepare the Notes. It is highly unlikely that he did so in order to create a record of the events for posterity. It is difficult to draw any other inference from the circumstances than the one Blue Line asks the court to draw.

177 In the circumstances, I conclude that the only possible purpose for making the Notes was to create a record of events in order to instruct counsel. The Notes are therefore protected by litigation privilege and need not be disclosed.

VI. Summary of Conclusions

178 Broadly summarized, my conclusions are as follows.

179 Blue Line must:

- provide further and better particulars as to the identities of the parties to the alleged Partnership;

- provide further and better particulars as to the individual items of confidential information possessed by Aquilini, as well as the individual items of confidential information used by the Aquilini Defendants to acquire an interest in the Enterprise;

- disclose the Compensation Evidence (that is, all correspondence relating to McRae's compensation); and

- disclose whether the settlement of the McRae compensation dispute included a term that McRae give evidence at the trial of this action.

180 Gaglardi (Blue Line) must answer questions on discovery regarding the information he communicated to Aquilini during Blue Line's negotiations with the Orca Bay Defendants.

181 Gaglardi (Blue Line) is not required to answer questions concerning the confidential information he believes was used by Aquilini or found its way into the Investment Agreement.

182 Robert Gaglardi (Blue Line) must answer questions concerning McRae's compensation.

183 Blue Line is not required to:

- provide further particulars regarding the alleged fiduciary relationships;
- provide further particulars as to the identities of the individuals or parties alleged to have carried on secret negotiations to acquire the Enterprise;
- provide further particulars as to the nature or dates of the acts alleged to constitute breaches of fiduciary duty by the Orca Bay Defendants;
- provide, through Gaglardi or McRae, analyses of the Investment Agreement and/or transaction documents;
- produce the Gaglardi Notes; or
- disclose, through McRae, any further information relating to McRae's involvement in negotiations related to acquisition of a CFL team.

184 The Aquilini Defendants must:

- disclose the date on which they retained Knott in connection with acquisition of the enterprise; and
- answer questions concerning representations they made, if any, to the NHL concerting their acquisition of the Enterprise.

185 The Aquilini Defendants are not required to:

- disclose whether they sought legal advice as to whether they could enter into the Investment agreement in light of their previous involvement with the alleged Partnership; or
- disclose their financial records for March or December, 2004.

186 The Orca Bay Defendants are not required to:

- provide information on the terms of employment of McCammon; or
- disclose the contents of discussions between McCammon and Joe Weinstein.

Motions granted in part.

END OF DOCUMENT

H. Rod Carey *Appellant*

v.

Her Majesty The Queen in right of Ontario, the Ontario Development Corporation, the Northern Ontario Development Corporation, Claude Bennett and Allan Grossman *Respondents*

INDEXED AS: CAREY *v.* ONTARIO

File No.: 18060.

1985: October 2; 1986: December 18.

Present: Beetz, McIntyre, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Evidence — Crown privilege — Production of cabinet and cabinet committee documents necessary to legal case — Low level policy matter several years old and of little public interest — Crown privilege claimed because of class of documents — Whether court should inspect documents to decide whether Crown's claim valid — Whether Crown's claim to immunity should be upheld.

The Government of Ontario increasingly became financially involved with Minaki Lodge, a resort in northwestern Ontario, and eventually became owner. Its dealings with appellant, the principal and later controlling shareholder of the lodge, gave rise to this action. On examination for discovery, the defendants' witnesses claimed an absolute privilege respecting all documents that went to or emanated from Cabinet and its committees. The claim was not based on the contents of the documents but on the class to which they belonged. Production, it was alleged, would breach confidentiality and inhibit Cabinet discussion of matters of significant public policy. An application to quash the subpoena *duces tecum* was granted, notwithstanding the judge's assumption that the documents would be relevant to the matters in issue. Both the Divisional Court and the Court of Appeal upheld that decision. At issue was whether to claim to refuse production of Cabinet documents as a class was valid, and whether it was necessary for the appellant to prove not only that the documents were relevant but also would assist his case.

H. Rod Carey *Appelant*

c.

Sa Majesté La Reine du chef de l'Ontario, la Société de développement de l'Ontario, la Société de développement du Nord de l'Ontario, Claude Bennett et Allan Grossman *Intimés*

RÉPERTORIÉ: CAREY *c.* ONTARIO

N° du greffe: 18060.

1985: 2 octobre; 1986: 18 décembre.

Présents: Les juges Beetz, McIntyre, Chouinard, Lamer, Wilson, Le Dain et La Forest.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Preuve — Privilège de la Couronne — Production de documents du Cabinet et de comités du Cabinet nécessaires à une action en justice — Question de politique de moindre importance datant de plusieurs années et de peu d'intérêt pour le public — Revendication du privilège de la Couronne fondée sur la catégorie de documents — La cour doit-elle examiner les documents afin de décider du bien-fondé de la revendication de la Couronne? — Convient-il de faire droit à la demande d'immunité avancée par la Couronne?

S'étant engagé de plus en plus à aider financièrement la Minaki Lodge (ci-après «l'hôtellerie»), un centre de villégiature du nord-ouest de l'Ontario, le gouvernement de cette province a fini par en devenir propriétaire. Ses relations avec l'appelant, l'actionnaire principal et, plus tard, l'actionnaire majoritaire de l'hôtellerie sont à l'origine du litige. À l'interrogatoire préalable, les témoins des défendeurs ont invoqué un privilège absolu à l'égard de tous les documents soumis au Cabinet et à ses comités ou en émanant. Cette revendication n'était pas fondée sur la teneur des documents, mais sur la catégorie à laquelle ils appartenaient. La production, a-t-on allégué, violerait la confidentialité et gênerait la discussion par le Cabinet de questions de politique importantes. Une demande en annulation du *subpœna duces tecum* a été accueillie, bien que le juge ait tenu pour avéré que les documents se rapporteraient aux questions en litige. Cette décision a été confirmée tant par la Cour divisionnaire que par la Cour d'appel. La question en litige est de savoir si l'on peut à bon droit refuser la production de documents du Cabinet en tant que catégorie et si l'appelant doit prouver non seulement que les documents sont pertinents mais qu'ils aideront sa cause.

Held: The appeal should be allowed.

The importance of withholding production on the basis of a public interest must be weighed against the public interest in the proper administration of justice. Protection of documents as a class was generally not favoured. There was public interest in the confidentiality of Cabinet deliberations in developing public policy, but this was only one of a number of variables to be taken into account in considering whether the interest in disclosure for the administration of justice was outweighed by other public interests. Among the variables to be weighed was the nature of the policy, whether it was contemporary or not, and the nature and importance of the action. In the present case, the information sought to be revealed concerned a particular transaction involving a low level policy matter that had taken place some thirteen years before.

Because high level documents were involved, the court should first inspect the documents to balance the competing interests in disclosing or producing them. The documents here were obviously relevant, and it was not necessary for appellant to further establish that they would assist his case.

Cases Cited

Considered: *Robinson v. State of South Australia (No. 2)*, [1931] A.C. 704; *Conway v. Rimmer*, [1968] A.C. 910; *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624; *Burmah Oil Co. v. Bank of England*, [1979] 3 All E.R. 700; *Smallwood v. Sparling*, [1982] 2 S.C.R. 686; *United States v. Nixon*, 418 U.S. 683 (1974); *Attorney-General v. Jonathan Cape Ltd.*, [1975] 3 All E.R. 484; *Sankey v. Whitlam* (1978), 21 A.L.R. 505; *Air Canada v. Secretary of State for Trade* (1983), 2 W.L.R. 494; *Fletcher Timber Ltd. v. Attorney-General*, [1984] 1 N.Z.L.R. 290; **referred to**: *R. v. Snider*, [1954] S.C.R. 479; *Gagnon v. Commission des valeurs mobilières du Québec*, [1965] S.C.R. 73; *Re Grosvenor Hotel, London (No. 2)*, [1964] 3 All E.R. 354; *Glasgow Corporation v. Central Land Board*, 1956 S.C. (H.L.) 1; *Goguen v. Gibson*, [1983] 2 F.C. 463; *Rogers v. Home Secretary*, [1973] A.C. 388; *Environmental Defence Society Inc. v. South Pacific Aluminium Ltd.*, [1981] 1 N.Z.L.R. 146; *R. and Vanguard Hutterian Brethren Inc.* (1979), 97 D.L.R. (3d) 86; *Smerchanski v. Lewis* (1981), 31 O.R. (2d) 705; *R. in Right of Alberta v. Mannix*, [1981] 5 W.W.R. 343; *Gloucester Properties Ltd. v. R.* (1981), 24 C.P.C. 82; *Lanyon Pty. Ltd. v. Commonwealth of Australia* (1974), 129 C.L.R. 650.

Arrêt: Le pourvoi est accueilli.

L'importance de la non-divulgation des documents dans l'intérêt public doit être évaluée par rapport à l'intérêt public dans la bonne administration de la justice. D'une manière générale, on ne favorise pas la protection de documents en tant que catégorie. Il est dans l'intérêt public que les délibérations du Cabinet dans l'élaboration de politiques soient confidentielles, mais ce n'est là qu'un facteur parmi tant d'autres à prendre en considération lorsqu'on examine si l'intérêt dans la divulgation aux fins de l'administration de la justice doit céder le pas à d'autres intérêts publics. Parmi les facteurs dont il faut tenir compte, il y a la nature de la politique, l'actualité de cette politique ainsi que la nature et l'importance de l'action. En l'espèce, les renseignements dont on demande la divulgation concernent une opération précise s'inscrivant dans le cadre d'une politique de moindre importance qui remonte quelque treize ans auparavant.

Parce qu'il s'agit de documents importants, la cour doit d'abord les examiner afin de soupeser les intérêts opposés dans la divulgation ou la production. En l'espèce, les documents sont manifestement pertinents et l'appelant n'a donc pas à prouver par d'autres moyens qu'ils aideront sa cause.

Jurisprudence

Arrêts examinés: *Robinson v. State of South Australia (No. 2)*, [1931] A.C. 704; *Conway v. Rimmer*, [1968] A.C. 910; *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624; *Burmah Oil Co. v. Bank of England*, [1979] 3 All E.R. 700; *Smallwood c. Sparling*, [1982] 2 R.C.S. 686; *United States v. Nixon*, 418 U.S. 683 (1974); *Attorney-General v. Jonathan Cape Ltd.*, [1975] 3 All E.R. 484; *Sankey v. Whitlam* (1978), 21 A.L.R. 505; *Air Canada v. Secretary of State for Trade* (1983), 2 W.L.R. 494; *Fletcher Timber Ltd. v. Attorney-General*, [1984] 1 N.Z.L.R. 290; **arrêts mentionnés**: *R. v. Snider*, [1954] R.C.S. 479; *Gagnon v. Commission des valeurs mobilières du Québec*, [1965] R.C.S. 73; *Re Grosvenor Hotel, London (No. 2)*, [1964] 3 All E.R. 354; *Glasgow Corporation v. Central Land Board*, 1956 S.C. (H.L.) 1; *Goguen c. Gibson*, [1983] 2 C.F. 463; *Rogers v. Home Secretary*, [1973] A.C. 388; *Environmental Defence Society Inc. v. South Pacific Aluminium Ltd.*, [1981] 1 N.Z.L.R. 146; *R. and Vanguard Hutterian Brethren Inc.* (1979), 97 D.L.R. (3d) 86; *Smerchanski v. Lewis* (1981), 31 O.R. (2d) 705; *R. in Right of Alberta v. Mannix*, [1981] 5 W.W.R. 343; *Gloucester Properties Ltd. v. R.* (1981), 24 C.P.C. 82; *Lanyon Pty. Ltd. v. Commonwealth of Australia* (1974), 129 C.L.R. 650.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C. 1970, c. E-10, ss. 36.1(2), 36.2(1) [both en. 1980-81-82-83, c. 111, s. 4, sch. III].
Evidence Act, R.S.O. 1980, c. 145, s. 30.

Authors Cited

Williston, W. B. and R. J. Rolls. *The Law of Civil Procedure*, vol. 2. Toronto: Butterworths, 1970.

APPEAL from a judgment of the Ontario Court of Appeal (1983), 43 O.R. (2d) 161, 38 C.P.C. 237, 1 D.L.R. (4th) 498, 7 C.C.C. (3d) 193, affirming a judgment of the Divisional Court (1982), 39 O.R. (2d) 273, 31 C.P.C. 34, 146 D.L.R. (3d) 684, 4 C.C.C. (3d) 83, affirming a judgment of Catzman J. (1982), 38 O.R. (2d) 430, 28 C.P.C. 310, granting an application to quash a subpoena *duces tecum*. Appeal allowed.

J. L. McDougall, Q.C., and *R. L. Armstrong*, for the appellant.

T. H. Wickett, for the respondents.

The judgment of the Court was delivered by

LA FOREST J.—This case involves a conflict between the public interest that a person who asserts a legal claim be afforded access to all information relevant to prove that claim, and the public interest against disclosure of confidential communications of the executive branch of government.

The immediate issue is whether the appellant Carey is entitled to compel production in an action against the Crown in right of Ontario and the other respondents of Cabinet documents in the possession of the executive government of the province which, he contends, would support his claim. In Ontario, this issue falls to be decided under common law.

The plaintiff's claim arises against the following background.

Lois et règlements cités

Loi sur la preuve, L.R.O. 1980, chap. 145, art. 30.
Loi sur la preuve au Canada, S.R.C. 1970, chap. E-10, art. 36.1(2), 36.2(1) [adoptés 1980-81-82-83, chap. 111, art. 4, ann. III].

Doctrine citée

Williston, W. B. and R. J. Rolls. *The Law of Civil Procedure*, vol. 2. Toronto: Butterworths, 1970.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1983), 43 O.R. (2d) 161, 38 C.P.C. 237, 1 D.L.R. (4th) 498, 7 C.C.C. (3d) 193, confirmant un jugement de la Cour divisionnaire (1982), 39 O.R. (2d) 273, 31 C.P.C. 34, 146 D.L.R. (3d) 684, 4 C.C.C. (3d) 83, confirmant un jugement du juge Catzman (1982), 38 O.R. (2d) 430, 28 C.P.C. 310, qui a fait droit à une demande en annulation d'un *subpœna duces tecum*. Pourvoi accueilli.

J. L. McDougall, c.r., et *R. L. Armstrong*, pour l'appelant.

T. H. Wickett, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE LA FOREST—Il s'agit en l'espèce d'un conflit entre l'intérêt qu'a le public à ce que toute personne qui présente une demande en justice ait accès à tous les renseignements pertinents nécessaires pour prouver ses allégations et l'intérêt du public à ce que les communications confidentielles de la branche exécutive du gouvernement ne soient pas divulguées.

La première question qui se pose est de savoir si, dans une action contre Sa Majesté du chef de l'Ontario et les autres intimés, l'appelant Carey est en droit d'obtenir la production de documents du Cabinet se trouvant en la possession du pouvoir exécutif de la province, documents qui, selon l'appelant, serviraient à étayer sa demande. En Ontario, cette question doit être décidée en vertu de la *common law*.

La réclamation du demandeur a pris naissance dans le contexte suivant.

Factual Background

The Minaki Lodge is a tourist resort complex of some note located on the Winnipeg River a few miles north of Kenora and Lake of the Woods. In the early 1960s, Carey became associated with the controlling group then operating the lodge as a shareholder. There is dispute among the parties about the financial health of the lodge during the late 1960s, but no one questions that the tourist industry in the area was adversely affected when mercury contamination was discovered in the adjoining river system. As a result the lodge, which had operated only in the summer months, did not open in the summer of 1971 and was not scheduled to open for the summer of 1972.

By the fall of 1971, the Government of Ontario had become concerned about the damage resulting to the economy of northwestern Ontario from the closing of the lodge and took steps to keep it operating. Its dealing with Carey in attempting to effect this purpose is what gave rise to this action.

Carey alleges that in the fall of 1971, the Government offered to make good all losses of the operators through forgivable or interest-free loans if the lodge was re-opened. The Government, however, denies such an offer formed part of the loan assistance it was willing to extend. Carey further alleges that he accepted the alleged offer and, in reliance on it, acquired control of the lodge from his associates and re-opened it in the summer of 1972. What is more, he adds, he kept it open at the Government's encouragement during the whole of the following winter and thereby incurred considerable losses for which the Government did not fully reimburse him. He claims he then advised the Government the lodge would be closed for the winter of 1973-1974 but the Government asked him to keep it open pending the completion of a feasability study. The Government denies making any such request.

According to Carey, in November 1973 the Government told him it wished to continue the operation of the lodge and to invest a large sum of

Contexte factuel

Minaki Lodge (ci-après «l'hôtellerie») est un centre de villégiature bien connu situé sur la rivière Winnipeg à quelques milles au nord de Kenora et du Lake of the Woods. Au début des années 60, Carey s'est associé en tant qu'actionnaire au groupe majoritaire qui exploitait alors l'hôtellerie. Bien que les parties soient en désaccord quant à la santé financière de l'hôtellerie à la fin des années 60, personne ne conteste que la découverte de contamination au mercure dans le réseau hydrographique en question a nui à l'industrie touristique de la région. Par conséquent, l'hôtellerie, qui n'était exploitée que pendant les mois d'été, est restée fermée au cours de l'été 1971 et il n'était pas prévu de la rouvrir pour l'été 1972.

Dès l'automne 1971, le gouvernement de l'Ontario, s'inquiétant du préjudice causé à l'économie du nord-ouest de l'Ontario par la fermeture de l'hôtellerie, a pris des mesures destinées à assurer sa réouverture. À cette fin, le gouvernement a négocié avec Carey, ce qui a entraîné la présente action.

Carey allègue qu'à l'automne 1971, le gouvernement a offert au moyen de prêts-subventions ou de prêts sans intérêt de dédommager les exploitants de toutes leurs pertes s'ils rouvraient l'hôtellerie. Le gouvernement par contre nie qu'une telle offre ait fait partie de l'aide sous forme de prêts qu'il était disposé à fournir. Carey affirme en outre qu'il a accepté ladite offre et que, sur la foi de celle-ci, a obtenu de ses associés le contrôle de l'hôtellerie, la rouvrant à l'été 1972. De plus, dit-il, encouragé par le gouvernement, il a gardé l'hôtellerie ouverte pendant tout l'hiver suivant, ce qui lui a occasionné des pertes appréciables dont le gouvernement ne l'a pas intégralement indemnisé. Toujours selon Carey, il a alors fait savoir au gouvernement que l'hôtellerie resterait fermée pendant l'hiver 1973-1974, mais le gouvernement lui a demandé d'attendre que soit achevée une étude de faisabilité. Le gouvernement prétend n'avoir jamais fait de telle demande.

Au dire de Carey, en novembre 1973 le gouvernement lui a manifesté le désir de voir continuer l'exploitation de l'hôtellerie et d'y investir une

money in it so as to make the resort a centerpiece for the resort industry in the area. However, he adds, since it would be politically inexpedient to provide funds to a private owner, the Government proposed to become his partner. Carey says he agreed to this proposal and accordingly continued to operate the lodge, incurring very substantial monthly operating losses which were not absorbed by the Government except to the extent necessary to enable him to meet current payments. These allegations are also denied by the Government, which claims that all financial assistance provided to the appellant from 1971 to 1973 was through loans arranged with the Ontario Development Corporation.

In late 1973 or early 1974, a meeting was held between Carey and the Minister of Industry and Tourism and a number of officials including some of the Northern Ontario Development Corporation. Carey claims he was told the Government had decided to invest over $5 million in the lodge, and that he could either have it go into receivership and see its staff and creditors go unpaid or assign his interest to the Ontario Development Corporation. The Government agrees that there was a discussion of the financial difficulties of the lodge and of the available options. At all events, the appellant accepted a written offer from the Ontario Development Corporation for the transfer of his shares on the understanding that the Corporation would assume all the owners' outstanding indebtedness, except shareholders' loans. Apparently as part of these arrangements, the appellant later signed a three-year consulting contract with the resort company for which he was to be paid some $15,000 a year. Carey asserts that he assigned his interests under the threat of receivership and its consequences. The Government, however, denies that he acted under any duress or compulsion.

somme importante afin d'en faire le centre de l'industrie touristique de la région. Il ajoute toutefois que, puisqu'il aurait été impolitique d'avancer des fonds à un propriétaire privé, le gouvernement a proposé de devenir son associé. Carey affirme avoir accepté cette proposition et avoir, en conséquence, continué à exploiter l'hôtellerie, subissant des pertes d'exploitation mensuelles considérables que le gouvernement n'a supportées que dans la mesure où cela était nécessaire pour permettre à Carey de faire face à ses paiements courants. Ces allégations font elles aussi l'objet d'une dénégation de la part du gouvernement qui prétend que toute l'aide financière reçue par l'appelant de 1971 à 1973 lui a été fournie au moyen de prêts consentis par la Société de développement de l'Ontario.

Vers la fin de 1973 ou le début de 1974, Carey a rencontré le ministre de l'Industrie et du Tourisme et plusieurs fonctionnaires, dont certains de la Société de développement du Nord de l'Ontario. Carey prétend s'être fait dire que le gouvernement avait décidé d'investir plus de cinq millions de dollars dans l'hôtellerie et qu'il pouvait choisir entre la faillite, auquel cas son personnel et ses créanciers ne seraient pas payés, ou la cession de son intérêt à la Société de développement de l'Ontario. Le gouvernement reconnaît qu'il a été question des difficultés financières de l'hôtellerie et des solutions possibles à celles-ci. Quoi qu'il en soit, l'appelant a accepté une offre écrite de la Société de développement de l'Ontario. Aux termes de cette offre l'appelant effectuerait la cession de ses actions et la Société assumerait toutes les dettes impayées des propriétaires, sauf les emprunts contractés par les actionnaires. Plus tard, apparemment en conformité avec l'accord ainsi intervenu, l'appelant a signé avec la société qui exploitait l'hôtellerie un contrat de trois ans suivant lequel il lui fournirait des services d'expert-conseil moyennant une rémunération annuelle d'environ 15 000 $. Carey affirme qu'il a cédé ses intérêts sous la menace de la faillite et de ce qui en découlerait. Le gouvernement toutefois nie que l'appelant ait agi sous le coup de la contrainte ou de la coercition.

The Action and Demand for Production

Some two years later, in March 1976, Carey brought the present action seeking damages, including exemplary damages, for breach of the alleged agreement, deceit and damage to reputation, the setting aside of the transfer on the grounds of duress and compulsion and as an unconscionable transaction, and a declaration that the appellant is the beneficial owner of the shares transferred by him. The action against the individual defendants was subsequently dismissed with consent, so only the Government and the two corporations remain as defendants.

On examination for discovery, the defendants' witnesses claimed an absolute privilege respecting all documents that went to Cabinet and its committees and all documents that emanated from it. When, in June of 1982, a date was fixed for trial, a subpoena *duces tecum* was served on the Secretary of the Cabinet for Ontario, Dr. E. E. Stewart, requiring him to attend at trial and bring all documents relating to the proceedings described in the subpoena. The Government then applied to quash the subpoena, and in support of the application filed an affidavit sworn by Dr. Stewart in which he acknowledged that he had relevant documents under his control but objected to their production on the basis that "it would not be in the public interest to produce these documents, or to make them available for inspection, even for the limited purposes of this litigation." By s. 30 of the Ontario *Evidence Act*, R.S.O. 1980, c. 145, such objection has the like effect as if it were made by a member of the Executive Council of the Province.

Dr. Stewart listed the documents in two schedules to his affidavit. The first schedule lists documents in the possession of his office at the time the subpoena was served on him. The second lists those formerly in his office but now in the possession of the archives where they would normally be kept confidential and unavailable for public access for a period of thirty years.

L'action et la demande de production

Environ deux ans plus tard, en mars 1976, Carey a intenté la présente action visant à obtenir, en premier lieu, des dommages-intérêts, y compris des dommages-intérêts exemplaires, pour violation de l'accord allégué, pour dol et pour atteinte à la réputation, en deuxième lieu, l'annulation de la cession pour cause de contrainte et de coercition et parce qu'elle constituait une opération abusive et en troisième lieu, un jugement déclarant que l'appelant est le propriétaire réel des actions qu'il a cédées. L'action contre les particuliers défendeurs a par la suite été rejetée du consentement des parties, de sorte que les seuls défendeurs qui restent sont le gouvernement et les deux sociétés.

À l'interrogatoire préalable, les témoins des défendeurs ont invoqué un privilège absolu à l'égard de tous les documents soumis au Cabinet et à ses comités et de tous les documents émanant du Cabinet. En juin 1982, la cause a été mise au rôle et on a assigné le secrétaire du Cabinet de l'Ontario, M. E. E. Stewart, à comparaître au procès et à produire tous les documents se rapportant aux procédures mentionnées dans le *subpœna*. Le gouvernement a alors présenté une demande en annulation du *subpœna*, produisant à l'appui de sa demande un affidavit souscrit par M. Stewart, dans lequel ce dernier reconnaissait avoir à sa disposition des documents pertinents mais s'opposait à leur production parce que [TRADUCTION] «il ne serait pas dans l'intérêt public de produire ces documents ou de permettre qu'on les examine, même aux fins restreintes du présent litige». Suivant l'art. 30 de la *Loi sur la preuve* de l'Ontario, L.R.O. 1980, chap. 145, une telle objection a le même effet qu'une objection formulée par un membre du Conseil exécutif de la province.

M. Stewart a énuméré les documents en question dans deux annexes jointes à son affidavit. La première annexe énumère les documents se trouvant dans son bureau au moment où le *subpœna* lui a été signifié. La seconde énumère les documents qu'il a déjà eus dans son bureau mais qui sont maintenant en la possession des archives où ils devraient normalement être conservés, confidentiels et inaccessibles au public, pendant une période de trente ans.

The affidavit claims privilege against disclosure of all these documents except a few orders in council and formal minutes of the Management Board. The claim of privilege is not based on the contents of these documents, which are not revealed, but on the class to which they belong, i.e. documents prepared for Cabinet, or that emanated from Cabinet, or that record its proceedings or those of its committees. These may compendiously be described as "Cabinet documents", although there may in some circumstances be ground for making a distinction between them.

The basis of the claim for the privilege against production of the documents is set forth in the following excerpts from the affidavit:

... it is my firm opinion that it has consistently been assumed and taken for granted at all material times by all members of the Executive Council, and by all members of the staff of the Cabinet office, that all of the discussions in the Executive Council are private and confidential, and will not be published or revealed to any persons who are not members of the Council. It has also been consistently realised and appreciated by all members of the Council that the decisions taken by it are collegial or group decisions, for each of which they all share responsibility.

It is also my firm opinion that it has consistently been assumed by the members of the Executive Council, and by the staff of the Cabinet office and the various government ministries, that documents prepared by subcommittees of the Cabinet for use by the Cabinet, and documents prepared by ministries or other government organizations for use by the Cabinet are privileged and confidential and will not be made public.

I have read and reviewed the documents listed in Exhibit 1 for which privilege is claimed. In my considered opinion, for the reasons set out below, it would not be in the public interest to produce these documents, or to make them available for inspection, even for the limited purposes of this litigation.

The notes kept by members of Cabinet staff of the discussions at Cabinet meetings do not purport to be complete, and do not indicate the basis upon which any individual member, or the Executive Council itself, formed a decision. They indicate certain points raised by individual members of Cabinet, and more importantly, they record the decisions reached by Cabinet ....

L'affidavit réclame un privilège de non-divulgation relativement à chacun de ces documents, à l'exception de quelques décrets du Conseil et procès-verbaux officiels du Conseil de gestion. Cette réclamation se fonde, non pas sur la teneur des documents, qui n'a pas été révélée, mais sur la catégorie à laquelle ils appartiennent, c.-à-d. celle des documents préparés pour le Cabinet ou émanant du Cabinet, ou contenant les délibérations du Cabinet ou de ses comités. Par souci de concision, on peut les décrire comme des «documents du Cabinet», bien qu'il puisse convenir dans certaines circonstances de faire des distinctions entre eux.

Le fondement de la réclamation d'un privilège de non-production des documents se trouve exposé dans les passages suivants tirés de l'affidavit:

[TRADUCTION] ... je suis fermement convaincu que tous les membres du Conseil exécutif et tout le personnel du bureau du Cabinet ont toujours supposé et tenu pour acquis que toutes les discussions du Conseil exécutif sont privées et confidentielles et qu'elles ne seront ni publiées ni révélées à des personnes qui ne font pas partie du Conseil. De plus, chacun des membres du Conseil a toujours été bien conscient du caractère collégial ou collectif des décisions du Conseil, à l'égard desquelles ils partagent tous la responsabilité.

Je suis en outre fermement convaincu que les membres du Conseil exécutif et le personnel du bureau du Cabinet et des différents ministères gouvernementaux ont toujours supposé que les documents établis par des sous-comités du Cabinet à l'usage du Cabinet ainsi que les documents préparés par les ministères ou d'autres organismes gouvernementaux à l'usage du Cabinet sont privilégiés et confidentiels et ne seront pas rendus publics.

J'ai lu et examiné les documents énumérés dans la pièce 1 à l'égard desquels le privilège est demandé. Après mûre réflexion, j'estime, pour les raisons exposées ci-après, qu'il ne serait pas dans l'intérêt public de produire ces documents ou de permettre qu'on les examine, même aux fins restreintes du présent litige.

Les notes prises par des membres du personnel du Cabinet, portant sur les discussions qui ont eu lieu au cours des réunions du Cabinet, ne se veulent aucunement complètes et n'indiquent pas ce sur quoi tel ou tel membre du Cabinet ou le Conseil exécutif lui-même a pu fonder une décision. Elles constatent certains points soulevés par des membres individuels du Cabinet et, plus important encore, elles enregistrent les décisions prises par le Cabinet ...

It is my firm opinion that if these notes of the discussions in the Executive Council were to be produced, it would almost necessarily lead to a distorted, incomplete and inaccurate impression of the nature of the actual discussion which took place. It is also my opinion that if these notes were produced, it would in future affect the nature of the discussions in Cabinet, and would inhibit the freedom of the members of Cabinet to discuss matters of significant public concern and policy, to the detriment of the public interest.

Je crois fermement que si ces notes des discussions du Conseil exécutif devaient être produites, il en résulterait presque inévitablement que l'on se ferait une idée fausse, incomplète et inexacte de la nature des discussions. J'estime en outre que la production de ces notes aurait des répercussions sur les discussions futures du Cabinet et imposerait des entraves à la liberté des membres du Cabinet de discuter de questions importantes de politique et d'intérêt public, et ce, au détriment du bien général.

The Courts Below

Catzman J. of the Supreme Court of Ontario (1982), 38 O.R. (2d) 430, 28 C.P.C. 310, assumed without deciding that the documents in question would be relevant to the matters in issue between the parties to the litigation. However he ordered that the subpoena *duces tecum* be quashed and set aside largely on the basis of the Ontario Court of Appeal decision in *Smerchanski v. Lewis* (1981), 31 O.R. (2d) 705 where it was stated, at p. 711, that documents relating to Cabinet proceedings are by their nature generally acknowledged to be privileged. For this and other reasons, he also rejected the suggestion that he inspect the documents privately so as to determine where the balance of public interest lay.

An appeal to the Divisional Court for Ontario was dismissed: (1982), 39 O.R. (2d) 273, 31 C.P.C. 34, 146 D.L.R. (3d) 684, 4 C.C.C. (3d) 83. White J., who gave the judgment of the Court, held, citing *inter alia*, *Smerchanski v. Lewis*, that Cabinet documents are presumed to be privileged under the doctrine of Crown privilege or public interest immunity in the absence of special circumstances, such as an allegation of criminal activity, malfeasance, misfeasance, nonfeasance, irregularity or other improprieties in the conduct of the members of the Cabinet or those reporting to the Cabinet, of which the documents in issue would be proof. In his view, the onus of establishing such circumstances is on those who seek production of the documents. Carey would have to discharge this onus before the court would look at the documents and embark on the process of weighing the interest in the confidentiality of executive or Cabinet delib-

Les tribunaux d'instance inférieure

Le juge Catzman de la Cour suprême de l'Ontario (1982), 38 O.R. (2d) 430, 28 C.P.C. 310, a tenu pour avéré, sans toutefois décider le point, que les documents en cause se rapporteraient aux questions en litige entre les parties au procès. Toutefois, se fondant principalement sur l'arrêt *Smerchanski v. Lewis* (1981), 31 O.R. (2d) 705, à la p. 711, où la Cour d'appel de l'Ontario dit que les documents relatifs aux délibérations du Cabinet sont, de par leur nature, généralement reconnus comme privilégiés, il a ordonné l'annulation du *subpœna duces tecum*. Pour cette raison et pour d'autres il a également repoussé la proposition qu'il examine les documents en privé afin de déterminer lequel des intérêts publics devait l'emporter.

Un appel devant la Cour divisionnaire de l'Ontario a été rejeté: (1982), 39 O.R. (2d) 273, 31 C.P.C. 34, 146 D.L.R. (3d) 684, 4 C.C.C. (3d) 83. Le juge White, qui a rendu le jugement de la cour, a cité notamment l'arrêt *Smerchanski v. Lewis* à l'appui de sa conclusion que, grâce au principe du privilège de Sa Majesté ou de l'immunité d'intérêt public, les documents du Cabinet sont réputés privilégiés, à moins qu'il n'y ait des circonstances spéciales telles qu'une allégation d'activité criminelle, de méfait (*malfeasance*), de mauvaise exécution (*misfeasance*), d'inaction (*nonfeasance*), d'irrégularité ou de toute autre conduite irrégulière reprochée aux membres du Cabinet ou à des personnes relevant du Cabinet, conduite dont les documents en cause constitueraient une preuve. De l'avis du juge White, c'est à ceux qui demandent la production des documents qu'il incombe d'établir l'existence de telles circonstances. Tant que Carey ne le ferait pas, la cour n'examinerait pas les documents ni n'entreprendrait l'analyse visant à déterminer lequel devrait primer, l'intérêt à préser-

erations against the interest in making available all relevant evidence to a court.

On the appeal to the Court of Appeal of Ontario (1983), 43 O.R. (2d) 161, 38 C.P.C. 237, 1 D.L.R. (4th) 498, 7 C.C.C. (3d) 193, that court rejected the "very special circumstances" rule propounded by the Divisional Court. It, however, dismissed the appeal for reasons set forth in the judgment of Thorson J.A. After an extensive examination of the case law, he concluded that the Crown (i.e. the provincial Government) had no absolute privilege or immunity from disclosure of documents based on either their content or class. The Crown could, however, claim protection of certain documents from disclosure on the basis of a specified public interest. Where such a claim is properly made, he stated, it will prevail unless the party seeking their production can persuade the court that there are cogent and concrete grounds that will substantially assist his case, that the issue to which the documents are relevant is one of real substance and is not raised merely to gain access to the documents, and that it is unlikely that the facts sought to be established by the documents can be otherwise proved. Only after this is done will the court proceed to examine the documents with a view to balancing the competing interests. In the case at hand, concrete and cogent grounds had not been presented. Nor had sufficient time elapsed to remove concern about the publication of the documents.

Although it did not have to deal with the issue in view of the conclusion it had arrived at, the Court thought it desirable to comment on the submission made on behalf of the Government that where a court decided to order an inspection, the Government should have a right to appeal before the court proceeded to act on that order, and if the Court of Appeal made such an order, the Govern-

ver le caractère confidentiel des délibérations de l'exécutif ou du Cabinet, ou l'intérêt à mettre à la disposition d'un tribunal tous les éléments de preuve pertinents.

En appel devant la Cour d'appel de l'Ontario (1983), 43 O.R. (2d) 161, 38 C.P.C. 237, 1 D.L.R. (4th) 498, 7 C.C.C. (3d) 193, celle-ci a écarté la règle des [TRADUCTION] «circonstances très spéciales» proposée par la Cour divisionnaire. Elle a néanmoins rejeté l'appel pour les motifs exposés dans le jugement du juge Thorson. Après un examen approfondi de la jurisprudence, ce dernier a conclu que Sa Majesté (c.-à-d. le gouvernement provincial) ne jouissait pas d'un privilège ou d'une immunité absolus qui venaient empêcher la communication de documents, soit en raison de leur contenu, soit en raison de leur catégorie. Sa Majesté pouvait cependant, en invoquant un intérêt public précis, réclamer une exemption de communication à l'égard de certains documents. Chaque fois qu'une demande de ce genre est dûment présentée, a dit le juge Thorson, on y accédera, à moins que la partie qui cherche à obtenir la production ne puisse persuader le tribunal qu'il existe des raisons concrètes et convaincantes de croire que les documents lui seront d'un grand secours, que la question à laquelle se rapportent les documents est sérieuse et n'a pas été soulevée simplement pour avoir accès aux documents et que, selon toute vraisemblance, les faits que l'on veut établir au moyen des documents ne peuvent être prouvés d'aucune autre manière. Ce n'est qu'alors que le tribunal examinera les documents en vue de faire un choix entre les intérêts opposés. En l'espèce, on n'a pas allégué de raisons concrètes et convaincantes. Par ailleurs, il ne s'était pas écoulé suffisamment de temps pour dissiper toute inquiétude relative à la publication des documents.

Quoique n'y étant pas tenue, eu égard à la conclusion à laquelle elle était arrivée, la cour a jugé à propos de faire des observations sur l'argument avancé au nom du gouvernement, selon lequel chaque fois qu'un tribunal décide d'ordonner l'inspection de documents, le gouvernement devrait avoir le droit d'en appeler de cette ordonnance avant que le tribunal ne commence à l'exé-

ment should be given an opportunity to seek leave to appeal to this Court. The Court of Appeal disagreed with this contention on the ground that it knew of no procedure by which this could be done and because of the practical consequences that could ensue from allowing this argument to prevail.

Leave to appeal to this Court was granted on December 3, 1983, [1983] 2 S.C.R. vi.

Grounds of Appeal

Counsel for Carey contends that the Court of Appeal erred

(a) in finding that Dr. Stewart's affidavit was sufficient to support the claim for non-disclosure despite the fact that it did not specify any special circumstances or particular damage to the public interest;

(b) in its formulation of the test to be applied in determining the circumstances in which the Crown will be obliged to produce Cabinet and other important documents at trial;

(c) in that it established the requirements to be met by a party seeking production of Crown documents relying, in large part, upon the English authorities which in turn relied upon the English rules of practice which have no equivalent in the provinces or territories of Canada.

Counsel for the respondents specified that the claim of privilege was put forward solely on the basis of the class of documents in issue and not on the basis of content. He further contended that the Court of Appeal erred in stating that the Government did not have a separate right to appeal from an order that the documents be inspected.

I do not propose to enter into the latter point in any detail, but I shall only make the following brief remarks. Appeals are creatures of statute, and counsel did not draw our attention to any

cuter et, si la Cour d'appel rendait une telle ordonnance, on devrait donner au gouvernement la possibilité de demander l'autorisation de se pourvoir devant cette Cour. La Cour d'appel a écarté cet argument pour le motif qu'elle ne connaissait aucune procédure par laquelle cela pouvait se faire et aussi en raison des conséquences pratiques de l'acceptation d'un tel argument.

L'autorisation de pourvoi devant cette Cour a été accordée le 3 décembre 1983, [1983] 2 R.C.S. vi.

Les moyens d'appel

L'avocat de Carey fait valoir que la Cour d'appel a commis une erreur

a) en concluant que l'affidavit de M. Stewart suffisait pour fonder la demande d'exemption de communication, malgré le fait que cet affidavit ne mentionnait aucune circonstance spéciale ni aucune atteinte particulière à l'intérêt public;

b) dans sa formulation du critère à appliquer pour déterminer les circonstances dans lesquelles Sa Majesté sera tenue de produire au procès des documents du Cabinet et d'autres documents importants;

c) parce que, en posant des exigences à remplir par une partie qui demande la production de documents de la Couronne, elle s'est fondée en grande partie sur la jurisprudence anglaise qui, elle, repose sur les règles de pratique anglaises, règles qui n'ont pas d'équivalent dans les provinces ou territoires du Canada.

L'avocat des intimés a précisé que la revendication de privilège avait pour seul fondement la catégorie à laquelle appartiennent les documents en cause et ne reposait nullement sur leur teneur. Il a soutenu en outre que la Cour d'appel a commis une erreur en affirmant que le gouvernement n'avait pas de droit distinct d'en appeler d'une ordonnance autorisant l'examen des documents.

Je ne me propose pas d'approfondir ce dernier point et je m'en tiendrai aux brèves observations suivantes. Les droits d'appel sont conférés par la loi et l'avocat ne nous a signalé aucun texte per-

statute permitting an appeal to the Court of Appeal from an order for inspection. He simply relied on English and New Zealand cases, which as Thorson J.A. remarked may rest on a different statutory basis. So far as the jurisdiction of this Court is concerned, it is premature to discuss the issue until it arises. I might say, however, that I am impressed with the practical implications mentioned by Thorson J.A. militating against permitting appeals to be heard on issues of this kind until the final disposition of the action. This is especially true in view of the fact that a special procedure has been provided for dealing with the really sensitive issues such as international relations and national defence and security; see *Canada Evidence Act*, R.S.C. 1970, c. E-10, ss. 36.1(2), 36.2(1), as enacted by S.C. 1980-81-82-83, c. 111, s. 4, sch. III.

General Legal Background

It is obviously necessary for the proper administration of justice that litigants have access to all evidence that may be of assistance to the fair disposition of the issues arising in litigation. It is equally clear, however, that certain information regarding governmental activities should not be disclosed in the public interest. The general balance between these two competing interests has shifted markedly over the years. At times the public interest in the need for government secrecy has been given virtually absolute priority, so long as a claim to non-disclosure was made by a Minister of the Crown. At other times a more even balance has been struck.

This difference in emphasis resulted in part from the manner in which the interests collided in particular cases. The need for secrecy in government operations may vary with the particular public interest sought to be protected. There is, for example, an obvious difference between information relating to national defence and information relating to a purely commercial transaction. On the other side of the equation, the need for disclosure may be more or less compelling having regard

mettant qu'une ordonnance d'inspection de documents soit portée en appel devant la Cour d'appel. Il s'est simplement appuyé sur la jurisprudence anglaise et néo-zélandaise dont, comme l'a fait remarquer le juge Thorson en Cour d'appel, le fondement législatif peut être différent. En ce qui concerne la compétence de cette Cour, il est prématuré d'en discuter tant que la question n'est pas soulevée. Il convient toutefois de souligner que les considérations d'ordre pratique mentionnées par le juge Thorson, qui militent contre l'autorisation d'appels sur ce type de questions avant le règlement définitif du litige, n'ont pas manqué de m'impressionner. C'est d'autant plus vrai qu'une procédure spéciale est prévue pour les questions particulièrement délicates telles les relations internationales, la défense et la sécurité nationales; voir *Loi sur la preuve au Canada*, S.R.C. 1970, chap. E-10, par. 36.1(2), 36.2(1), adoptés par S.C. 1980-81-82-83, chap. 111, art. 4, ann. III.

Le contexte juridique général

Il est manifestement nécessaire à la bonne administration de la justice que les justiciables puissent obtenir tous les éléments de preuve susceptibles de favoriser le règlement équitable des questions soulevées dans un litige. Toutefois, il est clair aussi que certains renseignements relatifs aux activités gouvernementales devraient dans l'intérêt public ne pas être divulgués. L'importance relative de chacun de ces deux intérêts opposés a changé sensiblement au fil des ans. À certains moments, l'intérêt qu'a le public à ce que le secret des délibérations du gouvernement soit gardé a reçu une priorité presque absolue; il suffisait qu'un ministre de la Couronne demande la non-divulgation. À d'autres époques, on s'est rapproché davantage de l'équilibre.

Cette différence tient en partie à la façon dont les intérêts se heurtaient dans des cas donnés. La nécessité du secret dans les activités gouvernementales peut varier selon l'intérêt public précis que l'on veut protéger. Il existe, par exemple, une différence évidente entre des renseignements qui se rapportent à la défense nationale et des renseignements concernant une opération purement commerciale. D'un autre côté, la nécessité de divulgation peut être plus ou moins impérieuse suivant la

to the nature of the litigation (e.g. between a criminal and civil proceeding) and the extent to which facts may be proved without resort to information sought to be protected from disclosure.

The shift in the balance between the two interests has also been affected by changing social conditions and the role of government in society at various times. When the early cases were decided, the activities of government were restricted to larger political issues. There was no general right to sue the Crown. The issue, therefore, did not frequently arise and when it did, it was often in the context of a suit between private litigants. In that period, it would appear, the tendency of the Crown was to produce evidence requested by litigants in the absence of some compelling reason that could not be disregarded; see the authorities cited by Lord Blanesburgh in *Robinson v. State of South Australia (No. 2)*, [1931] A.C. 704 (P.C.), at p. 714.

With the expansion of state activities into the commercial sphere, different attitudes to suits against the Crown developed and statutes were enacted to make these possible. The general social context also affected attitudes towards government secrecy. One can scarcely expect the views on this issue to be the same in wartime conditions when the total energy of the nation must be concentrated on winning the war, and an era of peace in which government activity impinges on every aspect of our lives and there is in consequence increased demands for more open government. The question, as Lord Upjohn noted in *Conway v. Rimmer*, [1968] A.C. 910 at p. 991, is one that invites periodic judicial reassessment. Not surprisingly, conflicting dicta can scarcely be reconciled.

nature (par ex., criminelle ou civile) du litige et la mesure dans laquelle les faits sont susceptibles d'être prouvés sans avoir recours aux renseignements que l'on cherche à protéger contre la divulgation.

L'évolution des conditions sociales ainsi que le rôle qu'a joué le gouvernement à différentes époques au sein de la collectivé ont également influencé le degré d'importance accordé aux deux intérêts en question. Quand les premières décisions dans le domaine ont été rendues, les activités gouvernementales s'exerçaient uniquement à l'égard de questions politiques de portée relativement large. Il n'y avait pas de droit général de poursuivre la Couronne. La question ne se posait donc que rarement et, quand on la soulevait, c'était souvent dans le contexte d'un litige entre particuliers. À cette époque-là, semblerait-il, Sa Majesté avait tendance à produire les éléments de preuve demandés par les parties au procès, en l'absence de quelque raison impérieuse qu'on ne pouvait ignorer; voir la jurisprudence citée par lord Blanesburgh dans l'arrêt *Robinson v. State of South Australia (No. 2)*, [1931] A.C. 704 (P.C.), à la p. 714.

L'élargissement du champ des activités étatiques pour englober la sphère commerciale a donné naissance à des attitudes nouvelles face aux actions contre la Couronne et cela s'est traduit par des lois visant à rendre possibles de telles actions. Les positions prises à l'égard du secret des délibérations du gouvernement ont été déterminées en outre par le contexte social général. En effet, on ne peut guère s'attendre que les opinions sur cette question soient les mêmes en temps de guerre quand toutes les énergies de la nation doivent être mobilisées pour assurer la victoire qu'elles ne le seraient si, dans une période de paix, les activités gouvernementales envahissaient tous les aspects de la vie des citoyens, ce qui porterait alors à revendiquer davantage un gouvernement plus ouvert. Comme l'a souligné lord Upjohn dans l'arrêt *Conway v. Rimmer*, [1968] A.C. 910, à la p. 991, il s'agit d'une question qui doit périodiquement faire l'objet du réexamen des tribunaux. Il ne faut donc pas s'étonner de l'impossibilité de concilier les opinions contradictoires exprimées sur ce point.

The widely divergent views on the subject may conveniently be illustrated by the two cases that first gave rise to the modern debate on the subject, *Robinson v. State of South Australia*, just cited, before the Privy Council, and *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, before the House of Lords.

In *Robinson*'s case, Robinson sued the State of Australia for the amount of damage that had resulted to his wheat in the possession of the State under wheat marketing legislation. The damage, it was alleged, resulted from the negligence of the agents of the State who handled the wheat. To establish his case, Robinson sought and obtained an order to obtain full discovery of all documents in the possession of the State relating to the matters in controversy. By affidavit, however, the State claimed that 1,892 State documents were privileged since their disclosure would be contrary to the interests of the State. The documents were said to comprise communications between officers administering the departments concerned.

The Privy Council decided against the State's claim for non-disclosure. The documents claimed, it said, were vital to the plaintiff's case. Besides, the privilege claimed was a narrow one to be exercised sparingly, and no further than was necessary for the protection of public interests. Lord Blanesburgh noted that the documents did not relate to the political activities of the State, but to its trading, commercial or contractual activities. While documents relating to the latter might properly not be disclosed in order to safeguard genuine public interests, the increasing extension of state activities into the spheres of business and commerce coupled with the apparently free use of the claim of privilege in relation to claims arising out of these activities, made it imperative for the courts to see to it that the scope of the privilege in such litigation should not be extended. The fact that production of the documents might prejudice the Crown's case or assist the plaintiff's did not justify the claim of privilege. "In truth", he added,

La grande divergence des opinions se dégage bien des deux arrêts qui ont lancé le débat moderne sur le sujet, savoir *Robinson v. State of South Australia*, précité, devant le Conseil privé, et *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, devant la Chambre des lords.

Dans l'affaire *Robinson*, Robinson a poursuivi l'État d'Australie pour le montant des dommages subis par son blé alors qu'il était en la possession de l'État en vertu des textes de loi en matière de commercialisation du blé. Le préjudice, a-t-on allégué, résultait de la négligence des mandataires de l'État qui avaient manutentionné le blé. Afin de prouver ses allégations, Robinson a demandé et a obtenu une ordonnance exigeant la communication intégrale de la totalité des documents qui se trouvaient en la possession de l'État et qui se rapportaient aux questions en litige. L'État a cependant produit un affidavit dans lequel il faisait valoir que 1 892 de ces documents étaient privilégiés parce que leur divulgation irait à l'encontre des intérêts de l'État. On disait en fait que les documents comprenaient des communications entre les fonctionnaires chargés de l'administration des ministères concernés.

Le Conseil privé a décidé de rejeter la revendication de non-divulgation de l'État. Selon le Conseil privé, les documents en question constituaient des éléments indispensables de la preuve du demandeur. D'autre part, le privilège invoqué était de portée restreinte, ne devant s'exercer qu'avec modération et seulement dans la mesure où cela s'imposait pour la protection des intérêts publics. Lord Blanesburgh a souligné que les documents en cause concernaient non pas les activités politiques de l'État, mais ses activités commerciales ou contractuelles. Bien que la communication de documents relevant de cette dernière catégorie puisse à bon droit être refusée afin d'assurer la sauvegarde d'intérêts publics réels, en raison de la tendance de plus en plus marquée vers l'intervention étatique dans les domaines des affaires et du commerce et à cause du recours, apparemment sans borne, à la revendication de privilège relativement à des demandes découlant des activités de l'État dans ces domaines, il était devenu impératif que les

"the fact that the documents, if produced might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security" (p. 716).

tribunaux voient à ne pas étendre la portée du privilège dans des litiges de ce genre. Ce n'est pas parce que la production des documents pourrait nuire à la cause de Sa Majesté ou encore aider celle du demandeur qu'une revendication de privilège est justifiée. [TRADUCTION] «En vérité», a-t-il ajouté, «le fait que les documents, si on les produisait, pourraient avoir un tel effet sur le sort du litige constitue en lui-même une raison impérieuse de les produire, raison qui ne doit céder le pas que devant les considérations les plus graves de politique ou de sécurité de l'État» (p. 716).

The Board noted that a court has always had the power to inquire into the nature of the document for which protection is sought and to require some indication of the injury the State would suffer from its production. In performing this task, it added, the court may inspect the documents privately, particularly in cases where the State itself is a party. In the result, the Board concluded that the proper course there was to remit the matter to the court that heard the case with directions that it was a proper one for exercising its power to inspect the documents.

Le Comité judiciaire a souligné que les tribunaux ont toujours été investis du pouvoir de faire enquête sur la nature du document à l'égard duquel la protection est demandée et d'exiger des précisions sur le préjudice que subirait l'État s'il était produit. En définitive, le Comité judiciaire est arrivé à la conclusion que la marche à suivre était de renvoyer l'affaire au tribunal qui l'avait entendue et de lui souligner qu'il y avait lieu d'exercer son pouvoir d'examiner les documents.

Eleven years later, in 1942, the House of Lords refused to follow the *Robinson* case in *Duncan v. Cammell, Laird & Co.*, *supra*. There the submarine *Thetis*, which the respondents had built for the Admiralty, sank while undergoing its submergence test, and an action in negligence was brought by representatives and dependents of those who had died in the mishap. The Crown objected to the production of several documents which revealed the structural specifications of the submarine and its condition when raised. The objection having been made in proper form, the House upheld it without any inspection of the documents.

Onze ans plus tard, en 1942, la Chambre des lords a refusé de suivre l'arrêt *Robinson* dans l'affaire *Duncan v. Cammell, Laird & Co.*, précitée. Dans cette affaire, le sous-marin *Thetis*, que la société intimée avait construit pour l'Amirauté, a coulé alors qu'il subissait son essai de submersion et les représentants des victimes de l'accident ainsi que les personnes à leur charge ont intenté une action pour négligence. Sa Majesté s'est opposée à la production de plusieurs documents révélant les caractéristiques du sous-marin et son état lors de son renflouement. Puisque l'objection avait été faite dans les formes prescrites, la Chambre l'a admise sans examen des documents.

The case was undoubtedly correctly decided. A properly framed affidavit by a Minister of the Crown objecting to giving information about the structure of equipment intended for the defence of the country must surely be treated with the utmost deference, especially in wartime. Lord Blanesburgh in *Robinson*'s case had noted that the documents should not be inspected where this could

Il ne fait aucun doute que cet arrêt était bien fondé en droit. Un affidavit en bonne et due forme dans lequel un ministre de la Couronne s'oppose à fournir des renseignements sur les caractéristiques de matériel destiné à la défense nationale doit sûrement être traité avec le plus grand respect, surtout en temps de guerre. Lord Blanesburgh avait d'ailleurs souligné dans l'arrêt *Robinson* que

have the effect of itself defeating the reasons for which a privilege was claimed.

What puts the *Duncan* case at odds with its predecessor, however, was the view taken of the respective roles of the courts and of the Crown in dealing with claims for the production of state documents. In *Robinson*'s case the court's role was given pre-eminence. In *Duncan*, by contrast, the House made it clear that a ministerial objection, properly made, was conclusive. The House expressly disapproved of the order for inspection granted in *Robinson*'s case.

No longer bound by English authority, this Court soon began to dissociate itself from some of the more absolute statements in *Duncan*'s case. In *R. v. Snider*, [1954] S.C.R. 479, the Court, at the request of the prosecution, allowed production of, and oral evidence respecting, the income tax returns of the accused despite the objection of the Minister of National Revenue. The Court there clearly reiterated "the general principle that in a court of justice every person and every fact must be available to the execution of its supreme functions" in the absence of a public interest recognized as overriding it (see Rand J. at p. 482).

A similar approach was taken in *Gagnon v. Commission des valeurs mobilières du Québec*, [1965] S.C.R. 73. There the Attorney General of Quebec objected on the basis of public interest to the Secretary of the Commission's divulging in the course of bankruptcy proceedings a letter written to the Commission by the bankrupt regarding the business of the bankrupt, but the Court refused to uphold this objection. By this time, the English courts themselves had begun to move away from the approach adopted in *Duncan*'s case; see *Re Grosvenor Hotel, London (No. 2)*, [1964] 3 All E.R. 354 (C.A.) Fauteux J., who gave the judgment of the majority of this Court, referred to the

les documents ne devaient pas faire l'objet d'un examen lorsque ce seul acte pouvait avoir pour effet de contrecarrer les buts d'une revendication de privilège.

Toutefois, ce à quoi tient l'incompatibilité de l'arrêt *Duncan* avec l'arrêt précédent est l'opinion exprimée relativement aux rôles respectifs des tribunaux et de Sa Majesté face à des demandes de production de documents de l'État. L'arrêt *Robinson* a donné prééminence au rôle des tribunaux. Dans l'arrêt *Duncan*, par contre, la Chambre des lords a clairement établi le caractère concluant d'une objection en bonne et due forme faite par un ministre. La Chambre a formellement désapprouvé l'ordonnance d'inspection accordée dans l'affaire *Robinson*.

N'étant plus liée par la jurisprudence anglaise, cette Cour n'a pas tardé à se distancier de certaines des déclarations les plus absolues faites dans l'arrêt *Duncan*. En effet, dans l'arrêt *R. v. Snider*, [1954] R.C.S. 479, la Cour, à la demande de la poursuite, a permis la production des déclarations d'impôt sur le revenu de l'accusé et a consenti à entendre des témoignages oraux à cet égard, et ce, en dépit de l'opposition du ministre du Revenu national. Dans cet arrêt, la Cour a clairement réitéré [TRADUCTION] «le principe général selon lequel une cour de justice, dans l'exercice de ses fonctions souveraines, doit pouvoir faire appel à toute personne et avoir à sa disposition tous les faits», à moins qu'il n'y ait un intérêt public dont on reconnaît la prépondérance sur ce principe (voir les motifs du juge Rand, à la p. 482).

Telle a été également la position prise dans l'arrêt *Gagnon v. Commission des valeurs mobilières du Québec*, [1965] R.C.S. 73. Là, le procureur général du Québec s'est opposé, en invoquant l'intérêt public, à ce que le secrétaire de la Commission produise dans le cadre de procédures en faillite une lettre portant sur l'entreprise du failli que celui-ci avait adressée à la Commission; la Cour a écarté l'objection. Déjà à cette époque, les tribunaux anglais eux-mêmes avaient commencé à s'écarter du point de vue retenu dans l'arrêt *Duncan*; voir *Re Grosvenor Hotel, London (No. 2)*, [1964] 3 All E.R. 354 (C.A.) Le juge Fauteux, qui a rédigé les motifs des juges de la majorité en cette

latter case in concluding that the courts had the final say in deciding between the conflicting demands of the litigant and the state, or at least in determining whether a ministerial objection is well founded. He conceded that such objection would obviously be well founded in the case of military secrets, diplomatic relations, Cabinet papers and high level political decisions. But the courts' power, though it must be prudently exercised, remained nonetheless. The facts, he added, will vary from case to case; each must be determined on its own merits.

Cour, s'est référé à ce dernier arrêt en concluant qu'en dernière analyse, il appartient aux tribunaux de choisir entre les réclamations contradictoires du plaideur et de l'État ou, à tout le moins, de décider du bien-fondé d'une objection émanant d'un ministre. Il a reconnu que le bien-fondé d'une telle objection serait évident dans le cas de secrets militaires, de relations diplomatiques, de documents du Cabinet et de décisions prises par les plus hautes instances politiques. Mais le pouvoir des tribunaux, nonobstant l'obligation de l'exercer avec prudence, n'en était pas moins réel pour autant. Les faits, a précisé le juge Fauteux, varieront d'une affaire à l'autre et chacune doit être tranchée en conséquence.

It was left to the House of Lords in *Conway v. Rimmer*, *supra*, in 1968, to dispose of the more excessive views in *Duncan*'s case and to bring English law in line with that of Canada and other parts of the Commonwealth as well as that of Scotland; for the latter, see *Glasgow Corporation v. Central Land Board*, 1956 S.C. (H.L.) 1. In *Conway*, a probationary constable brought action for malicious prosecution against his former superintendent. In the course of discovery, the latter revealed relevant documents in his possession which included four reports made by the defendant during the plaintiff's probationary period and a report by him to his chief constable for transmission to the Director of Public Prosecutions in connection with the prosecution of the plaintiff on a criminal charge, on which he was acquitted and on which the civil action was based. The Secretary of State for Home Affairs objected in proper form to the production of these documents on the ground that they fell within a class of documents the production of which would be injurious to the public interest. The House of Lords held that the documents should be produced for inspection and if it was found that disclosure would not be prejudicial to the public interest or that the possibility of such prejudice was insufficient to justify their being withheld, disclosure should be ordered.

Dans l'arrêt *Conway v. Rimmer*, précité, en 1968, la Chambre des lords a repoussé les plus excessives des opinions exprimées dans l'arrêt *Duncan* et a mis le droit anglais au diapason de celui du Canada et d'autres pays du Commonwealth et aussi de celui d'Écosse; pour un exemple du droit écossais, voir *Glasgow Corporation v. Central Land Board*, 1956 S.C. (H.L.) 1. Dans l'affaire *Conway*, un policier stagiaire a intenté contre son ancien surintendant une action pour poursuites abusives. Au cours de son interrogatoire préalable, le défendeur a révélé qu'il avait en sa possession des documents pertinents, dont quatre rapports établis par lui pendant le stage du demandeur ainsi qu'un rapport qu'il avait remis à son chef pour transmission au Director of Public Prosecutions, portant sur la poursuite du demandeur relativement à une accusation criminelle à l'égard de laquelle on l'avait acquitté et sur laquelle était fondée l'action civile. Le secrétaire d'État aux Affaires intérieures s'est opposé dans les formes prescrites à la production de ces documents pour le motif qu'ils relevaient d'une catégorie de documents dont la production nuirait à l'intérêt public. La Chambre des lords a conclu que les documents devaient être produits pour qu'ils puissent faire l'objet d'un examen et, si l'on décidait que leur divulgation ne serait pas préjudiciable à l'intérêt public ou que la possibilité d'un tel préjudice était trop faible pour justifier la non-divulgation, il y aurait lieu d'ordonner leur production.

The House firmly rejected the notion that the Minister's statement was final and conclusive. It was the courts that must determine the balance to be struck between the public interest in the proper administration of justice and the public interest in withholding certain documents or other evidence. Proper deference should, of course, be given to the Minister's views, particularly in relation to objections to production of particular documents on the basis of their contents, or where the Minister's reasons involve considerations that cannot properly be weighed on the basis of judicial experience. But class documents are often not of this character. For example, it noted, a court is certainly able to assess whether candour in making a report would likely be lessened by the possibility of its revelation in judicial proceedings.

In assessing whether documents should be produced or not, the court could in some cases come to a decision one way or the other on the basis of the Minister's statement alone, but in case of doubt the judge could inspect them.

The public interest in the non-disclosure of a document is not, as Thorson J.A. noted in the Court of Appeal, a Crown privilege. Rather it is more properly called a public interest immunity, one that, in the final analysis, is for the court to weigh. The court may itself raise the issue of its application, as indeed counsel may, but the most usual and appropriate way to raise it is by means of a certificate by the affidavit of a Minister or where, as in this case, a statute permits it or it is otherwise appropriate, of a senior public servant. The opinion of the Minister (or official) must be given due consideration, but its weight will vary with the nature of the public interest sought to be protected. And it must be weighed against the need of producing it in the particular case.

La Chambre a catégoriquement refusé de reconnaître à la déclaration du ministre un caractère déterminant et concluant. C'est aux tribunaux qu'il appartenait de déterminer l'importance relative à attribuer à l'intérêt qu'a le public à ce que la justice soit bien administrée et l'intérêt public à ce que la communication de certains documents ou d'autres éléments de preuve soit refusée. Il faut, bien entendu, accorder aux opinions du ministre le respect requis, particulièrement lorsqu'il s'oppose à la production de documents en raison de leur teneur ou que les raisons invoquées par lui reposent sur des considérations que les tribunaux ne sont pas en mesure d'apprécier adéquatement. Toutefois, tel est rarement le cas de documents faisant partie d'une catégorie quelconque. Par exemple, a-t-elle souligné, un tribunal est certainement en mesure de déterminer si on ferait preuve de moins de franchise en faisant un rapport si celui-ci risquait d'être divulgué au cours de procédures judiciaires.

En décidant de l'opportunité d'ordonner ou de ne pas ordonner la production de documents, le tribunal pourrait dans certains cas se fonder sur la seule déclaration du ministre, mais en cas de doute, il serait loisible au juge de procéder à une inspection.

Comme le juge Thorson l'a souligné en Cour d'appel, l'intérêt du public à ce qu'un document ne soit pas communiqué ne constitue pas un privilège de la Couronne. Il s'agit plus exactement d'une immunité d'intérêt public, d'une immunité qui, en dernière analyse, relève de l'appréciation du tribunal. Celui-ci peut lui-même soulever la question de son applicabilité, comme le peut d'ailleurs l'avocat, mais la façon la plus commune et la plus appropriée de le faire est au moyen d'un certificat sous la forme d'un affidavit d'un ministre ou d'un haut fonctionnaire lorsque, comme en l'espèce, c'est autorisé par une loi ou c'est par ailleurs indiqué. L'avis du ministre (ou du fonctionnaire) doit dûment entrer en ligne de compte, mais son poids variera en fonction de la nature de l'intérêt public que l'on cherche à protéger. Son avis doit en outre être considéré par rapport à la nécessité de produire le document dans l'affaire en question.

In the end, it is for the court and not the Crown to determine the issue. This was recently reaffirmed by this Court in *Smallwood v. Sparling*, [1982] 2 S.C.R. 686, to which I shall return. The opposite view would go against the spirit of the legislation enacted in every jurisdiction in Canada that the Crown may be sued like any other person. More fundamentally, it would be contrary to the constitutional relationship that ought to prevail between the executive and the courts in this country.

Il s'agit finalement d'une question qui est à trancher par le tribunal et non pas par Sa Majesté. Cette Cour l'a récemment réaffirmé dans l'arrêt *Smallwood c. Sparling*, [1982] 2 R.C.S. 686, dont je reparlerai. Retenir le point de vue contraire irait à l'encontre de l'esprit des lois adoptées par chaque législateur du Canada, prévoyant que Sa Majesté peut être poursuivie au même titre que n'importe quelle autre personne. Plus fondamentalement, ce point de vue serait incompatible avec les rapports qui, de par la Constitution, doivent exister entre le pouvoir exécutif et les tribunaux de notre pays.

The Affidavit

In making a claim of public interest immunity, the Minister (or official) should be as helpful as possible in identifying the interest sought to be protected. Examples of how this should be done appear in *Burmah Oil Co. v. Bank of England*, [1979] 3 All E.R. 700 (H.L.), and *Goguen v. Gibson*, [1983] 2 F.C. 463 (C.A.), where the Minister described with as much detail as the nature of the subject matter would allow the precise policy matters sought to be protected from disclosure.

L'affidavit

Quand il invoque une immunité d'intérêt public, le ministre (ou le fonctionnaire) doit se montrer aussi coopératif que possible en précisant l'intérêt qu'il cherche à protéger. Des exemples des modalités d'une telle coopération se dégagent des arrêts *Burmah Oil Co. v. Bank of England*, [1979] 3 All E.R. 700 (H.L.), et *Goguen c. Gibson*, [1983] 2 C.F. 463 (C.A.), où le ministre a décrit, en fournissant tous les détails qu'il pouvait compte tenu de la nature du sujet traité, les points de politique précis qu'il désirait protéger contre la divulgation.

Counsel for Carey argued that Dr. Stewart's affidavit is inadequate in that it does not set forth with sufficient particularity the interests sought to be protected. I suppose the point may be put in this way. Certainly the grounds advanced for protection are, as some cases have put it, somewhat amorphous and as Thorson J.A. pointed out, less helpful than they might be. Nonetheless, it seems to me that Thorson J.A. was correct in his view that in substance what was sought was the protection as a class of what he generally described as "Cabinet documents", i.e. documents prepared by government departments and agencies in formulating government policies, decisions made by Cabinet, and the like. That being so, Dr. Stewart did not see it as necessary to particularize the nature of the information sought to be protected as would be necessary if the claim for protection was based on the nature of the contents of the documents. Essentially what the certificate argues is that the process by which government policy is determined by the Executive Council must remain confidential whatever the policy may be and however much

L'avocat de Carey reproche à l'affidavit de M. Stewart d'être inadéquat en ce sens qu'il n'expose pas d'une façon assez détaillée les intérêts que l'on veut protéger. Or, je suppose que cet argument peut être formulé de cette façon. Certes, les raisons avancées à l'appui de la demande de protection revêtent, comme l'ont dit certaines décisions, un caractère plutôt nébuleux et, comme l'a souligné le juge Thorson de la Cour d'appel en l'espèce, ne présentent pas le degré d'utilité auquel on aurait pu s'attendre. Il me semble néanmoins que le juge Thorson a eu raison de conclure que ce qu'on cherchait en somme c'était la protection d'une catégorie de documents auxquels il a donné l'appellation générale de «documents du Cabinet», et qui se composait de documents préparés par des ministères et des organismes gouvernementaux dans la formulation de politiques du gouvernement, de documents exposant les décisions du Cabinet, etc. Dans ces circonstances, M. Stewart n'a pas vu la nécessité de préciser la nature des renseignements que l'on voulait protéger, ce qu'il aurait fallu faire si la demande de protection avait

time (save when it has become of historical interest only) has elapsed since the policy was developed. I refer in confirmation to the paragraphs of Dr. Stewart's affidavit already cited.

So viewed, the question is not so much whether the affidavit is insufficient as whether the substance of the claim is one to which the courts should give effect. Counsel for the Government put it that the issue raised was a simple question of principle. In short, may the documents be withheld from production simply because they are Cabinet documents as above described, at least where those documents are concerned with the formulation of government policy by the Cabinet? If one replies to this broad question in the negative, it may be necessary to ask whether the documents should be withheld because of the particular policy to which they refer. In that case it would be the duty of whoever makes the affidavit to give the court all the help he reasonably can. But if the question is answered in the affirmative, that would be an end to the matter. I shall, therefore, attempt to reply to the "simple question of principle" counsel for the Government asked us to address.

Rationale for Non-disclosure of Cabinet Documents

Generally speaking, a claim that a document should not be disclosed on the ground that it belongs to a certain class has little chance of success. Claims to secrecy for some classes of documents have, however, traditionally been considered valid, notable among these being documents relating to national defence or security and those regarding diplomatic relations with other countries. To some extent, though, claims regarding these documents, and particularly those dealing with defence or security, may be looked upon as akin to a "contents" claim. That, however, cannot be said of Cabinet documents which the

été fondée sur la nature de la teneur des documents. Le certificat allègue en substance que la démarche suivie par le Conseil exécutif dans l'élaboration de la politique gouvernementale doit demeurer confidentielle, quelle que soit cette politique et indépendamment du temps (sauf lorsque la politique ne revêt plus qu'un intérêt historique) écoulé depuis son élaboration. Je renvoie à titre de confirmation aux paragraphes déjà cités de l'affidavit de M. Stewart.

Dans cette optique, la question n'est pas tant de savoir si l'affidavit est insuffisant que de savoir si la nature de la réclamation est telle que les tribunaux devraient y donner effet. Selon l'avocat du gouvernement, il s'agit en l'espèce d'une simple question de principe. En bref, peut-on refuser de produire les documents simplement parce que ce sont des documents du Cabinet au sens mentionné ci-dessus, du moins en tant qu'ils se rapportent à la formulation de la politique gouvernementale par le Cabinet? Dans l'hypothèse d'une réponse négative à cette question générale, il pourrait s'avérer nécessaire de se demander s'il y a lieu de refuser de communiquer les documents en raison de la politique précise sur laquelle ils portent. En pareil cas, il serait du devoir du souscripteur de l'affidavit de prêter au tribunal toute assistance raisonnable. Une réponse affirmative, par contre, serait décisive. J'essaierai donc de répondre à la [TRADUCTION] «simple question de principe» sur laquelle l'avocat du gouvernement nous a demandé de nous pencher.

La raison d'être de la non-communication de documents du Cabinet

En règle générale, les chances sont minces qu'on puisse prétendre avec succès qu'un document ne devrait pas être communiqué en raison de la catégorie à laquelle il appartient. Toutefois, les revendications de secret à l'égard de certaines catégories de documents ont traditionnellement été tenues pour justifiées; c'est le cas notamment des documents ayant trait à la défense ou à la sécurité nationales et de ceux concernant les relations diplomatiques avec d'autres pays. Dans une certaine mesure, cependant, les réclamations touchant ces documents-là, et particulièrement ceux traitant de la défense ou de la sécurité, peuvent être rap-

cases have frequently considered as meriting the same type of protection as documents relating to national defence and diplomatic communications. That was done even in *Conway v. Rimmer* and in *Gagnon v. Commission des valeurs mobilières du Québec*, *supra*, despite the fact that the general thrust of these cases strongly favoured disclosure. Indeed in *Conway*'s case, the impression left is that Cabinet documents should never be revealed. But it was not necessary in those cases to decide the issue and it becomes essential to analyse the reasons underlying the claim.

The principal argument for withholding the documents described in the affidavit is that their disclosure would lead to a decrease in completeness, in candour and in frankness of such documents if it were known that they could be produced in litigation and this in turn would detrimentally affect government policy and the public interest. The familiar "candour argument" is combined with the need of completeness and the fear that the freedom of Cabinet members to discuss matters of significant public concern and policy might be diminished. This may simply mean that the setting in which confidential statements are made may make them different in kind from others.

At all events, the Government's counsel in his factum put it on the following basis. The principles of joint responsibility of the members of Cabinet, and of Cabinet solidarity, are basic to Canadian constitutional law and must be maintained and preserved in the public interest. These principles, he added, would be prejudiced by disclosure of the documents and information sought to be produced in these proceedings. In Canada, the United Kingdom and elsewhere in the Commonwealth, he maintained, Cabinet documents have consistently been accorded a high degree of protection against disclosure and courts will order them inspected or

prochées d'une revendication fondée sur la «teneur». Cette observation ne s'applique cependant pas aux documents du Cabinet que la jurisprudence a souvent considérés comme méritant le même type de protection que les documents en matière de défense nationale et aux communications diplomatiques. Ce point de vue a été adopté même dans les arrêts *Conway v. Rimmer* et *Gagnon v. Commission des valeurs mobilières du Québec*, précités, bien que, d'une manière générale, on y ait pris fermement position en faveur de la divulgation. En fait, l'arrêt *Conway* donne à entendre que les documents du Cabinet ne devraient jamais être révélés. Quoi qu'il en soit, on n'avait pas à résoudre la question dans ces affaires-là; d'où la nécessité d'analyser les raisons sous-tendant la réclamation.

L'argument principal invoqué pour la non-communication des documents énumérés dans l'affidavit est que leur divulgation aurait pour effet de les rendre moins complets à l'avenir et leur enlèverait de la franchise et de la sincérité si on les savait susceptibles de production dans le cadre d'un procès, ce qui nuirait à la fois à la politique gouvernementale et à l'intérêt public. À l'argument bien connu de la «franchise» viennent s'ajouter le souci du caractère complet et la crainte que ne soit diminuée la liberté des membres du Cabinet de discuter de questions importantes de politique et d'intérêt public. Or, il se peut qu'on entende simplement par là que le contexte dans lequel se font des déclarations confidentielles peut les rendre différentes d'autres déclarations.

Voici, en tout état de cause, comment l'a expliqué l'avocat du gouvernement dans son mémoire. Les principes de la responsabilité conjointe des membres du Cabinet et de la solidarité du Cabinet représentent des composantes fondamentales du droit constitutionnel canadien et l'intérêt public commande le maintien et la préservation de ces principes. Toujours selon l'avocat, la divulgation des documents et des renseignements dont on cherche à obtenir la production en l'espèce serait préjudiciable à ces principes. Au Canada, au Royaume-Uni et dans d'autres pays du Commonwealth, a soutenu l'avocat, les documents du Cabinet ont

produced only in the most exceptional and unusual circumstances.

I am prepared to attach some weight to the candour argument but it is very easy to exaggerate its importance. Basically, we all know that some business is better conducted in private, but generally I doubt if the candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation. Certainly the notion has received heavy battering in the courts.

The House of Lords had occasion to deal with the candour argument in *Conway v. Rimmer*, albeit at a lower level of government. Lord Reid dismissed it so far as it concerned routine documents like the probation and other reports in question in that case. He failed to see how such an argument could apply to such communications within a government department when similar communications within public corporations would not be so protected. Lord Morris of Borth-Y-Gest found the proposition that candour would be affected by the knowledge that by some remote chance a document might be the subject of possible enforced production one of "doubtful validity" (p. 957). To Lord Hodson, it seemed strange that civil servants alone are supposed to be unable to be candid without the protection denied other people (p. 976). Lord Pearce indicated that there were many circumstances where the possibility of disclosure would make the writer more candid (p. 987). And Lord Upjohn found it difficult to justify non-disclosure of class documents simply on the basis of the candour argument when equally important matters of confidence in relation to security and personnel matters in other walks of life were not similarly protected (p. 995).

toujours joui d'un haut degré de protection contre la divulgation et les tribunaux n'en ordonnent l'examen ou la production que dans les circonstances les plus exceptionnelles et inhabituelles.

Je suis prêt à reconnaître un certain poids à l'argument relatif à la franchise, mais il est bien facile d'en exagérer l'importance. Nous savons tous, au fond, qu'il vaut mieux traiter certaines affaires en privé, mais, en général, je doute que la faible possibilité qu'une communication quelconque puisse avoir à être produite aux fins d'un procès ait un effet appréciable sur la franchise de communications confidentielles. Indubitablement, cette notion a été mise à rude épreuve par les tribunaux.

Dans l'affaire *Conway v. Rimmer*, la Chambre des lords a eu l'occasion de se pencher sur l'argument relatif à la franchise, mais à un palier de gouvernement moins élevé. Lord Reid a rejeté l'argument en ce qu'il visait des documents courants comme ceux portant sur le stage et d'autres rapports en cause dans cette affaire. Il ne voyait pas comment cet argument pouvait s'appliquer à de telles communications au sein d'un organisme gouvernemental alors que des communications du même genre faites dans des sociétés publiques ne bénéficieraient pas de la même protection. Lord Morris of Borth-Y-Gest a jugé [TRADUCTION] «douteuse» (p. 957) la proposition selon laquelle la franchise souffrirait si l'on savait qu'il y avait une possibilité, ne fût-ce que très faible, que la production d'un document puisse être ordonnée. Lord Hodson a trouvé étrange que seuls les fonctionnaires soient réputés incapables de s'exprimer franchement sans une protection dont ne jouit personne d'autre (p. 976). Lord Pearce a souligné que dans bien des situations l'éventualité de divulgation inciterait le rédacteur à une plus grande franchise (p. 987). Lord Upjohn pour sa part a eu de la difficulté à accepter que la non-divulgation de documents appartenant à une catégorie donnée puisse se justifier simplement par l'argument relatif à la franchise alors que la même protection n'est pas accordée à des affaires confidentielles tout aussi importantes touchant la sécurité et le personnel dans d'autres secteurs (p. 995).

The same approach was adopted in later cases of which I mention only a few. In the *Glasgow Corporation* case, *supra*, at p. 20, Lord Radcliffe made the same point more colourfully by saying he would have supposed Crown servants were "made of sterner stuff". From my experience, he would not be disappointed. And I suspect Cabinet Ministers would be incensed at the suggestion that their officials were made of sterner stuff than themselves. In 1973, Lord Salmon in *Rogers v. Home Secretary*, [1973] A.C. 388 (H.L.), at p. 413, described the candour argument as "the old fallacy". More recently in *Burmah Oil Co. v. Bank of England*, *supra*, at p. 724, Lord Keith of Kinkel characterized the argument as "grotesque".

In both the *Gagnon* and *Conway* cases, however, Cabinet documents were looked upon in a different light than lower level official documents, and in the latter case the Law Lords dealt with the issue at some length. Most of them looked at these, we saw, as requiring a similar degree of protection as documents relating to national security and diplomatic relations. Production of Cabinet correspondence, they asserted, would never be ordered. For them this was simply obvious. Given the general attitude at the time, this is not surprising. The best explanation is that of Lord Reid. For him it was not candour but the political repercussions that might result if Cabinet minutes and the like were disclosed before such time as they were of historical interest only. He put it this way at p. 952:

> 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. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that

La même position a été adoptée dans des arrêts subséquents, dont voici un échantillonnage. Dans l'arrêt *Glasgow Corporation*, précité, à la p. 20, lord Radcliffe a exprimé le même point de vue d'une façon plus pittoresque en disant qu'il aurait cru les employés de l'État [TRADUCTION] «d'une autre trempe». D'après mon expérience personnelle, il n'aurait pas eu tort. Je soupçonne d'ailleurs que les ministres s'indigneraient devant l'idée que leurs fonctionnaires étaient d'une autre trempe qu'eux. En 1973, dans l'arrêt *Rodgers v. Home Secretary*, [1973] A.C. 388 (H.L.), à la p. 413, lord Salmon a décrit comme une [TRADUCTION] «erreur tenace» l'argument relatif à la franchise. Plus récemment, dans l'arrêt *Burmah Oil Co. v. Bank of England*, précité, à la p. 724, lord Keith of Kinkel a qualifié cet argument de [TRADUCTION] «saugrenu».

Dans les arrêts *Gagnon* et *Conway* cependant, les documents du Cabinet ont été considérés d'une façon différente des documents officiels émanant d'un échelon inférieur et, dans le dernier cas, les lords juges ont longuement examiné la question. En effet, nous avons constaté que la majorité des lords juges ont estimé que les documents du Cabinet doivent recevoir le même degré de protection que les documents se rapportant à la sécurité nationale et aux relations diplomatiques. Selon eux, la production de la correspondance du Cabinet ne serait ordonnée dans aucun cas. Pour eux, cela allait tout simplement de soi. Compte tenu de l'attitude prédominante à l'époque, cela n'est guère surprenant. La meilleure explication est celle fournie par lord Reid. Pour lui, ce n'était pas une question de franchise, mais plutôt des répercussions politiques qui risquaient d'en découler si les procès-verbaux du Cabinet et les documents du même genre étaient divulgués avant qu'ils ne présentent plus qu'un intérêt purement historique. Il a formulé ce point de vue ainsi, à la p. 952:

> [TRADUCTION] Je ne doute pas qu'il y a des catégories de documents qui, indépendamment de leur contenu, ne doivent pas faire l'objet de divulgation. Presque tout le monde reconnaît que les procès-verbaux du Cabinet et les documents du même genre ne devraient pas être divulgués tant que l'intérêt qu'ils présentent n'est pas purement historique. Je crois toutefois qu'il n'y en a pas beaucoup qui donneraient comme raison que la

such disclosure 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 criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view, also apply to all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition.

While some of these remarks may seem somewhat dated, I would agree that the business of government is sufficiently difficult that those charged with the responsibility for running the country should not be put in a position where they might be subject to harassment making Cabinet government unmanageable. What I would quarrel with is the absolute character of the protection accorded their deliberations or policy formulation without regard to subject matter, to whether they are contemporary or no longer of public interest, or to the importance of their revelation for the purpose of litigation. Subsequent cases have addressed these issues.

The Decline of Absolute Protection

The idea that Cabinet documents should be absolutely protected from disclosure has in recent years shown considerable signs of erosion. This development began in the United States in the famous case of *United States v. Nixon*, 418 U.S. 683 (1974), where a subpoena was directed to the former President of that country to produce tape recordings and documents relating to certain conversations and meetings between him and others. The President, claiming executive privilege, filed a motion to have the subpoena quashed, but the

divulgation prématurée constituerait une entrave à la franchise au sein du Cabinet. À mon avis, la raison la plus importante est qu'une telle divulgation susciterait ou attiserait des critiques publiques ou politiques mal fondées ou spécieuses. Il est déjà assez difficile de gouverner et aucun gouvernement ne pourrait envisager avec équanimité que les rouages internes de l'appareil gouvernemental soient exposés au regard de ceux qui sont prêts à critiquer sans pourtant posséder une connaissance suffisante des faits et qui agissent peut-être dans leur intérêt personnel. Et, selon moi, il en va de même de tous les documents touchant l'élaboration de politiques à l'intérieur des ministères, y compris, éventuellement, les procès-verbaux, même rédigés par des fonctionnaires subalternes et la correspondance avec des organismes externes. Il se peut en outre que les délibérations sur un cas précis aient besoin de protection au même titre que les délibérations en matière de politique. Je ne pense pas qu'il soit possible de limiter ces documents par une définition.

Quoique certaines de ces observations puissent sembler quelque peu désuettes, je suis d'accord que gouverner est à ce point difficile que les personnes chargées de la direction du pays ne devraient pas être placées dans une situation où elles pourraient faire l'objet d'un harcèlement qui rendrait impossible le gouvernement par le Cabinet. Je conteste toutefois le caractère absolu de la protection qu'on accorde aux délibérations du Cabinet ou à l'élaboration de politiques, sans égard au sujet en cause, sans se demander si elles sont d'actualité ou si elles ne présentent plus aucun intérêt pour le public, ou sans tenir compte de l'importance que leur divulgation peut avoir dans un procès. Ces questions ont été abordées dans des affaires subséquentes.

Le déclin de la protection absolue

Depuis quelques années, l'idée que les documents du Cabinet doivent jouir d'une protection absolue contre la divulgation semble être nettement en perte de vitesse. Cette tendance a été amorcée aux États-Unis par l'affaire célèbre *United States v. Nixon*, 418 U.S. 683 (1974), dans laquelle l'ancien président de ce pays a été sommé par voie de *subpœna* de produire des enregistrements sur bande magnétique et des documents se rapportant à certaines conversations et réunions entre lui et d'autres personnes. Le Président, invoquant le privilège du pouvoir exécutif, a présenté une requête en annulation du *subpœna*, mais la

Supreme Court of the United States, affirming the courts below, rejected the President's claim.

While there are important differences between the governmental structure of the United States and that of this country, the underlying values concerned are much the same. Consistent with the law in this country, the Court observed that, while it would accord great deference to presidential views, the judiciary, not the President, was the final arbiter of a claim of privilege. In doing this, a court was bound to weigh the conflicting interests.

The Court recognized the need to protect communications between high government officials. It gave some weight to the candour argument, but it also noted the importance of protecting the President from being harassed by vexatious and unnecessary subpoenas.

On the other hand, the need for confidentiality in government, the court thought, must be weighed against the historic commitment to the rule of law. The integrity of the judicial system and public confidence in it depended on full disclosure of all facts within the framework of the rules of evidence, particularly in criminal matters.

In weighing the competing interests, the Court took account of the fact that the claim to confidentiality was general in nature. It could not be concluded that presidential advisors would be moved to temper their candour by the infrequent occasions of disclosure in judicial proceedings. By contrast, the production of evidence in criminal proceedings was specific and central to the fair adjudication of a particular case.

The Court also took into account that the claim, as in the case here, was made solely on the basis that confidentiality was required to secure the decision-making process generally, not to protect the revelation of any particular action or policy.

Cour suprême des États-Unis a confirmé la conclusion des tribunaux d'instance inférieure et rejeté la requête.

Il existe certainement d'importantes différences de structure gouvernementales entre les États-Unis et le Canada, mais les valeurs qui les sous-tendent sont sensiblement les mêmes. Prenant une position bien en harmonie avec le droit canadien, la cour a fait remarquer que, bien qu'elle accorde le plus grand respect aux opinions du Président, c'est au pouvoir judiciaire et non pas au Président qu'il appartient de statuer en dernière instance sur une revendication de privilège. Ce faisant, le tribunal est tenu de prendre en considération les intérêts opposés.

La cour a reconnu la nécessité de protéger les communications entre personnes occupant des charges importantes dans le gouvernement. Elle a accordé un certain poids à l'argument relatif à la franchise, mais elle a aussi souligné l'importance de protéger le Président contre tout harcèlement par des *subpœnas* vexatoires et inutiles.

D'un autre côté, la nécessité d'assurer la confidentialité au sein du gouvernement, selon la cour, doit être soupesée par rapport à la reconnaissance historique de la suprématie du droit. L'intégrité du système judiciaire et la confiance du public en celui-ci dépendaient de la divulgation intégrale de tous les faits dans les limites prescrites par les règles de la preuve, particulièrement en matière pénale.

En pesant les intérêts opposés, la cour a pris en considération le caractère général de la confidentialité invoquée. On ne pouvait conclure que les cas peu fréquents de divulgation au cours de procédures judiciaires amèneraient les conseillers du Président à faire preuve de moins de franchise. La production de preuves dans des procédures criminelles, par contre, relevait proprement du règlement équitable d'une affaire donnée et constituait un élément essentiel de ce règlement.

La cour a tenu compte également de ce que, comme en l'espèce, la revendication avait pour seul fondement la nécessité de la confidentialité pour protéger le processus décisionnel en général, et non pas pour empêcher la révélation d'un acte ou d'une politique en particulier.

In the United Kingdom, the erosion of the notion of absolute protection of Cabinet documents from disclosure began the following year with the case of *Attorney-General v. Jonathan Cape Ltd.*, [1975] 3 All E.R. 484. Mr. R.H.S. Crossman, who had been a Cabinet Minister from 1964 to 1970, had throughout that period kept diaries with a view to writing his memoirs for the purposes of publication. The memoirs contained details of Cabinet discussions and disclosed differences between Cabinet Ministers on particular issues. After Mr. Crossman's death, the defendants, a book publisher and a newspaper, by arrangement with his literary executors, proposed to publish the memoirs. However, objection was made to their publication by the Secretary of the Cabinet, and the Attorney General sought to obtain two permanent injunctions restraining their publication.

The Attorney General contended that all papers, discussions and proceedings of Cabinet were confidential and the court should restrain their disclosure. The basis of that contention was that the confidential character of those materials derived from the convention of joint Cabinet responsibility whereby any policy decision reached by the Cabinet had to be supported thereafter by all its members whether they approved of it or not, unless they felt compelled to resign. Accordingly Cabinet proceedings could not be referred to outside the Cabinet in such a way as to disclose the attitude of individuals in arguments preceding a decision because this would inhibit free and open discussion in the Cabinet in the future. The Attorney General also contended that advice tendered to Ministers by civil servants and personal observations made by Ministers regarding their capacity and suitability were also confidential and could equally be restrained by the court.

Lord Widgery C.J. agreed that the views expressed by Ministers in Cabinet are confidential and their disclosure may be restrained where this

Au Royaume-Uni, l'arrêt *Attorney-General v. Jonathan Cape Ltd.*, [1975] 3 All E.R. 484, rendu l'année suivante, a marqué le commencement de l'érosion de la notion de la protection absolue des documents du Cabinet contre la divulgation. M. R.H.S. Crossman, ministre de 1964 à 1970, avait pendant toute cette période tenu des journaux en vue de la rédaction de ses mémoires pour publication. Les mémoires contenaient des détails concernant les discussions du Cabinet et révélaient les différends qui avaient surgi entre ministres sur certaines questions. Après la mort de M. Crossman, les défendeurs, une maison d'édition et un journal, conformément à une entente intervenue avec les exécuteurs littéraires du défunt, se proposaient de publier les mémoires. Le secrétaire du Cabinet s'est toutefois opposé à leur publication et le procureur général a sollicité deux injonctions permanentes pour empêcher leur publication.

Le procureur général a fait valoir que tous les documents, toutes les discussions et tous les procès-verbaux du Cabinet étaient confidentiels et que le tribunal devait en empêcher la divulgation. Le fondement de cet argument était que le caractère confidentiel de tout cela découlait de la convention de la responsabilité conjointe des membres du Cabinet, convention suivant laquelle toute décision en matière de politique prise par le Cabinet devrait par la suite recevoir l'appui de tous ses membres, qu'ils l'aient ou non approuvée, à moins qu'ils ne se sentent obligés de donner leur démission. Par conséquent, les délibérations du Cabinet ne pouvaient pas être mentionnées en dehors des réunions du Cabinet de manière à révéler les positions individuelles dans les débats précédant une décision parce que cela constituerait dans l'avenir une entrave à des discussions libres et ouvertes au sein du Cabinet. Le procureur général a fait valoir en outre que les conseils offerts aux ministres par des fonctionnaires ainsi que les observations personnelles de ministres concernant leurs aptitudes et leur compétence étaient également confidentiels et tout aussi susceptibles d'être frappés d'une interdiction de divulgation prononcée par le tribunal.

Le lord juge en chef Widgery a été d'accord que les opinions exprimées par des ministres au cours des réunions du Cabinet sont confidentielles et que

is clearly necessary in the public interest. He also accepted that the maintenance of the doctrine of joint responsibility within the Cabinet is in the public interest. However, the precise degree of confidentiality pertaining to Cabinet discussion, he found, was not entirely clear. There was no question that a court would restrain a person from disclosing information that affected national security or in other extreme cases. But the Attorney General faced serious difficulties in relying on the public interest in non-disclosure generally. While the application of the doctrine of joint responsibility might be prejudiced by premature disclosure of views, there must, Lord Widgery C.J. stated, be some time after which the confidential character of the information, and the duty of the court to restrain publication, would lapse. The precise point at which material loses its confidentiality may be extremely difficult to determine in a particular case. However, he rejected the suggestion that there should be an arbitrary period of thirty years. Rather he put the matter simply in this way at p. 496.

> The question for the court is whether it is shown that publication now might damage the doctrine notwithstanding that much of the action is up to 10 years old and three general elections have been held meanwhile.

He concluded that it would not.

There is a difference, however, between refusing to restrain disclosure and compelling disclosure and it is interesting that Lord Widgery C.J. thought it quite clear that no court would compel the production of Cabinet papers in the course of discovery in an action. As in *Conway v. Rimmer*, however, the question was not before the Court. Indeed, up to that time so far as I am aware, the only case in which that view was ever acted upon was in *Lanyon Pty. Ltd. v. Commonwealth of Australia* (1974), 129 C.L.R. 650, where Menzies J. of the High Court of Australia held in an action of compensation for land that Cabinet documents

leur divulgation peut être empêcher lorsque l'intérêt public l'impose manifestement. De plus, il a accepté l'idée qu'il est dans l'intérêt public de sauvegarder le principe de la responsabilité conjointe du Cabinet. Il a toutefois constaté que le degré précis de confidentialité relative aux discussions du Cabinet n'était pas parfaitement clair. Sans nul doute un tribunal empêcherait la divulgation de renseignements touchant la sécurité nationale et interviendrait aussi dans d'autres cas extrêmes. Mais, dans la mesure où il soutenait que l'intérêt public commandait une interdiction générale de divulgation, le procureur général se heurtait à des difficultés majeures. Bien que la divulgation prématurée d'opinions puisse nuire à l'application du principe de la responsabilité conjointe, il doit, affirme le lord juge en chef Widgery, exister un délai passé lequel les renseignements perdraient leur caractère confidentiel et l'obligation du tribunal d'empêcher la publication s'éteindrait. Or, le moment précis auquel des documents cessent d'être confidentiels peut être extrêmement difficile à déterminer dans un cas donné. Il a néanmoins écarté la proposition d'un délai arbitraire de trente ans et a dit simplement ceci, à la p. 496:

> [TRADUCTION] La question à trancher par la cour est donc de savoir si on a établi que la publication immédiate risquerait de porter atteinte à la doctrine, même si une bonne partie des événements en question remontent à dix ans et qu'il y ait eu dans cet intervalle trois élections générales.

Il a conclu par la négative.

Il y a toutefois une différence entre le refus d'empêcher la divulgation et le fait d'ordonner la divulgation et, chose intéressante, le lord juge en chef Widgery a tenu pour bien évident qu'aucun tribunal n'ordonnerait la communication préalable de documents du Cabinet dans le cadre d'une action en justice. Pas plus que dans l'affaire *Conway v. Rimmer*, cependant, la cour n'était pas saisie de cette question. En fait, jusqu'alors, autant que je sache, l'affaire *Lanyon Pty. Ltd. v. Commonwealth of Australia* (1974), 129 C.L.R. 650, était la seule dans laquelle on avait jamais appliqué ce point de vue. Dans cette action en indemnisation pour des biens-fonds, le juge Menzies de la Haute Cour d'Australie a conclu que, dans l'inté-

related to the matter should not be disclosed in the public interest.

It was in Australia, however, that the next stage of development took place. In *Sankey v. Whitlam* (1978), 21 A.L.R. 505 (H.C.), a private prosecutor had laid an information alleging that Mr. Whitlam, the former Prime Minister, and three former Cabinet colleagues had committed an offence against s. 86 of the *Crimes Act* and had been involved in a conspiracy at common law. The charges arose out of activities taken while the accused had been members of the Australian Cabinet.

In the course of the proceedings, a number of subpoenae *duces tecum* were issued on behalf of the prosecutor seeking production of various documents, including Cabinet documents, and communications between Ministers and departments and others. The Commonwealth objected to the production of some of these documents on the ground that disclosure would impede the proper functioning of the executive branch of government and the public service. As here, the objection was made not on the basis that disclosure of the contents would harm the national interest, but on the basis of the class to which they belonged. The magistrate upheld the objection and refused to order production of the documents. The prosecutor then brought an action for declarations that the documents be produced. The case was ultimately heard by the High Court of Australia which concluded that the documents should be produced.

The principal judgment, delivered by Gibbs A.C.J., is a veritable textbook on the subject. Dealing with the arguments traditionally advanced for non-disclosure of Cabinet documents, he noted that while some judges find the candour argument unconvincing, he did not find it altogether unreal that in some matters at least communications between Ministers and public servants might be more frank and candid if those concerned believed they were protected from disclosure. However, he did not think this consideration was sufficient to justify a grant of complete immunity from disclosure. Similarly, referring to the statement of Lord Reid above cited, he thought it was inherent in the

rêt public, les documents du Cabinet s'y rapportant ne devaient pas être divulgués.

C'est en Australie toutefois que l'étape suivante a été franchie. Dans l'affaire *Sankey v. Whitlam* (1978), 21 A.L.R. 505 (H.C.), un poursuivant privé avait déposé une dénonciation alléguant que M. Whitlam, l'ex-premier ministre, et trois anciens collègues du Cabinet avaient commis une infraction à l'art. 86 de la *Crimes Act* et avaient participé à un complot de *common law*. Les accusations tiraient leur origine d'activités auxquelles les accusés s'étaient livrés alors qu'ils étaient membres du Cabinet australien.

Au cours des procédures, plusieurs *subpœnas duces tecum* exigeant la production de divers documents, y compris des documents du Cabinet, et de communications entre ministres et ministères et autres, ont été lancés pour le compte du poursuivant. Le Commonwealth s'est opposé à la production de plusieurs de ces documents pour le motif que la divulgation gênerait le bon fonctionnement du pouvoir exécutif et de la fonction publique. Comme c'est le cas en l'espèce, l'objection se fondait non pas sur le préjudice que la divulgation de la teneur des documents porterait à l'intérêt national, mais sur la catégorie à laquelle appartenaient ces documents. Le magistrat a accueilli l'objection et a refusé d'ordonner la production des documents. Le poursuivant a alors intenté une action tendant à l'obtention d'un jugement ordonnant la production. La cause a finalement été entendue par la Haute Cour d'Australie qui a conclu que les documents devaient être produits.

Le jugement principal, rédigé par le juge en chef adjoint Gibbs, constitue un véritable traité en la matière. Dans une analyse des arguments traditionnellement avancés pour la non-divulgation de documents du Cabinet, il a fait remarquer que, quoique certains juges trouvent peu convaincant l'argument relatif à la franchise, pour sa part, il ne jugeait pas entièrement invraisemblable que, sur certaines questions du moins, les communications entre ministres et fonctionnaires pourraient être plus franches et ouvertes si ces personnes se croyaient à l'abri de la divulgation. Selon lui, toutefois, cette considération ne suffisait pas pour justifier une immunité totale. De même, il s'est

nature of things that government at a high level cannot function without some degree of secrecy. But here again he did not think the public interest required that all high level government documents should be protected from disclosure irrespective of their subject matter. Consistently with these views, Stephen J. noted that there were no static rules for classifying one class of documents as being immune from disclosure; it was simply one of the variables to take into account in balancing the relevant public interests.

Nor, the Court thought, should protection from disclosure last forever. The length of time the immunity should last would depend on the subject matter. The statement in *Conway v. Rimmer* that Cabinet documents should not be disclosed at least until they become of historical interest only was out of keeping with the principle enunciated in that case, namely, that documents should be withheld from disclosure only, and to the extent, that the public interest renders it necessary. The matters with which the documents in that case dealt with had occurred over three years before and were no longer of continuing significance.

Gibbs A.C.J. made another significant point. He underlined that "a rule of evidence designed to serve the public interest" should not "become a shield to protect wrongdoing by ministers in the execution of their office" (p. 532). Stephen J. elaborated on this issue. In some cases, he observed, it is important that disclosure be given to support the very purpose that non-disclosure is intended to support, i.e., the proper functioning of government. In that case, the charge of misbehaviour in the conduct of government operations made it important in the public interest that the documents be revealed.

référé à la déclaration précitée de lord Reid, se disant d'avis qu'il était dans l'ordre des choses que le gouvernement ne puisse fonctionner à ses échelons les plus élevés sans une certaine mesure de secret. Mais, là encore, il a estimé qu'il n'était pas nécessaire dans l'intérêt public que tous les documents émanant des plus hautes instances gouvernementales soient protégés contre la divulgation, indépendamment de leur contenu. Dans la même veine, le juge Stephen a souligné l'absence de règles figées permettant de qualifier d'exempte de communication une catégorie donnée de documents; la catégorie ne représentait qu'un des éléments à prendre en considération dans l'évaluation des intérêts publics en cause.

La cour a estimé en outre que la protection contre la divulgation ne devait pas durer indéfiniment. En effet, la durée de l'immunité serait fonction de la teneur des documents. Quand on affirmait dans l'arrêt *Conway v. Rimmer* que les documents du Cabinet ne devaient pas être divulgués tant que l'intérêt qu'ils présentaient n'était pas purement historique, on allait à l'encontre du principe énoncé dans ce même arrêt selon lequel la divulgation de documents doit être refusée seulement dans la mesure où l'intérêt public le commande. Les questions sur lesquelles portaient les documents dont il s'agissait dans cette affaire-là remontaient à plus de trois ans auparavant et n'avaient plus d'importance réelle.

Le juge en chef adjoint Gibbs a fait une autre observation importante. Il a souligné que [TRADUCTION] «une règle de preuve conçue pour servir l'intérêt public» ne devrait pas [TRADUCTION] «devenir un bouclier qui protège les ministres qui se rendent coupables de fautes dans l'exercice de leurs fonctions» (p. 532). Le juge Stephen a approfondi ce point. Dans certains cas, a-t-il fait remarquer, il importe qu'il y ait divulgation afin d'atteindre le but même qui est censé constituer la raison d'être de la non-divulgation, c.-à-d. le bon fonctionnement du gouvernement. Dans cette affaire, on se trouvait en présence d'une accusation de prévarication dans la conduite des activités du gouvernement et, par conséquent, il importait dans l'intérêt public que les documents soient communiqués.

The general flavour of the case may be rendered by the following remarks of Stephen J. at p. 534, with which I am in complete agreement:

On the one hand, a measure of secrecy must surround at least some aspects of what has been called the counsels of the Crown; the Executive Government of the Commonwealth should, in those cases where real need arises, be able to preserve the confidentiality both of information which it possesses and of advice which it receives. On the other hand, in civil and criminal cases alike, the course of justice must not be unnecessarily impeded by claims to secrecy and those who, with the Governor-General, exercise the executive power of the Commonwealth, Ministers of the Crown acting in exercise of their offices, should, in common with those officers of the public service of the Commonwealth who advise them, be as amenable to the general law of the land as are ordinary citizens.

Though the *Whitlam* case involved a criminal prosecution, the Court, as the last quotation reveals, saw no difference in principle between criminal and civil cases. The following year, the House of Lords in *Burmah Oil Co. v. Bank of England*, *supra*, also concluded that a court, in certain circumstances, might order the production of high level government documents—high level in that they were concerned with the formulating of government policy and that they involved the inner workings of the government. It was, as well, a civil case, one moreover that did not involve "special circumstances" such as criminal activities or other improprieties described by the Divisional Court. On the basis of this case, then, the Court of Appeal in the present case was quite right in rejecting the concept of special circumstances.

In the *Burmah Oil* case, Burmah Oil sued the Bank alleging that a sale of certain shares to the Bank should be set aside as an unconscionable transaction. Negotiations between the company and the Bank, which acted pursuant to government policy, were made at a time when Burmah Oil was in serious financial difficulties. Various documents disclosing the government's role in the transaction appeared on the Bank's list of documents in the litigation. At the request of the Crown, the Bank objected to discovery of a number of these docu-

Les remarques suivantes du juge Stephen, à la p. 534, donnent le sens général de l'arrêt et je les partage entièrement:

[TRADUCTION] D'un côté, au moins certains aspects de ce qu'on appelle les délibérations de la Couronne doivent bénéficier d'un certain degré de secret; le pouvoir exécutif du Commonwealth doit pouvoir, dans les cas où il en est réellement besoin, préserver le caractère confidentiel à la fois des renseignements qu'il a en sa possession et des conseils qu'il reçoit. Par ailleurs, aussi bien en matière civile qu'en matière criminelle, il faut que la justice puisse suivre son cours sans être indûment entravée par des revendications de secret; il faut en outre que les personnes qui, de concert avec le gouverneur général, exercent le pouvoir exécutif du Commonwealth, savoir les ministres de la Couronne dans l'exercice de leurs fonctions, soient, comme le sont les fonctionnaires du Commonwealth qui les conseillent, assujettis au droit général du pays au même titre que les simples citoyens.

Bien qu'il se soit agi dans l'affaire *Whitlam* d'une poursuite criminelle, il ressort du dernier passage cité que la cour ne voyait aucune différence de principe entre les causes criminelles et les causes civiles. L'année suivante, dans l'arrêt *Burmah Oil Co. v. Bank of England*, précité, la Chambre des lords a elle aussi conclu qu'un tribunal pouvait, dans certaines circonstances, ordonner la production d'importants documents gouvernementaux importants en ce sens qu'ils concernaient l'élaboration de politiques gouvernementales et qu'ils révélaient les rouages internes du gouvernement. C'était en outre une affaire civile qui, du reste, ne comportait pas de [TRADUCTION] «circonstances spéciales» telles que des activités criminelles ou d'autres méfaits décrits par la Cour divisionnaire. Compte tenu donc de cet arrêt, c'est à bon droit que la Cour d'appel a écarté en l'espèce le concept des circonstances spéciales.

Dans l'affaire *Burmah Oil*, Burmah Oil a intenté contre la Banque une action alléguant que la vente de certaines actions à la Banque devait être annulée parce qu'elle constituait une opération abusive. Les négociations entre la société et la Banque, qui a agi conformément à une politique gouvernementale, se sont déroulées à une époque où Burmah Oil éprouvait de graves difficultés financières. Divers documents précisant le rôle joué par le gouvernement dans l'opération figuraient sur la liste de documents produite par la

ments. A certificate by the Chief Secretary to the Treasury claimed privilege on the ground that he had concluded that the production of the documents would be injurious to the public interest because it was necessary to the proper functioning of the public service that they be withheld. The documents included high level ministerial papers relating to government policy (i.e. memoranda of meetings attended by Ministers) and interdepartmental communications between senior government officials. The documents were said to belong to a class relating to the formulation of government policy on important economic and financial matters.

Unlike the situation in the present case, the certificate was not "amorphous", but specific and motivated. The Minister had not contented himself with a claim of a blanket character that such documents should not be revealed in the public interest. Rather, he had fully set forth why they should be withheld, namely, that they concerned discussions at a very high level of specific government policies, policies identified as being of the highest national and political importance. The case, therefore, involved circumstances of far greater sensitivity than those in the present case.

All the Law Lords were agreed that there was no rule of law that a claim of immunity from production of Cabinet documents was conclusive. Whether the documents should be revealed or not was a question for the court.

Sankey v. Whitlam, *supra*, was cited with approval. A majority thought (Lord Wilberforce dissenting) that the action was not concerned with the policy reasons for rescuing Burmah Oil but with an alleged unconscionable transaction taken within the confines of that policy. The majority also concluded that a reasonably probable case had been made out that the documents contained material relevant to issues in the action. That being

Banque au cours du procès. À la demande de la Couronne, la Banque s'est opposée à la communication de plusieurs de ces documents. Le secrétaire principal du Trésor a produit un certificat dans lequel il invoquait le privilège pour le motif que, à son avis, la production des documents nuirait à l'intérêt public parce que leur non-divulgation était nécessaire pour la bonne marche de la fonction publique. Il s'agissait notamment d'importants documents ministériels ayant trait à la politique gouvernementale (c.-à-d. des procès-verbaux de réunions auxquels avaient assisté des ministres) et de communications interministérielles entre hauts fonctionnaires. Les documents en cause, prétendait-on, appartenaient à une catégorie de documents qui se rapportaient à l'élaboration de politiques gouvernementales sur des questions importantes relevant des domaines économique et financier.

À la différence de la situation présente, le certificat, loin d'être «nébuleux», était précis et motivé. Le ministre ne s'était pas contenté d'une allégation globale que l'intérêt public exigeait la non-communication de tels documents. Au contraire, il avait fait un exposé complet de la raison pour laquelle la communication devait être refusée, savoir que les documents concernaient des discussions tenues à un échelon très élevé sur des politiques gouvernementales précises, lesquelles étaient présentées comme revêtant la plus grande importance nationale et politique. La situation était donc beaucoup plus délicate que celle en l'espèce.

Tous les lords juges ont convenu qu'il n'y avait aucun principe de droit voulant qu'une réclamation d'exemption de communication de documents du Cabinet soit concluante. C'est au tribunal qu'il appartenait de décider de l'opportunité de divulguer ou de ne pas divulguer des documents.

Les lords juges ont cité et approuvé l'arrêt *Sankey v. Whitlam*, précité. La majorité a estimé (lord Wilberforce étant dissident) que l'action portait non pas sur les raisons de politique sous-tendant la décision de venir en aide à Burmah Oil, mais sur une opération qu'on prétendait abusive intervenue dans le cadre de cette politique. La majorité a conclu en outre qu'on avait prouvé l'existence d'une probabilité raisonnable que les

so, the court had a discretion to review the Crown's claim of privilege. In doing so, it had to balance the competing interests of preventing harm to the public service against the public interest in the administration of justice, and could inspect the documents privately to determine where the balance of interest lay. Having inspected them, however, the Law Lords concluded that the documents did not contain material necessary for disposing fairly of the case and therefore upheld the Crown's objection to their disclosure.

It is obvious that Lord Wilberforce accepted the newer approach with reluctance, but the majority was more favourably disposed towards disclosure for a variety of reasons. Lord Edmund-Davies, for example, underlined that the party objecting to disclosure was "not a wholly detached observer of events"; the government, he noted, had "a very real and lively interest" in the result of the proceedings (p. 720). Lord Keith of Kinkel emphasized that the whole context must be examined. In particular, he observed, "Details of an affair which is stale and no longer of topical significance might be capable of disclosure without risk of damage to the public interest" (p. 725); see also Lord Scarman, at p. 733. Lord Keith also noted the significance of the modern trend to more open government. While it is for Parliament to determine how far this trend should go, it is not a matter of indifference to the courts. As he put it at p. 725:

> There can be discerned in modern times a trend towards more open governmental methods than were prevalent in the past. No doubt it is for Parliament and not for courts of law to say how far that trend should go. The courts are, however, concerned with the consideration that it is in the public interest that justice should be done and should be publicly recognised as having been done. This may demand, though no doubt only in a very limited number of cases, that the inner workings of government should be exposed to public gaze, and there

documents renferment des renseignements qui se rapportaient aux questions soulevées par l'action. Cela étant, la cour jouissait d'un pouvoir discrétionnaire d'examiner la revendication de privilège avancée par Sa Majesté. Dans l'exécution de cette tâche, elle devait évaluer deux intérêts opposés, celui qu'il y avait à empêcher qu'il ne soit porté atteinte au service public et l'intérêt qu'a le public dans l'administration de la justice; à cette fin, elle pouvait examiner les documents en privé afin de déterminer lequel de ces intérêts l'emportait. Après avoir procédé à leur examen toutefois, les lords juges sont arrivés à la conclusion que les documents ne contenaient pas de données nécessaires à un règlement équitable du litige et, par conséquent, ont retenu le point de vue de Sa Majesté qui s'était opposée à leur divulgation.

Il appert que c'est avec hésitation que lord Wilberforce a accepté la tendance plus récente, mais la majorité, pour différentes raisons, a été plus disposée à permettre la divulgation. Lord Edmund-Davies, par exemple, a souligné que la partie qui s'opposait à la divulgation [TRADUCTION] «n'était pas le témoin entièrement désintéressé d'événements»; le gouvernement, a-t-il ajouté, avait un «intérêt [. . .] à la fois très réel et très vif» dans l'issue des procédures (p. 720). Lord Keith of Kinkel a insisté sur la nécessité d'examiner tout le contexte. En particulier, il a fait remarquer que, [TRADUCTION] «les détails d'une affaire passée qui n'est plus d'actualité pourraient être divulgués sans risque de préjudice à l'intérêt public» (p. 725); voir également lord Scarman, à la p. 733. Lord Keith a aussi mentionné en outre l'importance de la tendance moderne vers un gouvernement plus ouvert. Quoique la détermination des limites de cette tendance soit du ressort du Parlement, les tribunaux ne sauraient en faire abstraction. Comme il l'a dit, à la p. 725:

> [TRADUCTION] On peut constater à l'époque moderne une tendance vers un mode de gouvernement plus ouvert que ce n'était le cas dans le passé. Sans doute, c'est au Parlement et non pas aux cours de justice d'établir où cette tendance devrait aboutir. Les tribunaux ont toutefois présent à l'esprit qu'il est dans l'intérêt public que justice soit faite et que le public reconnaisse que justice a été faite. Or, cela peut nécessiter, quoique sans doute seulement dans un nombre fort restreint de cas, que les rouages internes du gouvernement soient exposés au

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.

Lord Scarman eloquently set forth the need for disclosure and distinguished between objections on the basis of class and content at p. 733:

A Cabinet minute, it is said, must be withheld from production. Documents relating to the formulation of policy at a high level are also to be withheld. But is the secrecy of the 'inner workings of the government machine' so vital a public interest that it must prevail over even the most imperative demands of justice? If the contents of a document concern the national safety, affect diplomatic relations or relate to some state secret of high importance, I can understand an affirmative answer. But if they do not (and it is not claimed in this case that they do), what is so important about secret government that it must be protected even at the price of injustice in our courts?

(Emphasis added.)

Once again English judicial attitude was adapted to conform with more liberal developments in other parts of the Commonwealth. In this approach, it was soon joined by the New Zealand Court of Appeal in *Environmental Defence Society Inc. v. South Pacific Aluminium Ltd.*, [1981] 1 N.Z.L.R. 146.

In Canada, however, the former attitude prevailed until the early 1980s. Until then, dicta can be found in several appeal courts to the effect that Cabinet documents are not open to disclosure until they become of historical interest; see *R. and Vanguard Hutterian Brethren Inc.* (1979), 97 D.L.R. (3d) 86 (Sask. C.A.); *Smerchanski v. Lewis*, *supra*. *R. in Right of Alberta v. Mannix*, [1981] 5 W.W.R. 343 (Alta. C.A.) showed somewhat more openness, but it was not until *Gloucester Properties Ltd. v. R.* (1981), 24 C.P.C. 82 that the new trend was adopted in a Canadian court. There Nemetz C.J., speaking for the British Columbia Court of Appeal, accepted the view that Cabinet minutes and discussions are not subject to absolute privilege. The claim of privilege, he

regard public, et d'aucuns pourraient estimer que cela amènera probablement, non pas des critiques spécieuses ou mal fondées, mais des critiques susceptibles d'améliorer le fonctionnement du gouvernement en tant qu'il touche les particuliers.

Lord Scarman a défendu avec éloquence la nécessité de la divulgation et a fait une distinction entre les objections fondées sur la catégorie et celles fondées sur la teneur, à la p. 733:

[TRADUCTION] Un procès-verbal du Cabinet doit, dit-on, être exempt de production. Il en va de même des documents ayant trait à l'élaboration de politiques à des échelons élevés. Mais le secret des «rouages internes de l'appareil gouvernemental» représente-t-il un intérêt public à ce point vital qu'il doit l'emporter sur les exigences mêmes les plus impératives de la justice? Si la teneur d'un document intéresse la sûreté nationale, touche les relations diplomatiques ou se rapporte à quelque secret d'État extrêmement important, je conçois qu'on y réponde par l'affirmative. Mais si ce n'est pas le cas (et on ne dit pas le contraire en l'espèce), le secret en matière gouvernementale revêt-il une importance telle qu'il doit être protégé même au prix d'injustice devant nos tribunaux?

(C'est moi qui souligne.)

Une fois de plus les tribunaux anglais ont su s'aligner sur l'orientation plus libérale d'autres pays du Commonwealth. La Cour d'appel de la Nouvelle-Zélande n'a pas tardé à en faire autant dans l'arrêt *Environmental Defence Society Inc. v. South Pacific Aluminium Ltd.*, [1981] 1 N.Z.L.R. 146.

Au Canada, cependant, les vieilles attitudes ont persisté jusqu'au début des années 80. Jusqu'alors plusieurs cours d'appel avaient exprimé l'opinion que les documents du Cabinet ne sont susceptibles de divulgation que du moment qu'ils ne revêtent plus qu'un intérêt historique; voir *R. and Vanguard Hutterian Brethren Inc.* (1979), 97 D.L.R. (3d) 86 (C.A. Sask.); *Smerchanski v. Lewis*, précité. Certes, l'arrêt *R. in Right of Alberta v. Mannix*, [1981] 5 W.W.R. 343 (C.A. Alb.) manifeste une attitude un peu plus libérale, mais ce n'est que dans l'arrêt *Gloucester Properties Ltd. v. R.* (1981), 24 C.P.C. 82, qu'un tribunal canadien a adopté la nouvelle orientation. Dans cet arrêt-là, le juge en chef Nemetz, parlant au nom de la Cour d'appel de la Colombie-Britannique, a retenu le

stated, will prevail only when it is necessary in the public interest. In words reminiscent of those expressed by Fauteux J. in *Gagnon v. Commission des valeurs mobilières du Québec*, *supra*, he noted that the court will weigh the facts in each particular case to determine whether the public interest in the administration of justice should prevail over the public interest in non-disclosure.

This Court had occasion to deal with the matter the following year in *Smallwood v. Sparling*, *supra*. Sparling was appointed under the *Canada Corporations Act* to conduct an investigation for the Restrictive Trade Practices Commission into the management of Canadian Javelin Ltd. A subpoena was issued to Mr. Smallwood, the former Premier of Newfoundland, to give evidence and to bring forth certain particularized documents. Mr. Smallwood then applied for an injunction enjoining Sparling and others from acting upon the subpoena. In support of his application, it was asserted that at the relevant times he had acted solely as Premier, and that any testimony he would be called upon to give or any documents he would be called upon to produce were subject to public interest immunity.

This Court, however, decided against the granting of the injunction. In dealing with these issues, Wilson J., who delivered the judgment, first noted that while a former Minister may, in some circumstances, claim public interest immunity with respect to specific oral or documentary evidence, he cannot claim complete immunity. In her review of the cases, she emphasized Rand J.'s statement in *R. v. Snider*, *supra*, that the general principle was that all facts must be available to the court in the absence of an overriding public interest. *Conway v. Rimmer*, she added, later adopted the view that state documents enjoyed only relative immunity and could in appropriate circumstances be divulged. She noted, however, that some comments in that case indicated that Cabinet documents could not be disclosed until they were of

point de vue selon lequel les procès-verbaux et les délibérations du Cabinet ne font pas l'objet d'un privilège absolu. Une revendication de privilège, a-t-il affirmé, sera accueilli seulement lorsque cela s'impose dans l'intérêt public. En des termes qui rappellent les propos tenus par le juge Fauteux dans l'arrêt *Gagnon v. Commission des valeurs mobilières du Québec*, précité, il a souligné que le tribunal pèsera les faits dans chaque cas afin de déterminer si l'intérêt public dans l'administration de la justice doit primer l'intérêt public dans la non-divulgation.

Cette Cour a eu l'occasion de se pencher sur la question l'année suivante dans l'affaire *Smallwood c. Sparling*, précitée. Sparling avait été nommé en vertu de la *Loi sur les corporations canadiennes* pour mener pour le compte de la Commission sur les pratiques restrictives du commerce une enquête sur la gestion de Canadian Javelin Ltd. M. Smallwood, l'ancien premier ministre de Terre-Neuve, a été sommé par voie de *subpœna* de témoigner et de produire certains documents. M. Smallwood a alors demandé une injonction interdisant à Sparling et à d'autres personnes de donner suite au *subpœna*. À l'appui de sa demande, il a fait valoir qu'aux époques pertinentes il avait agi seulement à titre de premier ministre et que tout témoignage de sa part ou toute production de documents qu'on pourrait lui demander étaient assujettis à l'immunité d'intérêt public.

Cette Cour a toutefois décidé de ne pas accorder d'injonction. En examinant ces questions, le juge Wilson, qui a rendu le jugement, a d'abord souligné qu'un ancien ministre peut dans certaines circonstances invoquer une immunité d'intérêt public à l'égard de preuves orales ou documentaires précises, mais qu'il ne peut réclamer une immunité totale. Dans son étude de la jurisprudence, elle a souligné la déclaration du juge Rand dans l'arrêt *R. v. Snider*, précité, selon laquelle le principe général veut que, en l'absence d'un intérêt public prépondérant, tous les faits doivent être mis à la disposition du tribunal. L'arrêt *Conway v. Rimmer*, a-t-elle ajouté, a par la suite adopté le point de vue que les documents de l'État jouissaient d'une immunité relative et pouvaient dans des circonstances appropriées être divulgués. Elle a

historical interest. In her view, however, the more recent *Burmah Oil* case did not appear to be based on any absolute principle of public immunity. That case, Wilson J. concluded, indicated that "it is the role of the courts, not the administration to determine whether disclosure of documents would be injurious to the public interest" (p. 704). The same principle applied to oral evidence.

In rejecting Mr. Smallwood's claim to immunity on the basis of the doctrine of collective Cabinet responsibility, Wilson J. underlined that in *Attorney-General v. Jonathan Cape Ltd.*, *supra*, Lord Widgery C.J. had made it clear that there was a time limit on the application of the doctrine. Indeed after a careful examination of the case, she concluded at p. 707 that:

> ... the onus would be on Mr. Smallwood to establish that the public interest in joint cabinet responsibility would be prejudiced by any particular disclosure he was being asked to make. Any blanket claim to immunity on this basis must, in my view, also fail.

Later, at p. 708, she added:

> His immunity in that regard is relative only and must wait upon the content of the proposed examination. Mr. Smallwood cannot be the arbiter of his own immunity. This is for the courts. The application in this respect was therefore premature.

Summary and Application of the Principles

The foregoing authorities, and particularly, the *Smallwood* case, are in my view, determinative of many of the issues in this case. That case determines that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important. So far as the pro-

cependant noté que, d'après certaines observations faites dans cet arrêt, les documents du Cabinet ne peuvent être communiqués qu'à partir du moment où ils ne présentent qu'un intérêt historique. À son avis toutefois, l'arrêt *Burmah Oil* qui est plus récent ne paraissait pas reposer sur un principe absolu d'immunité publique. Cette affaire, a-t-elle conclu, indiquait qu'«il appartient aux cours et non à l'administration de décider si la divulgation de documents nuira à l'intérêt public» (p. 704). Ce même principe s'applique à la preuve orale.

En rejetant la revendication d'immunité de M. Smallwood sur le fondement du principe de la responsabilité collective, le juge Wilson a souligné que dans l'arrêt *Attorney-General v. Jonathan Cape Ltd.*, précité, le lord juge en chef Widgery avait clairement dit que la durée d'applicabilité de la doctrine était limitée. De fait, après un examen soigneux de l'affaire, elle conclut, à la p. 707, que:

> ... il incombe à M. Smallwood d'établir que l'intérêt public dans la responsabilité collective du Cabinet serait mis en danger par une divulgation particulière qu'on lui demande de faire. De même, j'estime qu'il y a lieu de rejeter toute demande générale d'immunité sur ce fondement.

Plus loin à la p. 708, elle ajoute:

> Il n'a à cet égard qu'une immunité relative qui dépendra des questions posées à l'interrogatoire. M. Smallwood ne peut décider de sa propre immunité. Cette tâche incombe exclusivement aux cours. À ce point de vue, il s'agit donc en l'espèce d'une demande prématurée.

Résumé et application des principes

La jurisprudence qui précède, et en particulier l'arrêt *Smallwood*, règle à mon avis plusieurs des questions en cause en l'espèce. Cet arrêt détermine que les documents du Cabinet doivent être divulgués au même titre que d'autres éléments de preuve, à moins que cela ne porte atteinte à l'intérêt public. Toutefois, on ne saurait faire abstraction du fait que de tels documents concernent le processus décisionnel à l'échelon le plus élevé du gouvernement. Les tribunaux doivent agir avec prudence en ordonnant leur production. Toutefois, le palier du processus décisionnel dont il s'agit n'est qu'un élément parmi beaucoup d'autres à prendre en considération. Plus importantes encore, à ce qu'il me semble, sont la nature de la politique

tection of the decision-making process is concerned, too, the time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low level policy that has long become of little public interest is involved.

To these considerations, and they are not all, one must, of course, add the importance of producing the documents in the interests of the administration of justice. On the latter question, such issues as the importance of the case and the need or desirability of producing the documents to ensure that it can be adequately and fairly presented are factors to be placed in the balance. In doing this, it is well to remember that only the particular facts relating to the case are revealed. This is not a serious departure from the general regime of secrecy that surrounds high level government decisions.

I would repeat that no claim is made here on the basis of the nature of the policy discussed in the documents. If the certificate had particularized that their divulgence should be withheld on the ground, for example, that they relate or would affect such matters as national security or diplomatic relations, that would be another matter. If the certificate was properly framed, the court might in such a case well agree to their being withheld even without inspection; see in this context *Goguen v. Gibson*, *supra*. For on such issues, it is often unwise even for members of the judiciary to be aware of their contents, and the period in which they should remain secret may be very long.

In the present case, however, we are dealing with a claim based solely on the fact that the

en question et la teneur précise des documents. Aussi, en ce qui concerne la protection du processus décisionnel, le moment où sera divulgué un document ou un renseignement constitue un facteur extrêmement important. La révélation des discussions et des projets du Cabinet au stade de l'élaboration ou dans d'autres situations où le public s'intéresse vivement à ces choses risquerait de nuire gravement au bon fonctionnement du gouvernement par le Cabinet, mais cela n'est guère le cas lorsqu'il s'agit d'une politique de moindre importance qui a cessé depuis longtemps de susciter beaucoup d'intérêt parmi le public.

À ces considérations, et la liste n'est pas exhaustive, on doit bien entendu ajouter l'importance qu'il y a à produire les documents dans l'intérêt de l'administration de la justice. À ce propos, des points tels que l'importance de la cause et la nécessité ou l'opportunité de produire les documents afin qu'elle puisse être plaidée d'une manière adéquate et équitable sont autant de facteurs à faire entrer en ligne de compte. En même temps, il est bien de se rappeler que seuls doivent être révélés les faits particuliers se rapportant au litige. Ainsi on ne se trouve pas à s'écarter sérieusement du principe général du secret qui s'applique aux plus importantes décisions gouvernementales.

Je répète que la revendication en l'espèce ne se fonde nullement sur la nature de la politique traitée dans les documents. Si le certificat avait précisé que la divulgation devait être refusée pour le motif, par exemple, que les documents se rapportaient à des domaines tels que la sécurité nationale ou les relations diplomatiques, ou auraient des répercussions sur ces domaines-là, c'eût été une toute autre chose. Pour peu que le certificat revête la forme prescrite, le tribunal pourrait très bien en pareil cas consentir, sans même procéder à une inspection, à ce que les documents ne soient pas produits; dans ce contexte voir l'arrêt *Goguen c. Gibson*, précité. En effet, dans le cas de documents relevant de ces domaines, il vaut souvent mieux que même les juges ne soient pas au courant de leur contenu, et la période pendant laquelle ils devraient rester secrets peut alors être très longue.

Dans la présente affaire, cependant, nous sommes en présence d'une revendication ayant

documents concerned are of a class whose revelation might interfere with the proper functioning of the public service. It is difficult to see how a claim could be based on the policy or contents of the documents. We are merely dealing with a transaction concerning a tourist lodge in northern Ontario. The development of a tourist policy undoubtedly is of some importance, but it is hardly world-shaking. Apart from this, are we really dealing with the formulation of policy on a broad basis, or are we simply concerned with a transaction made in the implementation of that policy? Such a distinction was accepted by a majority of the House of Lords in *Burmah Oil* in relation to far more sensitive policy issues, i.e. major financial and economic policies of the nation. Policy and implementation may well be intertwined but a court is empowered to reveal only so much of the relevant documents as it feels it is necessary or expedient to do following an inspection.

I turn now to the length of time since the transaction in question occurred. Recent cases make clear that if Cabinet documents may be given protection as a class, that protection need not be continued until they are only of historical interest. Rather, these cases indicate that the period of protection solely for preserving the confidentiality of the government decision-making process will be relatively short. While it may be true as the Court of Appeal states that the government policy concerned—the tourist and recreational industry in northwestern Ontario—may still be ongoing, I find it difficult to accept its conclusion that the advice given and decisions taken respecting the transaction involved in this case have not so lost their immediacy that a court must concern itself about them. We are talking about a transaction that took place over twelve years ago in connection with what by any measure can scarcely be regarded as high level government policy. To advert to the remarks of Lord Widgery C.J. in the *Jonathan Cape* case, several provincial elections have taken place since that time, and governments

pour seul fondement le fait que les documents en cause appartiennent à une catégorie de documents dont la révélation risquerait d'entraver la bonne marche de la fonction publique. En effet, je conçois mal comment on pourrait fonder une revendication sur la politique énoncée dans les documents ou sur leur contenu. Il s'agit simplement d'une opération portant sur une hôtellerie dans le nord de l'Ontario. L'élaboration d'une politique touristique est sans doute importante jusqu'à un certain point, mais son importance n'est certainement pas capitale. À part cette considération, s'agit-il en réalité ici de la création d'une politique au sens large ou s'agit-il simplement d'une opération faite en exécution de cette politique? Dans l'arrêt *Burmah Oil*, la Chambre des lords à la majorité a retenu une telle distinction relativement à des questions de politique beaucoup plus délicates, c.-à-d. à l'égard d'importantes politiques nationales en matière financière et économique. Certes, il se peut bien que la politique et son application soient indissociables, mais un tribunal est autorisé à ne divulguer que les parties des documents pertinents qu'il juge nécessaires ou à propos à la suite d'un examen.

Cela m'amène au temps écoulé depuis l'opération en cause. Des arrêts récents établissent clairement que, si des documents du Cabinet peuvent recevoir une protection en tant que catégorie, point n'est besoin que cette protection continue jusqu'à ce qu'ils ne présentent plus qu'un intérêt historique. Au contraire, il se dégage de cette jurisprudence que la protection visant uniquement à préserver le caractère confidentiel du processus décisionnel du gouvernement sera de relativement courte durée. Bien qu'il puisse être vrai, comme l'a dit la Cour d'appel, que la politique gouvernementale en question, savoir celle touchant l'industrie du tourisme et de la récréation dans le nord-ouest de l'Ontario, soit encore en voie d'élaboration, j'ai de la difficulté à accepter sa conclusion que les conseils donnés et les décisions prises relativement à l'opération présentement en litige ont encore un tel intérêt qu'un tribunal soit obligé de s'en préoccuper. L'opération en question a eu lieu il y a plus d'une douzaine d'années dans le cadre d'une politique gouvernementale qu'aucun critère ne permet de qualifier d'importante. En fait, on peut dire, en

have come and gone. In the *Burmah Oil* case, the Court inspected the documents though the transaction concerned far more sensitive policy and had taken place three or four years before; see also the *Whitlam*, *Nixon* and *Smallwood* cases. Assuming there were matters respecting the transaction that could, even feebly, affect present policy, a court could, on weighing the competing interests, simply refrain from having these matters divulged.

There is a further matter that militates in favour of disclosure of the documents in the present case. The appellant here alleges unconscionable behaviour on the part of the government. As I see it, it is important that this question be aired not only in the inerests of the administration of justice but also for the purpose for which it is sought to withhold the documents, namely, the proper functioning of the executive branch of government. 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. This has been stated in relation to criminal accusations in *Whitlam*, and while the present case is of a civil nature, it is one where the behaviour of the government is alleged to have been tainted.

Divulgence is all the more important in our day when more open government is sought by the public. It serves to reinforce the faith of the citizen in his governmental institutions. This has important implications for the administration of justice, which is of prime concern to the courts. As Lord Keith of Kinkel noted in the *Burmah Oil* case, *supra*, at p. 725, it has a bearing on the perception of the litigant and the public on whether justice has been done.

s'inspirant des propos du lord juge en chef Widgery dans l'arrêt *Jonathan Cape*, qu'il y a eu dans l'intervalle plusieurs élections provinciales et plusieurs gouvernements se sont succédés. Dans l'affaire *Burmah Oil*, la cour a procédé à l'examen des documents, bien que l'opération en cause ait fait partie d'une politique bien plus délicate et n'avait eu lieu que trois ou quatre ans auparavant; voir aussi les arrêts *Whitlam*, *Nixon* et *Smallwood*. À supposer que l'opération comporte des aspects susceptibles d'avoir des répercussions, si faibles soient-elles, sur la politique actuelle, il serait loisible à un tribunal, après avoir pesé les intérêts opposés, de simplement ne pas en ordonner la divulgation.

Il y a un autre facteur qui milite en faveur de la divulgation des documents en l'espèce. L'appelant allègue une conduite peu scrupuleuse de la part du gouvernement. À mon sens, il importe que ce point soit débattu non seulement dans l'intérêt de l'administration de la justice mais aussi dans l'intérêt du bon fonctionnement du pouvoir exécutif du gouvernement, ce qui a été avancé comme but de la demande de non-divulgation des documents. Car, si le pouvoir exécutif a agi de façon sévère ou abusive envers un particulier, il faut que cela émerge au grand jour. Le secret en matière gouvernementale a pour objet de favoriser la bonne marche du gouvernement et non pas de lui faciliter les abus. Cela a été dit relativement à des accusations criminelles dans l'arrêt *Whitlam* et, malgré le caractère civil de la présente affaire, il s'agit d'un cas où l'on reproche au gouvernement une conduite abusive.

La divulgation est d'autant plus importante de nos jours que le public revendique un gouvernement plus ouvert. La divulgation sert à renforcer la confiance du citoyen en ses institutions gouvernementales. Cela est lourd de conséquences pour l'administration de la justice qui constitue une préoccupation majeure pour les tribunaux. Comme l'a souligné lord Keith of Kinkel dans l'arrêt *Burmah Oil*, précité, à la p. 725, elle a un effet sur la perception du justiciable et du public que justice a été faite.

Inspection

I would, therefore, order disclosure of the documents for the court's inspection. This will permit the court to make certain that no disclosure is made that unnecessarily interferes with confidential government communications. Given the deference owing to the executive branch of government, Cabinet documents ought not to be disclosed without a preliminary judicial inspection to balance the competing interests of government confidentiality and the proper administration of justice.

The Court of Appeal refused to inspect the documents not so much for the reasons I have described earlier, but because it felt that even before it could inspect the documents, there must be some concrete ground for belief, something beyond speculation, that the documents are likely to provide evidence of facts or a state of affairs which, if the documents were produced, would substantially assist the party seeking their production. That consideration was all the more important, it thought, were there was reason to believe these facts or state of affairs are likely to be capable of proof by some other means.

There is no doubt authority for this approach in recent English cases. In *Burmah Oil Co. v. Bank of England*, *supra*, the House of Lords, we saw, inspected Cabinet documents with a view to balancing the competing interests involved, but that was on the ground that it was reasonably probable or likely (Lord Wilberforce would have required a strong positive case) that the documents contained matter that was material to the issues arising in the case.

It is by no means clear from the judgment that the expressions "reasonably probable" or "likely" were used as a test or reflected the state of facts in that case. Indeed in the *Smallwood* case, at p. 703, Wilson J. interpreted the *Burmah Oil* case as holding that "when a claim of privilege is made in respect of documents which are *prima facie* rele-

L'examen

Par conséquent, je suis d'avis d'ordonner que les documents soient mis à la disposition de la cour pour qu'elle puisse les examiner. Cela lui permettra de s'assurer que les divulgations ne gêneront pas indûment les communications confidentielles du gouvernement. Compte tenu de la déférence due au pouvoir exécutif, les documents du Cabinet ne doivent pas être divulgués sans qu'on ne procède à un examen judiciaire préliminaire afin d'évaluer les intérêts opposés de la confidentialité en matière gouvernementale et de la bonne administration de la justice.

La Cour d'appel a refusé d'examiner les documents non pas tant pour les raisons que j'ai exposées précédemment, mais parce qu'elle a estimé que, avant même qu'elle puisse examiner les documents, il doit y avoir un motif concret de croire, un motif qui ne tient pas de la conjecture, que les documents fourniront vraisemblablement une preuve de certains faits ou d'un certain état de choses et que cette preuve, si les documents étaient produits, serait d'un grand secours à la partie qui cherche la production desdits documents. Cette considération était, de l'avis de la Cour d'appel, d'autant plus importante lorsqu'il y avait des raisons de croire que ces faits ou cet état de choses étaient probablement susceptibles de preuve par d'autres moyens.

Ce point de vue est sans doute appuyé par la jurisprudence anglaise récente. Nous avons vu que, dans l'arrêt *Burmah Oil Co. v. Bank of England*, précité, la Chambre des lords a examiné des documents du Cabinet avec l'intention d'équilibrer les intérêts opposés qui étaient en jeu. Cette démarche a toutefois été motivée par une probabilité raisonnable (lord Wilberforce aurait exigé une preuve positive solide) que les documents contenaient des données qui se rapportaient aux questions en litige.

Il est loin d'être clair à la lecture du jugement que l'expression [TRADUCTION] «probabilité raisonnable» a servi de critère ou qu'elle décrivait la situation qui existait dans cette affaire. D'ailleurs dans l'arrêt *Smallwood*, à la p. 703, le juge Wilson a considéré que l'arrêt *Burmah Oil* voulait dire que «lorsque le privilège est invoqué à l'égard de

vant to the issues before the court, the court must review the documents in order to balance the competing interests" already described.

The law in England was considerably clarified by the subsequent case of *Air Canada v. Secretary of State for Trade* (1983), 2 W.L.R. 494 (H.L.) There the British Airport Authority fixes the charges airlines have to pay for using airports. The Authority embarked on a programme of improvements which it had intended to finance out of its reserves and from borrowing. However, the Secretary of State for Trade, who had certain statutory powers over the Authority, ordered it to finance these improvements out of revenue. In consequence, the Authority imposed a 35 per cent increase on the charges at Heathrow Airport. Air Canada and other airlines then brought suit against the Authority and the Secretary of State claiming that the Secretary had acted unlawfully and that the charges were excessive and unlawful.

The airlines alleged that the Secretary's power was confined to the purpose of the Act concerned, whereas the dominant purpose for which he acted was to reduce public sector borrowings. So, they concluded, his directions were unlawful. They did not allege that his motives were different from those expressed in a White Paper and in a statement made by the Secretary in the House of Commons. But the airlines were not content to rely on the latter information; they sought production of a number of high level ministerial documents relating to the formulation of government policy and to interdepartmental communications between senior civil servants. The Secretary claimed public interest immunity against disclosing these documents.

The trial judge held that the court's concern was to elicit the truth whether it favoured one side or the other, and that the documents were necessary for the due administration of justice if they substantially assisted the court in determining the

documents qui à première vue se rapportent aux questions dont elle est saisie, la cour doit examiner ces documents afin de décider entre deux intérêts contradictoires» déjà décrits.

Le droit anglais a été passablement éclairci par l'arrêt subséquent *Air Canada v. Secretary of State for Trade* (1983), 2 W.L.R. 494 (H.L.) Le British Airport Authority (ci-après appelé «l'Office») fixe les droits à acquitter par les lignes aériennes pour l'utilisation des aéroports. L'Office a entrepris un programme d'améliorations qu'il avait prévu de financer à même ses réserves et au moyen d'emprunts. Toutefois, le secrétaire d'État au Commerce, auquel la loi conférait une certaine autorité sur l'Office, a ordonné à celui-ci de financer les améliorations à même ses revenus. En conséquence, l'Office a augmenté de 35 p. 100 les droits exigés à l'aéroport Heathrow. Alléguant que le secrétaire d'État avait agi illégalement et que les droits exigés étaient à la fois excessifs et illégaux, Air Canada et d'autres lignes aériennes ont alors intenté une action contre l'Office et le secrétaire d'État.

Les lignes aériennes ont allégué que le pouvoir du secrétaire ne pouvait s'exercer qu'aux fins de la loi en cause, tandis que la mesure qu'il avait prise visait principalement la réduction des emprunts du secteur public. Elles en concluaient donc que ses directives étaient frappées d'illégalité. Certes, les lignes aériennes n'ont pas prétendu que le secrétaire avait agi pour des motifs différents de ceux exprimés dans un livre blanc et dans une déclaration faite par le secrétaire lui-même devant la Chambre des communes, mais, n'étant pas satisfaites de se fonder sur ces renseignements, elles ont demandé la production de plusieurs documents ministériels importants se rapportant à l'élaboration de la politique du gouvernement et à des communications interministérielles entre hauts fonctionnaires. Le secrétaire a invoqué une immunité d'intérêt public contre la divulgation de ces documents.

Le juge de première instance a conclu que l'objet du tribunal était de dégager la vérité, que celle-ci soit favorable à une partie ou à l'autre, et que, dans la mesure où les documents aideraient réellement le tribunal à établir les faits sur lesquels

facts upon which its decision depended. This involved the interpretation to be given to Order 24, r. 13(1) of the English Rules of Court which provided that 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". Being inclined to think the high level ministerial documents were relevant for the purpose, the trial judge decided to inspect them, but stayed the order pending appeal.

The Court of Appeal allowed the appeal and its decision was upheld by the House of Lords. Three of the Law Lords (Lord Fraser of Tullybelton, Lord Wilberforce and Lord Edmund-Davies) were of the view that to permit documents to be inspected for the purpose of considering whether they should be produced under Order 24, r. 13(1), it was necessary for the person seeking their production to establish that they would give substantial support to the contention of the party seeking disclosure. Unless this were established, the court should not even inspect the documents. In their view, the party seeking production must first establish that they would be of assistance in establishing the plaintiff's case. Only if this had been done would the court inspect the documents to weigh the competing interests. This approach was adopted by the Court of Appeal in the present case.

It should be mentioned, however, that in the *Air Canada* case two of the Law Lords (Lord Scarman and Lord Templeman) were of the view that it was sufficient if the documents might assist any of the parties to the proceeding. They adopted the view of the trial judge that "documents are necessary for fairly disposing of a cause or for the due administration of justice if they give substantial assistance to the court in determining the facts upon which the decision in the cause will depend"; see Lord Scarman, at p. 535.

It should also be underlined that it was not solely for these reasons that the Law Lords refused

devrait se fonder sa décision, leur production s'imposait pour la bonne administration de la justice. Il a fallu à cette fin interpréter la règle 13(1) de l'ordre 24 des règles de pratique d'Angleterre, prévoyant que la production de documents en cour ou pour inspection ne doit être ordonnée que si le tribunal estime qu'une ordonnance est [TRADUCTION] «nécessaire pour régler équitablement la cause ou le litige ou pour éviter des frais». Étant porté à croire à la pertinence des importants documents ministériels en question, le juge de première instance a décidé de les examiner, mais a sursis au prononcé de l'ordonnance en attendant l'issue de l'appel.

La Cour d'appel a accueilli l'appel et son arrêt a été confirmé par la Chambre des lords. De l'avis de trois des lords juges (lord Fraser of Tullybelton, lord Wilberforce et lord Edmund-Davies), pour que soit autorisé l'examen de documents afin qu'on puisse déterminer s'il y avait lieu d'en ordonner la production en vertu de la règle 13(1) de l'ordre 24, il incombait à la personne qui demandait la production d'établir que ces documents étayeraient réellement le point de vue de la partie qui veut leur divulgation. À défaut de cela, le tribunal ne devrait même pas entreprendre l'examen des documents. À leur avis, la partie qui cherche à obtenir la production doit d'abord démontrer que les documents l'aideront à établir sa preuve. Seulement à ce moment-là le tribunal examinera-t-il les documents pour peser les intérêts opposés. Telle a été la démarche de la Cour d'appel en l'espèce.

Il convient toutefois de mentionner que, dans l'affaire *Air Canada*, deux lords juges (lord Scarman et lord Templeman) ont estimé qu'il suffisait que les documents soient susceptibles d'aider l'une des parties aux procédures. Ils ont fait leur l'opinion du juge de première instance que des [TRADUCTION] «documents sont nécessaires pour régler équitablement une cause ou pour la bonne administration de la justice s'ils aident réellement le tribunal à établir les faits sur lesquels sera fondée la décision dans l'affaire»; voir lord Scarman, à la p. 535.

Soulignons en outre que ce ne sont pas là les seuls motifs qui ont amené les lords juges à refuser

to inspect the documents, let alone have them disclosed. They were all of the view that any relevant information that might be gleaned from them had already been publicly revealed in the White Paper and the Secretary's statement mentioned earlier. Accordingly, their production was not, in the words of Order 24, r. 13(1) "necessary either for disposing fairly of the cause or matter or for saving costs". Lord Scarman made it clear that it was "for this reason, but for no other" that he would hold that the trial judge was wrong to decide to inspect the documents (p. 535).

What was involved in the *Burmah Oil* and *Air Canada* cases, therefore, was the question of how, in the particular circumstances of those cases, the court should exercise its discretion under an English Rule of Court in the context of the general practice in English courts, a rule the appellant maintains has no equivalent in this country. Before delving further into this matter, however, it is important that one look at precisely what the Court of Appeal did in the present case.

The approach of the Court of Appeal was as follows. Carey, it stated, failed to make the case he had to make in order to succeed. The Crown's objection to having the documents disclosed was based on a ground of a public interest which the law recognizes as sufficient to make a *prima facie* case for their protection. The burden of persuasion, therefore, was on the plaintiff to make the case to the contrary in accordance with the rules that govern how that is to be done. Central to Carey's claim, it stated, is his allegation that the Crown breached several agreements, which agreements could be established if the Cabinet documents in question were produced. However, the Court went on to say that to the extent that the agreements were later reduced to writing, they should be readily capable of being proved at trial. To the extent that they were not reduced to writing, their existence could be proved by calling witnesses. Counsel did not assert or lead the Court to believe these witnesses were unavailable.

d'examiner les documents et, à plus forte raison, à ne pas en permettre la divulgation. Ils ont tous estimé que tout renseignement pertinent qu'on aurait pu recueillir dans les documents avait déjà été rendu public dans le livre blanc et dans la déclaration du secrétaire déjà mentionné. Par conséquent, leur production n'était pas, pour reprendre les termes de la règle 13(1) de l'ordre 24, «nécessaire pour régler équitablement la cause ou le litige ou pour éviter des frais». Lord Scarman a dit clairement que c'était [TRADUCTION] «pour cette raison et pour aucune autre» qu'il concluait que le juge de première instance avait eu tort de décider d'examiner les documents (p. 535).

La question dans les affaires *Burmah Oil* et *Air Canada* était donc de savoir comment, étant donné les circonstances particulières de ces affaires, le tribunal devait exercer dans le contexte de la pratique générale des tribunaux anglais le pouvoir discrétionnaire que lui conférait une règle de pratique anglaise, règle qui, selon l'appelant en l'espèce, n'a pas de pendant au Canada. Avant d'étudier plus avant cette question, toutefois, il importe d'établir exactement ce que la Cour d'appel a fait dans la présente affaire.

La démarche de la Cour d'appel a été celle exposée ci-après. Carey, a-t-elle affirmé, n'a pas fait la preuve nécessaire pour obtenir gain de cause. Sa Majesté a opposé à la divulgation des documents l'intérêt public, ce qui est reconnu en droit comme suffisant pour constituer une preuve *prima facie* qu'il y a lieu de protéger lesdits documents. Il incombait en conséquence au demandeur de prouver le contraire conformément aux règles applicables. L'élément essentiel de la réclamation de Carey, d'après la Cour d'appel, est son allégation que Sa Majesté a violé plusieurs accords, l'existence desquels pourrait être établie si l'on produisait les documents du Cabinet en question. La cour a cependant ajouté que, dans la mesure où les accords ont par la suite été constatés par écrit, ils devraient être facilement prouvables au procès. Dans la mesure où ils n'ont pas été constatés par écrit, on pourrait produire des témoins pour établir leur existence. L'avocat n'a pas prétendu ni n'a donné à entendre à la cour qu'il n'y avait pas de tels témoins.

In a word, the Court stated, no case was made that the existence of and terms of the agreements are unlikely to be capable of proof by other means. All the submissions on behalf of Carey came down to, it concluded, is that the documents are relevant to his case and that, accordingly, they either could or might assist him. This was no more than "a bare unsupported assertion ... that something to help him may be found" in the documents; Carey's case stopped far short of showing "some concrete ground for belief" which would take the case beyond mere speculation.

What troubles me about this approach is that it puts on a plaintiff 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 and what one party was doing in relation to the relevant transactions at the time.

It may well be that witnesses could establish what the contract was but there are always questions of precise recall and of credibility. Besides, in an evolving arrangement like the one alleged there is no substitute for written documents in determining precisely what was going on, and what the parties had in mind. In particular, in the present case the Court failed to observe that the plaintiff was not only alleging breach of an agreement, but that the transfer of the lodge under the circumstances constituted an unconscionable transaction, the determination of which could surely be assisted by an examination of the document.

The method of approach adopted by the Court of Appeal appears to de diametrically opposed to that implicit in Wilson J.'s, remark in *Smallwood*, *supra*, p. 703, cited earlier, regarding the *Burmah*

En un mot, a dit la cour, on n'a pas établi qu'il était vraisemblablement impossible de prouver par d'autres moyens l'existence des accords et leurs modalités. La Cour d'appel a conclu que les arguments avancés pour le compte de Carey se ramenaient simplement à ceci: que les documents en question se rapportaient à sa réclamation et que, par conséquent, ils pouvaient lui être d'un certain secours. Il s'agissait là de rien d'autre qu'une [TRADUCTION] «simple affirmation, sans rien à l'appui [...] que quelque chose d'utile pourrait se trouver» dans les documents. En effet, la preuve produite par Carey était bien loin de démontrer [TRADUCTION] «un motif concret de croire» qui ferait sortir ses allégations du domaine de la pure conjecture.

Ce qui me gêne dans cette façon de voir est qu'elle impose à un demandeur l'obligation de prouver en quoi des documents, reconnus pertinents, peuvent l'aider. Mais comment peut-il s'y prendre? Il ne les a jamais vus; ils sont confidentiels et ne peuvent être consultés. Dans une certaine mesure donc la teneur des documents doit relever de la conjecture. En l'espèce toutefois les documents traitent du sujet même de l'action et renseignent sur le rôle que l'une des parties a joué à l'époque dans les opérations pertinentes.

Il se peut bien que le contenu du contrat puisse être établi par des témoins, mais on peut toujours se poser des questions concernant la mémoire et la crédibilité de ceux-ci. Au surplus, dans le cas d'une entente, comme celle qu'on dit exister en l'espèce, dont les modalités évoluent, rien ne vaut une preuve documentaire pour déterminer exactement ce qui s'est passé et ce que les parties ont eu à l'esprit. En particulier, la cour dans la présente affaire a omis de tenir compte de ce que le demandeur alléguait non seulement la violation d'un accord mais aussi le fait que la cession de l'hôtellerie dans les circonstances constituait une opération abusive. Or, il s'agit là d'une détermination que l'examen du document pourrait certainement faciliter.

La démarche adoptée par la Cour d'appel semble diamétralement opposée à celle qui était implicite dans la remarque déjà citée du juge Wilson dans *Smallwood*, précité, à la p. 703, en ce

Oil case. But even if one were to adopt the most stringent English view regarding the production of documents, which appears to have found favour with the Court of Appeal, I cannot help concluding that the documents are likely (though one cannot really tell without inspecting them) to assist Carey's case. The whole of the surrounding circumstances is, I think, sufficient to give a "concrete ground" for that view. I cannot agree that under the known circumstances the attempt to obtain disclosure can be categorized as a mere "fishing expedition".

It is instructive to examine more closely the observations on the point made by the Law Lords in the *Burmah Oil* case. It was the surrounding circumstances that persuaded the House to examine the documents in that case; see for example Lord Keith of Kinkel, at pp. 722-23. As Lord Scarman noted, "common sense must be allowed to creep into the picture" (p. 731). As in this case, the House at the time it heard the case was, in Lord Edmund-Davies' words at p. 720, "completely in the dark as to the cogency" of the documents. He added that "No judge can profitably embark on such [public interest] balancing exercise without himself seeing the disputed documents" (p. 721), a view shared by Lord Scarman (p. 731).

The *Burmah Oil* case bears a considerable resemblance to this case at least in so far as it alleged that the transaction was an unconscionable one, one forced on the plaintiff by undue pressure of the other party. That issue, as the majority in the *Burmah Oil* case noted, cannot be treated entirely objectively. On this issue, it seems to me, the remarks of Lord Scarman at p. 731 are compelling:

> Burmah's case is not merely that the Bank exerted pressure: it is that the Bank acted unreasonably, abusing its power and taking an unconscionable advantage of the weakness of Burmah. On these questions the withheld documents may be very revealing. This is not 'pure speculation'. The government was creating the pressure; the Bank was exerting it on the government's instruc-

qui concerne l'arrêt *Burmah Oil*. Mais même si on adoptait le point de vue anglais le plus rigoriste en matière de production de documents, point de vue que semble avoir retenu la Cour d'appel, je ne peux m'empêcher de conclure que les documents aideront probablement (quoiqu'on ne puisse vraiment en juger sans les avoir examinés) la cause de Carey. L'ensemble des circonstances suffit, je crois, pour constituer un «motif concret» d'adopter ce point de vue. Compte tenu des faits connus, je ne suis pas d'accord que l'on peut qualifier de simple «recherche à l'aveuglette» la tentative d'obtenir la divulgation.

Il est instructif d'examiner de plus près les observations qu'ont faites les lords juges sur ce point dans l'arrêt *Burmah Oil*. C'est le contexte factuel qui a persuadé la Chambre d'examiner les documents dans cette affaire; voir par exemple ce qu'a dit lord Keith of Kinkel, aux pp. 722 et 723. Comme l'a souligné lord Scarman, [TRADUCTION] «il faut accorder une place au gros bon sens» (p. 731). Comme en l'espèce, au moment où elle a entendu la cause, la Chambre des lords, pour reprendre les termes employés par lord Edmund-Davies, à la p. 720, [TRADUCTION] «ne savait rien de la pertinence» des documents. Il a ajouté que [TRADUCTION] «Aucun juge ne peut utilement entreprendre une telle évaluation [des intérêts publics] sans avoir lui-même vu les documents en litige» (p. 721), opinion qui a été partagée par lord Scarman (p. 731).

L'affaire *Burmah Oil* ressemble beaucoup à la présente affaire, du moins dans la mesure où l'on y alléguait qu'il s'agissait d'une opération abusive, imposée à la demanderesse au moyen d'une pression indue exercée par l'autre partie. Or cette question, comme l'a souligné la majorité dans l'affaire *Burmah Oil*, n'admet pas une analyse parfaitement objective. À ce propos, me semble-t-il, les observations de lord Scarman, à la p. 731, sont éloquentes:

> [TRADUCTION] Burmah fait valoir non pas simplement que la Banque a exercé des pressions, mais qu'elle a agi de manière déraisonnable, abusant de son pouvoir et tirant indûment avantage de la situation de faiblesse de Burmah. Sur ces points, les documents qu'on refuse de divulguer pourront s'avérer fort révélateurs. Ce n'est pas là de la «pure conjecture». Le gouvernement a créé la

tions. Is a court to assume that such documents will not assist towards an understanding of the nature of the pressure exerted? The assumption seems to me as unreal as the proverbial folly of attempting to understand Hamlet without reference to his position as the Prince of Denmark.

pression et la Banque l'a exercée à la demande du gouvernement. Cela étant, un tribunal doit-il supposer que de tels documents n'aideront d'aucune manière à comprendre la nature de la pression exercée? Pareille supposition me semble tout aussi irréaliste que la folie proverbiale d'une tentative de comprendre Hamlet sans tenir compte de sa qualité de prince de Danemark.

I might also observe that there was evidence in that case, apart from the documents sought to be discovered, that went some considerable way towards establishing that the transaction was unconscionable. The fact that there may be other evidence in the present case to prove the existence and terms of the transaction and the surrounding circumstances is no reason for refusing to produce, let alone inspect, the documents. This case is entirely different from the *Air Canada* case where the sole reason for seeking the production of the documents was to establish the motive of the Secretary of State in instructing the Airport Authority, a motive already fully revealed in a White Paper and a statement of the Secretary in the House of Commons. Under these circumstances the Law Lords concluded that it was improbable that the documents whose production was sought contained anything that had not already been published and were, therefore, unlikely to be of assistance to the Court.

Je pourrais mentionner en outre qu'il y avait dans cette affaire-là, en plus des documents dont on cherchait à obtenir la communication, des éléments de preuve qui tendaient nettement à démontrer le caractère abusif de l'opération en question. Le fait qu'il peut y avoir en l'espèce d'autres éléments de preuve établissant l'existence et les modalités de l'opération et les circonstances de celle-ci ne justifie aucunement le refus d'ordonner la production et, à plus forte raison, l'examen des documents. La présente instance diffère complètement de l'affaire *Air Canada*, où la production des documents a été demandée à seule fin d'établir le motif sous-tendant les directives que le secrétaire d'État avait donné à l'Airport Authority, motif déjà totalement dévoilé dans un livre blanc et dans une déclaration faite par le secrétaire d'État à la Chambre des communes. Dans ces circonstances, les lords juges ont jugé peu probable que les documents dont on demandait la production puissent contenir des renseignemements qui n'avaient pas déjà été rendus publics. Il s'ensuivait donc, selon eux, que ces documents ne seraient vraisemblablement d'aucun secours au tribunal.

I should add that I much prefer the approach of Lord Scarman and Lord Templeman in the *Air Canada* case that the court may under R.S.C. Order 24, r. 13, inspect the document and, if not found to be outbalanced on the basis of some public interest, produced not only when this is likely to assist the plaintiff's case or damage the defendant's, but also where it may assist any of the parties to the proceedings. Disclosure may as they indicate be necessary for a fair determination of the issues and for saving costs even when it does not directly assist the plaintiff's case; see for example Lord Scarman at p. 535.

Je tiens à ajouter que je préfère de beaucoup la position de lord Scarman et de lord Templeman qui ont dit dans l'affaire *Air Canada* que R.S.C. Ordre 24, règle 13 autorise la cour à examiner le document et, si elle conclut qu'aucun intérêt public ne l'en empêche, elle peut ordonner la production, non seulement lorsque cela aidera probablement la cause du demandeur ou risque de nuire à celle du défendeur, mais aussi lorsque la production pourra aider l'une des parties aux procédures. La divulgation peut, comme ils le disent, être nécessaire pour le juste règlement des questions en litige et pour éviter des frais, même si elle n'est d'aucun secours direct au demandeur; voir par exemple lord Scarman, à la p. 535.

Indeed, I do not think the rule, if it existed in this country, would require the rigorous approach adopted in England. Its language is not compelling and, even in England, a more relaxed practice is adopted when questions of confidentiality are not raised. It seems to me that in a claim of public interest immunity which, like the present, seems doubtful, the court should feel free to examine the documents. There has, for a long period now, been a far more open and flexible attitude towards discovery in this country than in England. I think deciding the issue on a bare *prima facie* case of a public interest in non-disclosure, such as the Court of Appeal did here, is out of place in Canadian practice. Lord Scarman referred with approval to the trend towards inspection and disclosure in the United States and in the Commonwealth generally as well as under Scottish law. Besides, counsel did not refer us to any rule in Ontario similar to R.S.C. Order 24, r. 13. The practice in the province is governed by rules having a quite independent base; for its genesis, see Williston and Rolls, *The Law of Civil Procedure* (1970), vol. 2, pp. 745-51, 780-81, 805-06. The different legislative base requires, as Le Dain J. in speaking on the regime under *Canada Evidence Act* pointed out in *Goguen v. Gibson*, *supra*, at p. 472, that the *Air Canada* case "be treated with caution".

En fait, je ne crois pas que la règle, si elle existait au Canada, exigerait la démarche rigoureuse adoptée en Angleterre. Sa formulation n'a rien d'impérieux et, même en Angleterre, on adopte une pratique moins stricte lorsqu'il ne s'agit pas de questions reliées à la confidentialité. À mon avis, dans le cas d'une revendication d'immunité d'intérêt public qui, comme en l'espèce semble mal fondée, le tribunal doit se sentir libre d'examiner les documents. Voilà maintenant longtemps que l'attitude canadienne à l'égard de la communication de documents est bien plus libérale et souple que l'attitude anglaise. Selon moi, il est inopportun dans le contexte canadien de faire comme la Cour d'appel en l'espèce et de trancher la question en fonction d'une simple preuve *prima facie* de l'existence d'un intérêt public à ce qu'il n'y ait pas de divulgation. Lord Scarman a exprimé son approbation de la tendance aux États-Unis, dans le Commonwealth en général, ainsi qu'en droit écossais, vers l'examen et la communication. Par ailleurs, l'avocat ne nous a renvoyés à aucune règle ontarienne semblable à R.S.C. Ordre 24, règle 13. La pratique en Ontario est assujettie à des règles dont le fondement est tout à fait distinct; sur l'origine de cette pratique voir Williston et Rolls, *The Law of Civil Procedure* (1970), vol. 2, aux pp. 745 à 751, 780 et 781, 805 et 806. Comme l'a souligné le juge Le Dain en parlant, dans l'arrêt *Goguen c. Gibson*, précité, à la p. 472, du régime constitué par la *Loi sur la preuve au Canada*, il faut, en raison de cette différence quant au fondement législatif, «examiner avec prudence» l'arrêt *Air Canada*.

The approach that, in my view, should be followed may be exemplified by a recent case in New Zealand, *Fletcher Timber Ltd. v. Attorney-General*, [1984] 1 N.Z.L.R. 290 (C.A.), where there is also no provision like Order 24, r. 13. There a judge refused to order the production and inspection of documents in an action for breach of a timber cutting agreement, or alternatively, for damages in tort resulting from negligent misrepresentation. The documents concerned included Cabinet documents and the Ministry of Forests raised a claim against their production on the ground of public interest immunity. On appeal, the

Selon moi, la démarche à suivre se dégage de l'arrêt néo-zélandais récent *Fletcher Timber Ltd. v. Attorney-General*, [1984] 1 N.Z.L.R. 290 (C.A.) En Nouvelle-Zélande, pas plus qu'au Canada, il n'y a pas de disposition comparable à la règle 13 de l'Ordre 24. Dans cette affaire, un juge a refusé d'ordonner la production et l'inspection de documents dans le cadre d'une action pour rupture d'un accord relatif à la coupe de bois ou, subsidiairement, pour le préjudice subi par suite du délit civil de déclaration inexacte faite par négligence. Parmi les documents en question figuraient des documents du Cabinet et le ministère des Forêts a

Court, in the exercise of its discretion, ordered their inspection.

I shall largely confine myself to the remarks of Woodhouse P. with whom the other judges were in substantial agreement. He referred to the different procedural environment that existed in England under which, he stated, the same test had to be used when the judge was asked to examine documents privately in order to resolve whether they should be made available to the applicant. He wryly added: "To describe the conclusion in another way, the condition upon which the discretion to make an order will arise has been brought forward to qualify what might be the only profitable way of deciding how the discretion could be correctly exercised" (p. 294). Whatever might be the situation in England, he held, this was not the law in New Zealand. At page 295, he made the following statement with which I am in total agreement:

> If the balance of public interest can be seen to support the claim of immunity without prior inspection by the Judge then the consequential decision against production will be made without further ado. In that regard the certificate itself should demonstrate with sufficient particularity what is the nature and the significance of the documents both in terms of any need to preserve their confidentiality on the one hand and for the actual litigation on the other. But where this is not the position, where the Judge has been left uncertain, it is difficult to understand how his own inspection could affect in any way the confidentiality which might deserve protection. And in that situation I think it would be wrong to put aside such a direct and practical means of resolving the difficulty. Indeed if it were to happen the primary responsibility of the Courts to provide informed and just answers would often depend on processes of sheer speculation, leaving the Judge himself grasping at air. That cannot be sensible nor is it necessary when by the simple act of judicial reconnaissance a reasonably confident decision could be given one way or the other.

opposé à leur production l'immunité d'intérêt public. En appel, la cour, dans l'exercice de son pouvoir discrétionnaire, a ordonné l'examen des documents.

Je me borne essentiellement aux observations du président Woodhouse avec lequel les autres juges ont été d'accord en substance. Il a fait mention du contexte différent en matière de procédure qui existait en Angleterre et qui, selon lui, exigeait l'emploi du même critère lorsqu'on demandait au juge d'examiner des documents en privé afin de déterminer s'il y avait lieu de permettre au requérant de les consulter. Il a ironiquement ajouté: [TRADUCTION] «On peut décrire la conclusion d'une autre manière: la condition de la naissance du pouvoir discrétionnaire de rendre une ordonnance a été invoquée pour restreindre ce qui constitue peut-être la seule manière valable de décider comment ce pouvoir discrétionnaire pourrait s'exercer correctement» (p. 294). Quelle qu'ait pu être la situation en Angleterre, a-t-il conclu, ce n'était pas ce que prévoyait le droit néo-zélandais. À la page 295, il a fait la déclaration suivante à laquelle je souscris entièrement:

> [TRADUCTION] S'il appert que l'intérêt public prépondérant appuie la demande d'immunité, sans que le juge procède à un examen préalable, alors la décision qui en résulte de ne pas ordonner la production sera prise sans autre formalité. À cet égard, le certificat lui-même devrait révéler avec suffisamment de précision la nature et l'importance des documents, tant du point de vue de la nécessité de préserver leur confidentialité d'une part que du point de vue des besoins du litige proprement dit d'autre part. Mais lorsqu'il n'en est pas ainsi, lorsqu'on a laissé le juge dans l'incertitude, il est difficile de concevoir en quoi son inspection risquerait de compromettre la confidentialité, qui peut mériter d'être protégée. Je crois que dans cette situation on aurait tort d'écarter un moyen aussi direct et aussi pratique de résoudre la difficulté. En fait, il en résulterait que la responsabilité primordiale des tribunaux de fournir des réponses éclairées et justes serait souvent assujettie à une démarche relevant de la pure conjecture, si bien que le juge lui-même ne saurait guère à quoi s'en tenir. Or, cela ne peut pas être raisonnable ni n'est nécessaire, car il suffit d'un simple acte d'inspection judiciaire pour que puisse être rendue avec passablement de confiance une décision dans un sens ou dans l'autre.

See also Richardson J., especially at pp. 301-02 and McMullin J., especially at pp. 307-08. These judges make it clear, in McMullin J.'s words at p. 308, that:

> ... once the documents are admitted to relate to the case, as they are here, they should be available for inspection unless there is some reason shown why in the interests of public policy that course should not be followed. And the onus of establishing that they should not be produced for inspection must lie on the party which seeks a departure from the general rule.

I am, therefore, of the view that the documents to be produced should be inspected by the trial judge to determine whether, on balancing the competing interests already described, they should be produced.

Conclusion

For these reasons, I would allow the appeal with costs throughout and I would also set aside the order of the Honourable Mr. Justice Catzman dated July 9, 1982 quashing the subpoena *duces tecum* directed to Dr. E. E. Stewart.

Appeal allowed with costs.

Solicitors for the appellant: Fraser & Beatty, Toronto.

Solicitor for the respondents: Archie Campbell, Toronto.

Voir également les propos du juge Richardson, particulièrement aux pp. 301 et 302, et du juge McMullin, particulièrement aux pp. 307 et 308. Ces juges disent clairement, pour reprendre les termes du juge McMullin, à la p. 308, que:

> [TRADUCTION] ... une fois admis que les documents se rapportent au litige, comme c'est le cas en l'espèce, il devrait être possible de les examiner, à moins qu'on ne présente une raison pour laquelle, dans l'intérêt public, il faut procéder autrement. Et l'obligation de prouver que les documents ne devraient pas être produits pour inspection incombe nécessairement à la partie qui cherche à déroger à la régle générale.

Par conséquent, je suis d'avis que le juge de première instance doit examiner les documents dont la production est demandée afin qu'il puisse déterminer si une fois évalués les intérêts déjà décrits, ils doivent être produits.

Conclusion

Pour ces motifs, je suis d'avis d'accueillir le pourvoi avec dépens dans toutes les cours et d'infirmer l'ordonnance de l'honorable juge Catzman en date du 9 juillet 1982 portant annulation du *subpœna duces tecum* adressé à M. E. E. Stewart.

Pourvoi accueilli avec dépens.

Procureurs de l'appelant: Fraser & Beatty, Toronto.

Procureur des intimés: Archie Campbell, Toronto.

Date: 20080429

Docket: DES-3-07

Citation: 2008 FC 549

Ottawa, Ontario, April 29, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ABDULLAH KHADR

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

INTRODUCTION:

[1] The United States of America has requested the extradition of Mr. Abdullah Khadr from Canada to face criminal charges in relation to acts which he is alleged to have committed in Pakistan in support of attacks against coalition forces in Afghanistan. In these proceedings, Mr. Khadr seeks to have certain information in the possession of the Canadian government disclosed to him to assist in his defence against the extradition request. The Attorney General of Canada is opposed to the release of that information on the ground that it's disclosure would cause injury to Canada's national security and international relations.

[2] This is an application pursuant to paragraph 38.04 (2) (c) of the *Canada Evidence Act*, R.S.C. 1985. c. C-5 ("the Act" or "CEA"). Notice under section 38.02 of the Act has been served on the Attorney General by a participant in the extradition case that disclosure of certain information could cause injury to the protected interests. The Attorney General has reviewed the information and authorized disclosure of some but not all of the information under section 38.03 of the Act. The starting point in these proceedings is, therefore, that the statute prohibits release of the undisclosed information unless it is authorized by the Court.

[3] The applicant seeks an Order pursuant to subsections 38.06 (1) or 38.06 (2) of the Act authorizing disclosure of the information and an Order for his costs. The respondent requests an Order confirming the Attorney General's decisions, or, in the alternative, that the undisclosed information be released only in the form of a summary and subject to conditions.

[4] Upon considering the evidence and representations of the parties with the assistance of an *amicus curiae*, the Court will exercise its discretion to authorize disclosure of information relevant to the extradition proceedings in the form of a summary and subject to conditions intended to minimize any risk of injury to the protected interests. The summary will be released only to counsel for the parties and its use restricted to the extradition proceedings.

[5] The Attorney General has been ordered to pay the costs of the participation of the *amicus curiae* on this application. No additional order for costs will be made.

PROCEDURAL HISTORY:

[6] Mr. Khadr, a Canadian citizen, was arrested in Pakistan in mid-October, 2004 and detained by Pakistani authorities until his release and repatriation to Canada on December 2, 2005. He was arrested at Toronto on December 17, 2005 on a provisional warrant issued by a Judge of the Ontario Superior Court of Justice under the *Extradition Act*, 1999. c. 18. Mr. Khadr was ordered detained following a bail hearing in that court on December 23, 2005 and has remained in custody since then.

[7] Extradition proceedings were formally commenced by the provision of a Request for Extradition dated February 9, 2006 from the US Attorney's office in Boston, Massachusetts, where the charges against him had been filed, and by an Authorization to Proceed dated March 15, 2006, signed on behalf of the Attorney General of Canada.

[8] The allegations against the applicant in the Record of the Case (ROC) and supplementary ROC's submitted by the requesting state are, in essence, that he procured munitions and explosive components to be used by Al Qaeda militants against US and coalition forces in Afghanistan. The corresponding Canadian crimes identified by the Attorney General in support of the request are terrorism, weapons and explosives offenses contrary to several provisions of the *Criminal Code of Canada*, R.S., 1985, c. C-46**.**

[9] As set out in the ROC and supplementary ROC's, the case against Mr. Khadr rests primarily on inculpatory statements taken from the applicant under caution by agents of the Federal Bureau of Investigation (FBI) in July 2005 while he was detained in Pakistan and in December 2005 at a hotel in Toronto shortly after his repatriation. The US also seeks to rely upon a cautioned statement taken by Royal Canadian Mounted Police (RCMP) officers following the applicant's return to Canada. RCMP officers had also interviewed Mr. Khadr in Pakistan in April 2005 but the US is not relying upon the statements obtained at that time as part of its case. However, the notes taken by the officers during the April 2005 interviews were filed in the applicant's bail hearing and form part of the record of this application.

[10] In August 2006, the applicant filed a motion for disclosure and related relief in the Ontario Superior Court of Justice. Among other things, the applicant requested that the court conduct a *voir dire* to determine the admissibility of the evidence against him and order that the Attorney General of Canada produce all documents relevant to the *voir dire*. The applicant submitted that the statements taken from him and proposed for use in the extradition proceedings must be excluded as products of torture, cruel and inhumane treatment and illegal detention in Pakistan. In the alternative, the applicant submitted that the circumstances of his detention were such as to render the evidence unreliable for the purpose of supporting his extradition from Canada.

[11] Counsel for the Attorney General of Canada, acting on behalf of the requesting state, conceded that based on Mr.Khadr's affidavit evidence, there was an "air of reality" to the contention that his allegations could be substantiated by evidence in its possession if the request for production was satisfied: see *United States of America v. Kwok* 2001 SCC 18, [2001] S.C.J. No.19 at paragraphs100 and 106; *R. v. Larosa*, 163 O.A.C. 108, [2002] O.J. No.3219 (O.C.A.) at paragraph 78. They, therefore, voluntarily undertook to disclose a large number of documents which were in the possession of the Canadian Security Intelligence Service (CSIS), the RCMP and the Department of Foreign Affairs and International Trade (DFAIT).

[12] In February, March and April 2007, Crown counsel issued four notices to the Attorney General under subsection 38.01(1) of the CEA, that certain of the documents which they proposed to disclose contained information of a sensitive nature or information which could injure Canada's international relations or national security if released. As required by the statute, the Attorney General reviewed the material and made decisions with respect to whether disclosure of the information would be authorized or not authorized. In the result, extensive redactions were made to the content of some of the documents disclosed to the applicant. Subsequently, upon receiving consent to disclose from the FBI, the originating agency, some of the redactions were removed or "lifted" and additional information released in the collection of documents.

[13] In a decision rendered on July 24, 2007, the extradition judge, Justice Christopher M. Speyer, ruled that no order for disclosure was required with respect to the material in the possession

of Canadian government departments or agencies as those documents had already been disclosed. He characterized this production as “voluminous” and noted that counsel for the Attorney General had agreed to provide any further material that may come to their attention. Justice Speyer declined to make any order for production against the requesting state. However, he accepted that the applicant's claims of abusive treatment during his detention in Pakistan were sufficient to provide for a realistic possibility that the remedy sought - exclusion of the inculpatory statements - could be achieved: *United States of America v. Khadr* [2007] O.J. No.3140 (S.C.J.).

[14] Justice Speyer noted that it was beyond the scope of his authority to determine whether the circumstances of the extradition proceeding required the production of unredacted copies of the material disclosed by the Canadian authorities as that jurisdiction is assigned to the Federal Court under section 38 of the CEA. On July 26, 2007 he adjourned the extradition proceeding so that an application could be brought under section 38. That application was filed in this Court on August 21, 2007 and was then case-managed by the Chief Justice until a complete record was submitted by the parties.

[15] The applicant filed affidavit evidence with extensive exhibits on September 20, 2007, including the content of the disclosure motion before the Ontario Superior Court. The bulk of the documents at issue in these proceedings were filed with the Court by the Attorney General in November, 2007, in both redacted and unredacted form, together with affidavit evidence in opposition to the application. These consisted of some 266 documents comprising approximately 1300 pages.

[16] Counsel for the applicant brought a motion for the appointment of *amicus curiae* on November 15, 2007. I was assigned the matter at this time. There was some initial delay in proceeding due to other matters requiring the involvement of counsel. Written submissions were filed and oral argument with respect to the motion was heard on December 20, 2007. In a decision released on January 15, 2008 I granted the motion and appointed Mr. Leonard Shore Q.C., of Ottawa as *amicus* to assist the court by representing the interests of the applicant during the *ex parte* hearings required by the statute: *Abdullah Khadr v. The Attorney General of Canada* 2008 FC 46, [2008] F.C.J. No.47.

[17] In response to a fifth notice served upon the Attorney General by counsel engaged in the extradition proceedings, the respondent filed supplementary *ex parte* affidavits with an additional 36 documents on January 29, 2008. This material was also served on the applicant in redacted form.

[18] During this process, counsel for the Attorney General identified additional sensitive or potentially injurious information which was said to have been inadvertently disclosed to the applicant. This information was initially contained in some 120 of the documents. That number was reduced on consent of the originator and through decisions of the Attorney General to authorize disclosure. In the result, there were 47 items of information in 41 documents, including several that were in the initial collection, for which the Attorney General sought an Order prohibiting further disclosure. For convenient reference, the pages of these documents containing the inadvertently disclosed information were assembled in one binder filed at a hearing on February 11, 2008. Redacted versions of these pages were also provided to counsel for the applicant. Counsel for the applicant continue to hold the original unredacted versions of this information as it was provided by

the Crown in the disclosure process, save for the item referred to in the next paragraph which they destroyed when informed that it was potentially injurious and had been unintentionally released.

[19] The document containing that item of information had already been given to a reporter for *The Globe and Mail* newspaper when counsel were made aware of its sensitivity. The information is set out in a portion of a sentence in an October 2004 briefing note to the Commissioner of the RCMP. Upon being contacted by counsel for the Attorney General, the newspaper withheld publication of the information pending the outcome of these proceedings.

[20] Closed and public hearings were conducted on February 21-22, 2008 in this matter. The private hearings were held for two purposes. The first was to receive representations from both parties and from counsel for *The Globe and Mail* with respect to the information which the Attorney General contends was inadvertently released during the disclosure process and which the Attorney General now seeks to protect through these proceedings.

[21] Counsel for the Attorney General was authorized to provide notice of the private hearings to *The Globe and Mail.* A lawyer for the newspaper appeared at the hearing on February 21st, filed a record in opposition to the Attorney General's request and made submissions concerning the information in the October 2004 briefing note. Counsel for the newspaper did not participate in the remainder of the hearings.

[22] The second purpose of the closed hearings was to provide the applicant with an opportunity to assist the Court with submissions as to the kind of information that would be useful to the defence in the extradition case. An *ex parte* hearing for this purpose is contemplated by the CEA in section 38.11. Counsel for the applicant, however, elected to have the respondent's counsel remain during these submissions on the understanding that any defence strategies or privileged information revealed would not be disclosed to the lawyers acting on behalf of the requesting state in the extradition case. While this was an exceptional procedure, not expressly provided for in the statute, it greatly assisted the Court during the subsequent *ex parte* hearings as the Court could candidly discuss questions of relevance with counsel for the Attorney General and the *amicus* without fear of disclosing information received in confidence from the applicant's lawyers.

[23] At the conclusion of the private hearings on February 22nd, the Court adjourned and resumed in a public session to hear the submissions of the parties with respect to the merits of the disclosure application in open court.

[24] A series of private *ex parte* hearings were conducted at the Court's secure facility in which witnesses from each of the departments and agencies in possession of the information at issue were examined by counsel for the Attorney General and cross-examined by the *amicus curiae*. Mr. Shore had previously been given access to all of the *ex parte* affidavit evidence filed by the Attorney General and was present for each of the private hearings. The redacted information was reviewed in this process and evidence and submissions received as to its relevance to the underlying extradition case and whether injury to the protected national interests would result as asserted by the Attorney General if it were to be disclosed.

[25] Following these hearings, at the request of the Court, counsel for the Attorney General and the *amicus curiae* reviewed the redacted information and allegedly inadvertent disclosures and prepared a list of the information which they, either jointly or individually, believed to meet the threshold test of relevance. The Court then heard further submissions in closed sessions from the Attorney General and the *amicus curiae* with respect to issues arising from this collection of information.

LEGAL FRAMEWORK:

[26] The appropriate test to apply in a proceeding under section 36.04 of the Act was developed by the Federal Court and the Federal Court of Appeal in *Canada (Attorney General) v. Ribic*, 2003 FCT 10, [2003] F.C.J. No. 1965, aff'd 2003 FCA 246, [2003] F.C.J. No. 1964 (*Ribic)*; see also *Canada (Attorney General) v. Khawaja*, 2007 FC 490, [2007] F.C.J. No. 622 (*Khawaja I*); rev'd in part but not on the test in *Canada (Attorney General) v. Khawaja*, 2007 FCA 342, [2007] F.C.J. No. 1473: *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)* 2007 FC 766, [2007] F.C.J. No. 1081 (*Arar*).

[27] A section 38.04 application is not a judicial review of the Attorney General's decision not to authorize disclosure. Instead, the designated judge must make a determination as to whether the statutory ban on releasing the information sought to be protected, as outlined in subsection 38.02(1), ought to be confirmed or not. In coming to that decision, the judge must assess the information in three steps.

[28] First, the judge must decide whether the information sought to be protected is relevant to the underlying proceeding. That threshold, as determined by the Federal Court of Appeal in *Ribic*, at paragraph 17, is a low one. In the criminal context, this is determined through application of the *Stinchcombe* test for disclosure: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83. If the information at issue may not be reasonably useful to the defence, it is not relevant and there is no need to go any further in assessing it.

[29] The extradition process is not equivalent to a criminal trial: see *Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779, [1991] S.C.J. No. 63. As stated in *Kindler* at paragraph 160, "… it differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on concepts of reciprocity, comity and respect for differences in other jurisdictions." However, the test of committal for extradition is the same as that required to justify committal for trial or to withdraw the case from a jury: see *United States of America v. Ferras* 2006 SCC 33, [2006] S.C.J. No.33 at paragraph 9. The extradition judge must assess whether there is sufficient admissible evidence to reach a verdict of guilty: *Ferras* at paragraph 46.

[30] In both the criminal trial context and in extradition proceedings which may lead to a criminal trial in another jurisdiction, the person's liberty and security interests are at stake. I consider it appropriate, therefore, that the test of relevance for disclosure of information in the context of an extradition proceeding should be the same as that for a criminal trial, i.e., the *Stinchcombe* test.

[31] Where the designated judge in a section 38 proceeding finds that the information is relevant, the next step is a determination whether disclosure would be injurious to international relations, national defence or national security, as outlined in section 38.06 of the *CEA*. At this stage, the judge must give considerable weight to the Attorney General's submissions on the injury which might be caused by disclosure, given the access that officeholder has to special information and expertise.

[32] However, a mere assertion of injury is not sufficient to reach a conclusion that the injury would in fact be caused by the disclosure. The party seeking the prohibition on disclosure, normally the Attorney General, bears the onus of establishing through evidence a factual basis to the allegations of probable injury on a reasonableness standard.

[33] To illustrate the application of the reasonableness standard in the national security context, Canadian courts have referred to comments in *Home Secretary v. Rehman*, [2001] H.L.J. No. 47, [2001] 3 WLR 877 (HL (E)). At page 895 of *Rehman*, Lord Hoffman said that the Court may reject the Executive's opinion when it was "one which no reasonable minister advising the Crown could in the circumstances reasonably have held". This statement was cited by the Supreme Court of Canada in describing a similar legislative test in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at paragraph 33 and by the Federal Court of Appeal in *Ribic* at paragraph 19.

[34] It is clear from the jurisprudence that the judge has the discretion to authorize disclosure if the Attorney General fails to demonstrate injury. As stated by Chief Justice John Richard of the Federal Court of Appeal in the context of a challenge to the constitutionality of the legislative scheme, an "authorization to disclose will issue if the judge is satisfied that no injury would result from public disclosure": *Canada (Attorney General) v. Khawaja*, 2007 FCA 388, [2007] F.C.J. No. 1635 [*Khawaja II*] at paragraph 42.

[35] Where the Attorney General can show a reasonable basis for his or her assessment that the disclosure of the information at issue would cause injury to international relations, national defence or national security, the judge must then proceed to the final step of the test. At this point, it must be determined whether the public interest in disclosure is outweighed by the public interest in non-disclosure. In assessing this balance, the threshold is neither the low strict relevancy test of *Stinchcombe* nor the stringent "innocence at stake" exception which applies to informer privilege.

[36] The factors to be considered in determining whether the public interest is best served by disclosure or non-disclosure will vary from case to case, as has been noted often in the Federal Court, including by Justice François Lemieux in the civil case *Canada (Attorney General) v. Kempo*, 2004 FC 1678, [2004] F.C.J. No. 2196. The designated judge is tasked in the third step of a section 38 application with the function of assessing those factors which he or she deems necessary to find the delicate balance between competing public interests of disclosure and non-disclosure.

[37] Some of the factors which may be assessed were outlined by Justice Marshall Rothstein, then a member of the Federal Court, in *Khan v. Canada (T.D.)*, [1996] 2 F.C. 316, [1996] F.C.J. No. 190 at paragraph 26. These factors, set out below, were cited with approval by the Court of Appeal in *Jose Pereira E Hijos, S.A. v. Canada (Attorney General)*, 2002 FCA 470, [2002] F.C.J. No. 1658:

> (a) The nature of the public interest sought to be protected by confidentiality;
> (b) Whether the evidence in question will "probably establish a fact crucial to the defence";
> (c) The seriousness of the charge or issues involved;
> (d) The admissibility of the documentation and the usefulness of it;
> (e) Whether the applicants have established that there are no other reasonable ways of obtaining the information;
> (f) Whether the disclosures sought amount to general discovery or a fishing expedition; (citations removed)

[38] In a different context, that of an application arising from a public inquiry, my colleague Justice Simon Noël developed the following list of factors in *Arar*, above, at paragraph 93:

> (a) The extent of the injury;
> (b) The relevancy of the redacted information to the procedure in which it would be used, or the objectives of the body wanting to disclose the information;
> (c) Whether the redacted information is already known to the public, and if so the manner by which the information made its way into the public domain;
> (d) The importance of the open court principle;
> (e) The importance of the redacted information in the context of the underlying proceeding;
> (f) Whether there are higher interests at stake, such as human rights issues, the right to make a full answer and defence in the criminal context, etc.;
> (g) Whether the redacted information relates to the recommendations of the commission and if so whether the information is important for comprehensive understanding of the said recommendation.

[39] While the last of Justice Noël's factors in *Arar* clearly does not apply in the present case, the remainder together with those identified by Justice Rothstein, varied as necessary, informed my consideration of how to balance the competing interests in the present application.

***Inadvertent Disclosures**:*

[40] At common-law, privileges attached to information can be found to have been waived if the information is released by the holder to the opposing party. Inadvertent disclosure does not necessarily constitute a waiver. Waiver will be established when it is shown that the holder of the privilege knew of its existence and demonstrated an intention to waive it. The Court has discretion to consider whether the circumstances of disclosure amount to a waiver: *Stephens v. Canada (Prime Minister)*, [1998] 4 F.C.89, [1998] F.C.J. No. 794.

[41] In *Khawaja I*, at paragraphs 104 to 111, I considered what, if any, effect the inadvertent disclosure of some of the information before the Court should have in a section 38 case. I concluded that the release of information which the Attorney General seeks to protect, not amounting to an informed and intentional waiver, is not enough to justify disclosure. In light of the case-by-case nature of the section 38 test and the importance of the interests at stake, the appropriate approach is to proceed by way of the same three-step assessment as for disclosure generally.

[42] In *Arar*, at paragraph 57, Justice Noël endorsed this approach but added that the circumstances of the "inadvertent disclosure" are of essential importance in determining whether the information can be protected by the Court.

Other "Public Interest" Considerations:

[43] The public interest in disclosure in section 38.06 exceeds the public interest in the fair trial rights of the individual concerned. It is broad enough to encompass other interests such as those noted by Justice Noël in *Arar*, above: human rights issues, the open court principle, freedom of the press and the right of the public to receive information.

[44] Freedom of the press is engaged in this proceeding in light of the inadvertent disclosure of one of the items of information to a newspaper. Freedom of expression including freedom of the press and the public's right to receive information are core values protected by subsection 2 (b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, being Schedule B to the *Canada Act 1982 (U.K.)* 1982, c.11. The scope of the protection afforded freedom of the press must be interpreted "in a generous and liberal fashion having regard to the history of the guarantee and focusing on the purpose of the guarantee": *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421, [1991] S.C.J. No.87 at paragraph 61.

[45] Inextricably linked to those values is the principle of the openness of court proceedings (see *Vancouver Sun*, (Re) 2004 SCC 43, [2004] S.C.J. No.41 and *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] S.C.J. No.41). Freedom of the press and the open court principle are not, however, absolute. They must yield on occasion when there are other important interests to be protected such as informant privilege (see *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] S.C.J. No. 43) or to protect the right of an individual to a fair hearing (see *Re Charkaoui*, 2008 FC 61).

[46] The Attorney General plays an important role in protecting the state's interest in national security, national defence and international relations and, as discussed above, the court should give considerable weight to submissions from that office with respect to the injury that the disclosure of the information would cause. However, even where injury is established the court retains the discretion under the statute to determine that the public interest in disclosure of the information outweighs that of nondisclosure. The effect of the decision on the restriction of a core value such as freedom of the press must be a significant factor in that determination.

[47] It is clear now that any court procedures that limit freedom of expression and freedom of the press in relation to legal proceedings, including those imposed by statute, are subject to the test set out by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R.835, [1994] S.C.J. No.104 and *R. v. Mentuck* 2001 SCC 76, [2001] 3 S.C.R. 442; see also *Toronto Star Newspapers Limited v. Ontario,* 2005 SCC 41, [2005] 2 S.C.R. 188 at paragraph 7. This was affirmed in the section 38 CEA context by Chief Justice Allen Lutfy in *Ottawa Citizen Group Inc. v. Canada (Attorney General),* 2006 FC 1552, [2006] F.C.J. No. 1969.

[48] The *Dagenais/Mentuck* test requires that public access to court proceedings be barred only when the appropriate court in the exercise of its discretion concludes that disclosure would subvert the ends of justice or unduly impair its proper administration. This test is meant to be applied in a flexible and contextual manner. In applying that test to the present context, I conclude that the court must be satisfied that the risk of injury from further disclosure of the information which the

newspaper possesses must be "real, substantial and well grounded in the evidence": *Toronto Star*, above, at paragraph 27.

ISSUES:

[49] The issues to be decided by the Court in these proceedings are:

(a) Whether to confirm the prohibition against disclosure of the information redacted pursuant to subsection 38.06(3) of the CEA;

(b) Whether to confirm the prohibition against further disclosure of some information that was inadvertently disclosed; and

(c) If the prohibition against disclosure is not confirmed, in what manner or under what conditions should the information be disclosed so as to limit the harm to national security and international relations?

APPLYING THE THREE STAGE TEST TO THE INFORMATION AT ISSUE:

The Relevance Threshold:

[50] The information at issue in these proceedings is contained in documents which are, for the most part, messages, reports and briefing notes written or compiled by Canadian officials in Islamabad, Pakistan and at CSIS, RCMP and DFAIT offices in Canada and correspondence from foreign officials. A considerable amount of the redacted information was provided by foreign agencies subject to express or implied caveats as to its use and broader distribution by their

Canadian counterparts. There is a great deal of repetition of the same information as the content of messages received by one Canadian agency or department was circulated to the others and recycled in further messages and reports.

[51] Much of the redacted information is, in my view, of no relevance to the underlying proceedings. This includes background analyses of a general nature, frequent references to other on-going investigations and to internal administrative information such as the names and telephone numbers of agents and civilian employees, file numbers, communication systems and databanks. That is not to say that such types of information may never be relevant but that upon review of the documents in these proceedings, I am satisfied that it does not meet the *Stinchcombe* threshold. Counsel for the applicant did not suggest that this type of information would be helpful to the defence. In a particular document, such as a briefing note on a broad range of topics, there may be only a small portion of text that is relevant to Mr. Khadr's case.

[52] Where I have concluded that the redacted information does not meet the low threshold of relevance I have excluded it from further consideration in the next two stages of the test and inclusion in the summary that has been prepared.

[53] The applicant's position is that the relevance of the redacted information ought to be determined by reference to the matters raised in the disclosure motion and examined by Justice Speyer in his decision of July 20, 2007. As noted above, Speyer J. held that the materials filed by the applicant on that motion met the "air of reality" threshold giving rise to a justiciable issue as to

whether the applicant was treated in such an abusive matter that the admission of the statement evidence would be unfair under section 7 of the *Charter*: see *Ferras*, above, at paragraph 60.

[54] I note that any finding that this Court may make regarding relevance is not binding upon the extradition court. Admissibility of evidence on behalf of the person sought in those proceedings is governed by paragraph 32 (1) (c) of the *Extradition Act*, 1999 c.18. That provision permits the reception of evidence which would not be otherwise admissible under Canadian law if it is relevant to the test for committal and considered reliable by the Court. That exception applies to evidence gathered abroad and would include hearsay. Evidence gathered in Canada remains bound by Canadian rules of evidence: *U.S.A. v. Anekwu* [2008] B.C.J. No. 536 (B.C.C.A.). That distinction may have some bearing on the admissibility of the information in the protected documents as it includes third party statements made both in Canada and abroad.

[55] The applicant's allegations of physical and mental abuse and arbitrary detention will be considered by the extradition court in so far as they relate to the issues of admissibility and fairness in those proceedings. The applicant's assumption is that the redacted information reproduced in the affidavit material before this Court will be relevant to those determinations. In particular, he seeks to corroborate his allegations that agents of the United States were behind his capture and detention in Pakistan and complicit in any abuse that he suffered during his detention there.

[56] At paragraph 51 of his reasons, Justice Speyer made the following comments:

> All allegations about American misconduct are denied by the requesting state. The relationship between American and Pakistani authorities in so far as it relates to the detention and treatment of Khadr is entirely a matter of speculation. In my view, this is a fishing trip to determine what, if any, American-Pakistani relationship agreement was in place relating to the arrest of Khadr....

[57] The applicant submits that disclosure of the redacted information will establish that the relationship between the American and the Pakistani authorities is more than a matter of speculation.

[58] The respondent acknowledges that the air of reality test had been met on the disclosure motion but submits that this was achieved solely through the applicant's own evidence and not on the content of the documents voluntarily disclosed, including the redacted information. The respondent does not concede that the redacted information is relevant.

[59] In the context of extradition proceedings, the respondent submits, relevance should be determined in relation to the content and scope of the requesting state’s ROC and supplementary ROCs. In this instance the record consists of the statement taken by the FBI in Pakistan, some eight months after Khadr's arrest, and the statements taken in Toronto by the RCMP and the FBI following his release and repatriation. Thus the redacted information would only be relevant, in the respondent’s view, if it assists in shedding some light on how those statements were obtained.

[60] I agree with the respondent that in a section 38 review of information sought to be disclosed for the purpose of an underlying extradition case, the scope of the relevance inquiry by the designated proceedings court should normally be limited to the parameters of the ROC submitted by the requesting state.

[61] However, the applicant says that the later statements which he made were derived from and are tainted by abusive conduct which he suffered in the initial days following his capture. He claims that he was arrested and detained at the behest of the requesting state; that a bounty was paid for his capture; that he was abused during his initial detention and coerced into making inculpatory statements; and that agents of the requesting state participated in the abuse during the early interrogation.

[62] The requesting state has conceded in affidavit evidence submitted to the extradition court and filed in this court as part of the applicant's record that agents of the United States began to interview Mr. Khadr some four days after his arrest, described as "debriefings", which continued for 17 days while he was within the custody of the Pakistani authorities. A member of the FBI was part of the team that conducted those debriefings.

[63] Inculpatory statements may be ruled inadmissible if tainted by earlier confessions obtained by coercion and where the tainting features which would disqualify the earlier confessions continued to be present or where the making of the prior statements was a substantial factor contributing to the making of the later statement: *R. v. I. (L.R.) and T. (E.)*, [1993] 4 S.C.R. 504, [1993] S.C.J. No. 132. The applicant says that when the RCMP and FBI officers interviewed him

later, they possessed information obtained during the early meetings and used it to challenge him on any inconsistency during the subsequent interviews.

[64] I understand that the requesting state takes the position that the FBI team that interviewed Mr. Khadr in Pakistan and again in Toronto was not apprised of the information obtained from him during the early debriefing sessions and that those statements are not tainted by any abuse, inducements or coercion that may have occurred following his capture. They deny involvement in any such actions if they occurred. Nonetheless, on the basis of the applicant's evidence alone, because of the full sequence of events, as alleged, there remains a realistic possibility that the statements taken under caution in Pakistan and Canada may be excluded from consideration in the extradition proceedings. I find, therefore, that any redacted information in the documents before the Court pertaining to the entire period of the applicant's detention in Pakistan may reasonably be useful to the defence and is relevant for the purposes of this determination.

[65] During the course of the hearings on February 21-22, 2008 counsel for the applicant made submissions as to the type of information that would assist the defence in challenging the requesting state's case if it were to be found in the documents at issue. In addition, at paragraph 65 of the applicant's application record, counsel set out a series of specific questions for which answers or relevant information would assist the applicant's defence. This was helpful to the Court during the review of the documents and the Attorney General's *ex parte* evidence.

[66] Counsel for the Attorney General and the *amicus curiae* also adopted a constructive approach to these proceedings by producing a table of the redacted information which in their joint or separate view could meet the relevance threshold together with a summary of the information. Mr. MacKinnon, counsel for the Attorney General, does not concede that the summary should be released and indeed argued vigorously to the contrary, particularly with respect to specific items. The *amicus curiae*, Mr. Shore, argued equally vigorously for the disclosure of additional information. As an experienced criminal defence counsel, Mr. Shore's view of what would be relevant and of assistance to the defence carried great weight with the Court.

[67] I am grateful to all counsel for their assistance to the Court in this matter. However, as required by the statute, I have made my own determination of what is relevant to the underlying proceedings based on a consideration of all of the evidence and having read all of the information at issue in each of the documents in its unredacted or clear form.

The Respondent's Injury Claims:

[68] As discussed above, the Attorney General bears the onus of establishing injury. In this case, he does not rely upon a claim of injury to national defence. The public affidavits served on the applicant and filed by the Attorney General in these proceedings describe various risks of harm which it is claimed would cause injury to Canada's national security and international relations. These claims were elaborated upon in the private *ex parte* affidavits filed by the respondent and in the evidence of the witnesses heard in the *ex parte* hearings with reference to the redacted information in each document.

[69] In general, the Attorney General submits that disclosure of the information sought to be protected will harm Canada's national security and or international relations by breaching the confidentiality of information sharing relations with third parties; by disclosing methods, techniques or ongoing investigations; by disclosing information about employees engaged in security intelligence work; and by identifying human sources.

[70] Specific concerns are set out in the respondent’s public record for each of the departments and agencies from whom the information at issue in these proceedings was collected. For CSIS, it is submitted, the disclosure of its information would be injurious to the national security of Canada as it would:

a) Identify or tend to identify CSIS's interest in individuals, groups or issues, including the existence or absence of past or present files or investigations, the intensity of investigations, or the degree of success or lack thereof of investigations;
b) Identify or tend to identify investigative techniques and methods of operation utilized by CSIS;
c) Identify or tend to identify relationships that CSIS maintains with security and intelligence foreign agencies and would disclose information received in confidence from such sources;
d) Identify or tend to identify CSIS employees or the administrative methodology of CSIS;
e) Identify or tend to identify human sources of information for CSIS or the content of information provided by human sources; and
f) Identify or tend to identify information concerning the telecommunications system utilized by CSIS.

[71] On behalf of DFAIT, it is submitted that confidentiality is fundamental to the collecting and sharing of information between states. International convention and practice requires that diplomatic communications are conducted in confidence unless there is an express agreement to the contrary. The release of the names of confidential sources and information provided by foreign officials with the expectation that the information would remain confidential would have a severe impact on Canada's ability to pursue its foreign-policy objectives and its reputation with other governments including key allies. Failure to protect such information in relation to consular cases could have an adverse effect on Canada's ability to provide consular assistance to detained individuals. Efforts to promote human rights, democracy and good governance would be compromised if candid assessments of Canadian officials about the situation in foreign states were released. Contacts in those states who engage in frank discussions with Canadian officials would be put at risk if their identities were disclosed.

[72] The RCMP is responsible for conducting investigations into terrorism offences as defined in Part II.1 of the *Criminal Code*, R.S., 1985, c. C-46 and for performing peace officer duties under the *Security Offences Act*, R.S. 1985, c.S-7 in relation to "conduct constituting a threat to the security of Canada" within the meaning of the *Canadian Security Intelligence Act*, R.S.C. 1985, c. C-23. It is submitted by the Attorney General that disclosure of information in the documents collected from the RCMP would cause injury to national security in relation to the following sensitive subjects:

a) Investigations, subjects and persons of interest;
b) Investigative methods and techniques;
c) Information received from foreign agencies; and
d) The identity of civilian employees.

The "Mosaic Effect" Theory

[73] As is common in any proceeding relating to national security, the Attorney General relies in part upon the metaphor of a "mosaic effect" to establish injury. In the hands of the informed reader, it is said, seemingly unrelated pieces of information which may not in and of themselves be particularly sensitive, can be used to develop a more comprehensive picture when compared with information already known by the recipient or available from another source. The court is urged to conclude that the assessment of the damage to national security cannot be made looking at each item of information in isolation. The information must be considered in the context of other information which may be released. The more limited the dissemination of information, the less likely it is that an informed reader can put together the pieces and determine targets, sources and methods of operation of the investigative agencies.

[74] This theory has been cited numerous times in US and Canadian jurisprudence relating to national security and access to information held by the intelligence agencies. As a matter of logic, the concept has some appeal but there is no apparent limit to how far it may be taken. Carried to an extreme, the theory would justify the withholding of all information no matter how innocuous. See David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act,* (2005) Yale Law Journal 629 and *CIA v. Sims: Mosaic Theory and Government Attitude*; (2006) 58 Admin. L. Review 845.

[75] In *Khawaja* I, I expressed the view, at paragraph 136, that the mosaic effect on its own will not usually provide sufficient reason to prevent disclosure of what would otherwise appear to be an innocuous piece of information and that further evidence will be required to convince the Court that the information, if disclosed, would be injurious.

[76] In *Khawaja II*, Justice J.D. Denis Pelletier discussed the difficulty in deciding whether information, apparently innocuous on its face, has value to a hostile observer. He concluded, at paragraphs 124-126, that it is this uncertainty about seemingly innocuous information that sets section 38 proceedings apart from other proceedings where the Court must decide whether to disclose information which, at the time of argument, is known only to one of the parties. The *ex parte* procedure allows the Attorney General to address the Court candidly about the injury which would be caused by disclosure.

[77] I agree with Justice Pelletier that the *ex parte* hearings are the opportunity for the Attorney General to connect the dots and present the entire picture. But the Attorney General must present evidence to back up the injury claims. Witnesses from the intelligence community may take the mosaic effect theory as an article of faith, relying upon it as a complete answer to the release of information they consider sensitive or potentially harmful. As stated by Justice Noël in *Arar*, at paragraph 84, "[s]imply alleging the effect is not enough. There must be some basis or reality for such a claim based on the particulars of a given file."

The Applicant's Position on Injury

[78] The applicant does not concede that any of the information at issue before this Court meets the second stage of the section 38.06 analysis. Counsel observed that the applicant's ability to comment upon this aspect of the test is compromised by the *ex parte* aspects of the proceedings. However, the applicant submits that in principle the disclosure of information pertaining to past investigations, information being withheld to prevent the exposure of a foreign government to embarrassment for wrongdoing, information provided by Canada to a foreign government, exculpatory information provided by a foreign government, and information that is protected solely because it is in the possession of CSIS should not be found to cause injury to Canada's national security and foreign relations.

[79] In these proceedings I have not found it necessary to consider whether the Attorney General sought to protect exculpatory information provided by a foreign government as that issue does not arise from the record before me. Nor was there any suggestion by the Attorney General that information provided to a foreign government by Canada or information in the possession of CSIS required protection on those grounds alone. In each instance, the Attorney General sought confirmation of his decision on the basis of the three stage test outlined above. However, the Attorney General disputes the contention that information relating to past investigations should never be protected and I consider it necessary to comment on the embarrassment factor.

Past investigations:

[80] The question of past investigations arises in this case because of statements made in the respondent's record to the effect that information pertaining to past national security investigations must be protected from public disclosure. The applicant submits that the information at issue pertains primarily to the investigation of his activities by the RCMP and CSIS. Considerable detail about that investigation is set out in the unredacted portions of the documents filed in these proceedings, in the affidavit evidence filed in support of the interim arrest warrant application, and in the ROC and supplementary ROCs.

[81] The applicant contends that the jurisprudence recognizes the legitimacy of claims for public interest immunity only in respect of ongoing investigations and not past investigations. There is no legitimate government interest he submits, in withholding any further information on this basis, citing *R. v. Chan*, 2002 ABQB 287, [2002] A.J. 363 at paragraphs 122 -127.

[82] *Chan* was a criminal case in which the question of public interest immunity had arisen in the context of the Crown's disclosure obligations under the *Stinchcombe* rule. Upon a review of the case law, the trial judge concluded that a qualified common-law privilege attached to information respecting ongoing investigations, investigative techniques and the safety of individuals. The decision is silent about past investigations and the applicant infers from this that they are excluded from the scope of the privilege.

[83] I note that the Supreme Court of Canada has recently determined that the privilege which attaches to the Crown's litigation work product in a prosecution ends when the case is completed: see *Blank v. Canada (Attorney General)* 2006 SCC 39, [2006] S.C.J. No. 39.

[84] The Attorney General submits that in the national security context, investigations do not often reach a tidy conclusion with a charge, prosecution, trial and conviction or acquittal. Information obtained is added to the body of intelligence collected about known or suspected threats and may assist in other related or unrelated investigations. The question to be addressed by the Court under section 38.06 is not whether the information pertains to an ongoing or completed investigation but whether disclosure would cause injury to the protected interests. The age of the information and present value may be a consideration in determining whether injury is made out or, if established, whether the public interest favours disclosure.

[85] I agree with the Attorney General's view of this question. I would add that from my review of the evidence in the present case, I am satisfied that there can be no clear distinction made between past and on-going investigations. Moreover, disclosure of the status of any possibly inactive investigation conducted by the RCMP or CSIS that may be revealed by the redacted information could cause injury to the protected national security interests.

***Embarrassment for wrongdoing**:*

[86] As noted above, the applicant seeks disclosure of information in support of his claims that he was subjected to abusive treatment amounting to torture and arbitrary detention contrary to both international law and the domestic law of Pakistan. He submits that the policy underlying section 38.06 of the CEA is not to prevent the exposure of a government to embarrassment for wrongdoing.

[87] My colleague Justice Simon Noël addressed this question in *Arar*, above. I agree with his conclusion, at paragraph 60, that information which is critical or embarrassing to the government cannot be protected but would add the qualification that this principle applies only when that is the sole or genuine reason why protection is sought.

[88] That conclusion is, I think, clear from the authorities cited by Justice Noël including the following statement from the *Johannesburg Principles: National Security, Freedom of Expression and Access to Information*, U.N. Doc. E/CN.4/1996/39 (1996), an instrument for interpreting article 19 of the United Nations *International Covenant on Civil and Political Rights* at Principle 2 (b):

> In particular, a restriction sought to be justified on the ground of national security is not legitimate **if its genuine purpose or demonstrable effect** is to protect interests unrelated to national security, including, for example, to protect the government from embarrassment or exposure of wrongdoing… [Abridged and emphasis added].

[89] I accept this statement as an expression of the principle Justice Noël was referring to in *Arar* with the exception of the inclusion of the words "or demonstrable effect" from the Johannesburg document. Regrettably, in some cases, protecting Canada's security and international relations interests may have the unintended and unwanted effect of protecting a government from

embarrassment or exposure. However, if, based on the Court's examination of the evidence, that is the sole or genuine reason the Attorney General seeks to withhold the information, the information must be disclosed.

[90] In the present case, I do not find that the Attorney General seeks to maintain the statutory prohibition on the redacted information merely because its disclosure would embarrass any foreign government or that of Canada. That may be a consequence of the release of certain information but it is not the "genuine purpose" of the Attorney General's opposition to disclosure in this case. Each claim for protection is legitimately based on other grounds such as the third party rule.

***Third Party Rule**:*

[91] As discussed above, the Attorney General seeks to maintain the statutory bar on disclosure of certain information on the ground that its release would breach the so-called "third party rule" which attaches to confidential communications between governments, their departments and agencies and officials. In some instances, the information is transmitted as classified with express caveats as to its use or further distribution by the receiving agency. In others, confidentiality is implied by the circumstances in which the information is conveyed. Foreign agencies may consent to the disclosure of some or all of their information for use in court proceedings. However, they may also take the position that their information or indeed, any indication of their interest in a particular matter must be protected indefinitely.

[92] As has been recognized repeatedly in the jurisprudence, Canada is a net importer of security intelligence information. The proportion we receive from foreign agencies far exceeds that which we provide in return. While CSIS may operate abroad in the interests of collecting information about threats to the security of Canada, it is not a foreign intelligence agency of the nature of those maintained by our closest allies and international partners. Canada depends upon the continued flow of the information they collect and share. Thus, any violation of the confidential relationship puts that flow of information at risk and could jeopardize Canada's national security. There is also a long-standing presumption of confidentiality in the day to day working relationships of our diplomats and officials with their foreign counterparts abroad and at home.

[93] In this matter, a considerable amount of the redacted information at issue was received from foreign governments. Evidence was received *ex parte* that requests had been made to certain of the agencies concerned to consent to disclosure of the redacted information which had originated with them. The Attorney General takes the position that such inquiries should not be considered to be a prerequisite to a determination by the Court that injury would result from a breach of the principle. In my view, however, the failure to make such inquiries may undermine the claim particularly where, as is often the case, on its face the information appears to be innocuous.

[94] In the case of one foreign agency, no response had been received as of the conclusion of the hearings. I believe it to be unlikely that it would ever agree to such a request given the position it has consistently maintained. With regard to the agency of another government, Canadian officials believed it would be futile to approach them considering the circumstances in which the information had been transmitted. Upon hearing all of the evidence, I agreed with that assessment.

[95] I note that the FBI responded to the request by agreeing to the lifting of redactions on certain information that had been provided by its offices. The Attorney General agreed to disclosure of that information. Those pages were then revised, filed with the Court and sent to applicant's counsel. That reduced the scope of the Court's review of the material.

[96] In this case, I had the benefit of the assistance of the *amicus*, Mr. Shore, to add to the Court's own probing of the justification for the claim of injury which would result from breach of the third party rule and whether steps had been taken to obtain consent to disclosure.

[97] In general, I agree with the exercise of the Attorney General's discretion to protect information on the ground that it would harm Canada's interests by breaching the third party rule. The people who do the internal assessments that support that exercise of discretion are experienced, knowledgeable and in day to day contact with their foreign counterparts. The evidence of the harm that would result from unilateral disclosure presented by the *ex parte* witnesses put forward by the Attorney General was credible and trustworthy. The witnesses were candid when they did not know why the foreign agency would want to protect the information but firm in their view of the results if those views were disregarded.

[98] Nonetheless, it is my view that too much of the routine communications between foreign and Canadian agencies is protected by the Attorney General in application of the third party principle. In this case there were examples that simply did not stand up to scrutiny. I am equally of the view that most of that type of information in this case is irrelevant to the underlying proceedings. There is no point in making a *pro forma* injury determination or balancing assessment of such information when it can be of no assistance to the applicant.

[99] I accept that, overall, the Attorney General has satisfied his burden to establish that disclosure of the information which I have found to be relevant would cause injury to Canada's national security and international relations. The next step then is to consider whether, notwithstanding that finding, the public interest in disclosure outweighs the public interest in non-disclosure.

Balancing the Public Interests:

[100] With respect to the third step of the analysis - the balancing of the public interests - the Attorney General relies on the evidence tendered on injury and submits that the public interest in nondisclosure of the protected information outweighs any public interest in its disclosure. In the alternative, the Attorney General submits, if it is determined that all or part of the information ought to be disclosed the court should exercise its discretion to disclose the information in a manner or impose conditions that are most likely to limit any injury pursuant to subsection 38.06(2).

[101] The applicant submits that any injury to the interests protected by section 38 can be eliminated by the imposition of appropriate conditions. As such, all information should be disclosed in a manner which prevents its disclosure to anyone other than on a "need to know" basis. The options for disclosure which the applicant proposed, in his descending order of preference, are as follows:

a) Disclosure of relevant documents and information publicly and unconditionally;
b) Disclosure of a summary of the relevant documents and information publicly and unconditionally;
c) Disclosure of all relevant information to the applicant's counsel on the condition that it may only be disclosed to the extradition judge during an *in camera* proceeding and not to any other party, including the applicant,
d) Disclosure of all relevant information to an *amicus curiae* appointed by the court on the condition that it may only be disclosed by the *amicus curiae* to the extradition judge during an *in camera* proceeding and not to any other party including the applicant.

[102] During oral argument, counsel for the applicant indicated that they were no longer proposing the fourth option. I had expressed the view that it was highly unlikely that I would presume to impose a requirement that the extradition judge permit an appearance *in camera* by an *amicus* appointed by this Court. However, counsel submitted that this Court has the jurisdiction to order that information only be disclosed in the context of an *in camera* hearing, leaving it to the discretion of the extradition judge to order any such proceeding should he or she deem it necessary.

[103] There are strongly competing public interests in this case. The public has an interest in ensuring that information that would be relevant to the extradition proceedings against the applicant is disclosed to him for the purposes of his defence. That interest reflects Canadian values and is enshrined in the guarantee of fundamental justice set out in section 7 of our *Charter*. The public also has a profound interest in maintaining the capacity of Canada's intelligence and investigative agencies to respond to threats to our collective security and the ability of our foreign affairs officers to conduct candid and effective relations with other countries.

[104] There is an additional factor that may call for additional deference to the Attorney General's position in these proceedings. Consideration of the public interest must include the fact that the security of Canada's troops and civilians in Afghanistan is in part dependent upon the cooperation of other governments in the region and that of the other members of the international security force deployed there. In that context, disclosure of the information at issue may have a much more serious impact if it were to result in a withdrawal or diminution of that cooperation.

[105] As discussed above, balancing the public interests in this case must also take into account the *Charter*'s guarantee of freedom of the press including the public's right to receive information which the press may obtain and choose to report upon.

[106] In the present case, *The Globe and Mail* obtained certain information because it was disclosed by the Crown to counsel for the applicant and was to be filed in an open court proceeding. It was only determined following service of the applicant's materials upon Crown counsel that the information was sensitive and might cause injury to a protected interest. The newspaper acted responsibly in not publishing the information when alerted by counsel that there was a concern. But for the subsequent intervention of a notice served on the Attorney General pursuant to the Act, however, the newspaper would have been free to publish the information and the public would have known of its content and been able to consider its implications. If not released through these proceedings, the public may never come to know of the information.

[107] The information in question refers to the payment of a bounty of USD $500,000 for Mr. Khadr's capture in Pakistan. The Pakistani authorities had reasons of their own for wanting to arrest Mr. Khadr given his alleged activities in that country. The information does not say that the bounty was actually paid or, if it was paid, by whom. The originating source of the information is not disclosed in the document. But it is clear that Canadian officials were told that a bounty had been paid shortly after the applicant's capture and included that information, presumably considered reliable, in briefing their superiors, in this instance the RCMP Commissioner.

[108] It is a reasonable inference from the public evidence filed in this application that the bounty was offered and paid by the US Government. Counsel for *The Globe and Mail* led evidence that the payment of bounties by the US has been freely disclosed in comparable contexts and, indeed, celebrated by US officials as a valuable tactic in apprehending suspected terrorists in the region. General Musharraf, the Head of State of Pakistan, published memoirs in which he writes of the

receipt of US bounties by his country as an illustration of its contribution to the so-called “Global War on Terror”.

[109] The Attorney General submits that the fact a bounty may have been employed in this instance has never been publicly acknowledged, that the release of the information would cause injury to Canada’s interests and that the Court should issue an Order barring its further disclosure.

[110] The evidence heard *in camera* supports the conclusion that the bounty was offered and paid by the US. I accept that the information was conveyed to Canadian officials in confidence and that the Attorney General seeks to protect it in a good faith application of the third party rule. However, the sole justification that was provided to the Court as to why publication of the information should be prohibited is that the originator does not want the information disclosed. No further explanation has been provided.

[111] Counsel for the applicant submits that disclosure of this fact is crucial to his defence. On the evidence before me I am satisfied that the information is relevant to the allegations made by the applicant. I am unable to conclude that release of the information would cause harm to Canada’s national security or international relations. It is now more than three years since the information was received by Canadian officials, the general practice is in the public domain, no human source would appear to be at risk and the circumstances in Pakistan have changed since these events took place.

[112] Had I concluded that the assertion of injury had been made out, I would have determined that the public interest in disclosure outweighs the public interest in non-disclosure of the information. As discussed above, the "public interest" includes the interests of the applicant to a full and fair airing of matters relevant to the admissibility of the case against him. In my view, that includes the information that a bounty was paid for his capture.

[113] The fact that a foreign state paid a bounty for the apprehension of a Canadian citizen abroad and that Canadian officials were aware of it at an early stage is also a matter in which the public would have a legitimate interest. While I considered whether it would be sufficient to authorize disclosure of the information to the applicant solely for the purpose of his defence to the extradition request, I have concluded that the newspaper should be allowed to publish the information and inform the public in furtherance of the core values of freedom of expression and freedom of the press. The prohibition on disclosure of this information will, therefore, not be confirmed.

[114] With regard to all of the so-called "inadvertent disclosures", including the item in the possession of the newspaper, the applicant submits that the circumstances of the release of the information to his counsel clearly demonstrated an informed intention on the part of the Crown to waive any privilege attaching to the documents. Crown counsel took some seven months to review information in the possession of the government that would be relevant to a determination of the issues in the extradition proceedings following their concession that the "air of reality" test had been met. They then proceeded to disclose that information. It was only during a subsequent review, presumably by other Government personnel, that the claims of public interest immunity under section 38 were raised. Indeed, counsel states that until the documents were filed in these

proceedings the only inadvertent disclosure of which he had been made aware concerned the October 2004 briefing note released to *The Globe and Mail*.

[115] The Attorney General submits that there is no evidence that the Crown ever intended to waive the privilege that attaches to the information. At the time the documents were disclosed to the applicant, the statutory prohibition imposed by subsection 38.02 (1) had not yet come into existence with respect to the information at issue. In those circumstances, it is submitted, the Crown could not be said to have waived a privilege which had not yet crystallized. In the decisions taken under section 38.03, the Attorney General confirmed the statutory prohibition and confirmed that there had been no intention to waive privilege.

[116] The applicant contends that the circumstances of this case are different from those in *Khawaja I* as in that case it was clear that mistakes had been made in redacting documents in the disclosure process. Having dealt with both cases I see no real difference, apart from the fact that the quantity of material in *Khawaja* was considerably larger. Both cases illustrate that there are systemic difficulties in asserting section 38 claims where voluminous disclosure is being made and the public interest requires a thorough review of the material. There are a limited number of people who can do this work. Despite efforts to be consistent, mistakes will be made and information redacted in one document may be disclosed in another. Counsel for the Attorney General filed a table of concordance with the Court that demonstrates that the information in each of the claimed inadvertent disclosures had been consistently redacted in other documents. I am satisfied, therefore, that there was no informed waiver in these circumstances.

[117] I see no reason in this case to depart from the conclusion I reached in *Khawaja I* that the three stage test should be applied to any information in respect of which notice is served on the Attorney General even belatedly. In reviewing the unredacted pages containing this information in the present case, it is clear that much of it consists of internal administrative information such as telephone or fax numbers or identifies the names and phone numbers of agency personnel. There are several references to the investigation of another individual. That information would not be of assistance to the applicant. It was properly redacted in other documents and I am satisfied that the failure to do so in this case was inadvertent oversight.

[118] However, I see no practical purpose would be achieved at this time by requiring counsel for the applicant to destroy or return their copies of the unredacted inadvertent disclosures. These documents have remained in their possession for over a year without any apparent resulting harm to the protected national interests. I think it sufficient that the information not be further disclosed. There is some information in the list of inadvertent disclosures which counsel for the applicant indicated could be of assistance to his client. Those details are included in the summary which is to be provided to counsel and may be used in the extradition proceedings.

CONCLUSION

[119] With regard to most of the information at issue in these proceedings, I am satisfied that the risk of injury has been established by the Attorney General. In balancing the public interests, I conclude that the interest in disclosure outweighs that of non-disclosure. I will exercise my discretion pursuant to subsection 38.06 (2) of the Act to authorize disclosure of the relevant information in the form of a summary to be used solely for the purposes of the extradition hearings. A separate Private Order to that effect will be issued to counsel for the parties with the summary attached as an annex.

[120] The information contained in the October 20, 2004 briefing note to the Commissioner of the RCMP is relevant to the underlying extradition proceedings. I am not satisfied that the Attorney General has met his onus to establish that disclosure of the information would cause injury to Canada's national security or international relations. Flowing from that conclusion, I do not believe that it is necessary to impose conditions to limit any injury that could possibly result to the protected interests. I will, therefore, exercise my discretion to authorize disclosure of that information without conditions.

[121] The applicant seeks his costs for this application. There has been no request for the payment of the costs of *The Globe and Mail*. The Attorney General has been directed to pay the reasonable fees and disbursements of the *amicus curiae* as there is no other readily accessible source of funds for that purpose. Apart from that obligation, an award of costs is within the discretion of the Court.

In section 38 proceedings, the Attorney General performs an important public function imposed by Parliament. While I have concerns about the length of time that it took to complete the review of the material for disclosure purposes, I accept that this was a function of the sensitivity of the information and insufficient resources. I note further that Crown counsel voluntarily undertook to make disclosure beyond the scope of the requesting state's Record of the Case when they recognized that there was an "air of reality" to the applicant's claims. In those circumstances, I will make no costs award.

ORDER

THIS COURT ORDERS THAT:

1. Pursuant to paragraph 38.02 (2) (b) of the Act, these Public Reasons for Order and Order shall be released to the Attorney General of Canada on the date of issuance, and the same shall be released to counsel for the applicant and to the public upon the expiry of the period for appeal provided in sections 38.09 and 38.1 of the Act;
2. The prohibition on disclosure of the information contained in RCMP document 1008, an October 20, 2004 briefing note to the Commissioner, is not confirmed and disclosure of that information is authorized unconditionally pursuant to subsection 38.06 (2) of the Act;
3. A summary of the other relevant information about which notice was given to the Attorney General in this matter shall be disclosed subject to conditions in the form of an Annex to Private Reasons for Order and Order which will be issued solely to counsel for the parties;
4. Subject to the foregoing exceptions, the information specified as “inadvertent disclosures” in a list filed with the Court on February 11, 2008, shall not be further disclosed by counsel for the applicant;
5. Counsel for the applicant may retain their unredacted copies of the “inadvertent disclosures” for the purpose of preparing for the extradition hearing but shall not disclose the information further except as it is summarized in the Annex to the Private Order to be issued in this matter;

6. The Court shall remain seized of this matter pending the outcome of the extradition proceedings and counsel for the parties may seek clarification of these Public Reasons for Order and Order at any time in writing with notice to the other party;
7. The Court Records relating to the hearing shall be kept in a location to which the public has no access pursuant to subsection 38.12 of the Act; and
8. The Order of January 15, 2008 shall continue in effect respecting the payment of the reasonable fees and disbursements of the *amicus curiae*; apart from that, the parties shall bear their own costs.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**DES-3-07**
STYLE OF CAUSE:	**ABDULLAH KHADR –v- ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	Ottawa. Ontario
DATE OF HEARING:	**Ex parte / In Camera hearing dates** January 23. 24. 25. 29, 30, 2008 February 11, 12, 2008 March 7, 20. 2008 **In Camera hearing dates** February 21, 22, 2008
REASONS FOR ORDER:	MOSLEY J.
DATED:	April 29, 2008

APPEARANCES:

Mr. Nathan J. Whitling Mr. Dennis Edney	FOR THE APPLICANT
Mr. Robert MacKinnon Ms. Marie Crowley	FOR THE RESPONDENT
Mr. P. M. Jacobsen	FOR THE GLOBE AND MAIL
Mr. L. Shore, Q. C.	AMICUS CURIAE

SOLICITORS OF RECORD:

	FOR THE APPLICANT
Parlee McLaws, LLP Edmonton Alberta	
John H. Sims, QC Deputy Attorney General of Canada	FOR THE RESPONDENT
Mr, Peter M. Jacobsen Bersenas Jacobsen Chouest Thomson & Blackburn Toronto Ontario	FOR THE GLOBE AND MAIL
Mr. L. Shore, Q. C. Shore Davis Hale Ottawa Ontario	AMICUS CURIAE

#1838

The Law of Privilege in Canada

Volume 1

Robert W. Hubbard
L.S.M., B.A. (Hon.), M.A., LL.B.
Susan Magotiaux
B.S.W., M.S.W., LL.B.
Suzanne M. Duncan
B.A., LL.B., LL.M.

347.

3.10 SUMMARY OF PUBLIC INTEREST PRIVILEGE

Public interest privilege recognizes that information should not be disclosed when its disclosure would be contrary to the "public interest". In gauging what is in the public interest, however, there is often competition between the public interest in obtaining disclosure and the public interest in resisting disclosure. Inevitably, public interest privilege requires a balancing of competing values and interests. Because there are many types of information that deserve protection, public interest privilege provides a broad umbrella to shelter various types of confidential information.

Several statutory provisions provide protection against disclosure in the name of the public interest. Often, these statutory manifestations of public interest privilege set out a substantive rule, including a threshold that must be met to obtain the protection of the privilege. Frequently, the statutory schemes also provide specific procedures by which privilege can be requested, obtained or denied, including appeal provisions. In effect, some statutory provisions constitute a complete code of public interest privilege. Sections 37 and 38 of the *Canada Evidence Act*[1] are illustrations of statutory public interest provisions. Public interest privilege can, however, also be invoked as a common law rule. This chapter deals with s. 37 and the common law rule protecting similar public interests. The following chapter deals with s. 38 of the *Canada Evidence Act*.

While ss. 37 and 38 are dealt with in separate chapters, the interests protected by these statutory provisions are very similar. Indeed, the procedures set out in the two sections protecting public interest privilege are virtually identical. This is no coincidence, for the sections have a mutual genesis. To gain a full appreciation for the public interests protected by ss. 37 and 38, the sections should be read together.

Unlike class privileges such as informer privilege and solicitor-client privilege, discussed in Chapters 2 and 11, respectively, public interest privilege is not an absolute privilege: public interest privilege usually involves a weighing of the competing public and private interests that warrant secrecy on the one hand and disclosure on the other. Invoking public interest privilege inevitably means that a court must resolve the issue whether something should remain confidential by balancing the factors for and against disclosure. The factual and legal context in which the weighing process takes place determines the result.

1 R.S.C. 1985, c. C-5.

Not everything that falls within a confidential information category can be protected under the *Canada Evidence Act* or under the common law.

(*The next page is* 3-3)

Simply because the government *prefers* that documents remain confidential is not enough to protect documents or information from disclosure.

3.20 KEY POINTS TO REMEMBER CONCERNING THE PUBLIC INTEREST PRIVILEGE RULE

The following are the key points to remember about the privilege directed at maintaining the secrecy of information in the "public interest":

- Public interest privilege is specifically protected by s. 37 of the *Canada Evidence Act*.
- Public interest privilege is also protected by the common law.
- When s. 37 of the Act is invoked, the determination of whether something should remain undisclosed is left to the superior court of the province or the Federal Court.
- Invoking s. 37 of the Act in inferior courts such as the provincial courts inevitably means transferring the determination to another court. This leads to delay and fragmentation of the proceedings.
- However, common law public interest privilege can be determined by a court at any level; therefore, to avoid delays in inferior courts, for instance, during preliminary inquiries, invoking common law protection of public interest privilege is often more expeditious.
- If the inferior tribunal makes a wrong determination under the common law, s. 37 can still be invoked to protect against wrongful disclosure.
- Whether under s. 37 of the Act or under the common law, public interest privilege protects against disclosure in a variety of contexts such as the protection of police ongoing investigations, investigative techniques and informers.
- Both s. 37 of the Act and common law public interest privilege involve a weighing by the court of the factors for and against disclosure.
- Public interest privilege, whether protected under s. 37 or the common law, is not a class privilege: it involves a contextual analysis that must be applied on a case-by-case basis.

3.30 THE NATURE AND PURPOSE OF PUBLIC INTEREST PRIVILEGE

In *Bisaillon v. Keable,* the Supreme Court defined the essence of public interest privilege as lying "either in national security or in the effective conduct of government".[2] Public interest privilege involves a claim by government or an official that information should be kept secret.

There is usually a tension between the interests in revealing and in protecting information in state hands. The Supreme Court has noted:[2a]

2 *Bisaillon v. Keable* (1983) 7 C.C.C. (3d) 385, at p. 414, [1983] 2 S.C.R. 60.

> Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.

Which interest predominates in a particular case is often a tough call.

The public interest privilege protected by s. 37 of the *Canada Evidence Act* and informer privilege should not be confused. Informer privilege is a class privilege distinct from the category of public interest privilege.[3] While informer privilege serves the public interest, it must not be mistaken as part of public interest privilege. In *Bisaillon v. Keable*, the court stated:[4]

> The secrecy rule regarding police informers' identity has been confused with Crown privilege, but this in my view is a mistake.
>
> The reason for the mistake may be that the secrecy rule regarding police informers' identity and Crown privilege have several points in common: in both cases relevant evidence is excluded in the name of a public interest regarded as superior to that of the administration of justice; in both cases the secrecy cannot be waived; finally, in both cases it is illegal to present secondary proof of facts which in the public interest cannot be disclosed. However, these *points in common should not be allowed to hide the specificity of the set of common law provisions applicable to secrecy regarding police informers' identity, which distinguishes it from the set of rules governing Crown privilege.*

Informer privilege and public interest privilege are also distinguished because of the procedures involved in connection with the two privileges.[5] While informer privilege is a class privilege that can be invoked merely because a confidential informer is involved, public interest privilege is dependent on affidavit or other evidence establishing the government interest in withheld information. Moreover, in determining questions of public interest, the court examines the contested evidence to analyze whether its production would be contrary to the public interest: no similar production or examination is required with informer privilege. The court in *Bisaillon v. Keable* stated:[6]

> In addition, the kind of secrecy affects procedure. There is no question of a sworn statement by the Minister involved as a basis for secrecy regarding police informers' identity. There is also no question of the court itself examining what is secret to decide whether it should be disclosed, or for example inspecting a list of informers to determine whether producing it would be contrary to the public interest.
>
> . . . . .
>
> The Crown has a vast store of information and its interest in keeping this secret may be infinitely variable depending on the type of information or documents and their content. There are cases in which the information is not confidential or

2a *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety and Security)* (2010), 255 C.C.C. (3d) 545, 319 D.L.R. (4th) 385 (S.C.C.), at para. 1.

3 *Bisaillon v. Keable, supra.*

4 *Supra*, at p. 414 (emphasis added).

5 *Bisaillon v. Keable, supra.*

6 *Supra*, at pp. 414-15.

> its confidential nature is of minor importance from the standpoint of the public interest. There are cases in which the public interest obviously demands secrecy; and there are borderline cases. The common law allows a member of the executive to make the initial decision; if he decides in favour of secrecy and states his reason for doing so in a sworn statement, the law empowers the judge to review the information and in the last resort to revise the decision by weighing the two conflicting interests, that of maintaining secrecy and that of doing justice.

In connection with claims of public interest privilege, a judicial officer must balance the competing interests for and against disclosure. This

(*The next page is* 3-5)

balancing occurs in the context of a specific case. There is no such balancing in respect of informer privilege. If informer privilege is at stake, the law has decided that this is a class of privilege "which it is in the public interest to keep secret, and that this interest will prevail over the need to ensure the highest possible standard of justice".[7]

In *Carey v. Ontario*,[8] the Supreme Court accepted that the public interest in non-disclosure is not a Crown privilege but a public interest immunity, therefore, the resolution of the disclosure issue involves a weighing process by the courts. The court in *Carey* stated:[9]

> *The public interest in the non-disclosure of a document is not, as Thorson J.A. noted in the Court of Appeal, a Crown privilege. Rather it is more properly called a public interest immunity, one that, in the final analysis, is for the court to weigh.* The court may itself raise the issue of its application, as indeed counsel may, but the most usual and appropriate way to raise it is by means of a certificate by the affidavit of a Minister or where, as in this case, a statute permits it or it is otherwise appropriate, of a senior public servant. *The opinion of the Minister (or official) must be given due consideration, but its weight will vary with the nature of the public interest sought to be protected. And it must be weighed against the need of producing it in the particular case.*

3.40 SECTION 37 OF THE *CANADA EVIDENCE ACT*

Section 37 is a statutory codification of public interest privilege. Section 37 contains both a substantive rule of privilege and a procedure by which the privilege can be invoked. Section 37 is set out in full in Appendix A.

3.40.10 The History of Section 37 of the *Canada Evidence Act*

Because the history of s. 37 is intertwined with the history of ss. 38 and s. 39, Chapters 4 and 5 dealing with these other sections should be examined. In *Babcock v. Canada (Attorney General)*, the Supreme Court observed:[10]

> Sections 37, 38 and 39 of the *Canada Evidence Act* deal with objections to the disclosure of protected information held by the federal government. *Section 37 relates to all claims for Crown privilege, except Cabinet confidences, or confidences of the Queen's Privy Council*; s. 38 pertains to objections related to international relations or national defence; and s. 39 deals with Cabinet confidences. *Under ss. 37 and 38, a judge balances the competing public interests in protection and disclosure of information.* Under s. 39, by contrast, the Clerk or minister balances the competing interests. If the Clerk or minister validly certifies information as confidential, a judge or tribunal must refuse any application for disclosure, without examining the information.

Section 37 along with ss. 38 and 39 can be traced back to s. 41 of the 1972 *Federal Court Act*.[11] Since the advent of s. 36.1 of the *Canada Evidence Act*

7 *Bisaillon v. Keable*, *supra*, at p. 386 (headnote).
8 (1986), 30 C.C.C. (3d) 498, [1986] 2 S.C.R. 637.
9 *Supra*, at pp. 510-11 (emphasis added).
10 [2002] 3 S.C.R. 3, 3 C.R. (6th) 1, at para. 17 (emphasis added).
11 *Federal Court Act*, R.S.C. 1970, Chap 10 (2nd Supp.) proclaimed in force August 1, 1972 (S.C. 1970-71-72, c. 1, s. 41).

process or in furtherance of an abuse of process".[139g] In this case, there was insufficient evidence for the court to determine that the Crown was deliberately delaying the civil action for an abusive purpose. The fact of the delay (which was not only the Crown's delay) was not in and of itself evidence of the allegation that the Crown was purposely delaying the case.

11.200 COMMON INTEREST EXCEPTION

The common interest exception to solicitor-client privileged information originated in the context of two parties jointly consulting one solicitor. The Ontario Court of Appeal in *R. v. Dunbar* stated:[140]

> The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication: see 8 *Wigmore on Evidence*, (McNaughton Rev.), p. 603; *McCormick on Evidence*, 2nd ed., p. 189; *Phipson on Evidence*, 12th ed. (1976), p. 247; Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974), p. 167.

For an example of joint retainer, see the case of *Sawdon Estate v. Watch Tower Bible and Tract Society of Canada*,[140a] where the Estate Trustee and the children of the deceased agreed to the joint retainer of a law firm. There was an issue of unreported income from a holding company in the Cayman Islands that was voluntarily disclosed to CRA by the Estate Trustee. The children each owned 5% of the holding company and voluntary disclosure to CRA was made on their behalf as well. Legal advice on this issue to both the Estate and the children was provided by the same law firm. In a motion by the Bible and Tract Society, who along with the Estate Trustee and the children were beneficiaries, for production of the law firm's documentation for the purpose of assessing the reasonableness of the actions of the Estate Trustee, and the fees paid by the Estate, the Estate Trustee objected on the basis of privilege to disclosing the documentation that related to the children's financial affairs. The court rejected this argument on the basis that there was no privilege or confidentiality among beneficiaries because the Estate Trustee was entitled to all the documentation from the law firm related to the voluntary disclosure, and the beneficiaries were all entitled to all of the documentation in possession of the Estate Trustee.

Significant consequences of a finding of joint retainer were felt in the case of *Boreta v. Primrose Drilling Ventures Ltd.*[140b] An application was brought by the plaintiff, VB, for an order for further disclosure of all relevant

139g *Supra*, footnote 139e, at para. 30.
140 (1982), 68 C.C.C. (2d) 13, at p. 37, 138 D.L.R. (3d) 221 (Ont. C.A.).
140a (2010), 61 E.T.R. (3d) 132,191 A.C.W.S. (3d) 13571 (Ont. S.C.J.).
140b (2010), 96 C.P.C. (6th) 164, 189 A.C.W.S. (3d) 643 (Alta. Q.B.).

material in their possession. VB was a creditor, officer and shareholder of Primrose Drilling, one of the defendants and JB, another of the defendants was also an officer of the company and VB's brother. McRory, yet another defendant, was a solicitor who was retained in 1992 and acted as solicitor for Primrose Drilling until 2006. VB was suing Primrose and the other defendants for oppressive conduct. VB claimed he was entitled to all documents possessed by McRory because he had instructed him as legal counsel and received legal advice from him. The court agreed, saying that VB was entitled to the documentation as an officer of the company and the fact that he was now in an adversarial position with the company did not disentitle him from viewing the documentation. McRory therefore was required to disclose all material and relevant documents in his possession, including those over which solicitor client privilege was claimed as a result of his legal advice to the company when he was practising law at the law firms.

The court in *General Accident Assurance Co. v. Chrusz* noted that the general principle of common interest was first enunciated by Lord Denning in *Buttes Gas and Oil Co. v. Hammer (No. 3)*:[141]

> "There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsels' opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.
>
> "In all such cases I think the courts should, for the purposes of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged."

For common interest to exist, the parties must share a common goal, seek a common outcome or have a selfsame interest. Common interest privilege has been applied in relation to reports of experts, as well as lawyers' opinions written for the purpose of corporate transactions and other contentious matters, even before the thought of litigation arises.

141 [1980] 3 All E.R. 475, at pp. 483-4, cited *in General Accident Assurance Co. v. Chrusz* (1999), 180 D.L.R. (4th) 241 at p. 261, 45 O.R. (3d) 321 (C.A.).

Where legal opinions are shared by parties with mutual interests in a commercial transaction, there is sufficient interest in common to extend the common interest privilege to the disclosure of opinions obtained by one of them to the others in the group, even in circumstances where no litigation is in existence or contemplated.[141a] Courts have held that commercial transactions can benefit from the uninhibited exchange of legal opinions among parties allied in interest. In *Maximum Ventures Inc. v. De Graaf*,[141b] the plaintiff sought production of a draft opinion letter prepared by the defendants in the course of negotiations between the successor to the plaintiff and the defendant, arising out of the sale of mining properties in Mongolia. The opinion was disclosed during discussions and meetings with solicitors. The solicitor for the defendant and the solicitor for the bank did not have the identical interest but financing the project was of common interest to all of them, and sharing the opinion was in aid of a due diligence investigation of the Maximum litigation. There was sufficient common interest to support the extension of the privilege.

As noted by the Supreme Court in *Pritchard v. Ontario (Human Rights Commission)*,[142] common interest privilege has narrowly expanded to cover situations in which a fiduciary or like duty has been found to exist between the parties so as to create a common interest. These situations include trustee-beneficiary relations, contractual obligations or agency relations.[142a]

In *Hospitality Corp. of Manitoba Inc. v. American Home Assurance Co.*,[143] the court reviewed principles set out in a number of decisions on common interest privilege in concluding that a letter written by a law firm to its client — an intervenor in the case and intended defendant — was not protected by common interest when it was provided to the defendant, American Home Assurance. The applicable principles were:

- the common interest must already be established at the time at which the information at issue is provided;[144]
- the common interest can exist even if there is some issue outstanding between the parties;[145]

141a *Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4th) 747, [2003] 3 C.T.C. 98 (F.C.T.D.), referred to in *Maximum Ventures Inc. v. de Graaf* (2007), 160 A.C.W.S. (3d) 770, 2007 BCSC 1215, affd 409 W.A.C. 214, 163 A.C.W.S. (3d) 40 (C.A.).

141b *Supra.*

142 (2004), 238 D.L.R. (4th) 1, [2004] 1 S.C.R. 809.

142a See *Allen v. Royal Canadian Legion* (2010), 943 A.P.R. 22, 195 A.C.W.S. (3d) 934 (S.C.), in which the court found that a fiduciary relationship sufficient to create a common interest exception had not been established between a local branch of the Royal Canadian Legion and the Dominion Command of the Royal Canadian Legion.

143 [2003] 3 W.W.R. 103, 169 Man. R. (2d) 123 (Q.B.), affd [2006] 5 W.W.R. 243, 184 Man. R. (2d) 133 (C.A.).

144 *Archean Energy Ltd. v. M.N.R.* (1997), 202 A.R. 198, [1998] 1 C.T.C. 398 (Q.B.); *Almecon Industries Ltd. v. Anchortek Ltd.* (1998), 85 C.P.R. (3d) 30, [1999] 1 F.C. 507 (T.D.); *YBM Magnex International, Inc. (Re)* (1999), 75 Alta. L.R. (3d) 99, 252 A.R. 165 (Q.B.).

145 *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2001), 6 C.P.C. (5th) 281, 103 A.C.W.S. (3d) 477 (Ont. S.C.J.), affd 55 O.R. (3d) 794, 149 O.A.C. 337, *sub nom. Royal Trust Corp. of Canada v. Fisherman* (C.A.); *YBM Magnex International Inc., supra.*

- the legal advice sought to be protected by common interest must be relevant to the claim of the parties claiming the common interest, not just the one party.[146]

The facts of the case were as follows: Hospitality Corp. bought property owned by Household. Hospitality Corp. claimed the property was damaged and sued Household's insurer, American Home. Hospitality Corp. also stated it intended to sue Household as the seller in a different action. It hoped that Household would assign its insurance policy with American Home to it. The legal opinion written after a meeting between Household and American Home stated that there was no obligation by Household to provide an assignment of the insurance policy. No common interest was found because the legal opinion was written at a time at which Household was not yet prepared to give an assignment of the insurance policy to Hospitality Corp. and the parties had not yet agreed to co-operate in the defence of the claims. The letter in fact was written in an attempt to persuade American Home to co-operate with Household. At the time the letter was sent, there was a serious and fundamental issue outstanding between the parties. If Household had followed the advice of its lawyer, then it would have had to sue American Home. Finally, the advice given was only relevant to the interests of Household, not American Home.

Common interest privilege can be lost in a situation in which the parties sharing the common interest then become embroiled in litigation against one another. Courts have held that the controversy must be elevated to that level of dispute in order for privilege to be inapplicable.[147] See for example *Peters v. Paterson*,[147a] in which an attempt to protect communications between two sets of defendants in a personal injury action arising out of a collision between a motorboat and a windsurfer was denied as a result of a third party notice that was issued by one of the defendants. The allegations set out in that notice demonstrated a severing of the commonality of interest of the defendants and therefore no common interest privilege could be maintained.

Common interest privilege does not exist between a corporate entity and its individual officer or employee who receives the legal advice when that advice is confined to the corporate entity's legal position. In *Van Der Wolf v. Allen*,[147b] the plaintiff in the litigation alleged defamatory comments by the defendant who was the former Mayor of the village of Harrison Hot Springs. The village was not a defendant in the action. The Mayor retained copies of part of a solicitor's letter received while he was Mayor. He sought production of the emails surrounding the request to the solicitor, the request to the solicitor and the complete response from the solicitor from the village, on the basis that he and the village held a joint interest in the instructions to

146 *Archean Energy Ltd. v. Canada (Minister of National Revenue)*, *supra*, footnote 144; *Almecon Industries Ltd. v. Anchortek Ltd.*, *supra*, footnote 144.

147 *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13, 138 D.L.R. (3d) 221 (Ont. C.A.).

147a [2010] B.C.J. No. 277 (QL), 186 A.C.W.S. (3d) 367 (S.C.).

147b (2008), 170 A.C.W.S. (3d) 718, [2008] B.C.J. No. 1476 (QL) (S.C.).

the earlier litigation. He was not represented by counsel and the only record of the interview was the notes of counsel for the defendant. The plaintiff sought production of the notes. The court agreed they should be disclosed, noting that the factual information obtained during the interview was not privileged. The court recognized that there could be notes of counsel that contained observations, annotations or editorial comments and was prepared to entertain an application for redaction of such comments.

In *Lytton v. Alberta*,[157] the defendant claimed privilege over a report prepared by a third party, Maclean Management Consulting Services Alberta. The defendant claimed that the dominant purpose of the report was the compilation of information related to contemplated litigation on the issue of sterilization. Following the principles set out in *Breau v. Naddy*[158] and *Moseley v. Spray Lakes Sawmills (1980) Ltd.*,[159] the court held that no facts in the report could be disclosed. The combination and choice of individual facts if released could reveal patterns and privileged information. The facts in the report could reveal the defendant's underlying method, analysis, approach or strategy. Therefore, given the purpose of the report, the facts in the report constituted work product privilege.

12.240 COMMON INTEREST PRIVILEGE

In *General Accident Assurance Co. v. Chrusz*,[160] it was noted by Carthy J.A. that "a document in the hand of an outsider will only be protected by a privilege if there is a common interest in litigation or its prospect." The

(*The next page is* 12-50.13)

157 (1999), 245 A.R. 290, [1999] A.J. No. 457 (QL) (Q.B.).
158 (1995), 133 Nfld. & P.E.I.R. 196, 57 A.C.W.S. (3d) 553 (P.E.I.S.C.).
159 (1996), 135 D.L.R. (4th) 69, 122 W.A.C. 101 (Alta. C.A.).
160 (1999), 180 D.L.R. (4th) 241 at p. 261, 45 O.R. (3d) 321 (C.A.).

general principle was first enunciated by Denning L.J. in *Buttes Gas and Oil Co. v. Hammer (No. 3)*:[161]

> There is a privilege which may be called a "common interest" privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsels' opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.
>
> In all such cases I think the courts should, for the purposes of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.

The *Buttes* decision was confirmed in the case of *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*.[162] In that case, the plaintiff moved for production of Royal Bank of Canada ("RBC") documents, as there were communications between RBC and Scotiabank at the operative time and a transfer of the funds in question from Scotiabank to RBC. Privilege was claimed on the basis that the communications were made for the purpose of legal advice, or that the dominant purpose of the communications was the litigation between Scotiabank and the plaintiff or RBC and the plaintiff. The court held that the documents were subject to common interest privilege. RBC had agreed to indemnify Scotiabank and was liable for loss or damage suffered by the plaintiffs by reason of the indemnity. RBC had an independent claim against the plaintiffs that arose from the same facts and involved many of the same issues. Common interest privilege was not

161 [1980] 3 All E.R. 475, at pp. 483-84, [1981] Q.B. 223 (C.A.). Canadian authorities which have dealt with common interest privilege in different contexts include: *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research)* (1995), 60 A.C.W.S. (3d) 485, [1995] O.J. No. 4148 (QL) (Gen. Div.); *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*, [1998] 10 W.W.R. 633 (Alta. Q.B.); *Archean Energy Ltd. v. M.N.R.* (1997), 202 A.R. 198 (Q.B.); *Lehman v. Insurance Corp. of Ireland*, [1984] 1 W.W.R. 615 (Man. Q.B.); *Maritime Steel and Foundries Ltd. v. Whitman Benn & Associates Ltd.* (1994), 114 D.L.R. (4th) 526 (N.S.S.C.); *Almecon Industries Ltd. v. Anchortek Ltd.* (1998), 157 F.T.R. 231 (T.D.), affd [1999] 1 F.C. 507 (T.D.); *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.).

162 (2004), 133 A.C.W.S. (3d) 611, [2004] B.C.J. No. 1865 (QL) (S.C.).

waived by the production of otherwise privileged documents to a third party where the parties amongst whom the documents are shared have a common interest.[163] The voluntary production of non-privileged documents to the plaintiff did not entitle the plaintiff to the production of RBC's privileged documents.

In *Holman v. Nguyen*,[164] the court held that no common interest existed between the defendant insurer and the individual defendant in a previous action and the same defendant insurer and a different individual defendant in a new action. Specifically, the Insurance Corporation of British Columbia ("ICBC") defended a motor vehicle collision personal injury claim by the plaintiff in an earlier action, on behalf of B. The plaintiff sued again in a second action arising out of another collision with a different defendant, N. ICBC again defended. The adjusters for ICBC gave the defendant N's solicitor in the second action a document (summary of examination for discovery of the plaintiff from the first action) in their possession from the first action. The defendant B from the first action had absolutely no interest in the current litigation against N. The only element in common was the fact the ICBC was the defendant in both actions. This was insufficient to establish common interest privilege.

An oft-referenced case in the area of common interest privilege is that of *Supercom of California Ltd. v. Sovereign General Insurance Co.*[165] Supercom claimed recovery of a $1 million loss through theft from its insurer, Sovereign. Sovereign denied coverage and Supercom sued for breach of contract. In the meantime, Sovereign had claimed privilege over 16 adjusters' reports and attached investigation reports that had been submitted to a non-profit organization, Investigation Crime Prevention Bureau ("ICPB"). ICPB's services to the insurance industry included maintaining a computerized national database of insurance loss information from reports submitted by members. An investigator could only refer or rely on a report submitted to the ICPB if he or she was conducting an investigation for the company that had submitted the report or unless the insurer had granted permission for it to be used in investigations. If fraud was involved, then the ICPB retained the report for 10 years. Supercom sought production of all the reports Sovereign had submitted to the ICPB.

The court had to determine whether Sovereign's act of forwarding the reports to the ICPB constituted a waiver of privilege. ICPB and Sovereign maintained that there was no waiver because they enjoyed a common interest. That common interest, they argued, extended to all ICPB members, who were insurance companies fighting the plague of potential insurance fraud by the plaintiffs and others. Their shared common interest was the protection of the values and goals of our society and ensuring insurance

163 *Home Depot of Canada Inc. v. Ladner Downs, Borden Ladner Gervais LLP* (2003), 22 B.C.L.R. (4th) 348, 43 C.P.C. (5th) 299 (S.C.).

164 [2000] B.C.J. No. 2535 (QL), 2000 BCSC 1915.

165 (1998), 37 O.R. (3d) 597, 1 C.C.L.I. (3d) 305 (Gen. Div.).

premiums were maintained at a reasonable level, for honest members of the public. The court did not accept this argument. It noted that there were four or five different insurers representing defendants and third parties who, while forming a united front in fighting the plaintiff's claim, were in fact adverse in interest not far below the surface because they would be fighting each other to determine who was responsible. The requisite dynamic of a shared common front or interest fundamental to a finding of common interest privilege was not present on the facts of this case. To find a common interest privilege among the ICPB and all its members would be a quantum leap from the extent of common law privilege developed to date.

The court also found on a public interest basis there was no reason to extend the common interest privilege to the defendants. Wilson J. wrote:[166]

> It would, in my view, be contrary to the interests of our adversary system to grant to the powerful insurance industry the rights and the advantage of freely pooling information to ICPB investigators without the obligation of advising the plaintiff of the nature of the information received. To do so would create a very uneven playing field. The principles of waiver of privilege are well founded. A litigant cannot take a position inconsistent with privilege and maintain the privilege. To extend the principles of common interest to the ICPB and its members in the insurance industry would be a quantum leap from the limited extent of common interest privilege developed to date in the case-law.
>
> I do not accept that disclosure of either the information on the computer database or the investigative reports will encourage or benefit those who do commit insurance fraud. The disclosure of documentation is made in the context of a court proceeding and is subject to scrutiny and control by the courts. The ICPB materials disclose that the question of whether the information on the ICPB database ought to be regulated and made public through a government run database was considered in 1988. There was opposition to having the ICPB database readily available to members of the public as it may impact upon the free exchange of information between the ICPB and the police or fire marshal. There is a significant difference between a public database and specified disclosure made in the context of a specific case.
>
> I conclude that the principles of common interest privilege ought not to be extended to apply to the ICPB and its member insurers. To do so would provide the powerful insurance industry with a potentially unfair advantage in the adversarial process. Improper methods or tactics contrary to fundamental principles of fairness may be allowed to flourish, without check, denigrating our legal system. A trial judge or jury may make a decision unaware of the true underlying facts. It is a deeply ingrained value of our justice system in criminal law that the ends do not justify the means. There must be continuity of these principles in civil litigation to protect the integrity of the system. I conclude that the extension of common interest privilege suggested by the ICPB is a broad one that is contrary to both the public interest and the increasing trend for early, complete and full disclosure in civil litigation.

The issue of common interest of parties in the context of a subrogated action was reviewed in the case of *Whatman v. Selley*.[167] Citing the principle that litigation privilege is contextual and that the documents had to be

166 *Supra*, at pp. 616-67.

167 (2000), 99 A.C.W.S. (3d) 44, [2000] O.J. No. 3155 (QL) (S.C.J. Case Mgt. Master).

looked at in the context of that particular litigation, on inspection of the documents in issue, the court found that some were privileged and others were not. The court did not accept the argument of the defendants that because the subrogated insurer — in this case the Lawyers' Professional Indemnity Company ("LPIC") — was potentially adverse in interest to the plaintiffs in whose name the action was brought, all documents prepared in contemplation of litigation were privileged as between them. According to the defendants, any release of documents by LPIC to the plaintiffs for the purpose of litigation would be a waiver of privilege and could be accessed by the defendant in subrogated action. The court disagreed and held that this was the wrong question; a red herring. The appropriate question was whether materials over which privilege was claimed were materials prepared in contemplation of that specific litigation, and not a future or potential action that may have existed between insurer and insured. The court found that in this particular action, there was a community of interest between LPIC and the plaintiffs. In the context of the present action, they shared a common interest against a common adversary.

An interesting interpretation of common interest privilege was apparent from the case of *Home Depot of Canada Inc. v. Ladner Downs, Borden Ladner Gervais LLP*.[167a] The document over which privilege was claimed was a sworn witness statement, taken by the plaintiff in anticipation of the litigation. The plaintiff had paid $3 million to settle an earlier action. The plaintiff then sued its solicitors for negligence. The witness from whom the statement was taken had been a consultant to the plaintiff at the time of the transaction at issue. That witness was joined by the defendants as a third party on the ground that he approved the clause in the contract at issue.

All parties agreed that the statement would have been litigation privileged had it not been sworn. There was no clear direct authority in support of the argument that a sworn witness statement was automatically not privileged, but there was an acknowledgement by the court that courts appear to discourage the extension of privilege to this kind of document. However, the court found that even if the statement under oath was improper, it should not be sufficient to destroy the privilege, and also found in favour of privilege on the alternative ground of common interest. The witness' disclosure of the statement to his counsel did not constitute waiver, and at the time the statement was created, the plaintiff and the witness had a common interest, even though they were opposing parties at the time the request for production was made. This was a broad interpretation of common interest.

Another relatively broad interpretation of common interest is found in the decision of *Sauvé v. Insurance Corp. of British Columbia*,[168] Sauvé was injured in a motor vehicle accident in which one of the cars was operated by Bowles. Sauvé also believed that an unidentified driver was also at fault so

167a (2003), 22 B.C.L.R. (4th) 348, 43 C.P.C. (5th) 299 (S.C.).
168 (2010), 87 C.C.L.I. (4th0 104, 87 C.P.C. (6th) 217 (B.C.S.C.).

she claimed against the Insurance Corporation as well as Bowles. At issue were two adjusters' reports prepared at the request of the Insurance Corporation and in their possession, which they had disclosed to Bowles but which they refused to disclose to the plaintiff, on the basis of litigation privilege. The Insurance Corporation claimed it had a common interest with Bowles and thus privilege in the reports was not waived. The court reviewed the pleadings and noted that the Corporation denied there was an accident, but said the plaintiff was negligent for her injuries. Bowles admitted there was an accident, denied he was negligent and alleged the accident was caused by an unidentified driver and that the plaintiff was contributorily negligent. The court held that Bowles' two allegations were on an equal footing and the assertion that the plaintiff was negligent by both defendants was sufficient to constitute common interest.

It is generally accepted that the joint or common interest must exist at the time of the creation of the privileged communication. The Ontario Superior Court in *Shaw v. Shaw*,[168a] quoted from *Commercial Union v. Mander*:[168a.1]

> In a case where the documents contain legal advice that joint interest must exist at the time the advice is sought . . .

In *Genier v. CCI Capital Canada Ltd.*[168a.2] common interest privilege was considered in the context of a class action. James Wilson was an insurance broker who accepted money for investment from his clients and placed it with some of the defendants. The money disappeared and the action resulted. Mr. Wilson who could not afford to retain counsel maintained that he was also a victim of misconduct by some of the defendants. He swore an affidavit in support of the plaintiff's motion to have the action certified as a class action. Counsel for the plaintiff assisted him in drafting the affidavit and made notes of his meeting with Mr. Wilson. The court held that plaintiff's counsel's showing him the notes in order to verify accuracy and assist in drafting the affidavit did not amount to a waiver of litigation privilege. Mr. Wilson and the plaintiff had an interest in common in establishing the liability of the defendants and wanting the action certified as a class action. Counsel's intent to maintain confidentiality was demonstrated by his not giving a copy of the notes to Mr. Wilson. The court wrote:[168b]

> As noted in *United States v. American Telephone & Telegraph Co.*, "'common interests' should not be construed as narrowly limited to co-parties. So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of trial preparation efforts. Moreover, with common interests on *a particular issue* [emphasis added] against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary. When the transfer

168a [2009] O.J. No. 5280 (QL), 183 A.C.W.S. (3d) 388 (S.C.J.).
168a.1 Commercial Union v. Mander, [1996] 2 Lloyd's Rep. 640.
168a.2 (2008), 163 A.C.W.S. (3d) 209, [2008] O.J. No. 161 (QL) (S.C.J.).
168b *Supra*, at para. 18.

> to a party with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger."

There must be an underlying privilege established in order for a claim for common interest privilege to be made out. In *Marus v. Canaccord Capital Corp.*,[168c] the defendants, a terminated employee and the employer company, claimed common interest privilege over correspondence between the employee's counsel and the company, sought by the plaintiff client investors, who sued for damages for investment losses. The court held that even though the defendants had a common interest in litigation at the time the correspondence was exchanged, the exchange of information was not protected by solicitor-client or litigation privilege resulting in no common interest privilege.

The decision of the court in *Canmore Mountain Villas Inc. v. Alberta (Minister of Seniors and Community Supports)*,[168d] underscored the potential confusion that can arise between common interest privilege and the common interest exception to privilege.[168e] The context of the case was the commencement of proceedings against a number of parties, arising from an alleged deal concluded among the plaintiff, the Province and the Town of Canmore. The Province claimed common interest privilege over documents relating to communication between the Town and the Province about the proposed deal to transfer land from the Province to the Town. Both representatives of the Town and Province had sought legal advice on this issue and referenced the work product of counsel. The court held:[168f]

> The common interest privilege is not dependent on an interest shared by the parties in ongoing or anticipated litigation. Common interest privilege has broader application than that. It is not dependent upon the parties being engaged in an adversarial system and sharing a common interest. This notion was rejected by Lowry, J. in *Fraser Milner Casgrain, LLP and Minister of National Revenue*, [2002] 11 W.W.R. 682 (B.C. Supreme Court). At para. 13 and 14, the following is found:
>
> > "The respondent maintains that common interest privilege can only arise where there is a common interest in actual or anticipated litigation. The promotion of the adversary system is, it says, the only justifiable rationale."
> > "I cannot accept that to be so. To my mind, the economic and social values inherent in fostering commercial transactions merit the recognition of a privilege that is not waived when documents prepared by professional advisers, for the purpose of giving legal advice, are exchanged in the course of negotiations. Those engaged in commercial transactions must be free to exchange privileged information without fear of jeopardizing the confidence that is critical to obtaining legal advice."

The court found that common interest privilege applied because communications were clearly directed to completing the transaction between the

---

168c (2007), 161 A.C.W.S. (3d) 401, [2007] B.C.J. No. 1950 (QL) (S.C.).
168d [2009] A.J. No 606 (QL), 177 A.C.W.S. (3d) 931 (Q.B.).
168e See Chapter 11, Section 11.200, "Common Interest Exception".
168f *Supra*, at para. 8.

Town and the Province and the representatives confidentially discussed the transfer and took positions based on legal advice sought and given that would protect their respective interests.

This description by the court sounds closer to the common interest exception to solicitor-client privilege, even though the protection was claimed in the context of litigation and was called common interest privilege. This demonstrates the confusion between the two concepts that can sometimes result.

Where experts were retained by a joint venture for the purpose of pursuing litigation against a defendant, privilege attached to those documents and communications.[168f.1]

12.245 ACCESS TO INFORMATION AND PRIVACY AND LITIGATION PRIVILEGE

In *Ontario (Ministry of Correctional Services) v. Ontario (Information and Privacy Commissioner)*,[168g] the Divisional Court considered s. 19 of the Ontario *Freedom of Information and Privacy Act*,[168h] and its interaction with the common law of litigation privilege. The Ministry and the requester sought judicial review of decisions of the Information and Privacy Commissioner to disclose certain information to the journalist requester about allegations of physical and sexual misconduct by individuals employed in the Cornwall office of Correctional Services between 1975 and 1995. There was ongoing and anticipated litigation involving the Ministry, as vicariously liable for the alleged actions of its employees.

After confirming that the standard of review was that of correctness, the court held that s. 19 had two branches. The first branch incorporated solicitor-client privilege, while the second branch was a statutory privilege that protected from disclosure a record prepared for or by Crown counsel for use in giving legal advice or in contemplation of or use in litigation. The court held that this statutory privilege was like litigation privilege, except it was permanent; it did not end when the litigation ended. On this point, the court distinguished the Supreme Court's decisions in *Goodis*,[168i] where the argument was restricted to solicitor-client privilege and *Blank*,[168j] in which the court considered s. 23 of the federal Access to Information legislation,[168k] containing different wording.

In applying branch 2 of s. 19 to the records at issue, the court held that letters from opposing counsel listing undertakings, refusals and advisements

168f.1 *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.* (2011), 209 A.C.W.S. (3d) 799, [2011] A.J. NO. 1469 (Q.B.).

168g (2008), 290 D.L.R. (4th) 102, 89 O.R. (3d) 457 (S.C.J. (Div. Ct.)).

168h R.S.O. 1990, c. F. 31.

168i *Ontario (Ministry of Correctional Services) v. Goodis* (2006), 271 D.L.R. (4th) 407, [2006] 2 S.C.R. 32.

168j *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257, [2006] 2 S.C.R. 319.

168k *Access to Information Act*, R.S.C. 1985, c. A-1.