LXKó KÓS.T.S CROWN PRIVILEGE : RECENT DEVELOPMENTS IN N.Z

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CROWN PRIVILEGE:
RECENT DEVELOPMENTS IN NEW ZEALAND.

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I. INTRODUCTION

"Crown privilege" is patently a misnomer for a rule of evidence which is neither an evidentiary privilege nor vested solely in the Crown or its agencies. Instead, the rule ought to be regarded as an exercise of judicial discretion: a court may, in the public interest, exclude certain documents from production in evidence, upon receipt of a formal objection by any person having an official duty in relation to the possession of the evidence sought.[1] Although the phrase "public policy" is preferred by many academic commentators, in deference to the long usage of "Crown privilege" that term has been retained here.

This article is principally concerned with four recent New Zealand decisions. In discussing Meates v. Attorney-General[2] and Elston v. State

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1. The formal objection will be in one of two forms:
   Contents claim: that the contents of the document are such that it would not be in the public interest that they be disclosed.
   Class claim: that the documents belong to a class such that it would not be in the public interest that they be adduced in evidence.
   See generally Cross on Evidence (2nd. NZ ed.), Wellington 1971, p.279. Also Duncan v. Cammell, Laird & Co. [1942] AC 624, 636 per Viscount Simon.

2. Unreported A.126/75; Supreme Court (Wellington) 18/2/76; Supplementary judgment 31/3/76 per Beattie J.

Services Commission[3], the differing approaches of the Supreme Court to judicial inspection of disputed evidence will be contrasted. The two Court of Appeal decisions, Konia v. Morley[4] and Tipene v. Apperley[5], concerned the production of documents in the possession of the police.

Part VI of the article considers the question of who may assert Crown privilege, and Part VII discusses the onus upon the party making such an assertion. Both issues have been the subject of considerable judicial misunderstanding, and an attempt to concisely declare the law will be made here.

II. MEATES v. ATTORNEY-GENERAL

The approach of Beattie J to the judicial inspection process is of prime interest in this case. The leading House of Lords decision in Conway v. Rimmer[6] is authority for the proposition

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3. Unreported A.281/76; Supreme Court (Wellington) 28/6/77 per Richardson J.
4. [1976] 1NZLR 455 (CA)
5. Unreported C.A.76/76; Court of Appeal (Wellington) 17/3/78: [1977] 1NZLR 100 (SC)
6. [1968] AC 910; [1968] 1All ER 874 (HL)

adopted by Beattie J that, if the Minister's reasons are not clearly expressed in his claim for exemption, the court will inspect the evidence and determine whether it ought to be produced by balancing the competing public interests.[7] His Honour saw the court as having a watch-dog function:

> "It may well be that on the inspection which I shall shortly order, the Minister's assumption will be fully justified, but I take the view, as I have a doubt in this matter, that the citizen is fully entitled to some scrutiny on his behalf."

One of the 217 documents in Meates for which the Crown claimed privilege was described by Beattie J as "a Cabinet paper." Although eventually exempting that document, His Honour saw fit to inspect it. This approach does not conform with that of the House of Lords in Conway v. Rimmer. There Lord Hodson said:

> "The plans of warships...and documents exemplified by cabinet minutes are to be treated, I think, as cases to which Crown privilege can be properly applied as a class without the necessity of the documents being considered individually."[8]

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7. Ibid. See especially Lord Reid at 952-953; Lord Morris of Borth-y-Gest at 971-972; Lord Pearce at 983-984; Lord Upjohn at 995. Approved: Konia v. Morley [1976] 1NZLR 455, 460 per McCarthy P.

Although the court retains a residual power to inspect any document[9], such a power would be sparingly used with certain classes of documents. In the case of Cabinet minutes and documents impinging on national security and diplomatic relations, there is an overwhelming public interest in the preservation of their secrecy, so that the judicial balancing of the competing public interest in the due administration of justice is unnecessary.[10] The inherent power of the court to inspect ought not to be exercised when the document concerned is of a class which is invariably exempt, for in such a case there is no "doubt".[11] It is consequently submitted that Beattie J was wrong to have ordered inspection of a Cabinet paper before according it exemption.

It is submitted that there are but two grounds upon which a court may inspect documents

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8. [1968] AC 910, 979. See also Lord Pearce at 984, and Lord Upjohn at 993.

9. Subject to s.27(3) Crown Proceedings Act 1950 whereby Crown may deny the existence of a document in urgent cases. Noted ibid. by Lord Pearce at 983.

10. Conway v. Rimmer [1968] AC 910, 952-953 per Lord Reid; Lord Morris at 971-972; Lord Pearce at 980. Rogers v. Home Secretary [1973] AC 388, 412 per Lord Salmon. Lanyon Pty. Ltd. v. Commonwealth [1974] 3ALR 58 (HCA-single judge in original jurisdiction.) Attorney-General v. Jonathan Cape Ltd. [1976] QB 752, 764 per Lord Widgery CJ (QB).

11. Conway v. Rimmer [1968] AC 910, 952-953 per Lord Reid. Rogers v. Home Secretary [1973] AC 388, 412 per Lord Simon of Glaisdale.

the subject of a Crown privilege claim:

(a) Where the claimant's certificate and affidavit do not adequately detail the nature and status of the documents,[12] and

(b) Where although the nature and status of the documents are sufficiently demonstrated; the claimant's certificate is not determinative of the balance between the competing public interests.[13]

However, in the case of (a) the preferable course is to first seek clarification or amplification of the certificate or affidavit, taking care not to impose a requirement that would force the disclosure of that information which it is sought to exempt.[14]

III. ELSTON v. STATE SERVICES COMMISSION

The plaintiff employee was suspended by the Commission during an industrial dispute at the New Plymouth Power Station. The plaintiff claimed that the suspension was void and sued for wages not received. It was alleged that contrary to s.10(1) of

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12. Conway v. Rimmer [1968] AC 910, 971 per Lord Morris.

13. Ibid. at 952-953 per Lord Reid; Lord Morris at 971; Lord Pearce at 988.

14. Ibid. at 971 per Lord Morris.

the State Services Act 1962, the Commission had failed to act independently, and instead had responded to an Executive order. The Minister of State Services claimed that a number of documents sought by the plaintiff were Cabinet papers and minutes; reports to him from the Commission; and that others disclosed Governmental policy.

Richardson J held firstly that the court is not bound by the Minister's certificate in either "contents" or "class" cases;[15] secondly, that although the Minister may express his view, it was for the court to balance the public interests involved. His Honour's third proposition was:

> "A judge may inspect the documents when the Minister's certificate is not sufficiently informative to enable him to say that privilege applies and it is necessary to decide the issue on the balance of competing considerations."

His Honour further held that there was no distinction between Cabinet decisions and Cabinet discussions, and that both were immune from production in evidence.[16] It is submitted that thus far the approach of Richardson J was in accord with the House of Lords in Conway v. Rimmer, the foundation of the modern doctrine of Crown privilege.

However, His Honour then held that it was

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15. See fn.1, ante.

16. See to same effect Attorney-General v. Jonathan Cape Ltd. [1976] QB 752, 764 per Lord Widgery CJ.

appropriate to distinguish documents which belong to high and low level classes:

> "Now, it is clear that, if the document is of a class that is immune from production, the immunity applies whether the particular document is made at the highest political or official level or by a junior official...."[17]

Richardson J then listed classes of documents for which he considered a ministerial claim for exemption would be conclusive, irrespective of contents:

> Class One: Cabinet minutes, (including Cabinet papers); correspondence between Ministers; papers prepared for Cabinet Committees; officials' file notes summarising Cabinet and Cabinet Committee decisions.
>
> Class Two: Correspondence between Cabinet Ministers and their official advisers.
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> Class Three: Minutes of discussions between heads of departments; memoranda of heads of departments; correspondence between heads of departments.

The approach of Richardson J raises two matters of immediate concern:

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17. His Honour cited Conway v. Rimmer [1968] AC 910, 952 per Lord Reid in support.

A. Conferment of "Absolute Protection"

Richardson J would exclude judicial inspection of the three classes of document (ante) when he refers to their exemption as:

"...(An) absolute protection from discovery...."

His Honour also said that in the case of Cabinet papers and other high level documents a ministerial certificate should be treated as decisive, and that:

> "There may be other categories of documents for which a ministerial certificate will be accepted as conclusive."

There is no "absolute protection" from judicial inspection , for Conway v. Rimmer establishes that the power of the court to inspect documents knows no bounds at common law.[18] To reason otherwise would be to hark back to Duncan v. Cammell, Laird & Co. Ltd.[19]

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18. [1968] AC 910, 971-972 per Lord Morris. See also Lord Pearce at 980 and 983; cf. Lord Reid at 953 who might be seen to limit inspection only where the "Minister's reasons are such that a judge can properly weigh them." Marconi's Wireless Telegraph Co. v. Commonwealth (No.2) (1913) 16 CLR 178, 194-195 per Griffith CJ. Robinson v. State of South Australia [1931] AC 704, 716 per Lord Blanesburgh (JCPC); followed Corbett v. Social Security Commission [1962] NZLR 878 (CA). See also Rogers v. Home Secretary [1973] AC 388, 406 per Lord Pearson- Crown has neither privilege nor prerogative to exclude evidence.

19. [1942] AC 624 (HL). Not followed: Corbett v. Social Security Commission [1962] NZLR 878 (CA); Conway v. Rimmer [1968] AC 910 (HL).

Rule 163 of the Code of Civil Procedure[20] confers upon the court a power to order production of documents for the inspection of the other party "as the Court or a Judge thinks right." As a matter of practice the courts will automatically withhold certain classes of document, such as Cabinet papers and those impinging on national security or diplomatic relations. In such cases the courts do not inspect because it would be immaterial to the conclusion reached.[21] However, inherently it remains a matter of judicial discretion.

B. Categorization Rigid and Arbitrary

In Conway v. Rimmer, Lord Reid conceived of an automatic exemption from production applying irrespective of contents to "Cabinet minutes and the like," and to "all documents concerned with policy making within departments including it may be minutes and the like by quite junior officials and correspondence with outside bodies."[22] Richardson J's categorization, although apparently drawing upon Conway v. Rimmer for support, effectively destroys the broad discretionary approach of that case by creating firm classes of documents exempt from production irrespective of whether they are concerned

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20. Pursuant to s. 51 Judicature Act 1908. Note Cross on Evidence (2nd NZ ed.), Wellington 1971, p.276 fn.(n).

21. Conway v. Rimmer [1968] AC 910, 952-953 per Lord Reid; Rogers v. Home Secretary [1973] AC 388, 408 per Lord Simon.

22. [1968] AC 910, 952.

with policy making. It is likely that a number of the documents excluded as belonging to Class Two or Class Three (ante) would be "routine documents." Lord Reid would not have exempted these because they are neither concerned with policy making, nor is their exemption "...really 'necessary for the proper functioning of the public service.'"[23] With respect, Richardson J's approach is arbitrary in that it would exempt "high level" routine documents and not those that are "low level", without demonstrating that there is a greater public interest in withholding the former; nor that there exists at all a public interest in exempting routine documents.

It is respectfully submitted that, with the exception of Class One (ante), Richardson J's categorization should not be followed. Although it is in the public interest that Governmental policy making documents should be withheld, the same cannot be said for routine documents. If a judge has a doubt whether a document is "policy making" or "routine", it is proper that he should be free to inspect it in order to determine its true nature and status.[24]

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23. Idem.

24. ie. Ground (a) advocated ante, p. 5.

IV. KONIA v. MORLEY

The plaintiff brought an action for false imprisonment and assault against a detective constable. Prior to the action, as a result of a complaint made by the plaintiff, the defendant had been found guilty of a disciplinary offence[25] and fined by a police tribunal. The plaintiff now sought the production of written statements made by the defendant; papers concerning the tribunal including the pleadings, findings and notes of evidence; and reports of senior police officers investigating the charge and preparing the disciplinary hearing.

In the Supreme Court, Haslam J held that all the documents were exempted from production by legal professional privilege. His Honour further held that the documents ought to be exempt because of the overwhelming public interest in police discipline and untrammelled freedom of expression within the force. Thus Haslam J saw a special Crown privilege attaching to police documents. Such a conclusion is, with respect, suspect because Conway v. Rimmer, which Haslam J cited in support of his view, decided that no special protection should be accorded to police documents with the exception of those that would disclose useful information to the

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25. Police Regulations 1959, reg.46.

underworld.[26]

In allowing the appeal,[27] the Court of Appeal, (McCarthy P, Richmond and Cooke JJ), held that police documents do not possess any special status. McCarthy P said:

> "I do not accept that documents relating to police disciplinary action constitute a class entitled for that reason alone to protection from production in all cases. There are doubtless classes of documents from time to time held by the police which do constitute such a class, for example, the class of documents in issue in R. v. Lewes Justices."[28]

Although obiter dicta, this acceptance of the rule in Rogers v. Home Secretary[29] by McCarthy P is significant in view of the decision in Tipene v. Apperley.[30] The Court of Appeal held, after inspecting the documents, that internal memoranda between police officers conducting an internal inquiry into the abuse of police powers, expressing their opinions and recommendations, would be withheld "in the interest of police discipline...."[31]

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26. [1968] AC 910, 953-954 per Lord Reid; see also Lord Morris at 972; and Lord Upjohn at 995.

27. [1976] 1NZLR 455.

28. Ibid. 463.

29. [1973] AC 388; [1972] 2AllER 1057; sub. nom. R. v. Lewes Justices, Ex. p. Secretary of State for Home Department. (HL).

30. Discussed Part V (this article) post, p. 22.

Of judicial inspection, McCarthy P said that although this was not such a case:

> "There are some classes of case where the minister's statement should be treated as decisive that protection is to be afforded in the public interest, such as when the safety of the state or diplomatic relations with another state would be imperilled."[32]

It is submitted that the inherent power of the court to inspect is not compromised by this statement. The operative word is "treated", demonstrating that judicial waiver of the right to inspect remains discretionary.

In relation to witnesses' statements, Richmond J said, obiter:

> "There may be statements from witnesses who are members of the public. There may be a case for confidentiality if there is a fear of victimisation; in other circumstances it is difficult to see why the need arises. Then there may be police witnesses who were not directly involved in the incident in question. Or the police witnesses may have been directly involved. The prospect of public disclosure as a result of litigation may be very real or exceedingly remote. I do not think that any general rule can be laid down, except that the courts should be slow to order production of

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31. [1976] 1 NZLR 455, 464 per McCarthy P. See also Richmond J at 465.

32. Ibid. 461.

such documents if the circumstances suggest that information has been supplied in circumstances where it might well not have been supplied at all had it been thought that it would later be made public."[33]

Although Richmond J clearly did not consider the fear of defamation proceedings over and above that of victimisation, a fear recognized in a number of other cases[34]; it is submitted that His Honour would see Crown privilege applying even where the witness was a malefactor. That, too, is significant when considering the later case of Tipene v. Apperley.[35]

V. TIPENE v. APPERLEY

In 1974 the defendant, a footwear retailer, pleaded guilty in the Magistrate's Court at Wellington to receiving slippers from the plaintiff, the property of the plaintiff's employer, knowing them to have been dishonestly obtained. During the proceedings the police prosecutor committed a grave error of judgment by either reading the defendant's confession or a summary of its contents to the open

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33. Ibid. 465.

34. Rogers v. Home Secretary [1973] AC 388; D. v. N.S.P.C.C. [1978] AC 171 (HL); Maass v. Gas, Light & Coke Coy. [1911] 2 KB 543 (CA).

35. Discussed post, p.32.

court.[36] This confession implicated the plaintiff, although charges have not been brought against him. In bringing proceedings for defamation, the plaintiff sought inspection of the confessional document from the defendant, who had had a copy of his statement given to him by the police. The document was essential to the plaintiff's case in order to prove the contents of the alleged libel. Initial approaches were made to the police who indicated that they would not object to the release of the statement if its maker agreed, which he did not. The plaintiff then applied to the Supreme Court for an order that the statement be produced for the plaintiff's inspection.[37]

The plaintiff submitted that the police had waived any Crown privilege by publishing the statement in open court in the presence of reporters[38]; by showing or reading from the defendant's statement when detectives later interviewed the plaintiff at his home[39]; and by expressing readiness to supply a copy of the statement subject to the defendant's approval. It is understood that the plaintiff did not additionally submit that the communication was not confidential because the confession was made subject to the caution that it "may be given in

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36. [1977] 1 NZLR 100, 103 per Beattie J (SC).

37. Motion governed by Rule 163, Code of Civil Procedure.

38. [1977] 1NZLR 100, 104.

39. Idem. The police strenuously denied this, and Beattie J found that the plaintiff had probably been shown only a search warrant.

evidence." This issue was to prove crucial in the Court of Appeal.[40]

Counsel for the Minister of Police[41] submitted that 'statements obtained from interviewees, whether suspects or not, in the course of enquiry into crime' formed a class of documents which ought to be automatically withheld in the public interest. Although persons who made statements honestly to the police had a defence of qualified privilege in an action for defamation[42], such a defence could be defeated by malice; and the prospect of becoming ensnared in a civil suit, whether he succeeded or failed, would deter many a police informant.

In the Supreme Court, Beattie J ordered that the statement be produced for the plaintiff's inspection. His Honour said:

> "On its facts, it is not a traditional 'police source of information' case. There is, in my view, a clear distinction between a member of the public volunteering information and fearing reprisal and the statement of an apprehended receiver who confessed his guilt. Furthermore, I consider that the conduct of the police gives the document a non-privileged character."[43]

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40. Unreported C.A. 76/76 (Wellington) 17/3/78. Discussed post, pp.33-35.

41. Intervening by agreement with counsel for the defendant.

42. Gatley, Libel and Slander 7ed., London 1974, para. 479, pp. 201-202.

43. [1977]1 NZLR 100, 107.

The Court of Appeal, (Woodhouse, Richardson and Quilliam JJ), dismissed the resulting appeal and affirmed Beattie J's order. In a single judgment delivered by Richardson J, the Court of Appeal stated:

> "There are no authorities directly in point and it is a matter of considering the application of well established principles to the particular circumstances of this case."

It will be submitted that the Court of Appeal's treatment of the English authorities is an inherent weakness in the decision.

However, the Court of Appeal's judgment supports the approach to judicial inspection which I previously submitted was the correct one when discussing Neates' and Elston's cases, (ante). The Court of Appeal held that except in the cases of national security, diplomatic relations and Cabinet papers, where the courts are not in a position to ascertain the relative public interests, a Minister's certificate shall not be treated as decisive. In balancing the competing public interests, the Court of Appeal tendered the following formula:

> "(a) Analyse the particular documents to determine their character.
>
> (b) Weigh the various public interest considerations which may be said to support non-disclosure of that category of document.
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> (c) Balance that against the principle that

> disclosure should be required to satisfy the public interest in the administration of justice in the particular circumstances of the case."

It is quite clear that "police documents" do not form a class ipso facto withheld from production.[44] This is in some degree due to police practice.[45] In Conway v. Rimmer it was established that "confidential reports by police officers to their superiors" attracted no special Crown privilege; similarly in Konia v. Morley, documents relating to an internal police disciplinary hearing. However, certain sub-classes of police documents, more specifically described, will be withheld.[46] Thus, in Tipene v. Apperley, the Court of Appeal stated:

> "...it is not sufficient to categorize the document as information in the hands of the police."[47]

It is trite law that the identity of police informers shall not be disclosed; it was accepted by all counsel involved and the Court of Appeal in Tipene. The sole exception is in criminal proceedings where the identity is necessary to prove

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44. Cross on Evidence (2nd NZ ed.), Wellington 1971, p.275.
45. Ibid. 274. See also [1962] Public Law 203.
46. [1976] 1NZLR 455, 465 per Richmond J.
47. That, of course, was not the class advocated by counsel for the Minister. See ante, p.16.

the innocence of the accused.[48] In such a case it is open to the Crown to protect their informant by discontinuing the prosecution. The "identity rule" is for the protection of the police function, not the safety of the informer.[49] Should the identity of informers be published, there would be general reluctance to give the police essential information.

The issue before the Court of Appeal in Tipene was: since the identity of the informer was known, would the confessional statement still be exempt from production in a civil action? In Conway v. Rimmer, three Law Lords appear to suggest that generally police information and materials will only attract Crown privilege while they would be useful to the underworld or in an impending prosecution.[50] In D. v. N.S.P.C.C. , Lord Simon of Glaisdale said, obiter:

> "The law therefore recognises here another class of relevant evidence which may- indeed must- be withheld from forensic investigation- namely, sources of police information...."[51]

In Tipene v. Apperley this statement was distinguished as applying uniquely to the identity of the informer

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48. Marks v. Beyfus (1890) 25 QBD 494, 498 per Lord Esher MR; 500 per Bowen LJ. (CA).

49. Worthington v. Scribner 109 Mass.487; 12 Am.Rep. 736 (1872); Roviaro v. U.S. 353 U.S. 53 (1956).

50. [1968] AC 910, 953-954 per Lord Reid; 972 per Lord Morris; 995 per Lord Upjohn.

51. [1978] AC 171, 232.

rather than to his statement; a view which I respectfully submit is probably wrong in view of His Lordship's earlier speech in Rogers v. Home Secretary.[52]

In Rogers v. Home Secretary[53] both the Home Secretary and the Gaming Board for Great Britain sought Crown privilege for information communicated by the police to the Board. The statutory duty of the Board included investigation into the character and reputation of applicants for gaming licences.[54] The information was contained in a letter sent to the Board by a senior police officer. The letter was improperly obtained and copied by the appellant, who had been refused a licence. Consequently the identity of the police officer was public knowledge. The appellant instituted proceedings for criminal libel and sought production of the letter. The claim for Crown privilege amounted to an assertion that if the confidentiality of communication was not preserved, the Board would be unable to perform its duties satisfactorily.

The House of Lords refused to order production of the document. Lord Reid said:

> "...it appears to me that, if there is not to be very serious danger of the board being deprived of information essential for the

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52. Discussed post, pp.21-22.

53. [1973] AC 388; [1972] 2All ER 1057 (HL).

54. Gaming Act 1968 (UK), s. 10.

proper performance of their difficult task, there must be a general rule that they are not bound to produce any document which gives information to them about an applicant."[55]

Lord Salmon said:

"In my view, any document or information that comes to the board from whatever source and by whatever means should be immune from discovery. It is only thus that the board will obtain all the material it requires in order to carry out its task efficiently. Unless this immunity exists many persons, reputable or disreputable, would be discouraged from communicating all they know to the board. They might well be in fear not only of libel actions or prosecutions for libel but also for their safety and maybe their lives."[56]

Lord Simon of Glaisdale said:

"Sources of police information are a judicially recognised class of evidence excluded on the ground of public policy, unless their production is required to establish innocence in a criminal trial....This suffices, in my view, to conclude the appeals...."[57]

This statement tends to explode the view taken by

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55. [1973] AC 388, 401.

56. Ibid. 413.

57. Ibid 407-408.

the Court of Appeal in Tipene that in the later case of D. v. N.S.P.C.C., Lord Simon used the phrase "sources of police information" in relation to the identity of the informer rather than the details of his information.[58] In Rogers, the identity of the Board's informant was common knowledge. It is also noteworthy that in Konia v. Morley, McCarthy P stated, obiter, that documents such as those in Rogers would form a class exempt from production if held by the police.[59] That would appear to encompass the situation in Tipene.

In Tipene, the Court of Appeal was satisfied only to cite the passage from the speech of Lord Salmon, (ante), without comment. It is submitted with respect that the Court of Appeal failed to have regard to the general principles of Rogers' case that were directly applicable to Tipene:

> (a) That the sources of information of a body charged with a statutory duty to investigate public activities are exempt from production;
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> (b) That documents gathered by the body in the course of that duty are also exempt insofar as they relate to sources of information;
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> (c) That this exemption applies notwithstanding the subsequent public disclosure of the identity of the informant.

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58. See ante, pp. 19-20.

59. [1976] 1NZLR 455, 463. See ante, p. 12.

Although the Court of Appeal in New Zealand is technically not bound by decisions of the House of Lords, in Ross v. McCarthy[60], North P said:

> "...it would be idle to suggest that they are not entitled, particularly on a matter of substantive law..., to be treated with the very greatest of respect and only departed from on rare occasions where for some good reason or another the law in New Zealand has developed on other lines...."[61]

It is submitted that the judgment of the Court of Appeal did not disclose the existence of an independent regime of Crown privilege in New Zealand, such as would justify a departure from the general principles established by the House of Lords in Rogers' case.

A. Other Commonwealth Authorities

In D. v. N.S.P.C.C.[62] the House of Lords upheld a claim for privilege in respect of documents which tended to reveal the identity of an informer to the National Society for the Prevention of Cruelty to Children. In Marks v. Beyfus[63] Lord Esher MR drew no distinction between the identity of an

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60. [1970] NZLR 449 (CA).

61. Ibid. 453-454. See also Bognuda v. Upton Shearer Ltd. [1972] NZLR 741, 757 per North P; 771-772 per Woodhouse J to same effect. (CA). Also Corbett v. Social Security Commission [1962] NZLR 878 (CA). Vide D.L. Mathieson (1965) 4 VUWLR 55, (comment).

62. [1978] AC 171.

63. (1890) 25 QBD 494 (CA).

informer to the Director of Public Prosecutions and the information given by one whose identity was common knowledge.[64] In Coe v. Simmonds (No.2)[65] Stout CJ, in refusing to order production of statements made to the police, drew no distinction between the identity of the informer and the details of his statement.

In Green v. Livermore[66] the plaintiff brought an action for malicious prosecution against a magistrate and a Crown prosecutor. The Ontario Supreme Court held that the defendants need not answer questions as to what information had led them to commit the plaintiff to a mental institution, because of Crown privilege. It was undisputed that the informer was the plaintiff's wife. In Curlett v. Canadian Fire Insurance Co.[67], a prosecutor was held to be immune from questioning as to the identity of informers and the substance of their information. The Alberta Supreme Court approved a statement made in a case quite unrelated to Crown privilege, Maass v. Gas, Light & Coke Coy.[68] There Lord Cozens-Hardy MR said, obiter:

> "If in every case in which the prosecution fails the prosecutor is to be compelled in an action to

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64. Both statement and identity were withheld. The Court of Appeal in Tipene recognized this conclusion.

65. (1911)30NZLR 488 (SC)

66. [1939] 3DLR 788 per Urquhart J. (SC-Ont.).

67. [1939] 2WWR 527. (SC-Alta.)

68. [1911] 2KB 543. (CA).

give the names of all persons from whom he has received information, often reluctantly given, and the substance of that information, it would become very difficult to get people to give information which, in the case of an acquittal, might result in an action against the informant for defamation under circumstances not admitting of a defence based on privileged occasion."[69]

B. United States Authorities

In the United States the law on informer privilege is not yet settled. A number of cases[70] and academic writers[71] would not recognize immunity in the circumstances of Tipene v. Apperley. The leading case is Roviaro v. U.S.[72] Delivering the opinion of the United States Supreme Court, Burton J said:

"What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with the enforcement of that law...

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69. Ibid. 548.

70. Roviaro v. U.S. 353 US 53 (1956); Mitchell v. Bass 252 F.2d. 513 (1958) (CA-Arkansas); Henrik Mannerfrid v. Teegarden 23 FRD 173 (1959) (DC-N.Y.).

71. Wigmore on Evidence (McNaughton rev. 1961), vol.8, para. 2374, p.766. Also 63 Yale L.J. 206 (1959).

72. 353 US 53; 77 S.Ct. 623; 1 L.Ed.2d. 639 (1956) (SC-US).

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognises the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.
>
> The scope of the privilege is limited by its underlying purpose. Thus where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." [73]

This decision may be contrasted with a number of others, particularly from the Supreme Court of Michigan. In Worthington v. Scribner[74] the Supreme Court of Massachusetts held that it was the duty of every citizen to communicate to his Government any information of an offence. The Supreme Court would neither compel nor allow the disclosure of this information in a civil action, either by a law officer, the informer himself or indeed anyone, without the Government's permission. The rationale of this was to

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73. 353 US 53, 59-60 per Burton J; Warren CJ, Frankfurter, Douglas, Harlan and Brennan JJ concurring; Clark J dissenting.

74. 109 Mass. 487; 12 Am.Rep. 736 (1872) (SC-Mass.).

protect the confidentiality of communication, not the informer's welfare.[75]

In Wells v. Toogood[76] the Supreme Court of Michigan held that a statement made by the defendant to a police officer, in front of witnesses and accusing the plaintiff of theft, was a privileged communication and inadmissible in an action for libel. Apart from the defendant being the victim rather than the thief, the facts are indistinguishable from Tipene. In Graham v. Cass Circuit Judge[77] the Michigan Supreme Court withheld an accusation of larceny made by the defendant to a justice of the peace. In Shinglemeyer v. Wright[78] the Michigan Supreme Court held that a complaint of theft, publicly disclosed as having been made by the defendant, would be withheld if it had been made in strictest confidence to a detective.

In Vogel v. Gruaz[79] the United States Supreme Court held that a statement made to an investigating State Attorney was exempt from production for reasons of public policy. In State ex. rel. Douglas v. Tune[80] the St. Louis Court of Appeals withheld a written complaint made to the municipal Complaints Board; if informers were afraid of a possible libel action, the Complaints Board would no longer receive essential information.[81]

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75. See also Pihl v. Morris 66 NE 2d. (1946) (SC-Mass) cf. Wheeler v. Hager 200 NE 561.
76. 131 NW 124 (1911) (SC-Mich.)
77. 66 NW 348 (1896) (SC-Mich.) 78. 82 NW 887 (1900).
79. 110 US 311; 4 S.Ct. 12; 28 L.Ed.158 (1884). Approved and applied: Roviaro v. U.S. 353 US 53 (1956).
80. 199 Mo.App.404; 203 SW 465 (1918).

Certain commentators criticize those decisions which confer immunity on an informer's statement when his identity is well known as; an unjustified distortion of an evidentiary rule; an "artificial obstacle to proof"[82]; and serving solely to protect the false and malicious informant.[83] It is submitted that these views may only be supported if the "informer identity rule" is viewed as a "contents privilege" rather than a "class privilege".[84] The excerpt reproduced from Roviaro (ante) supports such a conclusion. If the identity of the informer has been disclosed, there can be no reason to protect the contents of his statement.[85] However, exemption from production may still be justifiable on a "class" basis, which appears to be the approach of the Supreme Court of Michigan.

Several American states have enacted statutes which provide that the contents of reports made to public officials in "official confidence" are exempt from production where the "public interest would suffer by disclosure."[86] The result has been

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81. See also Steen v. First National Bank of Sarcoxie 298 F. 36 (1924) (Circ.Ct.Appeals).
82. Wigmore on Evidence (McNaughton rev. 1961), vol.8, para.2374, p.765-766.
83. 63 Yale L.J. 206, 219 (1953).
84. See ante, p.1, fn.1.
85. Wigmore, op.cit. ante, fn.82, pp.765-766.
86. Cal.Civ.Proc. Code §1881(5); Colo.Rev.Stat.Ann. §153-1-7; Ga.Code Ann. §38-1102; Idaho Code Ann. §9-203; Iowa Code Ann. §622.11; Minn.Stat.Ann. §595.02; Mont.Rev. Codes Ann. §93-701-4; Neb.Rev.Stat. § 25-1208; Nev.Rev.Stat. §48.090; N.D.Rev.Code §31-0106; N.J.Stat.Ann. §2A:84A-27; Ore.Rev.Stat. §44.040 P.R. Laws Ann.tit.32, §1734; S.D.Code §36.0101;

to create a "class privilege". In People v. McShann[87] Traynor J in the California Supreme Court said:

> "At common law the privilege could not be invoked if the identity of the informer was known to those who had cause to resent the communication; ...(but under the state official communications statute)... the test is whether the public interest would suffer by disclosure. Conceivably, even when the informer may be known to persons who have cause to resent the communication, disclosure in open court might still be against the public interest."[88]

The decision of the Court of Appeal in Tipene v. Apperley may be analysed in terms of its conclusions regarding:

A. the maker of the statement.

B. The character of the statement.

C. The effect of the caution.

D. The effect of publication by the Crown.

A. The Maker of the Statement

The Court of Appeal drew a distinction between "true informers" and other sources of

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Utah Code Ann. §77-59-27 and §78-24-8; Wash.Rev.Code §5.60.060. See also Uniform Rule of Evidence 34.

87. 50 Cal.2d. 802; 330 P.2d. 33 (1958) (SC-Cal.).

88. Ibid. at 807 and 35-36 respectively.

information. It would have been amenable to a claim for exemption from the former, because:

> "...in the true informer situation the reasons why the identity of the informer is protected from disclosure apply, at least in a general way, to any disclosure of the information given by him."

By "true informer" the Court of Appeal is almost certainly alluding to "informer" in its classical sense of a paid supplier of information, as distinct from members of the public or confessing accomplices. The states of mind of these three groups will be different with regard to the disclosure of their identity or the contents of their statements. The "true (paid) informer" will predominantly fear both physical harm and the loss of his income. The confessing accomplice will fear impending criminal proceedings; and both he and the member of the public may fear physical harm. Neither will fear loss of income as a result of disclosure.

However, it is submitted that common to all three will be the fear of defamation proceedings. With respect, the Court of Appeal cannot say that this fear will necessarily be greater in the one than the others. It is submitted that more relevant than the status of the maker of the statement, is the status of the recipient, who generally will be the party claiming Crown privilege. Thus in Rogers's case and in D. v. N.S.P.C.C. the public interest in the

unabridged flow of information to the Gaming Board, welfare authority or police required that even statements made by malicious informers be withheld.[89] Indeed it is from the criminal underworld that much of the information vital to the detection of offenders comes.[90] The value of police sources of information must not be underestimated:

> "It is rather disconcerting to discover that nine times out of ten, when the police disappear into the undergrowth after some spectacular crime and re-appear, apparently miraculously, with a man who is 'helping them with their enquiries', it is because some third party has told them for whom to look."[91]

A number of informants will be self-interested, "true informers", but many will be "people who are apt to be arrested and give information to stave off the evil day, or who have been already arrested and hope to buy police forbearance."[92]

B. The Character of the Statement

The Court of Appeal drew a second distinction

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89. [1973] AC 388, 413 per Lord Salmon; [1978] AC 171, 232-233 per Lord Simon. Note also that in Alfred Crompton Ltd. v. Customs and Excise Commissioners [1974] AC 405 at 434 the House of Lords found it significant that the recipients of certain information had the power to demand it.

90. Ibid. 401 per Lord Reid.

91. Peter Laurie, Scotland Yard, London 1970, p.180.

92. Ibid. 181.

between confessional information and information obtained in other ways. In the case of confessional information, which is subject to the caution that whatever is said will be taken down and "may be used in evidence", the Court of Appeal said:

> "...it is normally not realistic to say that the maker of the statement is likely to be significantly influenced in his willingness to furnish information to the police, or in what he says, by an express or unspoken assurance that his statement will not, without his consent, be disclosed by the police in any action for defamation against him: his over-riding concern must be with the criminal implications as they affect his future."

With due respect to the Court of Appeal, such a theory must be unrealistic. Apart from malice or financial reward, the sole reason which encourages a confessing offender to inform on a fellow delinquent is the hope that his cooperation will be rewarded by the authorities in both charging and sentencing. Against informing are two factors: firstly, the renowned code of criminal ethics requiring non-cooperation with the police; and secondly, the very real fear of retribution and physical harm. It is submitted that when Richmond J referred to "police witnesses (who) may have been directly involved", in Konia v. Morley, His Honour saw Crown privilege extending to statements by accomplices in an offence.[93]

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93. [1976] 1NZLR 455, 465. Discussed ante, pp.13-14.

Although Richmond J did not consider it, the fear of a defamation suit adds a third reason for remaining silent. The possibility of such an action will, as a result of Tipene, be brought to the attention of accused persons by their solicitors. It will not comfort an informant that he has the defence of qualified privilege, rebuttable by proof of malice; nor will a successful defence allay the worry and cost of litigation.

C. The Effect of the Caution

The Court of Appeal supported its decision to order production of Apperley's statement by reference to a lack of absolute confidentiality in the communication. This resulted from the preceding caution:

> "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."[94]

There seems to be no authority that an assurance of non-disclosure in any circumstances whatever is necessary to found a claim for Crown privilege. Confidentiality ipso facto is not a ground for privilege, but only a material consideration.[95] In re D (Infants)[96] a local authority objected to the production of reports prepared by its child care

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94. Judges' Rules, Rule II. Printed: [1964] 1WLR 152.
95. Alfred Crompton Ltd. v. Customs and Excise Commissioners [1974] AC 405, 433 per Lord Cross.
96. [1970] 1WLR 599 (CA).

officers. By regulation,[97] their case records were open to inspection by persons authorised by the Secretary of State. The child care officers could not possibly know who would eventually view the reports. The English Court of Appeal upheld the claim for privilege. In A.N.A. v. Commonwealth[98] the disputed evidence was an aircraft's "Black Box" recorder tape. These devices were installed subject to an agreement between pilots and the Department of Transport that the tapes would be used on four specific occasions only, none of which applied to the collision which had resulted in the litigation. Although Mason J, exercising the original jurisdiction of the High Court of Australia, rejected the claim for Crown privilege because of an insufficient public interest in exemption; His Honour did not refer to the obvious lack of absolute confidentiality in the tapes.

In Tipene v. Apperley the statement was made in confidence, subject to the qualification that it could be used in evidence. By pleading guilty, the defendant averted the application of this qualification, because no evidence is presented on a guilty plea. As the Court of Appeal admitted, the defendant did not authorize the police to reveal the document in civil proceedings; and the police kept faith with him to the extent of refusing to release the statement without his

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97. Boarding-Out of Children Regulations 1955 (UK), reg.10.

98. (1975) 132 CLR 582 (HCA-single judge, original jurisdiction).

approval, which is surely indicative of a confidence being protected. The only tenable argument that the confidentiality of the statement was still at risk was the possibility of its being used in evidence if criminal proceedings were ever brought against the plaintiff. The Court of Appeal did not take this point, and the argument is of comparatively little weight since the statement of B, containing admissions and also implicating A, is not as such admissible against A.

It is respectfully submitted that the Court of Appeal was incorrect in holding that the statement could not have been made in absolute confidence. Even if it was correct, a lack of confidentiality would only be a "material consideration" in a "class claim", being secondary to considerations of the public interest.

D. The Effect of Publication by the Crown

The Court of Appeal held it to be a weighty consideration that:

> "...there has been a publication in the newspaper report of the Magistrate's Court proceedings of information seriously damaging to the respondent which came from the statement made to the police by the appellant. It is no answer for the appellant and the Minister to say that that was a serious error on the part of the police. The

point is that, as between the appellant and the police, the statement was made with the appellant knowing that it could be used in evidence in criminal proceedings against him."

In Christie v. Ford[99] Kriewaldt J in the Supreme Court of the Northern Territory held that Crown privilege had no application to documents previously published. His Honour said:

"Once it is appreciated that the privilege covers the information, not the document qua document, then if a copy of the document has come into the possession of the parties by means not shown to be reprehensible, the reason for the privilege vanishes. No good purpose is served by acceding to the claims for privilege."[1]

Christie v. Ford may be distinguished as a claim for Crown privilege founded on the contents of the document. The public interest in protecting the contents of a document evaporates if those contents are published.[2] In a "class claim" different considerations apply. The Crown may not waive Crown privilege and release the communication, except under conditions established at the time of its making, for it has no true privilege to waive.[3] Consequently the regrettable error of the police prosecutor in the Magistrate's Court was not a waiver

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99. (1957) 2FLR 202 (SC-N.T.).
1. Ibid. 209.
2. Cross on Evidence (4 ed.), London 1974, p.266.
3. Discussed in Part VI, post, pp.38-39.

of privilege such as to preclude the withholding of the statement in a subsequent civil action. There is also authority that, in a "class claim", Crown privilege may apply despite disclosure of the identity of the informer and the contents of his communication.[4] It is therefore submitted that the publication of the contents of the defendant's statement is not the "weighty consideration" the Court of Appeal thought it to be.

Conclusion

It is submitted, with respect, that the decision of the Court of Appeal in Tipene v. Apperley can be supported neither in law nor for reasons of public policy. In law, the decision is directly contrary to strong House of Lords authority and a number of Commonwealth and American decisions. The judgment did not disclose an independent development of New Zealand law justifying departure from the broad principles formulated by the House of Lords in Rogers v. Home Secretary. In policy, there is a very considerable public interest in the unabridged flow of information regarding the commission of crime to law enforcement agencies. It follows that 'statements obtained from interviewees, whether suspects or not, in the course of enquiry into crime' ought to be

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4. Rogers v. Home Secretary [1973] AC 388; Green v. Livermore [1939] 3DLR 788; Wells v. Toogood 131 NW 348.

withheld from production in a subsequent civil suit, in the public interest. It is desirable that the protection attaching to the defendant's statement should be absolute, rather than dependent on whether the plaintiff can prove malice in an action for defamation. The public interest in the detection and prevention of crime must outweigh that of the private litigant.

VI. WHO MAY ASSERT CROWN PRIVILEGE?

This issue was raised in Elston v. State Services Commission when Richardson J said:

> "If it appeared in any case that a witness proposed to give evidence of Cabinet discussions, it would be the right and in some circumstances the duty of the Court to forbid disclosure."

It is clear that a judge enjoys the status of a guardian of the public interest; perhaps without the expertise of a Minister, but in a position of greater independence.[5] If a judge is a guardian of the public interest, he ought to be able to assert that interest. What then is the position when the Crown elects not to make a claim of Crown privilege, and thereby permits the production of a particular document? It is submitted that it is open for the court to assert

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5. Conway v. Rimmer [1968] AC 910, 956-957 per Lord Morris. Also Neates' case, cited ante, p.3 per Beattie J

the public interest it guards, and to prevent production if it sees fit. In Rogers v. Home Secretary, Lord Simon of Glaisdale said:

> "The Crown has prerogatives, not privilege. The right to procure that admissible evidence be withheld from, or inadmissible evidence adduced to, the courts is not one of the prerogatives of the Crown."[6]

It follows that should the Crown not object to the production of a particular document, that cannot constitute a waiver of privilege.[7]

There are two persons who may formally assert the public interest to exempt evidence from production. There is overwhelming authority that the court may take the initiative and proprio motu withhold evidence in the public interest.[8] In the

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6. [1973] AC 388, 407. See also Lord Reid at 400 and Lord Pearson at 406.

7. Ibid. 406 per Lord Pearson. See also D. v. N.S.P.C.C. [1978] AC 171, 234 per Lord Simon; Marks v. Beyfus (1890) 25QBD 494, 500 per Lord Esher MR. In New Zealand, on at least two recent occasions Cabinet papers have been produced when a member of Cabinet has been the defendant in a civil action: Brooks v. Muldoon [1973] 1NZLR 1; Fitzgerald v. Muldoon [1976] 2NZLR 615.

8. Rogers v. Home Secretary [1973] AC 388, 400 per Lord Reid; 406 per Lord Pearson; 407 per Lord Simon; Conway v. Rimmer [1968]AC 910, 950 per Lord Reid; Duncan v. Cammell, Laird & Co. [1942] AC 624, 642 per Viscount Simon; Marks v. Beyfus (1890) 25QBD 494, 500 per Lord Esher MR (CA); Hennessy v. Wright (1888) 21QBD 509, 519 per Wills J (QB); Attorney-

interim it may inspect the document in order to ascertain whether to make a final order excluding production. However, one authority suggests that the function of the court is only to raise the question of the public interest so that the Crown may make a formal objection.[9]

The second person is he in whom a public interest in non-disclosure is vested; or he who is "vested with the outside interest or relationship fostered by the particular privilege."[10] He is sometimes called the "owner" of the privilege.[11] It is sometimes said that this person must have some connection with central government.[12] This is not the American rule,[13] nor any longer that of the United

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General v. Jonathan Cape Ltd. [1976] AC 752, 764 per Lord Widgery CJ (QB); Marconi's Wireless Telegraph Co. v. Commonwealth (No.2) (1913) 16CLR 178, 206 per Isaacs J (HCA); Christie v. Ford (1957) 2FLR 202, 207-208 per Kriewaldt J (SC-N.T.); In Tipene v. Apperley, the Court of Appeal recognized, per obiter, that the court may proprio motu prevent production in certain cases, and that it has a discretion to permit the production of Cabinet decisions in evidence.

9. Rogers v. Home Secretary [1973] AC 388, 406 per Lord Pearson.

10. McCormick on Evidence, St. Paul (Minn.) 1964, p.152.

11. Idem.

12. Blackpool Corpn. v. Locker [1948] 1KB 349, 379 per Scott LJ. See also Cross on Evidence (2nd.NZ ed.), Wellington 1971, p.273.

13. At least two cases allowed the informer to claim the exemption himself: Worthington v. Scribner 12 Am.Rep. 736 (1872); Wells v. Toogood 131 NW 124 (1911).

Kingdom.[14] Furthermore, persons who are parties to the proceedings,[15] witnesses,[16] or "any interested person"[17] may "raise the question" of the public interest, if they have not sufficient standing to make a formal objection. This, it is submitted, means no more than that they may urge either the court or some person with sufficient standing to make a formal objection, to intervene on behalf of the public interest.[18]

In Rogers v. Home Secretary, the House of Lords held that the Gaming Board for Great Britain, a statutory authority,[19] had a public interest in the non-disclosure of information which it could assert by way of a formal objection. In re D (Infants)[20] the public interest was formally asserted, successfully, before the English Court of Appeal by a local authority. In D. v. N.S.P.C.C.[21], the House of Lords held that a body incorporated by Royal Charter and granted certain powers by statute,[22] the National Society for the Prevention of Cruelty to Children, could successfully assert the public interest in the exemption of

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14. D. v. N.S.P.C.C. [1978] AC 171 (HL); Re D (Infants) [1970] 1WLR 599 (CA).
15. Rogers v. Home Secretary [1973] AC 388, 406 per Lord Pearson; 407 per Lord Simon.
16. Idem.
17. Ibid. 400 per Lord Reid.
18. In D. v. N.S.P.C.C. the argument that any claim or assertion of the public interest must be considered by the court was rejected: See post, p.43.
19. Established pursuant to the Gaming Act 1968 (UK), s.10.
20. [1970] 1WLR 599 (CA). See De Smith Constitutional and Administrative Law (2nd.ed.), Harmondsworth 1973, p.623, fn.63.
21. [1978] AC 171; [1977] 2WLR 201 (HL).

an informant's communication from production. The N.S.P.C.C. sought to prevent the identity of an informer being disclosed in an action for damages for personal injuries brought by a woman the informer had falsely named as maltreating her infant daughter. The N.S.P.C.C. was neither a statutory body such as the Gaming Board, nor an agency of central or local government. The Society succeeded because:

> (a) The N.S.P.C.C. exercised powers conferred by statute in respect of the gathering of the information which the respondent sought production of,[23] and
>
> (b) The public interest asserted by the Society was identical to that of the police, had they received the information.[24]

The effect of this decision is to subordinate the status of the claimant and his relationship (if any) to central government, to the public interest he asserts. It appears essential that the claimant was acting under a duty, or exercising powers, in relation to the compilation or processing of the disputed evidence. Such duty or powers will most usually arise out of statute, subordinate legislation, or an act of Crown prerogative.[25] The court will

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22. Children and Young Persons Act 1969 (UK), s.1.
23. Such powers were also conferred on the police and local authorities.
24. [1978] AC 171, 219 per Lord Diplock; 229-230 per Lord Hailsham; 240-241 per Lord Simon.
25. The Royal Charter seemed of lesser significance: Ibid. 218 and 221 per Lord Diplock; 228-229 per Lord Hailsham; 240 per Lord Simon.

consider the wider responsibilities of the claimant in order to ascertain his public interest.[26] Dicta show that local and statutory authorities, and possibly public corporations, have sufficient standing to formally claim the exemption of evidence from production in the public interest.[27]

This is not to say that the claimant need have no status before mounting a claim. The House of Lords in D. rejected the appellant's "wider" submission that the public interest in exemption may be asserted on any occasion, and that it must immediately be balanced with the corresponding public interest in the due administration of justice. The House preferred the narrower view that the N.S.P.C.C. was covered by an existing head of public policy.[28] The N.S.P.C.C. had no duty to act in response to information received, and had numerous other powers and functions.[29] The public interest successfully asserted was, "the protection of children from neglect and ill-usage."[30]

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26. Ibid. 218-219 per Lord Diplock; 228 per Lord Hailsham; 240-241 per Lord Simon.

27. Ibid. at 236, where Lord Simon appears to consider that nationalised industries should come within the rule. Cf. Cross on Evidence (2nd NZ ed.), Wellington 1971, p.273.

28. Ibid. 219-220 per Lord Diplock; 230 per Lord Hailsham; 235 per Lord Simon; 245-246 per Lord Edmund-Davies.

29. Ibid. 240-241 per Lord Simon.

30. Ibid. 240 per Lord Simon.

It is therefore submitted that provided the claimant can establish:

(a) That he exercises some power or duty in relation to the creation or management of the disputed evidence,[31] and

(b) Some existing head of public policy demanding that evidence be withheld in the public interest on the particular facts before the court;[32]

it matters not that he engages in unrelated activities, including commercial undertakings for profit. As Lord Edmund Davies said:

"The sole touchstone is the public interest...."[33]

VII. THE ONUS IN ASSERTING CROWN PRIVILEGE

Confusion has arisen within recent cases as to the onus falling upon a person asserting a public interest in the non-disclosure of particular evidence. The confusion principally arises from the failure of the courts to take account of three distinctions before laying down a general rule:

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31. However, it would always be appropriate for the Crown to intervene and assert the public interest: Rogers v. Home Secretary [1973] AC 388, 400 per Lord Reid.
32. D. v. N.S.P.C.C. [1978] AC 171, 240 per Lord Simon.
33. Ibid. 246.

(a) Between an evidentiary "burden of proof" and an argumentative burden or onus;

(b) Between an assertion that the courts should not inspect the disputed material and one that it should not subsequently release it to be used in evidence;

(c) Between the onus in a "contents claim" and that in a "class claim."

In Konia v. Morley the matter was briefly considered. Cooke J believed there to be a "heavy burden of proof" on a claimant who submitted that the court ought not inspect the disputed documents in an action based on abuse of police power.[34] In balancing the competing public interests, the concept of a heavy onus was "less helpful." Cooke J said:

> "...I would respectfully follow the view of North J (in Corbett v. Social Security Commission) at p.911 that the power to overrule a ministerial objection is not to be lightly exercised."[35]

This would suggest that in the event of the competing public interests being evenly balanced, the Minister's objection would prevail.[36] Indeed McCarthy P thought that Corbett v. Social Security Commission[37] could have ruled that the onus is upon the party seeking to

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34. [1976] 1NZLR 455, 467 (CA)

35. Idem. In Corbett, see also Cleary J at p.920.

36. See discussion of Alfred Crompton case, post, p.48.

37. [1962] NZLR 878 (CA).

upset the Minister's objection.[38]

For certain "class claims" any onus will be slight. In Conway v. Rimmer, Lord Reid said:

> "I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their contents may be."[39]

Such classes of documents apart, in Rogers v. Home Secretary, Lord Reid said:

> "Claims for 'class privilege' were fully considered in Conway v. Rimmer. It was made clear that there is a heavy burden of proof on any authority which makes such a claim. But the possibility of establishing such a claim was not ruled out."[40]

The proper test is apparently:

> "...whether the withholding of a document because it belongs to a particular class is really 'necessary for the proper functioning of the public service'."[41]

A number of Commonwealth and American decisions support the concept of an onus, although on differing parties. In M.N.R. v. Huron Steel Fabricators (London)

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38. [1976] 1NZLR 455, 462; McCarthy P preferred not to express a conclusive view on the point. It must be remembered that Corbett was the Court of Appeal's cautious first step away from the rule in Duncan v. Cammell, Laird & Co.
39. [1968] AC 910, 952.
40. [1973] AC 388, 400.
41. Ibid. 401.

Ltd.,[42] the Canadian Federal Court held that the Crown had failed to discharge its onus to demonstrate that disclosure would impair the complete and accurate formulation of income tax returns. In Re Blais and Andras,[43] the Federal Court of Appeal held that there was a heavy onus on the Crown to establish that the public interest it asserted outweighed that in the administration of justice.[44] In the United States, in U.S. v. Reynolds[45] the Government sought exemption because disclosure would reveal military secrets. The United States Supreme Court held that in such a case the onus was on the party seeking disclosure to make a "strong showing of necessity". If the necessity was equivocal, the Government's objection would be sustained.[46] On the other hand, in Re Frank W Story[47] a police chief refused to deliver up police records relating to the slaying of a citizen by his officers, in an action for wrongful death brought by the dead man's successors. The Ohio Supreme Court held, in a majority decision delivered by Taft J, that:

> "All privileges of exemption from this duty (to bear testimony) are exceptional, and are therefore

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42. Sub.nom. M.N.R. v. Fratschko [1973] 31DLR (3d) 110; Affd. Federal Court of Appeal [1973] 27DTC 5347.

43. [1973] 30DLR (3d) 287.

44. See also R. v. Snider [1954] SCR 479.

45. The leading U.S. decision: 345 US 1; 73 S.Ct. 528; 32 ALR 2d. 382; 97 L.Ed. 727. (1953).

46. 345 US 1, 11.

47. 111 NE 2d. 385; Annotated 36 ALR 2d. 1312 (1953).

to be discountenanced. There must be good reason, plainly shown, for their existence."[48]

The decision of the House of Lords in Alfred Crompton Ltd. v. Customs and Excise Commissioners[49] challenges the placing of any onus predominantly on the claimant of Crown privilege. Lord Cross of Chelsea, delivering the decision, said:

"In a case where the considerations for and against disclosure appear to be fairly evenly balanced the courts should I think uphold a claim to privilege on the ground of public interest and trust to the head of the department concerned to do whatever he can to mitigate the ill-effects of non-disclosure."[50]

Phipson concludes:

"The normal rule that a party has to establish his right to resist a claim for discovery appears not to apply in this class of case."[51]

Lord Cross's approach may be contrasted with that of Lord Edmund-Davies in the later case of D. v. N.S.P.C.C.:

"If, on balance, the matter is left in doubt, disclosure should be ordered."[52]

It is submitted that the latter approach is to be

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48. 111 NE 2d. 385, 387 (1953).

49. [1974] AC 405 (HL)

50. Ibid. 434.

51. Phipson on Evidence (12th ed.), London 1976, para. 567, pp.234-235

52. [1978] AC 171, 246. Cf. Konia v. Morley [1976] 1NZLR 455, per McCarthy P at 462; per Cooke J at 467. Discussed ante, pp.45-46.

preferred, for the arrest of the usual, due administration of justice must be first justified.

Not only is there confusion as to where the onus lies, but it is by no means clear what form the onus takes. An evidentiary or persuasive burden of proof would require the proof of extrinsic facts to an extent determined by the quality of the burden.[53] Thus establishing the impairment of candour in the completion of tax returns[54] is such a burden. On the other hand, an argumentative onus is discharged by argument in law and policy, without a requirement that extrinsic facts be proven. A "heavy argumentative onus" would simply mean that the courts would be comparatively unlikely to accept counsel's argument.

It is submitted that the onus may be both evidentiary and argumentative in a claim for Crown privilege. The following formulae are respectfully tendered:

1. Initial onus on the claimant

The onus initially rests on the claimant of Crown privilege. The adversarial process requires the full disclosure of facts to ascertain the truth:

> "Privileges do not in any wise way aid the ascertainment of the truth, but rather they shut out the light. Their sole warrant is the

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53. Phipson's Manual on the Law of Evidence (9th ed.), London 1966, p.207.

54. The facts of M.N.R. v. Huron Steel Fabricators (London) Ltd. [1973] 31 DLR (3d) 110 (Fed.Ct.); Affirmed [1973] 27DTC 5347 (Fed.CA). Cited ante, p47.

protection of interests and relationships which rightly or wrongly are regarded as of sufficient social importance to justify some incidental sacrifice of sources of fact needed in the administration of justice."[55]

2. Exemption from judicial inspection

Where the claimant seeks to exclude documents from judicial inspection, a heavy argumentative onus will rest upon him.[56] The extent of the onus will depend on the nature of the class of document; in the case of Cabinet papers and documents impinging on national security or diplomatic relations, it will be comparatively light. It will be lighter in "contents claims."

3. "Contents claims"

The onus upon the claimant in a "contents" case will generally be lighter than that in a "class claim."[57] It will be principally argumentative.

4. "Class claims"

The onus upon the claimant in a "class" case will vary according to the class itself. Certain classes, (such as those impinging on national security

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55. McCormick on Evidence, St. Paul (Minn.) 1961, p.152. See also D. v. N.S.P.C.C. [1978] AC 171, 223 per Lord Hailsham; 234 per Lord Simon.

56. Konia v. Morley [1976] 1NZLR 455, 467 per Cooke J.

57. Conway v. Rimmer [1968] AC 910, 943 per Lord Reid; 993 per Lord Upjohn.

or diplomatic relations, Cabinet papers and high level policy documents), will attract a light argumentative onus and little or no evidentiary burden of proof. The courts are comparatively unlikely to reject claims for the exemption of these documents,[58] but the reverse is the case for lower level documents. In the latter case the onus may be "heavy", but this will depend on the nature of the class, not upon the fact that a "class claim" is being made.[59]

5. Onus transferred

When the claimant establishes a prima facie case for withholding the evidence, the onus will transfer to the respondent.[60] The transferred onus will be principally argumentative, and its weight will depend on the class concerned.

J. Stephen Kós.

8583 words.

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58. Ibid 952-953 per Lord Reid; 994-995 per Lord Upjohn. There is general acceptance that production of these documents would be overwhelmingly prejudicial to the public interest.

59. Cf. Rogers v. Home Secretary [1973] AC 388, 400 per Lord Reid. Cited ante, p.46 (this article).

60. Instanced by the U.S. Supreme Court: U.S. v. Reynolds 345 US 1 (1953). Cited ante, p.47.