

### Federal Court

that for a good time in the United Kingdom—and our case law and public administration law derives in some respect from the English law—the law was settled by the case of *Duncan v. Cammell Laird Company*, found in 1942 Appeal Cases, 624. This case was interpreted by the courts to mean that the executive had virtually complete control over the production of documents in the hands of the government as against the courts or against parties before the courts who might demand that production. It allowed a minister of the Crown to protect absolutely by affidavit any document the discovery of which, in the view of the minister, would affect the public interest, including the workings or operations of the public service. Indeed, the *Cammell Laird* case was thought by many people to have deprived the courts of any role at all in an area where a document might be in the hands of a minister acting within his ministerial responsibility.

Recently the House of Lords in the *Conway v. Rimmer* case, reported in 1968 Appeal Cases, 910, dealt with the question of the production of police reports in an action for malicious prosecution. In this case before the House of Lords two years ago a review of the rather broadly stated principle in the *Cammell Laird* case was undertaken by the House of Lords, and it is now clear that the courts should have some role in determining and weighing the various public interests that may be involved, when and if a minister of the Crown seeks to prevent production of a document on a court order.

Subclause (1) of clause 41 attempts to state the general principles that are laid down in the *Cammell Laird* case as interpreted by the *Conway v. Rimmer* case; but we have specifically stated that, in attempting to weigh the public interest in deciding whether the minister should have the power to withhold the production of a document by entering his affidavit, or conversely whether the court should have power to order production and discovery, the court should place—to use the words of the subclause—“such restrictions or conditions as it deems appropriate” upon the production.

It may well be, as hon. members recognize, that production may be valid in the interests of the parties concerned but perhaps invalid so far as the interests of the world at large are concerned. There are restrictions, but the general rule is as set out in clause 41(1), that the court has power to order production. Clause 41(2) sets restrictions against that ability of the court to order production or discovery of documents, and it reads this way:

● (3:20 p.m.)

When a minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.

There are four specific areas of exclusion and I take it that the hon. member takes no objection to three of those areas of exclusion. He recognizes that the confidence of

[Mr. Turner (Ottawa-Carleton).]

the cabinet or the Privy Council ought to remain a confidence. I think he accepts the fact that if a minister is to certify that the international relations of Canada would be injuriously affected, that again would govern. I take it that in the realm of national defence or security he again agrees that if the minister certifies it would be injurious to national defence or security the affidavit would bind the court and the production of the document would be refused.

The point of his amendment is, should that exclusion include a document when a minister says its production would be injurious to federal-provincial relations. That is the purpose of the amendment. I find it difficult to see how, where, in a federal state, the relationship between federal and provincial governments and executives, is in a state of uncertainty and flux, and involves delicate matters of policy affecting the unity of the country, differ in terms of principle from the other exclusions. I think we must recognize that it may not always be in the interests of the country that correspondence, say between first ministers or between other ministers of government departments, should be produced.

**Mr. Brewin:** Could I ask the minister a question?

**Mr. Turner (Ottawa-Carleton):** I will answer the question at the end, if I may. I would, therefore, submit that the exclusion of federal-provincial relations is a proper inclusion. Putting it the other way, the exclusion of federal-provincial relations is a proper inclusion in subclause (2).

I think I should make it clear that subclause (2) operates only where a minister of the Crown certifies that in fact that particular document ought not to be produced. There is no automatic exclusion under clause 41(2). There is no automatic exclusion of any document simply because it falls within one of the listed headings set forth in the subclause. It may be that in the normal case documents involving the relationships between federal and provincial governments would be produced, as they are often produced in this House on Notices of Motions for production of papers, with the consent of the province being obtained. For these reasons I urge that the House reject the amendment.

**Mr. Brewin:** Would the minister accept a question? Does the minister not consider that in those, I would think fairly rare cases, where a document relating to federal provincial relations is of such a confidential nature the minister does not want to produce it, it would be perfectly reasonable to leave that situation under the provisions of subclause (1)? The minister could make his affidavit and the court would have the responsibility of looking at the document, rather than give this blanket power to the minister under subclause (2).

**Mr. Turner (Ottawa-Carleton):** The hon. member takes a view different from mine as to who is best able to judge whether federal-provincial relations might be affected by the production of a document. I submit that a