Civil Litigation -- Discovery -- Public Interest Immunity and State Papers

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Civil Litigation—Discovery—Public Interest Immunity and State Papers.—It is hardly an exaggeration to describe as revolutionary, the transformation in the attitude of the courts in Commonwealth jurisdictions to claims by government that documents should not be subject to discovery because of the detrimental effect that disclosure would have upon the ability of the public service to discharge its responsibilities. As readers of this Review will know, English courts for many years took the view that a certificate submitted in proper form, normally by the responsible Minister, objecting to discovery or to the admission of oral evidence was regarded as dispositive. In 1968, however, the House of Lords, in the landmark case of Conway v. Rimmer, asserted that the function of balancing the competing public interests in an effective public service and in the administration of justice was ultimately one for the courts. Set in its wider context, this decision was but an illustration, albeit a particularly striking one, of a newly found (or revived) judicial willingness to perceive in the conduct of the business of government legal issues suitable for determination by the courts. It narrowed the range of Executive discretion that was legally unreviewable. Just as the general intellectual tide on which Conway v. Rimmer was decided shows little signs of ebbing, so, in their most recent pronouncements, the House of Lords and the High Court of Australia have significantly weakened the barriers that had hitherto appeared to provide sturdy protection to some highly sensitive areas of governmental secrecy.

In both Burmah Oil Co. Ltd. v. Bank of England and Sankey v. Whitlam, discovery was sought of documents that belonged to

1 Courts have accepted affidavits sworn by senior officials in the department concerned to the effect that, having read the document, they consider that its disclosure would be against public policy: Crompton (Alfred) Amusement Machines Ltd. v. Commissioners of Customs and Excise (No. 2), [1974] A.C. 405; and see D. v. N.S.P.C.C., [1978] A.C. 171, where a claim for immunity was made on behalf of the Society, the party against which discovery was being sought.


3 [1979] 3 All E.R. 700.

classes of documents that Lord Reid in *Conway v. Rimmer* appeared to regard as immune both from the exercise of the power of the courts to inspect documents in respect of which "Crown privilege" was claimed, and from the balancing of interests. By the time that the *Burmah Oil* case reached the House of Lords, the issues had been narrowed to the disclosure of documents (or parts of documents) that contained minutes of meetings attended by senior officials of the Bank and of government departments, at some of which Ministers were present. In *Sankey's case*, a private prosecutor sought the production of documents that included the minutes of Cabinet meetings. It was contended that they might contain evidence that would establish the guilt of the respondents, the former Prime Minister and several members of his Cabinet, of, *inter alia*, conspiring to effect unlawful overseas borrowings in an attempt to avoid the Senate's refusal to approve the budget. In so far as the judgments in these cases mark important developments in the common law they may well influence the way in which Canadian courts balance the interests of openness of government and due process of law against the need for complete secrecy about the innermost workings of government.

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5 English judges now seem to have settled on "public interest immunity" as the term that most accurately describes the legal rule under consideration. However, in *Science Research Council v. Nasse*, [1979] 3 All E.R. 673, Lord Scarman made the point that one advantage of the old terminology was that it indicated that the scope of the doctrine was confined to "information the secrecy of which is essential to the proper working of the government of the state" (at p. 697). Their Lordships' opinions in *Nasse* make it clear that their decision in *D. v. N.S.P.C.C.*, supra, footnote 1, is very unlikely to be used as a springboard for any dramatic extension of the range of public interest considerations that will be found to justify immunity from discovery. See *British Steel Corporation v. Granada Television Ltd.*, *The Times*, May 8th, 1980 (internal management documents "leaked" by employee in breach of confidence, discoverable, despite inhibiting effect upon investigative journalism). This comment is confined to "class" claims for immunity, although the distinction between "contents" and "class", immunity may not be logically watertight.

6 The plaintiff had at one time sought disclosure of documents containing financial and economic information supplied to the government by City institutions and individual businessmen. Lord Salmon (at p. 713) thought that these documents would be immune, whereas Lord Edmund-Davies (at p. 717) was "not satisfied" that a claim could be made out. Both cited *D. v. N.S.P.C.C.*, ibid., to support these contradictory conclusions. See footnote 9, infra.

7 The Federal Court Act, 1970, R.S.C., 1970, 2nd supp., c. 10, s. 41(2) would appear to make a Minister's certificate conclusive if it alleges, *inter alia*, that discovery "would disclose a confidence of the Queen's Privy Council for Canada". It may be not totally without significance that in *Attorney General of Quebec v. Attorney General of Canada* (1979), 90 D.L.R. (3d) 161, at p. 185, Pigeon J. expressly did not decide the question of whether a court of general jurisdiction could ever go behind a certificate covering documents falling within any of the categories...
Moreover, the cases have provided the first opportunities since Conway v. Rimmer was decided for a careful consideration at the highest judicial level of the scope of immunity from discovery to which communications within the public service are entitled. In the litigation of the last few years courts have been more concerned with defining the circumstances in which public interest immunity may arise in respect of information supplied in confidence, or under statutory duty, to law enforcement agencies by persons outside the agency.

This comment is limited to the way in which claims for the disclosure of state papers are handled in civil litigation. Suffice it to say that the primacy generally afforded the interest of an accused person in defending himself from a criminal charge renders highly dubious the application to criminal proceedings the principles established in civil litigation. It may also be that the public interest specified in s. 41(2). It should be noted that policy documents per se are not included within s. 41(2); quaere whether the existence of a statutory list of documents that are specifically made immune from judicial inspection might induce a court to conclude that in all other cases it is entitled to balance the competing interests. See further Re Blais and Andras (1972), 30 D.L.R. (3d) 287 (discovery ordered of investigative report that contained neither information given in confidence by informers nor matter relating to general policy).

Cf., though, Attorney General v. Jonathan Cape Ltd., [1976] Q.B. 752, where Lord Widgery C.J. held that the publication by a Minister of details of Cabinet discussions could be enjoined at the instance of the Attorney General as a breach of confidence, although he held that on the facts of the instant case the public’s “right to know” how government worked outweighed any detrimental effect of disclosure.

See also Inuit Tapirisat of Canada v. Leger (1978), 95 D.L.R. (3d) 665, at pp. 675-676 (Fed. Ct, C.A.), where Le Dain J. held that the “duty to act fairly” did not require departmental submissions to Cabinet to be disclosed to a person petitioning for a review of a C.R.T.C. rate-setting decision. And see Gulf Oil Corporation v. Gulf Canada Ltd. (March 18th, 1980, S.C.C., as yet unreported), in which Burmah Oil was discussed and held inapplicable to a Minister’s objection, based on public policy, to the disclosure of documents to be used at trial before a foreign court and sought pursuant to letters rogatory.

E.g. Rogers v. Secretary of State for the Home Department, [1973] A.C. 388 (police informers); cf. the similar restriction imposed upon the duty of an administrative tribunal to disclose the material in its possession: R. v. Gaming Board of Great Britain, ex p. Benaim and Khaida, [1970] 2 Q.B. 417; Lazarov v. Secretary of State of Canada, [1973] F.C. 927. The decision in D. should be regarded as no more than a relatively minor extension by analogy from Rogers: see footnote 1, supra. See also Norwich Pharmacal Ltd. v. Commissioners of Customs and Excise, [1974] A.C. 133; Crompton (Alfred) Amusement Machines Ltd. v. Commissioners of Customs and Excise, supra, footnote 1. However, in Science Research Council v. Nassé, supra, footnote 5, the House of Lords held that the possibly inhibiting effects of court ordered disclosure of confidential reports kept by employers on their employees’ abilities and performance did not justify conferring an immunity from production if they were necessary for the fair disposition of a case or for saving costs.

See, for example, Conway v. Rimmer, supra, footnote 2, at pp. 966-967, 987; D. v. N.S.P.C.C., supra, footnote 1, at pp. 218, 232-233.
in ensuring that those charged with criminal misconduct in public office are seen to be subjected to a full trial, requires that claims by the accused or the Attorney General to withhold from the prosecution evidence of guilt should be examined with an even greater circumspection than is called for in civil proceedings.\textsuperscript{11}

The proceedings that reached the House of Lords in \textit{Burmah Oil Co. Ltd. v. Bank of England}\textsuperscript{12} arose on an interlocutory appeal out of an action in which Burmah claimed rescission of a contract of sale of its substantial holding in British Petroleum Co. Ltd. (BP) and of its interests in the North Sea oilfields. The Bank had paid a price for the shares that was somewhat below that being quoted on the stock exchange at the time. The price subsequently rose sharply. Burmah shareholders received no benefit from this increase in the value of the shares that the Bank had purchased. In addition to the price paid for these assets, the Bank also provided guarantees for certain of Burmah's debts on which the company was in danger of defaulting. Burmah's case was that the Bank, at the instigation of the government departments closely involved in the rescue operation being mounted by the Bank in order to stave off a collapse of the company and a request for foreign financial assistance, had unfairly taken advantage of its superior economic power, and that the terms of the contract were unconscionable and unfair.

At an earlier stage of the negotiations the Bank had proposed that Burmah and the Bank should share any profits arising from a resale by the Bank of the shares should their value rise after the date of the sale. Government Ministers later insisted that no such profit-sharing concession should be made to the company. It was plain from the documents disclosed by the Bank that Bank officials had considered the original terms to be fair, and that this view had been communicated to Burmah and to the government. Burmah sought discovery of the additional documents on the ground that they might contain statements by officials of the Bank to the effect that the terms upon which the government was insisting were unfair. To establish that the Bank itself believed the final contract terms to be unfair would, the company alleged, be valuable evidence in support of its case.\textsuperscript{13}


\textsuperscript{12} Supra, footnote 3.

\textsuperscript{13} It is beyond the scope of this comment to consider the relevance of the subjective belief of a party to the "objective" issue of whether the contract was unconscionable. But it should be noted that both the likelihood of finding relevant evidence in the documents in question and the degree of relevance to issues in dispute in the main action of anything that the documents might contain are germane to the exercise by the court of its power to inspect and to order disclosure.
The House of Lords unanimously declined to order the Bank to disclose the documents that the Attorney General had, in the proceedings below, intervened to protect. The significant, and surprising point, however, is that by a majority their Lordships came to this conclusion only after they had privately inspected the documents and satisfied themselves that their disclosure was not necessary for fairly disposing of the case or for saving costs. By requiring a higher degree of relevance than normally must be shown to obtain discovery, a limited effect was given to the government's objections to producing the documents. Lord Wilberforce, in effect, dissenting, based his opinion on the ground that the documents fell within a class that the courts will normally allow to be withheld without inspection. He held that the plaintiff had not established with that degree of certainty necessary to outweigh the grounds for non-disclosure contained in the Minister's affidavit that the documents were likely to contain material of clear probative value to relevant issues in the main action.

An important question to which their Lordships directed their attention was the authoritativeness of the assertion by Lord Reid in Conway v. Rimmer that certain classes of documents ought never to be disclosed, whatever their contents. The classes relevant for

14 Although the Attorney General was not a party to the main action, he was joined as a respondent in the appeal to the House of Lords on the interlocutory question. Lord Scarman (at p. 735) stated that a court should not order disclosure in proceedings to which the Crown was not a party without first ensuring that the Attorney General was afforded an opportunity to intervene. Nor should disclosure be ordered before the Crown had exercised any right of appeal. The Bank, the defendant in the action, had not objected to discovery.


16 The standard of proof required to be satisfied by the party seeking disclosure in order to persuade the court to cross the threshold and inspect the documents was one of the issues upon which Lord Wilberforce departed from the majority. His Lordship (at p. 710) found Burmah's assertion that the documents were "very likely" to contain statements of the kind alleged, to be "the purest speculation": when immunity was claimed on the ground that the documents fell within one of the classes specifically mentioned by Lord Reid in Conway v. Rimmer, the court should only be prepared to exercise its power to inspect where the claimant had made out "a strong positive case". The majority, however, envisaged that the power to inspect should be exercised much less sparingly, and that it was enough for the court to be satisfied that it was "on the cards" (per Lord Edmund-Davies, at p. 719), or was reasonably probable (per Lord Keith of Kinkel, at p. 726) or that there was a "substantial case" (per Lord Scarman, at p. 734), that the documents would contain relevant evidence.

It was conceded by the Attorney General that statements of the kind suspected of being contained in the documents would be relevant to the issues involved in the main action. It would seem, though, that Lord Wilberforce thought that they would be of less probative value than did the majority.

17 Supra, footnote 2, at p. 952.
present purposes were "Cabinet minutes and the like", "all documents concerned with policy making within departments", and, possibly, "deliberations about a particular case". The principal rationale offered by his Lordship for excepting such classes of documents from judicial inspection and the balancing by individual judges of the competing heads of public interest was that: 18

"... 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."

The breadth of this statement and the assumptions about the relationship of government and governed upon which it appears to rest might well qualify it for inclusion in departmental advice to new recruits to the civil service. It certainly strikes a jarring note upon ears accustomed to the clamour for increased openness in government, and it has certainly seemed oddly out of place in a judgment that, in other respects, was highly sceptical of the Executive's claim to be the final arbiter of the extent to which application of the normal rules of discovery would prejudice the public interest. Lord Reid gave little credence to the ground upon which immunity claims for classes of documents was generally put by the government, namely, the inhibiting effect that fear of possible disclosure in hypothetical litigation would have on the frankness and candour of communication within the public service upon which its efficiency necessarily depends.

How, then, did the House of Lords in Burmah Oil deal with this apparent limitation upon a court's power to determine the propriety of such claims? One argument advanced by the company was that the documents in question did not fall within any of the categories exempted from judicial scrutiny by Lord Reid. Thus, it was argued, while the initial decision that the Bank should rescue Burmah was concededly one of policy, subsequent deliberations about the terms upon which the offer should be made did not justify this elevated status: these amounted to no more than the mere commercial details involved in implementing the policy decision to purchase. However, given the inextricable links between the two questions, and the political judgments permeating decisions over the disbursement of considerable sums of money from the public treasury into private hands, it is scarcely surprising that this attempt to skirt Lord Reid's dicta received generally short shrift in the House of Lords. 19

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18 Ibid.
19 In the Court of Appeal, Lord Denning M.R. evidently found the argument attractive and could see no reason why the handling of this publicly financed rescue
Lord Salmon appears to have taken the issue at all seriously;²⁰ Lord Wilberforce’s attack upon this aspect of the company’s case seems totally apt in the circumstances, although the way in which this kind of argument is handled in the future could depend upon the formulation of the rationale for immunity that is adopted.

Apart from considerations of the need for candour, which are considered below, is it possible to restate in more satisfying form Lord Reid’s concern for preserving governmental secrecy? One possibility is that documents falling within these categories are protected because premature disclosure might prejudice the government’s ability to bring to fruition the very policies to which the documents relate or other policies that might be adversely affected by disclosure of the documents in question.²¹ On the other hand, it is perhaps less obvious that state necessity, rather than political or administrative expediency, dictates that the government should be able to withhold from discovery in civil litigation, arguments and advice tendered in confidence to Ministers by their senior officials in circumstances where prospective damage to government policy is not apparent.²² Nonetheless, Lord Reid’s reference to the lifting of privilege when documents within the classes that he had described had become ‘only of historical interest’ might suggest that he had in mind the damage that premature revelation could inflict upon policies that were ongoing.²³ No doubt a court would be well advised to give great weight to a Minister’s explanation of possible adverse effects of disclosure upon the success of aspects of government policy that might not, at first sight, appear to be connected with the subject-matter of the documents in question.²⁴

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²⁰ Supra, footnote 3, at p. 715. Lord Keith of Kinkel (at p. 726) seemed also to regard as not totally irrelevant the fact that the documents related in part to the application of policy rather than to its formulation.

²¹ Cf. Freedom of Information Act, 5 U.S.C.S. §552(b)(5), which exempts from required disclosure ‘‘inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency’’. This exemption is discussed in Davis, Administrative Law Treatise (2nd ed., 1978), §§533 et seq. The author (p. 405) summarises the effect of this exemption thus: ‘‘The key to all the cases is that the fifth exemption protects the deliberative materials produced in the process of making agency decisions, but not factual materials, and not agency law.’’

²² Judges have regularly denied that political embarrassment is a relevant consideration to be weighed: see e.g. Burmah Oil supra, footnote 3, at p. 720, per Edmund-Davies.


²⁴ Thus Lord Wilberforce concluded (at p. 707) that the fact that the documents in question concerned events that had taken place four years before discovery was
Another justification for withholding documents that relate to Cabinet deliberations is that their disclosure might reveal that conflicting views were aired by Ministers, and that this would prejudice the collective responsibility of the Cabinet, a doctrine still commonly stated to be of fundamental constitutional importance in our system of government. On the other hand, recent British political history is replete with instances of "selective leaking" on an extensive and most enlightening scale, and one would be entitled to regard somewhat sceptically any suggestion that the difficulties that have beset British governments over this period have been to any significant extent attributable to breaches of a constitutional convention that seems nowadays to be inspired as much by the understandable desire of the government of the day for some shelter from the rigours of the party political battle, as by any more profound reason of state.

One last possibility may also be considered, although it has received no express judicial approval. This is that there are classes of documents the disclosure of which courts, as a measure of self-protective restraint, should normally not consider on a case-by-case basis. The danger is that courts may imperil their status by making decisions on matters that are likely to provoke allegations—especially, in Lord Reid's words, from those "with an axe to grind"—of party political favouritism. The legitimacy of the courts' intervention in disputes, particularly when an agency of the State is a party, depends in large part on the maintenance of a clear distance between the courts and the party political arena. It is surely not totally implausible to suggest that an awareness of the delicacy of the judicial role in matters of public law may explain why courts have in

sought did not destroy the Crown's claim, because "all is not past history, at least we do not know that it is" (emphasis added). The effect to be given in any given case to the lapse of time may well depend on how the public interest to be balanced against the administration of justice is defined. Presumably, an appellate court should decide the claim for immunity in the light of facts existing at the time when the appeal is heard, and not when the original order granting or refusing discovery was made.

This was the principal contention in the Crossman Diaries case, supra, footnote 23, although Lord Widgery C.J. (at p. 771) also said that publication at that time would not "inhibit free discussion in the Cabinet of today". Statutory protection is afforded to Cabinet papers in England by the Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28 and the Public Records Act 1958, 6 & 7 Eliz. II, c. 51. On the other hand, the disclosure of Cabinet papers that do not contain evidence of differing ministerial views should be determined by considerations applicable to other documents embodying policy proposals. The need to inquire about the content of the particular Cabinet papers in question was emphasised in Sankey v. Whitlam, supra, footnote 4, at p. 528, by Gibbs A.C.J.

This is not, of course, to deny that judges inevitably bring political values and assumptions to bear upon decisions that raise in legal form questions about the proper relationship between different branches of government and between the individual and the state.
the past been very reluctant to put themselves in the position of
deciding on a case-by-case basis whether the public interest requires
the disclosure of Cabinet or policy documents. As it is, the power
that the courts have assumed since 1968, to inspect documents for
which privilege is claimed and to strike a balance between competing
heads of public policy, already involves the courts in a more overtly
political function than they normally concede that they exercise. For
the courts to draw an admittedly rather rough and ready line at those
documents likely to contain explosive ammunition for the partisan
political debate may display a healthy instinct for institutional
self-preservation.

What, then, of the "candour argument" in the sensitive area of
high-level government decision-making? In Conway v. Rimmer,
Lord Reid evidently regarded it as being of secondary importance.27
However, it may well be that as a result of the difficulties in
formulating in a satisfying manner Lord Reid’s principal rationale,
and of the opinions given in Burmah Oil, the time may be ripe for a
revival of "candour" in this area from, if not exactly the dead, at
least the moribund. Thus both Lords Wilberforce28 and Scarman29
were prepared to give credence to the Attorney General’s contention
that the inhibiting effect that an order for discovery would have upon
the candour with which senior officials tendered advice to Ministers
and communicated with other officials, could seriously prejudice the
efficacy of the decision-making process, especially in controversial
and sensitive areas of government policy. On the other hand, Lord
Keith of Kinkel30 was even more dismissive of this argument than
Lord Reid had been in Conway v. Rimmer: and considerations of
candour have recently been given no more than a mixed reception by
the High Court of Australia.31 Because of the judicial ambivalence

27 Supra, footnote 2, at p. 952.
28 Supra, footnote 3, at p. 707.
29 Ibid., at pp. 733-734.
30 "The notion that any competent and conscientious public servant would be
inhibited at all in the candour of his writings by consideration of the off-chance that
they might have to be produced in a litigation is in my opinion grotesque. To
represent that the possibility of it might significantly impair the public service is even
more so" (ibid., at p. 724).
31 See Sankey v. Whitlam, supra, footnote 4, at p. 527, where Gibbs A.C.J.
stated: "Some judges now regard this reason as unconvincing, but I do not think it
altogether unreal to suppose that in some matters at least communications between
ministers and servants of the Crown may be more frank and candid if those concerned
believed that they are protected from disclosure" (emphasis added). Stephen J.,
however, said (at p. 545) of the candour argument that: "Recent authorities have
disposed of this ground as a tenable basis for privilege." Mason J. (at p. 572)
concurred in this conclusion. Contrast, however, Attorney General v. Jonathan Cape
Ltd., supra, footnote 8, at p. 771, where Lord Widgery C.J. evidently thought that
Cabinet discussions might be inhibited by the existence of the possibility of
disclosure.
about this justification for granting immunity from disclosure for state papers, and the effect that it might have upon the way in which a claim for immunity is dealt with in a particular case, it is worthwhile examining the argument a little more closely.

It would seem quite clear that the most important reason for withholding the information given in confidence to law enforcement agencies by informers has been the judges' prediction that the possibility, albeit remote, of a court-ordered disclosure would cause the flow of information upon which such agencies rely to diminish or to cease. It is assumed that informers perform a function without which the enforcement of the law would necessarily be much more difficult. The reasons why potential informers may be inhibited from supplying information in the future may depend upon the particular context. Sometimes the courts have emphasised that disclosure may endanger the informer's life and limb. Police informers are useful precisely because they maintain close associations with dangerous people who live on the wrong side of the law. In other cases, the fear has been that the means of criminal investigation and detection or of gathering intelligence information may be revealed if the communication is disclosed, and the future effectiveness of these activities thereby prejudiced. Another, more contentious, proposition that has recently received judicial support is that immunity from discovery is necessary because the fear that civil proceedings may be brought against the informant will discourage those with relevant information from passing it to the relevant authorities.32 In yet other cases, the inhibiting factor may be the fear of adverse effects upon the informant's business and commercial reputation.33

32 See D. v. N.S.P.C.C., supra, footnote 1 (fear of libel action may discourage from coming forward persons who suspect child abuse).

33 Alfred Crompton (Amusement Machines) Ltd. v. Customs and Excise Commissioners (No. 2), supra, footnote 1, is the leading illustration of a successful claim for immunity on this ground. Although their Lordships' reasoning is not quite as explicit as one might wish, the drift of the argument was clear enough. It was that although traders were under a statutory obligation to supply information required by the Commissioners—and the House of Lords in Norwich Pharmacal Co. v. Customs and Excise Commissioners, supra, footnote 9, had refused to presume that the fear of disclosure would dissuade individuals from complying with their legal obligations—the possibility that it might be disclosed in tax assessment proceedings involving other traders, would hamper that degree of co-operation between traders and the authorities upon which the tax collection system heavily depends.

It may be noted that the House of Lords has recently held that the fact that disclosure of the confidential reports made by employers upon their employees may involve breaches of confidence and may interfere with the smooth operation of promotion procedures does not justify extending "public interest immunity" to such documents. Nonetheless, when an employer establishes an interest of this kind in non-disclosure, discovery should not be ordered until the court has determined, by inspecting the documents, that their disclosure is necessary for disposing fairly of the case or for saving costs: Science Research Council v. Nassé, supra, footnote 1.
Many of these considerations would seem inappropriate to communications within the public service, although in Conway v. Rimmer itself little weight was given to the possibility that having to defend a libel action might cause public officials to pull their punches in personnel matters or other decisions calling for a frank assessment of an individual's honesty or competence. But what about the situation in Burmah Oil where disclosure of the advice might expose to liability the public authority for whom the official works? Here, it might be suggested, the inhibiting factor upon candour could be the possibility that disclosure of the advice would attract public criticism to the agency or expose it to legal liability; this might jeopardise the officer's career or cause him to suffer the embarrassment of personal publicity or adverse criticism in the press or Parliament. The fact that similar concerns may as readily occur in business or commercial enterprises, where confidential advice is clearly not immune from discovery, is not a conclusive argument against treating public officials differently. For the reason for granting immunity has nothing to do with any comparison of the respective virtues and vices of public and private employees. Its rationale is that there is a public interest in the proper functioning of the public service at the highest levels that the courts have not extended to the private sector. When applied to documents containing Cabinet discussion, the candour argument rests on the fear of the damage that might be done to the political careers and reputations of Ministers who were publicly revealed to have expressed certain views in Cabinet or who were shown to be unable to win Cabinet approval for departmental policies or interests. Such apprehensions, it might be argued, would inhibit free and frank discussion of policy in Cabinet.

In attempting to assess the weight to be given to any of the claims outlined above, it is important to recognise the world for what it is. It can be of little relevance that courts would prefer public officials and Ministers to be made of "sterner stuff", and to be less anxious than the government is apt in litigation to allege on their behalf that they are, to ensure that their written thoughts are not subject even to the remote possibility of disclosure in litigation. A consideration that, on the other hand, may limit the scope of a candour-based claim where the inhibiting factor is alleged to be the fear of the official that his career may be prejudiced by the revelation of the advice or information given by him to other officials or to Ministers, is that there will be many instances where the consequences of incompetence or lack of judgment will be felt whether or

34 Cf. Sankey v. Whitlam, supra, footnote 4, at p. 527, per Gibbs A.C.J.
35 See supra, footnote 33.
not a court orders disclosure of the communication. For the content of the communication will normally have come to the attention of the official's superiors, and if it is seriously mistaken or ill-advised, departmental sanctions will often be applied. Perhaps, though, adverse consequences are more likely to be visited upon the hapless official if his shortcomings become public knowledge.

If the fear of threats to life and limb, or of hypothetical, ill-founded litigation justify drawing the veil of secrecy over confidential communications between the citizen and public officials, then it cannot be unreasonable to be prepared to confer immunity from discovery upon communications between persons within the public service in cases where similar fears may exist. But when inhibitions upon candour are alleged to flow from the fear of the personal or political embarrassment that would attend disclosure, then the claims of candour would seem significantly less compelling. Of course, one can do little more than guess at the probable effect that disclosure rules will have upon behaviour, and how far the effectiveness of the public service will be impaired by officials' unwillingness to commit frank views to paper. As the case for non-disclosure becomes less persuasive it is particularly appropriate to bear in mind that the existence of the possibility of disclosure may actually enhance the working of the machinery of government by increasing officials' sense of responsibility for what they write, and thereby increase the accuracy and quality of their communications. Openness of government both embodies a democratic value and serves as a practical tool.

A consideration that may often be of critical importance in attempting to assess the weight to be given to a claim to exempt documents from discovery is the relevance to the claim of the lapse of time between the events to which the documents relate and the moment when their discovery is sought. It has already been suggested that when immunity for state papers is put on the basis of the damage that may be done to on-going government policies by premature exposure, then considerations of timing may be critical. However, the importance of the passage of time may be more difficult to assess when the claim for secrecy is advanced in the interest of encouraging candour of communication within the public service. Presumably, this argument retains whatever vitality is attributable to it for as long as the inhibiting fears may be fulfilled. Perhaps the lapse of time will never remove from a public official the fear of vexatious litigation as long as he is alive. But even before death finally removes the threat of suits in temporal forums, the further into the past that the applicable limitation period falls, the more insubstantial the inhibiting effect of disclosure will become. To attempt to suggest generally applicable standards for assessing the
effect upon the lapse of time in other contexts would appear to be an exercise in futility. It was, nonetheless, surprising that in Attorney General v. Jonathan Cape Ltd.\(^{36}\) it was held that the inhibiting effect of possible disclosure upon the candour of Cabinet deliberations had been exhausted in less than ten years, despite the fact that many of the politicians and policies so vividly documented by the diarist were still dominating British political life when the injunction to restrain the publication was sought. In the Burmah Oil case, Lord Wilberforce concluded that the strength of the "candour argument" was "within limits, independent of time".\(^{37}\) At the other extreme, Lord Keith of Kinkel dismissed all of the bases upon which the claim for immunity was put except the adverse effect of premature disclosure upon on-going policy. On this view, the lapse of time is relevant in so far as disclosure can no longer have this effect. The other opinions delivered in Burmah Oil are curiously silent on this issue, doubtless because their Lordships' inspection of the documents persuaded them that it was unnecessary to conclude the balancing exercise.

One final aspect of the Burmah Oil case deserves mention, although by the time that the case reached the House of Lords it had ceased to be a live legal issue. In the Court of Appeal,\(^{38}\) their Lordships had been required to consider the effect upon a claim for public interest immunity of an accidental disclosure of the documents in question. What had happened was that the documents sought by the company had been sent to its legal advisers with the parts that the government refused to disclose covered over. However, this cover-up—like others of recent memory—was incompetently executed; it was possible to read the words that it had been intended to obliterate.\(^{39}\) The company's lawyers put the documents in a sealed envelope and delivered them to the court; whether they had first passed on to their client the fruit of this...
particular forbidden tree of knowledge is not made clear in the report. The Court of Appeal permitted counsel for Burmah to use this accidental disclosure to argue that the court should itself inspect the documents because as a result of what he had seen he doubted whether in fact they fell within the description contained in the Minister's certificate. The majority acceded to this request, and concluded that the documents did indeed match the Minister's description, and that they contained nothing of any significant relevance to the company's claim.40

Whether accidental disclosure of the documents would have destroyed the Crown's claim that they should be immune from discovery did not have to be decided by the House of Lords. Lord Scarman, however, intimated that it would not.41 The effect of prior publication upon a claim for public interest immunity was subjected to much closer examination in Sankey v. Whitlam,42 where the claim extended to state papers that had been tabled in Parliament. However, it should also be noted that in this case a claim for immunity was deliberately not made for these documents on behalf of the Commonwealth of Australia—a point to which considerable importance was attached in the High Court.43 The immunity issue was raised by the respondent, who, by the time of the litigation, had been succeeded in office by his political opponents. After making short work of the contention that it would be a breach of Parliamentary privilege for the court to attach legal consequences to the publication of documents in Parliament,44 the High Court almost scornfully demolished the argument that it could be detrimental to any public interest to require the disclosure in litigation of documents that had already received wide publicity.45

40 Lord Denning M.R., dissenting, thought that the statements in the documents were relevant, and, accordingly, ordered discovery.

41 Supra, footnote 3, at pp. 735-736; a similar view had been advanced by Bridge L.J. in the Court of Appeal (supra, footnote 19, at p. 471). Contrast, however, Robinson v. State of South Australia (No. 2), supra, footnote 19, at p. 718; Whitehall v. Whitehall, 1957 S.C. 30, at p. 38.


43 See ibid., at pp. 530-531, per Gibbs, A.C.J., pp. 549-550, per Stephen J., p. 575, per Mason J., where the view was expressed that a court should be prepared to give at least as much weight to a Minister's decision not to claim immunity on the ground that disclosure would not prejudice the public interest, as is given to a certificate submitted by a Minister to a court in support of the exclusion of documents on the ground of public interest.

44 Ibid., at pp. 523-525, per Gibbs A.C.J., pp. 550-551, per Stephen J.

45 Ibid., at p. 531, per Gibbs A.C.J., pp. 546-548, per Stephen J., p. 575, per Mason J. Cf. R. v. Toronto Sun Publishing Ltd (1979), 24 O.R. (2d) 621, where the prior publication of documents marked "secret" was held to be a defence to a charge brought under the Official Secrets Act for publishing a "secret document".
The circumstances in which the publication had occurred in *Burmah Oil* were, of course, very different. For one thing, their disclosure had been unintentional, and for another, they had been revealed only to Burmah’s legal advisers who realised that an error had been made. Whether these differences should be regarded as material, however, is not altogether clear. If the company could not legally be restrained from copying and publishing the portions that its officers were not supposed to have seen, it would seem somewhat curious to continue to deny the company the use of the originals for the purpose of supporting its cause of action. Evidence is not normally rendered inadmissible because it was obtained in some unethical fashion, and it is difficult to see why documents should not be discoverable when accidentally disclosed—and the justification for their being withheld thereby undermined—simply because the disclosee knowingly took advantage of an adversary’s slip. The position might well be different if the Attorney General could enjoin publication of the documents, on the ground of restraining a breach either of the Official Secrets Act or of an unauthorised disclosure of a confidential communication. For if widespread publication could thus be prevented, the damage that would allegedly flow from disclosure could still be avoided and the rationale for the public interest immunity claim kept intact.

46 For the most recent formulations of the principle, see *R. v. Sang*, [1979] 2 All E.R. 1222.

47 Compare the treatment by the courts of the question of whether public interest immunity can be waived. It is clear that the Crown can always intervene in a suit to which it is not a party and claim immunity for documents that the party in possession is willing to disclose. This, of course, was the position in *Burmah Oil*. Moreover, the court is obliged to raise the question itself if the parties do not, although it is difficult to envisage circumstances in which documents would be held to be immune after a Minister of the Crown had inspected them and, understanding the law, raised no objection to their production on grounds of public policy.

But when immunity is claimed for a document solely because of its membership of a class the revelation of which would inhibit candour in the public service, it is difficult to understand why the claim should retain its vitality when the communicator consents to its revelation. Nonetheless, in *Science Research Council v. Nassé*, supra, footnote 5, at p. 693, Lord Fraser stated that were public interest immunity to extend to confidential reports made about employees by their superiors, “it could not be waived either by the employer alone, or by the employer both with the consents of the individual who is the subject of a report and of the person who made it”.

48 R.S.C., 1970, c. 0-3, as am. Although accidental or unauthorised disclosure would not in itself impose a duty of confidentiality upon the disclosee, if it is apparent to the disclosee that the information comprised the confidential communication of one person to another, then he may well be under a duty not to disclose: Goff and Jones, *The Law of Restitution* (2nd ed., 1978), pp. 514-515. Moreover, it is now clear that the doctrine of breach of confidence is applicable to both private and public secrets: *Attorney General v. Jonathan Cape Ltd.*, supra, footnote 8.

It might also be objected that to give this effect to prior publication would enable a litigant to use his alleged possession of a copy of the document being sought as a means of forcing disclosure. How would a court know whether he in fact had a true copy? It could presumably inspect to see if this were so, and only allow the claim for immunity, if otherwise sustainable, if inspection revealed that one was indeed a copy of the other. Perhaps it still might be argued that if the court found that the alleged "copy" did not contain the same information as that in the document for which immunity was being claimed, then the very possibility of acquiring that knowledge might prompt speculative fishing expeditions. But in the unlikely event that a court were to conclude that it would be undesirable even to reveal that there were discrepancies between the two documents tendered to it for inspection and comparison, it could refuse discovery without reasons.

The importance of the two cases considered in this comment is that they bring firmly within the ambit of judicial scrutiny an aspect of Ministerial discretion that had formerly appeared to be unreviewable in the courts. It is not now of much importance whether Lord Reid intended to establish legal rules or merely guidelines respecting the court's power to inspect state papers of the kind under discussion; in Burmah Oil even the Attorney General conceded that the court had a residual power to inspect and to order their disclosure in highly exceptional circumstances. While there is an attractive symmetry in extending judicial review irrespective of the particular class of document at stake, the matter is not without its troubling aspects.

For instance, an important criterion by which to test the soundness of a legal proposition is the extent to which it is calculated to facilitate the making of future decisions by judges. An open invitation to judges, unencumbered by limiting and structuring principles, to decide cases by reference to such large and open-textured notions as "the proper functioning of the public service" and "the administration of justice" is apt to prolong litigation, create inconsistencies and encourage appeals. Moreover, there are inherent dangers, both immediate and long-term, in allowing judges to wander at large over territory where they are likely to overestimate the institutional competence of courts fully to appreciate the strength of the Executive's claim. In particular, for the courts to assume such a role in highly charged political contexts may cause doubt to be cast

50 This was suggested as an appropriate solution in Sankey v. Whitlam; see supra, footnote 46.

51 A large proportion of the cases involving a claim of "Crown privilege" have been taken on to the House of Lords since Conway v. Rimmer was decided.
upon the authoritativeness of judicial pronouncements in other areas where the conduct of the Administration is called into question in the courts, but where judgment is rendered by reference to better defined and more and judicially manageable standards.

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2 The facts are taken substantially from the judgment of Lord Salmon, ibid., at p. 1235.