Questions of Privilege and Openness: Proposed Search and Seizure Reforms

Allan Manson*

Recent proposals for reform in the area of search and seizure have focussed, in part, on issues of information. These have included access to search warrant information, solicitor-client privilege and public interest immunity. In addressing these areas, the author suggests that preferences are developing for greater openness in the judicial process, respect for "fair trial" concerns and substantive protection of the lawyer-client relationship. Most jurisdictions, however, have rejected absolute immunity without judicial scrutiny for government documents. Since questions of confidentiality and access to information require an inquiry into the respective interests promoted by disclosure and non-disclosure, underlying value choices must be examined against preferences manifested elsewhere in the criminal law. Legislative reform of search and seizure powers, the author concludes, should therefore be both internally coherent and consistent with value choices which have evolved in related areas of criminal law.

L'accès aux renseignements ayant conduit à l'emission d'un bref de perquisition, la relativité du privilège de l'avocat et l'absolutisme de celui accordé à la Couronne, voilà tant de questions que les récentes esquisses de réforme en matière de fouilles et saisies on éclairé d'un jour nouveau. Selon l'auteur, un souci d'assurer une plus grande publicité à la démarche judiciaire, de respecter les exigences du *fair trial* et de raffermir la confidentialité entre l'avocat et son client se dessine peu à peu. Quant au privilège de la Couronne, la plupart des juridietions en conditionnant aujourd'hui l'existence à un examen judiciaire rigoureux. L'auteur estime que les problème de confidentialité et d'accès à l'information doivent être traités en fonction des valeurs, souvent différentes, que cherchent à promouvoir les nombreux domaines du droit criminel. C'est donc dans une perspective globale que devra être amorcée toute réforme législative en matière de fouilles et saisies.

*Of the Faculty of Law, Queen's University. The author wishes to thank his colleagues Donald Galloway, David Mullan and Don Stuart for their advice and valuable comments on an earlier draft of this paper.

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Introduction

The extent of police powers and the ability of the criminal law to invade the privacy of individuals have been the subject of much controversy in recent years. In particular, the scope of the authority to search and seize is one area which justifiably has received much attention.[1] The entrenched

[1]See generally Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Second Report: Freedom and Security under the Law* (1981), vol. 1, 103-23, 569-74 [herinafter cited as the McDonald Commission]; Hill, *After McIntyre* (1982) 26 C.R. (3d) 245; Paikin, *Attorney General of Nova Scotia* v. *MacIntyre: The Supreme Court of Canada Grapples with Public Access to Search Warrant Proceedings* (1981-82) 24 Crim. L.Q. 284; Paikin, "The Standard of 'Reasonableness' in the Law of Search and Seizure" in V. Del Buono, ed., *Criminal Procedure in Canada* (1982) 93-129; Stuart, *Annual Review of Criminal Law and Procedure* (1977) 9 Ottawa L. Rev. 568, 618-24. See also *Re Bordon & Elliot and the Qucen* (1975) 13 O.R. (2d) 248, (1975) 30 C.C.C. (3d) 337 (C.A.), where Arnup J.A. remarks that "the need for considering possible legislation is abundantly apparent".

guarantee of security against unreasonable search and seizure enacted by section 8 of the *Canadian Charter of Rights and Freedoms* has provided the springboard for increased judicial scrutiny of search practices.[2] The publication of the Law Reform Commission of Canada's working paper *Police Powers - Search and Seizure in Criminal Law Enforcement*[3] has been a welcome, albeit overdue, addition to the debate. The role of a working paper is to generate discussion, and this ambitious effort contains a comprehensive analysis of the present legal framework and a blueprint for legislative reform. In contrast, the proposed *Criminal Law Reform Act, 1984*,[4] a bulky document which touches on a variety of subjects, does not represent a re-thinking and general reform of the law of search and seizure. Instead, we find patches of amendments which appear to be responses to recent events in the area.[5] The legislation deals with the openness of the process, solicitor-client privilege and what is now commonly known as public interest privilege, previously described as either Crown or executive privilege. The impetus for the amendments relating to openness and solicitor-client privilege can be traced to the Supreme Court of Canada decisions in *MacIntytre* v. *Attorney General of Nova Scotia*[6] and *Descôteaux* v. *Mierzwinski*.[7] The public interest privilege sections arise as the final stage in the curious course chosen to replace section 41 of the *Federal Court Act*.[8]

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[2]Part 1 of Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [hereinafter the *Charter*]. See, *R.* v. *Cohen* (1983) 5 C.C.C. (3d) 156, (1983) 33 C.R. (3d) 151 (B.C.C.A.); *R.* v. *Collins* (1983) 5 C.C.C. (3d) 141, (1983) 33 C.R. (3d) 130 (B.C. C.A.); *R.* v. *Esau* (1983) 20 Man. R. (2d) 230, (1983) 4 C.C.C. (3d) 530 (C.A.); *Re Gillis and The Queen* (1982) 1 C.C.C. (3d) 545 (Que. S.C.); *R.* v. *Longtin* (1983) 41 O.R. (2d) 545, (1983) 5 C.C.C. (3d) 12 (C.A.); *R.* v. *Morrison* (1983) 6 C.C.C. (3d) 256, (1983) 34 C.R. (3d) 362 (B.C. Co. Ct.); *Re Regina and Shea* (1982) 38 O.R. (2d) 582, (1982)1 C.C.C. (3d) 316 (H.C.); *R.* v. *Stevens* (1983) 58 N.B.R. (2d) 413, (1983) 35 C.R. (3d) 1 (C.A.); *Re Trudeau and The Queen* (1982) 1 C.C.C. (3d) 342 (Que. S.C.); *R.* v. *Taylor* (1983) 25 Sask. R. 145, (1983) 7 C.C.C. (3d) 81 (Q.B.); *R* v. *Rao* (1984) 40 C.R. (3d) 1 (Ont. C.A.); *Hunter* v. *Southam Inc.* 17 September 1984 S.C.C. [unreported].

[3]*Working Paper No. 30* (1983), published shortly before the announcement by the Minister of Justice of the *Criminal Law Amendment Act, 1983*, which contained the provisions discussed herein (the proposed sections 443.2, 444.1 and 444.2) in the same form as they appeared in *Bill C-19, Criminal Law Reform Act, 1984*, 2nd Sess., 32nd Parl., 1983-84 [hereinafter cited as Bill C-19].

[4]Bill C-19, First Reading, 7 February 1984, died on the order paper.

[5]In the area of search and seizure, the proposed amendments which may attract the most attention are those dealing with "telewarrants" (s. 443.1) and "freezing orders" (ss 445.1-445.4, 446 and 446.2). A "freezing order" is the mechanism which authorizes the pre-trial seizure, detention and subsequent forfeiture (s. 668) of property allegedly used or intended to be used in the commission of an offence or was "obtained derived or realized directly or indirectly as a result of the commission of the offence".

[6][1982] 1 S.C.R. 175, (1982) N.R. 181, (1982) 65 C.C.C. (2d) 129 [hereinafter cited to S.C.R. as *MacIntyre*].

[7][1982] 2 S.C.R. 860, (1982) 70 C.C.C. (2d) 385, (1982) 28 C.R. (3d) 289 [hereinafter cited to S.C.R. as *Descôteaux*].

[8]R.S.C. 1970 (2nd Supp.), c. 10, rep. by S.C. 1980-81-82, c. 111, s.3.

Although the various amendments seek to protect different sets of interests, they are linked conceptually in that they all relate to information, access and confidentiality. They involve a large cast of characters including individuals, the public, the police, lawyers, the media, the judiciary and the government. Each brings its respective responsibilities and claims. Any issue of confidentiality or disclosure of information generates tension between the interests of those who claim access and the rights of those who wish to be protected from disclosure. Questions of privilege and openness are opposing sides of the same coin. The proper analytical approach is to examine the rationale for protecting the information and the relationship or process from which it flows. This must be weighed against the purpose of access or disclosure. The search and seizure stage of the criminal process raises claims for protection and countervailing claims to access which compel the consideration of a wide range of competing interests. Recent developments and proposals for reform provide an interesting opportunity to examine the extent to which value choices are coherent and consistent with other preferences manifested in our criminal law.

I. Openness

A. Background

There is no need to argue the importance of justice being done in public. Political philosophers, legal historians and jurists have made and documented the argument irrefutably.[9] It has been said that public trials and free access to courts "has been the rule in England from time immemorial",[10] and the public trial has been imported into Canadian and American jurisdictions as the presumptive rule. Openness is essential to promote a number of public interests. Access to the courts allows the community to be confident that its laws and values are being upheld and enhanced by its system of justice. Public scrutiny provides a check to ensure that power entrusted to the judiciary is not abused. Moreover, access to, and discussion about, the judicial process encourages an informed debate about laws and their application. It has also been said that public criminal trials serve a "prophylactic" purpose by showing the community that its system of justice is an

[9]J. Bentham, *Rationale of Judicial Evidence* (London: Hunt & Clarke, 1827), vol. 1, 522-37; W. Blackstone, *Commentaries* (Lewis Edition, 1893), vol. 3, 372-3; M. Hale, *The History of the Common Law*, 3rd ed. (1739) 253-4; F. Pollack, *The Expansion of the Common Law* (London: Stevens & Sons, 1904) 31-2; L. Radzinowica, *A History of English Criminal Law* (London: Stevens & Sons, 1948), vol. 1, 714-77.

[10]E. Jenks, *The Book of English Law*, 4th ed. (1936) 91.

effective and fair means of responding to those who have offended the rules of the community.[11]

The right to a public trial has now been constitutionally entrenched in section 11(d) of the *Canadian Charter of Rights and Freedoms.* However, a number of questions still remain: Is it an absolute right? Does the public have an absolute correlative right of access regardless of the views of the participants? Does a right of access imply an unrestricted right to communicate? Given that the administration of justice, and particularly criminal law enforcement, commences much earlier than the trial, what preliminary stages are equally amenable to a public right of access? At early stages of the judicial process, while public scrutiny and accountability are still important factors, other conflicting interests arise which are also related to the integrity of the administration of justice. This is particularly true at the investigative stage. For example, an application for authorization to intercept private communications would be futile if free public access and an unencumbered right to communicate were available. Similarly, publicity of pre-trial hearings presents the danger of prejudicing the views of potential jurors. As a result, the present *Criminal Code* permits orders banning the publication of evidence adduced at bail hearings[12] and preliminary hearings[13] until the case is disposed. At the pre-trial stage, access and accountability remain as substantial interests. However, other conflicting interests exist and compel a careful balancing and selection of priorities. This is clearly the case with search and seizure.

B. The Decision in MacIntyre

MacIntyre v. *Attorney General of Nova Scotia*[14] involved a journalist working for the Canadian Broadcasting Corporation who had approached the Chief Clerk of the Provincial Magistrate's Court at Halifax for access to search warrants and supporting material. His request was refused and he applied to the Trial Division of the Supreme Court of Nova Scotia for an order declaring that the warrants and supporting material were matters of public record that could be inspected. The Trial Division issued a declaration that search warrants which had already been executed and the informations relating to them were open to inspection by members of the general public. An appeal by the Attorney General of Nova Scotia to the Appeal Division

[11]G. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings* (1961) 110 U. Pa L. Rev. 1, 6-7.

[12]Section 457.2

[13]Section 467. See note 39, *infra,* for an explanation of a proposed amendment to s. 467.

[14]*Supra,* note 6. For a more detailed discussion of *MacIntyre,* see *Working Paper No. 30, supra,* note 3, 241-5; Mullan, *Developments in Administrative Law: The 1981-82 Term* (1983) 5 Sup. Ct L. Rev. 1, 58-60; Paikin, *supra,* note 1 (24 Crim. L.Q.); Hill, *supra,* note 1.

was dismissed. However, in dismissing the appeal, the Court provides a broader basis for access by ruling that MacIntyre was entitled to attend in Court during the application for search warrants, as could anyone who would be the subject of the proposed search. The order of the Appeal Division also included the unqualified declaration that "a member of the public is entitled to inspect informations upon which search warrants have been issued pursuant to s. 443 of the *Criminal Code* of Canada."[15] This part of the order appeared on its face not to be restricted to warrants that had been executed or that had resulted in some seizure. An appeal to the Supreme Court of Canada was dismissed by a narrow five-to-four margin.

In his majority decision Mr Justice Dickson, as he then was, recognized that any discussion of search powers involves a conflict between the competing interests of individual liberty and criminal law enforcement. He characterized the applicable policy considerations as:

> respect for privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of "openness" in respect of judicial acts.[16]

Quoting from Bentham, he characterized publicity as "the very soul of justice".[17] In the view of Dickson J., the ideal should be maximum accountability limited only so as not to harm the innocent or impair the "efficiency of the search warrant as a weapon".[18] Ultimately, he concluded that:

> [C]urtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.[19]

Thus, privacy and the protection of reputations from the unjustified stigma resulting from disclosure should prevail over the usually dominant interest in accountability through accessibility. However, with respect to innocence, Dickson J. was referring only to the situation "where a search is made and nothing is found".[20] He added, without amplification, that other considerations arise when something is seized.[21]

When the Court dealt with the issue of access to the proceeding in which the search warrant is sought, it was argued that openness would

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[15] *MacIntyre, supra*, note 6, 178.
[16] *Ibid.*, 183.
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*, 186-7.
[20] *Ibid.*, 187.
[21] *Ibid.*

frustrate the administration of justice since individuals could hide or destroy evidence before execution of the warrant. Dickson J. agreed that the process of issuing a search warrant represented an exception to the general rule of openness in that "the administration of justice would be rendered impracticable by the presence of the public".[22] In the end, the majority position permitted public access to search warrants and supporting material only if the warrant was executed and objects seized. This position was qualified however:

> Access can be denied when the ends of justice would be subverted by disclosure or the judicial document might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.[23]

Thus, there exists a residual discretion to prevent access.

The minority judgment, delivered by Martland J., concluded that search warrant proceedings are not analogous to the trial process and that access to documentation must be restricted to persons with a direct and tangible interest. He offered four reasons for ruling against public access: prejudice to a subsequent trial, the risk of disclosing the identity of police informers, the risk of disclosing patterns of police activity and rendering them inefficacious and the risk of harm to the reputations of innocent third parties.[24] These concerns are valid on their face; however, if directly interested persons have access after execution, the second and third reasons represent a risk that will arise in any event. As far as prejudice to a subsequent trial is concerned, this is a significant issue and one which Dickson J. did not address. Relying on a nineteenth-century English case, *R.* v. *Fisher*,[25] Martland J. concluded that the importance of publicity at trials has no application at the pre-trial stage where the pre-eminent concern must be ensuring that the course of a fair trial not be prejudiced.

C. Proposed Section 443.2

The Explanatory Notes to the Bill indicate that the purpose of the proposed section 443.2 is to "prevent undue publicity relating to searches under warrant. . .".[26] In the absence of consent or a consequential prosecution, the provision would prohibit publication or broadcast of the location of the search[27] or the identities of any person who "appears to occupy or

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[22]*Ibid.*, 186, quoting *Halsbury's Law of England*, 4th ed. (1975), vol. 10, 316, para. 316.
[23]*Ibid.*, 189.
[24]*Ibid.*, 198-201.
[25](1811) 2 Comp. 563, 170 E.R. 1253.
[26]Bill C-19, s. 104.
[27]Bill C-19, s. 106, proposed s. 443.2 (1)(a).

be in possession or control of that place", or anyone suspected as involved in the offence "in relation to which the warrant was issued".[28] The provision is clearly a response to *MacIntyre* and the demand for public access to information about searches which followed that decision. The proposed section is not directed to interested persons, court personnel or law enforcement officers, but to the media. It does not affect the issue of access as decided in *MacIntyre*, but relates to the use which can subsequently be made of the information. While *MacIntyre* delineated those search proceedings where access to information would be provided, this enactment relates to the publication of identities. It leaves the majority position substantially untouched restricting only the publication of identities, without consent, when no prosecution has been commenced. The issue of publication of the contents of allegations, to the extent that allegations might be raised in the material supporting a warrant application, is not addressed by this provision. Two nagging questions which flow from *MacIntyre* are not resolved satisfactorily by the proposed section.

First, one must consider the assertion of the majority that the privacy of the individual, in the sense of protecting the innocent from harm to reputation, is a "superordinate value". To Dickson J., the definition of "innocence" is determined by whether material has been seized. Of course, the occupier or owner of premises where goods are seized may have no relationship with the offence alleged. As well, goods may be seized which, by themselves or taken together with other evidence, assist in exculpating someone from suspicion. Also, even though goods are seized and a prosecution commenced, the accused may ultimately be acquitted. In all these situations, *MacIntyre* would permit access to search warrant material. In support of employing seizure as the threshold test, Dickson J. expressed concern about accountability in respect of the exercise of prosecutorial discretion not to proceed after some material has been seized pursuant to a search warrant.[29] In contrast, the proposed amendment moves the threshold of "innocence" to whether a prosecution has been commenced, at least for the purpose of publication of identities. This tends to ignore Dickson J.'s concern about the exercise of the Crown's discretion not to prosecute. Perhaps the legislation implies that, for the purpose of accountability, access to the information as provided by *MacIntyre* is sufficient. When goods are seized but no prosecution ensues, the public, including the media, can ask the appropriate questions if it learns of the event; only identities cannot be published. What is significant is that privacy as a value is recognized as superordinate only in respect of individuals characterized as innocent based on whether

[28]Bill C-19, s. 106, proposed s. 443.2 (1)(b).
[29]*Supra*, note 6, 187.

material is seized or a prosecution commenced. This re-arranging of priorities occurs not because "innocence" has been shown to be absent but rather because of a sense of proximity to criminality. The suggestion seems to be that the adage "where there's smoke, there's fire" does have a role in criminal law, at least to the extent of asserting the primacy of openness and accountability over privacy.

The second question raised by the proposed section concerns the relationship between the disclosure of the contents of allegations and the integrity of a subsequent trial process. Informations relied upon in support of an application for a search warrant must be particular as to the offence alleged,[30] the material sought[31] and the place to be searched.[32]Before granting the warrant, the justice must be persuaded that there are reasonable grounds to believe that the material sought will afford evidence. The mere recital of the informant's belief is inadequate; the justice must be persuaded.[33] Pursuant to section 445, material seized as a result of a search warrant must be brought before a justice, who shall detain it pending the events described in section 446.[34] It is unclear to what extent there will be access to information about a seizure beyond indicating that something was seized. Given that the material is intended as evidence, and that even an interested person can only examine detained material upon application to a judge,[35] there is no reason to interpret *MacIntyre* as requiring more than disclosure of the fact that a seizure was made. However, it is not difficult

[30]*Re Alder and The Queen* (1977) 5 A.R. 473, 485-8, (1977) 37 C.C.C. (2d) 234 (Alta S.C.) [hereinafter cited to A.R.]; *Re P.S.I. Mind Development Institute* (1977) 57 C.C.C. (20) 263 (Ont. H.C.); *R.* v. *Royal American Shows* [1975] 6 W.W.R. 571, 573 (Alta S.C.). Also see the earlier case of *R.* v. *Read* [1966] 2 C.C.C. 137, 139-40 (Alta S.C.), although the test for particularity asserted therein (sufficient particulars to validate an indictment) has been rejected in both the *PSI* case and *Royal American Shows.*

[31] See *Re Abou-Assak and Pollack and The Queen* [1978] C.S. 142, 148, 154-5, (1978) 39 C.C.C. (2d) 546; *R.* v. *Solloway and Mills* [1930] 65 O.L.R. 667, (1930) 53 C.C.C. 271 (C.A.); *Shumiatcher* v. *A.G. Saskatchewan* (1960) 129 C.C.C. 267 (Sask. Q.B.); *Re Wotrall* [1965] 1 O.R. 527, 537-39, [1965] 2 C.C.C. (2d) 1 (C.A.) [hereinafter cited to O.R.].

[32]*Re McAvoy* (1970) 12 C.R.N.S. 56, 65 (N.W.T. Terr. Ct.); *R.* v. *Royal American Shows, supra,* note 30.

[33]See *Re Alder and The Queen, supra,* note 30, 477; *R.* v. *Kehr* [1906] 11 O.L.R. 517, (1906) 11 C.C.C. 52 (H.C.); *Re Newfoundland and Labrador Corp.* (1974) 6 Nfld and P.E.I.R. 274, (1974) 138 D.L.R. (3d) 577 (Nfld C.A.) [hereinafter cited to Nfld and P.E.I.R.]; *Royal American Shows, supra,* note 30, 576; *R.* v. *Waterford Hospital* (1983) 43 Nfld and P.E.I.R. 132, 136-7, (1983) 35 C.R. (3d) 348 (Nfld C.A.) [hereinafter cited to Nfld and P.E.I.R.]; *Re Worrall, supra,* note 31, 531.

[34]The present s. 446(1) requires detention, unless the prosecutor consents to release, for a period of no more than three months unless proceedings are instituted or a justice is satisfied that further detention for a specific period is warranted.

[35]Pursuant to s. 446(5), the operation of which is discussed in *Re Canequip Exports Ltd and Smith* (1972) 8 C.C.C. (2d) 360 (Man. Q.B.); *Re Sutherland and the Queen* (1977) 38 C.C.C. (2d) 252 (Ont. Co. Ct.).

to imagine that the combination of the supporting information, with its description of the offence and material sought, and the fact of a seizure, if published, could produce some prejudicial effect on potential jurors.

Assuming the potential for prejudice, albeit not as great as the risk that flows from evidence adduced at other pre-trial stages, the majority decision in *MacIntyre* should have considered this issue as a concern pertaining to the "administration of justice".

The *Criminal Code* addresses this issue in the context of judicial interim release hearings and preliminary inquiries by providing for orders banning the publication of evidence upon the application of the accused.[36] The available prohibitions relate to the substance of evidence and submissions — not to the identity of the parties or the nature of the charge. Such prohibiting orders are made as a matter of course, since, on the accused's application, the justice's responsibility is structured in the mandatory form by using the phrase "shall ... make an order".[37] In these provisions, Parliament has clearly chosen as the predominate interest the protection of the trial process from the risk of prejudice. Surely it makes little sense to legislate with respect to search warrants in a way that is inconsistent with the way that similar material is treated at other pre-trial stages. This is not to say that new legislation must conform with trends set by existing enactments. The legislative framework of the criminal process must be developed to protect some interests over others. The framework, however, must be consistent in its preferences if it is to achieve its objectives. As well as the concerns of accountability and efficacy of searches addressed by Dickson J., the need to ensure a fair and impartial trial must also be addressed.

The Law Reform Commission's *Working Paper No. 30* has recommended that access to search warrant material be available to the "individual affected" and other members of the public, but that publication or broadcasting of contents be prohibited until:

> (a) upon application by an individual affected, the prohibition is revoked by a superior court judge or judge as defined in section 482 of the *Criminal Code*;
> (b) the individual affected is discharged at a preliminary inquiry; or
> (c) the trial of the individual affected is ended.[38]

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[36]See *Criminal Code* ss 457.2 and 457.

[37]Section 132 of Bill C-19 proposes an amendment to s. 467 which will give a justice the discretion to order non-publication of evidence adduced, and submissions made, at a preliminary hearing on the application of the Crown. If enacted, this will create a curious inconsistency with s. 457.2(1), which only permits applications by an accused and requires that the justice "shall" make the order. Section 457.2 was amended in 1976 by S.C. 1974-75-76, c. 93, s. 48 so as to remove judicial discretion on applications for non-publication orders.

[38]*Working Paper No. 30, supra*, note 3, 240, Recommendation 35.

The recommendation speaks to contents not identities. It requires non-publication, unlike the other *Criminal Code* mechanisms whereby an order for non-publication must be sought. The reason offered is that, unlike preliminary inquiries or bail hearings, the individual affected will not be present at the application for the search warrant and, hence, will be unable to seek an order banning publication. According to the recommendation, it is only the person affected who can seek a revocation of the ban on publication.[39]

Concerns about the identity of informers are addressed in another Law Reform Commission recommendation which permits police officers making applications for search warrants to obscure the name of an informant so long as it is confirmed that the only information obscured is that which could identify the informer.[40] In this regard, it should be noted that information outside the written material should not be used to supplement defective material.[41] Furthermore, the characteristics of the items sought must be set out with sufficient clarity so that, even if the source of information is not revealed, the justice can be satisfied that there is "reasonable ground to believe" that the items "will afford evidence".[42] The *Working Paper* has clearly chosen concern for the integrity of the trial process over other interests.

Before choosing between interests it is essential to understand them. The policy question is not as simple as asking when the interests of the individual should prevail over the systemic interests of the administration of justice. There is no clear dichotomy. Even under the rubric of the administration of justice there are competing interests. In *MacIntyre*, the majority attempted to balance public access and accountability on one hand and the efficacy of law enforcement on the other. Martland J., for the minority, focussed on the conflict between public access and the integrity of the trial process. From the perspective of the individual, his or her interests cannot be described in absolutely homogeneous terms either. Moreover, some individual interests are shared with other participants, but some are not. An individual's interest in liberty is obvious and generates a shared interest with the public in a fair trial. Privacy, on the other hand, can be of relative significance. When speaking only of protection from unfounded accusations, the privacy interest may be clear, but this can vary once an accusation becomes formalized into a criminal prosecution. Depending on the charge,

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[39]*Ibid.*, 244.

[40]*Ibid.*, 240, Recommendation 36.

[41]See *R.* v. *Silverman* [1977] 5 W.W.R. 102, 103 (Man. Q.B.); *R.* v. *Waterford Hospital*, *supra*, note 33, 137-9; *Re Worral*, *supra*, note 31, 535-6.

[42]See references in *supra*, note 33.

some people will continue to prefer privacy.[43] Others will look to the openness of the judicial process as a vehicle for public vindication. Ultimately, the only clear conclusion is that the matrix of interests has many elements and dimensions. As well, it is not static. The value to be attached to any interest can change at any stage in the process.[44] While choosing priorities is a difficult task, the debate must start with a careful analysis of the variety of interests at stake.

D. The "Fair Trial" Issue

Recently, a number of cases havc arisen in which representatives of the media have challenged statutory provisions and prohibitory orders by relying on arguments based on the right to public access and freedom of the press. The courts have expressed a clear trend towards favouring the interests of ensuring a fair trial. In *Re Southam Inc. and The Queen* (No. 1)[45] the Ontario Court of Appeal examined section 12 of the *Juvenile Delinquents Act*.[46] This provision had previously been interpreted as requiring *in camera* hearings.[47] MacKinnon A.C.J.O. was not persuaded that "an absolute ban in all cases is a reasonable limit on the right of access to the courts".[48] While agreeing that the absolute prohibition was *ultra vires*, he suggested that a discretionary power of exclusion based on the best interests of the child, or others, or the administration of justice, might not offend section 2(b) of tlie *Charter*.[49] In *R.* v. *C.F.R.B.*,[50] Smith J. refused to grant

[43]See *Re Regina and Several Unnamed Persons* (1983) 44 O.R. (2d) 81, (1983) 8 C.C.C. (3d) 528 (H.C.) [hereinafter cited to O.R.], in which a number of accused charged with gross indecency applied unsuccessfully for an order prohibiting the publication of their names. The judgment, at page 84, quoted with approval Dickson J.'s referenee to *Halsbury* in *MacIntyre*: "As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public form judicial proceedings." The case represents a situation where consensual offenses were alleged and the harm cuased to individuals by disclosure was likely far greater than any harm to the community by the offense. It appears that the issue of publication of identities depends not on the "sensibilities of the individuals involved" but rather with the sensibilities and ethics of the journalists involved.

[44]See Dickson J. in *MacIntyre, supra*, note 6, 187-9.

[45](1983) 41 O.R. (2d) 113, (1983) 3 C.C.C. (3d) 515 (C.A.) [hereinafter cited to O.R.]. This decision is an appeal from the judgment of Smith J. who issued a declaration that s. 12 of the *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3 was unconstitutional and inoperative: see *Re Constitutional Validity of Section 12 of the Juvenile Delinquents Act* (1982) 38 O.R. (2d) 748, (1982) 70 C.C.C. (2d) 257 (H.C.).

[46]R.S.C. 1970, c. J-3. For pre-*Charter* considerations of this provision see *C.B.* v. *The Queen* [1981] 2 S.C.R. 480, (1981) 62 C.C.C. (2d) 107 [hereinafter cited to S.C.R.]; *Re Juvenile Delinguents Act* (1975) 13 O.R. (2d) 6, (1975) 29 C.C.C. (2d) 439 (Prov. Ct. Fam. Div.); *Re Proulx and The Queen* (1975) 27 C.C.C. (2d) 44 (Ont. Prov. Ct., Fam. Div.).

[47]See *C.B.* v. *The Queen, supra*, note 46, 488-9.

[48]*Re Southam Inc. and The Queen, supra*, note 45, 134.

[49]*Ibid.*, 134.

[50](1982) 30 C.R. (3d) 80 (Ont. H.C.).

relief under section 24 of the *Charter* in respect of an order by a County Court judge prohibiting publication, until the trial was completed, of the fact that a change of venue application had been made. In dismissing the application on behalf of a newspaper publisher, Smith J. concluded that a "weighing process must always take place in each individual case and, the right to a fair trial being paramount, an appellate court or a court of competent jurisdiction will always be loath to interfere with the exercise of discretion".[51] A similar recognition of the paramountcy of fair trial interests arose in *R.* v. *Banville*,[52] a case in which an American reporter was convicted of failing to comply with an order made pursuant to section 467(1) of the *Criminal Code* by publishing a report on a preliminary hearing. On appeal, it was argued that section 467(1) could not be justified as a reasonable limit prescribed by law within the meaning of section 1 of the *Charter*. In dismissing the appeal, Hoyt J. distinguished between preventing an open trial and merely delaying the publication of evidence until some point in the future.[53] A further case, *Re Smith*[54] arose in the context of extradition proceedings following the death of John Belushi. At the bail hearing stage, an order was made, at the request of counsel, that all evidence and submissions should not be published. A representative of the media challenged this order under section 24 of the *Charter*, arguing that the ban on publicity infringed the right of freedom of the press under section 2(b). In examining the impugned order, Linden J. noted that the ban was temporary and neither denied access to the courtroom nor prohibited the publication of the disposition.[55] Accordingly, he concluded that the order was premised on legislation which constituted a reasonable limit on freedom of the press.[56] The Ontario Court of Appeal agreed with Linden J.'s decision.[57]

For those who are influenced by the American treatment of this issue,[58] attention should be paid to the appellate decision in *Re Smith* where Thorson J.A. discusses the constitutional history and structure of criminal procedure which applies in the United States.[59] As Bender points out, the function

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[51]*Ibid.*, 86.

[52](1983) 45 N.B.R. (2d) 134, (1983) 34 C.R. (3d) 20 (Q.B.), an appeal from (1982) 41 N.B.R. (2d) 114, (1983) 30 C.R. (3d) 59 (Prov. Ct.) [hereinafter cited to N.B.R.].

[53]*Ibid.*, 137-8.

[54]Also known as *Re Global Communications Ltd and A.G. for Canada* (1983) 42 O.R. (2d) 13, (1983) 5 C.C.C. (3d) 346 (H.C.) [hereinafter cited to O.R.].

[55]*Ibid.*, 20.

[56]*Ibid.*, 23.

[57]See *Re Smith; Global Communications v. California and A.G. for Ontario* (1984) 38 C.R. (3d) 209 (Ont. C.A.).

[58]See, for example, the comments of David Lepofsky, *Constitutional Right to Attend and Speak About Criminal Court Proceedings - An Emerging Liberty* (1983) 30 C.R. (3d) 87; *Section 2(b) of the Charter and Media Coverage of Criminal Court Proceedings* (1983) 34 C.R. (3d) 63; *Annotation to R. v. Sophonow* (1983) 34 C.R. (3d) 287, 288-9.

[59]*Supra*, note 57. Lepofsky argues that prior restraint in the form of gag orders should be

imposed by section 1 of our *Charter* imposes a different form of constitutional adjudication.[60] Any balancing of competing social interests comes into play not at the stage of defining constitutional rights but only through the application of section 1 when asking whether the impugned legislation represents a "reasonable limit" that can be demonstrably justified in a free and democratic society.[61] The hardest section 1 cases will be those which, like "fair trial" and "freedom of the press", involve a conflict between constitutionally protected values. Care must be taken to ensure that protections contemplated by the framers of our constitution are preserved and not emasculated in the haste to accelerate the evolution of a more recently recognized freedom.[62] Thus, caution must be exercised when looking to the American experience.

It is worth noting that the American position is not clear enough to be characterized as stating an absolute preference for public access and freedom of the press. In 1979, the United States Supreme Court held that the Sixth Amendment's guarantee of a public trial was personal to the accused and

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rejected in favour of the control of irresponsible reporting by means of jury selection procedures, changes of venue and the exercise of the contempt power. With respect to contempt, and following the lead of the Law Reform Commission of Canada, *Report No. 17: Contempt of Court* (1982), Bill C-19 attempted to provide a codification. The proposed section 131.11(1) would make it an offence to knowingly publish material "that creates a substantial risk that the course of justice in any particular civil or criminal judicial proceeding pending at the time of publication will be seriously impeded or prejudiced". However, a "judicial proceeding" in the criminal context, as defined in section 131.11(2)(b), does not commence until process has been issued for the accused's arrest, the accused has appeared in court or an indictment preferred. Thus, the search warrant stage is likely not protected by this provision.

[60]See Bender, *The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison* (1983) 28 McGill L.J. 811. See also Manson, *Annotation to Re Smith; Global Communications* (1984) 38 C.R. (3d) 210.

[61]This mode of analysis has been offered by a number of judges, including McDonald J. in *Soenen* v. *Director of Edmonton Remand Centre* (1983) 48 A.R. 31, (1983) 35 C.R. (3d) 206 (Q.B.) and Lambert J.A., dissenting, in *R.* v. *Smith* (1984) 8 D.L.R. (4th) 565, (1984) 39 C.R. (3d) 305 (B.C. C.A.).The formulation of some guaranteed rights, such as the protection against " unreasonable search and seizure", will require some balancing of interests at the definition stage. However, this is not a question of looking for "rationality in furthering some valid government objective": per Dickson J. in *Hunter* v. *Southam Inc. supra*, note 2.

[62]The recent unreported Supreme Court of Canada decision *A.G. Quebec* v. *Quebec Association of Protestant School Boards* (26 July 1984) exemplifies the importance of discerning the intention of the framers of our constitution as it relates to the scope of guaranteed rights and freedoms. That case held that the class of persons protected by s. 23 of the *Charter* could not be redefined by provincial legislation and, thus, the "language of instruction" provisions of Quebec's *Charter of the French Language* R.S.Q. 1977, c. C-11 could not be legitimized by s. 1 of the *Charter*.

did not give the public or the press an enforceable right of access to a pre-trial suppression hearing.[63] Even the subsequent case of *Richmond Newspaper Inc.* v. *Virginia*, which concluded that the First and Fourteenth Amendments guaranteed the public and the press a right of attendance at criminal trials, contained reservations about pre-trial matters.[64] The lead judgment of Chief Justice Burger explicitly distinguished the pre-trial context as it relates to the "constitutional demands of fairness".[65] As well, the judgment was followed by a footnote which stated that "our holding today does not mean that First Amendment rights of the public and representatives of the press are absolute" and that reasonable limitations may be imposed in individual cases.[66]

At the pre-trial stage,[67]Canadian courts have uniformly voiced preference for the concern to avoid prejudice at a subsequent trial. Absolute prohibitions against access have been struck down. However, provisions and orders which permit access to the public and the media, but which restrict temporarily what can be published, have all survived challenges brought on the grounds of public access and freedom of the press. The resolution of conflicts between competing values involves an inquiry into the potential prejudice which can result to an accused from publication or

[63]*Gannett Co.* v. *De Pasquale* 443 U.S. 368, 99 St. Ct 2898 (1979), with Blackmun, Marshall and White dissenting.

[64]448 U.S. 555, 100 S. Ct 2814 (1980) [hereinafter cited to U.S.]. See the discussions of this in Brailas, *Press Access to Government-Controlled Information and the Alternative Means Test*, (1981) 59 Texas L. Rev. 1279; Note, *The Executioner's Song: Is There a Right to Listen?* (1983) 69 Va L. Rev. 373; Cox, *The Supreme Court, 1979 Term: Freedom of Expression in the Burger Court* (1980) 94 Harv. L. Rev. 1, 20-6. Cox states, at page 23: "the Court was so badly splintered and the opinion delivered by the Chief Justice is woven of so many strands that the decision can stand only for the proposition that the public has a constitutional right to attend the kind of criminal trial that has historically been open to the public, unless circumstances justify its closure."

[65]*Ibid.*, 580.

[66]*Ibid.*, 581-2, note 18.

[67]The case of *R.* v. *Sophonow* (1983) 21 Man. R. (2d) 110, (1983) 34 C.R. (3d) 287, (1983) 6 C.C.C. (3d) 396 (C.A.) involved an application to an appellate court for an order restricting publication of material and commentary about guilt or innocence *after conviction* but pending an appeal. A number of articles had been published in which an individual who had not testified at the trial claimed that she had been sexually assaulted by the "real killer" after the appellant had been arrested. The appellant argued that the newspaper articles could prejudice a future trial, if ordered, in that it would be difficult to explain to the jury the absence of the person at the centre of the articles if she should disappear and not be available as a witness. In concurring judgments, both Hall and Matas JJ.A. were of the view that the contempt power and existing procedural safeguards would protect the appellant's right to a fair trial. It is significant, however, that Matas J.A., at page 115, was concerned to "reaffirm the importance of maintaining freedom of the press in balance with other freedoms and rights". Given that the application arose after conviction and during the appellate process, the case may be an example of how interests can vary as the process progresses.

broadcast. The first question must be whether there will be a risk to a fair trial viewed from the perspective of how that concept has evolved in Canada. While time may provide an expansion of the elements of a fair trial, the framers of the constitution surely did not intend any depreciation of those aspects which had already been developed. As Thorson J.A. has said:

> The right to a fair trial is a fragile right. It is quite capable of being shattered by the kind of publicity that can attend a bail hearing and, once shattered, it may, like Humpty Dumpty, be quite impossible to put together again.[68]

Recognizing the risk to an accused, one must also appreciate that other participants — witnesses and victims — may suffer harm from disclosure. To the extent that privacy may be recognized as a constitutionally protected interest,[69] risks of this sort may, in particular cases, add another factor to the crucible of competing constitutional entitlements. But one must also assess the impact on freedom of the press. A restriction on the ability to publish material until a later time, so long as access is ensured, does not constitute a denial but rather, more accurately, is a limitation.[70] Furthermore, the constitutional validity of legislation is a different question from its applicability in an individual case. A valid enactment can, on particular facts, result in an unjustifiable infringement or limitation of a constitutionally guaranteed right.[71] Thus, in an individual case where it can be shown that there is no risk to the right to a fair trial, a limitation on the freedom of the press may be unjustifiable. In such cases, the interests of privacy must still be considered but may not prevail. However, a statutory provision premised on a presumption of risk to the accused conforms with the concern to preserve the impartiality of the trier of fact and keep him free from the potential prejudice which can be caused by indiscreet and unrestricted publication. With respect to the search and seizure stage of the criminal process, and consistent with other pre-trial stages, attention must be paid to the need to protect the fairness of a subsequent trial. From the constitutional perspective, giving priority to the protection of the right to a fair trial when faced with competing claims is both reasonable and sound.

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[68]*Supra*, note 57, 228.

[69]See *Griswold* v. *Connecticut* 381 U.S. 479 (1965) and *Roe* v. *Wade* 410 U.S. 113 (1973) which, while not dealing directly with privacy in the sense of protection from unwanted disclosure of information, assert the notion of constitutionally protected "zones of privacy".

[70]The distinction between "denial" and "limit" was drawn by Deschênes C.J.S.C. in *Quebec Association of Protestant School Boards* v. *A.G. Quebec* [1982] C.S. 673, (1982) 140 D.L.R. (3d) 33. That case did not, however, involve a conflict between constitutional entitlements. Rather it brought into question provincial legislation which conflicted directly with a constitutional right: see *supra*, note 62.

[71]For example, with respect to s. 8 of the *Charter* and the search provisions of the *Narcotic Control Act*, see *R.* v. *Rao*, *supra*, note 2, per Martin J.A. speaking for a five judge panel.

III. Solicitor-Client Privilege

A. The Evidentiary Rule

Communications between a client and his legal advisor are privileged and kept confidential in order that advice can be given on the basis of a frank and truthful account of events without fear of prejudice arising from the discussion.[72] The privilege exists to protect the client and attaches to any communications, regardless of whether litigation is contemplated, so long as the purpose is to obtain professional legal advice.[73] While communications which themselves constitute a crime, or which are made to facilitate a crime, are not protected,[74] the privilege extends to protect communications by the client with agents and subordinates of his solicitor.[75] Thus, some prefer to use the broader label "legal professional privilege".[76]

The rationale of the solicitor-client privilege clearly stresses the importance of the relationship to the fair and efficient administration of justice. Consequently, all communications properly within the umbrella of the relationship must be kept confidential. Despite general acceptance of this rationale, the scope of the protection which it generated was restricted for many years to matters of evidence.[77] The privilege could only be asserted during the conduct of litigation to prevent tendering protected documents or communications into evidence without the client's consent or waiver. Though the rationale for the solicitor-client privilege appeared to shelter the relationship itself, restricting the scope of the privilege to evidentiary matters rendered inchoate and inadequate any right to confidences within the relationship.

This narrow view of the scope of the privilege was particularly apparent with respect to the issue of search and seizure. Because the privilege was

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[72]See *Solosky* v. *The Queen* [1980] 1 S.C.R. 821, 835, (1979) 50 C.C.C. (2d) 495 [hereinafter cited to S.C.R. as *Solosky*], where Dickson J. quoted the classic statement of the rationale by Jessel M.R. in *Anderson* v. *Bank of British Colombia* (1876) 2 Ch. 644, 649. Also see McNaughton, ed., *Wigmore on Evidence* (1961), vol. 8, para. 2291 [hereinafter *Wigmore*].

[73]See *Solosky, supra*, note 72, 835; *Wigmore, supra*, note 72, para. 2292; Sir Rupert Cross, *Evidence* 5th ed. (1979) 282-3.

[74]See *Solosky, supra*, note 72, 835 and *Wigmore, supra*, note 72, para. 2298.

[75]See Cross, *supra*, note 73, 283; *Wigmore, supra*, note 72, para. 2301; McLachlin, *Confidential Communications and the Law of Privilege* (1977) 11 U.B.C. Law Rev. 266, 275.

[76]See, e.g., Cross, *supra*, note 73, 282-95.

[77]See *R.* v. *Colvin* [1970] 3 O.R. 612, 617, (1970) 1 C.C.C. (2d) 8 (H.C.) *per* Osler J. Osler J. subsequently recanted in *Re Presswood and International Chem-Alloy Corp.* (1975) 11 O.R. (2d) 164, (1975) 36 C.R.N.S. 332 (H.C.). See also Chasse, *The Solicitor-Client Privilege and Search Warrants* (1977) 36 C.R.N.S. 349, 350; Kasting, *Recent Developments in the Canadian Law of Solicitor-Client Privilege* (1978) 24 McGill L.J. 115, 115-7.

viewed solely as a rule of evidence,[78] many judges held the view that search warrants could be issued authorizing the search of lawyers' offices and the seizure of material which might properly be the subject of solicitor-client privilege. Conversely, others ruled that the privilege should be recognized by the justice at the time a warrant to search was requested, and some held it applicable in the course of a motion to quash or upon application to return things seized.[79] By 1979, when the Supreme Court decided *Solosky* v. *The Queen*,[80] the prison mail-opening case, progress beyond a pure rule of evidence was apparent. However, questions still remained as to the extent of the protection afforded the solicitor-client relationship.[81]

B. The Decision in Descôteaux

The evolution of solicitor-client privilege into a substantive rule or matter of property has now been clearly recognized in the case of *Descôteaux*.[82] This decision also represents a refined re-statement of the operation and scope of the privilege and the right to confidentiality in both the evidentiary and substantive contexts. The unanimous judgment delivered by Lamer J. dealt with the issuance and execution of a search warrant in respect of a legal aid office. The warrant, issued pursuant to section 443 of the *Criminal Code*, authorized the seizure of an application form and other related documents as evidence that a legal aid applicant had misrepresented his income in order to qualify for assistance and thus obtain a benefit by false pretense. Lamer J. stated that individuals are entitled as of right to have their communications with their lawyer kept confidential. He added that this right to confidentiality, although evidentiary in origin, must be recognized as a substantive rule with broader applicability.[83] The same conditions precedent, limitations and exceptions, which had been judicially

[78]See *R.* v. *Colvin*, *supra*, note 77; *Re Alder and The Queen*, *supra*, note 30; *A.G. Quebec* v. *T.* (1977) 2 C.R. (3d) 30 (Que. S.C.).

[79]See *Re Director of Investigation and Research and Canada Safeway Ltd* (1972) 26 D.L.R. (3d) 745, [1972] 3 W.W.R. 547 (B.C. S.C.); *Re Steel and The Queen* (1979) 21 C.C.C. (2d) 278 (Ont. Prov. Ct.); *Re Director of Investigation and Research and Shell Canada* [1975] F.C. 184, (1975) 22 C.C.C. (2d) 70 (C.A.); *Re Presswood and International Chem-Alloy Corp.*, *supra*, note 77; *Re B.X. Development Inc. and The Queen* (1976) 31 C.C.C. (2d) 14, (1976) 36 C.R.N.S. 313 (Que. S.C.); *Re Borden & Elliot; supra*, note 1.

[80]*Supra*, note 72, 836 where Dickson J. discusses how "[r]ecent case law has taken the traditional doctrine of privilege and placed it on a new plane". See also, McLachlin & Thomas, *Solicitor-Client Privilege?* (1981) 2 Sup. Ct. L. Rev. 387.

[81]As McLachlin & Thomas, *supra*, note 80, suggest, *Solosky* is ambiguous on this issue. At one point, Dickson J. looked for "the evidentiary connection"; later he spoke of a fundamental right "to communicate in confidence with one's legal adviser". Clearly, he recognized that Canadian courts were "moving towards a broader concept of solicitor-client privilege", but chose, in the context of the case before him, not to attempt to define it.

[82]*Supra*, note 9.

[83]*Ibid.*, 870-3.

crafted in the evidentiary context and explained by Dickson J. in *Solosky*, applied to the substantive rule.[84] Its foundation is the uniqueness of the relationship between client and lawyer.[85] The substantive rule is encapsulated in the following quotation from Wigmore:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.[86]

Before applying the rule to the question of search and seizure and the facts of the particular case, Lamer J. formulated the four elements of the substantive rule:

> 1. confidentiality can be raised in any circumstances where disclosure without the client's consent may result;
> 2. when the legitimate exercise of a right comes into conflict with the right to confidentiality in solicitor-client communications, the issue should be resolved in favour of confidentiality "unless the law provides otherwise";
> 3. when there exists lawful authority to act in a way which might interfere with confidentiality, "the decision to do so and the choice of means of exercising that authority" should be structured so as not to impair confidentiality "except to the extent necessary in order to achieve the ends sought by enabling legislation";
> 4. statutes which can interfere with confidentiality as contemplated in rules 2 and 3 above must be interpreted restrictively.[87]

The interaction of the rule of evidence and the rule of substance is interesting. From the evidentiary perspective, a third party to the solicitor-client relationship who is privy to confidential material is not prohibited from introducing it into evidence. However, the substantive rule would require the trial judge to balance the respective interests of breaching and protecting confidences:

> The trial judge must satisfy himself, through the application of the substantive rule (no. 3), that what is being sought to be proved by the communications is important to the outcome of the case and that there is no reasonable alternative form of evidence that could be used for that purpose.[88]

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[84]*Ibid.*, 872-3.
[85]*Ibid.*, 871.
[86]*Ibid.*, 872.
[87]*Ibid.*, 875.
[88]*Ibid.*, 876.

This represents a refinement of the principles set out in *Slavutych* v. *Baker*[89] in that it requires an indication that the information has more than trifling probative value and an inquiry into alternative sources of information. This approach should also apply to obtaining evidence. The Newfoundland Court of Appeal recently applied this analysis, without reference to *Slavutych* or *Descôteaux*, in a case where a search warrant had been issued to seize hospital records allegedly containing admissions made by an accused during her stay for a court-ordered mental examination.[90] The court balanced the competing interests and quashed the search warrant, concluding that the integrity of the assessment process required maintenance of confidentiality.[91]

In applying the evidentiary and substantive rules to the question of search and seizure, Lamer J. noted that the solicitor-client relationship arises not at the time a retainer is effected but earlier, when the client first approaches the lawyer or his office in order to obtain legal advice.[92] Thus, all preliminary discussions including those related to fees, financial ability and other personal matters are protected, whether the lawyer ultimately acts for the client or not.[93] The issue is whether the object of the discussions with the lawyer, associates or staff is the creation of a professional relationship. Lamer J. added the essential qualification that communications about legal problems or financial means, while ordinarily privileged, lose that character "if and to the extent that they were made for the purpose of obtaining legal advice to facilitate the commission of a crime", or where the communication itself "is the material element (*actus reus*) of the crime".[94] Thus, with reference to the case before him, he concluded that the statements of financial means contained in the seized forms were allegedly "criminal in themselves" and could not benefit from any protection that would have been provided by the substantive or evidentiary rule.[95]

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[89][1976] 1 S.C.R. 254, 260, which adopted Wigmore's "four fundamental tests":

1. The communications must originate in a *confidence* that they will not be disclosed.
2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
3. The *relation* must be one which in the community ought to be sedulously *fostered.*
4. The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.

[90]See *R.* v. *Waterford Hospital, supra,* note 33.

[91]*Ibid.,* 138. The Court remarked that the admissions allegedly made to a doctor could be obtained by the alternative route of subpoening the doctor. Of course, an application by analogy of Lamer J.'s analysis should result in precluding the oral testimony as well. See Manson, *Annotation to R. v. Waterford Hospital* (1983) 35 C.R. (3d) 349.

[92]*Descôteaux, supra,* note 7, 876-8.

[93]*Ibid.,* 877-8.

[94]*Ibid.,* 881.

[95]*Ibid.,* 894.

Though not directly required to do so by the case before him, Lamer J. addressed a number of procedural questions relating to section 443(1)(b) and the solicitor-client privilege.[96] In so doing, he faced two conflicting interests: the quest for evidence and the right to confidentiality in solicitor-client communications. He confirmed that the jurisdiction of the justice to authorize a search depends on the reasonable belief that the search will result in the seizure of material that will "afford evidence".[97] Thus, on the basis of the evidentiary rule of privilege, Lamer J. accepted the views of Southey J. in *Re Borden and Elliot and The Queen*[98] and concluded that the justice would be without jurisdiction to issue a warrant in respect of material that could not subsequently be received in evidence because of the protection of solicitor-client privilege.[99] If the material sought to be seized appears to the justice to be protected by the evidentiary privilege, no warrant can issue.

Where a search involves the solicitor-client relationship two hard cases can arise: either the search is pursuant to section 443 (1)(a) or (c) and involves material which cannot be protected by the evidentiary rule, or that the material sought, while confidential, falls arguably into an exception to the evidentiary rule. Although Lamer J. stated that the evidentiary rule "seems to be applicable only" to searches pursuant to section 443(1)(b), he concluded that the substantive rule applies to "any search *affecting* the right of confidentiality".[100] Accordingly, any search of a lawyer's office or files for material not subject to the evidentiary rule "should be limited to what is absolutely necessary in order to seize the things for which the search was authorized".[101] Even though there is material in a file which is no longer confidential, the remainder of the file may be entitled to protection. Moreover, files relating to other clients will be confidential. Thus, he recognized that the mere presence of police in a lawyer's office, or even the risk of their attendance, tends to create a "chilling effect"[102] on the confidential nature of the relationship, an effect which must be limited by restrictive conditions.

With this in mind, Lamer J. reached two significant conclusions. First, he noted that the justice has the discretion to refuse to issue a warrant even if the requirements of section 443 appear to have been met so long as the

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[96]*Ibid.*, 882-92.

[97]*Ibid.*, 883.

[98]*Ibid.*, 884. See *Re Borden and Elliot and the Queen*, *supra*, note 1.

[99]*Ibid.*, 884-7 and 893.

[100]*Ibid.*, 888.

[101]*Ibid.*

[102]This descriptive phrase appeared in *Solosky*, *supra*, note 72, 510. It was used in Appellant's factum with reference to the impact of intrusions on confidential relationships: see *Procunier* v. *Martinez* 416 U.S. 396, 427 (1974); *Minnesota Civil Liberties Union* v. *Schoen* 448 F. Supp. 960, 965 (1978).

decision is reached judicially and not capriciously or arbitrarily.[103] The nature of the place to be searched is a factor which might bear on the exercise of discretion to deny the issuance of a warrant. In this regard, he suggested that the tests in *Re Pacific Press* are applicable: is a reasonable alternative source available and have reasonable steps been taken to obtain it from that alternative source?[104] He qualified the *Pacific Press* test, however, because of the need to preserve the utility of the search warrant as an investigative tool which can assist in determining whether a crime has been committed, by whom and whether evidence exists. Accordingly, "the reasonable alternative . . . is not an alternative to the method of proof but to the benefits of search and seizure of the evidence".[105] This is a curious basis for a qualification since, as Lamer J. pointed out, *Pacific Press* related solely to section 443(1)(b), and the tests do not seem amenable to subsections (a) and (c) which encompass the purely investigative role of search warrants.

Second, given concerns arising from the nature of the place to be searched, the justice has the power to impose specific execution procedures circumscribing the search. Lamer J. went even further by indicating that the justice has a duty to consider the execution procedures. He stated:

> the justice of the peace *must* set out procedures for the execution of the warrant that reconcile protection of the interests this right is seeking to promote with protection of those the search power is seeking to promote, and limit the breach of this fundamental right to what is strictly inevitable.[106]

Specifically with respect to lawyers' offices, he offered the following guidelines:

> 1. it would be desirable, as soon as a search warrant application is commenced in respect of a lawyer's office, to notify the Crown Attorney and "Bar authorities" who can provide assistance as to appropriate execution procedures;[107]
> 2. "the search should be made in the presence of a respresentative of the Bar";[108]
> 3. if the justice of the peace is not "a judge by profession", he would be "well advised" to refer the application to a judge of a court of criminal jurisdiction or even a superior court judge;[109]
> 4. when material is seized, part of which may be confidential, the material should be examined by the justice;[110]

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[103]*Descôteaux, supra*, note 7, 888-9.

[104]*Ibid.*, 889-90. See *Re Pacific Press and the Queen* (1977) 37 C.C.C. (2d) 487 (B.C. C.A.). It should be noted that while the *Pacific Press* tests were specifically ruled applicable in cases involving interference with fundamental freedoms, Lamer J. also raised the suggestion that the tests could, arguably, be appropriate "whenever a search is sought to be conducted, under 443(1)(b), of premises occupied by an innocent third party": *Descôteaux, ibid.*, 890.

[105]*Ibid.*, 891.

[106]*Ibid.*

[107]*Ibid.*

[108]*Ibid.*, 892.

[109]*Ibid.*, 896.

[110]*Ibid.*, 895.

> 5. if any parts of the original are confidential, the unprotected portions should be photocopied for use and the entire original sealed only to be opened by judge's order if, for example, the accused disputes the authenticity of the copied portions.[111]

At one point, Lamer J. asked himself whether search guidelines were not the proper subject matter for Parliamentary redress rather than judicial attention. After characterizing the absence of a framework as a legislative gap, he concluded that the judiciary had an obligation to use its discretion to preserve the confidentiality of solicitor-client communications.[112]

C. Proposed Section 444.1

In *Descôteaux*, the Supreme Court of Canada faced two elements of the administration of criminal justice which were in conflict: the utility of search powers and the confidentiality of the solicitor-client relationship. The latter interest prevailed. Accordingly, the integrity of the professional relationship is subject to intrusion only in cases where the material sought does not appear to be privileged in itself, and, even then, only when no alternate source of evidence exists. The proposed amendments go some way to codifying this protection. Section 444.1 will prohibit the copying or seizure of any document "without affording a reasonable opportunity for a claim of solicitor- client privilege".[113] If an objection to disclosure is made on the basis of solicitor-client privilege, the document must be sealed, without copying or examination, and delivered into the custody of the sheriff.[114] The client or lawyer then has fourteen days to apply to a judge for an appointment to determine "the question whether the document should be disclosed".[115] Thereafter, he or she attends at the appointed time to apply for an order determining the question.[116] Such applications are made to a "judge of a superior court of criminal jurisdiction of the province where the seizure was made".[117] On application, the judge may examine the document and "may allow the Attorney General to inspect the document and make representations".[118] If the judge is "of the opinion that the document should be disclosed", an order will issue requiring the custodian to deliver it to the officer who effected the seizure.[119] If the conclusion is that the document should not be disclosed, the document must be resealed and an

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[111] *Ibid.*, 895-6.
[112] *Ibid.*, 892.
[113] Section 444.1(10).
[114] Section 444.1(2).
[115] Section 444.1(3)(a)(i).
[116] Section 444.1(3)(c).
[117] Section 444.1(1)(b).
[118] Section 444.1(6)(b) and (c).
[119] Section 444.1(6)(d)(ii).

order for its return issued.[120] In either case, the judge is obliged to "deliver concise reasons for the determination in which the nature of the document is described without divulging the details thereof".[121] If an application is not made or not followed through, the Attorney General can apply to a judge for an order requiring the custodian to deliver the document to the officer who seized it.[122] Reflecting a sensitivity to the subtleties of the evidentiary rule, there is a sub-section in the proposed legislation which ensures that a document considered to be privileged continues to be protected by privilege even though the Attorney General was permitted to inspect it during the course of the application.[123]

The legislative scheme is unsatisfactory in two ways. First, the procedure is triggered only in respect of documents "in the possession of a lawyer". *Descôteaux* involved the search of a legal aid office, and it is understandable that Lamer J. would direct his attention to the issue of searching lawyers' offices. Parliament, however, is obliged to take a more expansive view. The privilege and the right to confidentiality are vested in the client. The procedures in section 444.1 provide a mechanism for adjudicating claims of privilege only when the documents are seized from the custody or possession of a lawyer. One must recognize that documents and communications generated by, and within, the solicitor-client relationship may be in the possession of the client or someone else. The case of *Solosky*,[124] relied upon by Lamer J., related to correspondence between a penitentiary prisoner and his lawyer. While that case did not involve a search warrant, it provides a good example of a situation where the professional relationship begs for protection beyond the limits of the lawyer's office.[125] Completeness requires an extension of the prohibition in section 444.1 to ensure that documents cannot be seized without first providing an opportunity to object on the ground of solicitor-client privilege. Given that some degree of caution might be expected when a lawyer's office is involved, it can be argued that it is more important to the integrity of the lawyer-client relationship to extend the mechanism for asserting claims of privilege to situations where the existence of the relationship might not be so apparent. The present *Income Tax Act* provisions dealing with solicitor-client privilege are also restricted

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[120]Section 444.1(6)(d)(i).

[121]Section 444.1(6)(d).

[122]Section 444.1(8).

[123]Section 444.1(7).

[124]*Supra*, note 72.

[125]*Solosky, supra*, note 72, involved mail exchanged between a solicitor and his prisoner client for the purpose of obtaining legal advice whether emanating from the lawyer or the client. Mail had been opened and examined by penitentiary authorities at Millhaven Institution. Hence, it appears that none of the correspondence in question was actually in the possession of the solicitor.

to documents in the possession of a lawyer.[126] These have been criticized on the ground that "if a statutory mechanism for the invocation of solicitor-client privilege is to be employed, it must be comprehensive and apply to all documents regardless of their location".[127] The Law Reform Commission's *Working Paper* on search warrants has recommended that "the protection should extend to materials in possession of the client as well as the solicitor".[128]

The second defect in the legislative scheme relates to the process of issuing and executing warrants. Lamer J. directed substantial attention to these areas, and it is regrettable that the proposed legislation ignores them. *Descôteaux* clearly states that there is no jurisdiction to issue a warrant in respect of material which is privileged. As well, Lamer J. offered a number of suggestions about problems inherent in searching law offices and the ways in which searches should be circumscribed. If these matters are to be addressed on a search warrant application, the justice's obligations should be codified and the officer applying must be frank about material which may be privileged and premises which may contain other confidential material.

An analogy can be drawn to the treatment of privilege in the context of wiretap applications. The *Criminal Code* only permits interceptions at a solicitor's office, residence or a place where consultation with clients occurs if there are reasonable grounds to believe that the solicitor or an associate is a party to an offence.[129] Furthermore, the authorizing judge "shall include . . . such terms and conditions as he considers advisable to protect privileged communications between solicitors and clients".[130] Recently, in *R.* v. *Chambers* (No.1), Spencer J. indicated that failure to disclose to the authorizing judge the full extent of the risk to privileged communications "may be a matter which vitiates the authorizations".[131] Ultimately, he opened the sealed packets, ruled on other grounds that the authorizations were invalid and

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[126]See s. 232, formerly R.S.C. 1970, c. I-5, s. 187. Note that the proposed s. 444.1(18) expressly provides that the provision "does not apply in circumstances where a claim of solicitor-client privilege may be made under the *Income Tax Act*".

[127]See Manitoba Law Reform Commission, *Report on Enforcement of Revenue Statutes* (1979) 25, quoted in *Working Paper No. 30, supra*, note 3, 257.

[128]*Supra*, note 3, 256, Recommendation 40.

[129]Section 178.13(1.1), enacted by S.C. 1976-77, c. 53, s.9.

[130]Section 178.13(1.2), enacted by S.C. 1976-77, c. 53, s.9. While the provision goes some way towards protecting privileged communications, its inadequacy has been the subject of criticism by D. Watt, *Law of Electronic Surveillance in Canada* (1979) 175-7, and Cohen, *supra*, note 5, 169-75.

[131]*R.* v. *Chambers* (1983) 34 C.R. (3d) 302, 310 (B.C. S.C.). This comment was made in the context of the ruling by Spencer J. that he was entitled to open the sealed packet, a decision which may now be questionable in light of the judgment of McIntyre J. in *Wilson* v. *R* (1983) 37 C.R. (3d) 97 (S.C.C.). Compare the views of Dickson J. in *Wilson*, 107-13.

directed a verdict of acquittal.[132] The British Columbia Court of Appeal allowed an appeal against the directed verdict.[133] With respect to the question of solicitor-client interceptions, the Court held that the authorizing judge is not required to impose special terms and conditions. In his concurring judgment, Anderson J.A. considered the Court's power to impose conditions when a solicitor-client conversation was involved and stated that "in most cases . . . a protective clause should be inserted in the authorization to protect persons other than the named targets".[134] It should be noted that the Court did not comment on the obligation to disclose the full nature of potential risk to privileged material, since it was of the view that the interception application in fact revealed the "true role" played by the lawyer.[135] What is significant, however, is the concern reflected by the *Criminal Code* and the judiciary to protect the lawyer-client relationship from improper intrusions. It would seem that an obligation to disclose potential risk must be implied by the statutory provisions in order to ensure proper consideration by the authorizing judge. Surely the *Criminal Code* should pay similar attention to the intrusive risks of searches.

With respect to execution, it should be noted that the only qualification in the *Criminal Code* is section 444, which provides that warrants "shall be executed by day, unless the justice, by the warrant, authorizes execution of it at night".[136] Lamer J. was concerned that the Crown Attorney's office and officials of the local Bar be consulted and assist in developing appropriate limits and controls for the search of a lawyer's office. His concern was that clearly privileged material, particularly confidential material relating to other clients, not be violated. Section 445 authorizes an officer executing a search warrant to "seize, in addition to the things mentioned in the warrant, anything that on reasonable grounds he believes has been obtained by or has been used in the commission of an offence".[137] This provision, without qualification, certainly encourages officers to be, at the

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[132]*R.* v. *Chambers* (No. 2) (1983) 34 C.R. (3d) 311 (B.C. S.C.).

[133]*R.* v. *Chambers* (1983) 9 C.C.C. (3d) 132, (1983) 37 C.R. (3d) 128 (B.C. C.A.).

[134]*Ibid.*, 141. Anderson J.A. showed some concern about an obligation to disclose by indicating that a ruling of invalidity may have resulted if the police practice had been both to intercept conversations between a solicitor and clients who were not named targets and then to forward information to the Minister of National Revenue.

[135]*Ibid.*, 140.

[136]Enacted by S.C. 1953-54, c. 51, s. 430. Its statutory predecessors can be traced back to R.S.C. 1886, c. 50, s. 101. The common law prohibited nocturnal searches: see *R.* v. *Adams* [1980] Q.B. 575, [1980] 1 All E.R. 473 (C.A.).

[137]This was a new provision introduced by S.C. 1953-54, c. 51, s. 431. It will be modified slightly by s. 107 of Bill C-19 so as to extend its scope to include telewarrants and freezing orders. However, there is no proposed amendment to restrict its operation to items in "plain view". See the discussion above at note 138 *et seq.* and Recommendation 24 of *Working Paper No. 30, supra,* note 3.

very least, inquisitive. The Law Reform Commission *Working Paper* points out that the Metropolitan Toronto Police training manual instructs officers not to confine their attention to items specified in the warrant.[138] The Commission's empirical research indicated that "33.7% of seizures represented objects that the issuer of the warrant did not, on evidence before him, order seized".[139] Without specific regard to the offices of lawyers and solicitor-client privilege, the *Working Paper* recommends:

> A peace officer executing a search warrant should be empowered to search only those areas, within the places and vehicles, or upon the persons mentioned in the warrant, in which it is reasonable to believe that the objects specified in the warrant may be found. A peace officer performing such a search should be empowered to seize, in addition to "objects of seizure" specified in the warrant, other "objects of seizure" he finds in plain view.[140]

By including "plain view",[141] the recommendation is clearly too broad to cover the situation of lawyers' offices in a way that discourages intrusions into confidential relationships. Legislation should require the justice to consider appropriate execution procedures in order that warrants contain procedures which are tailored to the circumstances of each case and which reflect, as a paramount consideration, the substantive rule defined by Lamer J. The broad scope of section 445, as it relates to the seizure of items not specified in the warrant, must be qualified so that, in respect of lawyers' offices, only specified items can be seized in the absence of an express authorization to extend seizure to material in "plain view". Again, Mr Justice Lamer's suggestion about consultation with the local Crown Attorney and officials of the Bar might provide the necessary encouragement to ensure that searches are authorized in ways that interfere with confidentiality only to the extent absolutely necessary in order to achieve the object of the authorizing legislation.

III. Public Interest Immunity

A. Evolution

It has long been recognized that, in some cases, documents relating to government activities ought not to be disclosed in the course of litigation.[142] In Commonwealth jurisdictions, this form of immunity has been traditionally and misleadingly known as Crown privilege. Elsewhere, it is called

[138]*Supra*, note 3, 213, where a police manual is quoted: "Be alert for anything unlawful".

[139]*Ibid.*, 213. The methodology of the report is described at *ibid.*, 80.

[140]*Ibid.*, 212.

[141]This appears to be an adoption of the American doctrine. See the discussion in *Working Paper No. 30, supra*, note 3, 225-6. Also see *Coolidge* v. *New Hampshire* 403 U.S. 443 (1971).

[142]See generally Cross, *supra*, note 73, 306-13; Brun, *L'Exécutif et ses documents: orientation récente du droit canadien* (1974) 15 C. de D. 659; Bushness, *Crown Privilege* (1973) 51 Can.

executive privilege.[143] At its heart lies the idea that the public interest is best served in some cases by preventing public disclosure of documents relating to government activities. Hence, the more recent and appropriate label has become public interest immunity.[144] The public has a significant interest both in the integrity of the administration of justice and in government activities. Some government activities, if they are to achieve their goals, require confidentiality. The scope of government involvement in the lives of individuals and the affairs of the community has increased substantially. It is inevitable that occasions will arise when parties to the litigation process seek to adduce into evidence material relating to government activity. The disclosure of such material might cause harm to the interests of the state with little countervailing benefit to the administration of justice. The harm is usually directed to matters of national security, national defence or international relations, but other governmental interests have also been recognized.[145] The nature of the potential harm depends on the role which the government has played. The governmental role may be consistent with its historical function as defender of the security of the nation. With increasing frequency, however, the government participates in the trade and commerce of the community. To prevent the risk of harm to the public interest, the law of evidence has provided that officials or Ministers of the Crown can object to the disclosure of a document either because of its particular contents or because it falls into a class of documents which is entitled to protection.[146] It is an understatement to suggest that the task of weighing claims as between the institutions of government and the administration of justice is inherently difficult and problematic. The threshold question, however, is who should perform the function: the courts or Ministers of the Crown.

Bar. Rev. 551; Lederman, *The Crown's Right to Suppress Information Sought in the Litigation Process: The Elusive Public Interest* (1973) 8 U.B.C. Law Rev. 272; Molnar, *Crown Privilege* (1977-78) 42 Sask. L. Rev. 173; Tanning, *Crown Privilege in Regard to Upper Echelon Government Documentation* (1981) 30 U.N.B.L.J. 121; and Wells, *Crown Privilege* (1976) 3 Queen's L.J. 126.

[143]See generally *Wigmore, supra*, note 72, para. 2378 and R. Berger, *Executive Privilege: A Constitutional Myth* (1974) 215-33.

[144]This contemporary phraseology flows from the recognition that, unlike other examples of privilege which exist to protect a litigant and can be waived by him, this protection arises in the public interest to avoid jeopardizing by disclosure a significant state interest. See the remarks of Viscount Simon in *Duncan* v. *Camell, Laird, & Co.* [1942] A.C. 624, 641-2; Lederman, *supra*, note 142, 272-4.

[145]See Cross, *supra*, note 73, 306; Bushnell, *supra*, note 142, 551-2; Jacob, *Discovery and Public Interest* [1976] Public Law 134, 142-152.

[146]The extension to include "class" claims can be attributed to Viscount Simon in *Duncan* v. *Camell, Laird, supra*, note 144, 642; see Lederman, *supra*, note 142, 276.

In *Robinson* v. *State of South Australia* (No. 2),[147] the Judicial Committee of the Privy Council inquired into an Australian High Court ruling which upheld a ministerial claim for privilege without examining the documents. The action involved a claim in negligence by a group of farmers relating to the manner in which the government stored wheat pursuant to a state-run wheat marketing scheme. Recognizing the probative value of the documents in question, the Judicial Committee commented that the interests of justice were "only to be overborne by the gravest considerations of state policy or security".[148] It ruled that the documents ought to have been examined in order to weigh the adequacy of the claim for privilege.[149]

In 1942, a claim for Crown privilege was argued in the House of Lords in *Duncan* v. *Cammell, Laird.*[150] The case involved an action for damages in negligence brought by the survivors of crew members when the experimental submarine Thetis sank on a trial run in 1939. An objection to production of government documents was made by the First Lord of the Admiralty on grounds of public interest, and the objection was upheld by a Master without examination. The case arose during wartime and the documents in question contained military secrets about new weapons. After a series of unsuccessful appeals, the issue eventually reached the House of Lords where, again, the original objection was upheld.

On its facts, the result is not open to question. Given the nature of the litigation, the description of the claim for privilege and the exigencies of the particular period in history, one can appreciate not only the desire to favour confidentiality but also the deference to the ministerial assertion of the claim. However, the judgment generated implications far beyond the case itself, since it appeared to hold that a ministerial objection to disclosure on proper grounds was conclusive and that the court had no power to inspect documents in order to assess the claim.[151] Available grounds would include national defence, international relations and "the proper functioning of the public service".[152] In this context, Viscount Simon created the dual notion

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[147][1931] A.C. 704, [1931] All E.R. 333 (J.C.P.C.) [hereinafter cited to A.C.].

[148]*Ibid.*, 716.

[149]The South Australian Rules of Court, Order 31, provided expressly for inspection of documents in cases of claims of privilege. It is clear, however, that Lord Blanesbrough rested his opinion on an inherent power to inspect regardless of the existence of express authority: *ibid.*, 722.

[150]*Supra*, note 144.

[151]*Ibid.*, 641-2 *per* Viscount Simon.

[152]*Ibid.*, 642.

of contents and class objections. The respected constitutional and administrative law scholar S.A. de Smith has stated:

> Probably no modern rule of English law has attracted so much criticism. The courts had abdicated in favour of the executive at the expense of the interests of the litigants and the public interest in the due administration of justice.[153]

The decision has been challenged because of its unsatisfactory and often inconsistent reasoning and inadequate attention to precedent.[154] The more significant focus of critical attention has been the unqualified breadth of the absolute immunity which it created.[155]

In 1968, the House of Lords was faced with the same question in *Conway* v. *Rimmer*.[156] Conway was a probationary police constable who had been prosecuted for the theft of a flashlight. The jury acquitted him at the close of the Crown's case. Subsequently, he was dismissed from the police force and began an action for malicious prosecution against his superintendent. At the discovery stage, the existence of various internal reports came to light, but the Home Secretary objected to their disclosure on the ground that they belonged to classes of documents which were in the public interest and therefore immune from disclosure. Surprisingly, the objection was overruled and production ordered. The Crown appealed successfully,[157] and the case ultimately came before the House of Lords for consideration. Of the five judgments rendered in the course of resurrecting the court's function as arbiter of claims of privilege, two judges expressly rejected the decision in *Duncan* v. *Cammell, Laird*,[158] one judge distinguished it[159] and the remaining two were ambiguous in their treatment of the earlier decision.[160] Commenting on *Conway* v. *Rimmer*, D.H. Clark has said:

> it is unquestionably of great constitutional importance as an authoritative restatement of the law relating to Crown privilege. In short, the decision restores to the judiciary in England its inherent residual power . . . to overrule a formally unimpeachable objection made on behalf of the Crown, in the name of the

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[153]S.A. de Smith, *Constitutional and Administrative Law*, 2nd ed. (Hammondsworth: Penguin, 1973) 619.

[154]Clark, *Administrative Control of Judicial Action: The Authority of Duncan v. Camell, Laird & Co.* (1967) 30 Mod. L. Rev. 489.

[155]C.K. Allen, *Law and Order*, 3rd ed. (1965) 347; de Smith, *supra*, note 153; Street, *State Secrets - A Comparative Study* (1951) 14 Mod. L. Rev. 121.

[156][1968] A.C. 910 (H.L.). For discussions of this case which are more careful and thoughtful than the brief comments herein, see Bushnell, *supra*, note 142, 563-8 and Clark, *The Last Word on the Last Word* (1969) 32 Mod. L. Rev. 142.

[157][1967] 2 All E.R. 1260 (C.A.).

[158]Lords Morris and Hodson.

[159]Lord Upjohn.

[160]Lords Reid and Pearce. Clark, *supra*, note 156, 142 suggests that these judges inclined toward distinction rather than rejection.

> public interest, to the disclosure of documentary or oral evidence in legal proceedings.[161]

From the five judgments, one can discern a number of variations. However, three common elements can be distinguished as essential to the process of responding to claims of public interest immunity: first, "it is for the court to decide whether to uphold the objection"; second, the adjudicative responsibility "must include a power to examine documents privately"; and, third, there is no inherent difference between contents and class claims.[162]

In Canada, even before the decision in *Conway* v. *Rimmer*, the judiciary had expressed grave doubts about an absolute privilege vesting in government documents.[163] In *R.* v. *Snider*, the question arose as to whether income tax returns held by the Minister of National Revenue could be produced in a criminal trial after the Minister had filed an affidavit expressing his opinion that production would be injurious to the public interest.[164] Early in his judgment, Rand J. took care to distinguish the conceptual difference between concerns about privilege when "the matter relates to evidence sought by either the Crown or the accused in a criminal prosecution" as compared to civil proceedings.[165] In his reasoning, he followed the judgment of *Robinson* v. *South Australia* and concluded that it is for the court, having been shown the nature of the documents in question, to decide whether the "public interest requires that they should not be revealed".[166] He stated:

> 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.[167]

The judgment of Kellock J., which arguably represented the majority,[168] also reflected a concern to distinguish between the civil and criminal contexts. He relied upon an excerpt from *Duncan* v. *Cammell, Laird*, which stated that the interests which apply "in criminal trials where an individual's life or liberty may be at stake" are "not necessarily the same" as those

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[161]*Supra*, note 156, 142.

[162]See Clark, *ibid.*, 143.

[163]*Re Constitutional Questions Determination Act; R.* v. *Snider* [1954] S.C.R. 479, [1954] 4 D.L.R. 483 [hereinafter cited to S.C.R. as *R.* v. *Snider*]; *Gagnon* v. *Quebec Securities Commission* [1965] S.C.R. 73, (1965) 50 D.L.R. (2d) 329 [hereinafter cited to S.C.R.]; Willis *Comment* (1955) 33 Can. Bar. Rev. 352, 353.

[164]*Ibid.*

[165]*Ibid.*, 481. Rinfret C.J.C. concurred in this judgment.

[166]*Ibid.*, 485.

[167]*Ibid.*, 485.

[168]Kerwin, Taschereau and Fauteux JJ. concurred and Estey J., in his separate judgment, expressed approval.

applicable to civil actions.[169] The Court unanimously ruled that the Minister's opinion was not conclusive.[170]

Within the federal sphere in Canada the issue of public interest immunity has been codified. Until recently, the power to assess claims was determined by section 41 of the *Federal Court Act*.[171] Sub-section 41(1) empowered the courts, when faced with a ministerial affidavit claiming that a document belonged to a class, or contained information, "which on grounds of a public interest" should not be produced, to examine the document and decide whether the "public interest in the administration of justice [outweighed] in importance the public interest specified in the affidavit". Subsection 41(2), however, described particular objections to disclosure which resulted in absolute immunity. In the face of a ministerial affidavit indicating that disclosure "would be injurious to international relations, national defence or to security, or to federal provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada", the Court could not examine the document and was obliged to refuse discovery and production. Because of the conclusive nature of the minister's affidavit and the emasculation of the courts when faced with it, sub-section 41(2) was the subject of substantial criticism.[172]

On 7 July 1982, royal assent was given to a package of legislation consisting of the *Access to Information Act*, the *Privacy Act* and amendments to the *Canada Evidence Act*.[173] It also included the express repeal of section 41 of the *Federal Court Act*.[174] In its place, an array of provisions were enacted dealing with access to the kinds of documents which previously fell within the scope of section 41. The new sections 36.1 and 36.2 of the *Canada Evidence Act* give to the courts the role of adjudicating objections to disclosure on "the grounds of a specified public interest".[175] The authority to deal with objections based on international relations or national defence or security is vested in the Chief Justice of the Federal Court.[176] These matters are dealt with *in camera* and the government can make its representations

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[169]*Ibid.*, 481.

[170]Bushnell, *supra*, note 142, 570-2; Lederman, *supra*, note 142, 278-9.

[171]R.S.C. 1970 (2nd Supp.), c. 10.

[172]See, for example, Mullan, *Not in the Public Interest: Crown Privilege Defined* (1971) 19 Chitty's L.J. 289; McDonald Commission, *supra*, note 1, 57-9.

[173]See respectively S.C. 1980-81-82-83, c. 111, Schedule I; S.C. 1980-81-82-83, c. 111, Schedule II; R.S.C. 1970, c. E-10, as am. S.C. 1980-81-82-83, c. 111, s. 4, Schedule III, adding ss 36.1-36.3.

[174]R.S.C. 1970 (2nd Supp.), c. 10, repealed by S.C. 1980-81-82-83, c. 111, s. 3.

[175]*Canada Evidence Act*, R.S.C. 1970, c. E-10, as am. S.C. 1980-81-82-83, c. 111, s. 4, Schedule III, adding ss 36.1-36.3. With respect to the operation of s. 36.2, see *Goguen and Albert* v. *Gibson* (1984) 50 N.R. (Fed. C.A.).

[176]Or such other judge of that court as he may designate: see *Canada Evidence Act*, s. 36.2(1).

ex parte.[177] With one striking exception, all claims based on public interest are determined either by the superior courts of the provinces or the Federal Court - Trial Division. The exception,[178] also found in the *Access to Information Act*[179] and *Privacy Act*,[180] relates to confidences of the Queen's Privy Council for Canada. While these are commonly referred to as Cabinet documents, the definitions in section 36.3(2) of the *Canada Evidence Act* are much broader than that phrase would ordinarily convey. This class of documents, without regard to their contents and without inspection or argument, is immune from disclosure in the course of litigation upon presentation of a written certificate by a Minister or the Clerk of the Privy Council stating that the documents belong to the described class.[181]

B. Proposed Section 444.2

Until the tabling of the recent amendments, there has been no legislative attempt to extend public interest immunity to the powers of search and seizure. Much of the case law, as we have seen, has arisen in the context of civil cases and the leading authorities have recognized that different considerations arise in a criminal proceeding.[182] Employing a similar procedure as that provided in cases of solicitor-client privilege, the proposed section 444.1 vests in the judiciary the authority to adjudicate claims on "grounds of a specified public interest".[183] Recognizing the evolving nature of the public interest, the scope of the category is unrestricted, either with respect to claims of contents or class, and the only differentiation arises with respect to those kinds of documents traditionally characterized as involving high state interests. When an objection is based on "the grounds that the disclosure would be injurious to international relations or national defence or security", the responsibility for assessing the claim is vested in the Chief Justice of the Federal Court, or such other Federal Court judge as might be

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[177]*Canada Evidence Act*, ss 36.2(5) and (6).

[178]*Canada Evidence Act*, s. 36.3. For a criticism of the special treatment afforded to Cabinet documents, see Hewett, *Editorial: Cabinet Secrets* (1983) 25 Crim. L.Q. 257.

[179]S.C. 1980-81-82-83, c. 111, Schedule I, s. 69.

[180]S.C. 1980-81-82-83, c. 111, Schedule II, s. 70.

[181]*Canada Evidence Act*, s. 36.3(1). But is the immunity absolute? See *infra*, note 240.

[182]See the discussion of *Snider*, above at note 164.

[183]The procedures set out in s. 444.1 apply, with minor exceptions, both to objections made on the basis of solicitor-client privilege and grounds of a specified public interest: see s. 444.1(2). The procedural differences relate to which courts have jurisdiction to deal with certain kinds of "public interest" claims involving international relations or national defence or security: see ss 444.1(4) and (5). As well, specific appeal provisions are included for these matters: see ss 444.1(12), (13) and (14). In the version published at first reading, there appears to be an error in s. 444.1(12) where it refers to determinations under "subparagraph (6)(c)(i) or (ii)". These determinations are actually made under subparagraphs (6)(d)(i) and (ii).

designated.[184] This is consistent with the recommendation made by the McDonald Commission in its report on *Security and Information.*[185] From the constitutional perspective, it is interesting that, while concern about harm to federal-provincial relations may still provide a basis for an objection to disclosure, the jurisdiction for dealing with such claims is shared between the provincial superior courts and the Federal Court and depends on the context within which the claim arises.[186] As with solicitor-client privilege cases, section 444.1(15) provides that any applications seeking an order precluding disclosure on public interest grounds, and any appeal therefrom, shall be heard *in camera.*

The major question relating to these proposals and other recent amendments dealing with government information is why "a confidence of the Queen's Privy Council for Canada" is to be accorded special status. The proposed section 444.2 deals solely and separately with this class of documents. This remains the one class of documents which is absolutely immune from production and disclosure even in the face of a validly issued warrant. The class is defined in terms identical to those used in related statutes:

> (a) A memorandum the purpose of which is to present proposals or recommendations to Council;
> (b)A discussion paper the purpose of which is to present background explanations analysis of problems or policy options to Council for consideration by Council in making decision;
> (c) An agenda of Council or a record recording deliberations or decisions of Council;
> (d) A record used for or reflecting communications or discussions between Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
> (e) A record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred in paragraph (d); and
> (f) Draft legislation.[187]

In respect of the seizure of any such document, the officer is required to seal the document and deliver it to the Clerk of the Privy Council.[188] The Clerk, or a Minister, then has ten days within which to provide a written

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[184]Section 444.1(4).

[185]*Supra*, note 173.

[186]This category, previously referred to specifically in the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, s. 41(2), repealed by S.C. 1980-81-82-83, c. 111, s. 3, receives no special mention in the proposed legislation. Thus, adjudicative jurisdiction is determined by a combination of s. 441.1(3)(a) and the definition of "judge" in s. 444.1(1).

[187]Section 444.2(4). For related provisions employing an identical definition, see *supra*, notes 178, 179 and 180.

[188]Section 444.2(1).

certificate "that the document constitutes a confidence of the Queen's Privy Council for Canada".[189] Only if the certificate is not produced will the documents be delivered to the officer who seized it.[190] Thus, when an informant has satisfied a judicial officer that there are reasonable grounds, according to section 443, that a document will afford evidence of a criminal offence, it cannot be seized simply because of the bald assertion that it falls within a described class.

The impact of these amendments can bear on three kinds of situations. First, there may be cases where a Cabinet document might afford evidence of criminal wrongdoing on the part of a Minster or other official. Anyone who considers this category hypothetical and not worthy of serious attention should consider the recent case of *U.S.* v. *Nixon*.[191] Second, there will be documents which might have probative value, either of an inculpatory or exculpatory nature, relating to allegations of criminality on the part of someone not related to the government. Third, there may be cases where the object of access to documents is not to obtain evidence but to further the progress of an investigation. In this regard, the Courts in both *MacIntyre*[192] and *Descôteaux*[193] distinguished the investigative aspect of a search from its evidence-gathering function.

The Minister of Justice has suggested that the special treatment offered to Cabinet documents is merely a codification of existing law.[194] If he had in mind the evolving common law of privilege and confidentiality, this view cannot be supported. With respect to rights of confidentiality, it is clear that substantive protection as well as evidentiary protection should be afforded to confidential communications.[195] However, all authorities retain for the judiciary the role of balancing interests and determining when disclosure in the interests of justice outweighs the maintenance of a confidence. The most relevant case is *Descôteaux*, which clearly preserves a role for the judiciary. Throughout his judgment, Lamer J. emphasized the balancing process. A significant factor to be taken into consideration in the process is the utility of the search warrant as an investigative tool.[196]

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[189]Section 444.2(2).

[190]*Ibid.*

[191]418 U.S. 683, 41 L. Ed. (2d) 1039 (1974) [hereinafter cited to U.S.]. All the documents filed in this case have been collected and published in L. Friedman, ed., *U.S.* v. *Nixon: The President Before the Supreme Court* (1974).

[192]*Supra*, note 4, 186.

[193]*Supra*, note 9, 891.

[194]Remarks of the Hon. Mark MacGuigan made in response to questions during a public address at Queen's University, Kingston, 18 October 1983 [unpublished].

[195]See *Descôteaux*, *supra*, note 7; *Slavutych* v. *Baker*, *supra*, note 89.

[196]See *Descôteaux*, *supra*, note 7, 889-91.

Confidentiality can also be used as a basis for comparing both solicitor-client and Cabinet document claims. While both are essentially claims of class, there are significant distinctions in the rationale upon which each is based. The confidential nature of the solicitor-client relationship is an essential element of the administration of justice and must be maintained in order to ensure the integrity of the judicial process as a whole.[197] The client needs to know that advice can be obtained based on information candidly exchanged. Privileged documents and communications are protected not only from disclosure but also from the peering investigative eyes of the police. However, it is recognized that the substance of a document or communication can remove the basis for protection if its nature is inconsistent with the proper role which the relationship ought to play within the administration of justice.[198] Thus, protection flows from the roles which participants play within the administration of justice, and the courts are competent to define these roles. Cabinet documents, on the other hand, are unrelated to the administration of justice, but generate a right to confidentiality because of the manner in which they relate to the proper functioning of the executive. While the solicitor-client relationship must be viewed as an element of the system of justice, the executive must be viewed as an integral part of the larger constitutional structure consisting of the legislature, the judiciary and the executive.[199] However, the judiciary's ability to adjudicate cases involving claims of executive privilege should not be diminished simply because the rationale for the privilege is external to the administration of justice. Arguments about the need for candour within the executive as the operative rationale for Crown privilege have been repeatedly rejected.[200] It is hard to accept that the rare prospect of an *in camera* judicial hearing about disclosure would so impair frankness and discourage candour as to render ineffectual the discussions of Cabinet Ministers and senior officials. Another ground which is often raised in defence of the executive privilege is the need to protect government from "ill-informed or captious" criticism.[201] However, the most persuasive rationale is the preservation of the concept of collective responsibility.[202] That is, on matters of policy the

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[197]See text, *infra*, at note 72 *et seq.*, and sources cited there.

[198]*Ibid.*, and Cross, *supra*, note 73, 282-95.

[199]See R. Dawson, *The Government of Canada*, 5th ed. (1970) 57-75.

[200]See *Conway* v. *Rimmer*, *supra*, note 156, 957 *per* Lord Morris, 976, 986-7 *per* Lord Pearce, 993-5 *per* Lord Upjohn, 952 *per* Lord Reid. *Burmah Oil Co. Ltd.* v. *Bank of England* [1980] A.C. 1090, 1132-3 (H.L.) *per* Lord Keith; *cf.* 1112 *per* Lord Wilberforce.

[201]See *Conway* v. *Rimmer*, *supra*, note 156, 952 *per* Lord Reid; *Burmah Oil*, *supra*, note 200, 1112 and 1145 *per* Lords Wilberforce and Scarma respectively; *cf.* Lord Keith, 1133-4.

[202]See *Attorney General* v. *Jonathan Cape Ltd* [1976] Q.B. 752, [1975] 3 All E.R. 484 and the discussion of *Sankey* v. *Whitlam*, *infra*, note 213. The concept of collective responsibility appears to be the truest source of the recurring phrase "the proper functioning of the government" as explained by Lord Upjohn in *Conway* v. *Rimner*, *supra*, note 156, 992-5.

Cabinet must show a single and unified face to the world.[203] Clearly, the definition of "a confidence of the Queen's Privy Council" goes far beyond documents which might reflect a lack of unanimity within the Cabinet. Moreover, if collective responsibility is the guiding principle, then a member of the judiciary must surely be competent to determine whether the substance of a document relates to the confidential relationship in that way or not.[204] When considering the class claim of Cabinet documents, the inquiry would not involve the judiciary in weighing matters of high policy. In fact, by offering the proposed section 444.1, which deals specifically with international relations, national defence and national security, the Minister of Justice has recognized the ability of the judiciary to give appropriate weight to all aspects of matters of high policy and, in particular, the opinions of the relevant Minister. Thus, the long-awaited evolution of substantive protections for other relationships cannot be used as an argument to preclude a judicial role in assessing objections to disclosure of Cabinet documents.

In considering the codification argument, we must also examine the evolution of the common law of public interest immunity. The cases do not support the absolute protection given to Cabinet documents by this proposed amendment. Recent decisions from Canada,[205] the Commonwealth,[206] and the United States[207] have treated the disclosure of Cabinet documents in a restrictive manner which does not involve limiting the judiciary's traditional role as adjudicator. In *Sankey* v. *Whitlam*, four members of the Australian High Court addressed the question of an absolute class privilege for Cabinet documents and unanimously concluded that it is the role of the court to balance the need for confidentiality against the interests of justice.[208] The case arose from informations laid by a private citizen against the former Prime Minister and Cabinet members alleging a criminal conspiracy with respect to the manner in which monies were borrowed. Both the prosecutor and some of the defendants issued subpoenas

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[203]See Dawson, *supra*, note 199, 188-90.

[204]Judicial competence to assess claims in relation to ministerial responsibilities (as compared to questions of national defence and security) was asserted explicitly and implicitly in *Conway* v. *Rimmer*, *supra*, note 156; see the remarks of Lord Morris, 956-7, and Lord Pearce, 987.

[205]*Mannix* v. *The Queen* (1981) 31 A.R. 169, (1981) 119 D.L.R. (3d) 722 (C.A.); *Glouchester Properties* v. *The Queen* (1981) 32 B.C.L.R. 61 (B.C. C.A.); *Re Carey and The Queen* (1982) 43 O.R. (2d) 161, (1982) 1 D.L.R. (4th) 498 (C.A.).

[206]England: *Burmah Oil*, *supra*, note 200. Australia: *Sankey* v. *Whitlam* (1978) 142 C.L.R. 1, (1978) 21 A.L.R. 457 (C.A.). New Zealand: *Environmental Defence Society* v. *South Pacific Aluminum Ltd* [1981] 1 N.Z.L.R. 146, 153 (C.A.). See Evans, *Comment* (1980) 58 Can. Bar. Rev. 360.

[207]*U.S.* v. *Nixon*, *supra*, note 191.

[208]*Supra*, note 206. For helpful discussions of this case see Goldring, *Crown Privilege, Scrutiny of the Administration and the Public Interest* (1978) 10 Fed. L. Rev. 80, and Hodge, *Sankey's Case Against Whitlam: Crown Privilege* (1977) N.Z.L.R. 58.

seeking production of Minutes of Federal Executive Council meetings, memoranda prepared for these meetings and documents produced for ministerial use by their respective departments. Of the four judgments which addressed the question of Crown privilege, the common position was most clearly formulated by Gibbs A.C.J.:

> It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words, whether the public interest which requires that the document should not be produced outweighs the public interest that the court of justice, in performing its functions, should not be denied access to the relevant evidence. . . .[209]

> The fundamental principle is that documents may be withheld from disclosure only if, and to the extent, that the public interest renders it necessary. That principle, in my opinion, must also apply to state papers. It is impossible to accept that the public interest requires that all state papers by kept secret forever or until they are only of historical interest.[210]

Significantly, Mason J., who had been Solicitor-General of the Commonwealth,[211] agreed with the views of Gibbs A.C.J. He rejected arguments for non-disclosure based on candour or the fear of "ill-informed and captious" criticism while recognizing the harm that could flow from premature publication of high level decisions and policies.[212] To Mason J., one could not seek "refuge in the amorphous statement that non-disclosure is necessary for the proper functioning of the Executive Government and of the public service". Rather, the proper rationale for non-disclosure lay in the constitutional doctrine of collective responsibility.[213] When balancing that interest against the public interest in the administration of justice, he stressed the need to consider whether the documents in question related to "important matters of policy" or current issues which were before the government.[214]

The House of Lords considered public interest immunity once again in *Burmah Oil Co. Ltd* v. *Bank of England* where the plaintiff was seeking to set aside the transfer of a large number of shares to the Bank at a fixed price per share. The plaintiff argued that the agreement was "unconscionable, inequitable and unreasonable".[215] The Bank of England was acting in close contact with the government, and while the Crown was not a party to the litigation, the plaintiff sought production of a number of documents

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[209]*Sankey* v. *Whitlam*, *supra*, note 206, 38-9.
[210]*Ibid.*, 41-2.
[211]See Goldring, *supra*, note 208, 88.
[212]*Supra*, note 206, 97.
[213]*Ibid.*, 96-8.
[214]*Ibid.*, 98-9.
[215]*Supra*, note 156.

in the possession of the Crown. A certificate from the Chief Secretary to the Treasury was filed objecting to production on public interest grounds. The documents in question were diverse, but it was clear that the case represented a class claim for immunity. With the exception of Lord Wilberforce, the House of Lords concluded that the documents should be produced for inspection in order to decide whether the public interest was best enhanced by disclosure or protection.[216] However, even to Lord Wilberforce the ministerial certificate was not conclusive. His view was that the parties seeking disclosure must "demonstrate the existence of a counter-acting interest" with reference to the litigation and the probative value of the documents sought. He concluded that there was no need to examine the documents, because there was not "the slightest ground, apart from pure speculation" for suggesting that the documents could outweigh the claim for immunity.[217] Lord Keith, in rejecting the notion of absolute immunity from judicial scrutiny, suggested that the judicial inquiry must look to "the nature of the subject matter, the person who dealt with it, and the manner in which they did so".[218] A further consideration is the degree to which the policies presented in the documents remain "unfulfilled", as this will increase the risk of prejudice from premature disclosure.[219] The strongest rejection of absolute immunity can be found in the judgment of Lord Scarman, who, relying on *Sankey* v. *Witlam* and *U.S.* v. *Nixon*, asked "what is so important about secret government that it must be protected even at the price of injustice in our courts?"[220] He concluded that it is the court's role to balance competing interests and that "the court may always, if it thinks it is necessary, itself inspect the documents".[221]

Sankey v. *Whitlam* and *Burmah Oil Co. Ltd* v. *Bank of England* have had a substantial persuasive effect on Canadian courts. An absolute privilege for Crown documents has been rejected by the Alberta Court of Appeal in *Mannix* v. *The Queen in Right of Alberta*[222] and by the British Columbia

[216]*Ibid.*, 1121 *per* Lord Salmon, 1130 *per* Lord Edmund-Davies, 1136 *per* Lord Keith, 1147 *per* Lord Scarman.

[217]*Ibid.*, 1113-4.

[218]*Ibid.*, 1134.

[219]*Ibid.*

[220]*Ibid.*, 1144.

[221]*Ibid.*, 1145. Recognizing the role of the judiciary in cases of public interest immunity, the House of Lords has more recently been occupied with questions relating to how that role should be played. In *Air Canada* v. *Secretary of State* [1983] 1 All E.R. 910, the Court considered what an applicant must show to warrant a judicial inspection of documents in the face of a Ministerial objection. Three Lords were of the view that the party must show that the material sought would likely assist his case. Lords Scarman and Templeman would be satisfied if the party could show that the material was necessary to the disposition of the case in that it would assist any of the parties.

[222]*Supra*, note 205.

Court of Appeal in *Gloucester Properties* v. *The Queen in Right of British Columbia.*[223] More recently, the issue was considered by the Supreme Court of Canada in *Smallwood* v. *Sparling* (also known as *Re Canada Javelin*)[224] in which the former Premier of Newfoundland used the grounds of Crown privilege in seeking an injunction to restrain an inspector appointed by the Restrictive Trade Practices Commission from compelling Mr. Smallwood's participation in a federal inquiry. With respect to documentary evidence, Wilson J. considered the relevant authorities, particularly *Burmah Oil Co. Ltd,* and concluded that:

> The decision indicates that it is the role of the courts, not the administration, to determine whether disclosure of the documents would be injurious to the public interest.[225]

The same question received a full and careful analysis by Thorson J.A. of the Ontario Court of Appeal in the recent case of *Re Carey and The Queen.*[226] The plaintiff had commenced an action against the Crown and others claiming damages for breach of an agreement, deceit and damage to reputation as well as other declaratory relief. Before trial, the plaintiff served a subpoena on the Secretary of the Ontario Cabinet requiring him to attend as a witness with relevant documents. The Crown brought an application to quash the subpoena, relying on an affidavit sworn by the Secretary which objected to disclosure on the grounds that "it would not be in the public interest to produce these documents, or to make them available for inspection, even for the limited purposes of this litigation".[227] After a lengthy and scholarly review of the evolution of public interest immunity, Thorson J.A. concluded that:

> in the absence of some special statutory protection, an absolute protection can no longer be claimed for such documents whatever their class or contents, since ultimately it is the duty of the courts to assess any such claim in light of the competing public interests involved.[228]

While Thorson J.A. qualified his conclusion by reference to the possibility of a statutory exception, no consideration was given to the question of the constitutional validity of such an enactment. He offered a two-stage process by which the party seeking production would first be required to show how the evidence would substantially assist its postion.[229] In this regard, the inquiry would be directed to relevance, probative value and the existence

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[223]*Supra,* note 205.
[224][1982] 2 S.C.R. 686, (1982) 141 D.L.R. (3d) 395 [hereinafter cited to S.C.R.].
[225]*Ibid.,* 704.
[226]*Supra,* note 205.
[227]*Ibid.,* 167.
[228]*Ibid.,* 195.
[229]*Ibid.,* 201-2. See *Air Canada* v. *Secretary of State, supra,* note 221.

of alternative means of establishing the facts in issue.[230] Only after this threshold had been crossed would the court proceed to the second stage where the competing aspects of public interest would be weighed in the balance.[231]

Recently the Supreme Court of Canada considered the issue of police informer privilege.[232] In the course of distinguishing it from Crown privilege, Beetz J. offered the following procedural view of objections based on Crown privilege:

> The common law allows a member of the executive to make the initial decision; if he decides in favour of secrecy and states his reasons for doing so in a sworn statement, the law empowers the judge to review the information and in the last resort to revise the decision by weighing the two conflicting interests, that of maintaining secrecy and that of doing justice.[233]

The common law position is clear, and there can be no doubt but that the proposed amendments are contrary to the present state of judicial thinking on the question of public immunity privilege.

Can it then be argued that the amendments are necessary in order to provide statutory consistency with the recent amendments to the *Canada Evidence Act*? In other words, because the *Canada Evidences Act* protects Cabinet documents from disclosure in evidence, is it an essential corollary that section 443(1)(b) can only provide authority for search and seizure in respect of items that can ultimately be adduced as evidence? Without considering the wisdom of section 36.3 of the *Canada Evidence Act*, one would hope that the courts would reserve to themselves the discretion to consider the validity of an objection in the context of the proceedings. Even the Attorney General in *Conway* v. *Rimmer* agreed that objections to disclosure could be overridden when there was an indication of bad faith, improper purpose or a false premise.[234] One need look no further than the authority of *Roncarelli* v. *Duplessis* for the proposition that the prerogative of a Minister of the Crown only exists so long as the Minister is acting *bona fide* and within the proper limits of his or her authority.[235] Accordingly, there should be no doubt, in a case where allegations of criminal conduct are made against either a Minister or senior official, that a court would be entitled to adjudicate an objection to disclosure if it was concerned that the objection was really premised on self interest rather than public interest. In cases where an accused is seeking disclosure of Cabinet documents in order

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[230]*Re Carey and The Queen, supra*, note 205, 202.
[231]*Ibid.*
[232]*Bisaillon* v. *Keable* (1983) 7 C.C.C. (3d) 385, (1983) 37 C.R. (3d) 289.
[233]*Ibid., 415.*
[234]*Conway* v. *Rimmer, supra*, note 156, 957.
[235][1959] S.C.R. 121, (1959) 16 D.L.R. (2d) 689.

to prove his or her innocence,[236] reference must be made to sections 7 and 11(d) of the *Charter* and the right to make full answer and defence. An analogy lies to the cases of police informer privilege in which it has been traditionally agreed that the protection must fall when the evidence sought tends to show the innocence of the accused.[237] It would seem that the constitutional entrenchment of the principles of fundamental justice, when juxtaposed with the indivisibility of the Crown, should persuade a trial judge that a Crown objection to the disclosure of evidence which is material to the defence may create a substantial fear that justice to the accused cannot be done.[238] Even if the trial judge is reluctant to embark on a balancing process which requires inspection and might ultimately result in disclosure, other avenues are available. The scope of section 24(1) of the *Charter* is sufficiently broad to support a stay of proceedings in the face of a perceived denial of "fundamental justice".[239] Section 36.3 of the *Canada Evidence Act* does not expressly and absolutely preclude a judicial role with respect to claims of privilege from production.[240] However, if the search and seizure

[236]Reference should be made to the speech of Lord Kilmuir in the House of Lords on 6 June 1956, reproduced in the report of *Conway* v. *Rimmer, supra*, note 156, 922-3, in which the Lord Chancellor stated that "Crown privilege should not be claimed" with respect to documents "relevant to the defence in criminal proceedings". It is also important to remember that most Crown privilege cases have arisen in the civil context and have expressly distinguished the criminal context where liberty is at stake: see *R.* v. *Snider, supra*, note 163, 486 and 489.

[237]*Solicitor-General* v. *Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario* [1981] 2 S.C.R. 494, 536, (1981) 128 D.L.R. (3d) 193, *per* Martland J. See the dissenting judgment of Laskin C.J.C., at 516, in which the exception to the applicability of police informer privilege is described as arising when disclosure would be "material to *the defence*". This is a preferable approach since the traditional statement of the exception, repeated by Martland J. and finding its source in *Marks* v. *Beyfus* (1890) 25 Q.B.D. 494, gives the erroneous impression that the accused carries the burden of showing that disclosure will exonerate him. See also Taylor, *The Health Records Case: Judicial "Misprescription"?* (1983) 5 Sup. Ct L.R. 329, 354-6.

[238]As well, the importance of the "appearance of justice" was stressed by Lord Edmund-Davies in *Burmah Oil, supra*, note 200, 1128.

[239]In the pre-*Charter* case of *R.* v. *Farrer* (1975) 32 C.C.C. (2d) 84 (Ont. Co. Ct.), a directed verdict of acquittal was ordered solely on the basis of a denial of the right to make full answer and defence. For a discussion of the authority to stay proceedings in the face of a *Charter* violation, see Stuart, *Annotation to R. v. Belton* (1982) 31 C.R. (3d) 223 and the references cited therein. See also the comments of Barrette-Joncas J. regarding s. 41(2) of the *Federal Court Act* (since repealed) in *R.* v. *Vermette* (No. 2) (1982) 68 C.C.C. (2d) 565, 571 (Que. S.C.): "I do not want to suggest that the court does not have the power to stay proceedings in cases where it is clearly shown that an accused has been prevented from putting into evidence the essential elements in his defence by an affidavit under s. 41(2)."

[240]While s. 36.3(1) provides that "disclosure ... shall be refused without examination", s. 36.3(4) exempts from the application of sub-section (1) some documents which would otherwise fit within the definition contained in sub-section (2). It is significant that the exceptions are not found within the definition provision, but rather operate to preclude the operation of sub-section (1), the provision which appears to exclude the judicial assessment role. Hence, it can be argued that some assertions of absolute privilege can be the subject of adjudication to determine whether the sub-section (4) exemption applies. See the *obiter* remarks of Marceau J. in Goguen, *supra*, note 174, who suggested that a s. 36.3 objection is "definitive and unassailable".

power is negated, the issue of evidentiary privilege can never arise. Thus, to argue that there is a need to provide consistency between search and seizure powers and section 36.3 of the *Canada Evidence Act* would be to emasculate the judiciary's role in assessing and responding to claims of evidentiary privilege in the criminal context — a role which section 36.3 does not preclude. The result would be inconsistency, not the consistency upon which the argument is ostensibly based. Moreover, such an argument ignores the investigative function of search warrants.

C. The Constitutional Validity of the Statutory Exception

It is important to consider the issue of a statutory exception as suggested by Thorson J.A. in *Carey*. Throughout his judgment, general statements about the primacy of the court's role in assessing claims for immunity were qualified by reference to the possibility of exclusion by statute. These references were not explained or developed and certainly not examined from the perspective of constitutional validity. The existing section 41 of the *Federal Court Act* represented an example of a statutory exclusion of the judicial function. It could be argued that its constitutional validity was confirmed in the case of *Human Rights Commission* v. *Attorney General of Canada*.[241] However, as Professor Mullan has pointed out, the consideration of this issue by the Supreme Court of Canada was incomplete.[242] An argument based on the separation of powers thesis was not advanced beyond the Court of first instance:

> Indeed, it was not raised before the Quebec Court of Appeal and, in Chouinard J.'s judgment in the Supreme Court of Canada, it seemed to be accepted that Parliament and the provincial legislatures could legislate on the subject of executive privilege. Thus, almost by default, legislative authority to restrict party and adjudicator access to pertinent material in the course of judicial and administrative proceedings has been conceded . . .".[243]

In the original case before Dêschenes C.J., it was suggested that a statute that precluded a judicial role of inspecting and assessing claims of crown immunity privilege violated the constitutional separation of powers.[244] The argument flows from the earlier work of Professor W.R. Lederman, who examined the history and contents of sections 96 to 100 of the *Constitution*

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[241](1982) 134 D.L.R. (3d) 17 (S.C.C.).

[242]*Developments in Administrative Law: The 1981-82 Term* (1983) 5 Sup. Ct L.R. 1, 12-14.

[243]*Ibid.*, 13.

[244][1977] C.S. 47. See also Mullan, *supra*, note 242, 12-13.

Act, 1867.[245] It was his view that these provisions circumscribing the constitution of the judiciary did more than just ensure a federal appointment power. They also crystalized a core jurisdiction which could not be diminished by legislative act. Thus, the various branches of the government have been separated functionally, each with its own constitutionally defined sphere of responsibility. While this argument was not accepted by Dêschenes C.J.,[246] it is unclear from the decision whether he was rejecting the separation of powers thesis generally or the subsidiary and more refined question of whether matters of Crown privilege were part of the core jurisdiction of superior courts.[247] The distinction is significant in that, at the time of Dêschenes C.J.'s decision, one could offer very little as evidence of any judicial acceptance of the separation of powers thesis. As Elliot has said:

> Attempts to persuade the courts of the validity of this thesis have been few and far between. They have also been singularly unsuccessful. In fact, in each case in which the thesis has been advanced it has been rejected almost out of hand. As yet, however, this disappointing track record does not include a definitive rejection of the thesis by the Supreme Court of Canada.[248]

Thus, it is not surprising that Dêschenes C.J. would be unpersuaded.

However, there may now be some reason to suggest that the trend has changed and that the present analytical posture of the Supreme Court of Canada is in line with the separation of powers thesis. In *McEvoy* v. *Attorney General of New Brunswick and Attorney General of Canada*, the Court unanimously ruled that a unified criminal court staffed with provincially appointed judges to exercise complete criminal jurisdiction could not be established validly even by jointly cooperative actions of both the provincial Legislature and the federal Parliament.[249] In its language and analysis, the *McEvoy* decision gave substantial support to the separation of powers thesis. Specifically with respect to section 96, the Court said it "has long been the rule that section 96, although in terms an appointing power, must be addressed in functional terms lest its application be eroded".[250] The decision

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[245]See particularly Lederman, *The Independance of the Judiciary* (1956) 34 Can. Bar Rev. 769 and 1139, and *The Supreme Court and the Canadian Judicial System* (1975) 13 Transactions of the Royal Society of Canada (4th Series) 209. For interesting and helpful discussions of Professor Lederman's thesis, see Elliot, *Comment: Reference Re Establishment of Unified Criminal Court of New Brunswick* (1982) 16 U.B.C. Law Rev. 313; Mullan, *The Uncertain Constitutional Position of Canada's Administrative Appeal Tribunals* (1982) 14 Ottawa L.R. 239, 260-9. See also Hogg, *Constitutional Law of Canada* (1977) 116-7 and Abel, *Laskin's Canadian Constitutional Law*, 4th ed. (1975) 762.

[246]*Supra*, note 244, 66.

[247]See Mullan, *supra*, note 242, 13.

[248]Elliot, *supra*, note 245, 314-5.

[249](1983) 4 C.C.C. (3d) 289 (S.C.C.).

[250]*Ibid.*, 301.

then referred to the body of provisions found between sections 96 and 100 of the *Constituion Act, 1867* and concluded that the proposed unified court scheme would constitute "a complete obliteration of superior court criminal law jurisdiction".[251] Without using the label, and without any specific reference to Professor Lederman's arguments, the Court described the constitutional framework in what can only be characterized as "separation of powers" terms:

> The traditional independence of English Superior Court judges has been raised to a level of fundamental principle of our federal system, by the Constitution Act, 1982 and cannot have less importance and force in the administration of criminal law than in the case of civil matters. Under the Canadian Constitution the superior courts are independent of both levels of government. The provinces constitute, maintain and organize the superior courts; the federal authority appoints the judges. The judicature sections of the Constitution Act, 1867 guarantee the independence of the superior courts; they apply to Parliament as well as to the provincial Legislature.[252]

Hence, the time may be right to build on the *McEvoy* decision by attempting to define the core jurisdiction which our Constitution has invested in our superior courts.

With respect to the question of an absolute immunity from judicial scrutiny as established by recent statutory amendments and the proposed amendments to the *Criminal Code*, a separation of powers argument can be approached both historically and functionally. If one looks at the many English[253] and Scottish[254] cases which antedate 1867, it is clear that superior courts exercised jurisdiction to consider claims of Crown privilege. Of course, there were some examples of judicial reluctance to inspect documents and disagree with the opinion of a Minister of the Crown, but it is wrong to view these examples of deference as an abrogation of jurisdiction.[255] In

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[251]*Ibid.*

[252]*Ibid.*, 302.

[253]See, for example, *Heslap* v. *Bank of England* (1833) 6 Sim. 192, 58 E.R. 566 (action for share of residue of estate); *Smith* v. *East India Co.* (1841) 1 Pl. 50, 41 E.R. 550 (action for share of proceeds of sale); *Wadeer* v. *East India Co.* (1856) 8 DeG. M. & G. 182, 44 E.R. 360 (action for delivery of promissory note).

[254]See *Glasgow Corporation* v. *Central Land Board*, [1956] A.C. 1 (H.L.), where it was confirmed that there has always been an inherent power in Scotland to override Crown objections to production: see the judgment of Lord Normand at 11-17.

[255]For example, *Beatson* v. *Skene* (1860) 5 H. & N. 838, 157 E.R. 1415 (slander action arising from inquiry into general's conduct during Crimean War). Martin B. dissented. For many years, the majority judgment of Pollock C.B. was touted as authority for the conclusiveness of a Ministerial objection. More recently, this has been refuted by careful analysis of the case. Lord Denning in *In Re Grosvenor Hotel London* (No. 2) [1965] Ch. 1210, [1964] 3 All E.R. 354, 1244-5 (C.A.) pointed out that the judgment in *Beatson* was qualified by the recognition that "cases might arise where the matter would be so clear that the judge might well ask for it in spite of some official scruples as to producing it". In *Conway* v. *Rimmer*, *supra*, note 156,

Conway v. *Rimmer*, Lord Upjohn specifically characterized the recognition of the judicial role in assessing claims of Crown privilege not as an assertion of new jurisdiction but as a means of regaining "its control over the whole of this field of the law".[256] Lord Pearce referred to the judicial role as the exercise of the High Court's "inherent power to decide what evidence it shall demand in fulfillment of its public duty to administer justice".[257] Historical sources thus support the view that matters of Crown privilege were properly within the jurisdiction of superior courts at the time of Confederation.

A functional analysis of the issue as it relates to the efficacy of an independent judiciary should settle the argument. The process of decision-making will always be impaired when relevant material is denied to the decision-maker. One is reminded of the conclusion of *Ellis* v. *Home Office* in which Devlin J. applied reluctantly the rigid doctrine of *Duncan* v. *Cammell, Laird* to exclude, without examination, government documents.[258] In dismissing a claim for damages for personal injuries by a prisoner, His Lordship expressed grave doubts whether justice had been done.[259] Of course, the law recognizes that some material should not be admitted into evidence based on concerns about fairness, reliability or the protection of a particular relationship. However, these are issues which usually either relate to the efficacy of the decision-making process or represent an evolved policy protecting certain relationships such as solicitor and client, husband and wife or police officer and informer. The protection was crafted by the judiciary and not thrust upon it by those who benefit from the protection.

963-4, Lord Morris focused on Pollock C.B.'s conclusion that "the judge *ought* not to compel the production of it". To Lord Morris, the use of "ought" rather than "cannot" flowed from a recognition of the Court's inherent power to override a Ministerial objection in the proper case. Perhaps the most significant example of deference amongst the pre-Confederation cases is *Gugy* v. *Maguire* (1863) 13 L.C.R. 33 because it appears to be the only decision of a Canadian court. Four of the five judges were of the view they should defer to the objection to production by the provincial secretary. Meredith J., for the majority, stated, at page 53, that "the most important English case" was *Beatson* v. *Skene*, which, as noted above, has since been rejected as an authority for the conclusiveness of a Ministerial objection. The lone dissent came from Mondelet J. who stated, at page 36, that the "existence of such an extraordinary privilege would be a most unjust exception to the law of this country". The case arose in curious circumstances in that a copy of the document which the provincial secretary sought to keep out of evidence had already been given to the plaintiff. The original was required as evidence according to the rules of the day and at that stage the objection on the ground of "injury to the public service" was raised. Mondelet J. was obviously disturbed by the "pretension" of a member of the government to suggest that injury might flow from a document the contents of which had already been made public.

[256]*Conway* v. *Rimmer*, *supra*, note 156, 994.
[257]*Ibid.*, 980.
[258][1953] 2 Q.B. 135, [1953] 2 All E.R. 149.
[259]*Ibid.*, 138 (Q.B.).

Specifically with reference to the separation of powers doctrine, the United States Supreme Court in *U.S.* v. *Nixon* concluded that:

> The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Article III. ...
>
> [T]o read the Article II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of non-military and non-diplomatic discussions would upset the constitutional balance of a "workable government" and gravely impair the role of the courts under Article III.
>
> Since we conclude that the legitimate needs of the judicial process may outweigh Presidential Privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the judiciary from according high respect to the representations made on behalf of the President.[260]

It may be true that the disclosure of some Cabinet documents would impair the functioning of the Executive. It is for this reason that our law entertains claims of privilege. However, an absolute privilege from disclosure and production will always impede the functioning of the courts. If one accepts that the separation of powers thesis is premised on the need to ensure the independent and unimpaired functioning of different branches of government, it is logically inconsistent to argue that the Constitution empowers Parliament to legislate in a way that can, in serious cases, emasculate the judiciary. Particularly when one notes the respect and deference which courts have paid to ministerial opinions that documents ought not to be disclosed, an absolute privilege does not enhance the functions of the executive, but merely permits them to be carried out in secret.

Conclusion

The *Criminal Law Reform Act, 1984* died on the order paper in June of 1984. One can only speculate about the extent to which it will be resurrected in the future. Of the three proposed amendments considered in this paper, only the new section 444.1 dealing with solicitor-client privilege and public interest immunity reflects a needed change to the procedural structure of the *Criminal Code*. With respect to solicitor-client privilege, it represents a substantial adoption of the analysis offered by Lamer J. in *Descôteaux*. One cannot speak so favourably about the other amendments.

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[260] *Supra*, note 191, 707. Of particular interest are the Special Prosecutor's *Main Brief* and *Reply Brief* found in Friedman, *supra*, note 191, 209 and 427 respectively. See also Brun, *La séparation des pouvoirs, la suprématie législative et l'intimité de l'éxecutif* (1973) 14 C. de D. 387.

The proposed section 443.1 ignores almost entirely the difficult issues relating to public access to search warrant material. The proposed section 444.2 is another unjustifiable attempt to render secret the affairs of the Cabinet, Ministers of the Crown and senior officials.

Other general observations arise from a consideration of these proposed amendments. First, the amendments tell us some interesting things about the process of law reform in Canada. There appears to be no co-ordination between the work of the Law Reform Commission of Canada and the Department of Justice. It is almost as if the Commission's working paper on search and seizure has been rendered anachronistic as soon as it was published. Instead of major reform, we see piecemeal amendments which are offered as solutions to particular, though difficult, issues. These questions, to be resolved satisfactorily, must be integrated into a consistent and comprehensive review of search and seizure based on accepted principles. Secondly, the amendments, while dealing with questions of priorities as between competing social interests, ignore a substantial body of judicial analysis of these social interests. With respect to both the conflict between the issues of fair trial and freedom of the press, and the issue of privilege for Cabinet documents, a number of courts have attempted to balance social interests and articulate priorities. Given the new constitutional mandate of the judiciary and the continuing role which it will play in shaping value preferences, it is ironic that the proposed amendments seem to ignore the views of the judiciary.