A RATIONAL APPROACH TO CABINET IMMUNITY UNDER THE COMMON LAW

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The public interest immunity (PII) doctrine empowers the government to suppress information, the disclosure of which would injure the community as a whole. However, when such information is relevant to the fair adjudication of legal rights, a tension arises between two competing aspects of the public interest: the interest of good government and the interest of justice. This tension raises questions of constitutional importance. Who should decide which aspect of the public interest must win? How should that decision be made? The aim of this article is to address these questions. In the first section, it is claimed that the courts, as opposed to the government, should have the final word on the validity of PII claims, as it would be contrary to the rule of law to prevent them from meaningfully reviewing the validity of PII claims and controlling the admissibility of evidence in legal proceedings. In addition, because of their greater independence and impartiality, judges are better placed than public officials to fairly adjudicate PII claims, especially when the government is a party to the proceedings. No classes of government secrets, not even Cabinet secrets, should be exempted from judicial review. While there is a consensus on these principles under the common law, the level of deference afforded to Cabinet immunity claims, and the way in which these claims are assessed, is not consistent in the Commonwealth. To fix this shortcoming, in the second section, it is argued that the courts should adopt a new rational approach consisting of four pillars: a narrow standard of discovery, an executive onus of justification, a cost-benefit analysis, and a judicial duty to minimize injury. The implementation of a rational approach would bolster predictability, certainty, and transparency in the judicial assessment of Cabinet immunity claims, and foster a better balance between the interests of good government and justice.

TABLE OF CONTENTS

I. INTRODUCTION 44
II. JUDICIAL REVIEW OF PUBLIC INTEREST IMMUNITY CLAIMS 45
A. JUDICIAL REVIEW OF PUBLIC INTEREST IMMUNITY CLAIMS IN GENERAL 45
B. JUDICIAL REVIEW OF CABINET IMMUNITY CLAIMS IN PARTICULAR 54
III. ASSESSMENT OF PUBLIC INTEREST IMMUNITY CLAIMS 68
A. ABSTRACT ASSESSMENT OF PUBLIC INTEREST IMMUNITY CLAIMS 68
B. ACTUAL ASSESSMENT OF PUBLIC INTEREST IMMUNITY CLAIMS 78
IV. CONCLUSION 88

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I. INTRODUCTION

As a matter of constitutional convention, Cabinet secrecy is fundamental to the proper functioning of the system of responsible government, as it empowers ministers to speak with candour during Cabinet deliberations, fosters an efficient collective decision-making process, and enables ministers to remain united in public, whatever disagreements they may have in private.[1] However, given their political nature, conventions cannot be relied upon to prevent the disclosure of Cabinet secrets in litigation. Indeed, the courts are responsible for the enforcement of legal, as opposed to political, rules. That said, nothing prevents the courts from relying on the rationale supporting a convention to extend the scope of a legal doctrine under the common law. This is what happened when the courts extended the scope of the doctrine of public interest immunity (PII), or Crown privilege, to Cabinet secrets.

Under the PII doctrine, the government can object to the production of government secrets in litigation, if their production would injure the public interest. A PII claim creates a tension between two competing aspects of the public interest in the preservation of peace and social order: the public interest in the proper administration of justice, and the public interest in the proper administration of government. The "interest of justice" requires that the courts have access to all the information relevant to the case before them in the search for the truth. If the judge does not have access to the relevant evidence, the litigant cannot have meaningful access to justice. A litigant who is deprived of relevant evidence because of a PII claim can lose a valid case and suffer a denial of justice. In contrast, the "interest of good government" requires that the government protect the privacy of its secrets, the publication of which would injure the whole community. The interest of good government captures numerous concerns, such as national security, defence, international relations, and the proper functioning of the system of responsible government.

The tension caused by a PII claim raises questions of "high constitutional importance" about the relationship between the respective powers of the judicial branch and the executive branch in a free and democratic society governed by the rule of law.[2] Indeed, if the government can refuse to produce documents in an arbitrary manner, the power of the courts to do justice is undermined. The questions raised by the tension between the government and the courts can be framed as follows: which branch should have the final word on which government secrets can or cannot be produced in litigation, and what process should be followed to make that determination? The first question raises the issue of the courts' power to review and overrule a ministerial objection to the production of government secrets. The second raises the issue of how the weighing and balancing of the competing aspects of the public interest should be carried out. PII has been described as a principle of constitutional law connected to the administration of justice, as opposed to a simple rule of discovery or evidence.[3]

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1 These three public interest rationales will be referred to as the candour, the efficiency, and the solidarity rationales. See generally Yan Campagnolo, "The Political Legitimacy of Cabinet Secrecy," 51:1 RJTUM [forthcoming in 2017].

2 *Duncan v Cammell, Laird & Co*, [1942] UKHL 3, [1942] AC 624 at 629, Simon LC [*Duncan*].

3 *Re Grosvenor Hotel, London (No 2)*, [1965] 1 Ch 1210 at 1243 (CA), Lord Denning MR [*Grosvenor Hotel*]; TG Cooper, *Crown Privilege* (Aurora, Ont: Canada Law Book, 1990) at 5–8; Alan W Mewett, "State Secrets in Canada" (1985) 63:2 Can Bar Rev 358; The Right Hon The Lord Mackay, "The Development of the Law on Public Interest Immunity" (1983) 2 CJQ 337 at 337.

The objective of this article is to critically examine how the courts have dealt with PII claims, especially Cabinet immunity claims,[4] under the common law in the United Kingdom, Australia, New Zealand, and Canada (at the provincial level).[5] The article is divided into two sections. In the first section, I will review the historical evolution of the PII doctrine. I will show that rule of law considerations have led the courts to affirm and exercise the power to review and overrule PII claims. Despite this positive development, I will argue that the level of deference afforded to Cabinet immunity claims by the courts, and the manner in which such claims are weighed and balanced, is not consistent in the jurisdictions under study. Some jurisdictions (the UK and Australia) are deferential toward Cabinet immunity claims, while others (New Zealand and Canada) are non-deferential. In the second section, I will argue that the courts should adopt a new rational approach to bolster predictability, certainty, and transparency in their assessment of Cabinet immunity claims. I will finally introduce the four pillars of the proposed rational approach: a narrow standard of discovery, an executive onus of justification, a cost-benefit analysis, and a judicial duty to minimize injury.

II. JUDICIAL REVIEW OF PUBLIC INTEREST IMMUNITY CLAIMS

A. JUDICIAL REVIEW OF PUBLIC INTEREST IMMUNITY CLAIMS IN GENERAL

1. TWO ANTITHETICAL POSITIONS

The debate about which branch of the State should have the final word on whether documents, the publication of which is said to injure the public interest, should be admitted in court, can be traced back to *Robinson v. State of South Australia (No. 2)*[6] and *Duncan*. It is difficult to imagine two cases where the factual foundations were more different. The common background is that both cases involved civil proceedings in negligence in which claims of Crown privilege were sustained by the lower courts, in respect of documents that seemed truly relevant to the fair disposition of the cases. They were otherwise at opposite ends of the spectrum: *Robinson* was a civil action against the State of South Australia with respect to the mismanagement of a wheat marketing scheme, in which the government opposed the production of 1892 documents about the business of the Wheat Harvest Board.[7] In comparison, *Duncan* was a civil action against the builders of the Thetis, a submarine armed with secret torpedo tubes, which sank in 1939 during the vessel's first submergence test, killing 99 crewmen, in which the government objected to the production of 16 documents, including the submarine's plans.[8]

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4 Cabinet immunity claims are a subset of PII claims relied upon to protect Cabinet secrets specifically.

5 The common law doctrine of Cabinet immunity has been superseded at the federal level in Canada, by the adoption of section 39 of the *Canada Evidence Act*, RSC 1985, c C-5. See also section 69 of the *Access to Information Act*, RSC 1985, c A-1, which excludes Cabinet secrets from the scope of the *Act*. For a detailed analysis of these provisions, see Yan Campagnolo, "The History, Law, and Practice of Cabinet Immunity in Canada" 47:2 RGD [forthcoming in 2017].

6 [1931] UKPC 55, [1931] AC 704 (PC) [*Robinson*].

7 *Ibid* at 704–706.

8 *Duncan*, *supra* note 2 at 625–27.

The fact that the claims of Crown privilege were not treated the same way by the Judicial Committee of the Privy Council in *Robinson*, and the Appellate Committee of the House of Lords in *Duncan*, is not surprising given their different backgrounds: *Robinson* involved the production of commercial documents of a disbanded department in a time of peace, while *Duncan* involved the production of national security documents that could have been useful to the enemy in a time of war. If the cases had been distinguished on that basis, no debate would likely have arisen. The debate arose because the Privy Council held that the judicial branch had in reserve the inherent power to inspect and order the production of government secrets, while the House of Lords denied the existence of that power. In short, *Robinson* asserted judicial supremacy while *Duncan* asserted executive supremacy.

a. Assertion of Judicial Supremacy

The problem in *Robinson* was that the government was plainly relying on the privilege for an improper purpose. By objecting to the production of relevant documents, it was attempting to avoid legal liability. Lord Blanesburgh, for the Privy Council, stressed that the privilege is a "narrow one, most sparingly to be exercised"[9] and should not be extended beyond what is necessary to protect the public interest. Given the "increasing extension of State activities into the spheres of trading business and commerce,"[10] the privilege should not be used to circumvent legal liability arising from such activities. In a time of peace, claims of Crown privilege for commercial documents, as opposed to political documents, should be uncommon. In general, the fact that the production of the documents could "prejudice the [government's] own case or assist that of the other side" was not a valid reason to resist production;[11] on the contrary, it was "a compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security."[12]

A traditional way to control the legality of a claim of privilege was to review the form of the claim to ensure that the proper procedure had been followed. Lord Blanesburgh stated that the claim should usually be made under oath by a minister after personal consideration of the matter. The sworn statement should describe the nature of the documents and the nature of the injury that would be sustained by their production. In *Robinson*, the statement filed on behalf of the responsible Minister was defective because it had not been made under oath, and did not describe the nature of the documents or injury. The mere reference to the fact that the documents were official or confidential was insufficient. The claim thus seemed to have been made "inadvisedly or lightly or as a matter of mere departmental routine."[13]

The case could have been decided solely on that basis, but it would not have solved the underlying problem. Overruling the claim because of procedural flaws could have led to the production of documents that must, in the public interest, remain confidential. And the alternative of requesting the Minister to file a new statement, in the proper form, did not address the concern that the Minister could use the privilege as a tactical weapon in court. Lord Blanesburgh's solution was to remit the matter to the Supreme Court of South

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9 *Robinson*, *supra* note 6 at 714.
10 *Ibid* at 715.
11 *Ibid* at 715–16.
12 *Ibid* at 716.
13 *Ibid* at 718.

Australia, with directions to inspect, in camera, the documents to determine whether or not production would injure the interest of good government. In doing so, he favoured substance over form. The proper stance was one of deference, not submission, to the Minister's views: "in any case of doubt, [the judge should not] resolve the doubt against the State without further inquiry from the Minister."[14] This approach, which was supported by the relevant English, Scottish, and Australian authorities,[15] as well as by the express terms of the *South Australian Rules of Court*,[16] resulted in the production of several documents to the plaintiff.[17]

b. Assertion of Executive Supremacy

Robinson was then the highest approval of judicial inspection to determine whether production would injure the public interest. It is thus not surprising that the families of the crewmen who lost their lives in the Thetis disaster relied on it in their fight against the shipbuilders. *Duncan* was heard by seven members of the House of Lords, who unanimously agreed to dismiss the approach taken in *Robinson*, even though *Duncan* fell directly within the "State security" exception carved by Lord Blanesburgh in *Robinson*.[18]

In *Duncan*, Lord Simon, for the House of Lords, sought to clarify the Crown privilege doctrine. The basic rule was that "documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld."[19] There were two ways of showing injury to the public interest: "by having regard to the contents of the particular document, or … by the fact that the document belongs to a class which … must … be withheld from production."[20] "Contents claims" are based on the argument that the substance of the documents is sensitive. These claims are made when production of the documents would injure, for example, national security, defence, or international relations. In contrast, "class claims" are based on the argument that the documents are part of a sensitive category of documents, without regard to their substance. These claims are made when production of the documents would injure the proper functioning of the public service, in the sense that the candour of the communications would decrease if they were not kept private.[21] Cabinet documents and other high-level documents relating to the formulation of policy or the making of decisions are examples of categories of documents which have been protected on that basis. While *Duncan* involved a contents claim based on national security and *Robinson* a class claim based on candour, the cases were not distinguished on that basis.

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14 *Ibid* at 725.

15 England: *Hennessy v Wright* (1888), 21 QBD 509 [*Hennessy*]; *Re Joseph Hargreaves Ltd*, [1900] 1 Ch 347 (CA); *Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd*, [1916] 1 KB 822 (CA) [*Asiatic Petroleum*]. Scotland: *Henderson v M'Gown*, [1916] SC 821. Australia: *Marconi's Wireless Telegraph Co Ltd v The Commonwealth (No 2)*, [1913] HCA 19, 16 CLR 178; *The Queensland Pine Company Limited v The Commonwealth of Australia*, [1920] Qd SR 121.

16 The *South Australian Rules of Court*, Order 31, r 14(2) as it appeared on 19 May 1931, cited in *Robinson*, *supra* note 6 at 723, allowed the courts to inspect documents subject to a private law privilege claim. Lord Blanesburgh considered that it also applied to a Crown privilege claim.

17 Carleton Kemp Allen, *Law and Orders: An Inquiry Into the Nature and Scope of Delegated Legislation and Executive Powers in English Law*, 3rd ed (London: Stevens & Sons, 1965) at 334–35, n 47.

18 *Robinson*, *supra* note 6 at 716.

19 *Duncan*, *supra* note 2 at 636.

20 *Ibid*.

21 *Ibid* at 635. The candour rationale stemmed from *Smith v The East India Company* (1841), 1 Ph 50.

The disagreement concerned whether the courts had the inherent power to overrule a claim of Crown privilege. Lord Simon did not think so. His approach was formalistic: if a claim had been made in the proper form, the courts were bound to accept it. This meant that the sanction for abuse of the privilege would be political, not legal, for the Minister could be held accountable before Parliament, but not the courts. In support of his position, Lord Simon raised substantive and procedural reasons. Substantively, he relied on handpicked English[22] and Scottish[23] authorities which, in his view, confirmed that ministers should have the final word on the production of government documents in court given their greater expertise to assess the injury to the interest of good government. Procedurally, he identified two further reasons against judicial supremacy: the judge cannot inspect the documents in camera, and the judge should not communicate with the government *ex parte*. These procedural reasons were unfounded at the time,[24] and courts have subsequently confirmed that in camera and *ex parte* inspections were procedurally appropriate to assess the validity of PII claims.

Lord Simon was prepared to give very broad discretion to the government over claims of privilege but, in attempting to maintain the appearance of legality, he insisted that the decision to suppress the documents is the decision of the judge, for "[i]t is the judge who is in control of the trial, not the executive."[25] He also laid down certain principles to limit the scope of the privilege. In his view, it would be improper to rely on Crown privilege to hide misconduct, prevent public criticism, and avoid legal liability. Crown privilege should only be claimed where the "public interest would otherwise be damnified,"[26] that is: where production would be injurious to national security, defence or international relations (contents claims); or where a class of documents must be kept confidential for the proper functioning of the public service (class claims). Most of what Lord Simon said about the scope of the privilege was consistent with *Robinson*, except that he did not give the courts any meaningful control over the exercise of the privilege by the government.

2. BRINGING AN UNLIMITED EXECUTIVE POWER INTO JUDICIAL CUSTODY

To say that *Duncan* was controversial would be an understatement. For some, it represented the "high-water mark of undue judicial indulgence to executive discretion"[27] in the field of Crown privilege. While the publication of the plans of a submarine in a time of war, where the survival of the State is at stake, would likely have been injurious to the public interest,[28] it is unclear whether national security was the real justification behind the

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22 *Beatson v Skene* (1860), 5 H & N 838.

23 *Earl v Vass* (1822), 1 Sh App 229 (HL); *Admiralty v Aberdeen Steam Trawling and Fishing Co Limited*, [1909] SC 335.

24 Before *Duncan*, *supra* note 2, the courts had taken a position in favour of in camera inspections of government documents: see *Hennessy*, *supra* note 15, Field J; *Asiatic Petroleum*, *supra* note 15, Scrutton J; *Spigelman v Hocken* (1933), 50 TLR 87 (KB), Macnaghten J; *Robinson*, *supra* note 6. As for *ex parte* inspections, while not ideal in theory, in practice they are better than no inspection at all from the litigant's perspective. See HG Hanbury, "Equality and Privilege in English Law" (1952) 68:2 Law Q Rev 173 at 181.

25 *Duncan*, *ibid* at 642.

26 *Ibid*.

27 DC Hodgson, "Recent Developments in the Law of Public Interest Immunity: Cabinet Papers" (1987) 17:2 VUWLR 153 at 155.

28 Sir William Wade & Christopher Forsyth, *Administrative Law*, 11th ed (Oxford: Oxford University Press, 2014) at 712.

government's objection. Indeed, some of the documents subject to the claim of privilege had previously been produced to a commission of inquiry, which had referred to them in its report. Further, one year after the House of Lords' decision, in a complete volte-face, the government produced some of the privileged documents at the request of the shipbuilders. This suggests that *Duncan* may yet be another example of cases where the government relied on Crown privilege to undermine litigation, rather than to protect sensitive information.[29]

a. Criticism of Executive Supremacy

From a rule of law perspective, *Duncan* raised three problems. First, it deprived the courts of the power to decide what evidence should be admissible in legal proceedings, in breach of the separation of powers which should exist between the executive and the judicial branches. Crown privilege could give the executive branch control over the admissibility of evidence in legal proceedings and allow it to interfere in a case for self-interested reasons.[30] Without access to relevant evidence, the right to a fair trial is undermined. Lord Simon's claim that the decision to suppress the evidence was the judge's decision was a smokescreen, as the judge was not given any discretion over the matter. How can the judge be in control of the proceedings if he or she must submit to the Minister's command?[31] Cecil Wright described this self-imposed judicial restraint as an "abdication by the courts of their proper function of determining what is admissible or inadmissible evidence."[32] This, in turn, would give the executive the opportunity to abuse the privilege: "The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to [public] officials too ample opportunities for abusing the privilege."[33]

Second, *Duncan* equated the public interest with the interest of good government, thus overlooking an important aspect of the public interest: the interest of justice. Harry Street observed the public interest required that individuals be able to assert their rights in court.[34] Roscoe Pound made the same point when he said that the main interest of the public is to secure the rights of each individual.[35] The conflict created by a claim of privilege did not pit public against private interests, it rather involved two competing aspects of the public interest: the interest of justice and the interest of good government. While ministers usually have more expertise to assess the latter, judges have more expertise to assess the former. Lord Simon's narrow view of the public interest meant that the privilege could be claimed in cases where there was a low risk of trivial injury to the interest of good government, even

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29 Maureen Spencer, "Bureaucracy, National Security and Access to Justice: New Light on *Duncan* v *Cammell Laird*" (2004) 55:3 N Ir Leg Q 277 at 296.

30 Stephen G Linstead, "The Law of Crown Privilege in Canada and Elsewhere Part 2" (1969) 3:2 Ottawa L Rev 449 at 462.

31 On this point, see the forceful dissenting opinion of Justice Mondelet in *Gugy v Maguire* (1863), 13 LCR 33 (QB). Allen, *supra* note 17, observed that, on the account of Lord Simon, "the judge becomes a piece of procedural machinery to put a conclusion to a legal process" (*ibid* at 336).

32 Cecil A Wright, "Evidence—Objection by Minister of State to Production—Public Interest" (1942) 20 Can Bar Rev 805 at 806.

33 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law Including the Statutes and Decisions of All Jurisdictions of the United States* (Boston: Little, Brown, & Co, 1904), § 2376.

34 Harry Street, "State Secrets—A Comparative Study" (1951) 14:2 Mod L Rev 121 at 130–31.

35 Roscoe Pound, "Administrative Discretion and Civil Liberties in England: The *Liversidge*, *Greene*, and *Duncan* Cases" (1943) 56:5 Harv L Rev 806 at 814. See also AL Goodhart, "Notes" (1942) 58:4 Law Q Rev 433 at 436.

though the evidence was of crucial importance to the fair disposition of the case.[36] The flaw in Lord Simon's reasoning was the assumption that the interest of good government, however low, must always trump the interest of justice, however high. What was required instead was a weighing and "balancing of the conflicting interests … [because] there [was] no justification for the assumption that governmental interest [overrode] all other considerations."[37]

Third, *Duncan* placed the government in a position where it was judge and party, in breach of the principle that "no one may be judge in his own cause."[38] How can a minister be expected to arbitrate fairly between the interest of good government and the interest of justice? The use of Crown privilege, legitimate or not, in cases where the government was a party would give the perception that justice had not been done, especially if the outcome was to deprive the litigant of critical evidence. John Wigmore stated that "[t]he lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it is to shield his wrongdoing under the privilege."[39] This was a risk in making the government the final decision-maker. From a rule of law perspective, the courts would have been in a far better position to decide issues of privilege in a fair and impartial manner, given their institutional independence.

Ellis v. Home Office is a classic illustration of these rule of law problems.[40] While awaiting trial in prison, Ellis had been beaten and severely injured by a fellow inmate. As a result, he sued the prison authorities for damages in negligence, alleging that the inmate was mentally ill and that the prison authorities had failed to take appropriate measures to prevent the aggression. To win, Ellis had to prove that the prison authorities were aware of the danger posed by the inmate. Yet, the government objected to the production of relevant police and medical reports based on a class claim. The lower Court felt obliged to accept the objection in light of *Duncan*, but confessed an "uneasy feeling that justice may not have been done."[41] While the Court of Appeal noted that "one facet of the public interest is that justice should always be done and should be seen to be done,"[42] it was also bound by stare decisis. In *Ellis*, justice did not appear to have been done: the State was seen as an interested party relying on the privilege to avoid legal liability to the detriment of the interest of justice. *Ellis* was seen as a "mockery of justice"[43] and it was not the only example.[44]

The doctrine of executive supremacy was most insidious in respect of class claims, which proliferated in the aftermath of *Duncan*. Such claims could easily be misused given that the government had absolute discretion to protect any class of documents deemed necessary for the proper functioning of the public service, without regard to their substance. The vagueness and the breadth of the doctrine could lead to abuse of power. Allen wrote that "'abuse of

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36 Hodge M Malek, ed, *Phipson on Evidence*, 18th ed (London: Sweet & Maxwell, 2013) at 789.
37 Street, *supra* note 34 at 134.
38 DEC Yale, "Iudex in Propria Causa: An Historical Excursus" (1974) 33:1 Cambridge LJ 80 at 80.
39 Wigmore, *supra* note 33, § 2376.
40 [1953] 2 QB 135 (CA) [*Ellis*].
41 *Ibid* at 137 (quoting Justice Devlin).
42 *Ibid* at 147, Morris LJ.
43 Theo Ruoff, "Links with London" (1957) 30 Austl LJ 456 at 457.
44 The government tried to suppress evidence "because it was favourable [to the plaintiff's] case" (*Odlum v Stratton* (1946), Wiltshire Gazette (HC), cited in Allen, *supra* note 17 at 338, n 56). See also *Broome v Broome*, [1955] 2 WLR 401; *Gain v Gain*, [1961] 1 WLR 1469.

power' does not consist only in gross, unscrupulous excess of it, but also in gradual and often well-meaning extension, in a timorous rather than an aggressive spirit."[45] The danger was not so much that Ministers would behave in an oppressive manner, "but under the influence of that exaggerated, not to say morbid, instinct of secretiveness which is an occupational disease of bureaucracy."[46] Pushed to the extreme, class claims could be used to protect any government document, whatever their nature. The sole limits placed on the exercise of Crown privilege were self-imposed by the government.[47]

b. Demise of Executive Supremacy

As some scholars have noted, "[p]robably no modern rule of English law has attracted so much criticism."[48] In light of the rule of law issues afflicting *Duncan*, it is not surprising that the precedent was not followed by the highest courts in the Commonwealth. In 1956, in *Glasgow Corporation v. Central Land Board*,[49] the House of Lords, acting as the highest court for Scotland, held that Lord Simon had misconstrued the Scottish authorities in *Duncan*. Indeed, it turned out that Scottish courts always had, as a matter of law, the power to overrule a ministerial objection; although, as a matter of practice, that power had been rarely exercised. The admission that *Duncan* had been decided per incuriam created a schism between the law of England and the law of Scotland on this central constitutional issue. Similarly, the Supreme Court of Canada,[50] the New Zealand Court of Appeal,[51] and the Supreme Court of Victoria[52] in Australia, asserted the power to overrule ministerial objections. Justice Rand best articulated the argument against the conclusive nature of claims of Crown privilege in *R v. Snider*: "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."[53]

These developments did not go unnoticed in London. It was surely unfortunate that there were differences of opinion on this central constitutional issue among Westminster States. In 1963, Arthur Goodhart argued that *Duncan* should be limited to the facts that were before the House of Lords.[54] Lord Simon had upheld a claim of Crown privilege for the plans of a submarine because production would have been injurious to national security in a time of war. *Duncan* could be seen as a binding authority only insofar as contents claims based on national security were involved. Lord Simon's statements regarding the conclusive nature

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45 Allen, *ibid* at 332.

46 *Ibid* at 337.

47 After *Ellis*, *supra* note 40, the government promised that class claims would not be used to protect: factual documents (such as accident, medical, and technical reports) in civil proceedings; statements made to the police if the author of the statement consented to production or had died; and documents needed for the defence against criminal charges subject to informer privilege. While these concessions were valuable, the courts were not in a position to enforce them. See UK, HL, *Parliamentary Debates*, 5th ser, vol 197, cols 741–48 (6 June 1956) [*House of Lords Debates*].

48 Stanley de Smith & Rodney Brazier, *Constitutional and Administrative Law*, 8th ed (London: Penguin Books, 1998) at 609.

49 [1956] SC (HL) 1.

50 *R v Snider*, [1954] SCR 479 [*Snider*]; *Gagnon v Commission des Valeurs Mobilières du Québec*, [1965] SCR 73.

51 *Corbett v Social Security Commission*, [1962] NZLR 878.

52 *Bruce v Waldron*, [1963] VR 3 [*Waldron*].

53 *Snider*, *supra* note 50 at 485.

54 Arthur L Goodhart, "The Authority of Duncan v. Cammell Laird & Co" (1963) 79:2 Law Q Rev 153.

of ministerial objections, in particular with respect to class claims based on candour, could be seen as *obiter dicta*. The consequences of this argument were significant given that contents claims were rare.[55] Interpreted in this manner, the law of England would become consistent with the law of Scotland, Canada, New Zealand, and Australia.

Goodhart's interpretation was given legal currency by the English Court of Appeal in *Grosvenor Hotel*.[56] This case arose out of a dispute between Gordon Hotels Ltd. and the British Railways Board over the renewal of the lease of the Grosvenor Hotel. When the Board refused to renew the lease on the basis that it wanted to use the building for its own purposes, Gordon Hotels challenged the decision before the High Court. The government objected to the production of the documents related to the impugned decision based on a class claim. For the first time since *Duncan*, an English court refused to treat the ministerial objection as conclusive. Lord Denning reasserted judicial supremacy: "The objection of a Minister … should not be conclusive.… After all, it is the judges who are the guardians of justice in this land: and if they are to fulfil their trust, they must be able to call upon the Minister to put forward his reasons so as to see if they outweigh the interests of justice."[57]

In 1968, the House of Lords had the opportunity to reconsider *Duncan*. This was only two years after the House had asserted the power to overrule its own decisions.[58] *Conway v. Rimmer*[59] was the first time the House of Lords would actually use that power. Conway was a police officer on probation who was prosecuted for the theft of a flashlight. Although he was acquitted at trial, he was dismissed from the police force. Conway subsequently filed a civil action in damages for malicious prosecution against Rimmer, his former supervisor. During the discovery process, he sought access to four reports assessing his performance as a police officer, and one report drafted for the Director of Public Prosecutions pertaining to the allegation of theft. The reports seemed highly relevant and both parties wanted them to be produced. However, the government objected to their production based on a class claim. The Law Lords dealt with two issues: do the courts have the power to overrule ministerial objections; and, if so, how and when should it be exercised?[60]

On the first point, the House of Lords reversed the general rule set out in *Duncan* on the conclusive nature of a ministerial objection and reinstated the approach established in *Robinson*, noting the flaws of Lord Simon's analysis and the rule of law problems created by his decision. The House of Lords reaffirmed the inherent power of English courts to overrule a ministerial objection to the production of documents in legal proceedings. The courts regained "control over the whole of this field of the law"[61] and the unity of the common law in the Commonwealth was restored. Executive supremacy could not be justified, especially in light of the increasing extension of State activities and the proliferation of mass documentation.

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55 At the time, there were only two other examples of contents claims in the Law Reports: *Asiatic Petroleum*, *supra* note 15; *R v Governor of Brixton Prison, Ex parte Soblen*, [1963] 2 QB 243 (CA).

56 *Supra* note 3. See also *Merricks v Nott-Bower* (1964), [1965] 1 QB 57 (CA); *Wednesbury Corporation v Ministry of Housing and Local Government* (1964), [1965] 1 WLR 261 (CA).

57 *Grosvenor Hotel*, *ibid* at 1245–46.

58 *Practice Statement (Judicial Precedent)*, [1966] 1 WLR 1234.

59 [1968] UKHL 2, [1968] AC 910 [*Conway*].

60 *Ibid* at 910–16.

61 *Ibid* at 994, Upjohn L.

On the second point, the House of Lords asserted the role of the courts to weigh and balance the competing aspects of the public interest. Judges would thus be required to make the kind of delicate value judgments that *Duncan* had left to the discretion of ministers. While judges would defer or give "full weight" to the reasons given by ministers on the degree of injury, these reasons would carry more weight if the objection had been made on the basis of the contents of the documents rather than their class. Indeed, judges did not possess less expertise than a minister to assess whether protection of a class of documents was necessary for the proper functioning of the public service. Moreover, judges had more expertise, independence, and impartiality to assess the degree of relevance of the documents. When the abstract weighing and balancing process would seem to favour production, judges would inspect the documents in camera and *ex parte*. Production would be ordered only where the degree of relevance outweighed the degree of injury.

Conway was "the culmination of a classic story of undue indulgence by the courts to executive discretion, followed by executive abuse, leading ultimately to a radical reform achieved by the courts."[62] The application of the weighing and balancing process to the facts of the case was simple. Regarding the interest of good government, reports on the conduct of police officers, as a class of documents, were seen as "routine documents." It was unlikely that these reports would be written with less candour in the future if they were produced. The possible injury to the interest of good government resulting from their production was therefore low. Regarding the interest of justice, the reports were seen as crucial evidence on the questions of malice and want of probable cause. Their degree of relevance therefore seemed high. Hence, the Law Lords inspected the documents and subsequently ordered their production, as the interest of justice was greater than the interest of good government. In doing so, they brought back "a dangerous executive power into legal custody."[63]

After *Conway*, the term "Crown privilege" was replaced by "public interest immunity" (PII) for three reasons. First, the term "privilege" implies that the holder has discretion to claim or waive the protection afforded by the law, as is the case for solicitor-client privilege. However, the State has a legal duty, which cannot be waived, to protect government secrets if the public interest demands it.[64] For this reason, the rule is best described as an immunity, rather than a privilege. Second, the protection does not belong to the "Crown" per se; the Crown exercises it on behalf of the public. The question of whether or not the production of government secrets would be injurious to the public interest can be raised by any interested party and even by the court itself.[65] Third, the term "PII" makes more explicit the judicial obligation to weigh and balance the competing aspects of the "public interest."

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62 Wade & Forsyth, *supra* note 28 at 711.

63 *Ibid* at 714. Public servants did not appreciate the "unwelcome judicial intrusion" into their professional field brought to bear by *Conway*, *supra* note 59 (Maureen Spencer & John Spencer, "Coping With *Conway* v. *Rimmer* [1968] AC 910: How Civil Servants Control Access to Justice" (2010) 37:3 JL & Soc'y 387 at 391).

64 *Makanjuola v Commissioner of Police of the Metropolis*, [1992] 3 All ER 617 (CA) at 623, Bingham LJ.

65 While a PII claim can be raised by anyone, it is unlikely to be sustained in court without the support of the government. See *R v Chief Constable of West Midlands Police, Ex parte Wiley*, [1994] UKHL 8, [1995] 1 AC 274 at 296–98, Woolf L [*Ex parte Wiley*].

B. JUDICIAL REVIEW OF CABINET IMMUNITY CLAIMS IN PARTICULAR

1. ASSERTION AND DEMISE OF ABSOLUTE CABINET IMMUNITY

a. Assertion of Absolute Cabinet Immunity

Before the late 1970s, Cabinet documents, as a class, were seen as absolutely immune from production in legal proceedings by the courts. This position was asserted in *obiter dicta* in the two English cases that spearheaded the shift from executive to judicial supremacy. Lord Denning first recognized the sanctity of "Cabinet papers" in *Grosvenor Hotel*[66] and, a few years later, Lord Reid confirmed the judicial consensus in *Conway*:

> 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.[67]

"Cabinet minutes and the like" thus appeared exempted from the weighing and balancing process established in *Conway*.[68] The reference to the "historical interest" exception was not a recognition that it would be appropriate to order the production of Cabinet documents that were no longer of any significance, but a recognition that under the *Public Records Act 1967*, this class of documents could be made public after 30 years.[69] Parliament had decided that the degree of injury associated with the publication of Cabinet documents was nil after 30 years. Save for this exception, Cabinet secrets remained off-limits.

b. Demise of Absolute Cabinet Immunity

When *Conway* was decided, the courts had not clearly made the connection between the protection of Cabinet secrecy under constitutional conventions and the common law. The connection was made, for the first time, in *Attorney-General v. Jonathan Cape Ltd.*[70] The issue was whether the Court should prevent the publication of ministerial memoirs that revealed details of "Cabinet discussions." The evidence established that Cabinet secrecy was one of the elements of collective ministerial responsibility and, as a result, was considered essential to the proper functioning of the Westminster system of responsible government. It was thus in the public interest to prevent the disclosure of Cabinet discussions, particularly the personal views expressed by ministers. This justification provided a principled basis for extending the scope of the breach of confidence doctrine to public secrets in addition to

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66 *Grosvenor Hotel*, *supra* note 3 at 1246, Lord Denning MR.

67 *Conway*, *supra* note 59 at 952, Reid L.

68 IG Eagles, "Cabinet Secrets as Evidence" [1980] Public L 263 at 263; Henrik G Tonning, "Crown Privilege in Regard to Upper Echelon Government Documentation" (1981) 30 UNBLJ 121 at 124; Hodgson, *supra* note 27 at 154–56.

69 (UK), c 44, s 1, which modified the *Public Records Act, 1958* (UK), 6 & 7 Eliz II, c 51, s 5(1), to reduce the period during which public records were closed to the public from 50 years to 30 years. In 2010, the *Constitutional Reform and Governance Act 2010* (UK), c 25, s 45(1)(a), further reduced that period to 20 years.

70 [1976] 1 QB 752 [*Jonathan Cape*]. This case is commonly referred to as "*Crossman's* case" or "*Crossman's Diaries*."

private secrets. This is an example of circumstances in which the scope of a legal rule (breach of confidence) was extended based on a political rule (the secrecy convention).

The justification for the secrecy convention also served to limit the scope of the rule. There had to be a point in time where the publication of ministerial memoirs would no longer injure the proper functioning of the Westminster system of responsible government. In this case (*Jonathan Cape*), as Richard Crossman's diaries described events that had occurred ten years earlier (during which time three elections had taken place), Lord Widgery held that their publication would not be injurious to the public interest. The recognition that the passage of time may limit the scope of Cabinet secrecy could not be reconciled with the recognition of an absolute Cabinet immunity. While *Jonathan Cape* clarified why Cabinet secrets should be protected, it also provided ammunition to litigants seeking to challenge this last bastion of executive supremacy.[71] However, at the time, it was clear that "no court [would] compel the production of Cabinet papers in the course of discovery in an action."[72]

The first major case where the production of Cabinet documents was directly sought in civil proceedings was *Lanyon Pty. Ltd. v. The Commonwealth*,[73] a decision of the High Court of Australia. In this case, the government had denied a corporation the permission to develop land in the Australian Capital Territory and had decided to acquire it by expropriation. The decision, founded upon policy considerations, had been made following Cabinet discussions. The corporation served subpoenas to the responsible Minister and Secretary to the Cabinet for "all minutes of cabinet" leading to the impugned decision, as well as for other documents from the National Capital Development Commission related to the proposed development.[74] The government objected to the production of the documents based on Cabinet immunity. Justice Menzies sustained the claim, without inspection, on the basis that Cabinet documents as a class should not be inspected or produced "except … in very special circumstances."[75] The immunity envisaged by Justice Menzies was less absolute than the one described by Lord Reid in *Conway*. While it is unclear what Justice Menzies had in mind when he said that Cabinet documents could be inspected and produced in "very special circumstances," his statement suggested that the "historical interest" exception was not the only exception to Cabinet immunity.

Sankey v. Whitlam[76] provides an example of the "very special circumstances" envisaged in *Lanyon*. This decision of the High Court of Australia was the first major case in any of the Westminster States where the production of Cabinet documents was ordered, thus putting an end to the theory that these documents were fully immune. The unusual background of the case created a perfect storm for the production of Cabinet documents. The case arose out of a criminal prosecution against former Prime Minister Gough Whitlam and three members of his Ministry in relation to their conduct in office. The charges were laid down by Sankey, a private citizen, rather than by a public prosecutor. Sankey claimed that the accused conspired to borrow USD $4 billion for the development of domestic energy sources, without

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71 Dennis Pearce, "The Courts and Government Information" (1976) 50 Austl LJ 513 at 520.
72 *Jonathan Cape*, *supra* note 70 at 764.
73 [1974] HCA 11, 129 CLR 650 [*Lanyon*].
74 *Ibid* at 652–53.
75 *Ibid* at 653.
76 [1978] HCA 43, 142 CLR 1 [*Whitlam*].

following the procedure established by the Constitution. The Executive Council approved the loan without the assent of the Loan Council, a federal-provincial institution designed to regulate the accumulation of debt in the federation. In short, Whitlam and his colleagues were accused of misfeasance in public office.[77]

The private prosecutor issued subpoenas to senior public servants for the production of documents related to the alleged offences. These documents included Executive Council documents, Loan Council documents, and other high-level government documents. Only the Executive Council documents could be described as "Cabinet documents" because they revealed "deliberations of Cabinet Ministers," within one level of government, that came into being for the purpose of effecting the loan.[78] The government claimed Cabinet immunity for the Executive Council documents, except for those that had previously been tabled in Parliament. Whitlam contended that they were all subject to Cabinet immunity.

Before *Whitlam*, it was assumed that "important State documents relating to [high-level] policy decisions, in particular Cabinet decisions and Cabinet papers, [were] immune from production."[79] The High Court dismissed this assumption: government documents should only be withheld from production if necessary in the public interest, and it is for the courts to make that determination. Lord Reid's *obiter dictum* in *Conway* on the absolute nature of Cabinet immunity was not consistent with this basic rule.[80] There was no reason to exempt Cabinet documents from the weighing and balancing process: "Cabinet decision[s] and cabinet papers do not stand outside the general rule that requires the court to determine whether on balance the public interest calls for production or non-production. They stand fairly and squarely within the area of application of that rule."[81] The High Court identified the three public interest rationales underpinning Cabinet secrecy, namely, the candour,[82] the efficiency,[83] and the solidarity[84] rationales.[85] The reasons for denying the absolute nature of Cabinet immunity were twofold: the passage of time, and the nature of the proceedings.

First, once it had been recognized that the justification for Cabinet secrecy faded away with the passage of time, it followed that Cabinet documents could not be forever immune from production. This stemmed from the "historical interest" exception, but it was not limited to it. The issue for the Court was whether the publication of Cabinet documents at a given point in time would injure the proper functioning of the Westminster system of responsible government. The answer did not depend on whether an arbitrary period of time fixed by statute had lapsed. It had to be determined on a case-by-case basis.[86] In *Jonathan Cape*, details of Cabinet discussions had been published after ten years. In *Whitlam*, the

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77 *Ibid* at 16–17.
78 *Ibid* at 51, 62, 99.
79 *Ibid* at 95, Mason J. See also *Australian National Airlines Commission v The Commonwealth*, [1975] HCA 33, 132 CLR 582 at 591 (referring to Cabinet minutes as a class of documents which should be kept secret).
80 *Whitlam*, *ibid* at 41, Gibbs ACJ.
81 *Ibid* at 96. See also *ibid* at 41–42, 63.
82 *Ibid* at 40, Gibbs ACJ. *Contra ibid* at 63, Stephen J; *ibid* at 97, Mason J.
83 *Ibid* at 40, 63, 97.
84 *Ibid* at 97–98.
85 The public interest rationales underpinning Cabinet secrecy are discussed in Campagnolo, *supra* note 1.
86 *Jonathan Cape*, *supra* note 70 ("the degree of protection afforded to Cabinet papers and discussion cannot be determined by a single rule of thumb. Some secrets require a high standard of protection for a short time. Others require protection until a new political generation has taken over" at 767).

documents sought had been created three to five years earlier. While they were not yet of historical interest, their subject matter was "no longer current"[87] or controversial, as the loan proposal had not been carried out and the accused had since retired from politics. Any damage caused by their production would have been trivial. Over the decade separating *Conway* and *Whitlam*, the "life of a cabinet secret"[88] was therefore significantly shortened.

Second, the most important factor in *Whitlam* was the nature of the proceedings: a criminal prosecution against ministers for misfeasance in public office. The twin objectives of the criminal justice system are that guilt shall not escape, nor innocence suffer. These objectives could not be achieved if the defendant, the prosecutor, and the judge did not have access to all the facts within the framework of evidence law. The integrity of, and public confidence in, the criminal justice system would be undermined. Even in *Duncan*, Lord Simon agreed that the government should not suppress evidence that is relevant to the defence of an accused in a criminal trial.[89] The reverse was equally true: the government should not suppress evidence that is relevant to the prosecution of an accused, especially a minister. Doing so would be the same as conferring an immunity from criminal liability to ministers, thus placing them above the law, a result which would be inconsistent with the purpose of the PII doctrine. Indeed, "a rule … designed to serve the public interest [should not] become a shield to protect wrongdoing by Ministers in the execution of their office."[90]

The United States Supreme Court in *United States v. Nixon*[91] inspired the reasoning of the High Court. During the Watergate scandal, seven persons were indicted by a grand jury for various criminal offenses, including conspiracy to obstruct justice. President Richard Nixon was named as a co-conspirator. The Special Prosecutor issued a subpoena for the production of tapes and documents revealing sensitive communications between the President and his advisors. In what looked like a desperate attempt to avoid criminal liability, Nixon claimed an absolute immunity from production based on the doctrine of separation of powers under the US Constitution.[92] The claim was rejected by the US Supreme Court: the immunity was relative, not absolute, and could be overruled in the public interest. It was the role of the judicial branch, as the ultimate interpreter of the Constitution, to define its proper scope.[93] The tension between the public interest in the protection of presidential secrecy and the public interest in the prosecution of offences was resolved in favour of the latter. Under the circumstances, the President's "generalized" assertion of immunity ultimately had to yield to the "demonstrated, specific need for evidence in a pending criminal trial."[94]

Despite the dissimilarities between the US presidential system and the Westminster parliamentary system, this statement could be applied by analogy to *Whitlam*. In both cases, there were allegations that the highest public official had been involved in the commission of a crime while in office. The evidence that could sustain the allegations was contained in

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87 *Whitlam*, *supra* note 76 at 98.
88 Eagles, *supra* note 68 at 278.
89 *Duncan*, *supra* note 2 at 633. See also *Snider*, *supra* note 50; *Waldron*, *supra* note 52; *House of Lords Debates*, *supra* note 47.
90 *Whitlam*, *supra* note 76 at 47.
91 418 US 683 (1974) [*Nixon*].
92 *Ibid* at 683.
93 *Ibid* at 706–707.
94 *Ibid* at 713.

records under the control of the executive branch of the State, various members of which were under investigation. The executive objection to their production was based on a class claim, as opposed to a contents claim. The general need for Cabinet and presidential secrecy did not seem to outweigh the specific need for the evidence in criminal proceedings. To uphold the objection would have frustrated the prosecution and impaired the basic function of the courts under the rule of law. The public confidence in the proper administration of justice required that the evidence be available to the Court so that the criminal charges could be dealt with. The decision to produce or suppress the evidence could not be left to those charged of the offence, nor to their political allies or opponents.

The two cases were similar, but not identical. A distinguishing feature pertained to the preliminary proof of wrongdoing presented by the prosecutors to support the charges. In *Nixon*, the indictment had been issued by a grand jury after the Special Prosecutor had made a prima facie case that a crime had been committed by the accused. In addition, the subpoena issued by the Special Prosecutor required the production of tapes and documents related to specific presidential meetings. The Special Prosecutor had been able to determine the time, the place, and the persons present at these meetings based on other evidence. The charges were thus supported by some evidence and the request for production was precise. Conversely, in *Whitlam*, the private prosecutor did not have to make a prima facie case against the accused before filing the charges. Rather, he was relying on the production of documents to obtain the evidence needed to support his suspicion.

Another distinguishing feature pertained to the treatment of the documents by the courts. After holding that the immunity was relative and that the weighing and balancing process seemed to favour production, the US Supreme Court decided that the tapes and documents should be inspected by a judge in camera and *ex parte*. The aim of the inspection was to identify the relevant and admissible extracts which would then be released to the prosecutor. In contrast, the High Court lifted the veil of secrecy over the Executive Council documents without inspection.[95] This approach could be justified for the documents that had been tabled in Parliament, as their prior publication had destroyed the immunity,[96] but not for the other documents, as it was not known whether they contained evidence of a crime.

Two conclusions can be drawn from *Whitlam*. First, the High Court was correct in ruling that Cabinet immunity was relative and could be defeated. The justification behind the rule does not support an absolute immunity irrespective of the passage of time and the nature of the proceedings. The scope of the common law doctrine of Cabinet immunity is therefore consistent with the scope of the Cabinet secrecy conventions.[97] Second, the High Court erred in ordering the production of Executive Council documents without inspecting them to assess their actual degree of relevance. Shortly after, the trial judge discharged the accused because "no prima facie case had been established" against them by the private prosecutor.[98] This suggests that the documents sought did not contain any evidence of a crime. It is unreasonable to order the production of documents based on unsupported assertions: "By not

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95 The Executive Council documents, unlike the Loan Council documents, were not inspected.

96 This is why the government did not object to their production. See *Whitlam*, *supra* note 76 at 44–45, 64, 100–101. See also *Robinson*, *supra* note 6 at 718.

97 The scope of the Cabinet secrecy conventions is discussed in Campagnolo, *supra* note 1.

98 Susan Campbell, "Recent Cases" (1979) 53 Austl LJ 212 at 212.

insisting on a preliminary inspection the court may have opened the door to actions or prosecutions which are really fishing expeditions by the political opponents of the government of the day."[99] This risk is less serious in criminal proceedings, as it is unusual for private citizens to initiate a prosecution against public officials, but it is far more serious in civil proceedings, which can more easily be launched against the government.

2. SCOPE OF CABINET IMMUNITY IN WESTMINSTER STATES

While *Conway* re-established the principle of judicial review for PII claims, *Whitlam* clearly extended the principle to Cabinet immunity claims. *Whitlam* represented "the final step in the establishment of the fundamental concept that administrative action is subject to judicial review."[100] The next stage in the development of Cabinet immunity was to determine what level of deference should be afforded to Cabinet immunity claims. This subsection provides a comparative analysis of the scope of Cabinet immunity post-*Whitlam* with a focus on the decisions of the highest courts in the UK, Australia, New Zealand, and Canada. Two different approaches can be identified. The UK and Australia have taken a "deferential approach," under which Cabinet documents are presumed immune and the onus is on the litigant to justify why they should be produced. New Zealand and Canada have taken a "non-deferential approach," under which Cabinet documents are not presumed immune and the onus is on the government to justify why they should be withheld. The first approach favours the interest of good government while the second favours the interest of justice.

a. Deferential Approach

Burmah Oil Co. v. Bank of England[101] and *Air Canada v. Secretary of State for Trade (No. 2)*[102] are the most relevant English cases. They did not raise the kind of "very special circumstances" found in *Nixon* and *Whitlam*; rather, they were civil proceedings in which it was alleged that the government had done something wrong, but not criminally so.

In *Burmah Oil*, the government was accused of unconscionable conduct. Burmah Oil had sold its shares in British Petroleum to the government for a very low price to avoid bankruptcy. Soon after the deal was made, the shares' price rose considerably. Burmah Oil sought to have the sale set aside on the basis that the government had taken an unfair advantage of its financial difficulties. On discovery, Burmah Oil sought access to high-level documents to prove that some public officials had considered that the deal was unfair.[103] In *Air Canada*, the government was accused of unlawful conduct. The government had made the decision to increase the landing charges at Heathrow Airport, in order to finance new infrastructures. A group of airlines challenged the decision on the ground that the increase was unlawful under the relevant statute because it was made for the purpose of reducing public sector borrowing, a purpose that was not recognized in the statute. On discovery, the airlines sought access to documents to establish the purpose of the government's decision.[104]

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99 Eagles, *supra* note 68 at 276.

100 Dennis Pearce, "Of Ministers, Referees and Informers—Evidence Inadmissible in the Public Interest" (1980) 54 Austl LJ 127 at 133.

101 [1979] UKHL 4, [1980] AC 1090 [*Burmah Oil*].

102 [1983] 2 AC 394 (HL (Eng)) [*Air Canada*].

103 *Burmah Oil*, *supra* note 101 at 1090–91.

104 *Air Canada*, *supra* note 102 at 394–95.

In both cases, the State disclosed numerous documents related to the matters in question, but resisted the production of some of them based on a class claim. The issue was whether the production of prima facie relevant documents was necessary for the fair disposition of these cases. This raised the preliminary issue of when the courts should exercise their power to inspect documents subject to an immunity claim. The House of Lords stated that a court should not inspect the documents unless it is persuaded by the litigant that the documents would likely substantially support the allegations made. In *Burmah Oil*, a 4–1 majority of the House of Lords held that Burmah Oil had met the onus, but in *Air Canada* it unanimously held that the litigant had not met the onus. In the end, after inspecting the documents in *Burmah Oil*, it concluded that their production was unnecessary.

In neither case did the House of Lords take the position that Cabinet documents were completely immune from judicial review, especially given that the government was "not a wholly detached observer of events in which it was in no way involved."[105] In *Burmah Oil*, Lord Keith stated that "it would be going too far to lay down that no [Cabinet] document … should [ever] … be ordered to be produced."[106] Lord Scarman did not "accept that there are any classes of documents which, however harmless their contents and however strong the requirement of justice, may never be disclosed until they are only of historical interest."[107] While not fully immune from production, Cabinet documents should, said Lord Wilberforce, receive a high degree of protection on the basis of the candour and the efficiency rationales. Indeed, it was not "for the courts to assume the role of advocates for open government."[108] Lord Fraser subsequently confirmed this approach in *Air Canada*: "I do not think that even Cabinet minutes are completely immune from disclosure … [but] they are entitled to a high degree of protection against disclosure."[109] In sum, by deciding that Cabinet documents were presumed immune on the basis of the candour and efficiency rationales, and placing the onus of justification on the litigant, the House of Lords adopted a deferential approach.

In Australia, courts have likewise shown a high degree of deference toward Cabinet secrets. The Australian approach to Cabinet immunity stems from a joint interpretation of *Lanyon* and *Whitlam*: the first case established that Cabinet documents should not be produced except in "very special circumstances"; the second provided an example of such circumstances. A deferential approach was taken in *Whitlam v. Australian Consolidated Press Ltd.*,[110] where the former Prime Minister's objection to answering questions on the substance of Cabinet discussions and deliberations was upheld. Chief Justice Blackburn stressed that: "Cabinet secrecy is an essential part of the structure of government which centuries of political experience have created. To impair it without a very strong reason would be vandalism, the wanton rejection of the fruits of [civilization]."[111]

The most important post-*Whitlam* case was the High Court's ruling in *The Commonwealth v. Northern Land Council*.[112] The Northern Land Council, an Aboriginal interest group,

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105 *Burmah Oil*, *supra* note 101 at 1128, Edmund-Davies L.
106 *Ibid* at 1134.
107 *Ibid* at 1144.
108 *Ibid* at 1112. *Contra ibid* at 1134–35, Keith L.
109 *Air Canada*, *supra* note 102 at 432.
110 (1985), 73 FLR 414 [*Australian Consolidated Press*].
111 *Ibid* at at 422.
112 [1993] HCA 24, 176 CLR 604 [*Northern Land Council*].

sought the rescission of an agreement made with the government with respect to uranium mining on certain lands, on the basis that the involved Ministers acted in an unconscionable manner in breach of their fiduciary duties. On discovery, the government gave the litigant access to the relevant records of Cabinet decisions, but not to the deliberations preceding these decisions. The deliberations had been recorded in 126 Cabinet notebooks, comprising thousands of pages. The litigant requested access to the notebooks to find evidence that would support its case. A 6–1 majority of the High Court upheld the immunity claim without inspection.[113]

The High Court recognized the conventional justification supporting Cabinet secrecy. It held that the doctrine of collective responsibility "could not survive in practical terms if Cabinet deliberations were not kept confidential" and imported into the law of Cabinet immunity, the political justification behind the secrecy convention: "it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made."[114]

The documents sought were "documents which record[ed] the actual deliberations of Cabinet" (core secrets), as opposed to "documents prepared outside Cabinet … for the assistance of Cabinet" (non-core secrets).[115] The notes written down in the Cabinet notebooks were used to draft the official records of Cabinet decisions, but did not provide a verbatim transcript of the proceedings. They could leave the reader with an incomplete or inaccurate picture of what had been said in the Cabinet room. While the events had taken place more than a decade earlier, the subject matter was still considered "current or controversial." Hence, the notebooks were "[d]ocuments recording Cabinet deliberations upon current or controversial matters."[116] This is the most sensitive type of Cabinet documents.

Based on *Lanyon*, the High Court ruled that it would take "very special circumstances" to overcome the immunity, and doubted that the production of such documents "would ever be warranted in civil proceedings."[117] The degree of injury sustained from the publication of "current or controversial" core secrets is so great that it is not likely to be outweighed, save in *Nixon*- or *Whitlam*-style prosecutions where it is needed to prove or disprove serious allegations of criminal conduct. The allegations made in *Northern Land Council* did not have the same degree of gravity. In addition, the High Court opined that the litigant could not, as a matter of logic, depend on the Cabinet notebooks to prove alleged actions or omissions that occurred "outside the confines of the Cabinet room."[118] While the notebooks broadly related to the case, it was unlikely that they would contain "crucial" evidence. Thus, the litigant had not met the onus to persuade the High Court to inspect the documents.

In *Northern Land Council*, the High Court adopted a deferential approach with respect to documents which recorded core secrets. What is unclear is whether it would have adopted

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113 *Ibid* at 604–12.
114 *Ibid* at 615.
115 *Ibid* at 614. The distinction between core and non-core secrets is discussed in Campagnolo, *supra* note 1.
116 *Northern Land Council*, *ibid* at 617.
117 *Ibid* at 618.
118 *Ibid* at 620.

the same approach if the litigant had sought access to documents which recorded non-core secrets. Before *Northern Land Council*, certain lower courts had adopted a non-deferential approach when dealing with non-core secrets;[119] however, these cases were inconsistent with *Lanyon*, in which the High Court declined to order the production of non-core secrets in the absence of "very special circumstances." Until *Lanyon* is overruled by the High Court, it is reasonable to assume that the courts will be deferential toward Cabinet immunity claims whether the documents at issue reveal core or non-core secrets.[120]

b. Non-deferential Approach

In New Zealand, over an eight-year period between 1977 and 1985, the courts went from one extreme to the other. Like the other jurisdictions examined, prior to *Whitlam*, the New Zealand Court of Appeal treated Cabinet immunity as an absolute immunity.[121] That was during the time when executive supremacy was still the rule for Cabinet secrets. Subsequently, after *Whitlam*, it transitioned to a deferential approach[122] before adopting a non-deferential approach.[123] This change in attitude was a direct result of a larger movement toward open government in New Zealand following the adoption of the *Official Information Act 1982*.[124] Beforehand, official secrecy had been the principle, and public access to information, the exception; the passing of the Act reversed the thrust of the law. This factor, along with the increasing extension of State activities into the commercial sphere (the effect of which was deeply felt in a small State like New Zealand), loomed in the background.

In the leading case, *Fletcher Timber*, a corporation sued the government for breach of a timber cutting agreement and negligent misrepresentation after the government adopted a new policy which limited the right to harvest timber. During the discovery process, the government admitted that some Cabinet documents "related" to the matters in question, but objected to their production on the basis of Cabinet immunity. As in *Burmah Oil* and *Air Canada*, the issue was when a court should exercise its power to inspect documents to decide whether their production should ultimately be ordered.[125]

The New Zealand Court of Appeal held that when the documents subject to an immunity claim "relate" to the matters in question, the court should normally inspect them to determine where the balance of public interest lies. The litigant did not have an onus to show that the documents would likely substantially support the allegations made. Rather, the onus was on the government to convince the court not to inspect the documents. To discharge the onus, the ministerial certificate should explain with "sufficient particularity" why the degree of injury is greater than the degree of relevance in the circumstances of the case.[126] The court

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119 See especially *Harbours Corporation of Queensland v Vessey Chemicals Pty Ltd*, [1986] FCA 292, 67 ALR 100; *Hooker Corporation Ltd v Darling Harbour Authority* (1987), 9 NSWLR 538 (SC).

120 See especially *Spencer v Commonwealth of Australia*, [2012] FCAFC 169, 206 FCR 309; *State of New South Wales v Ryan* (1998), 101 LGERA 246 (FCA). See also *Kamasaee v Commonwealth of Australia (No 3)*, [2016] VSC 438; *Kamasaee v Commonwealth of Australia (No 5)*, [2016] VSC 595; *Victoria v Seal Rocks Victoria (Australia) Pty Ltd (No 2)*, [2001] VSC 249.

121 *Tipene v Apperley*, [1978] 1 NZLR 761 at 764–65 (CA).

122 *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 2)*, [1981] 1 NZLR 153 (CA).

123 *Fletcher Timber Ltd v Attorney-General*, [1984] 1 NZLR 290 (CA) [*Fletcher Timber*].

124 (NZ), 1982/156.

125 *Fletcher Timber*, *supra* note 123 at 290–91.

126 *Ibid* at 295.

will pay due deference to the ministerial certificate; however, "the influence of comity must not permit the Minister's conclusion to become the substitute for informed judicial decision."[127] If the court is "in doubt" or "uncertain" as to where the balance of public interest lies after reading the certificate, it should inspect the documents.[128]

In *Fletcher Timber*, the ministerial certificate did not contain sufficient information to convince the Court of Appeal not to inspect the documents, which resulted in their inspection by the Court and their production to the litigant. However, the need for the production of Cabinet documents in *Fletcher Timber* was not self-evident. It is unclear how the documents could have supported the litigant's allegations of breach of contract and negligent misrepresentation. Such actions, if true, would have taken place outside of the Cabinet room. The production of Cabinet documents in this case suggests that the Court of Appeal had little, if any, deference for the government's position. The lack of deference is a consequence of the Court's failure to fully recognize, and properly weigh, the Cabinet secrecy rationales. Be that as it may, this ruling had a major influence on the Supreme Court of Canada.

In Canada, at the provincial level, the development of the Cabinet immunity doctrine can be organized into three phases: the period of unsettled law (pre-1986), the adoption of a non-deferential approach in *Carey v. Ontario*,[129] and the weakening of Cabinet immunity (post-1986). In the first period, courts took different approaches toward Cabinet immunity. Some treated it as an absolute immunity[130] and others as a relative immunity. Of the courts that took the latter approach, some adopted a deferential approach[131] and others a non-deferential approach.[132] The most relevant case in that period is *Smallwood v. Sparling*.[133] An investigative body had issued a subpoena ordering Joseph Roberts Smallwood, a former Newfoundland premier, to testify under oath in the course of an investigation into a corporation. Smallwood challenged the subpoena on the basis that any information he could have about the corporation would have been obtained in his official capacity, and would thus be subject to Cabinet immunity. The Supreme Court of Canada held that Smallwood's immunity claim was overbroad and premature, for it was not known at the time which questions would be asked, and it could not be assumed that the information should be pre-emptively suppressed in the public interest. Justice Wilson recognized that Cabinet immunity was relative, not absolute, noting that "Mr. Smallwood cannot be the arbiter of his own immunity," for this was the role of the courts.[134] Yet, ultimately, she did not have to decide whether or not specific Cabinet secrets should be disclosed. What remained unclear was whether the Supreme Court would adopt a deferential or a non-deferential approach vis-à-vis Cabinet immunity claims. That issue would be settled four years later in *Carey*.

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127 *Ibid* at 296.
128 *Ibid* at 295, 297, 302, 308.
129 [1986] 2 SCR 637 [*Carey*].
130 See *R in Right of Saskatchewan v Vanguard Hutterian Brethren Inc*, [1979] 4 WWR 173 (Sask CA).
131 See *Mannix v The Queen in Right of Alberta* (1981), 126 DLR (3d) 155 (Alta CA); *Somerville Belkin Industries Limited v Government of Manitoba*, [1985] 5 WWR 316 (Man QB); *New Brunswick Telephone Company Ltd v New Brunswick* (1981), 33 NBR (2d) 238 (QB); *British Columbia Medical Association v The Queen in Right of British Columbia* (1983), 144 DLR (3d) 374 (BCSC); *MacMillan Bloedel Ltd v The Queen in Right of British Columbia* (1984), 16 DLR (4th) 151 (BCSC).
132 *Manitoba Development Corp v Columbia Forest Products Ltd* (1973), 43 DLR (3d) 107 (Man CA); *Gloucester Properties Ltd v The Queen in Right of British Columbia* (1982), 129 DLR (3d) 275 (BCCA).
133 [1982] 2 SCR 686.
134 *Ibid* at 708.

Carey claimed $6 million in damages from the Government of Ontario in relation to the operation and sale of the Minaki Lodge, a tourist resort in northwestern Ontario. The Lodge was closed in 1970 after the discovery of mercury pollution in adjacent rivers. A year later, to stimulate the regional economy, a minister persuaded Carey to purchase, repair, and reopen the Lodge. For that purpose, Carey received $550,000 in loans from the Ontario Development Corporation (ODC). After two years of substantial operating losses, Carey was given two options: assign his shares in the Lodge to the ODC, or have it go into receivership. He chose the first option and then initiated civil proceedings in which he claimed that the government breached an unwritten contract to indemnify him for his operating losses, and that the shares' assignment was unconscionable. Carey's counsel issued a subpoena to the Secretary to the Cabinet ordering him to attend trial and bring all Cabinet documents related to the case. The State challenged the subpoena based on Cabinet immunity.[135]

Four years of litigation ensued, during which all levels of courts commented upon the Cabinet immunity doctrine. The range of interpretations was diverse. In the Ontario High Court of Justice, Justice Catzman took note of the unsettled state of the law and quashed the subpoena without inspection, thus treating the immunity as if it were absolute.[136] In the Ontario Divisional Court, Justice White denied absolute immunity in favour of the deferential approach asserted in *Lanyon*. Yet, in his view, the "very special circumstances" required to defeat the relative immunity were not limited to allegations of criminal conduct, as in *Nixon* and *Whitlam*; they also included: "malfeasance, misfeasance, nonfeasance, irregularity or other improprieties in the conduct of the members of Cabinet or those reporting to Cabinet, of which the documents in issue would be proof."[137] At the Court of Appeal,[138] Justice Thorson agreed that Cabinet immunity was not absolute, but found Justice White's test unhelpful as most civil proceedings against the government contain allegations that public officials did something wrong. There is nothing "very special" about such allegations. Justice Thorson preferred the deferential approach asserted in *Burmah Oil* and *Air Canada*, which imposed on the litigant the onus of showing that the documents would likely substantially support the allegations made.[139] In the end, whichever test was applied, Carey failed to persuade the lower courts to inspect the documents.

At the Supreme Court of Canada, Justice La Forest put the final nail in the coffin of the absolute immunity doctrine by stating that it would be "contrary to the constitutional relationship that ought to prevail between the executive and the courts in this country" to remove from the judicial branch the power to determine the issue.[140] In addition, Justice La Forest rejected the Australian and British deferential approaches. The first on the basis that it seemed too restrictive to limit the disclosure of Cabinet documents to cases involving serious allegations of criminal conduct. The second on the basis that it was unfair to impose on litigants the onus of showing that the documents would likely substantially support the allegations made, because they had no access to the documents and did not know their contents. Justice La Forest favoured New Zealand's non-deferential approach: the onus was

135 *Carey*, *supra* note 129 at 640–43.
136 *Carey v The Queen in Right of Ontario* (1982), 38 OR (2d) 430.
137 *Carey v The Queen in Right of Ontario* (1982), 39 OR (2d) 273 at 280.
138 *Re Carey and The Queen* (1983), 43 OR (2d) 161.
139 *Ibid* at 199.
140 *Carey*, *supra* note 129 at 654.

on the government to persuade the Court that inspection was not necessary. In *Carey*, the onus had not been met. Indeed, the documents sought were no longer "current or controversial" (12 years had passed and a new Ministry had been elected), and were related to a subject that was not very sensitive (tourism policy). Plus, the documents seemed relevant and could expose some form of "government misconduct" (breach of contract and unconscionable action).[141]

While Justice La Forest's ruling in *Carey* must be applauded in many respects, it nonetheless contained three weaknesses. First, Justice La Forest's definition of "Cabinet documents" was too vague and broad, as it included all "documents prepared by government departments … formulating government policies."[142] Not all documents "formulating government policy" are Cabinet documents; to qualify they must be closely linked to the collective decision-making process. Moreover, Justice La Forest failed to recognize that Cabinet documents are not all equally sensitive; documents which reveal core secrets (views and opinions) are more sensitive than documents which reveal non-core secrets (facts and background information). Both as a political and legal matter, core secrets deserve more protection than non-core secrets. Yet, in *Carey*, all documents were treated the same.[143]

Second, Justice La Forest did not give much weight to the rationales behind Cabinet secrecy, with the exception of the efficiency rationale. The main reason for the protection of Cabinet secrecy, the solidarity rationale, was almost totally ignored. As for the candour rationale, he did not dismiss it, but said that it was "easy to exaggerate its importance" and only deserved "some weight."[144] In my opinion, while the candour rationale does not support an absolute immunity for low-level documents which reveal public service views, it does support a relative immunity for high-level documents which reveal ministerial views. Confidentiality has always been accepted by the courts, without the need for any empirical confirmation, as a necessary condition to preserve the candour of solicitor-client discussions, as well as jury and judicial deliberations.[145] Why should it be doubted in respect of Cabinet deliberations? The candour rationale should be given "full weight," not just "some weight."

Third, Justice La Forest gave litigants a master key to unlock the doors of the Cabinet room. All they must do is to allege "government misconduct." Carey's allegations of breach of contract and unconscionable conduct weighted in favour of production, and other rulings have since extended "government misconduct" to allegations of tortious conduct.[146] If this approach is right, litigants can have access to Cabinet documents in any civil proceedings in which it is alleged that the government did something wrong, even if the action or omission seems low on the scale of gravity. This cannot be right, as it would totally

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141 *Ibid* at 659–75.

142 *Ibid* at 654.

143 Of the 35 documents over which Cabinet immunity was claimed, 14 seemed to be true Cabinet documents. Of the 14 documents, 11 seemed to contain core secrets (notes and minutes of Cabinet meetings, ministerial recommendations), and three seemed to contain non-core secrets (submissions to Cabinet, reports of Cabinet meetings).

144 *Carey*, *supra* note 129 at 657.

145 For solicitor-client discussions, see *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319 at para 26. For jury deliberations, see *R v Pan; R v Sawyer*, 2001 SCC 42, [2001] 2 SCR 344 at para 50. Finally, for judicial deliberations, see *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 SCR 815 at para 40.

146 See *Leeds v Alberta (Minister of the Environment)* (1990), 69 DLR (4th) 681 (Alta QB) [*Leeds*].

undermine Cabinet immunity. To have an impact on the outcome of the assessment process, the allegations of government misconduct should be supported by some prima facie evidence. Further, the courts should distinguish between various types of government misconduct with different degrees of gravity (from breach of contract or tortious conduct, to unlawful conduct or a criminal offence). It should not be enough for a litigant to make an unsupported allegation of breach of contract against the government to gain free access to sensitive information.

These weaknesses led to an improper weighing and balancing of the public interest. Following the Supreme Court's decision, the documents were sent back to the High Court for inspection. Justice Catzman dismissed the government's claim that the documents were irrelevant and ordered their production "without exception or excision."[147] Cabinet documents were filed at the trial and Ministers testified; the substance of their deliberations was published in the newspapers.[148] In his reasons for judgment, Justice Holland quoted from Cabinet documents, including notes of a Cabinet meeting recording discussions and debates among ministers on whether the government should take over the Minaki Lodge. Did the documents contain any information supporting Carey's allegations of breach of contract and unconscionable action? As Justice Holland dismissed the allegations on the merits, the answer was negative.[149] While the documents related to the case, they did not contain probative and material evidence. This suggests that the High Court may have failed to properly assess the documents' degree of relevance before ordering their production to Carey. As a consequence, Cabinet secrets may have been unnecessarily disclosed in this landmark case.

The non-deferential treatment of Cabinet immunity by the Supreme Court in *Carey* made it difficult for provincial governments to prevent the production of Cabinet secrets in court. In the post-*Carey* cases in which Cabinet immunity was a live issue, the courts almost systematically ordered the production of Cabinet secrets.[150] After *Carey*, the main criterion

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147 Harold Levy, "How One Man Beat Government Secrecy," *Toronto Star* (10 July 1987) A21.

148 Rick Haliechuk, "Cabinet Notes on Minaki Lodge Presented in Lawsuit," *Toronto Star* (13 January 1988) A19; Rick Haliechuk, "Secret Cabinet Files Stall Minaki Hearing," *Toronto Star* (20 January 1988) A18; Rick Haliechuk, "Judge Orders Tory's Papers Produced for Minaki Suit," *Toronto Star* (10 May 1988) A22; Susan Reid, "Ex-Cabinet Minister Says Minaki 'Perks' Insult His Integrity," *Toronto Star* (18 May 1988) A31; Susan Reid, "Taking Over Minaki in 1974 Called Only Option for Province," *Toronto Star* (19 May 1988) A22.

149 *Carey v Ontario*, [1988] OJ No 1252 (QL) (H Ct J), aff'd [1991] OJ No 1819 (QL) (CA).

150 Alberta: *Leeds*, *supra* note 146; *Pocklington Foods Inc v Alberta (Provincial Treasurer)* (1993), 110 DLR (4th) 279 (QB), implementing *Alberta (Provincial Treasurer) v Pocklington Foods Inc*, [1993] 5 WWR 710 [*Pocklington Foods*]. British Columbia: *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia*, 2002 BCSC 1509, 8 BCLR (4th) 281 [*Health Services*]; *British Columbia Teachers' Federation v British Columbia*, 2010 BCSC 961, 9 BCLR (5th) 388; *Provincial Court Judges' Association of British Columbia v British Columbia (Attorney General)*, 2012 BCSC 244, 31 BCLR (5th) 177, aff'd 2012 BCCA 157, 31 BCLR (5th) 256; *British Columbia Teachers' Federation v British Columbia*, 2013 BCSC 1216, 53 BCLR (5th) 391 [*BC Teachers' Federation*]. New Brunswick: *Enbridge Gas New Brunswick Limited Partnership v Province of New Brunswick*, 2015 NBQB 136, 438 NBR (2d) 1, rev'd 2016 NBCA 17, 447 NBR (2d) 201. Newfoundland: *Can Am Simulation Ltd v Newfoundland* (1994), 118 Nfld & PEIR 35 (SC (TD)) [*Can Am Simulation*]; *Winter v Newfoundland* (2000), 187 Nfld & PEIR 124 (SC (TD)). Nova Scotia: *Nova Scotia (Attorney General) v Nova Scotia (Royal Commission Into Marshall Prosecution)*, [1989] 2 SCR 788 [*Marshall*]; *Nova Scotia (Attorney General) v Royal & Sun Alliance Insurance Co of Canada* (2000), 189 NSR (2d) 290 (SC). Nunavut: *Nunavut (Department of Community and Government Services) v Northern Transportation Company Limited*, 2011 NUCJ 4, 2011 NUCJ 4 (CanLII) [*Northern Transportation*]. Prince Edward Island: *Johnston v Prince Edward Island* (1988), 73 Nfld & PEIR 228 (SC (TD)) [*Johnston*], aff'd (1989), 73 Nfld & PEIR 222 (CA).

became the relevancy of the information: if it falls within the applicable standard of relevance on discovery, production will ensue. However, it is unclear whether the production of Cabinet secrets was necessary to the fair disposition of any of these cases.[151]

While *Carey* has weakened Cabinet immunity at the provincial level, the doctrine remains pertinent. This conclusion is based on two considerations. First, in the period post-*Carey*, it appears that the courts primarily ordered the production of Cabinet documents recording non-core secrets (that is, factual and background information submitted to Cabinet during the decision-making process), and production was ordered only after the government had made the underlying decision public. The courts thus seem to have resisted the urge to order the production of core secrets (that is, Cabinet discussions and deliberations):

> [T]he documents which will be disclosed by my Order do not disclose what was discussed by the Cabinet. Rather, the documents relate to what was before Cabinet when decisions were taken by it. Accordingly, the disclosure of the documents should in no way impede the active debate that one would expect at the Cabinet table.[152]

This position is consistent with the constitutional conventions and the deferential approach taken by the High Court of Australia in *Northern Land Council* in relation to core secrets. It is therefore possible that the courts will limit the non-deferential approach to non-core secrets, although this distinction was not made explicit in *Carey*.

Second, in some of the cases after *Carey*, the courts imposed conditions to preserve the secrecy of Cabinet documents when production was ordered.[153] Under these conditions, the documents were marked confidential and access was restricted, the evidence was heard in camera, and the litigants and their counsel signed confidentiality undertakings and agreed to return the documents at the end of the litigation. Conditions are a means of giving litigants access to the documents they need to make their case while limiting the scope of the documents' publication. Conditions should be imposed each time the courts conclude that the interest of justice outweighs the interest of good government, so as to minimize the degree of injury. The courts' handling of core secrets, and their readiness to impose conditions to protect the secrecy of Cabinet documents, suggest that Cabinet immunity is still relevant in Canada.

To sum up, in this section, I have reviewed the rise and fall of the doctrine of absolute PII and Cabinet immunity. The shift from absolute to relative immunity took place in a time where the increasing extension of State activities led to demands for greater protection of individual rights and open government. It is now clear that the judicial branch should have

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151 There is insufficient data about the use of Cabinet documents as evidence in these cases to draw any solid conclusion. But, in at least two cases following *Carey*, *supra* note 129, the litigants lost on the merits. This suggests that the Cabinet documents did not support the litigants' allegations and may have been produced in vain. See *Johnston v Prince Edward Island* (1995), 128 Nfld & PEIR 1 (PEI SC (TD)); *Winter v HMTQ*, 2004 NLSCTD 110, 239 Nfld & PEIR 117.

152 *Health Services*, *supra* note 150 at para 39. See also *Johnston*, *supra* note 150; *BC Teachers' Federation*, *supra* note 150; *Anderson v Nova Scotia (Attorney General)*, 2014 NSSC 71, 342 NSR (2d) 52. Even the Marshall Inquiry refused to violate the anonymity of the personal views voiced by ministers in the privacy of the Cabinet room. See *Marshall*, *supra* note 150.

153 See *Can Am Simulation*, *supra* note 150; *Health Services*, *ibid*, Schedule 1; *Northern Transportation*, *supra* note 150, Schedule 1.

the final word on which government secrets, including Cabinet secrets, can be produced. From a rule of law perspective, it is the role of the judicial branch to decide which evidence should be admitted in legal proceedings, not the executive branch. And the judicial branch is in a better position to fairly weigh and balance the competing aspects of the public interest, as it is independent and impartial. Other factors, such as the passage of time and the nature of proceedings, militate against the recognition of an absolute immunity for Cabinet secrets. At the same time, it must be recognized that the executive branch is more efficient and has greater expertise to assess the degree of injury to the interest of good government which could result from production.[154] Yet, while its position is entitled to deference, there is no consensus as to what the level of deference should be. English and Australian courts tend to be deferential while New Zealander and Canadian courts tend not to be. The non-deferential approach almost systematically leads to the production of provincial Cabinet documents in Canada, although a line of cases has attempted to mitigate its consequences. The question of deference is connected to the manner in which PII claims should be assessed by the courts.

III. ASSESSMENT OF PUBLIC INTEREST IMMUNITY CLAIMS

Once it is accepted that the judicial, rather than the executive, branch should have the final word about the validity of PII claims, the question becomes: how should PII claims, especially Cabinet immunity claims, be assessed by the courts? This section will address that question. It is divided into two parts which will examine, respectively, the abstract and actual assessment of PII claims. "Abstract assessment" refers to the discovery and objection stages: the stages unfolding before the judge has seen the documents subject to PII. "Actual assessment" refers to the inspection and production stages: the stages unfolding after the judge has seen the documents subject to PII. Each stage gives rise to a specific line of inquiry: Which standard of relevance should govern the disclosure of documents on discovery? When should the courts inspect documents subject to PII? Which approach should the courts adopt to weigh and balance the competing aspects of the public interest? When should the courts order production of documents and under which conditions? I will answer each question via a rational approach to PII made of four pillars: a narrow discovery standard, an executive onus of justification, a cost-benefit analysis, and a judicial duty to minimize injury.

A. ABSTRACT ASSESSMENT OF PUBLIC INTEREST IMMUNITY CLAIMS

1. DISCOVERY STAGE: IDENTIFYING THE RELEVANT DOCUMENTS

The substantive law of PII is conceptually distinct but nonetheless connected to the procedural law of discovery. Disputes about access to government documents can only arise if the parties are aware of the existence of the documents. Thus, as a matter of law, in civil proceedings each party must disclose to the other party the basis of his or her claim, and all documents within his or her control relevant to the claim after the pleadings (statements of claims or defence) have been filed. The documents must be listed in an affidavit of documents, and can be inspected by the other party, unless a valid objection to their

[154] Ronald M Lieberman, "Executive Privilege" (1975) 33:2 UT Fac L Rev 181 at 182–85.

production is made. While the disclosure duty is continuous during the proceedings, it is usually fulfilled during the discovery process. The discovery process is designed to promote fair hearing rights and preserve judicial resources in three ways: (1) it enables each party to know the case that will be presented by the other party, assess its strengths and weaknesses, and prepare an effective answer; (2) it narrows the issues to be decided at trial by allowing the parties to obtain admissions of fact from each other; and (3) it facilitates out-of-court settlements.[155]

Pursuant to the principle of access to evidence, all relevant evidence must be available to the court in the search for the truth. What is relevant can only be assessed in relation to the allegations made by the parties in their pleadings. The concept of relevance is twofold: it includes factual relevance and legal relevance. "Factual relevance" refers to the probative value of the evidence: whether, as a matter of logic and experience, the evidence assists in proving or disproving a particular fact.[156] Evidence has probative value if it makes the existence of a fact more or less probable, or more or less likely to be true.[157] "Legal relevance" refers to the materiality of the evidence: whether the evidence assists in proving or disproving a fact that is significant and in dispute between the parties.[158] Evidence is material if it is related to an element of the cause of action or defence over which the parties disagree.[159] Only evidence that meets the criteria of factual and legal relevance can be admitted at the trial.[160]

Given the exploratory nature of the process, the standard of relevance on discovery is not necessarily limited to factual and legal relevance. Two standards can be identified: semblance of relevance and simple relevance. The "semblance of relevance standard" affords the broadest scope of discovery. Under this standard, each party must disclose to the other party all documents "relating to any matter in question in the action."[161] Therefore, documents must be disclosed if they "seem" relevant, in the sense that they are somehow connected to the subject matter of the case. Four categories of documents must be disclosed under this standard: (1) documents which a party intends to rely upon in support of his or her case; (2) documents which adversely affect a party's case or support another party's case; (3) documents which are part of the story or background of the case, but do not fall under categories 1 and 2; and (4) documents "which may fairly lead him to a train of inquiry" that

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155 Todd L Archibald, James C Morton & Corey D Steinberg, *Discovery: Principles and Practice in Canadian Common Law*, 2nd ed (Toronto: CCH, 2009) at 11–12.

156 *Black's Law Dictionary*, 9th ed, *sub verbo* "relevant."

157 To identify factually relevant evidence, ask: "[D]oes [the evidence] tend to prove or disprove the fact for which it is tendered?" (Hamish Stewart et al, *Evidence: A Canadian Casebook*, 3rd ed (Toronto: Emond Montgomery, 2012) at 7 [Stewart, *Evidence*]).

158 Daphne A Dukelow, *The Dictionary of Canadian Law*, 4th ed (Toronto: Carswell, 2011) *sub verbo* "material."

159 To identify legally relevant evidence, ask: "[I]s the fact that the evidence tends to prove or disprove legally significant in establishing an element of the cause of action, offence, or defence at issue?" (Stewart, *Evidence*, *supra* note 157 at 7).

160 Edward W Cleary, ed, *McCormick on Evidence*, 3rd ed (St Paul, Minn: West, 1984) ("[i]n sum, relevant evidence is evidence that in some degree advances the inquiry. It is material and probative. As such, it is admissible, at least prima facie" at 544).

161 The term "relating to" can be substituted by "touching" or "regarding," the term "any" by "every," and the term "in question" by "in issue." Whatever combinations of these terms is adopted in any given jurisdiction, the semblance of relevance standard remains equally broad.

may elicit documents under categories 1 and 2.[162] The first two categories usually lead to the disclosure of a limited number of factually and legally relevant documents, while the last two categories usually lead to the disclosure of a large number of non-factually and non-legally relevant documents, especially in complex litigation where there is a lack of cooperation between the parties. In the information age, where the volume of documents is higher than ever, the parties run the risk of being submerged in a "plethora of irrelevancies,"[163] thus increasing the length and costs of litigation. The semblance of relevance standard, which was designed to prevent "trial by ambush," now often leads to "trial by avalanche." This situation is inefficient and undermines the principle of access to justice.[164]

While semblance of relevance has been the classic standard among the Westminster States to set out the scope of discovery, there has been a movement over the past two decades toward a narrower standard in some jurisdictions: simple relevance. Under the "simple relevance standard," the parties must disclose documents within their control on which they intend to rely (category 1) and which adversely impair their case (category 2). Background documents (category 3) and "train of inquiry" documents (category 4) need not be disclosed.[165] The simple relevance standard has been adopted in the UK, Australia, New Zealand, and Canada (in federal, Alberta, Nova Scotia, Ontario, and Saskatchewan courts), even though the language used in the applicable legislation varies.[166] Despite this evolution, there is some evidence that courts, accustomed to the semblance of relevance standard, remain reluctant to apply the narrower simple relevance standard.[167] The semblance of relevance standard remains in force in eight Canadian jurisdictions: British Columbia, Manitoba, Newfoundland, New Brunswick, Northwest Territories, Nunavut, Prince Edward

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162 The infamous "train of inquiry" test stems from the English case *Compagnie Financière du Pacifique v Peruvian Guano Co* (1882), 11 QBD 55 at 63. For a review of that standard, see The Right Honourable The Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Woolf Inquiry Team, 1995) ch 21.

163 Archibald, Morton & Steinberg, *supra* note 155 at 1. See also Linda S Abrams & Kevin P McGuinness, *Canadian Civil Procedure Law*, 2nd ed (Markham, Ont: LexisNexis, 2010) § 13.14.

164 Woolf, *supra* note 162, ch 21:

> The result of the *Peruvian Guano* decision was to make virtually unlimited the range of potentially relevant … documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is.

165 *Ibid*. See also Megan Marrie, "From a 'Semblance of Relevance' to 'Relevance': Is It Really a New Scope of Discovery for Ontario?" (2011) 37:4 Adv Q 520.

166 United Kingdom, *Civil Procedure Rules 1998* (UK), r 31.6; Australia, *Federal Court Rules 2011* (Cth), rr 20.14(1)–(2); New Zealand, *High Court Rules 2016* (NZ), r 8.7; Canada, *Federal Courts Rules*, SOR/98-106, rr 222– 23; Alberta, *Rules of Court*, Alta Reg 124/2010, rr 5.2, 5.5–5.6; Nova Scotia, *Civil Procedure Rules*, r 15.02; Ontario, *Rules of Civil Procedure*, RRO 1990, Reg 194, r 30.02(1); Saskatchewan, *The Queen's Bench Rules*, r 5-6(1)(b). For a comparative analysis of standards of relevance among Westminster States, see Ontario, Superior Court of Justice & Ministry of the Attorney General, *Report of the Task Force on the Discovery Process in Ontario* (November 2003) at Part III, Appendix H, online: <www.ontariocourts.ca/scj/news/publications/discoveryreview/>. See also Ontario, Ministry of the Attorney General, *Civil Justice Reform Project*, by Honourable Coulter A Osborne (November 2007), online: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>.

167 Marrie, *supra* note 165. Based on a review of the relevant case law, Marrie argues that the shift toward the simple relevance standard in Canada may not have the intended effect of narrowing the scope of discovery, since the courts tend to revert to the classic semblance of relevance standard through judicial interpretation. Only Alberta courts seem to properly apply the simple relevance standard. In her view, the principle of proportionality, entrenched in the provincial rules of civil procedure rather than the simple relevance standard, may be the court's "trump card" to narrow the scope of discovery.

Island, and Yukon.[168] Whichever standard of relevance is applied, the obligations imposed upon the parties during the discovery process should remain proportional to the importance of the case.

The shift toward the simple relevance standard, insofar as the courts do not reinstate the semblance of relevance standard via judicial interpretation, is a positive development, for it has the potential to significantly reduce the number of disputes regarding access to Cabinet documents. Under the semblance of relevance standard, when the government is a party to litigation, it must disclose the existence of all Cabinet documents which seem connected to the matters in question. The cases reviewed in this article suggest that Cabinet documents do not usually fall under categories 1 or 2, as the government does not intend to rely on them and they do not adversely impair its case. Rather, they form part of the background of the case (category 3). In other words, while they are connected to the case, they do not contain factually or legally relevant evidence. This was the situation, for example, in *Burmah Oil*, *Air Canada*, and *Carey*, where the documents did not contain the "smoking gun" litigants were expecting to uncover. Had a narrower standard of relevance been applied in these cases, it is likely that no dispute about access to Cabinet documents would have arisen.

I have focused until now on disclosure obligations in civil, as opposed to criminal, proceedings. In criminal proceedings, only the prosecutor is bound to disclose the relevant evidence within his or her control to the accused before trial, subject to any applicable privilege or immunity.[169] Relevance is assessed in relation to the pleadings (the information or indictment), as well as the elements of the offense and the defence. The purpose of disclosure is to ensure that the accused knows the case against him or her so as to be able to make full answer and defence.[170] Evidence falls within the standard of relevance if "there is a reasonable possibility that [it] might be used by the accused in making full answer and defence or in making decisions about the conduct of the case."[171] The standard of relevance includes any evidence that tends to weaken the prosecution's case or strengthen the defence's case; however, it is not so broad as to permit "fishing expeditions." Considering the nature of the interest at stake (the liberty interest) as well as the burden of proof (beyond a reasonable doubt), this broad standard of relevance is appropriate.

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168 British Columbia, *Supreme Court Civil Rules*, BC Reg 168/2009, rr 7.1(1), 7.1(11); Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, rr 30.01(1), 30.02(1); Newfoundland and Labrador, *Rules of the Supreme Court, 1986*, SNL1986, c 42, Schedule D, r 32.01(1); New Brunswick, *Rules of Court*, NB Reg 82-73, r 31.02(1); Northwest Territories and Nunavut, *Rules of the Supreme Court of the Northwest Territories*, NWT Reg 010-96, r 219; Prince Edward Island, *Rules of Civil Procedure*, r 30.02(1); Yukon, *Rules of Court for the Supreme Court of Yukon*, r 25(3).

169 Stewart, *Evidence*, *supra* note 157 at 12; Archibald, Morton & Steinberg, *supra* note 155 at 11. For an overview of the applicable privileges and immunities, see David M Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) ch 7.

170 See *R v Stinchcombe*, [1991] 3 SCR 326.

171 Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 250.

2. OBJECTION STAGE: ASSESSING THE STRENGTH OF THE OBJECTION

Under the law of discovery, the State, as any party, must disclose to the other party the existence of the documents that meet the applicable standard of relevance. But the government can object to the production of documents on the basis of PII, of which Cabinet immunity is a subset, in addition to any privilege available under evidence law. The law of discovery and evidence are branches of private law and, as such, the rules may vary from one jurisdiction to another. This explains why the standard of relevance applied during the discovery process is not uniform among Westminster States. Unlike the law of discovery and evidence, PII is a principle of constitutional law, connected to the administration of justice, as it delineates the respective powers and duties of the executive and judicial branches in relation to the admissibility of government secrets as evidence in legal proceedings.[172] Given that PII is a doctrine of constitutional importance, the rules under the common law should seek to be consistent among Westminster States without regard to regional differences in the law of discovery and evidence. Two questions will be addressed: how should a PII claim be made, and when should the court inspect the documents before ruling on the validity of a PII claim?

a. How Should a PII Claim Be Made?

Whether access to government documents is sought prior to the commencement of trial (on discovery) or during trial (by subpoena), the process to object to their production is the same. While, in principle, anyone (even the judge) can raise PII in court, the claim will not be vindicated without the support of the government.[173] The government can only make a PII claim if it has come to the conclusion, after pre-balancing the competing aspects of the public interest, that the interest of good government outweighs the interest of justice. The level of formalism required to make a valid PII claim has decreased over time. Before *Conway*, strict procedural safeguards were established to control the use of PII. To ensure political accountability for the decision, the courts required that the claim be made under oath in an affidavit by a minister who, after reading each document, had formed the opinion that production would be injurious.[174] After *Conway*, these safeguards have become redundant as to the end of ensuring procedural fairness, as the accountability for the decision to suppress evidence has shifted from the executive to the judicial branch.[175] PII claims can now be made by public servants by way of certificate, without the sanction of an oath.[176]

Who should make the objection when access to Cabinet documents is sought in court? While a certificate objecting to the production of Cabinet documents in court can be made by any minister or deputy minister, on behalf of the government, it should normally be made

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172 "[The question of PII] is of high constitutional importance, for it involves a claim by the executive to restrict the material which might otherwise be available for the tribunal" (*Duncan*, *supra* note 2 at 629). In the same vein, Lord Denning described PII as a "principle of our constitutional law which is to be observed in the administration of justice" (*Grosvenor Hotel*, *supra* note 3 at 1243). See also Cooper, *supra* note 3 at 5–8, 38.

173 *Ex parte Wiley*, *supra* note 65 at 296–98.

174 *Robinson*, *supra* note 6 at 718–19; *Duncan*, *supra* note 2 at 637–39.

175 Cooper, *supra* note 3 at 108.

176 See e.g. *Carey*, *supra* note 129.

by the Secretary to the Cabinet. As custodian of the Cabinet documents of past and current Ministries, the Secretary to the Cabinet is the official with the most expertise to assess the degree of injury to the interest of good government resulting from production.[177] As the most senior public servant, his or her decision is expected to be made with the public interest in mind, rather than political expediency. Plus, a centralized process promotes uniformity in the exercise of the duty to claim Cabinet immunity. To properly assess the competing aspects of the public interest, the Secretary should seek and obtain legal advice from a counsel who is not otherwise involved in arguing the merits of the case, so as to minimize the risk that the advice be tainted by improper considerations of litigation strategy.[178]

What kind of information should the certificate contain to enable the government to satisfy the onus of justificiation? When prima facie relevant Cabinet documents are identified, the onus is on the government to explain why they should be withheld. Whether the objection will succeed depends on the cogency of the reasons articulated to justify it. The government's position is communicated to the court by way of certificate, which should contain a sufficient description of the documents, an assessment of the degree of relevance, and an assessment of the degree of injury.[179]

First, the certificate should contain a sufficiently detailed description of the documents to establish that they are, in fact, Cabinet documents. A standard description should identify the nature of each document,[180] as well as its author, recipient, subject matter, and date.[181] In addition, to facilitate the assessment of the claim by the court, the certificate should state, for each document: whether or not it is an adverse document, whether or not it contains core secrets, and whether or not it pertains to a policy for which a final decision has been made and announced.

Second, the certificate should provide an assessment of each document's degree of relevance, which depends on its factual and legal relevance.[182] The assessment is crucial in jurisdictions where the semblance of relevance standard is in force to separate adverse documents from background and "train of inquiry" documents. In jurisdictions that have adopted the simple relevance standard, it can be presumed that the documents listed in the certificate are adverse. Litigants need facts to support their claims and are likely to dedicate resources to obtain access to documents which undermine their opponent's case or support their own case: documents with a high degree of relevance.[183] The government will need to advance very cogent reasons to persuade the court to suppress these documents, as their production is likely necessary to the fair disposition of the case. In contrast, litigants are less

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177 The role of the Secretary to the Cabinet as custodian of Cabinet documents is discussed in Campagnolo, *supra* note 1.

178 Cooper, *supra* note 3 at 61.

179 Certificates are used in proceedings to convey the State's position to the court, while affidavits are used to convey witnesses' testimonies. Unlike an affidavit, a certificate does not expose the person who signs it to cross-examination. See Uniform Law Conference of Canada, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Toronto: Carswell, 1982) at 448, 460.

180 Is the document an official or unofficial Cabinet document? Is it a memorandum, a submission, a minute, a record of decision, a briefing note, a letter, a PowerPoint presentation, an email, or a draft of legislation?

181 *Babcock v Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3 at para 28 (by analogy).

182 Cooper, *supra* note 3 at 39–40, n 73.

183 SI Bushnell, "Crown Privilege" (1973) 51:4 Can Bar Rev 551 at 581; Christopher Berzins, "Crown Privilege: A Troubled Exclusionary Rule of Evidence" (1984) 10:1 Queen's LJ 135 at 136.

likely to deplete resources to gain access to background and "train of inquiry" documents, as their degree of relevance is lower. It should be easier for the government to persuade the courts to suppress them, as their production is likely unnecessary to the fair disposition of the case. A rational assessment of the documents' degree of relevance will assist the parties and the court in centering the debate on the documents that are most relevant.

Third, the certificate should provide an assessment, for each document, of the degree of injury that could be sustained as a result of its production.[184] At the outset, the assessment should reaffirm the rationales behind Cabinet secrecy (candour, efficiency, and solidarity) as they explain why access to Cabinet documents is restricted. However, these rationales will not suffice to deprive the court of prima facie relevant evidence.[185] To achieve this objective, the government must explain why, in the particular circumstances of the case, production of Cabinet documents would injure the public interest. The degree of injury depends on the contents of the documents and the timing of their production. The dichotomy between core and non-core secrets is critical. Documents containing core secrets are substantively more sensitive because they reveal the personal views expressed by ministers during the deliberative process. Plus, given their anecdotal nature, their degree of relevance is lower. In contrast, documents containing non-core secrets are substantively less sensitive because they reveal information of a factual nature and, as such, their degree of relevance is higher. As for the timing of production, documents containing non-core secrets lose their sensitivity once ministers have made and announced their final decision on a given policy or action. Documents containing core secrets remain sensitive as long as ministers remain in public life.[186] A rational assessment of the degree of injury will assist the parties and the court in centring the debate on the documents that are less sensitive.

A certificate containing a sufficient description of the documents, as well as a tailored assessment of the degree of relevance and degree of injury, will be of assistance to the court in deciding whether or not to uphold the objection. It will demonstrate that the government has considered the relevant factors and pre-balanced the competing aspects of the public interest. If the level of information provided in the certificate is insufficient, that is, if the government fails to fulfill the onus of justification, it runs the risk of failing to persuade the court to uphold the objection.[187]

b. When Should the Court Inspect the Documents?

When the government has made a prima facie valid objection to the production of Cabinet documents, the court must decide whether or not to inspect them. This raises two questions: should inspection be the rule or the exception, and who bears the onus of persuading the court to inspect the documents? If inspection is the exception, the documents are presumed

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184 *Fletcher Timber*, *supra* note 123 at 295, Woodhouse P.

185 In New Zealand and Canada, the courts have been unconvinced by assertions of immunity based on standard formulae restating the Cabinet secrecy rationales without addressing the particular circumstances of the case. See *Fletcher Timber*, *ibid*; *Carey*, *supra* note 129.

186 *Whitlam*, *supra* note 76; *Australian Consolidated Press*, *supra* note 110 at 423.

187 For example, in *Carey*, *supra* note 129, the Cabinet immunity claim had several flaws: the descriptions of the documents were incomplete, there was no assessment of the degree of relevance, and the assessment of the degree of injury was not tailored to the circumstances of the case. The government thus failed to persuade the courts to uphold the claim and was forced to produce many Cabinet documents.

immune and the onus of persuading the court to inspect them is on the party seeking production, the litigant (the deferential approach). However, if inspection is the rule, the documents are not presumed immune and the onus of persuading the court not to inspect them is on the party resisting production, the government (the non-deferential approach).

The deferential approach stems from a concern with "fishing expeditions" and judicial economy. When semblance of relevance standard was the norm in the UK, the deferential approach ensured that the court would only inspect documents of substantial, rather than apparent, relevance.[188] In *Burmah Oil*, Lord Edmund-Davies stated that the Court could take "a peep" if the "documents [were] 'likely' to contain material substantially useful to the party seeking" production.[189] Similarly, Lord Keith said that inspection would be justified if there was a "reasonable probability" of the documents containing evidence lending "substantial support" to the case of the party seeking production.[190] This approach was confirmed by Lord Fraser in *Air Canada*:

> [I]n order to persuade the court even to inspect documents for which public interest immunity is claimed, the party seeking disclosure ought at least to satisfy the court that the documents are very likely to contain material which would give substantial support to his contention on an issue which arises in the case, and that without them he might be "deprived of the means of... proper presentation" of his case.[191]

The deferential approach raises three problems. First, the court cannot appropriately weigh and balance the competing aspects of the public interest without actually inspecting the documents. As such, a refusal to inspect prima facie relevant documents should be seen as an abdication by the judicial branch of its core function to control the admissibility of evidence, and a step back to a form of executive supremacy. Second, the onus imposed on the party seeking production is inconsistent with the principle of access to evidence. The onus should be on the party resisting production to persuade the court that prima facie relevant documents must be suppressed without inspection. Third, the onus imposed on the party seeking production is unfair and almost impossible to fulfill, as he or she does not have access to the documents which are subject to the Cabinet immunity claim:

> What troubles me about [the deferential] approach is that it puts on a plaintiff [the] burden of proving how the documents, which are admittedly relevant, can be of assistance. How can he do that? He has never seen them; they are confidential and so unavailable. To some extent, then, what the documents contain must be a matter of speculation.[192]

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188 See *Burmah Oil*, *supra* note 101 at 1117, where Lord Wilberforce stated that the courts should only inspect the documents "in rare instances where a strong positive case is made out, certainly not upon a bare unsupported assertion by the party seeking production that something to help him may be found."

189 *Ibid* at 1129, Edmund-Davies L.

190 *Ibid* at 1135–36, Keith L.

191 *Air Canada*, *supra* note 102 at 435. Lord Edmund-Davies and Lord Wilberforce agreed with Lord Fraser.

192 *Carey*, *supra* note 129 at 678, La Forest J.

It is a Catch-22 situation as the onus can hardly be met without access to the documents.[193] In most cases, the only fact that the party seeking production will know for certain is that the documents are prima facie relevant, in the sense that they fall within the applicable standard of relevance. In jurisdictions where the semblance of relevance standard applies, their actual degree of relevance will be a matter of speculation. The party seeking production should thus only be required to establish that he or she has a prima facie valid case, and that the documents are prima facie relevant to the case. The party resisting production should then bear the onus of filing a valid objection and persuading the court to sustain it.

To convince the court to sustain the objection without inspection, the party resisting production must clearly establish that production is unnecessary to the fair disposition of the case. Two scenarios are possible. First, the documents sought do not have substantial factual and legal relevance (such as background and "train of inquiry" documents). Hence, the government can reasonably contend that the litigant's private interest and the public interest in the proper administration of justice will not be injured if the claim is sustained. Second, the documents sought have substantial factual and legal relevance (such as adverse documents), but their production is unnecessary because they are inadmissible for another reason,[194] or the government has admitted the fact that the documents would prove,[195] or an alternative means of proof is available to the party seeking production.[196] In such cases, the court can sustain the objection without risk of denial of justice. The concerns about "fishing expeditions" and judicial economy are resolved in a principled and fair manner. Whether the court should forego inspection depends on the importance of the case, which can be assessed in relation to the interests of the litigant and the government.

With respect to the litigant's interest, a distinction can be made between three types of proceedings. First, in civil proceedings of a private nature, the litigant's interest can be weighed in terms of economic and reputational value. If the litigant is deprived of the proper means to present his or her case, there is a danger of expropriation without compensation.[197] In such cases, the interest at stake can be assigned a value (low, moderate, or high) in relation to the amount of money claimed. Second, in civil proceedings of a public nature, in addition to the litigant's interest, the public interest in upholding the rule of law will arise. If the litigant is deprived of the proper means to present his or her case, there is a danger of abuse of power or unlawful action.[198] In such cases, the interest at stake will vary from moderate to high. Third, in criminal proceedings, the accused's interest can be weighed in terms of stigma and loss of liberty. If the accused is deprived of the proper means to present his or her case, there is a risk of convicting an innocent. In such cases, the interest at stake will be high. In sum, the higher the litigant's interest, the more reluctant the court should be to forego inspection. If the interest at stake is moderate to high, as a rule, the court should inspect the documents to preserve public confidence in the administration of justice.

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193 Adam Tomkins, *The Constitution After Scott: Government Unwrapped* (Oxford: Clarendon Press, 1998) at 176. The only significant case in which the party seeking production discharged the onus is *Burmah Oil*, *supra* note 101. Yet, after inspecting the documents, the Law Lords held that their production was unnecessary to the fair disposition of the case.

194 Stewart, *Evidence*, *supra* note 157 at 5–7.

195 *Ibid* at 14–15.

196 See e.g. *Air Canada*, *supra* note 102.

197 Wade & Forsyth, *supra* note 28 at 711.

198 TRS Allan, "Abuse of Power and Public Interest Immunity: Justice, Rights and Truth" (1985) 101:2 Law Q Rev 200 at 205–206.

With respect to the government's interest, a distinction must also be made between three situations. First, in cases where the government does not have an interest in the outcome, the reasonable apprehension of bias, and the risk that it could suppress evidence for self-interested motives, will be low.[199] Second, in cases where the government has an interest in the outcome, the reasonable apprehension of bias, and risk that it could suppress evidence for self-interested motives, will vary from moderate to high.[200] Third, in cases where the government has an interest in the outcome and plausible allegations of criminal misconduct are made against public officials, the reasonable apprehension of bias, and the risk that it could suppress evidence for self-interested motives, will be high.[201] In sum, the higher the reasonable apprehension of bias, the more reluctant the court should be to forego inspection. If the government's interest is moderate to high, the court should, as a rule, inspect the documents to preserve the appearance of justice.[202]

There are three possible outcomes at the end of the objection stage: the onus of justification can be discharged in full, in part, or not at all. The onus of justification will be discharged in full if the government makes a prima facie valid objection and persuades the court that inspection is unnecessary to the fair disposition of the case. In this situation, the court may sustain the objection without first inspecting the documents. To achieve this result, the government must clearly establish one of the following: the documents are not factually and legally relevant, the documents are inadmissible for another reason, the facts that the documents would prove have been admitted, or alternative means of proof are available. Moreover, for the court to sustain the objection without inspection, the litigant's and the government's interests in the case must be low.

The onus of justification will be discharged in part if the government makes a prima facie valid objection, but fails to persuade the court that inspection is unnecessary to the fair disposition of the case. In this situation, the court should not sustain the objection without first inspecting the documents. Indeed, if the documents seem factually and legally relevant, admissible, and replaceable by no alternative means of proof, the court should inspect them, considering the possible denial of justice that could ensue if the objection is sustained. Furthermore, the court should inspect the documents before ruling on the objection if the litigant's and the government's interests in the case are moderate to high.

Finally, the onus of justification will not be discharged at all if the government fails to make a prima facie valid objection, that is, if it fails to provide a sufficient description of the documents, an assessment of their degree of relevance, or an assessment of the degree of injury that would result from production. Without this basic information, the court will not

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199 This situation is unlikely to arise, as litigants usually seek access to Cabinet documents to prove a wrongful or unlawful government action. The government always has an interest in the outcome of such cases.

200 This is the situation in which access to Cabinet documents is usually sought. Litigants will either allege a breach of private law against the government acting as a commercial entrepreneur, or a breach of public law. See *Burmah Oil*, *supra* note 101; *Air Canada*, *supra* note 102; *Fletcher Timber*, *supra* note 123; *Carey*, *supra* note 129; *Northern Land Council*, *supra* note 112.

201 This situation is rare, but not unprecedented. See *Nixon*, *supra* note 91; *Whitlam*, *supra* note 76.

202 TRS Allan, "Before the High Court: Discovery of Cabinet Documents: the *Northern Land Council* Case" (1992) 14:2 Sydney L Rev 230 at 238 [Allan, "Discovery of Cabinet Documents"] ("[i]t is deeply antagonistic to the rule of law that central government should be able to resist discovery, without judicial evaluation of the claim to immunity, where it is itself implicated in the proceedings" at 238).

have any firm basis upon which to sustain the objection. In this situation, the court should first give the government the opportunity to file a new certificate before dismissing the objection. Even though the objection is invalid, production of the documents could still be injurious to the public interest, and the court has a duty to protect the public interest. Substance should prevail over form. However, if the government persists in refusing to provide the basic information, the court would be justified in dismissing the objection.

B. ACTUAL ASSESSMENT OF PUBLIC INTEREST IMMUNITY CLAIMS

1. INSPECTION STAGE: WEIGHING AND BALANCING THE PUBLIC INTEREST

Judicial inspection of documents subject to a prima facie valid objection should occur as a rule, unless the government can persuade the court that it is unnecessary. Substantively, what remains to be examined is: how should the inspection be conducted, and when should production be ordered? In other words, which approach should be followed to "weigh" the competing aspects of the public interest and decide on which side the "balance" must come down? To answer this question, I rely on cost-benefit analysis, which seeks to rationalize the method by which the interest of justice and the interest of good government are weighed and balanced against each other. I seek to bolster the transparency of the judicial intellectual process in the assessment of PII claims. Prior to addressing the substantive issues, I will deal with the procedural issues pertaining to the confidentiality of judicial inspections.

a. Procedural Issues: In Camera and *Ex parte* Proceedings

To preserve the confidentiality of the documents during the assessment of a PII claim, the inspection is typically conducted in camera and *ex parte* by a judge who is not involved in deciding the merits of the case.[203] The requirement that the inspection take place in camera is not controversial, considering that inspection in open court would undermine the documents' confidentiality and defeat the purpose of the whole exercise. In contrast, the requirement that the inspection take place *ex parte* is, to some degree, controversial. It has been argued that counsel acting on behalf of the party seeking production (the private litigant) should be afforded the opportunity to inspect the documents and make submissions, if he or she obtains the proper security clearance and signs a confidentiality undertaking.[204]

From a theoretical standpoint, enabling the litigant's counsel to participate in the assessment of a PII claim, by giving him or her the opportunity to raise issues, tender proof, and submit arguments, would be consistent with the nature of the adversarial process.[205] From a practical standpoint, the inspection stage could be carried out more efficiently if counsel could inspect the documents and identify those which he or she intends to rely upon. The debate would centre on the documents identified by counsel, rather than all the

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[203] For reasons of fairness and to bolster the appearance of justice, the judge deciding the merits of the case should not have knowledge of evidence that has not been seen by both parties.

[204] Mewett, *supra* note 3 at 377; Lieberman, *supra* note 154 at 191–92.

[205] Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv L Rev 353.

documents subject to the PII claim, therefore preserving scarce judicial resources. The court would likely benefit from counsel's informed submissions on the documents' degree of relevance and, as such, would be in a better position to assess the PII claim.

There are two noteworthy precedents in which lower courts ordered the production of sensitive documents for inspection by the litigants' counsel before assessing PII claims. In the first, the order was justified on the basis of the high volume of documents (126 Cabinet notebooks, containing thousands of pages) and the complexity of the issues.[206] In the second, the order resulted from the trial judge's inability to assess the relevance of 41 documents without the assistance of submissions from the litigant's counsel.[207] In both cases, the courts sought a confidentiality undertaking from counsel: they undertook not to reveal the contents of the documents inspected to anyone, not even their own clients. Breach of the undertaking would have constituted contempt of court, as well as professional misconduct. In the end, however, these two decisions were reversed on appeal.[208]

There are three considerations which militate against allowing the litigant's counsel to inspect Cabinet documents. First, it undermines the confidentiality of the documents and could therefore ultimately undermine the PII doctrine. If it were sufficient to launch a lawsuit against the government to open the doors of the Cabinet room, the proper functioning of our system of government would be at risk. The litigant's counsel, especially when he or she is politically motivated, is precisely the type of persons against which Cabinet immunity is supposed to protect political actors. After all, "would a Cabinet speak freely, or keep full and accurate minutes, if it knew that the only people who would read those minutes were lawyers suing the government in respect of the very matters discussed?"[209] In *Northern Land Council*, the High Court recognized that judicial inspection without the assistance of the litigant's counsel "may in some cases cast a heavy burden on the court, but it is unavoidable if confidentiality is to be maintained until a claim for immunity is determined."[210]

Second, by undertaking to preserve the confidentiality of the documents, the litigant's counsel is placed in a difficult ethical situation insofar as his or her duty to the court may conflict with the interest of his or her client.[211] The aim of securing the best outcome for his or her client may lure counsel to make use of the information acquired during the inspection, and breach his or her undertaking to the court, if the PII claim is ultimately sustained. Unlike the courts or the government when dealing with PII claims, the litigant's counsel has no formal duty to protect the public interest: he or she represents mainly private or partisan interests. One may also question the reliability of counsel's undertaking not to share the information with his or her client. Given the cloak of solicitor-client privilege, how could a breach of the undertaking ever be established?

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206 *Commonwealth v Northern Land Council*, [1990] FCA 382, 24 FCR 576, aff'd (1991), 30 FCR 1.
207 *Pocklington Foods Inc v Alberta (Provincial Treasurer)* (1992), 132 AR 176 (QB).
208 *Northern Land Council*, *supra* note 112; *Pocklington Foods*, *supra* note 150.
209 *Pocklington Foods*, *ibid* at para 20.
210 *Northern Land Council*, *supra* note 112 at 620.
211 *R v Basi*, 2009 SCC 52, [2009] 3 SCR 389 (Fish J noted that litigants' counsel "might feel bound to withdraw their representation, caught in a conflict between their duty to represent the best interests of their client and their duty to the court not to disclose or to act on the information heard *in camera*" at para 46 [emphasis in original]).

Third, in terms of expertise, the court is well placed to assess the documents' degree of relevance. The identification of factually and legally relevant evidence is at the centre of judicial expertise. The accomplishment of this function presupposes that litigant's counsel has sufficiently defined the cause of action, framed the issues in dispute, and identified the kind of evidence that would support his or her position. Provided that this condition has been fulfilled, the court should be in a position to assess the documents' degree of relevance without further assistance from counsel. As stated by T.G. Cooper, "counsel's assistance at the inspection stage is most useful in the area where it is least required, that is, in discerning the relevance and materiality of the contents of the sensitive documents."[212]

Judicial inspection should, in principle, be done without the benefit of submissions from the litigant's counsel. However, in exceptional circumstances, it should remain possible for the court to appoint an independent counsel to make submissions on behalf of litigants with respect to the validity of PII claims. The role of independent counsel should be limited to arguing the PII issue for the litigant: he or she should not be involved in arguing the merits of the case once the PII issue is resolved. As independent counsel would be appointed by the court, sworn to a duty of confidentiality, and vetted by the government, the risk of leaks and improper use of sensitive information would be low, and no ethical dilemma would arise. To fulfill his or her role, independent counsel should be briefed by the litigant's counsel on the elements of the cause of action, the issues in dispute, and the kind of evidence that would support the litigant's position. Given the possible impact on the length and costs of the legal proceedings, an independent counsel should only be appointed where the importance of the case would justify it, and where the court would otherwise be unable to properly assess the PII claim without the assistance of submissions on behalf of the litigant.

b. Substantive Issues: Benefit and Cost of Production

The core element of the PII doctrine is the weighing and balancing process laid down in *Conway* and applied to Cabinet documents in *Whitlam*. The basic rule is clear: documents must be produced if the public interest in the proper administration of justice outweighs the public interest in the proper administration of government. Stanley de Smith and Rodney Brazier argued that *Conway* "has substituted absolute judicial discretion for absolute executive discretion," and queried why "judicial wisdom and experience should be surer guides to the public interest on these matters than the judgments formed by the Executive."[213] As it is applied on a case-by-case basis, the weighing and balancing process makes the application of the PII doctrine less predictable and certain than the approach taken in *Duncan*. Still, there can be no doubt that the weighing and balancing process is more consistent with the rule of law. Greater predictability and certainty could be achieved by clarifying the methodology to be followed in the assessment of PII claims. Each PII claim "involves three judgments: (1) How much injury would be caused to the executive interests by disclosing the evidence? (2) How much injury would be caused to the interests of justice by withholding the evidence? (3) Which interest should prevail?"[214]

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212 Cooper, *supra* note 3 at 94–95.
213 de Smith & Brazier, *supra* note 48 at 611.
214 Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 122.

The first two questions establish the core variables, and the third, the conclusion to be drawn from their interaction. The basic rule requires a cost-benefit analysis, where the interest of justice represents the benefit of production and the interest of good government represents the cost of production; production should be ordered when the benefit is deemed greater than the cost. In these situations, production fosters the public interest in the preservation of peace and social order. Which factors should be examined to assess the respective weights of the interest of justice and the interest of good government?

i. Weighing the Benefit of Production: Degree of Relevance

With respect to the interest of justice, the most significant factor is the importance of the documents in relation to their factual relevance (probative value) and legal relevance (materiality).[215] The court should inquire whether production of the documents is necessary to the fair disposition of the case, that is, whether the litigant needs access to the documents to establish the elements of his or her cause of action. At this stage, the litigant's need for the documents is the primary concern, whatever the nature of the proceedings, be they civil or criminal. If probative and material evidence is suppressed, the litigant will suffer denial of justice and the interest of justice will be injured. However, if non-probative and non-material evidence is suppressed, the litigant will not suffer denial of justice, and the interest of justice will not be injured. The interest of justice is closely connected to substantive legal rights; it is fostered when litigants are able to effectively vindicate their legal rights.[216]

The factual relevance of each document can be weighed by assigning a value from 0 to 3, where 0 means that the document has no factual relevance, 1 means that the document has low factual relevance, 2 means that the document has moderate factual relevance, and 3 means that the document has high factual relevance. The legal relevance of each document can be weighed in the same manner. By multiplying the value given to the factual relevance of a document and the value given to its legal relevance, we find its degree of relevance. The degree of relevance can range from 0 to 9, where 0 means that the document is not relevant, 1 to 2 mean that the document has a low degree of relevance, 3 to 4 mean that the document has a moderate degree of relevance, and 6 to 9 mean that the document has a high degree of relevance. The degree of relevance can be used to weigh the interest of justice or the benefit of production. In principle, the court should not order the production of documents unless the degree of relevance is substantial,[217] that is, moderate to high under the proposed model, which can be illustrated by the following scoring matrix.

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215 Cooper, *supra* note 3 at 80–82. See also *Ex parte Wiley*, *supra* note 65 at 280–82; *Carey*, *supra* note 129 at 671.

216 Allan, "Discovery of Cabinet Documents," *supra* note 202 at 234.

217 *Ex parte Wiley*, *supra* note 65 at 280.

FIGURE 1

Non-Relevant		DEGREE OF RELEVANCE Scoring Matrix			
Low Relevance					
Moderate Relevance		FACTUAL RELEVANCE			
High Relevance		Nil [0]	Low [1]	Moderate [2]	High [3]
LEGAL RELEVANCE	Nil [0]	0	0	0	0
	Low [1]	0	1	2	3
	Moderate [2]	0	2	4	6
	High [3]	0	3	6	9

At one end of the spectrum, a document would have a high degree of relevance if it could be used to establish an element of the cause of action. For example, if the litigant alleges that the terms of a contract made with the government are unconscionable, and some of the documents inspected by the court establish that public officials unreasonably sought to exploit the litigant's vulnerabilities when the contract was formed, these documents would have a high degree of relevance, as they tend to establish the truthfulness of a significant fact in the action. At the other end of the spectrum, if the documents relate to the contract without supporting the litigant's allegations of unconscionable conduct, their degree of relevance would be low. Under the proposed model, adverse documents would have a moderate to high degree of relevance, while background and "train of inquiry" documents would have a low degree of relevance. The degree of relevance would be nil in cases where the documents do not meet the discovery standard, the documents are inadmissible for another reason, the facts that the documents would establish are not in dispute, or an alternative means of proof is available. Production of such documents would not foster the interest of justice.

ii. Weighing the Cost of Production: Degree of Injury

With respect to the interest of good government, the most significant factor is the sensitivity of the documents in relation to their contents and the timing of their production.[218] On the first point, regarding sensitivity, three considerations must be examined: the level of the decision-maker, the nature of the policy, and the nature of the information. First, "[t]he weight of the public interest against [production] … will in general be stronger where the documents are Cabinet papers than when they are at a lower level,"[219] because the Cabinet is the highest decision-maker within government. Second, the weight of the public interest against production will be stronger where the documents deal with subject matter such as national security, defence, or international relations, rather than the government's commercial and contractual activities.[220] It will also be stronger where the documents deal

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218 *Carey*, *supra* note 129 at 670–73; Hodgson, *supra* note 27 at 172–73, 175–76.
219 *Air Canada*, *supra* note 102 at 435. See also *Jonathan Cape*, *supra* note 70 at 769–70.
220 *Robinson*, *supra* note 6 at 715–16; *Burmah Oil*, *supra* note 101 at 1121–22, 1128.

with the formulation, rather than the implementation, of policy.[221] Third, the weight of the public interest against production will be stronger where the documents reveal core secrets (views and opinions), rather than non-core secrets (facts and background information).[222]

On the second point, regarding timing sensitivity, the main consideration is whether the development of the impugned policy is still ongoing or whether a final decision has been made and announced. The weight of the public interest against production will be stronger where the documents relate to the planning and development of a policy.[223] Such documents are pre-decisional and deliberative; they reflect the give-and-take of opinion in the decision-making process, which will result in a final Cabinet decision.[224] Their production before a final decision has been made and announced, when there is a keen interest in the subject matter, will likely injure the decision-making process and the interest of good government.[225] This applies to core and non-core secrets. After the planning and development stage has come to an end, and a final decision has been made and announced, or after a proposed policy has been abandoned, the weight of the public interest against production will be stronger where the documents reveal core secrets, rather than non-core secrets. From this moment on, the publication of factual information will not likely injure the interest of good government. But the publication of personal views expressed by ministers while deliberating on government policy will likely injure the interest of good government as long as the political actors remain in public life.[226] The injury will decrease with the passage of time, when the policy involved is no longer current or controversial,[227] a number of elections have been held,[228] and changes of government have occurred,[229] or until the documents become purely of historical interest.[230]

Considering that Cabinet documents are not a homogeneous class of documents, each document cannot be deemed equally sensitive.[231] It is thus essential to conduct an individual assessment of each document's level of sensitivity in relation to its contents and timing of production.[232] The level of sensitivity can be weighed, in view of the contents of each document, by assigning a value from 0 to 3, where 0 means that the contents of the document are not sensitive, 1 means that the contents of the document are slightly sensitive, 2 means that the contents of the document are moderately sensitive, and 3 means that the contents of the document are highly sensitive. The level of sensitivity can be weighed, in view of the timing of production of each document, by following the same process. By multiplying the value given to the contents of a document and the value given to the timing of production, we find its degree of injury. The degree of injury can range from 0 to 9, where 0 means that

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221 *Carey*, *supra* note 129 at 671–72.

222 *Northern Land Council*, *supra* note 112 at 614–15. See also Bushnell, *supra* note 183 ("[t]he more the factual content and the less the opinion content the greater should be the tendency to disclose" at 552).

223 *Carey*, *supra* note 129 at 670–71.

224 *Whitlam*, *supra* note 76 at 97; Cooper, *supra* note 3 at 45, n 87.

225 *Carey*, *supra* note 129 at 670–71.

226 *Australian Consolidated Press*, *supra* note 110 at 423.

227 *Whitlam*, *supra* note 76 at 46, 98.

228 *Jonathan Cape*, *supra* note 70 at 771; *Carey*, *supra* note 129 at 672–73.

229 *Whitlam*, *supra* note 76 at 99–100; *Carey*, *ibid*.

230 *Conway*, *supra* note 59 at 952.

231 *Jonathan Cape*, *supra* note 70 at 767; *Whitlam*, *supra* note 76 at 41–42.

232 Cabinet documents are no longer assessed only on the basis of the class to which they belong. As Cabinet immunity is relative, not absolute, it is necessary to take into account the specific contents of each document. See Allan, "Discovery of Cabinet Documents," *supra* note 202 at 232.

production of the document is not injurious, 1 to 2 mean production of the document is slightly injurious, 3 to 4 mean that production of the document is moderately injurious, and 6 to 9 mean that production of the document is highly injurious. The degree of injury can be used to weigh the cost of production. In principle, the court should not decline to order production, unless the degree of injury is substantial,[233] that is, moderate to high under the proposed model, which can be illustrated by the following scoring matrix.

FIGURE 2

No Injury		**DEGREE OF INJURY Scoring Matrix**			
Low Injury					
Moderate Injury		**CONTENTS SENSITIVITY**			
High Injury		**Nil [0]**	**Low [1]**	**Moderate [2]**	**High [3]**
TIMING SENSITIVITY	**Nil [0]**	**0**	**0**	**0**	**0**
	Low [1]	**0**	**1**	**2**	**3**
	Moderate [2]	**0**	**2**	**4**	**6**
	High [3]	**0**	**3**	**6**	**9**

At one end of the spectrum, the degree of injury ensuing from production would be high if the document reveals ministerial views on the formulation of an important policy, before a decision has been made and announced. This would be the case if a litigant seeks access to Cabinet documents related to a decision to go to war when ministers are still deeply divided. At the other end of the spectrum, the degree of injury would be low if the document reveals factual information on the implementation of a policy of lower importance, or the performance of contractual obligations, after a decision has been made and announced. This would be the case if a litigant seeks access to documents related to a decade-old decision to spend money for the economic development of a region, or to award a public contract.[234] The degree of injury would be nil in two cases: the contents are no longer sensitive where the document was voluntarily published by the government,[235] and the timing of production is no longer sensitive where the document is so old that it is purely of historical interest.[236]

233 *Ex parte Wiley*, *supra* note 65 at 281–82.

234 Many scenarios can be envisaged in between, such as the situation in which the litigant seeks access to ministerial views on the formulation of a policy after a decision has been made and announced, and the situation in which the litigant seeks access to factual information on the formulation of a policy, before a decision has been made and announced. In these cases, the degree of injury would be moderate to high.

235 *Robinson*, *supra* note 6 at 718; *Whitlam*, *supra* note 76 at 44–45, 64, 100.

236 *Conway*, *supra* note 59 at 952.

iii. Balancing the Benefit and the Cost of Production: Civil Proceedings

The balancing process must be conducted on an individual basis for each document. The interest of justice (benefit of production) is established in relation to each document's degree of relevance, and the interest of good government (cost of production) is established in relation to each document's degree of injury. In principle, if the degree of relevance is deemed greater than the degree of injury, then production should be ordered; conversely, if the degree of relevance is deemed smaller than the degree of injury, then production should be declined. What if the degrees of relevance and of injury are deemed equal? Cooper argues that the court should defer to the government's expertise and decline production.[237] I disagree. While the government has more expertise than the court to assess the degree of injury (as such, it is entitled to deference on this point), it does not have more expertise to assess the degree of relevance (as such, it is not entitled to deference on this point). As PII is an exception to the principle of access to evidence,[238] if the government fails to persuade the court that the degree of injury outweighs the degree of relevance, the claim should fail.

iv. Balancing the Benefit and the Cost of Production: Criminal Proceedings

The question arises as to whether the same balancing process should be carried out in civil and criminal proceedings. Can the court decline to order the production of documents which may assist the defence in criminal proceedings based on the PII doctrine? The answer is negative.[239] Given the stigma of a verdict of culpability and the loss of liberty that may ensue, documents which may establish the innocence of the accused must be produced. This exception is known as the "innocence-at-stake" rule.[240] Thus, "[t]he application of the [PII] doctrine in criminal proceedings … will involve a different balancing exercise to that in a civil proceeding."[241] As such, if a document could assist the defence case (that is, if its degree of relevance is moderate to high), then production should be ordered, notwithstanding the degree of injury; conversely, if it cannot assist the defence case (that is, if its degree of relevance is nil to low), then production should be declined. There is no balancing process in criminal proceedings: if a document is relevant, the balance will come down in favour of production. The prosecutor will have two options: produce the documents, or abort the prosecution.[242]

The approach described above was confirmed as a result of the *Matrix Churchill* affair, and the Scott Inquiry, in the UK.[243] The affair refers to the criminal prosecutions of Matrix Churchill corporate executives for the unlawful exportation of arms to Iraq. The defence alleged that the government had been informed of the exports and had encouraged them. To establish the truth of these allegations, it sought access to certain government documents.

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237 Cooper, *supra* note 3 at 118.
238 Edward Koroway, "Confidentiality in the Law of Evidence" (1978) 16:2 Osgoode Hall LJ 361 at 363.
239 *Duncan*, *supra* note 2 at 633–34.
240 See *R v McClure*, 2001 SCC 14, [2001] 1 SCR 445; *R v Brown*, 2002 SCC 32, [2002] 2 SCR 185.
241 Alan W Bryant, Sidney N Lederman & Michelle K Fuerst, *The Law of Evidence in Canada*, 3rd ed (Toronto: LexisNexis, 2009) § 15.37.
242 Malek, *supra* note 36 at 794.
243 For an overview of the *Matrix Churchill* affair, see Tomkins, *supra* note 193 at 167–200.

The government replied by filing various PII claims, thus creating the risk that the defence may be deprived of factually and legally relevant evidence. After inspection, the trial judge ordered the production of several documents, and the prosecution complied with the order. The documents were used by the defence in cross-examination of witnesses, leading to the concession that the arms were exported with ministerial support. Once the concession was made, the prosecutions were aborted. Amid claims of cover-up and abuse of power, Richard Scott was appointed to shed light on the matter. In his report, Scott criticized the government for its improper use of a class claim to suppress relevant evidence in criminal prosecutions.[244] In the aftermath of the Inquiry, the government recognized that the balancing process differs in criminal prosecutions and abandoned the use of class claims.[245]

Let us now turn to the cases where access to government documents may be required for the criminal prosecution of public officials. It is possible that the government could object to the production of documents in this context, as happened in *Nixon* and *Whitlam*. Given that the aim of PII is to foster the proper administration of government, it would be improper to use the PII doctrine to suppress evidence of a crime. As such, if a document could assist the prosecution's case (if its degree of relevance is moderate to high), then production should be ordered, notwithstanding the degree of injury; conversely, if it cannot assist the prosecution's case (if its degree of relevance is nil to low), then production should be declined.

2. PRODUCTION STAGE: MINIMIZING THE DEGREE OF INJURY

When the court concludes that production of documents should be ordered in the public interest, the final question is: which measures should be taken to minimize the degree of injury to the interest of good government? The interest of justice requires that litigants be given access to factually and legally relevant documents, and the opportunity to use them in court; however, it does not require the full publication of sensitive documents in open court to satisfy the curiosity of the public. Thus, if the degree of injury ensuing from the production of a document is substantial (moderate to high), the court should take measures to minimize it.[246] This stems from the court's duty to uphold the public interest and the deference owed to the government on the degree of injury. Two measures can be implemented to minimize the degree of injury: the court can edit the documents, and impose conditions for their use.

First, the court can edit a document to extract the relevant information and protect the remaining sensitive information.[247] Why should the court order the production of a full memorandum to Cabinet, if only a few pages are relevant? Conversely, why should the court refuse the production of a full briefing note if only a few pages contain sensitive

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244 Richard Scott, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, vol 4 (London: HMSO, 1996) at 1781–93.

245 UK, HC, *Official Report*, 6th ser, vol 287, cols 949–58 (18 December 1996); UK, HL, *Parliamentary Debates*, 5th ser, vol 576, cols 1507–17 (18 December 1996).

246 If the court concludes that the degree of injury is low, after giving the proper level of deference to the government's assessment, it does not need to take special measures to minimize the degree of injury. In this context, the level of protection afforded by the implied undertaking rule is sufficient. See *Juman v Doucette*, 2008 SCC 8, [2008] 1 SCR 157.

247 *Conway*, *supra* note 59 at 943–44. See also Gerry Molnar, "Crown Privilege" (1977–1978) 42:2 Sask L Rev 173 at 188–89.

information? In both cases, if the relevant information can be understood without the context provided by the full version of the document, it could be extracted and produced. This is consistent with the approach taken in *Nixon*.[248] If the relevant information cannot be understood without the context provided by the full version of the document, the government could draft a summary of the information (to be reviewed and approved by the court) or admit the underlying facts. The editing process could be used to sever non-core from core secrets in Cabinet documents. Non-core secrets usually have a higher degree of relevance and a lower degree of injury than core secrets, as they reveal objective facts, not subjective views. The editing process could be used to extract and produce non-core secrets while protecting core secrets.

Second, the court can impose conditions for the use of sensitive documents. Indeed, the documents are produced to the litigant for a specific and limited use, not to all the world for an unspecified and unlimited use. It should thus be made clear that the documents cannot be published without the court's consent. To that end, they could be marked "confidential" and their access made conditional upon the acceptance of a confidentiality undertaking by the litigants and their counsel.[249] The undertaking is an explicit promise made to the court not to violate the confidentiality of the documents by disclosing them to unauthorized persons. Breach of the undertaking constitutes contempt of court and carries serious consequences. In addition, at the government's request, the court could order that any part of the litigation where excerpts from the documents are read into the record, or testimonies given on their contents, take place in camera.[250] As a result, the related portions of the court transcript, and any sensitive documents filed into evidence, would be sealed by the court. At the end of the litigation, any sensitive documents in the possession of the court as well as the litigants and their counsel would be returned to the government. While these conditions cannot entirely remove the risk of injury, they can lower it to a tolerable level.[251]

To sum up, in this section, I put forth a rational approach to the assessment of Cabinet immunity claims in legal proceedings. I have divided the assessment process into two phases (abstract and actual phases) and four stages (discovery, objection, inspection, and production stages). Regarding the discovery stage, I have argued that the process could be improved in terms of efficiency if the standard of relevance was narrowed from semblance of relevance to simple relevance. Regarding the inspection stage, for reasons of fairness, I have taken the position that the court should, as a rule, inspect prima facie relevant documents, unless the government persuades the court that their degree of relevance is clearly low. Regarding the production stage, to increase predictability, certainty, and transparency in the assessment of

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248 In *Nixon*, *supra* note 91 at 715–16, the US Supreme Court directed the lower Court to hear the tapes and extract the relevant information. The Special Prosecutor was only given access to the relevant information; the remaining information was returned to its lawful custodian under seal.

249 JES Simon, "Evidence Excluded by Considerations of State Interest" (1955) 13:1 Cambridge LJ 62 at 76. The (explicit) confidentiality undertaking will reinforce the "implied undertaking rule" in jurisdictions where it applies, such as Canada, or fulfill the same purpose in jurisdictions where it does not apply.

250 *Ibid* at 76–78. See also Molnar, *supra* note 247 at 188.

251 See e.g. *Can Am Simulation*, *supra* note 150 at para 55; *Health Services*, *supra* note 150, Schedule 1; *Northern Transportation*, *supra* note 150, Schedule 1. The integrity of the judicial process requires that the confidentiality undertaking be respected. As such, the courts should refuse to vary a confidentiality order for Cabinet documents unless a "material change of circumstances" has taken place (*British Columbia Teachers' Federation v British Columbia*, 2015 BCCA 185, [2015] 11 WWR 645, rev'g 2014 BCSC 121, [2014] 3 WWR 672).

PII claims, I have proposed a cost-benefit analysis, the aim of which is to maximize the public interest by weighing and balancing the interest of justice and the interest of good government. The first should be weighed in relation to the degree of relevance (factual and legal relevance) and the second in relation to the degree of injury (contents and timing sensitivity). Production should be ordered if the degree of relevance is deemed equal to, or greater than, the degree of injury. Regarding the production stage, I have submitted that the court should minimize the degree of injury by editing the documents and imposing conditions for their use.

IV. CONCLUSION

The objective of this article was to critically review how the judicial branch has dealt with PII claims, especially Cabinet immunity claims, under the common law among the Westminster States. Two questions were examined: which branch of the State, the executive or the judicial, should have the final word on which government secrets, including Cabinet secrets, can be produced in legal proceedings; and which process should be followed to weigh and balance the competing aspects of the public interest when assessing PII claims?

First, the debate between judicial (*Robinson*) and executive (*Duncan*) supremacy has been settled. It is now clearly established that the courts should have the final word under the common law (*Conway*) for two reasons: it is the inherent function of the courts, not the government, to control the admissibility of evidence in legal proceedings; and procedural fairness demands that PII claims be decided by an independent and impartial judge, rather than a seemingly biased public official. It is also clearly established that Cabinet immunity claims are subject to judicial review: the immunity is relative, not absolute (*Whitlam*). This does not mean that the courts should automatically order the production of Cabinet secrets in legal proceedings; it means that Cabinet immunity claims should be assessed in a way that is responsive to the justification supporting the immunity and the circumstances of the case. The scope of Cabinet secrecy under constitutional conventions and the common law is, in this regard, consistent: the courts have accepted that the justification for Cabinet secrecy fades away with the passage of time (*Jonathan Cape*) and cannot be used to shield public officials against criminal prosecutions (*Whitlam*). On these principles, there is a consensus.

Yet there is no consensus on the level of deference which should be given to Cabinet immunity claims. The UK (*Burmah Oil* and *Air Canada*) and Australia (*Northern Land Council*) have taken a deferential approach while New Zealand (*Fletcher Timber*) and Canada (*Carey*) have taken a non-deferential approach. Under the first approach, Cabinet documents are presumed immune. The court will not inspect them, unless the litigant shows that they would likely substantially support the allegations made. This approach favours the interest of good government. Under the second approach, Cabinet documents are not presumed immune. The court will inspect them, unless the government establishes that their contents are very sensitive. This approach favours the interest of justice. The flaw with the deferential approach is that the onus requirement is inconsistent with the principle of access to evidence and unfair to litigants, thus resulting in the suppression of prima facie relevant documents. The flaw with the non-deferential approach is that insufficient weight is given to the rationales underpinning Cabinet secrecy, thus resulting in the production of sensitive

documents which may not support the allegations made (*Carey*). In light of these flaws, it became necessary to consider a new approach to assess Cabinet immunity claims.

Second, the proposed rational approach sought to incorporate the strengths of the deferential and non-deferential approaches. One of the strengths of the deferential approach is the focus on efficiency. Many disputes about access to Cabinet documents could be avoided if a narrower standard of relevance was adopted. Disputes should centre on documents that are likely truly relevant, not documents that simply relate to the case. Another strength of the deferential approach is the focus on expertise. Respect for the government's expertise implies that the courts should inspect the documents before ordering their production, defer to the government's assessment of the degree of injury, and minimize the degree of injury whenever production is ordered. The strength of the non-deferential approach is the focus on fairness. As such, the government should bear the onus of justifying why documents should be withheld. The courts should not uphold an objection to production without first inspecting the documents, unless their degree of relevance is clearly low. Also the courts should not defer to the government's assessment of the degree of relevance, given their greater expertise over the matter and the risk of government bias. The rational approach seeks to reach the proper equilibrium between efficiency, expertise, and fairness.

The main stage in the assessment of PII claims is the inspection stage, where the judge weighs and balances the competing aspects of the public interest. As part of the proposed rational approach, I have argued for a cost-benefit analysis of PII claims with the objective of maximizing the public interest. How should the interest of justice (benefit of production) and the interest of good government (cost of production) be weighed? The interest of justice should be weighed in relation to the degree of relevance found by multiplying the values given to the factual and legal relevance of each document.[252] The interest of good government should be weighed in relation to the degree of injury found by multiplying the values given the contents and timing sensitivity of each document.[253] How should the interest of justice and the interest of good government be balanced? A document should be produced if its degree of relevance is deemed greater than, or equal to, its degree of injury. As an exception, in cases where plausible allegations of criminal misconduct are presented, a document should be produced if its degree of relevance is deemed moderate to high. By imposing on the courts a duty to minimize the degree of injury whenever production is ordered, the rational approach enforces the interest of justice without unduly harming the interest of good government.

The adoption of the proposed rational approach by the courts under the common law would provide greater predictability, certainty, and transparency in the assessment of Cabinet immunity claims. It would ensure that the information that should remain secret is protected in a manner that would not be unduly detrimental to the rights of litigants and the public confidence in the administration of justice. The rational approach would, as compared to the deferential and non-deferential approaches, enable the courts to achieve a better balance between the interests of good government and justice. The principles underlying the rational approach can readily be applied at the provincial level in Canada; however, they cannot be

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[252] See Figure 1, above.
[253] See Figure 2, above.

applied at the federal level as sections 39 of the *Canada Evidence Act* and 69 of the *Access to Information Act* currently prevent any meaningful assessment of Cabinet immunity claims by the courts.[254] These outdated provisions should be overhauled as they are inconsistent with any conception of the rule of law requiring that executive action be subject to meaningful judicial review,[255] and are thus antithetical to the rational approach proposed in this article.

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254 See *supra* note 5.

255 This point will be further analyzed in Yan Campagnolo, "Cabinet Immunity in Canada: The Legal Black Hole" [forthcoming in 2018].