RECONCILING CABINET SECRECY WITH THE RULE OF LAW

By

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Faculty of Law
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ABSTRACT

This dissertation explores the tension between government openness and secrecy. It focuses on Cabinet secrecy, that is, the doctrine protecting the confidentiality of the collective decision-making process at the top of the executive branch in Westminster jurisdictions. I argue that Cabinet secrecy is crucial to the proper functioning of the system of responsible government as it fosters the candour of ministerial discussions, protects the efficiency of the decision-making process, and enables Ministers to remain united in public notwithstanding any disagreement they may have in private. Yet, excessive secrecy can hamper government accountability by depriving citizens, parliamentarians and judges of the information needed to hold public officials responsible for their decisions and actions. An important question is who should have the final authority over the disclosure of Cabinet secrets when a dispute arises, the Government or the Courts? Under the common law, Courts in the United Kingdom, Australia, New Zealand and Canada (at the provincial level) asserted the authority to review and overrule Cabinet immunity claims to prevent abuses of power. In Canada, at the federal level, by the enactment of sections 39 of the Canada Evidence Act and 69 of the Access to Information Act, Parliament deprived the Courts of the power to inspect and order the disclosure of Cabinet secrets. An examination of the relevant cases shows that the absence of meaningful judicial review has led to an overbroad application of Cabinet immunity by
public officials. Based on David Dyzenhaus’ theory of law as justification, I argue that the statutory regime offends the rule of law and the Canadian Constitution because it violates the requirements of procedural fairness (the right to an independent and impartial decision-maker and the right to reasons) and the separation of powers principle (the Courts’ authority to control the admissibility of evidence and the legality of executive action). Then, in the light of the best practices in Westminster jurisdictions, I make policy recommendations with the objective of reconciling Cabinet secrecy with the rule of law, especially by narrowing the scope of Cabinet immunity and ensuring that such claims are subject to meaningful oversight and review.
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INTRODUCTION

Political parties are often elected on the promise to foster greater openness and transparency. Yet, once in power, the veil of secrecy is rarely lifted in any significant manner. The authors of the BBC satirical sitcoms Yes Minister and Yes Prime Minister have vividly captured this dynamic in the first episode of the series entitled “Open Government.” The sitcom describes the rise of the Right Honourable James Hacker, from parliamentarian to Minister of Administrative Affairs and, ultimately, Prime Minister of the United Kingdom in the 1980s. In the first episode, after taking office as Minister, Hacker tells his Deputy Minister, Sir Humphrey Appleby, that his political party has made election pledges about open government and that he “firmly” intends to keep them:

We need a new broom. We are going to throw open the windows and let in a bit of fresh air. We are going to cut through the red tape and streamline this creaking old bureaucratic machine. We are going to have a clean sweep [...] by the clean sweep and the new broom, I mean that we must have more Open Government.¹

Accordingly, when Hacker is informed that his predecessor had agreed to buy 1,000 made-in-America computer display terminals, at 10,000 GBP each, when the same product is built in his constituency, affected by rising unemployment, he decides to publicly denounce the shameful contract rather than hiding it. However, after finalizing his speech and giving instructions that it be sent to the press, Hacker receives a memorandum from the Prime Minister informing him of the imminent signature of an important Anglo-American defence trade agreement. It becomes suddenly clear to him that his speech would injure Anglo-American relations and displease the Prime Minister. Fearing for the future of his political career, Hacker gives up the idea of criticizing the contract and nervously asks Sir Humphrey whether he could “hush up” the whole story. Luckily for him, the release of his speech had been caught up in bureaucratic red tape and had not yet been sent to the press. This marked the end of Hacker’s “firm” commitment towards open government.

Pledges in favour of open government are no more unusual in real-life Canada. In the Conservative Party’s 2006 election platform, Stephen Harper announced that the time for accountability had finally arrived. In a style similar to Hacker’s, referring to the numerous scandals plaguing the Liberal Party, especially the sponsorship scandal which was then under investigation by Justice John Gomery, he promised to “clean up government” and “replace a culture of entitlement and corruption with a culture of accountability.” After winning the 2006 general election, the Conservatives implemented some electoral promises through the Federal Accountability Act, but set aside important promises that would have bolstered the Access to Information Act. Indeed, they did not: subject Cabinet documents to the ATIA; give the Information Commissioner the power to order the release of information; enact a “public interest override” for all exemptions to the disclosure of government secrets; and ensure that all exemptions could only be justified based on the “injury” that would result from disclosure. These pledges were never fulfilled.

Following their election, the Conservatives were regularly criticized for their lack of transparency, especially during the debates surrounding the treatment of Afghan detainees in 2009-2010 and the costs of crime bills, corporate tax cuts and the purchase of F-35 fighter jets in 2011. In the latter case, the Conservatives relied on Cabinet secrecy to refuse the disclosure of information sought by the House of Commons Finance Committee. The claim was challenged by the members of opposition parties, who insisted that they needed the information to fulfil their constitutional role of assessing proposed legislation. This position, in turn, raised questions about the scope of Cabinet secrecy in our system of government and whether a decision made by the executive branch to shroud information in secrecy should be subject to meaningful oversight and review. In the absence of any other viable remedy, and considering the minority position of the Conservatives, these debates culminated in the

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4 Conservative Party’s 2006 Election Platform, supra note 2 at 3.
6 Access to Information Act, RSC 1985, c A-1 [ATIA].
7 Conservative Party’s 2006 Election Platform, supra note 2 at 12.
8 Kristen Shane, “Time to Review ‘Cabinet Confidences,’ Say MPs Critics,” The Hill Times (7 March 2011).
adoption of an unprecedented motion of contempt and a general election in 2011.\textsuperscript{9} While the Conservatives won a majority government, their reputation for secrecy endured.\textsuperscript{10}

In the course of the 2015 general election, the Liberal Party also unsurprisingly promised a more "open and transparent government."\textsuperscript{11} Among its boldest promises were the promises to: subject the Prime Minister’s and Ministers’ Offices to the federal access to information regime; and give the Information Commissioner the power to order the release of information.\textsuperscript{12} Following the victory of the Liberals, these promises found their way in the Prime Minister’s mandate letters to the President of the Treasury Board and the Minister of Justice.\textsuperscript{13} However, as of November 15, 2017, no measures have been formally adopted to strengthen the federal access to information regime,\textsuperscript{14} which ranks 49th at the international level and last at the national level.\textsuperscript{15} One can only hope that the Liberals’ promise to reform the access to information regime will not suffer the same fate as their broken promise to reform the electoral system.\textsuperscript{16} Based on past experience, there is room for doubt.\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{9} House of Commons Debates, 40th Parl, 3rd Sess, No 149 (25 March 2011) at 1420.
\item \textsuperscript{10} Canadian Press, “Conservatives Win Most Secretive Government Award,” CBC News (29 April 2012).
\item \textsuperscript{12} Ibid. Unlike the Conservatives in 2006, the Liberals did not, however, promise to reform Cabinet secrecy.
\item \textsuperscript{13} Mandate Letter from Justin Trudeau to Scott Brison (13 November 2015), online: <http://pm.gc.ca/eng/president-treasury-board-canada-mandate-letter>; Mandate Letter from Justin Trudeau to Jody Wilson-Raybould (13 November 2015), online: <http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>.
\item \textsuperscript{14} On June 19, 2017, the Treasury Board President introduced Bill C-58, An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts, 1st Sess, 42nd Parl, 2017, in the House of Commons. Following a thorough review of Bill C-58, the Information Commissioner concluded that it would not result in an improvement, but rather in a regression, of the right of access to information. See Information Commissioner of Canada, Failing to Strike the Right Balance for Transparency (September 2017), online: <http://www.oic-ci.gc.ca/eng/rapport-special-c-58_special-report-c-58.aspx>.
\item \textsuperscript{15} Centre for Law and Democracy, Global Right to Information Rating, online: <http://www.rti-rating.org/country-data/>; Centre for Law and Democracy, Canadian RTI Rating, online: <https://www.law-democracy.org/live/global-rti-rating/canadian-rti-rating/>.
\item \textsuperscript{16} Laura Stone, “Trudeau Abandons Electoral Reform, Breaking Key Campaign Promise,” Globe and Mail (1 February 2017).
\item \textsuperscript{17} As pointed out by Information Commissioner John Reid: “Governments make skeptics of Information Commissioners. Time after time, régime after régime, scandal after scandal, government leaders raise expectations by promising to be more accountable and transparent. Just as routinely, governments maintain their deep addiction to secrecy […]. When it comes to honoring the public’s ‘right to know’, governments have found it profoundly challenging to ‘walk the [t]alk.’” See Information Commissioner of Canada, Annual Report: 2003-2004 at 3, online: <http://www.oic-ci.gc.ca/eng/tp-pr-ar-ra-archive.aspx>.
\end{itemize}
Openness and transparency is rarely a priority for a ruling Government, whatever its political stripes. It is usually not in the self-interest of a Government to increase transparency as it opens its members to more scrutiny, criticism and accountability. That said, secrecy is not unique to the executive branch, it is also found in the legislative and the judicial branches. Parliamentarians receive confidential advice from committee staff and legislative assistants. Meetings of House of Commons committees are sometimes held in closed sessions. Meetings of the Board of Internal Economy, the governing body of the House of Commons, are usually held in camera;\(^\text{18}\) and the same is true for caucus meetings, except in exceptional circumstances. Judicial deliberations also take place in camera. In the United States, “[i]t is difficult to imagine more secretive deliberations than those that take place in Supreme Court conferences.”\(^\text{19}\) Confidentiality is a condition of employment for judges’ law clerks and staff. The situation is the same in Canada.\(^\text{20}\) Mark Rozell argues that secretive decision-making yields better decisions than those that would be made through an open process. What matters ultimately is that the decision-maker justifies, and is held accountable for, the “end result,” that is, the final outcome of the decision-making process.\(^\text{21}\)

It is trite to say that a Government cannot function completely in the open; that there are legitimate reasons to preserve the confidentiality of some information.\(^\text{22}\) To take a clear example, the disclosure of a battle plan to the enemy in a time of war would be injurious to the public interest. Similarly, a Government should be able to preserve the confidential nature of its internal decision-making process, especially at the highest level: “No one really supposes that a Cabinet ought to meet and hold its debate in the presence of reporters, TV

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\(^\text{18}\) To the question "Why does the Board meet in camera," the answer provided reads as follows: “In the partisan environment of the House of Commons, the Board (with equal representation from the governing party and the officially recognized parties) operates on consensus. It holds its meetings in camera to allow for full and frank exchanges.” See House of Commons, Board of Internal Economy, “Frequently Asked Questions,” online: <http://www.ourcommons.ca/About/BOIE/boie-faq-e.html>.


\(^\text{21}\) Rozell, *supra* note 19 at 53.

cameras and interested outsiders.” The experiment of open Cabinet meetings was tried by Premier Gordon Campbell in British Columbia in 2001, unsuccessfully. These open meetings were not real Cabinet meetings as they did not contain any debate between Ministers. Yet, while there are legitimate reasons for government secrecy, there is also a risk that public officials may hide information for improper purposes, to avoid public embarrassment or to cover up an unlawful conduct, as did President Richard Nixon in the context of the Watergate scandal. To minimize this risk, it is necessary to set out the legitimate scope of government secrecy and ensure that claims of secrecy are subject to meaningful oversight and review.

1. **OVERVIEW**

   **Subject – Cabinet secrecy in Canada**

   This dissertation is about Cabinet secrecy, which is a subject of both political science (public administration) and law (constitutional and administrative law) in the Westminster system of responsible government. It will primarily focus on the federal jurisdiction in Canada. The term “Cabinet secrecy” refers to the political rules (constitutional conventions) and legal rules (common law and statute law) designed to protect the confidentiality of the collective decision-making process at the top of the executive branch. The term “Cabinet” refers to a body of advisers to the Sovereign composed of current Ministers.

   First, from a political perspective, in the system of responsible government, where the Government is accountable to the House of Commons, Ministers need a forum (the Cabinet room) where they can freely propose, debate and reach a consensus on government policy and action. The secrecy of Cabinet proceedings ensures, *inter alia*, that documents recording internal views and disagreements between Ministers do not fall into the hands of political opponents, who could exploit this information to weaken the Government and endanger its ability to preserve the confidence of the House of Commons. Cabinet secrecy is essential to the maintenance of Cabinet solidarity. Historically, attempts to soften Cabinet

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solidarity, by allowing Ministers to debate the pros and cons of proposed policies in public before a consensus had been reached in the Cabinet, as did Prime Minister Pierre Elliott Trudeau in 1968, have been short-lived. This initiative made the Government look weak and disorganized and, ultimately, undermined its credibility. In this sense, “Cabinet secrecy can be seen as a necessary evil in the pursuit of good decision making and good governance.”

Second, from a legal perspective, the common law doctrine of public interest immunity provides the Government with a justification to refuse the disclosure of Cabinet secrets. At the federal level in Canada, the common law has been superseded by a statutory regime contained in sections 39 of the Canada Evidence Act and 69 of the ATIA. Section 39 removes from judges the power to inspect “confidences of the Queen’s Privy Council for Canada” (Cabinet confidences) and order their production in legal proceedings. It is a strong privative clause. Section 69 excludes Cabinet confidences from the scope of the ATIA and the jurisdiction of the Information Commissioner and the Federal Court of Canada. No other Westminster jurisdiction provides such a high level of protection to Cabinet confidences.

According to the United Nations, good governance can be measured by many factors, such as: efficiency; transparency; accountability; civil participation; and respect for the rule of law. Cabinet secrecy fosters government efficiency. To be sure, failure to maintain the confidentiality of Cabinet proceedings would increase the level of public pressure put on Ministers by stakeholders and give rise to partisan criticism by their political opponents, which would frustrate the collective decision-making process. The alleged leak of Cabinet secrets relating to naval supply-ship contracts by Vice-Admiral Mark Norman illustrates how a breach of Cabinet secrecy may hamper the collective decision-making process. Following this event, Treasury Board President Scott Brison stated that “the leaks prevented cabinet

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26 WA Matheson, The Prime Minister and the Cabinet (Toronto: Methuen, 1976) at 18.
27 White, supra note 24 at 141.
28 Canada Evidence Act, RSC 1985, c C-5, s 39 [CEA], which is reproduced in the Appendix.
29 ATIA, supra note 6, s 69, which is reproduced in the Appendix.
30 In contrast, under section 38 of the CEA, supra note 28, which enables the Government to protect international relations, national defence and national security information, judges have the power to inspect the documents and order their production.
from doing its job to properly analyze the Chantier Davie project as political pressure mounted in Quebec City for Ottawa to keep the contract in place.”

However, while Cabinet secrecy fosters government efficiency, it is inconsistent with government transparency and accountability and, to some extent, civil participation and the rule of law. Indeed, citizens, parliamentarians and judges need access to government information to accomplish their civic and constitutional duties. Access to information enables citizens to participate meaningfully in the democratic process by expressing informed opinions on public affairs and exercising their right to vote in an enlightened manner during election time. The media play a crucial role in communicating information to the citizenry in that regard. Access to information enables parliamentarians to fulfil their constitutional role of authorizing proposed legislation and expenses. It enables judges to adjudicate cases against the Government fairly, in view of all the relevant evidence, and prevent denials of justice. Thus, access to information allows citizens, parliamentarians and judges to hold the Government accountable for its policies and actions. Finally, at some point in time, access to previously sensitive information will enable academics to bring our national history to life and draw important lessons for future generations.

Problems – Overbreadth and lack of meaningful review

There are two apparent problems with the statutory regime of Cabinet secrecy in Canada. The first problem is the excessively broad scope of the statutory regime. Sections 39 of the CEA and 69 of the ATIA protect Cabinet confidences as a “class of documents” without substantively defining the meaning of that term. They establish a “non-exhaustive” list of documents where such confidences can be found, including: Cabinet memoranda, discussion papers; Cabinet agenda, minutes and decisions; communications between Ministers on

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Cabinet business; briefing notes to Ministers on Cabinet business; draft legislation; and other related documents. The indeterminacy of the term “Cabinet confidence” empowers public officials to protect documents that have a weak connection to the collective decision-making process without considering the public interest. Moreover, over the years, the Government has taken administrative measures to reduce the scope of an important exception to Cabinet immunity: the “discussion paper exception.” This exception enables the public disclosure of factual and the background information once the underlying Cabinet decision has been made public. By abolishing discussion papers in 1984 and interweaving facts and the background information with ministerial views and recommendations in 2012, the Government closed an important window to Cabinet proceedings that Parliament had provided to Canadians.

The second problem is the lack of meaningful oversight and review of government decisions to withhold information based on Cabinet secrecy. In parliamentary proceedings, as shown by the 2011 incidents over the Conservatives’ refusal to disclose the costs of crime bills, corporate tax cuts and the purchase of F-35 fighter jets, the House of Commons cannot force the Government to disclose the information, although it may hold it in contempt. Apart from this extreme remedy, there is no other dispute settlement mechanism to settle this kind of disagreement between the executive and the legislative branches. In legal proceedings, the Courts do not have the power to inspect Cabinet confidences and determine whether the information sought is being withheld reasonably, for a proper purpose, in the public interest. This is inconsistent with the separation of powers that should exist between the executive and judicial branches. Likewise, under the ATIA, the Information Commissioner and the Federal Court are deprived of the power to inspect Cabinet confidences. The absence of meaningful oversight and review, along with the overbreadth of the regime, raises serious concerns of unlimited executive discretion, which could cause abuse of power.

**Objective – Demystify and rethink Cabinet secrecy**

The objective of the dissertation is to assess whether the doctrine of Cabinet secrecy remains legitimate, especially in an era where government openness is an important value. I will then examine whether the legal rules adopted to protect Cabinet secrecy at the federal level in Canada are consistent with the rule of law and the Constitution. Finally, I will make
policy recommendations to further improve the statutory regime. To achieve this, I will review the relevant political and legal rules in the United Kingdom, Australia, New Zealand and Canada. I will rely on primary (statutes and case law) and secondary sources (literature review). I will also rely on historical correspondence between Prime Ministers and Cabinet records obtained from the Privy Council Office under the ATIA to explain the rationale behind the relevant rules and their evolution over time. There is currently a dearth of literature on Cabinet secrecy: as a subject of academic study, it is under-researched and under-theorized. This dissertation is the first comprehensive study of Cabinet secrecy in the Commonwealth. It will assist public officials, lawyers and judges in the application of Cabinet immunity and open new avenues of research for the academic community. Ultimately, it should lead to a more focused protection of Cabinet secrecy and greater government openness.

2. STRUCTURE

The dissertation contains four chapters and a conclusion, which will examine Cabinet secrecy from a political, legal, theoretical and comparative perspective.

Chapter 1 – Cabinet secrecy under constitutional conventions

Chapter 1 will focus on the political protection of Cabinet secrecy. Cabinet is, first and foremost, a political institution; as such, its functioning is regulated by political rules known as "constitutional conventions." While conventions are binding upon political actors, they are not enforced by the Courts. In the system of responsible government, conventions have historically protected the privacy of Cabinet proceedings. However, in the modern era, where openness and transparency have become fundamental values, Cabinet secrecy is looked upon with suspicion. The justification and scope of Cabinet secrecy are, as we have seen, contentious. The debate about the contemporary relevancy of Cabinet secrecy raises two important questions: why is Cabinet secrecy deemed essential to the proper functioning of our system of government; and what are the limits to Cabinet secrecy?

In Section 1, I will identify the conventional justification for Cabinet secrecy. I will argue that Cabinet secrecy fosters the candour of ministerial discussions, protects the efficiency of the collective decision-making process, and enables Ministers to remain united
in public, whatever disagreements they may have in private. Cabinet secrecy also ensures that the Cabinet documents created under one political party do not fall into the hands of their opponents when there is a change in power. It would be unwise to force Ministers to settle their policy in public and prematurely publish Cabinet documents. This approach would not bolster government openness and transparency; rather, it would undermine it, as ministerial discussions would likely move to another private forum and Cabinet documents would likely cease to exist. Our national historical record would suffer as a result.

In Section 2, I will identify the conventional limits to Cabinet secrecy. I will argue that, although Cabinet secrecy is essential, it is not absolute. Political actors accept that Cabinet secrets are not all equally sensitive: information that reveals the personal views voiced by Ministers when deliberating on government policy and action (core secrets) deserves more protection than the facts and the background information (non-core secrets) underpinning Cabinet decisions. In addition, it is well-established that the sensitivity of Cabinet secrets decreases with the passage of time, until they become only of historical interest, as evidenced by the rule allowing former Ministers to reveal Cabinet secrets in their political memoirs. Finally, political actors recognize that the public interest may justify that an exception be made to Cabinet secrecy in some cases, especially when serious allegations of misconduct, mismanagement or criminal wrongdoing are made against public officials. I will submit that, properly construed and applied, Cabinet secrecy remains legitimate today.

**Chapter 2 – Cabinet secrecy under the common law**

Chapter 2 will focus on the legal protection of Cabinet secrecy under the common law in the United Kingdom, Australia, New Zealand and Canada (at the provincial level). Given their political nature, conventions cannot be relied upon to prevent the disclosure of Cabinet secrets in legal proceedings. Courts are responsible for enforcing legal, as opposed to political, rules. But nothing prevents the Courts from relying on the rationale supporting a convention to extend the scope of a legal doctrine under the common law. This is what happened when the Courts extended the scope of the public interest immunity (PII) doctrine to Cabinet secrets. Under the PII doctrine, the Government can object to the production of sensitive information in the public interest. Yet, when such information is relevant to the fair
adjudication of legal rights, a tension arises between two competing aspects of the public interest: the interest of justice; and the interest of good government. This tension raises two questions of high constitutional importance: who should decide which aspect of the public interest should win, the Government or the Courts; and how should that decision be made?

In Section 1, I will review the historical evolution of the PII doctrine. I will show that, for a brief period between 1942 and 1968, the English Courts treated PII as an absolute immunity, thus enabling Ministers to abuse the doctrine. In 1968, in Conway v Rimmer, the House of Lords restored the judicial power to review and overrule PII claims. I will submit, based on rule of law and separation of powers considerations, that the Law Lords reached the correct conclusion. Because of their greater independence and impartiality, judges are better placed than Ministers to fairly adjudicate PII claims, especially when the Government is a party to the litigation. The admissibility of evidence in court is a question for judges, not Ministers. No class of government secrets, not even Cabinet secrets, should be exempted from judicial review. While there is now a consensus on these principles, the level of deference afforded to Cabinet immunity claims, and the way in which these claims are assessed, is inconsistent throughout Westminster jurisdictions. I will argue that the various approaches taken by judges to assess Cabinet immunity claims are unsatisfactory.

In Section 2, I will attempt to fix this shortcoming by proposing a new “rational approach” for the assessment of Cabinet immunity claims. The proposed approach would start by narrowing the standard of discovery to prevent legal disputes about the production of documents that are not truly relevant to the fair disposition of the case. It would then impose on the Government the onus of justifying why prima facie relevant documents should be withheld in legal proceedings. The key part of the proposed approach would be a cost-benefit analysis, pursuant to which judges would be called to assess the documents’ degree of relevance and degree of injury in a more methodical manner. Its final element would be

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37 Conway v Rimmer, [1968] 1 All ER 874 (HL).
38 Sankey v Whitlam (1978), 142 CLR 1.
39 Compare: Air Canada v Secretary of State for Trade (No 2), [1983] 1 All ER 910 (HL); Commonwealth v Northern Land Council (1993), 176 CLR 604; Fletcher Timber Ltd v Attorney-General, [1984] 1 NZLR 290 (CA); Carey v Ontario, [1986] 2 SCR 637 [Carey].
the recognition of a judicial duty to minimize the degree of injury when production is ordered. I will argue that the adoption of the proposed approach would bolster predictability, certainty and transparency in the assessment of Cabinet immunity claims, and foster a proper balance between the interests of justice and of good government.

Chapter 3 – Cabinet secrecy under statute law

Chapter 3 will focus on the legal protection of Cabinet secrecy under statute law in Canada. The federal jurisdiction in Canada is the only Westminster jurisdiction which has enacted a near-absolute immunity for Cabinet confidences. In reaction to the readiness of the Courts to overrule PII claims, Parliament adopted a statutory regime to oust the common law first in 1970, and then in 1982. As we have seen, section 39 of the CEA deprives judges of the power to inspect Cabinet confidences and order their production in legal proceedings and section 69 of the ATIA excludes Cabinet confidences from the scope of the access to information regime thus putting them outside the reach of the Information Commissioner and Federal Court of Canada. These provisions shield Cabinet confidences for 20 years. Two questions will be addressed: why has Parliament adopted these draconian provisions; and how have they been interpreted and applied since they have been proclaimed into force?

In Section 1, based on an in-depth examination of historical Cabinet documents which have been communicated to me by the Privy Council Office under the ATIA, I will show that the Liberals retreated, at the eleventh hour, from a promise made in the 1980 Throne Speech to abolish the absolute immunity for Cabinet confidences. This change was made at the personal request of Prime Minister Pierre Elliott Trudeau following a string of events that led him to believe that judges could not be trusted to properly handle Cabinet immunity claims. Although this last-minute amendment to the legislation, which led to the enactment of sections 39 of the CEA and 69 of the ATIA, was forcefully denounced by the opposition parties, none of them has since then taken steps to change the legislation while in power. I

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40 Federal Court Act, RSC 1970, c 10 (2nd Supp), s 41(2), which is reproduced in the Appendix.
41 An Act to enact the Access to Information Act and the Privacy Act, to amend the Federal Court Act and the Canada Evidence Act, and to amend certain other Acts in consequence thereof, SC 1980-81-82-83, c 111, Schedule 1, s 69 and Schedule 3, s 36.3.
42 Senate, Journals of the Senate, 32nd Parl, 1st Sess, vol 126, part 1 (14 April 1980) at 16.
will submit that it is a strange turn of events that Trudeau, the Prime Minister who gave unprecedented powers to the Courts through the adoption of the *Canadian Charter of Rights and Freedoms*, and enabled them to review PII claims pertaining to international relations, national defence and national security, would not trust them with Cabinet confidences.

In Section 2, I will demonstrate that the scope of Cabinet immunity under the statutory regime is overbroad and leaves very little room for judicial review of Cabinet immunity claims. I will argue that the Government has taken advantage of the indeterminacy of the term “Cabinet confidences,” and the open-ended nature of sections 39 of the *CEA* and 69 of the *ATIA*, to extend the scope of Cabinet secrecy beyond the level of protection afforded to this kind of information under conventions and the common law. Moreover, by making administrative changes to the Cabinet Paper System, the executive has narrowed the scope of a crucial exception to Cabinet immunity, that is, the “discussion paper exception.” This exception was intended to provide some level of transparency to the public by allowing the disclosure of facts and background information when the underlying Cabinet decision had been made and announced. I will argue that these problems are made worse by the fact that only a very weak form of judicial review is available against Cabinet immunity claims which, in practice, makes it quite difficult to challenge such claims.

**Chapter 4 – Cabinet secrecy and the rule of law**

Chapter 4 will focus on the theoretical problems resulting from the adoption of a near-absolute immunity for federal Cabinet confidences in Canada. Over the years, litigants have tried, time and again, to challenge the constitutionality of section 39 of the *CEA* based on the unwritten constitutional principles, the division of powers and fundamental rights and freedoms. In 2002, in *Babcock v Canada (Attorney General)*, the Supreme Court of Canada

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44 Sections 39(4)(b) of the *CEA*, *supra* note 28 and 69(3)(b) of the *ATIA*, *supra* note 6.

45 *Singh v Canada (Attorney General)*, [2000] 3 FC 185 (CA).


(SCC) ended the debate by holding that section 39 did not offend the rule of law and the provisions of the Constitution. It concluded that section 39 did not fundamentally alter the relationship between the executive and the judicial branches of the State as judges could review Cabinet immunity claims in very limited circumstances. This conclusion is not consistent with a remark made by the SCC when dealing with Cabinet immunity under the common law in *Carey v Ontario* (1986).\(^{49}\) I will revisit the SCC’s controversial decision in *Babcock* and challenge its reasoning. Two questions will be addressed: did the SCC articulate a meaningful conception of the rule of law; and is the statutory regime truly consistent with the rule of law and the provisions of the Constitution?

In Section 1, I will show that the SCC adopted the thinnest conception of the rule of law, that is, rule by law, in its jurisprudence.\(^{50}\) According to this view, a legal rule is valid if it has been adopted by the proper authority under the proper procedure. I will argue that this conception of the rule of law is of limited use as a normative framework to assess the legality of statutory provisions such as section 39 of the *CEA* as it does not impose any meaningful constraints on legislative action. To that end, I will turn to David Dyzenhaus’ theory of law as justification which insists upon the requirements of fairness, transparency and accountability.\(^{51}\) I will contend that the theory of law as justification, which is implicit in the Canadian legal order, provides a better normative framework to assess legislation because it imposes meaningful constraints on the State which, in turn, illuminate the flaws affecting section 39. Moreover, the theory of law as justification is consistent with the rational approach set out in Chapter 2. To conform to the theory of law as justification, an executive decision to suppress relevant evidence in court should comply with two basic requirements: it must be made by an independent and impartial decision-maker as a result of a fair process; and it must be subject to meaningful judicial review.

In Section 2, I will argue that section 39 of the *CEA* violates these basic requirements. The decision-making process established by Parliament under section 39 is procedurally

\(^{49}\) *Carey*, supra note 39.

\(^{50}\) See especially *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473.

unfair because the person who has the power to suppress Cabinet confidences, namely, a Minister or the Clerk of the Privy Council, lacks the requisite level of independence and impartiality to carry out this task. The unfairness of the process is aggravated by the fact that the decision-maker is not required to justify why Cabinet confidences should be protected in the public interest in the specific circumstances of the case. This breach of the duty to act fairly is at odds with the theory of law as justification and paragraph 2(e) of the Canadian Bill of Rights. In addition, section 39 infringes the core, or inherent, jurisdiction and powers of provincial Superior Courts as it deprives them of the authority to: control the admissibility of evidence in litigation; and review the legality of executive action. This is inconsistent with the theory of law as justification and the separation of powers that should prevail pursuant to section 96 of the Constitution Act, 1867. I will ultimately submit that section 39 is an unlawful privative clause, that is, a form of legal black hole, which offends the rule of law and the provisions of the Constitution.

Conclusion – Policy recommendations

The conclusion will provide policy recommendations to improve the federal statutory regime. The aim is to design a system that can protect Cabinet secrets in accordance with the principles of democracy and the rule of law. The recommendations will address the issues identified in Chapters 3 and 4, and incorporate the best practices in the United Kingdom, Australia, New Zealand and Canada (at the provincial level). In addition, they will consider the various reports prepared by parliamentary committees, Information Commissioners and government task forces on Cabinet confidences reform. From a normative perspective, the scope of Cabinet immunity should be proportional to its objective (the proper functioning of the system of responsible government) and Cabinet immunity claims should be subject to meaningful oversight and review. The law should maximize government transparency and accountability while affording a sufficient level of protection to Cabinet proceedings. The key questions are: what measures should be taken to narrow the scope of Cabinet immunity; and which institutions should have the mandate of controlling the legality of such claims?

52 Canadian Bill of Rights, SC 1960, c 44.
I will propose four measures that would meaningfully narrow the scope of Cabinet immunity without compromising our system of government. First, sections 39 of the *CEA* and 69 of the *ATIA* should protect Cabinet confidences based on an “injury test,” rather than a “class test.” In line with conventions and the common law, Cabinet confidences should only be withheld where their disclosure would injure the convention of ministerial responsibility, the candour of Cabinet discussion, or the efficiency of the Cabinet decision-making process. Second, sections 39 and 69 should include an explicit “public interest override.” To be sure, Cabinet immunity should only be claimed when public interest in nondisclosure outweighs the public interest in disclosure. The issue is not only whether disclosing Cabinet confidences would be injurious; the issue is whether the cost of disclosure is greater than its benefit. Third, sections 39 and 69 should clearly state that the facts and the background information supporting Cabinet decisions should be made public once the decision has been made and announced. To this end, Cabinet documents should be formatted in a way that would enable public officials to sever ministerial views and recommendations from facts and background information. Fourth, the maximum period during which Cabinet immunity can be claimed should be consistent with the expected duration of a Minister’s political career.

Finally, I will propose two measures that would ensure that Cabinet immunity claims are subject to meaningful oversight and review. First, in the context of litigation, provincial Superior Courts as well as the Federal Court of Canada should have the power to inspect Cabinet confidences, assess the competing aspects of the public interest, and order their disclosure. As will be argued in Chapter 4, it would be unconstitutional to deprive provincial Superior Courts of that power. Yet, to ensure that Cabinet immunity claims are assessed in a methodical manner by judges, Parliament should consider entrenching into section 39 of the *CEA* the rational approach outlined in Chapter 2. Second, in the context of the access to information regime, the Information Commissioner and the Federal Court should have the power to inspect Cabinet confidences to ensure that the immunity is not abused by public officials. The Federal Court should also have the additional power of ordering the disclosure of Cabinet confidences where the immunity has been improperly claimed.
To remain a legitimate doctrine in our modern era, the function and the importance of Cabinet secrecy to the Westminster system of responsible government must be properly explained and understood. However, it is hardly sufficient to demystify Cabinet secrecy to maintain its legitimacy: it is also necessary to rethink the doctrine to ensure that it is applied reasonably by the Government in a manner consistent with our Constitution and the best practices in comparable jurisdictions. Cabinet secrecy must, in short, be reconciled with the rule of law. This is the essence of what I seek to accomplish in this dissertation.
CHAPTER 1

CABINET SECRECY AND CONSTITUTIONAL CONVENTIONS


INTRODUCTION

Chapter 1 sets out the justification and scope of the constitutional conventions that protect Cabinet secrecy in the Westminster system of responsible government.¹ Conventions are “rules of constitutional behaviour which are considered to be binding by and upon those who operate the Constitution, but which are not enforced by the law courts.”² The “conventions of the Constitution” are distinguished from the “law of the Constitution” on the basis that they are not judicially enforceable.³ According to Ivor Jennings, whose test was adopted by the Supreme Court of Canada, three questions must be examined to establish the existence and scope of a convention: what are the precedents; did the actors in the precedents believe they were bound by a rule; and is there a reason for the rule?⁴

In an era where openness and transparency are important values, the ongoing secrecy of Cabinet deliberations and documents is looked upon with suspicion. Why should Cabinet proceedings remain secret in our system of government? Is Cabinet secrecy merely a device enabling public officials to hide relevant information to cover lies and avoid embarrassment? In this chapter, I take the position that Cabinet secrecy is, within limits, fundamental to the proper functioning of the Westminster system of responsible government. I will show that two conventions have developed to protect the confidentiality of Cabinet proceedings: the

¹ This chapter focuses primarily on the relevant constitutional conventions in Canada, at the federal level, and the United Kingdom. In addition, where appropriate, specific examples are drawn from Canadian provincial jurisdictions, Australia and New Zealand.
secrecy and the access conventions. The first ensures that the collective decision-making process within the executive branch, in particular the personal views expressed by Ministers when deliberating on government policy and action, remain private. The second ensures that the Cabinet documents created under one political party do not fall into the hands of their opponents. Without these two conventions, our system of government would not work.

While a certain degree of Cabinet secrecy is necessary, how much secrecy is necessary is a matter of contention. What kind of information must be protected to ensure the proper functioning of the Westminster system of responsible government? When is it proper for former Ministers or the Government to reveal Cabinet secrets? I will demonstrate that while Cabinet secrecy is an important rule, it is not an absolute rule. Indeed, all Cabinet secrets are not equally sensitive: views, advice and recommendation usually require a higher degree of protection than facts, analysis and decisions. The passage of time also has the effect of transforming sensitive Cabinet secrets into harmless historical information. And there are circumstances in which the public interest requires that an exception be made to the Cabinet secrecy conventions; for example, when serious allegations of misconduct, mismanagement or criminal wrongdoing are made against public officials. The recognition that the scope of Cabinet secrecy is not unlimited bolsters, to some extent, the legitimacy of the rule.

Chapter 1 is divided into two sections. In Section 1, I will set out the conventional justification for Cabinet secrecy. I will situate the relevant conventions in the web of political rules that make the Westminster system of responsible government work. I will also identify the precedents and the reasons why political actors feel bound to uphold the secrecy of Cabinet deliberations, focusing on the candour, the efficiency and the solidarity rationales. In addition, I will examine the political rules that have developed to protect the secrecy of Cabinet documents following the creation of the Cabinet Secretariat. In Section 2, I will set out the conventional limits to Cabinet secrecy, that is, the limits which have been voluntarily accepted by the relevant political actors, rather than the limits which have been imposed by the Courts or Parliament. This chapter seeks to present a balanced perspective on Cabinet secrecy, that is, a perspective which recognizes the value of the rule in the modern era, while defining the legitimate boundaries of its application.
1. CONVENTIONAL JUSTIFICATION FOR CABINET SECRECY

What is the “reason” for Cabinet secrecy in the Westminster system of responsible government? What does it seek to protect exactly? Section 1 will address these questions. It is divided into two subsections, which will examine the justification and scope of the Cabinet secrecy conventions. In the first subsection, I will explain what Cabinet secrecy is meant to protect and why Cabinet proceedings are deemed confidential. I will set out the three rationales which justify Cabinet secrecy, namely, the candour, the efficiency and the solidarity rationales. In the second subsection, I will review the historical events that led to the establishment of Cabinet secretariats in the United Kingdom and Canada, and the rules that have developed to ensure that the Cabinet documents created under one political party do not fall into the hands of their opponents. I will show that the secrecy convention and the access convention, Canada’s two Cabinet secrecy conventions, are of fundamental importance to the system.

1.1 Secrecy Convention

To properly understand the conventions relating to Cabinet secrecy, it is necessary to first understand the principles underpinning the Westminster system of government. Within this system, one of the most important principles is the principle of responsible government, the idea that the executive branch, the Government, is accountable to the legislative branch, Parliament. This principle was imported through the Preamble to the Constitution Act, 1867, which states that Canada has a constitution “similar in principle to that of the United Kingdom.” The principle of responsible government has two aspects: individually, Ministers are responsible for their department and their personal conduct; and, collectively, Ministers are responsible for government policy and action. Collective ministerial responsibility, in turn, has three dimensions: the confidence, the solidarity and the secrecy conventions.

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5 Andrew Heard, Canadian Constitutional Conventions: The Marriage of Law and Politics, 2nd ed (Don Mills, Ont: Oxford University Press, 2014) at 90.
First, pursuant to the confidence convention, the Government is subordinated to the will of Parliament. The Prime Minister and the Ministers must collectively maintain the support of the elected House of Parliament, the House of Commons, to remain in power. Without that support, the Government would lose its democratic legitimacy. That is why the person appointed as Prime Minister is usually the leader of the party holding the most seats in the House. If confidence is lost, the Government must resign or advise the dissolution of the House to the Sovereign. In other words, Ministers stand or fall as a group. The risk of losing the confidence of the House is obviously more important in minority situations. In majority situations, as a result of party discipline, the Government tends to dominate the House and is not in any significant danger of being defeated.7

From a legal perspective, under the Constitution Act, 1867, the executive power is vested in the Sovereign, the Queen, who is represented in Canada by her Governor General.8 The Act also creates the Queen’s Privy Council for Canada to “aid and advise” the Governor General in the governance of the State.9 The Governor General must exercise the executive power on the advice of the Privy Council (together, they form the “Governor in Council”). While the Privy Council has a broad membership,10 the Governor General is bound to follow the advice of a small group of Privy Councillors made up of current Ministers. This ensures that the executive power is exercised democratically. Ministers are thus members of both the Privy Council (the legal executive) and the Cabinet (the political executive).

In this context, the Cabinet is a forum, presided over by the Prime Minister, where Ministers meet to propose, debate and decide government policy and action.11 The Cabinet

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9 Constitution Act, 1867, supra note 6, s 13.
10 Privy Council members are appointed for life and include current and former Ministers, senior judges, elder statesmen, opposition party leaders, provincial premiers and some members of the royal family. See Heard, supra note 5 at 86.
11 The Prime Minister is the master of the Cabinet: he or she determines the structure of Cabinet committees, their membership and their agenda. See Canada, Privy Council Office, Responsibility in the Constitution (Ottawa: Minister of Supply and Services Canada, 1993) at 24-27; Arnold Heeney, “Cabinet Government in Canada: Some Recent Developments in the Machinery of the Central Executive” (1946) 12:3 Canadian Journal of Economics and Political Science 282 at 282-83.
is the place where Ministers decide, as a group, how the executive power should be exercised. However, the Cabinet, unlike the Privy Council, has no legal existence or power. It is merely an informal advisory body. Jennings rightly states that “[n]either the Cabinet nor the Prime Minister, as such, claims to exercise any powers conferred by law. They take the decisions, but the acts which have legal effect are taken by others – the Queen, the Privy Council, a minister [...] and the like.”\textsuperscript{12} From a legal perspective, the executive power is exercised by the Governor in Council or individual Ministers; however, from a conventional perspective, the Governor in Council or individual Ministers act on the advice of the Cabinet.

Second, pursuant to the solidarity convention, when Ministers have made a decision in the Cabinet on a given subject, all Ministers must support that decision in public, whether or not they agreed with it in private, unless they resign. Before making a major announcement, which would engage the collective responsibility of the Government, a Minister must ensure that he or she has the support of the Cabinet. Solidarity enables the Government to maintain the support of the House of Commons. In addition, solidarity allows the opposition parties and the electorate to hold the whole Government accountable for its policies and actions in the House, the media or at the ballot box.

Third, along with the confidence and solidarity conventions, there is the secrecy convention, which has been described as “one of the cornerstones of the Westminster system of government.”\textsuperscript{13} It is widely accepted, even in Western democracies, that the “Government cannot function completely in the open”; it must be able to protect the confidential nature of its decision-making process, especially at the highest level of the State.\textsuperscript{14} In \textit{Babcock v Canada (Attorney General)} (2002), the Supreme Court of Canada also unanimously recognized that

\textsuperscript{12} Jennings, \textit{Cabinet Government}, \textit{supra} note 7 at 2. See also William R Anson & A Berriedale Keith, \textit{The Law and Custom of the Constitution}, vol 2, part 1, 4th ed (Oxford: Clarendon Press, 1935) at 156: “the Cabinet is not the executive in the sense in which the Privy Council was the executive. The Cabinet shapes policy and settles what shall be done in important matters [...] but it is not therefore the executive. [...] The Cabinet is the motive power in our executive.”

\textsuperscript{13} Nicholas d’Ombrain, “Cabinet Secrecy” (2004) 47:3 Canadian Public Administration 332 at 333.

Cabinet secrecy is essential to “good government.” I will now review the precedents and the reasons underpinning the secrecy convention.

1.1.1 Precedents and Scope

(1) Precedents

What precedents support the secrecy convention? When they are appointed to the Privy Council, Ministers take an oath pursuant to which they promise to speak their minds freely and to “keep secret all matters committed and revealed to [them] in Council.” This duty of secrecy has deep historical roots going back to the time when the Sovereign was an active decision-maker. When the Sovereign made a decision, it would have been improper for there to be any evidence of dissent opinion among his or her advisers as such evidence would have undermined his or her authority. The oath of Privy Councillor was therefore the primary source of the duty of secrecy and the Sovereign had the power to ensure that Ministers would uphold their oath. Over time, the Constitution evolved into a system of responsible government and the Sovereign stopped being the effective decision-maker. The affairs of the State were managed by a group of Ministers, who enjoyed the support of the House of Commons. While Ministers continued to be appointed to the Privy Council and swear the oath, the reasons underlying the duty of secrecy expanded. In addition to being a duty owed to the Sovereign, it became, and now is, a duty that Ministers owe to each other.

The secrecy convention can be observed in the day-to-day workings of government. Since the inception of the Cabinet, Cabinet proceedings have been considered confidential. Ministers have historically been prohibited from taking notes of what happens in the Cabinet room. The application of the secrecy convention can be seen on a daily basis: Ministers do not, in principle, disclose the substance of Cabinet deliberations, nor do they disclose when

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15 Babcock v Canada (Attorney General), 2002 SCC 57, [2002] 3 SCR 3 at para 15 [Babcock]. While I agree with the Court’s decision on this point, I will challenge its position about the constitutionality of the federal statutory regime of Cabinet secrecy in Chapter 4, infra at 193-247.
16 PC 1999-1441 (3 August 1999).
19 Jennings, Cabinet Government, supra note 7 at 269-70.
items will be discussed in the Cabinet room. The secrecy convention is applied throughout Westminster jurisdictions. Its importance was recently affirmed by Prime Minister Justin Trudeau in a document intended to provide guidance to his Ministers:

We [...] share collective responsibility for the actions of the Government. This means that Ministers must be prepared to explain and defend the government's policies and actions before Parliament at all times, and that the government must speak to Parliament and Canadians with a single voice. This in turn requires that Ministers be able to engage in full and frank discussion at Cabinet, with the assurance that what they say will be held in confidence. Ministers are bound to this confidentiality by their oaths as Privy Councillors.

Since 1867, all Ministers appointed to office have taken the oath and undertaken to uphold the secrecy convention. In addition to this compelling line of precedents, the fact that the convention is applied on a daily basis suggests that Ministers feel bound by their oath.

(2) Scope

What is the scope of the secrecy convention? What would we learn if we were allowed inside the Cabinet room? We would become privy, first and foremost, to information of a political nature, which may be conveniently divided into six categories.

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20 In Attorney General v Jonathan Cape Ltd, [1975] 3 All ER 484 (QB) at 493 [Jonathan Cape], Lord Widgery CJ noted that "[t]he general understanding of Ministers whilst in office was that information obtained from Cabinet sources was secret and not to be disclosed to outsiders." See also Stanley de Smith & Rodney Brazier, Constitutional and Administrative Law, 8th ed (London: Penguin Books, 1998) at 183.


22 Canada, Privy Council Office, Open and Accountable Government, supra note 21 at v. This document is usually updated after each general election. Former versions of the documents, signed by previous Prime Ministers, contain similar statements on the importance of preserving Cabinet secrecy.

First, we would learn which subjects were discussed and the position of each Minister on the issues debated. Therefore, we would know the agenda of Cabinet meetings and the personal views of each Minister on the items listed on the agenda.

Second, we would learn which position won the day on any given issue and for what reasons. Ministers, like any group of human beings that must come to an agreement on a controversial issue, are not always of the same mind; some may be opposed to a particular initiative, some may be in favour of it and the rest may not care one way or another. In the end, one position will prevail. As spectators to these debates, we would know who are the winners and the losers in the group.

Third, we would learn which political factors were taken into account. Ministers are, *inter alia*, politicians who hold power and seek to retain it. As such, before agreeing to pursue a specific course of action, they consider the likelihood of their decision being well received by the electorate. A key consideration is whether the proposed initiative will improve the political party’s popularity and its chances of winning the next election.

Fourth, we would learn how vigorously each Minister defended his or her personal and institutional interests. There is a healthy competition among Ministers to obtain a greater share of the limited financial resources available. Ministers seek to obtain more funds for their department, region and riding to increase their public profile.

Fifth, we would learn the strategy chosen to announce and promote the decision. A communication plan will be prepared to set out how, where and by whom the decision will be announced; it will provide key communication lines. In addition, if the decision requires the tabling of legislation, a parliamentary plan will be prepared to set out the position of the opposition parties and stakeholders, and the strategy for the adoption of the legislation.

Sixth, we would learn the nature of the compromises that were made to forge a consensus. For example, a decision to finance the building of a factory in an Eastern city may be accepted only if an equal project is developed for a Western city in need of economic development. Consensus is usually forged as a result of some give-and-take.
In this context, the fundamental purpose of the secrecy convention is to protect the collective decision-making process, in particular the personal views expressed by Ministers while deliberating on government policy or action. Nicholas d’Ombrain, an expert on the machinery of government, describes the convention as follows:

The convention was established to protect the process of decision-making, which is quintessentially political in a system of government built on the collective responsibility of ministers to the House of Commons [...]. [The convention] protects the views and opinions of ministers, not the substance of the matters deliberated or decided.24

The convention protects the decision-making process and the personal views exchanged by Ministers in the discharge of their collective responsibility, whatever the substance of the discussion may be. It is thus a non-substantive form of secrecy, as opposed to the substantive form of secrecy protecting, for example, national security information. Hence, if Ministers debate a Canadian strategy against terrorism, the information may be subject to Cabinet secrecy as well as national security. Yet, when Cabinet secrecy will lapse with the passage of time, disclosure of the information may still be refused for national security reasons.

The concept of “Cabinet secrets” can usefully be broken down into two categories, which I will refer to as: core and noncore secrets. “Core secrets” refer to information which reveals the personal views voiced by Ministers when deliberating on government policy and action. This is the heart of what the secrecy convention is intended to protect. In contrast, “noncore secrets” refer to information which relates to the collective decision-making process, but which does not reveal the personal views voiced by Ministers when deliberating on government policy and action. As a matter of convention, core secrets are considered more sensitive than noncore secrets and therefore receive a higher degree of protection. In addition, Cabinet secrets can be found either in official or unofficial Cabinet documents, depending on whether or not the document in question is part of the formal Cabinet Paper System (such as Cabinet memoranda, agenda, minutes and records of decisions).25

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24 d’Ombrain, supra note 13 at 333.
25 Documents created to be used in the course of the collective decision-making process of the Treasury Board or the Governor in Council would also be considered official Cabinet documents.
1.1.2 Public Interest Rationales

Applying Jennings’ test, it is undisputable that the secrecy convention is supported by a long line of precedents and that the relevant political actors feel bound by the rule. The only outstanding question, which I will now turn to, is whether there is a valid reason for the rule. Three public policy rationales have been advanced in support of the secrecy of Cabinet proceedings: the candour, the efficiency and the solidarity rationales.26

(1) Candour

First, it is claimed that the secrecy convention fosters the candour and completeness of ministerial discussions. Ministers must feel at ease to speak their mind freely during the collective decision-making process to identify and reconcile any disagreement they may have. In this context, failure to protect the privacy of the deliberations would have a chilling effect on their willingness to speak their mind freely on sensitive political issues. Ministers would refrain from voicing opinions that could be perceived as unpopular or politically incorrect.27 A former British Prime Minister, Lord Salisbury, as recorded by his biographer, explained as follows the importance of the tradition of candour in the Cabinet room:

Originating in a spontaneous gathering of friends, legally unrecognised, [the Cabinet system] had inherited a tradition of freedom and informality which was in his eyes indispensable to its efficiency. A Cabinet discussion was not the occasion for the deliverance of considered judgments but an opportunity for the pursuit of practical conclusions. It could only be made completely effective for this purpose if the flow of suggestions which accompanied it attained the freedom and fullness which belongs to private conversations – members must feel themselves untrammelled by any consideration of consistency with the past or self-justification in the future.28

The link between secrecy and candour is a simple fact of human life. We all have views that we would share in the privacy of our homes, with family and friends, which we would not necessarily repeat in public. Similarly, Ministers have views that they would share in the

26 See generally d’Ombra, supra note 13.
privacy of the Cabinet room, with political allies, which they would not necessarily repeat in public, in particular given the level of public scrutiny they face on a daily basis.

The legal system also recognizes the link between secrecy and candour. Would an accused person speak freely to his or her lawyer, if his or her words could subsequently be used against him or her? Would jury members voice their true opinion, if their deliberations were televised? Even Supreme Court judges consider that they need some degree of secrecy to protect the candour of their deliberations.\(^2^9\) So do the members of the House of Commons’ governing body.\(^3^0\) All branches of the State rely on this rationale to justify the secrecy of their deliberations. The candour rationale provides a solid foundation for the secrecy convention.

**(2) Efficiency**

Second, it is contended that the secrecy convention safeguards the efficiency of the collective decision-making process. In *Conway v Rimmer* (1968), Lord Reid of the Appellate Committee of the House of Lords stressed the importance of preserving Cabinet secrecy for the following reason:

[The premature disclosure of Cabinet secrets] would create or fan ill-formed or captious public or political criticism. The business of government is difficult enough as it is and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. \(^3^1\)

The efficiency rationale seeks to prevent the premature disclosure of Cabinet secrets. Hence, it justifies the confidentiality of Cabinet proceedings before a final decision is made and announced by Ministers. The concern is that failure to maintain the confidentiality of Cabinet proceedings would increase the level of public pressure put on Ministers by stakeholders

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\(^{30}\) Canada, House of Commons, Board of Internal Economy, online: <http://www.ourcommons.ca/About/BOIE/Index-e.html>.

and give rise to partisan criticism by their political opponents. This would ultimately paralyze the collective decision-making process.

The efficiency rationale can justify the protection of information intimately connected to the decision-making process in the deliberative stage, even though it does not reveal the personal views of Ministers as such (for example, Cabinet agenda and records of decisions as well as factual and background information). However, while the efficiency rationale does provide a valid justification for the secrecy convention, it must be recognized that, after a final decision has been made and announced, this rationale loses much of its significance.

(3) Solidarity

Third, it is argued that the secrecy convention enables Ministers to remain united in public and speak with one voice. Solidarity and secrecy are flip sides of the same coin. Without secrecy, solidarity could not be achieved. Without solidarity, the Government could not maintain the confidence of the House of Commons. Without the confidence of the House, the Government would fall. Secrecy is thus, from a political perspective, a matter of survival.

This explains why Ministers cannot distance themselves from unpopular decisions by saying to their constituents: “Well, don’t condemn me along with the rest of the cabinet, because I disagree with that decision and argued all along that another course of action should be followed.” Ministers must remain united with their Cabinet colleagues regardless of their personal preferences; if they cannot support a collective decision, they should resign, as did Lucien Bouchard following the failure of the Meech Lake Accord and Michael Chong to oppose a motion which recognized “Québécois as a nation within a united Canada.” But, until then, a screen of silence conceals the divisions between them and their colleagues.

Solidarity and secrecy protect Ministers from the attacks of political opponents that would erupt if divisions were perceived in the collective mind. If disagreements between Ministers were made public, their political opponents would exploit these disagreements to weaken the unity of the Ministry and its ability to maintain the support of the House of

32 Heard, supra note 5 at 106-07.
33 Ibid at 108.
Commons. Secrecy ensures that Ministers can change their minds during the decision-making process, perhaps even accept the defeat of a proposal, with the knowledge that it will not be used against them. Laurence Lowell observed that “[m]en engaged in a common cause who come together for the purpose of reaching an agreement usually succeed, provided their differences of opinion are not made public.”34 Robert MacGregor Dawson made the same point:

The miracle of cabinet solidarity [...] is frequently no miracle at all, for the simple reason that it may have no existence save as a common bulwark against an aggressive enemy [...]. The deliberations of the Cabinet, in short, are held in the strictest secrecy [...]. Relying on this protection, Cabinet members are free to voice their opinions without reserve on all subjects which come up for discussion; the motives which have influenced the Cabinet in coming to its decision will not be disclosed; the dissentients can support the corporate policy without being themselves singled out for special attack or having their motives impugned.35

Breaches of solidarity have been rare in Canada. Two examples have been reported. First, in 1902, Prime Minister Wilfrid Laurier fired his Public Works Minister, Israel Tarte, for publicly disagreeing with the government’s tariffs policy. Second, in 1916, Prime Minister Robert Borden fired his Defence Minister, Sam Hughes, for insubordination.36 Suspension of solidarity is also rare. Examples would include the free votes on the death penalty in 1967, 1976 and 1987, and on abortion in 1988.37

Experience has shown that it is unwise to undermine solidarity. When Pierre Elliott Trudeau first took office as Prime Minister in 1968, he encouraged his Ministers to debate the pros and cons of proposed policies in public before a consensus had been forged in the Cabinet. On February 4, 1969, he made this statement in the House of Commons:

A decision which has become government policy is not debatable by ministers. All of them are responsible for the decision and all of them must abide by it or else withdraw from the Cabinet. However, regarding policies that are in the formulative stage, regarding the priorities that the government will have to

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34 Lowell, supra note 17 at 65.
36 Heard, supra note 5 at 107.
37 Ibid at 108.
decide upon in the future [...] ministers and all members of the government party are encouraged to discuss, not only in the House but in the country.\textsuperscript{38}

This initiative did not last long given the damage caused to the Government’s credibility as Trudeau’s Ministers were fighting each other in public. The point is that a lack of solidarity makes the Government look weak and disorganized. This is not the kind of Government that can maintain the support of the House of Commons and the electorate for a long time. The solidarity rationale is the strongest rationale in support of Cabinet secrecy.

The candour, the efficiency and the solidarity rationales explain why Cabinet secrecy is an essential characteristic of the Westminster system of responsible government and why it is not realistic to expect that Cabinet deliberations take place in public. The idea of “open” Cabinet meetings is as strange as the idea of “open” caucus meetings: the political party in power, just like the political parties in opposition, should not be expected to settle its political strategy in public.

When he was Premier of British Columbia, Gordon Campbell experimented with open Cabinet. While in the opposition, he had promised various measures to foster openness and transparency in government. After winning the 2001 election, he opened one Cabinet meeting per month to the public with a live broadcast and online posting of Cabinet agenda, submissions, slides and transcripts. The initiative resulted in 29 open meetings over the first 34 months of his administration. Yet, the open meetings contained “zero debate and not much discussion.”\textsuperscript{39} Graham White provides the following description:

Typically, selected ministers make long, carefully scripted announcements and receive congratulatory comments and supportive questions from their colleagues; when it comes time for a “decision,” the result is a foregone conclusion. Conflict, discord, and competition for resources or priority are notably absent (as are overt references to the political consequences of proposed policies). On occasion a ministerial presentation may generate a modicum of give and take between ministers. But while questions can be substantive and genuine, they uniformly seek clarification or explanation; they do not challenge ministers and their policies.\textsuperscript{40}

\textsuperscript{38} Reproduced in WA Matheson, \textit{The Prime Minister and the Cabinet} (Toronto: Methuen, 1976) at 18.


\textsuperscript{40} Graham White, \textit{Cabinets and First Ministers} (Vancouver: UBC Press, 2005) at 116.
Open Cabinet meetings are staged events and, as such, cannot be compared to closed Cabinet meetings. The real discussions and decisions are still made behind closed doors. Indeed, as noted by the Raddcliffe committee on ministerial memoirs, “[n]o one really supposes that a Cabinet ought to meet and hold its debate in the presence of reporters, TV cameras and interested outsiders.” Ministers cannot afford to fight each other in public. Hence, if Cabinet meetings were required to be open, the real discussion and decisions would likely move to another private forum.

To sum up, in this subsection, I have explained why the secrecy convention is deemed essential to the proper functioning of the Westminster system of responsible government. The convention is supported by a long line of precedents going back to 1867 and consistently applied since then. Indeed, the fact that each Minister who has been appointed to the Privy Council has sworn an oath of secrecy and that this oath is respected on a daily basis, suggest that Ministers feel duty-bound to maintain the secrecy of Cabinet proceedings while in office. I have argued that the rationales underpinning the secrecy convention, namely, the candour, the efficiency and the solidarity rationales, provide a compelling reason for the secrecy convention. The Trudeau and Campbell experiments suggest that our system of government cannot function properly without this rule. In this sense, it could thus be said that Cabinet secrecy is a “necessary evil in the pursuit of good decision making and good governance.”

1.2 Access Convention

A second convention, the access convention, stems from the secrecy convention. The access convention developed as a result of the establishment of the Cabinet Secretariat and the implementation of an organized system of Cabinet records. It regulates the way in which the Cabinet documents created under the governing political party should be handled when there is a change in power. I will review the historical events that led to the establishment of the Cabinet Secretariat and the development of the access convention.

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42 White, supra note 40 at 141.
1.2.1 Establishment of the Cabinet Secretariat

Before the 20th century, Cabinet meetings were informal in the sense that they had no structure or organized system of records. At the end of a meeting, no formal decision was recorded. At the time, the only official document recording Cabinet discussions was the letter from the Prime Minister to the Sovereign, informing him or her of what had taken place.43 This modus operandi raised numerous questions: were Ministers adequately prepared for Cabinet meetings; did they have the information needed to properly assess the proposed initiatives; how could they know with certainty what decisions had been made at the end of the meeting; and how could public officials implement these decisions? In the 20th century, because of the World Wars and the increase in the volume and complexity of State activities, measures were taken to improve the efficiency of the decision-making process, which led to the creation of Cabinet secretariats in the United Kingdom in 1916 and in Canada in 1940.

(1) United Kingdom

At the outset of the First World War, Prime Minister Herbert Asquith refused to create a secretariat because he was concerned that it could weaken Cabinet solidarity and secrecy.44 However, the informal character of Cabinet meetings, and the lack of proper recordkeeping, compromised the British war effort. In 1916, the new Prime Minister, David Lloyd George, established the War Cabinet to replace the full Cabinet in the handling of the War. Maurice Hankey, a shrewd administrator, was appointed as the first Secretary to the War Cabinet. His mandate was to prepare the agenda, circulate the relevant documents to Ministers, record the minutes of proceedings and communicate the decisions to responsible departments for implementation. Hankey successfully developed a system that provided Ministers with the information needed to make decisions and communicate these decisions to the responsible departments, while preserving Cabinet solidarity and secrecy. All in all, the establishment of

the (nonpartisan) secretariat improved the administration of the war effort. In 1919, when the full Cabinet was restored, the secretariat was retained on a permanent basis.

(2) Canada

The success of the British experiment led to a recommendation for the establishment of a similar office in Canada as early as 1919. But the recommendation was not immediately implemented. In 1927, Prime Minister MacKenzie King considered the idea of establishing a Cabinet Secretariat, but the candidate he had in mind for the position of secretary declined the offer. The project remained inactive for several years as King was “not a man to reach a decision in a hurry” and the “machinery of government did not interest him” very much.

In 1936, King was introduced to Arnold Heeney, the son of a close friend and a Montreal lawyer. King was so impressed by Heeney that he invited him to work for him. Heeney first joined King’s team as Principal Secretary, with the perspective of later being appointed Secretary to the Cabinet. In 1938, the Cabinet still had no secretariat nor any organized system of records. When he first arrived in Ottawa, Heeney was shocked by the “incredibly haphazard" manner in which Cabinet business was conducted:

I found it shattering to discover that the highest committee in the land conducted its business in such a disorderly fashion that it employed no agenda and no minutes were taken. The more I learned about cabinet practice, the more difficult it was for me to understand how such a regime could function at all. In fact the Canadian situation before 1940 was the same as that which existed in Britain before 1916.

Despite these challenges, King “recoiled from efforts to formalize the business of the cabinet, an institution whose genius, historically and in his own experience, had been its

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45 JF Naylor, A Man and an Institution: Sir Maurice Hankey, the Cabinet Secretariat and the Custody of Cabinet Secrecy (Cambridge: Cambridge University Press, 1984) at 52.
48 Arnold Heeney, The Things that Are Caesar’s: Memoirs of a Canadian Public Servant (Toronto: University of Toronto Press, 1972) at 74-75 [Heeney, The Things that Are Caesar’s]. See also Arnold Heeney, “Mackenzie King and the Cabinet Secretariat” (1967) 10:3 Canadian Public Administration 366 at 367 [Heeney, “Mackenzie King”].
flexibility and informality." It was only in 1940 that King reluctantly established the Cabinet Secretariat, as a consequence of the information outburst that occurred during the Second World War. The increase in volume and complexity of government business created needs for coordination and for the provision of a definitive record of past decisions and rationales. The Cabinet War Committee, which superseded the full Cabinet from 1939 to 1944, required a more efficient system for making, communicating and implementing decisions. The Cabinet Secretariat was incorporated into the Privy Council Office, which had been the secretariat for the Privy Council since 1867, but until then had not been involved in Cabinet business:

Since Confederation, there has always been a secretariat for Council in the person of the Clerk of the Privy Council. [...] The clerk, however, served no function for Cabinet. Before ministers assembled for a meeting, which took place in the Privy Council chambers in the East Block of the Parliament Buildings, the clerk placed at the Prime Minister’s chair a set of draft orders which had been prepared for consideration. The clerk withdrew once deliberations began. After the meeting, he returned to find the orders divided between two compartments of a large wooden box at the Prime Minister’s place. Those in the right hand side had been approved and were formally drafted and transmitted to Rideau Hall for the Governor General’s signature; those in the left-hand side had been deferred or rejected. The clerk thus had nothing more than remote contact with the Cabinet.

Given that the Clerk of the Privy Council was already performing secretarial duties for the Privy Council, it seemed natural that he or she should perform the same kind of duties for the Cabinet. As a result, the old position of Clerk of the Privy Council and the new position of Secretary to the Cabinet were combined. In March 1940, a Minute of Council was adopted to implement the new structure and appoint Heeney to the positions of Clerk and Secretary.

[T]he great increase in the work of the Cabinet, of recent years, and particularly since the outbreak of war, has rendered it necessary to make provision for the performance of additional duties of a secretarial nature relating principally to the collecting and putting in shape of agenda of Cabinet meetings, the providing of information and material necessary for the

49 Heeney, The Things that Are Caesar’s, supra note 48 at 79. See also Heeney, “Mackenzie King” supra note 48 at 371.
50 Masschaele, supra note 44 at 153. See also Heeney, The Things that Are Caesar’s, supra note 48 at 75; Heeney, “Mackenzie King,” supra note 48 at 368.
deliberations of the Cabinet and the drawing up of records of the results, for communication to the department concerned [...].

 Provision for the performance of the said additional duties [...] can most conveniently be made by providing that they be undertaken by the Clerk of the Privy Council, and that for such purposes it is desirable that he be appointed Secretary to the Cabinet.51

Within a few years, the Cabinet Secretariat became accepted as a necessary part of the machinery of government. In 1945, the system that had been developed to support the Cabinet War Committee was extended to the full Cabinet.52 Heeney credited King for this accomplishment: “while he may have had little interest in the administrative process, [he] had a sure and subtle instinct for the business of government.”53

1.2.2 Development of the Access Convention

While the establishment of Cabinet secretariats greatly increased the effectiveness of the decision-making process at the top of the executive branch, it created a new risk, that is, the risk that the confidential deliberations of the outgoing Ministry could be accessed by the incoming Ministry following a change in power. This situation was not unprecedented, even before the creation of the first secretariat, as reported by William R. Anson:

When Lord Grey’s Government resigned in 1832 on a difference with the King as to the creation of peers, a Cabinet minute which recorded the dissent of the Duke of Richmond from the opinion of his colleagues was shown to the Duke of Wellington, who was invited to form a Ministry. After the failure of the Duke and the return of Lord Grey to office, this difference of opinion among Lord Grey’s colleagues was turned to their disadvantage in debate. But the trouble was occasioned, not so much by the disclosure of the differences in the minute, as by the communication of a Cabinet minute to the opponents of the Minister who framed it. This is unquestionably contrary to custom.54

51 PC 1940-1121 (25 March 1940).
52 Heeney, The Things that Are Caesar’s, supra note 48 at 79. See also Heeney, “Mackenzie King” supra note 48 at 372.
53 Heeney, The Things that Are Caesar’s, supra note 48 at 81. See also Heeney, “Mackenzie King” supra note 48 at 374. In fact, Heeney championed the creation of the Secretariat “in spite of King’s obtuseness” and "succeeded where a lesser man might have failed.” See JR Mallory, The Structure of Canadian Government, revised ed (Toronto: Gage Publishing Limited, 1984) at 119 [Mallory, Canadian Government].
54 Anson & Keith, supra note 12 at 120.
This risk focused attention on the necessity for an understanding between incoming and outgoing Ministries. Two considerations had to be reconciled. On the one hand, the documents recording the Cabinet proceedings of former Ministries should be preserved to allow continuity in the administration of public affairs and for historical reasons. Ministers should not be entitled to leave office with documents that might embarrass them. On the other hand, documents recording the Cabinet proceedings of one political party should not be allowed to fall into the hands of another political party.\(^{55}\) Indeed, as illustrated by Anson, the temptation to use such information for partisan purposes is difficult to resist. The aim is to maintain a balance between providing incoming Ministers with the information they need to perform their duty without placing outgoing Ministers in a vulnerable position. A new rule, the access convention, was developed for that purpose. The access convention provides that, in principle, Cabinet documents can only be examined by the Ministers who were members of the Cabinet when they were created. Thus, when there is a change in power, the incoming Ministry cannot access the Cabinet documents of the outgoing Ministry.

\textbf{(1) United Kingdom}

The access convention was applied for the first time in the United Kingdom in 1951, following Prime Minister Clement Attlee’s defeat.\(^{56}\) In the words of former British Secretary to the Cabinet, John Hunt, “the conventions arose from the need to preserve ministerial papers and to protect them from exploitation by a subsequent Government from a different political complexion”.\(^{57}\) Addressing the House of Commons in January 1983, Prime Minister Margaret Thatcher summarized as follows the scope of the access convention:

Ministers of a former Administration, whether currently in office or not, may see but may not retain official documents which they saw as members of that Administration. Ministers of a current Administration may not see documents of a former Administration of a different political party, other than documents which can be regarded as being in the public domain, official communications

\(^{55}\) John Hunt, “Access to a Previous Government’s Papers” [1982] PL 514 at 515: “The [convention seeks to] reconcile two […] requirements. The first is that papers of a previous Government should be preserved to allow continuity of administration [and] research into the past […]. The second […] is the need to avoid new Ministers using such papers to make unfair political capital at the expense of their predecessors.”


\(^{57}\) Hunt, \emph{supra} note 55 at 517.
to overseas Governments, and written opinions of the Law Officers. Ministers of a current Administration may normally see documents of a former Administration of the same political party, whether or not they saw those documents as members of that Administration, provided that the requirement to see them arises in the course of their Ministerial duties.\footnote{United Kingdom, House of Commons, \textit{Parliamentary Debates}, vol 35, col 29-30W (17 January 1983).}

This approach strikes an appropriate balance between ensuring the continuity in the administration of public affairs and protecting the Cabinet secrets of former Ministries from partisan exploitation by the current Ministry. While the current Ministry cannot examine the Cabinet documents of former Ministries, it can be made aware by the Civil Service of the decisions made by its predecessors, as well as the noncore secrets which underpinned these decisions. In principle, only the substance of the former Ministers' private deliberations, that is, core secrets, which the current Ministry does not need to know to ensure the continuity in the administration of public affairs, is off-limits.

\textbf{(2) Canada}

The access convention was first applied in Canada when John Diefenbaker succeeded Louis St. Laurent as Prime Minister in 1957. It was the first change of Ministry between political parties since the creation of the Cabinet Secretariat in 1940. Before then, there was no reason to apply the convention, as no organized system of Cabinet records existed. In addition, between 1935 and 1957, Canada was governed by the Liberal Party, first under the leadership of Prime Minister King and then under the leadership of Prime Minister St. Laurent. As King and St. Laurent were members of the same political party, there was no reason to apply the convention between them.

Following his defeat by Diefenbaker, St. Laurent received a memorandum from Robert Bryce, the Secretary to the Cabinet, the purpose of which was to determine how St. Laurent’s Cabinet documents should be handled. Bryce described the nature of the problem as follows:

In order that these papers may be useful, they have to be written frankly and confidentially, frequently revealing differences of view between Ministers or opinions of Ministers which would not be put on paper if it were felt they
would ultimately fall into the hands of members of another political party. It seems to be in the long term interest of all parties and of effective government that Cabinet papers can continue to be prepared on this basis.59

Bryce captured the core elements of the access convention: what the rule is meant to protect ("differences of view between Ministers or opinions of Ministers"); against what evil is the protection required (the misuse of the information by “members of another political party”); and what principle is safeguarded by the rule ("effective government").

Bryce went on to offer two options to St. Laurent: the first was to remove or destroy the Cabinet documents of his Ministry to ensure that they would not fall into the hands of his political opponents; the second was to leave these documents in the custody of the Secretary to the Cabinet for posterity with the undertaking that they would not be shown to future Ministries. Bryce recommended the second option as the first one would have disrupted government effectiveness and the continuity in the administration of public affairs, creating a gaping hole in the national historical record, and endangering the existence of the Cabinet Secretariat. In comparison, the second option avoided these negative consequences while protecting Cabinet documents. It also had the advantage of being consistent with the British practice. St. Laurent endorsed Bryce’s recommendation; however, for the access convention to develop, the other relevant political actor, Diefenbaker, had to accept it as well.

Diefenbaker received the substance of Bryce’s advice from St. Laurent. Shortly after taking office, the Prime Minister travelled to London and met with Attlee, who had agreed to a similar arrangement when he left office in 1951. A memorandum, which summarized the relevant principles, was given to him by Norman Brook, the British Secretary to the Cabinet. Upon his return from London, Diefenbaker shared with his Ministers the advice he had received. On July 6, 1957, the Cabinet officially approved the access convention:

The Prime Minister said that, while he was in London, he had taken the opportunity to enquire about the procedures followed in the United Kingdom on the extent to which an incoming administration had access to the Cabinet

papers of a previous administration. He had spoken to Earl Attlee about the matter and had found that the procedures followed were in accordance with the account which had been given to him by Mr. St. Laurent before he resigned as Prime Minister. Briefly, the practice was that the Cabinet papers of an outgoing administration were left in the custody of the Secretary to the Cabinet, who furnished to the new administration the information necessary to carry on the process of government with continuity.

The Prime Minister suggested that the same procedure be followed in Canada.

The Cabinet noted with approval the proposal of the Prime Minister that the procedure in the United Kingdom on access to records of a previous administration be followed in Canada.60

Why did Diefenbaker agree to this arrangement? The reason is simple: if the current Prime Minister wants future Prime Ministers to respect the privacy of his or her Cabinet documents, the current Prime Minister must be ready to respect the privacy of the Cabinet documents created under his or her predecessors. This special agreement between St. Laurent and Diefenbaker was of great significance. Reflecting on it, Heeney commented:

We may count ourselves fortunate that these two men agreed that the British tradition should be followed and that the secretary to the cabinet should be accepted as the custodian of cabinet papers [...]. With that agreement, the cabinet secretariat became a permanent institution of Canadian government.61

The access convention has been constantly followed since 1957 and, since then, the Secretary to the Cabinet has been the custodian of Cabinet documents. In this capacity, the Secretary can inform the incoming Ministry of the decisions made by the outgoing Ministry so that official business may be carried out efficiently, but he or she cannot reveal the personal views expressed by former Ministers, or any disagreement between them. In short, the Secretary should “provide new Ministers with all the information they need without politically embarrassing former Ministers.”62 From a conventional perspective, former Prime

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60 Extract from Cabinet Conclusions entitled “United Kingdom Cabinet Office: Procedures on Access to Records of a Previous Administration” (6 July 1957), reproduced in Côté, supra note 59 at 233.
61 Heeney, The Things that Are Caesar’s, supra note 48 at 80. See also Heeney, “Mackenzie King,” supra note 48 at 373.
62 Hunt, supra note 55 at 516.
Ministers maintain control over the Cabinet documents created under their leadership and may agree to their disclosure to the current Ministry or to the public.63

The Secretary to the Cabinet ensures that the access convention is respected each time there is a change in power by asking both the incoming and outgoing Prime Ministers to ratify the convention in writing. Nine exchanges of letters have taken place since 1957: in 1963, when Lester B. Pearson defeated John Diefenbaker;64 in 1979, when Joe Clark defeated Pierre Elliott Trudeau;65 in 1980, when Pierre Elliott Trudeau defeated Joe Clark;66 in 1984, when Brian Mulroney defeated John Turner;67 in 1993, when Kim Campbell replaced Brian Mulroney;68 in 1993, when Jean Chrétien defeated Kim Campbell;69 in 2003, when Paul Martin replaced Jean Chrétien;70 in 2006, when Stephen Harper defeated Paul Martin;71 and, in 2015, when Justin Trudeau defeated Stephen Harper.72 An analysis of the letters and the information, which are currently part of the public record, shows that three major changes have taken place in the scope of the convention since 1957.

First, the types of Cabinet documents subject to the access convention has increased significantly. In 1957 and 1963, the convention was only applied to “Cabinet and Cabinet

63 Ibid at 517-518.
65 Letter from Michael Pitfield to Pierre Elliott Trudeau (1 June 1979); Letter from Pierre Elliott Trudeau to Michael Pitfield (1 June 1979); Letter from Michael Pitfield to Joe Clark (1 June 1979). These letters were released by the Privy Council Office under the ATIA, supra note 64 (A-2016-00370).
66 Letter from Marcel Massé to Joe Clark (29 February 1980); Letter from Joe Clark to Marcel Massé (29 February 1980); Letter from Marcel Massé to Pierre Elliott Trudeau (29 February 1980). These letters were released by the Privy Council Office under the ATIA, supra note 64 (A-2016-00370).
67 Letter from Gordon Osbaldeston to John Turner (12 September 1984); Letter from Gordon Osbaldeston to Brian Mulroney (14 September 1984). These letters were released by the Privy Council Office under the ATIA, supra note 64 (A-2016-00370).
68 Letter from Glen Shortliffe to Brian Mulroney (24 June 1993); Letter from Glen Shortliffe to Kim Campbell (30 June 1993). These letters were released by the Privy Council Office under the ATIA, supra note 64 (A-2016-00370).
69 Letter from Glen Shortliffe to Kim Campbell (undated); Letter from Glen Shortliffe to Jean Chrétien (3 November 1993). These letters were released by the Privy Council Office under the ATIA, supra note 64 (A-2016-00370).
70 The Privy Council Office has confirmed that the access convention was applied in 2003 when Paul Martin replaced Jean Chrétien, although the relevant letters have not yet been made public.
71 The Privy Council Office has confirmed that the access convention was applied in 2006 when Stephen Harper defeated Paul Martin, although the relevant letters have not yet been made public.
72 The Privy Council Office has confirmed that the access convention was applied in 2015 when Justin Trudeau defeated Stephen Harper, although the relevant letters have not yet been made public.
committee minutes, conclusions and documents.” The focus was primarily on official Cabinet documents, especially those which revealed the personal views expressed by Ministers while deliberating on government policy and action (core secrets), such as Cabinet minutes. But, as of 1979, the access convention has been applied to all documents which reveal Cabinet secrets, whether they are official or unofficial, and whether they reveal core or noncore secrets. In other words, the scope of the convention was broadened to replicate the scope of Cabinet immunity under statute law. This extension appears unnecessary considering that the noncore secrets of a former Ministry, especially the decisions made and the background information underpinning these decisions, can be revealed to the current Ministry without endangering the proper functioning of the Westminster system of responsible government.

Second, from 1957 to 1984, the access convention was only applied when there was a change in power between political parties. For this reason, the convention was not applied in 1968, when Trudeau replaced Pearson. Yet, it has been reported that the convention was applied when Turner replaced Trudeau as leader of the Liberal Party in 1984, although there is no official exchange of letters in the Privy Council Office’s archives supporting this report. The historical record confirms, however, that the convention was applied when Campbell replaced Mulroney as leader of the Conservative Party in 1993 and when Martin replaced Chrétien as leader of the Liberal Party in 2003. This would suggest that the convention now applies when there is a change of leadership within a political party. Such an extension of the convention appears inconsistent with its purpose, that is, to prevent that the deliberations of one political party be exploited by opposing political parties for partisan purposes. There is no clear public policy rationale for applying the rule when there is a change of leadership within the same political party. It is thus doubtful that the current administrative practice can be elevated to the rank of constitutional conventions, as it is not necessary to the proper functioning of our system of government.

73 HF Davis & A Millar, Manual of Official Procedure of the Government of Canada (Ottawa: Privy Council Office, 1968) at 97. Likewise, the access convention was not applied when St. Laurent replaced King in 1948.
74 See d’Ombrain, supra note 13 at 357, n 50: “Starting in 1984, when John Turner took over from Trudeau, the convention was extended to cover the documents of successive administrations of the same political party. This was a stretch from Bryce’s wording based on British practice concerning the protection of one party’s cabinet secrets from an opposing party.”
Third, since the adoption of provisions of the *Canada Evidence Act* and the *Access to Information Act* in 1982, the temporal scope of Cabinet immunity has been limited to a period of 20 years.\(^{75}\) This legal limit, established by Parliament, also reduces the scope of the access convention. Moreover, these provisions contain an exception for discussion papers, a special type of Cabinet documents, which are meant to provide background explanations, analyses of problems and policy options to the Cabinet for the purpose of making decisions. Discussion papers are no longer subject to Cabinet immunity when the underlying Cabinet decision has been made public.\(^{76}\) Finally, the Supreme Court of Canada has indirectly limited the scope of the convention in *Babcock* by ruling that Cabinet documents can only be protected in the context of litigation when the public interest requires it.\(^{77}\) These limited exceptions to the convention do not undermine its purpose.

To sum up, in this subsection, I have shown that the organized system of Cabinet records that is currently in place would not have been created if the confidentiality of these records could not have been preserved. The purpose of the access convention is to prevent that the personal views expressed by Ministers during the decision-making process, which may be recorded in Cabinet documents, fall into the hands of their political opponents when there is a change in power, as the information could be used for partisan purposes. In the light of the foregoing, I have argued that the scope of the convention may have been unnecessarily extended in Canada: first, by applying it to documents which do not reveal the personal views expressed by Ministers during the decision-making process; and, second, by applying it when there is a change of leadership within the same political party.

2. **CONVENTIONAL LIMITS TO CABINET SECRECY**

What are the limits to Cabinet secrecy in the Westminster system of responsible government? When can Cabinet secrets be revealed and by whom? Section 2 will address these questions. I will identify the conventional limits to Cabinet secrecy. By conventional

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\(^{75}\) See *Canada Evidence Act*, RSC 1985, c C-5, s 39(4)(a) [*CEA*]; *ATIA*, supra note 64, s 69(3)(a). These provisions are reproduced in the Appendix.

\(^{76}\) *CEA*, supra note 75, ss 39(2)(b), 39(4)(b); *ATIA*, supra note 64, ss 69(1)(b), 69(3)(b). See also *Canada (Minister of Environment) v Canada (Information Commissioner)*, 2003 FCA 68.

\(^{77}\) *Babcock*, supra note 15 at para 22.
limits, I mean the limits that have been voluntarily accepted by political actors, rather than the legal limits imposed by the Courts or Parliament. While under statute law Cabinet secrets are protected for 20 years, under convention, the duty of secrecy may lapse before then. The duty ends when the reason for it no longer exists or when a more compelling public interest overrides it. The passage of time constitutes an important limit to Cabinet secrecy: at some point, Cabinet secrets become only of historical interest and can be disclosed without any risk of injury. Yet, there is no clear rule to assess precisely when that moment comes. Similarly, there are several situations in which the conventions ensuring the secrecy of Cabinet proceedings have been breached or relaxed by the relevant political actors. I have divided them into two groups. In the first subsection, I will review the situations in which former Ministers have disclosed Cabinet secrets when resigning from office or publishing their political memoirs. In the second subsection, I will examine the situations in which the Government has made an exception to the Cabinet secrecy conventions in the public interest.

2.1 Voluntary Disclosure by Former Ministers

There are mainly two situations in which former Ministers may legitimately reveal the substance of Cabinet deliberations: first, when they resign; and, second, when they publish their political memoirs. Former Ministers are not bound by the 20-year period set out in statutes. The statutes enable the Government to refuse the disclosure of Cabinet secrets, but do not impose a legally-enforceable duty of secrecy on Ministers. While Ministers are morally bound by their oath as Privy Councillors, the oath cannot silence them until the end of time. Indeed, the oath is not justiciable and political sanctions are inefficient against an individual who is no longer in office. It must be recognized that “[a]t some point of time the secrets of one period must become the common learning of another.”

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78 CEA, supra note 75, s 39(4)(a); ATIA, supra note 64, s 69(3)(a).
79 Lowell, supra note 17 at 65-66.
2.1.1 Ministerial Resignation

When a Minister resigns because of an irreconcilable difference of opinion with the other members of the Cabinet, he or she may wish to explain the basis of the disagreement to the House of Commons and the media. As such, “[w]hen ministers resign from the cabinet over policy differences, they are permitted to make a brief statement about the matters that have led to their decision; but these disclosures seldom result in any great revelations beyond the obvious fact that there was a split in the cabinet.”81 If a resigning Minister intends to disclose documents revealing the nature of the disagreement with the Cabinet, he or she must obtain the consent of the Governor General through the Prime Minister.82 There are few precedents where this procedure was followed in Canada. The resignation of Minister of Defence James Ralston in 1944 over the conscription issue is a rare example. Ralston sought permission to table his correspondence with King on the matter in the House of Commons. On King’s advice, the Governor General granted the request even if “the correspondence in question contain[ed] references to discussions and deliberations in the Cabinet.”83

2.1.2 Ministerial Memoirs

Former Ministers may reveal the substance of Cabinet deliberations in their political memoirs or other works related to their experience in office. Indeed, those who have held public office have a rich knowledge and a unique perspective on the historical events that have shaped our nation. At one point in time, they must be able to share their experience with members of the civil society. To that end, former Ministers have access to all the Cabinet documents within the custody of the Secretary to the Cabinet issued to them when they were in office. Former Ministers cannot, however, publish Cabinet documents of less than 20 years of age without authorization. As a rule, former Ministers must seek the guidance of the Secretary to the Cabinet before publishing their memoirs.84 There does not seem to be any case where the Government tried to stop the publication of political memoirs in Canada. But

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81 Heard, supra note 5 at 110.
82 Mallory, Canadian Government, supra note 53 at 94. See also Anson & Keith, supra note 12 at 121.
83 Letter from William Lyon Mackenzie King to The Earl of Athlone (17 November 1944); Letter from The Earl of Athlone to William Lyon Mackenzie King (18 November 1944). These letters are reproduced in Elcock, “Affidavit,” Exhibits C and D, supra note 23.
84 Privy Council Office, Guidance for Ministers, supra note 18 at 42.
this course of action is not unprecedented in the United Kingdom. The drama surrounding the publication of the Crossman diaries is a powerful illustration of the tensions which come into play when a former Minister decides to publish his or her political memoirs.

(1) Crossman’s Case

Richard Crossman was a Minister in the Labour Government, under the leadership of Prime Minister Harold Wilson, from 1964 to 1970. During his time in office, Crossman had kept diaries which contained details of Cabinet proceedings and disclosed the disagreements between Ministers on current issues. Crossman had kept the diaries with the intention of publishing them at a later date, a fact known to his Cabinet colleagues. Following the fall of the Labour Party in the 1970 general election, Crossman began to organize his diaries for publication. When he died in 1974, his literary executors pursued the publication process. However, by that time, the Labour Party was back to power and many of Crossman’s former colleagues, including Prime Minister Wilson, were back in office.

Before their publication, a copy of the diaries was sent to the Secretary to the Cabinet, John Hunt, for official scrutiny. After some back and forth with the executors, Hunt objected to the publication of the diaries on the basis that they revealed a “blow by blow” account of Cabinet deliberations as well as differences of views between Ministers.85 Despite Hunt’s objection, an extract of the diaries was published in The Sunday Times in January 1975. In reaction, the British Government filed legal proceedings against the executors, the publisher and the newspaper to prevent further publication. The case was unusual for it did not involve a situation in which the Government was resisting the disclosure of Cabinet documents in court. On the contrary, the Government was proactively seeking a permanent injunction to prohibit the publication of memoirs on the basis that they revealed the substance of Cabinet deliberations. This was a draconian remedy which had not been sought before. If granted, it would have significantly limited former Ministers’ freedom of speech.

In the proceedings, the Government relied on the secrecy convention. The defendants replied that Cabinet secrecy was exclusively based on a political rule, an obligation founded

85 Jonathan Cape, supra note 20 at 489.
in conscience, and that the Courts could not prevent the publication of the diaries on that basis. For this reason, the Government had to find a legal rule to justify the injunction. It argued that the breach of confidence doctrine (pursuant to which a person should not profit from the wrongful publication of information received in confidence), which had until now only been applied to “private” secrets, should be extended to “public” secrets in the interest of good government. The High Court, per Lord Widgery CJ, agreed and laid down this test:

The [Government] must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facets of the public interest contradictory to and more compelling than that relied on.\(^{86}\)

Applying the test, Lord Widgery reached three conclusions. First, the Government had established that Cabinet deliberations were confidential. As such, their publication could be restrained in the public interest. Second, it was in the public interest to uphold the doctrine of collective ministerial responsibility, which could be damaged by the premature disclosure of Cabinet deliberations. Third, there was a limit in time after which the confidential nature of Cabinet deliberations, and the duty of the Courts to restrain their publication, came to an end. Lord Widgery’s conclusion on this point decided the case:

Since the conclusion of the hearing in this case I have had the opportunity to read the whole of volume 1 of the diaries, and my considered view is that I cannot believe that the publication at this interval of anything in volume 1 would inhibit free discussion in the cabinet of today, even though the individuals involved are the same, and the national problems have a distressing similarity with those of a decade ago.\(^{87}\)

While the decision was controversial, the Government did not appeal it. In 1976 and 1977, volumes two and three of Crossman’s diaries were published without objection from the Government.\(^{88}\) The publication of Crossman’s diaries has been described “as a defeat of the Cabinet Office’s excessive claim to defend Cabinet secrecy.”\(^{89}\) The diaries were a source of inspiration for the popular BBC satirical sitcoms *Yes Minister* and *Yes Prime Minister* aired

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\(^{86}\) *Ibid* at 495.

\(^{87}\) *Ibid* at 496.


\(^{89}\) Naylor, *supra* note 45 at 311
in the 1980s. *Crossman’s* case weakened the duty of secrecy felt by former Ministers and numerous memoirs have since been published in the United Kingdom.\textsuperscript{90} In comparison, in Canada, few Ministers have published their memoirs, much to the regret of political scientists whose insight is incomplete as a result.\textsuperscript{91}

\textbf{(2) Radcliffe Committee’s Report}

In April 1975, while *Crossman’s* case was still pending, the Government appointed a Committee of Privy Counsellors, under the leadership of Lord Radcliffe, to propose rules on the publication of memoirs, and other similar works, by former Ministers, and the means by which these rules could be implemented. In examining the matter, the Radcliffe Committee sought to maintain a balance between: the public interest in the protection of government secrets; and the public interest in the publication of political memoirs:

There is a public interest at stake in the dissemination of that kind of informed experience of the affairs of government that an ex-Minister is peculiarly equipped to supply […]. There is also another type of public interest involved in securing that a man who has held public office in the service of his country and has been exposed to controversy and criticism as to his discharge of it should be enabled to offer to the public a reasoned and documented account of his stewardship at the end of the day.\textsuperscript{92}

The Radcliffe Committee did not think that the legal framework developed by Lord Widgery was helpful for two reasons. First, it did not provide a uniform code of working rules capable of providing clear guidance to former Ministers (rather, it adopted an individualized approach ascertained through litigation). Second, litigation is not the best way to arbitrate such disputes because they require political and administrative judgment. In addition, the Radcliffe Committee did not think that legislation offered the right solution because formal

\textsuperscript{90} Heard, \textit{supra} note 5 at 111.  
\textsuperscript{92} \textit{Report on Ministerial Memoirs, supra} note 27 at 16.
sanctions would be needed to enforce it.\footnote{Ibid at 25-26: “[Ministers] should be able, surely, to conduct themselves properly and recognise their obligations without the creation of statutory offenses or statutory penalties. To be driven to suggest otherwise would be to acknowledge a sad decline in the prestige of modern government.”} On the contrary, it considered that the ministerial duty of secrecy should remain conventional. It thus proposed a set of “guidelines.”

Under these guidelines, Ministers would be allowed to publish an account of their time in office subject to two exceptions: first, they should not disclose information that could injure international relations, national defence or national security; and, second, for 15 years, they should not disclose information that could injure the confidential relationships between Ministers, such as the personal views expressed by their colleagues on government action and policy.\footnote{Ibid at 30. The Radcliffe Committee chose the period of 15 years for two reasons: first, a Minister who has something to write about should be able to do it during his or her own lifetime; and, second, the 15-year period, which corresponds to the maximum duration of three successive legislatures, is sufficiently long to protect the proper functioning of the system of responsible government.} Furthermore, Ministers should submit a draft of their memoirs to the Secretary to the Cabinet for two reasons: first, so that he or she can ensure that the memoirs do not disclose information injurious to international relations, national defence or national security; and, second, so that he or she can give advice on the treatment of the confidential relationships between Ministers. While former Ministers are expected to take the Secretary to the Cabinet’s advice into consideration, they ultimately retain control over the content of their memoirs.\footnote{Ibid at 27-29. These rules were laid down in 1946 by Lord Morrison, on behalf of Prime Minister Attlee, in a statement to the House of Commons. They were based on a memorandum drafted by the Secretary to the Cabinet, Edward Bridges, and approved by the Cabinet. The statement and memorandum are reprinted in the Report on Ministerial Memoirs, supra note 27 at 5-9. For an overview of the Radcliffe Committee’s guidelines, see Geoffrey Marshall, Ministerial Responsibility (Oxford: Oxford University Press, 1989) at 68-71.}

The Committee’s guidelines were accepted by the Government\footnote{Naylor, supra note 45 at 312.} and remain in force today.\footnote{United Kingdom, Cabinet Office, Cabinet Manual, supra note 21 at paras 11.30-11.31; United Kingdom, Cabinet Office, Ministerial Code, supra note 21 at para 8.10. While the Australian Cabinet Handbook, supra note 21, remains silent on this issue, the New Zealand Cabinet Manual, supra note 21, adopts, at paras 8.120-8.123, rules that are similar to those recommended by the Radcliffe Committee in 1976. The Canadian version, Open and Accountable Government, supra note 21, does not contain much guidance on the publication of ministerial memoirs, except for the advice to consult the Secretary to the Cabinet.} These rules provide clear guidance to former Ministers, something that was missing from the individualized approach taken by Lord Widgery. Insofar as they follow these rules, former Ministers can expect that the Government will not interfere with the publication of
their memoirs; and the Government can be confident that Cabinet proceedings will not be prematurely disclosed. The fact that the guidelines remain in force in the United Kingdom suggests that they strike an appropriate balance between the various interests involved. It is interesting to note that if the 15-year moratorium proposed by the Radcliffe Committee had been adopted by Lord Widgery, the first volume of Crossman’s diaries would not have been published before 1979 as opposed to 1975. By that time, neither Prime Minister Wilson nor the Labour Party would have been in power. The publication of the diaries in this context would have been less likely to injure Crossman’s former party and colleagues.

To sum up, in this subsection, I have shown that former Ministers can reveal Cabinet secrets when they resign from office or publish their memoirs. In these circumstances, there is little that the Government can do to silence former Ministers given that political sanctions are ineffective against them. In addition, the Courts have been reluctant to issue injunctions preventing former Ministers from revealing Cabinet secrets in their memoirs, as evidenced by Crossman’s case. Ultimately, what Ministers chose to reveal in their memoirs is a matter of judgment. There is no evidence suggesting that these exceptions to the rule have unduly undermined the proper functioning of the Westminster system of responsible government.

2.2 Voluntary Disclosure by the Government

The Government may voluntarily disclose Cabinet documents in the public interest. This type of voluntary disclosure is an exception to the Cabinet secrecy conventions. Under the current practice, the disclosure of Cabinet documents must be authorized by the Governor in Council pursuant to the recommendation of the current Prime Minister and, if the documents were created under a former Ministry, the former Prime Minister. When an exception is warranted, the Governor in Council will adopt an Order in Council listing the documents to be disclosed. The disclosure of Cabinet documents can occur in the context of investigations conducted by independent executive or legislative institutions. The first kind of investigation is usually carried out by a commission of inquiry or the Royal Canadian Mounted Police (RCMP) while the second kind is usually carried out by the Auditor General or the House of Commons.
2.2.1 Executive Institutions

(1) Commissions of Inquiry

Under the *Inquiries Act*, the Governor in Council can establish a commission of inquiry to investigate “any matter connected with the good government of Canada.”\footnote{Inquiries Act, RSC 1985, c I-11, s 2.} While they are part of the executive branch of the State, commissions of inquiry operate at arm’s length from the core executive. Commissioners have the power to summon witnesses, and compel them to give evidence under oath and produce documents.\footnote{Ibid, ss 4-5.} Three commissions of inquiry have had access to Cabinet documents to fulfil their mandates: the McDonald Commission; the Gomery Commission; and the Oliphant Commission.

The McDonald Commission was the first outside institution to have access to Cabinet documents. It was established in 1977 to investigate the actions of the RCMP Security Service following serious allegations that it had committed illegal and unauthorized acts, such as warrantless break-ins, mail opening and electronic surveillance as well as barn-burning and theft.\footnote{PC 1977-1911 (6 July 1977) established the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, and appointed Justice David McDonald as well as Messrs. Donald Rickerd and Guy Gilbert as Commissioners.} These actions could not be viewed as isolated cases of abuse of power by the RCMP. The underlining problem was the lack of legal framework for the RCMP Security Service and the lack of oversight. During the investigation, members of the RCMP attempted to implicate Ministers in unlawful activities. The Commissioners accordingly extended their investigation beyond the RCMP to the Cabinet. Prime Minister Trudeau first resisted the Commissioners' requests to access Cabinet documents, but eventually had to consent given the seriousness of the allegations and the public pressure. The Governor in Council made an exception to the secrecy and the access conventions and, as a result, the Commissioners were given access to the Cabinet documents that were relevant to their mandate.\footnote{PC 1979-887 (22 March 1979); PC 1979-1616 (2 June 1979).} In the end, the Commissioners found no evidence that Ministers had authorized unlawful activities.
The Gomery Commission was established in 2004 to investigate the sponsorship scandal. Before accepting his mandate, the Commissioner insisted on obtaining access to the relevant Cabinet documents. While Prime Minister Martin first resisted, like Trudeau, he ultimately accepted. The Governor in Council once again made an exception to the secrecy and the access conventions by giving the Commissioner access to the relevant documents of the Chrétien and Martin Ministries. In this context, when a commission is established in the interest of good government, after serious allegations of government misconduct, it is difficult for a Prime Minister to deny access to the relevant Cabinet documents. How can a commissioner carry out his or her mandate without access to all the relevant information? If the public interest requires that a commission of inquiry be created, it surely requires that its commissioner be given the tools to do its work. In the end, the Commissioner cleared Martin of blame, but was harsh on Chrétien who, in his view, had failed to take measures that could have prevented the problem. The Commissioner’s finding against Chrétien was later quashed by the Federal Court of Canada on the basis of a reasonable apprehension of bias.

The Oliphant Commission was established in 2008 to investigate three cash payments, of between 75,000 CAD and 100,000 CAD each, made by Karlheinz Schreiber to Brian Mulroney shortly after Mulroney stepped down as Prime Minister. The allegations raised questions about the integrity of the Office of the Prime Minister. The focus of the Inquiry was the Bear Head Project, a proposal by the German company to build a tank factory in Nova Scotia. As the proposal had been submitted to the Cabinet, the Commissioner needed access to Cabinet documents to fulfil his mandate. Some of the documents were available as they had been created more than 20 years earlier, but others were still considered confidential. As a result, the Commissioner had access to only half of the story. For him to have access to the full story, Mulroney’s consent, as former Prime Minister, was needed. If

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105 Chrétien v Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities), 2008 FC 802, confirmed in Canada (Attorney General) v Chrétien, 2010 FCA 283.

Mulroney had refused to authorize the disclosure of the documents, a political crisis would likely have ensued, as he was the individual under investigation. Yet, ultimately, after examining the documents through his lawyer, Mulroney gave his consent and the crisis was averted. The Governor in Council made an exception to the secrecy and the access conventions by giving the Commissioner access to 142 Cabinet documents and allowed witnesses to testify about them. An appropriate balance was reached between secrecy and transparency as a result of this limited disclosure: the Commissioner was given access to the information he required to carry out the investigation, but Cabinet secrecy, as a rule, was not unduly undermined. In the end, the Commissioner concluded that Mulroney had failed to live up to the standard of conduct that he had himself adopted as Prime Minister by accepting cash payments from Schreiber and attempting to conceal these payments.

(2) Criminal Prosecutions

In addition to commissions of inquiry, access to Cabinet documents was granted with respect to the criminal prosecutions of two Ministers: André Bissonnette and John Munro. In the exceptional cases where serious allegations of criminal wrongdoing are made against Ministers, the police and prosecution services may be given access to Cabinet documents and permission to use the evidence in court in the interest of the proper administration of justice. When Ministers are accused of criminal wrongdoing for acts or omissions done in the course of their ministerial duties, Cabinet secrecy cannot be used to hamper police investigation and Crown prosecution. In other words, Cabinet secrecy cannot, and does not, afford immunity to Ministers for criminal wrongdoing committed in the course of their official functions.

Bissonnette was Minister of State for Small Business and Minister of Transport in the Mulroney Ministry. In 1987, he was charged with fraud and breach of trust under the Criminal Code in relation to the sale of land to Swiss-based Oerlikon Aerospace. It was alleged that Bissonnette and his business associates made a number of transactions to drive up the price of land in St. Jean, Quebec, before selling it to Oerlikon for the construction of a factory. These transactions drove the price of the land from 800,000 CAD to almost 2.9

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107 PC 2009-534 (10 April 2009).
108 Criminal Code, RSC 1985, c C-46 [Criminal Code].
million CAD in 11 days. Oerlikon contracted to buy the land 13 weeks before being awarded a 600 million CAD contract to build a low-level air defence system by the Government. The RCMP sought access to Cabinet documents relevant to the case. In 1987, the Governor in Council granted access to 11 Cabinet documents and allowed witnesses to testify about them “for the purposes of the proceedings” against Bissonnette. While the Minister was acquitted by a local jury, one of his closest business associates was convicted of fraud.

Munro was, inter alia, Minister of Indian Affairs and Northern Development in the second Trudeau Ministry. From 1985 to 1989, the RCMP investigated allegations concerning the misuse of public funds by Munro to finance his 1984 campaign for the leadership of the Liberal Party. Munro was suspected of having arranged a 1.5 million CAD grant to the Assembly of First Nations, as Minister, so part of the funds could be channelled back into his leadership campaign. In 1989, Munro and eight individuals were charged under the Criminal Code with fraud and other related infractions. In 1990, given the “particular nature of the charges,” in the “interest of the proper administration of the criminal justice system,” the Governor in Council made an exception to the secrecy and the access conventions, which enabled both Munro and the RCMP to access the relevant Cabinet documents produced under the Trudeau Ministries, and use them in the criminal proceedings. The charges against Munro were ultimately thrown out and he received a 1.4 million CAD indemnification from the Government.

2.2.2 Legislative Institutions

(1) Auditor General

The Auditor General is an officer of Parliament appointed by the Governor in Council under the Auditor General Act. His or her mandate is to audit government spending to provide information that will enable Parliament to hold the Government accountable for the expenditure of public funds. Before 1986, the Auditor General did not have access to Cabinet

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111 Auditor General Act, RSC 1985, c A-17 [AGA].
documents for carrying out his or her audits, but a legal battle between the Auditor General and the Government resulted in a voluntary softening of Cabinet secrecy.

In the early 1980s, Auditor General Ken Dye sought to obtain access to information relating to the 1.7 billion CAD acquisition of Petrofina by Petro-Canada to conduct a performance ("value for money") audit. Dye’s requests were rejected by Petro-Canada, the Governor in Council and the Prime Minister for the reasons that he was exceeding the scope of his statutory authority and the information sought was protected by Cabinet secrecy. In a letter to Dye, Prime Minister Trudeau adopted an uncompromising posture:

Surely you are not claiming a right of free access to confidences of the Queen’s Privy Council for Canada. You know that, under our system of government, confidences of the Queen’s Privy Council for Canada must, to safeguard the principle of collective responsibility of Ministers, remain confidential. Moreover, given the nature of such confidences, I cannot see how they could have any relevance or utility to the fulfillment of your responsibilities under the Auditor General Act.\(^\text{112}\)

In 1984, the Auditor General commenced legal proceedings before the Federal Court of Canada in which he ultimately sought a declaration that the Auditor General was entitled to access the information requested by virtue of section 13(1) of the AGA. This provision states that the Auditor General has the right to obtain all the information he needs to fulfil his or her mandate, unless his or her right has been expressly limited by an Act of Parliament. The Government replied that disclosure of the information would violate the secrecy conventions and the certificate filed by the Secretary to the Cabinet pursuant to section 36.3 of the CEA (which is now section 39 of that Act). The Government further argued the Auditor General’s sole remedy was to report the denial of access to the House of Commons, which could take proper political sanctions against the Government.

The matter was heard by Associate Chief Justice Jerome, a former Liberal Member of Parliament and Speaker of the House of Commons. While Jerome ACJ recognized the existence of the secrecy convention in Canada, he stressed that a political rule cannot, in our

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\(^{112}\) Reproduced in Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources), [1989] 2 SCR 49 at 69-71 [Auditor General, SCC].
system of government, supersede a legal rule. In addition, Jerome ACJ did not agree that there was a conflict between sections 13 of the AGA and 36.3 of the CEA: even though the certificate prevented him from ordering the production of Cabinet secrets, it did not prevent him from issuing a declaration that the Auditor General was entitled to have access to the information sought. Finally, Jerome ACJ did not agree that the Auditor General’s only remedy was to report the denial of access to the House of Commons. In his view, this remedy was ineffective given that the governing party controlled a majority of seats in the House. As a result of party discipline, any attempt to force the production of the information or to adopt a motion of non-confidence would fail. Jerome ACJ thus issued a declaratory judgment in favour of the Auditor General.

The Government was preoccupied with the Federal Court’s decision, for it granted to the Auditor General the right to access any information contained in Cabinet documents that he or she deemed necessary for auditing purposes, without imposing on the Auditor General an obligation to keep the information confidential. Minister of Justice John Crosbie explained why the Government decided to appeal the Federal Court’s ruling:

The judgment leaves the auditor general with access to it all and he has no obligation not to disclose it [...]. We don’t think a cabinet government can function with this judgment as it stands today [...]. Cabinet ministers must be free to speak their mind to one another frankly, to disagree with each other, to put their regional interests as forcefully as they can. They cannot do so if the necessary confidentiality of cabinet proceedings [...] is removed.

Yet, following the Federal Court’s decision, the Government conceded that the Auditor General should have access to the information found in some Cabinet documents for auditing purposes. It thus made an unprecedented decision and provided the Auditor General with a limited and confidential access to Cabinet documents related to public expenditures. Order in Council PC 1985-3783 of December 27, 1985 provided the Auditor General with access to the following documents that came into existence on or after January 1, 1986:

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113 Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources), [1985] 1 FC 719 at 739-42.
114 Ibid at 749-50.
(a) a Submission to the Governor in Council;
(b) a Submission to the Treasury Board;
(c) any explanations, analyses of problems or policy options contained in a Memorandum or Discussion Paper presented to Council in making decisions but not information revealing a recommendation or proposal presented to Council by a Minister of the Crown;
(d) a final decision of Council; and
(e) a decision of Treasury Board.

In essence, the Auditor General gained access to Cabinet and Council decisions, as well as the submissions and background information underpinning these decisions. However, he or she did not gain access to the “core” of what the secrecy and the access conventions are meant to protect: documents which would reveal the personal views expressed by Ministers when deliberating on government policies and actions. As such, Cabinet minutes were clearly out of bounds. In addition, the Auditor General was not given access to Cabinet agenda and draft legislation, not because they reveal core secrets, but because he or she does not need access to these documents for auditing purposes. According to Minister Crosbie:

The new policies […] will give the auditor general access to about 80 per cent of cabinet information, including submissions to Treasury Board, final decisions of cabinet and the options placed before ministers […]. [However, the] auditor general will not have access to information that reveals the discussions and positions of ministers and the internal deliberations and proceedings of cabinet.\footnote{116}

While, at the time, the Auditor General deplored the fact that the 1985 Order in Council did not give him access to the information he was seeking with respect to the acquisition of Petrofina,\footnote{117} the concession made by the Government, and the prospective access provided to the Office of the Auditor General, represented an important step forward.

On appeal, a 2-1 majority of the Federal Court of Appeal, and a unanimous Supreme Court of Canada, sided with the Government.\footnote{118} The important point made by the Supreme Court was that the Auditor General did not have a legally enforceable right to access Cabinet documents. Whenever the Auditor General is denied access to Cabinet documents which are

\footnote{116} Ibid.
\footnote{117} Ibid.
\footnote{118} Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources), [1987] 1 FC 406 (CA); Auditor General, SCC, supra note 112.
required for auditing purposes, his or her only remedy is to report the denial of access to the House of Commons.\textsuperscript{119} The House may adopt a motion to compel the production of the information; it may also adopt a motion of non-confidence. It may be that, if the governing political party controls a majority of seats in the House, no sanction will be taken against the Government. Yet, from a legal perspective, the composition of the House is irrelevant.\textsuperscript{120}

A political remedy was an adequate alternative remedy to a legal remedy given the nature of the dispute, which opposed the executive and legislative branches. If the judicial branch were to intervene in such disputes, it would shift the balance of constitutional powers. The significance of the political remedy open to the Auditor General should not be underestimated. To be sure, a report to the House of Commons that the Government denied access to information raises the matter to the attention of political opponents, the media and, by implication, the electorate. The Government will face questions in the House and may be criticized by the media. The electorate may take this into consideration when assessing the Government’s performance when it is time to go to the ballot box. Political pressure and bad press may lead the Government to reconsider its position. After all, without this litigation, the Government would likely not have accepted to give the Auditor General access to Cabinet documents. In and of itself, this was a major victory for the Auditor General.

In addition to the 1985 Order in Council, two other Orders in Council were adopted in 2006 and 2017 to further clarify the scope of the Auditor General’s access to Cabinet documents.\textsuperscript{121} The Office of the Auditor General, the Privy Council Office and the Treasury Board also signed two agreements in 2010 to provide guidance on the interpretation and application of the Orders in Council and set out a process to settle disputes on access to Cabinet documents.\textsuperscript{122} All in all, these documents have not significantly altered the scope of the 1985 Order in Council. Over the years, the Government and the Auditor General seem to

\textsuperscript{119} AGA, \textit{supra} note 111, s 7(1)(b).
\textsuperscript{120} \textit{Auditor General}, SCC, \textit{supra} note 112 at 103-04.
\textsuperscript{121} PC 2006-1289 (6 November 2006); PC 2017-517 (12 May 2017).
\textsuperscript{122} See the following two documents signed by the Privy Council Office, the Treasury Board Secretariat and the Office of the Auditor General: Guidance to Deputy Heads, Departmental and Entity Legal Counsel and OAG Audit Liaisons on providing the Auditor Access to Information in certain Confidences of the Queen’s Privy Council (Cabinet confidences) (12 May 2010); and 2010 Protocol Agreement on Access by the Office of the Auditor General to Cabinet Documents (12 May 2010).
have reached an appropriate balance between transparency and secrecy: the Government recognizes that the Auditor General may have access to non-core secrets contained in some Cabinet documents for auditing purposes and, in turn, the Auditor General accepts that he or she cannot have access to core secrets and must, in any event, keep the information confidential.

(2) House of Commons

In the Westminster system of responsible government, one of the roles of the House of Commons is to hold the Government accountable. That role takes various forms, including the daily question period, the examination and vote on legislation and the review of public accounts. To perform that role, the House needs access to information. It can obtain information from the Government by requesting access to documents or inviting public officials to testify before one of its committees. As a matter of parliamentary privilege, the House has broad powers to order the Government to produce information. But are these powers unlimited? Can it force the Government to reveal Cabinet secrets? A key decision was made by House Speaker Roland Michener in 1957:

I understood the hon. member’s question and my view of it, as I stated, is that an inquiry into the method by which the government arrives at its decision in cabinet is entirely out of order. Even to ask whether it was on the agenda is out of order in itself, and that is what the hon. member asked. What can be asked, of course, is what decision the government came to. As I understand the situation, the decision of the government is one and indivisible. Inquiry into how it is arrived at and particularly inquiry into the cabinet process is not permitted in the house.123

A similar conclusion was reached in Australia. In Egan v Chadwick, a 2-1 majority of the New South Wales Court of Appeal decided that the legislature’s power to compel the production of documents did not extend to Cabinet documents.124 The majority reasoned that the legislature’s power to request the production of documents is derived from its power to hold the government to account, which stems from the principle of responsible government. As such, this power is also limited by the principle of responsible government.

123 House of Commons Debates, 23rd Parl, 1st Sess, vol 1 (6 November 1957) at 813 (Hon Roland Michener).
As the Westminster system of government cannot function without the secrecy convention, on which depends the confidence and solidarity conventions, the legislature cannot force a Minister to table Cabinet documents or reveal the substance of Cabinet proceedings:

[I]t is not reasonably necessary for the proper exercise of the functions of the Legislative Council to call for documents the production of which would conflict with the doctrine of ministerial responsibility [...]. The power is itself [...] derived from that doctrine. The existence of an inconsistency or conflict constitutes a qualification on the power itself.\(^\text{125}\)

Egan was an exceptional case. Disputes between the legislative and executive branches on the scope of the power to compel documents are not usually settled by judicial means; they are rather settled by political means, such as: the dispute relating to the Afghan detainees’ documents in 2009-2010; and the dispute relating to the costs of various bills in 2011.

First, on November 25, 2009, following the testimony of Canadian diplomat Richard Colvin, the House of Commons Committee on the Canadian Mission in Afghanistan requested that the Government produce documents relating to the treatment of prisoners transferred by the Canadian authorities to the Afghan forces. On December 10, 2009, the House ordered the Government to produce the documents requested without redaction. In March and April 2010, the Government tabled thousands of pages of redacted documents, asserting its duty to protect national security. On April 27, 2010, House Speaker Peter Milliken issued a ruling which declared that the House of Commons’ power to call for documents was unlimited:

[P]rocedural authorities are categorical in repeatedly asserting the powers of the House in ordering the production of documents. No exceptions are made for any category of government documents, even those related to national security.

Therefore, the Chair must conclude that it is perfectly within the existing privileges of the House to order production of the documents in question.\(^\text{126}\)

This was a very sweeping statement by Milliken, one suggesting that the House of Commons could even request the production of Cabinet documents, a position that was not shared by Michener in 1957 or the New South Wales Court of Appeal in 1999. Nothing, however,

\(^\text{125}\) Ibid at paras. 43, 46, 54, 55 (Spigelman CJ), 154 (Meagher J).

\(^\text{126}\) House of Commons Debates, 40th Parl, 3rd Sess, No 34 (27 April 2010) at 1530 (Hon Peter Milliken).
suggests that Milliken had in mind Cabinet documents when he made that statement as the Government was invoking national security to justify the redactions.

On June 15, 2010, following Milliken's ruling, all the political parties, except the New Democratic Party, signed a “Memorandum of Understanding” to resolve the crisis. Their leaders, Stephen Harper, Michael Ignatieff and Gilles Duceppe, agreed to establish an ad hoc committee of Members of Parliament as well as a panel of arbiters, composed of three former judges, to review the documents and decide which ones could be released. But the ad hoc committee did not have access to Cabinet documents. Only the panel of arbiters would have access to them and decide if they should be released or not. Obviously, the Conservatives did not want their Cabinet secrets to fall into the hands of their political opponents. This “Memorandum of Understanding” was sufficient to put an end to the crisis. Ultimately, the panel of arbiters did not review any Cabinet document, as it was dismantled as soon as the Conservatives won a majority one year later.

Second, on March 25, 2011, the Government was found in contempt of Parliament and lost the confidence of the House of Commons, thus triggering the 41st Canadian general election. The loss of confidence was caused by the Government’s refusal to give the House Finance Committee documents disclosing the costs of crime bills, corporate tax cuts and the purchase of F-35 fighter jets. The Government claimed that the “documents” sought were protected by Cabinet secrecy. The claim was challenged by Opposition parties, who insisted that they needed the “information” to properly assess the proposed legislation. The consensus of all the experts that were called to testify before the House of Commons’ Procedure and House Affairs Committee, including a former Secretary to the Cabinet, Mel Cappe, was that the House has the right to know the costs of proposed legislation and the Government cannot rely on Cabinet secrecy to refuse to provide the information.

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128 House of Commons Debates, 40th Parl, 3rd Sess, No 149 (25 March 2011) at 1420.
When a bill is tabled in the House of Commons, adequate financial information must be given to Members of Parliament to allow them to properly exercise their fundamental constitutional role of assessing the proposed legislation and appropriating the funds required to implement it. If this information can only be found in Cabinet documents, then it should be extracted and communicated to the House. In March 2011, the House was not asking that the Government disclose Cabinet documents revealing ministerial views, that would have been improper, and the Government would have been justified in refusing to comply with the request. Rather, the House was seeking access to financial information needed to make an informed decision on proposed legislation. The test to be applied in such circumstances, as stated in *Egan*, “is whether disclosure is inconsistent with the principles of responsible government.”¹³⁰ In March 2011, disclosure would not have been inconsistent with the principles of responsible government. These events suggest that there is still no common understanding of what is and what is not subject to Cabinet secrecy, and no proper dispute settlement mechanism exists to settle the issue.¹³¹

To sum up, in this subsection, I have established that the Government has voluntarily softened the secrecy and the access conventions when the public interest required it. This has happened when serious allegations of misconduct, mismanagement or criminal wrongdoing have been made against public officials. In such cases, the public interest requires that Cabinet documents be disclosed to foster good government. In addition, as a result of a judicial battle, the Government has agreed to give the Auditor General a limited and confidential access to Cabinet documents to enable him or her to properly audit public expenditures. So far, the Government has, however, refused to produce Cabinet documents at the request of the House of Commons. This position is justified insofar as the membership of the House includes political opponents who could use the information for partisan ends.

¹³⁰ *Egan*, *supra* note 124 at para 71 (Spigelman CJ).
¹³¹ *Standing Committee Evidence*, *supra* note 129 at 1405. See also Beverly Duffy, “Orders for Papers and Cabinet Confidentiality post *Egan v Chadwick*” (2006) 21:2 Australasian Parliamentary Review 93 at 104. The same problems seem to exist in New South Wales: “An increasing number of documents are not being returned to the [legislative] Council on the grounds of cabinet confidentiality and yet the House has no way of knowing if the government’s claims relate to ‘true’ cabinet documents or a wider class of documents that should not attract this immunity. An important step in enabling the [legislative] Council to fulfil its accountability function is to ensure such documents are evaluated by the independent legal arbiter.”
Yet, the Government should not rely on Cabinet secrecy to refuse to disclose the factual and background information the House needs to assess the costs of proposed legislation.

CONCLUSION

The objective of this chapter was to show that Cabinet secrecy is fundamental to the proper functioning of the Westminster system of responsible government. Cabinet secrecy is protected by two conventions, the secrecy and the access conventions. The conditions of existence of constitutional conventions require the analysis of the historical precedents, the statements of political actors and the reason for the rule.¹³²

First, the precedents for the Cabinet secrecy conventions can be seen in the day-to-day operations of the executive branch. While in office, Ministers do not disclose, without appropriate authorization, Cabinet secrets to outsiders, and access to the documents containing such information is firmly controlled by the Secretary to the Cabinet as custodian of Cabinet documents. Prime Ministers of various political loyalties throughout Westminster jurisdictions have recognized the existence of these conventions in speeches, exchanges of letters and the ministerial guides given to each new Minister upon taking office. In addition, their existence was recognized by executive orders and judicial decisions.

Second, since the inception of the Canadian federation in 1867, all Ministers have sworn the oath of Privy Councillor, in which they promise to uphold the secrecy of Cabinet proceedings. The duty of secrecy is owed both to the Sovereign, whose consent is required to publish Cabinet documents, and the Ministry. Keeping the secrecy of Cabinet proceedings is not an optional matter for current Ministers: it is a duty enforced by the Prime Minister. It is a matter of political survival. Based on a *quid pro quo*, successive Prime Ministers have agreed to respect the confidential nature of their opponents’ Cabinet documents every time there is a change in power. The current Ministry could not expect that the confidential nature of its Cabinet documents would be respected by future Ministries if it were unwilling to show the same degree of respect to past Ministries.

Third, the reason behind the Cabinet secrecy conventions is the proper functioning of the Westminster system of government (good government). The reasoning is as follows: to maintain the confidence of the House of Commons, Ministers must be united and speak with a single voice, a result that can only be achieved if they have a confidential forum in which they can discuss candidly and reach a consensus on proposed policy and action. In addition, upon leaving office, Ministers require the undertaking that their Cabinet documents will not be accessed and exploited by their opponents, otherwise these documents will be destroyed, thus undermining the continuity in the administration of public affairs and the historical record. These conventions cannot be discarded without altering our system of government.

While there is a consensus among political actors, judges and constitutional experts on the existence of the Cabinet secrecy conventions, their scope has not yet been set out with precision. To remain legitimate, the scope of Cabinet secrecy conventions should not exceed what is necessary to ensure the proper functioning of the Westminster system of responsible government; it should, in other words, remain proportional to its objective.

The secrecy convention aims to protect the collective decision-making process and the personal views expressed by Ministers while deliberating on government policy and action. It applies whatever the substance of the subject matter examined by the Cabinet may be as it is a non-substantive form of secrecy. A distinction must be made between two periods in the decision-making process: before and after a decision has been made public. The first period requires a higher degree of secrecy to protect the efficiency of the decision-making process from undue pressure and criticism. This justifies the provisional protection of factual and background information, or noncore secrets, about the policy or action under consideration in the deliberative stage. But a lower degree of secrecy is required in the second period. After a decision is made public, it is no longer necessary to protect the noncore secrets supporting the decision. From that moment on, only ministerial views, or core secrets, must remain confidential to protect ministerial solidarity and the candour of ministerial discussions.

The access convention, which is set in motion when there is a change of Ministry, aims to prevent the new Ministry from examining the core secrets recorded in former Ministries'
Cabinet documents. Yet, the new Ministry can be informed of the noncore secrets recorded in former Ministries’ Cabinet documents to ensure the continuity in the administration of public affairs. For this reason, the current practice of applying the access convention to all Cabinet documents, whether they are official or unofficial and whether they contain core or noncore secrets, seems overbroad. Moreover, given that the access convention was designed to protect the personal views expressed by Ministers while in office from unfair exploitation by opposing political parties, it should not be applied when there is a change of leadership within the same political party, as is currently the case in Canada.

The scope of the Cabinet secrecy conventions diminishes, and slowly fades away, with the passage of time, when the underlying information becomes only of historical interest. By law, it cannot be protected after 20 years. However, disclosure of Cabinet secrets may occur sooner in two situations. First, disclosure can be made by a Minister after leaving office. A resigning Minister may disclose the substance of Cabinet deliberations to explain the nature of the disagreement with the Cabinet. In addition, a former Minister may share his or her recollection of Cabinet deliberations in political memoirs to explain and justify the decisions made while in office. How much to disclose is ultimately a matter of judgment.

Second, disclosure can be made by the Government in the public interest. Executive institutions, such as commissions of inquiry and the RCMP, have been given broad access to Cabinet documents to investigate serious allegations of misconduct, mismanagement or criminal wrongdoing by public officials. Legislative institutions were given limited access to Cabinet documents. Confidential access to the noncore secrets contained in certain Cabinet documents related to public expenditures was given to the Auditor General. Nonetheless, the Government has always refused to produce Cabinet documents at the request of the House of Commons. The Government is justified in refusing to share the core secrets contained in Cabinet documents, but it is not justified in refusing to share noncore secrets, especially when the information is needed by the House of Commons to perform its constitutional role. The disclosure of noncore secrets after a decision has been made public does not endanger ministerial solidarity, the candour of ministerial discussions, or the efficiency of the decision-making process.
While conventions are binding on political actors, they are not enforceable in court. The consequences for their breach are political, not legal. As such, the Government could not rely on the Cabinet secrecy conventions to prevent the disclosure of Cabinet secrets in the context of litigation or under the access to information regime. It was therefore necessary for the Courts and Parliament to devise positive law rules that would regulate whether Cabinet deliberations and documents should be protected or disclosed in litigation. In this context, the Cabinet secrecy conventions provided the rationale for the extension of the doctrine of public interest immunity to Cabinet secrets by the Courts under the common law. It also provided the rationale for the adoption of sections 39 of the *Canada Evidence Act* and 69 of the *Access to Information Act* by Parliament. The common law and statutory rules should be interpreted and applied in the light of the justification and scope of the Cabinet secrecy conventions given that they draw their legitimacy from them. This implies that there should be not automatic rules with respect to Cabinet secrets: whether Cabinet secrets should be protected or disclosed depends on the context and the requirements of the public interest. While the Government is the final arbiter of the public interest under conventions, it cannot, as will be argued in the upcoming chapters, be the final arbiter of the public interest under the law, as this is a role for the Courts in a system governed by the rule of law.
CHAPTER 2

CABINET SECRECY AND COMMON LAW PUBLIC INTEREST IMMUNITY

A Matter of Public Interest: Weighing and Balancing the Benefit and Cost of Producing Cabinet Secrets in Legal Proceedings

INTRODUCTION

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

Under the PII doctrine, the Government can object to the production of government secrets in litigation, if their production would injure the public interest. A PII claim creates a tension between two competing aspects of the public interest in the preservation of peace and social order: the public interest in the proper administration of justice; and the public interest in the proper administration of government. The “interest of justice” requires that the Courts have access to all the information relevant to the case before them in the search for the truth. If the judge does not have access to the relevant evidence, the litigant cannot have meaningful access to justice. A litigant who is deprived of relevant evidence because of a PII claim can lose a valid case and suffer a denial of justice. In contrast, the “interest of good government” requires that the Government protect the privacy of its secrets, the publication

\(^1\) The candour, the efficiency and the solidarity rationales are discussed in Chapter 1, *supra* at 27-32.
of which would injure the whole community. The interest of good government captures numerous concerns, such as international relations, national defence and national security, and the proper functioning of the system of responsible government.

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

The objective of this chapter is to critically review how the Courts have dealt with PII claims, especially Cabinet immunity claims, under the common law, in the United Kingdom, Australia, New Zealand and Canada (at the provincial level). Chapter 2 is divided into two sections. In Section 1, I will examine the historical evolution of the PII doctrine. I will show that rule of law considerations have led the Courts to affirm and exercise the power to review and overrule PII claims. Despite this positive development, I will argue that the level of deference afforded to Cabinet immunity claims by the Courts, and the way such claims are weighed and balanced, is not consistent in the jurisdictions under study. Some jurisdictions

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2 Duncan v Cammell Laird & Co Ltd, [1942] 1 All ER 587 at 588 (HL) (Lord Simon) [Duncan].
4 Cabinet immunity claims are a subset of PII claims relied upon to protect Cabinet secrets specifically.
5 The common law doctrine of Cabinet immunity has been superseded at the federal level, in Canada, by the adoption of section 39 of the Canada Evidence Act, RSC 1985, c C-5. See also section 69 of the Access to Information Act, RSC 1985, c A-1, which excludes Cabinet secrets from the scope of the Act. These provisions are reproduced in the Appendix.
(the United Kingdom and Australia) are deferential toward Cabinet immunity claims while others (New Zealand and Canada) are nondeferential. In Section 2, I will argue that the Courts should adopt a new rational approach to bolster predictability, certainty and transparency in their assessment of Cabinet immunity claims. I will finally introduce the four pillars of the proposed rational approach: a narrow standard of discovery; an executive onus of justification; a cost-benefit analysis; and a judicial duty to minimize injury.

1. JUDICIAL REVIEW OF CABINET IMMUNITY CLAIMS

1.1 Judicial Review of Public Interest Immunity Claims in General

1.1.1 Two Antithetical Positions

The debate about which branch of the State should have the final word on whether documents, the publication of which is said to injure the public interest, should be admitted in court, can be traced back to Robinson v State of South Australia (No 2) (1931) and Duncan v Cammell Laird & Co Ltd (1942). It is difficult to imagine cases where the factual foundations were more different. The common background is that both cases involved civil proceedings in negligence in which claims of Crown privilege were sustained by the lower Courts, in respect of documents that seemed truly relevant to the fair disposition of the cases. They were otherwise at opposite ends of the spectrum: Robinson was a civil action against the State of South Australia with respect to the mismanagement of a wheat marketing scheme, in which the Government opposed the production of 1892 documents about the business of the Wheat Harvest Board. In comparison, Duncan was a civil action against the builders of the Thetis, a submarine armed with secret torpedo tubes, which sank in 1939 during the vessel’s first submergence test, killing 99 crewmen, in which the Government objected to the production of 16 documents, including the submarine’s plans.

The fact that the claims of Crown privilege were not treated the same way by the Judicial Committee of the Privy Council, in Robinson, and the Appellate Committee of the House of Lords, in Duncan, is not surprising given their different backgrounds: Robinson

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6 Robinson v State of South Australia (No 2), [1931] All ER Rep 333 (PC) [Robinson].
involved the production of commercial documents of a disbanded department in a time of peace, while *Duncan* involved the production of national security documents that could have been useful to the enemy in a time of war. If the cases had been distinguished on that basis, no debate would likely have arisen. The debate arose because the Privy Council held that the judicial branch had in reserve the inherent power to inspect and order the production of government secrets while the House of Lords denied the existence of that power. In short, *Robinson* asserted judicial supremacy while *Duncan* asserted executive supremacy.7

(1) Assertion of Judicial Supremacy

The problem in *Robinson* was that the Government was plainly relying on the privilege for an improper purpose. By objecting to the production of relevant documents, it was attempting to avoid legal liability. Lord Blanesburgh, for the Privy Council, stressed that the privilege is a “narrow one, most sparingly to be exercised”8 and should not be extended beyond what is necessary to protect the public interest. Given the “increasing extension of State activities into the spheres of trading business and commerce,”9 the privilege should not be used to circumvent legal liability arising from such activities. In a time of peace, claims of Crown privilege for commercial documents, as opposed to political documents, should be uncommon. In general, the fact that the production of the documents could “prejudice the [Government’s] own case or assist that of the other side” was not a valid reason to resist production; on the contrary, it was “a compelling reason for their production – one only to be overborne by the gravest considerations of State policy or security.”10

A traditional way to control the validity of a claim of privilege was to review the form of the claim to ensure that the proper procedure had been followed. Lord Blanesburgh stated that the claim should usually be made under oath by a Minister after personal consideration

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7 The term “judicial supremacy” means that the Courts are the final decision-makers with respect to claims of Crown privilege; thus, the ultimate decision to protect or disclose sensitive information in litigation belongs to judges, not public officials. In contrast, the term “executive supremacy” means that the Government is the final decision-maker with respect to claims of Crown privilege; thus, the ultimate decision to protect or disclose sensitive information in litigation belongs to public officials, not judges.
8 *Robinson*, supra note 6 at 337.
9 *Ibid*.
10 *Ibid* at 338.
of the matter. The sworn statement should describe the nature of the documents and the nature of the injury that would be sustained by their production. In *Robinson*, the statement filed on behalf of the responsible Minister was defective because it had not been made under oath, and did not describe the nature of the documents or injury. The mere reference to the fact that the documents were official or confidential was insufficient. The claim thus seemed to have been made “inadvisably or lightly or as a matter of mere departmental routine.” ¹¹

The case could have been decided solely on that basis, but it would not have solved the underlying problem. Overruling the claim because of procedural flaws could have led to the production of documents that must, in the public interest, remain confidential. And the alternative of requesting the Minister to file a new statement, in the proper form, did not address the concern that the Minister could use the privilege as a tactical weapon in court. Lord Blanesburgh’s solution was to remit the matter to the Supreme Court of South Australia, with directions to inspect, *in camera*, the documents to determine whether or not production would injure the interest of good government. In doing so, he favoured substance over form. The proper stance was one of deference, not submission, to the Minister’s views: “in any case of doubt [the judge should not] resolve the doubt against the State without further inquiry from the Minister.” ¹² This approach, which was supported by the relevant English, Scottish and Australian authorities, ¹³ as well as by the express terms of the *South Australian Rules of Court*, ¹⁴ resulted in the production of several documents to the plaintiff. ¹⁵

(2) Assertion of Executive Supremacy

*Robinson* was then the highest approval of judicial inspection to determine whether production would injure the public interest. It is thus not surprising that the families of the

¹¹ *Ibid* at 339.
¹² *Ibid* at 342.
¹⁴ The *South Australian Rules of Court*, Order 31, r 14(2) as it appeared on May 19, 1931, cited in *Robinson*, supra note 6, allowed the Courts to inspect documents subject to a private law privilege claim. Lord Blanesburgh considered that it also applied to a Crown privilege claim.
crewmen who lost their lives in the Thetis disaster relied on it in their fight against the shipbuilders. *Duncan* was heard by seven members of the House of Lords, who unanimously agreed to dismiss the approach taken in *Robinson*, even though *Duncan* fell directly within the “State security” exception carved by Lord Blanesburgh in *Robinson*.

In *Duncan*, Lord Simon, for the House of Lords, sought to clarify the Crown privilege doctrine. The basic rule was that “documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld.” There were two ways of showing injury to the public interest: “by having regard to the contents of the particular document”; or “by the fact that the document belongs to a class which [...] must as a class be withheld from production.”16 “Contents claims” are based on the argument that the substance of the documents is sensitive. These claims are made when production of the documents would injure, for example, international relations, national defence or national security. In contrast, “class claims” are based on the argument that the documents are part of a sensitive category of documents, without regard to their substance. These claims are made when production of the documents would injure the proper functioning of the public service, in the sense that the candour of the communications would decrease if they were not kept private.17 Cabinet documents and other high-level documents relating to the formulation of policy or the making of decisions are examples of categories of documents which have been protected on that basis. While *Duncan* involved a contents claim based on national security and *Robinson* a class claim based on candour, the cases were not distinguished on that basis.

The disagreement concerned whether the Courts had the inherent power to overrule a claim of Crown privilege. Lord Simon did not think so. His approach was formalistic: if a claim had been made in the proper form, the Courts were bound to accept it. This meant that the sanction for abuse of the privilege would be political, not legal, for the Minister could be held accountable before Parliament, but not the Courts. In support of his position, Lord Simon raised substantive and procedural reasons. Substantively, he relied on handpicked

16 *Duncan*, supra note 2 at 592.
17 *Ibid*. The candour rationale stemmed from *Smith v East India Co* (1841), 1 Ph 50.
English and Scottish authorities\(^{18}\) which, in his view, confirmed that Ministers should have the final word on the production of government documents in court given their greater expertise to assess the injury to the interest of good government. However, on the whole, the authorities before Duncan did not support his position.\(^{19}\) Procedurally, he advanced two additional reasons against judicial supremacy: the judge cannot inspect the documents \textit{in camera}; and the judge should not communicate with the Government \textit{ex parte}. These reasons were unfounded at the time\(^{20}\) and Courts have subsequently confirmed that \textit{in camera} and \textit{ex parte} inspections were procedurally appropriate to assess the validity of PII claims.

Lord Simon was prepared to give very broad discretion to the Government over claims of privilege but, in attempting to maintain the appearance of legality, he insisted that the decision to suppress the documents is the decision of the judge, for “[i]t is the judge who is in control of the trial, not the executive.”\(^{21}\) He also laid down certain principles to limit the scope of the privilege. In his view, it would be improper to rely on Crown privilege to hide misconduct, prevent public criticism and avoid legal liability. Crown privilege should only be claimed where the “public interest would otherwise be damnified,” that is: where production would be injurious to international relations, national defence or national security (contents claims); or where a class of documents must be kept confidential for the proper functioning of the public service (class claims).\(^{22}\) Most of what Lord Simon said about the scope of the privilege was consistent with Robinson, except that he did not give the Courts any meaningful control over the exercise of the privilege by the Government.

\(^{18}\) England: Beatson v Skene, [1843-60] All ER Rep 882. Scotland: Commissioners of the Board of Customs for Scotland v Vass (1822), 18 Digest 168 (HL); Admiralty Comrs v Aberdeen Steam Trawling & Fishing Co, [1908] Sess Cas 335.

\(^{19}\) This point is examined in detail in Chapter 4, \textit{infra} at 232-36.

\(^{20}\) Before Duncan, \textit{supra} note 2, the Courts had taken a position in favour of \textit{in camera} inspections of government documents: see Hennessy, \textit{supra} note 13 (Field J); Asiatic Petroleum, \textit{supra} note 13 (Scrutton J); Spigelman v Hocken (1933), 150 Law Times Reports 256 (KB) (Macnaghten J); Robinson, \textit{supra} note 6. As for \textit{ex parte} inspections, while not ideal in theory, in practice, they are better than no inspection at all from the litigant’s perspective. See HG Hanbury, “Equality and Privilege in English Law” (1952) 68:2 Law Q Rev 173 at 181.

\(^{21}\) Duncan, \textit{supra} note 2 at 595.

\(^{22}\) \textit{Ibid.}
1.1.2 Bringing an Unlimited Executive Power into Judicial Custody

To say that Duncan was controversial would be an understatement. For some, it represented the “high-water mark of undue judicial indulgence to executive discretion” in the field of Crown privilege. While the publication of the plans of a submarine in a time of war, where the survival of the State is at stake, would likely have been injurious to the public interest, it is unclear whether national security was the real justification behind the Government’s objection. Indeed, some of the documents subject to the claim of privilege had previously been produced to a commission of inquiry, which had referred to them in its report. Moreover, one year after the House of Lords’ decision, in a complete volte face, the Government produced some of the privileged documents at the request of the shipbuilders. This suggests that Duncan may yet be another example of cases where the Government relied on Crown privilege to undermine litigation, rather than to protect sensitive information.

(1) Criticism of Executive Supremacy

From a rule of law perspective, Duncan raised three problems. First, it deprived the Courts of the power to decide what evidence should be admissible in legal proceedings, in breach of the separation of powers which should exist between the executive and the judicial branches. Crown privilege could give the executive branch control over the admissibility of evidence in legal proceedings and allow it to interfere in a case for self-interested reasons. Without access to relevant evidence, the right to a fair trial is undermined. Lord Simon’s claim that the decision to suppress the evidence was the judge’s decision was a smokescreen, as the judge was not given any discretion over the matter. How can the judge be in control of the proceedings if he or she must submit to the Minister’s command?

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27 On this point, see the forceful dissenting opinion of Mondelet J in Gugy v Maguire (1863), 13 LCR 33 (QB). Allen, supra note 15 at 336, observed that, on the account of Lord Simon, “the judge becomes a piece of procedural machinery to put a conclusion to a legal process.”
described this self-imposed judicial restraint as an “abdication by the courts of their proper function of determining what is admissible or inadmissible evidence.” This, in turn, would give the Government the opportunity to abuse the privilege:

The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to [public] officials too ample opportunities for abusing the privilege.

Second, Duncan equated the public interest with the interest of good government, thus overlooking an important aspect of the public interest: the interest of justice. Harry Street observed the public interest required that individuals be able to assert their rights in court. Roscoe Pound made the same point when he said that the main interest of the public is to secure the rights of each individual. The conflict created by a claim of privilege did not pit public against private interests, it involved two competing aspects of the public interest: the interest of justice; and the interest of good government. While Ministers usually have more expertise to assess the latter, judges have more expertise to assess the former. Lord Simon’s narrow view of the public interest meant that the privilege could be claimed in cases where there was a low risk of trivial injury to the interest of good government, even though the evidence was of crucial importance to the fair disposition of the case. The flaw in Lord Simon’s reasoning was the assumption that the interest of good government, however low, must always trump the interest of justice, however high. What was required instead was a weighing and “balancing of the conflicting interests [...] [because] there [was] no justification for the assumption that governmental interest [overrode] all other considerations.”

Third, Duncan placed the Government in a position where it was judge and party, in breach of the principle that “no one may be judge in his own cause.” How can a Minister be

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33 Street, supra note 30 at 184.
expected to arbitrate fairly between the interest of good government and the interest of justice? The use of Crown privilege, legitimate or not, in cases where the Government was a party would give the perception that justice had not been done, especially if the outcome was to deprive the litigant of critical evidence. John Wigmore stated that “[t]he lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it is to shield his wrongdoing under the privilege.”

This was a risk in making the Government the final decision-maker. From a rule of law perspective, the Courts would have been in a far better position to decide issues of privilege in a fair and impartial manner given their institutional independence.

*Ellis v Home Office* (1953) is a classic illustration of these rule of law problems. While awaiting trial in prison, Ellis had been beaten and severely injured by a fellow inmate. As a result, he sued the prison authorities for damages in negligence, alleging that the inmate was mentally ill and that the prison authorities had failed to take appropriate measures to prevent the aggression. To win, Ellis had to prove that the prison authorities were aware of the danger posed by the inmate. Yet, the Government objected to the production of relevant police and medical reports based on a class claim. The lower Court felt obliged to accept the objection in the light of *Duncan*, but confessed an “uneasy feeling that justice may not have been done.”

While the Court of Appeal noted that “one facet of the public interest is that justice should always be done and should be seen to be done,” it was also bound by *stare decisis*. In *Ellis*, justice did not appear to have been done: the Government was seen as an interested party relying on the privilege to avoid legal liability to the detriment of the interest of justice. *Ellis* was seen as a “mockery of justice” and it was not the only example.

The doctrine of executive supremacy was most insidious in respect of class claims, which proliferated in the aftermath of *Duncan*. Such claims could easily be misused given

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34 Wigmore, *supra* note 29 at § 2376.
35 *Ellis v Home Office*, [1953] 2 QB 135 [*Ellis*].
36 *Ibid* at 137 (Devlin J).
37 *Ibid* at 147 (Lord Morris).
39 The Government tried to suppress evidence “because it was favourable [to the plaintiffs] case” in *Odlum v Stratton* (HC), cited in Allen, *supra* note 15 at 338, n 56, 339. See also *Broome v Broome*, [1955] 1 All ER 201; *Gain v Gain*, [1962] 1 All ER 63.
that the Government had absolute discretion to protect any class of documents deemed necessary for the proper functioning of the public service, without regard to their substance. The vagueness and overbreadth of the doctrine could lead to abuse of power. Carleton Allen pointed out that "abuse of power does not consist only in gross, unscrupulous excess of it, but also in gradual and often well-meaning extension, in a timorous rather than an aggressive spirit." The danger was not so much that Ministers would behave in an oppressive manner "but under the influence of that exaggerated, not to say morbid, instinct of secretiveness which is an occupational disease of bureaucracy." Pushed to the extreme, class claims could be used to protect any government document, whatever their nature. The sole limits placed on the exercise of Crown privilege were self-imposed by the Government.

(2) Demise of Executive Supremacy

As some scholars have noted, "[p]robably no modern rule of English law has attracted so much criticism." In the light of the rule of law issues afflicting Duncan, it is not surprising that the precedent was not followed by the highest Courts in the Commonwealth. In 1956, in Glasgow Corporation v Central Land Board, the House of Lords, acting as the highest Court for Scotland, held that Lord Simon had misconstrued the Scottish authorities in Duncan. Indeed, it turned out that Scottish Courts always had, as a matter of law, the power to overrule a ministerial objection although, as a matter of practice, that power had been rarely exercised. The admission that Duncan had been decided per incuriam created a schism between the law of England and the law of Scotland on this central constitutional issue. Similarly, the Supreme Court of Canada, the New Zealand Court of Appeal and the

40 Allen, supra note 15 at 332
41 Ibid at 337.
42 After Ellis, supra note 35, the Government promised that class claims would not be used to protect: factual documents (such as accident, medical and technical reports) in civil proceedings; statements made to the police if the author of the statement consented to production or had died; and documents needed for the defence against criminal charges subject to informer privilege. While these concessions were valuable, the Courts were not in a position to enforce them. See United Kingdom, House of Lords, Parliamentary Debates, vol 197, col 741-48 (6 June 1956) [House of Lords Debates].
44 Glasgow Corporation v Central Land Board (1956), Sess Cas 1 (HL).
Supreme Court of Victoria, in Australia, asserted the power to overrule ministerial objections. Rand J best articulated the argument against the final and conclusive nature of claims of Crown privilege in *R v Snider* (1954):

> 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.

These developments did not go unnoticed in London. It was surely unfortunate that there were differences of opinion on this central constitutional issue in Westminster jurisdictions. In 1963, Arthur Goodhart argued that *Duncan* should be limited to the facts that were before the House of Lords. Lord Simon had upheld a claim of Crown privilege for the plans of a submarine because production would have been injurious to national security in a time of war. *Duncan* could be seen as a binding authority only insofar as contents claims based on national security were involved. Lord Simon’s statements regarding the final and conclusive nature of ministerial objections, especially with respect to class claims based on candour, could be seen as obiter dicta. The consequences of this argument were significant given that contents claims were rare. Interpreted in this manner, the law of England would become consistent with the law of Scotland, Canada, New Zealand and Australia.

Goodhart’s interpretation was given legal currency by the English Court of Appeal in *Re Grosvenor Hotel, London (No 2)* (1964). The case arose out of a dispute between Gordon Hotels and the British Railways Board over the renewal of the lease of the Grosvenor Hotel. When the Board refused to renew the lease on the basis that it wanted to use the building for its own purposes, Gordon Hotels challenged the decision before the High Court. The Government objected to the production of the documents related to the impugned decision.

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50. At the time, there were only two other examples of contents claims in the Law Reports: *Asiatic Petroleum*, supra note 13; *R v Governor of Brixton Prison, ex parte Soblen*, [1963] 2 QB 243.
based on a class claim. For the first time since Duncan, an English Court refused to treat the ministerial objection as final and conclusive. Lord Denning reasserted judicial supremacy:

The objection of a Minister [...] should not be conclusive. [...] After all, it is the judges who are the guardians of justice in this land: and if they are to fulfil their trust, they must be able to call on the Minister to put forward his reasons so as to see if they outweigh the interests of justice.\textsuperscript{52}

In 1968, the House of Lords had the opportunity to reconsider Duncan. This was only two years after the House had asserted the power to overrule its own decisions. Conway v Rimmer (1968),\textsuperscript{53} was the first time the House would actually use that power. Conway was a police officer on probation who was prosecuted for the theft of a flashlight. Although he was acquitted at trial, he was dismissed from the police force. Conway subsequently filed a civil action in damages for malicious prosecution against Rimmer, his former supervisor. During the discovery process, he sought access to four reports assessing his performance as a police officer and one report drafted for the Director of Public Prosecutions pertaining to the allegation of theft. The reports seemed highly relevant and both parties wanted them to be produced. However, the Government objected to their production based on a class claim. The Law Lords dealt with two issues: do the Courts have the power to overrule ministerial objections; and, if so, how and when should it be exercised?

On the first point, the House of Lords reversed the general rule set out in Duncan on the final and conclusive nature of a ministerial objection, and reinstated the approach established in Robinson and earlier cases, noting the flaws of Lord Simon’s analysis and the rule of law problems stemming from his decision. The House of Lords reaffirmed the inherent power of English Courts to overrule a ministerial objection to the production of documents in legal proceedings. The Courts effectively regained “control over the whole of this field of the law”\textsuperscript{54} and the unity of the common law in the Commonwealth was restored. Executive supremacy could not be justified, especially in the light of the increasing extension of State activities and the proliferation of mass documentation.

\textsuperscript{52} Grosvenor Hotel, supra note 3 at 361-62.
\textsuperscript{53} Conway v Rimmer, [1968] 1 All ER 874 (HL) [Conway].
\textsuperscript{54} Ibid at 915 (Lord Upjohn).
On the second point, the House of Lords asserted the role of the Courts to weigh and balance the competing aspects of the public interest. Judges would thus be required to make the kind of delicate value-judgments that Duncan had left to the discretion of Ministers. While judges would defer or give “full weight” to the reasons given by Ministers on the degree of injury, these reasons would carry more weight if the objection had been made on the basis of the contents of the documents rather than their class. Indeed, judges did not possess less expertise than a Minister to assess whether protection of a class of documents was necessary for the proper functioning of the public service. Moreover, judges had more expertise, independence and impartiality to assess the degree of relevance of the documents. When the abstract weighing and balancing process would seem to favour production, judges would inspect the documents in camera and ex parte. Production would be ordered only where the degree of relevance outweighed the degree of injury.

Conway was “the culmination of a classic story of undue indulgence by the courts to executive discretion, followed by executive abuse, leading ultimately to a radical reform achieved by the courts.”\(^{55}\) The application of the weighing and balancing process to the facts of the case was simple. Regarding the interest of good government, reports on the conduct of police officers, as a class of documents, were seen as “routine documents.” It was unlikely that these reports would be written with less candour in the future if they were produced. The possible injury to the interest of good government resulting from their production was thus low. Regarding the interest of justice, the reports were seen as crucial evidence on the questions of malice and want of probable cause. Their degree of relevance thus seemed high. Hence, the Law Lords inspected the documents and subsequently ordered their production as the interest of justice was greater than the interest of good government. In doing so, they brought back “a dangerous executive power into legal custody.”\(^{56}\)

After Conway, the term “Crown privilege” was replaced by “public interest immunity” (PII) for three reasons. First, the term “privilege” implies that the holder has discretion to

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\(^{55}\) Wade & Forsyth, supra note 24 at 711.

claim or waive the protection afforded by the law, as is the case for solicitor-client privilege. However, the Crown has a legal duty, which cannot be waived, to protect government secrets, if the public interest demands it.\textsuperscript{57} For this reason, the rule is best described as an immunity, rather than a privilege. Second, the protection does not belong to the “Crown” \textit{per se}; the Crown exercises it on behalf of the public. The question of whether or not the production of government secrets would be injurious to the public interest can be raised by any interested party and even by the Court itself.\textsuperscript{58} Third, the term “PII” makes more explicit the judicial obligation to weigh and balance the competing aspects of the “public interest.”

\textbf{1.2 Judicial Review of Cabinet Immunity Claims in Particular}

\textbf{1.2.1 Assertion and Demise of Absolute Cabinet Immunity}

\textit{(1) Assertion of Absolute Cabinet Immunity}

Before the late 1970s, Cabinet documents, as a class, were seen as absolutely immune from production in legal proceedings by the Courts. This position was asserted in \textit{obiter dicta} in the two English cases that spearheaded the shift from executive to judicial supremacy. Lord Denning first recognized the sanctity of “Cabinet papers” in \textit{Grosvenor Hotel}\textsuperscript{59} and, a few years later, Lord Reid confirmed the judicial consensus in \textit{Conway}:

\begin{quote}
I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest.\textsuperscript{60}
\end{quote}

“Cabinet minutes and the like” thus appeared exempted from the weighing and balancing process established in \textit{Conway}.\textsuperscript{61} The reference to the “historical interest” exception was not

\begin{footnotes}
\textsuperscript{57} \textit{Makanjuola v Commissioner of Police of the Metropolis}, [1992] 3 All ER 617 (CA) at 623 (Lord Bingham).
\textsuperscript{58} While a PII claim can be raised by anyone, it is unlikely to be sustained in court without the support of the Government: \textit{R v Chief Constable of the West Midlands Police, ex parte Wiley}, [1994] 3 All ER 420 at 438-39 (HL) (Lord Woolf) [\textit{Ex Parte Wiley}].
\textsuperscript{59} \textit{Grosvenor Hotel}, supra note 3 at 362 (Lord Denning), 364 (Lord Harman), 369 (Lord Salmon).
\textsuperscript{60} \textit{Conway, supra} note 53 at 888 (Lord Reid), 905 (Lord Hodson), 910 (Lord Pearce), 914 (Lord Upjohn).
\end{footnotes}
a recognition that it would be appropriate to order the production of Cabinet documents that were no longer of any significance, but a recognition that under the *Public Records Act 1967*, this class of documents could be made public after 30 years.\(^2\) Parliament had decided that the degree of injury associated with the publication of Cabinet documents was nil after 30 years. Save for this exception, Cabinet secrets remained off-limits.

\((2)\) **Demise of Absolute Cabinet Immunity**

When *Conway* was decided, the Courts had not clearly made the connection between the protection of Cabinet secrecy under constitutional conventions and the common law. The connection was made, for the first time, in *Attorney General v Jonathan Cape Ltd* (1975).\(^3\) The issue was whether the Court should prevent the publication of ministerial memoirs that revealed details of “Cabinet discussions.” The evidence established that Cabinet secrecy was one of the elements of collective ministerial responsibility and, as a result, was considered essential to the proper functioning of the Westminster system of responsible government. It was thus in the public interest to prevent the disclosure of Cabinet discussions, particularly the personal views expressed by Ministers. This justification provided a principled basis for extending the scope of the breach of confidence doctrine to public secrets, in addition to private secrets. This is an example of circumstances in which the scope of a legal rule (breach of confidence) was extended based on a political rule (secrecy convention).

The justification for the secrecy convention also served to limit the scope of the rule. There had to be a point in time where the publication of ministerial memoirs would no longer injure the proper functioning of the Westminster system of responsible government. In this case, as Richard Crossman’s diaries described events that had occurred ten years earlier (during which time three elections had taken place), Lord Widgery held that their publication would not be injurious to the public interest. The recognition that the passage of time may limit the scope of Cabinet secrecy could not be reconciled with the recognition of

\(^2\) *The Public Records Act 1967* (UK), c 44, s 1, modified the *Public Records Act, 1958* (UK), 6 & 7 Eliz II, c 51, s 5(1), to reduce the period during which public records were closed to the public from 50 years to 30 years. In 2010, the *Constitutional Reform and Governance Act 2010* (UK), c 25, s 45(1)(a), reduced that period to 20 years.

\(^3\) *Attorney General v Jonathan Cape Ltd*, [1975] 3 All ER 484 (QB) [*Jonathan Cape or Crossman’s case*].
an absolute Cabinet immunity. While *Crossman's* case clarified why Cabinet secrets should be protected, it also provided ammunition to litigants seeking to challenge this last bastion of executive supremacy.\(^\text{64}\) However, at the time, it was clear that "no court [would] compel the production of cabinet papers in the course of discovery in an action."\(^\text{65}\)

The first case where the production of Cabinet documents was directly sought in civil proceedings was *Lanyon Pty Ltd v Commonwealth* (1974),\(^\text{66}\) a decision of the High Court of Australia. In this case, the Government had denied a corporation the permission to develop land in the Australian Capital Territory and had decided to acquire it by expropriation. The decision, founded upon policy considerations, had been made following Cabinet discussions. The corporation served subpoenas to the responsible Minister and Secretary to the Cabinet for "all minutes of cabinet" leading to the impugned decision as well as for other documents from the National Capital Development Commission related to the proposed development. The Government objected to the production of the documents based on Cabinet immunity. Menzies J sustained the claim, without inspection, on the basis that Cabinet documents as a class should not be inspected nor produced "except [...] in very special circumstances."\(^\text{67}\) The immunity envisaged by Menzies J was less absolute than the one described by Lord Reid in *Conway*. While it is unclear what Menzies J had in mind when he said that Cabinet documents could be inspected and produced in "very special circumstances," his statement suggested that the "historical interest" exception was not the only exception to Cabinet immunity.

*Sankey v Whitlam* (1978)\(^\text{68}\) provides an example of the "very special circumstances" envisaged in *Lanyon*. This decision of the High Court of Australia was the first major case in any of the Westminster jurisdictions where the production of Cabinet documents was ordered, thus putting an end to the theory that these documents were fully immune. The unusual background of the case created a perfect storm for the production of Cabinet documents. The case arose out of a criminal prosecution against former Prime Minister Gough Whitlam and three members of his Ministry in relation to their conduct in office. The

\(^{64}\) Dennis Pearce, "The Courts and Government Information" (1976) 50 Austl L J 513 at 520.
\(^{65}\) Jonathan Cape, *supra* note 63 at 490.
\(^{67}\) Ibid at 653.
\(^{68}\) *Sankey v Whitlam* (1978), 142 CLR 1 [Whitlam].
charges were laid down by Sankey, a private citizen, rather than by a public prosecutor. Sankey claimed that the accused conspired to borrow 4 billion USD for the development of domestic energy sources, without following the procedure established by the Constitution. The Executive Council approved the loan without the assent of the Loan Council, a federal-provincial institution designed to regulate the accumulation of debt in the federation. In short, Whitlam and his colleagues were accused of misfeasance in public office.

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

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

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69 *Ibid* at 51, 62 (Stephen J), 99 (Mason J).
70 *Ibid* at 95 (Mason J). See also *Australian National Airlines Commission v Commonwealth* (1975), 132 CLR 582 at 591 (Mason J) referring to “Cabinet minutes” as a class of documents which should be kept secret.
72 *Ibid* at 96 (Mason J). See also *ibid* at 41-42 (Gibb ACJ), 63 (Stephen J).
73 *Ibid* at 40 (Gibbs ACJ). *Contra ibid* at 63 (Stephen J) & 97 (Mason J).
efficiency\textsuperscript{74} and the solidarity\textsuperscript{75} rationales.\textsuperscript{76} The reasons for denying the absolute nature of Cabinet immunity were twofold: the passage of time; and the nature of the proceedings.

First, once it had been recognized that the justification for Cabinet secrecy faded away with the passage of time, it followed that Cabinet documents could not be forever immune from production. This stemmed from the “historical interest” exception, but it was not limited to it. The issue for the Court was whether the publication of Cabinet documents at a given point in time would injure the proper functioning of the Westminster system of responsible government. The answer did not depend on whether an arbitrary period of time fixed by statute had lapsed. It had to be determined on a case-by-case basis.\textsuperscript{77} In Crossman’s case, details of Cabinet discussions had been published after ten years. In Whitlam, the documents sought had been created three to five years earlier. While they were not yet of historical interest, their subject-matter was “no longer current” or controversial, as the loan proposal had not been carried out and the accused had since retired from politics.\textsuperscript{78} Any damage caused by their production would have been trivial. Over the decade separating Conway and Whitlam, the “life of a cabinet secret” was therefore significantly shortened.\textsuperscript{79}

Second, the most important factor in Whitlam was the nature of the proceedings: a criminal prosecution against Ministers for misfeasance in public office. The twin objectives of the criminal justice system are that guilt shall not escape, nor innocence suffer. These objectives could not be achieved if the defendant, the prosecutor and the judge did not have access to all the facts within the framework of evidence law. The integrity of, and public confidence in, the criminal justice system would be undermined. Even in Duncan, Lord Simon agreed that the Government should not suppress evidence that is relevant to the defence of an accused in a criminal trial.\textsuperscript{80} The reverse was equally true: the Government should not

\textsuperscript{74} Ibid at 40 (Gibbs ACJ), 63 (Stephen J), 97 (Mason J).
\textsuperscript{75} Ibid at 97-98 (Mason J).
\textsuperscript{76} The public interest rationales underpinning Cabinet secrecy are discussed in Chapter 1, supra at 27-32.
\textsuperscript{77} Jonathan Cape, supra note 63 at 492: “the degree of protection afforded to cabinet papers and discussion cannot be determined by a single rule of thumb. Some secrets require a high standard of protection for a short time. Others require protection until a new political generation has taken over.”
\textsuperscript{78} Whitlam, supra note 68 at 98 (Mason J). See also Ibid at 46 (Gibbs ACJ).
\textsuperscript{79} Eagles, supra note 61 at 278.
\textsuperscript{80} Duncan, supra note 2 at 591. See also Snider, supra note 45; Waldron, supra note 47; House of Lords Debates, supra note 42.
suppress evidence that is relevant to the prosecution of an accused, especially a Minister. Doing so would be the same as to conferring an immunity from criminal liability to Ministers, thus placing them above the law, a result which would be inconsistent with the purpose of the PII doctrine. Indeed, “a rule [...] designed to serve the public interest [should not] become a shield to protect wrongdoing by Ministers in the execution of their office.”

The US Supreme Court in *United States v Nixon* (1974)\(^{82}\) inspired the reasoning of the High Court. During the Watergate scandal, seven persons were indicted by a grand jury for various criminal offenses, including conspiracy to obstruct justice. President Richard Nixon was named as a coconspirator. The Special Prosecutor issued a subpoena for the production of tapes and documents revealing sensitive communications between the President and his advisors. In what looked like a desperate attempt to avoid criminal liability, Nixon claimed an absolute immunity from production based on the doctrine of separation of powers under the US Constitution. The claim was rejected by the US Supreme Court: the immunity was relative, not absolute, and could be overruled in the public interest. It was the role of the judicial branch, as the ultimate interpreter of the Constitution, to define its proper scope.\(^{93}\) The tension between the public interest in the protection of Presidential secrecy and the public interest in the prosecution of offenses was resolved in favour of the latter. Under the circumstances, the President’s “generalized” assertion of immunity ultimately had to yield to the “demonstrated, specific need for evidence in a pending criminal trial.”\(^{84}\)

Despite the dissimilarities between the US presidential system and the Westminster parliamentary system, this statement could be applied by analogy to *Whitlam*. In both cases, there were allegations that the highest public official had been involved in the commission of a crime while in office. The evidence that could sustain the allegations was contained in records under the control of the executive branch of the State, members of which were under investigation. The executive objection to their production was based on a class claim, as opposed to a contents claim. The general need for Cabinet and Presidential secrecy did not

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\(^{81}\) *Whitlam*, supra note 68 at 47 (Gibbs ACJ). See also *ibid* at 56 (Stephen J), 100 (Mason J).


\(^{83}\) *ibid* at 706-07.

\(^{84}\) *ibid* at 712-13.
seem to outweigh the specific need for the evidence in criminal proceedings. To uphold the objection, without inspection, would have frustrated the prosecution and impaired the basic function of the Courts under the rule of law. The public confidence in the proper administration of justice required that the evidence be available to the Court so that the criminal charges could be dealt with. The decision to produce or suppress the evidence could not be left to those charged of the offense, nor to their political allies or opponents.

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

Another distinguishing feature pertained to the treatment of the documents by the Courts. After holding that the immunity was relative and that the weighing and balancing process seemed to favour production, the US Supreme Court decided that the tapes and documents should be inspected by a judge *in camera* and *ex parte*. The aim of the inspection was to identify the relevant and admissible extracts which would then be released to the prosecutor. In contrast, the High Court lifted the veil of secrecy over the Executive Council documents without inspection.85 This approach could be justified for the documents that had been tabled in Parliament, as their prior publication had destroyed the immunity,86 but not for the other documents, as it was not known whether they contained evidence of a crime.

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85 The Executive Council documents, unlike the Loan Council documents, were not inspected.
86 That is why the Government did not object to their production. See *Whitlam*, supra note 68 at 44-45 (Gibbs ACJ), 64 (Stephen J), 100-01 (Mason J). See also *Robinson*, supra note 6 at 339.
Two conclusions can be drawn from *Whitlam*. First, the High Court was correct in ruling that Cabinet immunity was relative and could be defeated. The justification behind the rule does not support an absolute immunity irrespective of the passage of time and the nature of the proceedings. The scope of the common law doctrine of Cabinet immunity is therefore consistent with the scope of the Cabinet secrecy conventions. Second, the High Court erred in ordering the production of Executive Council documents without inspecting them to assess their actual degree of relevance. Shortly after, the trial judge discharged the accused because “no *prima facie* case had been established” against them by the private prosecutor. This suggests that the documents sought did not contain any evidence of a crime. It is unreasonable to order the production of documents based on unsupported assertions: “By not insisting on a preliminary inspection the court may have opened the door to actions or prosecutions which are really fishing expeditions by the political opponents of the government of the day.” This risk is less serious in criminal proceedings, as it is unusual for private citizens to initiate a prosecution against public officials, but it is far more serious in civil proceedings, which can more easily be launched against the Government.

### 1.2.2 Scope of Cabinet Immunity in Westminster Jurisdictions

While *Conway* re-established the principle of judicial review for PII claims, *Whitlam* clearly extended the principle to Cabinet immunity claims. *Whitlam* was “the final step in the establishment of the fundamental concept that administrative action is subject to judicial review.” The next stage in the development of Cabinet immunity was to determine what level of deference should be afforded to Cabinet immunity claims. This subsection provides a comparative analysis of the scope of Cabinet immunity post-*Whitlam* with a focus on the decisions of the highest Courts in the United Kingdom, Australia, New Zealand and Canada. Two different approaches can be identified. The United Kingdom and Australia have taken a “deferential approach,” under which Cabinet documents are presumed immune and the onus is on the litigant to justify why they should be produced. New Zealand and Canada have taken

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87 The scope of the Cabinet secrecy conventions is discussed in Chapter 1, *supra* at 43-63.
88 Susan Campbell, “Recent Cases – Evidence” (1979) 53 Austl L J 212 at 212.
89 Eagles, *supra* note 61 at 276.
a “nondeferential approach,” under which Cabinet documents are not presumed immune and the onus is on the Government to justify why they should be withheld. The first approach favours the interest of good government while the second favours the interest of justice.

(1) Deferential Approach

*Burmah Oil Co Ltd v Bank of England* (1979)\(^1\) and *Air Canada v Secretary of State for Trade (No 2)* (1983)\(^2\) are the most relevant English cases.\(^2\) They did not raise the kind of “very special circumstances” found in *Nixon* and *Whitlam*; rather, they were civil proceedings in which it was alleged that the Government had done something wrong, but not criminally so.

In *Burmah Oil*, the Government was accused of unconscionable conduct. Burmah Oil had sold its shares in British Petroleum to the Government for a very low price to avoid bankruptcy. Soon after the deal was made, the shares’ price rose considerably on the stock market. Burmah Oil sought to have the sale set aside on the basis that Government had taken an unfair advantage of its financial difficulties. On discovery, Burmah Oil sought access to high-level documents to prove that some public officials had considered that the deal was unfair.

In *Air Canada*, the Government was accused of unlawful conduct. The Government had made the decision to increase the landing charges at Heathrow Airport to finance new infrastructures. A group of airlines challenged the decision on the basis that the increase was unlawful under the relevant statute because it was made for the purpose of reducing public sector borrowing, a purpose that was not recognized in the statute. On discovery, the airlines sought access to documents to establish the purpose of Government’s decision.

In both cases, the Government disclosed numerous documents related to the matters in question, but resisted the production of some of them based on a class claim. The issue was whether the production of *prima facie* relevant documents was necessary for the fair disposition of these cases. This raised the preliminary question of when should the Courts

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\(^1\) *Burmah Oil Co Ltd v Bank of England*, [1979] 3 All ER 700 (HL) [*Burmah Oil*].

\(^2\) *Air Canada v Secretary of State for Trade (No 2)*, [1983] 1 All ER 910 (HL) [*Air Canada*].
exercise their power to inspect documents subject to an immunity claim. The House of Lords stated that a court should not inspect the documents unless it is persuaded by the litigant that the documents would likely substantially support the allegations made. In *Burmah Oil*, a 4-1 majority of the House of Lords held that Burmah Oil had met the onus, but in *Air Canada* it unanimously held that the litigant had not met the onus. In the end, after inspecting the documents in *Burmah Oil*, it concluded that their production was unnecessary.

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

In Australia, Courts have likewise shown a high degree of deference toward Cabinet secrets. The Australian approach to Cabinet immunity stems from a joint interpretation of *Lanyon* and *Whitlam*: the first case established that Cabinet documents should not be produced except in “very special circumstances”; the second case provided an example of such circumstances. A deferential approach was taken in *Whitlam v Australian Consolidated*
Press (1985), where the former Prime Minister’s objection to answering questions on the substance of Cabinet discussions and deliberations was upheld. Blackburn CJ stressed that: “Cabinet secrecy is an essential part of the structure of government which centuries of political experience have created. To impair it without a very strong reason would be vandalism, the wanton rejection of the fruits of civilization.”$^{98}$

The most important post-Whitlam case was the High Court’s ruling in Commonwealth v Northern Land Council (1993).$^{99}$ The Northern Land Council, an aboriginal interest group, sought the rescission of an agreement made with the Government with respect to uranium mining on certain lands on the basis that Ministers acted in an unconscionable manner in breach of their fiduciary duties. On discovery, the Government gave the litigant access to the relevant records of Cabinet decisions, but not to the deliberations preceding these decisions. The deliberations had been recorded in 126 Cabinet notebooks, comprising thousands of pages. The litigant requested access to the notebooks to find evidence that would support its case. A 6-1 majority of the High Court upheld the immunity claim without inspection.

The High Court recognized the conventional justification supporting Cabinet secrecy. It held that the doctrine of collective responsibility “could not survive in practical terms if Cabinet deliberations were not kept confidential” and imported into the law of Cabinet immunity, the political justification behind the secrecy convention: “it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made.”$^{100}$

The documents sought were “documents which record[ed] the actual deliberations of Cabinet” (core secrets), as opposed to “documents prepared outside Cabinet […] for the assistance of Cabinet” (noncore secrets).$^{101}$ The notes written down in the Cabinet notebooks were used to draft the official records of Cabinet decisions, but did not provide a verbatim transcript of the proceedings. They could leave the reader with an incomplete or inaccurate

$^{98}$ *Whitlam v Australian Consolidated Press* (1985), 60 ACTR 7 at 15 [*Australian Consolidated Press*].


$^{100}$ *Ibid* at 615.

$^{101}$ *Ibid* at 614. The distinction between core and noncore secrets is discussed in Chapter 1, *supra* at 26.
picture of what had been said in the Cabinet room. While the events had taken place more than a decade earlier, the subject matter was still considered “current or controversial.” Hence, the notebooks were “[d]ocuments recording Cabinet deliberations upon current or controversial matters.”102 This is the most sensitive type of Cabinet documents.

Based on Lanyon, the High Court ruled that it would take “very special circumstances” to overcome the immunity and doubted that the production of such documents “would ever be warranted in civil proceedings.”103 The degree of injury sustained from the publication of “current or controversial” core secrets is so great that it is not likely to be outweighed, save in Nixon- or Whitlam-style prosecutions where it is needed to prove or disprove serious allegations of criminal conduct. The allegations made in Northern Land Council did not have the same degree of gravity. In addition, the High Court opined that the litigant could not, as a matter of logic, depend on the Cabinet notebooks to prove alleged actions or omissions that occurred “outside the confines of the Cabinet room.”104 While the notebooks broadly related to the case, it was unlikely that they would contain “crucial” evidence. Thus, the litigant had not met the onus to persuade the High Court to inspect the documents.

In Northern Land Council, the High Court adopted a deferential approach with respect to documents which recorded core secrets. What is unclear is whether it would have adopted the same approach if the litigant had sought access to documents which recorded noncore secrets. Before Northern Land Council, certain lower Courts had adopted a nondeferential approach when dealing with noncore secrets;105 however, these cases were inconsistent with Lanyon, in which the High Court had declined to inspect and order the production of noncore secrets in the absence of “very special circumstances.” Until Lanyon is overruled by the High Court, it is reasonable to assume that the Courts will be deferential toward Cabinet immunity claims whether the documents at issue reveal core or noncore secrets.106

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102 Northern Land Council, supra note 99 at 617.
103 Ibid at 618.
104 Ibid at 620.
(2) Nondeferential Approach

In New Zealand, over an eight-year period, between 1977 and 1985, the Courts went from one extreme to the other. Like the other jurisdictions examined, prior to Whitlam, the New Zealand Court of Appeal treated Cabinet immunity as an absolute immunity.\(^{107}\) That was the time when executive supremacy was still the rule for Cabinet secrets. Subsequently, after Whitlam, it transitioned to a deferential approach\(^ {108}\) before adopting a nondeferential approach\(^ {109}\). This change in attitude was a direct result of a larger movement toward open government in New Zealand following the adoption of the Official Information Act 1982.\(^ {110}\) Beforehand, official secrecy had been the principle, and public access to information, the exception; the passing of the Act reversed the thrust of the law. This factor, along with the increasing extension of State activities into the commercial sphere, the effect of which was deeply felt in a small State like New Zealand, loomed in the background.

In the leading case, *Fletcher Timber Ltd v Attorney-General* (1984), a corporation sued the Government for breach of a timber-cutting agreement and negligent misrepresentation after the Government adopted a new policy which limited the right to harvest timber. During the discovery process, the Government admitted that some Cabinet documents “related” to the matters in question, but objected to their production on the basis of Cabinet immunity. As in *Burmah Oil* and *Air Canada*, the issue was when the Court should exercise its power to inspect documents to decide whether their production should ultimately be ordered.

The New Zealand Court of Appeal held that when the documents subject to an immunity claim “relate” to the matters in question, the Court should normally inspect them to determine where the balance of public interest lies. The litigant did not have an onus to show that the documents would likely substantially support the allegations made. Rather, the onus was on the Government to convince the Court not to inspect the documents. To discharge the onus, the ministerial certificate should explain with “sufficient particularity”

\(^{107}\) *Tipene v Apperley*, [1978] 1 NZLR 761 at 764-65 (CA).


\(^{109}\) *Fletcher Timber Ltd v Attorney-General*, [1984] 1 NZLR 290 (CA) [*Fletcher Timber*].

\(^{110}\) *Official Information Act 1982* (NZ), 1982/156.
why the degree of injury is greater than the degree of relevance in the circumstances of the case. The Court will pay due deference to the certificate; however, “the influence of comity must not permit the Minister’s conclusion to become the substitute for informed judicial decision.” If the Court is “in doubt” or “uncertain” as to where the balance of public interest lies after reading the certificate, it should inspect the documents.

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

In Canada, at the provincial level, the development of the Cabinet immunity doctrine can be organized into three phases: the period of unsettled law (pre-1986); the adoption of a nondeferential approach in *Carey v Ontario* (1986); and the weakening of Cabinet immunity (post-1986). In the first period, Courts took different approaches toward Cabinet immunity. Some treated it as an absolute immunity and others as a relative immunity. Of the Courts that took the latter approach, some have adopted a deferential approach and others a nondeferential approach. The most relevant case in that period is *Smallwood v*

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111 *Fletcher Timber*, supra note 109 at 295 (Woodhouse P), 302 (Richardson J), 308 (McMullin J).
112 Ibid at 296 (Woodhouse P).
113 Ibid at 295, 297 (Woodhouse P), 302 (Richardson J), 308 (McMullin J).
114 *Carey v Ontario*, [1986] 2 SCR 637 [Carey].
116 Mannix v Alberta, [1981] 5 WWR 343 (CA); Somerville Belkin Industries Ltd v Manitoba, [1985] 5 WWR 316 (QB); New Brunswick Telephone Company Ltd v New Brunswick (1981), 33 NBR (2d) 238 (QB); British Canadian Medical Association v British Columbia (1983), 144 DLR (3d) 374 (CA); MacMillan Bloedel Ltd v British Columbia (1984), 16 DLR (4th) 151 (SC).
Sparling (1982). An investigative body had issued a subpoena ordering Joseph Roberts Smallwood, a former Newfoundland Premier, to testify under oath in the course of an investigation into a corporation. Smallwood challenged the subpoena on the basis that any information he could have about the corporation would have been obtained in his official capacity and would thus be subject to Cabinet immunity. The Supreme Court of Canada held that Smallwood’s immunity claim was overbroad and premature for it was not known at the time which questions would be asked and it could not be assumed that the information should be pre-emptively suppressed in the public interest. Wilson J recognized that Cabinet immunity was relative, not absolute, noting that “Mr. Smallwood cannot be the arbiter of his own immunity,” for this was the role of the Courts. Yet, ultimately, she did not have to decide whether or not specific Cabinet secrets should be disclosed. What remained unclear was whether the Supreme Court would adopt a deferential or nondeferential approach vis-à-vis Cabinet immunity claims. That issue would be settled four years later in Carey.

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

Four years of litigation ensued during which all levels of Courts commented upon the Cabinet immunity doctrine. The range of interpretations was diverse. In the Ontario High

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119 Ibid at 708 (Wilson J).
Court, Catzman J took note of the “unsettled state of the law” and quashed the subpoena, without inspection, thus treating the immunity as if it were absolute.\textsuperscript{120} In the Ontario Divisional Court, White J denied absolute immunity in favour of the deferential approach asserted in \textit{Lanyon}. Yet, in his view, the “very special circumstances” required to defeat the relative immunity were not limited to allegations of criminal conduct, as in \textit{Nixon} and \textit{Whitlam}; they also included: “malfeasance, misfeasance, nonfeasance, irregularity or other improprieties in the conduct of the members of Cabinet or those reporting to Cabinet, of which the documents in issue would be proof.”\textsuperscript{121} At the Court of Appeal, Thorson JA agreed that Cabinet immunity was not absolute, but found White J’s test unhelpful as most civil proceedings against the Government contain allegations that public officials did something wrong. There is nothing “very special” about such allegations. Thorson JA preferred the deferential approach asserted in \textit{Burmah Oil} and \textit{Air Canada}, which imposed on the litigant the onus of showing that the documents would likely substantially support the allegations made.\textsuperscript{122} In the end, whichever test was applied, Carey failed to persuade the lower Courts to inspect the documents.

At the Supreme Court of Canada, La Forest J put the final nail in the coffin of the absolute immunity doctrine by stating that it would be “contrary to the constitutional relationship that ought to prevail between the executive and the courts in this country” to remove from the judicial branch the power to determine the issue.\textsuperscript{123} In addition, La Forest J rejected the Australian and British deferential approaches. The first on the basis that it seemed too restrictive to limit the disclosure of Cabinet documents to cases involving serious allegations of criminal conduct. The second on the basis that it was unfair to impose on litigants the onus of showing that the documents would likely substantially support the allegations made, because they had no access to the documents and did not know their contents. La Forest J favoured New Zealand’s nondeferential approach: the onus was on the Government to persuade the Court that inspection was not necessary. In \textit{Carey}, the onus had not been met. Indeed, the documents sought were no longer “current or controversial”\textsuperscript{12}

\begin{footnotesize}
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\item[\textsuperscript{120}] Carey v Ontario, [1982] OJ No 3437 (HC).
\item[\textsuperscript{121}] Carey v Ontario, [1982] OJ No 3509 at para 15 (DC).
\item[\textsuperscript{122}] Carey v Ontario, [1983] OJ No 3160 at para 78 (CA).
\item[\textsuperscript{123}] Carey, supra note 114 at 654.
\end{itemize}
\end{footnotesize}
years had passed and a new Ministry had been elected) and related to a subject that was not very sensitive (tourism policy). Plus, the documents seemed relevant and could expose some form of “government misconduct” (breach of contract and unconscionable action).

While La Forest J’s ruling in Carey must be applauded in many respects, it nonetheless contained three weaknesses. First, La Forest J’s definition of “Cabinet documents” was too vague and broad as it included all “documents prepared by government departments [...] formulating government policies.”\(^\text{124}\) Not all documents “formulating government policy” are Cabinet documents; to qualify they must be closely linked to the collective decision-making process. Furthermore, La Forest J failed to recognize that Cabinet documents are not all equally sensitive: documents which reveal core secrets (views and opinions) are more sensitive than documents which reveal noncore secrets (facts and background information). Both as a political and legal matter, core secrets deserve more protection than noncore secrets. Yet, in Carey, all the documents were treated the same.\(^\text{125}\)

Second, La Forest J did not give much weight to the rationales behind Cabinet secrecy, with the exception of the efficiency rationale. The main reason for the protection of Cabinet secrecy, the solidarity rationale, was almost totally ignored. As for the candour rationale, he did not dismiss it, but said that it was “easy to exaggerate its importance” and only deserved “some weight.”\(^\text{126}\) In my opinion, while the candour rationale does not support an absolute immunity for low-level documents which reveal public service views, it does support a relative immunity for high-level documents which reveal ministerial views. Confidentiality has always been accepted by the Courts, without the need for any empirical confirmation, as a necessary condition to preserve the candour of solicitor-client discussions, as well as jury and judicial deliberations.\(^\text{127}\) Why should it be doubted in respect of Cabinet deliberations? The candour rationale should be given “full weight,” not just “some weight.”

\(^{124}\) Ibid.

\(^{125}\) Of the 35 documents over which Cabinet immunity was claimed, 14 seemed to be true Cabinet documents. Of the 14 documents, 11 seemed to contain core secrets (notes and minutes of Cabinet meetings; ministerial recommendations), and three noncore secrets (submissions to Cabinet; reports of Cabinet meetings).

\(^{126}\) Carey, supra note 114 at 657.

\(^{127}\) For solicitor-client discussions, see Blank v Canada (Minister of Justice), 2006 SCC 39, [2006] 2 SCR 319 at para 26. For jury deliberations, see R v Pan; R v Sawyer, 2001 SCC 42, [2001] 2 SCR 344 at para 50. Finally,
Third, La Forest J gave litigants a master key to unlock the doors of the Cabinet room. All they must do is to allege "government misconduct." Carey’s allegations of breach of contract and unconscionable conduct weighted in favour of disclosure, and other rulings have since extended “government misconduct” to allegations of tortious conduct.128 If this approach is right, litigants can have access to Cabinet documents in any civil proceedings in which it is alleged that the Government did something wrong, even if the action or omission seems low on the scale of gravity. This cannot be right as it would totally undermine Cabinet immunity. To have an impact on the outcome of the assessment process, the allegations of government misconduct should be supported by some prima facie evidence. Moreover, the Courts should distinguish between various types of government misconduct with different degrees of gravity (from a breach of contract or tortious conduct, to an unlawful conduct to a criminal offense). It should not be enough for a litigant to make an unsupported allegation of breach of contract against the Government to gain free access to sensitive information.

These weaknesses led to an improper weighing and balancing of the public interest. Following the Supreme Court’s decision, the documents were sent back to the High Court for inspection. Catzman J dismissed the Government’s claim that the documents were irrelevant and ordered their production “without exception or excision.”129 Cabinet documents were filed at the trial and Ministers testified; the substance of their deliberations was published in the newspapers.130 In his reasons for judgment, Holland J quoted from Cabinet documents, including notes of a Cabinet meeting recording discussions and debates among Ministers on whether the Government should take over the Minaki Lodge. Did the documents contain any information supporting Carey’s allegations of breach of contract and unconscionable action? As Holland J dismissed the allegations on the merits, the answer was negative.131 While the

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128 Leeds v Alberta (Minister of the Environment) (1990), 69 DLR (4th) 681 (QB) [Leeds].
documents related to the case, they did not contain probative and material evidence. This suggests that the High Court may have failed to properly assess the documents’ degree of relevance before ordering their production to Carey. As a consequence, Cabinet secrets may have been unnecessarily disclosed in this landmark case.

The nondeferential treatment of Cabinet immunity by the Supreme Court in Carey made it difficult for provincial Governments to prevent the production of Cabinet secrets in court. In the post-Carey cases in which Cabinet immunity was a live issue, the Courts almost systematically ordered the production of Cabinet secrets. After Carey, the main criterion is the relevancy of the information: if it falls within the applicable standard of relevance on discovery, production will ensue. However, it is unclear whether the production of Cabinet secrets was necessary to the fair disposition of any of these cases.

While Carey has weakened Cabinet immunity at the provincial level, the doctrine remains pertinent. This conclusion is based on two considerations. First, in the period post-Carey, it appears that the Courts primarily ordered the production of Cabinet documents recording noncore secrets (that is, factual and background information submitted to Cabinet during the decision-making process) and production was ordered only after the Government

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133 There is insufficient data about the use of Cabinet documents as evidence in these cases to draw any solid conclusion. But, in at least two cases following Carey, supra note 114, the litigant lost on the merits. This suggests that the Cabinet documents did not support the litigants’ allegations and may have been produced in vain. See Johnston v Prince Edward Island, [1995] PEIJ No 32 (SC); Winter v Newfoundland, [2004] NJ 210 (SC).
had made the underlying decision public. The Courts thus seem to have resisted the urge to order the production of core secrets (that is, Cabinet discussions and deliberations):

[T]he documents which will be disclosed by my Order do not disclose what was discussed by the Cabinet. Rather, the documents relate to what was before the Cabinet when decisions were taken by it. Accordingly, the disclosure of the documents should in no way impede the active debate that one would expect at the Cabinet table.\textsuperscript{134}

This position is consistent with the constitutional conventions and the deferential approach taken by the High Court of Australia in \textit{Northern Land Council} in relation to core secrets. It is therefore possible that the Courts will limit the nondeferential approach to noncore secrets, although this distinction was not made explicit in \textit{Carey}.

Second, in some of the cases after \textit{Carey}, the Courts imposed conditions to preserve the secrecy of Cabinet documents when production was ordered.\textsuperscript{135} Under these conditions: the documents were marked confidential and access was restricted; the evidence was heard \textit{in camera}; and the litigants and their counsel signed confidentiality undertakings and agreed to return the documents at the end of the litigation. Conditions are a means of giving litigants access to the documents they need to make their case while limiting the scope of their publication. Conditions should be imposed each time the Courts conclude that the interest of justice outweighs the interest of good government so as to minimize the degree of injury. The Courts’ handling of core secrets and their readiness to impose conditions to protect the secrecy of Cabinet documents, suggest that Cabinet immunity is still relevant in Canada.

To sum up, in Section 1, I have reviewed the rise and fall of the doctrine of absolute PII and Cabinet immunity. The shift from absolute to relative immunity, and from executive to judicial supremacy, took place in a time where the increasing extension of States activities led to demands for more protection of individual rights and open government. It is now clear that the judicial branch should have the final word on which government secrets, including

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  \item \textsuperscript{134} \textit{Health Services}, supra note 132 at para 39. See also \textit{Johnston}, supra note 132 (SC); \textit{BC Teachers’ Federation}, supra note 132; \textit{Anderson v Nova Scotia (Attorney General)}, [2014] NS] No 96 (SC). Even the Marshall Inquiry refused to violate the anonymity of the personal views voiced by Ministers in the privacy of the Cabinet room. See \textit{Marshall}, supra note 132.
  \item \textsuperscript{135} \textit{Can Am Simulation}, supra note 132 at para 55; \textit{Health Services}, supra note 132, Schedule 1; \textit{Northern Transportation}, supra note 132, Schedule 1.
\end{itemize}
Cabinet secrets, can be produced. From a rule of law perspective, it is the role of the judicial branch to decide which evidence should be admitted in legal proceedings, not the executive branch. And the judicial branch is in a better position to fairly weigh and balance the competing aspects of the public interest as it is independent and impartial. Other factors, such as the passage of time and the nature of proceedings, militate against the recognition of an absolute immunity for Cabinet secrets. At the same time, it must be recognized that the executive branch is more efficient and has greater expertise to assess the degree of injury to the interest of good government which could result from production. Yet, while its position is entitled to deference, there is no consensus as to what the level of deference should be. English and Australian Courts tend to be deferential while New Zealander and Canadian Courts tend not to be. The nondeferential approach almost systematically leads to the production of provincial Cabinet documents in Canada, although a line of cases has tried to mitigate its consequences. The question of deference is connected to the manner in which PII claims should be assessed by the Courts.

2. ASSESSMENT OF PUBLIC INTEREST IMMUNITY CLAIMS

Once it is accepted that the judicial, rather than the executive, branch should have the final word about the validity of PII claims, the question becomes: how should PII claims, especially Cabinet immunity claims, be assessed by the Courts? Section 2 will address that question. It is divided into two subsections which will examine, respectively, the abstract and actual assessment of PII claims. “Abstract assessment” refers to the discovery and objection stages: the stages unfolding before the judge has seen the documents subject to PII. “Actual assessment” refers to the inspection and production stages: the stages unfolding after the judge has seen the documents subject to PII. Each stage gives rise to a specific line of inquiry. Which standard of relevance should govern the disclosure of documents on discovery? When should the Courts inspect documents subject to PII? Which approach should the Courts adopt to weigh and balance the competing aspects of the public interest? When should the Courts order production of documents and under which conditions? I will answer these questions

through a new rational approach to PII made of four pillars: a narrow discovery standard; an executive onus of justification; a cost-benefit analysis; and a judicial duty to minimize injury.

2.1 Abstract Assessment of Public Interest Immunity Claims

2.1.1 Discovery Stage: Identifying the Relevant Documents

The substantive law of PII is conceptually distinct but nonetheless connected to the procedural law of discovery. Disputes about access to government documents can only arise if the parties are aware of the existence of the documents. Thus, as a matter of law, in civil proceedings, each party must disclose to the other party the basis of his or her claim and all documents within his or her control relevant to the claim after the pleadings (statements of claims or defence) have been filed. The documents must be listed in an affidavit of documents and can be inspected by the other party, unless a valid objection to their production is made. While the disclosure duty is continuous during the proceedings, it is usually fulfilled during the discovery process. The discovery process is designed to promote fair hearing rights and preserve judicial resources in three ways: (1) it enables each party to know the case that will be presented by the other party, assess its strengths and weaknesses, and prepare an effective answer; (2) it narrows the issues to be decided at trial by allowing the parties to obtain admissions of fact from each other; and (3) it facilitates out of court settlements.\(^{137}\)

Pursuant to the principle of access to evidence, all relevant evidence must be available to the Court in the search for the truth. What is relevant can only be assessed in relation to the allegations made by the parties in their pleadings. The concept of relevance is twofold: it includes factual relevance and legal relevance. “Factual relevance” refers to the probative value of the evidence: whether, as a matter of logic and experience, the evidence assists in proving or disproving a particular fact.\(^{138}\) Evidence has probative value if it makes the existence of a fact more or less probable, or more or less likely to be true.\(^{139}\) “Legal relevance”

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refers to the materiality of the evidence: whether the evidence assists in proving or disproving a fact that is significant and in dispute between the parties.\textsuperscript{140} Evidence is material if it is related to an element of the cause of action or defence over which the parties disagree.\textsuperscript{141} Only evidence that meet the criteria of factual and legal relevance can be admitted at the trial.\textsuperscript{142}

Given the exploratory nature of the process, the standard of relevance on discovery is not necessarily limited to factual and legal relevance. Two standards can be identified: semblance of relevance; and simple relevance. The “semblance of relevance standard” affords the broadest scope of discovery. Under this standard, each party must disclose to the other party all documents “relating to any matter in question in the action.”\textsuperscript{143} Therefore, documents must be disclosed if they “seem” relevant in the sense that they are somehow connected to the subject matter of the case. Four categories of documents must be disclosed under this standard: (1) documents on which a party intends to rely upon in support of his or her case; (2) documents which adversely affect a party’s case or support another party’s case; (3) documents which are part of the story or background of the case, but do not fall under categories 1 and 2; and (4) documents “which may fairly lead him to a train of inquiry” that may elicit documents under categories 1 and 2.\textsuperscript{144} The first two categories usually lead to the disclosure of a limited number of factually and legally relevant documents while the last two categories usually lead to the disclosure of a large number of non-factually and non-legally relevant documents, especially in complex litigation where there is a lack of cooperation between the parties. In the information age, where the volume of documents is

\textsuperscript{140} Daphne A Dukelow, \textit{The Dictionary of Canadian Law}, 4th ed (Toronto: Carswell, 2011) \textit{sub verbo} “material”.

\textsuperscript{141} To identify legally relevant evidence, ask: “[I]s the fact that the evidence tends to prove or disprove legally significant in establishing an element of the cause of action, offence, or defence at issue?” See Stewart, \textit{Evidence, supra} note 139 at 7.

\textsuperscript{142} Edward W Cleary, \textit{McCormick on Evidence}, 3rd ed (St Paul, Minn: West, 1984) at 544: “In sum, relevant evidence is evidence that in some degree advances the inquiry. It is material and probative. As such, it is admissible, at least prima facie.”

\textsuperscript{143} The term “relating to” can be substituted by “touching” or “regarding”; the term “any” by “every”; and the term “in question” by “in issue.” Whatever combinations of these terms is adopted in any given jurisdiction, the semblance of relevance standard remains equally broad.

higher than ever, the parties run the risk of being “lost in a plethora of irrelevancies,” thus increasing the length and costs of litigation. The semblance of relevance standard, which was designed to prevent “trial by ambush,” now often leads to “trial by avalanche.” This situation is inefficient and undermines the principle of access to justice.

While semblance of relevance has been the classic standard in Westminster jurisdictions to set out the scope of discovery, there has been a movement over the past two decades toward a narrower standard, that is, simple relevance. Under the “simple relevance standard,” the parties must disclose documents within their control on which they intend to rely (category 1) and which adversely impair their case (category 2). Background documents (category 3) and “train of inquiry” documents (category 4) need not be disclosed. The simple relevance standard has been adopted in the United Kingdom, Australia, New Zealand, and Canada (in federal, Alberta, Nova Scotia, Ontario and Saskatchewan courts), even though the language used in the applicable legislation varies.

Despite this evolution, there is some evidence that the Courts, accustomed to the semblance of relevance standard, are reluctant to apply the narrower simple relevance standard. The semblance of relevance standard remains in force in eight Canadian jurisdictions: British Columbia, Manitoba, Newfoundland, New Brunswick, Northwest Territories, Nunavut, Prince Edward Island and Yukon.

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146 Lord Woolf, supra note 144, ch 21: “The result of the Peruvian Guano decision was to make virtually unlimited the range of potentially relevant […] documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is.”


148 Megan Marrie, “From a ‘Semblance of Relevance’ to ‘Relevance’: Is it really a New Scope of Discovery for Ontario?” (2011) 37:4 Advocates’ Q 520. Based on a review of the relevant case law, Marrie argues that the shift toward the simple relevance standard in Canada may not have the intended effect of narrowing the scope of discovery, for the Courts tend to revert to the classic semblance of relevance standard through judicial interpretation. Only Alberta Courts seem to properly apply the simple relevance standard. In her view, the principle of proportionality, entrenched in the provincial rules of civil procedure, rather than the simple relevance standard, may be the Court’s “trump card” to narrow the scope of discovery.
Whichever standard of relevance is applied, the obligations imposed upon the parties during the discovery process should remain proportional to the importance of the case.

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

I have focused until now on disclosure obligations in civil, as opposed to criminal, proceedings. In criminal proceedings, only the prosecutor is bound to disclose the relevant evidence within his or her control to the accused before trial, subject to any applicable privilege or immunity. Relevance is assessed in relation to the pleadings (the information or indictment), as well as the elements of the offense and the defence. The purpose of disclosure is to ensure that the accused knows the case against him or her so as to be able to make full answer and defence. Evidence falls within the standard of relevance if “there is a reasonable possibility that [it] might be used by the accused in making full answer and defence or in making decisions about the conduct of the case.” The standard of relevance includes any evidence that tends to weaken the prosecution’s case or strengthen the


defence’s case; however, it is not so broad as to permit fishing expeditions. Considering the nature of the interest at stake (the liberty interest) as well as the burden of proof (beyond reasonable doubt), this broad standard of relevance is appropriate.

2.1.2 Objection Stage: Assessing the Strength of the Objection

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

(1) How Should a PII Claim Be Made?

Whether access to government documents is sought prior to the commencement of trial (on discovery) or during trial (by subpoena) the process to object to their production is the same. While, in principle, anyone (even the judge) can raise PII in court, the claim will not be vindicated without the support of the Government. The Government can only make a PII claim if it has come to the conclusion, after pre-balancing the competing aspects of the

152 “[The question of PII] is of high constitutional importance, for it involves a claim by the executive to restrict the material which might otherwise be available for the tribunal”: *Duncan, supra* note 2 at 588. In the same vein, Lord Denning described PII as a “principle of our constitutional law which is to be observed in the administration of justice”: *Grosvenor Hotel, supra* note 3 at 360. See also *Cooper, supra* note 3 at 5-8, 38.

public interest, that the interest of good government outweighs the interest of justice. The level of formalism required to make a valid PII claim has decreased over time. Before *Conway*, strict procedural safeguards were established to control the use of PII. To ensure political accountability for the decision, the Courts required that the claim be made under oath in an affidavit by a Minister who, after reading each document, had formed the opinion that production would be injurious.\textsuperscript{154} After *Conway*, these safeguards have become redundant to the end of ensuring procedural fairness, as the accountability for the decision to suppress evidence has shifted from the executive to the judicial branch.\textsuperscript{155} PII claims can now be made by public servants by way of certificate, without the sanction of an oath.\textsuperscript{156}

Who should make the objection when access to Cabinet documents is sought in court? While a certificate objecting to the production of Cabinet documents in court can be made by any Minister or Deputy Minister, on behalf of the Government, it should normally be made by the Secretary to the Cabinet. As custodian of the Cabinet documents of past and current Ministries, the Secretary to the Cabinet is the official with the most expertise to assess the degree of injury to the interest of good government resulting from production.\textsuperscript{157} As the most senior public servant, his or her decision is expected to be made with the public interest in mind, rather than political expediency. Plus, a centralized process promotes uniformity in the exercise of the duty to claim Cabinet immunity. To properly assess the competing aspects of the public interest, the Secretary should seek and obtain legal advice from a counsel who is not otherwise involved with the case, so as to minimize the risk that the advice be tainted by improper considerations of litigation strategy.\textsuperscript{158}

What kind of information should the certificate contain to enable the Government to satisfy the onus of justification? When *prima facie* relevant Cabinet documents are identified, the onus is on the Government to explain why they should be withheld. Whether the objection will succeed depends on the cogency of the reasons articulated to justify it. The

\textsuperscript{154} *Robinson*, supra note 6 at 339-41; *Duncan*, supra note 2 at 593.

\textsuperscript{155} *Cooper*, supra note 3 at 108.

\textsuperscript{156} See, for example, *Carey*, supra note 114.

\textsuperscript{157} The role of the Secretary to the Cabinet as custodian of Cabinet documents is discussed in Chapter 1, *supra* at 32-43.

\textsuperscript{158} *Cooper*, supra note 3 at 61.
Government’s position is communicated to the Court by way of certificate, which should contain: a sufficient description of the documents; an assessment of the degree of relevance; and an assessment of the degree of injury.\textsuperscript{159}

First, the certificate should contain a sufficiently detailed description of the documents to establish that they are, in fact, Cabinet documents. A standard description should identify the nature of each document\textsuperscript{160} as well as its author, recipient, subject matter, and date.\textsuperscript{161} In addition, to facilitate the assessment of the claim by the Court, the certificate should state, for each document: whether or not it is an adverse document; whether or not it contains core secrets; and whether or not it pertains to a policy for which a final decision has been made and announced.

Second, the certificate should provide an assessment of each document’s degree of relevance, which depends on its factual and legal relevance.\textsuperscript{162} The assessment is crucial in jurisdictions where the semblance of relevance standard is in force to separate adverse documents from background and “train of inquiry” documents. In jurisdictions that have adopted the simple relevance standard, it can be presumed that the documents listed in the certificate are adverse. Litigants need facts to support their claims and are likely to dedicate resources to obtain access to documents which undermine their opponent’s case or support their own case: documents with a high degree of relevance.\textsuperscript{163} The Government will need to advance very cogent reasons to persuade the Court to suppress these documents, as their production is likely necessary to the fair disposition of the case. In contrast, litigants are less likely to deplete resources to gain access to background and “train of inquiry” documents, as their degree of relevance is lower. It should be easier for the Government to persuade the Courts to suppress them, as their production is likely unnecessary to the fair disposition of

\textsuperscript{159} Certificates are used in proceedings to convey the Government’s position to the Court while affidavits are used to convey witnesses’ testimonies. Unlike an affidavit, a certificate does not expose the person who signs it to cross-examination. See Uniform Law Conference of Canada, \textit{Report of the Federal-Provincial Task Force on Uniform Rules of Evidence} (Toronto: Carswell, 1982) at 448, 460.

\textsuperscript{160} Is the document an official or nonofficial Cabinet document? Is it a memorandum, a submission, a minute, a record of decision, a briefing note, a letter, a PowerPoint presentation, an email or draft legislation?


\textsuperscript{162} Cooper, \textit{supra} note 3 at 39-40, n 73.

the case. A rational assessment of the document’s degree of relevance will assist the parties and the Court in centering the debate on the documents that are most relevant.

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

A certificate containing a sufficient description of the documents as well as a tailored assessment of the degree of relevance and degree of injury will be of assistance to the Court in deciding whether or not to uphold the objection. It will demonstrate that the Government has considered the relevant factors and pre-balanced the competing aspects of the public interest. If the level of information provided in the certificate is insufficient, that is, if the

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164 Fletcher Timber, supra note 109 at 295 (Woodhouse P).
165 In New Zealand and Canada, the Courts have been unconvinced by assertions of immunity based on standard formulae restating the Cabinet secrecy rationales without addressing the particular circumstances of the case. See Fletcher Timber, supra note 109; Carey, supra note 114.
166 Whitlam, supra note 68; Australian Consolidated Press, supra note 98 at 16.
(2) When Should the Court Inspect the Documents?

When the Government has made a *prima facie* valid objection to the production of Cabinet documents, the Court must decide whether or not to inspect them. This raises two questions: should inspection be the rule or the exception; who bears the onus of persuading the Court to inspect the documents? If inspection is the exception, the documents are presumed immune and the onus of persuading the Court to inspect them is on the party seeking production, the litigant (the deferential approach). But, if inspection is the rule, the documents are not presumed immune and the onus of persuading the Court not to inspect them is on the party resisting production, the Government (the nondeferential approach).

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

[I]n order to persuade the court even to inspect documents for which public interest immunity is claimed, the party seeking disclosure ought at least to satisfy the court that the documents are very likely to contain material which would give substantial support to his contention on an issue which arises in

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167 For example, in *Carey*, *supra* note 114, the Cabinet immunity claim had several flaws: the descriptions of the documents were incomplete; there was no assessment of the degree of relevance; and the assessment of the degree of injury was not tailored to the circumstances of the case. The Government thus failed to persuade the Courts to uphold the claim and was forced to produce many Cabinet documents.

168 *Burmah Oil*, *supra* note 91 at 711. Lord Wilberforce stated that the Courts should only inspect the documents “in rare instances where a strong positive case is made out, certainly not on a bare unsupported assertion by the party seeking production that something to help him may be found.”

169 Ibid at 721 (Lord Edmund-Davies).

170 Ibid at 726 (Lord Keith).
the case, and that without them he might be ‘deprived of the means of... proper presentation’ of his case.\textsuperscript{171}

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

What troubles me about [the deferential] approach is that it puts on a plaintiff [the] burden of proving how the documents, which are admittedly relevant, can be of assistance. How can he do that? He has never seen them; they are confidential and so unavailable. To some extent, then, what the documents contain must be a matter of speculation.\textsuperscript{172}

It is a Catch-22 situation as the onus can hardly be met without access to the documents.\textsuperscript{173} In most cases, the only fact that the party seeking production will know for certain is that the documents are \textit{prima facie} relevant, in the sense that they fall within the applicable standard of relevance. In jurisdictions where the semblance of relevance standard applies, their actual degree of relevance will be a matter of speculation. The party seeking production should thus only be required to establish that: he or she has a \textit{prima facie} valid case; and the documents are \textit{prima facie} relevant to the case. The party resisting production should then bear the onus of filing a valid objection and persuading the Court to sustain it.

To convince the Court to sustain the objection without inspection, the party resisting production must clearly establish that production is unnecessary to the fair disposition of

\begin{footnotes}
\item \textsuperscript{171} \textit{Air Canada}, \textit{supra} note 92 at 917. Lord Edmund-Davies and Lord Wilberforce agreed with Lord Fraser.
\item \textsuperscript{172} \textit{Carey}, \textit{supra} note 114 at 678 (La Forest J).
\item \textsuperscript{173} Adam Tomkins, \textit{The Constitution after Scott: Government Unwrapped} (Oxford: Clarendon Press, 1998) at 176. The only case in which the onus was discharged is \textit{Burmah Oil}, \textit{supra} note 91. Yet, after inspecting the documents, the Law Lords held that their production was unnecessary to the fair disposition of the case.
\end{footnotes}
the case. Two scenarios are possible. First, the documents sought do not have substantial factual and legal relevance (such as background and "train of inquiry" documents). Hence, the Government can reasonably contend that the litigant’s private interest and the public interest in the proper administration of justice will not be injured if the claim is sustained. Second, the documents sought have substantial factual and legal relevance (such as adverse documents), but their production is unnecessary because: they are inadmissible for another reason;\textsuperscript{174} the Government has admitted the fact that the documents would prove;\textsuperscript{175} or an alternative means of proof is available to the party seeking production.\textsuperscript{176} In such cases, the Court can sustain the objection without risk of denial of justice. The concerns about fishing expeditions and judicial economy are resolved in a principled and fair manner. Whether the Court should forego inspection depends on the importance of the case, which can be assessed in relation to the interests of the litigant and the Government.

With respect to the litigant’s interest, a distinction can be made between three types of proceedings. First, in civil proceedings of a private nature, the litigant’s interest can be weighed in terms of economic and reputational value. If the litigant is deprived of the proper means to present his or her case, there is a danger of expropriation without compensation.\textsuperscript{177} In such cases, the interest at stake can be assigned a value (low, moderate or high) in relation to the amount of money claimed. Second, in civil proceedings of a public nature, in addition to the litigant’s interest, the public interest in upholding the rule of law will arise. If the litigant is deprived of the proper means to present his or her case, there is a danger of abuse of power or unlawful action.\textsuperscript{178} In such cases, the interest at stake will vary from moderate to high. Third, in criminal proceedings, the accused’s interest can be weighed in terms of stigma and loss of liberty. If the accused is deprived of the proper means to present his or her case, there is a risk of convicting an innocent. In such cases, the interest at stake will be high. In sum, the higher the litigant’s interest, the more reluctant should the Court be to

\textsuperscript{174} Stewart, \textit{Evidence, supra} note 139 at 5-7.
\textsuperscript{175} \textit{Ibid} at 14-15.
\textsuperscript{176} See, for example, \textit{Air Canada, supra} note 92.
\textsuperscript{177} \textit{Wade & Forsyth, supra} note 24 at 711.
forego inspection. If the interest at stake is moderate to high, as a rule, the Court should inspect the documents to preserve the public confidence in the administration of justice.

With respect to the Government’s interest, a distinction must also be made between three situations. First, in the cases where the Government does not have an interest in the outcome, the reasonable apprehension of bias, and the risk that it could suppress evidence for self-interested motives, will be low.179 Second, in the cases where the Government has an interest in the outcome, the reasonable apprehension of bias, and risk that it could suppress evidence for self-interested motives, will vary from moderate to high.180 Third, in the cases where the Government has an interest in the outcome and plausible allegations of criminal misconduct are made against public officials, the reasonable apprehension of bias, and the risk that it could suppress evidence for self-interested motives, will be high.181 In sum, the higher the reasonable apprehension of bias, the more reluctant should the Court be to forego inspection. If the Government’s interest is moderate to high, the Court should, as a rule, inspect the documents to preserve the appearance of justice.182

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

179 This situation is unlikely to arise as litigants usually seek access to Cabinet documents to prove a wrongful or unlawful government action. The Government always has an interest in the outcome of such cases.
180 This is the situation in which access to Cabinet documents is usually sought. Litigants will either allege a breach of private law against the Government acting as a commercial entrepreneur, or a breach of public law. See Burmah Oil, supra note 91; Air Canada, supra note 92; Fletcher Timber, supra note 109; Carey, supra note 114; Northern Land Council, supra note 99.
181 This situation is rare, but not unprecedented. See Nixon, supra note 82; Whitlam, supra note 68.
182 TRS Allan, “Discovery of Cabinet Documents: the Northern Land Council Case” (1992) 14:2 Sydney L Rev 230 at 238 [Allan, “Discovery of Cabinet Documents”]: “It is deeply antagonistic to the rule of law that central government should be able to resist discovery, without judicial evaluation of the claim to immunity, where it is itself implicated in the proceedings.”
available. Moreover, for the Court to sustain the objection without inspection, the litigant’s and the Government’s interests in the case must be low.

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

Finally, the onus of justification will not be discharged at all if the Government fails to make a *prima facie* valid objection, that is, if it fails to provide: a sufficient description of the documents; an assessment of their degree of relevance; or an assessment of the degree of injury that would result from production. Without this basic information, the Court will not have any firm basis upon which to sustain the objection. In this situation, the Court should first give the Government the opportunity to file a new certificate, before dismissing the objection. Even though the objection is invalid, production of the documents could still be injurious to the public interest and the Court has a duty to protect the public interest. Substance should prevail over form. However, if the Government persists in refusing to provide the basic information, the Court would be justified in dismissing the objection.

### 2.2 Actual Assessment of Public Interest Immunity Claims

#### 2.2.1 Inspection Stage: Weighing and Balancing the Public Interest

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

(1) Procedural Issues: In Camera and Ex Parte Proceedings

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

From a theoretical standpoint, enabling the litigant’s counsel to participate in the assessment of a PII claim, by giving him or her the opportunity to raise issues, tender proof and submit arguments, would be consistent with the nature of the adversarial process. From a practical standpoint, the inspection stage could be carried out more efficiently if counsel could inspect the documents and identify those on which he or she intends to rely upon. The debate would centre on the documents identified by counsel, rather than all the documents subject to the PII claim, therefore preserving scarce judicial resources. The Court would likely benefit from counsel’s informed submissions on the document’s degree of relevance and, as such, would be in a better position to assess the PII claim.

There are two noteworthy cases in which lower Courts ordered the production of sensitive documents for inspection by the litigants’ counsel before assessing PII claims. In

183 For reasons of fairness and to bolster the appearance of justice, the judge deciding the merits of the case should not, in principle, have knowledge of evidence that has not been seen by both parties.
184 Mewett, supra note 3 at 377; Lieberman, supra note 136 at 191-92.
the first case, the order was justified on the basis of the high volume of documents (126 Cabinet notebooks, containing thousands of pages) and the complexity of the issues.\textsuperscript{186} In the second case, the order resulted from the trial judge’s inability to assess the relevance of 41 documents without the assistance of submissions from the litigant’s counsel.\textsuperscript{187} In both cases, the Courts sought a confidentiality undertaking from counsel, who undertook not to reveal the contents of the documents inspected to anyone, not even their own clients. Breach of the undertaking would have constituted contempt of court as well as a professional misconduct. In the end, however, these two cases were reversed on appeal.\textsuperscript{188}

There are three considerations which militate against allowing the litigant’s counsel to inspect Cabinet document. First, it undermines the confidentiality of the documents and could thus ultimately undermine the PII doctrine. If it were sufficient to launch a lawsuit against the Government to open the doors of the Cabinet room, the proper functioning of our system of government would be at risk. The litigant’s counsel, especially when he or she is politically motivated, is precisely the type of persons against which Cabinet immunity is supposed to protect political actors. After all, “[w]ould a Cabinet speak freely, or keep full and accurate minutes, if it knew that the only people who would read those minutes were lawyers suing the government in respect of the very matters discussed?”\textsuperscript{189} In \textit{Northern Land Council}, the High Court recognized that judicial inspection without the assistance of the litigant’s counsel “may in some cases cast a heavy burden on the court, but it is unavoidable if confidentiality is to be maintained until a claim for immunity is determined.”\textsuperscript{190}

Second, by undertaking to preserve the confidentiality of the documents, the litigant’s counsel is placed in a difficult ethical situation insofar as his or her duty to the Court may conflict with the interest of his or her client.\textsuperscript{191} The aim of securing the best outcome for his

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\item \textsuperscript{186} \textit{Northern Land Council v Commonwealth} (1990), 102 ALR 110 (FC), affirmed \textit{Commonwealth v Northern Land Council} (1991), 103 ALR 267 (Full Court).
\item \textsuperscript{187} \textit{Pocklington Foods Inc v Alberta (Provincial Treasurer)}, [1992] A No 606 (QB).
\item \textsuperscript{188} \textit{Northern Land Council, supra} note 99; \textit{Pocklington Foods, supra} note 132 (CA).
\item \textsuperscript{189} \textit{Pocklington Foods, supra} note 132 at 5 (CA).
\item \textsuperscript{190} \textit{Northern Land Council, supra} note 99 at 620.
\item \textsuperscript{191} \textit{R v Basi}, 2009 SCC 52, [2009] 3 SCR 389 at para 46, where Fish J noted that litigants’ counsel “might feel bound to withdraw their representation, caught in a conflict between their duty to represent the best interests of their client and their duty to the court not to disclose or to act on the information heard \textit{in camera}.”
\end{itemize}
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or her client may lure counsel to make use of the information acquired during the inspection, and breach of his or her undertaking to the Court, if the PII claim is ultimately sustained. Unlike the Courts or the Government when dealing with PII claims, the litigant’s counsel has no formal duty to protect the public interest: he or she represents mainly private or partisan interests. One may also question the reliability of counsel’s undertaking not to share the information with his or her client. Given the cloak of solicitor-client privilege, how could a breach of the undertaking ever be established?

Third, in terms of expertise, the Court is well placed to assess the documents’ degree of relevance. The identification of factually and legally relevant evidence is at the centre of judicial expertise. The accomplishment of this function presupposes that litigant’s counsel has sufficiently defined the cause of action, framed the issues in dispute and identified the kind of evidence that would support his or her position. Provided that this condition has been fulfilled, the Court should be in a position to assess the documents’ degree of relevance without further assistance from counsel. As stated by TG Cooper, “counsel’s assistance at the inspection stage is most useful in the area where it is least required, that is, in discerning the relevance and materiality of the contents of the sensitive documents.”

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

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192 Cooper, supra note 3 at 94-95.
case would justify it and where the Court would otherwise be unable to properly assess the PII claim without the assistance of submissions on behalf of the litigant.

(2) Substantive Issues: Benefit and Cost of Production

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

1. How much injury would be caused to the executive interests by disclosing the evidence?
2. How much injury would be caused to the interests of justice by withholding the evidence?
3. Which interest should prevail?

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

193 de Smith & Brazier, *supra* note 43 at 611.
(A) Weighing the Benefit of Production: Degree of Relevance

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

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

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195 Cooper, supra note 3 at 80-82. See also Ex Parte Wiley, supra note 58 at 423-25 (Lord Templeman); Carey, supra note 114 at 671 (La Forest J).
196 Allan, “Discovery of Cabinet Documents” supra note 182 at 234.
197 Ex Parte Wiley, supra note 58 at 423 (Lord Templeman).
At one end of the spectrum, a document would have a high degree of relevance if it could be used to establish an element of the cause of action. For example, if the litigant alleges that the terms of a contract made with the Government are unconscionable and some of the documents inspected by the Court establish that public officials unreasonably sought to exploit the litigant’s vulnerabilities when the contract was formed, these documents would have a high degree of relevance, as they tend to establish the truthfulness of a significant fact in the action. At the other end of the spectrum, if the documents relate to the contract without supporting the litigant’s allegations of unconscionable conduct, their degree of relevance would be low. Under the proposed model, adverse documents would have a moderate to high degree of relevance; and background and “train of inquiry” documents would have a low degree of relevance. The degree of relevance would be nil in cases where: the documents do not meet the discovery standard; the documents are inadmissible for another reason; the facts that the documents would establish are not in dispute; or an alternative means of proof is available. Production of such documents would not foster the interest of justice.

(B) Weighing the Cost of Production: Degree of Injury

With respect to the interest of good government, the key factor is the sensitivity of the documents in relation to their contents and the timing of their production. On the first point, regarding contents sensitivity, three considerations must be examined: the level of the decision-maker; the nature of the policy; and the nature of the information. First, “[t]he

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198 Carey, supra note 114 at 670-73; Hodgson, supra note 23 at 172-73, 175-76.
weight of the public interest against [production] [...] will in general be stronger where the documents are Cabinet papers than when they are at a lower level,” because the Cabinet is the highest decision-maker within government.  

Second, the weight of the public interest against production will be stronger where the documents deal with subject matters such as international relations, national defence or national security, rather than the Government’s commercial and contractual activities. It will also be stronger where the documents deal with the formulation, rather than the implementation, of policy. Third, the weight of the public interest against production will be stronger where the documents reveal core secrets (views and opinions), rather than noncore secrets (facts and background information).

On the second point, regarding timing sensitivity, the main consideration is whether the development of the impugned policy is still ongoing or whether a final decision has been made and announced. The weight of the public interest against production will be stronger where the documents relate to the planning and development of a policy. Such documents are predecisional and deliberative: they reflect the give-and-take of opinion in the decision-making process, which will result in a final Cabinet decision. Their production, when there is a keen interest in the subject matter, before a final decision has been made and announced, will likely injure the decision-making process and the interest of good government. This applies to core and noncore secrets. After the planning and development stage has come to an end, and a final decision has been made and announced, or after a proposed policy has been abandoned, the weight of the public interest against production will be stronger where the documents reveal core secrets, rather than noncore secrets. From this moment on, the publication of factual information will not likely injure the interest of good government. But the publication of personal views expressed by Ministers while deliberating on government policy will likely injure the interest of good government as long as the political actors remain

199 Air Canada, supra note 92 at 917 (Lord Fraser). See also Jonathan Cape, supra note 63 at 495.
200 Robinson, supra note 6 at 337-38; Burmah Oil, supra note 91 at 715 (Lord Salmon), 720 (Lord Edmund-Davies).
201 Carey, supra note 114 at 671-72.
202 Northern Land Council, supra note 99 at 614-15. See also Bushnell, supra note 163 at 552: “The more the factual content and the less the opinion content the greater should be the tendency to disclose.”
203 Carey, supra note 114 at 670-71.
204 Whitlam, supra note 6 at 97 (Mason J); Cooper, supra note 3 at 45, n 87.
205 Carey, supra note 114 at 670-71.
in public life.\textsuperscript{206} The injury will decrease with the passage of time, when the policy involved is no longer current or controversial,\textsuperscript{207} a number of elections have been held,\textsuperscript{208} and changes of government have occurred,\textsuperscript{209} until the documents become purely of historical interest.\textsuperscript{210}

Considering that Cabinet documents are not a homogeneous class of documents, each document cannot be deemed equally sensitive.\textsuperscript{211} It is thus essential to conduct an individual assessment of each document’s level of sensitivity in relation to its contents and timing of production.\textsuperscript{212} The level of sensitivity can be weighed, in view of the contents of each document, by assigning a value from 0 to 3, where: 0 means that the contents of the document are not sensitive; 1 means that the contents of the document are slightly sensitive; 2 means that the contents of the document are moderately sensitive; and 3 means that the contents of the document are highly sensitive. The level of sensitivity can be weighed, in view of the timing of production of each document, by following the same process. By multiplying the value given to the contents of a document and the value given to the timing of production, we find its degree of injury. The degree of injury can range from 0 to 9, where: 0 means that production of the document is not injurious; 1 to 2 mean production of the document is slightly injurious; 3 to 4 mean that production of the document is moderately injurious; and 6 to 9 mean that production of the document is highly injurious. The degree of injury can be used to weigh the interest of good government or the cost of production. In principle, the Court should not decline to order production, unless the degree of injury is substantial,\textsuperscript{213} that is, moderate to high under the proposed model, which can be illustrated by the following scoring matrix:

\begin{align*}
\text{Degree of Injury} & \leq 0 \\
0 & \leq \text{Degree of Injury} < 1 \\
1 & \leq \text{Degree of Injury} < 2 \\
2 & \leq \text{Degree of Injury} < 3 \\
3 & \leq \text{Degree of Injury} < 4 \\
4 & \leq \text{Degree of Injury} < 5 \\
5 & \leq \text{Degree of Injury} < 6 \\
6 & \leq \text{Degree of Injury} < 7 \\
7 & \leq \text{Degree of Injury} < 8 \\
8 & \leq \text{Degree of Injury} < 9 \\
9 & \text{Degree of Injury} \geq 9
\end{align*}

\textsuperscript{206} \textit{Australian Consolidated Press}, supra note 98 at 16.
\textsuperscript{207} \textit{Whitlam}, supra note 68 at 46 (Gibbs ACJ), 98 (Mason J).
\textsuperscript{208} Jonathan Cape, supra note 63 at 496; \textit{Carey}, supra note 114 at 672-73.
\textsuperscript{209} \textit{Whitlam}, supra note 68 at 99-100 (Mason J); \textit{Carey}, supra note 114 at 672-73.
\textsuperscript{210} Conway, supra note 53 at 888 (Lord Reid).
\textsuperscript{211} Jonathan Cape, supra note 63 at 492; \textit{Whitlam}, supra note 68 at 41-42 (Gibbs ACJ).
\textsuperscript{212} Cabinet documents are no longer assessed only on the basis of their class to which they belong. As Cabinet immunity is relative, as opposed to absolute, it is necessary to take into account the specific contents of each document. See Allan, “Discovery of Cabinet Documents” supra note 182 at 232.
\textsuperscript{213} Ex Parte Wiley, supra note 58 at 424 (Lord Templeman).
At one end of the spectrum, the degree of injury ensuing from production would be high if the document reveals ministerial views on the formulation of an important policy, before a decision has been made and announced. This would be the case if a litigant seeks access to Cabinet documents related to a decision to go to war when Ministers are still deeply divided. At the other end of the spectrum, the degree of injury would be low if the document reveals factual information on the implementation of a policy of lower importance, or the performance of contractual obligations, after a decision has been made and announced. This would be the case if a litigant seeks access to documents related to a decade-old decision to spend money for the economic development of a region, or to award a public contract.

The degree of injury would be nil in two cases: the contents are no longer sensitive where the document was voluntarily published by the Government; and the timing of production is no longer sensitive where the document is so old that it is purely of historical interest.

(C) Balancing the Benefit and the Cost of Production: Civil Proceedings

The balancing process must be conducted on an individual basis, for each document. The interest of justice (benefit of production) is established in relation to each document’s degree of relevance, and the interest of good government (cost of production) is established in relation to each document’s degree of injury. In principle, if the degree of relevance is

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

215 Robinson, supra note 6 at 339; Whitlam, supra note 68 at 44-45 (Gibbs ACJ), 64 (Stephen J), 100 (Mason J).
deemed greater than the degree of injury, then production should be ordered; conversely, if the degree of relevance is deemed smaller than the degree of injury, then production should be declined. What if the degrees of relevance and of injury are deemed equal? Cooper argues that the Court should defer to the Government’s expertise and decline production.\textsuperscript{216} I disagree. While the Government has more expertise than the Court to assess the degree of injury (as such, it is entitled to deference on this point), it does not have more expertise to assess the degree of relevance (as such, it is not entitled to deference on this point). As PII is an exception to the principle of access to evidence,\textsuperscript{217} if the Government fails to persuade the Court that the degree of injury outweighs the degree of relevance, the claim should fail.

**(D) Balancing the Benefit and the Cost of Production: Criminal Proceedings**

The question arises as to whether the same balancing process should be carried out in civil and criminal proceedings. Can the Court decline to order the production of documents which may assist the defence case in criminal proceedings based on the PII doctrine? The answer is negative.\textsuperscript{218} Given the stigma of a verdict of culpability and the loss of liberty that may ensue, documents which may establish the innocence of the accused must be produced. This is consistent with the “innocence-at-stake” exception.\textsuperscript{219} Thus, “[t]he application of the [PII] doctrine in criminal proceedings [...] will involve a different balancing exercise to that in a civil proceeding.”\textsuperscript{220} As such, if a document could assist the defence case (if its degree of relevance is moderate to high), then production should be ordered, notwithstanding the degree of injury; conversely, if it cannot assist the defence case (if its degree of relevance is nil to low), then production should be declined. There is no balancing process in criminal proceedings: if a document is relevant, the balance will come down in favour of production. The prosecutor will have two options: produce the documents; or abort the prosecution.\textsuperscript{221}

\textsuperscript{216} Cooper, supra note 3 at 118.
\textsuperscript{218} Duncan, supra note 2 at 591.
\textsuperscript{221} Malek, supra note 32 at 794.
The approach described above was confirmed as a result of the *Matrix Churchill* affair, and the Scott Inquiry, in the United Kingdom. The affair refers to the criminal prosecutions of Matrix Churchill corporate executives for the unlawful exportation of arms to Iraq. The defence alleged that the Government had been informed of the exports and had encouraged them. To establish the truth of these allegations, it sought access to government documents. The Government replied by filing various PII claims, thus creating the risk that the defence may be deprived of factually and legally relevant evidence. After inspection, the trial judge ordered the production of several documents, and the prosecution complied with the order. The documents were used by the defence in cross-examination of witnesses, leading to the concession that the arms were exported with ministerial support. Once the concession was made, the prosecutions were aborted. Amid claims of cover-up and abuse of power, Richard Scott was appointed to shed light on the matter. In his report, Scott criticized the Government for its improper use of a class claim to suppress relevant evidence in criminal proceedings. In the aftermath of the Inquiry, the Government recognized that the balancing process differs in criminal proceedings and abandoned the use of class claims.

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

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222 For an overview of the *Matrix Churchill* affair, see Tomkins, *supra* note 173 at 167-200.
2.2.2 Production Stage: Minimizing the Degree of Injury

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

First, the Court can edit the document to extract the relevant information and protect the remaining sensitive information. Why should the Court order the production of a full memorandum to Cabinet, if only a few pages are relevant? Conversely, why should the Court refuse the production of a full briefing note if only a few pages contain sensitive information? In both cases, if the relevant information can be understood without the context provided by the full version of the document, it could be extracted and produced. This is consistent with the approach taken in Nixon. If the relevant information cannot be understood without the context provided by the full version of the document, the Government could draft a summary of the information (to be reviewed and approved by the Court) or admit the underlying facts. The editing process could be used to sever noncore from core secrets in Cabinet documents. Noncore secrets usually have a higher degree of relevance and a lower degree of injury than core secrets, as they reveal objective facts, not subjective views. The editing process could be used to extract and produce noncore secrets while protecting core secrets.

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225 In contradistinction, if the degree of injury is low, the level of protection afforded by the implied undertaking rule should be sufficient. See Juman v Doucette, 2008 SCC 8, [2008] 1 SCR 157.
227 In Nixon, supra note 82 at 715-16, the US Supreme Court directed the lower Court to hear the tapes and extract the relevant information. The Special Prosecutor was only given access to the relevant information; the remaining information was returned to its lawful custodian under seal.
Second, the Court can impose conditions for the use of sensitive documents. Indeed, the documents are produced to the litigant for a specific and limited use, not to all the world for an unspecified and unlimited use. It should thus be made clear that the documents cannot be published without the Court's consent. To that end, they could be marked “confidential” and their access made conditional upon the acceptance of a “confidentiality undertaking” by the litigants and their counsel. The undertaking is an explicit promise made to the Court not to violate the confidentiality of the documents by disclosing them to unauthorized persons. Breach of the undertaking constitutes contempt of court and carries serious consequences. In addition, at the Government's request, the Court could order that any part of the litigation where excerpts from the documents are read into the record or testimonies given on their contents, take place in camera. As a result, the related portions of the Court transcript, and any sensitive documents filed into evidence, would be sealed by the Court. At the end of the litigation, any sensitive documents in the possession of the Court as well as the litigants and their counsel would be returned to the Government. While these conditions cannot entirely remove the risk of injury, they can lower it to a tolerable level.

To sum up, in Section 2, I set forth a rational approach to the assessment of Cabinet immunity claims in legal proceedings. I have divided the assessment process into two phases (abstract and actual phases) and four stages (discovery, objection, inspection and production stages). Regarding the discovery stage, I have argued that the process could be improved in terms of efficiency if the standard of relevance was narrowed from semblance of relevance to simple relevance. Regarding the inspection stage, for reasons of fairness, I have taken the position that the Court should, as a rule, inspect prima facie relevant documents, unless the Government persuades the Court that their degree of relevance is clearly low. Regarding the production stage, to increase predictability, certainty and transparency in the assessment of

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

229 Ibid at 76-78. See also Molnar, supra note 226 at 188.

230 See, for example, Can Am Simulation, supra note 132 at para 55; Health Services, supra note 132, Schedule 1; Northern Transportation, supra note 132, Schedule 1. The integrity of the judicial process requires that the confidentiality undertaking be respected. As such, the Courts should refuse to vary a confidentiality order for Cabinet documents unless a "material change of circumstances" has taken place: British Columbia Teachers' Federation v British Columbia, [2015] BCJ No 840 (CA), reversing [2014] BCJ No 91 (SC).
PII claims, I have proposed a cost-benefit analysis, the aim of which is to maximize the public interest by weighing and balancing the interests of justice and of good government. The first should be weighed in relation to the degree of relevance (factual and legal relevance) and the second in relation to the degree of injury (contents and timing sensitivity). Production should be ordered if the degree of relevance is deemed equal to, or greater than, the degree of injury. Regarding the production stage, I have submitted that the Court should minimize the degree of injury by editing the documents and imposing conditions for their use.

CONCLUSION

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

First, the debate between judicial (Robinson) and executive (Duncan) supremacy has been settled. It is now clearly established that the Courts should have the final word under the common law (Conway) for two reasons: it is the inherent function of the Courts, not the Government, to control the admissibility of evidence in legal proceedings; and procedural fairness demands that PII claims be decided by an independent and impartial judge, rather than a seemingly biased public official. It is also clearly established that Cabinet immunity claims are subject to judicial review: the immunity is relative, not absolute (Whitlam). This does not mean that the Courts should automatically order the production of Cabinet secrets in legal proceedings; it means that Cabinet immunity claims should be assessed in a way that is responsive to the justification supporting the immunity and the circumstances of the case. The scope of Cabinet secrecy under constitutional conventions and the common law is in this regard consistent: Courts have accepted that the justification for Cabinet secrecy fades away with the passage of time (Crossman’s case) and cannot be used to shield public officials against criminal prosecutions (Whitlam). On these principles, there is a consensus.
Yet, there is no consensus on the level of deference which should be given to Cabinet immunity claims. The United Kingdom (Burmah Oil and Air Canada) and Australia (Northern Land Council) have taken a deferential approach while New Zealand (Fletcher Timber) and Canada (Carey) have taken a nondeferential approach. Under the first approach, Cabinet documents are presumed immune. The Court will not inspect them, unless the litigant show that they would likely substantially support the allegations made. This approach favours the interest of good government. Under the second approach, Cabinet documents are not presumed immune. The Court will inspect them, unless the Government establish that their contents are very sensitive. This approach favours the interest of justice. The flaw with the deferential approach is that the onus requirement is inconsistent with the principle of access to evidence and unfair to litigants, thus resulting in the suppression of prima facie relevant documents. The flaw with the nondeferential approach is that insufficient weight is given to the rationales underpinning Cabinet secrecy, thus resulting in the production of sensitive documents which may not support the allegations made (Carey). In the light of these flaws, it became necessary to consider a new approach to assess Cabinet immunity claims.

Second, the proposed rational approach sought to incorporate the strengths of the deferential and nondeferential approaches. One of the strengths of the deferential approach is the focus on efficiency. Many disputes about access to Cabinet documents could be avoided if a narrower standard of relevance was adopted. Disputes should center on documents that are likely truly relevant, not documents that simply relate to the case. Another strength of the deferential approach is the focus on expertise. Respect for the Government’s expertise implies that the Courts should: inspect the documents before ordering their production; defer to the Government’s assessment of the degree of injury; and minimize the degree of injury whenever production is ordered. The strength of the nondeferential approach is the focus on fairness. As such, the Government should bear the onus of justifying why documents should be withheld, the Courts should not uphold an objection to production without first inspecting the documents, unless their degree of relevance is clearly low, and the Courts should not defer to the Government’s assessment of the degree of relevance, given their greater expertise over the matter and the risk of Government bias. The rational approach seeks to reach the proper equilibrium between efficiency, expertise and fairness.
The main stage in the assessment of PII claims is the inspection stage, where the judge weighs and balances the competing aspects of the public interest. As part of the proposed rational approach, I have argued for a cost-benefit analysis of PII claims with the objective of maximizing the public interest. How should the interest of justice (benefit of production) and the interest of good government (cost of production) be weighed? The interest of justice should be weighed in relation to the degree of relevance found by multiplying the values given to the factual and legal relevance of each document. The interest of good government should be weighed in relation to the degree of injury found by multiplying the values given the contents and timing sensitivity of each document. How should the interest of justice and the interest of good government be balanced? A document should be produced if its degree of relevance is deemed greater than, or equal to, its degree of injury. As an exception, in cases where plausible allegations of criminal misconduct are presented, a document should be produced if its degree of relevance is deemed moderate to high. By imposing on the Courts a duty to minimize the degree of injury whenever production is ordered, the rational approach enforces the interest of justice without unduly harming the interest of good government.

The adoption of the proposed rational approach by the Courts under the common law would provide greater predictability, certainty and transparency in the assessment of Cabinet immunity claims. It would ensure that the information that should remain secret is protected in a manner that would not be unduly detrimental to the rights of litigants and the public confidence in the administration of justice. The rational approach would, as compared to the deferential and nondeferential approaches, enable the Courts to achieve a better balance between the interests of justice and good government. The principles underlying the rational approach can readily be applied at the provincial level in Canada; however, they cannot be applied at the federal level as sections 39 of the Canada Evidence Act and 69 of the Access to Information Act currently prevent any meaningful assessment of Cabinet immunity claims by the Courts. These provisions appear inconsistent with any conception of the rule of law requiring that executive action be subject to meaningful judicial review and therefore seem antithetical to the rational approach proposed in this chapter. The history of sections 39 and 69, and the way in which they have been interpreted and applied by the Government and the Courts, will be discussed in the next chapter.
CHAPTER 3

CABINET SECRECY AND STATUTORY PUBLIC INTEREST IMMUNITY

A Matter of Parliamentary Sovereignty: Entrenching Executive Supremacy over Federal Cabinet Confidences

INTRODUCTION

As demonstrated in Chapter 1, Cabinet secrecy is a cornerstone of the Westminster system of responsible government. The confidentiality of Cabinet deliberations is protected both as a matter of constitutional convention and law. The common law doctrine of Cabinet immunity enables the Government to prevent the disclosure of Cabinet secrets in litigation. As demonstrated in Chapter 2, Cabinet immunity is a relative, not an absolute, immunity under the common law. Based on the rule of law, Courts have affirmed and exercised the power to inspect Cabinet secrets and order their disclosure when the interest of justice outweighs the interest of good government. They have recognized that Cabinet secrets are not all equally sensitive: the private views voiced by Ministers during the collective decision-making process (core secrets) are more sensitive than other related information (noncore secrets). In addition, they have confirmed that the sensitivity of the information diminishes with the passage of time, until it is only of historical interest.

The common law applies in all Westminster jurisdictions except one. At the federal level in Canada, Parliament has enacted a special statutory regime to supersede the common law. That regime enables the Government to claim a near-absolute immunity for a class of information known as “confidences of the Queen’s Privy Council for Canada,” that is, “Cabinet confidences.” Because of this near-absolute immunity, the Courts do not have the power to inspect and order the production of Cabinet confidences. The interest of good government is thus systematically paramount to the interest of justice and there is a constant risk of abuse of power as executive action is not subject to meaningful judicial review. This is a form of Canadian exceptionalism with respect to Cabinet immunity.
The term “Cabinet confidences” is unique to Canada. It is intended to have the same meaning as “Cabinet secrets” under conventions and the common law. Yet, given its statutory basis, and the way in which it was interpreted and applied, the term “Cabinet confidence” captures information that may not necessarily be shielded under conventions and the common law. The statutory regime shields core and noncore secrets indiscriminately for a period of 20 years. This is a consequence of the over-inclusive and self-interested nature of legislative rulemaking in contrast to the more tailored approach of the common law, which is fashioned in a case-by-case manner by an independent and impartial judiciary. In this chapter, the term “Cabinet confidences” refers specifically to the kind of information that is protected under the federal statutory regime in Canada.

The statutory regime consists of a web of rules. The first rule was contained in subsection 41(2) of the *Federal Court Act* (*FCA*), adopted in 1970.¹ That provision allowed Ministers to decisively withhold sensitive classes of documents in litigation, including documents containing Cabinet confidences. In 1982, subsection 41(2) was replaced by section 39 of the *Canada Evidence Act* (*CEA*),² which still enables the Government to prevent the compulsory disclosure of federal Cabinet confidences in any judicial or quasi-judicial proceedings in Canada. At the same time, Parliament adopted the *Access to Information Act* (*ATIA*).³ While the *ATIA* provides a right to access government-held information, Cabinet confidences are excluded from its scope pursuant to section 69. This web of rules effectively prevents the Courts from inspecting and ordering the production of Cabinet confidences.

The objective of this chapter is to critically review the scope of sections 39 and 69 in the light of conventions, the common law and the parliamentary intention supporting these provisions. I will focus on the way in which sections 39 and 69 were developed, interpreted and applied by Parliament, the Government and the Courts. Chapter 3 is divided into two sections dealing with the inception and the interpretation of the federal statutory regime. In Section 1, I will argue that the Courts were deprived of the power to assess Cabinet immunity claims because the Liberals did not trust judges to properly protect Cabinet confidences. In

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1 *Federal Court Act*, RSC 1970, c 10 (2nd Supp), s 41(2) [*FCA*], which is reproduced in the Appendix.
2 *Canada Evidence Act*, RSC 1985, c C-5, s 39 [*CEA*], which is reproduced in the Appendix.
3 *Access to Information Act*, RSC 1985, c A-1, s 69 [*ATIA*], which is reproduced in the Appendix.
Section 2, I will show that the scope of Cabinet immunity under the statutory regime is overbroad and leaves very little room for judicial review of Cabinet immunity claims.

1. INCEPTION OF THE FEDERAL STATUTORY REGIME

Section 1 will explain why Parliament entrenched executive supremacy over the disclosure of Cabinet confidences in 1970 and 1982. It is divided into two subsections. In the first subsection, I will submit that the intent behind the adoption of subsection 41(2) of the FCA in 1970 was to prevent the Courts from inspecting and ordering the production of sensitive federal government documents in litigation. In the second subsection, I will claim that an ambitious legislative reform proposal, part of the freedom of information movement, which would have subjected Cabinet immunity claims to judicial review, was set aside at the last minute at the request of Prime Minister Pierre Elliott Trudeau. While in 1982 Parliament liberalized public interest immunity (PII) by enabling the Courts to inspect and order the production of any federal government document, it maintained executive supremacy over the disclosure of Cabinet confidences with the adoption of sections 39 of the CEA and 69 of the ATIA.

1.1 Parliament’s Entrenchment of Executive Supremacy

Soon after the principle of judicial review for PII claims was re-established in Conway v Rimmer (1968), but before it was clearly extended to Cabinet immunity claims in Sankey v Witham (1978), Parliament legislated to stop the rising common law trend toward more open government. In doing so, it overreacted to Conway; no other Westminster jurisdiction, however displeased it may have been with the decision of the House of Lords, overruled the common law so drastically. In 1970, a new provision, section 41, was incorporated into the

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4 Conway v Rimmer, [1968] 1 All ER 874 (HL) [Conway]. The House of Lords reasserted and exercised the power to inspect government secrets and order their production in litigation when the interest of justice outweighed the interest of good government.

5 Sankey v Whitlam (1978), 142 CLR 1 [Whitlam]. For the first time, a Court ordered the production of Cabinet documents in the context of a criminal prosecution against former Ministers.

6 The evolution of Cabinet immunity under the common law is explained in Chapter 2, supra at 81-101.

The *FCA* to regulate PII claims for federal government documents in litigation.\(^8\) Subsection 41(1) laid down the rule, and subsection 41(2) laid down the exception. As a rule, the Courts could assess PII claims made by a Minister. They could inspect documents, weigh and balance the competing aspects of the public interest, and order their production where the interest of justice outweighed the interest of good government. As an exception, the Courts could not assess PII claims where a Minister certified under oath that production would: injure international relations, national defence, national security or federal-provincial relations; or disclose a Cabinet confidence. In these cases, production had to be refused without judicial inspection. In sum, subsection 41(1) provided a relative immunity, except for the specific classes of documents listed in subsection 41(2), which enjoyed an absolute immunity.\(^9\)

### 1.1.1 Scope of the Absolute Immunity

The problematic part of the provision was subsection 41(2) which codified the House of Lords’ decision in *Duncan v Cammell Laird* (1942),\(^10\) which had led to clear cases of abuse of power in the United Kingdom.\(^11\) In 1970, no judge would have overruled a PII claim where a Minister certified in the proper form that production of the documents would injure national security or disclose a Cabinet confidence. When reasserting the judicial power to review PII claims in *Conway*, Lord Reid was adamant that “cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest.”\(^12\) But, after *Conway*, the power to decide whether such documents should be protected in a given case belonged to the Courts, not the Government. In a proper case, as in *Whitlam*, judges would have the power to order production. In *Conway*, Lord Morris said that Parliament could remove that power from the Courts and confer it exclusively to the Government by way of statute, even though this would be “out of harmony with [...] the administration of justice.”\(^13\) This was an

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\(^8\) The *FCA*, *supra* note 1, received Royal Assent on December 3, 1970, and was proclaimed into force on June 1st, 1971. See *Federal Court Act*, SOR-71-241 (1971) C Gaz II, vol 105, No 11 at 887.


\(^10\) *Duncan v Cammell Laird & Co Ltd*, [1942] 1 All ER 587 (HL) [*Duncan*]. The House of Lords held that judges should accept as final and conclusive an executive objection to the production of government secrets in litigation.


\(^12\) *Conway*, *supra* note 4 at 888 (Lord Reid).

\(^13\) *Ibid* at 890 (Lord Morris).
affirmation of rule of law values associated with the common law, albeit one that, under a system of parliamentary sovereignty, can be displaced by a clear expression of legislative intent to oust the common law. This is what Parliament did by adopting subsection 41(2): by way of statute, it froze the common law of PII, as it was understood in 1970, and curbed its natural evolution, in a case-by-case manner.

When the FCA was debated in Parliament in the midst of the October crisis in the fall of 1970, the Minister of Justice, John Turner, accepted the common law approach to PII set forth in Conway two years earlier.\(^{14}\) However, he submitted, without opposition, that it would be reasonable to preserve a Duncan-style absolute immunity for the specific classes of documents listed in subsection 41(2). The only disagreement related to the inclusion of documents which would injure federal-provincial relations to the list. The New Democrats submitted that the new provision afforded a “vague” and “general” basis for protecting documents which could too easily be “abused.”\(^{15}\) The Progressive Conservatives stated that an absolute immunity would prevent a litigant from presenting “his full case to the judge” and give rise to an appearance of bias thus undermining the proper administration of justice.\(^{16}\) While this criticism was directed toward the inclusion of federal-provincial relations to the list of documents subject to the absolute immunity, it equally applied to the other classes of documents listed in subsection 41(2). Turner did not directly address these arguments. In his view, documents relating to federal-provincial relations, as a class, were very sensitive, especially at a time when national unity was in danger, and Ministers were better able than judges to assess what is injurious to federal-provincial relations.\(^{17}\)

In the end, subsection 41(2) was enacted by Parliament without much controversy. David Mullan argued that the lack of controversy over this provision was due to the fact that Canadian jurists had historically paid little attention to one of the basic areas of English


\(^{17}\) *Ibid* at 698-99 (Hon John Turner).
constitutional law: “the proper role of the courts in relation to the executive.”\textsuperscript{18} This was another way of saying that they tend to neglect common law constitutionalism (the small-c constitution) in favour of the written Constitution (the big-C Constitution). Subsection 41(2) was an attempt to limit the authority of Conway and, as such, a “retrenchment of Crown privilege in Canada.”\textsuperscript{19} The fact that the provision was incorporated into a statute that otherwise increased the power of the Courts made it even more disturbing. The enactment of subsection 41(2) implied that Parliament did not have faith in the integrity and wisdom of judges on matters involving Cabinet confidences.\textsuperscript{20} How could litigants convince judges that PII claims were made improperly without the benefit of judicial inspection? Mullan argued that subsection 41(2) “completely abrogate[d] the right of litigants to challenge a claim at all.”\textsuperscript{21} Perhaps he overstated the case a little on this point. Despite the draconian language of subsection 41(2), it is doubtful that judges would have sustained PII claims if litigants could adduce external evidence of bad faith.\textsuperscript{22} Yet, in the absence of such evidence, which is difficult to acquire, PII claims were immune from effective judicial supervision. It is thus fair to say that subsection 41(2) seriously curtailed the rights of litigants and was out of sync with the common law set forth in Conway.

There are two reported cases in which litigants challenged the Government’s reliance on subsection 41(2) to protect documents disclosing Cabinet confidences. In Landreville v Canada (1977), a former judge sought access to Cabinet minutes, Cabinet memoranda and a note to the Prime Minister to prove that the Government did not honour its promise to pay him part of his pension in exchange for his resignation after his integrity had been seriously put in doubt. Given the clear wording of subsection 41(2), the Federal Court was bound to


\textsuperscript{19} Mullan, supra note 18 at 290. See also Snider, supra note 18; Gagnon v Commission des valeurs mobilières, [1965] SCR 73.

\textsuperscript{20} Mullan, supra note 18 at 290: “[I]t is one of the strange contradictions of the Federal Court Act that an Act, which generally gives the courts greater authority over the executive branch of government, should at the same time show a lack of faith in the integrity of the courts to responsibly adjudicate in all cases on claims of Crown Privilege and protect the genuine security interest of the state.”

\textsuperscript{21} Ibid at 292.

\textsuperscript{22} Roncarelli v Duplessis, [1959] SCR 121 [Roncarelli].
refuse production, even if the documents were relevant to the issue. Nonetheless, it was not
naive about the intent behind the enactment of the provision as it recognized that:

Parliament deliberately codified the common law as stated in Duncan [...] to
forestall application of Conway [...].

That codification precludes the evolution in Canada of a Crown privilege
where the final decision on production in litigation of relevant documents
rests with an independent judiciary rather than an interested executive.23

This point is further illustrated by Wilfrid Nadeau Inc v Canada (1977). In that case, a builder
had lost a public contract for the construction of a road in Jean Chrétien’s riding to a local
competitor, despite being the lowest bidder. The contract had been awarded by Chrétien, as
Minister of Indian Affairs and Northern Development, with the approval of the Treasury
Board. The builder sought access to Treasury Board documents to prove that the decision
was made as a result of improper political influence and patronage, but the Government
objected. The Federal Court reluctantly refused production, even if the documents seemed
relevant to the issue. The builder was thus unable to make its case and lost.24

While it is unclear whether the documents withheld in Wilfrid Nadeau contained the
“smoking gun” that the litigant was looking for, it has now been shown that the documents
withheld in Landreville did support the litigant’s case.25 There can be little doubt that the use
of subsection 41(2) created a risk of abuse of power, that is, a risk that the Government could
suppress unfavourable evidence to thwart a public inquiry or gain a tactical advantage in
litigation. Was that risk sufficiently important to make subsection 41(2) unconstitutional?
Not according to the Supreme Court of Canada (SCC). In Commission des droits de la personne
v Canada (Attorney General) (1982), the SCC confirmed that Parliament had the power to
lodge over PII for federal government documents under the Constitution and, in view of
parliamentary sovereignty, it could make the immunity absolute. As for the risk of abuse of
power, the SCC stressed that “the risk that the Executive will apply legislation validly adopted
by Parliament with malice or even arbitrarily does not have the effect of divesting Parliament

23 Landreville v Canada, [1977] 1 FC 419 at 422 (FC).
24 Wilfrid Nadeau Inc v Canada, [1977] 1 FC 541 (FC).
25 William Kaplan, Bad Judgments: The Case of Mr. Justice Leo A. Landreville (Toronto: University of Toronto
Press, 1996) at 175-76. Kaplan reached that conclusion after reviewing the documents nearly 30 years later.
of its power to legislate."\(^\text{26}\) In sum, it confirmed that the judges would not enforce subsection 41(2) if it was shown in a specific case that the Government had acted abusively; however, the provision was not unconstitutional by design. This reasoning is not persuasive given that, in practice, it is almost impossible for judges to reach the conclusion that a PII claim has been made abusively without inspecting the documents at issue. As will be shown in Chapter 4, the conclusion of the SCC in this case was inconsistent with the rule of law.

1.1.2 Meaning of Cabinet Confidences

With the enactment of subsection 41(2), Parliament introduced for the first time into federal law the term "Cabinet confidence." But the term was not defined and there was some uncertainty as to its precise meaning. The Liberals tried to infuse meaning to this term in the 1977 Green Paper on *Legislation on Public Access to Government Documents*, which laid down the principle "open access subject to specified exemptions," as the basis of a future freedom of information regime.\(^\text{27}\) One of the proposed exemptions was designed to protect Cabinet confidences. Its justification was based on the link between Cabinet secrecy and solidarity, and their importance to the proper functioning of our system of government. The Green Paper identified the nature of the information to be protected as "the views of Ministers on matters before Cabinet," as opposed to the "background information and research" behind Cabinet decisions.\(^\text{28}\) It thus distinguished subjective views from objective facts.\(^\text{29}\)

Regrettably, this substantive understanding of "Cabinet confidences" was lost after the establishment of the Commission of Inquiry into Certain Activities of the Royal Canadian Mounted Police (RCMP) in 1978, also known as the McDonald Commission. It was the first investigative body to gain access to Cabinet and other high-level documents. Rather than relying on subsection 41(2) to prevent it from accessing the relevant documents, the

\(^{26}\) *Commission des droits de la personne v Attorney General of Canada*, [1982] 1 SCR 215 at 228 [*Commission des droits de la personne*].

\(^{27}\) Secretary of State, *Legislation on Public Access to Government Documents*, by John Roberts (Ottawa: Minister of Supply and Services, 1977) at 9. The exemptions were taken from section 41 of the *FCA*, *supra* note 1, and Cabinet Guidelines tabled in the House of Commons in 1973, which recognized the right of Members of Parliament to access government documents subject to certain exemptions: *Ibid* at 10.

\(^{28}\) *Ibid* at 12.

\(^{29}\) As such, the definition set out in the Green Paper is consistent with the distinction between "core secrets" and "noncore secrets" discussed in Chapter 1, *supra* at 26.
Government devised a special process under which they could be shared with the commissioners. It was deemed in the public interest to shed light on the allegations of unlawful activities by the RCMP Security Service and assess whether Ministers had authorized these activities. During the Inquiry, government counsel prepared a list of the various types of documents in which Cabinet confidences could be found, such as “Cabinet agenda, memoranda, minutes and decisions,” “Ministerial briefing notes for use in Cabinet” and “documents [...] describing discussions [...] among Ministers.” That list was the first attempt to provide a comprehensive definition of “Cabinet confidences.” The term “Cabinet confidence” thus took on a specific meaning: it was understood in relation to “the types of documents where ‘confidences’ were likely to be found.” This non-substantive understanding of “Cabinet confidences” had a significant influence on the way the current statutory regime was devised, interpreted and applied.

1.2 Cabinet Immunity as the Last Vestige of Executive Supremacy

By the end of the 1970s, there was a strong momentum in Canada for the recognition of a right to freedom of information and the abolition of subsection 41(2) of the *FCA*, which led to the adoption of Bill C-43 in 1982. Bill C-43 had three schedules: Schedule 1 enacted the *ATIA*; Schedule 2 enacted the *Privacy Act*; and Schedule 3 amended the *CEA*. I will focus on the statutory framework established by the *ATIA* and the *CEA*. Bill C-43 eliminated the absolute immunity for almost all federal government documents. Even documents the disclosure of which would injure international relations, national defence, national security, or federal-provincial affairs, are now subject to judicial review under the *ATIA* and the *CEA*. They are protected by a relative immunity. The same would have been true for documents disclosing Cabinet confidences, but for last minute amendments to Bill C-43. Through an

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30 PC 1979-887 (22 March 1979); PC 1979-1616 (2 June 1979).
33 An Act to enact the Access to Information Act and the Privacy Act, to amend the Federal Court Act and the Canada Evidence Act, and to amend certain other Acts in consequence thereof, SC 1980-81-82-83, c 111. Bill C-43 was tabled on July 17, 1980 and received Royal Assent on July 7, 1982. Schedules 1 and 2 were proclaimed into force on July 1st, 1983, and Schedule 3 was proclaimed into force on November 23, 1982.
analysis of Cabinet records and parliamentary debates, I will explain why the Liberals preserved executive supremacy over the disclosure of Cabinet confidences in 1982, while accepting judicial supremacy over all other classes of information.

1.2.1 Initial Version of Bill C-43

Under Trudeau’s leadership, the Liberals were reluctant to allow the Courts to overrule PII claims in respect of sensitive classes of federal government documents, especially if they disclosed Cabinet confidences. They argued that judicial review would undermine ministerial responsibility. In their view, Ministers were better placed than judges to assess the demands of the public interest. That is why the Liberals pushed subsection 41(2) through Parliament in 1970. It is also why they were against any freedom of information regime where someone other than a Minister would have final authority over the release of documents.³⁴ The Canadian Bar Association (CBA) opposed this view. While it conceded the importance of protecting government documents, it argued that a freedom of information regime without judicial review would become “meaningless and self-serving.” Judicial review was essential because “decisions which might smack of arbitrariness if reached by [the Executive] would be less prone to attack if made by the Judiciary.”³⁵

The Progressive Conservatives agreed. After winning the 1979 general election, they introduced Bill C-15, the Freedom of Information Act. In line with the CBA’s position, Bill C-15 would have subjected to judicial review all decisions to withhold documents, even Cabinet documents and subsection 41(2) would have been repealed.³⁶ While the Progressive Conservatives lost power before Bill C-15 was enacted, their initiative created a momentum for freedom of information. When the Liberals reclaimed power in 1980, they seemed ready to finally abandon absolute executive control over the disclosure of government documents. The April 1980 Throne Speech contained two important promises in this regard:

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³⁴ Roberts, supra note 27 at 15-19.
Freedom of information legislation will be introduced to provide wide access to government documents. The right accorded to Ministers to withhold government documents from courts of law under Section 41(2) of the Federal Court Act will be removed.37

The Liberals took steps to fulfill these two promises when they introduced Bill C-43 in July 1980; it was in many respects inspired by the Progressive Conservatives’ Bill C-15. First, Bill C-43 created a right to access any government-held document, subject to specific exemptions. The initial version of the Bill contained a mandatory class exemption for Cabinet documents (clause 21). Decisions to withhold documents based on an exemption were subject to judicial review. The first level of review was led by the Information Commissioner, who could examine, or inspect, any government document, even Cabinet documents, to determine whether an exemption had been properly applied. The second level of review was conducted by the Federal Court, which could take the additional step of ordering the disclosure of documents if it came to the conclusion that an exemption claim was unfounded. As stated by Francis Fox, then Minister of Communications, “in all cases the commissioner and the court will have the right to examine any government record.”38

Second, Bill C-43 repealed section 41 of the FCA and replaced it with a new provision of the CEA (clause 36.1). The new provision would restore the jurisdiction of the Courts to assess all PII claims, including Cabinet immunity claims, at the federal level. At the time, the Liberals had come to accept that the absolute immunity in subsection 41(2) was out of step with the law of PII in other Westminster jurisdictions. In addition, the PII regime had to be harmonized with the new access to information regime. It would have been incoherent to give the Information Commissioner and the Federal Court the power to assess the validity of Cabinet immunity claims under the ATIA, but deny the same power to the Courts in litigation under the CEA. The interests at stake in civil and criminal actions (such as liberty, economic and reputational interests) were deemed more important than the interest at stake under the ATIA (that is, government transparency). Fox stated that this change would “create better conditions for the administration of justice by the courts.”39

37 Senate, Journals of the Senate, 32nd Parl, 1st Sess, vol 126, part 1 (14 April 1980) at 16.
39 Ibid at 6689.
Bill C-43 received second reading in the House of Commons in January 1981 and was then referred to the Standing Committee on Justice and Legal Affairs. The examination of the Bill in Committee dragged on for several months given the zeal of members of the opposition who sought to develop the best possible access regime.\textsuperscript{40} By November 1981, the work of the Committee remained unfinished. Trudeau then instructed Fox to hold up the Bill because he was concerned that it did not adequately protect Cabinet minutes. What was the source of his concerns? Just five days after the introduction of the Bill, Trudeau was called to testify \textit{in camera} before the McDonald Commission. The Prime Minister was questioned about the substance of Cabinet discussions on the unlawful activities of the RCMP Security Service. He was even put in a situation where he had to challenge the accuracy of Cabinet minutes, which he had not vetted, as they were inconsistent with the handwritten notes taken by one of the secretaries during the relevant meeting. The minutes attributed to the Prime Minister comments that had apparently been made by someone else. Trudeau was upset: “I certainly wouldn’t want [these minutes] to be used as evidence against me.” Later on, during his testimony, when questioned on the contents of other Cabinet minutes which the RCMP had neglected to return to the Privy Council Office, he added: “This just proves I was right in saying: \textit{don’t circulate these God-dammed minutes everywhere} [...] these discussions between [Ministers are privileged], and what the hell are they doing in the files of the RCMP?”\textsuperscript{41}

Trudeau’s instructions to Fox in November 1981 coincided with the timing of two court decisions handed down in western provinces under the common law. In \textit{Mannix v Alberta}, for the first time in Canada, the Alberta Court of Appeal refused to recognize the absolute character of Cabinet immunity and ordered the production of Cabinet documents.\textsuperscript{42} In \textit{Gloucester Properties Ltd v British Columbia}, the British Columbia Court of Appeal forced a Minister to testify publicly on the substance of Cabinet discussions.\textsuperscript{43} No Court had ever gone this far. In these cases, which did not involve serious allegations of criminal misconduct (as

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\textsuperscript{42} \textit{Mannix v Alberta}, [1981] 5 WWR 343 (CA).
\textsuperscript{43} \textit{Gloucester Properties Ltd v British Columbia (Environment and Land Use Committee)}, [1982] 1 WWR 449 (CA).
\end{flushleft}
in *Whitlam*), the Courts had treated Cabinet immunity in a nondeferential manner. There was a danger that these precedents would creep into federal law if no action was taken. Trudeau believed that individuals who had not taken the oath of Privy Councillor should not become privy to Cabinet confidences for the purposes of deciding on their production. For him, the two court decisions had given rise to a dilemma: “either we put nothing in writing and we destroy all the minutes which have been accumulated [or] we prevent the courts from having access to them.”\(^{44}\) Because he considered it important to keep Cabinet minutes for historical purposes, the only option was the second. Trudeau’s position was bolstered by the provinces, which had urged Ottawa to maintain an absolute immunity for Cabinet documents and to remove them from the jurisdiction of the review bodies under the *ATIA*.\(^{45}\)

### 1.2.2 Final Version of Bill C-43

Trudeau asked Fox to find a solution to meet his concern “that absolute protection be afforded to Cabinet minutes.”\(^{46}\) An *ad hoc* Cabinet committee was set up in April 1982 to review Bill C-43 and make recommendations to the Cabinet.\(^{47}\) In May, Fox asked the *ad hoc* committee: “To what extent should Bill C-43 be modified in order to give effect to concerns expressed for the absolute protection of Cabinet minutes?”\(^{48}\) He presented three options: (1) make no changes to Bill C-43; (2) exclude Cabinet minutes from Bill C-43; or (3) retain section 41 of the *FCA*. Fox favoured Option 1. It was the most consistent with the promises made in the Throne Speech, the value of open government and the common law. In his view, Bill C-43 sufficiently protected Cabinet minutes. Under the *ATIA*, Cabinet minutes were

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\(^{45}\) Letter from Roy McMurtry to Francis Fox on the proposed *Access to Information Act* and *Privacy Act* (10 June 1981). This letter as well as the provincial position were made public: Robert Sheppard, “Provincial Leaders Hold up Passage of Access Bill: Fox,” *Globe and Mail* (3 February 1982) at 8; Robert Sheppard, “Delay of Access Bill is Criticized by Legal Group,” *Globe and Mail* (27 Avril 1982) at 8.

\(^{46}\) Memorandum from AJ Darling to Michael Pitfield entitled “Access to Information: Mr. Fox’s Review” (8 April 1982). This document was released by the Privy Council Office under the *ATIA*, supra note 3 (A-2016-00758).

\(^{47}\) Record of Cabinet Decisions entitled “Access to Information,” No 5059-82RD (NSD) (29 April 1982) at 2. This document was released by the Privy Council Office under the *ATIA*, supra note 3 (A-2016-00758).

\(^{48}\) Aide-Mémoire entitled “Bill C-43: Access to Information, Privacy and Crown Privilege” (6 May 1982) at 1 [Aide-Mémoire]. This document was released by the Privy Council Office under the *ATIA*, supra note 3 (A-2016-00758).
exempted. While the Information Commissioner and the Federal Court would have access to them, they were bound to uphold the exemption if, upon inspection, the document fell within the protected class. Under the CEA, the cases in which litigants would need access to Cabinet minutes would be rare and production would only be ordered if the SCC concluded that the interest of justice outweighed the interest of good government. However, Trudeau was not convinced. Option 1 was therefore dismissed. So was Option 3 as it went beyond what was necessary to address his concerns and was inconsistent with the Throne Speech.

As such, the most promising course of action was Option 2, the exclusion of Cabinet minutes from Bill C-43. The lessons learned as a result of Trudeau’s testimony before the McDonald Commission had not been forgotten. During Cabinet discussions over Bill C-43, a Minister stressed that Cabinet minutes “often attributed views to Ministers which they were not in a position afterward to vet as to their accuracy.” To properly insulate the collective decision-making process, it was not only necessary to protect Cabinet minutes, it was also necessary to protect any document recording ministerial views on government policy or action. The private views expressed by Ministers in the Cabinet room (core secrets) should be protected whether they are recorded in Cabinet minutes or other documents. Hence, the ad hoc committee recommended that Bill C-43 be amended to exclude “Cabinet minutes and other documents recording discussions or communications between Ministers” from the ATIA, and to afford an absolute immunity to these documents under the CEA, so that no “outsiders” could inspect them and order their release.

Ministers understood Trudeau’s concerns as centering on Cabinet minutes and other documents recording discussions or communications between Ministers. They tried to narrow down the absolute protection to these documents. Cabinet memoranda, agenda and records of decisions would remain subject to the general access regime. Yet, it was not clear

49 Cabinet Minutes entitled “Bill C-43: Access to Information, Privacy and Crown Privilege,” No 17-82CBM (13 May 1982) at 8 [Cabinet Minutes on Bill C-43]. This document was released by the Privy Council Office under the ATIA, supra note 3 (A-2016-00758).
if Trudeau just wanted to protect Cabinet minutes and the like or the whole sphere of Cabinet confidences.\textsuperscript{51} In February, the SCC had confirmed the constitutionality of subsection 41(2), although it stated that it would intervene if the immunity was abused.\textsuperscript{52} Subject to this limit, the option of keeping an absolute immunity for Cabinet confidences remained opened. At the same time, the pressure to liberalize access to Cabinet documents was rising. In March, after the McDonald Commission, the Auditor General sought access to Cabinet documents to audit the purchase of Petrofina by Petro-Canada. Trudeau’s reply was categorical:

Surely you are not claiming a right of free access to confidences of the Queen’s Privy Council for Canada. You know that, under our system of government, confidences of the Queen’s Privy Council for Canada must, to safeguard the principle of collective responsibility of Ministers, remain confidential.\textsuperscript{53}

Trudeau eventually made clear that he wanted to afford the highest level of protection to the whole sphere of Cabinet confidences, not just Cabinet minutes and the like. In a Cabinet meeting, he said: “of course Cabinet memoranda [are] to be considered as excluded and privileged communications between Ministers.”\textsuperscript{54} “Communications” was understood in the broadest possible sense. Indeed, the minutes of that meeting reported that “all forms of communications between Ministers should be absolutely protected.”\textsuperscript{55} Trudeau’s intention was confirmed in the record of decision: “The wording of [the new provisions] should specify that confidences of the Queen’s Privy Council for Canada are excluded from the application of the Access to Information […] and provide an absolute privilege to the confidences.”\textsuperscript{56} If Trudeau only sought to confer a higher level of protection to documents recording ministerial views (core secrets), it would have been sufficient to shield Cabinet memoranda,

\textsuperscript{51} Memorandum from DB Dewar to Michael Pitfield entitled “Access to Information” (12 May 1982). This document was released by the Privy Council Office under the \textit{ATIA}, supra note 3 (A-2016-00758).

\textsuperscript{52} \textit{Commission des droits de la personne}, supra note 26 at 228.

\textsuperscript{53} Reproduced in \textit{Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)}, [1989] 2 SCR 49 at 69-71 [\textit{Auditor General}].

\textsuperscript{54} Memorandum from Robert Auger to Michael Pitfield entitled “Access to Information: Cabinet Discussion” (20 May 1982) [Memorandum to Pitfield from Auger]. This document was released by the Privy Council Office under the \textit{ATIA}, supra note 3 (A-2016-00758).

\textsuperscript{55} Cabinet Minutes entitled “Bill C-43: Access to Information, Privacy and Crown Privilege,” No 18-82CBM (20 May 1982) at 9. This document was released by the Privy Council Office under the \textit{ATIA}, supra note 3 (A-2016-00758).

\textsuperscript{56} Record of Cabinet Decision entitled “Bill C-43: Access to Information, Privacy and Crown Privilege,” No 274-82RD (20 May 1982). This document was released by the Privy Council Office under the \textit{ATIA}, supra note 3 (A-2016-00758).
Cabinet minutes and ministerial communications. It was not necessary to extend the absolute protection to Cabinet agenda, Cabinet decisions, discussions papers and draft legislation (noncore secrets), as they did not record ministerial views.

Clauses 68 (now section 69 of the ATIA) and 36.3 (now section 39 of the CEA) were drafted to address Trudeau’s concerns. They were designed to shield Cabinet confidences. To pre-empt judicial interpretation of the term, the provisions provided a non-exhaustive list of documents which were deemed to contain such confidences. The list reflected the structure of the Cabinet Paper System and was similar to the list of Cabinet documents that had been drafted during the McDonald Commission. It included Cabinet memoranda, agenda, minutes and decisions as well as ministerial communications and briefing notes on Cabinet business. It was also extended to discussion papers, draft legislation and any other document containing Cabinet confidences. Under clause 68, Cabinet records were excluded, rather than exempted, for 20 years. The clauses setting out the power of the Information Commissioner and the Federal Court were amended to ensure that they could only examine, or inspect, “records [...] to which this Act applies.” Cabinet records were thus beyond their reach.

Under the CEA, the initial provision governing PII (clause 36.1) was subdivided into three: clauses 36.1, 36.2 and 36.3. The purpose of the new provisions was to replace section 41 of the FCA and establish an exhaustive regime for the production of federal government documents in litigation. Clause 36.1 (now section 37) confirmed the basic rule set forth in Conway. Superior Courts could review all PII claims, except claims relating to: international relations, national defence or national security; and Cabinet confidences. Clause 36.2 (now section 38) dealt with the production of documents pertaining to international relations, national defence or national security. For reasons of expertise and security, only the Chief Justice of the Federal Court (or a designated judge) could assess these claims. The immunity for these documents was no longer absolute: judges could inspect them and order their production, after weighing and balancing the competing aspects of the public interest. Clause

57 Memorandum to Pitfield from Auger, supra note 54.
36.3 (now section 39), the last vestige of executive supremacy, preserved a near-absolute immunity for Cabinet confidences by giving them a greater level of protection than they would have under the common law and a greater level of protection than any other class of documents under statute law. No one could inspect or order the production of Cabinet confidences. That said, clause 36.3 afforded a narrower immunity than subsection 41(2) as it provided a non-exhaustive list of documents deemed to contain Cabinet confidences (which was substantively the same list as clause 68) and limited to 20 years the temporal scope of the immunity.

Trudeau was satisfied with these amendments and Fox was authorized to proceed to the House of Commons Standing Committee on Justice and Legal Affairs with the new version of Bill C-43. Clearly, the parliamentary opposition would not welcome these changes. In a note to Fox, Robert Auger, a senior Privy Council officer, said that “[i]t will be crucial to justify in a credible fashion absolute privilege for Cabinet confidences. We will be grilled on this one.” Auger recommended that Standing Committee meetings be concentrated in one or two days and that the opposition parties be given the text of the amendments no more than a day in advance to prevent them from “build[ing] up pressure (with the help of the media) against the [...] amendments.”

The plan was simple: Fox would present the amendments on a take it or leave it basis. In the end, the opposition parties would have to choose between Bill C-43, as amended, and no legislation at all. Rightly or wrongly, there was a fear that if Bill C-43 died on the Order Paper, any chance of enacting a statutory regime of access to information would be lost for quite some time.

The debates before the Committee and the House of Commons were lively. Fox tried to minimize the effect of the amendments by arguing that, whether Cabinet confidences were

59 Memorandum from Robert Auger to Francis Fox entitled “Access to Information: Committee Hearings” (26 May 1982). This document was released by the Privy Council Office under the ATIA, supra note 3 (A-2016-00758).
60 Memorandum from AJ Darling to Michael Pitfield entitled “Access to Information: Bill C-43” (23 April 1982). This document was released by the Privy Council Office under the ATIA, supra note 3 (A-2016-00758).
exempted or excluded, they would remain confidential. The opposition parties were not fooled. As the new provisions provided no check against abuse, they dealt a "body blow" to the principle of judicial review, a cornerstone of Bill C-43. The New Democrats described them as the "Mack truck" amendments for they had created a "gaping hole" in the Bill. The Liberals had accepted judicial review except in one area: in matters of Cabinet secrecy, they did not trust the judgment of "some outside, unelected authority." The Progressive Conservatives vowed to subject all Cabinet immunity claims to judicial review when they would be back in power. While Fox was responsible for defending these last minute amendments, internal records of Cabinet discussions make it clear that he did not support them. But for Trudeau’s concerns, these changes would not have taken place:

Comments made by the Prime Minister regarding his personal feelings on judicial review illustrate that it was his own personal feelings which caused the changes to the legislation in 1982. Francis Fox stated that if the opposition had not stonewalled the Committee hearings, the legislation would have been law before the legal cases in the western provinces ever became an issue.

By providing an absolute protection for Cabinet confidences, the Liberals significantly retreated from the promise made in the Throne Speech and the philosophy of Bill C-43, as initially drafted. Upon their enactment, both sections 39 of the CEA and 69 of the ATIA were criticized. These provisions had two inherent flaws, that is, their open-ended as well as their final and conclusive nature. First, the term “Cabinet confidences” remained substantively undefined. The provisions could thus be used to protect documents remotely related to Cabinet proceedings. Murray Rankin suggested that a Cabinet laundering process would be devised. He feared that public officials would process embarrassing documents “through a

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63 Ibid at 94:134 (Svend Robinson), 94:138 (Hon Walter Baker). These amendments were described as a "major watering down" of the Bill: 94:135 (Svend Robinson). They had driven a "horse and a cart through the cornerstone of freedom of information": 94:140 (Hon Walter Baker). The opposition parties felt that they had been forced to drink a "glass of hemlock juice" in order to save Bill C-43: 94:142 (David Kilgour).
64 HOC Debates, June 1982, supra note 61 at 18859-18860 (Svend Robinson).
65 Standing Committee Evidence, June 1982, supra note 61 at 94:151 (Hon Francis Fox).
66 HOC Debates, June 1982, supra note 61 at 18856 (Hon Walter Baker). This promise remains unfulfilled.
67 Aide-Mémoire, supra note 48 at 4; HOC Debates, June 1982, supra note 61 at 18857 (Hon Walter Baker).
Cabinet briefing book or memorandum” so that they could be protected.69 Similarly, John McCamus contended that the new provisions reflected “the desire of the inner circle of government to immunize itself completely from the inconvenience and potential embarrassment of disclosures.”70

Second, Government actions taken under these provisions were beyond the reach of the judicial branch. Oddly, while facilitating the flow of information, the Liberals had enacted one of the most secretive immunities in Westminster jurisdictions. They asked Canadians to make a leap of faith: to assume that the Government would not abuse its right to conceal documents. Why did Trudeau trust the Courts to make crucial decisions under the Canadian Charter of Rights and Freedoms and to review PII claims in matters of national security, but did not trust them to review Cabinet immunity claims?71 It is not because these claims were less prone to exaggeration, overstatements and abuses, than other PII claims. Rather, it is because Cabinet secrecy is a matter of political survival: the premature disclosure of the views expressed by Ministers in Cabinet (core secrets) would weaken ministerial solidarity and the Ministry’s ability to maintain the confidence of the House of Commons.72 That is why Trudeau was unwilling to abandon control over Cabinet confidences to the Courts. Whether Cabinet immunity claims should escape effective judicial supervision was controversial.73

To sum up, by entrenching executive supremacy over the disclosure of Cabinet confidences in 1970, the Liberals restored the infamous rule laid down in Duncan, which had led to clear cases of abuse of power in the United Kingdom. In doing so, they rejected the approach taken in Conway, which had been praised for its consistency with the rule of law. Canada thus became the sole Westminster jurisdiction where judges could not inspect and order the production of Cabinet confidences in litigation. The Liberals almost fixed this

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72 See generally Chapter 1, supra at 24-26, 29-32.
anomalous situation in the 1980s, when they proposed to abolish the absolute immunity. However, Trudeau’s reluctance to abandon control over Cabinet confidences, fuelled by his experience with the McDonald Commission and the nondeferential attitude to Cabinet immunity taken by the Courts under the common law, persuaded him to preserve a near-absolute immunity, not just for documents revealing core secrets, but for the whole sphere of Cabinet confidences.

2. INTERPRETATION OF THE FEDERAL STATUTORY REGIME

Section 2 will explain how sections 39 of the CEA and 69 of the ATIA have been interpreted and applied by the Government and the Courts since 1982. It is divided into two subsections. In the first subsection, I will delineate the scope of, and the limits to, Cabinet immunity. I will argue that the Government has interpreted the term “Cabinet confidences” overbroadly and has sought to unduly limit the statutory exceptions to Cabinet immunity. In contrast, the Courts have tried to limit the scope of the immunity by forcing the Government to assess the competing aspects of the public interest before asserting Cabinet immunity and by enforcing the statutory exceptions to Cabinet immunity to their full extent. In the second subsection, I will focus on the process by which the Government can claim Cabinet immunity and the degree to which such claims can be challenged. I will show that Parliament has limited the Courts’ power to review the legality of Cabinet immunity claims by preventing them from inspecting Cabinet confidences. As such, only a weak form of judicial review is currently available.

2.1 Scope of, and Limits to, Cabinet Immunity

The scope of Cabinet immunity under sections 39 of the CEA and 69 of the ATIA is the same. The structural differences between them stem from the respective situations in which they apply. Section 39 applies in litigation, when a litigant seeks access to government information to assert his or her legal rights. It empowers the Government to prevent the production of information that falls within the standard of relevance on discovery based on Cabinet immunity. When a certificate in the proper form is filed, no one can inspect and order the production of records containing Cabinet confidences or force a public official to answer
questions that would reveal such information. In contrast, section 69 applies when someone seeks access to government-held records, whatever the reason. The ATIA provides the right to access government information found in existing records, but does not create a legal duty to provide responses to questions. This explains why subsection 69(1) excludes “records” containing Cabinet confidences, as opposed to “information” like subsection 39(1).

### 2.1.1 Scope of Cabinet Immunity

To assess the scope of sections 39 of the CEA and 69 of the ATIA, two questions must be answered: what is the “Queen’s Privy Council for Canada”; and what is a “confidence”? In response to the first, the Privy Council was established under the Constitution to advise the Governor General in the governance of Canada. By convention, the Governor General must act on the advice of a small committee of Privy Councillors made up of current Ministers. The Treasury Board is a committee of the Privy Council. Clearly, the scope of sections 39 and 69 is not limited to the Privy Council and its committees. Under subsections 39(3) and 69(2), the term “Council” also includes the Cabinet and its committees. It thus captures both the legal and the political executives. Sections 39 and 69 protect the collective decision-making process wherever it takes place, as the justification supporting Cabinet secrecy is the same whether Ministers deliberate in the Privy Council or Cabinet. I will now turn to the second question: what is a confidence? The starting point is to review the classes of documents deemed to contain Cabinet confidences.

### 1) Classes of Documents Deemed to Contain Cabinet Confidences

Three approaches were considered by public officials to protect Cabinet confidences by way of statute. The first was to protect Cabinet confidences, without defining this term, as did subsection 41(2) of the FCA. The second was to protect specific classes of documents as opposed to Cabinet confidences generally. The third was to substantively define the nature of the information to be protected, and the justification for its protection, without referring to any specific class of documents. Cabinet confidences, for example, could have been defined as any information “which would disclose the deliberations of Ministers [...] in connection
with the exercise of their collective political responsibility.” The federal statutory regime combines the first and the second approaches. Sections 39 and 69 protect Cabinet confidences, without defining this term, and provide a non-exhaustive list of documents deemed to contain such information. These documents, listed in paragraphs (a) to (f) of subsections 39(2) and 69(1), are protected without regard to their actual substance. In addition, the Government has wide discretion to shield any other related documents pursuant to subsections 39(2) *in limine* and 69(1)(g). These provisions were designed to give the broadest protection possible to Cabinet confidences. Which classes of documents are specifically identified under subsections 39(2) and 69(1)?

Paragraph (a) refers to “memoranda the purpose of which is to present proposals or recommendations to Council.” Memoranda to Cabinet, Treasury Board submissions and Governor in Council submissions are the main examples of documents prepared by Ministers to obtain a collective decision on matters of government policy or action. As they are official Cabinet documents which record core secrets, their level of sensitivity is high. Paragraph (a) also captures documents that are attached to memoranda and submissions. But the fact that a document was attached to a memorandum or submission does not transform all other existing copies of that document into a Cabinet document. For example, if a document was attached for information only, any copy of that document found in departmental files, severed from the memorandum or submission, would not fall under paragraph (a). Thus, if a newspaper clipping is attached to a memorandum to Cabinet, the fact that it was attached to the memorandum, and any discussion about its substance, is subject to Cabinet immunity, but not the clipping itself. The same is true for most documents attached to memoranda and submissions, such as legal opinions, tables of statistics, consultant reports and Crown corporations’ business plans. The original version of these documents does not fall within the scope of Cabinet immunity. If it were sufficient to attach a document to a memorandum or submission to suppress all other existing copies of that document, the room for abuse

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would be limitless. Yet, in the past, the Government did try to protect consultant reports\textsuperscript{76} and Crown corporations' business plan\textsuperscript{77} on that basis.

Paragraph (b) refers to “discussion papers the purpose of which is to present background explanations, analyses of problems or policy options [...] for consideration by Council in making decisions.” Discussion papers were a special class of documents used from 1977 to 1984. Ministers prepared them to bring specific issues to the attention of the Cabinet. Discussion papers provided a factual and neutral analysis of a specific problem and options to address it. Unlike memoranda to Cabinet, their “purpose” was not to make “proposals or recommendations” to the Cabinet. Discussion papers were unofficial Cabinet documents, which did not reveal ministerial views. As they did not reveal core secrets, their degree of sensitivity was low. In fact, discussion papers were intended to be published once the Cabinet had made and announced its final decision on the underlying initiative. This rule was known as the “discussion paper exception” (see Subsection 2.1.2, below). By enacting this exception, Parliament sought to segregate facts from opinions and, in doing so, it clearly recognized that noncore secrets were less sensitive than core secrets.

Paragraph (c) refers to “agenda of Council or records recording deliberations or decisions of Council.” Cabinet, Treasury Board and Governor in Council agenda, minutes and decisions fall within this class of documents. While agenda, minutes and decisions are all official Cabinet documents, only minutes reveal ministerial views (core secrets). The degree of sensitivity of Cabinet minutes is thus high. Minutes are kept for historical purposes. They provide a summary of the discussion as opposed to a verbatim record. In principle, minutes should be impersonal and “should not attribute views to persons unless it is absolutely necessary to do so.”\textsuperscript{78} It is necessary to do so in the following situations: when a Minister reserves his or her position, registers dissent or demands that his or her views be recorded; when a departmental or regional point has been put forward; or when a difference has arisen.


\textsuperscript{78} Privy Council Office, Cabinet Papers System Unit, \textit{A Guide to Minute Writing} (November 1998) at 6. This document was released by the Privy Council Office under the ATIA, \textit{supra} note 3 (A-2016-00758).
in the positions of two or more Ministers. The amount of detail recorded in minutes depends on the Prime Minister’s directives and the significance of the discussion.79

Unlike minutes, agenda and decisions do not reveal ministerial views (core secrets). Agenda contain the list of the subject matters discussed by Ministers on specific dates;80 and decisions record the consensuses reached by Ministers on these subject matters. Once a decision has been made and announced on a given initiative, the rationale for protecting agenda and decisions disappears. However, under the statutory regime, agenda and decisions are protected for 20 years. The temporal scope of Cabinet immunity is overbroad, especially with respect to Council decisions. While an argument may perhaps be made that records of Cabinet decisions should remain confidential even after their substance was made public, there is no reason for protecting Treasury Board and Governor in Council decisions in similar circumstances. As these institutions are part of the legal executive, their decisions may directly affect individual rights and interests. This explains why Governor in Council decisions are published in the form of Orders in Council. By analogy, the same should be true for Treasury Board decisions given that it is a committee of Council with direct statutory authority. Yet, the Government protects Treasury Board letters of decision for 20 years under paragraph (c). As a result, individuals whose rights or interests are adversely affected by Treasury Board decisions may be deprived of the means to challenge these decisions.81 This is a serious matter that has received little attention. Because they embody official executive actions, Treasury Board letters of decision are no different than Orders in Council and should be published. There is no rationale for keeping these letters confidential.

79 For example, the minutes of the Mulroney Ministry on abortion and the Meech Lake Accord are quite explicit, while other older minutes are rather sanitized. See Canadian Press, “Mulroney-Era Documents Reveal Struggle with Abortion Laws,” CBC News (17 November 2013); Canadian Press, “Brian Mulroney, Pierre Trudeau Meech Lake Drama Unveiled in Cabinet Minutes,” CBC News (23 March 2014).

80 Against the recommendation of the Information Commissioner, the Clerk of the Privy Council relied on paragraphs 69(1)(c) of the ATIA, supra note 3, to refuse the disclosure of the dates, times and locations of Cabinet meetings. See Information Commissioner of Canada, Annual Report: 2015-2016 at 22-23, online: <http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx> [ICC Annual Report 2015-2016].

Paragraph (d) refers to “records [of] communications [...] between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy.” Letters from one Minister to another and notes of informal meetings between Ministers fall within this class of documents. These letters and notes are unofficial Cabinet documents, which can reveal the collective decision-making process (noncore secrets), and, or, ministerial views (core secrets). Their degree of sensitivity varies from high to low depending on whether they contain core or noncore secrets. To fall under paragraph (d), the “record” must relate to the making of government decisions or policies. In other words, it must relate to a subject matter that will be decided by Ministers as a group, not one that will be decided by a Minister alone, under his or her own statutory authority, without consultation with his or her colleagues. Similarly, communications between Ministers as Members of Parliament, communications between federal and provincial Ministers and communications related to personal, social and political party affairs cannot be protected under paragraph (d).

Paragraph (e) refers to “records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council.” Briefing notes, talking points and PowerPoint presentations prepared for one or more Ministers in relation to Cabinet, Treasury Board and Governor in Council business fall within this class of documents. These documents are unofficial Cabinet documents which can reveal the collective decision-making process (noncore secrets) and, or, ministerial views (core secrets). Their degree of sensitivity varies from high to low depending on whether they contain core or noncore secrets. These documents are usually sent from Deputy Ministers to their Ministers in relation to collective decisions (Cabinet and Council in their collegial sense), not individual decisions. They concern proposals that are ripe to be presented to Cabinet or Council, not embryonic proposals still in development. In contrast, “source documents,” created for use by public officials in the development of departmental policies,

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82 TBS Guidelines, supra note 75 at 13.4.3(d).
83 Smith, Kline & French Laboratories Ltd v Canada (Attorney General), [1983] 1 FC 917 at 931 (FC) [Smith, Kline & French Laboratories].
cannot be protected under paragraph (e) unless the information they contain provides a clear link to Cabinet or Council business.\(^{86}\)

Paragraph (f) refers to "draft legislation." Draft bills, draft regulations, drafting instructions and other documents related to the drafting of legislation, fall within this class of documents, whether or not the legislation is ultimately enacted.\(^{87}\) Draft legislation remains confidential even after the final version has been tabled in the House of Commons or Senate or, in the case of regulations, after they have been approved by the Governor in Council and published in the *Canada Gazette*. Draft bills and regulations are unofficial Cabinet documents which do not reveal ministerial views. As they do not reveal core secrets, their degree of sensitivity is low. In fact, they are often shared with stakeholders during their development. A copy of draft legislation shared with outside parties cannot be protected under paragraph (f), as the Government has lost control over the information.

Paragraph (g) refers to "records that contain information about the contents of any record [...] referred to in paragraphs (a) to (f)." This class of documents is found under section 69, but not under section 39. This is because the first applies to "records" while the second applies to "information." It was unnecessary to include paragraph (g) under subsection 39(2) as it is clear from the introductory sentence that the list of documents is not exhaustive. Pursuant to the *ejusdem generis* principle, any document sharing the same characteristics as the documents listed in paragraphs (a) to (f) would fall within the scope of Cabinet immunity. Departmental documents, such as notes and emails, which reveal the contents of memoranda, submissions, agenda, minutes, decisions, communications, briefing notes or draft legislation, are captured if the information they contain provides a nexus to collective business.\(^{88}\) They are unofficial Cabinet documents and their degree of sensitivity varies from high to low depending on whether they contain core or noncore secrets. Paragraph (g) is not based on a substantive definition of Cabinet confidences: it is relied upon to shield any departmental document containing information found in documents listed in

\(^{86}\) TBS Guidelines, *supra* note 75 at 13.4.3(e).

\(^{87}\) Smith, Kline & French Laboratories, *supra* note 83 at 932; *Quinn v The Prime Minister of Canada*, 2011 FC 379 at para 32(iii) [Quinn].

\(^{88}\) TBS Guidelines, *supra* note 75 at 13.4.3(g).
paragraphs (a) to (f). The relevant extracts are severed and protected. In 2015-2016, almost 75% of all the documents excluded under section 69 of the ATIA fell under paragraph (g).\(^8^9\)

Without a substantive definition of Cabinet confidences, and meaningful judicial review of Cabinet immunity claims, paragraph (g) is a form of “legal black hole,” which can be used to prevent the release of any information remotely connected to Cabinet or Council.

(2) Weighing and Balancing the Competing Public Interests

If the information falls within the definition of “Cabinet confidences,” should the Government weigh and balance the competing aspects of the public interest before asserting Cabinet immunity under the federal statutory regime? Under the common law, the answer is clearly positive.\(^9^0\) However, under statute law, sections 39 and 69 do not explicitly require that the Government weigh and balance the competing aspects of the public interest before asserting Cabinet immunity. It could thus be argued that Parliament has set the balance in favour of Cabinet secrecy. In other words, if the information is a Cabinet confidence within the meaning of sections 39 and 69, it could be protected without regard to the public interest in disclosure. This position may perhaps be justified under the ATIA given that the aspects of the public interest at issue are general: Cabinet secrecy versus government transparency. Indeed, the exclusion of Cabinet records under section 69 does not prevent anyone from enforcing his or her legal rights in court. That said, can this position be justified in litigation where access to Cabinet confidences is essential to the fair disposition of a specific case and where the issuance of a certificate under section 39 would result in a denial of justice?

In Babcock v Canada (Attorney General) (2002), the SCC said “no.” It asserted that two questions had to be examined before a certificate is issued: “first, is [the information] a Cabinet confidence within the meaning of [section 39]; and second, […] should [the Government] protect [the information] taking into account the competing interests in disclosure and [in] retaining confidentiality?”\(^9^1\) The duty to assess the public interest does


\(^9^0\) TG Cooper, Crown Privilege (Aurora, Ont: Canada Law Book, 1990) at 27-34 [Cooper, Crown Privilege].

not stem from the wording of section 39; rather, it stems from the inherent nature of Cabinet immunity as a PII. In litigation, it cannot be assumed that the interest of good government will always outweigh the interest of justice. The Government must consider the impact of a decision to withhold information on the rights of the litigant prior to issuing a certificate. It would be contrary to the inherent nature of PII to withhold information where the degree of relevance outweighs the degree of injury. The Government’s duty to assess the public interest before claiming PII is the same under the common law and statute law. The main difference is that under the common law, and sections 37 and 38 of the CEA, the Courts can also independently assess the public interest while under section 39, they cannot.

The Government is thus legally bound to assess the public interest before issuing a certificate. Two questions arise: who assesses the public interest; and how is the assessment conducted? First, pursuant to subsection 39(1), only “a minister of the Crown or the Clerk of the Privy Council” can object to the disclosure of Cabinet confidences. In practice, this role is played by the Clerk. No Minister has ever signed a certificate under section 39. As Secretary to the Cabinet, the Clerk is the person with the most institutional expertise to assess whether information falls within the purview of section 39. Plus, the fact that all certificates are signed by the Clerk ensures that the review process is uniform, and the results are consistent. This level of consistency could not be achieved if each Minister issued certificates for Cabinet confidences within their portfolios. Lastly, pursuant to the access convention, the current Ministry cannot access the Cabinet confidences of previous Ministries. It is thus often impossible for current Ministers to issue certificates, as they do not have access to the relevant information.

Second, to assess the public interest, the Clerk relies on the common law approach. As such, he or she weighs and balances the degree of injury and the degree of relevance of the information, and decides whether the information should be protected or not. Hogg, Monahan and Wright argue this duty was imposed by the SCC in the well-intentioned effort to reduce the tactical advantage given to the Government under section 39. But, in their view,

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the Clerk does not have sufficient expertise, impartiality and independence to assess the public interest. How can the Clerk, who has several other duties and who is usually not a lawyer, properly assess the competing aspects of the public interest? To do that, the Clerk “would have to fully understand all the issues in the litigation and the relevance of each document to those issues.”\textsuperscript{94} This is extremely time-consuming, especially when numerous documents must be reviewed.\textsuperscript{95} The authors suggest that it would be “awkward” for the Clerk, whose duty is to protect Cabinet secrecy, to allow the disclosure of Cabinet documents. They also submit that there is no way of knowing whether the Clerk has properly assessed the public interest as he or she cannot be cross-examined. Hence, “it is not a plausible interpretation of [section] 39 to read it as imposing on [the Clerk] the heavy burden of balancing the interest in disclosure against the government’s policy of secrecy.”\textsuperscript{96}

I do not entirely share their conclusion. Two issues must be distinguished: the first is whether the Clerk should assess the public interest before withholding information in court; and the second is whether his or her assessment should be final and conclusive. The Government has a duty to assess the public interest before asserting PII. Within the Government, the Clerk is the person with the most institutional expertise to fulfil this duty. While he or she may not be a lawyer, the Clerk is supported by a team of lawyers.\textsuperscript{97} These lawyers conduct the initial review of documents under section 39: they assess whether the documents contain Cabinet confidences and whether the public interest requires that they be protected based on the common law approach. In doing so, they assess the sensitivity of the documents and their relevance in the light of the pleadings. In making the final assessment, the Clerk thus benefits from expert legal advice on the nature of the documents and their sensitivity and relevance. Hogg, Monahan and Wright are correct to point out that it would be unusual for the Clerk to disclose Cabinet confidences and that there is no way of knowing whether the public interest assessment was properly conducted. However, it does

\textsuperscript{95} \textit{RJR-MacDonald Inc v Canada (Attorney General)}, [1995] 3 SCR 199 [\textit{RJR-MacDonald}]; \textit{Nunavut Tunngavik Inc v Canada (Attorney General)}, 2014 NUCJ 1 [\textit{Nunavut Tunngavik}].
\textsuperscript{96} Hogg, Monahan & Wright, \textit{supra} note 94 at 135.
not follow from these arguments that the Clerk should not assess the public interest before issuing a certificate. What follows from these arguments is that the Clerk should justify why the public interest requires that certain documents be withheld in the circumstances of the case and his or her assessment should not be final and conclusive, given the Clerk’s perceived lack of impartiality and independence.98

2.1.2 Limits to Cabinet Immunity

The scope of Cabinet immunity under sections 39 of the CEA and 69 of the ATIA is not as absolute as it was under subsection 41(2) of the FCA. Parliament has determined that the public interest does not require that Cabinet confidences be withheld in two cases: the first concerns the “passage of time”; and the second relates to “discussion papers.”99

(1) Passage of Time

Under constitutional conventions and the common law, the scope of Cabinet secrecy shrinks, and eventually fades away, with the passage of time. There is a point in time where the disclosure of Cabinet secrets no longer threatens the proper functioning of the system of responsible government. In Conway (1968), Lord Reid said that “cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest,” that is, after 30 years when they are transferred to the public archives.100 In Crossman’s case (1975), Lord Widgery refused to prevent the publication of ministerial memoirs, which revealed the substance of Cabinet discussions, even if only ten years had passed since the discussions had taken place.101 In Whitlam (1978), the High Court of Australia ordered the production of Cabinet documents that had been created three to five years earlier as their subject-matter was “no longer current” or controversial and the relevant political actors had since retired.102 Over a decade, the “life of a cabinet secret” was therefore significantly shortened.103

98 This point is examined in detail in Chapter 4, infra at 216-19.
99 See paragraphs 39(4)(a) and (b) of the CEA, supra note 2 and 69(3)(a) and (b) of the ATIA, supra note 3.
100 Conway, supra note 4 at 888. Following the adoption of the Constitutional Reform and Governance Act 2010 (UK), c 25, s 45(1)(a), Cabinet documents are now transferred to the public archives after 20 years.
102 Whitlam, supra note 5 at 46 (Gibbs ACJ), 98 (Mason J).
Under statute law, in Canada, subsection 41(2) of the *FCA* (1970) did not set a precise time limit for the protection of Cabinet confidences. They could thus forever remain secret. When the *ATIA* was in development, the CBA proposed that Cabinet documents be protected for ten years.\(^{104}\) The Progressive Conservatives found that period too short and proposed 20 years instead, which was the expected duration of a Minister’s political career.\(^{105}\) When the Liberals regained power, they kept the 20-year period as a benchmark for the protection of Cabinet confidences. This criterion is appropriate. The views expressed by a Minister in Cabinet should usually remain secret until the moment he or she retires from politics. The 20-year limit, the maximum duration of four legislatures under the Constitution, seems reasonable, although further empirical studies would need to be conducted to confirm that it represents an accurate approximation of the expected duration of a Minister’s political career. If it is, we must inquire whether this time limit should apply in all cases and for all classes of Cabinet documents. As recognized under conventions and the common law, Cabinet documents must sometimes be released in the public interest. Moreover, Cabinet documents are not all equally sensitive: core secrets are more sensitive than noncore secrets.

While the 20-year limit may be justified for core secrets, it is not justified for noncore secrets. Cabinet documents recording core secrets, such as memoranda, submissions and minutes, should receive a higher degree of protection. The same degree of protection should be afforded to excerpts of ministerial communications, ministerial briefing notes and other related documents insofar as they record core secrets. In contrast, Cabinet documents recording only noncore secrets, such as agenda, decisions and draft legislation, should receive a lower degree of protection. Noncore secrets are protected to ensure the efficiency of the collective decision-making process, and the rationale for the protection fades away once a decision has been made and announced on a given subject matter.\(^{106}\) Parliament acknowledged, to some extent, that not all classes of Cabinet confidences were equally


\(^{106}\) This was recognized in Bill C-15 and the initial version of Bill C-43, in which draft legislation was only protected until the moment when the final version of a bill had been tabled in Parliament. Paragraph (f) was subsequently amended to confer a 20-year protection to draft legislation. See *Standing Committee Evidence*, July 1981, *supra* note 40 at 50:20.
sensitive under sections 39 and 69 as one class of Cabinet documents, discussion papers, receives a lower degree of protection.

(2) Discussion Papers

Cabinet confidences are protected for 20 years. The only exception to this rule is the “discussion paper exception.” Discussion papers were used from 1977 to 1984. They did not reveal ministerial views (core secrets). Rather, they contained useful facts and background information that could assist Ministers during the Cabinet decision-making process (noncore secrets). Parliament provided discussion papers with a lower degree of protection than other Cabinet documents. Under Bill C-15 and the initial version of Bill C-43, they would have become accessible once the Cabinet had made a decision on the underlying initiative. In the end, it was decided that a discussion paper would become accessible once the Cabinet had made and announced its decision. If the decision had not been announced, a discussion paper would become accessible four years after the decision was made. The four-year period was chosen as it represented the normal “lifetime of a government.”

Discussion papers were introduced in 1977 to foster government transparency. To that end, Trudeau decided that Ministers should receive two documents for each Cabinet proposal: a discussion paper and a memorandum to Cabinet. The discussion paper was intended to present a neutral and factual discussion of available options to solve a particular problem. It would serve as a basis for internal and external consultation. A discussion paper would precede or accompany the drafting of a memorandum to Cabinet which would be used by Ministers to present recommendations to their colleagues. A memorandum to Cabinet would be a shorter document summarizing the recommendations, argumentation and political considerations. Cabinet agreed that “as a general rule, discussion papers will be

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107 Ibid at 50:11 (Hon Francis Fox).
released by the responsible Minister at the time of the announcement of the related decision.”

The “discussion paper exception” was then entrenched in sections 39 and 69. The intention behind the exception was to facilitate the disclosure of the factual material presented to the Cabinet. The “discussion paper exception” was expected to provide a new window into Cabinet proceedings. Citizens and litigants would be entitled to know the facts and the background information (noncore secrets) upon which Ministers collectively relied to make a specific decision. This would help the public better understand why certain decisions had been made and, to some extent, meaningfully contribute to the public debate.

Nevertheless, the intention behind the “discussion paper exception” was never fully fulfilled in practice. Shortly after the entry into force of the ATIA, the Government undertook a review of the Cabinet Paper System. The perceived problem can be summarized as follows: Ministers were too busy to read the background information incorporated into discussion papers; they thus only read the shorter memoranda to Cabinet. In an effort to get Ministers to read the background information, public officials moved the information from discussion papers to memoranda to Cabinet. It did not solve the problem. Memoranda to Cabinet became too long and Ministers who were looking for a summary ignored them in favour of the shorter assessment note. As a result, the assessment note became the memorandum to Cabinet, the memorandum to Cabinet became the discussion paper and the discussion paper became superfluous.

The number of discussion papers steadily decreased over the years from 298 in 1977 to 23 in 1984. A senior Privy Council officer, Roberto Gualtieri, was tasked with the mandate of finding a solution to fix the Cabinet Paper System. In his report to the Clerk, he concluded that the concept of discussion paper was flawed because these papers


111 Standing Committee Evidence, July 1981, supra note 40 at 50:18-50:19 (Hon Francis Fox): “On the question of factual material, it seems to me most, if not all of the factual material, will be included in the discussion papers which are to be released […]. And it seems to me that the general principle here of saying that the discussion papers are going to be made public after the decision is made public is a clear indication of the desirability of this coming out […]. Also there is the indication that we want discussion papers to come out; that we want the factual basis on which decisions are taken to be made public.”

were used for two conflicting purposes: to support the Cabinet decision-making process; and to inform the public. Gualtieri ultimately made three important recommendations:

[1] Limit [memoranda to Cabinet] to a maximum of three pages [...] ; [2] Put supporting background information and analysis in appendices [...] ; and [3] Prepare Discussion Papers when it is intended to release them as part of a Communication Plan.\textsuperscript{113}

Gualtieri recognized that, following these changes, the background information appended to memoranda to Cabinet would fall under the scope of paragraphs 39(2)(a) and 69(1)(a), and remain confidential for 20 years. He clearly anticipated the effects of these changes: “The proposed recommendation on [discussion papers] will be interpreted as a move away from access to information towards more secretive government.”\textsuperscript{114} He was aware that “making these background papers strict cabinet confidences would be depicted as an attempt to eviscerate the ATIA and thwart the will of Parliament.”\textsuperscript{115} He thus proposed that:

No announcement of the changes would be made. Those making inquiries about the impact of the changes on access to information should be told that the purpose of the changes is to improve the decision-making process [...] ; the changes will have no adverse impact on the government’s commitment to access to information and the release of Discussion Papers.\textsuperscript{116}

These changes would, however, have a serious impact on public access to background information. Trudeau approved the recommendations and the last discussion paper was filed in May 1984. The discussion papers that have been produced since then are a different sort of document used as part of a Communication Plan. Since mid-1984, the background information that was previously in discussion papers was incorporated into memoranda to Cabinet. Memoranda to Cabinet were accordingly divided into two sections: the Ministerial Recommendation (core secrets) and the Background/Analysis sections (noncore secrets). The objective of the first was to present the Minister’s recommendation to the Cabinet; the


\textsuperscript{114} \textit{Ibid}.


\textsuperscript{116} Memorandum from Gualtieri to Osbaldeston, \textit{supra} note 113.
objective of the second was to present a detailed analysis of the relevant facts and options to the Cabinet. From then on, the Government took the position that the “discussion paper exception” under sections 39 and 69 had become irrelevant.

The demise of the discussion paper would likely have been unnoticed but for the work of Ken Rubin. Soon after the passage of the ATIA, Rubin, an access to information activist and researcher, made various access to information requests for discussion papers. His requests were met with resistance in some departments. After three years of work, Rubin published his assessment in 1986 in which he stressed that the practice of preparing discussion papers was short lived: “From all the evidence available to me, it appears that no departmental discussion papers have been produced under Prime Ministers Turner and Mulroney. What used to be included in discussion papers is now only included in cabinet memoranda.”

The demise of the discussion paper was noted by the Information Commissioner in 1987, but it took almost ten years before an investigation was launched into the matter.

The “discussion paper exception” was dead from mid-1984 to 2001, and was brought back to life following a long judicial battle between the Information Commissioner and the Government. In 1996, Parliament passed legislation banning trade of the fuel additive MMT because it could harm the environment and human health.

The next year, Ethyl Canada, a manufacturer of MMT, filed an access to information request for: “Discussion Papers, the purpose of which is to present background explanations, analysis of problems or policy options to the [Cabinet] in making decisions with respect to [MMT].” Environment Canada found four documents falling within the purview of the request, but excluded them under

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118 Ken Rubin, Access to Cabinet Confidences: Some Experiences and Proposals to Restrict Cabinet Confidentiality Claims (September 1986) at 14 [Rubin, Access to Cabinet Confidences]. Rubin also uncovered “a scandalous but perfectly legal practice of ensuring that discussion papers are excluded.” This practice consisted of adding a ministerial “recommendation” within a discussion paper, which had the effect of transforming them into memoranda to Cabinet. Ibid at 36.
120 Manganese-based Fuel Additives Act, SC 1997, c C-11.
paragraphs 69(1)(a) and (e). In 1998, Ethyl complained to the Information Commissioner, John Reid, who launched a comprehensive investigation into discussion papers. As a former Liberal Minister, Reid could appreciate the functioning of the Cabinet and the importance of Cabinet secrecy. Based on a detailed review of the Cabinet Paper System since 1977, and the evolution of discussion papers, Reid concluded that the complaint was well founded.¹²¹

Noting that the background information had been moved from discussion papers to memoranda to Cabinet, which are protected for 20 years under paragraph 69(1)(a), Reid recommended that the Government sever and disclose the Background/Analysis section of the memorandum to Cabinet on MMT as the underlying decision had been made public. The Government did not accept his recommendation. It argued that discussion papers were now used for communication purposes only and no such paper had been created in relation to the decision to ban MMT. While the documents at issue did contain background information, they did not bear the title “discussion papers” and had been properly excluded under section 69. This position was inconsistent with the Government’s own administrative guidelines on Cabinet confidences, which stated that “the title of the document is not determinative of the character of the document.”¹²² Plus, in 1985, the Government had given the Auditor General access to the Background/Analysis sections of memoranda to Cabinet for auditing purposes, recognizing that about 80% of the information placed before Cabinet was factual in nature rather than political.¹²³ The Government had thus accepted that the Background/Analysis sections was factual in nature and could be severed from the rest of memoranda to Cabinet.

Reid filed a judicial review application before the Federal Court. The Court held that the decision to protect the documents was made in error. Parliament had intended that the background information found in discussion papers be publicly released. The Government could not thwart the will of Parliament by moving the background information from a document which is accessible to another which is not, because it would make the exception meaningless. Substance must prevail over form. The Government’s actions were “viewed as

¹²² Treasury Board Secretariat, Treasury Board Manual (1 December 1993), c 2-6 at 6 [1993 TBS Guidelines].
an attempt to circumvent the will of Parliament.”124 The Federal Court of Appeal agreed and ordered the Government to review the documents to determine “whether there is within or appended to the documents an organized body or corpus of words, which looked upon on its own, comes within the definition [of discussion paper].”125

After Ethyl, any part of a Cabinet document which contained background explanation, analyses of problem or policy options for consideration by Cabinet in making decisions, and which could stand alone as a discussion paper, had to be severed and disclosed if the underlying Cabinet decision had been made public or, when the decision had not been made public, if four years had passed. Ethyl brought the “discussion paper exception” back to life. By reaffirming Parliament’s intention, the Courts reduced the scope of Cabinet secrecy. The Government was legally bound to apply the exception to the Background/Analysis sections of memoranda to Cabinet and excerpts of ministerial briefing notes. In his 2002-2003 Annual Report, Reid said that Ethyl would be an “important catalyst for reducing the zone of cabinet secrecy.”126 He was right for almost ten years, until the Cabinet Paper System was changed again.

In July 2012, as a result of changes approved by Prime Minister Stephen Harper, the Background/Analysis section of memoranda to Cabinet was abolished to streamline Cabinet business.127 The Background/Analysis section was seen as often duplicating, rather than supplementing, the Ministerial Recommendation section. For this reason, its contents were formally moved to the Ministerial Recommendation section and other annexes. While it is within the prerogative of the Prime Minister to organize the Cabinet Paper System as he or she sees fit, the abolition of the Background/Analysis section has consequences for the “discussion paper exception” under sections 39 and 69, and for the Auditor General’s right

124 Canada (Information Commissioner) v Canada (Minister of Environment), [2001] 3 FC 514 at para 45 (Blanchard J) [Ethyl, FC, 2001].
125 Canada (Information Commissioner) v Canada (Minister of Environment), 2003 FCA 68 at para 26 (Noël JA) [Ethyl, FCA, 2003].
127 Ken Rubin, “Harper’s Cabinet Need Not have any Background Facts, Reinforces Greater Cabinet Secrecy,” The Hill Times (14 April 2014) at 15: “By eliminating the background analysis component of [memoranda to Cabinet], what the current PM has ensured, with mandarin support, is that Cabinet records themselves have now become more sanitized, compromised and even more brazenly secret.”
to access Cabinet documents. The background information found in memoranda to Cabinet, which should be made available to everyone once the underlying decision has been made public, may now remain secret for 20 years. Until July 2012, the Background/Analysis section was the modern embodiment of the defunct discussion paper.

Does the discussion paper exception remain relevant in the light of this development? In theory, the answer is “yes,” in the sense that the Government is still bound by the law, as interpreted in Ethyl. Cabinet documents will continue to be reviewed to assess whether they contain “corpuses of words” that fall within the definition of discussion paper. It is possible that excerpts of memoranda to Cabinet and ministerial briefing notes will fall within that definition. Nonetheless, few ministerial briefing notes meet the criteria for the exception. As for memoranda to Cabinet, the new template makes it harder to find excerpts that could stand alone as a discussion paper. The background information is now intertwined with the proposed course of action in the Ministerial Recommendation section. The new template blurs the distinction between facts (noncore secrets) and opinions (core secrets), and makes it harder to sever the former from the latter. Whatever the intention behind these changes, their effect is clear: the scope of the “discussion paper exception” has been reduced and the window on Cabinet proceedings is now smaller. History seems to be repeating itself. Instead of reducing the scope of Cabinet immunity by clearly separating “facts” from “opinions,” the Government has widened its scope by interweaving them.

2.2 Claiming and Challenging Cabinet Immunity

Now that the scope of Cabinet secrecy under sections 39 of the CEA and 69 of the ATIA has been delineated, I will examine the steps that must be followed by the Government to claim Cabinet immunity and the circumstances in which such claims can be challenged. The level of formality required to make a valid Cabinet immunity claim is greater under section 39 than it is under section 69. This is because the public interest affected by the former (the

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128 Under paragraph (c) of PC 2006-1289 (6 November 2006), the Auditor General can access “any explanations, analyses of problems or policy options contained in a record presented to [Cabinet] [...] for consideration [...] in making decisions.” This was meant to capture the Background/Analysis section of memoranda to Cabinet. See also PC 2017-517 (12 May 2017).
public interest in the fair administration of justice) is deemed more important that the public interest affected by the latter (the public interest in government transparency). As a result, Cabinet immunity claims tend to be more carefully tailored under section 39 than they are under section 69. Under both provisions, the circumstances in which such claims can be challenged are limited as no independent third party can inspect the documents. For that reason, only a weak form of judicial review is available against Cabinet immunity claim.

2.2.1 Claiming Cabinet Immunity

The issue of Cabinet immunity arises when the Government has a legal obligation to produce documents. This may happen in litigation when a statement of claims is filed against the Government for, *inter alia*, breach of contract, breach of fiduciary duty, or negligence. One of the first steps of the litigation will be the discovery process during which each party must identify and disclose to the other party all the relevant documents under its control.\(^{129}\) The obligation to produce documents may also arise under the access to information regime. The Government must disclose all documents falling within the scope of an access request. In both cases, public officials will search departmental files to find the relevant documents and review them for the applicable immunities and privileges. The process is similar in litigation and under the *ATIA*, except for how Cabinet immunity is claimed.

(1) Claiming Cabinet Immunity under the CEA

How must Cabinet immunity be claimed under *CEA*? The answer stems from the wording of subsection 39(1), as interpreted by the SCC. In *Babcock* (2002), lawyers from the Department of Justice in Vancouver sued the Government in damages for breach of contract and breach of fiduciary duties because they were paid less than their colleagues in Toronto. During the discovery process, the Government objected to the production of 51 documents. The lawyers challenged the objection. The SCC held that “Cabinet confidentiality is essential to good government.”\(^{130}\) It described section 39 as “Canada’s response to the need to provide a mechanism for the responsible exercise of the power to claim Cabinet confidentiality in the

\(^{129}\) A similar process is found under Rule 317 of the *Federal Courts Rules*, SOR/98-106, when a judicial review application is filed to challenge the legality of a formal executive decision or action.

\(^{130}\) *Babcock*, SCC, *supra* note 91 at paras 15-18. See also Chapter 1, *supra* at 20-32.
context of judicial and quasi-judicial proceedings.” Section 39 goes beyond the common law because, once the information is validly certified, the Court cannot inspect it and assess the public interest. A certificate is valid if it complies with four conditions:

(1) it is done by the Clerk or minister; (2) it relates to information within subsection 39(2); (3) it is done in a bona fide exercise of delegated power; and (4) it is done to prevent disclosure of hitherto confidential information.

First, a certificate must be signed by a Minister or the Clerk. Only the highest public officials can exercise the discretion of claiming Cabinet immunity. In practice, this function is played by the Clerk, as Secretary to the Cabinet. Ministers are ill-placed to perform this role as they do not have access to previous governments’ Cabinet documents. Plus, the fact that one person is responsible to claim Cabinet immunity ensures greater consistency in the interpretation and application of section 39. The process resulting in the signature of a certificate is simple. When proceedings are initiated against the Government, public officials locate the documents falling within the discovery standard. These documents are then reviewed by Justice counsel for the immunities and privileges. If some documents are subject to Cabinet immunity, Justice counsel prepares a schedule describing and assessing the documents for the Privy Council Office (PCO). As he or she is responsible for the conduct of the case, Justice counsel is not involved in the decision to claim Cabinet immunity or not. PCO counsel reviews the documents to assess whether they contain Cabinet confidences and whether they should be withheld in the public interest. If so, he or she prepares a certificate and a legal opinion, outlining his or her analysis of the case, describing the documents and assessing the public interest. The Clerk makes the final decision based on all the information.

Second, the certified documents must contain “Cabinet confidences” within the meaning of subsection 39(2). Given that no outsider (not even judges) can inspect the documents, the certificate must sufficiently describe them to enable the litigant and the judge

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131 Babcock, SCC, supra note 91 at para 21.
132 Without a certificate in the proper form, the mere assertion of section 39 of the CEA, supra note 2, does not justify a refusal to disclose Cabinet confidences. See Appleby-Ostroff, supra note 81 at para 34; Superior Plus Corp v Canada, 2016 TCC 217 at para 51.
133 Babcock, SCC, supra note 91 at para 27.
to assess whether they fall within the scope of subsection 39(2). The manner in which documents have been described in certificates has evolved from the initial certificate (before 1983) to the generic certificate (1983-2002) to the current certificate (since 2002).

The initial certificate did not provide much information. In *Smith, Kline and French Laboratories v Canada (Attorney General)* (1983), a company challenged the constitutionality of the compulsory licensing scheme for medicine under patents law. To support its case, it sought access to documents setting out the purpose of the scheme. A certificate was filed to prevent their production. The certificate was attacked on the basis that it did not sufficiently describe the documents. Consider, for example, the following description:134

Document #1 is a copy of a memorandum the purpose of which is to brief a Minister of the Crown and therefore is within [paragraph 39(2)(e) of the *CEA*].

The Federal Court agreed that the description was insufficient. It held that section 39, unlike subsection 41(2) of the *FCA*, intended to limit the scope of Cabinet immunity. This was done by clarifying the meaning of the term “Cabinet confidences” and providing exceptions to Cabinet immunity. It was thus open to the Court to determine whether, on the face of the certificate, the documents fell within the scope of section 39. The Court identified two problems: the descriptions did not track the language of subsection 39(2) as the purpose of the document, and its relation to Cabinet business, had not been made explicit; and the Clerk had not stated, in the certificate, that the exceptions to Cabinet immunity under subsection 39(4) did not apply (passage of time and discussion paper). This approach may seem “unduly formalistic,” but “litigants and the courts are entitled at least to the assurance that the Clerk [...] has directed his mind to those criteria and limitations.”135 *Smith, Kline and French Laboratories* gave rise to the generic certificate.136 That model was a step up from the initial

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134 *Smith, Kline & French Laboratories*, supra note 83 at 928.

135 Ibid at 933.

certificate, even though it did not provide meaningful information about the nature of the documents. Consider, for example, the following description:

Document No. 1 constitutes information contained in a memorandum to Council the purpose of which was to present proposals or recommendations to Council and therefore is within [paragraph 39(2)(a) of the CEA].

That was the kind of description used in generic certificates from 1983 to 2002. In a lone opinion, in *Canada (Attorney General) v Central Cartage (1988)*, the trial judge found that it did not “provide sufficient information to enable the Court to determine whether the information described in the Certificate is properly categorized.” The certificate “should state the date of the document, from whom and to whom it was sent and its subject matter.” While the trial judge was correct, his decision was set aside by the Federal Court of Appeal. Confirming *Smith, Kline and French Laboratories*, the Court of Appeal noted that “[t]here simply is no authority in [section 39] to support requiring the additional information that the Trial Judge requested in the order he made.” Hence, it was sufficient for the certificate to track the language of the relevant paragraphs in subsection 39(2).

It was not before 2001 that the Courts began to seriously question the value of generic certificates. Southin JA of the British Columbia Court of Appeal led the charge. In *Babcock*, she queried how the litigant and the judge could determine whether the Clerk was acting within the limits of his or her statutory powers under section 39 based on the descriptions of the documents provided in generic certificates: “To require the Clerk to give a meaningful description is to give the court a real and not illusory capacity to ensure that she has exercised the power in accordance with and not in disregard of the will of Parliament.”

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138 Ibid at 8.
139 *Central Cartage*, FCA, supra note 136 at para 16.
140 The Court of Appeal made one limited exception to that rule. If the documents listed in a certificate had previously been listed, and fully described, in the Government’s affidavit of documents, the Clerk had to cross reference the two lists. Otherwise, it would be impossible for the litigant and the judge to know which of the documents listed in the affidavit had ultimately been protected under the certificate. See *Puddister Trading Co v Canada*, [1996] FCJ No 345 (CA) [*Puddister Trading*]; *Samson Indian Band*, FCA, supra note 136. In the latter case, Stone JA stated that generic descriptions would be sufficient if the documents listed in a certificate had not previously been listed in the Government’s affidavit of documents.
141 *Babcock v Canada (Attorney General)*, 2000 BCCA 348 at para 46 [*Babcock, BCCA*].
Without such descriptions, “the court cannot tell whether the document falls within the ambit of [section 39].” On appeal, the SCC agreed with Southin JA on this point:

[T]he Clerk [...] must provide a description of the information sufficient to establish on its face that the information is a Cabinet confidence and that it falls within the categories of [subsection] 39(2) [...]. The kind of description required for claims of solicitor-client privilege [...] will generally suffice. The date, title, author and recipient of the document [...] should normally be disclosed.143

Thus, the date, title, author and recipient of the document are now an integral part of section 39 certificates. The SCC suggested that this information could be omitted if its disclosure would raise confidentiality concerns. This is possible in theory, but unlikely in practice, as litigation is usually initiated after a final decision has been made and announced, and the information that must be provided would not reveal ministerial views. This part of Babcock is a positive development as it enables the Courts to better assess whether, based on the description provided in the certificate, a document falls within the scope of subsection 39(2). Yet, the Clerk is not required to state that he or she has conducted the public interest assessment or explain why the interest of good government outweighs the interest of justice. Part of the reasons for claiming Cabinet immunity remains unknown. The persuasiveness of current certificates would be bolstered if the litigant and the judge could understand why the public interest demands that the documents be protected. For a Cabinet immunity claim to comply with the rule of law, the Clerk must meaningfully justify his or her decision.144

Third, the certificate must be issued in good faith: the Clerk must exercise his or her statutory powers under section 39 for the purpose of protecting Cabinet confidences in the public interest, “not to thwart public inquiry” or “gain tactical advantage in litigation.” The Clerk should not claim Cabinet immunity to cover up an illegal, negligent, or incompetent action or omission. He or she should not selectively disclose information supporting the

142 Ibid at para 54. See also Ainsworth Lumber, supra note 84 at paras 15, 19.
143 Babcock, SCC, supra note 91 at para 28.
144 Cooper, Crown Privilege, supra note 90 at 167, 175. On the importance for the Government to properly justify Cabinet immunity claims, see also Chapter 2, supra at 106-10 and Chapter 4, infra at 221-27.
145 Babcock, SCC, supra note 91 at para 25.
Government’s position and protect information that undermines it.\textsuperscript{146} This is consistent with the precedents. In \textit{Duncan}, the House of Lords stated that PII should not be used to hide misconduct, prevent public criticism or avoid legal liability; and, in \textit{Roncarelli}, the SCC held that a discretion conferred by statute must not be exercised for an improper purpose.\textsuperscript{147} How can the judge know whether a claim is made in good faith? Hogg, Monahan and Wright claim that “without the judicial power to examine contested documents, there is really no way of determining whether documents have been withheld for good public policy reasons.”\textsuperscript{148}

In accordance with the general principles of law, the Courts must assume that the Clerk is acting in good faith when he or she issues a certificate unless the litigant proves otherwise. However, at the moment, given that the Clerk is not obliged to explain why the interest in good government outweighs the interest of justice, and given that judges do not have the power to inspect the documents subject to Cabinet immunity, it is very difficult for litigants to establish bad faith. In fact, bad faith can only be proven if the decision-maker publicly reveals his or her improper motives,\textsuperscript{149} if a whistleblower brings such improper motives to light, or if an external body with subpoena power investigates and finds that the decision-maker acted improperly. There is currently no other way of establishing bad faith.

In \textit{Babcock}, the SCC stated that the issuance of a certificate “may permit a court to draw an adverse inference” against the Government\textsuperscript{150} and referred to \textit{RJR-MacDonald Inc v Canada (Attorney General)} (1995) as an example. In \textit{RJR-MacDonald}, the Clerk had certified hundreds of documents related to the Government’s decision to enact a total ban on tobacco advertising. The legislation effecting the ban was challenged by tobacco companies as an unjustifiable infringement of freedom of expression under the \textit{Charter}. One of the documents

\begin{footnotesize}
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\item \textsuperscript{146} \textit{Ibid} at para 36. At the British Columbia Court of Appeal, \textit{supra} note 141 at para 23, MacKenzie JA held the selective disclosure of Cabinet documents would be “an abuse of the judicial process.” See also \textit{JTJ MacDonald Corp v Canada (Procureur général)}, 2004 CanLII 30110 (QCCA).
\item \textsuperscript{147} \textit{Duncan}, \textit{supra} note 10 at 595; \textit{Roncarelli}, \textit{supra} note 22 at 140 (Rand J).
\item \textsuperscript{148} Hogg, Monahan & Wright, \textit{supra} note 94 at 134.
\item \textsuperscript{149} For example, in \textit{Roncarelli}, \textit{supra} note 22 at 141, Quebec Premier Maurice Duplessis publicly revealed that he had terminated Frank Roncarelli’s liquor license as an act of retaliation for his support of Jehovah witnesses. In his reasons for judgment, Rand J recognized that “[i]t may be difficult if not impossible” to demonstrate bad faith as the administrative decision-maker was not, at the time, obliged to “justify a refusal” or “give reasons for its action.” Yet, in \textit{Roncarelli}, \textit{supra} note 22, that difficulty did not arise given that Duplessis had “openly avowed” the reasons why he had terminated Roncarelli’s liquor license.
\item \textsuperscript{150} \textit{Babcock}, SCC, \textit{supra} note 91 at para 36.
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subject to the certificate was described as a study examining less intrusive means of reducing tobacco consumption. The SCC drew an adverse inference from the Government’s refusal to disclose it: “one is hard-pressed not to infer that the results of the study must undercut the government’s claim that a less intrusive ban would not have produced an equally salutary result.”

It concluded that some provisions of the legislation were unconstitutional as the Government had failed to prove that a total ban was the less intrusive means to achieve its objective under section 1 of the Charter. As such, in this case, the Government’s decision to claim Cabinet immunity effectively prevented it from meeting its onus of justification under section 1. This is the price that must sometimes be paid to protect sensitive information.

Fourth, the information contained in the documents must be confidential. As such, section 39 cannot be used to protect information that was previously disclosed. In Babcock, the SCC struck down the certificate for 17 documents out of 51 because they had lost their confidential nature: 12 had been disclosed in the litigation and five had been in the litigants’ possession before the litigation. One was an affidavit from a public servant that had been filed by the Government during a failed attempt to change the venue of the litigation. The affidavit set out the rationale behind the Treasury Board’s decision to pay a higher salary to Justice lawyers in Toronto. The SCC stated that section 39 “does not restrain voluntary disclosure of confidential information.” Indeed, the duty to protect information only arises when the public interest demands it. Moreover, section 39 “cannot be applied retroactively to documents that have already been produced in litigation.” This statement is consistent with a long line of judicial authorities both under the common law and statute law:

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151 RJR-MacDonald, supra note 95 at para 166.
152 Similarly, a Cabinet immunity claim under section 39 of the CEA, supra note 2, could undermine the Government’s ability to defend the legality of an order in council. See Gitxaala Nation v Canada, 2016 FCA 187 at paras 59, 298-299, 319, 356.
154 Babcock, SCC, supra note 91 at para 22.
155 Ibid at para 33.
156 Robinson v State of South Australia (No 2), [1931] All ER Rep 333 at 339; Whitlam, supra note 5 at 44-45 (Gibbs ACJ), 64 (Stephen J) & 100-01 (Mason J); Leeds v Alberta (Minister of the Environment) (1990), 69 DLR (4th) 681 (QB).
157 Best Cleaners and Contractors Ltd v Canada, [1985] 2 FC 293 (CA) [Best Cleaners]; Delisle v Canada (Royal Canadian Mounted Police), [1997] FC No 204 (FC); Babcock, BCCA, supra note 141. The following cases have been overruled as a result of Babcock, SCC, supra note 91: Energy Probe v Canada (Attorney General), [1992] OJ No 892 (CJ); Samson Indian Nation and Band v Canada, [1996] 2 FC 483 (FC) [Samson Indian Band, FC];
voluntary disclosure of Cabinet confidences by the Government prevents any subsequent use of Cabinet immunity.

In *Babcock*, the SCC pointed out that the concept of waiver does not apply to Cabinet immunity.¹⁵⁸ Strictly speaking, an immunity cannot be waived. The Government has a duty to protect Cabinet confidences when the interest of good government outweighs the interest of justice. Given that the information recorded in Cabinet documents does not necessarily have the same degree of relevance and degree of injury, it must be expected that, as a result of the public interest assessment, some documents will be disclosed while others will not. Such an outcome must be distinguished from an improper selective disclosure aimed at conferring the Government a tactical advantage in litigation. For example, the fact that the Government has made public a Cabinet decision through a press release does not mean that all the underlying Cabinet documents should be made public as well. In addition, the fact that some background information recorded in a Cabinet document (non-core secrets) is relevant to the fair disposition of a case does not mean that the private views expressed by Ministers while deliberating on the subject matter (core secrets) should also be revealed.

(2) Claiming Cabinet Immunity under the ATIA

The purpose of the *ATIA*, as stated in subsection 2(1), is to foster government transparency by providing “a right of access to information in records under the control of a government institution.” The right of access to information is vital in a free and democratic society as it facilitates the exercise of freedom of expression and democratic rights protected under sections 2(b) and 3 of the *Charter*.¹⁵⁹ It gives members of the public access to the information they need to express opinions on the functioning of the Government and enables them to exercise their right to vote in an enlightened manner. Yet, under subsection 2(1) of the *ATIA*, the right of access to information is not absolute: it is subject to “limited and specific

¹⁵⁸ *Babcock*, SCC, supra note 91 at paras 31-32. On this point, the SCC reversed the British Columbia Court of Appeal’s decision, which had held that the disclosure of some Cabinet documents constituted a waiver of immunity for other related Cabinet documents.

exceptions.” The aim of these exceptions is to protect various aspects of the public interest, such as international relations, national defence and national security. Because of the risk that public officials may improperly apply the exceptions, decisions to withhold documents are subject to independent review by the Information Commissioner and the Federal Court. But all of this is not true when it comes to Cabinet confidences. As they are excluded from the ATIA, Cabinet confidences are not subject to the right of access, the scope of the exclusion is not limited, and decisions to withhold them are not subject to independent review.

The decision to claim Cabinet immunity under section 69 involves three players: the department subject to the request, the Department of Justice and PCO. Since 1983, three processes have been used to deal with Cabinet confidences. The first was laid down in the 1983 Treasury Board Secretariat’s (TBS) Guidelines on Cabinet confidences.¹⁶⁰ A senior public servant was chosen within each department to determine in “clear cases” whether a document contained Cabinet confidences or not. That person had wide discretion and was only obliged to consult Justice and PCO counsel if he or she was uncertain about the nature of a document. This process resulted in the over-identification of Cabinet confidences.¹⁶¹ This outcome can be explained by the fact that senior public servants did not necessarily have the required expertise to properly identify Cabinet confidences. Plus, given the importance of Cabinet confidences, they often erred on the side of caution because the “consequences of release of a record in error are far more important than the error of withholding.”¹⁶²

In 1986, the TBS Guidelines were modified. The Government recognized that “[t]here have been a number of instances [...] where documents that were not Confidences were claimed as such.”¹⁶³ This undermined the legitimacy of section 69. The second process was set out: departments were required to consult PCO each time they sought to apply section 69.¹⁶⁴ In consultation with Justice counsel, public servants would fill out a detailed schedule

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¹⁶¹ Rubin, *Access to Cabinet Confidences*, supra note 118 at 59-64.
¹⁶⁴ *Ibid.* This process was reaffirmed in the 1993 TBS Guidelines, *supra* note 122.
in which each document would be described and the reason for its exclusion set out. Justice
counsel would then send the schedule along with the documents to PCO counsel. After
reviewing them, PCO counsel would communicate his or her assessment to the department.
Section 69 could only be applied when PCO counsel had concluded that a document
contained Cabinet confidences. As a team of PCO counsel reviewed all Cabinet immunity
claims for the Government, the application of section 69 was more consistent. However, with
the advent of computers and emails, the volume of documents to be examined exploded and
the time needed to conduct consultation with PCO became unreasonably long.165

The third process was devised in 2013. Under the current policy, departments are no
longer obliged to systematically consult PCO. Yet, they do not enjoy the same freedom they
had in 1983. Departments must systematically seek the advice of Justice before using section
69. Given that Justice has branches in each department, there is no shortage of lawyers to
carry out the work. Justice counsel must only consult PCO in two situations: first, if he or she
is uncertain about the nature of a document; and, second, if a document falls within the scope
of the “discussion paper exception.”166 PCO remains the centre of expertise on Cabinet
secrecy.167 It has kept control over the “discussion paper exception” because it is a complex
 provision which may result in the early publication of memoranda to Cabinet and ministerial
briefing notes. Under the current process, the time needed to respond to access requests has
fallen,168 but the risk that section 69 will not be applied consistently has been revived.169 In
fact, immediately following the adoption of the new process in 2013, the total number of
exclusions under section 69 surged by 49%.170 In addition, it has been reported that

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166 TBS Guidelines, *supra* note 75 at 13.4.5.
170 Yan Campagnolo, “Cabinet Documents should be under the Scope of the ATIA,” *The Hill Times* (6 June 2016) at 15. The official statistics demonstrate that the total number of exclusions has increased from 2117 in 2012-2013 to 3152 in 2013-2014 and has remained stable since then (that is, 3089 in 2014-2015 and 3279 in 2015-2016). See Treasury Board Secretariat, *Access to Information and Privacy Statistical Report, 2012-2013*,
requesters asked departments more than 2,200 times, from 2013 to 2016, not to process documents containing Cabinet confidences as part of their access to information requests to obtain a faster response from departments. Without this new trend, the total number of exclusions under section 69 may have surged even more.

Two points distinguish the manner in which Cabinet immunity is claimed under the CEA and the ATIA: the public interest assessment; and the issuance of a formal certificate. These differences stem from the assumption that the interest of justice (the litigants’ right to access government information in litigation) is greater than the interest in government transparency (the citizens’ right to access government information outside litigation). As such, under the ATIA, public officials are not required to weigh and balance the competing aspects of the public interest before excluding documents. The only issue is whether the documents contain Cabinet confidences. If they do, the documents are excluded, unless one of the exceptions to Cabinet immunity applies. Plus, as a matter of law, it is not necessary for the Clerk to issue a certificate under section 39 so that documents can be excluded under section 69. Whether this two-tier regime can be justified depends on the value given to the right of access to information. While it is not explicitly protected in the Charter, the SCC held that the right of access to information can be protected as part of freedom of expression pursuant to paragraph 2(b); however, in obiter dictum, the SCC has suggested that Cabinet immunity would not violate the Charter.

In 1984, the Information Commissioner reached an agreement with the Government. When a complaint was filed in relation to section 69, the Commissioner could request a written confirmation from the responsible Minister or the Clerk that the excluded documents contained Cabinet confidences. The confirmation provided the assurance that the documents had been reviewed at the “highest possible government level,” which would help dispel any doubt as to their nature. Complaints have sometimes led to the reversal of the decision to

172 Quinn, supra note 87 at para 32(ii).
174 The Information Commissioner mentioned that she would also ask for a written confirmation when she had “some doubt about the application of section 69.” The process is described in the Commissioner’s 1987-
exclude documents.\textsuperscript{175} The confirmation took the form of a letter to the Commissioner,\textsuperscript{176} which included a description of the documents and a statement that they fell within the scope of section 69.\textsuperscript{177} While it was signed by a Minister or the Clerk, the letter was not a formal section 39 certificate. This requirement still exists, but letters of confirmation are no longer signed by a Minister or the Clerk. Rather, they are signed by lower-level public officials.\textsuperscript{178} Because of this change, the assurance that the matter would be considered \textit{de novo} at the highest level of government has been lost. The current process does not mitigate the risk that documents may be improperly excluded. The only way of ensuring the integrity of the process would be to allow independent third parties to inspect the documents subject to section 69.

When the Liberals revised Bill C-43 in 1982, they amended the clauses dealing with the Information Commissioner’s and the Federal Court’s power to examine, or inspect, documents during investigations and judicial review applications. Because of this change, the Commissioner and the Court can only “examine any record to which this Act applies.”\textsuperscript{179} Therefore, given that the \textit{ATIA} does not apply to Cabinet confidences pursuant to section 69, the Commissioner and the Court cannot, in principle, examine them. Since the coming into force of the \textit{ATIA}, the Commissioner has consistently taken the position that he or she did not have authority to access Cabinet confidences,\textsuperscript{180} except in one case.


\textsuperscript{178} TBS Guidelines, supra note 75 at 13.4.6, 13.4.7; \textit{ICC Annual Report 2014-2015}, supra note 168 at 42.

\textsuperscript{179} See sections 36(2) and 46 of the \textit{ATIA}, supra note 3. These provisions would have taken precedence over section 39 of the \textit{CEA}, supra note 2, if Cabinet confidences had not been excluded from the \textit{ATIA}, supra note 3.

In *Canadian Broadcasting Corporation v Canada (Information Commissioner)* (2011), the issue was whether the Commissioner had the power to inspect the Canadian Broadcasting Corporation’s (CBC) documents. Section 68.1 excludes information pertaining to CBC’s “journalistic, creative or programming activities” from the *ATIA*. The exclusion is followed by an exception for information that relates to the CBC’s “general administration.” In the Federal Court, the Commissioner argued that she had the power to inspect CBC’s documents to assess whether the exclusion had been properly applied. The CBC rejected this argument on the basis that the *ATIA* did not apply to these documents. The Court held that the Commissioner had the power to inspect the documents to separate the information about the CBC’s journalistic activities from information about its general administration. Given that the Commissioner’s investigations are confidential, and she cannot order the disclosure of documents, the process would not be injurious to the CBC.

On appeal, the Commissioner tried to push the reasoning one step further. Given the similarities in the structure of sections 68.1 and 69 (an exclusion followed by an exception to the exclusion), she took the position that she should also have the power to inspect Cabinet confidences to separate the information excluded under subsection 69(1) from information not excluded under subsection 69(3), unless the Clerk issues a certificate under section 39. Subsection 69(3) sets out two exceptions for: documents created more than 20 years ago; and discussion papers. While the Federal Court of Appeal upheld the lower Court’s decision, it rejected the Commissioner’s new argument, noting that her “official position has always been that she cannot access records and information excluded by the Act.” The Court of Appeal stated that neither the Commissioner nor the Court could inspect documents containing Cabinet confidences under the *ATIA* whether or not a certificate had been issued under section 39. The Court of Appeal reasoned that existence of an exception under

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181 *Canadian Broadcasting Corporation v Canada (Information Commissioner)*, 2010 FC 954 at para 31.
182 *Ibid* at para 36.
183 *Canadian Broadcasting Corporation v Canada (Information Commissioner)*, 2011 FCA 326 at para 37 [CBC, FCA].
184 *Ibid* at para 49.
185 The Federal Court cannot compel the production of documents containing Cabinet confidences in the context of judicial review applications under the *ATIA*, *supra* note 3. While the Clerk has, in the past, issued section 39 certificates in these circumstances (see *Ethyl*, FC, 2001, *supra* note 124 and *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2008 FC 766 [Prime Minister’s Agenda]), he was not
subsection 69(3), unlike the existence of an exception under section 68.1, could be assessed “on the face of the record, without it being necessary to examine its contents.”

This reasoning is not entirely persuasive. True, the Commissioner can assess whether a document has been in existence for more than 20 years “on the face of the record,” without reviewing its contents; however, whether the “discussion paper exception” applies cannot be assessed “on the face of the record.” The contents of a document must be reviewed to assess whether it contains a “corpus of words” within the meaning of “discussion papers.” Following the abolition of the Background/Analysis section of memoranda to Cabinet, the application of the exception is more complex, as facts (noncore secrets) are intertwined with opinions (core secrets). Moreover, research must be undertaken to assess whether Cabinet has made a decision on the initiative and, if so, whether it has been made public. This kind of information cannot be verified “on the face of the record.” To be consistent with its reasoning on section 68.1 and Ethyl, the Court of Appeal should have concluded that the Commissioner and the Court have the power to inspect memoranda to Cabinet to assess whether parts of these documents fall under the “discussion paper exception.” Only the issuance of a section 39 certificate could limit that power, assuming that section 39 is constitutional.

2.2.2 Challenging Cabinet Immunity

The Cabinet secrecy statutory regime, as well as executive decisions to claim Cabinet immunity, have been challenged under constitutional and administrative law. Constitutional challenges have focused on the issues of whether the statutory regime is consistent with the division of legislative powers (administration of justice in the province), the unwritten constitutional principles (rule of law; separation of powers; and judicial independence), the Charter (right to life, liberty and security; right to a fair trial; and right to equality) and

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186 CBC, FCA, supra note 183 at paras 50-54. That said, if the documents are voluntarily produced, the Court can inspect them, see Prime Minister’s Agenda, supra note 185 at para 124.  
188 Commission des droits de la personne, supra note 26.  
189 Ibid; Singh v Canada (Attorney General), [2000] 3 FC 185 (CA) [Singh]; Babcock, SCC, supra note 91.  
190 ILWU v Canada, [1989] 1 FC 444 (FC); Central Cartage, FCA, supra note 136; CARI, supra note 85.
the *Canadian Bill of Rights*\(^{191}\) (right to property; and right to a fair trial).\(^{192}\) Suffice it to say, for now, that these constitutional challenges have failed. The SCC has confirmed the validity of the statutory regime in *Commission des droits de la personne* (1982) and *Babcock* (2002). In contrast, administrative challenges have focused on the issue of whether the Government can withhold Cabinet confidences under sections 39 of the *CEA* or 69 of the *ATIA* in a specific case. The emphasis has been on the legality of executive action, not on the constitutionality of the legislation. This section focuses only on administrative challenges to Cabinet immunity claims; the constitutional validity of the statutory regime will be examined in Chapter 4.

In enacting section 39, Parliament set out a strong privative clause which makes it hard to challenge Cabinet immunity claims. Section 39 takes precedence over all legal rules which give litigants, agents of Parliament,\(^{193}\) adjudicators and judges access to government documents. While the scope of judicial review of Cabinet immunity claims is narrow, any “court, person or body with the jurisdiction to compel the production of information” can review Cabinet immunity claims under section 39.\(^{194}\) In comparison, only the Information Commissioner and the Federal Court can review Cabinet immunity claims under section 69. The review body cannot inspect Cabinet confidences; it must decide the issue based on the description of the documents and extrinsic evidence.\(^{195}\) Cabinet immunity claims have been challenged on questions of law\(^{196}\) and the Courts have applied the correctness standard of review.\(^{197}\) As they limit the free flow of information, sections 39 and 69 should be narrowly interpreted.\(^{198}\) Cabinet immunity claims can be challenged on procedural and substantive grounds.

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\(^{191}\) *Canadian Bill of Rights*, SC 1960, c 44.

\(^{192}\) *Commission des droits de la personne*, supra note 26; *EACL*, supra note 136; *Central Cartage*, FCA, supra note 136; *Wedge v Canada (Attorney General)*, [1995] FCJ No 1399 (FC).

\(^{193}\) *Auditor General*, supra note 53.

\(^{194}\) *Babcock*, SCC, supra note 91 at paras 42-44.

\(^{195}\) *CARI*, supra note 85 at para 42; *Singh*, supra note 189 at para 50; *Babcock*, SCC, supra note 91 at para 40; *Canada (Information Commissioner) v Canada (Minister of Environment)*, [2000] FCJ No 480 at paras 13-15 (CA).

\(^{196}\) *Singh*, supra note 189 at para 43.

\(^{197}\) *Ethyl*, FCA, 2003, supra note 125 at para 22.

\(^{198}\) *Samson Indian Band*, FC, supra note 157 at para 30; *Donahue*, supra note 136 at para 8; *Babcock*, BCCA, supra note 141 at para 14.
(1) Procedural Challenges to Cabinet Immunity Claims

A procedural challenge lies against a Cabinet immunity claim under section 39 when it is not made in the proper form. Such a claim is invalid in three situations. First, if the Government asserts Cabinet immunity to protect documents without submitting a certificate signed by the Clerk.199 Second, if the certificate does not sufficiently describe the documents; for example, if it does not identify and track the language of the paragraph of subsection 39(2) under which the document falls, or if it does not disclose the document’s date, title, author or recipient. Third, if the certificate does not confirm that the exceptions to Cabinet immunity under subsection 39(4) do not apply (passage of time and discussion paper). The consequences of the breach of these requirements are minimal. The Courts have taken a remedial approach and allowed the Government to correct the deficiencies by filing a new certificate within a reasonable amount of time, not exceeding 30 days.200 This remedial approach is justified, as substance must take precedence over form. The public interest could be injured if the Government lost the right to claim Cabinet immunity as a result of technical deficiencies. Only when the Government has failed to fix the deficiencies within a reasonable amount of time would the Court be justified in ordering the documents’ production.

(2) Substantive Challenges to Cabinet Immunity Claims

A substantive challenge lies against a Cabinet immunity claim when: it seeks to protect documents that fall outside the scope of the immunity; or it is made for an improper motive. This implies that the documents have been withheld mistakenly or abusively.201

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199 Appleby-Ostroff, supra note 81 at paras 34-36. A claim based on a certificate filed for the same documents in different proceedings is invalid: Prime Minister’s Agenda, supra note 185 at para 176. When the volume of documents is high, the Government can negotiate the timing of the certificate’s filing: Sawridge Band v Canada, [2001] FCJ No 1488 (FC); Nunavut Tunngavik, supra note 95. However, if the Government fails to file the certificate within the deadline set by the Court, the Court may compel the documents’ production: Nunavut Tunngavik Inc v Canada (Attorney General), 2014 NUC] 31.

200 Smith, Kline & French Laboratories, supra note 83 (30 days); Puddister Trading, supra note 140 (10 days); Samson Indian Band, FC, supra note 157 (reasonable time); Babcock, BCCA, supra note 141 (21 days); Ainsworth Lumber, supra note 84 (21 days); Pelletier v Canada (Attorney General), 2005 FCA 118 [Pelletier] (15 days); Tribal Wi-Chi-Way-Win Capital Corporation v Canada (Attorney General), Federal Court, T-22-10 (13 September 2011) (20 days); Syncrude Canada Ltd v Canada (Attorney General), Federal Court, T-1643-11 (26 October 2012) (21 days).

201 Babcock, SCC, supra note 91 at para 28. See also Smith, Kline & French Laboratories, supra note 83 at 929; Central Cartage, FCA, supra note 136 at para 11; CARI, supra note 85 at para 34.
first type of case is more frequent than the second. No Canadian Court has ever found that Cabinet immunity was claimed abusively.\(^{202}\) While public officials make mistakes from time to time, they do not ordinarily act in bad faith and, in any event, such behaviour is difficult to prove, as external evidence of bad faith is hard to obtain, and the Courts cannot inspect the documents. It will not be possible to prove bad faith, unless: it is clear from public statements that the claim was made abusively; a whistleblower provides such evidence to the litigant; or an external body with subpoena power investigates and finds that the claim was made abusively. Yet, the possibility that Cabinet immunity may be used to thwart a public inquiry or gain a tactical advantage in court cannot be excluded.\(^{203}\) This would be the case if the Clerk issued a certificate to shield the Government from public embarrassment or legal liability. This kind of improper motives would vitiate the certificate. That said, Cabinet immunity claims are usually challenged in two situations that do not involve allegations of bad faith.

First, a Cabinet immunity claim can be challenged if the documents do not, based on their descriptions, fall within one of the classes listed in subsections 39(2) and 69(1), or an analogous class. Examples of documents that clearly fall outside the scope of these provisions include: an agreement or contract signed with third parties;\(^{204}\) a corporate or business plan drafted by a Crown corporation;\(^{205}\) a report drafted by a consultant;\(^{206}\) a letter between a federal and provincial Minister; and a letter between two federal Ministers on parliamentary, social or party affairs.\(^{207}\) A Cabinet immunity claim can also be challenged if, based on their descriptions, the documents fall within one of the exceptions listed in subsections 39(4) and 69(3). This would be the case if the date of the document suggests that it was created more than 20 years ago. It would also be the case if a document falls within the definition of “discussion paper” and there is evidence that Cabinet has made its decision public. Most of

\(^{202}\) There is only one case in which a dissenting judge implied that Cabinet immunity may have been claimed abusively: \textit{CARI}, supra note 85 at para 9. In that case, Hugessen JA suspected that a ministerial briefing note subject to a certificate did not fall within the scope of section 39. In this context, he said that if his suspicions were true, he would “consider this case to be a gross abuse of executive power, but one which Parliament, sadly, has clearly intended to be out of reach of judicial scrutiny.”

\(^{203}\) Babcock, SCC, supra note 91 at para 25.


the challenges made on this basis have been initiated by the Information Commissioner under the ATIA. The best example is Ethyl, in which the Commissioner proved, through extrinsic evidence, that the "discussion paper exception" remained relevant.

Second, a Cabinet immunity claim can be challenged if the documents are no longer confidential. As stated in Babcock, "[w]here a document has already been disclosed, [Cabinet immunity] no longer applies." It is crucial to distinguish between three types of disclosure: voluntary, inadvertent and unauthorized. Neither section 39 nor 69 prevent the Government from disclosing Cabinet confidences. The voluntary disclosure of Cabinet confidences may occur when a Minister announces an initiative that has been debated in Cabinet, or table legislation in Parliament. It may also take place when the Government gives a commission of inquiry or the RCMP access to Cabinet confidences to carry out an investigation. Finally, it may happen during the discovery process in litigation. If Cabinet documents are produced to the litigant, or if public officials disclose Cabinet confidences during their examination on discovery, the Clerk cannot subsequently certify the documents or information under section 39. This explains why the certificate was not upheld in relation to 17 documents in Babcock.

In doing so, the SCC implicitly confirmed the position taken by the Federal Court of Appeal in Best Cleaners and Contractors Ltd v Canada (1985). In that case, the Clerk had, very late in the proceedings (that is, one day before the beginning of the trial), filed a certificate in relation to Cabinet confidences that had previously been disclosed to the litigant, without objection from government counsel. Public officials had revealed the contents of a Treasury Board submission during their examination on discovery. In addition, the copy of a Treasury Board’s letter of decision had been given to the litigant. While these Cabinet confidences had been lawfully disclosed, the trial judge ruled that they were not admissible given the issuance of the certificate. Deprived of the use of this seemingly relevant evidence, the litigant lost at trial. On appeal, by a 2-1 majority, the Federal Court of Appeal ordered a new trial. The majority held that while section 39 prevented the Courts from forcing the Government to

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208 The support of the Information Commissioner is crucial to the successfultness of a judicial review application related to the exclusion of Cabinet documents under section 69 of the ATIA, supra note 3. Thus far, in cases where the Commissioner did not support the challenge, the Federal Court dismissed the application: Gogolek v Canada (Attorney General), [1996] FC No 154 (FC); Quinn, supra note 87.

disclose Cabinet confidences, it did not prohibit their voluntary disclosure. Therefore, a judge can inspect Cabinet confidences, if the information is lawfully before him or her, and the issuance of a certificate will not prevent their admission into evidence.

What if Cabinet confidences are disclosed by inadvertence as opposed to voluntarily? Should the Government be allowed to claim Cabinet immunity under section 39? In Babcock, the SCC left the question open. Two different jurisprudential trends have since developed. On the one hand, the British Columbia Supreme Court has taken the position that documents that have been disclosed by inadvertence cannot be protected under section 39, as they have lost their confidential nature. But, in such cases, the documents may still be protected under the common law. The judge is thus free to inspect the documents and assess the competing aspects of the public interest. On the other hand, the Federal Court has taken the position that documents that have been disclosed by inadvertence can be protected under section 39. The difficulty with this approach is to distinguish inadvertent from voluntary disclosure. Indeed, if a document containing Cabinet confidences is purposively attached to a letter from the Deputy Clerk to the Information Commissioner, is the disclosure inadvertent? What if a confidential Governor in Council submission is carelessly sent to the chairman of a Crown corporation to inform him that he has been dismissed? In both cases, the Federal Court ruled that the disclosure was inadvertent.

The line between inadvertent and voluntary disclosure was clearly drawn in Reece v Canada (Attorney General) (2006). In that case, government counsel had, in consultation with the responsible Minister’s chief of staff, disclosed portions of a ministerial briefing note in judicial review proceedings. Counsel was then informed by PCO that the briefing note should have been protected in full. The Clerk issued a certificate which covered the briefing note. Counsel submitted that he had inadvertently disclosed the briefing note and, as such, it should be returned. The Federal Court disagreed. In its view, the Government could not rely

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210 Best Cleaners, supra note 157 at 311.
211 Babcock v Canada (Attorney General), 2004 BCSC 1311 at paras 27-33. After assessing the public interest in the abstract, Smith J held that the inadvertently disclosed documents should be admitted. To preclude the Court from considering the documents in this case would “affect the integrity of the judicial process.”
212 Ethyl, FC, 1999, supra note 157 at paras 31-53.
213 Pelletier, supra note 200 at paras 25-26.
on section 39 to protect the briefing note because a calculated and deliberate disclosure had taken place. When a document is lawfully disclosed in litigation by counsel with apparent authority to do so, the disclosure cannot be described as inadvertent. Indeed, if the parties could not rely on the “efficacy of deliberate decisions and actions taken by counsel in the conduct of the case,” litigation would become “unmanageable.”

In the light of Best Cleaners, Babcock and Reece, the disclosure of Cabinet confidences by government counsel and public officials in litigation cannot be considered inadvertent. The Government cannot rely on section 39 to bar the admission of the information. The issue is whether the disclosure of Cabinet confidences by public officials before the litigation can be considered “inadvertent.” In my opinion, the notion of inadvertent disclosure should not apply to section 39. The conditions for a valid certification set out in Babcock should be strictly interpreted given the draconian nature of that provision when compared to the common law. If Cabinet confidences have been disclosed (inadvertently or not) to a party with adverse interests, the information is no longer confidential, and the fourth condition for a valid certification is not met. To be sure, all the parties to the litigation are privy to the information. There is no reason why it should be kept from the Court. If the Government thinks that the public interest would be injured by the use of the information in court, it could make an immunity claim under the common law. In such circumstances, the Court would have the power to inspect the information and assess the public interest. This would be a principled manner of limiting the scope of section 39 while protecting the public interest.

There is one case where the disclosure of Cabinet confidences should not necessarily prevent the Government from relying upon section 39: when the disclosure is unauthorized. This kind of disclosure occurs when public officials leak Cabinet confidences. In Bruyere v Canada (2004), a litigant was given a Cabinet document in an unmarked envelope by an unknown person at a conference. The litigant then tried to use the document in proceedings against the Government. The Clerk issued a certificate to protect it and government counsel

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214 Reece v Canada (Minister of Western Economic Development), 2006 FC 688 at para 28.
215 Yet, government counsel’s undertaking to disclose a document in litigation will not prevent the Clerk from certifying that document under section 39, provided that it was not produced to the litigant. See CARI, supra note 85 at para 44.
demanded its return. The Federal Court could not “condone such conduct or sanction the otherwise unauthorized and prohibited disclosure of Cabinet confidences.”

It ordered that the document be returned to the Government. Allowing the litigant to use the information would have put the administration of justice into disrepute. The status of Cabinet documents cannot be decided by “rogue” public officials; the proper legal processes must be followed.

To sum up, only a weak form of judicial review of Cabinet immunity claims is available under the current statutory regime. In some cases, like Smith, Kline and French Laboratories, the Government was forced to provide better descriptions of the documents certified under section 39. These descriptions are important for, in the absence of power to inspect the documents, it is the primary way for litigants and the Courts to assess the legality of a Cabinet immunity claim. Over the years, the Information Commissioner has been successful in convincing the Government and the Courts that some classes of documents did not fall within the scope of sections 39 and 69. The Commissioner’s persistence in Ethyl resulted, to some extent, in the revival of the “discussion paper exception.” The main ground upon which litigants have been able to defeat Cabinet immunity claims is lack of confidentiality. If Cabinet confidences have been voluntarily disclosed to the litigant, as in Best Cleaners, Babcock and Reece, the Government cannot prevent the use of the information in court by issuing a certificate.

CONCLUSION

The objective of this chapter was to establish the scope of Cabinet immunity under federal statute law in Canada. It addressed four questions.

First, why did Parliament entrench executive supremacy over Cabinet confidences? The answer is that the Liberals did not trust judges to handle their political secrets. In 1970, after the House of Lords asserted the power to review PII claims under the common law in Conway (1968), Parliament enacted subsection 41(2) of the FCA to provide the Government with an absolute immunity over Cabinet confidences. Ministers were given the discretionary

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power to protect this undefined class of information for an unlimited period of time. In enacting subsection 41(2), Parliament restored the principle set out in Duncan (1942) which had led to abuse of executive power. This provision was enacted without much controversy as Canadian jurists have historically paid little attention to one of the basic areas of British constitutional law, that is, the proper role of the judicial branch in relation to the executive branch. By the late 1970s, there was a momentum in Canada in favour of greater freedom of information. The initial version of Bill C-43 would have given the Courts the power to inspect and order the production of Cabinet confidences in litigation and under the ATIA. This would have made the federal statutory regime consistent with the common law. However, Trudeau backtracked as a result of his experience with the McDonald Commission and the nondeferential attitude to Cabinet immunity taken by the Courts under the common law. His decision to maintain absolute control over the disclosure of Cabinet confidences led to the adoption of sections 39 of the CEA and 69 of the ATIA in 1982.

Second, what is the scope of, and what are the limits to, Cabinet immunity under statutory regime? While sections 39 and 69 narrowed the scope of Cabinet immunity by providing a definition of “Cabinet confidences,” that definition was overbroad. Instead of setting out a substantive definition, Parliament defined “Cabinet confidences” in relation to the types of documents where confidences could be found. It provided a non-exhaustive list of seven classes of documents which were deemed to contain Cabinet confidences. Public officials can thus protect any information that has some connection, however tenuous, to Cabinet proceedings. As for the limits to Cabinet immunity, Parliament decided that Cabinet confidences should be protected for 20 years, a period deemed to constitute the expected duration of ministerial careers. The other limit to Cabinet immunity, the “discussion paper exception,” was intended to enable the disclosure of background information after the underlying Cabinet decision had been made public. But the Government was able to sidestep this exception, and extend the reach of Cabinet secrecy, by modifying the Cabinet Paper System in 1984 and 2012.

Mullan, supra note 18 at 291.
Third, how must Cabinet immunity be claimed in litigation and under the *ATIA*? The process leading to a Cabinet immunity claim in litigation is more rigorous than the process leading to the exclusion of Cabinet documents under the *ATIA*. To claim Cabinet immunity under section 39, the Government must file a certificate, signed by the Clerk, in which the documents are sufficiently described. Before signing the certificate, the Clerk must have reached the conclusion that the documents contain Cabinet confidences and that public interest demands that they be withheld. The process is centralized: all Cabinet immunity claims are filtered by PCO counsel to ensure that section 39 is interpreted and applied consistently. In contrast, to claim Cabinet immunity under section 69, the Government does not need to file a certificate. Cabinet documents are excluded by lower-level public officials on the advice of Justice counsel. As the process is decentralized, there is no guarantee that section 69 is interpreted and applied consistently. Before excluding the documents, public officials must have reached the conclusion that the documents contain Cabinet confidences, but they do not need to assess the competing aspects of the public interest. As such, under the *ATIA*, the public interest in secrecy always trumps the public interest in transparency.

Fourth, in which circumstances can Cabinet immunity claims be challenged? Judicial review of Cabinet immunity claims is quite difficult, as no independent body can inspect the documents protected or order their production. Yet, no privative clause, however draconian, can completely insulate executive decisions or actions for judicial review. Cabinet immunity claims can be challenged if it is not made in the proper form; for example, if the certificate is not signed by the Clerk, or if the certificate does not sufficiently describe the documents. The remedy is to allow the Government to file a proper certificate within a reasonable period of time. In addition, Cabinet immunity claims can be challenged if there is extrinsic evidence that documents were withheld in bad faith, either to thwart a public inquiry or gain a tactical advantage in litigation. That said, in practice, the evidence needed to prove bad faith is nearly impossible to obtain. This may explain why no Cabinet immunity claim has successfully been challenged on that ground. Most challenges to Cabinet immunity are made on the basis that the documents: do not, on their face, fall within the scope of sections 39 or 69; or have lost their confidential nature because of their previous disclosure. Judicial challenges have been successful on the first ground in *Ethyl* (2003) and on the second in *Babcock* (2002).
The next question that should be addressed is whether the federal statutory regime is consistent with the rule of law and the Constitution, especially the provisions marking the boundaries between the respective roles of the executive and judicial branches. Two major problems can be identified. The first problem is one of procedural fairness. The process leading to the suppression of relevant Cabinet confidences in litigation raises a reasonable apprehension of bias as the decision-maker, the Clerk, is not sufficiently independent and impartial to make a final decision in this regard. Furthermore, the decision-maker is not required to properly justify his or her decision to claim Cabinet immunity; he or she is not required to be transparent and engage in a dialogue of justification. The second problem is one of separation of powers. The statutory regime deprives the Courts of their power to assess the admissibility of evidence in litigation and their jurisdiction to meaningfully review the legality of executive action. These problems will be addressed in the next chapter.
CHAPTER 4

CABINET SECRECY AND THE RULE OF LAW

A Matter of Principle: Challenging the Legality of Executive Supremacy over Federal Cabinet Confidences

INTRODUCTION

As demonstrated in Chapter 3, Canada is the only Westminster jurisdiction to have enacted a near-absolute immunity for Cabinet confidences. Parliament entrenched executive supremacy over the disclosure of Cabinet confidences at the behest of Prime Minister Pierre Elliott Trudeau’s Liberal Government, which did not trust the Courts to properly protect its political secrets. To ensure the highest level of protection to Cabinet confidences, Parliament adopted a broad statutory scheme, the scope of which went beyond the protection afforded to this type of information under constitutional conventions and the common law. Given that Parliament has effectively removed from the Courts the power to inspect and order the production of Cabinet confidences, it is extremely difficult to challenge Cabinet immunity claims. Litigants and judges do not have access to the information required to determine whether such claims are made reasonably and in good faith by the executive branch.¹

The fundamental question is whether the federal statutory regime is constitutional. Under the common law, which applies at the provincial level in Canada, the Courts’ power to inspect and order the production of Cabinet confidences is now considered a constitutional imperative. In Carey v Ontario (1986), the Supreme Court of Canada (SCC) concluded that it would be “contrary to the constitutional relationship that ought to prevail between the executive and the courts in this country” to deprive the judiciary of this power.² Despite this statement, Courts have held that Parliament could, pursuant to the doctrine of parliamentary sovereignty, provide a near-absolute statutory immunity to the Government over Cabinet confidences. In their view, this kind of immunity would not violate the Constitution.³ The

¹ For an overview of Cabinet immunity under statute law, see Chapter 3, supra at 150-89.
² Carey v Ontario, [1986] 2 SCR 637 at 654 [Carey].
Courts’ position on this issue appears inconsistent: it is either constitutional to deprive the judiciary of the power to inspect and order the production of Cabinet confidences, or it is not, as the common law and statute law must both comply with the same constitutional rules.

In its seminal decision on Cabinet immunity under statute law, *Babcock v Canada (Attorney General)* (2002), the SCC did not address this inconsistency. In eight paragraphs, at the very end of its reasons, it held that executive supremacy over Cabinet immunity did not violate the unwritten principles of the rule of law, the separation of powers and judicial independence. Based on historical considerations, and the fact that a weak form of judicial review is possible, the SCC further stated that the statutory regime did not fundamentally alter the relationship between the executive and the judicial branches of the State. It thus confirmed that the near-absolute nature of Cabinet immunity at the federal level is not only legal but also legitimate. The SCC reached its conclusion by embracing a very thin conception of the rule of law and a very narrow interpretation of the separation of powers. In doing so, the SCC disregarded the wisdom of *Carey* and the common law legacy of Cabinet immunity.

The objective of this chapter is to show that the near-absolute statutory immunity granted to Cabinet confidences violates the rule of law and the provisions of the Constitution. I will focus on section 39 of the *Canada Evidence Act*, which deprives judges of the power to inspect and order the production of Cabinet confidences in litigation. Chapter 4 is divided into two sections. In Section 1, I will demonstrate that the SCC’s very thin conception of the rule of law is of limited use as a normative framework to assess the legality of section 39. To that end, I will turn to the thicker theory of law as justification. In Section 2, I will demonstrate that section 39 breaches the requirements of procedural fairness and intrudes upon the core, or inherent, jurisdiction and powers of provincial Superior Courts. I will

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4 *Babcock*, supra note 3 at paras 53-61.
5 *Canada Evidence Act*, RSC 1985, c C-5, s 39 [CEA], which is reproduced in the Appendix.
7 See section 96 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [Constitution Act, 1867].
argue that to comply with the rule of law and the provisions of the Constitution, Cabinet immunity claims should be decided by independent and impartial judges, following a fair decision-making process, in the course of which judges can inspect the documents and assess the public interest.

**1. DEFINING THE RULE OF LAW**

To determine whether section 39 of the CEA is consistent with the rule of law, it is first necessary to define what is meant by “rule of law.” While the rule of law is an important political ideal, with deep historical roots going back to the Greeks and the Romans, there is no broad consensus on its precise meaning. All conceptions of the rule of law seek, to various degrees, to limit the powers of the State, to replace the often-arbitrary rule of men by a more rational rule of law. Beyond this basic idea, legal theorists tend to distinguish thin from thick conceptions of the rule of law. Thin conceptions are associated with positivist approaches to the rule of law while thick conceptions are associated with natural law approaches. In an influential article on the rule of law, Paul Craig describes the main differences between thin (or formal) and thick (or substantive) conceptions:

Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.); the clarity of the ensuing norm (was it sufficiently clear to guide an individual’s conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm (was it prospective or retrospective, etc.). Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met.

[In contrast, substantive] conceptions of the rule of law seek to go beyond this. They accept that the rule of law has the formal attributes mentioned above, but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between “good” laws, which comply with such rights, and “bad” laws which do not.8

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Section 1 will define the scope of the rule of law conception that will then be used in Section 2 to determine whether Parliament can confer on the Government a near-absolute immunity over the production of Cabinet confidences through section 39 of the CEA. It is divided into two subsections. In the first subsection, I will argue that the SCC has thus far adopted a very thin conception of the rule of law as an unwritten constitutional principle, one which is of limited use to assess the legality of legislation. In the second subsection, I will argue that the thicker theory of law as a culture of justification, which is implicit in the Canadian legal order, provides a better normative framework to that end because it imposes meaningful constraints on the State which, in turn, illuminate the flaws affecting section 39.

1.1 The Supreme Court of Canada’s Conception of the Rule of Law

1.1.1 Rule of Law as Rule by Law

What conception of the rule of law has the SCC adopted to date? In the Canadian legal order, the rule of law is an “unwritten constitutional principle,” the existence of which stems implicitly from the preamble to the Constitution Act, 1867 and explicitly from the preamble to the Constitution Act, 1982. The SCC has characterized the rule of law as a “fundamental postulate of our constitutional structure” lying “at the root of our system of government.” This depiction calls for two comments. First, despite its importance, the rule of law is only one of several unwritten constitutional principles, distinct from the separation of powers, judicial independence, federalism, democracy and respect for minorities. The fact that the SCC has distinguished the rule of law from these principles suggests that it has a narrow conception of the rule of law. Second, Canada has a written Constitution, setting out its constitutional structure and outlining fundamental rights and freedoms. For reasons of


9 Canada is to have “Constitution similar in Principle to that of the United Kingdom.”

10 Canada is founded upon principles that recognize “the supremacy of [...] the rule of law.”

11 Roncarelli v Duplessis, [1959] SCR 121 at 142 [Roncarelli].


certainty, predictability and legitimacy, the SCC considers that judicial review of legislative action should be grounded in the text, not the unwritten principles, of the Constitution.\textsuperscript{14} This would seem to support David Mullan’s observation that Canadian jurists tend to give more importance to the Big-C Constitution over the small-c constitution.\textsuperscript{15}

The SCC’s conception of the rule of law contains at least three elements. The first requires “the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order.”\textsuperscript{16} The second recognizes that “the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.”\textsuperscript{17} The third demands that “the relationship between the state and the individual [...] be regulated by law.”\textsuperscript{18} In short, the rule of law presupposes: the existence of a legal order; within that legal order, legal rules must apply equally to the State and the legal subjects; and the actions of the State must be authorized by legal rules. The SCC has recognized that there may be other components to the rule of law, but has not yet ruled on what else may be involved.\textsuperscript{19} While the three elements identified thus far are prerequisites to the existence of the rule of law, they do not impose any meaningful constraint on the State. They incorporate the idea of legal limits on State power, without attempting to define the boundaries of these limits. They thus set out a “skeletal version of the rule of law,”\textsuperscript{20} which corresponds to the thinnest (positivist) conception of the rule of law, known as “rule by law.” Under this conception, a legal rule is valid if it has been enacted by the proper authority under the proper procedure.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{14} Quebec Secession Reference, supra note 12 at para 53; Reference re Remuneration of Judges of the Provincial Court (PEI), [1997] 3 SCR 3 at paras 93 (Lamer CJ), 314-16 (La Forest J) [Provincial Judges Reference].
\item \textsuperscript{15} David Mullan, “Not in the Public Interest: Crown Privilege Defined” (1971) 19:9 Chitty’s LJ 289 at 291.
\item \textsuperscript{17} Manitoba Language Rights Reference, supra note 16 at 748.
\item \textsuperscript{18} Quebec Secession Reference, supra note 12 at para 71; Provincial Judges Reference, supra note 14 at para 10.
\item \textsuperscript{20} Mark Carter, “The Rule of Law, Legal Rights in the Charter, and the Supreme Court’s New Positivism” (2007-2008) 33 Queen’s LJ 453 at 464.
\item \textsuperscript{21} In other words, a legal rule is valid if it satisfies the “rule of recognition.” See HLA Hart, The Concept of Law (Oxford: Oxford University Press, 1961) at 92.
\end{itemize}
The SCC’s conception of the rule of law, as an unwritten constitutional principle, does not yet incorporate the principles of formal legality. Like “rule by law,” “formal legality” is a thin conception of the rule of law. However, it goes beyond “rule by law” by imposing certain constraints on the State. With the aim of ensuring that the law can guide the conduct of legal subjects efficiently, formal legality requires that legal rules be general, clear, public, prospective, coherent, possible to comply with, and relatively stable over time. In addition, it requires that State action be congruent with legal rules. While these principles are widely accepted among legal theorists, the SCC has so far refused to include them in its conception of the rule of law. It will only recognize and enforce the principles of formal legality where they are explicitly entrenched in the text of the Constitution. Hence, in *British Columbia v Imperial Tobacco Canada Ltd* (2005), the SCC upheld the validity of a provincial Act which targeted tobacco companies and held them retroactively liable for the healthcare expenses triggered by tobacco consumption, although the Act was neither general nor prospective. Nothing in the text of the Constitution explicitly prohibited such measures in civil cases.

### 1.1.2 Rule by Law as a Normative Framework

To what extent can the unwritten rule of law principle (however understood) be used, as a normative framework, to assess the legality of legislation? The answer is threefold. First, the SCC has so far suggested that the rule of law could not be used, on its own, to invalidate legislation. This is in line with the position defended by respected constitutional scholars. Peter Hogg and Warren Newman argue that the rule of law can be used to support the interpretation of constitutional provisions, but it should not be relied upon as the sole basis

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25 In contrast, in criminal cases, this type of measure would have clearly violated sections 7 and 11(g) of the *Charter*, supra note 6.
26 *Imperial Tobacco*, supra note 24 at para 59: “[I]t is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content.” To support this statement, Justice Major cited Elliot, *supra* note 13 at 115, who argued that none of the three rule of law elements identified by the SCC has the normative potential to limit legislative (as opposed to executive) action.
to strike down legislation. The rule of law must be reconciled with the principles of constitutionalism and democracy. If a legal rule is consistent with the text of the Constitution (constitutionalism), and has been adopted under the proper procedure by the legislative branch (democracy), judges should enforce it, whether or not they agree with the underlying policy. This is consistent with the very thin conception of the rule of law adopted by the SCC. Under this view, the remedy against legislation that is perceived unjust or unfair does not lie in the unwritten principles, but in the text of the Constitution and the ballot box.

This approach has prevailed in several important cases, including cases dealing with the constitutionality of Cabinet immunity. In Singh v Canada (Attorney General) (2000), the Federal Court of Appeal dismissed the claim that section 39 of the CEA violates the rule of law, because it is consistent with the SCC’s three elements: it establishes a legal order for the protection of Cabinet confidences; it applies equally to the Government and legal subjects; and it allows the Government to protect Cabinet confidences in litigation. Whether section 39 is good or bad policy is irrelevant, said the Federal Court of Appeal, for “the rule of law does not preclude a special law with a special result dealing with a special class of documents which, for long standing reasons based on constitutional principles such as responsible government, have been treated differently.”

The SCC quoted this passage with approval in Babcock. While section 39 may be a “draconian” rule, it added, it is one that Parliament has the power to adopt. The SCC has consistently declined to invalidate legislation on the basis that it violates the unwritten rule of law principle, thus suggesting that the rule of law does not have normative force as an independent base to challenge the validity of legislation.

Second, while the rule of law has not been used, on its own, to invalidate legislation, it has been relied upon to bolster the interpretation of a provision of the Constitution which,

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28 Imperial Tobacco, supra note 24 at para 66.
29 Singh, supra note 3 at para 36.
30 Babcock, supra note 3 at para 57.
31 See especially Imperial Tobacco, supra note 24 at paras 59-60.
in turn, has been used to invalidate legislation or justify a specific remedy. This form of argument has been considered more legitimate as the declaration of invalidity is based on the text of the Constitution. For example, in the *Manitoba Language Rights Reference*, the rule of law was used in two ways: in conjunction with section 23 of the *Manitoba Act, 1870*, to sustain the decision that the unilingual statutes enacted by the legislature since 1890 were invalid, as they had not been enacted in French; and in conjunction with section 52 of the *Constitution Act, 1982*, to suspend the effects of the decision, while the statutes were translated and re-enacted, to maintain the legal order. In *R v Nova Scotia Pharmaceutical Society* (1992), the SCC held, based on the rule of law and section 7 of the *Charter*, that vague and unintelligible legal rules are invalid. In the *Quebec Secession Reference* (1998), the rule of law was used to support the conclusion that Quebec could not unilaterally secede from Canada, even after a clear majority vote, as this would breach the constitutional amendment procedure. In *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)* (2014), the SCC invalidated regulations imposing court hearing fees on the basis that, without proper exemptions, these fees could impede access to justice and violate the core, or inherent, jurisdiction of Superior Courts under section 96 of the *Constitution Act, 1867*. The rule of law served to bolster the nexus between the core jurisdiction of Superior Courts and access to justice. In the light of the foregoing, the rule of law may thus have some normative force in connection with the text of the Constitution.

Third, it may be open to the Courts to conclude that a legal rule is, at the same time, inconsistent with the rule of law and constitutionally valid. This type of situation could occur where a legal rule violates a requirement of the rule of law without violating the text of the Constitution. The obvious example is *Imperial Tobacco*. There, had the SCC incorporated the principles of formal legality as part of the unwritten rule of law principle, it would have concluded that the impugned Act was inconsistent with the rule of law because the measures

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33 *Manitoba Language Rights Reference*, *supra* note 16 at 766-68.
35 *Quebec Secession Reference*, *supra* note 12 at para 91. See also Part V of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
were not general and prospective. Yet, as the written Constitution does not require that rules be general and prospective in civil cases, the Act would still have been constitutionally valid. In adopting this midway position, the SCC would have upheld its duty to protect the rule of law in a way that is respectful of its role in the Canadian legal order. It would have signaled to Parliament and the Government that there was something wrong with the Act and opened the way for corrective measures through an institutional dialogue. The Government would still have been able to apply the Act, but there would have been a political cost to doing so. Perhaps, in the future, the SCC may be persuaded to use the rule of law in this manner.

To sum up, the SCC has so far adopted a very thin, not to say weak, conception of the unwritten constitutional rule of law principle, which embraces three elements: there must be a legal order; within that legal order, legal rules must apply equally to the State and legal subjects; and State action must be authorized by legal rules. The SCC has suggested that the rule of law could not be used, on its own, to challenge the validity of democratically-enacted legal rules. To be legitimate, judicial review of legislation should be grounded on the text of the Constitution (the big-C Constitution). Thus, to challenge the validity of legislation, the rule of law should be used in conjunction with specific provisions of the Constitution. This approach is consistent with the SCC’s positivist conception of the rule of law and its neglect of small-c constitutionalism. The problem is the following: because the SCC’s current conception of the rule of law is very thin, its normative force is limited. At present, the rule of law cannot breathe much life into the text of the Constitution. While it does have some normative potential, that potential is locked. Hence, we are in a cul-de-sac: the rule of law can be used to bolster the interpretation of the text of the Constitution, but the SCC’s conception of the rule of law is too thin to play that role in a meaningful manner. To unlock the full normative potential of the rule of law principle, I will turn to an alternative conception of the rule of law, the theory of law as justification, which is implicit is the Canadian legal order.

37 About institutional dialogue between the three branches of the State, see Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, revised ed (Toronto: Irwin Law, 2016).
1.2 An Alternative Conception of the Rule of Law

1.2.1 Rule of Law as Justification

The theory of law as justification offers a compelling alternative conception of the rule of law, in contrast to the rule by law conception, as it fosters the establishment of a “culture of justification” in legal orders. The first to coin this term was South African scholar Etienne Mureinik. In 1994, in an influential article, he presented the “culture of justification” as an ideal for the new South African Constitution, as opposed to the “culture of authority” that prevailed during Apartheid. For Mureinik, a culture of justification is “a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command.”

This simple idea, that is, the idea that State actors must provide substantive justification for all their actions, was subsequently developed into an elaborate rule of law theory by David Dyzenhaus, as part of what he calls the “Rule-of-Law Project.” The aim of this project is to ensure that State power is exercised within the limits of the rule of law by requiring State actors to embrace a culture of justification. The presence of a culture of justification in a legal order requires three key elements: the recognition of fundamental legal principles; the judicial review of State action; and the imposition of an onus of justification on the State.

(1) Fundamental Legal Principles

The first element of a culture of justification is that judges must take the view that the rule of law has content, that it is made of fundamental legal principles. These principles can be enshrined in a written or unwritten Constitution. Law as justification promotes a thicker conception of the rule of law, as compared to rule by law. The eight principles of formal legality, set out by Lon Fuller, are at the centre of the Rule-of-Law Project. The first seven

40 Ibid at 139.
principles are directed primarily to the legislative branch because they pertain to the inner quality that legal rules must possess to count as law. Legal rules must be general, public, prospective, clear, coherent, possible to comply with, and relatively stable over time, so that legal subjects can be guided by them. A rule that fails to meet one of these principles entirely, or several of them substantially, cannot claim legal legitimacy. The eighth principle, congruence, is directed primarily to the executive branch: it requires State actors to act in a manner consistent with legal rules. Compliance with these principles infuses the law with an “inner morality.” Law as justification focuses on “a kind of justice located within the law,” in the design and administration of the law.

Law as justification goes beyond formal legality as it is “both liberal and democratic in inspiration.” Thus, it seeks to reconcile the need to place the development of legal rules in the hands of the elected representatives of the people (the value of participation) with the need to ensure that rules do not unjustifiably violate the rights of individuals (the value of accountability). Dyzenhaus accepts that legal legitimacy is incomplete without democratic legitimacy. Furthermore, he views legal subjects as “bearer[s] of human rights,” who must be treated with equality and dignity, and whose liberty must be respected. Beyond these fundamental attributes and the requirements of procedural fairness, Dyzenhaus has

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41 Fuller, *Morality of Law*, *supra* note 22 at 33-81.
43 Fuller, *Morality of Law, supra* note 22 at 81-91.
44 Dyzenhaus, “Process and Substance,” *supra* note 42 at 294.
45 Dyzenhaus, *Constitution of Law, supra* note 39 at 12.
47 Dyzenhaus, “Process and Substance,” *supra* note 42 at 297.
48 Dyzenhaus, *Constitution of Law, supra* note 39 at 13;
resisted the urge to define more precisely the substantive content of the rule of law. This may be explained by the fact that the focus of law as justification is on the connection between process and substance; the intuition that a good decision-making process should lead to a substantively good decision. That said, a culture of justification is more likely to prosper in a legal order that values democracy and human rights.

(2) Judicial Review

The second element of a culture of justification is that judges must be empowered to review legislative and executive actions to ensure that they comply with fundamental legal principles. This implies the existence of a separation of powers between the legislative, the judicial and the executive branches, under which independent and impartial judges have the ultimate responsibility to interpret and apply the law in cases of controversy. Although the Rule-of-Law Project requires the cooperation of the three branches of the State in the maintenance of the rule of law, judges have a special role in this regard. Because of their obligation of fidelity to the law, judges must warn the legislative and executive branches when they fail to uphold the Rule-of-Law Project. There are many ways in which this may happen. Lawmakers may enact legal rules limiting access to the Courts, depriving litigants of procedural fairness or giving to State actors a broad and unreviewable discretion on a given matter, which could then be abused. Privative clauses are the archetype of this type of legal rule. The danger with privative clauses is that they create “legal black holes,” that is, zones which are not controlled by the rule of law. Legal black holes are inconsistent with a culture of justification because they insulate State action from judicial review.

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52 In the Constitution of Law, supra note 39 at 12-13, Dyzenhaus gives the following account of the rule of law requirements: “legislation must be capable of being interpreted in such a way that it can be enforced in accordance with the requirements of due process: the officials who implement it can comply with a duty to act fairly, reasonably and in a fashion that respects the equality of all those who are subject to the law.”
53 See generally Dyzenhaus, “Process and Substance,” supra note 42.
54 Dyzenhaus, Constitution of Law, supra note 39 at 10-11. Dyzenhaus uses the metaphor of judges as “weathermen” to describe this role, that is, the “role of alerting the Commonwealth to storm clouds on the horizon when the rule of law which secures the fabric of civil society is put under strain.” Ibid at 201.
55 “Privative clauses” are statutory provisions seeking to limit or preclude judicial review of executive action.
56 The term “legal black hole” was initially coined by Johan Steyn in an article entitled "Guantanamo Bay: The Legal Black Hole" (2004) 53:1 ICLQ 1.
57 Dyzenhaus, Constitution of Law, supra note 39 at 3, 42, 50.
Judicial review is also essential to the fulfilment of Fuller’s congruence principle.\textsuperscript{58} Its essential purpose is to ensure that State actors act in a manner that is consistent with legal rules. There could be no rule of law, even on a bare rule by law understanding of that concept, if the executive branch was free to ignore the legal rules enacted by the legislative branch. While the first seven principles of legality enable the conversion of public policy into legal rules, the last one enables the conversion of legal rules into what Fuller describes as “claims of right or accusations of fault.”\textsuperscript{59} It is the function of independent and impartial judges to review executive action for congruence, in line with the rules of procedural fairness. In public law, “adjudication” is one of the main devices under which legal subjects can hold the State accountable. It is a “form of social ordering,” which enables legal subjects to participate in decisions that affect them, through the presentation of “proofs and reasoned arguments [supported by] principles.”\textsuperscript{60} When lawmakers shield executive action from judicial review, that is, when they create a legal black hole, they prevent the application of the congruence principle. This is inconsistent with a culture of justification as it ensures “that there is no law with which official action has to be congruent.”\textsuperscript{61} In doing so, lawmakers fail to address legal subjects with the dignity they deserve as bearers of human rights.

(3) Onus of Justification

The third element of a culture of justification is that the legislative and executive branches must bear the onus of justifying their actions by reference to the fundamental legal principles. The onus of justification is triggered when State action affects individual rights, privileges or interests.\textsuperscript{62} In such cases, legal subjects will inquire: “But how can that be law for me?”\textsuperscript{63} In answering the question, the State satisfies what Bernard Williams describes as the “Basic Legitimation Demand”; to do so, the State must “offer a justification of its power

\textsuperscript{58} Fuller, \textit{Morality of Law}, supra note 22 at 81-91.
\textsuperscript{60} \textit{Ibid}, as interpreted in Dyzenhaus, “Rule-of-Law Project,” \textit{supra} note 51 at 96.
\textsuperscript{61} Dyzenhaus, “Process and Substance,” \textit{supra} note 42 at 303.
\textsuperscript{63} Dyzenhaus, “Process and Substance,” \textit{supra} note 42 at 304.
to each subject.” In other words, it must provide reasons for its action. State actors must be transparent and identify the source of the legal power they are asserting, and the way that power has been interpreted and applied, in view of the legal subject’s specific circumstances. Only in the light of the reasons provided by State actors to justify their actions can legal subjects, and judges, determine whether these actions are consistent with fundamental legal principles. By discharging their “duty to give reasons,” State actors enable legal subjects to know that their dignity and equal status under the law have been respected, and that the actions were taken in good faith, free of bias, based on the appropriate legal considerations.

Yet, the duty to give reasons makes sense only if the reasons provided do in fact justify the action. Hence, it is not enough that reasons be provided, they must also be reviewed by a judge to assess whether they show, or are capable of showing, that the action is justifiable in view of the fundamental legal principles. “Justifiable” must not be confused with “justified.” When a judge inquires whether a decision is “justified,” he or she is asking whether he or she would have made the same decision (correctness standard). When a judge inquires whether a decision is “justifiable,” he or she is asking whether the decision is defensible in the light of the appropriate legal considerations (reasonableness standard). The reasonableness standard requires that the decision be rational and proportional. Law as justification recognizes that State actors have a legitimate role in the interpretation of the law. This implies that judges should not quash an executive decision just because they would have reached a different conclusion. Dyzenhaus uses the concept of “deference as respect” to communicate the idea that judges should defer to executive interpretation of the law, within expertise, if the reasons provided to support that interpretation are “good enough.”

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64 Bernard Williams, In the Beginning was the Deed: Realism and Moralism in Political Argument (Princeton: Princeton University Press, 2005) at 4. See also Dyzenhaus, “Process and Substance,” supra note 42 at 304-06.
65 Dyzenhaus, Constitution of Law, supra note 39 at 140.
67 Dyzenhaus, “Proportionality and Deference,” supra note 62 at 255.
1.2.2 Justification as a Normative Framework

Now that the three elements of the theory of law as justification have been outlined, I will demonstrate that the theory is implicit in the Canadian legal order, even though the Courts have not yet recognized it. I will then argue that the theory of law as justification also underpins the approach taken by the Courts under the common law to determine the validity of public interest immunity claims (PII) at the provincial level in Canada. Finally, I will identify the normative conditions that a statutory regime of PII, such as section 39 of the CEA, must fulfil to comply with the theory of law as justification.

(1) Law as Justification and the Canadian Legal Order

The three elements of the theory of law as justification are embedded in the Canadian legal order. First, the Canadian legal order contains written and unwritten fundamental legal principles. The written Constitution establishes democratic governance in the form of an elected House of Commons and protects a broad range of human rights, including equality, dignity and liberty. Moreover, the Constitution contains unwritten principles, such as the rule of law, democracy and respect for minorities, which are broad expressions of the nature of the Canadian legal order and can be used to fill in the gaps in the written Constitution. Similarly, in administrative law, the SCC has declared that executive discretion should be exercised: “in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.” Democracy and human rights are therefore important features of both law as justification and the Canadian legal order. Lastly, important principles

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69 The PII doctrine empowers the Government to object to the disclosure of relevant yet sensitive information in the context of litigation on the basis that such disclosure would be injurious to the public interest.
70 See sections 37 of the Constitution Act, 1867, supra note 7, and 3 of the Charter, supra note 6.
71 See sections 1 and 2 of the Bill of Rights, supra note 6, and 2 to 23 of the Charter, supra note 6.
73 Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at para 56 [Baker].
of formal legality, such as the principles of generality,\textsuperscript{74} clarity,\textsuperscript{75} publicity,\textsuperscript{76} prospectivity\textsuperscript{77} and congruence,\textsuperscript{78} have a clear textual basis in the Constitution and ordinary statutes.

Second, the Canadian legal order establishes a separation of powers which affirms the power of the Courts to review the validity of legislative and executive actions, and strike down invalid actions.\textsuperscript{79} While there may be no genuine separation of powers between the legislative and executive branches, given that Ministers are members of both branches, the judicial branch is clearly segregated from the other two. The institutional independence of the Courts stems from the unwritten principle of judicial independence as well as paragraph 11(d) of the \textit{Charter} and section 96 of the \textit{Constitution Act, 1867}.\textsuperscript{80} Section 96, especially, constitutionalizes the core, or inherent, jurisdiction and powers of provincial Superior Courts, and protects their capacity to review executive action for jurisdictional errors.\textsuperscript{81} As for the Courts’ power to invalidate legislation, it stems from section 52 of the \textit{Constitution Act, 1982}, as well as the principle of constitutionalism. Rules of procedural fairness under the common law,\textsuperscript{82} the \textit{Bill of Rights}\textsuperscript{83} and the \textit{Charter}\textsuperscript{84} require that legal subjects receive a fair hearing before an independent and impartial decision-maker. The Canadian legal order is thus designed to ensure that fundamental legal principles are recognized and enforced in a manner consistent with the congruence principle and a culture of justification.

Third, the Canadian legal order imposes on the legislative and executive branches the onus of justifying their actions when they affect legally protected individual interests. As a matter of constitutional law, the Government bears the onus of justifying any legal rule that limits a fundamental right or freedom under section 1 of the \textit{Charter}. Section 1 involves an

\begin{itemize}
\item \textsuperscript{74} See section 15 of the \textit{Charter}, supra note 6.
\item \textsuperscript{76} See the \textit{Publication of Statutes Act}, RSC 1985, c S-21.
\item \textsuperscript{77} See section 11(g) of the \textit{Charter}, supra note 6.
\item \textsuperscript{78} See section 96 of the \textit{Constitution Act, 1867}, supra note 7. See also \textit{Roncarelli}, supra note 11; David Dyzenhaus, “The Deep Structure of \textit{Roncarelli v. Duplessis}” (2004) 53 UNBLJ 111.
\item \textsuperscript{79} \textit{Fraser v PSSRB}, [1985] 2 SCR 455 at 469-70 [Fraser].
\item \textsuperscript{80} \textit{Provincial Judges Reference, supra} note 14 at paras 82-109.
\item \textsuperscript{81} \textit{Crevier v AG (Québec)}, [1981] 2 SCR 220 at 237 [Crevier].
\item \textsuperscript{83} See paragraphs 1(a), 2(e) and 2(f) of the \textit{Bill of Rights}, supra note 6.
\item \textsuperscript{84} See sections 7 and 11(d) of the \textit{Charter}, supra note 6.
\end{itemize}
The Government also bears the onus of justifying, pursuant to the principles of fundamental justice, any legal rule that violates the right to life, liberty and security of the person protected under section 7 of the Charter. A similar onus of justification exists as a matter of administrative law. The rules of procedural fairness impose on the Government a legal duty to provide reasons when it makes a decision which adversely affects individual interests. As shown by Roncarelli v Duplessis (1959) and Baker v Canada (1999), awareness of the reasons supporting executive actions is key to a successful judicial review application. The onus of justification, and the concept of "deference as respect," are accordingly part of the Canadian legal order.

(2) Law as Justification and PII under the Common Law

The requirements of "judicial review" and "onus of justification" are essential to assessing whether the various common law approaches to PII in Westminster jurisdictions comply with the theory of law as justification. For almost three decades, as a result of the House of Lords' decision in Duncan v Cammell Laird (1942), the common law deprived judges of the power to review the substantive validity of PII claims made in the proper form by the responsible Minister. This situation led to instances of abuse of power, as Ministers claimed PII for tactical reasons in cases where the Government was a party, in breach of the fundamental rules of procedural fairness. Duncan was inconsistent with the congruence principle and the second element of law as justification as it prevented judicial review of
State action. This flaw was corrected in Conway v Rimmer (1968),91 when the House of Lords overruled Duncan and affirmed the power of the Courts to: inspect the documents subject to a PII claim; weigh and balance the competing aspects of the public interest; and order their production when appropriate. Since then, the common law enables the Courts to review PII claims in accordance with the second element of law as justification (judicial review).

This development did not, however, have the effect of making the common law of PII consistent with the third element of law as justification. Courts in the United Kingdom and Australia have taken the position that judges must not inspect Cabinet documents that fall within the discovery standard, unless the litigant persuades them that an inspection is necessary.92 However, it is almost impossible for litigants to meet this burden as they are not privy to the documents’ contents. Cabinet immunity claims therefore remain, to some extent, unreviewable in these jurisdictions. This is problematic from a rule of law perspective, especially when it is alleged that the Government has acted illegally. The “public interest [...] in the maintenance of legality,”93 cannot be vindicated if judges refuse to inspect relevant documents subject to a Cabinet immunity claim. In this context, judges cannot determine whether executive action is truly congruent with legal rules. For this reason, Courts in Canada, at the provincial level, inspired by the position taken in New Zealand, have reversed the onus: the default position is that judges must inspect Cabinet documents that fall within the discovery standard unless the Government persuades them that it is not necessary.94 Thus, Canada’s and New Zealand’s approach under the common law also complies with the third element of law as justification (onus of justification).

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91 Conway v Rimmer, [1968] 1 All ER 874 (HL) [Conway].
92 Burmah Oil v Bank of England, [1979] 3 All ER 700 (HL) [Burmah Oil]; Air Canada v Secretary of State for Trade (No 2), [1983] 1 All ER 910 (HL) [Air Canada]; Commonwealth v Northern Land Council (1993), 176 CLR 604 (HC) [Northern Land Council].
94 Carey, supra note 2; Fletcher Timber Ltd v Attorney-General, [1984] 1 NZLR 290 (CA) [Fletcher Timber].
(3) Law as Justification and PII under Statute Law

In this context, we can identify two normative conditions that a PII statutory regime, such as section 39 of the *CEA*, must follow to comply with the theory of law as justification. These conditions are triggered each time an executive decision to withhold information has the effect of depriving litigants of evidence relevant to the fair disposition of the case. The first condition combines the fundamental legal principles with the onus of justification, while the second deals with the requirement of judicial review.

1. The statutory regime should establish a fair decision-making process. This implies that the ultimate decision to withhold the Cabinet confidences in litigation should be made by an independent and impartial decision-maker. In addition, it implies that State actors should have the obligation to properly justify Cabinet immunity claims.

2. Executive decisions to withhold Cabinet confidences should be subject to review by the Courts to ensure that executive action is congruent with legal rules and State actors do not exceed the limits of their legal powers. This implies that the Courts should have the power to inspect Cabinet confidences and to overrule immunity claims where they fail to meet the standard of reasonableness.

To sum up, the theory of law as justification provides a compelling alternative conception of the rule of law as compared to the SCC’s rule by law conception. Because it is embedded in the Canadian legal order, law as justification can legitimately be relied upon by the Courts to guide their interpretation of the Constitution. What does it imply for section 39 of the *CEA*? In a culture of justification, if the congruence principle and the integrity of the adjudicative process are to be maintained, the ultimate decision to deprive litigants of relevant evidence in litigation must be made pursuant to a fair process, by unbiased judges, with the power to review both the justification and the information. Yet, at the same time, under a culture of justification, judges must defer to an executive decision to shield Cabinet confidences in litigation if it is reasonable (deference as respect).
2. ASSESSING THE LEGALITY OF SECTION 39 OF THE CEA

Is the regime of Cabinet secrecy set forth in section 39 of the CEA consistent with the theory of law as justification and the provisions of the Constitution? Section 2 will answer that question. It is divided into two subsections. In the first subsection, I will inquire whether the statutory decision-making process is procedurally fair. I will focus on two requirements of procedural fairness, namely, the litigant’s right to: have his or her case determined by an independent and impartial decision-maker; and have access to the reasons underpinning the decision. These requirements, essential to law as justification, stem from the common law, paragraph 2(e) of the Bill of Rights and sections 7 and 11(d) of the Charter. In the second subsection, I will inquire whether section 39 unduly limits the authority of provincial Superior Courts to: control the admissibility of evidence in litigation; and review the legality of executive action. Judicial review, a key element of law as justification, is protected under section 96 of the Constitution Act, 1867. I will demonstrate that section 39 is procedurally unfair and encroaches upon the core, or inherent, jurisdiction and powers of Superior Courts. It is thus inconsistent with the rule of law as a culture of justification and, because it violates provisions of the Constitution, it is also unconstitutional.

2.1 Section 39 Is Procedurally Unfair

2.1.1 The Decision-Maker Is Not Independent and Impartial

In civil cases against the federal Government, litigants have challenged the validity of section 39 of the CEA (and the provisions that preceded it) on the basis that it violates the “right to a fair hearing” guaranteed under paragraph 2(e) of the Bill of Rights. Paragraph 2(e) provides that no law of Canada must be construed or applied so as to “deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.” The SCC held that paragraph 2(e) requires that

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95 That is, sections 41(2) of the Federal Court Act, RSC 1970, c 10 (2nd Supp), which is reproduced in the Appendix, and 36.3 of the Canada Evidence Act, RSC 1970, c E-10, as enacted by SC 1980-81-82-83, c 111, s 4.
96 Commission des droits de la personne v Canada (Procureur général), [1978] JQ no 174 at paras 36-38 (CA); Ouvrages de raffinage de métaux Dominion Ltée v Énergie Atomique du Canada Ltée, [1988] JQ no 2680 at paras 25-34 (SC); Central Cartage, supra note 3 at paras 32-44; Wedge v Canada (Attorney General), [1995] FCJ no 1399 at para 13 (FC).
decision-makers who determine individual rights and obligations "act fairly, in good faith, without bias and in a judicial temper, [and afford to the litigant] the opportunity to adequately state his case." In their fight against section 39, litigants have focused on the last element of that statement: the right to adequately state one’s case, which is part of the natural justice principle audi alteram partem (to hear the other side). The gist of their claim was that section 39 deprived them of access to evidence that was admittedly relevant to the fair disposition of their case, thus preventing them from adequately stating their case. Courts have rejected this claim, taking the position that the exclusion of relevant evidence because of a privilege or immunity does not violate the “right to a fair hearing.” Iacobucci JA, then of the Federal Court of Appeal, summarized the orthodox position as follows:

Many questions of privilege such as solicitor-client, priest-penitent, or rules on hearsay evidence can operate to cut down on the ability to state one’s case by denying admissibility into evidence even though relevance may be established. The issue of [PII] attaching to Cabinet confidences is firmly established as one of these exceptions and I believe it has not been ousted by the wording of paragraph 2(e) of the Canadian Bill of Rights.98

While the litigants were on to something, the thrust of their argument was misplaced. What makes the decision-making process set out under section 39 procedurally unfair is not the fact that it may lead to the exclusion of relevant evidence for public policy reasons; rather, it is the fact that the decision to exclude the evidence is made by someone who is seemingly biased, namely, “a minister of the Crown or the Clerk of the Privy Council.” Subsection 39(1) gives members of the executive branch a very broad discretion to decide whether relevant evidence should be withheld in proceedings where the Government is a party, in breach of the natural justice principle nemo judex in sua causa (no one may be judge in his own cause). This attribute differentiates section 39 from the other existing privileges and immunities. The Minister or the Clerk is not just “objecting” to the production of information, he or she is finally and conclusively “deciding” the matter. No other privilege or immunity enables a litigating party to decide what evidence should be excluded from the proceedings. This is normally a matter for the judge to decide. Hence, the problem is not so much that section 39

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97 Duke v The Queen, [1972] SCR 917 at 923.
98 Central Cartage, supra note 3 at para 41.
prevents a party from adequately stating his or her case, the problem is that the individual who has the power to exclude the evidence is not “without bias.” I will flesh out this argument by answering three questions: what are the requirements of the rule against bias; why does section 39 violate that rule; and what are the consequences of the violation?

(1) Requirements of the Rule Against Bias

The rule against bias provides that decision-makers and decision-making processes must not grant undue preferential treatment to one party over another or be driven by preconceived notions. It seeks to maintain the fairness of the process for litigants and the confidence of the public in the administration of justice. Thus, a mere perception of bias, if it is reasonable, may nullify a decision: “[I]t is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.” In civil cases, the rule against bias applies to any decision-maker who must decide matters affecting individual rights. In such cases, a litigant is legally entitled to an independent and impartial decision-maker. The required degree of independence and impartiality varies depending on whether the decision-maker performs judicial or quasi-judicial functions (which will require a higher degree) or administrative functions (which will require a lower degree).

The notion of “impartiality” refers to the decision-maker’s state of mind in relation to the issues and the parties in a case. An impartial decision-maker is one that can decide with an open mind and who does not have an interest with, or connection to, the matter in dispute. A decision-maker will be disqualified if there is actual evidence of bias or if the situation gives rise to a “reasonable apprehension of bias.” In the latter case, the question to ask is: “[W]hat would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?” A reasonable apprehension of bias can be individual or institutional. An individual

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99 2747-3174 Québec Inc v Quebec (Régie des permis d’alcool), [1996] 3 SCR 919 at para 45 [2747-3174 Québec Inc].
100 Rex v Sussex Justices, Ex parte McCarthy, [1924] 1 KB 256 at 259 (Lord Hewart).
101 Valente v The Queen, [1985] 2 SCR 673 at 685 [Valente].
102 Committee for Justice and Liberty v National Energy Board, [1978] 1 SCR 369 at 394 (de Grandpré)).
bias arises where the decision-maker has: a pecuniary interest in the outcome of the case; a relationship with one of the parties; a prior involvement in the case; or an attitudinal predisposition toward a specific outcome. An institutional bias arises where the structure or internal practices of a decision-making body give rise to a “reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases.”

The notion of “independence” is connected to the notion of “impartiality” in the sense that independence strengthens the public’s perception of impartiality. The essence of judicial independence is “the complete liberty of individual judges to hear and decide the cases that come before them: no outsiders – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way a judge conducts his or her case and makes his or her decision.” Judicial independence therefore connotes a status of relationship to others, especially to the executive branch, which rests on objective conditions like security of tenure, financial security and administrative control. Courts are independent from the executive branch because: judges can only be removed for cause after a full hearing and independent review; their salary and pension are fixed by law; and they have control over how their affairs are managed. The SCC has ruled that these conditions apply, to some extent, to administrative bodies, even if they are part of the executive branch. But how can administrative bodies be, at the same time, a part of, and independent from, the executive branch? What matters is not so much that these bodies be independent from the executive branch, it is that they be independent from the parties to

103 *R v Lippé*, [1991] 2 SCR 114 at 144 (Lamer C) [*Lippé*]. The SCC confirmed the applicability of this test in the administrative context in *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at para 67 [*Matsqui Indian Band*].
104 *Lippé*, supra note 103 at 139 (Lamer C).
105 *The Queen v Beauregard*, [1986] 2 SCR 56 at 69.
106 *Valente*, supra note 101 at 685.
107 Ibid at 698. The Government cannot dismiss a judge because it does not like his or her decisions.
108 Ibid at 704. The Government cannot alter judges’ pay for arbitrary reasons, such as discontent with decisions rendered, and judges’ salaries must be sufficient to keep them from seeking alternative sources of income.
109 Ibid at 708-09. The Government cannot decide which judge should hear a particular case (administrative independence) or how a case should be decided (adjudicative independence).
110 *Matsqui Indian Band*, supra note 103 at paras 80, 83 (Lamer C).
111 *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781 at paras 24, 32 [*Ocean Port Hotel*].
the litigation. As such, a reasonable apprehension of bias arises where one of the parties has control over the tenure, remuneration or the modus operandi of the decision-maker.

(2) Consistency of Section 39 with the Rule Against Bias

Three conditions must be met for the rule against bias to apply in the context of section 39 of the CEA. First, the litigation must involve a litigant and the Government. The central concern is that one of the parties to the litigation, the Government, may improperly exclude relevant information. This concern is less acute in litigation where the Government is not a party. Second, the information excluded must be “relevant” to the fair disposition of the case. It is the exclusion of relevant information that would undermine the litigant’s right to state his or her case and lead to denial of justice. In contrast, the exclusion of irrelevant information would have no impact on the fairness of the proceedings. However, given that no one can inspect the information excluded by the Government, it is reasonable to assume that any information that falls within the standard of discovery is prima facie relevant to the fair disposition of the case. Third, the power to exclude relevant information in litigation, for public policy reasons, must be judicial in nature. Because it involves the interpretation and application of legal standards, in a manner that is meant to be final and conclusive, and which will affect the litigant’s rights, the power to exclude relevant documents is judicial in nature whether it is exercised by a judge, a Minister or a senior public servant. Hence, a high level of independence and impartiality is required from the decision-maker.

Would the exclusion of relevant Cabinet confidences in litigation by a Minister or the Clerk give rise to a reasonable apprehension of bias? Is the decision-maker sufficiently independent and impartial to perform this function in a fair manner?

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113 See, for example, Matsqui Indian Band, supra note 103.
114 That is, whether the documents contain Cabinet confidences within the meaning of subsection 39(2) of the CEA, supra note 5, and whether the public interest requires that they be protected.
115 Under section 39 of the CEA, supra note 5, the Minister or the Clerk is not merely objecting to the production of Cabinet confidences and letting the judge decide the matter. Rather, he or she is finally and conclusively deciding the matter. The power to exclude evidence in litigation is judicial in nature.
With respect to the question of independence, neither the Minister nor the Clerk are independent from the executive branch as such. But this is not the issue: the issue is whether a party to the litigation has direct or indirect control over their tenure, remuneration or \textit{modus operandi}. The answer is “yes.” Ministers and Clerks are appointed under the Prime Minister’s recommendation and hold their position during pleasure, meaning that they can be removed at any time, for any reason. Let us focus on the Clerk who has the primary responsibility for the application of section 39. The Clerk performs three functions: Deputy Minister to the Prime Minister; Secretary to the Cabinet; and Head of the Public Service. As the most senior public servant, the Clerk has a duty of loyalty to the Prime Minister and Cabinet. The Clerk’s main role is to ensure the efficiency of the collective decision-making process and to assist his or her political masters to develop and implement their policy goals. At the same time, the Clerk must decide issues related to the application of section 39. When deciding if Cabinet confidences should be disclosed in litigation, the Clerk is acting for the executive branch and is accountable to the Prime Minister and Cabinet for his or her decision.

The disclosure of Cabinet confidences is naturally a question of concern for the Prime Minister and Cabinet, especially if the information pertains to their own Ministry, as it could have major political consequences. It could weaken the candour and the efficiency of Cabinet deliberations as well as ministerial solidarity. It could even jeopardize the Ministry’s capacity to maintain the confidence of the House of Commons and electorate.\footnote{For the public interest rationales underpinning Cabinet secrecy, see Chapter 1, \textit{supra} at 27-32.} These are the kind of negative effects that Parliament tried to prevent when it made Cabinet immunity almost absolute. The disclosure of Cabinet confidences could also have major legal consequences as the information could be used to: attack the legality of government policies;\footnote{See, for example, \textit{Air Canada}, \textit{supra} note 92; \textit{Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 2)}, [1981] 1 NZLR 153 (CA).} establish governmental liability for civil wrongs;\footnote{See, for example, \textit{Burmah Oil}, \textit{supra} note 92; \textit{Fletcher Timber}, \textit{supra} note 94; \textit{Carey}, \textit{supra} note 2; \textit{Northern Land Council}, \textit{supra} note 92; \textit{Babcock}, \textit{supra} note 3.} or uncover the mismanagement of public funds.\footnote{See, for example, the Commission of Inquiry into the Sponsorship Program and Advertising Activities: PC 2004-119 (20 February 2004), PC 2004-986 (14 September 2004). See also the Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney: PC 2009-534 (10 April 2009).} There are strong incentives within the executive branch to keep Cabinet documents secret.
It would be unprecedented for anyone to allow the disclosure of an official Cabinet document without the Prime Minister’s consent. This could explain why Cabinet documents are not voluntarily disclosed in litigation before the expiry of the 20-year *moratorium*. A reasonable apprehension of bias arises from the Prime Minister’s power over the decision-maker’s tenure and his or her “political self-interest” in maintaining Cabinet secrecy. An informed person would likely conclude that the Minister or the Clerk cannot decide the matter fairly.

With respect to the question of impartiality, the process set out under section 39 of the *CEA* may give rise to a reasonable apprehension of individual and institutional bias. A perception of individual bias may arise from the Minister’s or the Clerk’s prior involvement in the Government decision under scrutiny. Ministers and Clerks should not make a final and conclusive decision on the disclosure of Cabinet confidences in litigation if they have been involved in making the impugned decision. Assume that the Minister of Environment and the Clerk have been involved in the collective decision-making process leading to the decision to approve the construction of a pipeline, despite significant adverse environmental effect. Assume that the legality of the decision is now being challenged by First Nations bands on the basis that their rights have not been properly considered. Would an informed person likely conclude that the Minister or the Clerk has an interest in withholding Cabinet confidences that may be used to nullify the decision? In these circumstances, a reasonable apprehension of bias would arise from the direct connection between the decision-maker and the impugned decision. The same reasoning would apply in cases where allegations of breach of contract or fiduciary duties, or unconscionable conduct, are made against the Government. If the Minister or the Clerk has been involved in making the impugned decision, he or she cannot finally and conclusively decide whether relevant evidence should be withheld in related proceedings, without giving rise to a reasonable apprehension of bias.

Lastly, a perception of institutional bias may arise from the role played by Counsel to the Clerk in the decision-making process under section 39 of the *CEA*. In relation to any major litigation against the Government, Counsel is called to perform two seemingly incompatible

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functions: on the one hand, provide legal advice to, and seek instructions from, the Clerk and Prime Minister on which position should be taken in the litigation and, on the other, provide legal advice to the Clerk on whether evidence that is relevant to the fair disposition of the case should be withheld. These functions are incompatible because the Government’s ability to successfully defend against the lawsuit may be undermined by the disclosure of Cabinet confidences. The problem is that one person is involved in developing the Government’s litigation strategy and deciding whether evidence that could weaken that strategy should be withheld. Lawyers involved in the litigation process in a specific case should not participate in the adjudicative process, as it would give rise to a “reasonable apprehension of bias [in the mind of an informed person] in a substantial number of cases.” When Counsel advises the Clerk to issue a certificate on the basis of Cabinet immunity, he or she is in effect participating in the adjudicative process because the certificate will deprive the litigant and the judge of evidence that would have been relevant to the fair disposition of the case. In doing so, Counsel is effectively acting both as judge and party in the same cause.

(3) Consequences of the Violation of the Rule Against Bias

The decision-making process established by Parliament under section 39 of the CEA is thus inconsistent with the rule against bias, which is part of both the common law and the theory of law as justification. The wording of section 39 suggests that Parliament wanted to overrule the common law by enabling the Minister or the Clerk to withhold relevant Cabinet confidences despite any reasonable apprehension of bias. Absent constitutional constraints, the Courts would have to enforce Parliament’s intention. Yet, at the federal level, the rule against bias has been given a quasi-constitutional status pursuant to paragraph 2(e) of the Bill of Rights. As such, the rule against bias cannot, in the absence of an express declaration, be displaced by an ordinary statute like the CEA. In the end, the fact that the Prime Minister controls the appointment of Ministers and Clerks, and could exert an influence over the application of Cabinet immunity, leads to the conclusion that section 39 does not meet the

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121 2747-3174 Québec Inc, supra note 99 at para 54.
122 See generally Ocean Port Hotel, supra note 111.
There are also concerns with respect to individual and institutional bias in the decision-making process. Consequently, section 39 could be declared “inoperative” insofar as it violates paragraph 2(e) of the Bill of Rights.125

Until now, the analysis has focused on the question of independence and impartiality in the context of civil cases, but the same reasoning would apply in criminal cases. Where an individual faces true penal consequences, the analysis would focus on sections 7 and 11(d) of the Charter.126 In R v Stinchcombe (1991), the SCC held that an accused has a constitutional right to make full answer and defence as per section 7.127 To that end, the principles of fundamental justice, which incorporate the duty of procedural fairness, requires that all relevant evidence be provided to the accused.128 In addition, where a dispute arises as to the admissibility of relevant evidence, the accused is constitutionally entitled to have an “independent and impartial tribunal” decide the matter as per paragraph 11(d). Thus, it is doubtful that the issuance of a final and conclusive certificate under section 39 of the CEA in a criminal case would survive Charter scrutiny.129 This could explain why the Government has not tried to use section 39 in this context. In cases in which Cabinet confidences were relevant to the defence of former Ministers, the Government has voluntarily disclosed the information.130 Given the importance of the interest at stake, the Government must choose between prosecuting the accused and protecting Cabinet confidences, as it cannot do both.

124 In 2747-3174 Québec, supra note 99 at paras 67-68. The SCC’s decision suggests that, to meet the quasi-constitutional requirement of independence, the decision-maker must at least have been appointed for a fixed term and must only be removable for cause. He or she must thus have some security of tenure.

125 MacBain v Lederman, [1985] 1 FC 856 (CA). See also Hassouna v Canada (Minister of Citizenship and Immigration), 2017 FC 473.

126 Section 7 of the Charter, supra note 6, would also apply in any proceeding, criminal or not, where the “right to life, liberty and security of the person” is engaged, such as extradition proceedings.


129 Canadian Association of Regulated Importers v Canada (Attorney General), [1992] 2 FC 130 at paras 10-12 (CA).

130 See, for example, the disclosure of Cabinet confidences that was authorized in the course of the criminal prosecutions against former Progressive Conservative Minister André Bissonnette (PC 1987-2284 of November 6, 1987) and former Liberal Minister John Munro (PC 1990-2228, PC 1990-2229 and PC 1990-2230 of October 11, 1990).
2.1.2 The Decision-Maker Is Not Required to Give Reasons

There is another question of concern, from a procedural fairness perspective, with the way section 39 of the CEA has been interpreted and applied. This concern goes to the heart of the theory of law as justification, as it relates to the reasons given by the decision-maker for withholding relevant information in litigation. The duty to give reasons is now firmly established in the Canadian positive law as an element of the natural justice principle *audi alteram partem*. I will argue that, in their current form, the certificates issued by the Government to withhold Cabinet confidences are structurally deficient because they fail to address a fundamental issue: why does the public interest require that the information be withheld in the circumstances of the case? The Minister or the Clerk is bound to answer that question before issuing a section 39 certificate, but his or her reasoning is not communicated to the litigant and the judge, as it would be for any other PII claim. This argument has not yet been tested in court. I will address three questions: what are the requirements of the duty to give reasons; why are the reasons provided in current section 39 certificates insufficient; and what are the consequences of the failure to provide sufficient reasons?

(1) Requirements of the Duty to Give Reasons

As a rule, under the common law, procedural fairness did not historically require that reasons be provided for administrative decisions. The reluctance to impose a general duty to give reasons stemmed from numerous concerns. Courts considered that it would place an undue burden on administrative decision-makers, thus triggering additional cost and delay, and possibly even inducing a lack of candour from decision-makers. Nevertheless, these concerns have been gradually overshadowed by the benefits of recognizing a general duty to give reasons. The provision of reasons fosters transparency and accountability, and bolsters public confidence in the integrity of the decision-making process. It also promotes better decisions as it forces decision-makers to address the critical issues in dispute and to carefully articulate their reasoning. As a result, the provision of reasons enables affected individuals

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132 *Public Service Board of New South Wales v Osmond* (1986), 159 CLR 656 at 668 (HC) (Gibbs CJ).
to assess: whether their submissions and all the appropriate factual and legal considerations have been taken into account; and whether the decision should be challenged by way of statutory appeal or judicial review. If and when the decision is challenged, it enables the appeal or reviewing Court to assess whether the decision should be sustained or not. All in all, the provision of reasons ensures that the affected individual is treated with fairness, dignity and respect. This explains why the SCC has recognized in Baker a duty to give reasons “where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances [such as to facilitate judicial review].”

To address the traditional concerns regarding the duty to give reasons, and maintain the efficiency of administrative decision-making processes, the SCC has shown flexibility as to how this duty can be performed. When the duty to give reasons applies, procedural fairness requires that the decision-maker provide some form of reasons, but these reasons do not necessarily need to be as detailed as those drafted by judges. At minimum, to meet the Basic Legitimation Demand, the reasons must answer the question “Why?” The litigant is entitled to know why the decision-maker has reached a specific conclusion. To answer the Demand, the decision-maker must do more than simply recite the parties’ submissions, summarize the evidence and state a conclusion. The decision-maker must address the critical issues in dispute and explain why he or she was persuaded by some arguments and not by others. In doing so, the decision-maker must identify his or her key findings of fact and the evidence upon which they are based. In addition, if his or her conclusion is based on the interpretation and application of legal provisions or precedents, the decision-maker must explain his or her legal reasoning. In short, he or she must show that there is a “logical connection” between the conclusion and the basis for the conclusion. Only in the light of the decision-makers’ factual and legal justification will the litigant and the appeal or reviewing Court be able to assess whether all the relevant considerations have properly been

134 Baker, supra note 73 at para 39.
135 National Corn Growers Association v Canada (Import Tribunal), [1990] 2 SCR 1324 at 1383 (Gonthier J).
136 Baker, supra note 73 at para 43.
137 Ibid at paras 40, 44.
139 Gray v Director of the Ontario Disability Support Program (2002), 59 OR (3d) 364 (CA) at para 22.
140 Mullan, Administrative Law, supra note 131 at 314-15.
141 R v REM, 2008 SCC 51, [2008] 3 SCR 3 at paras 17, 35.
taken into account. As the SCC held in *Dunsmuir*, the legality of a decision depends in part on the “justification, transparency and intelligibility” of the reasons articulated to support it.\(^{142}\)

**2. Consistency of Section 39 Certificates with the Duty to Give Reasons**

Would a Government’s decision to protect Cabinet confidences under section 39 of the *CEA* trigger the duty to give reasons? The answer is “yes.” A decision of this nature is bound to have “important significance” for the litigant if it deprives him or her of evidence that is relevant to the fair disposition of the case. That is why the litigant should be entitled to understand the rationale behind the decision beyond the obvious fact that information falls within the statutory class of “Cabinet confidences.” Plus, while a section 39 certificate is meant to be final and conclusive, and thus is not subject to a “statutory right of appeal,” it is not immune from judicial review on jurisdictional grounds. However, for such challenge to be meaningful, the litigant and the judge need to have access to the justification supporting the claim.\(^{143}\) The fact that the plain wording of subsection 39(1) imposes on the Government the duty to “[certify] in writing that the information constitutes a [Cabinet] confidence” suggests that Parliament itself envisioned that some form of reasons be provided to justify the use of Cabinet immunity. This is consistent with the Courts’ longstanding position under the common law.\(^{144}\) Therefore, the issue is not so much whether the Government has a duty to give reasons when claiming Cabinet immunity; it is the scope of that duty.

In *Babcock*, the SCC stated that the Government must answer two questions before issuing a certificate: do the documents contain “Cabinet confidences” within the meaning of subsection 39(2) of the *CEA*; and does the public interest require that the documents be protected in the circumstances of the case?\(^{145}\) One would expect the certificate to address both questions. Unfortunately, it does not. The SCC has imposed on the Government the duty to give reasons regarding the first but not the second question.\(^{146}\) To show that it has duly

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\(^{142}\) *Dunsmuir*, *supra* note 87 at para 47.


\(^{144}\) See especially *Robinson v State of South Australia (No 2)*, [1931] All ER Rep 333 (PC) [*Robinson*].

\(^{145}\) *Babcock*, *supra* note 3 at para 22.

\(^{146}\) *Ibid* at para 28.
addressed the first question, the Government must provide a sufficient description of the documents in the certificate. To that end, it must: identify each document’s date, title, author and recipient; and indicate under which paragraph of subsection 39(2) each document falls (memoranda to Cabinet, discussion papers, agenda, minutes, decisions, briefing notes, letters or draft legislation). If the descriptions provided clearly establish that the documents contain Cabinet confidences, the duty to give reasons will be satisfied regarding the first question. Turning to the second question, the SCC has stated that the public interest assessment is a “discretionary element [that] may be taken as satisfied by the act of certification.”\textsuperscript{147} This implies that the Government is not required to justify why the documents must be protected in the public interest. In fact, the certificates issued by the Government in the aftermath of Babcock do not address this issue.\textsuperscript{148} This is an important flaw in the manner in which section 39 was interpreted by the SCC: without justification, there is simply no way to know whether the Government has properly addressed the second question.

The SCC’s position does not flow from the plain wording of the statutory provision: Parliament has not expressly superseded the relevant common law principles in enacting section 39 of the CEA. At most, one could say that the statutory provision is silent on whether reasons must be provided with respect to the public interest assessment. It is thus open to the Courts to refer to the common law to fill in the gap in the statutory provision.\textsuperscript{149} What does the common law say about the issue? Under the common law, to make a successful claim, the Government must not only describe the documents in the certificate, but explain why the public interest require that they be withheld. It must provide an assessment of the documents’ degree of relevance and degree of injury. The public interest assessment is the critical part of certificates. Under the common law, the debate is seldom about whether the documents contain Cabinet confidences; it is about whether the interest of justice outweighs the interest good government. In assessing the public interest, the Government must take into consideration factors, such as the documents’ probative value and materiality, on the one hand, and the sensitivity of their contents and the timing of their production, on the

\textsuperscript{147} Ibid.
\textsuperscript{148} See, for example, Pelletier v Canada (Attorney General), 2005 FCA 118 at para 12 [Pelletier].
\textsuperscript{149} Cooper v Wandsworth Board of Works (1863), 143 ER 414 (CP) at 420.
other. Failure to provide a rational justification would defeat the claim. As the Government is already under a duty to perform a public interest assessment under section 39, why should it be exempted from the duty to share its justification with the litigant and the judge?

The common law doctrine of procedural fairness also supports the recognition of a broader duty to give reasons under section 39. Statutory provisions should not lightly be interpreted to displace the common law in this regard. Access to the reasons would assure the litigant that the Government has considered all the appropriate factors, and adequately weighed and balanced the competing aspects of the public interest. This is imperative not only to ensure that the litigant is treated with respect, but also as a means of bolstering the public confidence in the integrity of the decision-making process. Access to the reasons may bring to light *bona fide* or *mala fide* errors that may have been made during the public interest assessment. Knowledge of these errors would enable the litigant to exercise his or her constitutional right to judicially challenge the decision. Without this knowledge, the litigant would be unable to do so in a meaningful way, for he or she would not know whether the decision is reasonable. His or her ability to participate in the review process by making submissions to the Court would be impeded. Moreover, without this knowledge, the reviewing Court would be unable to assess whether the Government’s decision to withhold Cabinet confidences can be justified. Courts should thus rely on the common law to broaden the duty to give reasons as part of section 39 to include the public interest assessment. In *Babcock*, the SCC has taken a first step by “reading in” the public interest assessment in section 39, although it was not explicitly required by the plain wording of the provision. It should now compel the Government to disclose its public interest assessment in certificates, as a condition of validity of Cabinet immunity claims, considering that this information can be provided without revealing any legitimate Cabinet confidence.

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151 Litigants and judges need to know whether the certified documents are relevant (considering their probative value and their materiality to the issues in dispute) and sensitive (considering the nature of the information they reveal – core or noncore secrets – and the timing of their production – before or after a decision has been made public). This information can be provided without breaching any legitimate Cabinet
(3) Consequences of the Violation of the Duty to Give Reasons

What are the consequences of the Government’s failure to communicate its public interest assessment to the litigant and the judge? Beyond violating a key requirement of the theory of law as justification, the Government’s failure would invalidate the certificate, and the Cabinet immunity claim, whether the failure is seen as a procedural or substantive defect. The procedural question (subject to the correctness standard) is whether the Government has given reasons to sustain the decision. In contrast, the substantive question (subject to the reasonableness standard) is whether the Government’s reasons are adequate to sustain the decision. The Government’s failure to communicate its public interest assessment would likely be viewed as a substantive rather than a procedural defect.\(^{152}\) If the Court considers that the issuance of a certificate fulfils the procedural requirement to give reasons, it would turn its minds to the issue of whether the reasons provided in the certificate are adequate.\(^{153}\) However, as the certificate would not contain the Government’s public interest assessment, the Court would be unable to assess the reasonableness of the decision to withhold Cabinet confidences. This deficiency would stem from the Government’s decision not to provide the information. In this context, the Court would be powerless to palliate the lack of reasons as judges sometimes do.\(^{154}\) The Court would not be able to “supplement” the reasons provided in the certificate as it could not inspect documents subject to section 39 and conduct its own public interest assessment. As such, the Court would have no other option than to declare the certificate invalid and remit the matter to the Government, so that it could issue a new certificate, containing its public interest assessment, or abandon its claim.\(^{155}\)

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\(^{152}\) *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 21 (Abella J): “It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review.”

\(^{153}\) *Ibid* at para 22: “[Where] there are reasons, there is no […] breach [of the duty of fairness]. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.”

\(^{154}\) See, for example, *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 SCR 654 at paras 53-54.

\(^{155}\) It would be inappropriate for the Courts to order the production of the documents without first giving the Government the opportunity to justify its decision by providing its public interest assessment. *Ibid* at para 55.
To sum up, in this section, I have developed novel arguments, supporting the position that the way section 39 has been designed, interpreted and applied is procedurally unfair and inconsistent with the theory of law as justification. First, I have argued that the decision-making process gives rise to a reasonable apprehension of bias, as the Minister and Clerk do not have the independence and impartiality needed to fairly adjudicate Cabinet immunity claims in cases involving the Government. Second, I have argued that the Courts are not able to assess the reasonableness of certificates because the Minister and Clerk do not provide reasons explaining why the public interest requires that relevant Cabinet confidences be withheld in the circumstances of the case. These rule of law problems pertain to the identity of the decision-maker and the way he or she exercises his or her statutory discretion. I will now turn to another fundamental flaw of section 39 relating to the separation of powers between the executive and the judicial branches of the State.

### 2.2 Section 39 Violates the Core Jurisdiction of Superior Courts

It is often said that there “is no general ‘separation of powers’ in the Constitution Act, 1867,” in the sense that it “does not separate the legislative, executive and judicial functions and insist that each branch of government exercise only ‘its own’ function.”\(^\text{156}\) This assertion is based on two considerations. First, in a system of responsible government, the executive branch is responsible to the legislative branch, and such a system is often described as the “antithesis of separation of powers.”\(^\text{157}\) Second, the legislative branch may confer non-judicial functions to the Courts or judicial functions to bodies which are not Courts. While the SCC has recognized that the Canadian Constitution does not insist on a “strict” separation of powers, it has also recognized that there is a “functional” separation of powers between the three branches of the State under which the legislature is primarily responsible to make the law, the judiciary to interpret and apply the law, and the executive to administer and implement the law.\(^\text{158}\) The aspect of the separation of powers which concerns us is the separation between the judiciary, on the one hand, and the legislature and the executive, on the other. The rule of law is meaningless without the existence of independent and impartial

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\(^{157}\) Singh, supra note 3 at para 28.

\(^{158}\) Fraser, supra note 79 at 469-70.
Courts with jurisdiction to review the legality of legislative and executive actions. This aspect of the separation of powers is entrenched in section 96 of the Constitution Act, 1867,\textsuperscript{159} which protects the core, or inherent, jurisdiction and powers of provincial Superior Courts from legislative encroachments.

There are two ways in which legislatures may encroach upon the core jurisdiction and powers of Superior Courts. First, they may grant to an inferior Court or tribunal a jurisdiction or power that has traditionally belonged to Superior Courts. Second, they may remove from Superior Courts a jurisdiction or power that has traditionally been within their purview. Courts have devised different legal tests whether there is a “grant” of authority to an inferior Court or tribunal\textsuperscript{160} or a “removal” of authority from Superior Courts.\textsuperscript{161} The first test prevents provincial legislatures from creating bodies competing with Superior Courts\textsuperscript{162} while the second test prevents provincial legislatures as well as Parliament from restricting the jurisdiction and powers of Superior Courts.\textsuperscript{163} When examining the validity of section 39, the question is not whether Parliament can enable public officials to claim Cabinet immunity on behalf of the Government. The common law has long recognized that public officials can, subject to judicial supervision, object to the production of sensitive information on public policy grounds.\textsuperscript{164} The question is whether Parliament can make Cabinet immunity claims final and conclusive; whether it can prevent Superior Courts from inspecting and ordering the production of Cabinet confidences in litigation. The problem is thus the “removal” of the Superior Courts’ jurisdiction and powers over Cabinet immunity claims.

The rationale supporting section 96 of the Constitution Act, 1867 is the “maintenance of the rule of law through the protection of the judicial role.”\textsuperscript{165} Governance by the rule of law requires the existence of a judicial system that can ensure that legal rules and processes

\textsuperscript{159} Section 96 of the Constitution Act, 1867, supra note 7, seeks to promote national unity by establishing Courts of general jurisdiction whose members are appointed by the federal Government.

\textsuperscript{160} See generally Re Residential Tenancies Act, 1979, [1981] 1 SCR 714.


\textsuperscript{162} Hogg, supra note 156 at 7-36.

\textsuperscript{163} MacMillan Bloedel, supra note 161 at para 15.


\textsuperscript{165} Provincial Judges Reference, supra note 14 at para 88.
are upheld. In Canada, Superior Courts are the “foundation of the rule of law.” Removing part of their core jurisdiction or powers would emasculate them: it would make them something less than a Superior Court. In MacMillan Bloedel Ltd v Simpson (1995), Lamer CJ stated that the “core jurisdiction of [...] superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law.” The concepts of “jurisdiction” and “powers” should not be conflated. The core “jurisdiction” of Superior Courts is their non-statutory authority to hear and determine disputes. Superior Courts, as the only Courts of general jurisdiction, have inherited their core jurisdiction from the English High Court of Justice. In addition, “a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction.” These core “powers” are procedural in nature and dependent on the exercise of jurisdiction; they enable Superior Courts to control their procedure, maintain the fairness of their processes and award remedies. The core power which concerns us is the power to control the admissibility of evidence in litigation; the core jurisdiction which concerns us is the jurisdiction to review the legality of executive action.

These aspects of Superior Courts’ core jurisdiction and powers are linked to another legal doctrine that the SCC has merged into section 96 of the Constitution Act, 1867. In Trial Lawyers Association, the SCC invalidated regulations imposing “court hearing fees” because these fees could, in some cases, impede access to justice. In doing so, it stressed that legal rules “must be consistent with [section] 96 and the requirements that flow by necessary implication from [section] 96.” One such requirement is the need to maintain access to justice. It may be argued that section 39 of the CEA impedes access to justice by depriving

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166 MacMillan Bloedel, supra note 161 at para 37.
167 Ibid at para 38.
169 Connelly v Director of Public Prosecutions, [1964] 2 All ER 401 at 409 (HL).
170 “Core powers” include the power to regulate its own procedure, ensure the fairness of the process and prevent abuses of process. See generally Joseph, supra note 168; Yihan, supra note 168.
171 Trial Lawyers Association, supra note 36.
172 Ibid at para 24.
173 Ibid at para 32.
litigants of evidence that would enable them to enforce their rights and contest the legality of executive action: "If people cannot challenge government actions in court, individuals cannot hold the state to account – the government will be, or be seen to be, above the law."\textsuperscript{174}

Discussions about the validity of section 39 of the \textit{CEA} often begin with an analysis of \textit{Commission des droits de la personne v Canada (Attorney General)} (1982). In this case, the SCC held that Parliament had jurisdiction over federal PII and, pursuant to the doctrine of parliamentary sovereignty, could make the immunity absolute.\textsuperscript{175} However, this position was flawed: Parliament's jurisdiction is, and has always been, subject to section 96 of the \textit{Constitution Act, 1867}. \textit{Commission des droits de la personne} stands for the position that an absolute PII is consistent with the division of powers between the two levels of government, federal and provincial, but it does not stand for the position that an absolute PII is consistent with the separation of powers between the three branches of the State. That issue was not tackled in 1982\textsuperscript{176} and has since only been addressed in a cursory manner.

\section*{2.2.1 Superior Courts Cannot Control the Admissibility of Evidence}

The question of whether section 39 of the \textit{CEA} violates section 96 of the \textit{Constitution Act, 1867} was cursorily addressed by the SCC in \textit{Babcock}. There, Justice lawyers working in Vancouver sued the Government for breach of contract and breach of fiduciary duties as they were not paid as much as their Toronto counterparts. The rates of pay had been fixed by the Treasury Board (which is a committee of the Privy Council). The lawsuit was filed in the British Columbia Supreme Court (which is a Superior Court). On discovery, the Clerk relied on section 39 to withhold 51 documents setting out the Treasury Board decision's rationale. The lawyers challenged the constitutionality of section 39 on the basis that it violated section 96. They submitted that the power to regulate the admissibility of evidence in litigation is part of the core powers of Superior Courts. The Government replied that Superior Courts did not have the power to require the production of Cabinet confidences in 1867 and, as such, that power was not protected by section 96. The British Columbia Supreme Court and the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{174} \textit{Ibid} at para 40.
\item \textsuperscript{175} \textit{Commission des droits de la personne, supra} note 3 at 228.
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\end{footnotesize}
SCC sided with the Government on this specific issue. The SCC insisted that "there is a long common law tradition of protecting Cabinet confidences." It asserted that "superior courts operated since pre-Confederation without the power to compel Cabinet confidences." Back then, it said, "no court had any jurisdiction regarding actions against the Sovereign.

I will challenge these conclusions on three grounds: the concept of "core jurisdiction and powers" should be interpreted progressively; Superior Courts had the power to overrule PII claims in 1867; and the power to overrule PII claims is constitutional in nature.

(1) Progressive Interpretation of "Core Jurisdiction and Powers"

In Babcock, the SCC stated that there was "no clear test" to determine whether a given jurisdiction or power is protected under section 96 of the Constitution Act, 1867. However, as a starting point, when inquiring whether a grant or removal of authority is lawful, the SCC inquires whether Superior Courts had that authority in 1867. While the SCC has not explained why it is necessary to travel back in time to delineate the core jurisdiction and powers of Superior Courts, its position is likely based on the desire to respect the Framers' intent. The problem with this "originalist" approach is that there is no evidence that the Framers intended the concept of "core jurisdiction and powers" to stay frozen in time. Moreover, whether that was the Framers' intent or not, originalism is inconsistent with the prevailing approach to constitutional interpretation: the "living tree doctrine." It is well established that the Constitution must be interpreted in a progressive manner to adapt to

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177 Babcock v Canada (Attorney General), [1999] BCJ No 1777 at para 69 (SC); Babcock, supra note 3 at para 60 (SCC). At the British Columbia Court of Appeal, MacKenzie JA suggested that section 39 was contrary to the constitutional relationship that should prevail between the judiciary and the executive, but decided the appeal on another basis. See Babcock v Canada (Attorney General), 2000 BCCA 348 at para 14.
178 Babcock, supra note 3 at para 60.
179 Ibid.
180 Ibid.
181 Ibid at para 59.
182 Sobeys Store Ltd v Yeomans, [1989] 1 SCR 238 at 263 (Wilson J) [Sobeys].
183 In contrast, before being modified by the Imperial Parliament in 1875, section 18 of the Constitution Act, 1867, supra note 7, explicitly provided that the privileges of the Canadian House of Commons and Senate could not exceed the privileges that the British House of Commons held, enjoyed and exercised in 1867.
The SCC has often rejected the claim that the Constitution should be interpreted statically:

The frozen concepts reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.

With the expansion of state activities and the rise of human rights instruments, such as the Charter, the role of Superior Courts has significantly evolved since 1867. Why should their core jurisdiction and powers remain the same? Kent Roach rightly points out that the SCC’s interpretative approach to section 96 has the effect of transforming important separation of powers issues into narrow historical questions: “Section 96 emerges as a weak device to protect the separation of powers.” What would it entail to interpret section 96 progressively? It would entail asking one key question: is the jurisdiction or power “essential to the administration of justice and the maintenance of the rule of law”?

I will show that, whether we ask the question in 1867 or today, the power of Superior Courts to control the admissibility of evidence (and overrule PII claims) is, and has always been, essential.

(2) Longstanding Judicial Power to Overrule PII Claims

If the core powers of Superior Courts are frozen in time, we must inquire whether they had the power to overrule PII claims in 1867. In Babcock, the SCC asserted that they did not, but its reasoning contained two flaws: it mischaracterized the issue; and it conflated Crown immunity and Crown privilege. First, the SCC asked whether Superior Courts had “the power to compel Cabinet confidences” in 1867. While the characterization of the power

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184 The doctrine was relied upon, inter alia, to recognize women’s right to be appointed to the Senate: Edwards v Canada (Attorney General), [1930] AC 124 (PC). It was also relied upon to confirm same-sex couples’ right to have a civil marriage: Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 SCR 698.
188 Babcock, supra note 3 at para 60. The Federal Court of Appeal mischaracterized the issue in Singh, supra note 3 at para 42, when it inquired whether “the issuance of [section 39] certificates [was] a traditional and
should be narrow, it should not be so narrow as to make the inquiry pointless. Given that the organized system of Cabinet records that is currently in place did not exist in 1867, and the issue of their production did not arise, it is pointless to ask whether Superior Courts could compel “Cabinet confidences” at that time. Rather, we must “search for analogous, not precisely the same, jurisdiction” and focus on the “type of dispute” at issue. The dispute in Babcock pertained to the production of “government documents” in litigation: the specific class of documents sought was immaterial. Second, the SCC stated that “no court had any jurisdiction regarding actions against the Sovereign” in 1867. This is true, but irrelevant. The Crown immunity and Crown privilege doctrines are not one and the same. Although no one could sue the Crown without its consent, as per the Crown immunity doctrine, the Courts could still compel the production of government documents in proceedings over which they had jurisdiction whether or not the Crown was a party to the proceedings. Litigants could subpoena public officials at trial to compel them to testify and produce documents. In such cases, the Crown’s right to object to the disclosure of sensitive information on public policy grounds was not a matter of Crown immunity, it was a matter of Crown privilege or PII.

The relevant authorities do not support the position taken by the SCC in Babcock. Rather, they support the position that, as a matter of law, the Courts have historically had the power to inspect and order the production of government documents; however, as a matter of practice, they have sometimes been reluctant to exercise it.

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189 Sobeys, supra note 182 at 254.
190 The organized system of Cabinet records was established following the creation of the Cabinet secretariat in the United Kingdom (1916) and Canada (1940). See Chapter 1, supra at 33-36.
191 Sobeys, supra note 182 at 255.
192 Babcock, supra note 3 at para 60.
193 Before the adoption of the Crown Proceedings Act, 1947 (UK), 10 & 11 Geo VI, c 44, the Crown could not be sued in court. To initiate proceedings against the Crown, a litigant first had to obtain the Crown’s consent through a Petition of Right. When Crown immunity was abolished in 1947, the Crown’s right to object to the disclosure of government documents on public policy grounds (Crown privilege) was explicitly preserved. See TG Cooper, Crown Privilege (Aurora: Canada Law Book Inc, 1990) at 8-16.
194 Before the House of Lords' decision in Duncan, supra note 90, the case law did not support the position that judges could not overrule PII claims. See Linstead, “Crown Privilege, Part 1,” supra note 164 at 98; Paul Lordon, ed, Crown Law (Toronto: Butterworths, 1991) at 516.
English case pre-1867 is Beatson v Skene (1860). In Beatson, the Court of Exchequer ruled on the validity of a PII claim over the production of documents in a defamation suit. While sustaining the claim, Pollock CB, for the majority, agreed that “cases might arise where the matter would be so clear that the judge might well ask for [a document] in spite of some official scruples as to producing it,” but added that judges should only do this in “extreme cases.” Martin B took a more liberal approach: “wherever the judge is satisfied that the document may be made public without prejudice to the public service, the judge ought to compel its production, notwithstanding the reluctance of [public officials] to produce it.” The difference between them was only a matter of degree, as they both agreed that judges could, in some cases, overrule PII claims. Beatson was applied by the Court of Queen’s Bench in Gugy v Maguire (1863), the sole relevant Canadian case pre-1867. There, the majority upheld a PII claim in a defamation suit. In doing so, it did not explicitly deny the possibility that a PII claim could be overruled in extreme cases, but did not consider that Gugy was such a case. Mondelet J, in dissent, would have overruled the claim. Given that a copy of the document had been made public, he could not see how its production would injure the public interest. To him, Gugy was exactly the type of case warranting judicial intervention.

Before the House of Lords’ decision in Duncan v Cammell Laird (1942), the English authorities supported the position that the Courts had a reserve power to overrule PII claims. In 1888, the High Court asserted the power to privately inspect documents subject to a PII claim to verify that the public interest was the real reason for the claim, but did not exercise it. In 1916, it took the further step of exercising the power to inspect the documents before upholding the claim. In 1931, the Judicial Committee of the Privy Council confirmed that the Courts had the power to inspect and order the production of government documents despite the Government’s objection. Its decision opened the way to the production of thousands of documents to the plaintiffs. In 1933, the High Court overruled a PII claim after

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197 Beatson, supra note 196 at 885.
198 Ibid.
199 Gugy v Maguire (1863), 13 LCR 33 (QB).
200 Hennessy v Wright (1888), 21 QBD 509.
201 Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd, [1916] 1 KB 822 (CA).
202 Robinson, supra note 144.
inspecting the documents and concluding that their production would not injure the public interest. The state of the law was summed up as follows in 1941: “theoretically the court has a right to look at the documents, notwithstanding the claim made by the Minister, in order to form its own view of the validity of the claim, [but] by the practice of the court the power will only rarely be exercised.” This historical survey shows that before Duncan, “the judiciary [was] the ultimate arbiter of the public interest.” In 1942, the House of Lords parted ways with this line of authorities by deciding that the Courts should not overrule PII claims. Yet, it mitigated its position by stating that PII claims were only final and conclusive in civil, not criminal, cases. Furthermore, it insisted “it is the judge who is in control of the trial, not the executive” and, as such, the decision to exclude documents “is the decision of the judge.” Hence, even then, the House of Lords did not entirely deny the Courts’ power to overrule PII claims.

Duncan was rejected by the highest Courts in Australia, New Zealand and Canada. The SCC overruled PII claims in criminal and civil cases. In a case arising out of Scotland, Lord Radcliffe said that it would be a “great pity” if the Courts “abdicated [...] a right of control which their predecessors in earlier centuries have been insistent to assert.” Duncan was disapproved by the English Court of Appeal in 1963, before being overturned by the House of Lords in Conway v Rimmer (1968). In Conway, the Law Lords did not purport to create a new judicial power to overrule PII claims; they re-established an enduring power that had been improperly constrained. Speaking of the PII doctrine, Lord Upjohn said that it was time for the Courts to “regain its control over the whole of this field of the law.” DH Clark noted that Conway “restore[d]” to the Courts their power to overrule PII claims. When the issue regarding the production of Cabinet documents was first adjudicated in the wake of Conway,

203 Spigelman v Hocken (1933), 150 Law Times Reports 256 (KB).
204 Duncan v Cammell Laird & Co Ltd, [1941] 1 All ER 437 at 440 (CA).
205 Clark, “Administrative Control of Judicial Action,” supra note 195 at 504.
206 Duncan, supra note 90 at 595.
207 Chapter 2, supra at 77-81.
208 R v Snider, [1954] SCR 479 [Snider].
210 Glasgow Corporation v Central Land Board, 1956 Sess Cas 1 (HL).
211 Re Grosvenor Hotel, London (No 2), [1964] 3 All ER 354 [Grosvenor Hotel].
212 Conway, supra note 91 at 915.
the Courts held that they had the power to inspect them and order their production.\textsuperscript{214} Thus, the position that Canadian Courts did not have the power to compel government documents, whatever their nature, before or after 1867, is not supported by the authorities. The fact that the Courts have sometimes been reluctant to exercise the power to compel government documents and overrule PII claims, as a matter of practice, did not divest them of that power, as a matter of law.

\textbf{(3) Constitutional Nature of the Judicial Power to Overrule PII Claims}

The key issue is whether the judicial power to control the admissibility of evidence, including the power to overrule PII claims, is "essential to the administration of justice and the maintenance of the rule of law."\textsuperscript{215} The case law on this issue is inconsistent. In \textit{Carey v Ontario} (1986), the SCC held that "it would be contrary to the constitutional relationship that ought to prevail between the executive and the courts in this country" to deprive the judiciary of the power to inspect and order the production of Cabinet confidences.\textsuperscript{216} Yet, in \textit{Babcock v Canada} (2002), the SCC stated that section 39 of the \textit{CEA}, which deprives the judiciary of the power to inspect and order the production of Cabinet confidences, "[did] not fundamentally alter or interfere with the relationship between the courts and the other branches of government."\textsuperscript{217} While \textit{Carey} was decided under the common law and \textit{Babcock} was decided under statute law, these positions cannot both be accurate. Depriving judges of the power to inspect and order the production of Cabinet confidences either interferes with the proper constitutional relationship between the judiciary and the executive or it does not. Common law and statute law rules must both comply with section 96 of the \textit{Constitution Act, 1867}. The SCC's position in \textit{Babcock} suggests an increased judicial deference to statute law, which is unwarranted when dealing with the core powers of Superior Courts.

In a seminal article, IH Jacob stated that the "essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and

\begin{footnotes}
\item[\textsuperscript{214}] \textit{Sankey v Whitlam} (1978), 142 CLR 1 [\textit{Whitlam}] (Australia); \textit{Burmah Oil}, supra note 92 (United Kingdom); \textit{Fletcher Timber}, supra note 94 (New Zealand); \textit{Carey}, supra note 2 (Canada).
\item[\textsuperscript{215}] \textit{MacMillan Bloedel}, supra note 161 at para 38.
\item[\textsuperscript{216}] \textit{Carey}, supra note 2 at 654.
\item[\textsuperscript{217}] \textit{Babcock}, supra note 3 at para 57.
\end{footnotes}
to prevent its process being obstructed and abused.” Such powers are the “life-blood” of a Superior Court as they enable it to “fulfil itself as a court of law.” What is the function of the Courts if not to resolve disputes by the interpretation and application of the law? As the law is not applied in a vacuum, to perform this function the Courts first need to determine the relevant facts. In our adversarial system, it is the parties’ role to present the relevant oral or documentary evidence to the Court. In the proper administration of justice, all relevant evidence should be available to the parties within the framework of the rules of evidence. By exception, the parties can claim some privileges for confidential information, or object to the admissibility of unreliable or unduly prejudicial evidence. Yet, to maintain the integrity of the adjudicative process, the final decision on the production or admissibility of evidence is made by the judge. If this kind of decision was left to the parties, it would be in their self-interest to suppress unfavourable evidence. As a consequence, judges would no longer be in control of the adjudicative process and would be unable to prevent abuses. This would, in turn, undermine the public confidence in the administration of justice.

John Wigmore described the Courts’ power to assess the admissibility of evidence as an “indestructible judicial function.” Rules preventing them from fulfilling this function trespass “upon their exclusive province.” The highest Courts in common law jurisdictions support Wigmore’s position. In 1954, Rand J held that it would be inconsistent with “basic conceptions of our polity” to forbid judges from determining PII claims as this power is necessary to prevent “executive encroachments upon the administration of justice.” In 1963, Lord Denning stated that PII was a constitutional law matter as it deals with the proper relationship between the respective powers of the executive and the Courts. As “guardians of justice,” judges must have the final word on the admissibility of evidence. This point

219 Ibid.
220 Trial Lawyers Association, supra note 36 at para 33.
221 R v Carosella, [1997] 1 SCR 80 at para 56 (Sopinka J): “Under our system, which is governed by the rule of law, decisions as to which evidence is to be produced or admitted is for the courts.”
223 Ibid at § 1353
224 Ibid.
225 Snider, supra note 208 at 485 (Rand J).
226 Grosvenor Hotel, supra note 211 at 360, 362.
was later confirmed by the House of Lords.227 In 1974, Burger CJ held that an absolute PII would undercut the United States’ “historic commitment to the rule of law” and “gravely impair the basic function of the courts” under the Constitution.228 Decades earlier, Vinson CJ had said that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers” as it would lead to “intolerable abuses.”229 Gibbs, Stephen and Mason JJ of the High Court of Australia reached the same conclusion.230 In 1982, Wilson J denied that the executive could be the “arbiter of his own immunity [as this power] is for the courts.”231 The authorities support the position taken in Carey. Judges, who have the final responsibility for maintaining the rule of law, must also have final responsibility for deciding what evidence should be available to enable them to do justice.232 In Allan Manson’s words:

[A]n 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.233

In Babcock, the SCC overlooked the wisdom of Carey and the common law when dismissing the claim that section 39 of the CEA violates the core powers of Superior Courts. While the SCC is free to change its mind, in a culture of justification, it should at least explain why it did so. It should explain why the authorities cited above are mistaken in holding that the power to control the admissibility of evidence and overrule PII claims is constitutional in nature. The explanation should go beyond the issue of whether Superior Courts had that power in 1867; it must address the substantive question, that is, whether the Superior Courts’ power to control the admissibility of evidence is essential to the administration of

227 See generally Conway, supra note 91.
229 United States v Reynolds, 345 US 1 (1953) at 8-10.
230 Whitlam, supra note 214.
232 I am paraphrasing a statement made by Lord Woolf in R v Chief Constable of the West Midlands Police, ex parte Wiley, [1994] 3 All ER 420 at 438. While Parliament can regulate Cabinet immunity by way of statute, in doing so, it must preserve the judge’s discretionary power to inspect Cabinet documents and order their production when the interest of justice outweighs the interest of good government. See Hamish Stewart, “Section 7 of the Charter and the Common Law Rules of Evidence” (2008) 40 SCLR (2d) 415 at 416.
justice and the maintenance of the rule of law. Babcock has given a negative answer to that question. This answer, if it is correct, could have major consequences: Parliament could adopt a near-absolute immunity not just over Cabinet confidences, but over all government information, and abolish the right to discovery against the State. If the Government could control access to evidence in this way through statute law, the citizens’ capacity to hold it to account, and by extension the rule of law, would be undermined. It is troubling that the SCC’s position, if carried to its logical conclusion, could lead to such an absurd outcome.

2.2.2 Superior Courts Cannot Review the Legality of Executive Action

Parliament and the provincial legislative assemblies cannot totally deprive Superior Courts of their jurisdiction to review the legality of executive action. While they can limit the scope of judicial review by the use of privative clauses, they cannot prevent Superior Courts from reviewing executive action for jurisdictional errors. In Crevier v AG (Québec) (1981), the SCC held that judicial review for jurisdictional errors was the “hallmark of a superior court” and was constitutionally protected under section 96 of the Constitution Act, 1867. The rule of law requires that Superior Courts have the last word on jurisdiction and that individuals have efficient remedies to protect themselves from unlawful executive action. If section 39 of the CEA was interpreted to totally exclude judicial review, it would be unlawful. In Babcock, the SCC held that this was not the effect of section 39. While it can be viewed as a “draconian” privative clause, it does not, in the SCC’s view, prevent judicial review for jurisdictional errors. Judges can review Cabinet immunity claims to determine: whether the certified documents fall within the scope of section 39; and whether the certificate was issued in bad faith. As judges cannot inspect the documents, any challenge must be made...

235 The concept of “jurisdictional error” includes “acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting [the relevant statutory] provisions”: Service Employees’ International Union, Local No 333 v Nipawin District Staff Nurses Association, [1975] 1 SCR 382 at 389.
237 Dunsmuir, supra note 87 at para 30.
238 Babcock, supra note 3 at para 39.
239 Ibid at para 60.
based on the information available on the face of the certificate or external evidence. Even though “these limitations may have the practical effect of making it difficult to set aside a [section] 39 certification,” Parliament has not, according to the SCC, “substantially altered the role of the judiciary from their function under the common law regime.”

The issue is whether section 39 of the CEA, as interpreted by the SCC in Babcock, really enables Superior Courts to review Cabinet immunity claims on jurisdictional grounds. In other words, does it enable meaningful judicial review of executive action, as required by the congruence principle, the theory of law as justification and the Canadian Constitution? I will show that, contrary to the SCC’s position, it does not. At the outset, it is important to stress that the certification of documents under section 39 is not just a question of fact, as stated by the Federal Court of Appeal in Singh. The certification involves mixed questions of fact and law. The decision-maker must first inspect the documents to assess whether they fall within the legal meaning of the term “Cabinet confidences,” which is partly a matter of statutory interpretation. He or she must then weigh and balance the competing aspects of the public interest to assess whether the documents should be withheld. This requires an analysis of the documents’ degree of relevance and their degree of injury. I will argue that Superior Courts cannot review whether Cabinet immunity has been claimed mistakenly or abusively without access to the documents and the justification for their protection.

(1) Judicial Review of Executive Mistakes

There are three types of bona fide mistakes that the administrative decision-maker could make when issuing a certificate under section 39 of the CEA.

First, the Minister or the Clerk could claim the immunity for documents that do not fall within the statutory definition of “Cabinet confidences” under subsection 39(2) because: (1) the documents are not sufficiently connected to the collective decision-making process; or (2) the information they contain has been made public. This first problem arises because

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240 Ibid at para 40.
241 Ibid at para 60.
242 Singh, supra note 3 at para 29.
243 The degree of relevance is a function of the probative value and materiality of the information. In contrast, the degree of injury is a function of the sensitivity of the information and the timing of its disclosure.
subsection 39(2) is open-ended: it does not provide an exhaustive list of documents which contain Cabinet confidences. Plus, the list of documents provided in subsection 39(2) is very broad: it is not limited to official Cabinet documents; it includes departmental documents that have a tenuous connection to the collective decision-making process.\textsuperscript{244} With respect to departmental documents, the descriptions provided in section 39 certificates (namely, the author, recipient, subject and date) may not be sufficient to clearly establish, on the face of the certificate, that the documents contain Cabinet confidences. This is a serious problem given that an increasing number of documents certified under section 39 are departmental documents such as emails, briefing notes and PowerPoint slides.\textsuperscript{245} The second problem relates to the confidentiality of the information. If the information has been made public, it can no longer be protected under section 39. Yet, the Government sometimes claims section 39 for documents the contents of which have been made public.\textsuperscript{246} Judges cannot know if the information found in certified documents is truly confidential without inspecting them.

Second, the Minister or the Clerk could claim the immunity although the public interest requires that the documents be produced in the specific circumstances of the case. The public interest weighing and balancing process is a fundamental part of the analysis. Without access to the “public interest” justification underpinning Cabinet immunity claims, judges cannot know if the decision-maker has reasonably weighed and balanced the competing aspects of the public interest. The decision-maker could underestimate the documents’ degree of relevance and overestimate the degree of injury that would result from production.

Third, the Minister or the Clerk could misapply the “discussion paper exception.” Because of modifications to the Cabinet paper system, no discussion paper was disclosed from 1984 to 2003. This exception was revived following the intervention of the Information Commissioner and the Federal Court of Canada.\textsuperscript{247} However, in 2012, new modifications to

\begin{footnotesize}
\textsuperscript{244} See, for example, Ken Rubin, \textit{Access to Cabinet Confidences: Some Experiences and Proposals to Restrict Cabinet Confidentiality Claims} (September 1986) at 59-64.
\textsuperscript{245} Yan Campagnolo, “Cabinet Documents should be under the Scope of the ATIA,” \textit{The Hill Times} (6 June 2016) at 15.
\textsuperscript{246} See, for example, Pelletier, supra note 148.
\textsuperscript{247} \textit{Canada (Information Commissioner) v Canada (Minister of the Environment)}, 2003 FCA 68 [Ethyl].
\end{footnotesize}
the Cabinet paper system had the effect of significantly narrowing the scope of this exception. In practice, the application of this exception depends on a careful review of the documents to determine whether they contain: "a corpus of words the purpose of which is to present background explanations, analyses of problems or policy options to [Cabinet]." Any part of a document which falls within this definition must be disclosed if the Cabinet decision has been made public or, if not, four years have passed since it was made (paragraph 39(4)(b) of the CEA). But no one can determine if this exception applies based on the description of the documents without reading them. Without inspection powers, judges cannot know if the documents listed in section 39 certificates are subject to the discussion paper exception. This is troubling given that the Government has often misapplied this exception in the past.

(2) Judicial Review of Executive Abuses of Power

In addition, the Minister or the Clerk could claim Cabinet immunity abusively, that is, to thwart public inquiry or to gain tactical advantage in litigation. History contains many examples in which PII was used for such improper purposes. Bad faith is rarely apparent on the face of a certificate as the decision-maker can misrepresent the true nature of the documents and the outcome of the public interest assessment. Bad faith can be uncovered through: external evidence; or a judicial inspection of the documents. The first method is uncertain as external evidence is difficult to obtain. It requires one of three scenarios to play out. First, the decision-maker could publicly reveal the true motives underpinning his or her decision without realizing their improper nature. Second, a whistleblower could leak the

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248 Ibid at para 27.
249 See generally Ethyl, supra note 247; Ken Rubin, “Harper’s Cabinet Need Not have any Background Facts, Reinforces Greater Cabinet Secrecy,” The Hill Times (14 April 2014) at 15. See also Chapter 3, supra at 162-68.
250 Babcock, supra note 3 at para 25.
251 For example, in Robinson, supra note 144 and Ellis v Home Office, [1953] 2 QB 135 (CA), public officials relied on PII to avoid legal liability in civil proceedings. Similarly, in Nixon, supra note 228 and Whitlam, supra note 214, public officials relied on PII to thwart criminal proceedings.
253 For example, in Roncarelli, supra note 11, Premier Duplessis admitted that he had cancelled Mr. Roncarelli’s liquor licence as a punishment for helping Jehovah’s witnesses. Similarly, in Conway, supra note 91 at 882, the Attorney General conceded that PII was sometimes claimed to shield public officials from legal liability in civil proceedings.
true motives underpinning the decision. Third, an external body with subpoena power could investigate and find that the Government has used PII improperly. These scenarios all involve an element of luck or arbitrariness. Technically, the litigant cannot cross-examine the decision-maker to probe his or her motives because a certificate is not an affidavit. The only effective way to ensure that Cabinet immunity is consistently claimed in good faith, in line with the rule of law, is the second: to enable judges to inspect documents to confirm that they contain Cabinet confidences which should be withheld in the public interest.

(3) Cabinet Immunity as a Legal Black Hole

As the interpretation and application of section 39 of the CEA is almost exclusively in the Government’s hands, there is a risk that Cabinet immunity could be overclaimed. The dangers of executive auto-interpretation are well-documented. Decision-makers are often subject to subtle pressure from their political masters, who yield power over them. The legal analysis behind their decisions may be self-serving or mistaken. The decision-maker could end up exceeding his or her jurisdiction and, without meaningful review, this unlawful conduct would remain undetected. Scrutiny of executive auto-interpretation demands a level of transparency, justification and intelligibility that section 39 forbids. Usually, when judges review the legality of administrative decisions, they have access to the record of tribunal and the reasons for the decision, but this is not the case under section 39. Contrary to the SCC’s position in Commission des droits de la personne, the problem stems from the design of the legislation, not only the way in which it is applied. Section 39 conceals possible unlawful executive action by blinding judges, by precluding them from inspecting documents. It prevents the application of the congruence principle. Left in the dark, deprived of the light that would enable them to detect unlawful conduct, judges are ill-equipped to

254 Note, however, that the Courts usually decline to admit unlawfully obtained evidence: Attorney-General of Ontario v Gowling & Henderson (1984), 47 OR (2d) 449 (HC); Bruyere v Canada, [2004] FCJ No 2194 (FC).
255 As did the Information Commissioner in Ethyl, supra note 247.
256 Likewise, there is evidence that the Government tends “to exaggerate claims of national security confidentiality.” See Canada (Citizenship and Immigration) v Harkat, 2014 SCC 37, [2014] 2 SCR 33 at para 63.
258 Commission des droits de la personne, supra note 3 at 228-29. See also Little Sisters Book and Art Emporium v Canada (Minister of Justice), 2000 SCC 69, [2000] 2 SCR 1120 at paras 203-13 (Iacobucci J).
uphold the rule of law. A judge cannot confirm whether a PII claim is valid or not without inspecting the documents at issue, no more than a house inspector can confirm that a house is free of defect without setting foot inside it. Reading a certificate is like looking at a house’s façade: it is a very poor way of assessing the quality of the thing under scrutiny.

In enacting section 39 of the *CEA*, Parliament has created a legal black hole,²⁵⁹ that is, a zone which is not controlled by law. To put it bluntly, it has taken “the risk of an abuse of power that lies beyond judicial review.”²⁶⁰ The SCC should have ruled that Parliament has no constitutional authority to create legal black holes. Under section 96 of the *Constitution Act, 1867*, it cannot remove from Superior Courts the core jurisdiction to review executive action for jurisdictional errors. Unfortunately, rather than taking this course of action, the SCC turned a blind eye to section 39. In *Babcock*, it sanctioned the myth that judges can meaningfully review Cabinet immunity claims without access to the documents and the justification for the claim. If that were true, there would be no difference, from a rule of law perspective, between a relative and a near-absolute immunity. The SCC has denied that section 39 produces a legal black hole. In doing so, it has created something more dangerous than a legal black hole, namely, a legal grey hole. Dyzenhaus explains that a legal grey hole is a zone which appears to be controlled by law, and thus garners the legitimacy of the rule of law, but in fact is not.²⁶¹ Section 39 is a legal grey hole in the sense that the Government can overclaim Cabinet immunity, without being detected, and still pretend that it is acting in accordance with the rule of law. This is nothing more than a smokescreen given that no one outside the Government can confirm whether Cabinet immunity is properly applied.

To sum up, in this section, I have challenged the SCC’s position in *Babcock* that section 39 of the *CEA* does not interfere with the proper relationship between the executive and the judicial branches. First, I have argued that the power of Superior Courts to control the admissibility of evidence in litigation is essential to the administration of justice and the maintenance of the rule of law. By removing that power, Parliament has undermined the ability of judges to ensure the fairness of the proceedings and to remedy abuses of process.

²⁶⁰ See the views of Mayrand JA quoted in *Commission des droits de la personne*, supra note 3 at 227.
Second, I have argued that section 39 unduly limits the jurisdiction of Superior Courts to review executive action for jurisdictional errors by preventing them from inspecting certified documents. Without inspection powers, judges cannot assess whether a claim has been made reasonably and in good faith. By creating a zone in which the executive branch is free from judicial scrutiny, section 39 weakens the separation of powers. A judge cannot be a judge, and fulfil his or her constitutional responsibility to maintain the rule of law, without the powers necessary to hold the executive branch accountable.

CONCLUSION

The objective of this chapter was to show that section 39 of the CEA violates the rule of law and the provisions of the Constitution. To this end, I have adopted, as a normative framework, the theory of law as justification, which is implicit in the Canadian legal order. The theory of law as justification imposes meaningful constraints on the State and, in contrast to the SCC’s very thin conception of the rule of law, it illuminates the flaws afflicting section 39. I have relied on the theory of law as justification to give substance to the unwritten rule of law principle and guide the interpretation of the relevant provisions of the Constitution. I have built the arguments around two principles: procedural fairness; and the separation of powers. As such, I have examined whether the statutory regime established by Parliament to regulate Cabinet immunity claims violates the duty of procedural fairness and the core, or inherent, jurisdiction and powers of Superior Courts. I have concluded that it does. Consequently, the statutory regime is not only incompatible with the theory of law as justification, but also unconstitutional.

Procedural fairness is a fundamental legal principle both under the theory of law as justification and the Constitution. A government decision to deprive a litigant of relevant evidence in litigation triggers two aspects of the duty of fairness: the litigant’s right to have the matter decided by an independent and impartial decision-maker; the litigant’s right to be informed of the reasons for the decision. First, it is trite law that “no one may be judge in his own cause.” Hence, a member of the executive branch should not be allowed to make a

262 See sections 2(e) of the Bill of Rights, supra note 6, as well as 7 and 11(d) of the Charter, supra note 6.
final and conclusive decision to withhold relevant evidence in cases where the Government is a party. Indeed, a party to the litigation should not have control over the tenure of the decision-maker. In addition, the decision-maker should not decide questions of disclosure if he or she has been involved in the development of the impugned government policy. These situations raise a reasonable apprehension of bias. Second, claims of Cabinet secrecy are not made in a manner consistent with an important aspect of law as justification: the onus of justification. The decision-maker is not currently required to justify why the public interest demands that Cabinet confidences be withheld. Without this information, the litigant and the judge cannot determine whether the decision-maker has properly weighed and balanced the interests of justice and good government. They cannot assess whether the claim is rational, proportional and reasonable. This lack of transparency prevents meaningful judicial review.

Judicial review is fundamental to the maintenance of a culture of justification and the rule of law in Canada. Section 39 of the CEA impedes judicial review, and the function of Superior Courts under the separation of powers, as it limits: their core power to control the admissibility of evidence; and their core jurisdiction to review the legality of executive action. First, the authorities support the position that the power to control the admissibility of evidence is essential to the administration of justice and the maintenance of the rule of law. If the parties could decide what evidence is admissible or not, it would lead to grave abuses. Self-interested parties would suppress any evidence that is unfavourable to their case. Judges would no longer be in full control of the judicial process and would be unable to remedy abuses of process. Their capacity to search for the truth would be undermined along with the public confidence in the administration of justice. Second, by depriving Superior Courts of the power to inspect documents, section 39 limits their capacity to review executive action for jurisdictional errors. Under normal circumstances, judges cannot detect whether a claim has been made mistakenly or abusively without inspection powers. As such, judges cannot assess if the executive action is, in Fuller’s words, “congruent” to the legal rules. To the extent that it insulates executive action from rule of law constraints, section 39 is a legal black hole. Unfortunately, the SCC has legitimized that hole by denying its existence.

263 See section 96 of the Constitution Act, 1867, supra note 7.
Section 39 of the *CEA* is the antithesis of the rule of law and the principle of access to justice in Canada. While it seeks to protect a principle that is important to the functioning of the system of responsible government, that is, Cabinet secrecy, it does so in a manner that is inconsistent with the provisions of the Constitution, interpreted in the light of the theory of law as justification. Even if the Courts concluded, based on positive law considerations, that section 39 does not breach any specific provision of the Big-C Constitution, the controversy would remain. Indeed, under the theory of law as justification, legislation may be considered in breach of the rule of law although it does not clearly breach the Big-C Constitution. In such cases, while the Courts cannot strike down the legislation, they should openly acknowledge the rule of law breach in order to deprive the offending legislation of legal legitimacy.

Cabinet secrecy can be protected at the federal level in Canada as well as it is at the provincial level and elsewhere, without depriving litigants of basic procedural fairness and Superior Courts of their core jurisdiction and powers. Any jurisdiction which incorporates the principles of procedural fairness and the separation of powers in its conception of the rule of law would likewise find the idea of a near-absolute PII immunity objectionable. From a theoretical perspective, to comply with the rule of law, Cabinet immunity claims should be decided by independent and impartial judges who have unfettered access to the justification and the information. This is not to say that judges should never defer to executive decisions to claim Cabinet immunity, but deference should be triggered by the quality of the reasons supporting the decision, not blind submission to the assumed wisdom of public officials. The rule of law rejects absolute rules of secrecy or disclosure in favour of a more contextual assessment in which all the aspects of the public interest are duly considered.
CONCLUSION

The subject of this dissertation was Cabinet secrecy. It explored the tension between government openness and secrecy. Access to government information is a crucial element of good governance as it enables citizens to meaningfully participate in the democratic process, exercise their freedom of expression and ensure that public office holders are accountable. Unfortunately, the federal access to information regime in Canada is outdated. A study undertaken by the Centre for Law and Democracy ranks the federal access regime 49th at the international level and last at the national level. One of the main weaknesses of the regime is that it does not apply to “Cabinet confidences” pursuant to section 69 of the Access to Information Act. In addition, the Government has a near-absolute immunity over the production of Cabinet confidences in legal proceedings pursuant to section 39 of the Canada Evidence Act. The high level of protection afforded to Cabinet confidences at the federal level is unparalleled in Canadian provinces and other Westminster jurisdictions.

The objective of this dissertation was to determine: whether the doctrine of Cabinet secrecy remains legitimate in an era where government openness is an important value; and, if so, whether the legal rules developed to protect Cabinet secrecy at the federal level in Canada are consistent with the rule of law and the Constitution. To achieve this objective, I have examined, from a theoretical and comparative perspective, the relevant constitutional conventions, common law rules and statutory rules in the United Kingdom, Australia, New Zealand and Canada. The general conclusion is that Cabinet secrecy remains legitimate, but the statutory regime devised by Parliament to protect Cabinet secrecy is inconsistent with the rule of law and the Constitution. Furthermore, the statutory regime has fallen out of step with the best practices in provincial jurisdictions and the United Kingdom, Australia and New Zealand.

3 Access to Information Act, RSC 1985, c A-1, s 69 [ATIA], which is reproduced in the Appendix.
4 Canada Evidence Act, RSC 1985, c C-5, s 39 [CEA], which is reproduced in the Appendix.
Zealand. I will now summarize the main findings flowing from this dissertation and propose policy recommendations to improve the statutory regime.

1. FINDINGS

Finding 1 – As a matter of convention, Cabinet secrecy is essential to the proper functioning of the system of responsible government.

As demonstrated in Chapter 1, as a matter of constitutional convention, Cabinet secrecy remains legitimate today for it is an essential component of the doctrine of collective ministerial responsibility along with the confidence and the solidarity conventions. Cabinet is a forum in which Ministers meet to propose, debate and decide government policies and actions. The privacy of Cabinet proceedings fosters the candour of ministerial discussions and the efficiency of the collective decision-making process. In addition, it enables Ministers to remain united in public, notwithstanding any disagreement they may have in private. Solidarity is critical as it allows Ministers to maintain, as a group, the support of the House of Commons and to remain in power. The confidence, solidarity and secrecy conventions complement each other. To remove one component would weaken the proper functioning of the system of responsible government. Initiatives aimed at relaxing ministerial solidarity and secrecy have historically proven to be ill-advised. If the privacy of Cabinet proceedings could not be protected, ministerial discussions would likely move to another forum.

Finding 2 – As a matter of convention, when there is a change in power, the new Ministry cannot access the Cabinet secrets of the former Ministry.

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5 Ministers must feel at ease to speak their mind freely during the collective decision-making process to identify and reconcile any disagreement they may have. Failure to protect the privacy of Cabinet proceedings would have a chilling effect on their willingness to speak their mind freely.

6 Failure to maintain the privacy of Cabinet proceedings before a final decision is made and announced would increase the level of public pressure put on Ministers by stakeholders and give rise to partisan criticism by their political opponents. This would ultimately paralyze the collective decision-making process.

7 Ministers must remain united in public and speak with one voice. If private disagreements between Ministers were made public, their political opponents would exploit these disagreements to weaken the unity of the Ministry and its ability to maintain the confidence of the House of Commons.

8 Consider, for example, the short-lived decision of Prime Minister Pierre Elliott Trudeau to relax the rules of ministerial solidarity in 1968 and the unsuccessful experiment of Premier Gordon Campbell with open Cabinet meetings in British Columbia in 2001.
The Cabinet Secretariat was established in Canada during the Second World War to support the collective decision-making process. An organized system of Cabinet documents was put in place to that end on the condition that the confidentiality of the documents be protected. A new convention, the access convention, was adopted to ensure that the political secrets of the governing political party would not fall into the hands of its opponents.\(^9\) Hence, when there is a change of power, the new Ministry is forbidden to access the Cabinet documents created under the former Ministry.\(^10\) These documents are left into the custody of the Clerk of the Privy Council, as Secretary to the Cabinet. The Clerk can inform the new Ministry of the decisions made by the former Ministry so that official business may be carried out efficiently, but he or she cannot reveal the personal views voiced by Ministers when deliberating on government policy and action, or any private disagreement between them.\(^11\) If the confidentiality of Cabinet documents could not be guaranteed, these documents would likely cease to exist, and part of our national historical record would be lost.

**Finding 3 – As a matter of convention, Cabinet secrets do not enjoy an absolute level of protection in all circumstances.**

Conventions do not afford an absolute level of protection to Cabinet secrets. Rather, they distinguish between what I have called “core” and “noncore” secrets. “Core secrets” refer to information which reveals the personal views voiced by Ministers when deliberating on government policy and action. In comparison, “noncore secrets” refer to information which relates to the collective decision-making process, without revealing the personal views voiced by Ministers when deliberating on government policy and action. Core secrets are considered more sensitive than noncore secrets because it is the kind of information that political opponents could use to weaken the unity of the Ministry and its ability to maintain

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\(^9\) The access convention was first applied in 1957. The convention was subsequently confirmed in 1963, 1979, 1980, 1984, 1993, 2003, 2006 and 2015, through exchanges of letters between the Clerk of the Privy Council, the outgoing Prime Minister and the incoming Prime Minister.

\(^10\) The access convention was initially applied when there was a change of Ministry between political parties; however, since 1984, it has been applied when there is a change of leadership within the same political party. This extension of the convention seems inconsistent with its rationale.

\(^11\) The access convention was initially primarily applied to documents recording core secrets, especially Cabinet minutes; however, since 1979, it has been extended to documents recording noncore secrets. This extension of the convention seems inconsistent with its rationale.
the support of the House of Commons. Noncore secrets, such as the facts and the background information underpinning Cabinet decisions, can be disclosed without any risk of injury once the decision has been made public. Moreover, conventions recognize that: the sensitivity of Cabinet secrets decreases with the passage of time, until they become only of historical interest; and the public interest may require that an exception be made to Cabinet secrecy (for example, in the context of criminal cases, commissions of inquiry, Auditor General audits and, to a limited extent, parliamentary proceedings).

**Finding 4 – Under the common law, Courts have the power to inspect Cabinet secrets and decide whether they should be produced in the public interest.**

As demonstrated in Chapter 2, from 1942 to 1968, public interest immunity (PII) claims by Ministers were considered final and conclusive in England. The abdication by English Courts of their power to control the admissibility of evidence in legal proceedings enabled Ministers to suppress relevant evidence in cases in which the Government was a party, in violation of the rule of law and the separation of powers. In 1968, in reaction to abuses of PII by Ministers, and to bring the law of England in line with the law elsewhere in Westminster jurisdictions, English Courts restored the judicial power to inspect government secrets and order their production, and introduced a new weighing and balancing process for the assessment of PII claims. Shortly after, that power was extended to Cabinet secrets in the United Kingdom, Australia, New Zealand and Canada, therefore confirming that

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12 Disclosure of Cabinet secrets may happen sooner in two cases. A resigning Minister may disclose Cabinet secrets to explain the nature of the disagreement with his or her former colleagues. In addition, a former Minister may disclose Cabinet secrets in his or her political memoirs to explain or justify the decisions made while in office. See Attorney General v Jonathan Cape Ltd, [1975] 3 All ER 484 (QB) [Jonathan Cape].

13 Access to Cabinet documents was authorized in the Bissonnette and Munro criminal prosecutions.

14 Access to Cabinet documents was granted to the McDonald, Gomery and Oliphant commissions of inquiry.

15 A confidential access to certain Cabinet documents was given to the Auditor General of Canada for auditing purposes in 1985, 2006 and 2017.

16 The executive branch should not rely on Cabinet secrecy to refuse to provide to the House of Commons the information it requires to assess the effects and the costs of proposed legislation, as did the Conservatives in 2011. Without this information, the legislature cannot properly perform its constitutional role.

17 Duncan v Cammell Laird & Co Ltd, [1942] 1 All ER 587 at 588 (HL).

18 Conway v Rimmer, [1968] 1 All ER 874 (HL).

19 Burmah Oil Co Ltd v Bank of England, [1979] 3 All ER 700 (HL) [Burmah Oil].

20 Sankey v Whitlam (1978), 142 CLR 1 [Whitlam].

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

22 Carey v Ontario, [1986] 2 SCR 637 [Carey].
Cabinet immunity is relative, not absolute, under the common law. The justification and scope of Cabinet immunity is consistent under constitutional convention and the common law: Courts have confirmed that the justification for Cabinet secrecy fades away with the passage of time\textsuperscript{23} and does not shield public officials against criminal prosecutions.\textsuperscript{24}

\textbf{Finding 5 – Under the common law, the approach taken by the Courts to assess Cabinet immunity claims is inconsistent in Westminster jurisdictions.}

The level of deference afforded to Cabinet immunity claims under the common law is inconsistent: the highest Courts in the United Kingdom and Australia are deferential towards Cabinet immunity claims while the highest Courts in New Zealand and Canada are not. Under what I have called the “deferential approach,”\textsuperscript{25} Cabinet documents are presumed immune. Courts will not inspect them unless the litigant shows that they would likely substantially support the allegations made. The problem with the deferential approach is that the onus requirement is inconsistent with the principle of access to evidence and unfair to litigants, thus resulting in the suppression of \textit{prima facie} relevant documents. In contrast, under what I have called the “nondeferential approach,”\textsuperscript{26} Cabinet documents are not presumed immune. Courts will inspect them unless the Government establishes that their contents are very sensitive. The problem with the nondeferential approach is that insufficient weight is given to the rationales underpinning Cabinet secrecy, thus resulting in the production of sensitive documents which may not support the allegations made. As a consequence, Cabinet secrets are over protected in some jurisdictions, to the detriment of the interest of justice, and under protected in others, to the detriment of the interest of good government.

\textbf{Finding 6 – Under the common law, the approach taken by the Courts to assess PII claims could be bolstered by the adoption of a new rational approach.}

To improve the predictability, certainty and transparency in the assessment of PII claims, I have proposed a new “rational approach.” For reasons of efficiency, and to prevent

\begin{itemize}
  \item \textit{Jonathan Cape}, supra note 12.
  \item \textit{Burmah Oil}, supra note 19; \textit{Air Canada v Secretary of State for Trade (No 2), [1983] 1 All ER 910 (HL); Commonwealth v Northern Land Council} (1993), 176 CLR 604.
  \item \textit{Fletcher Timber}, supra note 21; \textit{Carey}, supra note 22.
\end{itemize}
disputes about the production of documents that have a low degree of relevance, the rational approach favours the adoption of a “narrow standard of relevance" during the discovery process.\textsuperscript{27} For reasons of fairness, it imposes the “onus of justification” on the Government:\textsuperscript{28} Courts should inspect the documents before ruling on a PII claim, unless the Government clearly shows that production is unnecessary to the fair disposition of the case. In addition, the rational approach implements a “cost-benefit analysis” for the assessment of PII claims: in principle, production should be ordered if the interest of justice, which is measured by the documents’ degree of relevance (their factual and legal relevance),\textsuperscript{29} is greater than, or equal to, the interest of good government,\textsuperscript{30} which is measured by the documents’ degree of injury (their contents and timing sensitivity).\textsuperscript{31} Lastly, in deference for the Government’s expertise, the rational approach includes a “judicial duty to minimize injury” (by editing the documents or imposing conditions for their use) whenever production is ordered.\textsuperscript{32} The approach seeks to guide the judicial assessment of PII claims to ensure that litigants are not unfairly deprived of crucial evidence while protecting our system of government from excessive harm.

\textbf{Finding 7 – Under statute law, Canada is the only Westminster jurisdiction to have entrenched a near-absolute Cabinet immunity.}

\textsuperscript{27} The rational approach favours the adoption of the “simple relevance standard” over the “semblance of relevance standard” during the discovery process. To be sure, the parties should only be required to disclose documents that are likely truly relevant to the fair disposition of the case as opposed to all documents that broadly relate to the case.

\textsuperscript{28} To discharge the onus of justification, the Government must file a certificate in which it sufficiently describes the documents subject to Cabinet immunity and explains why they should be protected in the public interest by considering their degree of relevance and their degree of injury.

\textsuperscript{29} “Factual relevance” refers to the probative value of the evidence: whether, as a matter of logic and experience, the evidence assists in proving or disproving a fact. “Legal relevance” refers to the materiality of the evidence: whether the evidence assists in proving or disproving a fact that is significant and in dispute between the parties.

\textsuperscript{30} As an exception, in criminal proceedings, given that the liberty interest is at stake, production should be ordered if the degree of relevance is moderate to high, notwithstanding the degree of injury.

\textsuperscript{31} “Contents sensitivity” depends on the level of the decision-maker (high-level versus low-level), the nature of the policy (national security versus commercial activities) and the nature of the information (core secrets versus noncore secrets). “Timing sensitivity” depends on whether the development of the impugned policy is still ongoing, in which case the sensitivity will be higher, or whether a final decision has been made and announced, in which case the sensitivity will be lower.

\textsuperscript{32} See, for example, Can Am Simulation Ltd v Newfoundland, [1994] N No 125 (SC); Health Services and Support-Facilities Subsector Bargaining Association v British Columbia, [2002] BC No 2464 (SC); Nunavut (Department of Community and Government Services) v Northern Transportation Co, [2011] NuJ No 3 (CJ).
As demonstrated in Chapter 3, the Parliament of Canada legislated in 1970 to stop the common law trend towards more government openness. Pursuant to subsection 41(2) of the *Federal Court Act*,

33 Parliament superseded the common law and granted to the Government an absolute immunity over “confidences of the Queen’s Privy Council for Canada.” This decision raised serious questions about the Canadian conception of the relationship that should exist between the executive and judicial branches.34 While the Liberals considered giving to the Courts the power to review Cabinet immunity claims, as part of the access to information reforms tabled in Parliament in 1980,35 they finally decided to maintain a near-absolute immunity over Cabinet confidences in legal proceedings (section 39 of the CEA) and to exclude them from the new *ATIA* (section 69 of the *ATIA*). This decision was made as a result of the direct intervention of Prime Minister Pierre Elliott Trudeau, and against the advice of the responsible Minister, Francis Fox, because the Prime Minister did not trust the Courts to properly handle sensitive political secrets.36 Consequently, the level of protection afforded to federal Cabinet confidences in Canada exceeds the level of protection afforded to international relations, national defence and national security information.

**Finding 8 – Under statute law, the scope of Cabinet immunity, as interpreted and applied by the Government, is overbroad.**

The federal statutory regime, namely, sections 39 of the CEA and 69 of the ATIA, protects “Cabinet confidences” as a “class of documents” without substantively defining the meaning of that term. Rather, these provisions set out a “non-exhaustive” list of documents in which Cabinet confidences can be found, such as: Cabinet memoranda; discussion papers; Cabinet agenda, minutes and decisions; communications between Ministers on Cabinet business; briefing notes to Ministers on Cabinet business; draft legislation; and other related

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33 *Federal Court Act*, RSC 1970, c 10 (2nd Supp), s 41(2), which is reproduced in the Appendix.
36 Four events underpinned Trudeau’s decision: his testimony before the McDonald Commission where Cabinet minutes were used to contradict him; two decisions by provincial courts of appeal which ordered the production of Cabinet secrets in litigation; the increasing pressure from the Auditor General to access Cabinet secrets regarding the acquisition of Petrofina by Petro-Canada; and a decision of the Supreme Court of Canada (SCC) which confirmed the constitutionality of an absolute statutory PII.
documents. Unlike the relevant conventional and common law rules, the provisions protect all Cabinet confidences for 20 years, whether they reveal core or noncore secrets. The most recent statistics show that almost 75% of the documents excluded under section 69 fall under the category “other related documents.” The vagueness and open-ended nature of this category allows public officials to protect documents that have a tenuous link to the collective decision-making process, without considering the competing aspects of the public interest. There are several cases in which Cabinet immunity was overclaimed.

The most egregious example of government abuse of Cabinet immunity is the manner in which it circumvented the “discussion paper exception” over the years. A discussion paper is a document the purpose of which “is to present background explanations, analyses of problems or policy options to Council.” Discussion papers were used for consultation purposes and did not reveal core secrets. Under paragraphs 39(4)(b) and 69(3)(b), they were supposed to become publicly available once Cabinet had made and announced its decision on the subject matter. But, in 1984, Prime Minister Trudeau decided that discussion papers should no longer be created. The Government, accordingly, moved the facts and the background information that were found in discussion papers into the Background/Analysis section of memoranda to Cabinet, which are protected for 20 years, and stopped applying the “discussion paper exception.” In 2003, this overbroad interpretation of Cabinet immunity was successfully challenged before the Federal Court of Appeal. The Government was thus compelled to disclose the Background/Analysis section of memoranda to Cabinet under the “discussion paper exception,” until Prime Minister Stephen Harper decided to abolish it for

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37 To be sure, documents such as Cabinet agenda, records of decisions and draft legislation which, by virtue of their nature, do not reveal core secrets are protected for 20 years: section 39(4)(a) of the CEA, supra note 4.
40 Paragraphs 39(2)(b) of the CEA, supra note 4, and 69(1)(b) of the ATIA, supra note 3.
41 Canada (Information Commissioner) v Canada (Minister of Environment), [2001] 3 FC 514, affirmed 2003 FCA 68.
good in 2012. Facts and background information are now intertwined with ministerial views and recommendations and, as a result, it has become increasingly difficult to apply the “discussion paper exception” as it was initially intended by Parliament.

Finding 9 – Under statute law, only a weak form of judicial review is available against Cabinet immunity claims.

The Courts have interpreted sections 39 of the CEA and 69 of the ATIA in a way that significantly limits judicial review of Cabinet immunity claims. They have confirmed that judges cannot, under any circumstance, inspect information that has been certified under section 39 or excluded under section 69. Judges can only overrule a Cabinet immunity made in the proper form in three situations: if, based on the description of the documents, they do not fall within the meaning of the term “Cabinet confidences”; if, based on extrinsic evidence, it appears that the claim has been made in bad faith; and if the information subject to the immunity claim is no longer confidential. Without the power to inspect the documents, in the light of the justification for their protection, the Courts cannot meaningfully review the reasonableness of Cabinet immunity claims. This explains why, in practice, it has been so difficult for litigants to challenge these claims at the federal level. The problem is exacerbated under section 69 given that the process leading to the exclusion of Cabinet confidences was decentralized in 2013 and does not require the issuance of a formal certificate.

Finding 10 – The theory of law as justification provides a useful normative framework to assess the legality of Cabinet immunity under statute law.

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42 Ken Rubin, “Harper’s Cabinet Need Not have any Background Facts, Reinforces Greater Cabinet Secrecy,” The Hill Times (14 April 2014) at 15.
43 Although discussion papers are no longer created, public officials continue to exclude documents based on section 69(1)(b) of the ATIA, supra note 3, which enables the Government to protect discussion papers before the underlying decision has been made public or four years have passed since it was made. See, for example, TBS 2015-2016 Info Source, supra note 38.
45 Canadian Broadcasting Corporation v Canada (Information Commissioner), 2011 FCA 326.
46 The decentralization had the immediate effect of increasing by 49% the number of exclusions made under section 69 of the ATIA, supra note 3, in 2013-2014. See Yan Campagnolo, “Cabinet Documents should be under the Scope of the ATIA,” The Hill Times (6 June 2016) at 15.
47 Quinn v The Prime Minister of Canada, 2011 FC 379.
As demonstrated in Chapter 4, the Supreme Court of Canada (SCC) has so far adopted a very thin conception of the unwritten rule of law principle, that is, rule by law. Under this conception, a legal rule is valid if it has been enacted by the proper authority under the proper procedure. The SCC’s conception of the rule of law is of limited use as a normative framework to assess the legality of statutory provisions as it does not impose any meaningful constraint on the State. To that end, I have thus turned to the thicker theory of law as justification, which is implicit in the Canadian legal order. The theory insists on the requirements of fairness, transparency and accountability. Under the theory, an executive decision to withhold relevant evidence in legal proceedings must comply with two criteria. First, it should be made following a fair decision-making process. This implies that the final decision to withhold Cabinet confidences should be made by an independent and impartial decision-maker. It also implies that public officials should have the duty to properly justify Cabinet immunity claims. Second, executive decisions to withhold Cabinet confidences should be subject to judicial review to ensure that executive action is consistent with legal rules and that public officials do not exceed the limits of their legal powers. To this end, Courts should have the power to inspect Cabinet confidences and to overrule immunity claims where they fail to meet the standard of reasonableness.

Finding 11 – The statutory regime governing Cabinet immunity in Canada violates the requirements of procedural fairness.

The decision-making process established under section 39 of the CEA is inconsistent with the theory of law as justification and the requirements of procedural fairness protected under paragraph 2(e) of the Canadian Bill of Rights. Pursuant to subsection 39(1), the decision to suppress Cabinet confidences in legal proceedings is made either by a Minister or the Clerk of the Privy Council, and is final and conclusive. This is problematic from a rule of law perspective given that the Minister or the Clerk is not an independent and impartial

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48 Babcock, supra note 44.
51 The three elements of the theory of law as justification (that is, fundamental legal principles, judicial review of State action and onus of justification) are recognized by the Canadian legal order.
52 Canadian Bill of Rights, SC 1960, c 44.
decision-maker, especially when the Government is a party to the proceedings.\textsuperscript{53} The suppression of relevant evidence by the Minister or the Clerk in this context raises a reasonable apprehension of bias. In addition, the Minister or the Clerk is not required to “justify” why the documents should be suppressed in the public interest in breach of the duty to give reasons.\textsuperscript{54} These flaws raise serious concerns about the legality of section 39.

Finding 12 – The statutory regime governing Cabinet immunity in Canada violates the core jurisdiction and powers of provincial Superior Courts.

The theory of law as justification and section 96 of the Constitution Act, 1867 require the existence of a separation of powers between the Courts and the Government. Section 39 of the CEA violates this requirement by enabling the Government to intrude upon the core, or inherent, jurisdiction and powers of provincial Superior Courts in two ways. First, section 39 deprives the Courts of the power to control the admissibility of evidence in litigation, a power which is “essential to the administration of justice and the maintenance of the rule of law.”\textsuperscript{55} Without that power, judges cannot protect the integrity of the judicial process from possible abuses by self-interested parties.\textsuperscript{56} Second, section 39 deprives the Courts of the jurisdiction to meaningfully review the legality of executive action for jurisdictional errors.\textsuperscript{57} The grounds for judicial review under section 39 are so thin that it is almost impossible to prove that the Government has claimed Cabinet immunity mistakenly or abusively without inspecting the documents. Section 39 can therefore be described as a “legal black hole,” that is, a zone in which executive action is uncontrolled by law.\textsuperscript{58}

\textsuperscript{53} Ministers and the Clerk of the Privy Council serve at the pleasure of the Prime Minister, who has a vested interest in protecting the secrecy of Cabinet proceedings; they lack security of tenure and thus independence. In addition, to the extent that they have been involved in the deliberations leading to the adoption of the decision that is being challenged in court, they cannot be considered impartial.

\textsuperscript{54} The absence of reasons with respect to the public interest weighing and balancing process effectively prevents the Court from reviewing the reasonableness of the claim.

\textsuperscript{55} MacMillan Bloedel Ltd v Simpson, [1995] 4 SCR 725 at para 38.

\textsuperscript{56} John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law Including the Statutes and Decisions of All Jurisdictions of the United States (Boston: Little, Brown, and Co, 1904) at § 1353, 2376.

\textsuperscript{57} Crevier v AG (Quebec), [1981] 2 SCR 220.

\textsuperscript{58} Dyzenhaus, \textit{supra} note 50 at 3, 42, 50.
2. POLICY RECOMMENDATIONS

In the light of these findings, what kind of changes should be made by Parliament to improve the federal statutory regime? The aim is to design a system that can protect Cabinet secrets in accordance with the principles of democracy and the rule of law. The system should also be consistent with the best practices in Westminster jurisdictions. How can Parliament maximize the public interest in justice, government transparency and government accountability, while ensuring that Cabinet proceedings are sufficiently protected? The policy recommendations, which are relevant to both sections 39 of the CEA and 69 of the ATIA, are divided into two groups. The first is intended to ensure that the scope of Cabinet immunity is proportional to its objective of safeguarding the proper functioning of the system of responsible government. The second is intended to ensure that Cabinet immunity claims are subject to proper oversight and review mechanisms.

2.1 Narrowing the Scope of Cabinet Immunity

Recommendation 1 – Cabinet immunity should be protected on the basis of an injury test as opposed to a class test.

The federal statutory regime currently protects “Cabinet confidences” based on a “class test” as opposed to an “injury test.” Hence, any document that is deemed to contain Cabinet confidences is protected for 20 years: the potential injury to the “interest of good government” is assumed rather than demonstrated. The assessment focuses exclusively on whether or not the documents contain Cabinet confidences. As this term is not substantively defined in the relevant statutes, it leads to an overbroad interpretation of the class.\textsuperscript{59} To limit the scope of Cabinet immunity, certain jurisdictions have defined “Cabinet confidences” as information which “reveals the substance of Cabinet deliberations” (Alberta,\textsuperscript{60} British

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\item[\textsuperscript{59}] This fact was recognized by a Government task force mandated to modernize the ATIA, supra note 3. See Access to Information Task Force, Access to Information: Making it Work for Canadians (June 2002) at 46, online: <publications.gc.ca/collections/Collection/BT22-83-2002E.pdf> [ATI Task Force 2002 Report].
\item[\textsuperscript{60}] Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25, s 22(1) [Alberta FIPPA].
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Columbia,\textsuperscript{61} Manitoba,\textsuperscript{62} New Brunswick,\textsuperscript{63} Newfoundland and Labrador,\textsuperscript{64} Nova Scotia,\textsuperscript{65} Ontario,\textsuperscript{66} Prince Edward Island\textsuperscript{67} and Australia\textsuperscript{68}). However, the statutory provisions in these jurisdictions go on to provide a non-exhaustive list of documents (like the list found under subsections 39(2) of the \textit{CEA} and 69(1) of the \textit{ATIA}), which are deemed to “reveal the substance of Cabinet deliberations.” Any information which relates to the collective decision-making process may thus be subject to Cabinet immunity.\textsuperscript{69} Although this approach has been endorsed by parliamentary committees,\textsuperscript{70} Information Commissioners\textsuperscript{71} and government task forces,\textsuperscript{72} I am not persuaded that it would usefully limit the scope of Cabinet immunity.

The term “Cabinet confidence” is difficult to define as all sorts of documents relate to the collective decision-making process within the executive branch. This problem can be avoided by shifting the basis of the protection from a class test to an injury test.\textsuperscript{73} Under an

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\item \textsuperscript{61} Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165, s 12(1) [\textit{BC FIPPA}].
\item \textsuperscript{62} Freedom of Information and Protection of Privacy Act, CCSM, c F175, s 19 (1) [\textit{Manitoba FIPPA}].
\item \textsuperscript{63} Right to Information and Protection of Privacy Act, SNB 2009, c R-10.6, s 17(1) [\textit{NB RIPPA}].
\item \textsuperscript{64} Access to Information and Protection of Privacy Act, 2015, SNL 2015, c A-1.2, s 27(2)(b) [\textit{NL AIPPA}].
\item \textsuperscript{65} Freedom of Information and Protection of Privacy Act, SNS 1993, c 5, s 13(1) [\textit{NS FIPPA}].
\item \textsuperscript{66} Freedom of Information and Protection of Privacy Act, RSO 1990, c F-31, s 12(1) [\textit{Ontario FIPPA}].
\item \textsuperscript{67} Freedom of Information and Protection of Privacy Act, RSPEI 1988, c F-15.01, s 20(1) [\textit{PEI FIPPA}].
\item \textsuperscript{68} Freedom of Information Act 1982 (Cth), No 3, s 34(3) [\textit{Australia FOIA}].
\item \textsuperscript{69} That said, the jurisdictions which have taken this approach have attempted to limit the scope of Cabinet immunity by specifying that the documents must have been “submitted or prepared for submission” to the Cabinet or must “relate directly” to the collective decision-making process.
\end{itemize}
injury test, a document could only be protected if its disclosure would truly injure: (1) the convention of ministerial responsibility; (2) the candour of Cabinet discussions; or (3) the efficiency of the Cabinet decision-making process. This approach, which has been adopted in the United Kingdom\textsuperscript{74} and New Zealand,\textsuperscript{75} would make explicit the public interest rationales underpinning Cabinet secrecy. Information would no longer be protected merely because it falls within the very broad class of “Cabinet confidences”; rather, it would be protected because its disclosure would be injurious to the interest of good government. Changes to the structure of the Cabinet Paper System (the type, name and format of Cabinet documents) by the Government, as happened with discussion papers, would have no impact on the level of protection afforded to Cabinet confidences. The scope of Cabinet immunity under statute law would finally be consistent with constitutional conventions and the common law.

**Recommendation 2 – Cabinet immunity should not be applied when the public interest in disclosure outweighs the public interest in nondisclosure.**

The federal statutory regime does not explicitly provide that the Government must assess competing aspects of the public interest before protecting Cabinet confidences, as it does for other types of information.\textsuperscript{76} The public interest assessment has been “read into” section 39 of the *CEA* by the SCC in the context of litigation,\textsuperscript{77} but a similar requirement does not currently exist under section 69 of the *ATIA*. Yet, given that Cabinet immunity is a PII, it should only be claimed when the public interest in nondisclosure outweighs the public interest in disclosure. This explains why the access to information laws in British Columbia, Alberta, Newfoundland, Nova Scotia, Prince Edward Island, the United Kingdom and New Zealand contain a “public interest override.”\textsuperscript{78} The Information Commissioner also favours

\textsuperscript{74} Freedom of Information Act 2000 (UK), c 36, s 36(2) [UK FOIA].
\textsuperscript{75} Official Information Act 1982 (NZ), 1982/156, s 9(2)(f) and (g) [NZ OIA].
\textsuperscript{76} See, for example, subsection 20(6) of the *ATIA*, supra note 3, and paragraph 8(2)(m) of the *Privacy Act*, RSC 1985, c P-21.
\textsuperscript{77} Babcock, supra note 44. See also subsections 37(5) and 38.06(2) of the *CEA*, supra note 4.
\textsuperscript{78} General public interest override: Alberta FIPPA, supra note 60, s 32(1); BC FIPPA, supra note 61, s 25(1); NS FIPPA, supra note 65, s 31(1); NL AIPPA, supra note 64, s 27(3); PEI FIPPA, supra note 67, s 30(1). Limited public interest override in cases of “grave environmental, health or safety hazard to the public”: Ontario FIPPA, supra note 66, s 11(1); NB RIPPA, supra note 63, s 28(2); Access to Information and Protection of Privacy Act, RSY 2002, c 1, s 28(1) [Yukon ATIPPA].
the adoption of a “public interest override” under the ATIA.79 This kind of exception would require the disclosure of Cabinet confidences, despite a potential injury to the interest of good government, when the public interest in government transparency is predominant. A “public interest override” under the ATIA could apply, for example, when the release of the information is needed to prevent “a grave environmental, health or safety hazard to the public”80 or shed light on serious allegations of fraud or maladministration.81 The protection of Cabinet confidences based on an injury test and a “public interest override” suggests that this type of information should be subject to a “discretionary” exemption.

**Recommendation 3 – Cabinet immunity should not be applied to protect the facts and the background information related to a decision that has been made public.**

The federal statutory regime currently contains an exception for “discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions.”82 Discussion papers can be disclosed when the underlying decision has been made public or, if it has not been made public, when four years have passed since it was made.83 Some provincial statutes contain a similar exception.84 However, the federal Government has made modifications to the Cabinet Paper System which have rendered the exception meaningless. For the exception to work in practice, the format of Cabinet documents should be changed to ensure that facts and background information (noncore secrets) can be severed from ministerial views and recommendations (core secrets). “Preventing the disclosure of facts does not conform to the purpose of the Cabinet secrecy convention.”85 Judges, parliamentarians, journalists, litigants

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80 Ontario FIPPA, supra note 66, s 11(1); NB RIPPA, supra note 63, s 28(2); Yukon ATIPPA, supra note 78, s 28(1).
81 As was the case, for example, in the context of the McDonald, Gomery and Oliphant commissions of inquiry, as well as the Bissonnette and Munro criminal prosecutions.
82 Paragraphs 39(2)(b) of the CEA, supra note 4 and 69(1)(b) of the ATIA, supra note 3.
83 Paragraphs 39(4)(b) of the CEA, supra note 4 and 69(3)(b) of the ATIA, supra note 3.
84 Alberta FIPPA, supra note 60, s 22(2)(c); BC FIPPA, supra note 61, s 12(2)(c); Ontario FIPPA, supra note 66, s 12(1)(c); NS FIPPA, supra note 65, s 13(2)(c); NL AIPPA, supra note 64, s 27(1)(d); Yukon ATIPPA, supra note 78, s 15(2)(c). See also Australia FOIA, supra note 68, s 34(6).
and citizens need facts to hold the Government to account. Access to the facts and the background information underpinning legislative provisions would also foster a better institutional dialogue between the three branches of the State.\footnote{On the dialogue theory, see generally Kent Roach, \textit{The Supreme Court on Trial: Judicial Activism or Democratic Dialogue}, revised ed (Toronto: Irwin Law, 2016). Access to the facts and the background information underpinning government policies would also foster a better dialogue between administrative decision-makers and the individuals who are subject to their discretionary powers. See Geneviève Cartier, “Administrative Discretion as Dialogue: A Response to John Willis (or: From Theology to Secularization),” (2005) 55:3 UTLJ 629.} An exception to Cabinet secrecy for this type of information has been supported in all reports proposing reforms to modernize the federal statutory regime.\footnote{HOC 1987 Report, supra note 70 at 31; Information Commissioner of Canada, \textit{Annual Report: 1993-1994} at 25, online: <http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx> [ICC 1993-1994 Annual Report]; ICC 1995-1996 Annual Report, supra note 71 at 41-42; ICC 2000-2001 Annual Report, supra note 71 at 50-51; ATi Task Force 2002 Report, supra note 59 at 46; ICC 2005 Report, supra note 71, clause 69; ICC 2015 Report, supra note 71 at 62; HOC 2016 Report, supra note 70 at 35.} Consideration should be given to creating a similar exception for official Cabinet documents which have evidential value and do not reveal core secrets, such as Cabinet and Treasury Board decisions.\footnote{ICC 2005 Report, supra note 71, clause 69.}

**Recommendation 4 – Cabinet immunity should not be applied for a period that exceeds the expected duration of a Minister’s political career.**

The federal statutory regime contains an exception for Cabinet confidences "that have been in existence for more than twenty years."\footnote{Paragraphs 39(4)(a) of the CEA, supra note 4 and 69(3)(a) of the ATIA, supra note 3.} Just like constitutional conventions and the common law, statute law recognizes that the sensitivity of Cabinet confidences weakens with the passage of time. Under the provincial access to information regimes, the protection for Cabinet confidences varies between ten and 25 years.\footnote{10 years: NS FIPPA, supra note 65, s 13(2)(a). 15 years: Alberta FIPPA, supra note 60, s 22(2)(a); BC FIPPA, supra note 61, s 12(2)(a); NB RIPP, supra note 63, s 17(2); Access to Information and Protection of Privacy Act, SNWT (Nu) 1994, c 20, s 13(2) [Nunavut ATIPPA]; Access to Information and Protection of Privacy Act, SNWT 1994, c 20, s 13(2) [NWT ATIPPA]. 20 years: Ontario FIPPA, supra note 66, s 12(2)(a); Manitoba FIPPA, supra note 62, s 19(2)(a); NL AIPP, supra note 64, s 27(4)(a); PEI FIPPA, supra note 67, s 20(2)(a); UK FOIA, supra note 74, ss 62-63. 21 years: Archives Act 1983 (Cth), No 79, s 3(7) (Australia), except for Cabinet notebooks which are protected for 31 years under section 22A. 25 years: Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, LRQ, c A-2.1, s 33 [Quebec ATIPPA]; Freedom of Information and Protection of Privacy Act, SS 1990-91, c F-22.01, s 16(2)(a) [Saskatchewan FIPPA]; Public Records Act 2005 (NZ), 2005/40, s 21 (New Zealand).} Several parliamentary committees, Information Commissioners and government task forces have recommended to reduce the
protection to 15 years. The choice of any number of years is, to some extent, arbitrary. What criterion could objectively guide this choice? A relevant criterion is “the expected duration of a Minister’s political career.” A Minister should be able to expect that the views he or she has voiced during Cabinet proceedings will not be made public before he or she retires from active politics. While the current 20-year period does seem reasonable with respect to core secrets, it would be useful to undertake an empirical study of the duration of ministerial careers since the establishment of the Cabinet secretariat in 1940 to confirm that it is a proper benchmark. In any event, the statutory provisions should make clear that the 20-year period is a maximum, not a minimum: the disclosure of Cabinet confidences should be allowed, in the public interest, before the expiry of that period.

2.2 Subjecting Cabinet Immunity to Meaningful Oversight and Review

Recommendation 5 – In the context of litigation, provincial Superior Courts and the Federal Court should have the power to inspect Cabinet confidences, assess the competing aspects of the public interest and order their production.

In the context of litigation, section 39 of the *CEA* provides that the Courts cannot inspect and order the production of Cabinet confidences when a certificate in the proper form is filed by a Minister or the Clerk. This provision deprives the Courts of their power to control the admissibility of evidence as well as their jurisdiction to meaningfully review executive action. The solution to fix this problem would be to enable the Courts to inspect Cabinet confidences, assess the competing aspects of the public interest, and order their production when required. This would restore to the Courts the power and the jurisdiction that they already possess under the common law. The more difficult question is which Court

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93 In contrast, the public release of noncore secrets after a decision has been made public would not be injurious to the interest of good government as it would no longer undermine the efficiency of the collective decision-making process. Only core secrets may need to be protected after a decision has been made public in order to maintain ministerial solidarity and candour.
should have authority over the production of Cabinet confidences. Should it be provincial Superior Courts and the Federal Court of Canada, as is the case under section 37 of the *CEA* (which applies to PII claims in general), or should it be just the Federal Court, as is the case under section 38 of the *CEA* (which applies to PII based on international relations, national defence and national security)?

The arguments in favour of giving exclusive jurisdictions to the Federal Court centres on considerations of security, expertise and consistency. First, the offices of the Federal Court comply with the security requirements for the handling of secret and top-secret documents, which is not necessarily the case for Superior Courts. Second, because only a small number of Federal Court judges would be called to review Cabinet confidences, these judges would develop expertise on the subject matter over time. In contrast, a Superior Court judge may only be called to deal with federal Cabinet confidences once during his or her career. Third, given that the Federal Court has exclusive jurisdiction over the production of international relations, national defence and national security information, it would seem logical to give it exclusive jurisdiction over the production of Cabinet confidences as well. As a result, the same interpretation of section 39 would apply throughout the country.

These arguments, however, do not justify ousting the jurisdiction of Superior Courts. As demonstrated in Chapter 4, under section 96 of the *Constitution Act, 1867*, Parliament cannot deprive Superior Courts of their power to control the admissibility of evidence and their jurisdiction to review the legality of executive action. Thus, it would be unconstitutional for Parliament to divest Superior Courts of their authority to rule on Cabinet immunity claims. It would also be inefficient as it would create a bifurcated process: the Superior Court would need to suspend its proceedings while the Federal Court, which in most cases will not be as familiar with the issues in dispute, rules on the production of Cabinet confidences. In addition, the strength of the arguments for giving exclusive jurisdiction to the Federal Court

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94 The Department of Justice recommended that the Federal Court of Canada be given a limited power to review Cabinet immunity claims under the *CEA*, supra note 4, following the SCC’s ruling in *Babcock*, supra note 44. See *DOJ 2005 Report, supra* note 72 at 14-15.

95 This is a major problem under section 38 of the *CEA*, supra note 4. See *R v Ahmad*, 2011 SCC 6, [2011] 1 SCR 110; Kent Roach, “‘Constitutional Chicken’: National Security Confidentiality and Terrorism Prosecutions after *R. v. Ahmad*” (2011) 54 SCLR (2d) 357.
should not be overstated. The offices of provincial Superior Courts can be upgraded to comply with the relevant security requirements. Furthermore, while Superior Court judges would not often deal with cases involving the production of federal Cabinet confidences, this does not mean that they would not have the expertise to do so. Indeed, Superior Court judges are often called to decide issues of privilege and immunity; they are also sometimes called to review Cabinet immunity claims at the provincial level. Any legal inconsistency between them would eventually be resolved by the SCC. In the end, the Court with jurisdiction over the case should have the power to decide the claim, as it is generally in a better position to assess the relevance of the documents and protect the fairness of the proceedings.

To ensure that Cabinet immunity claims are properly assessed by the Courts, it may be appropriate for Parliament to guide the exercise of judicial discretion. This could be done by entrenching in statute the rational approach to Cabinet immunity claims outlined in Chapter 2. As such, Parliament could: narrow down the standard of discovery in litigation against the federal Government; impose on the Government the onus of properly justifying Cabinet immunity claims; set out the various steps of the cost-benefit analysis in the statute; and impose on the Courts a duty to minimize the degree of injury whenever production is ordered. The rational approach would provide the Courts with the necessary guidance to ensure that a proper balance is reached between the interest of justice and the interest of good government. It would provide litigants with the information they require for the fair disposition of their case without unduly undermining our system of government.

**Recommendation 6 – In the context of the ATIA, the Information Commissioner and the Federal Court should have the power to inspect Cabinet confidences, and the Federal Court should have the additional power of ordering their disclosure.**

As section 69 of the ATIA excludes Cabinet documents from the scope of the Act, the Information Commissioner and the Federal Court cannot inspect these documents and order their disclosure.\(^\text{96}\) It is thus almost impossible to determine whether section 69 is applied in

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\(^{96}\) No other provision of the *ATIA*, *supra* note 3, has undermined the credibility of the Act and brought it into greater disrepute than section 69. See *HOC 1987 Report*, *supra* note 70 at 31; *ICC 1993-1994 Annual Report*, *supra* note 87 at 24.
a reasonable manner. “Cabinet confidentiality risks being broadly, and too self-servingly applied by governments when it is free from independent oversight.” The solution would be to provide an ordinary “exemption,” as opposed to an “exclusion,” for Cabinet documents under the ATIA. The question is who should have the power to inspect Cabinet documents to ascertain if the claim is reasonable. Two approaches have been proposed. The first approach is to empower the Federal Court, but not the Commissioner, to inspect the documents. If the claim is invalid, the Court could compel the disclosure of the documents. This approach was supported by a parliamentary committee and two government task forces. The implication is that the Commissioner cannot be trusted to handle political secrets. As the Commissioner is accountable to Parliament, several members of which are political opponents of the Ministers, he or she should not have the power to inspect Cabinet documents. The second approach is to allow both the Commissioner and the Federal Court to inspect Cabinet documents. This approach has consistently been recommended by the Commissioner and has been adopted in nearly all Canadian provinces, the United Kingdom, Australia, and New Zealand. The main difference among these jurisdictions is that some of them allow the Commissioner to compel the disclosure of documents while others do not.

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97 Information Commissioner John Reid, cited in ICC 2015 Report, supra note 71 at 60.
100 Alberta FIPPA, supra note 60, ss 56, 69; BC FIPPA, supra note 61, s 44(1)(b); Ontario FIPPA, supra note 66, ss 52(4), 56(2); Manitoba FIPPA, supra note 62, ss 59(1), 66(1); Saskatchewan FIPPA, supra note 90, s 54(1)(a); NS FIPPA, supra note 65, s 38(1)(a); NL AIPPA, supra note 64, ss 42, 97(3); PEI FIPPA, supra note 67, s 53(2); Quebec ATIPPA, supra note 90, s 141; Nunavut ATIPPA, supra note 90, s 34; NWT ATIPPA, supra note 90, s 34; Yukon ATIPPA, supra note 78, s 53(1)(b). Only New Brunswick does not enable its Information Commissioner to inspect Cabinet confidences: NB RIPPA, supra note 63, ss 70(1), 73(1).
101 UK FOIA, supra note 74, ss 50, 55, Schedule 3.
102 Australia FOIA, supra note 68, s 55U(3).
103 NZ OIA, supra note 75, ss 28-29.
104 Jurisdictions enabling the Information Commissioner to compel the disclosure of Cabinet confidences: Alberta FIPPA, supra note 60, s 72; BC FIPPA, supra note 61, ss 58-59.01. Ontario FIPPA, supra note 66, s 54(1); Manitoba FIPPA, supra note 62, s 66.8(2); PEI FIPPA, supra note 67, s 66(2). Jurisdictions preventing the Information Commissioner from compelling the disclosure of Cabinet confidences: Saskatchewan FIPPA, supra note 90, s 55(1)(a); NS FIPPA, supra note 65, s 39(1)(a); NL AIPPA, supra note 64, s 47; Nunavut ATIPPA, supra note 90, s 35; NWT ATIPPA, supra note 90, s 35; Yukon ATIPPA, supra note 78, s 57; UK FOIA, supra note 74, s 54; Australia FOIA, supra note 68, s 55L(2); NZ OIA, supra note 75, s 30.
The second approach is better for two reasons. First, it is faster, cheaper and more efficient to enable the Information Commissioner to investigate and try to resolve complaints before commencing proceedings before the Federal Court. If complainants could go directly to the Court, it would put an “enormous strain on judicial resources.”\textsuperscript{105} Second, the Commissioner is non-partisan and has a legal obligation to maintain the confidentiality of government documents.\textsuperscript{106} There is no reasonable ground to believe that the Commissioner would leak confidential information to the Ministers’ political opponents.\textsuperscript{107} Third, for the judicial review process to be meaningful, someone must be in a position to challenge the Government’s claim. The Commissioner would not be able to do that if he or she is not involved in the investigative stage. As for the issue of whether the Commissioner should have the power to compel the disclosure of Cabinet confidences, I take no position. I would simply note that this power would transform his or her role from “ombudsperson” to “quasi-judicial tribunal.” This would require that important structural changes be made to the Office of the Information Commissioner to ensure that the decision-making process ultimately leading to a disclosure order be presided by an independent and impartial adjudicator.

The role of the Information Commissioner and the Federal Court would be to review the documents \textit{in camera} and \textit{ex parte} to assess whether their disclosure would be injurious to: (1) the convention of collective ministerial responsibility; (2) the candour of Cabinet discussion; or (3) the efficiency of the Cabinet decision-making process. In doing so, the Commissioner or the Court would defer to the expertise of the Government, which is in a better position to assess the potential injury to the interest of good government. If disclosure would be injurious to the public interest, the Commissioner or the Court would then examine whether the “public interest override” should be applied. Under the \textit{ATIA}, the interest in government transparency would only outweigh the interest in good government in exceptional cases; for example, when the release of the information is needed to prevent


\textsuperscript{106} See especially sections 35(1), 62 and 64 of the \textit{ATIA}, supra note 3.

\textsuperscript{107} That said, to limit the risk that the confidentiality of the information could be compromised, the power to inspect Cabinet confidences could be delegated to only a limited number of designated employees within the Office of the Information Commissioner, as was recommended in \textit{ICC 1995-1996 Annual Report}, supra note 71 at 45; \textit{ICC 2000-2001 Annual Report}, supra note 71 at 53; \textit{ICC 2015 Report}, supra note 71 at 63; \textit{HOC 2016 Report}, supra note 70 at 35. See also section 59(2) of the \textit{ATIA}, supra note 3, by analogy.
“grave environmental, health or safety hazard to the public,”\textsuperscript{108} or to shed light on serious allegations of fraud or maladministration.

I do not support the insertion of a provision in sections 39 of the \textit{CEA} or 69 of the \textit{ATIA} that would enable the Government to overrule a court order requiring the disclosure of Cabinet confidences, as currently exists in Canadian law. Under section 38.13 of the \textit{CEA}, the Attorney General of Canada can issue a certificate overruling a judicial decision ordering the disclosure of international relations, national defence and national security information in legal proceedings.\textsuperscript{109} While the issuance of such certificates may engender a political cost for the Government, I think that it is inconsistent with the rule of law to enable an executive officer to overrule a judicial decision made in a specific case, after both parties have had the opportunity to present their arguments, and after the Court has had the opportunity to inspect the information and assess the public interest. If the Government is displeased with a judicial decision, the remedy is to file an appeal against the decision, up to the SCC, if need be. The Government should not be allowed to overrule unfavourable judicial decisions itself. Provisions such as section 38.13 are troubling from a rule of law perspective.

In conclusion, this dissertation has shown that the federal statutory regime is broken and should be fixed. The experience of the Canadian provinces as well as other Westminster jurisdictions demonstrates that Cabinet confidences can be adequately protected with a narrower immunity subject to meaningful oversight and review.\textsuperscript{110} However, there is little hope that the Government will, through Parliament, take measure to modernize sections 39

\textsuperscript{108} See, for example, \textit{Ontario FIPPA}, supra note 66, s 11(1); \textit{NB RIPPA}, supra note 63, s 28(2); \textit{Yukon ATIPPA}, supra note 78, s 28(1).

\textsuperscript{109} A similar provision, enabling the Government to overrule the Information Commissioner, also exists under the access to information regimes in Quebec and the United Kingdom. See \textit{Quebec ATIPPA}, supra note 90, s 145; \textit{UK FOIA}, supra note 74, s 53(2).

\textsuperscript{110} Stanley L Tromp, \textit{Fallen Behind: Canada’s Access to Information Act in the World Context} (September 2008) at 13, online: <www3.telus.net/index100/report>: “Canada surely needs to at least raise its own FOI laws up to the best standards of its Commonwealth partners […]. This is not a radical or unreasonable goal at all, for to reach it, Canadian parliamentarians need not leap into the future, but merely step into the present.” Canada is far behind New Zealand, which encourages the proactive release of Cabinet documents through publication online. See New Zealand, Department of the Prime Minister and Cabinet, \textit{Cabinet Manual}, 2017 at paras 8.14-8.19, online: <https://www.dpmc.govt.nz/our-business-units/cabinet-office/supporting-work-cabinet/cabinet-manual>.
of the *CEA* and 69 of the *ATIA*. Why would the Government change a regime which gives it complete control over the public release of its political secrets? Unless there is something to be gained by changing the regime, any self-interested actor would want to preserve the status quo. While the issue of Cabinet secrecy is important to litigants, journalists and academics, it has not been a priority for Canadians in general. The impetus for change will thus have to come from another venue, the most promising being litigation. It is hoped that the arguments presented in this dissertation can be used to persuade the Courts that the statutory regime is not only unwise from a policy perspective, but also unconstitutional. A judicial declaration of unconstitutionality would open the way for Parliament to modernize the statutory regime in the light of the policy recommendations made above.

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112 It is thus not surprising that all the bills that sought to reform Cabinet immunity were unsuccessful. See generally *LOP 2012 ATIA Reform Proposals Review*, supra note 73.
APPENDIX

STATUTORY PROVISIONS

*Federal Court Act, RSC 1970, c 10 (2nd Supp)*

41. (1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit.

(2) 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.

*Canada Evidence Act, RSC 1985, c C-5*

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

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

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

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

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

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
(e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

(f) draft legislation.

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

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

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

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

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

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

Access to Information Act, RSC 1985, c A-1

69 (1) This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,

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

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

(c) agenda of Council or records recording deliberations or decisions of Council;

(d) records 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) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);

(f) draft legislation; and
(g) records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f).

(2) For the purposes of subsection (1), Council means the Queen’s Privy Council for Canada, committees of the Queen’s Privy Council for Canada, Cabinet and committees of Cabinet.

(3) Subsection (1) does not apply to

(a) confidences of the Queen’s Privy Council for Canada that have been in existence for more than twenty years; or

(b) discussion papers described in paragraph (1)(b)

(i) if the decisions to which the discussion papers relate have been made public, or

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