

## The History, Law and Practice of Cabinet Immunity in Canada

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Article abstract

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# ARTICLES

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## The History, Law and Practice of Cabinet Immunity in Canada

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YAN CAMPAGNOLO\*

### ABSTRACT

*Canada has the dubious honour of being the sole Westminster jurisdiction to have enacted a near-absolute immunity for Cabinet confidences. Through the adoption of sections 39 of the Canada Evidence Act and 69 of the Access to Information Act in 1982, the federal Parliament has deprived the courts of the power to inspect Cabinet confidences and order their disclosure when the public interest demands it. Why has Parliament enacted these draconian statutory provisions? How have these provisions been interpreted and applied since they have been proclaimed into force? This article seeks to answer these questions based on a detailed examination of the relevant historical records, parliamentary debates, case law and government reports. The first section seeks to demonstrate that the political decision to provide a near-absolute immunity for Cabinet confidences was made at the highest level of the State, by Prime Minister Pierre Elliott Trudeau, based on the debatable justification that the courts could not be trusted to properly adjudicate Cabinet immunity claims. The second section seeks to establish that the government has taken advantage of the inherent vagueness of sections 39 and 69 to give an overbroad interpretation to the term "Cabinet confidences." In addition, by modifying the Cabinet Paper System, the government has significantly narrowed the scope of an important exception to Cabinet immunity, that is, the "discussion paper exception," which was initially intended to provide some level of transparency to the Cabinet decision-making process. These problems are compounded by the fact that only a weak form of judicial review is available against Cabinet immunity claims which, in practice, makes it tremendously difficult to challenge such claims.*

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\* Assistant Professor, Common Law Section, University of Ottawa. This article is based on the third chapter of a dissertation which was submitted in connection with fulfilling the requirements for a Doctoral degree in Law at the University of Toronto. The research was supported by the Social Sciences and Humanities Research Council of Canada. For helpful comments on earlier versions, I am indebted to Kent Roach, David Dyzenhaus, Hamish Stewart and the anonymous reviewers of the *Revue générale de droit*. I also wish to acknowledge the excellent editing work performed by Amélie B. Lavigne.

**KEY-WORDS:**

*Cabinet immunity, Cabinet secrecy, Cabinet confidence, Cabinet document, Babcock v Canada (Attorney General), section 39 of the Canada Evidence Act, section 69 of the Access to Information Act.*

**RÉSUMÉ**

*Le Canada a l'honneur douteux d'être le seul État de tradition Westminster à avoir promulgué une immunité quasi absolue pour les renseignements confidentiels du Cabinet. En 1982, par l'adoption des articles 39 de la Loi sur la preuve et 69 de la Loi sur l'accès à l'information, le Parlement fédéral a privé les tribunaux du pouvoir d'inspecter les renseignements confidentiels du Cabinet et d'ordonner leur divulgation lorsque l'intérêt public le requiert. Pourquoi le Parlement a-t-il adopté ces dispositions législatives draconiennes? Comment ces dispositions ont-elles été interprétées et appliquées depuis leur entrée en vigueur? Cet article a pour objet de répondre à ces questions sur la base d'une analyse minutieuse des documents historiques, des débats parlementaires, des décisions judiciaires et des rapports gouvernementaux pertinents. La première partie vise à démontrer que la décision politique d'octroyer une immunité quasi absolue aux renseignements confidentiels du Cabinet fut prise au plus haut échelon de l'État, par le premier ministre Pierre Elliott Trudeau, pour la raison contestable qu'on ne peut faire confiance aux tribunaux pour juger adéquatement les revendications d'immunité du Cabinet. La seconde section vise à établir que le gouvernement a tiré parti de l'imprécision inhérente des articles 39 et 69 pour donner une interprétation excessivement large à l'expression « renseignements confidentiels du Cabinet ». De plus, en modifiant le système des dossiers du Cabinet, le gouvernement a considérablement réduit la portée d'une exception importante à l'immunité du Cabinet, c'est-à-dire « l'exception relative aux documents de travail », initialement adoptée afin de conférer une certaine transparence au processus décisionnel du Cabinet. Ces problèmes sont amplifiés par le fait que les recours en révision judiciaire contre les revendications d'immunité du Cabinet ont une portée fort restreinte, ce qui rend toute contestation extrêmement difficile d'un point de vue pratique.*

**MOTS-CLÉS :**

*Immunité du Cabinet, secret ministériel, renseignement confidentiel du Cabinet, document du Cabinet, Babcock c Canada (Procureur général), article 39 de la Loi sur la preuve, article 69 de la Loi sur l'accès à l'information.*

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## INTRODUCTION

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. 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 confidences” 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 rule-making 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 article, 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.<sup>1</sup> 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)*,<sup>2</sup> 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*

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1. *Federal Court Act*, RSC 1970, c 10 (2nd Supp), s 41(2) [FCA], which is reproduced in Appendix 1.

2. *Canada Evidence Act*, RSC 1985, c C-5, s 39 [CEA], which is reproduced in Appendix 2.

*Act (ATIA)*.<sup>3</sup> 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 article 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. This article builds on previous work dealing with the protection of Cabinet secrecy under conventions<sup>4</sup> and under the common law.<sup>5</sup> I will focus on the way in which sections 39 and 69 were developed, interpreted and applied by Parliament, the government and the courts. This article is divided into two sections dealing with the inception and interpretation of the federal statutory regime. In Section I, 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 Section II, 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.

## I. INCEPTION OF THE FEDERAL STATUTORY REGIME

Section I will explain why Parliament entrenched executive supremacy over the disclosure of Cabinet confidences in 1970 and 1982. It is divided into two subsections. In Subsection A, 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 Subsection B, 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

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3. *Access to Information Act*, RSC 1985, c A-1, s 69 [*ATIA*], which is reproduced in Appendix 3.

4. Yan Campagnolo, "The Political Legitimacy of Cabinet Secrecy" 51:1 RJT [forthcoming in 2017] [Campagnolo, "Legitimacy of Cabinet Secrecy"].

5. Yan Campagnolo, "A Rational Approach to Cabinet Immunity Under the Common Law" (2017) 55:1 *Alta L Rev* 43 [Campagnolo, "Cabinet Immunity Under the Common Law"].

supremacy over the disclosure of Cabinet confidences with the adoption of sections 39 of the *CEA* and 69 of the *ATIA*.

## A. Parliament's Entrenchment of Executive Supremacy

Soon after the principle of judicial review for PII claims was re-established in *Conway v Rimmer*,<sup>6</sup> but before it was clearly extended to Cabinet immunity claims in *Sankey v Witham*,<sup>7</sup> Parliament legislated to stop the rising common law trend toward more open government.<sup>8</sup> In doing so, it overreacted to *Conway*; no other Westminster jurisdiction, however displeased it may have been with the decision of the Appellate Committee of the House of Lords, overruled the common law so drastically.<sup>9</sup> In 1970, a new provision, section 41, was incorporated into the *FCA* to regulate PII claims for federal government documents in litigation.<sup>10</sup> 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.<sup>11</sup>

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6. *Conway v Rimmer*, [1968] 1 All ER 874 (HL) [*Conway*]. The Appellate Committee of 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.

7. *Sankey v Whitlam* (1978), 142 CLR 1 [*Whitlam*]. For the first time in Westminster jurisdictions, a court ordered the production of Cabinet documents in the context of a criminal prosecution against former ministers.

8. For an overview of the evolution of Cabinet immunity under the common law, see Campagnolo, "Cabinet Immunity Under the Common Law", *supra* note 5.

9. Maureen Spencer & John Spencer, "Coping with *Conway v. Rimmer* [1968] AC 910: How Civil Servants Control Access to Justice" (2010) 37:3 JL & Soc'y 387 at 391.

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

11. René Dussault & Louis Borgeat, *Administrative Law*, Vol 3, 2nd ed (Toronto: Carswell, 1989) at 212-13.

## 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*,<sup>12</sup> which had led to clear cases of abuse of power in the United Kingdom.<sup>13</sup> 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."<sup>14</sup> 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."<sup>15</sup> This was an 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.<sup>16</sup> 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

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12. *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.

13. See generally Campagnolo, "Cabinet Immunity Under the Common Law", *supra* note 5.

14. *Conway*, *supra* note 6 at 888 (Lord Reid).

15. *Ibid* at 890 (Lord Morris).

16. *House of Commons Debates*, 28th Parl, 2nd Sess, Vol 5 (25 March 1970) at 5479 (Hon John Turner) [*HOC Debates*, March 1970]. For an overview of the relevant debates, see also House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes*, No 33 (9 June 1970) at 33:89–33:92; *House of Commons Debates*, 28th Parl, 3rd Sess, Vol 1 (29 October 1970) at 696–702 [*HOC Debates*, October 1970].



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.”<sup>17</sup> 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.<sup>18</sup> 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 was injurious to federal-provincial relations.<sup>19</sup>

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 constitutional law: “the proper role of the courts in relation to the executive.”<sup>20</sup> Subsection 41(2) was an attempt to limit the authority of *Conway* and, as such, a “retrenchment of Crown privilege in Canada.”<sup>21</sup> 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.<sup>22</sup> How could litigants convince judges that PII claims were made improperly without the benefit of judicial inspection? Mullan

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17. *HOC Debates*, March 1970, *supra* note 16 at 5479 (Andrew Brewin).

18. *HOC Debates*, October 1970, *supra* note 16 at 700-01 (Robert McCleave).

19. *Ibid* at 698-99 (Hon John Turner).

20. David Mullan, “Not in the Public Interest: Crown Privilege Defined” (1971) 19:9 *Chitty’s LJ* 289 at 291. On this point, see also the opinion of Rand J in *R v Snider*, [1954] SCR 476 at 485-86 [Snider].

21. Mullan, *supra* note 20 at 290. See also *Snider*, *supra* note 20; *Gagnon v Commission des valeurs mobilières*, [1965] SCR 73.

22. Mullan, *supra* note 20 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.

argued that subsection 41(2) “completely abrogate[d] the right of litigants to challenge a claim at all.”<sup>23</sup> 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.<sup>24</sup> 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*, 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 refuse production, even if the documents were relevant to the issue. Nonetheless, it was not naïve 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.<sup>25</sup>

This point is further illustrated by *Wilfrid Nadeau Inc v Canada*. 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

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23. *Ibid* at 292.

24. *Roncarelli v Duplessis*, [1959] SCR 121 [*Roncarelli*].

25. *Landreville v Canada*, [1977] 1 FC 419 at 422 (FC).

the documents seemed relevant to the issue. The builder was thus unable to make its case and lost.<sup>26</sup>

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.<sup>27</sup> 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 (AG)*, the SCC confirmed that Parliament had the power to legislate 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 of its power to legislate.”<sup>28</sup> 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.

## 2. Meaning of Cabinet Confidences

With the enactment of subsection 41(2), Parliament introduced for the first time into federal law the term “Cabinet confidences.” 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

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26. *Wilfrid Nadeau Inc v Canada*, [1977] 1 FC 541 (FC).

27. William Kaplan, *Bad Judgments: The Case of Mr Justice Léo A Landreville* (Toronto: University of Toronto Press, 1996) at 175–76. Kaplan reached that conclusion after reviewing the documents nearly 30 years later.

28. *Commission des droits de la personne v Canada (AG)*, [1982] 1 SCR 215 at 228 [*Commission des droits de la personne*].

regime.<sup>29</sup> 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.<sup>30</sup> It thus distinguished subjective views from objective facts.<sup>31</sup>

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 government devised a special process under which they could be shared with the commissioners.<sup>32</sup> 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,” “[m]inisterial briefing notes for use in Cabinet,” and “documents [...] describing discussions [...] among Ministers.”<sup>33</sup> That list was the first attempt to provide a comprehensive definition of “Cabinet confidences.” The term “Cabinet confidences” thus took on a specific meaning: it was understood in relation to “the types of documents where ‘confidences’ were likely to be found.”<sup>34</sup>

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29. 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.

30. *Ibid* at 12.

31. As such, the definition set out in the Green Paper is consistent with the distinction between “core secrets” and “noncore secrets”; Campagnolo, “Legitimacy of Cabinet Secrecy”, *supra* note 4.

32. PC 1979-887 (22 March 1979); PC 1979-1616 (2 June 1979).

33. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Second Report: Freedom and Security Under the Law*, Vol 2, Appendix “F”, “Reasons for Decision of the Commission” (13 October 1978) at 1176.

34. Nicholas d’Ombain, “Cabinet Secrecy” (2004) 47:3 Canadian Public Administration 332 at 343.

This nonsubstantive understanding of “Cabinet confidences” had a significant influence on the way the current statutory regime was devised, interpreted and applied.

## B. 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*.<sup>35</sup> 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 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. 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

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35. *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 17 July 1980 and received Royal Assent on 7 July 1982. Schedules 1 and 2 were proclaimed into force on 1 July 1983, and Schedule 3 was proclaimed into force on 23 November 1982.

documents.<sup>36</sup> 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.”<sup>37</sup>

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.<sup>38</sup> 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:

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.<sup>39</sup>

The Liberals took steps to fulfil 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 independent 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

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36. Roberts, *supra* note 29 at 15–19.

37. T Murray Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (Ottawa: Canadian Bar Association, 1977) at 127–28.

38. Canadian Bar Association, Special Committee on Freedom of Information, *Freedom of Information in Canada: A Model Bill* (Ottawa: Canadian Bar Association, 1979) at 39–40.

39. Senate, *Journals of the Senate*, 32nd Parl, 1st Sess, Vol 126, part 1 (14 April 1980) at 16.

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."<sup>40</sup>

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."<sup>41</sup>

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.<sup>42</sup> 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 *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

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40. *House of Commons Debates*, 32nd Parl, 1st Sess, Vol 6 (29 January 1981) at 6691.

41. *Ibid* at 6689.

42. House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, Nos 49–50 (8–9 July 1981) [Standing Committee Evidence, July 1981].

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: *don't circulate these God-damned minutes everywhere* [...] these discussions between [ministers are privileged], and what the hell are they doing in the files of the RCMP?"<sup>43</sup>

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 *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.<sup>44</sup> In *Gloucester Properties v British Columbia*, the British Columbia Court of Appeal forced a minister to testify publicly on the substance of Cabinet discussions.<sup>45</sup> No court had ever gone this far. In these cases, which did not involve serious allegations of criminal misconduct (as 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."<sup>46</sup> 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.<sup>47</sup>

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43. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Evidence*, Vol No 334 (25 August 1981) at 303052, 303067. See also James Rusk, "Restricted Access Troubled Commissioners", *Globe and Mail* (29 August 1981) at 11.

44. *Mannix v Alberta*, [1981] 5 WWR 343 (CA).

45. *Gloucester Properties Ltd v British Columbia (Environment and Land Use Committee)*, [1982] 1 WWR 449 (CA).

46. House of Commons, Standing Committee on Miscellaneous Estimates, *Minutes of Proceedings and Evidence*, No 79 (28 April 1982) at 79:11–79:12 (Rt Hon Pierre Elliott Trudeau). See also Ottawa Bureau, "Bothered by 'Dilemma' of Access Bill, PM Says", *Globe and Mail* (1 May 1982) at 12.

47. 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 April 1982) at 8.



## 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.”<sup>48</sup> An *ad hoc* Cabinet committee was set up in April 1982 to review Bill C-43 and make recommendations to the Cabinet.<sup>49</sup> 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?”<sup>50</sup> 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 promise 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 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.”<sup>51</sup>

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48. Memorandum from A J 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).

49. 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).

50. 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).

51. 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).

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 in other documents. Hence, the *ad hoc* committee recommended that Bill C-43 be amended to exclude from the *ATIA* "Cabinet minutes and other documents recording discussions or communications between Ministers," and to afford an absolute immunity to these documents under the *CEA*, so that no "outsiders" could inspect them and order their release.<sup>52</sup>

Ministers understood Trudeau's concerns as centring 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 if Trudeau just wanted to protect Cabinet minutes and the like or the whole sphere of Cabinet confidences.<sup>53</sup> In February, the SCC had confirmed the constitutionality of subsection 41(2), although it stated that it would intervene if the immunity was abused.<sup>54</sup> 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

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52. *Ad Hoc* Group of Ministers on Bill C-43, No 1-82CMAHGMB (10 May 1982); Report of Committee Decision entitled "Bill C-43: Access to Information, Privacy and Crown Privilege", No 248-82 CR (11 May 1982); Cabinet Minutes on Bill C-43, *supra* note 51 at 9; Record of Cabinet Decision entitled "Bill C-43: Access to Information, Privacy and Crown Privilege", No 248-82RD (13 May 1982). These documents were released by the Privy Council Office under the *ATIA*, *supra* note 3 (A-2016-00758).

53. Memorandum from D B Dewar to Michael Pitfield entitled "Access to Information", (12 May 1982). This document was released by the Privy Council Office under the *ATIA*, *supra* note 3 (A-2016-00758).

54. *Commission des droits de la personne*, *supra* note 28 at 228.

Council for Canada must, to safeguard the principle of collective responsibility of ministers, remain confidential.<sup>55</sup>

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."<sup>56</sup> "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."<sup>57</sup> 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."<sup>58</sup> 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, Cabinet minutes and ministerial communications. It was not necessary to extend the absolute protection to Cabinet agenda, Cabinet decisions, discussion 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 nonexhaustive list of documents which were deemed to contain such confidences.<sup>59</sup> 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

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55. Reproduced in *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 at 69–71 [*Auditor General*].

56. 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 *ATIA*, *supra* note 3 (A-2016-00758).

57. 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 *ATIA*, *supra* note 3 (A-2016-00758).

58. 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 *ATIA*, *supra* note 3 (A-2016-00758).

59. Memorandum to Pitfield from Auger, *supra* note 56.

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.”<sup>60</sup> 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 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 nonexhaustive 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

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60. Memorandum to Cabinet entitled “Bill C-43: Access to Information, Privacy and Crown Privilege”, No 274-82MC (18 May 1982) at 9. This document was released by the Privy Council Office under the *ATIA*, *supra* note 3 (A-2016-00758).

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."<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> Fox tried to minimize the effect of the amendments by arguing that, whether Cabinet confidences were exempted or excluded, they would remain confidential.<sup>64</sup> 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.<sup>65</sup> The New Democrats described them as the "Mack truck" amendments for they had created a "gaping hole" in the Bill.<sup>66</sup> 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."<sup>67</sup> The Progressive Conservatives vowed to subject all Cabinet immunity claims to judicial review when they

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61. 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).

62. Memorandum from A J 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).

63. House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, No 94 (8 June 1982) [*Standing Committee Evidence*, June 1982]; *House of Commons Debates*, 32nd Parl, 1st Sess, Vol 16 (28 June 1982) at 18850 [*HOC Debates*, June 1982].

64. *Standing Committee Evidence*, June 1982, *supra* note 63 at 94:133, 94:136, 94:140, 94:143.

65. *Ibid* at 94:134 (Svend Robinson), 94:138 (Hon Walter Baker). The 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).

66. *HOC Debates*, June 1982, *supra* note 63 at 18859–18860 (Svend Robinson).

67. *Standing Committee Evidence*, June 1982, *supra* note 63 at 94:151 (Hon Francis Fox).

would be back in power.<sup>68</sup> While Fox was responsible for defending these last minute amendments, internal records of Cabinet discussions make it clear that he did not support them.<sup>69</sup> 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.<sup>70</sup>

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 Cabinet briefing book or memorandum" so that they could be protected.<sup>71</sup> 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."<sup>72</sup>

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68. *HOC Debates*, June 1982, *supra* note 63 at 18856 (Hon Walter Baker). This promise was not fulfilled.

69. Aide-Mémoire, *supra* note 50 at 4; *HOC Debates*, June 1982, *supra* note 63 at 18857 (Hon Walter Baker).

70. S J Brand, "The Prime Minister and Cabinet" in Donald C Rowat, ed, *The Making of the Federal Access Act: A Case Study of Policy-Making in Canada* (Ottawa: Carleton University, 1985) at 98.

71. T Murray Rankin, "The New Access to Information and Privacy Act: A Critical Annotation" (1983) 15:1 *Ottawa L Rev* 1 at 26. See also Tom Onyshko, "The Federal Court and the Access to Information Act" (1993-1994) 22 *Man LJ* 73 at 81-82.

72. John D McCamus, "Freedom of Information in Canada" (1983) 10 *Government Publications Review* 51 at 56.

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?<sup>73</sup> 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.<sup>74</sup> That is essentially why Trudeau was unwilling to abandon control over Cabinet confidences to the courts. Whether Cabinet immunity claims should escape effective judicial supervision was controversial.<sup>75</sup>

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 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.

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73. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter]. See also Rankin, *supra* note 71 at 33.

74. See generally Campagnolo, "Legitimacy of Cabinet Secrecy", *supra* note 4.

75. Allan W Mewett, "Cabinet Secrets" (1982-1983) 25:3 Crim LQ 257 at 258.

## II. INTERPRETATION OF THE FEDERAL STATUTORY REGIME

Section II 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 Subsection A, 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 Subsection B, 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.

### A. 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).



## 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.

### *a. 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.”<sup>76</sup> 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 nonexhaustive 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).

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76. Privy Council Office, *Freedom of Information Legislation: A Discussion Paper*, by Walter Baker (Ottawa: President of the Privy Council, 1979).

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).<sup>77</sup> 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 would be limitless. Yet, in the past, the government did try to protect consultant reports<sup>78</sup> and Crown corporations’ business plan<sup>79</sup> 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.

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77. For the administrative interpretation of Cabinet confidences, see Treasury Board Secretariat, *Access to Information Manual*, c 13.4, online: <[www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha13\\_4](http://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha13_4)> [TBS Guidelines].

78. Information Commissioner of Canada, *Annual Report: 1996–1997* at 51–53, online: <[www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx](http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx)> [ICC *Annual Report 1996–1997*].

79. Information Commissioner of Canada, *Annual Report: 1999–2000* at 74, online: <[www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx](http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx)> [ICC *Annual Report 1999–2000*].

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 II.A.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.”<sup>80</sup> 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 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.<sup>81</sup>

Unlike minutes, agenda and decisions do not reveal ministerial views (core secrets). Agenda contains the list of the subject matters discussed

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80. Privy Council Office, Cabinet Papers System Unit, *A Guide to Minute Writing* (November 1998) at 6. This document was released by the Privy Council Office under the ATIA, *supra* note 3 (A-2016-00758).

81. 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).

by ministers on specific dates;<sup>82</sup> 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.<sup>83</sup> 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.

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.<sup>84</sup> These letters and notes are unofficial Cabinet documents, which can reveal the collective decision-making process (noncore secrets), and, or, ministerial views

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82. 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: <[www.oic-ci.gc.ca/eng/rp-pr\\_ar-ra.aspx](http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx)> [*ICC Annual Report 2015–2016*].

83. See, for example, *Howe v Canada (AG)*, 2007 BCCA 314; *Appleby-Ostroff v Canada (AG)*, 2011 FCA 84 [*Appleby-Ostroff*]; Information Commissioner of Canada, *Annual Report: 2001–2002* at 52–54, online: <[www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx](http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx)>; Information Commissioner of Canada, *Annual Report: 2002–2003* at 21–25, online: <[www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx](http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx)> [*ICC Annual Report 2002–2003*]. See also d’Ombraïn, *supra* note 34 at 359, n 90.

84. TBS Guidelines, *supra* note 77 at 13.4.3(d).

(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).<sup>85</sup>

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<sup>86</sup> in relation to Cabinet, Treasury Board and Governor in Council businesses 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 by deputy ministers to their ministers in relation to collective decisions (Cabinet and Council in their collegial sense), not individual decisions.<sup>87</sup> 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, cannot be protected under paragraph (e), unless the information they contain provides a clear link to Cabinet or Council business.<sup>88</sup>

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

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85. *Smith, Kline & French Laboratories Ltd v Canada (AG)*, [1983] 1 FC 917 at 931 (FC) [*Smith, Kline & French Laboratories*].

86. *Ainsworth Lumber Co v Canada (AG)*, 2001 BCSC 225 at para 25 [*Ainsworth Lumber*].

87. *Canadian Association of Regulated Importers v Canada (AG)*, [1992] 2 FC 130 at para 38 (CA) [*CARI*]; *Alberta Wilderness Association v Canada (AG)*, 2013 FCA 190 at paras 47–51.

88. TBS Guidelines, *supra* note 77 at 13.4.3(e).

not the legislation is ultimately enacted.<sup>89</sup> 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.<sup>90</sup> 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 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).<sup>91</sup> Without a substantive definition of Cabinet confidences, and meaningful judicial review of Cabinet immunity claims, paragraph (g) is a form of “legal black hole,”

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89. *Smith, Kline & French Laboratories*, *supra* note 85 at 932; *Quinn v The Prime Minister of Canada*, 2011 FC 379 at para 32(iii) [*Quinn*].

90. TBS Guidelines, *supra* note 77 at 13.4.3(g).

91. Treasury Board Secretariat, *Access to Information and Privacy Statistical Report, 2015–2016*, online: <[www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html](http://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html)>.

which can be used to prevent the release of any information remotely connected to Cabinet or Council.

*b. Weighing and Balancing the Competing Aspects of the Public Interest*

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.<sup>92</sup> 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 (AG)*, 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?”<sup>93</sup> The duty to assess the public interest does 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

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92. T G Cooper, *Crown Privilege* (Aurora, Ont: Canada Law Book, 1990) at 27–34 [Cooper, *Crown Privilege*].

93. *Babcock v Canada (AG)*, 2002 SCC 57, [2002] 3 SCR 3 at para 22 [*Babcock*, SCC].

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.<sup>94</sup> 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.<sup>95</sup> 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, 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

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94. Cooper, *Crown Privilege*, *supra* note 92 at 139; T G Cooper, "Auditor General of Canada v Minister of Energy, Mines and Resources et al." (1990) 40 *Administrative Law Reports* 1 at 7.

95. See generally *Carey v Ontario*, [1986] 2 SCR 637.



the relevance of each document to those issues.”<sup>96</sup> This is extremely time-consuming, especially when numerous documents must be reviewed.<sup>97</sup> 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.”<sup>98</sup>

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.<sup>99</sup> 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 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

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96. Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 135.

97. *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 [RJR-MacDonald]; *Nunavut Tunngavik Inc v Canada (AG)*, 2014 NUCJ 1 [Nunavut Tunngavik].

98. Hogg, Monahan & Wright, *supra* note 96 at 135.

99. See generally Yves Côté, “La protection des renseignements confidentiels du Cabinet au gouvernement fédéral : la perspective du Bureau du Conseil privé” (2006) 19:2 Can J Admin L & Prac 219.

the case and his or her assessment should not be final and conclusive, given the Clerk's perceived lack of impartiality and independence.<sup>100</sup>

## 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."<sup>101</sup>

### a. *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*, 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.<sup>102</sup> In *Crossman's* case, Lord Widgery refused to prevent the publication of ministerial memoirs, which revealed the substance of Cabinet discussions, even if only 10 years had passed since the discussions had taken place.<sup>103</sup> In *Whitlam*, 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.<sup>104</sup> Over a decade, the "life of a cabinet secret" was therefore significantly shortened.<sup>105</sup>

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100. On this point, see Yan Campagnolo, "Cabinet Immunity in Canada: The Legal Black Hole" 63:2 McGill LJ [forthcoming in 2018] [Campagnolo, "Legal Black Hole"].

101. 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.

102. *Conway*, *supra* note 6 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.

103. *AG v Jonathan Cape Ltd*, [1975] 3 All ER 484 (QB).

104. *Whitlam*, *supra* note 7 at 46 (Gibbs ACJ), 98 (Mason J).

105. Ian G Eagles, "Cabinet Secrets as Evidence" [1980] PL 263 at 278.

Under statute law, in Canada, subsection 41(2) of the *FCA* 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 10 years.<sup>106</sup> The Progressive Conservatives found that period too short and proposed 20 years instead, which was the expected duration of a minister's political career.<sup>107</sup> 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 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.<sup>108</sup> To some extent, Parliament acknowledged that not all classes of Cabinet secrets or confidences were equally sensitive under

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106. Canadian Bar Association, *supra* note 38 at 39–40.

107. Baker, *supra* note 76; House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, No 14 (11 December 1979) at 14:34 (Hon Walter Baker); *Whitlam v Australian Consolidated Press* (1985), 60 ACTR 7 at 16.

108. 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 42 at 50:20.

sections 39 and 69 as one class of Cabinet documents, discussion papers, receives a lower degree of protection.

*b. 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.”<sup>109</sup> A discussion paper would only remain secret for 20 years if the Cabinet had not made a decision at all.

Discussion papers were introduced in 1977 to foster government transparency.<sup>110</sup> 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.<sup>111</sup> 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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109. *Ibid* at 50:11 (Hon Francis Fox).

110. Memorandum from Michael Pitfield to Pierre Elliott Trudeau entitled “Release of Discussion Papers” (5 September 1978). This document is reproduced in *Minister of Environment Canada v Information Commissioner of Canada*, Federal Court of Appeal, Court File No A-233-01, “Appeal Book”, Vol 8 (25 July 2001) at 1555 [Ethyl, “Appeal Book”].

111. Privy Council Office, *Guidance Manual for the Preparation and Handling of Cabinet Papers* (1977) at 8. This document is reproduced in Ethyl, “Appeal Book”, *supra* note 110, Vol 3 at 177.

released by the responsible Minister at the time of the announcement of the related decision.”<sup>112</sup> 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.<sup>113</sup> 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 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.<sup>114</sup> 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 were used for two conflicting purposes:

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112. Record of Cabinet Decision entitled “Release of Discussion Papers”, No 306-80RD (1 May 1980). This document is reproduced in *Ethyl*, “Appeal Book”, *supra* note 110, Vol 20 at 3696.

113. *Standing Committee Evidence*, July 1981, *supra* note 42 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.

114. Memorandum from Gordon Osbaldeston to Pierre Elliott Trudeau entitled “Reform of the Cabinet Paper System” (19 December 1983), Appendix 1. This document is reproduced in *Ethyl*, “Appeal Book”, *supra* note 110, Vol 13 at 2416.

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.<sup>115</sup>

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.”<sup>116</sup> 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.”<sup>117</sup> 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.<sup>118</sup>

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).

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115. Memorandum (draft) from Roberto Gualtieri to Gordon Osbaldeston entitled “Cabinet Paper System” (12 August 1983), Annex entitled “Reform of the Cabinet Paper System” [Memorandum from Gualtieri to Osbaldeston]. This document is reproduced in *Ethyl*, “Appeal Book”, *supra* note 110, Vol 6 at 964.

116. *Ibid.*

117. Memorandum from Roberto Gualtieri to Gordon Osbaldeston entitled “Cabinet Paper System: Treatment of Discussion Papers” (22 September 1983). This document is reproduced in *Ethyl*, “Appeal Book”, *supra* note 110, Vol 10 at 1727.

118. Memorandum from Gualtieri to Osbaldeston, *supra* note 115.

The objective of the first was to present the minister's recommendation to the Cabinet; the objective of the second was to present a detailed analysis of the relevant facts and options to the Cabinet.<sup>119</sup> From then on, the government took the position that the "discussion paper exception" under the 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."<sup>120</sup> The demise of the discussion paper was noted by the Information Commissioner in 1987, but it took almost 10 years before an investigation was launched into the matter.<sup>121</sup>

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.<sup>122</sup> 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

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119. Privy Council Office, *Guidance Handbook for the Preparation of the 3 Page Memorandum to Cabinet* (27 April 1984). This document is reproduced in *Ethyl*, "Appeal Book", *supra* note 110, Vol 6 at 1057. See also Privy Council Office, *Memoranda to Cabinet: A Drafter's Guide* (24 November 1997) at A7. This document is reproduced in *Ethyl*, "Appeal Book", *supra* note 110, Vol 4 at 554.

120. 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.

121. Information Commissioner of Canada, *Annual Report: 1998–1999* at 56, online: <[www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archiv.aspx](http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archiv.aspx)>. The discussion paper issue was also discussed in the 1999–2000, 2001–2002, 2002–2003, 2006–2007 and 2007–2008 Annual Reports.

122. *Manganese-based Fuel Additives Act*, SC 1997, c C-11.

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 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.<sup>123</sup>

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."<sup>124</sup> 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.<sup>125</sup> The government had thus accepted that the Background/Analysis sections were 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

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123. Letter from John Reid to Christine Stewart and Jean Chrétien (30 March 1999). This document is reproduced in *Ethyl*, "Appeal Book", *supra* note 110, Vol 2 at 119.

124. Treasury Board Secretariat, *Treasury Board Manual* (1 December 1993), c 2-6 at 6 [1993 TBS Guidelines].

125. Canadian Press, "Ottawa to Appeal Cabinet Secrecy Ruling: Crosbie", *The Gazette* (31 December 1985) B1.



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 an attempt to circumvent the will of Parliament."<sup>126</sup> 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]."<sup>127</sup>

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."<sup>128</sup> He was right for nearly 10 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.<sup>129</sup> 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

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126. *Canada (Information Commissioner) v Canada (Minister of Environment)*, [2001] 3 FC 514 at para 45 (Blanchard J) [*Ethyl*, FC, 2001].

127. *Canada (Information Commissioner) v Canada (Minister of Environment)*, 2003 FCA 68 at para 26 (Noël JA) [*Ethyl*, FCA, 2003].

128. *ICC Annual Report 2002–2003*, *supra* note 83 at 16, 22.

129. 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."

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 to access Cabinet documents.<sup>130</sup> 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.

## B. 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

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130. 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).

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 public interest in the fair administration of justice) is deemed more important than 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.

### 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.<sup>131</sup> 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.

#### a. *Claiming Cabinet Immunity under the CEA*

How must Cabinet immunity be claimed under the *CEA*? The answer stems from the wording of subsection 39(1), as interpreted by the SCC. In *Babcock*, 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

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131. 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.

to the production of 51 documents. The lawyers challenged the objection. The SCC held that “Cabinet confidentiality is essential to good government.”<sup>132</sup> 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 context of judicial and quasi-judicial proceedings.”<sup>133</sup> Section 39 goes beyond the common law because, once the information is validly certified, the court cannot inspect it and assess the public interest.<sup>134</sup> A certificate is valid if it complies with four conditions:

- (1) [I]t 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.<sup>135</sup>

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 in order to identify any applicable immunity or privilege. 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

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132. *Babcock*, SCC, *supra* note 93 at paras 15–18. See also Campagnolo, “Legitimacy of Cabinet Secrecy”, *supra* note 4.

133. *Babcock*, SCC, *supra* note 93 at para 21.

134. 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 83 at para 34; *Superior Plus Corp v Canada*, 2016 TCC 217 at para 51.

135. *Babcock*, SCC, *supra* note 93 at para 27.

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 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 (AG)*, a company challenged the constitutionality of the compulsory licensing scheme for medicine under patent 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:

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*].<sup>136</sup>

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.”<sup>137</sup> *Smith, Kline*

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136. *Smith, Kline & French Laboratories*, *supra* note 85 at 928.

137. *Ibid* at 933.

and *French Laboratories* gave rise to the generic certificate.<sup>138</sup> That model was a step up from the initial 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*].<sup>139</sup>

That was the kind of description used in generic certificates from 1983 to 2002. In a lone opinion, in *Canada (AG) v Central Cartage*, 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.”<sup>140</sup> 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.”<sup>141</sup> Hence, it was sufficient for the certificate to track the language of the relevant paragraphs in subsection 39(2).<sup>142</sup>

It was not before 2001 that the courts began to seriously question the value of generic certificates. Southin JA of the British Columbia

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138. *Ouvrages de raffinage de métaux Dominion Ltée v Énergie atomique du Canada Ltée*, [1988] JQ No 2680 (SC) [EACL]; *Canada (AG) v Central Cartage Co*, [1990] 2 FC 641 (CA), leave to appeal dismissed: [1990] SCCA no 317 [Central Cartage, FCA]; *CARI*, *supra* note 87; *Samson Indian Band v Canada*, [1997] FCJ No 1328 (CA) [Samson Indian Band, FCA]; *Donahue Inc v Canada (Minister of Exterior Trade)*, [1997] FCJ No 473 (FC) [Donahue]; *Babcock v Canada (AG)*, [1999] BCJ No 1777 (SC) [Babcock, BCSC]; *Canada (Minister of Citizenship and Immigration) v Katriuk*, [1999] 3 FC 143 (FC); *Canadian Arctic Resources Committee Inc v Diavik Diamond Mines Inc*, [2000] FCJ No 910 (FC); *Society Promoting Environmental Conservation v Canada*, [2000] FCJ No 893 (FC).

139. *Canada (AG) v Central Cartage Co*, [1988] FCJ No 801 at 4 (FC).

140. *Ibid* at 8.

141. *Central Cartage*, FCA, *supra* note 138 at para 16.

142. 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 138. 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.

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."<sup>143</sup> Without such descriptions, "the court cannot tell whether the document falls within the ambit of [section 39]."<sup>144</sup> 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.<sup>145</sup>

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.<sup>146</sup>

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143. *Babcock v Canada (AG)*, 2000 BCCA 348 at para 46 [*Babcock*, BCCA].

144. *Ibid* at para 54. See also *Ainsworth Lumber*, *supra* note 86 at paras 15, 19.

145. *Babcock*, SCC, *supra* note 93 at para 28.

146. *Cooper, Crown Privilege*, *supra* note 92 at 167, 175. On the importance for the government to properly justify Cabinet immunity claims, see also Campagnolo, "Cabinet Immunity Under the Common Law", *supra* note 5; Campagnolo, "Legal Black Hole", *supra* note 100.

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.”<sup>147</sup> 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 government’s position and protect information that undermines it.<sup>148</sup> This is consistent with the precedents. In *Duncan*, the House of Lords stated that PII should not be used to hide misconduct, prevent public criticism or avoid legal liability; and, in *Roncarelli*, the SCC held that a discretion conferred by statute must not be exercised for an improper purpose.<sup>149</sup> 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.”<sup>150</sup>

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,<sup>151</sup> 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.

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147. *Babcock*, SCC, *supra* note 93 at para 25.

148. *Ibid* at para 36. At the British Columbia Court of Appeal, *Babcock*, BCCA, *supra* note 143 at para 23, MacKenzie JA held the selective disclosure of Cabinet documents would be “an abuse of the judicial process.” See also *JTI MacDonald Corp c Canada (Procureur général)*, 2004 CanLII 30110 (QC CA).

149. *Duncan*, *supra* note 12 at 595; *Roncarelli*, *supra* note 24 at 140 (Rand J).

150. Hogg, Monahan & Wright, *supra* note 96 at 134.

151. For example, in *Roncarelli*, *supra* note 24 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 *Roncarelli*, *supra* note 24, that difficulty did not arise given that Duplessis had “openly avowed” the reasons why he had terminated Roncarelli’s liquor license.



In *Babcock*, the SCC stated that the issuance of a certificate “may permit a court to draw an adverse inference” against the government<sup>152</sup> and referred to *RJR-MacDonald Inc v Canada (AG)* as an example. In *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 *Charter*. One of the documents 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 stud[y] must undercut the government’s claim that a less intrusive ban would not have produced an equally salutary result.”<sup>153</sup> 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.<sup>154</sup>

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 5 had been in the litigants’ possession before the litigation.<sup>155</sup> 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.”<sup>156</sup> Indeed, the duty to protect information only arises when the public

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152. *Babcock*, SCC, *supra* note 93 at para 36.

153. *RJR-MacDonald*, *supra* note 97 at para 166.

154. 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, 298–99, 319, 356.

155. *Babcock*, SCC, *supra* note 93 at paras 45–47. The government ultimately produced all 51 documents to the litigants. See *Babcock v Canada (AG)*, 2003 BCSC 1385 at para 16.

156. *Babcock*, SCC, *supra* note 93 at para 22.

interest demands it. Moreover, section 39 “cannot be applied retroactively to documents that have already been produced in litigation.”<sup>157</sup> This statement is consistent with a long line of judicial authorities both under the common law<sup>158</sup> and statute law<sup>159</sup>: the 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.<sup>160</sup> 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 (noncore 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.

### *b. 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

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157. *Ibid* at para 33.

158. *Robinson v State of South Australia (No 2)*, [1931] All ER Rep 333 at 339; *Whitlam*, *supra* note 7 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).

159. *Best Cleaners and Contractors Ltd v Canada*, [1985] 2 FC 293 (CA) [*Best Cleaners*]; *Delisle v Canada (Royal Canadian Mounted Police)*, [1997] FCJ No 204 (FC); *Babcock*, BCCA, *supra* note 143. The following cases have been overruled, on this point, as a result of *Babcock*, SCC, *supra* note 93: *Energy Probe v Canada (AG)*, [1992] OJ No 892 (CJ); *Samson Indian Nation and Band v Canada*, [1996] 2 FC 483 (FC) [*Samson Indian Band*, FC]; *Bourque, Pierre & Fils Ltée v Canada*, [1999] FCJ No 58 (FC); *Babcock*, BCSC, *supra* note 138; *Canada (Information Commissioner) v Canada (Minister of Environment)*, [1999] FCJ No 1760 (FC) [*Ethyl*, FC, 1999].

160. *Babcock*, SCC, *supra* note 93 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.

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*.<sup>161</sup> 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 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.<sup>162</sup> 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.<sup>163</sup> 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.”<sup>164</sup>

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161. See generally Vincent Kazmierski, “Something to Talk About: Is There a Charter Right to Access Government Information?” (2008) 31:2 Dal LJ 351.

162. Treasury Board Secretariat, *Guidelines on Confidences of the Queen’s Privy Council for Canada – Access to Information Act*, Circular No 1983-45 (30 August 1983) at 25.8.

163. Rubin, *Access to Cabinet Confidences*, *supra* note 120 at 59–64.

164. Information Commissioner of Canada, *Annual Report: 1984–1985* at 3, online: <[www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archiv.aspx](http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archiv.aspx)> [ICC *Annual Report 1984–1985*].

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.”<sup>165</sup> 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.<sup>166</sup> In consultation with Justice counsel, public servants would fill out a detailed schedule 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.<sup>167</sup>

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.”<sup>168</sup> PCO remains the centre of expertise on Cabinet secrecy.<sup>169</sup> 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

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165. Treasury Board Secretariat, *Confidences of the Queen's Privy Council for Canada*, Circular No 1986-23 (4 June 1986) at para 4.

166. *Ibid.* This process was reaffirmed in the 1993 TBS Guidelines, *supra* note 124.

167. Treasury Board Secretariat, *Reducing Delays in the Processing of Access to Information Requests* (March 2012) at 2.3, online: <[www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/reducing-delays-processing-access-information-requests.html](http://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/reducing-delays-processing-access-information-requests.html)>.

168. TBS Guidelines, *supra* note 77 at 13.4.5.

169. Treasury Board Secretariat, *Policy on Access to Information* (20 August 2014) at 8.2, online: <[www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12453](http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12453)>.

to access requests has fallen,<sup>170</sup> but the risk that section 69 will not be applied consistently has been revived.<sup>171</sup> In fact, immediately following the adoption of the new process in 2013, the total number of exclusions under section 69 surged by 49%.<sup>172</sup> In addition, it has been reported that 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.<sup>173</sup> 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.<sup>174</sup> 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);

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170. Information Commissioner of Canada, *Annual Report: 2014–2015* at 28, online: <[www.oic-ci.gc.ca/eng/rp-pr\\_ar-ra.aspx](http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx)> [*ICC Annual Report 2014–2015*].

171. Information Commissioner of Canada, *Annual Report: 2013–2014* at 20, online: <[www.oic-ci.gc.ca/eng/rp-pr\\_ar-ra.aspx](http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx)> [*ICC Annual Report 2013–2014*]; *ICC Annual Report 2014–2015*, *supra* note 170 at 42; *ICC Annual Report 2015–2016*, *supra* note 82 at 23 (example of inconsistent application of section 69).

172. 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 2,117 in 2012–2013 to 3,152 in 2013–2014 and has remained stable since then (that is, 3,089 in 2014–2015 and 3,279 in 2015–2016). See Treasury Board Secretariat, *Access to Information and Privacy Statistical Report, 2012–2013, 2013–2014, 2014–2015 and 2015–2016*, online: <[www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html](http://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip.html)>.

173. *ICC Annual Report 2014–2015*, *supra* note 170 at 42; *ICC Annual Report 2015–2016*, *supra* note 82 at 22.

174. *Quinn*, *supra* note 89 at para 32(ii).

however, in *obiter dictum*, the SCC has suggested that Cabinet immunity would not violate the *Charter*.<sup>175</sup>

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.<sup>176</sup> Complaints have sometimes led to the reversal of the decision to exclude documents.<sup>177</sup> The confirmation took the form of a letter to the Commissioner,<sup>178</sup> which included a description of the documents and a statement that they fell within the scope of section 69.<sup>179</sup> 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.<sup>180</sup> Because of this change, the assurance that the matter would be considered *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

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175. *Ontario (Public Safety and Security) v Criminal Lawyers’ Association*, 2010 SCC 23, [2010] 1 SCR 815.

176. 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 *1987–1988 Annual Report* at 34, online: <[www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx](http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx)>. See also *ICC Annual Report 1984–1985*, *supra* note 164 at 15, 67.

177. Rubin, *Access to Cabinet Confidences*, *supra* note 120 at 62–64; Information Commissioner of Canada, *Annual Report: 1992–1993* at 44–45, online: <[www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx](http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx)> [*ICC Annual Report 1992–1993*]; *ICC Annual Report 1996–1997*, *supra* note 78 at 51–53; *ICC Annual Report 1999–2000*, *supra* note 79 at 74; Information Commissioner of Canada, *Annual Report: 2000–2001* at 45, online: <[www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx](http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx)> [*ICC Annual Report 2000–2001*].

178. Treasury Board Secretariat, *Guidelines for the Preparation of a Certificate for the Information Commissioner*, AIP 2022-08 (14 August 1984); 1993 TBS Guidelines, *supra* note 124.

179. Information Commissioner of Canada, *Annual Report: 1994–1995* at 6, online: <[www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx](http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx)>; *ICC Annual Report 2002–2003*, *supra* note 83 at 21–22.

180. TBS Guidelines, *supra* note 77 at 13.4.6, 13.4.7; *ICC Annual Report 2014–2015*, *supra* note 170 at 42.

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."<sup>181</sup> Therefore, given that the *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 *ATIA*, the Commissioner has consistently taken the position that he or she did not have authority to access Cabinet confidences,<sup>182</sup> except in one case.

In *Canadian Broadcasting Corporation v Canada (Information Commissioner)*, the issue was whether the Commissioner had the power to inspect Canadian Broadcasting Corporation's (CBC) documents. Section 68.1 excludes from the *ATIA* information pertaining to the CBC's "journalistic, creative or programming activities." 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.<sup>183</sup> 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.<sup>184</sup>

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

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

182. See, *inter alia*, *ICC Annual Report 1984–1985*, *supra* note 164 at 15, 67, 68, 70; *ICC Annual Report 1996–1997*, *supra* note 78 at 32; *ICC Annual Report 2000–2001*, *supra* note 177 at 44; *ICC Annual Report 2013–2014*, *supra* note 171 at 20.

183. *Canadian Broadcasting Corporation v Canada (Information Commissioner)*, 2010 FC 954 at para 31.

184. *Ibid* at para 36.

issues a certificate under section 39.<sup>185</sup> 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."<sup>186</sup> 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.<sup>187</sup> The Court of Appeal reasoned that existence of an exception under 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."<sup>188</sup>

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."<sup>189</sup> The contents of a document must be reviewed to assess whether it contains a "corpus of words" which falls within the meaning of "discussion paper." 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

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185. *Canadian Broadcasting Corporation v Canada (Information Commissioner)*, 2011 FCA 326 at para 37 [CBC, FCA].

186. *Ibid* at para 49.

187. 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 126 and *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2008 FC 766 [*Prime Minister's Agenda*]), he was not obliged to do so, as confirmed in CBC, FCA, *supra* note 185 at paras 50–54. That said, if the documents are voluntarily produced, judges can inspect them; see *Prime Minister's Agenda*, *supra* note 187 at para 124.

188. CBC, FCA, *supra* note 185 at para 65.

189. ICC Annual Report 2013–2014, *supra* note 171 at 20.



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. 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),<sup>190</sup> the unwritten constitutional principles (rule of law; separation of powers; and judicial independence),<sup>191</sup> the *Charter* (right to life, liberty and security; right to a fair trial; and right to equality)<sup>192</sup> and the *Canadian Bill of Rights*<sup>193</sup> (right to property; and right to a fair trial).<sup>194</sup> 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* and *Babcock*. 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 is examined elsewhere.<sup>195</sup>

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,<sup>196</sup> 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

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190. *Commission des droits de la personne*, supra note 28.

191. *Ibid*; *Singh v Canada (AG)*, [2000] 3 FC 185 (CA) [*Singh*]; *Babcock*, SCC, supra note 93.

192. *ILWU v Canada*, [1989] 1 FC 444 (FC); *Central Cartage*, FCA, supra note 138; *CARI*, supra note 87.

193. *Canadian Bill of Rights*, SC 1960, c 44.

194. *Commission des droits de la personne*, supra note 28; *EACL*, supra note 138; *Central Cartage*, FCA, supra note 138; *Wedge v Canada (AG)*, [1995] FCJ No 1399 (FC).

195. See generally Campagnolo, “Legal Black Hole”, supra note 100.

196. *Auditor General*, supra note 55.

the production of information” can review Cabinet immunity claims under section 39.<sup>197</sup> 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.<sup>198</sup> Cabinet immunity claims have been challenged on questions of law<sup>199</sup> and the courts have applied the correctness standard of review.<sup>200</sup> As they limit the free flow of information, sections 39 and 69 should be narrowly interpreted.<sup>201</sup> Cabinet immunity claims can be challenged on procedural and substantive grounds.

### a. *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.<sup>202</sup> 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 date, title, author or recipient of the document. 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,

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197. *Babcock*, SCC, *supra* note 93 at paras 42–44.

198. *CARI*, *supra* note 87 at para 42; *Singh*, *supra* note 191 at para 50; *Babcock*, SCC, *supra* note 93 at para 40; *Canada (Information Commissioner) v Canada (Minister of Environment)*, [2000] FCJ No 480 at paras 13–15 (CA).

199. *Singh*, *supra* note 191 at para 43.

200. *Ethyl*, FCA, 2003, *supra* note 127 at para 22.

201. *Samson Indian Band*, FC, *supra* note 159 at para 30; *Donahue*, *supra* note 138 at para 8; *Babcock*, BCCA, *supra* note 143 at para 14.

202. *Appleby-Ostroff*, *supra* note 83 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 187 at para 176. When the volume of documents is high, the government can negotiate the timing of the filing of the certificate: *Sawridge Band v Canada*, [2001] FCJ No 1488 (FC); *Nunavut Tunngavik*, *supra* note 97. However, if the government fails to file the certificate within the deadline set by the court, the court may compel the production of the documents: *Nunavut Tunngavik Inc v Canada (AG)*, 2014 NUCJ 31.

not exceeding 30 days.<sup>203</sup> 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 production of the documents.

### *b. 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 mistakenly or abusively withheld.<sup>204</sup> The first type of cases is more frequent than the second. No Canadian court has ever found that Cabinet immunity was claimed abusively.<sup>205</sup> 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.<sup>206</sup> 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

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203. *Smith, Kline & French Laboratories*, *supra* note 85 (30 days); *Puddister Trading*, *supra* note 142 (10 days); *Samson Indian Band*, FC, *supra* note 159 (reasonable time); *Babcock*, BCCA, *supra* note 143 (21 days); *Ainsworth Lumber*, *supra* note 86 (21 days); *Pelletier v Canada (AG)*, 2005 FCA 118 [*Pelletier*] (15 days); *Tribal Wi-Chi-Way-Win Capital Corporation v Canada (AG)*, Federal Court, T-22-10 (13 September 2011) (20 days); *Syncrude Canada Ltd v Canada (AG)*, Federal Court, T-1643-11 (26 October 2012) (21 days).

204. *Babcock*, SCC, *supra* note 93 at para 28. See also *Smith, Kline & French Laboratories*, *supra* note 85 at 929; *Central Cartage*, FCA, *supra* note 138 at para 11; *CARI*, *supra* note 87 at para 34.

205. There is only one case in which a dissenting judge implied that Cabinet immunity may have been claimed abusively: *CARI*, *supra* note 87 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."

206. *Babcock*, SCC, *supra* note 93 at para 25.

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;<sup>207</sup> a corporate or business plan drafted by a Crown corporation;<sup>208</sup> a report drafted by a consultant;<sup>209</sup> a letter between a federal and a provincial minister; and a letter between two federal ministers on parliamentary, social or party affairs.<sup>210</sup> 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 the challenges made on this basis have been initiated by the Information Commissioner under the *ATIA*.<sup>211</sup> 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.”<sup>212</sup> 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

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207. *ICC Annual Report 1992–1993*, *supra* note 177 at 44–45.

208. *ICC Annual Report 1999–2000*, *supra* note 79 at 74.

209. *ICC Annual Report 1996–1997*, *supra* note 78 at 51–53.

210. *ICC Annual Report 2000–2001*, *supra* note 177 at 45.

211. The support of the Information Commissioner is crucial to the successfulness 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 (AG)*, [1996] FCJ No 154 (FC); *Quinn*, *supra* note 89.

212. *Babcock*, *SCC*, *supra* note 93 at para 26.

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*. 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. A public servant had revealed the contents of a Treasury Board submission during his 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 disclose Cabinet confidences, it did not prohibit their voluntary disclosure.<sup>213</sup> 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

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213. *Best Cleaners*, *supra* note 159 at 311.

documents and assess the competing aspects of the public interest.<sup>214</sup> 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?<sup>215</sup> 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?<sup>216</sup> 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 (AG)*. 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 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."<sup>217</sup>

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.<sup>218</sup> The issue

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214. *Babcock v Canada (AG)*, 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."

215. *Ethyl*, FC, 1999, *supra* note 159 at paras 31–53.

216. *Pelletier*, *supra* note 203 at paras 25–26.

217. *Reece v Canada (Minister of Western Economic Development)*, 2006 FC 688 at para 28.

218. 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 87 at para 44.

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*, 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 demanded its return. The Federal Court could not “condone such conduct or sanction the otherwise unauthorized and prohibited disclosure of Cabinet confidences.”<sup>219</sup> 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

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219. *Bruyere v Canada*, [2004] FCJ No 2194 at para 9 (FC). See *Ontario (AG) v Gowling & Henderson* (1984), 47 OR (2d) 449 (HC) for a similar approach under the common law.

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 article 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 reasserted the power to review PII claims under the common law in *Conway*, Parliament enacted subsection 41(2) of the *FCA* to provide the government with an absolute immunity over Cabinet confidences. Ministers were given the discretionary 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* 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.<sup>220</sup> 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 non-deferential attitude to Cabinet immunity taken by the courts under the common law. His decision to maintain absolute control over the disclosure of

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220. Mullan, *supra* note 20 at 291.



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 went on to provide a nonexhaustive list 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 side-step this exception, and extend the reach of Cabinet secrecy, by modifying the Cabinet Paper System in 1984 and 2012.

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 from judicial review. A Cabinet immunity claim 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, a Cabinet immunity claim can be challenged if there is extrinsic evidence that the 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* and on the second in *Babcock*.

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 and conclusive 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 control the admissibility of evidence in litigation and their jurisdiction to meaningfully review the legality of executive action. These problems will be addressed in a forthcoming article.<sup>221</sup>

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221. See generally Campagnolo, "Legal Black Hole", *supra* note 100.

## APPENDIX 1: SECTION 41 OF THE FEDERAL COURT ACT

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.

## APPENDIX 2: SECTION 39 OF THE CANADA EVIDENCE ACT

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 agenda of Council or a record recording deliberations or decisions of Council;

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred 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.

## APPENDIX 3: SECTION 69 OF THE ACCESS TO INFORMATION ACT

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.