COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT

The Honourable Richard D. Leblanc, Commissioner

APPLICATION FOR NON-DISCLOSURE

1. The Government of Newfoundland and Labrador ("the Province") hereby applies to withhold or redact certain records determined by the Commission to be relevant to the Inquiry. The Commissioner adopted six principles to guide the Inquiry: Independence; Cooperation; Thoroughness; Expeditious; Openness to the Public; and Fairness. The Province will, wherever applicable, apply these principles to its conduct in the Inquiry including the production of documents.

2. The Province believes that the appropriate approach to determining admissibility of documents in an inquiry can be summarized as follows:

   (i) the principle of relevance is applicable but less strictly than in a court of law;

   (ii) relevant evidence may be excluded for commercial sensitivities or for the public interest;

   (iii) assessments of harm by public officials should be treated with deference but the Commission ultimately determines if a document meets the criteria for exclusion;

(iv) there is little guidance in legislation applicable to Inquiries that informs the criteria to be applied by a Commission in determining exceptions to admission but privacy legislation and case law on public interest immunity are helpful.

PROCEDURAL HISTORY

3. The Province received a Summons from the Commission dated January 4th, 2018 for the production of all documents in the Province's custody, possession or control related to the Muskrat Falls Project and/or hydroelectric power on the Lower Churchill River. As of August 9th, 2018, the Province has provided 1,043,913 records to the Commission.

4. The Commission has determined that some of the records produced by the Province are relevant to the Inquiry. The Commission has asked the Province to review these records and determine if the Province objects to the disclosure of the records. The Province has advised the Commission of its position relating to most of these records.

ADMISSIBILITY OF EVIDENCE INTO THE INQUIRY

5. The *Public Inquiries Act* grants a Commission the authority to compel testimony and the production of evidence. Section 9 of the *Act* states that:

> **9.** A commission may, by summons,
>
> (a) require a person to attend as a witness and give evidence, orally or in writing, on oath or by affirmation; and
>
> (b) require a person to produce to the Commission or a person designated by the commission all documents, records, including documents or records maintained in electronic form, and things in his or her custody or control that may relate in any way to the subject of the Inquiry.

6. Judicial and academic authority also suggests that a Commissioner has authority to determine admissibility based on the commissioner's authority to control proceedings. The use of the words "relate in any way" suggests that the legislature

intended to give a commissioner a broad authority in determining what is admissible evidence. Section 21 of the Inquiry's Rules of Procedure states:

> *21. The term "relevant" is intended to have a broad meaning and includes anything that touches or concerns the subject matter of the Inquiry or that may directly or indirectly lead to other information that touches or concerns the subject matter of the Inquiry.*

7. The Ontario Court of Appeal in *Bortolotti v Ontario* 15 O.R. (2d) 617 ("*Bortolotti*") explained that evidence regarding an inquiry into certain matters respecting land acquisitions in the North Pickering Project was admissible before an Inquiry if the evidence was reasonably relevant to the subject matter of the commission. The Ontario Court of Appeal adopted the statement found in McCormick on Evidence 2nd ed., at p. 438: "*Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value ...*". **(TAB 1)**

8. The Ontario Court of Appeal (ONCA) in *Ontario Provincial Police v Cornwall Public Inquiry Commissioner* 2008 ONCA 33 (*"Cornwall*) at paragraph 26 explained that the first step in determining relevance for an Inquiry was a consideration of the terms of the Order-In-Council, or Terms of Reference. **(TAB 2)** The ONCA in *Cornwall* further cited *Bortolotti*:

> *Although the evidence of C12 and C13 falls outside the subject matter of the Inquiry, it could nevertheless be admissible if it were found to be "reasonably relevant to the subject matter of the inquiry": Bortolotti at p. 624. It would meet that test if it had a bearing on an issue to be resolved and could reasonably, in some degree, advance the inquiry. A decision to admit evidence on this basis will attract a high degree of deference from a reviewing court and will be judged against a standard of reasonableness.*

9. Ruel in "*The Law of Public Inquiries*" (2009) **(TAB 3)** aptly summarized the relevancy principle, citing the Ipperwash Inquiry Final Report, Volume 3, Inquiry Process authored by the Honourable Sidney B. Linden stating (page 74):

> *"...documents and information are admissible before an inquiry not only based on relevance to the terms of reference in the technical sense, but also if the evidence to some degree advances the inquiry or is helpful in fulfilling the inquiry's mandate in the public interest".*

10. The Province also offers the following excerpt from *Re Bortolotti et al. and Ministry of Housing et al.,* 1977 CanLII 1222 (ON CA) which aptly summarizes the appropriate approach for the admission of evidence in an inquiry.

> *The foregoing test of relevancy means that the gates will be opened quite wide in the admission of evidence. All the evidence admitted will not, of course, be of equal probative value. It will be the task of the Commission to determine the weight which should be given the oral or documentary evidence presented to it, when making its recommendations and report.*

11. The Province has identified for the Commission documents which the Province believes are not relevant using the definition of relevant espoused herein. The Province submits that records that are "clearly" not relevant should be withheld or partially redacted.

EXCEPTIONS TO THE ADMISSIBILITY OF EVIDENCE

12. There are judicially accepted exceptions to the broad rule that anything relevant is admissible as evidence in an Inquiry. The Commissioner has the authority to rule inadmissible evidence that, although determined to be relevant, meets the criteria of the exceptions. Some of the relevant exceptions to admission are privilege, commercial sensitivity, and public interest immunity. This Brief will address commercial sensitivity and public interest immunity. The issue of privilege is not appropriate for this forum.

Commercial Sensitivity

13. Neither case law nor statutes from this Province are very helpful in providing a definition of commercially sensitive information. In a Memo dated June 7th, 2018 to all Parties with Standing (the "Memo") the Commissioner of the Inquiry expressed the principle that all relevant documents would be open to disclosure to the parties and public. However, the Commissioner further outlined that this

presumption was subject to a claim for not only applicable privileges but also commercially sensitive information.

14. The Commission relied upon the *Energy Corporation Act* SNL 2007 C E-11.01 and the *Access to Information and Protection of Privacy Act* SNL 2015 C A-1.2 (*"ATIPP Act"*) to guide his formulation of the meaning of commercial sensitivity. The Commissioner in the Memo outlined the following principles to consider when determining if information was commercially sensitive:

1. It is presumed that information should be disclosed unless a valid reason is provided for its non-disclosure.

2. The burden is on the party seeking that information not be disclosed to explain why it should remain confidential.

3. Information which reasonably might harm the competitive position, interfere with the negotiating position or result in financial loss or harm to a provider of information or to a third party will be considered as being of a commercially sensitive nature. As well, information supplied to a provider on a confidential basis by a third party will be considered as being of a commercially sensitive nature.

4. Documents of a commercially sensitive nature as described above should not be disclosed where the person requesting non-disclosure establishes that disclosure would reasonably be expected to:

    a. harm the competitive position of the provider or third party;
    b. result in significant financial loss to a provider or third party due to premature disclosure;
    c. result in a negative impact, financial or otherwise, in ongoing or future negotiations with others;
    d. materially prejudice the financial, economic or other interests of government of the province, Nalcor, its subsidiaries and more generally the people of this Province ; or
    e. be injurious to the ability of the government of the province generally to manage the economy of the Province.

5. If a document contains information that is both commercially sensitive and non-commercially sensitive, the commercially sensitive information shall be redacted and the remainder of the document shall be disclosed.

6. Potential embarrassment, a loss of confidence or serious misbehavior is not a basis to conclude information should not be disclosed.

7. Information already in the public domain should be disclosed, even if found to be of a commercially sensitive nature.

15. The Province submits that certain records the Commission wishes to disclose to the parties and the public should be withheld or redacted as they contain commercial sensitive information. The documents that contain sensitive information will be identified by the Province and public officials from the Province will provide affidavits which will describe how the release of commercially sensitive information could harm the interests of the Province.

INJURY TO THE PUBLIC INTEREST

16. The Province submits that the records the Commission wishes to rely upon at the Inquiry can potentially harm the interests of the Government of Newfoundland and Labrador.

17. The Province submits that the Commission must balance the probative value of disclosure or admission of relevant information with the potential injury or harm to the public interest caused by disclosure. A non-exhaustive list of reasons for the requested redactions include:

a. Potential harm to future negotiations with Indigenous groups;
b. Potential harm to future relationships in general with Indigenous groups;
c. Confidential information or communications disclosed by another Government; and
d. Release of Information regarding a third party that is contractually confidential or otherwise harmful to the relationship with the third party or third parties in general.

18. Disclosure that is potentially injurious to the public interest and relating to Crown privilege or public interest immunity is addressed by section 12(2) and section 12(3) of the *Act*:

> *(2) Notwithstanding subsection (1), a rule of law that authorizes or requires the withholding of records, documents or other things or a refusal to disclose information, on the grounds that the disclosure would be injurious to the public interest or would violate Crown privilege, does not apply in respect of an inquiry under this Act.*
>
> *(3) Notwithstanding subsection (1), a person shall not refuse to disclose information to a commission or a person authorized by a commission on the grounds that the disclosure is prohibited or restricted by another Act or regulation.*

19. The Province submits that this section should be interpreted in a manner that provides some protection to important government interests when disclosure would injure or harm those interests. The section should be interpreted to mean that cabinet documents cannot be protected solely on the basis of the principle of cabinet secrecy or confidence. Rather, cabinet documents should receive protection from disclosure if disclosure would harm or injure government interest. Simon Ruel in his book, "*The Law of Public Inquiries in Canada*" at page 82 explained that "public interest privilege recognizes that certain types of information should not be released if its disclosure would be contrary to the public interest." This privilege exists at common law and is also protected federally pursuant to sections 37 to 37.3 of the *Canada Evidence Act ("CEA")..".* **(TAB 4)** The meaning of Public Interest Immunity in s. 12 should be limited to cabinet secrecy.

20. The Province bears the responsibility of identifying the instances where harm may ensue. There is little or no legislative guidance to aid the Commissioner through this balancing within applicable statutes. However, privacy legislation in this Province and other jurisdictions along with case law may be helpful to the Commission. The Supreme Court of Canada in *Babcock v Canada (Attorney General),* 2002 SCC 57, concluded that a Commissioner of an Inquiry has the authority to consider public interest when determining admissibility. Justice

McLaughlin for the Court explained at paragraph 53: *"the common law does not restrict review of claims for public immunity to superior courts".* **(TAB 5)** Simon Ruel in *"The Law of Public Inquiries in Canada" (2009)* succinctly summarized this principle at page 83:

> *questions of the admissibility of evidence, including the determination of privilege, may be decided by the tribunal or body where the issue of admissibility arises, whether that body is a court, tribunal or commission of inquiry",*
>
> ...
>
> *this principle would apply to all common law public interest privileges, at the exception of those that ought to be determined by superior courts or the federal courts under statute.* **(TAB 6)**

21. Ed Ratushny, in his book *"The Conduct of Public Inquiries" (2009)* addressed public interest immunity (page 352), stating that at common law a judicial discretion exists to weigh the public interest in protecting documents sought to be withheld by government against that of disclosing them in the courts. This discretion continues to exist though Ratushny notes that it has been superseded federally by the statutory provisions of the CEA. He stated that the government must specify the public interest invoked in claiming immunity. The court then may order disclosure or refuse to disclose depending upon the importance of the values raised by each position. **(TAB 7)**

22. The consideration of harm to the public interest involves an assessment of the degree of injury to the disclosing party. Although the Commissioner is not bound by this legislation, Section 37 of the *CEA* addressed objections to the disclosure of protected information held by the federal government and the criteria contained in this section is helpful to the Commissioner:

Specified Public Interest

Objection to disclosure of information

- ***37 (1)*** *Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.*

- ***Obligation of court, person or body***

  (1.1) *If an objection is made under subsection (1), the court, person or body shall ensure that the information is not disclosed other than in accordance with this Act.*

- ***Disclosure order***

  (4.1) *Unless the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, the court may authorize by order the disclosure of the information.*

- ***Disclosure order***

  (5) *If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.*

- ***Prohibition order***

  (6) *If the court does not authorize disclosure under subsection (4.1) or (5), the court shall, by order, prohibit disclosure of the information.*

- ***Evidence***

  (6.1) *The court may receive into evidence anything that, in the opinion of the court, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base its decision on that evidence.*

23. The factors to be considered in addressing public interest immunity were discussed by the Supreme Court of Canada ("SCC") in *Carey v Ontario* [1986] 2 SCR 637. **(TAB 8)** Justice La Forest summarized the correct approach at paragraphs 78-79:

> *78. 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 protection 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.*
>
> *79. 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.*

24. The SCC in *Carey* undertook a balancing analysis to determine whether disclosure interfered with the public interest. Justice La Forest eventually ordered disclosure of the documents for the Court's inspection to ensure that no disclosure was made that unnecessarily interfered with confidential government communication. Justice La Forest stated at paragraph 85 that: *"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."*

25. The Federal Court in *Canada (Attorney General) v Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar* 2008 3 FCR 248 (*"Arar"*) ruled on an application brought by the Attorney General of Canada, pursuant to s. 38.04 of the *CEA*, seeking to prohibit the disclosure of redacted portions of the public report of the O'Connor Commission due to potential injury to international relation or national defence or national security, subcategories of public interest privilege. **(TAB 9)** The court applied the criteria set out at section 38.06 of the *CEA*, reproduced in part below:

> *38.06 (1) Unless the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information.*
>
> *(2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.*
>
> .....

26. Justice S. Noel in *Arar* attempted to judicially define the concept of injury, beginning at paragraph 50:

50 This being said, the definition of "potentially injurious information" contained in the CEA is little more than circular. I therefore turn to the ordinary meaning of the term "injury".

51 The Oxford English Dictionary defines "injury" as follows:

1. Wrongful action or treatment; violation or infringement of another's rights; suffering or mischief wilfully and unjustly inflicted. With an and pl., A wrongful act; a wrong inflicted or suffered.

2. Intentionally hurtful or offensive speech or words; reviling, insult, calumny; a taunt, an affront. Obs. [Cf. F. injure = parole offensante, outrageuse.]

3. a. Hurt or loss caused to or sustained by a person or thing; harm, detriment, damage. With an and pl. An instance of this.

b. concr. A bodily wound or sore. Obs. rare.

4. attrib. and Comb., as injury-doing, wrong-doing; injury-feigning vbl. n. and ppl. a.; injury time, the extra time allowed in a game of football or the like to make up for time spent in attending to injuries.
(The Oxford English Dictionary, 2nd ed., s.v. "injury")

Obviously in the context of section 38 of the CEA definition (3) is most appropriate. This definition indicates, as do the others to an extent, that to be considered an 'injury' there has to be some detriment, damage or loss. For its part, the Black's Law Dictionary defines the term "injury" as follows (Black's Law Dictionary, 7th ed., s.v. "injury"):

1. The violation of another's legal right, for which the law provides a remedy; a wrong or injustice. See WRONG.

2. Harm or damage. — injure, vb. — injurious, adj.

Once again the concept of harm and damage is echoed in this definition.

27. Justice Noel further outlined non-exhaustive factors that were to be assessed and weighed against one another to determine whether the public interest lied in disclosure or in non-disclosure at paragraphs 98-99:

> *98. (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 a commission, and if so whether the information is important for a comprehensive understanding of the said recommendation.*
>
> *99. I reiterate, the weighing of the public interest in disclosure against the public interest in non-disclosure must consider a number of different factors. It is only once these factors have been properly assessed and weighed against one another that a determination as to disclosure can be made. [Emphasis Added]*

28. In terms of Provincial legislation, the *ATIPP Act* may provide assistance to deliberations of the Commissioner. Section 34 of the *ATIPPA Act* provides factors that a public body may rely upon to refuse to disclose information.

> *34. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *(a) harm the conduct by the government of the province of relations between that government and the following or their agencies:*
>
> *(i) the government of Canada or a province,*
>
> *(ii) the council of a local government body,*
>
> *(iii) the government of a foreign state,*

(iv) an international organization of states, or

(v) the Nunatsiavut Government; or

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.

(2) The head of a public body shall not disclose information referred to in subsection (1) without the consent of

(a) the Attorney General, for law enforcement information; or

(b) the Lieutenant-Governor in Council, for any other type of information.

(3) Subsection (1) does not apply to information that is in a record that has been in existence for 15 years or more unless the information is law enforcement information.

29. The Province submits that due to the complex and wide ranging topics detailed within the Terms of Reference, the public interest is at an increased risk of injury because of the principle of the "mosaic effect". The Federal Court in *Arar* discussed the "mosaic effect", which is explained at paragraph 82 of the judgment as a principle that information, which may seemingly appear meaningless or trivial in isolation can be harmful to the interests of government when fitted together by a knowledgeable party or member of the public. The Court cited the Federal Court decision of *Henrie v Canada (Security Intelligence Review Committee),* 1989 2 FC 229 at para 30 (T.D.):

> *It is of some importance to realize than an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such* ***an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions*** *regarding the investigation of a particular threat or of many other threats to national security...* **[Emphasis Added]**

The Province submits that this effect must be kept in mind when the Commissioner approaches what may appear to be benign information for which an official of the Province has concluded should not be released. The Province is particularly concerned, in this regard, with the public and other Parties with whom the Province has commercial and contractual relationships.

DEFERENCE TO GNL OFFICIALS

30. As referenced throughout this submission, the subject matter of the Inquiry is broad and involves many Departments and Agencies of the Province. Officials from many of these departments have produced thousands of documents and reviewed hundreds of documents. They have been asked to identify information which is potentially harmful or injurious to the operation of government if released by the Commission. The Province has provided Affidavits from officials of the Departments that are most affected by the disclosure of documents. **(TAB 10)**

a. Paul Carter – Executive Director, Muskrat Falls Oversight Committee/ Senior Advisor, GNL, Muskrat Falls Inquiry
b. Aubrey Gover – Department of Indigenous Affairs
c. Craig Martin – Department of Finance
d. John Cowan - Department of Natural Resources (to be provided)
e. Greg Clarke – Department of Intergovernmental Affairs

31. The Supreme Court of Canada dealt with a similar issue regarding the production of provincial government records and privilege of the Crown in *Canadian Javelin Ltd., Re* 1982 CarswellNat 490 (*Canadian Javelin)*. **(TAB 11)** Justice Wilson for the Court cited with approval the principle that deference is to be given decisions of the Executive. Justice Wilson further cited the case of *R v Snider* [1954] SCR 49 as the leading Canadian authority, citing specifically the conclusion of Rand J's decision at paragraph 27:

> ....
>
> Once the nature, general or specific as the case may be, of documents or the reasons against its disclosure, are shown, the question for the court is whether they might, on any rational view, either as to their contents or the fact of their existence, be such that

> the public interest requires that they should not be revealed; if they are capable of sustaining such an interest, and a minister of the Crown avers its existence, then the courts must accept his decision. On the other hand, if the facts, as in the example before us, show that, in the ordinary case, no such interest can exist, then such a declaration of the minister must be taken to have been made under a misapprehension and be disregarded.

The Province submits that the Commission has the authority to refuse to withhold the information when no public interest is apparent; however, once the Province has demonstrated that the information involved may harm a public interest, a Commission must not ignore that determination without reason.

32. Further to this principle, the Federal Court in *Arar* explained at paragraphs 46-47 that a court should accord deference to decisions of the executive in what concerns matters of national security, national defence and international relations, subcategories of public interest immunity. The executive is considered to have greater knowledge and expertise in these areas:

> *46 The second step under the section 38.06 scheme asks the Court to determine whether disclosure would be injurious to international relations, national defence, or national security. It is normally the executive, after assessing the information, who determines whether disclosure would be injurious. It is trite law in Canada, as well as in numerous other common law jurisdictions, that courts should accord deference to decisions of the executive in what concerns matters of national security, national defence and international relations, as the executive is considered to have greater knowledge and expertise in such matters than the courts (Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3 (S.C.C.) at para. 33; Ribic, at para. 19; United States v. Reynolds, 345 U.S. 1 (U.S. S.C. 1953); Secretary for the Home Department v. Rehman, [2001] UKHL 47 (U.K. H.L.) at para. 31). Justice Létourneau of the Federal Corut of Appeal wrote in Ribic, at paragraph 18: "It is a given that is it not the role of the judge to second-guess or substitute his opinion for that of the executive". Also of interest, Lord Hoffman, of the House of Lords, wrote the following in a postscript in Rehman, above:*
>
> *... in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown ... It is not only that the executive has access to special information and*

> *expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only be entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.*
>
> *47 This being said, the onus at this stage is on the party seeking the prohibition on disclosure to convince the Court that disclosure would be injurious to international relations, national defence or national security (Ribic, at paragraph 21; Khawaja, at paragraph 65). The case law establishes that to find that an injury to international relations, national defence or national security would result from disclosure, the reviewing judge must be satisfied that the executive's opinion as to injury has a factual basis, established by evidence (see Ribic, at paragraph 18). Moreover, the Federal Court of Appeal in Ribic, using the standard of review language states that "if his [the Attorney General's] assessment of injury is reasonable, the judge should accept it" (Ribic, at paragraph 19).*

33. Though the subject matter of the Inquiry in this case does not deal with national security or defence, the principles should apply to other matters affecting the public interest. The Province submits that in each Affidavit attached officials have described, in a general way, the potential harm that may result from certain disclosure of information. Based upon the number of documents involved it is impossible to get an official to address each document. The Province submits that the Commission should show deference to the opinions of Province's officials regarding the nature of the harm that may ensue. These officials are better positioned to determine risks to the public interest based upon experience and knowledge. Of course, the officials do not address a legal question in their Affidavits and the application of principles to the facts is in the sole discretion of the Commissioner.

REMEDY SOUGHT

34. The Province submits that as a result of the evidence outlined in the Affidavits, the proposed partial and full redactions should be accepted by the Commission, where the harm identified is a harm that is entitled to protection. Generally, harm is protected in these circumstances by redaction or refusing to disclose. However,

the Province suggests that other methods of protecting the public interest are available. This includes but is not limited to 1) summaries of the harmful information; 2) agreed statement of facts relating to specific records or events; or 3) limiting disclosure of the relevant records to the Parties with standing and not to the public.

NALCOR RECORDS

35. The Province is the sole shareholder of Nalcor, a crown process corporation wholly owned by the Province by virtue of section 3(3) of the *Energy Corporation Act* SNL 2001, c. E-11.01. The Commission, as part of its disclosure, has requested the Province review for privilege and sensitivities numerous documents solely authored by or primarily based upon Nalcor information.

36. The Province submits that Nalcor and its officials are in the best position to assess these documents for commercial sensitivity. The Province will defer to Nalcor's identification of documents as sensitive. Further, the Commission ought to approach Nalcor's assessment or identification with deference. The Province has requested Nalcor review these files and they have suggested redactions where applicable. The Province, in turn, relied upon Nalcor's assessment when advising the Commission with respect to the Province's position on the admissibility of many documents.

37. The Province has identified documents which Nalcor has identified as not relevant. The Province wishes to re-state its understanding of the law with regard to admissibility of evidence. The principle of relevance is applicable but applied with less stringency then is the case in a court of law.

SUMMARY ALTERNATIVES

38. The Province hereby reiterates its commitment to transparency and to cooperating with the Commission to ensure the independence, thoroughness, expedition, openness and fairness of the Inquiry. The Province believes that this principles can be honoured while protecting the Province from harm or injury to its operations.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador this 14th day of August, 2018.

Peter Ralph, QC
Solicitor for Her Majesty in Right of Newfoundland and Labrador

cc R. Barry Learmonth, QC
Kate O'Brien
Third Floor, Beothuck Building
20 Crosbie Place
St. John's, NL A1B 3Y8

Re Bortolotti et al. and Ministry of Housing et al.

15 O.R. (2d) 617

ONTARIO
COURT OF APPEAL
ESTEY, C.J.O., HOULDEN AND HOWLAND, JJ.A.
1ST APRIL 1977.

Administrative law -- Judicial review -- Scope -- Power of Divisional Court to review decisions of commission appointed under Public Inquiries Act, 1971 (Ont.), c. 49 -- Considerations.

The power of the Ontario Divisional Court to review the decisions of a commission appointed under the Public Inquiries Act, 1971 (Ont.), c. 49, is limited by s. 6(1) of the Act. The Court's power is supervisory only, i.e., to ensure that the commission does not exceed its jurisdiction.

[Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton (1975), 10 O.R. (2d) 113, 64 D.L.R. (3d) 477, 27 C.C.C. (2d) 31, folld; Re Ontario Crime Com'n, Ex p. Feeley and McDermott, [1962] O.R. 872, 34 D.L.R. (2d) 451, 133 C.C.C. 116, distd]

Administrative law -- Commission of inquiry -- Admissibility of evidence -- Public Inquiries Act, 1971 (Ont.), c. 49.

Evidence -- Admissibility -- Commission appointed under Public Inquiries Act, 1971 (Ont.), c. 49.

A commission of inquiry appointed under the Public Inquiries Act, 1971 (Ont.), c. 49, has a different function to perform

from that of a Court, arbitrator or administrative tribunal. It has a duty to consider, recommend and report. Accordingly, any evidence is admissible before it if the evidence is reasonably relevant to the subject-matter of the commission, and the only exclusionary rule that is applicable is that respecting privilege as required by s. 11 of the Act. In determining what is "reasonably relevant" the subject-matter of the inquiry must be scrutinized carefully.

[Re Ontario Crime Com'n, [1963] 1 O.R. 391, 37 D.L.R. (2d) 382, [1963] 1 C.C.C. 117; Re Children's Aid Society of County of York, [1934] O.W.N. 418; R. v. Gaich or Gajic, [1956] O.W.N. 616, 116 C.C.C. 34, 24 C.R. 196; Re Huston (1922), 52 O.L.R. 444, folld]

Administrative law -- Procedure -- Power of majority of commissioners of inquiry to bind minority on rulings relating to admissibility of evidence -- Public Inquiries Act, 1971 (Ont.), c. 49 -- Interpretation Act, R.S.O. 1970, c. 225, s. 27(c).

Although the Public Inquiries Act, 1971 (Ont.), c. 49, is silent as to the power of the majority of commissioners on a commission to make rulings as to the admissibility of evidence, the majority does have that power. Section 27(c) of the Interpretation Act, R.S.O. 1970, c. 225, indicates that that is the case and to hold otherwise would result in a multiplicity of records.

[Grindley et al. v. Barker et al. (1798), 1 Bos. Pul. 229, 126 E.R. 875; Atkinson v. Brown, [1963] N.Z.L.R. 755; Picea Holdings Ltd. v. London Rent Assessment Panel, [1971] 2 Q.B. 216, apld; Re Schabas et al. and Caput of University of Toronto et al. (1974), 6 O.R. (2d) 271, 52 D.L.R. (3d) 495, refd to]

APPEAL from an order of the Divisional Court given on a case stated by Commissioners appointed under the Public Inquiries

Act, 1971.

J. W. Sopinka, Q.C., and R. W. Cosman, for appellants.

Robert P. Armstrong, for respondent, Ministry of Housing.

Ian G. Scott, Q.C., John Collins and Chris G. Paliare, for respondents, Terrence and Heather Lynn Dinsmore and other complainants.

The judgment of the Court was delivered by

HOWLAND, J.A.:-- This is an appeal, pursuant to leave granted by this Court, from an order of the Divisional Court answering questions in a case stated by the Honourable J. F. Donnelly, R. M. Grant, Q.C., and David G. Humphrey, Q.C., Commissioners appointed by the Lieutenant-Governor in Council under the Public Inquiries Act, 1971 (Ont.), c. 49, to conduct an inquiry into certain matters respecting land acquisitions in the North Pickering Project. The appeal raises important questions as to the admissibility of certain oral and documentary evidence which has been tendered by the respondents Terrence Dinsmore and Heather Lynn Dinsmore to the Commission, and as to the power of a majority of the Commissioners to make binding rulings respecting the admissibility of evidence.

On March 2, 1972, the Treasurer of Ontario announced in the Legislature the plans of the Government of Ontario for a satellite city called Cedarwood to be developed on 25,000 acres to the south of an airport which the federal Government simultaneously announced was to be built by it in the Township of Pickering. The land for this city was to be acquired by the Government of Ontario either voluntarily or under the Expropriations Act, R.S.O. 1970, c. 154. The entire project of the federal and provincial Governments was known as the North Pickering Project. With the assistance of land acquisition agents, some of whom are the appellants in this appeal, a number of residential properties were acquired by the Government of Ontario including that of the respondents

Terrence and Heather Lynn Dinsmore.

Following complaints about the manner of land acquisition, an investigation was made by the Ombudsman for the Province of Ontario. He reported to the Minister of Housing with his recommendations on June 22, 1976. On July 15, 1976, a select committee of the Legislature, known as the Select Committee on the Ombudsman, was appointed to review the various reports made by the Ombudsman including his report on the North Pickering Project. While the Select Committee was reviewing the report of the Ombudsman on the North Pickering Project an agreement was reached between the Minister of Housing and the Ombudsman, concerning the disposition of the contested claims respecting the North Pickering Project. This agreement, with some modifications, was approved by the Select Committee. Under its terms some 28 complaints respecting claims placed in dispute by the reply of the Minister of Housing dated August 31, 1976, and claims handled by the appellants, were to be submitted by Order in Council to a commission appointed under the Public Inquiries Act, 1971, and certain proceedings which had been instituted by the appellants before the Divisional Court were to be discontinued. The merits of the remaining complaints were to be investigated by the Ombudsman, and the Minister of Housing undertook to accept the Ombudsman's recommendation with respect to those complaints and, where appropriate, to refer any such cases to the Land Compensation Board.

In order to implement the agreement, it was provided by Order in Council 2959/76, dated October 26, 1976, as amended by Order in Council 3545/76, dated December 22, 1976, that a commission be issued under the Public Inquiries Act, 1971, appointing the Honourable J. F. Donnelly Chairman, R. M. Grant, Q.C., and David G. Humphrey, Q.C., Commissioners "to consider, recommend and report in relation to":

(I) the overall merits of claims for additional compensation of

(a) cases placed in dispute by the reply of the Minister of Housing of the 31st day of August, 1976, to the report of the Ombudsman on the North Pickering Project;

(b) any other cases handled by any of the five agents, Applicants [the appellants in this appeal] in the motion instituted before the Divisional Court relative to allegations of misconduct contained in the said report of the Ombudsman;

such merits of claims shall include but not so as to limit the generality of the foregoing, all circumstances of each particular case including any misleading statements inadequate appraisals or misunderstandings based upon reasonable grounds in the circumstances of the particular case.

(II) where entitlement to additional compensation has been recommended in the discretion of the Commission, to determine the amount, if any, of such additional compensation, having regard for such merits and taking into account any benefit or profit derived from the use of compensation paid on the original sale between the date of such sale and the date hereof.

(III) The Commission shall also enquire into, consider and report in relation to what allegations of misconduct are made against

Terry Bortolotti James Gilhespie William Thompson Joseph Kuzik J. E. Spafford

in the report of the Ombudsman and as to whether or not such allegations, if any, are justified.

Order in Council 2959/76 also provided:

All matters referred to this Commission shall be heard and determined in proceedings of an adversarial nature. The Ministry of Housing, former land owners, present and former agents and officials of what now forms part of the Ministry of Housing will be entitled to be represented by counsel who shall be paid by the Ministry of Housing. The reasonable costs of counsel and of any appraisals required for the

former land owners, shall be borne by the Ministry of Housing. Counsel for the former land owners will be appointed by the Ombudsman.

In addition Part III of the Public Inquiries Act, 1971 was declared to apply to the inquiry.

On January 25, 1977, the Commission commenced to hear the claim of the respondents Terrence Dinsmore and Heather Lynn Dinsmore. Counsel for these respondents introduced as exhibits certain documents from the files of the Ministry of Housing which had been furnished to him by the Select Committee on the Ombudsman. One of these documents purported to be a memorandum dated April 18, 1975, from J. L. Forster, Director to Mr. W. Wronski, Assistant Deputy Minister, to which was attached several pages of a report said to have been prepared by Mr. W. R. Kellough, an appraiser. This document is ex. C to the stated case hereafter referred to. The majority of the Commission ruled (Commissioner Humphrey dissenting) that these documents could not be filed in evidence unless Mr. Kellough was called to give evidence.

A further document which counsel sought to introduce was a file copy of a memorandum dated June 13, 1975, entitled "Property Acquisition for the North Pickering Project" but bearing no indication as to its author. This document is ex. D to the stated case. The majority of the Commission (Commissioner Humphrey dissenting) ruled that this document was not admissible in the absence of evidence as to its authorship.

The respondents, Mr. and Mrs. Dinsmore, had dealt with a land acquisition agent, Mr. Bowles, in connection with the sale of their property. Their neighbours, Mr. and Mrs. Bayes, had dealt with the appellant Joseph Kuzik as land acquisition agent in connection with the sale of their property. The majority of the Commission (Commissioner Humphrey dissenting) ruled that Mrs. Dinsmore could not testify as to statements made to her by Mr. and Mrs. Bayes before the agreement of sale of the Dinsmore property was made, nor could Mrs. Bayes testify as to what she had told Mrs. Dinsmore concerning an alleged conversation

between Mrs. Bayes and Mr. Kuzik. Commissioner Humphrey considered that the evidence which Mrs. Dinsmore wished to give, considered in the light of the evidence that Mrs. Bayes was to give, was evidence as to a fact, namely, a representation made by a Government agent to another person in similar circumstances pursuant to a common plan of acquisition, and hence was not hearsay.

On January 31, 1977, at the request of counsel for the respondents Terrence Dinsmore and Heather Lynn Dinsmore, the Commission stated a case for the Divisional Court pursuant to s. 6 of the Public Inquiries Act, 1971 upon the following questions:

Question 1

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that a document obtained from the files of the Ministry of Housing and tendered as an exhibit by Counsel for the claimant and marked hereto as Exhibit "C" was inadmissible in evidence

Question 2

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that a document obtained from the files of the Ministry of Housing and tendered as an exhibit by Counsel for the claimant and marked hereto as Exhibit "D" was admissible in evidence

Question 3

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that the document referred to in Question 1 would not be admitted and marked as an exhibit notwithstanding the conclusion of Commissioner Humphrey that the document was in fact admissible and would have been received by him

Question 4

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that the document referred to in Question 2 would not be admitted and marked as an exhibit notwithstanding the conclusion of Commissioner Humphrey that the document was in fact admissible and would have been received by him

Question 5

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that no questions could be put to the witness Dinsmore or elicit statements made to her by her neighbours, Mr. and Mrs. Bayes, prior to the execution by Dinsmore of the Agreement of Purchase and Sale wherein the Dinsmore property was sold to the Crown in right of Ontario

Question 6

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in refusing to permit counsel for the claimant to lead evidence as to what was said by Mrs. Bayes to Mrs. Dinsmore regarding a conversation between Kuzik and Mrs. Bayes

Question 7

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that the matters referred to in Questions 5 and 6 were inadmissible, notwithstanding the conclusion of Commissioner Humphrey that the evidence was, in fact, admissible and he would have received the evidence

By its order dated February 10, 1977, the Divisional Court answered the questions as follows:

Question 1: Subject to the answer given to Question 3, the Commission of Inquiry properly exercised its jurisdiction.

Question 2: Subject to the answer given to Question 4, the

Commission of Inquiry properly exercised its jurisdiction.

Question 3: The Commission of Inquiry declined jurisdiction.

Question 4: The Commission of Inquiry declined jurisdiction.

Question 5: The Commission of Inquiry declined jurisdiction.

Question 6: The Commission of Inquiry declined jurisdiction.

Question 7: The Commission of Inquiry declined jurisdiction.

Southey, J., who delivered the judgment of himself and Rutherford, J., in the Divisional Court, considered that the admissibility of the evidence in question was a matter which properly fell within the discretion of the Commission. In his opinion the documents referred to in Qq. 1 and 2 would not be acceptable in evidence at a trial unless tendered through a witness who would prove them in accordance with the rules of evidence. On the other hand he did not consider that the testimony referred to in Qq. 5 and 6 violated the rule as to hearsay evidence. As to the remaining questions, he felt that the Commission should admit any evidence which any of the Commissioners regarded as admissible and relevant to the matters to be considered so long as it did not result in the Commission exceeding its jurisdiction.

Reid, J., on the other hand considered that the admissibility of evidence should be determined by whether it was relevant to the inquiry, and not whether it offended the rules of evidence followed by the Courts. Accordingly, he concluded that the answers to Qq. 1, 2, 5 and 6 should be that the Commission declined jurisdiction in refusing to inquire into relevant matters, facts or circumstances. However, he was of the opinion that the Chairman of the Commission was entitled and authorized to govern the proceedings of the Commission even if the other two members were opposed to his views: hence the rulings of the Chairman would decide the admissibility of evidence before the Commission.

The issues in this appeal are as follows:

1. To what extent, if any, are the rulings of the Commission reviewable by the Divisional Court on the stated case in question
2. Are the rulings which were made by the majority of the Commissioners as to the admissibility of evidence binding on the remaining Commissioner
3. Should the Commission have admitted the testimony referred to in Qq. 5 and 6

The appellants are not appealing from the answers of the Divisional Court to Qq. 1 and 2 as to the inadmissibility of the documents referred to in these questions and there is no cross-appeal as to the answers to these questions. Accordingly, the answers to these questions are not in issue in this Court, except in so far as they are affected by the answers to Qq. 3 and 4.

Power of review by the Divisional Court

The first matter requiring consideration is the power of the Divisional Court to review the rulings of the Commission. The statutory basis of this power is to be found in s. 6 of the Public Inquiries Act, 1971, which provides in part as follows:

> 6(1) Where the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question by a person affected, the commission may of its own motion or upon the request of such person state a case in writing to the Divisional Court setting forth the material facts and the grounds upon which the authority to appoint the commission or the authority of the commission to do the act or thing are questioned.
>
> (2) If the commission refuses to state a case under subsection 1, the person requesting it may apply to the Divisional Court for an order directing the commission to state such a case.

The jurisdiction conferred on the Court under s. 6(1) is much narrower than the jurisdiction conferred by its predecessor, s.

5(1) of the Public Inquiries Act, R.S.O. 1970, c. 379, which provided:

> 5(1) Where the validity of the commission or the jurisdiction of a commissioner or the validity of any decision, order, direction or other act of a commissioner is called into question by any person affected, the commissioner, upon the request of such person, shall state a case in writing to the Court of Appeal setting forth the material facts and the decision of the court thereon is final and binding.

Section 5(1) conferred both an appellate and a supervisory jurisdiction upon the Court. It permitted the Court to review decisions, orders or directions made in the exercise of the Commissioner's discretion and to substitute its opinion for that of the Commissioner when the validity of his decision, order or direction was called into question: Re Ontario Crime Com'n, Ex p. Feeley and McDermott, [1962] O.R. 872 at p. 895, 34 D.L.R. (2d) 451 at p. 474, 133 C.C.C. 116.

Section 6(1) of the Public Inquiries Act, 1971 no longer provides for a case to be stated as to the "validity of any decision, order, direction or other act of a commissioner". I am in agreement with the conclusion of Morden, J., in Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton (1975), 10 O.R. (2d) 113 at pp. 119-21, 64 D.L.R. (3d) 477 at pp. 483-5, 27 C.C.C. (2d) 31, that "authority" in s. 6(1) means "jurisdiction", and that the statutory powers of the Court are now "supervisory only, i.e., confined to seeing to it that the Commission does not exceed its jurisdiction. They do not extend to enable the Court to substitute its discretion for that of the Commission where the latter has made a decision lying within the confines of its jurisdiction."

An error of jurisdiction arises where the Commission has not kept within the subject-matter of the inquiry as set forth in Order in Council 2959/76. In the exercise of its powers under s. 6(1) of the Public Inquiries Act, 1971, the Divisional Court has a supervisory role to perform respecting errors of jurisdiction. In considering whether the Commission has

exceeded or has declined its jurisdiction, it is necessary to determine what evidence is admissible before the Commission and whether the Commission has the power to reject evidence by the application of exclusionary rules of evidence.

The Commission of Inquiry is charged with the duty to consider, recommend and report. It has a very different function to perform from that of a Court of law, or an administrative tribunal, or an arbitrator, all of which deal with rights between parties: Re Ontario Crime Com'n, [1963] 1 O.R. 391, 37 D.L.R. (2d) 382, [1963] 1 C.C.C. 117. It is quite clear that a commission appointed under the Public Inquiries Act, 1971 is not bound by the rules of evidence as applied traditionally in the Courts, with the exception of the exclusionary rule as to privilege (s. 11): Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton at p. 124 O.R., p. 488 D.L.R.; Re Children's Aid Society of County of York, [1934] O.W.N. 418 at p. 420. It may admit evidence which is not given under oath or affirmation (s. 10).

The approach of the Commission should not be a technical or unduly legalistic one. A full and fair inquiry in the public interest is what is sought in order to elicit all relevant information pertaining to the subject-matter of the inquiry.

As Cross points out in his text on Evidence, 4th ed., at p. 24:

> The admissibility of evidence ... depends first on the concept of relevancy of a sufficiently high degree, and secondly on the fact that the evidence tendered does not infringe any of the exclusionary rules that may be applicable to it.

In my opinion, any evidence should be admissible before the Commission which is reasonably relevant to the subject-matter of the inquiry, and the only exclusionary rule which should be applicable is that respecting privilege as required by s. 11 of the Public Inquiries Act, 1971. The requirement that the evidence be reasonably relevant was applied by this Court in R. v. Gaich or Gajic, [1956] O.W.N. 616 at p. 617, 116 C.C.C. 34,

24 C.R. 196. Having determined that the test of reasonable relevance should be applied, it is necessary to consider the meaning of the words "reasonably relevant".

The definition of "relevant" which has been commonly cited with approval by the Courts is that in Stephen's Digest of the Law of Evidence, 12th ed., art. I. It states that the word means that "any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other". In concluding what evidence is admissible as being reasonably relevant to a commission of inquiry, I would adopt the statement in McCormick on Evidence, 2nd ed., at p. 438: "Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value ...". A similar test was applied by this Court in Re Huston (1922), 52 O.L.R. 444. There a Commissioner appointed to hold an inquiry under the Public Inquiries Act, R.S.O. 1914, c. 18, as amended, decided to admit certain telegrams, and refused to state a case as to their admissibility. After examining and considering the telegrams, the Court was not prepared to say that the Commissioner erred in admitting them as relevant since he considered that they would be of assistance to him in reaching a conclusion as to the matters which were specifically referred to him.

In deciding whether evidence is reasonably relevant it is necessary to scrutinize carefully the subject-matter of the inquiry as set forth in Order in Council 2959/76. This is the governing document. The subject-matter of the inquiry is broad and somewhat unusual in its nature. It comprises:

(a) the overall merits of certain specified claims for additional compensation, including all circumstances of each particular case, which will embrace any misleading statements, inadequate appraisals or misunderstandings based upon reasonable grounds;

(b) a determination of the amount of additional compensation which the Commission is prepared to recommend;

(c) a report as to whether certain allegations of misconduct against the appellants are justified.

Its role is not only investigatory but requires a determination of the additional compensation that it sees fit to recommend.

The foregoing test of relevancy means that the gates will be opened quite wide in the admission of evidence. All the evidence admitted will not, of course, be of equal probative value. It will be the task of the Commission to determine the weight which should be given the oral or documentary evidence presented to it, when making its recommendations and report.

If evidence is reasonably relevant to the subject-matter of the inquiry, the Commission is not entitled to reject it as offending one of the exclusionary rules of evidence as applied in the Courts, other than the rule as to privilege which is made expressly applicable by s. 11 of the Public Inquiries Act, 1971. If this were not so, it would be possible, as Morden, J., points out in Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton, supra, at p. 121 O.R., p. 485 D.L.R., for the Commission to "define its own terms of reference under the guise of evidential rulings on admissibility" and consequently to govern its jurisdiction. If the Commission has refused to admit evidence which is reasonably relevant to the subject-matter of the inquiry, and is not expressly excluded by the Public Inquiries Act, 1971, or has admitted evidence which is not reasonably relevant to the inquiry, then the Commission is subject to the supervisory role of the Divisional Court on a stated case under s. 6(1) on the ground that the Commission has declined or exceeded its substantive jurisdiction.

An error of jurisdiction might also arise by reason of the denial of a statutory right. Under s. 5(1) of the Public Inquiries Act, 1971 a person who satisfies the Commission that he has a substantial and direct interest in the subject-matter of the inquiry is entitled to give evidence and to call and cross-examine witnesses relevant to his interest. The exclusion of such evidence by the Commission would be a denial of a statutory right amounting to an error of jurisdiction. The

admission of evidence which is privileged under the law of evidence would fall within the same category by reason of s. 11 of the Public Inquiries Act, 1971.

There may also be procedural practices amounting to a denial of natural justice which raise a jurisdictional issue: see Royal Com'n into Metropolitan Toronto Police Practices and Ashton, at p. 121 O.R., p. 485 D.L.R. However, it is not necessary in this appeal to consider whether such procedural practices would be reviewable by the Divisional Court on a stated case under s. 6(1) of the Public Inquiries Act, 1971.

Apart from the supervisory role of the Divisional Court in respect of errors of jurisdiction, the Commission has very broad powers under s. 3 of the Public Inquiries Act, 1971, as qualified by ss. 4 and 5, to control and direct the procedure to be followed on the inquiry. The Commission has a wide discretion, which it can exercise within the framework of the jurisdiction of the Commission. However, it cannot, as I have stated, exercise its discretion so as to narrow or enlarge that jurisdiction.

Power of the majority of the Commissioners to make binding rulings

The next issue for consideration is the power of the majority of the Commissioners to make rulings which are binding on the remaining Commissioner. While the supervisory powers of the Divisional Court on a stated case are limited to determining whether there has been an error of jurisdiction, the ruling or proposed ruling of the Commission as to the admissibility of evidence must necessarily precede the request for a stated case. It is the authority of the Commission to make the ruling which is called in question in the stated case. Accordingly, it is necessary to determine whether such rulings can be made by a majority of the Commission.

It is submitted by counsel for the respondents Terrence Dinsmore and Heather Lynn Dinsmore that as each Commissioner is required to make his recommendations and report, he should be entitled to determine the evidence upon which his conclusions

are to be based. As has been pointed out, this submission was accepted by the majority in the Divisional Court.

The term "commission" as defined in s. 1(a) of the Public Inquiries Act, 1971 means "the one or more persons appointed to conduct an inquiry under this Act". In my opinion it is significant that the Act draws a distinction between acts to be performed by the body called a Commission, and acts which may be performed by one of the Commissioners.

Under s. 3 the conduct of and the procedure to be followed on an inquiry is under the control and direction of the Commission. Section 4 gives the Commission the power in certain circumstances to hold the hearing in camera. Under s. 5 it is the Commission that is to accord to a person who has a substantial or direct interest in the subject-matter of the inquiry an opportunity to give evidence and to examine and cross-examine witnesses. It is the Commission which may state a case under ss. 6 and 8. The power to admit evidence not under oath or affirmation (s. 10) and the power to appoint a person to make an investigation (s. 17) are also given to the Commission.

On the other hand s. 14 provides:

> 14. Where two or more persons are appointed to make an inquiry, any one of them may exercise the powers conferred by section 7, 12 or 13.

It was contended on the hearing of the appeal that s. 7 contemplates one Commissioner requiring the admission of evidence which he considers to be relevant.

Section 7 provides:

> 7(1) A commission may require any person by summons,
>
> (a) to give evidence on oath or affirmation at an inquiry; or
>
> (b) to produce in evidence at an inquiry such documents and

things as the commission may specify,

relevant to the subject matter of the inquiry and not inadmissible in evidence at the inquiry under section 11.

(2) A summons issued under subsection 1 shall be in Form 1 and shall be served personally on the person summoned and he shall be paid at the time of service the like fees and allowances for his attendance as a witness before the commission as are paid for the attendance of a witness summoned to attend before the Supreme Court.

In my opinion, s. 7 only empowers one of the Commissioners to perform the administrative function of issuing the necessary summons to a witness whose oral or documentary evidence is required. Similarly one Commissioner is authorized under s. 12 to release documents produced in evidence and under s. 13 to administer oaths and affirmations and to require evidence to be given under oath or affirmation. Section 7 does not authorize one Commissioner to require evidence to be admitted for his benefit which the majority has ruled to be inadmissible. Such rulings as to admissibility properly fall within the powers of the Commission under s. 3 as part of the conduct of the inquiry.

The provision in Order in Council 2959/76 that "All matters referred to this Commission shall be heard and determined in proceedings of an adversarial nature" is also of significance. An "adversary proceeding" is defined in Black's Law Dictionary, 4th ed. (1968), as "one having opposing parties". While the report of the Commission does not have to be a unanimous one, the fact that there is not only to be a hearing but a determination in proceedings of an adversarial nature contemplates, in my judgment, that if there is not a unanimous report, there will at least be a majority and a minority report on the subject-matter of the inquiry. In my opinion the evidence which is admitted by the Commission is admitted for the benefit of all the Commissioners. It is obvious that there is to be only one hearing or series of hearings and from these proceedings will come one record. There is one body of evidence on which the Commissioners should make their recommendations

and report. They may, of course, attach different weight to the various items of evidence. It would greatly complicate the task of the Government if it had to assess the recommendations and reports of the Commission based on the admission of different evidence by each Commissioner. It would also render the position of counsel submitting argument to the Commission virtually impossible as there could be an infinite multiplicity of records.

In the absence of any express statutory provisions in the Public Inquiries Act, 1971 giving the majority of the Commissioners power to bind the minority, one must look to other relevant statutory provisions and to the decisions of the Courts.

Section 27(c) of the Interpretation Act, R.S.O. 1970, c. 225, provides that:

> 27. In every Act, unless the contrary intention appears,
>
> . . . . .
>
> (c) where an act or thing is required to be done by more than two persons, a majority of them may do it;

There is no express provision in the Public Inquiries Act, 1971 which requires the Commission to rule on the admissibility of evidence. Its power to make such rulings is implicit in s. 3 which places the conduct of and the procedure to be followed on an inquiry under its control and direction. Unlike s. 5 which requires the Commission to accord certain rights to interested persons, s. 3 does not make the giving of rulings on the admissibility of evidence mandatory. Section 27(c) of the Interpretation Act does not, therefore, determine the matter before us.

As to the decisions of the Courts it may be regarded as having been established since Grindley et al. v. Barker et al. (1798), 1 Bos. Pul. 229, 126 E.R. 875, that where a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general (that is, public)

nature, and all of them are regularly assembled, the act of the majority will bind the minority. Eyre, C.J., was, however, careful to point out in that case that this general rule of law would have to give way if a contrary intent could be ascertained from the particular statute in question. Grindley v. Barker was approved by the Judicial Committee of the Privy Council in its report respecting the questions raised with reference to the "Irish Boundary Commission", 59 L.J. 517 (1924). Their Lordships stated:

> (b) If three Commissioners had once been appointed, then, although in private arbitrations unanimity is necessary, it is otherwise when the matter to be determined is of public concern. This was settled so long ago as 1798 in the case of Grindley v. Baker ... [sic]. This case was followed by Lord Chancellor Cairns, Lord Selborne, and several other members of the Judicial Committee in the matter of an Arbitration between the Province of Ontario and the Province of Quebec, where the matter was referred by his Majesty to the Judicial Committee. The case is reported in 4 Cartwright's Cases on the British North America Act, p. 712. The case had to do with section 142 of the British North America Act, where a certain matter was to be referred to the arbitrament of three arbitrators, one appointed by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada. One of the arbitrators had retired. Lord Selborne says "the view which prevails that unanimity is necessary when power is given to three persons does not depend on anything peculiar to arbitrations, it surely would be a general view subject to control either by something expressed in the instrument or by something to be collected from the nature of the power and the duty to be performed under it." And then he puts the question, "Is not one reason for the distinction that in the public interest it is necessary that the thing should be decided"; and their Lordships' answers were given in accordance with this view. These authorities seem to their Lordships conclusive. They have no doubt that this is a matter of public interest, and not a matter of merely private concern between the parties concerned, and they, therefore, answer that though in accordance with their answer to Question 1 if no appointment is made the Commission

cannot go on, yet if once the three appointments had been made, a majority would rule.

(Emphasis added.)

The same general rule of law was applied by the Court of Appeal of New Zealand in Atkinson v. Brown, [1963] N.Z.L.R. 755, and by the Divisional Court in England in Picea Holdings Ltd. v. London Rent Assessment Panel, [1971] 2 Q.B. 216.

A careful perusal of the Public Inquiries Act, 1971 does not disclose any contrary intention that the decision of the majority of the Commissioners should not bind the minority. I can see no reason why this general rule should not be applicable to a commission of inquiry under that Act. The powers of the Commissioners in question were of a public nature and were being exercised at a hearing where all three Commissioners were present. In my opinion, the rulings made by the majority of the Commissioners as to the admissibility of evidence were binding on the minority.

In the Divisional Court, Reid, J., in his dissenting judgment concluded that the Chairman had the power to govern the proceedings even if the other two Commissioners were opposed to his views. He relied on the decision of the Divisional Court in Re Schabas et al. and Caput of University of Toronto et al. (1974), 6 O.R. (2d) 271, 52 D.L.R. (3d) 495, where the chairman of the University of Toronto Caput indicated his intention to make rulings on grounds of law. It should, however, be noted that in the Schabas case the Court considered that the silence of the remainder of the members of Caput was tantamount to their approval of the actions of the chairman. The Chairman of the Commission in this appeal, however, acts merely as the spokesman through which the rulings of the Commission are made known. He has no special powers to make rulings which are binding on the other Commissioners.

Rejection of testimony in Qq. 5 and 6

The remaining issue is whether the Commission properly refused to permit the admission of the testimony referred to in

Qq. 5 and 6. In discussing the role of the Divisional Court respecting errors of jurisdiction, I have already pointed out that evidence should be admitted if it is reasonably relevant to the subject-matter of the inquiry. I have also pointed out that apart from the exclusionary rule as to privilege, the Commission is not bound by the rules of evidence including the hearsay rule. Accordingly, it is not necessary, as the majority of the Divisional Court did, to consider whether the evidence in question would have constituted a violation of the rule respecting hearsay evidence.

The Commission was required to consider all the circumstances of each particular case including any misleading statements or misunderstandings based upon reasonable grounds in the circumstances of that case. In my opinion the testimony referred to in Qq. 5 and 6 was reasonably relevant in the sense that it would advance the inquiry. The fact that Mr. Kuzik, the land acquisition agent with whom Mr. and Mrs. Bayes had their dealings, made the same statement to them as Mr. Bowles made to the respondents Terrence Dinsmore and Heather Lynn Dinsmore, namely, that he could not see how they would receive any more money if they awaited expropriation, would be relevant in determining whether the Dinsmores acted on a misunderstanding based upon reasonable grounds. If the Dinsmores believed what Mrs. Bayes told them, it would be an additional consideration which the Dinsmores weighed in reaching a decision to sell their property. I have already referred to the conclusion of Commissioner Humphrey that the testimony was admissible. In my opinion the Commission declined jurisdiction in not admitting the testimony referred to in Qq. 5 and 6.

Accordingly, the appeal should be allowed in part and the order of the Divisional Court should be varied by deleting the answers to Qq. 3 and 4 and substituting the following:

Question 3: The Commission of Inquiry properly exercised its jurisdiction in deciding that the document referred to in Question 1 would not be admitted and marked as an exhibit notwithstanding the conclusion of Commissioner Humphrey that the document was in fact admissible and would have been received by him;

Question 4: The Commission of Inquiry properly exercised its jurisdiction in deciding that the document referred to in Question 2 would not be admitted and marked as an exhibit notwithstanding the conclusion of Commissioner Humphrey that the document was in fact admissible and would have been received by him.

I would make no order as to the costs of this appeal or of the application for leave to appeal.

Judgment accordingly.

Most Negative Treatment: Check subsequent history and related treatments.

2008 ONCA 33
Ontario Court of Appeal

Ontario Provincial Police v. Cornwall Public Inquiry Commissioner

2008 CarswellOnt 191, 2008 ONCA 33, [2008] O.J. No. 153, 163 A.C.W.S. (3d) 481, 232 O.A.C. 251, 289 D.L.R. (4th) 14

ONTARIO PROVINCIAL POLICE, ONTARIO PROVINCIAL POLICE ASSOCIATION, CORNWALL COMMUNITY POLICE SERVICE, MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES and THE EPISCOPAL CORPORATION OF THE DIOCESE OF ALEXANDRIA CORNWALL (APPELLANTS) and THE HONOURABLE G. NORMAND GLAUDE, COMMISSIONERTHE CORNWALL PUBLIC INQUIRY (RESPONDENT)

Doherty J.A., E.E. Gillese J.A., and M.J. Moldaver J.A.

Heard: December 13, 2007
Judgment: January 18, 2008
Docket: CA C47951

Proceedings: reversing *Ontario Provincial Police v. Cornwall Public Inquiry Commissioner* (2007), (sub nom. *Ontario Provincial Police v. Glaude)* 229 O.A.C. 238, 2007 CarswellOnt 5828 (Ont. Div. Ct.) [Ontario]

Counsel: Gina Saccoccio Brannan, Q.C. for Ontario Provincial Police
W. Mark Wallace for Ontario Provincial Police Association
David Rose for Ministry of Community Safety and Correctional Services
Peter E. Manderville for Cornwall Community Police Service
Brian J. Gover, Patricia M. Latimer for Respondent, Commissioner
Leslie M. McIntosh for Intervenor, Attorney General for Ontario

Subject: Public

Related Abridgment Classifications

Law enforcement agencies
III Commissions of inquiry
III.2 Jurisdiction

Public law
III Public authorities
III.6 Provincial boards and commissions
III.6.e Miscellaneous

Headnote

Public law --- Public authorities — Provincial boards and commissions — Miscellaneous
Public inquiry — Commission was formed to conduct public inquiry into institutional response to allegations of historical abuse against young people in city — Provincial and municipal police services, Ministry of Community Safety and Correctional Services, diocese and Attorney General as intervenor brought unsuccessful application for order directing commissioner of

inquiry to state case regarding evidence of two witnesses — Evidence related to sexual assault against one witness by other young persons at knifepoint, which was reported to police at time of incident, but it was alleged nothing was done — By majority, divisional court held commissioner was in best position to assess relevance of weight to be attached to evidence of witnesses — Divisional court held it was open to commissioner to decide what construction to place on "historical" and "abuse" as set out in terms of reference in order to carry out his mandate — Divisional court held alleged failure of provincial police to respond to witness's complaint could be considered "reasonably relevant" to mandate of inquiry, and did not direct commissioner to state case — Applicants appealed — Appeal allowed — Commissioner erred in finding that proposed evidence of witnesses came within subject matter of commission, and committed jurisdictional error.

Law enforcement agencies --- Commissions of inquiry — Jurisdiction
Commission was formed to conduct public inquiry into institutional response to allegations of historical abuse against young people in city — Provincial and municipal police services, Ministry of Community Safety and Correctional Services, diocese and Attorney General as intervenor brought unsuccessful application for order directing commissioner of inquiry to state case regarding evidence of two witnesses — Evidence related to sexual assault against one witness by other young persons at knifepoint, which was reported to police at time of incident, but it was alleged nothing was done — By majority, divisional court held commissioner was in best position to assess relevance of weight to be attached to evidence of witnesses — Divisional court held it was open to commissioner to decide what construction to place on "historical" and "abuse" as set out in terms of reference in order to carry out his mandate — Divisional court held alleged failure of provincial police to respond to witness's complaint could be considered "reasonably relevant" to mandate of inquiry, and did not direct commissioner to state case — Applicants appealed — Appeal allowed — Commissioner erred in finding that proposed evidence of witnesses came within subject matter of commission, and committed jurisdictional error — Subject matter of commission was investigation of institutional response to allegation of historical sexual abuse of young people by persons in authority or positions of trust in city — Evidence of witnesses was not reasonably relevant to subject matter of inquiry.

Table of Authorities

Cases considered by *M.J. Moldaver J.A.*:

Bortolotti v. Ontario (Ministry of Housing) (1977), 76 D.L.R. (3d) 408, 15 O.R. (2d) 617, 1977 CarswellOnt 499 (Ont. C.A.) — followed

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 50 Admin. L.R. (2d) 199, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — referred to

Marcovitz v. Bruker (2007), 2007 SCC 54, 2007 CarswellQue 11548, 2007 CarswellQue 11549 (S.C.C.) — referred to

NAV Canada c. Wilmington Trust Co. (2006), 2006 CarswellQue 4890, 2006 CarswellQue 4891, 2006 SCC 24, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.)* 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc., (Bankrupt), Re)* 349 N.R. 1, (sub nom. *Canada 300 Inc., Re)* [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc. (Bankrupt), Re)* 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re)* 269 D.L.R. (4th) 79 (S.C.C.) — referred to

Ontario (Royal Commission into Metropolitan Toronto Police Practices) v. Ashton (1975), 10 O.R. (2d) 113, 27 C.C.C. (2d) 31, 64 D.L.R. (3d) 477, 1975 CarswellOnt 487 (Ont. Div. Ct.) — considered

Ryan v. Law Society (New Brunswick) (2003), 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 302 N.R. 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, (sub nom. *Law Society of New Brunswick v. Ryan)* [2003] 1 S.C.R. 247, 31 C.P.C. (5th) 1 (S.C.C.) — referred to

Statutes considered:

Public Inquiries Act, 1971, S.O. 1971, c. 49
s. 6 — referred to

s. 6(1) — referred to

s. 11 — considered

Public Inquiries Act, R.S.O. 1990, c. P.41
Generally — referred to

s. 6 — considered

s. 6(1) — considered

s. 6(2) — considered

s. 6(3) — considered

APPEAL by applicants from judgment reported at *Ontario Provincial Police v. Cornwall Public Inquiry Commissioner* (2007), (sub nom. *Ontario Provincial Police v. Glaude)* 229 O.A.C. 238, 2007 CarswellOnt 5828 (Ont. Div. Ct.), dismissing application for stated case.

***M.J. Moldaver J.A.*:**

1 On April 14, 2005, a Commission known as the Cornwall Public Inquiry was established pursuant to the *Public Inquiries Act*, R.S.O. 1990, c. P. 41 ("Act"). Mr. Justice G. Normand Glaude of the Ontario Court of Justice was appointed as the Commissioner.

2 The Commission has been functioning for the better part of two years. After sorting out a host of preliminary matters, including the issue of which parties would be granted standing, the Commission began hearing evidence in mid-February 2006. As of mid-July 2007, the Commission had heard from sixty-four witnesses, including eleven contextual expert witnesses, nineteen corporate officials representing various public institutions, twenty-eight alleged victims and six relatives of alleged victims.

3 Against that backdrop, it is hard to believe that the Commissioner, his counsel and the parties would, at this late stage, be involved in a debate about the subject matter of the Inquiry and the breadth of the Commissioner's mandate. And yet that is precisely the issue that lies at the core of this appeal.

4 The issue has its genesis in the evidence of two witnesses, identified for privacy purposes as C12 and C13. Commission counsel seeks to lead their evidence before the Commissioner, while the appellants and the Attorney General for Ontario, as intervenor, seek to exclude it.

5 In a nutshell, the impugned evidence arises from an allegation by C12 that on December 8, 1993, when she was sixteen years old and living with her mother in Alexandria, Ontario, she was sexually assaulted at knifepoint by two teenage boys. C12 reported the matter to the police in Alexandria the next day. If permitted to testify, C12 and her mother, C13, will speak about the abusive, insensitive and unprofessional treatment that C12 allegedly received at the hands of an officer of the Ontario Provincial Police who took her complaint and commenced the investigation. C12 will also speak about her loss of confidence in the police, her decision not to proceed with the charges and the emotional difficulties that she has suffered as a result of the incident.

6 The appellants, led by the Ontario Provincial Police ("OPP"), and the intervenor submit that the proposed evidence falls outside the ambit of the Commission's mandate. They say that the phrase "allegations of historical abuse of young people" in the Order in Council ("OIC") establishing the Commission restricts the subject matter of the Commission to allegations of abuse of young persons in the Cornwall area by persons who were in positions of trust or authority, and which were reported to a public institution a considerable time after the abuse occurred. Commission counsel, on the other hand, submits that the subject matter of the Commission extends to all cases involving allegations of abuse of young people in the Cornwall area, including allegations of sexual assault such as those made by C12, so long as the allegations were made before April 14, 2005, the date on which the Commission was established.

7 Following a hearing in which the parties set out their respective positions, the Commissioner determined that the subject matter of the Commission was the more expansive one urged by Commission counsel. In his written reasons dated June 16, 2007, the Commissioner refused a request under s. 6(1) of the Act to state a case to the Divisional Court questioning his authority to receive the evidence of C12 and C13.

8 The OPP and others then applied to the Divisional Court under s. 6(2) of the Act for an order directing the Commissioner to state such a case. In the application to the Divisional Court, the appellants posed the following questions:

> Question 1: Do the Terms of Reference of the Cornwall Public Inquiry contemplate the hearing of evidence of an allegation of sexual assault on a 16 year old female by a 16 year old male and a 17 year old male which was reported to the police on the day following the alleged offence given the mandate of the inquiry to "...inquire into and report on the institutional response of the justice system ... to allegations of historical abuse of young people..."?
>
> Question 2: In deciding to hear the evidence of C12 and C13, did the Commission of Inquiry properly exercise its jurisdiction or exceed its jurisdiction?

9 In a split decision, the Divisional Court dismissed the application to direct the Commissioner to state such a case. The majority concluded that the Commissioner did not err in construing his mandate broadly. They further held that it was open to him to find that the evidence of C12 and C13 was "reasonably relevant" to the subject matter of the Inquiry. Accordingly, they declined to direct the Commissioner to state a case.

10 H. Spiegel J., in dissent, came to the opposite conclusion. In his view, the Commissioner misconstrued the subject matter of the Commission and exceeded his jurisdiction in concluding that the proposed evidence of C12 and C13 came within it. He would have allowed the application and answered the questions on the stated case as follows:[1]

> Question 1: Is evidence of sexual abuse of a young person reported at or near the time it was alleged to have occurred reasonably relevant to the Terms of Reference given the mandate of the inquiry to "... inquire into and report on the institutional response of the justice system... to allegations of historical abuse ...?"
>
> Answer: No.
>
> Question 2: In deciding to hear the evidence of C12 and C13 did the Commissioner properly exercise his jurisdiction or exceed his jurisdiction?
>
> Answer: The Commissioner exceeded his jurisdiction.

11 For reasons that follow, I am respectfully of the view that the Commissioner erred in finding that the proposed evidence of C12 and C13 comes within the subject matter of the Commission. In so concluding, the Commissioner impermissibly redefined and expanded the scope of his mandate and committed jurisdictional error. Accordingly, I would allow the appeal and would answer the questions on the stated case, as framed by the appellants, in the same manner as did Spiegel J.

Relevant Statutory Provisions

12 Section 6 of the Act states:

> 6. (1) Where the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question by a person affected, the commission may of its own motion or upon the request of such person state a case in writing to the Divisional Court setting forth the material facts and the grounds upon which the authority to appoint the commission or the authority of the commission to do the act or thing are questioned.

(2) If the commission refuses to state a case under subsection (1), the person requesting it may apply to the Divisional Court for an order directing the commission to state such a case.

(3) Where a case is stated under this section, the Divisional Court shall hear and determine in a summary manner the question raised.

13 The relevant parts of the OIC dated April 14, 2005, which created the Cornwall Public Inquiry, state:

WHEREAS allegations of abuse of young people have surrounded the City of Cornwall and its citizens for many years. The police investigations and criminal prosecutions relating to these allegations have concluded. Community members have indicated that a public inquiry will encourage individual and community healing;

AND WHEREAS under the *Public Inquiries Act*, R.S.O. 1990, c. P.41, the Lieutenant Governor in Council may, by commission, appoint one or more persons to inquire into any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or the administration of justice therein or any matter of public concern, if the inquiry is not regulated by any special law and if the Lieutenant Governor in Council considers it desirable to inquire into that matter;

AND WHEREAS the Lieutenant Governor in Council considers it desirable to inquire into the following matters. The inquiry is not regulated by any special law;

THEREFORE, pursuant to the *Public Inquiries Act*:

Establishment of the Commission

1. A Commission shall be issued effective April 14, 2005, appointing the Honourable G. Normand Glaude as a Commissioner.

Mandate

2. The Commission shall inquire into and report on the institutional response of the justice system and other public institutions, including the interaction of that response with other public and community sectors, in relation to:

(a) allegations of historical abuse of young people in the Cornwall area, including the policies and practices then in place to respond to such allegations, and

(b) the creation and development of policies and practices that were designed to improve the response to allegations of abuse

in order to make recommendations directed to the further improvement of the response in similar circumstances.

3. The Commission shall inquire into and report on processes, services or programs that would encourage community healing and reconciliation in Cornwall.

4. The Commission may provide community meetings or other opportunities apart from formal evidentiary hearings for individuals affected by the allegations of historical abuse of young people in the Cornwall area to express their experiences of events and the impact on their lives.

Analysis

14 I begin my analysis by referring in more detail to the reasons of the Commissioner for refusing to state a case on the issue whether he had jurisdiction to hear the evidence of C12 and C13. The appellants' position before the Commissioner was that the term "historical abuse of young people" in para. 2 of the OIC restricts the scope of the Inquiry to situations where the

abuse complained of occurred to a child, by a person in authority, and which was only reported to an institution much later. In contrast, Commission counsel took the view that the word "historical" means abuse that occurred prior to April 14, 2005, the date of the OIC.

15 The Commissioner concluded that the proposed evidence came within the subject matter of the Inquiry and for that reason it was within his jurisdiction to admit it. This conclusion is made clear at p. 4 of his reasons where he defined the issue confronting him as follows:

> Finally, I should note that the parties did make submissions with respect to relevance of the evidence in question.
>
> In my view, the question before me is *one of jurisdiction only* as relevance would go to issues such as admissibility generally and the weight to be given to such evidence, which is not the subject matter of a section 6 application.[2] [Emphasis added.]

16 In reaching this conclusion, the Commissioner expressed the opinion that both of the competing interpretations of "historical" that were advanced by the parties "have merit and that they are not mutually exclusive but are quite compatible." He acknowledged that "the main focus of Parliament" in appointing the Inquiry "was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry; hence, the reference to allegations of historical abuse." More will be said later in these reasons about the nature of the cases that were in the spotlight in Cornwall at the time of the decision to convene the Inquiry. Suffice to say at this point that these cases involved allegations of historical abuse of young people by persons in authority or positions of trust.

17 Having identified the main focus of his mandate, the Commissioner was of the view that such mandate should not be read as being limited to a consideration of those particular cases:

> I am of the view that while Parliament certainly indicated that historical allegations of abuse would be a central part of the Inquiry, the mandate certainly does not read to limit it to those specific cases.
>
> To interpret the mandate in such a way is unduly restrictive and contrary to the spirit of the preamble and to section 3 of the Order in Council.

18 On the Commissioner's view of the expansive mandate created by the OIC, the proposed evidence of C12 and C13 came within the terms of reference and as such, it was clearly admissible.

19 The majority of the Divisional Court, in dismissing the appellants' application to direct the Commissioner to state a case, correctly articulated the principles that govern applications under s. 6 of the Act. These principles were first set out by Morden J. in *Ontario (Royal Commission into Metropolitan Toronto Police Practices) v. Ashton* (1975), 10 O.R. (2d) 113 (Ont. Div. Ct.)and were later approved by Howland J.A. in *Bortolotti v. Ontario (Ministry of Housing)* (1977), 15 O.R. (2d) 617 (Ont. C.A.). Howland J.A. held at p. 623 that applications under s. 6(1) of the Act are confined to matters of jurisdiction only:

> Section 6(1) of the *Public Inquiries Act, 1971* no longer provides for a case to be stated as to the "validity of any decision, order, direction or other act of a commissioner". I am in agreement with the conclusion of Morden, J., in *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* (1975), 10 O.R. (2d) 113 at pp. 119-21, 64 D.L.R. (3d) 477 at pp. 483-5, 27 C.C.C. (2d) 31, that "authority" in s. 6(1) means "jurisdiction", and that *the statutory powers of the Court are now "supervisory only, i.e., confined to seeing to it that the Commission does not exceed its jurisdiction. They do not extend to enable the Court to substitute its discretion for that of the Commission where the latter has made a decision lying within the confines of its jurisdiction."*
>
> [Emphasis added.]

20 Howland J.A. went on at pp. 623-24 to explain how the court on a s. 6 application is to assess whether the Commission has committed a jurisdictional error:

> *An error of jurisdiction arises where the Commission has not kept within the subject-matter of the inquiry as set forth in Order in Council 2959/76.* In the exercise of its powers under s. 6(1) of the *Public Inquiries Act, 1971*, the Divisional Court has a supervisory role to perform respecting errors of jurisdiction. In considering whether the Commission has exceeded or has declined its jurisdiction, it is necessary to determine what evidence is admissible before the Commission...
>
> *In my opinion, any evidence should be admissible before the Commission which is reasonably relevant to the subject-matter of the inquiry*, and the only exclusionary rule which should be applicable is that respecting privilege as required by s. 11 of the *Public Inquiries Act, 1971*. [Emphasis added.][3]

21 *Bortolotti* thus directs that an error of jurisdiction occurs when the Commission admits evidence that is not reasonably relevant to the subject matter of the inquiry. Howland J.A. addressed the meaning of the phrase "reasonably relevant" at pp. 624-25:

> Having determined that the test of reasonable relevance should be applied, it is necessary to consider the meaning of the words "reasonably relevant".
>
> The definition of "relevant" which has been commonly cited with approval by the Courts is that in *Stephen's Digest of the Law of Evidence*, 12th ed., art. I. It states that the word means that "any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other". *In concluding what evidence is admissible as being reasonably relevant to a commission of inquiry, I would adopt the statement in McCormick on Evidence, 2nd ed., at p. 438: "Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value ... ".*
>
> *In deciding whether evidence is reasonably relevant it is necessary to scrutinize carefully the subject-matter of the inquiry as set forth in Order in Council 2959/76. This is the governing document....*[Emphasis added.]

22 Having correctly set out the applicable legal principles from *Bortolotti* at paras. 14-17 of their reasons, the majority did not go on to perform the review function that they had identified, namely, "to scrutinize carefully the subject matter of the inquiry as set forth in the Order in Council". Instead, the majority took a deferential approach to reviewing the Commissioner's decision on the subject matter of the Inquiry and simply concluded that it was "open to him to place a different construction on 'historical' and 'abuse' as set out in the Terms of Reference in order to carry out his mandate" (at para. 20).

23 In my respectful view, the majority erred in taking a deferential approach. No deference is owed to the Commissioner on the issue of the definition of the subject matter of the Inquiry. The Commissioner's jurisdiction is limited to that subject matter, which is prescribed by the legislature in the OIC creating the Commission. If the Commissioner defines the subject matter too broadly or too narrowly, he or she will have rewritten the OIC and redefined the terms of reference. That, of course, is impermissible and constitutes jurisdictional error.

24 In my view, the Commissioner misconstrued the OIC and in so doing he enlarged the subject matter of the Inquiry and conferred a much wider jurisdiction upon himself than the legislature contemplated. In interpreting the OIC as he did, I believe that the Commissioner committed four errors:

> (1) he failed to consider the context and circumstances in which the Commission was established;
>
> (2) he failed to consider relevant wording in the preamble to the OIC that provided valuable insight into the nature and type of allegations at issue;
>
> (3) he failed to construe wording used in the OIC harmoniously and with reference to the document as a whole;
>
> (4) by reason of the first three errors, he misidentified the subject matter of the Inquiry and ascribed to himself a mandate that is beyond anything contemplated by the legislature.

25 I now propose to address each of the four errors.

(1) Failure to consider the context and circumstances leading to the creation of the Commission

26 The starting point for interpreting the Commissioner's mandate is a consideration of the terms of the OIC: *Bortolotti* , p. 623. In this case, however, the words of the OIC are not plain and obvious and do not admit of only one meaning. The Commissioner essentially acknowledged this difficulty at the outset of his analysis with his comment that the parties' competing interpretations of the word "historical" as used in the OIC both "have merit" and are "quite compatible". Likewise the word "abuse" — which appears in the paragraphs describing the mandate of the Commissioner and in the preamble — is capable of being broadly or narrowly construed, and yet the term is not defined in the OIC.

27 Given the unclear language used in the OIC, the Commissioner was entitled to and should have looked beyond the four corners of the document for assistance in interpreting its meaning. Had he done so, he would have gained valuable insight into the scope of his mandate from the background circumstances and context in which the Commission was created.

28 In upholding the Commissioner's interpretation of the subject matter of the Commission, the majority of the Divisional Court also failed to consider the background circumstances that led to the establishment of the Inquiry. With respect, I believe that it was necessary to have careful regard to these circumstances when defining the subject matter of the Inquiry.

29 The background circumstances that gave rise to calls for this public inquiry are referred to in summary form in the first two sentences of the preamble to the OIC as follows:

> WHEREAS *allegations of abuse of young people* have surrounded the City of Cornwall and the citizens for many years. *The police investigations and criminal prosecutions relating to these allegations have concluded.*[4] [Emphasis added.]

30 The factual matrix surrounding "the allegations of abuse of young people" in the City of Cornwall and the details of the completed "police investigations and criminal prosecutions relating to them" is described in the affidavit of acting Detective Superintendent Colleen McQuade of the OPP, dated July 18, 2007. In her affidavit, Det. Supt. McQuade details the background and history of allegations of historical sexual abuse involving children in the Cornwall area by persons in authority or positions of trust and how those allegations ultimately came to public attention. She refers to an initial complaint made in 1992 by a thirty-four year old Cornwall resident who claimed that, as a child, he had been sexually abused by a priest and a probation officer. She comments on the charges that were laid in relation to those allegations and how those charges eventually came to be withdrawn. She then details steps taken in 1994 by a member of the Cornwall Police Service that resulted in the public exposure of the original allegations, including the circumstances surrounding the withdrawal of charges relating to them, as well as further allegations of historical sexual abuse involving the priest made by two other adult complainants.

31 Det. Supt. McQuade's affidavit also outlines the repercussions arising from these allegations, including charges that were laid "under the *Police Act*" against the Cornwall police officer who disclosed the pertinent information, as well as an ensuing civil action that the officer brought against a number of "named individuals and organizations including the former and current Chiefs of Police of the Cornwall Police Service". According to Det. Supt. McQuade, in the context of his civil suit, the Cornwall police officer and his lawyer "began to collect information regarding other alleged victims of child sexual abuse, a clan of pedophiles in the Cornwall area, a conspiracy [by the priest and the probation officer] and their lawyer... in the fall of 1993, to murder [the officer] and the members of his family, and a conspiracy to obstruct justice in late summer 1993 by prominent members of the Cornwall community including, amongst others, [the lawyer of the priest and the probation officer], the Crown Attorney, the Bishop of the Diocese and the Chief of Police".

32 Det. Supt. McQuade explains that this information was delivered to the Chief of Police of the London Police Service in late 1996 and, by early 1997, it had found its way to the OPP and the Ministry of the Attorney General. Eventually, the Regional Director of Crown Attorneys for the Eastern Region of Ontario "requested that the OPP investigate the myriad of allegations contained in the information which [the Cornwall police officer] had provided". This in turn led to the commencement in July 1997 of an investigation by the OPP "into allegations of historic sexual abuse in the Cornwall area known as 'Project Truth'". That project ultimately resulted in "fifteen (15) persons being charged with one hundred and fifteen (115) offences involving thirty-four (34) alleged victims". All criminal proceedings arising from the project concluded on October 18, 2004. On November 4, 2004, the Premier of Ontario "announced that the Government of Ontario was committed to calling a public

inquiry into 'Project Truth'".

33 In my view, this information fleshes out the meaning of the first two sentences of the preamble to the OIC and makes it clear that the "allegations of abuse of young people" that had "surrounded the City of Cornwall and its citizens for many years" refer to the allegations of historical sexual abuse of young people by persons in authority or positions of trust that were the focus of Project Truth and the "police investigations and criminal prosecutions" in relation to those allegations that had now concluded.

34 I am fortified in this interpretation of the preamble to the OIC by various Hansard extracts that both pre-date and post-date the formation of the Commission on April 14, 2005. Three of the relevant extracts pre-date the OIC and the other post-dates it.

35 The first relevant Hansard extract is from April 20, 2004, when the MPP for Stormont-Dundas-Charlottenburgh, Mr. Jim Brownell, posed the following question to the Attorney General:

> *During the past decade in my riding of Stormont-Dundas-Charlottenburgh, there have been numerous cries for an independent public inquiry into childhood sexual abuse allegations and cover-ups in Cornwall.* As a candidate in the last election, I wholeheartedly supported a public inquiry. The lives of many people have been touched by the issues surrounding these allegations. The citizens, police forces, public organizations and those who work in the judiciary system are in need of a sense of worth and community. A thorough investigation will have positive consequences for those who work to uphold pride, sensibility and the spirit of community in my riding.

36 The Attorney General Michael Bryant responded:

> There is right now a criminal proceeding that is underway. ... A public inquiry cannot be held at this time, while this criminal proceeding is underway.
>
> . . . . .
>
> When the criminal proceeding is complete, at that point, we will be relying upon that member to continue to be an advocate on behalf of his community....

37 Another Hansard extract of significance is from November 4, 2004, when MPP Peter Kormos from Niagara Centre posed the following question to the Premier:

> *A cloud continues to hang over the city of Cornwall because you haven't kept your promise to hold a full public inquiry into the Project Truth investigation.* It's a troubling story because, as you know, a citizens' committee itself uncovered evidence of sexual assaults on close to 50 victims, some of them as young as 12 years old. The OPP subsequently laid 115 charges against 15 people, yet only one person was ever convicted, and most of the cases were stayed by the crown because of prosecutorial delay.

38 In response to MPP Kormos' query, Premier Dalton McGuinty expressed his commitment to holding such an inquiry after the expiry of the appeal period in the criminal proceedings.

39 In Hansard from November 18, 2004, MPP Bronwell made the following remarks:

> *...On November 4, 2004, the Premier stood before this House and committed to the people of my riding that a full public inquiry would be called in the Project Truth investigations once all criminal proceedings were concluded.*
>
> I'm happy to announce today that on Monday, November 15, 2004, the last of the criminal proceedings were concluded, and yesterday the Premier, myself and the Attorney General, Michael Bryant, committed to holding a full public inquiry in this case....
>
> *The Project Truth investigations and subsequent criminal proceedings have clouded over the Cornwall area for the past decade. With the announcement of this public inquiry, the truth of allegations of misconduct and alleged cover-ups will*

> *be able to come to light. The people of Cornwall and area will be able to lift this cloud of allegations and have these investigations come to a conclusion.* [Emphasis added]

40 The final relevant Hansard extract is from April 19, 2005, when MPP Brownell expressed his thanks to the Attorney General and Premier for ordering the Inquiry:

> *First let me congratulate and thank you and the Premier for the realization of a full public inquiry into the sex abuse scandal that has shaken the community of Cornwall and area.* I was proud to be with you yesterday at city hall in Cornwall to see the looks of relief on the faces of the victims as it became clear that the McGuinty team was fulfilling its promise to hold an inquiry. From the formation of this government, you have worked tirelessly with me and with those involved in the community and area to see that this long-standing concern was addressed.

41 The Attorney General responded as follows:

> Yes, with the public inquiry, under the *Public Inquiries Act*, he has all the tools at his disposal to leave no stone unturned and to provide recommendations that ultimately, we hope, will lead to some reconciliation and healing for the people of Cornwall. Along the way, we will work with the commission, as the commissioner sees fit, to ensure that victims get the services they need during what will inevitably be a very painful time for them. *Ultimately, with this public inquiry, we will finally get to the bottom of what happened and will get recommendations so we can proceed better in the future, in a way that not only can everybody have confidence in the system, but the victims can feel that justice has been done.*
>
> [Emphasis added.]

42 In my view, these extracts are telling. They provide valuable insight into the background and purpose of the OIC. They were available to the Commissioner and the Divisional Court as an interpretative aid and should have been used in determining the legislative purpose for creating the Commission: see *NAV Canada c. Wilmington Trust Co.*, [2006] 1 S.C.R. 865 (S.C.C.) at paras. 57-59; *Marcovitz v. Bruker*, 2007 SCC 54 (S.C.C.)at paras. 3-8.

43 Considered in conjunction with the factual matrix outlined by Det. Supt. McQuade in her affidavit, these Hansard extracts provide clear evidence of the context and circumstances in which the Commission was created. I would summarize them as follows:

- a clan of pedophiles allegedly operated in the Cornwall area for a very long period of time;
- prominent local citizens allegedly conspired to cover up the activities of the clan of pedophiles; and
- Project Truth and the prosecutions it spawned failed to generate satisfactory results and a cloud of suspicion and mistrust continues to hang over the citizens of Cornwall.

44 Had the Commissioner or the majority of the Divisional Court referred to the Hansard extracts and the factual matrix as outlined by Det. Supt. McQuade in her affidavit filed with the Divisional Court, they would have recognized that the legislative intention in appointing the Inquiry was not to investigate the institutional response to all allegations of abuse in the Cornwall area that pre-date April 14, 2005, including allegations of sexual assault such as those made by C12. Rather, the legislative intention in ordering the Inquiry was more focused: the legislature sought to have the Commissioner investigate the institutional response to allegations of historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust and recommend ways in which those institutions could better respond to this type of allegation.

(2) Failure to consider relevant wording in the preamble

45 As set out above, the first two sentences of the preamble to the OIC state:

> WHEREAS allegations of abuse of young people have surrounded the City of Cornwall and its citizens for many years. The police investigations and criminal prosecutions relating to these allegations have concluded.

46 In defining the subject matter of the Inquiry in broad terms, the Commissioner paid particular attention to the first sentence of the preamble. He mentioned this sentence in his reasons with a view to substantiating his conclusion that the legislature had chosen to give him a wide mandate. Thus, he noted that there was no reference in the preamble to "allegations of abuse at the hands of persons in authority" and that "the preamble clearly contemplates a general inclusive statement, not limited to historical allegations, but referring to 'allegations of abuse of young people [that] have surrounded the City of Cornwall'...".

47 With respect, the Commissioner's analysis ignores the second sentence of the preamble. As noted, that sentence narrows the so-called "general inclusive" allegations of abuse referred to in the first sentence to those that formed the subject matter of "police investigations and criminal proceedings related to these allegations [that] have concluded." Such allegations related to historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust that were the subject of the Project Truth investigations.

48 The Commissioner's failure to consider the second sentence of the preamble was serious and in my view it skewed his subsequent analysis of the subject matter of the Commission.

(3) Failure to construe the wording of the OIC harmoniously and with reference to the document as a whole

49 In determining that his mandate entitled him to look into institutional responses relating to any and all allegations of sexual assault involving young people in the Cornwall area prior to April 14, 2005, the Commissioner focused heavily on para. 2(b) of the OIC. For convenience, para. 2 is again reproduced:

> **Mandate**
>
> 2. The Commission shall inquire into and report on the institutional response of the justice system and other public institutions, including the interaction of that response with other public and community sectors, in relation to:
>
> (a) allegations of historical abuse of young people in the Cornwall area, including the policies and practices then in place to respond to such allegations, and
>
> (b) the creation and development of policies and practices that were designed to improve the response to allegations of abuse
>
> in order to make recommendations directed to the further improvement of the response in similar circumstances.

50 The Commissioner noted that para. 2(b) contains no reference to "historical" abuse; rather, it refers to "policies and practices that were designed to improve the response to allegations of abuse". In the Commissioner's view, that provision, properly construed, calls for a "broad and liberal interpretation" as opposed to one that is restricted to "complaints [of historical abuse] reported by adults."

51 With respect, I believe that the Commissioner erred in reading para. 2(b) in isolation and in construing the words "allegations of abuse" differently from the words "allegations of historical abuse" used elsewhere in para. 2 and in other provisions of the OIC. In my view, he should have construed those phrases harmoniously and with reference to the document as a whole. Had he done so, I am satisfied for several reasons that he would have treated the words "allegations of historical abuse" and "allegations of abuse" synonymously.

52 First, as I have already pointed out, the Commissioner misconstrued the words "allegations of abuse" in the first sentence of the preamble. Had he read those words in conjunction with the second sentence of the preamble, he would have realized that the "allegations of abuse" were the allegations of abuse that formed the subject matter of Project Truth, i.e. allegations of

historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust.

53 Second, it must be noted that para. 2, although divided into sub-paragraphs, is one complete sentence. Paragraph 2(b) must be read together with the language in para. 2(a) and with the concluding words in that provision, which refer both explicitly and implicitly to allegations of historical abuse. Paragraph 2(a) speaks of "allegations of *historical* abuse ... including *the policies and practices then in place* to respond to such allegations" [Emphasis added.]. The concluding language of para. 2 speaks of "recommendations directed to further improvement of the response *in similar circumstances*" [Emphasis added.]. Surely "similar circumstances" refers to allegations of historical abuse, as the appellant suggests, and not allegations of sexual assault of any kind, as Commission counsel suggests.

54 Third, the Commissioner failed to have regard to para. 4 of the OIC. Paragraph 4 is a free-standing provision that provides for informal opportunities "for individuals affected by *the allegations of historical abuse* of young people in the Cornwall area" to express their views and feelings [Emphasis added.]. That provision dovetails with the third sentence in the preamble to the OIC and it reflects the view of community members that "a public inquiry will encourage individual and collective healing". If the subject matter of the inquiry were meant to include allegations of sexual assault such as those made by C12, it is illogical that the legislature would have restricted the community meetings and other informal opportunities to "individuals affected by allegations of historical abuse of young people in the Cornwall area". And yet, para. 4 is clearly restricted in that fashion.

55 When para. 2 of the OIC is read as a whole and in conjunction with the other provisions of the OIC including the preamble, it is apparent that the legislature was directing the Commissioner to look at institutional policies and practices — past, present and future — in responding to allegations of historical abuse of young people in the Cornwall area. Such allegations would include those that were the subject of the Project Truth investigation as well as any similar allegations of historical abuse of young people by persons in authority or positions of trust that were not investigated by Project Truth or that came to light after the Project Truth investigation ended. This interpretation harmonizes the meaning of the word "allegations" throughout the OIC, including its meaning in the preamble, para. 2 and para. 4.

56 In contrast, reading para. 2(b) as the Commissioner does leads to the untenable conclusion that, by virtue of this clause, the legislature intended the Commissioner to compare and contrast present-day institutional responses to any and all allegations of abuse, including but not limited to the allegations of historical abuse, with past institutional responses limited solely to allegations of historical abuse under para. 2(a). With respect, that interpretation is not logical. Moreover, it isolates para. 2(b) and promotes it from a clause that describes one discrete component of the Commissioner's mandate into a clause that single-handedly broadens his mandate beyond all proportions — something which in my view, the legislature did not contemplate. That leads me to the fourth error.

(4) Failure to interpret the OIC in a manner that was reasonable and within the contemplation of the legislature

57 The Commissioner identified the primary focus of his mandate as follows:

> In reviewing the mandate, it is clear that the main focus of Parliament was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry; hence, the reference to allegations of historical abuse.
>
> . . . . .
>
> I am of the view that while Parliament certainly indicated that historical allegations of abuse would be a central part of the Inquiry, the mandate certainly does not read to limit it to those specific cases.

58 The Commissioner further observed that the Commission was "nearing the end of the victims' evidence and it is not the intention of this Inquiry to now open the floodgates, or to widen the mandate that I have set to date."

59 With respect, these words of the Commissioner do not sit well with the expansive view he took of his mandate. As already indicated, by interpreting the OIC as he did, the Commissioner ascribed to himself a mandate that is truly breathtaking in its scope. By defining the words "historical" as he did, the Commissioner gave himself jurisdiction to assess the response of various institutions (past, present and future), including the justice system, the police, Children's Aid Societies and the like, to any and all allegations of sexual abuse made by young people in the Cornwall area, including historical allegations of abuse

such as those investigated by Project Truth and allegations of sexual assault, such as those reported by C12, presumably from the date of Cornwall's inception in 1834 to April 14, 2005, the date on which the Commission was formed.

60 Such a wide-ranging mandate is inconsistent with the Commissioner's acknowledgement that the "main focus of Parliament was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry; hence, the reference to allegations of historical abuse." I fail to see how, on the Commissioner's view of his mandate, he could reasonably hope to keep the floodgates from opening. If C12's evidence (which falls outside the Commissioner's view of the main focus of the Inquiry) were to be admitted, it would open the door to similar testimony from hundreds of complainants and their family members who might wish to come forward and speak of their experiences with the police and other institutions, both pro and con, not to mention the hundreds of judicial officers, police officers, CAS workers and the like who would no doubt wish to respond.

61 In short, the Commissioner's view of his mandate runs the risk of standing the so-called "main focus" of the Inquiry on its head and creating an unwieldy, if not unmanageable, mega-inquiry that could go on for years at great public expense. Such an outcome would diminish the value to be gained from the important work that the legislature had assigned to the Commissioner.

Conclusion on the Subject Matter of the Commission

62 Properly construed, the OIC empowers the Commissioner to look into and report on institutional responses — past, present and future — relating to allegations of historical abuse of young people in the Cornwall area by persons in authority or positions of trust, including the allegations investigated in Project Truth as well as similar such allegations. Allegations that were reported at the time of the abuse, or years later, or both, would fall within this mandate. In other words, the Commissioner can look at the response of various institutions to allegations made and reported in the 1950s, as well as their response to allegations made for the first time or renewed in the 1990s.[5]

63 C12's evidence does not come within the subject matter assigned to the Commissioner by the terms of the OIC. With respect, the Commissioner erred in holding otherwise. The same holds true for C13's evidence. For these reasons, Questions 1 and 2 of the stated case should be answered as Spiegel J. did in his dissenting opinion.

Is the evidence of C12 and C13 reasonably relevant to the subject matter of the Inquiry?

64 Although the evidence of C12 and C13 falls outside the subject matter of the Inquiry, it could nevertheless be admissible if it were found to be "reasonably relevant to the subject matter of the inquiry": *Bortolotti* at p. 624. It would meet that test if it had a bearing on an issue to be resolved and could reasonably, in some degree, advance the inquiry. A decision to admit evidence on this basis will attract a high degree of deference from a reviewing court and will be judged against a standard of reasonableness.

65 Affording a high degree of deference to such a ruling makes eminent good sense. Otherwise, Commissions would constantly be in a state of "stop and go" as disgruntled parties trundled off to the Divisional Court to challenge evidentiary rulings with which they disagreed. If the Commissioner believes that an item or body of evidence, though peripheral to the subject matter of the Commission, bears on an issue to be resolved and will in some degree advance the inquiry, so long as the Commissioner's view is reasonably based, the admission of the evidence will not constitute jurisdictional error. (For a general discussion of the standard of reasonableness see *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.) at paras. 56-62 and *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247 (S.C.C.) at paras. 46-56).

66 The Commissioner made no finding on whether the evidence of C12 and C13 was reasonably relevant to the subject matter of the Inquiry. To be precise, he did not turn his mind to the issue, having concluded that their evidence came within his mandate and was thus clearly admissible.

67 In circumstances where the Commissioner has not ruled on whether the proffered evidence is reasonably relevant to the subject matter of the Inquiry, I would normally refrain from commenting on whether the evidence is capable of passing the deferential test of "reasonably relevant" as set out in *Bortolotti* . However, the issue was canvassed by the parties in oral argument and I think it would be helpful to address it, in an effort to avoid further delays.

68 Assuming that the evidence of C12 and C13 stands alone and is not the prelude to an avalanche of other such evidence from like complainants and their family members, I fail to see how it could reasonably advance the inquiry that the Commission had been asked to perform. Without wishing to minimize the seriousness of C12's complaint or the gravity of her allegations against the investigating officer, her evidence, if true, essentially comes down to one person having been treated inappropriately by a police officer in a case where she allegedly was sexually assaulted by other teenagers. Her evidence does not speak to systemic problems that may or may not exist in the way police respond to allegations of sexual abuse of young people by persons in a position of trust or authority. In other words, it has no probative value in relation to the Commissioner's mandate.

69 On the other hand, if C12's evidence does not stand alone but is a prelude to an avalanche of similar evidence — the reception of which is likely to be very time-consuming, hotly contested and liable to deflect the Commissioner from the task at hand- any marginal probative value that such evidence might have would, in my view, be greatly outweighed by its prejudicial effect. As such, it would likewise not pass the "reasonably relevant" test.

70 In so concluding, I do not wish to leave the impression that there can be no meaningful overlap, in so far as institutional responses are concerned, between cases such as the one described by C12 and the cases such as those investigated by Project Truth. Nor am I suggesting that allegations of historical sexual abuse of young people by persons in authority or positions of trust are a breed apart and entirely distinct from all other allegations of sexual abuse, including allegations of sexual assault committed by teenagers. By way of example, studies that have explored the systemic responses of institutions such as the police to general allegations of abuse made by young people might well pass the reasonable relevance test, even though the subject matter of the study will not be precisely the same as the subject matter of this Inquiry.

71 For these reasons, I am of the view that the proposed evidence of C12 and C13 is not reasonably relevant to the subject matter of the Inquiry and should therefore not be received.

72 In conclusion, I would answer the questions in the stated case as framed by the appellants as follows:

> Question 1: Do the Terms of Reference of the Cornwall Public Inquiry contemplate the hearing of evidence of an allegation of sexual assault on a 16 year old female by a 16 year old male and a 17 year old male which was reported to the police on the day following the alleged offence given the mandate of the inquiry to ...inquire into and report on the institutional response of the justice system ... to allegations of historical abuse of young people...?
>
> Answer: No.
>
> Question 2: In deciding to hear the evidence of C12 and C13, did the Commission of Inquiry properly exercise its jurisdiction or exceed its jurisdiction?
>
> Answer: The Commissioner exceeded his jurisdiction.

Doherty J.A.:
I agree.

E.E. Gillese J.A.:
I agree.

Appeal allowed.

Footnotes

1 The first question on the stated case as set out by Spiegel J. is worded slightly differently than the first question as framed by the appellants. In the Commissioner's factum filed with the Divisional Court, he also framed questions that he would have stated in the event he were directed to do so by the Divisional Court. It is not necessary to set out these questions; although the Commissioner included much more detail, the ultimate questions he raised do not differ in any significant way from the questions posed by the appellants.

2 The Commissioner's statement that matters of relevance, such as "admissibility generally and the weight to be given to such evidence" are "not the subject matter of a section 6 application" is not entirely accurate. As was held by this court in *Re Bortolotti et al. and the Ministry of Housing et al.*, discussed *infra*, such matters can give rise to jurisdictional error if the proposed evidence is not "reasonably relevant" to the subject matter of the inquiry.

3 Section 11 reads:
11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

4 More will be said about these two sentences shortly. For now, I note that in his reasons purporting to identify the subject matter of the inquiry, the Commissioner made no mention of the second sentence.

5 I do not agree with the dissenting opinion of Spiegel J. to the extent that he concluded at para. 31 that the term "historical" in para. 2(a) of the OIC imports a requirement that there must necessarily be a lapse of time between the time of the abuse and the time of reporting for the allegation to be considered as historical.

THE LAW OF PUBLIC INQUIRIES IN CANADA

Simon Ruel, B.Sc. (Université Laval), LL.B. (Université de Montréal)
Member of the Barreau du Québec and of the
Law Society of Upper Canada

CARSWELL®

commission.[32] If the evidence is clearly within the terms of reference, then it is admissible. Even if the evidence technically falls outside the terms of reference, it could nonetheless be admitted if reasonably relevant to the subject matter of the inquiry.[33] Relevancy in this context involves that the evidence, to some degree, advances the inquiry, has a bearing on any issue to be resolved or would be of assistance for a commissioner in reaching a conclusion as to matters that were referred to him.[34] In other words, documents and information are admissible before an inquiry not only based on relevance to the terms of reference in the technical sense, but also if the evidence to some degree advances the inquiry or is helpful in fulfilling the inquiry's mandate in the public interest.[35] As the Federal Court wrote in *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar — O'Connor Commission)*:

> [. . .] Therefore, the relevancy factor is to be applied to a Commission of Inquiry by considering its uniqueness and utility to the [. . .] government and public in providing remedies, often in situations of crisis, and acting in the public interest.[36]

In any case, however, a commissioner of inquiry has the authority to rule inadmissible any evidence where its prejudicial effect, e.g. on reputational interest, outweighs its probative value.[37]

---

32 *Supra* note 29 at page 625; *Ontario Provincial Police v. Cornwall Public Inquiry Commissioner* (2008), [2008] O.J. No. 153, 2008 CarswellOnt 191 at para. 26 (Ont. C.A.) [*Ontario Provincial Police*].

33 *Supra* note 29 at page 624; *Ontario Provincial Police*, *ibid.* at para. 64.

34 *Children's Aid Society*, *supra* note 30 at paras. 8, 14; *supra* note 29 at pages 624, 625; *Ontario Provincial Police*, *ibid.* at paras. 20, 21, 64.

35 Report of the Ipperwash Inquiry, Volume 3, Inquiry Process, The Honourable Sidney B. Linden, pages 5, 6.

36 *Attorney General of Canada and Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar and Maher Arar*, File: DES-4-06, July 24, 2007 at para. 11, Noël J. (F.C.) (this is the expurgated version of the top secret Reasons for Order issued on July 24, 2007, which must be read in conjunction with the public reasons in the same case issued on July 24, 2007 in *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, [2008] 3 F.C.R. 248, Noël J. (F.C.) [*Arar*].

37 See The Public Inquiry: Two Suggestions for Reform, Robert P. Armstrong, 43 U.N.B.L.J. 377, 1994, page 379, where reference is made to the opening statement of Commissioner Dubin at the opening session of the Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance:

> The rules of evidence that govern proceedings in court do not apply to Royal Commissions and hearsay evidence is in a general sense admissible. I realize, however, that reputations may sometimes be unfairly destroyed, and I will do all that I can to see that any evidence which is completely unfounded will not be introduced to destroy the reputation of any person.

Canada Evidence Act (R.S.C., 1985, c. C-5)

Specified Public Interest

Marginal note: Objection to disclosure of information

37 (1) Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

Marginal note: Obligation of court, person or body

(1.1) If an objection is made under subsection (1), the court, person or body shall ensure that the information is not disclosed other than in accordance with this Act.

...

Marginal note: Objection not made to superior court

(3) If an objection to the disclosure of information is made before a court, person or body other than a superior court, the objection may be determined, on application, by

- **(a)** the Federal Court, in the case of a person or body vested with power to compel production by or under an Act of Parliament if the person or body is not a court established under a law of a province; or
- **(b)** the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.

2002 SCC 57, 2002 CSC 57
Supreme Court of Canada

Babcock v. Canada (Attorney General)

2002 CarswellBC 1576, 2002 CarswellBC 1577, 2002 SCC 57, 2002 CSC 57, [2002] 3 S.C.R. 3, [2002] 8 W.W.R. 585, [2002] B.C.W.L.D. 635, [2002] A.C.S. No. 58, [2002] S.C.J. No. 58, 114 A.C.W.S. (3d) 1057, 168 B.C.A.C. 50, 214 D.L.R. (4th) 193, 275 W.A.C. 50, 289 N.R. 341, 3 C.R. (6th) 1, 3 B.C.L.R. (4th) 1, J.E. 2002-1314, REJB 2002-32276

The Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada and in his capacity as Minister of Justice, the Treasury Board of Canada and the Deputy Minister of Justice, Appellants v. Patricia Babcock, Linda Bell, Victoria Bryan, Lynn Burch, Karl Burdak, George Carruthers, Gordon Carscadden, Margaret E.T. Clare, Timothy W. Clarke, Moyra Dhaliwal, Mary Jane Dodge, Jonas Dubas, S. David Frankel, Greg D. Franklin, Valerie Hartney, Bruce Hilchey, John Kennedy, Digby Kier, Daniel L. Kiselbach, Ingeborg E. Lloyd, Josephine Loncaric, John Loo, William Mah, Ian McKinnon, Robert Moen, Nancy Oster, Michael Owens, Brent Paris, Darlene Patrick, Paul Pelletier, David Prest, Brian Purdy, Christopher Randall, Brian Sedgwick, Karen Shirley, Pamela Lindsay Smith, Tim Stokes, Cory Stolte, Josée Tremblay, Karen A. Truscott, Max Weder, Harry Wruck and Wendy Yoshida, Respondents and The Attorney General of British Columbia, the Attorney General for Alberta, the Information Commissioner of Canada and the British Columbia Civil Liberties Association, Intervenors

The Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada and in his capacity as Minister of Justice, the Treasury Board of Canada and the Deputy Minister of Justice, Appellants v. Rosemary Lutter and Emily Reid, Respondents and The Attorney General of British Columbia, the Attorney General for Alberta, the Information Commissioner of Canada and the British Columbia Civil Liberties Association, Intervenors

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: February 20, 2002
Judgment: July 11, 2002
Docket: 28091

Proceedings: reversing in part (2000), 76 B.C.L.R. (3d) 35 (B.C.C.A.); reversing (1999), 70 B.C.L.R. (3d) 128 (B.C.S.C.)

Counsel: *David Sgayias, Q.C., Christopher Rupar*, for Appellants
Richard R. Sugden, Q.C., Craig P. Dennis, for Respondents
George H. Copley, Q.C., for Intervenor, Attorney General of British Columbia
James C. Robb, Q.C., for Intervenor, Attorney General for Alberta
Daniel Brunet, for Intervenor, Information Commissioner of Canada

Joseph J. Arvay, Q.C., *Christopher Jones*, for Intervenor, British Columbia Civil Liberties Association

Subject: Evidence; Civil Practice and Procedure; Constitutional; Public; Criminal

Related Abridgment Classifications

Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xi Crown privilege or public interest

Evidence
VII Documentary evidence
VII.5 Privilege as to documents
VII.5.d Crown privilege

Public law
I Crown
I.5 Practice and procedure involving Crown in right of Canada
I.5.b Forum for proceedings
I.5.b.ii In proceedings against Crown
I.5.b.ii.B Statutory jurisdiction of provincial courts

Headnote

Practice --- Discovery — Discovery of documents — Privileged document — Crown privilege or public interest
Lawyers employed by Federal Justice Department brought action concerning inequality of pay between Toronto office and Vancouver office — Documents over which Crown asserted Cabinet confidentiality were not producable, except where documents had previously been disclosed or were in lawyers' possession.

Procédure --- Communication de la preuve — Communication de documents — Document privilégié — Privilège de la Couronne ou l'intérêt public
Avocats à l'emploi du ministère fédéral de la Justice ont intenté une action parce que le salaire payé au bureau de Vancouver était différent de celui payé au bureau de Toronto — Documents que la Couronne affirmait être visés par la confidentialité des délibérations du Cabinet ne pouvaient être produits, à moins qu'ils n'aient déjà été communiqués ou qu'ils ne soient en la possession des avocats.

The salaries of lawyers of the Department of Justice who work in Toronto were higher than the salaries of lawyers who worked for the Department of Justice in Vancouver. Lawyers who worked for the Department of Justice in Vancouver brought an action based on breach of contract and fiduciary duty against the Crown. The Crown listed certain documents as producable.

The Crown's motion to transfer proceedings to the Federal Court was dismissed. During the proceedings, a representative of the Crown disclosed that the reason why salaries had been raised at the Toronto office was because of salary raises in the private sector in Toronto.

After the Crown's motion to transfer proceedings to Federal Court was dismissed, the Crown altered its position regarding the production of documents. The Crown asserted that certain documents were confidential on the ground that they contained information constituting confidences of the Queen's Privy Council for Canada. This assertion covered 12 documents which had previously been listed as producable, some of which had been disclosed, five documents in control or possession of the lawyers and 34 documents which had previously been listed as not producable. The Crown also asserted Cabinet confidentiality regarding information disclosed during the motion to transfer proceedings to the Federal Court.

The lawyers' application for production of certain documents was dismissed. The chambers judge found that when the Clerk of the Privy Council files a certificate on the ground that a document is a confidence of the Privy Council, the Court has no

power to set aside the certificate. The lawyers' appeal was allowed. The appellate court found the Crown's claim to confidentiality had been waived because some of the documents had been listed as producable and because selective information had been disclosed from certain documents.

The Crown appealed.

Held: Documents which had not been disclosed or were in the possession of the other party were subject to Cabinet confidentiality.

Per McLachlin C.J.C. (Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ. concurring): Although Cabinet confidentiality was once considered absolute, today the public's interest in protection of information must be balanced against the public interest in disclosure of information. Under s. 39 of the *Canada Evidence Act*, when the Clerk certifies a confidence regarding a document, then a court, body or jurisdiction hearing the matter must refuse disclosure without examining the document. For certification to be valid, it must be done by the Clerk of the Privy Council or a Minister of the Crown, must be a bona fide exercise of delegated power and must meet the criteria outlined in s. 39(2) of the Act. Documents which have already been disclosed are not subject to Cabinet confidence.

Waiver of Cabinet confidence is not possible at common law. Therefore, the fact that certain documents were disclosed did not create a waiver regarding all the documents. However, when some information on a particular matter has been disclosed, all information on that matter must be disclosed.

In the case at bar, the Clerk's certification applied to the documents which the Crown contended were not producable. The certification, however, did not apply to the documents which had already been disclosed or which were in the possession of the lawyers.

The lawyers were entitled to cross-examine the representative of the Crown regarding statements about the reason for the pay increase in Toronto. As the government had voluntarily disclosed the information, Cabinet confidentiality could not be invoked. Related information which had been voluntarily disclosed in other documents was also ordered produced. Related information in documents which had not been certified was not required to be produced.

The principles of the rule of law and the independence of the judiciary did not allow for disclosure of the certified documents. Nor does s. 39 of the Act limit the ability of Superior Courts to control their own procedures.

Per L'Heureux-Dubé J.: Agreement was expressed generally with the reasons of McLachlin C.J.C. However, no balancing of the public's interest in disclosure against the public's interest in protecting Cabinet information need take place. When a document is a Cabinet confidence and the government wishes to protect the information, then confidence applies.

Les avocats travaillant pour le ministère de la Justice, dans son bureau de Toronto, recevaient un meilleur salaire que ceux qui travaillaient dans le bureau de Vancouver. Les avocats de Vancouver ont intenté contre la Couronne une action pour violation de contrat et manquement à son obligation fiduciaire. La Couronne a émis une liste indiquant les documents pouvant être produits.

La requête présentée par la Couronne pour obtenir le renvoi des procédures devant la Cour fédérale a été rejetée. Pendant les procédures, un des représentants de la Couronne a révélé que les salaires du bureau de Toronto avaient été augmentés en raison de hausses salariales dans le secteur privé de Toronto.

À la suite du rejet de la requête de la Couronne pour obtenir le renvoi des procédures devant la Cour fédérale, la Couronne a changé sa position relativement à la production des documents. Elle a affirmé que certains des documents étaient confidentiels parce qu'ils contenaient des renseignements confidentiels du Conseil privé de la Reine pour le Canada. Cette affirmation visait 12 documents préalablement énumérés comme pouvant être produits, certains d'entre eux ayant déjà été communiqués, cinq documents sous le contrôle des avocats ou en leur possession ainsi que 34 documents préalablement décrits comme ne pouvant pas être produits. La Couronne a aussi affirmé l'application de la confidentialité des délibérations du Cabinet à l'égard des renseignements divulgués lors de l'audition de la requête présentée pour obtenir le renvoi des procédures devant la Cour fédérale.

La demande de production de certains documents présentée par les avocats a été rejetée. Le juge en chambre a conclu que

lorsque le greffier du Conseil privé émet une attestation qu'un document constitue un renseignement confidentiel du Conseil privé, le tribunal n'a alors pas le pouvoir de l'annuler. Le pourvoi des avocats a été accueilli. La Cour d'appel a estimé que la Couronne avait renoncé à sa faculté de revendiquer la confidentialité, puisque certains documents avaient été énumérés comme pouvant être produits et parce que des renseignements sélectifs contenus dans certains documents avaient été divulgués.

La Couronne a interjeté appel.

Arrêt: Les documents qui n'avaient pas été divulgués ou qui étaient en la possession de l'autre partie étaient assujettis à la confidentialité des délibérations du Cabinet.

McLachlin, J.C.C. (Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, JJ., souscrivant): La confidentialité des délibérations du Cabinet a déjà été considérée comme étant absolue mais, maintenant, il faut mettre en équilibre l'intérêt du public dans la protection des renseignements et l'intérêt du public dans la divulgation des renseignements. En vertu de l'art. 39 de la *Loi sur la preuve au Canada*, lorsque le greffier atteste qu'un document constitue un renseignement confidentiel, le tribunal, l'organisme ou la personne ayant compétence pour entendre l'affaire doit refuser la divulgation sans examiner le document. Pour que l'attestation soit valide, elle doit être faite par le greffier du Conseil privé ou par un ministre de la Couronne, constituer un exercice réel d'un pouvoir délégué et satisfaire aux critères énoncés à l'art. 39(2) de la Loi. Les documents qui ont déjà été divulgués ne sont pas assujettis à la règle de la confidentialité des délibérations du Cabinet.

En common law, il est impossible de renoncer à la confidentialité des délibérations du Cabinet. Par conséquent, le fait que certains des documents avaient déjà été divulgués n'a pas donné lieu à une renonciation visant tous les documents. Cependant, lorsque certains renseignements touchant une certaine question ont été divulgués, tous les renseignements relatifs à cette question doivent alors être divulgués.

Dans cette affaire-ci, l'attestation du greffier s'appliquait aux documents visés par la prétention de la Couronne qu'ils ne pouvaient être produits. Cependant, l'attestation ne s'appliquait pas aux documents qui avaient déjà été divulgués ou qui étaient en la possession des avocats.

Les avocats avaient le droit de contre-interroger le représentant de la Couronne relativement à ses déclarations portant sur la raison de la hausse salariale à Toronto. Puisque le gouvernement avait volontairement divulgué les renseignements, il ne pouvait invoquer la confidentialité des délibérations du Cabinet. Les renseignements connexes qui avaient été volontairement divulgués dans d'autres documents devaient aussi être produits. Les renseignements connexes contenus dans d'autres documents qui n'étaient pas visés par l'attestation n'avaient pas à être produits.

Les principes de la primauté du droit et de l'indépendance judiciaire ne permettaient pas la divulgation des documents visés par l'attestation. Par ailleurs, l'art. 39 de la Loi ne restraignait pas le pouvoir des cours supérieures de contrôler leurs propres procédures.

L'Heureux-Dubé, J.: Les motifs de la juge en chef McLachlin étaient partagés pour l'essentiel. Il n'était cependant pas nécessaire de faire l'équilibre entre l'intérêt du public dans la divulgation des renseignements et l'intérêt du public dans la protection des renseignements du Cabinet. Lorsqu'un document constitue un renseignement confidentiel du Cabinet et que le gouvernement désire protéger ce renseignement, il est alors confidentiel.

Table of Authorities

Cases considered by *McLachlin C.J.C.*:

Canada (Procureur général) c. Québec (Commission des droits de la personne) (1981), [1982] 1 S.C.R. 215, 41 N.R. 318, 134 D.L.R. (3d) 17, (sub nom. *Commission des droits de la personne, Appelante et Le procureur général du Canada et Claude Vermette, Intimés et Bertrand Roy, Robert Senay et Hélène Mailhot, Mis en cause et Le procureur général du Québec, Intervenant)* 1982 CarswellQue 114F, 4 C.H.R.R. 1585, 1982 CarswellQue 114 (S.C.C.) — considered

Carey v. Ontario, 22 Admin. L.R. 236, [1986] 2 S.C.R. 637, 35 D.L.R. (4th) 161, 72 N.R. 81, 20 O.A.C. 81, 30 C.C.C. (3d) 498, (sub nom. *Carey v. R.)* 14 C.P.C. (2d) 10, 58 O.R. (2d) 352n, 1986 CarswellOnt 1011 (S.C.C.) — considered

Duncan v. Cammell, Laird & Co., [1942] 1 All E.R. 587, [1942] A.C. 624, 111 L.J.K.B. 406, 166 L.T. 366, 58 L.T.R. 242, 86 Sol. Jo. 287 (U.K. H.L.) — referred to

Leeds v. Alberta (Minister of the Environment), 106 A.R. 105, 69 D.L.R. (4th) 681, (sub nom. *Leeds v. Alberta)* 43 L.C.R. 145, 1990 CarswellAlta 631 (Alta. Q.B.) — referred to

MacMillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 725, [1996] 2 W.W.R. 1, 14 B.C.L.R. (3d) 122, 44 C.R. (4th) 277, 130 D.L.R. (4th) 385, 103 C.C.C. (3d) 225, 191 N.R. 260, 33 C.R.R. (2d) 123, 68 B.C.A.C. 161, 112 W.A.C. 161, 1995 CarswellBC 974, 1995 CarswellBC 1153 (S.C.C.) — referred to

Makanjuola v. Commissioner of Police of the Metropolis (1989), [1992] 3 All E.R. 617 (Eng. C.A.) — considered

R. v. Eldorado Nuclear Ltd., 50 N.R. 120, [1983] 2 S.C.R. 551, 4 D.L.R. (4th) 193, 1 O.A.C. 243, 7 Admin. L.R. 195, 8 C.C.C. (3d) 449, 77 C.P.R. (2d) 1, 1983 CarswellOnt 796, 1983 CarswellOnt 816 (S.C.C.) — referred to

Reference re Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act, S.N.S. 1992, c. 31, 50 R.P.R. (2d) 137, 35 Admin. L.R. (2d) 169, (sub nom. *Reference re Residential Tenancies Act)* 193 N.R. 1, (sub nom. *Reference re Residential Tenancies Act)* 149 N.S.R. (2d) 1, (sub nom. *Reference re Residential Tenancies Act)* 432 A.P.R. 1, (sub nom. *Reference re Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act (N.S.), ss.7, 8(2))* 131 D.L.R. (4th) 609, (sub nom. *Reference re Amendments to the Residential Tenancies Act)* [1996] 1 S.C.R. 186, 1996 CarswellNS 166, 1996 CarswellNS 166F (S.C.C.) — considered

RJR-Macdonald Inc. c. Canada (Procureur général), (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 127 D.L.R. (4th) 1, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* [1995] 3 S.C.R. 199, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 100 C.C.C. (3d) 449, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 62 C.P.R. (3d) 417, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 31 C.R.R. (2d) 189, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 187 N.R. 1, 1995 CarswellQue 119, 1995 CarswellQue 119F (S.C.C.) — considered

Roncarelli v. Duplessis, [1959] S.C.R. 121, 16 D.L.R. (2d) 689, 1959 CarswellQue 37 (S.C.C.) — considered

Sankey v. Whitlam (1978), 21 A.L.R. 505, 142 C.L.R. 1 (Australia H.C.) — referred to

Singh v. Canada (Attorney General), 2000 CarswellNat 26, (sub nom. *Westergard-Thorpe v. Canada (Attorney General))* 183 D.L.R. (4th) 458, 251 N.R. 318, [2000] 3 F.C. 185, 2000 CarswellNat 1752, 20 Admin. L.R. (3d) 168 (Fed. C.A.) — considered

Statutes considered by *McLachlin C.J.C.*:

Canada Evidence Act, R.S.C. 1985, c. C-5
Generally — referred to

s. 37 — considered

s. 38 — considered

s. 39 — considered

s. 39(1) — considered

s. 39(2) "a confidence of the Queen's Privy Council for Canada" — considered

s. 39(4) — considered

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
Generally — referred to

s. 96 — referred to

Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.)
s. 41(2) — referred to

Ombudsman Act, R.S.B.C. 1996, c. 340
Generally — referred to

Rules considered by *McLachlin C.J.C.*:

Rules of Court, 1990, B.C. Reg. 221/90
Generally — referred to

APPEAL by Crown from judgment reported at 2000 BCCA 348, 2000 CarswellBC 1156, 76 B.C.L.R. (3d) 35, [2000] 6 W.W.R. 577, 188 D.L.R. (4th) 678, 142 B.C.A.C. 161, 233 W.A.C. 161 (B.C. C.A.), allowing lawyers' appeal from judgment dismissing lawyer's application for production of documents.

POURVOI de la Couronne à l'encontre du jugement publié à 2000 BCCA 348, 2000 CarswellBC 1156, 76 B.C.L.R. (3d) 35, [2000] 6 W.W.R. 577, 188 D.L.R. (4th) 678, 142 B.C.A.C. 161, 233 W.A.C. 161 (B.C. C.A.), qui a accueilli le pourvoi des avocats à l'encontre du jugement ayant rejeté leur demande pour obtenir la divulgation des documents.

***McLachlin C.J.C.*:**

1 This case raises the issue of when, if ever, Cabinet confidences must be disclosed in litigation between the government and private citizens.

2 On June 6, 1990, the Treasury Board of Canada set the pay of Department of Justice lawyers working in the Toronto Regional Office at a higher rate than that of lawyers working elsewhere. Vancouver staff lawyers brought an action in the Supreme Court of British Columbia, contending that by failing to pay them the same salaries as Toronto lawyers the government breached their contracts of employment and the fiduciary duty toward them.

3 The action proceeded, and the parties exchanged lists of relevant documents in December 1996, as required by the B.C. Supreme Court Rules. A supplemental list of documents was delivered by the government in June 1997. The government listed a number of documents as producible.

4 The government then brought a motion to have the action transferred from the Supreme Court of British Columbia to the Federal Court. In support of its application, it filed an affidavit by Joan McCoy, an officer of the Treasury Board Secretariat. The affidavit stated that the rationale for the Order-in-Council authorizing pay raise for Toronto lawyers was that lawyers in Toronto generally commanded higher salaries than lawyers in other parts of the country. The affidavit also disclosed the date of the Treasury Board's decision.

5 The government's motion to transfer the action was denied and the action continued in the Supreme Court of British Columbia. The government, nearly two years after it delivered the first list of documents, changed its position on disclosure of documents. It delivered a certificate of the Clerk of the Privy Council pursuant to s. 39(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, objecting to the disclosure of 51 documents and any examination thereon, on the ground that they contain "information constituting confidences of the Queen's Privy Council for Canada". The certificate claimed protection for 12 government documents previously listed as producible (some of which had already been disclosed), for five documents in the control or possession of the plaintiffs, and for 34 government documents and information previously listed as not producible.

6 The plaintiffs (respondents) brought an application to compel production of the documents for which the government claimed protection. The chambers judge, Edwards J., ruled against them, holding that s. 39 of the *Canada Evidence Act* was constitutional and clear. If the Clerk of the Privy Council filed a certificate, that was the end of the matter, and the courts had no power to set the certificate aside. A majority of the Court of Appeal reversed this decision and ordered production of the

documents on the ground that the government had waived its right to claim confidentiality by listing some of the documents as producible and by disclosing selective information in the McCoy affidavit. The government appeals this decision to this Court.

I. Legislation

7 *Canada Evidence Act*, R.S.C. 1985, c. C-5

39. (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

(2) For the purpose of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes, without restricting the generality thereof, information contained in

(*a*) a memorandum the purpose of which is to present proposals or recommendations to Council;

(*b*) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(*c*) an agendum of Council or a record recording deliberations or decisions of Council;

(*d*) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(*e*) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (*d*); and

(*f*) draft legislation.

(3) For the purposes of subsection (2), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

(4) Subsection (1) does not apply in respect of

(*a*) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or

(*b*) a discussion paper described in paragraph (2)(*b*)

(i) if the decisions to which the discussion paper relates have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

II. Decisions

A. British Columbia Supreme Court (1999), 176 D.L.R. (4th) 417 (B.C. S.C.)

8 The chambers judge dismissed the plaintiff's application for production and upheld the government's claim to confidentiality in its entirety. He held that certification by the Clerk of the Privy Council or a minister of the Crown under s. 39 creates absolute protection, which reflects the importance of protecting the confidentiality of the Cabinet process. Since the

remuneration of employees was exclusively within competence of the federal government, the Clerk's decision to certify the documents and information as confidential could not be challenged. Neither the listing of documents as producible nor the disclosure of information in the McCoy affidavit constituted waiver. Edwards J. found that barring very exceptional circumstances, prior disclosure does not waive s. 39. Finally, Edwards J. rejected the argument that confidentiality unconstitutionally trenched on the core jurisdiction of the Superior courts protected by s. 96 of the *Constitution Act, 1867*, given the long recognition of cabinet privilege as a legitimate exercise of Parliament's power.

***B. British Columbia Court of Appeal* (2000), 188 D.L.R. (4th) 678, 2000 BCCA 348 (B.C. C.A.)**

9 The majority of the Court of Appeal held that Edwards J. erred in rejecting the claim that the government had waived protection to the documents and information. The Crown, as a public representative, must be able to waive privilege; otherwise, any litigant opposing the Crown would be in the untenable position of being unable to rely on the government's production of documents, regardless of how essential the documents were to their case or how late the Crown's application for immunity. While there might be a need for "extreme curtailment" of a litigant's rights to full discovery for documents concerned with sensitive matters like state defence, internal security or diplomatic relations, the government must be permitted to waive protection in appropriate cases.

10 Applying this principle, the majority held that the government waived immunity for the 17 documents previously identified as producible. Protection was also waived for the information in the McCoy affidavit which outlined the government's rationale for the salary differential at the heart of the litigation. Any claim for privilege thereafter would be selective, requiring that claims for confidentiality on all related information be treated as waived. With respect to the remaining 34 documents, the majority held that s. 39 confers class immunity rather than selective immunity; it followed that waiver operates on a class basis. Thus, waiver of immunity for 17 of the documents covered by the s. 39 certificate waived the immunity for all of the relevant documents within the class. In view of this conclusion, it was not necessary to consider whether s. 39 was constitutional.

11 Southin J.A. dissented. In her view, it is "not appropriate for the judiciary to intermeddle in the business of the Cabinet and its committees and it is not at all clear to me, ... that the judiciary must regain its control over this whole field of the law, a proposition which to me has a distasteful ring of judicial arrogance" (para. 52). This said, s. 39 is limited to papers that are actually put before the Cabinet or a Cabinet committee and the Clerk must exercise her powers properly. She must properly describe the documents, bringing them within the ambit of the section, and if it can be shown, either from internal or external evidence, that the Clerk has exceeded the power conferred upon her, the court can require disclosure of all documents not within the section.

12 Southin J.A. held that only an act of the Clerk or of a minister of the Crown can effect waiver. Otherwise, junior functionaries having no conception of the importance of Cabinet confidentiality would be able to waive it, to the detriment of the national interest.

13 Newbury J.A concurred with MacKenzie J.A. with respect to the waiver of privilege in this case. However, she went on to state that had waiver not occurred, she would have agreed with Southin J.A.'s findings concerning the requirements of particularity on the part of the Clerk in claiming the privilege.

III. Issues

14

1. What is the nature of Cabinet confidentiality and the processes by which it may be claimed and relinquished?

2. Is s. 39 of the *Canada Evidence Act* constitutional?

IV. Discussion

A. The Principles

15 Cabinet confidentiality is essential to good government. The right to pursue justice in the courts is also of primary importance in our society, as is the rule of law, accountability of the executive, and the principle that official actions must flow from statutory authority clearly granted and properly exercised. Yet sometimes these fundamental principles conflict. How are such conflicts to be resolved? That is the question posed by this appeal.

16 The answer to the question lies in our understanding of Cabinet confidentiality. What is its purpose? What does it apply to? What is the process for claiming it? Once claimed, can it be relinquished or lost, and if so how? These questions find their answers in an understanding of Cabinet confidentiality and the ambit and effect of s. 39 of the *Canada Evidence Act* that protects it.

(1) The Function of Section 39 of the Canada Evidence Act

17 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.

18 The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny: see *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185 (Fed. C.A.), at paras. 21-22. If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. The rationale for recognizing and protecting Cabinet confidences is well summarized by the views of Lord Salisbury in the *Report of the Committee of Privy Counsellors on Ministerial Memoirs*, January 1976, at p. 13:

> A Cabinet discussion was not the occasion for the deliverance of considered judgements but an opportunity for the pursuit of practical conclusions. It could only be made completely effective for this purpose if the flow of suggestions which accompanied it attained the freedom and fulness which belong to private conversations — members must feel themselves untrammelled by any consideration of consistency with the past or self-justification in the future... The first rule of Cabinet conduct, he used to declare, was that no member should ever "Hansardize", another — ever compare his present contribution to the common fund of counsel with a previously expressed opinion...

The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. In addition to ensuring candour in Cabinet discussions, this Court in *Carey v. Ontario*, [1986] 2 S.C.R. 637 (S.C.C.), at p. 659, recognized another important reason for protecting cabinet documents, namely to avoid "creat[ing] or fan[ning] ill-informed or captious public or political criticism". Thus, ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making.

19 At one time, the common law viewed Cabinet confidentiality as absolute. However, over time the common law has come to recognize that the public interest in Cabinet confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield: see *Carey*, *supra*. Courts began to weigh the need to protect confidentiality in government against the public interest in disclosure, for example, preserving the integrity of the judicial system. It follows that there must be some way of determining that the information for which confidentiality is claimed truly relates to Cabinet deliberations and that it is properly withheld. At common law, the courts did this, applying a test that balanced the public interest in maintaining confidentiality against the public interest in disclosure: see *Carey*, *supra*.

20 In addition, many jurisdictions have enacted laws that modify the common law and provide a statutory process for determining what documents are protected and how claims to confidentiality may be challenged: see, for example, the *Ombudsman Act*, R.S.B.C. 1996, c. 340. The exercise of this statutory power is subject to the well-established rule that official actions must flow from statutory authority clearly granted and properly exercised: *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.). The courts have the power and the responsibility, when called upon, to determine whether the certifying official has exercised his or her statutory power in accordance with the law.

21 Section 39 of the *Canada Evidence Act* is Canada's response to the need to provide a mechanism for the responsible exercise of the power to claim Cabinet confidentiality in the context of judicial and quasi-judicial proceedings. It sets up a process for bringing information within the protection of the Act. Certification by the Clerk of the Privy Council or by a minister of the Crown, is the trigger by which information becomes protected. The Clerk must certify that the "information constitutes a confidence of the Queen's Privy Council for Canada". For more particularity, s. 39(2) sets out categories of information that falls within its scope.

22 Section 39(1) permits the Clerk to certify information as confidential. It does not restrain voluntary disclosure of confidential information. This is made clear from the French enactment of s. 39(1) which states that s. 39 protection arises only "*dans les cas où*" (in the cases where) the Clerk or minister opposes disclosure of information. Therefore, the Clerk must answer two questions before certifying information: first, is it a Cabinet confidence within the meaning of ss. 39(1) and (2); and second, is it information which the government should protect taking into account the competing interests in disclosure and retaining confidentiality? If, and only if, the Clerk or minister answers these two questions positively and certifies the information, do the protections of s. 39(1) come into play. More particularly, the provision that "disclosure of the information shall be refused without examination or hearing of the information by the court, person or body" is only triggered when there is a valid certification.

23 If the Clerk or minister *chooses* to certify a confidence, it gains the protection of s. 39. Once certified, information gains greater protection than at common law. If s. 39 is engaged, the "court, person or body with jurisdiction" hearing the matter *must* refuse disclosure; "disclosure of the information shall be refused". Moreover, this must be done "without examination or hearing of the information by the court, person or body". This absolute language goes beyond the common law approach of balancing the public interest in protecting confidentiality and disclosure on judicial review. Once information has been validly certified, the common law no longer applies to that information.

24 This raises the issue of what constitutes valid certification. Two requirements are plain on the face of the legislation. First, it must be done by the Clerk of the Privy Council or a minister of the Crown. Second, the information must fall within the categories described in s. 39(2).

25 A third requirement arises from the general principle applicable to all government acts, namely, that the power exercised must flow from the statute and must be issued for the *bona fide* purpose of protecting Cabinet confidences in the broader public interest. The function of the Clerk under the Act is to protect Cabinet confidences, and this alone. It is not to thwart public inquiry nor is it to gain tactical advantage in litigation. If it can be shown from the evidence or the circumstances that the power of certification was exercised for purposes outside those contemplated by s. 39, the certification may be set aside as an unauthorized exercise of executive power: see *Roncarelli*, *supra*.

26 A fourth requirement for valid certification flows from the fact that s. 39 applies to *disclosure* of the documents. Where a document has already been disclosed, s. 39 no longer applies. There is no longer a need to seek disclosure since disclosure has already occurred. Where s. 39 does not apply, there may be other bases upon which the government may seek protection against further disclosure at common law: *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (U.K. H.L.), at p. 630; *Leeds v. Alberta (Minister of the Environment)* (1990), 69 D.L.R. (4th) 681 (Alta. Q.B.); *Sankey v. Whitlam* (1978), 142 C.L.R. 1 (Australia H.C.), at p. 45. However, that issue does not arise on this appeal. Similarly, the issue of inadvertent disclosure does not arise here because the Crown deliberately disclosed certain documents during the course of litigation.

27 On the basis of these principles, I conclude that certification is generally valid if: (1) it is done by the Clerk or minister; (2) it relates to information within s. 39(2); (3) it is done in a *bona fide* exercise of delegated power; (4) it is done to prevent disclosure of hitherto confidential information.

28 It may be useful to comment on the formal aspects of certification. As noted, the Clerk must determine two things: (1) that the information is a Cabinet confidence within s. 39; and (2) that it is desirable that confidentiality be retained taking into account the competing interests in disclosure and retaining confidentiality. What formal certification requirements flow from this? The second, discretionary element may be taken as satisfied by the act of certification. However, the first element of the Clerk's decision requires that her certificate bring the information within ambit of the Act. This means that the Clerk or minister must provide a description of the information sufficient to establish on its face that the information is a Cabinet confidence and that it falls within the categories of s. 39(2) or an analogous category; the possibility of analogous categories flows from the general language of the introductory portion of s. 39(2). This follows from the principle that the Clerk or minister must exercise her statutory power properly in accordance with the statute. The kind of description required for claims of solicitor-client privilege under the civil rules of court will generally suffice. The date, title, author and recipient of the document containing the information should normally be disclosed. If confidentiality concerns prevent disclosure of any of these preliminary indicia of identification, then the onus falls on the government to establish this, should a challenge ensue. On the other hand, if the documents containing the information are properly identified, a person seeking production and the court must accept the Clerk's determination. The only argument that can be made is that, on the description, they do not fall within s. 39, or that the Clerk has otherwise exceeded the powers conferred upon her.

29 As to the timing of certification, the only limits are those found in s. 39(4). Subject to these outer limits, it seems that information that falls within s. 39(2) may be certified long after the date the confidence existed or arose in Cabinet. At the same time, as discussed, if there has been disclosure, s. 39 no longer applies, since its only purpose is to prevent disclosure.

30 It may be that the Clerk or minister can withdraw a certification of Cabinet confidence under s. 39 of the *Canada Evidence Act*, on the theory that the power to certify must also include a power to decertify, as suggested by Southin J.A.; and that where a certification is made in error, for example, the Clerk or minister should be able to correct the matter. However, that issue does not arise here.

(2) Waiver

31 On the facts of this case, the concept of waiver in any ordinary sense of the term finds no place. As discussed, the Clerk or minister is not compelled to certify Cabinet confidences and invoke the protection of s. 39(1). However, if the Clerk or minister chooses to do so, the protection of s. 39 automatically follows. That protection continues indefinitely, unless: (i) the certificate is successfully challenged on the ground that it related to information that does not fall under s. 39; (ii) the power of certification of the Clerk or minister has otherwise been improperly exercised; (iii) s. 39(4) is engaged; or (iv) the Clerk or minister chooses to decertify the information. The clear language of s. 39(1) permits no other conclusion.

32 This is consistent with the fact that waiver does not apply at common law. A claim for confidentiality at common law cannot be contested on the ground that the government has waived its right to claim confidentiality. As Bingham L.J. observed in *Makanjuola v. Commissioner of Police of the Metropolis* (1989), [1992] 3 All E.R. 617 (Eng. C.A.), at p. 623, "[p]ublic interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish". Consequently, "public interest immunity cannot in any ordinary sense be waived" (p. 623). Issues of production pursuant to s. 39 of the *Canada Evidence Act* fall to be resolved by the Clerk or minister responsible for balancing the public interests. If a certificate is not properly filed, and documents are released, the Crown is precluded from claiming s. 39 protection. However, by releasing some documents, the Crown has not waived its right to invoke s. 39 over other documents.

33 It is argued that unless the broad power of waiver envisioned by the majority of the Court of Appeal is recognized, litigants opposing the Crown will be placed in the untenable position of being unable to rely on the Crown's production of documents, no matter how essential such documents are to their case or how late the Crown makes its claim to immunity. This concern is alleviated by the fact that s. 39(1) cannot be applied retroactively to documents that have already been produced in litigation; it applies only to compel disclosure.

34 The conclusion that waiver does not apply here makes it unnecessary to consider the issue of class waiver - whether disclosure of one document removes protection from all documents in the same class. However, the related issue of class disclosure of information must be addressed.

35 Section 39 protects "information" from disclosure. It may be that some information on a particular matter has been disclosed, while other information on the matter has not been disclosed. The language of s. 39(1) does not permit one to say that disclosure of some information removes s. 39 protection from other, non-disclosed information. If the related information has been disclosed in other documents, then s. 39 does not apply and the documents containing the information must be produced. If the related information is contained in documents that have been properly certified under s. 39, the government is under no obligation to disclose the related information.

36 This raises the concern that selective disclosure of documents or information may be used unfairly as a litigation tactic. The fear is that the Crown could choose to disclose only those documents which are favourable to its position and certify those documents which are detrimental. Selective disclosure designed to prevent at getting at the truth would not be a proper exercise of the Clerk's or minister's s. 39 powers: *Roncarelli*, *supra*. Moreover, the ordinary rules of litigation offer protection from abuse. First, government witnesses may be cross-examined on the information produced. Second, the refusal to disclose information may permit a court to draw an adverse inference. For example, in *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), the Attorney General's refusal to disclose information relating to an advertising ban on tobacco, led to the inference that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result (para. 166, *per* McLachlin J.)

(3) Judicial Review

37 Judicial review under s. 39 arises when "a court, person or body with jurisdiction to compel the production of information" is presented with an application to order disclosure of information which the Clerk or a minister has certified as a Cabinet confidence under s. 39(1). Section 39 is directed to whether a document is protected from disclosure.

38 Section 39(1) leaves little scope for judicial review of a certification of Cabinet confidentiality. It states flatly that "disclosure of the information *shall* be refused" (emphasis added). Furthermore, it must be refused "without examination or hearings of the information by the court, person or body".

39 As discussed, even language this draconian cannot oust the principle that official actions must flow from statutory authority clearly granted and properly exercised: *Roncarelli*, *supra*. It follows from this principle that the certification of the Clerk or minister under s. 39(1) may be challenged where the information for which immunity is claimed does not on its face fall within s. 39(1), or where it can be shown that the Clerk or minister has improperly exercised the discretion conferred by s. 39(1). "[T]he Court may entertain a proceeding for judicial review of the issuance of a certificate although it may not review the factual correctness of the certificate if it is otherwise in proper form": *Singh*, *supra*, at para. 43. The appropriate way to raise an argument that the Clerk has exercised her decision improperly is "by way of judicial review of the Clerk's certificate" (para. 50). The party challenging the decision may present evidence of "improper motives in the issue of the certificate" (para. 50), or otherwise present evidence to support the claim of improper issuance.

40 The court, person or body reviewing the issuance of a s. 39 certificate works under the difficulty of not being able to examine the challenged information. A challenge on the basis that the information is not a Cabinet confidence within s. 39 thus will be generally confined to reviewing the sufficiency of the list and evidence of disclosure. A challenge based on wrongful exercise of power is similarly confined to information on the face of the certificate and such external evidence as the challenger may be able to provide. Doubtless these limitations may have the practical effect of making it difficult to set aside a s. 39 certification.

41 However, it does not follow from the fact that s. 39 makes it difficult to attack a certification that the procedure is unlawful. As pointed out in *Singh*, *supra*, at para. 50, the restrictions in s. 39(1) amount to a privative clause - an unusual privative clause perhaps, but one nevertheless open to Parliament to prescribe. Courts are not unfamiliar with privative clauses that preclude them from making certain findings of fact. Provided they are within Parliament's constitutional power, they will apply. This does not, however, prevent the tribunal from drawing inferences as to the motives of the Clerk or minister from all the surrounding evidence in determining whether the statutory power to certify has been properly exercised: see *Roncarelli*, *supra*, where the majority of the Court drew the inference of illegitimate exercise of power from circumstantial evidence.

42 One issue remains: what tribunals are competent to decide whether a s. 39 certificate's claim to protection should be set aside on grounds that the information, as described, does not fall within s. 39 or that the certification power has been improperly

exercised? The wording of s. 39(1) refers to "information before a court, person or body with jurisdiction to compel the production of information" and directs the relevant tribunal to refuse disclosure. It would seem to follow that the same bodies are competent to make orders for disclosure for improperly claimed s. 39 protection. This view is reinforced by the fact that s. 39(1) is essentially an evidentiary provision; questions of the admissibility of evidence normally fall to be decided by the tribunal seized of the matter in which the admissibility issue arises.

43 The Federal Court in *Singh*, *supra*, at para. 44, however, suggested that only judicial bodies, like the Federal Court, could review a s. 39 certificate: the R.C.M.P. Public Complaints Commission could not do so because it "is essentially an agency of the Executive and draws such powers as it has solely from an Act of the same Parliament that enacted the *Canada Evidence Act*". It is not apparent why this should be so, however. It seems open to Parliament to confer on a court, person or body with jurisdiction the power to determine whether acts of other public officials are valid. While the issue need not be decided in this case, I see no reason why all bodies expressly mentioned in s. 39 should not have the power to inquire into the validity of s. 39 claims for protection. The same would seem to apply for reviews at common law, given that the matter is essentially one of admissibility of evidence in a proceeding. The common law does not restrict review of claims for public immunity to superior courts.

44 Against this may be put the concern that to permit a proliferation of tribunals to set aside s. 39 certificates risks undue disclosure of important Cabinet confidences. However, s. 39 review is limited by the condition that the tribunal cannot inspect the documents, undermining the concern of improvident disclosure. Moreover, the government may appeal the tribunal's decision. Ultimately, I am not persuaded that permitting tribunals other than superior courts to determine s. 39 issues will illegitimately undermine s. 39 claims to protection.

B. Application of the Principles

(1) The Documents

45 The government issued a s. 39 certificate for 51 documents. Twelve of these had been identified in its list of documents under "Part I: Documents to which there is no objection to production". Of these 12, a number appear to have been not only listed, but actually disclosed to the plaintiffs. The certificate also claimed confidentiality for five documents which were in the plaintiffs' possession or control and which the plaintiffs had listed as producible.

46 On the record before us, s. 39 certification applies to the 34 documents listed as not producible.

47 As discussed, s. 39 of the *Canada Evidence Act* does not apply to the government documents already disclosed. Nor does s. 39 apply to the five certified documents that were in the plaintiffs' possession or control. The documents were disclosed by the government in the context of litigation. The disclosure provisions of s. 39 therefore do not apply and these documents should be produced.

(2) Information in the McCoy Affidavit

48 The government claims protection from disclosure for the information contained in the affidavit of Joan McCoy, which was filed in support of the government's unsuccessful motion to transfer the plaintiffs' case from the Supreme Court of British Columbia to the Federal Court.

49 Of particular importance is Ms. McCoy's statement in para. 21 that: "The rationale for the Treasury Board's decision to increase rates for legal officers in the Toronto Regional Office was the rise in private sector salaries to levels well above those paid in the public sector during a period of rapid economic growth in the late 1980s". According to the McCoy affidavit, "[t]he escalation of external pay rates, matched to a large degree by increases for provincial lawyers as well, had impaired the ability of the Department of Justice to attract candidates for positions in the Law group in the Toronto Regional Office. It had also led to an increase in resignations from the federal Public Service as experienced legal officers, attracted by higher salaries, left for employment in the provincial government and the private sector in the Toronto area. The viability of the regional operation was imperilled by these losses and immediate action was required to stem the flow" (para. 21 of McCoy affidavit).

50 The plaintiffs take issue with this rationale and seek to cross-examine Ms. McCoy on her statement. The government refuses to permit the statement to be used in evidence and denies the right to cross-examine on the information contained in it.

51 When it filed the McCoy affidavit, the government chose to disclose the reason for the decision to pay the Toronto Law group more than other Law groups. The government disclosed that information to support the motion that the B.C. Supreme Court was not the appropriate forum for the case. Therefore, s. 39 cannot be invoked. The affidavit must be disclosed and Ms. McCoy may be cross-examined on its contents.

52 As to related information, if it has been voluntarily disclosed in other documents, then s. 39 does not apply and the documents must be produced. By contrast, the government is under no obligation to disclose related information contained in documents that have been properly certified under s. 39, but runs the risk that refusal may permit the court to draw an adverse inference.

C. The Constitutionality of Section 39

53 Because s. 39 applies to the undisclosed documents, it is necessary to consider the constitutional questions in this case. The respondents argue that s. 39 of the *Canada Evidence Act* is of no force or effect by reason of one or both of the preamble to the *Constitution Act, 1867* and s. 96 of the *Constitution Act, 1867*.

(1) The Preamble to the Constitution Act, 1867

54 The respondents in this case challenge the constitutionality of s. 39 and argue that the provision is *ultra vires* Parliament because of the unwritten principles of the Canadian Constitution: the rule of law, the independence of the judiciary, and the separation of powers. Although the unwritten constitutional principles are capable of limiting government actions, I find that they do not do so in this case.

55 The unwritten principles must be balanced against the principle of Parliamentary sovereignty. In *Canada (Procureur général) c. Québec (Commission des droits de la personne)* (1981), [1982] 1 S.C.R. 215 (S.C.C.), this Court upheld as constitutional s. 41(2) of the *Federal Court Act*, the predecessor to s. 39, which permitted the government to claim absolute privilege over a broader class of confidences.

56 Recently, the Federal Court of Appeal considered the constitutional validity of s. 39 of the *Canada Evidence Act* in *Singh*, *supra*. On the basis of a thorough and compelling review of the principle of parliamentary sovereignty in the context of unwritten constitutional principles, Strayer J.A. held that federal Crown privilege is part of valid federal law over which Parliament had the power to legislate. Strayer J.A. concluded at para. 36:

> ... the rule of law cannot be taken to invalidate a statute which has the effect of allowing representatives of the Crown to identify certain documents as beyond disclosure: that is, the rule of law does not preclude a special law with a special result dealing with a special class of documents which, for long standing reasons based on constitutional principles such as responsible government, have been treated differently from private documents in a commercial law suit.

57 I share the view of the Federal Court of Appeal that s. 39 does not offend the rule of law or the doctrines of separation of powers and the independence of the judiciary. It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.

(2) Section 96 of the Constitution Act, 1867

58 A second constitutional question must be considered: whether Parliament's decision to limit superior courts from compelling disclosure of Cabinet confidences impermissibly invade the core jurisdiction of the superior courts?

59 There is no clear test for defining what is considered to be the "core jurisdiction" of a s. 96 court. In *Reference re Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act, S.N.S. 1992, c. 31*, [1996] 1 S.C.R. 186 (S.C.C.), Lamer C.J. stated at para. 56:

> Section 96's "core" jurisdiction is a very narrow one which includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the reservation of its foundational role within our legal system.

Citing *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.), the respondents argue that s. 39 impermissibly infringes on the core jurisdiction of a superior court because it interferes with courts' ability to control their own process. First, because the section operates to prevent a superior court from remedying an abuse of process, and second, because it denies evidence centrally relevant to the core factual questions in the litigation. The respondents contend that s. 39 deprives the judiciary of its role of review, a power which a superior court possesses under the common law of public interest.

60 As previously stated, there is a long common law tradition of protecting Cabinet confidences. In Canada, superior courts operated since pre-Confederation without the power to compel Cabinet confidences. Indeed, at the time of Confederation, no court had any jurisdiction regarding actions against the Sovereign: see *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551 (S.C.C.). Further, s. 39 has not substantially altered the role of the judiciary from their function under the common law regime. The provision does not entirely exclude judicial review of the determination by the Clerk that the information is a Cabinet confidence. A court may review the certificate to determine whether it is a confidence within the meaning provided in s. 39(2) or analogous categories, or to determine if the certificate was issued in bad faith. Section 39 does not, in and of itself, impede a court's power to remedy abuses of process.

61 I therefore conclude that there is no basis upon which to find that s. 39 of the *Canada Evidence Act* is unconstitutional.

V. Conclusion

62 I would allow the appeal in part, with costs to the respondents.

63 On the record before us, the documents certified but disclosed, including the McCoy affidavit, are no longer protected and may be used in the litigation. The plaintiffs may cross-examine on the McCoy affidavit. The remaining documents are protected by s. 39 of the *Canada Evidence Act*. These conclusions are made without prejudice to future applications in this case.

***L'Heureux-Dubé J.*:**

64 While I agree substantially with the reasons of the Chief Justice and the result she reaches, I cannot agree with her view as reflected in paras. 17, 22 and 28 of her reasons that "competing interests" in disclosure must be taken into account.

65 In my view, the unequivocal language of the statute does not mandate consideration of the public interest in disclosure; I believe the Clerk or the minister must only answer two questions before certifying, namely, whether (1) the document is a Cabinet confidence; and (2) it is information that the government wishes to protect.

Order accordingly.
Ordonnance en conséquence.

End of Document

THE LAW OF PUBLIC INQUIRIES IN CANADA

Simon Ruel, B.Sc. (Université Laval), LL.B. (Université de Montréal)
Member of the Barreau du Québec and of the
Law Society of Upper Canada

CARSWELL®

injurious to the public interest.[91] However, this does not appear to be the current status of the law. Questions of the admissibility of evidence, including the determination of privileges, may be decided by the tribunal or body where the issue of admissibility arises, whether that body is a court, tribunal or commission of inquiry. This principle would apply to all common law public interest privileges, at the exception of those that ought to be determined by superior courts or the federal court under statute.[92]

However, at the federal level, pursuant to the *Canada Evidence Act*, the determination of specified public interest claims of privilege is within the exclusive jurisdiction of superior courts or the Federal Court.[93]

Information or documents protected by public interest privilege do not loose that character because a commission of inquiry proceeds *in camera*. Once a claim of public interest privilege is recognized, it applies to all portions of an inquiry, whether or not some of the evidence might be heard *in camera*.[94] This principle would equally apply to other categories of privileges.

(6) International relations, national defence, national security

Public interest privilege relating to international relations, national defence and national security are addressed in sections 38 to 38.16 of the *Canada Evidence Act*. Under the *Act*, claims of privilege concerning international relations, national defence or national security may only be determined by the Federal Court.[95] Under section 38.01 of the *Canada Evidence Act*, when an objection is made on those grounds and the Attorney General of Canada is notified, the person presiding the proceedings is bound to uphold it and ensure that the information is not disclosed other than in accordance with the *Act*. The term "proceeding" is defined at section 38 as "a proceeding before a court, person or body with jurisdiction to compel the production of information," which would include a commission of inquiry.

This notification procedure allows the Attorney General of Canada to apply to the Federal Court for an order with respect to the disclosure of such type of information.[96] Under this process, the commission, tribunal or court where the objection to disclosure is made in the first place looses jurisdiction to the Federal Court. The Federal Court judge seized of application made by the Attorney General may authorize the disclosure of information that would be injurious to international rela-

---

91 *Canadian Javelin Ltd.*, *supra* note 79 at pages 704, 708; *supra* note 45 at paras. 249, 250.

92 *Supra* note 46 at paras. 42 to 44.

93 *Canada Evidence Act*, paras. 37(2), (3).

94 *Pham Estate, Re* (2004), 26 Admin. L.R. (4th) 245 at paras. 15 to 22, Belzil J. (Alta. Q.B.); reversed on other grounds in (2005), 30 Admin. L.R. (4th) 159 (Alta. C.A.).

95 *Canada Evidence Act*, section 38.04.

96 *Canada Evidence Act*, section 38.04.

The Conduct *of* Public Inquiries

law, policy, and practice

ED RATUSHNY

IRWIN LAW

to "edit" information to assist the accused. Justice McLachlin noted that there may be cases where the court can be certain that an edited document will not reveal the informer's identity. But, in this case, that was not possible since it was an anonymous tip sheet and the informer could not be consulted. In such circumstances, none of the details should be disclosed, subject only to the "innocence at stake" exception.

If the exception is asserted by the accused, the following steps should follow:

- The accused must show some basis to support the conclusion that without disclosure his innocence is at stake.
- If the court finds such a basis, only as much information should be revealed as is essential to permit proof of innocence.
- The Crown should first be given the option of staying proceedings.
- If the Crown chooses to proceed, the essential information should be disclosed to the accused.

It should be kept in mind that, while the public interest in law enforcement underlies this privilege, there is no balancing of that public interest in its application to specific situations. It must be applied as rule of law.

6) Public-Interest Immunity

At common law, where the government seeks to withhold its documents or information from the courts, a judicial discretion exists to weigh the public interest in protecting them against that of disclosing them in the courts.[90] This discretion still exists throughout Canada but at the federal level it has been emasculated by superimposed statutory provisions in the *Canada Evidence Act*.[91]

Section 39 applies to Cabinet-related documents and is cast very broadly. A minister or the clerk of the Privy Council simply files a certificate that the information in question is covered by this section and the protection is absolute. Reference was made in Chapter 5, Section A

90 The nature and exercise of discretion was addressed in *Carey v. Ontario*, [1986] 2 S.C.R. 637.

91 Above note 37.

the circumstances in which Commissioner Gomery was able to gain cess to the secret Cabinet documents relevant to his mandate, but is was highly unusual. There is no legal avenue by which such access n be obtained.

Section 38 is equally restrictive with respect to National Security onfidentiality but in a more convoluted way. There is no provision for dicial balancing of the public interest in disclosure against potential jury to international relations, national defence, or national security. he extent of government resistance to disclosure on these grounds as demonstrated in both the Arar and Air India inquiries.[92] In Arar, the ommissioner essentially abandoned any attempt to obtain disclosure n a claim-by-claim basis in favour of writing the entire report as his ehicle for expressing his views on these issues. In Air India, Commissioner Major used the threat of his resignation to gain sufficient ground ı the war of attrition to allow his hearings to be completed. Under section 38, the attorney general may overturn the judge's decision requiring isclosure by simply filing a certificate.

Section 37 applies to the protection or disclosure of government information on grounds other than Cabinet or NSC immunity. The ground ıf public interest for claiming immunity must be specified by the government in each situation. The court then may order disclosure where :he public interest in disclosure is more important than the specified ıublic interest. The form and conditions of disclosure may be directed to limit encroachment on the specified public interest. The forum for adjudicating the government objection is the Federal Court or the provincial superior court, depending on the jurisdiction under which the commission of inquiry is established.

7) Official Functions

A number of privileges and immunities arise out of the functions performed in a variety of public roles. These include the absolute immunity of judges from testifying about the grounds for their decisions, based on the principle of judicial independence.[93] Closely related is the quali-

---

92 Section D(2), above in this chapter.

93 Chapter 7, Section A(2).

Most Negative Treatment: Distinguished
Most Recent Distinguished: Human Rights Institute of Canada v. Canada (Minister of Public Works & Government Services) | 2001 FCT 71, 2001 CFPI 71, 2001 CarswellNat 543, 2001 CarswellNat 5477, [2001] A.C.F. No. 401, [2001] F.C.J. No. 401, 104 A.C.W.S. (3d) 641 | (Fed. T.D., Feb 13, 2001)

1986 CarswellOnt 472
Supreme Court of Canada

Carey v. Ontario

1986 CarswellOnt 1011, 1986 CarswellOnt 472, [1986] 2 S.C.R. 637, [1986] S.C.J. No. 74, 14 C.P.C. (2d) 10, 1 W.C.B. (2d) 25, 20 O.A.C. 81, 22 Admin. L.R. 236, 30 C.C.C. (3d) 498, 35 D.L.R. (4th) 161, 58 O.R. (2d) 352n, 72 N.R. 81, J.E. 87-79, EYB 1986-67591

CAREY v. THE QUEEN IN RIGHT OF ONTARIO

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

Heard: October 2, 1986
Judgment: December 18, 1986
Docket: No. 18060

Counsel: *J.L. McDougall*, Q.C. and *Robert L. Armstrong*, for appellant
T.H. Wickett, Q.C., for respondents

Subject: Civil Practice and Procedure; Public; Criminal; Evidence

Related Abridgment Classifications

Evidence
VII Documentary evidence
VII.5 Privilege as to documents
VII.5.d Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Crown privilege

Discovery — Discovery of documents — Privileged documents — Crown privilege or public interest — Twelve-year-old low level policy matter of little public interest — Privilege asserted for Cabinet documents on basis of class — Documents relevant to action — Documents to be produced for inspection by Court.

Crown — Procedure in proceedings by and against Crown in Right of Province — Proceedings against Crown where authorized by statute — Discovery — Discovery of documents — Crown privilege or public interest — No absolute privilege attaching to Cabinet documents — Consideration to be given to nature of policy concerned, time when disclosure sought, level of government — Documents to be produced for inspection by trial Judge.

The appellant plaintiff brought this action against the provincial Crown and others on the grounds that the defendants had agreed to make good all his losses in operating a lodge that was important to the tourist industry of Northern Ontario. The defendants denied making such an agreement. On 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. After a date was fixed for trial,

a subpoena duces tecum was served on the Secretary of the Cabinet. The defendants moved to quash the subpoena. They acknowledged that the Secretary had relevant documents under his control, but claimed privilege — not on the basis of the content of the documents, but on the basis of the class to which they belong, i.e., Cabinet documents. The motion was granted and the subpoena quashed. An appeal to the Divisional Court was dismissed, and a further appeal to the Ontario Court of Appeal was also dismissed. A motion for leave to appeal to the Supreme Court of Canada was granted.

Held:

The appeal was allowed. The documents were to be produced to the trial Judge for inspection.

It was necessary for the proper administration of justice that litigants have access to all evidence that might be of assistance to the fair disposition of the issues in litigation. On the other hand, certain information regarding governmental activities should not be disclosed in the public interest. The balance between these competing interests invited periodic judicial reassessment. The public interest in the non-disclosure of a document was not a Crown privilege; rather, it was more properly called a "public interest immunity", one that was for the Court and not the Crown to weigh and decide.

The principal argument for withholding the documents was that their disclosure would lead to a decrease in completeness and in candour, thereby inhibiting the freedom of Cabinet members to discuss matters of significant public concern. It was very easy to exaggerate the importance of this argument, though some weight should be attached to it. It was doubtful that the off-chance that a written communication might be required to be produced for the purposes of litigation would measurably affect the candour of confidential communications generally.

The idea that Cabinet documents should be absolutely protected from disclosure has in recent years shown considerable signs of erosion. Today, Cabinet documents, like other evidence, are required to be disclosed unless such disclosure would interfere with the public interest. That the documents concerned the decision-making process at the highest level of government was only one variable to be considered. The nature of the policy concerned and the particular contents of the documents were more important. Another variable was the time when a document was to be revealed; revelations of Cabinet discussion and planning at the developmental stage might severely inhibit the proper functioning of government, but this would not be so when low-level policy that had long become of little public interest was involved.

The claim herein was based solely on the fact that the documents concerned were of a class whose revelation might interfere with the proper functioning of the public service. It was difficult to see how a claim could be based on the policy or contents of the documents, which dealt merely with a transaction concerning a tourist lodge in Northern Ontario. The impugned transaction took place over 12 years ago in connection with what by any measure could scarcely be regarded as high level government policy. If the documents could affect present policy a Court could weigh the competing interests and refrain from divulging these matters.

Table of Authorities

Cases considered:

Air Canada v. Secretary of State for Trade, [1983] 2 A.C. 394, [1983] 1 All E.R. 910, [1983] 2 W.L.R. 494 (H.L.) — *considered*

A.G. v. Jonathan Cape Ltd., [1976] Q.B. 752, [1975] 3 All E.R. 484 — *considered*

Burmah Oil Co. v. Bank of England, [1980] A.C. 1090, [1979] 3 All E.R. 700 (H.L.) — *considered*

Can. Javelin Ltd., Re; Sparling v. Smallwood, [1982] 2 S.C.R. 686, 68 C.P.R. (2d) 145, (sub nom. *Smallwood v. Sparling*) 141 D.L.R. (3d) 395, 44 N.R. 571 (S.C.C.) — *considered*

Conway v. Rimmer, [1968] A.C. 910, [1968] 1 All E.R. 874 (H.L.) — *considered*

Duncan v. Cammell, Laird & Co., [1942] A.C. 624 (H.L.) — *considered*

Environmental Defence Society Inc. v. South Pacific Aluminium Ltd., [1981] 1 N.Z.L.R. 146 (N.Z. C.A.) — *referred to*

Fletcher Timber Ltd. v. A.G., [1984] 1 N.Z.L.R. 290 (N.Z. C.A.) — *considered*

Gagnon v. Comm. des valeurs mobilières du Québec, [1965] S.C.R. 73 (S.C.C.) — *referred to*

Glasgow Corp. v. Central Land Bd., [1955] S.C 64, affirmed [1956] S.C. (H.L.) 1 — *referred to*

Gloucester Properties Ltd. v. R., [1982] 1 W.W.R. 449 (*sub nom. R. v. Gloucester Properties Ltd.*), 32 B.C.L.R. 61, 24 C.P.C. 82, 129 D.L.R. (3d) 275 (B.C. C.A.) — *referred to*

Goguen v. Gibson, [1983] 2 F.C. 463, 3 Admin. L.R. 225, 40 C.P.C. 295, 10 C.C.C. (3d) 492, 50 N.R. 286 (Fed. C.A.) — *referred to*

Grosvenor Hotel, London (No. 2), Re, [1965] Ch. 1210, [1964] 3 All E.R. 354 (C.A.) — *referred to*

Lanyon Pty. Ltd. v. Commonwealth of Australia (1974), 129 C.L.R. 650, 3 A.L.R. 58 (Aus. H.C.) — *referred to*

R. v. Mannix, [1981] 5 W.W.R. 343 (Alta. C.A.) — *referred to*

R. v. Snider, [1954] S.C.R. 479, 109 C.C.C. 193, [1954] C.T.C. 255, 54 D.T.C. 1129 (S.C.C.) — *referred to*

R. v. Vanguard Hutterian Brethren Inc., [1979] 4 W.W.R. 173, 46 C.C.C. (2d) 389, (sub nom. *Re R. and Vanguard Hutterian Brethren Inc.)* 97 D.L.R. (3d) 86 (Sask. C.A.) — *referred to*

Robinson v. State of South Australia (No. 2), [1931] A.C. 704 (P.C.) — *referred to*

Rogers v. Home Secretary, [1973] A.C. 388, [1972] 2 All E.R. 1057 (H.L.) — *referred to*

Sankey v. Whitlam (1978), 21 A.L.R. 505 (Aus. H.C.) — *considered*

Smerchanski v. Lewis; Smerchanski v. Asta Securities Corp. (1981), 31 O.R. (2d) 705, (sub nom. *Smerchanski v. Lewis)* 21 C.P.C. 105, 58 C.C.C. (2d) 328, 120 D.L.R. (3d) 745 (Ont. C.A.) — *considered*

United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (U.S. D.C., 1974) — *considered*

Statutes considered:

Canada Corporations Act, R.S.C. 1970, c. C-32.

Canada Evidence Act, R.S.C. 1970, c. E-10 —

s. 36.1(2) [en. 1980-81-82, c. 111, s. 4 (Sched. III)]

s. 36.2(1) [en. 1080-81-82, c. 111, s. 4 (Sched. III)]

Evidence Act, R.S.O. 1980, c. 145 —

s. 30

Rules considered:

English Supreme Court Rules —

O. 24, R. 13(1)

Authorities considered:

Williston and Rolls, The Law of Civil Procedure (1970), vol. 2, pp. 745-51, 780-81, 805-06.

APPEAL from judgment of the Ontario Court of Appeal reported at (1983), 43 O.R. (2d) 161, 38 C.P.C. 237, 3 Admin. L.R. 158, 7 C.C.C. (3d) 193, 1 D.L.R. (4th) 498, affirming (1982), 39 O.R. (2d) 273, 31 C.P.C. 34, 4 C.C.C. (3d) 83, 146 D.L.R. (3d) 684, which affirmed a judgment of Catzman J. (1982), 38 O.R. (2d) 430, 28 C.P.C. 310, granting an application to quash subpoena duces tecum.

The judgment of the Court was delivered by *La Forest J.*:

1 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.

2 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.

3 The plaintiff's claim arises against the following background.

Factual Background

4 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.

5 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.

6 Carey alleges that in the fall of 1971, the Government offered to make good all losses of the operators through forgiveable or interest-free loans if the lodge was reopened. 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 reopened 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 1973-74 but the Government asked him to keep it open pending the completion of a feasibility study. The Government denies making any such request.

7 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 money in it so as to make the resort a centrepiece 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.

8 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 3-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.

The Action and Demand for Production

9 Some 2 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.

10 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.

11 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 30 years.

12 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.

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

> [I]t 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. ...
>
> 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.

The Courts Below

14 Catzman J. of the Supreme Court of Ontario [reported at (1982), 38 O.R. (2d) 430, (sub nom. *Carey v. R.)* 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; Smerchanski v. Asta Securities Corp.* (1981), 31 O.R. (2d) 705, (sub nom. *Smerchanski v. Lewis)* 21 C.P.C. 105, 58 C.C.C. (2d) 328, 120 D.L.R. (3d) 745, where it was stated, at p. 711 [O.R.], 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.

15 An appeal to the Divisional Court for Ontario was dismissed [reported at (1982), 39 O.R. (2d) 273, 31 C.P.C. 34, 4 C.C.C. (3d) 83, 146 D.L.R. (3d) 684]. 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 deliberations against the interest in making available all relevant evidence to a Court.

16 On the appeal to the Court of Appeal of Ontario, [reported at (1983), 3 Admin. L.R. 158, 43 O.R. (2d) 161, 38 C.P.C. 237, 7 C.C.C. (3d) 193, 1 D.L.R. (4th) 498], 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.

17 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 Government 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.

18 Leave to appeal to this Court was granted on December 3, 1983.

Grounds of Appeal

19 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 requiremnts 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 of territories of Canada.

20 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.

21 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 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 1980-81-82-83, c. 111, s. 4, Sched. III.

General Legal Background

22 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.

23 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 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.

24 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 at 714 (P.C.).

25 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 991, [1968] 1 All E.R. 874, is one that invites periodic judicial reassessment. Not surprisingly, conflicting dicta can scarcely be reconciled.

26 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.

27 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.

28 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, "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).

29 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.

30 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 dependants 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.

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

32 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.

33 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, 109 C.C.C. 193, [1954] C.T.C. 255, 54 D.T.C. 1129, 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 [S.C.R.]).

34 A similar approach was taken in *Gagnon v. Comm. des valeurs mobilières du Québec*, [1965] S.C.R. 73 (S.C.C.). 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)*, [1965] Ch. 1210, [1964] 3 All E.R. 354 (C.A.). Fauteux J., who gave the judgment of the majority of this Court, referred to the 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.

35 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 Corp. v. Central Land Bd.*, [1955] S.C. 64, affirmed [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 Prosecution 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.

36 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.

37 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.

38 The public interest in the non-disclosure of a document is not, as Thorson J. 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.

39 In the end, it is for the Court and not the Crown to determine the issue. This was recently reaffirmed by this Court in *Re Can. Javelin Ltd; Sparling v. Smallwood*, [1982] 2 S.C.R. 686, 68 C.P.R. (2d) 145, (sub nom. *Smallwood v. Sparling)* 141 D.L.R. (3d) 395, 44 N.R. 571 , 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.

The Affidavit

40 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*, [1980] A.C. 1090, [1979] 3 All E.R. 700 (H.L.), and *Goguen v. Gibson*, [1983] 2 F.C. 463, 3 Admin. L.R. 225, 40 C.P.C. 295, 10 C.C.C. (3d) 492, 50 N.R. 286 (Fed. 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.

41 Counsel for Carey argued that Dr. Stewart's affidavit is inadequate in that it does not set forth with sufficient particularity the interest 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 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.

42 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

43 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 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. Comm. 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 analyze the reasons underlying the claim.

44 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.

45 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 produced only in the most exceptional and unusual circumstances.

46 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.

47 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 [[1968] A.C.]). 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).

48 The same approach was adopted in later cases of which I mention only a few. In the *Glasgow Corp.* 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 at 413, [1972] 2 All E.R. 1057 (H.L.), described the candour argument as "the old fallacy". More recently in *Burmah Oil Co. v. Bank of England*, supra, at p. 724 [All È.R.], Lord Keith of Kinkel characterized the argument as "grotesque".

49 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 [[1968] A.C.]:

> 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 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

50 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, 94 S. Ct. 3090, 41 Ed. 2d 1039 (U.S. D.C., 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 Supreme Court of the United States, affirming the Courts below, rejected the President's claim.

51 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.

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

53 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.

54 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.

55 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.

56 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 *A.G. v. Jonathan Cape Ltd.*, [1976] Q.B. 752, [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.

57 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.

58 Lord Widgery C.J. agreed that the views expressed by Ministers in Cabinet are confidential and their disclosure may be restrained where this 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 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 30 years. Rather he put the matter simply in this way at p. 496 [[1975] 3 All E.R.]:

> 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.

59 There is a difference, however, between refusing to restrain disclosure and compelling disclosure and it is interesting that Lord Widgery 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 related to the matter should not be disclosed in the public interest.

60 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.

61 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.

62 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 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.

63 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 3 years before and were no longer of continuing significance.

64 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.

65 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.

66 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*, 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.

67 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 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 documents. 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.

68 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.

69 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.

70 *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 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 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.

71 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 [[1979] 3 All E.R.]). 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 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.

72 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)

73 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.

74 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. v. Vanguard Hutterian Brethren Inc.*, [1979] 4 W.W.R. 173, 46 C.C.C. (2d) 389, (sub nom. *Re R. and Vanguard Hutterian Brethern Inc.)* 97 D.L.R. (3d) 86 (Sask. C.A.); *Smerchanski v. Lewis*, supra. *R. 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.*, [1982] 1 W.W.R. 449, 32 B.C.L.R. 61, 24 C.P.C. 82, 129 D.L.R. (3d) 275, 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 stated, will prevail only when it is necessary in the public interest. In words reminiscent of those expressed by Fauteux J. in *Gagnon v. Comm. des valeurs mobilières du Québec*, 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.

75 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, R.S.C. 1970, c. C-32, 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.

76 This Court, however, decided against the granting of the injunction. In dealing with these issues, Madame Justice Wilson, 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 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, Madame Justice Wilson 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.

77 In rejecting Mr. Smallwood's claim to immunity on the basis of the doctrine of collective Cabinet responsibility, Madame Justice Wilson underlined that in *A.G. v. Jonathan Cape Ltd.*, supra, Lord Widgery 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 that [p. 707, S.C.R.]:

> ... 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

78 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 protection 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.

79 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.

80 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 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.

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

82 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 12 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 in the *Jonathan Cape* case, several provincial elections have taken place since that time, and governments 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 3 or 4 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.

83 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 interests 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 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.

84 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, at p. 725, it has a bearing on the perception of the litigant and the public on whether justice has been done.

Inspection

85 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.

86 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, where there was reason to believe these facts or state of affairs are likely to be capable of proof by some other means.

87 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.

88 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, Madame Justice Wilson interpreted the *Burmah Oil* case as holding that "when a claim of privilege is made in respect of documents which are prima facie relevant to the issues before the Court, the Court must review the documents in order to balance the competing interests" already described.

89 The law in England was considerably clarified by the subsequent case of *Air Canada v. Secretary of State for Trade*, [1983] 2 A.C. 394, [1983] 1 All E.R. 910, [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 program 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.

90 The airlines alleged that the Secretary's power was confined to the purposes 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.

91 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 facts upon which its decision depended. This involved the interpretation to be given to O. 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.

92 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 O. 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.

93 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 [W.L.R., p. 924, [1983] 1 All E.R.].

94 It should also be underlined that it was not solely for these reasons that the Law Lords refused 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 O. 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 [W.L.R. p. 924, All E.R.]).

95 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.

96 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.

97 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.

98 What troubles me about this approach is that it puts on a plaintiff the burden of proving how the documents, which are admittedly relevant, can be of assistance. How can he do that? He had 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.

99 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.

100 The method of approach adopted by the Court of Appeal appears to be diametrically opposed to that implicit in Madame Justice Wilson's remark in *Smallwood*, p. 703 [S.C.R.], cited earlier, regarding the *Burmah 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".

101 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 [All E.R.]. 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).

102 The *Burmah Oil* case bears a considerable resemblance to this case at least insofar 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 instructions. 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.

103 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.

104 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 Supreme Court Rule (U.K.), O. 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 [W.L.R., p. 924 All E.R.].

105 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 O. 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 the Canada Evidence Act pointed out in *Goguen v. Gibson*, at p. 304 [C.P.C.], that the *Air Canada* case "be treated with caution".

106 The approach that, in my view, should be followed may be exemplified by a recent case in New Zealand, *Fletcher Timber Ltd. v. A.G.*, [1984] 1 N.Z.L.R. 290 (C.A.), where there is also no provision like O. 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 Court, in the exercise of its discretion, ordered their inspection.

107 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 p. 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.

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.

108 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

109 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.

2007 FC 766, 2007 CF 766
Federal Court

Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar

2007 CarswellNat 2355, 2007 CarswellNat 4542, 2007 FC 766, 2007 CF 766, [2007] F.C.J. No. 1081, 159 A.C.W.S. (3d) 908, 316 F.T.R. 279 (Eng.), 72 Admin. L.R. (4th) 68

Attorney General of Canada, Applicant and Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar and Maher Arar, Respondents

S. Noël J.

Heard: April 25, 30; May 1-3, 14, 23, 2007
Judgment: July 24, 2007
Docket: DES-4-06

Counsel: Mr. A. Préfontaine, for Applicant
Mr. P. Cavalluzzo, Ms V. Verma, Mr. R. Atkey, for Respondent Commission
Mr. L. Waldman, Ms M. Edwardh, for Respondent, Maher Arar

Subject: Evidence

Related Abridgment Classifications

Evidence
VII Documentary evidence
VII.6 Public documents
VII.6.b Government documents
VII.6.b.iii Miscellaneous

Evidence
VII Documentary evidence
VII.6 Public documents
VII.6.d Miscellaneous

Evidence
XVII Privilege
XVII.4 Public interest immunity
XVII.4.a Crown privilege

Headnote

Evidence --- Documentary evidence — Public documents — Government documents — Miscellaneous
Level of deference accorded to findings of **public inquiry** commissioner — M was Canadian citizen who was arrested while transiting through New York in 2002 and, after being detained there for over week, deported against his will to Syria where he was imprisoned, interrogated and tortured for nearly one year — Governor-in-Council ("GIC") adopted terms of reference in 2004, establishing public commission of inquiry — Associate chief justice was appointed commissioner and part of his mandate was to investigate and report on actions of Canadian officials in relation to deportation and detention of M ("factual inquiry")

— Commissioner prepared two different reports at end of factual inquiry: in camera report, which included sensitive information that might be injurious to international relations, national defence or national security, and public report that was released in September 2006 — Government took issue with some of information included in public report and chose to redact certain portions — Commissioner sent report to Privy Council and advised that redacted information could be disclosed to public and was necessary to fairly recite facts surrounding events — In response, Attorney General of Canada brought application, pursuant to s. 38.04 of Canada Evidence Act ("Act"), seeking to prohibit **disclosure** of redacted portions — Application granted in part — **Disclosure** authorized for that information, which was identified as not injurious and/or for which **public interest** in **disclosure** prevailed, while remaining information was protected — Commissioner's rulings, as to whether redacted information could be disclosed, were to be afforded no deference given wording of terms of reference, role, structure of commission, and wording of s. 38 of Act — Act was clear that where this Court was seized with such application, Court after applying criteria set out ins. 38.06 makes determination as to whether information in question should be disclosed — This wording indicated that Court's role under ss. 38.04 and 38.06 of Act was to rule on whether particular information could be disclosed — To accord deference to commissioner's findings would result in Court abdicating its role and judicial obligations under Act — That said, case law clear that role under s. 38 is not to judicially review decision to disclose information — Furthermore, commissioner's point of view expressed in his rulings and subsequent reports were valuable to decision to be made on present application — While commission acts independently during inquiry, report once filed with GIC becomes confidence of Privy Council and power to make final report public belongs to executive.

Evidence --- Documentary evidence — Public documents — Miscellaneous
Three-part test — Canadian citizen was deported unwillingly by U.S. officials to Syria where he was imprisoned and tortured for one year — In 2004, Governor-in-Council ("GIC") adopted terms of reference, establishing public commission of inquiry into actions of Canadian officials in relation to citizen's deportation and detention — Judge who was appointed commissioner prepared two different reports at end of factual inquiry: in camera report, which included sensitive information and public report — Government redacted certain portions of information included in public report — Commissioner sent report to Privy Council and advised redacted information could be disclosed to public and was necessary to fairly recite facts — In reply, federal attorney general brought application pursuant to s. 38.04 of Canada Evidence Act seeking to prohibit disclosure of redacted portions — Application granted in part — Disclosure authorized for that information, which was identified as not injurious and/or for which public interest in disclosure prevailed, while remaining information was protected — Three-part test set out in s. 38.06 of Act was applied — First, redacted information met low threshold of relevance — Relevancy was evaluated given uniqueness and utility of commissions of inquiry to government and public — Terms of reference set out procedure on how to deal with sensitive information under ss. 38.01(6)(d) and 38.01(8) of Act — Second, disclosing some of information would be injurious to international relations, national defence or national security — Consideration of terms "injury", "international relations", "prejudiciable" and "national security" — Not absolute rule that information in public domain cannot be protected from disclosure — Breaching third party rule was comparable to breach of contractual obligations — Such breach may cause harm and affect flow of information to Canada, and in many cases, only non-breaching party would fully know effect — Important to consider nature of Canada's relationship with law enforcement or intelligence agency from which information was received — While care must be taken when considering whether to circumvent third party rule, severity of potential harm assessable under third part of test — While "mosaic effect" is of concern, in itself it is insufficient to prevent disclosure of otherwise innocuous piece of information — Third, weighing of public interests in disclosure vs. non-disclosure involved assessing several factors such as, extent of injury and relevance of redacted information.

Evidence --- Privilege — Public interest immunity — Crown privilege
Canadian citizen was deported unwillingly by U.S. officials to Syria where he was imprisoned and tortured for one year — In 2004, Governor-in-Council ("GIC") adopted terms of reference, establishing public commission of inquiry into actions of Canadian officials in relation to citizen's deportation and detention — Judge who was appointed commissioner prepared two different reports at end of factual inquiry: in camera report, which included sensitive information and public report — Government redacted certain portions of information included in public report — Commissioner sent report to Privy Council and advised redacted information could be disclosed to public and was necessary to fairly recite facts — In reply, federal attorney general brought application pursuant to s. 38.04 of Canada Evidence Act seeking to prohibit disclosure of redacted portions — Application granted in part — Disclosure authorized for that information, which was identified as not injurious and/or for which public interest in disclosure prevailed, while remaining information was protected — Three-part test set out in s. 38.06 of Act was applied — First, redacted information met low threshold of relevance — Relevancy was evaluated given uniqueness and utility of commissions of inquiry to government and public — Terms of reference set out procedure on how to deal with sensitive information under ss. 38.01(6)(d) and 38.01(8) of Act — Second, disclosing some of information would be injurious to international relations, national defence or national security — Consideration of terms "injury", "international

relations", "prejudiciable" and "national security" — Not absolute rule that information in public domain cannot be protected from disclosure — Breaching third party rule was comparable to breach of contractual obligations — Such breach may cause harm and affect flow of information to Canada, and in many cases, only non-breaching party would fully know effect — Important to consider nature of Canada's relationship with law enforcement or intelligence agency from which information was received — While care must be taken when considering whether to circumvent third party rule, severity of potential harm assessable under third part of test — While "mosaic effect" is of concern, in itself it is insufficient to prevent disclosure of otherwise innocuous piece of information — Third, weighing of public interests in disclosure vs. non-disclosure involved assessing several factors such as, extent of injury and relevance of redacted information.

Table of Authorities

Cases considered by *S. Noël J.*:

Attorney General v. Guardian Newspaper Ltd. (No. 2) (1988), [1990] 1 A.C. 109, [1988] 3 W.L.R. 776, [1988] 2 W.L.R. 805, [1988] 3 All E.R. 545 (U.K. H.L.) — considered

Babcock v. Canada (Attorney General) (2002), 2002 SCC 57, 2002 CarswellBC 1576, 2002 CarswellBC 1577, [2002] 8 W.W.R. 585, 214 D.L.R. (4th) 193, 3 B.C.L.R. (4th) 1, [2002] 3 S.C.R. 3, 3 C.R. (6th) 1, 289 N.R. 341, 168 B.C.A.C. 50, 275 W.A.C. 50 (S.C.C.) — considered

Canada (Attorney General) v. Khawaja (2007), 2007 FC 490, 2007 CF 490, 219 C.C.C. (3d) 305, 2007 CarswellNat 1129, 2007 CarswellNat 2337 (F.C.) — followed

Carey v. Ontario (1986), 22 Admin. L.R. 236, 58 O.R. (2d) 352n, 1986 CarswellOnt 1011, 1986 CarswellOnt 472, [1986] 2 S.C.R. 637, 35 D.L.R. (4th) 161, 72 N.R. 81, 20 O.A.C. 81, 30 C.C.C. (3d) 498, (sub nom. *Carey v. R.)* 14 C.P.C. (2d) 10 (S.C.C.) — followed

Charkaoui, Re (2007), 54 Admin. L.R. (4th) 1, 2007 SCC 9, 44 C.R. (6th) 1, 59 Imm. L.R. (3d) 1, 2007 CarswellNat 325, 2007 CarswellNat 326, 358 N.R. 1, 276 D.L.R. (4th) 594, (sub nom. *Charkaoui v. Canada)* [2007] 1 S.C.R. 350 (S.C.C.) — considered

Commonwealth v. John Fairfax & Sons Ltd. (1980), 147 C.L.R. 39 (Australia H.C.) — considered

Henrie v. Canada (Security Intelligence Review Committee) (1988), 1988 CarswellNat 160, 1988 CarswellNat 160F, 53 D.L.R. (4th) 568, 24 F.T.R. 24, [1989] 2 F.C. 229 (Fed. T.D.) — considered

Henrie v. Canada (Security Intelligence Review Committee) (1992), (sub nom. *Henrie v. Security Intelligence Review Committee)* 55 F.T.R. 96 (note), 88 D.L.R. (4th) 575, 5 Admin. L.R. (2d) 269, 140 N.R. 315, 1992 CarswellNat 194 (Fed. C.A.) — referred to

Jose Pereira E Hijos S.A. v. Canada (Attorney General) (2002), 2002 FCA 470, 2002 CarswellNat 3344, 299 N.R. 154, 235 F.T.R. 158 (note), 2002 CarswellNat 4195, 2002 CAF 470 (Fed. C.A.) — followed

K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs) (1996), 1996 CarswellNat 1750, 1996 CarswellNat 2627, 122 F.T.R. 105, [1997] 1 F.C. 405 (Fed. T.D.) — followed

Phillips v. Nova Scotia (Commissioner, Public Inquiries Act) (1995), 1995 CarswellNS 12, 1995 CarswellNS 83, 39 C.R. (4th) 141, 31 Admin. L.R. (2d) 261, (sub nom. *Phillips v. Richard, J.)* 180 N.R. 1, (sub nom. *Phillips v. Richard, J.)* 141 N.S.R. (2d) 1, (sub nom. *Phillips v. Richard, J.)* 403 A.P.R. 1, (sub nom. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy))* 98 C.C.C. (3d) 20, (sub nom. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy))* 124 D.L.R. (4th) 129, (sub nom. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy))* [1995] 2 S.C.R. 97, (sub nom. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy))* 28 C.R.R. (2d) 1 (S.C.C.) — considered

Ribic v. Canada (Attorney General) (2003), 2003 CarswellNat 4708, 2003 FCA 246, 2003 CAF 246, 320 N.R. 275, (sub

nom. *R. v. Ribic)* 185 C.C.C. (3d) 129, 2003 CarswellNat 5043, [2005] 1 F.C.R. 33 (F.C.A.) — followed

Ruby v. Canada (Solicitor General) (2000), 187 D.L.R. (4th) 675, (sub nom. *Ruby v. Royal Canadian Mounted Police)* 256 N.R. 278, 2000 CarswellNat 3423, [2000] 3 F.C. 589, 6 C.P.R. (4th) 289, 42 Admin. L.R. (3d) 214, 2000 CarswellNat 1106, (sub nom. *Ruby v. Royal Canadian Mounted Police)* 184 F.T.R. 159 (note) (Fed. C.A.) — considered

Ruby v. Canada (Solicitor General) (2002), 2002 SCC 75, 2002 CarswellNat 3225, 2002 CarswellNat 3226, 99 C.R.R. (2d) 324, 219 D.L.R. (4th) 385, 295 N.R. 353, 7 C.R. (6th) 88, 22 C.P.R. (4th) 289, 49 Admin. L.R. (3d) 1, [2002] 4 S.C.R. 3 (S.C.C.) — considered

Secretary for the Home Department v. Rehman (2001), [2002] 1 All E.R. 122, [2001] 3 W.L.R. 877 (U.K. H.L.) — considered

Suresh v. Canada (Minister of Citizenship & Immigration) (2002), 2002 SCC 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3, 2002 CarswellNat 7, 2002 CarswellNat 8, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1 (S.C.C.) — considered

Toronto Star Newspapers Ltd. v. Canada (2007), 278 D.L.R. (4th) 99, 2007 FC 128, 2007 CarswellNat 248, 151 C.R.R. (2d) 74, 2007 CF 128, 2007 CarswellNat 1499 (F.C.) — considered

United States v. Reynolds (1953), 345 U.S. 1 (U.S. S.C.) — referred to

Statutes considered:

Access to Information Act, R.S.C. 1985, c. A-1
Generally — referred to

s. 15 — referred to

s. 15(2) "activités hostiles ou subversives" — referred to

s. 15(2) "subversive or hostile activities" — referred to

Canada Evidence Act, R.S.C. 1985, c. C-5
Generally — referred to

s. 38 — considered

s. 38 "potentially injurious information" — considered

s. 38 "renseignements potentiellement préjudiciables" — considered

s. 38.01 [en. 2001, c. 41, s. 43] — referred to

s. 38.01(1) [en. 2001, c. 41, s. 43] — referred to

s. 38.01(6)(d) [en. 2001, c. 41, s. 43] — referred to

s. 38.01(8) [en. 2001, c. 41, s. 43] — referred to

s. 38.02 [en. 2001, c. 41, s. 43] — referred to

s. 38.02(1.1) [en. 2001, c. 41, s. 43] — referred to

s. 38.04 [en. 2001, c. 41, s. 43] — pursuant to

s. 38.04(1) [en. 2001, c. 41, s. 43] — referred to

s. 38.04(4) [en. 2001, c. 41, s. 43] — referred to

s. 38.04(5) [en. 2001, c. 41, s. 43] — referred to

s. 38.06 [en. 2001, c. 41, s. 43] — considered

s. 38.06(2) [en. 2001, c. 41, s. 43] — referred to

s. 38.11 [en. 2001, c. 41, s. 43] — referred to

s. 38.11(1) [en. 2001, c. 41, s. 43] — referred to

s. 38.11(2) [en. 2001, c. 41, s. 43] — referred to

s. 38.12(2) [en. 2001, c. 41, s. 43] — referred to

s. 39 — referred to

s. 39(2)(a) — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23
s. 2 "menaces envers la sécurité du Canada" — referred to

s. 2 "threats to the security of Canada" — considered

Inquiries Act, R.S.C. 1985, c. I-11
Pt. I — referred to

Privacy Act, R.S.C. 1985, c. P-21
Generally — referred to

Treaties considered:

International Covenant on Civil and Political Rights, 1966, C.T.S. 1976/47; 999 U.N.T.S. 171; 6 I.L.M. 368
Article 19 — considered

Words and phrases considered

national defence

. . . given the purpose of section 38 [of the *Canada Evidence Act*, R.S.C. 1985, c. C-5], namely to prevent the release of information that could be injurious, the [*Black's Law Dictionary*, 7th ed]'s broad definition of what constitutes national defence is appropriate.

national security

From . . . definitions [set out in Cohen, S., *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril* (Markham: LexisNexis Canada, 2005) at pages 161-164, and in 2006 paper by Forcese, C.F., "Through a Glass Darkly: The Role and Review of "National Security" Concepts in Canadian Law" (43 Alta. L. Rev. 963)] "national security" means at minimum the

preservation of the Canadian way of life, including the safeguarding of the security of persons, institutions and freedoms in Canada.

APPLICATION by Attorney General of Canada pursuant to s. 38.04 of *Canada Evidence Act* for order prohibiting disclosure of certain redacted portions of public report on basis that disclosure of information would be injurious to international relations, national defence or national security.

S. Noël J.:

1 This is an application by the Attorney General of Canada pursuant to section 38.04 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (CEA) for an order by the Federal Court prohibiting the disclosure of certain redacted portions of the public report, issued by the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("Commission" or "Inquiry"), on the basis that disclosure of this information would be injurious to international relations, national defence or national security. This is the public judgment. A twin *ex parte (in camera)* judgment has also been issued today. In the *ex parte (in camera)* judgment, I have applied the principles which are explained in this judgment to the particular factual situation of the file.

1. Background and Facts

(A) Establishing the Inquiry

2 Maher Arar is a Canadian citizen, who was never charged with any criminal offence in Canada, the United States, or Syria. On September 26, 2002, while transiting through John F. Kennedy International Airport in New York, Mr. Arar was arrested and detained by American officials for 12 days. He was then removed against his will to Syria, the country of his birth. Mr. Arar was imprisoned in Syria for nearly one year, where he was interrogated, tortured, and held in degrading and inhuman conditions. On October 5, 2003, Mr. Arar returned to Canada. These events attracted a great deal of media attention, including concerns about the role Canadian officials may have played in Mr. Arar's detention in the United States, his removal to Syria, and his imprisonment and treatment while in Syria.

3 On February 5, 2004, the Governor-in-Council adopted Order-in-Council 2004-48 (Terms of Reference) on recommendation of the Deputy Prime Minister and the Minister of Public Safety and Emergency Preparedness. The Terms of Reference established a public Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, under Part I of the *Inquiries Act*, R.S.C. 1985, c. I-11. The Honourable Dennis O'Connor, Associate Chief Justice of Ontario, was appointed Commissioner and was given a dual mandate: (a) to investigate and report on the actions of Canadian officials in relation to the deportation and detention of Maher Arar (Factual Inquiry); and (b) to recommend an independent review mechanism for the RCMP's national security activities (Policy Review). By subsequent Order-in-Council dated February 12, 2004, the Inquiry was added to the schedule of the CEA which lists entities who can receive information injurious to international relations, national defence, or national security without having to provide notice to the Attorney General under section 38.01 of the CEA.

4 It is important to note that this application relates only to the public report outlining the Commissioner's findings in the Factual Inquiry.

(B) Mandate of the Commissioner

5 In the words of Justice Cory, writing for the majority of the Supreme Court in *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 (S.C.C.) at paragraph 62, the purpose and the significance of a commission of inquiry is the following:

> One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions

of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.

6 The Commission's Terms of Reference in respect to the Factual Inquiry required the Commissioner to:

(a) to investigate and report on the actions of Canadian officials in relation to Maher Arar, including with regard to

(i) the detention of Mr. Arar in the United States,

(ii) the deportation of Mr. Arar to Syria via Jordan,

(iii) the imprisonment and treatment of Mr. Arar in Syria,

(iv) the return of Mr. Arar to Canada, and

(v) any other circumstances directly related to Mr. Arar that the Commissioner considers relevant to fulfilling this mandate.

7 In order to allow the Commissioner to successfully complete his mandate, the Terms of Reference gave him broad powers over the rules of procedure which would govern the Inquiry. Among the most important parameters for the Commission were the following:

[...]

(e) the Commissioner be authorized to adopt any procedures and methods that he may consider expedient for the proper conduct of the inquiry, and to sit at any times and in any places in Canada that he may decide;

(f) the Commissioner be authorized to grant to any person who satisfies him that he or she has a substantial and direct interest in the subject-matter of the factual inquiry an opportunity during that inquiry to give evidence and to examine or cross-examine witnesses personally or by counsel on evidence relevant to the person's interest;

[...]

(k) the Commissioner be directed, in conducting the inquiry, to take all steps necessary to prevent disclosure of information that, if it were disclosed to the public, would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security and, where applicable, to conduct the proceedings in accordance with the following procedures, namely,

(i) on the request of the Attorney General of Canada, the Commissioner shall receive information *in camera* and in the absence of any party and their counsel if, in the opinion of the Commissioner, the disclosure of that information would be injurious to international relations, national defence or national security,

(ii) in order to maximize disclosure to the public of relevant information, the Commissioner may release a part or a summary of the information received *in camera* and shall provide the Attorney General of Canada with an opportunity to comment prior to its release, and

(iii) if the Commissioner is of the opinion that the release of a part or a summary of the information received *in camera* would provide insufficient disclosure to the public, he may advise the Attorney General of Canada, which

advice shall constitute notice under section 38.01 of the Canada Evidence Act;

(l) the Commissioner be directed, with respect to the preparation of any report intended for release to the public, to take all steps necessary to prevent the disclosure of information that, if it were disclosed to the public, would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security;

8 The Terms of Reference ensured that the Commissioner would have access to all information he deemed necessary to fully investigate the events surrounding the Maher Arar affair, while guaranteeing that information injurious to international relations, national defence or national security would not be disclosed without prior authorization from the Government. In particular, section (k) of the Terms of Reference establishes how the Commission is to handle information that is subject to national security confidentiality.

9 In a July 19, 2004 ruling on confidentiality, the Commissioner determined that he would apply the same test that a reviewing judge would apply under subsection 38.06(2) of the CEA when making determinations as to whether information for which national security confidentiality is claimed should be disclosed under section (k) of the Terms of Reference. At page 16 of the ruling the Commissioner wrote (Ruling is available online at *www.ararcommission.ca*):

I am of the view that the process set out in the Terms of Reference [section (k)] contemplates that I should, at this stage, apply the same test that a reviewing judge would apply under s. 38.06(2) of the Canada Evidence Act.

The Government did not apply for a judicial review of the Commissioner's July 19, 2004 ruling.

(C) Protection of Sensitive Information

10 The Commissioner developed and published Rules of Procedure and Practice (Rules), as per his power under section (e) of the Terms of Reference. The Rules addressed in detail the process for receiving evidence subject to national security confidentiality claims. According to the Rules, the Commissioner was to convene an *in camera* hearing to hear all evidence over which the Government asserted a national security confidentiality claim. After hearing all evidence *in camera*, the Commissioner would periodically rule as to the validity of the national security confidentiality claim asserted. As stated above, such determinations were made by applying the same test that a reviewing judge would under subsection 38.06(2) of the CEA.

11 The Rules also provided that the Commissioner could appoint an independent legal counsel to act as *amicus curiae* during the *in camera* hearings so as to test, in an adversarial manner, the Government's national security confidentiality claims. The Commissioner appointed the Honourable Ron Atkey to be the *amicus curiae* given his expertise in national security matters and due to the fact that he served as a federal Minister of Employment and Immigration and as Chair of the Security Intelligence Review Committee (SIRC). Mr. Atkey was assisted by Mr. Gordon Cameron, who also has an expertise in national security matters having served for more than ten years as outside counsel for SIRC. It must also be noted that Mr. Atkey was one of the Commissioner's counsel in the present application.

12 After presiding over hearings where government witnesses testified as to the validity of the national security claims, the Commission also heard evidence from Mr. Reid Morden, a former Director of CSIS and a former Deputy Minister of the Department of Foreign Affairs, who has experience dealing with issues of national security confidentiality. Mr. Morden was retained as an expert advisor and witness to assist the Commissioner with disclosure decisions. In carrying out his duties, Mr. Morden reviewed the information over which the Government claimed national security confidentiality and the reasons why such confidentiality was claimed, and then testified as to the potential injurious consequences (if any) the disclosure of this information could have.

13 After the Commissioner's main evidentiary hearing concluded, Government counsel engaged in a series of discussions with the Commissioner in regards to the information that the Commissioner might wish to include in the Factual Inquiry report. These discussions resolved the vast majority of the disputes as to what information could not be disclosed for reasons of national security confidentiality. Nonetheless, after these discussions there remained certain passages which the Government maintained were not to be disclosed due to national security confidentiality but that the Commissioner insisted must be disclosed to the

public. These passages were reviewed by senior government officials, including several Deputy Ministers, which resulted in the Government authorizing the disclosure of certain passages, notwithstanding the potential injury of such disclosure. The Ministers were then briefed on the remaining protected passages, and the Ministers decided not to authorize their disclosure, regardless of the fact that the Commissioner was of the opinion that their disclosure was in the public interest and was necessary to fairly recite the facts surrounding the Arar affair. As it stands approximately 99.5% of the public report has been disclosed to the public, and only the release of about 1500 words is contested.

14 In the public report, the passages the Government claims should be protected are designated by [***], regardless of whether the designation replaces one word, one sentence or one paragraph. The decision to use this designation was made by the Government, but controversy has arisen as in the past the Government has chosen to black out text containing sensitive information, including during the Inquiry when the Government chose to black out sensitive information contained in their public exhibits.

15 It is also important to note that the Commissioner declared himself satisfied with the content of the public report. He stated in different passages throughout the public report that he was satisfied with the results of the Factual Inquiry, notwithstanding the expurgated 1500 words. He stated that the report permits a good understanding of what happened to Mr. Arar. At pages 10 of the Analysis and Recommendations volume of the public report, the Commissioner wrote:

> The Factual Inquiry process was thorough and comprehensive, and I am satisfied that I have been able to examine all the Canadian information relevant to the mandate ... The process was complex because of the need to keep some of the relevant information confidential, to protect national security and international relations interests... However, I am pleased to say that I am able to make public all of my conclusions and recommendations, including those based on *in camera* evidence.

At pages 11-12 of the Factual Background — Volume I, the Commissioner makes the following unequivocal statement:

> A good deal of evidence in the Inquiry was heard in closed, or *in camera*, hearings, but a significant amount of this *in camera* evidence can be discussed publicly without compromising national security confidentiality. For that reason, this Report contains a more extensive summary of the evidence than might have been the case in a public inquiry in which all of the hearings were open to the public and all transcripts of evidence are readily available. <u>While some evidence has been left out to protect national security and international relations interests, the Commissioner is satisfied that this edited account does not omit any essential details and provides a sound basis for understanding what happened to Mr. Arar, as far as can be known from official Canadian sources.</u>
>
> Finally, it should be noted that there are portions of this public version that have been redacted on the basis of an assertion of national security confidentiality by the Government that the Commissioner does not accept. This dispute will be finally resolved after the release of this public version. Some or all of this redacted information may be publicly disclosed in the future after the final resolution of the dispute between the Government and the Commission.
>
> [Emphasis added]

Furthermore, at page 304 of the Analysis and Recommendations volume, the Commissioner wrote:

> The Inquiry is now complete and I am comfortable that, in the end, I was able to get to the bottom of the issues raised by the mandate, as I had access to all the relevant material, regardless of any NSC claims. In this report, I have disclosed additional information that was not available for the public hearings.

(D) Commissioner's Notice to Disclose

16 The Commission prepared two different reports at the conclusion of the Factual Inquiry: an *in camera* report, which includes sensitive information which may be injurious to international relations, national defence or national security; and a public report, which was released on September 18, 2006. As discussed above, the Government took issue with some of the information contained within the public report, and as a result chose to redact certain portions of it on the basis that the release of these portions of the report would cause injury to Canada's international relations, national defence, or national security.

17 On September 18, 2006 the Commissioner sent the public report, detailing the findings of the Factual Inquiry, to the Privy Council. With the report, the Commissioner included a letter to the clerk of the Privy Council stating that the information redacted from the report is information that can be disclosed to the public and is necessary to fairly recite the facts surrounding the Arar affair. In response the Government filed the present application, pursuant to section 38.04 of the CEA, asking the Court to prohibit the disclosure of the redacted portions of the public report on the basis that they contain information that if disclosed would be injurious to international relations, national defence or national security.

18 On September 26, 2006, the Senior Assistant Deputy Minister of Justice informed the Commissioner that the Attorney General had received notice, pursuant to subsection 38.02(1.1) of the CEA, that sensitive or potentially injurious information may be disclosed in connection with the Inquiry and "accordingly, the Commissioner, having provided notice on September 18, 2006, is free to disclose the information after 10 days has elapsed" (Application Record of the Attorney General, Affidavit of Simon Fothergill, Exhibit C, page 30).

19 The same day, the Deputy Attorney General wrote to the Commissioner informing him that the Government was bringing an application to the Federal Court, pursuant to section 38.04 of the CEA, for an order prohibiting the Commission from disclosing the redacted information.

2. Procedural Overview

20 On December 6, 2006, the Attorney General filed the present application with the Federal Court, pursuant to section 38.04 of the CEA, seeking to prohibit the disclosure of the redacted portions of the Commissioner's public report.

21 In accordance with section 38.11 of the CEA the entire application record was initially private. On December 20, 2006 Chief Justice Lutfy, with the consent of the Attorney General, made an order allowing some documents in the case to be made public. It is to be noted that unlike most other cases dealing with issues under section 38 of the CEA one of the respondents (the Commission) has had access to the entire record and has participated in all *in camera* proceedings, as the Commission's counsel had access to all the information at issue during the Inquiry. Thus, only the respondent Maher Arar was denied access to the "private" materials and was excluded from the *in camera* hearing.

22 On February 5, 2007, Chief Justice Lutfy rendered his decision in *Toronto Star Newspapers Ltd. v. Canada*, 2007 FC 128 (F.C.) [*Toronto Star*]. In his decision the Chief Justice looked to the Supreme Court's decision in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3 (S.C.C.), where provisions similar to section 38.11 of the CEA contained in the *Privacy Act*, R.S.C. 1985, c. P-21 were found to be constitutionally overbroad. In his decision, the Chief Justice concluded that the provisions requiring section 38 of the CEA applications be heard in private violated subsection 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*], and could not be saved by section 1 of the *Charter*. More specifically, Chief Justice Lutfy found that the combined effect of subsections 38.04(4), 38.11(1) and 38.12(2) of the CEA violated the open court principle which is enshrined under subsection 2(b) of the *Charter*, and that this violation could not be saved by section 1 (*Toronto Star*, at paragraphs 39, 70-72). The Chief Justice determined that the appropriate remedy to this *Charter* violation would be to read down the impugned sections of the CEA so that these sections apply only to the *ex parte* submissions provided for in subsection 38.11(2) of the CEA (*Toronto Star*, at paragraph 83). Given this decision, the content of this application's "private" file was reviewed and documents which could be classified as "public" became part of the public file, while sensitive information and documents remained part of an *ex parte* (*in camera*) file.

23 On April 30, 2007, the Court heard a full day of public submissions in this matter. Subsequently, numerous days of *ex parte* (*in camera*) (excluding the Respondent Maher Arar and his counsel) submissions were held.

24 Following a request from the Court to review the *ex parte* (*in camera*) affidavits filed in the case given the decision and the approach taken by Chief Justice Lutfy in *Toronto Star*, on May 10, 2007 counsel for the Attorney General wrote to inform the Court that the Attorney General and the Commission had consented to the disclosure of five *ex parte* (*in camera*) affidavits, if portions of these remained redacted. Consequently, on May 14, 2007 the Court publicly released redacted versions of some of the *ex parte* (*in camera*) affidavits, namely those of Mr. Reid Morden, Chief Superintendant Richard Evans, Mr. Geoffrey O'Brian, X (an anonymous RCMP official), and Mr. Daniel Livermore. These affidavits became part of the public file. The contents of these affidavits are discussed in the analysis section of this judgment.

25 In response to the release of these affidavits, the Court scheduled a public hearing on the morning of May 23, 2007 to allow the Respondent, Maher Arar, to make submissions on the released affidavits. Following this hearing, the *ex parte* (*in camera*) hearing was resumed. The *ex parte* (*in camera*) hearing concluded this same day.

26 I also note that I asked counsel for both parties to address whether the Commission's *in camera* report, which was submitted to the Privy Council, should be made available to the Court. The parties agreed to this request and the Commission's *in camera* report was made available to the Court.

27 As stated earlier, I have chosen to write both a public and an *ex parte* (*in camera*) decision in this matter. The public decision will deal with the general principles at issue in this application whereas the *ex parte* (*in camera*) decision will apply the principles elaborated in the public decision to the specific information at issue in this application.

3. Legislative Framework (The Judicial Test to be Met)

28 For the sake of completeness and for reference purposes I have reproduced below the sections of the CEA which are most relevant to the present application.

38.01 (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

[...]

38.02 (1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding

(a) information about which notice is given under any of subsections 38.01(1) to (4);

(b) the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under subsection 38.01(5);

(c) the fact that an application is made to the Federal Court under section 38.04 or that an appeal or review of an order made under any of subsections 38.06(1) to (3) in connection with the application is instituted; or

(d) the fact that an agreement is entered into under section 38.031 or subsection 38.04(6).

(1.1.) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given.

(2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if

(a) the Attorney General of Canada authorizes the disclosure in writing under section 38.03 or by agreement under section 38.031 or subsection 38.04(6); or

38.01 (1) Tout participant qui, dans le cadre d'une instance, est tenu de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements dont il croit qu'il s'agit de renseignements sensibles ou de renseignements potentiellement préjudiciables est tenu d'aviser par écrit, dès que possible, le procureur général du Canada de la possibilité de divulgation et de préciser dans l'avis la nature, la date et le lieu de l'instance.

[...]

38.02 (1) Sous réserve du paragraphe 38.01(6), nul ne peut divulguer, dans le cadre d'une instance:

a) les renseignements qui font l'objet d'un avis donné au titre de l'un des paragraphes 38.01(1) à (4);

b) le fait qu'un avis est donné au procureur général du Canada au titre de l'un des paragraphes 38.01(1) à (4), ou à ce dernier et au ministre de la Défense nationale au titre du paragraphe 38.01(5);

c) le fait qu'une demande a été présentée à la Cour fédérale au titre de l'article 38.04, qu'il a été interjeté appel d'une ordonnance rendue au titre de l'un des paragraphes 38.06(1) à (3) relativement à une telle demande ou qu'une telle ordonnance a été renvoyée pour examen;

d) le fait qu'un accord a été conclu au titre de l'article 38.031 ou du paragraphe 38.04(6).

(1.1) Dans le cas où une entité mentionnée à l'annexe rend, dans le cadre d'une application qui y est mentionnée en regard de celle-ci, une décision ou une ordonnance qui entraînerait la divulgation de renseignements sensibles ou de renseignements potentiellement préjudiciables, elle ne peut les divulguer ou les faire divulguer avant que le procureur général du Canada ait été avisé de ce fait et qu'il se soit écoulé un délai de dix jours postérieur à l'avis.

(2) La divulgation des renseignements ou des faits visés au paragraphe (1) n'est pas interdite:

(a) si le procureur général du Canada l'autorise par écrit au titre de l'article 38.03 ou par un accord conclu en application de l'article 38.031 ou du paragraphe 38.04(6);

(b) a judge authorizes the disclosure under subsection 38.06(1) or (2) or a court hearing an appeal from, or a review of, the order of the judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further appeal is available.

38.04 **(1)** The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under any of subsections 38.01(1) to (4).

[...]

(4) An application under this section is confidential. Subject to section 38.12, the Chief Administrator of the Courts Administration Service may take any measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

(5) As soon as the Federal Court is seized of an application under this section, the judge

(a) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;

(b) shall decide whether it is necessary to hold any hearing of the matter;

(c) if he or she decides that a hearing should be held, shall

(i) determine who should be given notice of the hearing,

(ii) order the Attorney General of Canada to notify those persons, and

(iii) determine the content and form of the notice; and

(d) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations.

38.06 (1) Unless the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information.

(2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

(b) si le juge l'autorise au titre de l'un des paragraphes 38.06(1) ou (2) et que le délai prévu ou accordé pour en appeler a expiré ou, en cas d'appel ou de renvoi pour examen, sa décision est confirmée et les recours en appel sont épuisés.

38.04 (1) Le procureur général du Canada peut, à tout moment et en toutes circonstances, demander à la Cour fédérale de rendre une ordonnance portant sur la divulgation de renseignements à l'égard desquels il a reçu un avis au titre de l'un des paragraphes 38.01(1) à (4).

[...]

(4) Toute demande présentée en application du présent article est confidentielle. Sous réserve de l'article 38.12, l'administrateur en chef du Service administratif des tribunaux peut prendre les mesures qu'il estime indiquées en vue d'assurer la confidentialité de la demande et des renseignements sur lesquels elle porte.

(5) Dès que la Cour fédérale est saisie d'une demande présentée au titre du présent article, le juge:

a) entend les observations du procureur général du Canada — et du ministre de la Défense nationale dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale* — sur l'identité des parties ou des témoins dont les intérêts sont touchés par l'interdiction de divulgation ou les conditions dont l'autorisation de divulgation est assortie et sur les personnes qui devraient être avisées de la tenue d'une audience;

b) décide s'il est nécessaire de tenir une audience;

c) s'il estime qu'une audience est nécessaire:

(i) spécifie les personnes qui devraient en être avisées,

(ii) ordonne au procureur général du Canada de les aviser,

(iii) détermine le contenu et les modalités de l'avis;

d) s'il l'estime indiqué en l'espèce, peut donner à quiconque la possibilité de présenter des observations.

38.06 (1) Le juge peut rendre une ordonnance autorisant la divulgation des renseignements, sauf s'il conclut qu'elle porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales.

(2) Si le juge conclut que la divulgation des renseignements porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice porté aux relations internationales ou à la défense ou à la sécurité nationales, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés.

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the prohibition of disclosure.
(3.1) The judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence.
(4) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (2) but who may not be able to do so in a proceeding by reason of the rules of admissibility that apply in the proceeding may request from a judge an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that judge, as long as that form and those conditions comply with the order made under subsection (2).

(5) For the purpose of subsection (4), the judge shall consider all the factors that would be relevant for a determination of admissibility in the proceeding.

(3) Dans le cas où le juge n'autorise pas la divulgation au titre des paragraphes (1) ou (2), il rend une ordonnance confirmant l'interdiction de divulgation.
(3.1) Le juge peut recevoir et admettre en preuve tout élément qu'il estime digne de foi et approprié — même si le droit canadien ne prévoit pas par ailleurs son admissibilité — et peut fonder sa décision sur cet élément.
(4) La personne qui veut faire admettre en preuve ce qui a fait l'objet d'une autorisation de divulgation prévue au paragraphe (2), mais qui ne pourra peut-être pas le faire à cause des règles d'admissibilité applicables à l'instance, peut demander à un juge de rendre une ordonnance autorisant la production en preuve des renseignements, du résumé ou de l'aveu dans la forme ou aux conditions que celui-ci détermine, dans la mesure où telle forme ou telles conditions sont conformes à l'ordonnance rendue au titre du paragraphe (2).
(5) Pour l'application du paragraphe (4), le juge prend en compte tous les facteurs qui seraient pertinents pour statuer sur l'admissibilité en preuve au cours de l'instance.

4. Issues

(A) *The Deference Issue*

(B) *Some of the Principles and Concepts at Play*

5. Analysis

(A) The Deference Issue

29 Both Respondents submit that the Court should accord deference to the Commissioner's rulings as to what information can be disclosed. The Commission, in its submissions, uses the pragmatic and functional approach to conclude that the Commissioner's findings as to whether certain information can be disclosed, notwithstanding the Government's national security confidentiality claim, should be reviewed on the reasonableness standard.

30 The Attorney General, for his part, did not directly address the question of deference to the Commissioner in his submissions. However, counsel for the Attorney General did speak to this issue at the public hearing. The Attorney General, in oral submissions, argued that the Commissioner's rulings as to whether the information at issue can be disclosed should be afforded no deference given the wording of the Terms of Reference, the role, the structure of the Commission, and the wording of section 38 of the CEA.

31 I agree with the Attorney General. The position of the Respondents is unpersuasive on this point. The CEA is clear: where the Federal Court is seized with an application to determine whether information can be disclosed under section 38.04, the Court after applying the criteria set out at section 38.06 makes a determination as to the whether the information in question should be disclosed. This wording indicates that the Court's role under sections 38.04 and 38.06 of the CEA is to rule on whether particular information can be disclosed. This judicial obligation cannot be delegated. Thus, to accord deference to the Commissioner's findings, as per the Respondents' submissions, would result in the Court abdicating its role and judicial obligations under the CEA.

32 This being said, the jurisprudence is also clear that the Court's role under section 38 of the CEA is not to judicially review a decision to disclose information. As the Federal Court of Appeal wrote in *Ribic v. Canada (Attorney General)*, 2003 FCA 246 (F.C.A.) [*Ribic*]:

> It is important to remind ourselves that proceedings initiated pursuant to section 38.04 of the Act for an order regarding disclosure of information are not judicial review proceedings. They are not proceedings aimed at reviewing a decision of the Attorney General not to disclose sensitive information. The prohibition to disclose sensitive information is a statutory one enacted by paragraph 38.02(1)(a) [as enacted by S.C. 2001, c.41, s.43] of the Act ...
>
> [Emphasis added]

This was also recently affirmed by Justice Mosley in *Canada (Attorney General) v. Khawaja*, 2007 FC 490 (F.C.) at paragraph 61 [*Khawaja*].

33 Having said this, the Court is fully aware that the Commission has considered the matters referred to in the Terms of Reference in detail. Moreover, this Court also recognizes that the point of view expressed by the Commissioner in his rulings, and his subsequent reports, are valuable to the decision that has to be made in the present application.

34 As a general rule, a commission acts independently of the Government when conducting its inquiry and when it subsequently reports its conclusions and recommendations. However, as per paragraph 39(2)(a) of the CEA, a commission's report once filed with the Governor-in-Council becomes a confidence of the Privy Council. Thus, it is the executive who possesses complete power over whether to make a commission's final report public. Nonetheless, it goes without saying that if the executive chooses not to release a commission's report it would certainly have to account to the Canadian public.

35 In the situation at hand, the executive, on the advice of the Ministers consulted, chose to redact approximately 1500 words from the public report that the Commissioner submitted to the Privy Council. The executive then took steps, under section 38 of the CEA, to obtain an order from this Court prohibiting the disclosure of the redacted passages.

36 This is the situation that the present application creates. I feel that it is important to reiterate that the Court, contrary to other section 38 applications, had the benefit of assessing the *ex parte* (*in camera*) hearings from different view points given that both the Commission and the Attorney General made submission at these hearings. The fact that I heard from both the Applicant and one of the Respondents can be useful in making a decision. Having said that, this Court will now fully assume all of its judicial obligations as prescribed by the CEA.

(B) Some of the Principles and Concepts at Play

(I) The Ribic Three-Part Test

37 The parties agree that the Court must apply the section 38.06 of the CEA scheme to determine whether disclosure of the information at issue in the present application should be prohibited. The section 38.06 scheme demands that the Court apply a three-step test, which was clarified by the Federal Court of Appeal in *Ribic*, at paragraphs 17-21. The first step of the scheme demands that the party seeking disclosure establish that the information, for which disclosure is sought, is relevant. The second step demands that the Attorney General establish that disclosure of the information at issue would be injurious to international relations, national defence, or national security. If injury is found to exist, the last step asks the Court to determine whether the public interest in disclosure outweighs the public interest in non-disclosure, and thus whether the information at issue should be disclosed.

38 I feel it is important to emphasize that the Federal Court of Appeal's decision *Ribic* is in no way put in doubt by this decision. All parties are in agreement that the framework established in *Ribic* must be applied to determine whether the information at issue in this application can be disclosed. This being said, the facts giving rise to *Ribic* are very different from the facts in the present application. In the case at hand, we are dealing with a commission of inquiry with a mandate to investigate the actions of Canadian officials in the Arar affair, whereas *Ribic* dealt with how much of the information provided by two witnesses had to be disclosed at a criminal trial. In my view, the interests at stake are different in these two contexts: in the criminal context a person's liberty and security interests are at stake; whereas a commission of inquiry plays a unique and

useful role as it undertakes a fact-finding missions to inform Canadians and provide recommendations to the Government regarding a particular situation of crisis so as to restore public confidence in the process of government.

39 Consequently, I will apply the *Ribic* framework, but will attempt to contextualize it given the particularities giving rise to this application, namely that we are dealing with a public inquiry.

(II) The Relevancy of the Redacted Information

40 The first step of the section 38.06 test demands that the party seeking disclosure establish that the information for which disclosure is sought is "in all likelihood relevant evidence" (*Ribic*, at paragraph 17). The Federal Court of Appeal in *Ribic* specified that the threshold, at this stage, is a low one (*Ribic*, at paragraph 17). The Court went on to say that this first step is a necessary one because if the information is found to be not relevant, the analysis under section 38.06 will come to an end (*Ribic*, at paragraph 17).

41 I reiterate that contrary to *Ribic*, which was a criminal case, the present application involves a commission of inquiry. In what concerns the Arar Commission, the terms of reference provide a detailed procedure on how to deal with protected information. Under the terms of reference, the Commission can receive sensitive information under paragraph 38.01(6)(d) and subsection 38.01(8) of the CEA. Therefore, in the case at hand, the relevancy factor is to be evaluated considering the uniqueness and utility of commissions of inquiry to the government and the public.

42 As previously explained, the Terms of Reference at paragraph (k) and its subparagraphs give the Commissioner a mandate to ensure the non-disclosure of sensitive information and establish a procedure which must be followed when considering whether information can be disclosed, all in accordance with section 38 of the CEA. To that end, the Commissioner may consider releasing a summary of the evidence heard *in camera* and if such a summary is not sufficient, in the Commissioner's opinion, he may inform the Applicant. Such an opinion constitutes notice under section 38.01 of the CEA. This was the route whereby the Applicant filed the present application with the Court.

43 The Attorney General submits that the contents of the redacted portions of the public report are not relevant to the terms of reference of the Commission and that the Commissioner has never explained the relevancy of this information.

44 For his part, the Commissioner in his *ex parte* (*in camera*) decisions addressed the relevancy factor when discussing the public interest in disclosure. In his decision, the Commissioner commented that some of the information at issue, if disclosed, would help the public understand the Commissioner's recommendations. A reading of the Commissioner's three volumes shows that the Inquiry dealt with a good number of the public interest issues raised by this application, including: issues of human rights when dealing with other countries; Canada's use of information obtained through questionable means such as torture; international sharing practices post 9/11, et al.

45 Having reviewed each of the redacted portions of the Commission's public report, knowing that the threshold to establish relevance is low, and having in mind the words of Justice Cory of the Supreme Court on the importance of commissions of inquiry in *Phillips*, above, particularly the paragraph I reproduced at paragraph 5 of this judgment, I find relevance in the redacted passages. After all, the Commissioner clearly identified the redacted information as being relevant for the purposes of his report. Surely such an opinion carries some weight. I further note that the Commissioner's determinations as to relevance may also be of some significance under the third part of the *Ribic* test, as sometimes the more relevant the redacted information, the greater the public interest in disclosure; and conversely, sometimes the less relevant the redacted information, the less the public interest in disclosure. Of course, "relevance" must be weighed against other factors so that a final determination as to disclosure can be made.

(III) Providing Some Meaning to the Concept of "Injury"

46 The second step under the section 38.06 scheme asks the Court to determine whether disclosure would be injurious to international relations, national defence, or national security. It is normally the executive, after assessing the information, who determines whether disclosure would be injurious. It is trite law in Canada, as well as in numerous other common law jurisdictions, that courts should accord deference to decisions of the executive in what concerns matters of national security, national defence and international relations, as the executive is considered to have greater knowledge and expertise in such

matters than the courts (*Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3 (S.C.C.) at para. 33; *Ribic*, at para. 19; *United States v. Reynolds*, 345 U.S. 1 (U.S. S.C. 1953); *Secretary for the Home Department v. Rehman*, [2001] UKHL 47 (U.K. H.L.) at para. 31). Justice Létourneau of the Federal Corut of Appeal wrote in *Ribic*, at paragraph 18: "It is a given that is it not the role of the judge to second-guess or substitute his opinion for that of the executive". Also of interest, Lord Hoffman, of the House of Lords, wrote the following in a postscript in *Rehman*, above:

> ... in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown ... It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only be entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.

47 This being said, the onus at this stage is on the party seeking the prohibition on disclosure to convince the Court that disclosure would be injurious to international relations, national defence or national security (*Ribic*, at paragraph 21; *Khawaja*, at paragraph 65). The case law establishes that to find that an injury to international relations, national defence or national security would result from disclosure, the reviewing judge must be satisfied that the executive's opinion as to injury has a factual basis, established by evidence (see *Ribic*, at paragraph 18). Moreover, the Federal Court of Appeal in *Ribic*, using the standard of review language states that "if his [the Attorney General's] assessment of injury is reasonable, the judge should accept it" (*Ribic*, at paragraph 19).

48 Given that the Attorney General has the burden to prove that disclosure would be injurious to international relations, national defence or national security, the question becomes: what is an "injury to international relations, national defence, or national security"? I have attempted to provide some meaning to this concept in the paragraphs that follow.

49 The CEA at section 38 offers the following definition of "potentially injurious information":

"potentially injurious information" means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security. [Emphasis added]	« renseignements potentiellement préjudiciables » Les renseignements qui, s'ils sont divulgués, sont susceptibles de porter préjudice aux relations internationales ou à la défense ou à la sécurité nationales. [Je souligne]

Of interest, this definition uses the word "could" whereas section 38.06 of the CEA states that a judge is to determine whether the disclosure of information "would" be injurious to international relations, national defence, or national security. The Federal Court of Appeal in *Jose Pereira E Hijos S.A. v. Canada (Attorney General)*, 2002 FCA 470 (Fed. C.A.) at paragraph 14, spoke to the meaning of the words "would" and "could" in the context of the CEA:

> Counsel for the appellants also contended that even if it could be said that Parts D and E of the Buckley certificate were effectively adopted by the respondent, the certificate is itself defective because nowhere therein is it stated, in compliance with subsection 38(1), that the release of the information "would" be injurious to Canada's international relations. That phraseology suggests that in order to secure the benefit of sections 37 and 38 a party must show a probability that a feared injury will result from disclosure. The record contains nothing showing that the disclosure of information sought by the series of "vote buying" questions "would be injurious to international relations". It is noted that the phraseology employed in Parts D and E to the Buckley certificate is "could" and "could reasonably" rather than "would". The statute would seem to require a showing of probability of injury instead of mere possibility.
>
> [Emphasis added]

I agree with the Federal Court of Appeal. The use of the word "would" by the legislator indicates that the Government under section 38.06 of the CEA must satisfy the reviewing judge that the injury alleged must be probable, and not simply a possibility or merely speculative.

50 This being said, the definition of "potentially injurious information" contained in the CEA is little more than circular. I therefore turn to the ordinary meaning of the term "injury".

51 The Oxford English Dictionary defines "injury" as follows:

> 1. Wrongful action or treatment; violation or infringement of another's rights; suffering or mischief wilfully and unjustly inflicted. With *an* and *pl.*, A wrongful act; a wrong inflicted or suffered.
>
> 2. Intentionally hurtful or offensive speech or words; reviling, insult, calumny; a taunt, an affront. *Obs.* [Cf. F. *injure = parole offensante, outrageuse.*]
>
> 3. a. Hurt or loss caused to or sustained by a person or thing; harm, detriment, damage. With *an* and *pl.* An instance of this.
>
> b. *concr.* A bodily wound or sore. *Obs. rare.*
>
> 4. *attrib.* and *Comb.*, as ***injury-doing***, wrong-doing; ***injury-feigning*** vbl. n. and ppl. a.; **injury time**, the extra time allowed in a game of football or the like to make up for time spent in attending to injuries.

(*The Oxford English Dictionary*, 2nd ed., *s.v.* "injury")

Obviously in the context of section 38 of the CEA definition (3) is most appropriate. This definition indicates, as do the others to an extent, that to be considered an 'injury' there has to be some detriment, damage or loss. For its part, the Black's Law Dictionary defines the term "injury" as follows (*Black's Law Dictionary*, 7th ed., *s.v.* "injury"):

> **1.** The violation of another's legal right, for which the law provides a remedy; a wrong or injustice. See WRONG. **2.** Harm or damage. — injure, *vb.* — injurious, *adj.*

Once again the concept of harm and damage is echoed in this definition.

52 Turning to the definition of "préjudiciable", the word used in the French version of the CEA. Le Petit Robert defines "préjudiciable" as "Qui porte, peut porter préjudice" (*Le Petit Robert*, 1992, *s.v.* « préjudiciable »). The same dicitionary defines the word "préjudice" as:

> **1.** Perte d'un bien, d'un avantage par le fait d'autrui; acte ou événement nuisible aux intérêts de qqn et le plus souvent contraire au droit, à la justice. *Causer un préjudice à qqn. Porter préjudice:* causer du tort. *Subir un préjudice.* V. Dommage. *Préjudice matériel, moral, esthétique, d'agrément, de jouissance.* V. Dam, désavantage, détriment. **2.** Ce qui est nuisible pour, ce qui va contre (qqch.) *Causer un grave préjudice à une cause, à la justice. Au préjudice de l'honneur, de la vérité.* V. Contre, malgré.

(*Le Petit Robert*, 1992, *s.v.* « préjudice »)

For its part, the Dictionnaire de droit Québécois et Canadien defines "préjudiciable" as: "qui cause ou peut causer un préjudice" (*Dictionnaire du droit Québécois et Canadien*, 2e édition, « préjudiciable »), and defines "préjudice" as:

> **1.** Dans un sens général, atteinte portée aux droits ou aux intérêts de quelqu'un. Ex. L'administrateur du bien d'autrui est tenu de réparer le préjudice causé par sa démission si elle est donnée sans motif sérieux. **2.** Dommage corporel, matériel, ou moral subi par une personne par le fait d'un tiers et pour lequel elle peut éventuellement avoir le droit d'obtenir réparation.

(*Dictionnaire du droit Québécois et Canadien*, 2e édition, « préjudice »)

The French definition reverberates the same concept as the English definition, namely that for an 'injury' to exist some harm or damage must occur.

53 To further explain these principles, it is useful to consider Canadian, as well as foreign case law. Although the jurisprudence fails to explicitly define "injury to international relations, national defence or national security", the jurisprudence, particularly out of the United Kingdom, provides some indicia as to what can be considered such an injury.

(a) Information in the Public Domain

54 In *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3 (S.C.C.), the Supreme Court of Canada ruled that information in the public domain could not be protected under section 39 of the CEA, which deals with confidences of the Queen's Privy Council for Canada. At paragraph 26 of *Babcock*, above, Chief Justice McLachlin wrote:

> Where a document has already been disclosed, s. 39 no longer applies. There is no longer a need to seek disclosure since disclosure has already occurred. Whether section 39 does not apply, there may be other bases upon which the government may seek protection against further disclosure at common law [...] However, that issue does not arise on this appeal. Similarly, the issue of inadvertent disclosure does not arise here because the Crown deliberately disclosed certain documents during the course of litigation.

Although *Babcock*, above, deals with section 39 of the CEA, the same principle applies in the section 38 of the CEA context, namely that information in the public domain cannot be protected from disclosure. In *K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)* (1996), [1997] 1 F.C. 405 (Fed. T.D.) at paragraph 35, Justice Rothstein (as he then was) discusses the principle in the section 38 of the CEA context:

> In many cases, the confidential information constitutes observations on existing policies and practices and how they might relate to a legal challenge [...] I am inclined to think that much of what is said to be confidential is already publicly known in one form or another. It appears that if anything, disclosure might result in some embarrassment to the respondent but why that embarrassment would harm international or federal-provincial relations is not readily evident. I think what we largely have in this case is exaggeration of the harm to Canadian interests from disclosure which subsections 37(1) and 38(1) of the *Canada Evidence Act* were enacted to curtail.

55 Case law emanating from the United Kingdom also supports the principle that information in the public domain cannot be protected by the courts. In the House of Lord's decision in *Attorney General v. Guardian Newspaper Ltd. (No. 2)* (1988), [1990] 1 A.C. 109 (U.K. H.L.) [hereinafter "*Observer Ltd.*"], Lord Brightman wrote at page 267:

> The Crown is only entitled to restrain the publication of intelligence information if such publication would be against the public interest, as it normally will be if theretofore undisclosed. But if the matter sought to be published is no longer secret, there is unlikely to be any damage to the public interest by re-printing what all the world has already had the opportunity to read.
>
> [Emphasis added]

However, even more interesting is Justice Scott's decision in the case at the Chancellery Division level, a decision which was subsequently upheld by both the Court of Appeal and the House of Lords. Justice Scott, his judgement, reproduced at page 150 of *Attorney General v. Guardian Newspaper Ltd. (No. 2)* (1988), [1990] 1 A.C. 109 (U.K. H.L.), sets out five criteria that should be looked to when determining whether the public accessibility of information is fatal to an attempt to prohibit disclosure. These criteria are the following:

> (1) The nature of the information — where the information is very harmful a court will be more willing to prohibit further disclosure;
>
> (2) The nature of the interest sought to be protected;
>
> (3) The relationship between the plaintiff (person seeking prohibition on disclosure) and the defendant;
>
> (4) The manner in which the defendant has come into possession of the information — if the defendant does not have "clean hands" a court will be more likely to prohibit the disclosure;
>
> (5) The circumstances in which, and the extent to which, the information has been made public.

56 I note that the rule that information available in the public domain cannot be protected from disclosure is not an absolute. There are many circumstances which would justify protecting information available in the public domain, for instance: where only a limited part of the information was disclosed to the public; the information is not widely known or accessible; the authenticity of the information is neither confirmed nor denied; and where the information was inadvertently disclosed.

57 In Canada, the Supreme Court has left the door open to the possibility that courts can prohibit the disclosure of information that has entered the public domain through inadvertent disclosure (see *Babcock*, above at paragraph 54 [reproduced at paragraph 54 of this judgment]. In *Khawaja*, Justice Mosley also addressed the effects of an inadvertent disclosure. At paragraph 111 of his decision, he wrote:

> ... inadvertent waiver is not enough to justify disclosure. In light of the case-by-case nature of the test, the most appropriate approach is to proceed by way of the same three step assessment; taking into account the fact that inadvertent disclosure of the information has occurred. Inadvertent disclosure may for example make it more difficult for the government to demonstrate injury under the second stage of the assessment. Inadvertent disclosure can also be considered at the balancing stage of the test, as it might weigh in favour of the Court considering the release of the information subject to conditions designed to limit any remaining concerns regarding injury.

In my view, the circumstances of the "inadvertent disclosure" are of essence when determining whether inadvertently disclosed information can be protected by the Court. As stated by Justice Mosley, such a determination must be made keeping in mind the three-part test established under section 38.06 of the CEA.

(b) Information Critical of the Government or which would bring Embarrassment to the Government

58 As can be seen from the passage I have reproduced from *K.F. Evans Ltd.*, above (at paragraph of this judgment), the Court will not prohibit disclosure where the Government's sole or primordial purpose for seeking the prohibition is to shield itself from criticism or embarrassment. This principle has also been confirmed by the Supreme Court in *Carey v. Ontario*, [1986] 2 S.C.R. 637 (S.C.C.) at paragraphs 84-85, where Justice LaForest, for the Court, wrote:

> [84] 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 interests 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.
>
> [85] 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.
>
> [Emphasis added]

59 Also of interest, Justice Mason of the High Court of Australia stated in his judgment in *Commonwealth v. John Fairfax & Sons Ltd.* (1980), 147 C.L.R. 39 (Australia H.C.) at page 51:

> [...] But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action. Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will

be protected.

This passage was later cited with approval by Bingham L.J. and Lord Keith of Kinkel in their respective judgments in *Observer Ltd*, above.

60 The same principle has also been expressed in the *Johannesburg Principles: National Security, Freedom of Expression and Access to Information*, U.N. Doc. E/CN.4/1996/39 (1996), a tool for interpreting article 19 of the United Nations' International Covenant on Civil and Political Rights, which states 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 a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

Given the abundance of case law and legal documents advancing that information which is critical or embarrassing to the Government cannot be protected, there appears to me to be no reason to depart from the application of this principle.

(IV) Some Meaning to the Concept of "International Relations"

61 I now turn to what is meant by the term 'international relations'. Canadian jurisprudence does not define this term. However, Black's Law Dictionary defines 'international relations' as (*Black's Law Dictionary*, 7th ed., *s.v.* "international relations"):

> **1.** World politics. **2.** Global political interaction primarily among sovereign nations. **3.** The academic discipline devoted to studying world politics, embracing international law, international economics, and the history and art of diplomacy.

Given this definition and the purpose of section 38 of the CEA, 'information injurious to international relations' refers to information that if disclosed would be injurious to Canada's relationship with foreign nations.

(V) Some Meaning to the Concept of "National Defence"

62 As for the term 'national defence', Black's Law Dictionary defines the term as follows (*Black's Law Dictionary*, 7th ed., *s.v.* "national defense"):

> **1.** All measures taken by a nation to protect itself against its enemies • A nation's protection of its collective ideals and values is included in the concept of national defense. **2.** A nation's military establishment.

In my view given the purpose of section 38, namely to prevent the release of information that could be injurious, the Black's Law Dictionary's broad definition of what constitutes national defence is appropriate.

(VI) Some Meaning to the Concept of "National Security"

63 Unlike the terms 'international relations' and 'national defence', whose definition is widely and more easily understood, the meaning of this term is not commonly known, and there has been great debate in the academic world as to what it delineates. The *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, at section 2, offers the following definition of "threats to the security of Canada":

"threats to the security of Canada" means	« menaces envers la sécurité du Canada »—Constituent des menaces envers la sécurité du Canada les activités suivantes:
(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,	a) l'espionnage ou le sabotage visant le Canada ou préjudiciables à ses intérêts, ainsi que les activités tendant à favoriser ce genre d'espionnage ou de sabotage;
(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,	b) les activités influencées par l'étranger qui touchent le Canada ou s'y déroulent et sont préjudiciables à ses intérêts, et qui sont d'une nature clandestine ou trompeuse ou

(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and	comportent des menaces envers quiconque; c) les activités qui touchent le Canada ou s'y déroulent et visent à favoriser l'usage de la violence grave ou de menaces de violence contre des personnes ou des biens dans le but d'atteindre un objectif politique, religieux ou idéologique au Canada ou dans un État étranger;
(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,	d) les activités qui, par des actions cachées et illicites, visent à saper le régime de gouvernement constitutionnellement établi au Canada ou dont le but immédiat ou ultime est sa destruction ou son renversement, par la violence.
but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (*a*) to (*d*).	La présente définition ne vise toutefois pas les activités licites de défense d'une cause, de protestation ou de manifestation d'un désaccord qui n'ont aucun lien avec les activités mentionnées aux alinéas *a*) à *d*).

For its part, the *Access to Information Act*, R.S.C. 1985, c. A-1, at section 15, talks about "the detection, prevention or suppression of subversive or hostile activities". At section 15(2) of the Act, the term "subversive or hostile activities" is defined as:

"Subversive or hostile activities" means:	« activités hostiles ou subversives » a) L'espionnage dirigé contre le Canada ou des États alliés ou associés avec le Canada;
(a) espionage against Canada or any state allied with or associated with Canada;	
(b) sabotage;	b) le sabotage;
(c) activities directed toward the commission of terrorist acts, including hijacking, in or against Canada or foreign states;	c) les activités visant la perpétration d'actes de terrorisme, y compris les détournements de moyens de transport, contre le Canada ou un État étranger ou sur leur territoire;
(d) activities directed toward accomplishing government change within Canada or foreign states by the use of or encouragement of the use of force, violence or any criminal means;	d) les activités visant un changement de gouvernement au Canada ou sur le territoire d'États étrangers par l'emploi de moyens criminels, dont la force ou la violence, ou par l'incitation à l'emploi de ces moyens;
(e) activities directed toward gathering information used for intelligence purposes that relates to Canada or any state allied or associated with Canada; and	e) les activités visant à recueillir des éléments d'information aux fins du renseignement relatif au Canada ou aux États qui sont alliés ou associés avec lui;
(f) activities directed toward threatening the safety of Canadians, employees of the Government of Canada or property of the Government of Canada outside Canada.	(f) les activités destinées à menacer, à l'étranger, la sécurité des citoyens ou des fonctionnaires fédéraux canadiens ou à mettre en danger des biens fédéraux situés à l'étranger.

64 Case law provides some meaning to the term as well. The Supreme Court in *Suresh*, above, commented on the meaning of the term "danger to the security of Canada". At paragraphs 88-90, Justice Arbour (as she then was), writing for the majority of the Court, stated the following:

> 88 [...] These considerations lead us to conclude that to insist on direct proof of a specific threat to Canada as the test for "danger to the security of Canada" is to set the bar too high. There must be a real and serious possibility of adverse effect to Canada. But the threat need not be direct; rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security.
>
> 89 While the phrase "danger to the security of Canada" must be interpreted flexibly, and while courts need not insist on direct proof that the danger targets Canada specifically, the fact remains that to return (*refouler*) a refugee under s. 53(1)(*b*) to torture requires evidence of a serious threat to national security. To suggest that something less than serious threats founded on evidence would suffice to deport a refugee to torture would be to condone unconstitutional application of the *Immigration Act*. Insofar as possible, statutes must be interpreted to conform to the Constitution. This supports the conclusion that while "danger to the security of Canada" must be given a fair, large and liberal interpretation, it nevertheless demands proof of a potentially serious threat.
>
> 90 These considerations lead us to conclude that a person constitutes a "danger to the security of Canada" if he or she

poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious", in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.

[Emphasis added]

65 For its part, the House of Lords under the penmanship of Lord Slynn of Hadley in *Rehman* wrote (*Rehman*, above, at paragraphs 15-16):

[...] "the interests of national security" cannot be used to justify any reason the Secretary of State has for wishing to deport an individual from the United Kingdom. There must be some possibility of risk or danger to the security and well-being of the nation which the Secretary of State considers makes it desirable for the public good that the individual should be deported. But I do not accept that this risk has to be the result of "a direct threat" to the United Kingdom [...] Nor do I accept that the interests of national security are limited to action by an individual which can be said to be "targeted at" the United Kingdom, its system of government or its people [...]

[...] The sophistication of means available, the speed of movement of persons and goods, the speed of modern communication, are all factors which may have to be taken into account in deciding whether there is a real possibility that the national security of the United Kingdom may immediately or subsequently be put at risk [...] To require the matters in question to be capable of resulting "directly" in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected. I accept that there must be a real possibility of an adverse effect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate [...]

[Emphasis added]

66 I now turn to the definitions offered of the term "national security" by some of the legal scholars. Mr. Stanley Cohen, in his book *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril* (Markham: LexisNexis Canada, 2005) at pages 161-164, offers the following definition of national security:

Although a pivotal concept, "national security" and the related, if not equivalent phrase, "danger to the security of Canada", have been regarded as notoriously difficult to define. Nevertheless, despite possessing a degree of imprecision, the concept of "danger to the security of Canada" is not unconstitutionally vague. In *Suresh*, at the level of the Federal Court of Appeal, Robertson J.A. found, in the context of deportation proceedings, that the phrase was constitutionally sufficient. He acknowledged that the phrase was imprecise but reasoned that whether a person poses a danger to the security of Canada may be determined by "the individual's degree of association or complicity with a terrorist organization".

[...]

"National security" also finds expression in the Canadian Evidence Act (CEA) in the context of the Act's definitions of "potentially injurious information" and "sensitive information". In both instances, the concept is linked with information relating to national defence and international security, although, clearly, these matters are not co-extensive.

As Lustgarten and Leigh point out in their fine text, *In From the Cold: National Security and Parliamentary Democracy*, the phrase "national security" is actually a relative newcomer to the lexicon of international affairs and political science. In the U.K., the wealth of statutes and regulations giving extraordinary powers to the Executive and its officials were generically entitled and drew their justifications from the need for Defence of the Realm. "National security", at least in the United States and the United Kingdom, seemingly has drawn its currency from the American practice and experience.

The use of this terminology rather than national "defence" has important implications for foreign policy, signalling "a more grandly ambitious conception of that nation's [America's] role in world affairs." As is evident, the term "national security" also has great currency in Canada, notwithstanding this country's rather more modest claims in the international

arena.

67 For his part, Professor Craig Forcese wrote the following in what concerns the definition of "national security" in his 2006 paper "Through a Glass Darkly: The Role and Review of "National Security" Concepts in Canadian Law" (43 Alta. L. Rev. 963):

> ... Canada's National Defence College defined national security in 1980 as the preservation of a way of life acceptable to the Canadian people and compatible with the needs and legitimate aspirations of others. It includes freedom from military attack or coercion, freedom from internal subversion, and freedom from the erosion of the political, economic, and social values which are essential to the quality of life in Canada.
>
> [...]
>
> A slightly more focused definition of national security has been offered by the U.S. Department of Defense:
>
> > National Security is a collective term encompassing both national defence and international relations of the United States. Specifically, the condition provided by:
> >
> > a) military or defence advantage over any foreign nation or group of nations;
> >
> > b) favourable foreign relations position; or
> >
> > c) defence posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.
>
> [...]
>
> Still another definition, one that boils a broad definition of national security is as follows:
>
> > Central to [a] kind of national security policy ... [based on the preservation of a way of life acceptable to the Canadian people and the security of people, national institutions, and freedoms from unlawful harm, armed attacks and other violence] and three principal frameworks: deterrence against attacks; defence against those attacks that you can identify; and then a credible ability to defeat attacks on our national security.

68 From these definitions "national security" means at minimum the preservation of the Canadian way of life, including the safeguarding of the security of persons, institutions and freedoms in Canada.

69 This being said, to properly understand the national security claims at issue in this application some of the grounds on which such claims can succeed must be made known. As a brief overview, the Attorney General submits the following types of information should not be disclosed:

(a) Information collected and within the possession of intelligence agencies and law enforcement agencies (to a certain extent);

(b) Information obtained from foreign intelligence agencies or law enforcement agencies (Third Party Rule);

(c) Information relating to targets of investigations or persons of interest;

(d) The name of sources, modes of operations, and situation assessments made intelligence and law enforcement agencies;

(e) Information that if pieced into the general picture may permit a comprehensive understanding of the information being protected (Mosaic Effect).

I will specifically address the Third Party Rule, the Mosaic Effect, and the impact of disclosure on international relations in the paragraphs that follow.

(VII) The Third Party Rule

70 In order to consolidate and to insure the steady flow of information, law enforcement and intelligence agencies have historically relied on the third party rule. This rule is an understanding among information sharing parties that the providers of the information will maintain control over the information's subsequent disclosure and use. In other words, agencies receiving information under the third party rule promise not to disclose the information they receive unless they obtain permission from the source. This being said, the third party rule is one that is sacred among law enforcement and intelligence agencies and is premised on mutual confidence, reliability and trust. X (for the RCMP), an affiant for the Applicant, describes this rule in his affidavit as an "understanding among information sharing partners that the party providing information controls the subsequent dissemination and use of that information beyond the receiving party" (Public Affidavit of X (for the RCMP), at paragraph 23).

71 The Attorney General submits that if the third party rule is breached, the bilateral relationship between the party sharing information and Canada could be detrimentally affected. The Attorney General also submits that because the law enforcement and intelligence communities are relatively small, if Canada is viewed as unreliable and untrustworthy by one country this view may be adopted by other countries that may have access to information of interest to Canada. As per X (for the RCMP)'s affidavit, strict adherence to the third party rule is necessary to maintain relationships with law enforcement and intelligence partners so as to continue to receive information from them.

72 The Attorney General, through its submissions and its affidavits, also explains that under the third party rule it is possible to seek consent for disclosure from providers of the information. Such consent is generally sought in the law enforcement context, where the receiving agency wishes to press charges based on the information obtained. X (for the RCMP)'s affidavit explains that although a procedure exists for seeking consent to disclosure, if the RCMP were to seek consent to disclose the information in this case, the RCMP's commitment to the third party rule may be questioned as disclosure would be sought for a purpose other than law-enforcement, and therefore outside the general accepted parameters for seeking consent (X (for the RCMP)'s affidavit, at paragraph 42).

73 The respondent Maher Arar submits that the third party rule does not apply unless the information obtained by Canada is specifically marked as "confidential", or otherwise designated as being protected by the third party rule. Thus, only where information is marked as being protected will Canada be required to obtain consent before disclosing such information. Counsel to Mr. Arar referred to the Federal Court of Appeal's decision in *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589 (Fed. C.A.) which provides an in-depth overview of the third party rule in the context of the *Access to Information Act*. Justices Létourneau and Robertson writing for the Court, state at paragraphs 101-111:

> Section 19 is a qualified mandatory exemption: the head of a government institution must refuse to disclose personal information obtained in confidence from another government or an international organization of states unless that government or institution consents to disclosure or makes the information public. This is generally referred to as the third party exemption.
>
> [...]
>
> It is true that the primary thrust of the section 19 exemption is non-disclosure of the information but, as we already mentioned, it is not an absolute prohibition against disclosure. This exemption, like the others, has to be read in the overall context of the Act which favours access to the information held. Subsection 19(2) authorizes the head of a government institution to disclose the information where the third party consents.
>
> [...]
>
> In our view, a request by an applicant to the head of a government institution to have access to personal information about him includes a request to the head of that government institution to make reasonable efforts to seek the consent of the third party who provided the information [...]

> [...] This means that the reviewing Judge ought to ensure that CSIS has made reasonable efforts to seek the consent of the third party who provided the requested information. If need be, a reasonable period of time should be given by the reviewing Judge to CSIS to comply with the consent requirement of paragraph 19(2)(a).

In summary, the Federal Court of Appeal in *Ruby* indicates that consent to disclosure is necessary to not violate the third party rule and that law enforcement and intelligence agencies have a duty to prove that they made reasonable efforts to obtain consent to disclosure or they must provide evidence that such a request would be refused if consent to disclosure was sought.

74 Mr. Arar also argues that the Attorney General provided no specific information as to why seeking consent to disclosure would cause harm to Canada. According to Mr. Arar, the argument that seeking consent to disclosure is different in the law-enforcement context and in the context of a public inquiry is not compelling. Mr. Arar explains that the goals of the Inquiry, namely to look into the potential wrongdoings of Canadian officials in the Arar affair as well as recommend a review mechanism for the RCMP's national security activities, are reasons as compelling as criminal prosecutions for seeking consent to disclosure.

75 Moreover, Mr. Arar contends that if seeking consent, on its own, amounts to harm, depending on the country from which disclosure is sought, the likelihood of harm may be limited. If the information originates from countries such as the United Kingdom or the United States, or other western democracies, seeking consent is unlikely to cause harm as these countries have legal systems similar to Canada's and therefore understand the role and importance of public inquiries for promoting democratic governance. According to Mr. Arar this is particularly true of the United States, as the country was approached by the Commission and was invited to participate in the Inquiry, but refused to do so. Finally, Mr. Arar submits that seeking consent to disclosure, on its own, is unlikely to cause harm, especially as the fact that consent is sought does not mean that consent will be given and that the information at issue will be disclosed.

76 Furthermore, Mr. Arar submits that with respect to other regimes such as Syria, it is unlikely that consent to disclosure would cause further harm to Syria's relationship with Canada. The fact that the Commission substantiated Mr. Arar's claims that he was tortured by Syrian officials and that the Government of Canada has made an official complaint to the Syrian government with respect to Mr. Arar's torture while in Syrian jail has probably soured relations between the two countries more than seeking consent to disclosure could.

77 This being said, in my view the third party rule is of essence to guarantee the proper functioning of modern police and intelligence agencies. This is particularly true given that organized criminal activities are not restricted to the geographic territory of a particular nation and that recent history has clearly demonstrated that the planning of terrorist activities is not necessarily done in the country where the attack is targeted so as to diminish the possibility of detection. Consequently, the need for relationships with foreign intelligence and policing agencies, as well as robust cooperation and exchanges of information between these agencies, is essential to the proper functioning of policing and intelligence agencies worldwide.

78 Furthermore, I note that information sharing is particularly important in the Canadian context as it is recognized that our law enforcement and intelligence agencies require information obtained by foreign law enforcement and intelligence agencies in order to nourish their investigations. It has been recognized time and time again that Canada is a net importer of information, or in other words, that Canada is in a deficit situation when compared with the quantity of information it provides to foreign nations. The Supreme Court in *Charkaoui, Re*, 2007 SCC 9 (S.C.C.), noted at paragraph 68:

> The protection of Canada's national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective ... The facts on this point are undisputed. Canada is a net importer of security information. This information is essential to the security and defence of Canada, and disclosure would adversely affect its flow and quality.

79 In my view breaching the third party rule can be compared to the breach of one's contractual obligations. In contract law, the effect of a breach of a contract is not necessarily clear at the moment of the breach. However, after a breach occurs numerous possible scenarios may come true. The first being that the innocent party may begin proceedings against the breaching party for damages. The second being that the innocent party takes no outright action, however they view the breaching party as unreliable and untrustworthy which may affect the relationship to varying degrees, the extent of which are generally only known to the innocent party. The third being that nothing occurs. This could happen for various reasons, among them that the contract is viewed as unimportant, the innocent party wished the contract to come to an end, the innocent party is empathetic

as they would have taken the same action as the breaching party, etc. In my view these same scenarios are possible where a breach of the third party rule occurs. If Canada were to breach the third party rule, depending on the particular circumstances injury could occur. However, the extent of the harm which may follow would not be easy to assess as it is impossible to predict the future. In other words, a breach of the third party rule may cause harm and may affect the flow of information to Canada. However, in many cases, only the non-breaching party will fully know the effect of a breach to this rule.

80 When determining whether disclosure will cause harm, it is also important to consider the nature of Canada's relationship with the law enforcement or intelligence agency from which the information was received. It is recognized that certain agencies are of greater importance to Canada and thus that more must be done to protect our relationship with them. Consequently, care must be taken when considering whether to circumvent the third party rule in what concerns information obtained from our most important allies.

81 This being said, the severity of the harm that may be caused by a breach of the third party rule can be assessed under the third part of the section 38.06 test when the reviewing judge balances the public interest in disclosure against the public interest in non-disclosure.

(VIII) The Mosaic Effect

82 This Court and numerous others have written at length about the "mosaic effect". This principle advances that information, which in isolation appears meaningless or trivial, could when fitted together permit a comprehensive understanding of the information being protected. Justice Mosley in *Khawaja* at paragraph 136 cites to *Henrie v. Canada (Security Intelligence Review Committee)* (1988), [1989] 2 F.C. 229 (Fed. T.D.) at para. 30, aff'd (1992), 88 D.L.R. (4th) 575 (Fed. C.A.) to describe the "mosaic effect":

> The mosaic effect was aptly described by the *Federal Court in Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229 at para. 30 (T.D.), aff'd, 88 D.L.R. (4th) 575 (C.A.) [*Henrie*] wherein the Court recognized:
>
> > 30 It is of some importance to realize than an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such **an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions** regarding the investigation of a particular threat or of many other threats to national security...
>
> [Emphasis in the original]

83 The Attorney General submits that in what concerns the particular information at issue in this application, probable injury would occur if the information is disclosed due to the "mosaic effect". The affiant X (for the RCMP) explains that "the more limited the dissemination of some of the information, the more likely an informed reader can determine the targets, sources and methods of operation of the agency" (Affidavit of X (for the RCMP), at paragraph 48). Mr. O'Brian, in his affidavit, also explains that CSIS is particularly concerned with the mosaic effect. At paragraphs 32-33 of his affidavit, Mr. O'Brian wrote:

> ... in the hands of an informed reader, 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.
>
> By fitting the information disclosed by the Service with what is already known, the informed reader can determine far more about the Service's targets and the depth of its knowledge than a document on its face reveals to an uninformed reader. In addition, by having some personal knowledge of the Service's assessments and conclusions on an individual or the depth, or lack, of its information regarding specific threats would alert some persons to the fact that their activities

escaped investigation by the Service.

84 This being said, the mosaic effect is obviously of concern. However, I agree with my colleague Justice Mosley's recent conclusion in *Khawaja*, 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. Thus, further evidence will generally be required to convince the Court that a particular piece of information, if disclosed would be injurious to international relations, national defence or national security. Consequently the Attorney General, at minimum, will have to provide some evidence to convince the Court that disclosure would be injurious due to the mosaic effect. Simply alleging a "mosaic effect" is not sufficient. There must be some basis or reality for such a claim, based on the particulars of a given file.

(IX) The Impact of Disclosure on International Relations

85 The Attorney General, particularly through the affidavit of Mr. Daniel Livermore, explains how disclosure of information could be injurious to international relations. Below, I have detailed the various effects which the Attorney General claims disclosure would have, as well as the injury following from each of them. I note that some of the injurious effects described do not specifically apply to the factual situation of this application, but for the sake of completeness and for future reference, I have included them in this decision.

(a) Disclosure of Comments made by Foreign Officers

86 Mr. Livermore in his affidavit writes that in the normal course of diplomatic exchanges, information is provided in confidence to foreign officials with the expectation that such information will remain confidential. Mr. Livermore goes on to state that the release of information acquired by Canada through diplomatic exchanges would undermine Canada's credibility as a privileged interlocutor with the foreign officers and the foreign government in question. Mr. Livermore also suggests that it is international practice that information provided in confidence by foreign officials is to remain confidential and that the names of foreign officials who provide such information are to remain confidential. To do otherwise, according to Mr. Livermore, would severely affect Canada's ability to pursue its foreign policy objectives.

87 Reid Morden, affiant for the Commission, agrees in part with Mr. Livermore. Mr. Morden in his affidavit states at paragraph 18 that:

> Without question, one must exercise judgment before disclosing comments made by foreign officials. This judgment involves weighing the release of the information against the broader public interest. However, this balancing process must be done on a case by case basis.

(b) Public Criticism of Foreign Governments

88 According to Mr. Livermore public negative comments made by Canadian diplomats about foreign governments can cause injury. Mr. Livermore, in his affidavit, explains that the fundamental purpose of Canadian diplomatic presence in a country is to maintain influential channels of communication to protect Canadians and advance a wide range of Canadian interests including the respect for human rights, democracy, and the rule of law. Furthermore, the affiant states that to permit Canadian officials to make public negative comments about a foreign government would diminish Canada's influence in the country at which the comments are aimed, and would diminish Canada's capacity to protect Canadians in distress through consular services.

89 Mr. Livermore also suggests that the release of confidential assessments of human rights situations of foreign countries, as well as other assessments of situations in foreign countries, may affect the willingness of foreign states to engage with Canada on such issues.

90 For its part, the Commission submits, through its affiant Reid Morden, that public criticism of a country's human rights

record would not necessarily have an adverse impact on Canada's relations with that country or on information sharing. Mr. Morden points to the fact that the United States publicly criticizes countries with poor human rights records and publishes this criticism in report format on the official website of the State Department, yet retains good relations with many of these countries.

(X) If Injury is found to exist, which Interest prevails, the Public Interest in Disclosure or the Public Interest in Non-Disclosure

91 The last step of the analysis under section 38.06 of the CEA demands that a reviewing judge consider whether the public interest in disclosure outweighs the public interest in non-disclosure. It must be noted that a judge will normally only undertake such an analysis where an injury to international relations, national defence or national security is found to exist. However, in the present case which involves a Commission of inquiry and because of the issues at play, I undertook such an analysis even though I concluded that disclosing some of the information would not be injurious.

92 This being said and keeping in mind that the present application involves a Commission of inquiry, the weighing of the public interest in disclosure against the public interest in non-disclosure involves assessing numerous factors. These factors can only be identified after the factual issues at hand are properly understood. Once the factors at play in a particular proceeding are identified, they are individually assessed and then weighed against one another. It is only once this exercise is complete that a proper determination as to whether the public interest favours disclosure or non-disclosure can be made. In the following paragraphs I will identify some of the factors considered in the present application, keeping in mind that it involves a commission of inquiry.

93 One factor which was considered was the relevance of the redacted information. In some circumstances, the higher the relevance of the redacted information, the greater the public interest in disclosure and conversely the less relevant the information the greater the public interest in non-disclosure. I reiterate, such an assessment cannot in itself be determinative of the interest since it can only be made after all the factors at play in a particular proceeding are identified and assessed. A second factor which can be considered is the extent of the injury that would occur if the information is disclosed. It may be that the less severe the injury the greater the public interest in disclosure, and conversely the greater the injury the greater the public interest in non-disclosure. As an example, where a human source or an investigative technique would be disclosed, the injury likely to occur would be very grave and therefore the public interest would favour non-disclosure; however, where the only injury is a loss of control of the information, the injury would be less severe and therefore the public interest would tip in favour of disclosure. Again, this assessment is not determinative in itself, as a determination as to whether the public interest lies in disclosure or non-disclosure can only be made after all the factors at play in a particular proceeding are identified and assessed.

94 Below, I have detailed the various interests raised by both Respondents in favour of public disclosure. I note that it is impossible to comment on the persuasiveness of the public interest arguments raised in this public judgment. Nonetheless, I can say that I have considered each of these arguments when weighing the public interest in disclosure against the public interest in non-disclosure.

95 The Commission submits that disclosure is necessary to promote the "open court" principle. Public inquiries play an important role in democracy by ensuring that Government officials are accountable. A commission's ability to reveal the truth to the public about a particular controversy may allow the public to regain its confidence in governing institutions. The Commission also submits that only through maximum disclosure will the Government be exposed to public scrutiny, which is, according to the Commission "unquestionably the most effective tool in achieving accountability for those whose action[sic] are being examined." (Commission's Memorandum of Fact and Law, at paragraph 59). Keeping these concepts in mind, it is important to remember that the Commissioner declared himself satisfied with the content of the public report (see paragraph 15 of the present decision). In my view, this opinion is an element to consider when balancing the public interest in disclosure against the public interest in non-disclosure.

96 The Respondent Mr. Arar, for his part, submits that not disclosing the redacted information would undermine the very purpose of calling the Inquiry. According to Mr. Arar, he has a *right to know* the facts relating to his detention, deportation and torture. Furthermore, he claims that the redactions within the public report may contain information which is necessary for the public to understand the actions of the RCMP and CSIS in the Arar affair. In particular, he believes that at least some of the redactions relate to the candour of certain CSIS operatives, who may have misled their superiors. Mr. Arar also argues that the redactions conceal the fact that briefings to numerous Ministers were inadequate and that the RCMP's investigation and

adherence to information sharing protocols was deficient. Thus, Mr. Arar views disclosure as in the public interest to fully understand the inadequacies of the various organizations and officials who played a role in the Arar affair and to promote transparency and responsible government.

97 Mr. Arar also submits that disclosure is in the public interest as it would clarify whether "purchased information" produces reliable intelligence upon which action can be taken, especially where such information is obtained by torture. According to Mr. Arar full disclosure is of essence to determine whether our intelligence services rely on information extracted under torture. According to Mr. Arar such a determination is important as torture is a crime of universal jurisdiction, and if information obtained through torture is used by intelligence agencies in Canada these organizations may be considered complicit in torture. Given these submissions, Mr. Arar believes that the Inquiry is "inexorably linked" with the cases of Abdullah Almalki and Ahmed El Maati. Consequently, he feels that disclosure in the Arar Inquiry is necessary for the proper investigation of the Almalki and El Maati affairs and only through disclosure will the "pattern of conduct of Canadian intelligence agencies and the possible use of Syria and other undemocratic regimes as proxy torturers" be disclosed (Memorandum of the Respondent Maher Arar, dated April 19, 2007, at paragraph 42).

98 This being said, for the purposes of this proceeding, which considers the application of section 38 of the CEA when dealing with a commission of inquiry, I have identified some non-exhaustive factors which must be assessed and weighed against one another to determine whether the public interest lies in disclosure or in non-disclosure:

(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 a commission, and if so whether the information is important for a comprehensive understanding of the said recommendation.

99 I reiterate, the weighing of the public interest in disclosure against the public interest in non-disclosure must consider a number of different factors. It is only once these factors have been properly assessed and weighed against one another that a determination as to disclosure can be made.

6. Brief Comments on the *Ex Parte (In Camera)* Decision

100 As mentioned at the beginning of this judgment, I am also issuing a twin *ex parte* (*in camera*) 82 pages (178 paragraphs) decision today. The *ex parte* (*in camera*) decision considers some of the principles (with the particular situation of the file) overviewed in the public decision. In the end, I have agreed in part with the Attorney General and in part with the Commission.

7. Conclusion

101 For the sake of transparency and to aid in understanding this public judgment, I am including the order issued in the *ex parte* (*in camera*) judgment, without the table which details my determination on disclosure for each redacted passage. Obviously, the reason why the table is not included is to protect the sensitive information contained in the redacted passages, the whole subject to the right of appeal provided for by the CEA.

Order

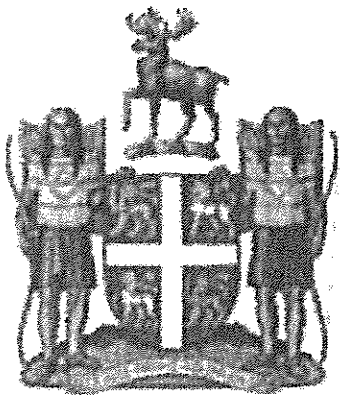
IN ACCORDANCE WITH SECTIONS 38.04 AND 38.06 OF THE CEA, THIS COURT ORDERS that:

- The information, disclosure of which is identified as not injurious and/or for which the public interest in disclosure prevails, as contained in the table that is part of the *ex parte* (*in camera*) order (not included in the present public order so as to respect the objectives of the CEA), is authorized for disclosure, the whole subject to the right to appeal the said order as provided in the Act; and

- The remaining information, disclosure of which is identified as injurious and/or for which the public interest in non-disclosure prevails, as contained in the table that is part of the *ex parte* (*in camera*) order (not included in the present public order so as to respect the objectives of the CEA), not be disclosed, and the present order confirms the prohibition of disclosure thereof;

Application granted in part.

End of Document



COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT

The Honourable Richard D. LeBlanc, Commissioner

AFFIDAVIT

I, Paul Quinton Carter, of the City of St. John's, in the Province of Newfoundland and Labrador, MAKE OATH AND SAY THAT:

1. I am employed by the Government of Newfoundland and Labrador as a senior advisor, and as such have knowledge of the matters hereinafter deposed to.

2. I have been requested by Government of Newfoundland and Labrador Muskrat Falls Inquiry Office ("GNL MFI") to review Muskrat Falls Project Oversight Committee documents to determine if release of those documents would be harmful to the operation of Government, Nalcor and/or third parties.

3. I have been an employee of the Government of Newfoundland and Labrador since 2005. Prior to this, I was an employee of the Government of Canada – Natural Resources Canada – Canadian Forest Service for approximately 10 years working in forest research.

4. With the Government of Newfoundland and Labrador, I have held the positions of Executive Director - Labrador, Executive Director - Iron Ore Industry, Assistant Deputy Minister - Royalties and Benefits, with the Department of Natural Resources, Executive Director Muskrat Falls Project Oversight Committee with

Executive Council/Cabinet Secretariat and, more recently, assisting the Department of Justice and Public Safety GNL MFI as a senior advisor.

5. My executive experience has largely centered in areas of natural resource management, negotiation of project agreements, project benefits, royalties and tax systems, and monitoring and compliance of project agreements. I have managed many commercially sensitive documents during my employment with the Government of Newfoundland and Labrador.

6. Since August, 2016 I have been Executive Director for the Muskrat Falls Project Oversight Committee ("Committee"). In this role, I communicate frequently with Nalcor Muskrat Falls' project team members and perform duties as per the Committee's Terms of Reference and I serve as Secretary to the Committee.

7. Either through reviewing project information, preparing materials for Committee meetings, participating in Committee meetings, developing Committee reports and other day-to-day Nalcor project team engagements, I am generally aware of project information that could be considered commercially sensitive and which could impact project costs and/or schedule if released.

8. These sensitivities are largely either Nalcor owned internal project documents or materials that relate to active working contracts and relationships with project contractors.

9. The project is still currently under construction and many contracts are not yet closed out or considered final. There are various commercial claims outstanding and it is possible that more may emerge as project construction draws to a close. The timing of the release of information may have an impact on these commercial claims and contract close outs and possibly result in increased project costs or schedule changes.

10. The types of information I have reviewed for this screening generally include both Committee prepared materials and Nalcor project documentation. Much of the Committee prepared materials rely in part on Nalcor project documentation.

11. In my advisory role with the GNL MFI, I have also been actively involved in screening other GNL documents and assisting with coordinating reviews within Government of Newfoundland and Labrador line departments and Nalcor.

12. In many instances reviews beyond the GNL MFI were necessary to assess the commercial sensitivity of information contained within documents. At times these reviews were challenging to complete within timeframes specified while a document management process was put in place and coordination of line department reviews along with the sheer volume of material to be reviewed commenced. I can confirm, however, that reviews were completed as expeditiously as possible and continue to occur as of the date of this Affidavit.

13. As of date of this Affidavit there remain some documents that were sent to the GNL MFI by the Commission during the weeks previous that are still under review. Also, Nalcor has not provided responses to some of the earlier documents that were sent to them for screening but advise that these reviews will be completed shortly.

14. The GNL MFI is continuing to work to have these reviews finalized as expeditiously as possible to assist the Commission's work.

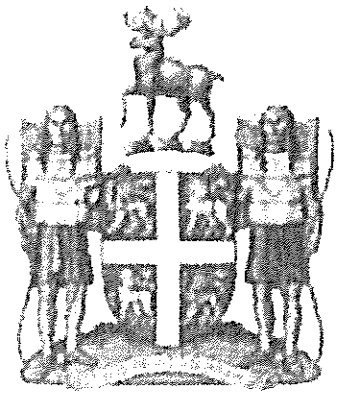
DATED at the City of St. John's, in the Province of Newfoundland and Labrador this 14th day of August, 2018.

SWORN BEFORE ME at the City of St. John's, in the Province of Newfoundland and Labrador this 14 day of August, 2018)

Paul Quinton Carter

A Commissioner for Oaths in and for the Province of Newfoundland and Labrador

S. Ruth Steele
A Commissioner for Oaths in and for
the Province of Newfoundland and Labrador.



COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT

The Honourable Richard D. LeBlanc, Commissioner

AFFIDAVIT

I, Aubrey Trent Gover, QC, of the City of St. John's, in the Province of Newfoundland and Labrador, MAKE OATH AND SAY THAT:

1. I am the Deputy Minister of Indigenous Affairs for the Government of Newfoundland and Labrador (Government) and have held that position since 2017. From 2013 to 2017 I was the Government's Deputy Minister of the Labrador and Aboriginal Affairs Office. I was the assistant Deputy Minister of Indigenous Affairs for the Government from 2010 to 2013. Prior to that, from 2007 to 2009, I was Chief Negotiator for the Government for the self-government and comprehensive Innu Nation's land claim, and was personally involved in the creation of the "New Dawn Agreement." From 1999 to 2007 I was legal counsel to Government's Department of Labrador and Aboriginal Affairs. Therefore, by virtue these roles, I have acquired extensive personal knowledge of the facts herein deposed to, unless otherwise indicated.

2. In the above roles, over almost two decades, I have acquired extensive knowledge of the Government's legal and policy positions vis a vis all

Indigenous governments and organizations with settled or asserted section 35 Constitutional Rights in the Province of Newfoundland and Labrador, and how the public disclosure of those positions would likely affect the Lower Churchill Projects, the efforts to advance Reconciliation with Indigenous people in the province, and, thereby, enhance social and economic outcomes for Indigenous people in the province, and more generally, how it would affect the social and economic development of the Province of Newfoundland and Labrador.

3. Before 2007 and after 2009, I was involved in all aspects of Indigenous issues associated with the Lower Churchill Projects, including the Indigenous consultation and Indigenous litigation concerning these Projects.

4. During my tenure from 2007 to 2009 as Chief Negotiator of the Innu Nation's land claim the design of the consultation strategy for the Generation Project was devised by others, but I was aware generally of those developments.

5. During my tenure as Assistant Deputy Minister, the Province developed and published its Aboriginal Consultation Policy.

6. I have reviewed documents that have been provided to me for review in relation to the Muskrat Falls Inquiry respecting Indigenous issues, including cabinet papers, briefing note, powerpoints, emails, correspondence, and other documents generated by Indigenous Affairs and others.

7. I have identified in those documents matters, the public disclosure of which would in my view be prejudicial to the ongoing negotiations to create a final land claims agreement for the Innu Nation, and thereby prejudice the Lower Churchill Projects and acquisition by the Labrador Innu of the benefits of a final land claims agreement, and more generally to the prejudice of the social and economic development the Province of Newfoundland and Labrador.

8. The Innu Nation's land claim Agreement-In-Principle was one of the three agreements contemplated by the 2008 New Dawn Agreement. The other two agreements of the New Dawn Agreement were the Lower Churchill Impacts and Benefits Agreement and the Upper Churchill Redress Agreement. These Agreements were the means by which the Innu provided their concurrence in the Projects. Therefore, the land claim is linked to the Projects.

9. The land claim Agreement in Principle Land selections and the Innu Nation Claim Area to Labrador are attached.

10. These areas overlap with the claim areas of NunatuKavut, the Quebec Innu, and the Naskapi of Quebec. The federal government will insist on overlap agreements with appropriate Indigenous peoples to bring any Innu Nation final land claim agreement into effect. Therefore, the relationships between Innu Nation and these other Indigenous organizations will be crucial to achieving any such needed overlap agreements.

11. Likewise, I have identified matters, the public disclosure of which would in my view, be prejudicial to government positions, including legal positions, in relation the Lower Churchill Projects, and generally, respecting the NunataKavut Community Council (formerly the Labrador Metis Nation), the six Innu bands in Quebec that have asserted land claims to portions of Labrador, and the asserted land claims of the Naskapi Nation of Quebec to portions of Labrador.

12. As well, I have identified matters in the noted documents that would in my view prejudice government positions, including legal positions, in relation to the Nunatsiavut Government and the interpretation or implementation of the Labrador Inuit Land Claims Agreement.

13. Given the vast areas coved by these claims and the Labrador Inuit Land Claims Agreement, prejudice to these positions could impede the social and economic development of the province.

14. While Labrador is resource rich, it is also claim rich. Therefore, an essential key to sustainable resource development in Labrador, as it is generally across northern Canada, is Indigenous consultation on asserted rights, negotiation and settlement of land claims, and implementation of settled claims to the benefit of Indigenous people and the province.

15. Government's relationship with the seven Quebec Indigenous bands that have asserted claims in Labrador is mainly in relation to consultation on resource developments in their respective claim areas in Labrador, particularly mining developments in western Labrador, and in relation to harvesting the migratory and sedentary caribou herds of Labrador. However, all seven were consulted on the Generation Project and the Labrador-Island Transmission Link Project.

16. In 1975, the Quebec Innu (not Naskapi) came together to form the Attikamek-Montagnais Council (CAM) for the purposes of negotiating a land claim. In 1979, CAM filed a 632,000 km2 claim to eastern Quebec and much of western and southern Labrador. A map of the area claimed in Labrador is attached.

17. Growing disagreement between the members of CAM resulted in CAM breaking apart in 1994. However, the claims of the six Quebec Innu bands were accepted by the federal government for negotiation, but have not been accepted by Government.

18. The claim of the Naskapi Nation has not been accepted by neither the federal government nor Government. See attached claim map submitted by the Naskapi to the Join Review Panel for the Generation Project.

19. The claim of Nunatukavut has not been accepted by negotiation by the federal government, so Government has no decision to make on this claim, until the federal government makes its decision on the claim. See attached claim area of NunatuKavut as it is understood based upon past communications with NunatuKavut.

20. The claim of the Labrador Inuit in this province was settled by the Labrador Inuit land Claims Agreement. See attached map of various areas of this Agreement.

21. The claim of the Nunavik Inuit of Quebec to this province has been settled, but their rights are confined to the Torngat National Park.

22. The Innu Nation, the Nunatsiavut Government and the NunatuKavut Community Council, all have land claims that extend into Quebec, so the overlapping nature of these claims and the Quebec claims is a consideration in Government's relationships with all Indigenous governments and organizations consulted on the Generation and Labrador-Island Link Project.

23. The primary Governmental interactions with the Innu Nation and the two Innu bands in Labrador is the negotiation on the final land claims agreement; consultation on all economic developments in their claim area, social matters, caribou herds and other matters, and the modifications of provincial programs to meet the unique cultural, linguistic, and other needs of the Innu.

24. The primary areas of provincial social interest given that the Labrador Innu are Status Indians on reserve are the protection of Indigenous children and justice. There is an Innu lead Roundtable comprised of both governments to address immediate social issues in the communities. Through that Roundtable and its predecessor the Innu have assumed complete control, with federal funding, for K to 12 education on reserve and income support.

25. The federal government has most fully discharged its subsection 91(24) Constitutional responsibilities in relation to Status Indians on federal Indian Act reserves. This tends to mean provinces, that while provinces still have responsibilities to Status Indians on reserve, provinces have greater responsibilities for all other Indigenous people.

26. The primary Governmental interactions with the Nunatsiavut Government is the ongoing implementation of the Labrador Inuit Land Claims Agreement and the consultations and interactions required by that Agreement. As well, the modifications of provincial programs to meet the unique cultural, linguistic, and other needs of the Inuit is critical, since the provincial is still currently responsible to deliver all provincial programs to the Inuit of Nunatsiavut.

27. The primary interactions with NunatuKavut are consultations in its claim area on resource development and other matters, and advocacy to the federal government on behalf of NunatuKavut. NunatuKavut members, since they currently can only avail of a few limited federal Indigenous specific programs, are in receipt of all provincial programs.

28. A key issue for the Projects for NunatuKavut was the lack of an Impacts and Benefits Agreement with Nalcor. However, Nunatukavut has since signed a Community Development Agreement with Nalcor on December 4, 2017.

29. On July 12, 2018 in Happy Valley-Goose Bay, the Honourable Carolyn Bennett, Minister of Crown-Indigenous Relations and Northern Affairs (CIRNAC), Todd Russell, President of the Nunatukavut, and Yvonne Jones, Parliamentary Secretary to the Minister of Crown-Indigenous Relations and Northern Affairs, announced the start of discussions on recognition of NunatuKavut Indigenous rights and aspirations for self-determination. Minister Bennett called the announcement the launch of "exploratory negotiations" a "shared journey of reconciliation," whereby the NunatuKavut will "identify the

scope, nature, and extent of Indigenous rights and how they should and could be implemented."

30. Innu leaders responded to the announcement criticizing the federal decision to begin new negotiations with the NunatuKavut before finalizing Innu Nation's land claim. The Innu leaders noted that the NunatuKavut was claiming land already claimed by Innu, whose presence in their ancestral territory predates Inuit and European occupancy by thousands of years.

31. The key Project issue for Nunatsiavut Government is methyl mercury. An Independent Expert Advisory Committee was set up to provide advice on the mitigation of methyl mercury in relation to the Generation Project and it has provided that advice. Government is currently processing that advice.

32. The above noted matters and other matters have factored into my views

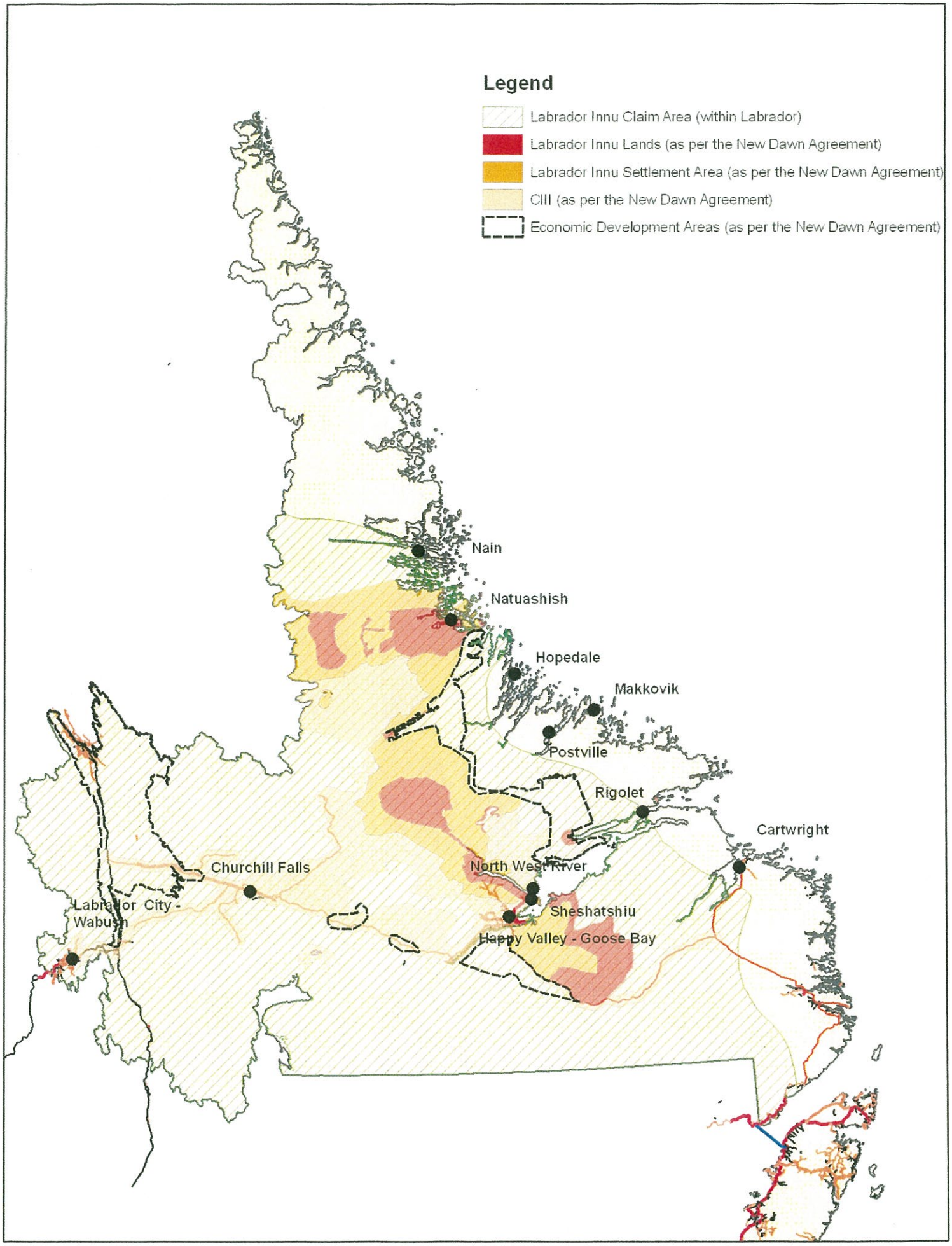
DATED at the City of St. John's, in the Province of Newfoundland and Labrador this 15 day of August, 2018.

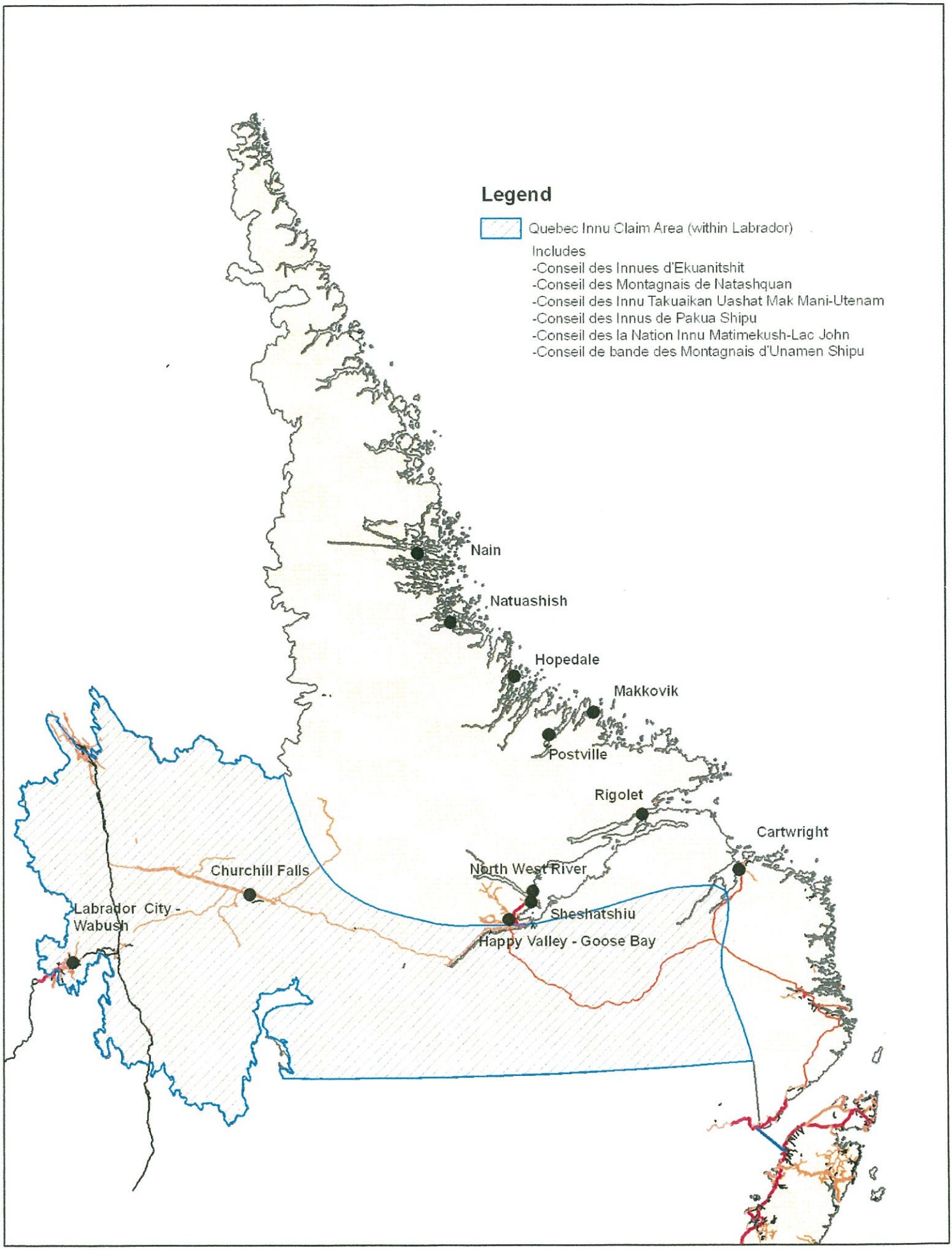
SWORN BEFORE ME at the City of St. John's, in the Province of Newfoundland and Labrador this 15 day of August, 2018

A Commissioner for Oaths in and for the Province of Newfoundland and Labrador

Peter Ralph, QC

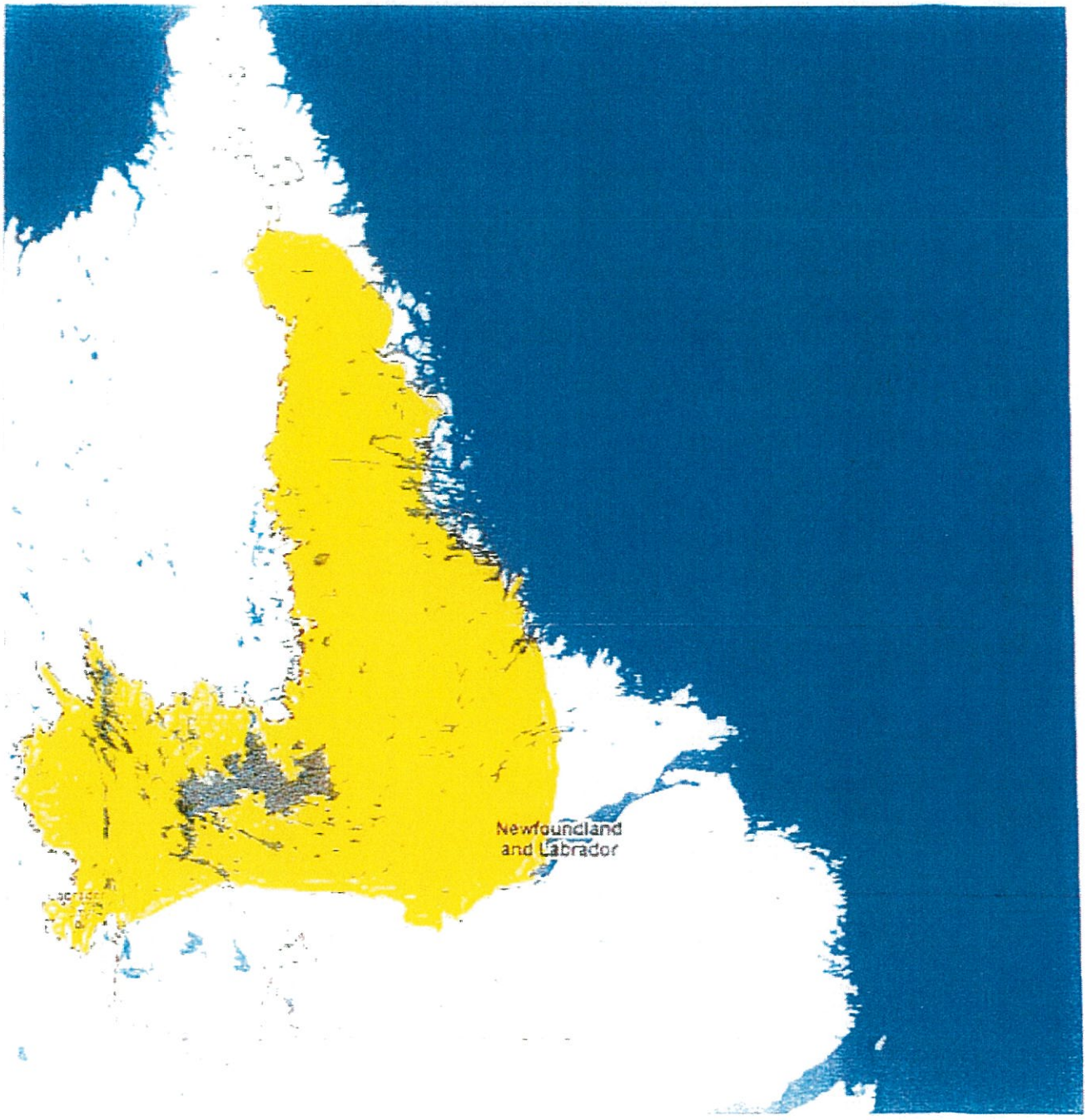
Aubrey Trent Gover, QC


Legend
Labrador Innu Claim Area (within Labrador)
Labrador Innu Lands (as per the New Dawn Agreement)
Labrador Innu Settlement Area (as per the New Dawn Agreement)
CIII (as per the New Dawn Agreement)
Economic Development Areas (as per the New Dawn Agreement)
Nain
Natuashish
Hopedale
Makkovik
Postville
Rigolet
Cartwright
Churchill Falls
North West River
Sheshatshiu
Happy Valley - Goose Bay
Labrador City - Wabush


Legend
Quebec Innu Claim Area (within Labrador)
Includes
-Conseil des Innues d'Ekuanitshit
-Conseil des Montagnais de Natashquan
-Conseil des Innu Takuaikan Uashat Mak Mani-Utenam
-Conseil des Innus de Pakua Shipu
-Conseil des la Nation Innu Matimekush-Lac John
-Conseil de bande des Montagnais d'Unamen Shipu
Nain
Natuashish
Hopedale
Makkovik
Postville
Rigolet
Cartwright
North West River
Sheshatshiu
Happy Valley - Goose Bay
Churchill Falls
Labrador City - Wabush

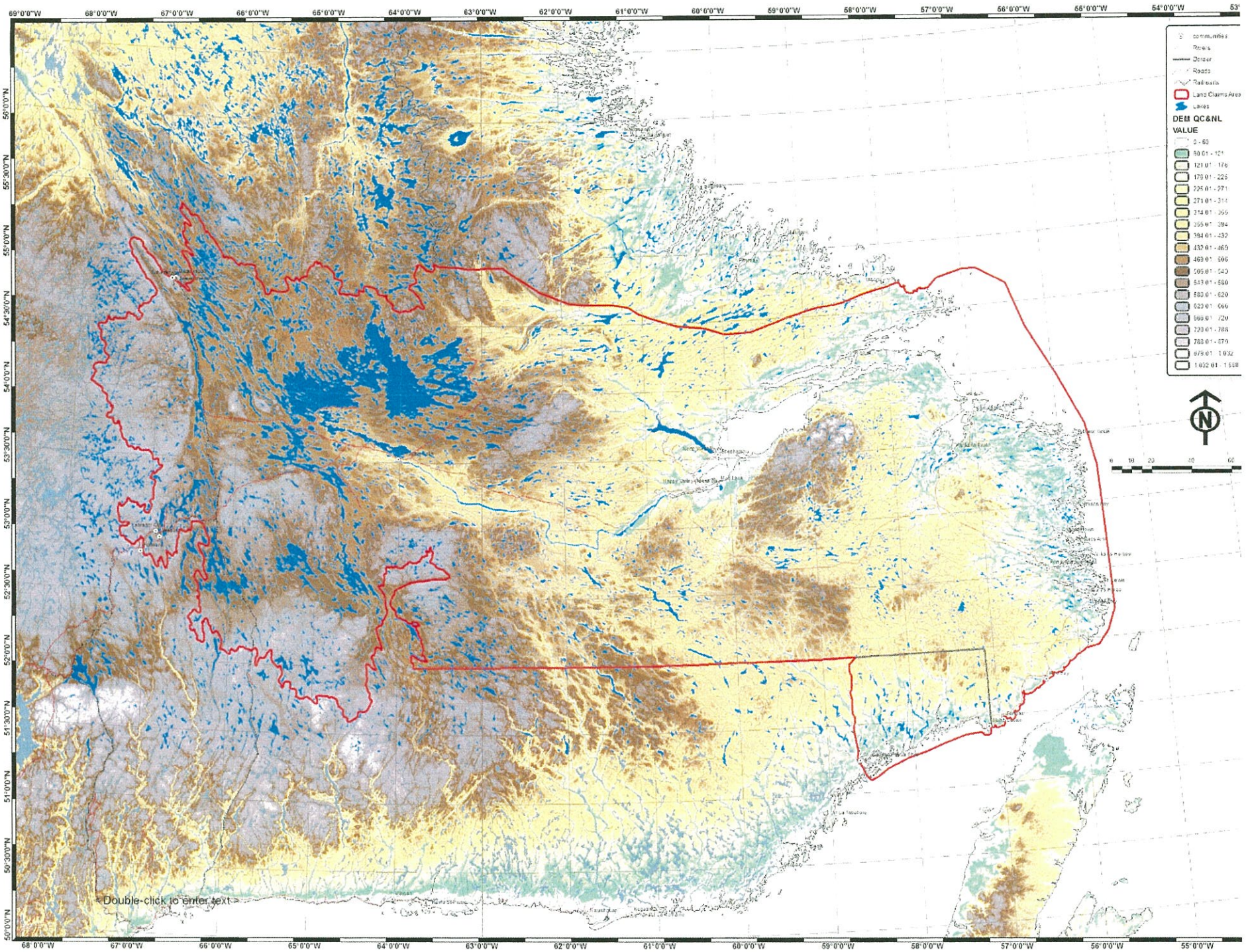
Naskapi Nation of Kawawachikamach

Area of Claim in Labrador

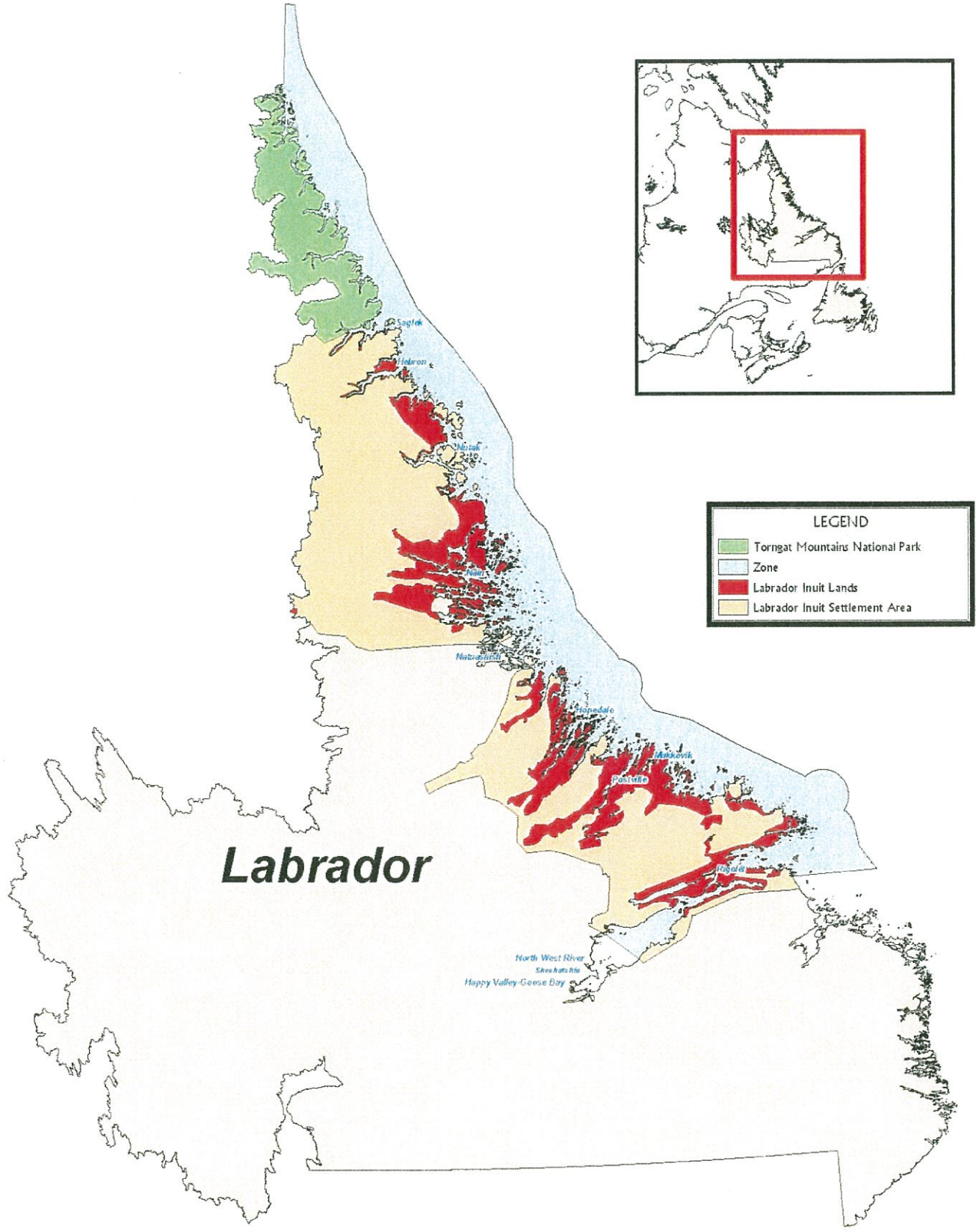


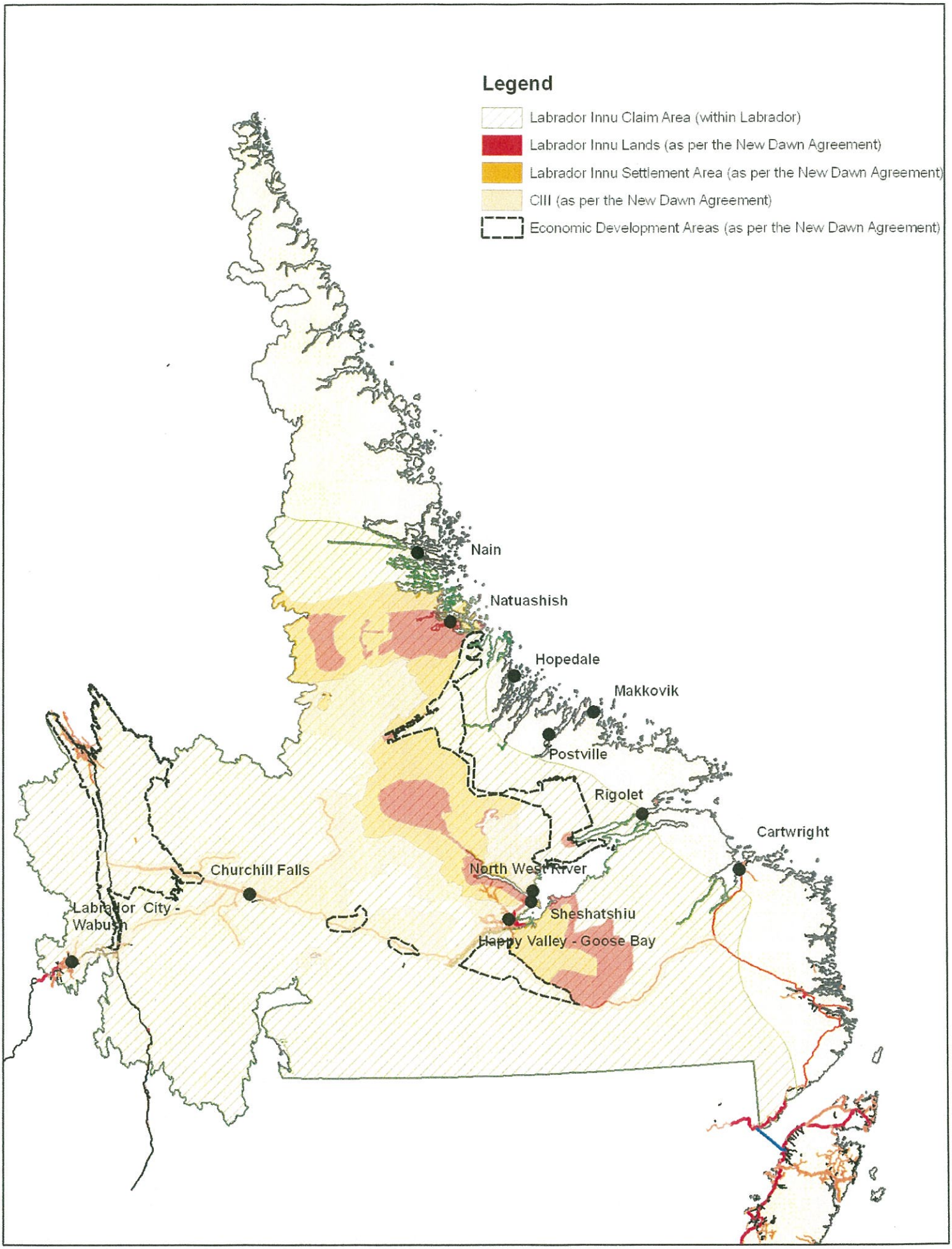
Source: Modified from Walter H Marcel May 1996 Naskapi Band of Quebec Area of Claim in Laerador

: AREA CLAIMED


communities
Rivers
Border
Roads
Railroads
Land Claims Area
Lakes
DEM QC&NL
VALUE
0 - 60
60.01 - 121
121.01 - 176
176.01 - 225
225.01 - 271
271.01 - 314
314.01 - 355
355.01 - 394
394.01 - 432
432.01 - 469
469.01 - 506
506.01 - 543
543.01 - 580
580.01 - 620
620.01 - 669
669.01 - 720
720.01 - 786
786.01 - 879
879.01 - 1 032
1 032.01 - 1 588
Double-click to enter text

LABRADOR INUIT LAND CLAIMS AGREEMENT




Legend
Labrador Innu Claim Area (within Labrador)
Labrador Innu Lands (as per the New Dawn Agreement)
Labrador Innu Settlement Area (as per the New Dawn Agreement)
CIII (as per the New Dawn Agreement)
Economic Development Areas (as per the New Dawn Agreement)
Nain
Natuashish
Hopedale
Makkovik
Postville
Rigolet
Cartwright
Churchill Falls
North West River
Sheshatshiu
Happy Valley - Goose Bay
Labrador City -
Wabush

COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT

The Honourable Richard D. LeBlanc, Commissioner

AFFIDAVIT

I, Roland Craig Martin, of the City of Mount Pearl, in the Province of Newfoundland and Labrador, MAKE OATH AND SAY THAT:

1. I was requested by Government of Newfoundland and Labrador Muskrat Falls Inquiry Office ("GNL MFI") to review documents to determine if release of those documents would be harmful to the operation of Government, Nalcor and/or third parties.

2. I have been an employee of the Government of Newfoundland and Labrador since 1992.

3. With the Government of Newfoundland and Labrador, I have held multiple positions within my career. The more recent include Director of Royalties, Department of Natural Resources; Executive Director of the Muskrat Oversight Committee, Executive Council; and my current position of Assistant Deputy Minister – Economics, Fiscal and Statistics Branch, Department of Finance.

4. My experience has largely centered in areas of financial and economic analysis, negotiation of agreements, and policy and administration of both royalties and tax systems. I have handled many commercially sensitive documents during my employment with the Government of Newfoundland and Labrador.

5. Since May 2015 I have been Assistant Deputy Minister with the Department of Finance. In this role I am a member of the Muskrat Falls Oversight Committee. For the period May 2014 to April 2015 I was the Executive Director of the Muskrat Falls Oversight Committee. In these roles, I have had frequent communication with the Nalcor Muskrat Falls project team members as well as Nalcor's financial team.

6. From my work as Assistant Deputy Minister of Finance and my involvement with the Muskrat Falls Project I am generally aware of project information that could be

considered commercially sensitive the release of which could harm a third party or harm relations with that third party, including other Governments.

7. These sensitivities are largely with respect certain information included in drafts of agreements with third parties, executed contracts with third parties and materials provided to the Government by an external third party.

8. These sensitivities have been identified in each of the documents provided and the sensitivities highlighted.

9. The documents provided were initially reviewed by either Mr. T. Skinner or Mr. W. Norman, both employees of the Department of Finance and then reviewed by myself for final sign off. The types of information reviewed for this screening generally included materials prepared during the sanctioning of the project, materials prepared in support of the initial Federal Loan Guarantee and financing of the project and materials relating to the more recent second Federal Loan Guarantee in support of the project. Most of these materials were prepared by Nalcor or the Department of Natural Resources.

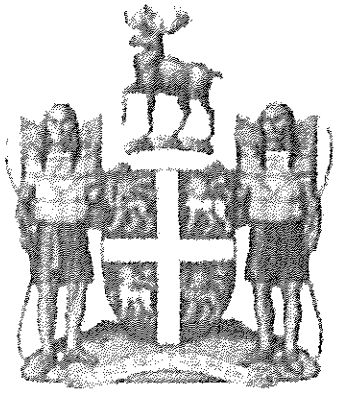
DATED at the City of St. John's, in the Province of Newfoundland and Labrador this 14 day of August, 2018.

SWORN BEFORE ME at the City of St. John's, in the Province of Newfoundland and Labrador this 14th day of August, 2018

Roland Craig Martin

A Commissioner for Oaths in and for the Province of Newfoundland and Labrador

Barrister, Solicitor and Notary (NL)



COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT

The Honourable Richard D. LeBlanc, Commissioner

AFFIDAVIT

I, John Cowan, of the City of St. John's, in the Province of Newfoundland and Labrador, MAKE OATH AND SAY THAT:

1. I am employed by the Government of Newfoundland and Labrador as Assistant Deputy Minister at the Department of Natural Resources and as such have knowledge of the matters hereinafter deposed to.

2. I have been requested by the Government of Newfoundland and Labrador Muskrat Falls Inquiry Office ("GNL MFI") to review Government of Newfoundland and Labrador documents in preparation for the Commission of Inquiry Respecting the Muskrat Falls Project to determine if release of those documents would be harmful to the operation of Government, Nalcor, and/or third parties.

3. I have been an employee of the Government of Newfoundland and Labrador since October of 2000 and have held various positions since that time. These positions include: Policy Analyst in the former department of Human Resources Labour and Employment; Policy Analyst in the department of Finance; Consultant in the department of Health and Community Services; Planning Analyst, Manager of Regional Economic Planning and Manager of Regional Economic Development in the former department of Innovation, Trade and Rural Development; Cabinet Officer with Cabinet Secretariat; Director of Resource and Fiscal Policy with the

Indigenous and Aboriginal Affairs Secretariat, formally known as the Department of Intergovernmental Affairs; Director of Energy Policy and Director of Electricity and Alternative Energy with the Department of Natural Resources; Executive Director of Planning and Coordination with Cabinet Secretariat/Executive Council; and since May of 2017, Assistant Deputy Minister of Energy with the Department of Natural Resources. I have also held special assignment roles with the House of Assembly and with the implementation of the Access to Information and Privacy Protection Act.

4. My experience has largely centered in areas of policy development. In these roles, I have managed some commercially sensitive documents during my employment with the Government of Newfoundland and Labrador. As part of my current responsibilities I deal daily with Nalcor Energy and Newfoundland and Labrador Hydro, and have frequent contact with the Government of Canada, other Provincial and Territorial Governments, private companies, and other stakeholders.

5. While I was not with the department of Natural Resources during the time period when most of the documentation was created, through my roles at Natural Resources in reviewing project information, preparing briefing materials and cabinet materials, and engagement with Nalcor, I am generally aware of information that could be considered sensitive and which could negatively impact the operation of Government, Nalcor, and/or third parties if released.

6. The types of information I reviewed generally from Nalcor and Newfoundland and Labrador Hydro include presentations, memos, and regulatory filings.

7. In performing this document screening, I, in my role as Assistant Deputy Minister of Energy with the Department of Natural Resources, have reviewed the information based on the directions provided. the following principles:

    1. Being mindful to the purpose of the Inquiry itself; and.
    2. No disclosure of information, to the best of my knowledge, in cases where disclosure would reasonably be expected to:

(a) Harm the competitive position of the provider or third party;
(b) Result in significant financial loss to a provider or third party due to premature disclosure;
(c) Result in a negative impact, financial or otherwise, in ongoing or future negotiations with others;
(d) Materially prejudice the financial, economic or other interests of Government of the Province, Nalcor, its subsidiaries, and, more generally, the people of this Province; or
(e) be injurious to the ability of the Government of the Province generally to manage the economy of the Province.

Based on my review of documents as Assistant Deputy Minister (Energy), I provide the following comments.

8. There are documents that record negotiating positions of the Government of Newfoundland and Labrador Government and its Crown Corporations as it pertains to other provinces and territories, and companies, which if released could harm the Government regarding its negotiation positions in those matters.

9. Some of the documents include assessments of Provincial and Territorial positions on various energy matters, such as approaches to marketing and Newfoundland and Labrador's approach to maximizing opportunities in relation to these matters which if released may cause harm to the Province or other Governments.

10. Releasing documents containing information on past dealings with third parties could result in the release of commercially sensitive information could which cause harm to either the Province or the third parties. This includes multiple versions of documents and agreements which could reveal negotiating positions and approaches to negotiating. This could result in prejudice from third parties, reduce the likelihood some might engage in future discussions, and expose provincial positioning in relation to similar matters.

11. There is a significant amount of information on negotiations with Emera, the UARB decision, and its impact on the Nalcor negotiating approach. The New England marketing approach is also identified. Success of the LCP project will rely on maintaining positive relationships with other Governments and entities and revealing strategic approaches may be harmful to the Province.

12. There are multiple versions of draft agreements and MHI reports that may contain commercially sensitive information. Nalcor should review these documents to ensure that release will not be harmful.

13. There are a significant number of documents that are largely either Nalcor owned internal project documents or materials that relate to Nalcor; therefore Nalcor should review those documents to ensure that release will not be harmful.

14. I note that review of hand-written documents were particularly hard to assess.

15. In some instances there are documents in their entirety or in part that do not appear to be relevant to the Inquiry.

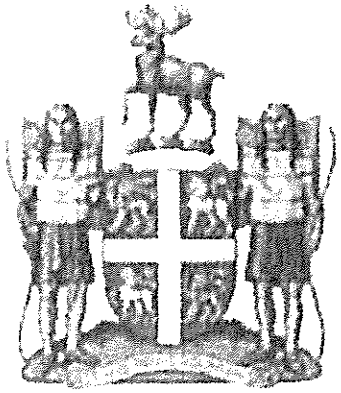
DATED at the City of St. John's, in the Province of Newfoundland and Labrador this 15th day of August, 2018.

SWORN BEFORE ME at the City of St. John's, in the Province of Newfoundland and Labrador this 15th day of August, 2018)

John Cowan

A Commissioner for Oaths in and for the Province of Newfoundland and Labrador

Peter Ralph, QC



COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT

The Honourable Richard D. LeBlanc, Commissioner

AFFIDAVIT

I, Greg Clarke, of the City of St. John's, in the Province of Newfoundland and Labrador, MAKE OATH AND SAY THAT:

1. I was requested by Government of Newfoundland and Labrador Muskrat Falls Inquiry Office ("GNL MFI") to review Muskrat Falls Project Oversight Committee documents to determine if release of those documents would be harmful to the operation of Government, Nalcor and/or third parties.

2. I have been an employee of the Intergovernmental and Indigenous Affairs Secretariat (Intergovernmental Affairs Branch) since March 2014 and have served as Director of Resource and Fiscal Policy since that time.

3. In this capacity, I coordinated the MFI record search for IIAS. I am also the official in IIAS who reviewed the records that comment was requested on from an intergovernmental perspective. In this context, I have been asked to review briefing notes, emails, written summaries of meetings, draft intergovernmental agreements, power point presentations, draft and final letters, and hand written notes.

4. In my tenure with the Intergovernmental Affairs Branch, I have been involved in the negotiation of several intergovernmental agreements, and preparation for many bilateral and multilateral intergovernmental meetings. This work has involved preparation and analysis of negotiating strategies, and interaction with intergovernmental and line department officials from federal and provincial governments, as well as U.S. states and foreign countries. This work also involves briefing executive and Premier's Office on intergovernmental negotiations and policy development.

5. If GNL discloses documents showing the province's strategic positions with respect to intergovernmental agreements or policy formation, it may be possible for other governments and third parties to ascertain patterns in GNL's negotiating strategies and tactics, and use those patterns to develop counter strategies and tactics that undermine GNL's achievement of its intergovernmental negotiation objectives. GNL will be at a disadvantage if background and analysis of its negotiation positions are publicly available to observe but those of other governments are not, as much of a government's emphasis during intergovernmental negotiation is on anticipating how other governments will act and react during a negotiation, but with each party having limited information about the other's positions and interests. In certain circumstances, like international trade negotiations, the GNL has signed agreements preventing the disclosure of confidential information pertaining to such negotiations. The release of this information would have serious intergovernmental implications for the GNL, other provinces and territories and the federal government.

6. If GNL discloses documents showing information that other governments shared with GNL in confidence, or documents that expose other governments' own strategic positions with respect to intergovernmental agreements or policy formation (which may be shared with GNL as a negotiating tactic or because GNL is collaborating with another government on an intergovernmental negotiation or policy issue) it could drastically diminish the willingness of other governments to share information with GNL, information that makes it possible for GNL to advance its intergovernmental objectives.

7. Intergovernmental negotiation and policy formation is dependent on the sharing of information between governments, and often this information is sensitive or confidential. Other governments share this information with GNL (and GNL shares information with

other governments) both to build trust with other governments, modify other government's intergovernmental interests to make them more consistent with GNL's, and to work together to achieve already shared objectives. Information sharing is almost always done confidentially, and making related documents public could, again, deter other governments from sharing information and analysis with GNL.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador this 15 day of August, 2018.

SWORN BEFORE ME at the City of St. John's, in the Province of Newfoundland and Labrador this 15 day of August, 2018

Greg Clarke

A Commissioner for Oaths in and for the Province of Newfoundland and Labrador

Peter Ralph, QC

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canada Deposit Insurance Corp. v. Oland | 1997 CarswellAlta 797, 53 Alta. L.R. (3d) 192, 206 A.R. 283, 156 W.A.C. 283, 12 C.P.C. (4th) 50, [1998] 1 W.W.R. 507, 152 D.L.R. (4th) 509, 74 A.C.W.S. (3d) 54, [1997] A.J. No. 931 | (Alta. C.A., Sep 23, 1997)

1982 CarswellNat 490
Supreme Court of Canada

Canadian Javelin Ltd., Re

1982 CarswellNat 490F, 1982 CarswellNat 490, [1982] 2 S.C.R. 686, 141 D.L.R. (3d) 395, 17 A.C.W.S. (2d) 56, 44 N.R. 571, 68 C.P.R. (2d) 145, J.E. 82-1171

The Honourable Joseph Roberts Smallwood, (Applicant-Respondent) Appellant and Frederick Herbert Sparling, (Respondent-Appellant) Respondent and Luc A. Couture and Robert S. MacLellan, (Respondents in first instance) and The Attorney General of Canada, the Attorney General for Alberta, the Attorney General of British Columbia, the Attorney General of Manitoba, and the Attorney General for Ontario, Interveners

Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

Judgment: May 11, 1982
Judgment: November 23, 1982
Docket: 16394

Proceedings: On appeal from the Federal Court of Appeal

Counsel: *Joseph Nuss, Q.C.* , and *Brian Riordan* , for the appellant.
François Garneau , for the respondent.
T.B. Smith, Q.C. , and *P.K. Doody* , for the intervener the Attorney General of Canada.
Wm. Henkel, Q.C. , for the intervener the Attorney General for Alberta.
Howard R. Eddy , for the intervener the Attorney General of British Columbia.
Brian F. Squair , for the intervener the Attorney General of Manitoba.
John Cavarzan, Q.C. , for the intervener the Attorney General for Ontario.

Subject: Intellectual Property; Property; Evidence

Related Abridgment Classifications

Evidence
XVII Privilege
XVII.4 Public interest immunity
XVII.4.a Crown privilege

Headnote

Evidence --- Witnesses — Privilege — Privilege under public policy — Crown privilege

Canada Corporations Act, R.S.C. 1970, c. C-32, s. 114(2), (10).

Restrictive Trade Practices Commission inspector issuing subpoena requiring former provincial premier to give evidence in investigation of company -- Said former premier obtaining injunction to restrain inspector from acting on subpoena -- Grounds that evidence would relate to duties as Minister of Crown and violate Crown privilege -- Injunction set aside on appeal -- Former Minister ordered to testify in private capacity not entitled to claim privilege -- Former Minister not entitled to refuse to answer questions pertaining to actions as premier and not requiring violation of Crown privilege or cabinet secrecy -- Decisions about privileged nature of particular testimony or documents to be determined at hearing.

The judgment of the Court was delivered by *Wilson J.*:

1 This appeal raises an important issue as to the scope of immunity available to a former minister of the Crown in right of a province when he has been subpoenaed to present both oral and documentary evidence at a federal public inquiry. The circumstances giving rise to this appeal are as follows.

2 On May 17, 1977, the respondent Sparling was appointed an inspector pursuant to s. 114 of the *Canada Corporations Act* , R.S.C. 1970, c. C-32, as amended R.S.C. 1970 (1st Supp.), c. 10, to conduct an investigation into the affairs and management of Canadian Javelin Limited ("Javelin"). This is an investigation by the Restrictive Trade Practices Commission ("the Commission"). Mr. Sparling's mandate reads as follows:

> The Commission hereby orders that an investigation be conducted of the affairs and management of Canadian Javelin Limited from the date of its incorporation including, without limiting the generality of the foregoing, the investigation of its source and disposition of capital funds, its maintenance of corporate books and accounting records, its disclosure of financial and other information to shareholders, its compliance with statutory obligations, its acquisition, operation and disposition of its assets and of those of its affiliated companies, the disposition of its shares and of those of its affiliated companies, and its dealing with affiliated companies, and that Mr. Frederick H. Sparling, Director, Corporations Branch, Department of Consumer and Corporate Affairs, be appointed as inspector for that purpose.

3 On April 25, 1980, the respondent Couture, a member of the Commission, issued a subpoena under s. 114(10) of the *Canada Corporations Act* to Mr. Smallwood. The subpoena reads as follows:

> Upon the Application made by Mr. F.H. Sparling, inspector, pursuant to section 114(10) of the Canada Corporation Act, and pursuant to authority conferred by and under the said Act, you are hereby required and ordered to attend before R.S. MacClellan [*sic*], Q.C., a member of the Restrictive Trade Practices Commission, or before any other person named by him at the Battery Inn Hotel, Signal Hill Road, St. John's Newfoundland May 13 1980, at 10:00 o'clock in the forenoon and so forth from day to day thereafter as may be required to give evidence upon oath and bring with you the documents more fully particularized hereafter in connection with the above investigation.

4 The appellant Smallwood is the Honourable Joseph Roberts Smallwood, a former Premier and Minister of the Province of Newfoundland. He applied to the Federal Court Trial Division for an injunction enjoining Messrs. Sparling, Couture and MacLellan from acting upon the subpoena. In support of his application he filed an affidavit containing the following assertions:

> 5. In my dealings with Canadian Javelin Limited and/or in dealings with third parties involving matters affecting the said Canadian Javelin Limited, I have acted solely in the capacity as representative of Her Majesty the Queen in right of the Province of Newfoundland holding the office of Premier, and/or Minister of Finance, and/or Minister of Economic Development, and/or Minister of Justice and/or Attorney General;
>
> 6. Any evidence which I may be called upon to give or documents which I may be called upon to produce before the said R.S. MacLellan, Q.C., can relate only to matters arising out of the carrying out of my duties and responsibilities as representative of Her Majesty the Queen in right of the Province of Newfoundland;
>
> 7. Any testimony under oath which I may be called upon to make or any documentation I may be called upon to produce before the said R.S. MacLellan, Q.C., would result in a violation of Crown Privilege, a breach of my oath of office as

Minister of Her Majesty the Queen in right of the Province of Newfoundland and/or a violation of the doctrine of Cabinet Secrecy;

8. I shall be obliged to decline to reply to any questions put to me and shall be obliged to decline to produce any documents which may deal with matters relating to the exercise of my duties and responsibilities as a Minister of Her Majesty the Queen in right of the Province of Newfoundland;

9. The giving of testimony and/or the production of documents by me in the proposed examination would disclose a confidence of the Executive Council of the Province of Newfoundland;

10. Moreover, Respondent Luc A. Couture in his quality as member and Vice-Chairman of the Restrictive Trade Practices Commission and Respondent R.S. MacLellan in his quality as member of the Restrictive Trade Practices Commission being a "Federal Board, Commission or other Tribunal" as defined in s. 2(g) of the Federal Court Act (R.S.C. 1970, c. 10 (2nd supp.), as amended), have no right to inquire into the affairs and/or dealing of Her Majesty the Queen in right of the Province of Newfoundland as performed by her Ministers;

5 The Trial Division granted Mr. Smallwood's application and issued an injunction in the following terms:

THIS COURT DOTH ORDER AND ADJUDGE that each and every one of the Respondents as well as any other persons who shall have notice of this Injunction be and is hereby restrained from endeavouring to compel the attendance by JOSEPH ROBERTS SMALLWOOD to be questioned as a witness before the Respondent R.S. MacLELLAN or the Respondent LUC A. COUTURE or any members of the Restrictive Trade Practices Commission for the purpose of questioning the said JOSEPH ROBERTS SMALLWOOD with respect to or pertaining to any matter in which he was involved or of which he had knowledge in his capacity as Premier of the Province of Newfoundland.

6 Mr. Sparling's appeal to the Federal Court of Appeal was allowed and the injunction set aside. Pratte J., speaking for the unanimous Court, rejected the following three arguments advanced by counsel for Mr. Smallwood:

(1) The appellant is merely an inspector appointed under a federal statute who, as such, has no right to inquire into the affairs of Her Majesty the Queen in right of the Province of Newfoundland.

(2) Mr. Smallwood is not a compellable witness in this matter because, being a former Minister of the Crown, he is entitled to invoke the prerogative of the Crown and of Ministers of the Crown not to be compelled either to give discovery in a civil action or to testify in an inquiry.

(3) In any event, any testimony under oath that Mr. Smallwood might be called upon to give would result in a violation of Crown privilege (or public interest immunity), a breach of his oath of office and a violation of the doctrine of Cabinet secrecy.

7 The appellant was granted leave to appeal to this Court and the following constitutional question was set by order of the Chief Justice:

Does the Restrictive Trade Practices Commission and an inspector conducting an investigation under section 114 of the *Canada Corporations Act* have the constitu tional authority to enquire into the affairs, dealings or administration of the Crown in right of the Province of Newfoundland as performed by its Premier or other Minister?

8 The Attorneys General of Canada, Ontario, Quebec, Manitoba, Saskatchewan, Alberta, British Columbia and Newfoundland were granted leave to intervene in these proceedings. The Attorneys General of Quebec, Saskatchewan and Newfoundland subsequently withdrew. The Attorney General of Canada supports the position of the respondent and would answer the Chief Justice's question in the affirmative. The Provincial Attorneys General support Mr. Smallwood and would answer the question in the negative.

The constitutional question

9 Section 114 of the *Canada Corporations Act* provides for the investigation of companies incorporated under the Act. Javelin is such a company. The thirty-two subsections of s. 114 describe the procedure to be followed by the Restrictive Trade Practices Commission in carrying out an investigation. The following subsections are relevant to this appeal:

> *114* .(1) Five or more shareholders holding shares representing in the aggregate not less than one-tenth of the issued capital of the company or one-tenth of the issued shares of any class of shares of the company may apply, or the Minister on his own initiative may cause an application to be made, to the Restrictive Trade Practices Commission established under the *Combines Investigation Act* (hereinafter called the "Commission"), upon reasonable notice to the company or other interested party or *ex parte* if the Commission is of the opinion that the giving of notice would in view of the allegations made by the applicants or on behalf of the Minister unduly prejudice any investigation that might be ordered by the Commission, for an order directing an investigation of the company in respect of which the application is made.
>
> (2) Where it is shown to the Commission by the Minister or upon the solemn declaration of the applicant shareholders that there are reasonable grounds for believing that in respect of the company concerned,
>
> (a) its business or the business of a company affiliated therewith is being conducted with intent to defraud any person;
>
> (b) in the course of carrying on its affairs or the affairs of a company affiliated therewith, one or more acts have been performed wrongfully in a manner prejudicial to the interests of any shareholder;
>
> (c) it or a company affiliated therewith was formed for any fraudulent or unlawful purpose or is to be dissolved in any manner for a fraudulent or unlawful purpose; or
>
> (d) the persons concerned with its formation, affairs or management, or the formation, affairs or management of a company affiliated therewith, have in connection therewith been guilty of fraud, misfeasance or other misconduct,
>
> the Commission may issue its order for the investigation of the company, and appoint an inspector for that purpose.
>
> . . . . .
>
> (10) On *ex parte* application of the inspector or on his own motion a member of the Commission may order that any person resident or present in Canada be examined under oath before, or make production of any books or papers or other documents or records to the member or before or to any other person named for the purpose by the order of the member, and the member or the other person named by him may make such orders as seem to him to be proper for securing the attendance of such witness and his examination and the production by him of any books or papers or other documents or records, and may otherwise exercise, for the enforcement of such orders or punishment for disobedience thereof, all powers that are exercised by any superior court in Canada for the enforcement of subpoenas to witnesses or punishment of disobedience thereof.
>
> . . . . .
>
> (30) For the purposes of this section, the Commission or any member thereof has all the powers of a commissioner appointed under Part I of the *Inquiries Act* .

10 Pursuant to the *Inquiries Act* , R.S.C. 1970, c. 1-13, the Commissioners have the following powers:

> *4* . The commissioners have the power of summoning before them any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investiga tion of the matters into which they are appointed to examine.
>
> *5* . The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

11 The Commissioners' mandate orders that an investigation be conducted into the affairs and management of Javelin. It is the company which is the object of the investigation. It may be that much of the company's business was conducted with the government of Newfoundland but this, in my view, is not sufficient to transform the investigation into an inquiry into the affairs of the Crown in right of Newfoundland. There is nothing to indicate that Mr. Sparling has exceeded his mandate and I would agree with Mr. Justice Pratte when he concluded:

> The material filed in support of the application shows that the appellant Sparling was appointed to conduct an investigation of Canadian Javelin Limited and nothing in the record indicates that he exceeded or intends to exceed that mandate. The mere fact that, in the course of his investigation he might oblige a former Minister of a province to testify as to facts known by him in his capacity as Minister, would not change the object of the inquiry and transform it into an inquiry in the administration of that province.

12 Counsel for the appellant submits, however, that the mandate of the Commissioner was a colourable attempt by the federal government, under the guise of an inquiry pursuant to the *Canada Corporations Act* , to conduct a probe of the affairs of the government of Newfoundland and he relies on the decision of this Court in *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218 . In *Keable* the Commissioner was given a mandate under the *Public Inquiry Commission Act* , R.S.Q. 1964, c. 11 to investigate and report on allegedly illegal acts undertaken by various police forces in Quebec including the Royal Canadian Mounted Police. One of the constitutional questions which arose in that case was whether the Order-in-Council defining the mandate of the Commissioner was in whole or in part *ultra vires* the Province of Quebec. Mr. Justice Pigeon speaking for the majority concluded that the inquiry came within the scope of provin cial authority in the area of "The Administration of Justice in the Province", but that the Commissioner's mandate be amended to exclude references to the management of the R.C.M.P. Quoting from his reasons at p. 242:

> I thus must hold that an inquiry into criminal acts allegedly committed by members of the R.C.M.P. was validly ordered, but that consideration must be given to the extent to which such inquiry may be carried into the administration of this police force. It is operating under the authority of a federal statute, the *Royal Canadian Mounted Police Act* , (R.S.C. 1970, c. R-9). It is a branch of the Department of the Solicitor General, (*Department of the Solicitor General Act* , R.S.C. 1970, c. S-12, s. 4). Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force. *The doctrine of colourability is just as applicable in adjudicating on the validity of a commission's term of reference or decisions as in deciding on the constitutional validity of legislation* . As Viscount Simon said in *Attorney General for Saskatchewan v. Attorney General for Canada*, [1949] A.C. 110 , (at p. 124) "you cannot do that indirectly which you are prohibited from doing directly".
>
> (Emphasis added.)

13 I do not view the mandate of Mr. Sparling as a colourable attempt to investigate the affairs of the Crown in right of Newfoundland. There is nothing whatsoever in the mandate to indicate that the investigation goes beyond an inquiry into the affairs of Javelin. The case is clearly distinguishable from *Keable* on that basis. I find therefore that the issue raised by the constitutional question does not arise on the facts of this case and the question as set need not be answered.

14 I turn now to the more difficult issue raised on this appeal, namely, Mr. Smallwood's alleged immunity to give oral testimony or produce documents at the inquiry. Mr. Smallwood claims this immunity on three grounds: Crown privilege (public interest immunity), his oath of office and the doctrine of cabinet secrecy.

Campellability as a witness

15 A preliminary issue which must be determined prior to a consideration of public interest immunity is whether Mr. Smallwood is compellable as a witness. Does he, by virtue of his position as a former Minister, have any special claim which

would deny the Commission the right to subpoena him? *Wigmore on Evidence* , 1961, McNaughton revision, vol. 8, p. 748, states at para. 2370:

> *2370 .(c). Testimonial privilege of the executive not to be a witness* . The public (in the words of Lord Hardwicke) has a right to every man's evidence. Is there any reason why this right should suffer an exception when the desired knowledge is in the possession of a person occupying at the moment the office of *chief executive* of a state?
>
> There is no reason at all. His temporary duties as an official cannot override his permanent and fundamental duty as a citizen and as a debtor to justice. *The general principle of testimonial duty to disclose knowledge needed in judicial investigations is of universal force. It does not suffer an exemption which would apply irrespective of the nature of the person's knowledge and would rest wholly on the nature of the person's occupation* .
>
> . . . . .
>
> Let it be understood, then, that there is no exemption for officials as such or for the executive as such from the universal testimonial duty to give evidence in judicial investigations. The exemptions that exist are defined by other principles.
>
> (Emphasis added.)

16 In *R. v. Baines*, [1909] 1 K.B. 258 subpoenas were issued to the Prime Minister and the Home Secretary to require them to testify in criminal proceedings. They applied to have the subpoenas set aside on the basis they had no evidence to give which was relevant to any issue that could arise at the trial. Their applications were allowed on that basis but in the course of his judgment Bigham J. affirmed that (at p. 261):

> It must not be supposed that the position which the applicants occupy affords them any privilege. They stand in the same position as any other of His Majesty's subjects.

17 The decision in *Baines* was approved by the British Columbia Supreme Court in *R. v. Allerton* (1914), 17 D.L.R. 294 .

18 It would appear then that at common law a cabinet minister might not be exempted from presenting evidence in a court proceeding merely by virtue of his position as a minister of the Crown. It is necessary to consider whether this has been changed by statute.

19 *The House of Assembly Act* , R.S.N. 1970, c. 159, s. 19, provides:

> *19* . The House of Assembly and the members thereof shall hold, enjoy, and exercise such and the like privileges, immunities, and powers as are now held, enjoyed, and exercised by the House of Commons of the Parliament of Canada and by the members thereof.

20 The *Senate and House of Commons Act* , R.S.C. 1970, c. S-8 provides:

> **PRIVILEGES AND IMMUNITIES OF MEMBERS AND OFFICERS**
>
> *4* . The Senate and the House of Commons respectively, and the members thereof respectively, hold, enjoy and exercise,
>
> (a) such and the like privileges, immunities and powers as, at the time of the passing of the *British North America Act, 1867* , were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom, and by the members thereof, so far as the same are consistent with and not repugnant to that Act; and
>
> (b) such privileges, immunities and powers as are from time to time defined by Act of the Parliament of Canada, not exceeding those at the time of the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof respectively.
>
> *5* . Such privileges, immunities and powers are part of the general and public law of Canada, and it is not necessary to

plead the same, but the same shall, in all courts in Canada, and by and before all judges, be taken notice of judicially.

21 It seems to me that these statutes do not provide any immunities which did not exist at common law. Section 41 of the *Federal Court Act* , R.S.C. 1970 (2nd Supp.), c. 10 appears to apply only to documentary privilege and does not expressly create a privilege on the basis of status as a minister of the Crown. Nor does *The Oaths of Office Act* , R.S.N. 1970, c. 278 purport to create any privilege. I find therefore that the common law has not been changed as far as compellability in a court of law is concerned.

22 Counsel for Mr. Smallwood, however, raised the issue as to whether Mr. Smallwood was compellable as a witness at a public inquiry as opposed to a court of law. For assistance on this question I return to the judgment of Mr. Justice Pigeon in *Keable* (*supra*). Quoting from his reasons at pp. 244-45:

> I do not find it necessary to review at great length the numerous authorities cited on the fourth constitutional question. Because, at common law, a commission of inquiry has no power to compel the attendance of witnesses and to require the production of documents, any jurisdiction for such purposes depends on statutory authority, *and it seems clear that provincial legislation cannot be effective by itself to confer such jurisdiction as against the Crown in right of Canada* . In the recent case of *Her Majesty in right of Alberta v. C.T.C.*, [1978] 1 S.C.R. 61 , Laskin C.J., said with the concurrence of all but two of the other members of the Court (at p. 72):
>
> > ...a Provincial Legislature cannot in the valid exercise of its legislative power, embrace the Crown in right of Canada in any compulsory regulation.
>
> . . . . .
>
> Appellants submit that the decision of this Court in *Regina v. Snider*, [1954] S.C.R. 479 , means that a minister of the Crown is a compellable witness at a trial and they point out that under s. 7 of the provincial Act a commissioner has "all the powers of a judge of the Superior Court in term". *This enactment cannot, at least towards federal authorities, have the effect of making an inquiry the legal equivalent of a trial. Such an inquiry is rather in the nature of a discovery and it seems to be well established that, at common law, the Crown enjoys a prerogative against being compelled to submit to discovery* .
>
> (Emphasis added.)

23 Accepting on the authority of *Keable* that an inquiry is in the nature of a discovery, is Mr. Smallwood compellable as a witness at the inquiry? Unfortunately, we received little assistance from counsel on this issue, perhaps because there is a dearth of authority on the subject. While *Keable* is helpful as to the nature of a public inquiry, it was dealing with the question whether provincial legislation could confer jurisdiction on a commission of inquiry to compel the attendance of federal Crown witnesses. In the instant case we have the converse. Can federal legislation confer jurisdiction on a commission of inquiry to compel the attendance of provincial Crown witnesses? We have no constitutional problem here of the kind which arose in *Keable* .

24 Nevertheless *Keable* suggests that a public inquiry such as we have here may be more in the nature of a discovery than a court proceeding. To that extent therefore the case is helpful to Mr. Smallwood's cause if counsel is correct that the law already reviewed is applicable only to court proceedings. I do not believe, however, that *Keable* went that far. But, be that as it may, I think Mr. Smallwood faces a greater hurdle on the issue of his compellability as a witness. He is no longer a minister of the Crown in right of Newfoundland. He is a private citizen and called upon to testify as such. It may be, as will be discussed later in these reasons, that former ministers can claim public interest immunity in some circumstances with respect to specific oral or documentary evidence, but I can find no authority for the proposition that former ministers can claim complete testimonial immunity.

25 It seems to me that if I am correct in holding that the conduct of the inquiry is within the constitutional authority of the Restrictive Trade Practices Commission under the *Canada Corporations Act* because it is an inquiry into the affairs and management of Javelin, then there is no basis for Mr. Smallwood's claim to complete testimonial immunity. As was pointed out by *Wigmore* , he did not have it at common law in respect of court proceedings. Nor does he have it by statute. I see no

reason therefore why he should not be amenable to subpoena if he has relevant evidence to contribute towards a validly constituted federal inquiry conducted in the public interest. In so saying, of course, I do not prejudge the scope of his right to claim Crown privilege with respect to particular oral or documentary disclosures if such is legally available to him. This is the next issue I propose to address.

Documentary evidence

26 There is no statute in Newfoundland dealing with the privilege of the Crown in right of the province. It is necessary therefore to turn to the common law. The common law with respect to privilege vis-à-vis documentary evidence seems to be fairly clear.

27 The leading Canadian authority, is *R. v. Snider*, [1954] S.C.R. 479 in which this Court affirmed the right of the court to examine documents to ascertain whether there might be prejudice to the public interest in their disclosure. In *Snider* the Director of Taxation for the District of Vancouver was subpoenaed to give oral evidence and to produce the income tax returns of the accused in a criminal proceeding. The Minister of National Revenue objected. The following passage from the judgment of Rand J. at p. 482 delimits the scope of Crown privilege in this area:

> What is in debate are confidential communications and, for a better understanding of the question, the distinction is to be kept in mind between them and the matter which they deal with or express, that is, there may be confidential or secret matter apart from that of the communications themselves but to which they relate, or the secrecy may exist as to the matters which the communications themselves create or indeed to the fact of the communication alone. *It requires as its essential condition that there be a public interest recognized as overriding the general principle that in a court of justice every person and every fact must be available to the execution of its supreme functions* . As Lord Chancellor Hardwicke, in speaking against the Bill For Indemnifying Evidence, Cobbett's Parliamentary History 12, 675, 693, 1742, declared:
>
> > It has, my lords, I own, been asserted by the noble duke that the public has a right to every man's evidence — a maxim which in its proper sense cannot be denied. For it is undoubtedly true that the public has a right to all the assistance of every individual.
>
> And this applies as fully to the private suitor or an accused as to the public. The privilege is one to be asserted by or on behalf of a person or persons including the Crown to whose benefit it enures, and it may be waived only by the beneficiary; if the disclosure is proposed in a proceeding between third parties, the court itself must interpose to safeguard the privilege.
>
> *It springs, then, from a confidential communication coupled with a paramount public interest in permitting the secrecy surrounding the communication or its contents to be maintained* .
>
> (Emphasis added.)

The conclusion of the Court is perhaps best summarized at pp. 485-86 of Rand J.'s judgment:

> Once the nature, general or specific as the case may be, of documents or the reasons against its disclosure, are shown, the question for the court is whether they might, on any rational view, either as to their contents or the fact of their existence, be such that the public interest requires that they should not be revealed; if they are capable of sustaining such an interest, and a minister of the Crown avers its existence, then the courts must accept his decision. On the other hand, if the facts, as in the example before us, show that, in the ordinary case, no such interest can exist, then such a declaration of the minister must be taken to have been made under a misapprehension and be disregarded. *To eliminate the courts in a function with which the tradition of the common law has invested them and to hold them subject to any opinion formed, rational or irrational, by a member of the executive to the prejudice, it might be, of the lives of private individuals, is not in harmony with the basic conceptions of our polity* . But I should add that the consequences of the exclusion of a document for reasons of public interest as it may affect the interest of an accused person are not in question here and no implication is intended as to what they may be.
>
> What is secured by attributing to the courts this preliminary determination of possible prejudice is protection against executive encroachments upon the administration of justice; and in the present trend of government little can be more

essential to the maintenance of individual security. *In this important matter, to relegate the courts to such a subserviency as is suggested would be to withdraw from them the confidence of independence and judicial appraisal that so far appear to have served well the organization of which we are the heirs* . These are considerations which appear to me to follow from the reasoning of the Judicial Committee in *Robinson v. South Australia*, [1931] A.C. 704 .

(Emphasis added.)

28 It should be noted that this decision predates the House of Lord's decision in *Conway v. Rimmer*, [1968] A.C. 910 and was decided at a time when the prevailing law was that of absolute immunity as recognized in *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 .

29 *Conway v. Rimmer* (*supra*) remains the authority in England on this issue. It affirms the "relative immunity" position. However, of note are some comments made in the case with respect to cabinet minutes. They cannot be disclosed until such time as they are of historical interest (*per* Lord Reid at p. 952). Similar comments appear at p. 973 *per* Lord Hodson, at p. 987 *per* Lord Pearce and at p. 993 *per* Lord Upjohn.

30 Perhaps the most useful authority as far as its factual similarities to the present case are concerned is *Burmah Oil Co. v. Bank of England*, [1979] 3 All E.R. 700 (H.L.) . In that case Burmah Oil had brought an action against the Bank to set aside a sale of stock. The list of documents prepared by the Bank included docu ments which disclosed the part played by the government in the transaction between Burmah and the Bank and the advice received by the government. At the request of the Crown the Bank objected to discovery of some sixty-two documents. The documents were divided into three categories and the claims for privilege were advanced as follows:

Category A

These consist of communications between, to and from Ministers (including Ministers' Personal Secretaries acting on behalf of Ministers) and minutes and briefs for Ministers and memoranda of meetings attended by Ministers. All such documents relate to the formulation of the policy of the Government ... [the Minister thereafter sets out various aspects of government policy in relation to the financial difficulties of Burmah].

Category B

These consist of communications between, to and from senior officials of the Department of Energy, of the Treasury, and of the Bank including memoranda of meetings of and discussions between such officials, and drafts prepared by such officials (including drafts of minutes and briefs comprised in Category A), all such communications and drafts relating to the formulation of one or more aspects of the policy described in Category A.

Category C

These consist of memoranda of telephone conversations and meetings between senior representatives of major companies and other businessmen on the one hand and a Minister or senior officials of government departments and of the Bank on the other and memoranda of meetings of such officials and briefs for Ministers and drafts of such briefs, all recording or otherwise referring to commercial or financial information communicated in confidence by such company representatives and businessmen.

31 The action was subsequently narrowed to ten documents falling within Categories A and B. These were mainly minutes of meetings attended by bank and government officials some of whom were ministers.

32 It was held that when a claim of privilege is made in respect of documents which are *prima facie* relevant to the issues before the court, the court must review the documents in order to balance the competing interests of preventing harm to the state or the public service by disclosure and preventing frustration of the administration of justice by withholding disclosure.

33 The decision of the House of Lords is of interest in two aspects. First, the action took place at the discovery stage and the Crown was not a party to the original action. Edmund-Davies L.J. made the following comments at p. 720:

> There is a further feature in this case which it would be pusillanimous to ignore. It consists in the fact that this is not one of those cases where the complete detachment of the party resisting disclosure is beyond doubt. It is true that the government is not a party to these proceedings, but it would be unrealistic to think that the conduct of government's servants and advisers nowise enters into this case. Not only is it the fact that the Bank, left to its own devices, would have complied in full with Burmah's request for discovery, but its only opponent (through the intervention of the Attorney-General) is the government, whose own role must inevitably and inescapably be scrutinised and may be subjected to criticism. *Accordingly, since not only justice itself but also the appearance of justice is of considerable importance, the balancing exercise is bound to be affected to some degree where the party objecting to discovery is not a wholly detached observer of events in which it was in no way involved* . It cannot realistically be thought that the government is wholly devoid of interest in the outcome of these proceedings. On the contrary, it has a very real and lively interest, for were Burmah to succeed it could only be on the basis that the Bank behaved unconscionably, and the evidence indicates that the Bank was acting throughout in accordance with government instructions.
>
> (Emphasis added.)

Second, the House of Lords unanimously recognized that these were documents which belonged to a "class" of documents which would, according to *Conway v. Rimmer* (*supra*), be absolutely protected from production as being "cabinet minutes and the like". Nevertheless, their decision that the documents should not be disclosed was taken after the documents had been examined and seems to have been based on their finding that the documents were not relevant to the issue between Burmah and the Bank. It does not appear to have been based on any absolute principle of public interest immunity. The decision indicates that it is the role of the courts, not the administration, to determine whether disclosure of the documents would be injurious to the public interest.

Oral evidence

34 Having concluded that there is no absolute privilege *vis-à-vis* the documents, I must now determine whether the same principle applies to oral testimony. *Halsbury's Laws of England* , vol. 17, 4th ed., 1976, at p. 167 states:

> *238. Official communications* . Secrets of state, state papers, confidential official documents and communications between the government and its officers or between such officers are inadmissible evidence if their disclosure would be contrary to the public interest.
>
> The same principle applies to oral evidence, although it will normally not be possible to prevent a witness from giving evidence entirely, since he may be able to give both evidence protected by this rule and other relevant evidence; thus an application by the Crown to set aside a subpoena to such a witness will be refused.

35 In *Duncan v. Cammell, Laird & Co.* (*supra*) Viscount Simon L.C. stated at p. 643:

> The present opinion is concerned only with the production of documents, but it seems to me that the same principle must also apply to the exclusion of evidence which, if given, would jeopardize the interests of the community.

This statement was cited with approval in the decision of Sachs J. in *Broome v. Broome*, [1955] 1 All E.R. 201 . In that case Mrs. Broome, in the course of a petition for divorce, required information from the Soldiers', Sailors', and Airmen's Families Association. Subpoenas were issued to Mrs. Allsop, a member of the Association, and to the Secretary of State requesting documents. The claim of the Crown requesting privilege *vis-à-vis* Mrs. Allsop's testimony failed on a procedural ground but in the course of his judgment Sachs J. made the following observations at pp. 205-06:

> When, however, one had regard to the issues which were being contested in the present case, it was obvious that the case had so developed that the evidence of Mrs. Allsop might well be relevant to points which had arisen before there was any occasion for reconciliation between the parties. Thus there were disputes both as to what accommodation could have been secured by the husband at the time when his wife arrived in Hong Kong; as to whether or not the accommodation he in fact secured was reasonable accommodation in the circumstances; and as to matters relating to general conditions in Hong Kong. *Until questions were put to the witness it was obviously impossible to tell whether or not they came within the area of S.S.A.F.A. activities for which the Minister of War was stated to desire protection* . An application to set aside the

subpoena would, if granted, have prevented the witness even being sworn, and would certainly have prevented her having given evidence on any fact, whether or not it was one against the public interest to disclose. Further, any certificate in a "blanket form" which stopped a witness going into the witness-box seems contrary in principle to those portions of the decided cases which enjoin Ministers before giving a certificate as regards documents to examine each in turn in the light of the issues arising in the case.

In those circumstances it seemed to me that even if it was within the competence of a Minister of the Crown to prevent a witness giving evidence on some set of facts or class of facts, it was surely wrong to adopt a procedure which would prevent the witness giving any evidence whatsoever of any sort . Certainly nothing in *R. v. Baines* assisted counsel, as the present subpoena did not refer to a witness who could give no relevant evidence, nor was the subpoena oppressive in any way. Accordingly, I ruled that the application to set aside the subpoena failed.

(Emphasis added.)

36 It appears to me that, in the absence of any statutory provision which would override the common law, the rule with respect to oral testimony is the same as the rule with respect to documents, *i.e.* it is the rule of "relative immunity".

Cabinet secrecy

37 The other basis of Mr. Smallwood's claim to immunity is the doctrine of cabinet secrecy. The concept of cabinet secrecy and collective cabinet responsibility was discussed in *Attorney-General v. Jonathan Cape Ltd.*, [1975] 3 All E.R. 484 . In that case Mr. Crossman who had been a cabinet minister from 1964 to 1970 had kept diaries which he intended to publish. After his death in 1974 a firm of publishers wished to publish the diaries and a newspaper published serialized extracts from them. The Attorney-General brought actions seeking permanent injunctions restraining these publications on the basis that they were of a confidential nature. This confidentiality was premised on the doctrine of joint cabinet responsibility.

38 Lord Widgery C.J. denied the Attorney General's request. The purpose of the doctrine is, of course, to maintain the confidentiality of the views of individual cabinet ministers in reaching joint decisions. Lord Widgery held, however, that there was a time limit on the application of the doctrine. His conclusions are summarized in the following passage from his judgment at pp. 495-96:

Applying those principles to the present case, what do we find?

1. In my judgment, the Attorney-General has made out his claim that the expression of individual opinions by cabinet ministers in the course of cabinet discussion are matters of confidence, the publication of which can be restrained by the court when this is clearly necessary in the public interest.

2. The maintenance of the doctrine of joint responsibility within the cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual ministers.

3. There must, however, be a limit in time after which the confidential character of the information, and the duty of the court to restrain publication, will lapse. Since the conclusion of the hearing in this case *I have had the opportunity to read the whole of volume I of the diaries, and my considered view is that I cannot believe that the publication at this interval of anything in volume I would inhibit free discussion in the cabinet of today, even though the individuals involved are the same, and the national problems have a distressing similarity with those of a decade ago* . It is unnecessary to elaborate the evils which might flow if at the close of a cabinet meeting a minister proceeded to give the press an analysis of the voting, but we are dealing in this case with a disclosure of information nearly 10 years later.

It may, of course, be intensely difficult in a particular case, to say at what point the material loses its confidential character, on the ground that publication will no longer undermine the doctrine of joint cabinet responsibility. It is this difficulty which prompts some to argue that cabinet discussions should retain their confidential character for a longer and arbitrary period such as 30 years, or even for all time, but this seems to me to be excessively restrictive. *The court should intervene*

> *only in the clearest of cases where the continuing confidentiality of the material can be demonstrated* . In less clear cases — and this, in my view, is certainly one — reliance must be placed on the good sense and good taste of the minister or ex-minister concerned.
>
> In the present case there is nothing in Mr. Crossman's work to suggest that he did not support the doctrine of joint cabinet responsibility. 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.
>
> (Emphasis added.)

39 On the authority of the *Cape* case (*supra*) it seems to me 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.

40 In summary, it seems to me that for the above reasons the injunction issued by the Federal Court, Trial Division, was properly set aside by the Feder al Court of Appeal. Mr. Smallwood has no exemption from the universal testimonial duty to give evidence simply by virtue of his status as former Premier and Minister of the Province of Newfoundland. Nor does he enjoy either by statute or at common law any blanket immunity to give oral testimony or produce documents. 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.

41 I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors of record:
Solicitors for the appellant: *Ahern, Nuss & Drymer* , Montreal.
Solicitors for the respondent: *Desjardins, Ducharme* , Desjardins & Bourque, Montreal.
Solicitor for the intervener the Attorney General of Canada: *R. Tassé* , Ottawa.
Solicitor for the intervener the Attorney General for Alberta: *Ross W. Paisley* , Edmonton.
Solicitor for the intervener the Attorney General of British Columbia: *The Ministry of Attorney General* , Victoria.
Solicitor for the intervener the Attorney General of Manitoba: *The Department of the Attorney General of Manitoba* .
Solicitor for the intervener the Attorney General for Ontario: *Rendall Dick* , Toronto.