

Behind Closed Doors

The Law and Politics of Cabinet Secrecy

YAN CAMPAGNOLO



Contents

Foreword / vii

The Honourable Louis LeBel, CC

Acknowledgments / xi

Introduction / 3

1 Constitutional Conventions / 18

2 Common Law Public Interest Immunity / 65

3 Statutory Public Interest Immunity / 121

4 The Rule of Law / 174

Conclusion / 222

Appendix: Statutory Provisions / 243

Notes / 247

Selected Bibliography / 315

Index / 323

Introduction

In politics, a promise to foster greater openness and transparency often helps political parties win elections. Yet, once in power, governing parties rarely lift the veil of secrecy in any significant manner. The creators of the satirical British Broadcasting Corporation sitcoms *Yes Minister* and *Yes Prime Minister* vividly captured this dynamic in the first episode of the series, entitled “Open Government.” The sitcoms portray the rise of the Right Honourable James Hacker from member of Parliament to minister of administrative affairs and, ultimately, to prime minister of the United Kingdom in the 1980s. In the first episode, after taking office as minister, Hacker tells his deputy minister, Sir Humphrey Appleby, that his political party made election pledges about open government and that he “firmly” intends to keep them:

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

Accordingly, when Hacker learns that his predecessor had agreed to buy one thousand made-in-America computer display terminals

at £10,000 each – when the same product is built in his constituency, where unemployment is rising – he decides to publicly denounce, rather than hide, this unfortunate contract. However, after finalizing his speech and instructing that it be sent to the press, Hacker receives a memorandum from the prime minister informing him that an important Anglo-American defence and trade agreement is about to be signed. He immediately realizes that his speech would injure Anglo-American relations and displease the prime minister. Fearing for the future of his political career, Hacker gives up the idea of criticizing the contract and nervously asks Sir Humphrey whether he could “hush up” the whole story. Luckily for him, his speech had been caught up in bureaucratic red tape and had not yet reached the press. This marked the end of Hacker’s “firm” commitment to open government.

Pledges of open government are no more unusual in Canadian real life. In the Conservative Party of Canada’s 2006 election platform, Stephen Harper announced that the “time for accountability” had finally arrived.² In a style similar to Hacker’s, he referred to the numerous scandals plaguing the Liberal Party of Canada, especially the sponsorship scandal that was then under investigation by Justice John Gomery,³ and promised to “clean up government” and “replace a culture of entitlement and corruption with a culture of accountability.”⁴ After winning the 2006 general election, the Conservatives implemented some of their election promises through the *Federal Accountability Act*⁵ but set aside important commitments that would have bolstered the *Access to Information Act* (ATIA).⁶ Indeed, they decided not to do any of the following: subject the exclusion of Cabinet documents to review by the information commissioner; give the information commissioner the power to order the release of information; ensure that exemptions could be justified based only on the “injury” that would result from disclosure; and enact a “public interest override” for exemptions to the disclosure of government secrets.⁷ The Conservatives thus broke their promises to reform the ATIA.

Once elected, the Conservatives were criticized for their lack of transparency, especially during the debates surrounding the treatment of Afghan detainees in 2009–10 and the costs of crime bills, corporate tax cuts, and the purchase of F-35 fighter jets in 2011. In the latter case, the Conservatives relied on Cabinet secrecy to justify their decision

to refuse to disclose information sought by the House of Commons Standing Committee on Finance. Members of the opposition parties challenged this refusal on the basis that they needed the information to fulfill their constitutional role of assessing proposed legislation. This dispute raised questions about the scope of Cabinet secrecy in Canada's system of government and whether an executive branch decision to shroud information in secrecy should be subject to independent oversight and review mechanisms.⁸ Given the lack of viable alternatives and the minority position of the Conservatives in the House of Commons, these debates culminated in the adoption of an unprecedented motion of contempt and a general election in 2011.⁹ Although the Conservatives ultimately won a majority government that year, their reputation for secrecy endured.¹⁰

During the 2015 general election, the Liberals also, unsurprisingly, promised a more “open and transparent government.”¹¹ Among their boldest promises were commitments to have the *ATIA* apply to the Office of the Prime Minister and ministers' offices and to give the information commissioner the power to issue binding disclosure orders.¹² Following the Liberals' victory, these promises found their way into the prime minister's mandate letters to the president of the Treasury Board and the minister of justice and attorney general of Canada.¹³ However, the Liberal government's changes to the *ATIA* did not meaningfully implement these promises.¹⁴ The cycle once again repeated itself during the 2019 general election when the Conservatives made opportunistic promises to reform Cabinet secrecy in the wake of the SNC-Lavalin affair.¹⁵ As of June 30, 2020, the federal access-to-information regime ranked fifty-seventh internationally and fifth domestically in terms of openness and transparency.¹⁶ Former information commissioner John Reid put it this way:

Governments make skeptics of Information Commissioners. Time after time, régime after régime, scandal after scandal, government leaders raise expectations by promising to be more accountable and transparent. Just as routinely, governments maintain their deep addiction to secrecy ... When it comes to honoring the public's “right to know”, governments have found it profoundly challenging to “walk the walk.”¹⁷

Openness and transparency are rarely a priority for politicians – whatever their political stripes – when they are in power. Increased transparency is usually not in their interest, as it opens them to more scrutiny, criticism, and accountability. That said, secrecy is not unique to the executive branch; it is also found in the legislative and judicial branches. Indeed, members of Parliament and senators receive confidential advice from committee staff and legislative assistants. Meetings of House of Commons committees sometimes take place in closed session. Meetings of the Board of Internal Economy, the governing body of the House of Commons, may unfold in camera.¹⁸ Caucus meetings are usually private, save in exceptional circumstances. Judicial deliberations also take place in camera. For example, in the United States, “[i]t is difficult to imagine more secretive deliberations than those that take place in Supreme Court conferences.”¹⁹ In fact, confidentiality is a condition of employment for the law clerks and staff of judges. The situation is the same in Canada.²⁰ Political scientist Mark Rozell argues that secretive decision-making yields better decisions than those that would be made in an open setting. What ultimately matters is that the decision-maker justifies and is held accountable for the “end result” – that is, the final outcome of the decision-making process.²¹

It is trite to say that a government cannot function completely in the open and that there are legitimate reasons to keep some information confidential.²² To take a clear example, disclosing a battle plan to the enemy in a time of war would injure the public interest. A government should also be able to preserve the confidential nature of its internal decision-making process, especially at the highest level: “No one really supposes that a Cabinet ought to meet and hold its debate in the presence of reporters, TV cameras and interested outsiders.”²³ The experiment of “open Cabinet” meetings was unsuccessfully tried by Liberal Premier Gordon Campbell in British Columbia in 2001. These “open” meetings were not “real” Cabinet meetings, as they did not involve any debate or disagreements between the ministers.²⁴ Yet, while there are legitimate reasons for government secrecy, there is also a risk that public officials may hide information for improper purposes, to avoid public embarrassment, or to cover up unlawful conduct, as did US President Richard Nixon in the Watergate scandal.²⁵ To minimize this risk, the scope of

legitimate government secrecy must be set out, and claims of secrecy must be subject to meaningful oversight and review.

This book is about the rules governing Cabinet secrecy in a Westminster system of responsible government. It focuses on the federal statutory regime in Canada. The term “Cabinet secrecy” refers to the political rules (constitutional conventions) and legal rules (common law and statute law) designed to protect the confidentiality of the collective decision-making process at the top of the executive branch of the state. From a political perspective, in the system of responsible government, where the government is accountable to the House of Commons, ministers need a forum (that is, the Cabinet room) where they can freely propose, debate, and reach a consensus on government policy and action. The confidentiality of Cabinet proceedings enables ministers to speak freely during the deliberative process. In addition, it ensures that documents recording the personal views expressed by ministers – or any disagreements between them – do not fall into the hands of their political opponents, who could exploit this information to undermine the government and its ability to retain the confidence of the House of Commons. Cabinet secrecy is essential to maintaining Cabinet solidarity as well as the convention of collective ministerial responsibility. Historically, attempts to soften Cabinet solidarity by allowing ministers to debate the pros and cons of proposed policies in public before Cabinet reaches a consensus – as Prime Minister Pierre Elliott Trudeau did in 1968 – have been short-lived.²⁶ Public disagreements between ministers are often criticized for making the government look weak and disorganized. In this sense, “Cabinet secrecy can be seen as a necessary evil in the pursuit of good decision making and good governance.”²⁷

From a legal perspective, the common law doctrine of public interest immunity provides the executive with a justification for suppressing Cabinet secrets when the public interest in the proper administration of government (hereinafter “the interest of good government”) is greater than the public interest in the proper administration of justice (hereinafter “the interest of justice”). At the federal level in Canada, the common law has been superseded by a statutory regime – again, adopted at the initiative of Pierre Elliott Trudeau – contained in section 39 of the *Canada Evidence Act (CEA)*²⁸ and section 69 of the *ATIA*.²⁹ Section 39 removes

from the courts the power to inspect “confidences of the Queen’s Privy Council for Canada” (hereinafter “Cabinet confidences”) and compel their production in litigation when the public interest demands it (that is, when the interest of justice is greater than the interest of good government).³⁰ Similarly, section 69 excludes Cabinet confidences from the scope of the *ATIA* and the jurisdiction of both the information commissioner and the Federal Court. These provisions shield Cabinet confidences from disclosure for a period of twenty years.³¹ Among the Westminster jurisdictions studied in this book, no other confers such a high level of protection on Cabinet confidences.

According to the United Nations, good governance can be measured by many factors, including efficiency, transparency, accountability, civic participation, and respect for the rule of law.³² Cabinet secrecy fosters government efficiency. Failing to maintain the confidentiality of Cabinet proceedings would increase the public pressure that stakeholders put on ministers and give rise to partisan criticism from their political opponents, which would impair the collective decision-making process. However, while Cabinet secrecy fosters government efficiency, it is inconsistent with government transparency and accountability and, to some extent, civic participation and the rule of law. Indeed, citizens, parliamentarians (that is, members of Parliament and senators), and judges need access to government information to perform their civic and constitutional duties.³³ First, access to information enables citizens to participate meaningfully in the democratic process by expressing informed opinions on public affairs and exercising their right to vote in an enlightened manner at election time.³⁴ In this regard, the media plays a crucial role in communicating information to the citizenry. Second, access to information enables parliamentarians to fulfill their constitutional role of approving proposed legislation and government spending. Third, it enables judges to adjudicate cases against the government fairly, in view of all the relevant evidence, and prevent various denials of justice. Thus, access to information enables citizens, parliamentarians, and judges to hold the government accountable for its policies and actions. Lastly, deferred access to previously sensitive information enables academics to bring the country’s history to life and draw important lessons for future generations.³⁵

In this context, two issues plague the statutory regime of Cabinet secrecy in Canada. The first issue is the excessively broad scope of the regime. Section 39 of the *CEA* and section 69 of the *ATIA* protect Cabinet confidences as a class of documents without substantively defining the meaning of the term. The provisions establish a non-exhaustive list of documents where such confidences can be found: Cabinet memoranda; discussion papers; Cabinet agenda, minutes, and decisions; communications between ministers on Cabinet business; briefing notes to ministers on Cabinet business; draft legislation; and other related documents. The indeterminacy of the term “Cabinet confidence” empowers public officials to protect any document that has any connection (even a weak one) to the collective decision-making process, which may lead to improper application of the immunity. Moreover, over the years, the government has taken administrative measures to reduce the scope of an important exception to Cabinet immunity: the “discussion paper exception.” This exception enables factual and background information to be disclosed once the associated Cabinet decision has been made public. By abolishing “discussion papers” in 1984 and interweaving factual and background information with ministerial views and recommendations in 2012, the government greatly broadened Cabinet secrecy.

The second issue stems from the lack of meaningful oversight and review of government decisions to withhold information based on Cabinet immunity. In the parliamentary context, as the Conservatives’ refusal in 2011 to disclose the costs of crime bills, corporate tax cuts, and the purchase of F-35 fighter jets showed, the House of Commons cannot force the government to disclose Cabinet confidences, although it may hold the government in contempt if it is a minority government. Apart from this extreme remedy, no other dispute settlement mechanism exists for this kind of conflict between the executive and legislative branches. In the context of litigation, the courts do not have the power to inspect the information in order to determine whether it falls within the definition of Cabinet confidences and whether it should be withheld in the public interest. This limit on judicial power is inconsistent with the separation of powers. Likewise, the *ATIA* deprives the information commissioner and the Federal Court of the power to inspect Cabinet confidences. The absence of meaningful oversight

and review and the overbreadth of the regime give rise to a significant risk of abuse of power.

The objective of this book is to assess whether the doctrine of Cabinet secrecy remains legitimate in an era where government openness and transparency have become fundamental public values. In addition, the book will examine whether the legal rules adopted to protect Cabinet secrecy at the federal level in Canada are consistent with the rule of law and the provisions of the Constitution. Finally, it will make policy recommendations to improve the statutory regime. The literature on Cabinet secrecy is limited: as a subject of academic study, it is under-researched and under-theorized. This volume is the first comprehensive study of Cabinet secrecy in the Commonwealth. It seeks to open new avenues of research for the academic community and to assist public officials, lawyers, and judges in applying Cabinet immunity. Ultimately, the book should foster a more precise protection of Cabinet secrecy and greater government openness.

The book's four chapters will examine Cabinet secrecy from a political, legal, theoretical, and comparative perspective. [Chapter 1](#) will focus on the political protection of Cabinet secrecy. Cabinet is, first and foremost, a political institution; as such, it functions according to political rules known as "constitutional conventions." While conventions bind political actors, they are not enforced by the courts. In the system of responsible government, conventions have historically protected the privacy of Cabinet proceedings. However, in an era where openness and transparency have become fundamental public values, Canadians look upon Cabinet secrecy with suspicion. The justification for and scope of Cabinet secrecy are contentious. The debate about the contemporary relevance of Cabinet secrecy raises two important questions: Why is Cabinet secrecy deemed essential to the proper functioning of Canada's system of government, and what are the limits to Cabinet secrecy?

The first part of [Chapter 1](#) will outline the political justification for Cabinet secrecy based in convention. It will argue that Cabinet secrecy fosters the candour of ministerial discussions, maintains the efficiency of the collective decision-making process, and enables ministers to remain united in public no matter what disagreements they may have in private. Cabinet secrecy also ensures that Cabinet documents created

under one political party do not fall into the hands of its opponents after a change of government. Forcing ministers to settle their policy differences in public or to disclose Cabinet documents prematurely would be counterproductive. Such drastic measures would not bolster government openness and transparency; rather, they would undermine these fundamental public values, because ministerial discussions would likely move to a different, private forum and Cabinet documents would probably cease to exist. Canada's national historical record would suffer as a result.

The second part of [Chapter 1](#) will identify the political limits to Cabinet secrecy based in convention. It will demonstrate that, although Cabinet secrecy is essential, it cannot be absolute. Political actors accept that Cabinet secrets are not all equally sensitive: information that reveals the personal views voiced by ministers when deliberating on government policy and action (core secrets) deserves more protection than the factual and background information (non-core secrets) underpinning Cabinet decisions. In addition, it is well established that Cabinet secrets become less sensitive with the passage of time, until they are only of historical interest, as evidenced by the rule allowing former ministers to reveal Cabinet secrets in their political memoirs. Finally, political actors recognize that the public interest may justify exceptions to Cabinet secrecy in some cases, especially when credible allegations of misconduct, mismanagement, or criminal wrongdoing are made against public officials. This part of the chapter will establish that, properly construed and applied, Cabinet secrecy remains legitimate.

[Chapter 2](#) will focus on the legal protection of Cabinet secrecy under the common law in the United Kingdom, Australia, New Zealand, and Canada at the provincial level. Given their political nature, constitutional conventions cannot be relied on to prevent disclosure of Cabinet secrets in legal proceedings. The courts are responsible for enforcing legal rules, not political ones. However, nothing prevents the courts from relying on the rationale supporting a convention to extend the scope of a legal doctrine under the common law. This is what happened when the courts extended the public interest immunity (PII) doctrine to Cabinet secrets. Pursuant to the PII doctrine, the government can object to the production of sensitive information on the basis of the public interest.

Yet, when such information is relevant to the fair adjudication of legal rights, a tension arises between two competing aspects of the public interest: the interest of justice and the interest of good government. This tension raises two questions of great constitutional importance: Who should decide which aspect of the public interest prevails – the government or the courts – and how should that decision be made?

The first part of [Chapter 2](#) will review the historical evolution of the PII doctrine. It will show that, for a brief period between 1942 and 1968, the English courts treated PII as an absolute immunity, thus enabling ministers to abuse the doctrine.³⁶ In 1968, in *Conway v. Rimmer*, the Judicial Committee of the House of Lords restored the courts' power to inspect government documents and order their production in the public interest.³⁷ This part of the chapter will submit that, based on the rule of law and the separation of powers, the law lords reached the correct conclusion. Because of their greater independence and impartiality, judges are better placed than ministers to fairly adjudicate PII claims, especially when the government is a party to the proceedings. The admissibility of evidence in litigation is a question for judges, not ministers. No class of government secrets, not even Cabinet secrets, should be exempt from judicial review.³⁸ While these are now consensus principles, the level of deference afforded to Cabinet immunity claims, and the way in which these claims are assessed, is inconsistent across Westminster jurisdictions.³⁹ The various approaches judges take to assess Cabinet immunity claims are unsatisfactory, as they unduly favour either the interest of justice or the interest of good government.

The second part of [Chapter 2](#) will attempt to fix this shortcoming by proposing a new “rational,” or “balanced,” approach for assessing Cabinet immunity claims. The proposed approach would first narrow the standard of discovery to prevent legal disputes over the production of documents that are not truly relevant to the fair disposition of a case. It would then impose on the government the onus of justifying why *prima facie* relevant documents should be withheld in litigation. The key part of the proposed approach would be a cost-benefit analysis, by which judges assess the documents' “degree of relevance” and “degree of injury” in a more methodical manner. Finally, the new approach would recognize a judicial duty to minimize the degree of injury when production is

ordered. This part of the chapter will contend that the proposed approach would bolster predictability, certainty, and transparency in the assessment of Cabinet immunity claims and foster a proper balance between the interest of justice and the interest of good government.

[Chapter 3](#) will focus on the legal protection of Cabinet secrecy under statute law in Canada. Among the Westminster jurisdictions studied in this book (the United Kingdom, Australia, New Zealand, and Canada), the federal jurisdiction in Canada is the only one that has enacted a near-absolute immunity for Cabinet confidences. In response to the courts' readiness to inspect and order the production of government documents, Parliament adopted a statutory regime to override the common law, first in 1970⁴⁰ and again in 1982.⁴¹ As previously mentioned, section 39 of the *CEA* deprives judges of the power to inspect Cabinet confidences and order their production in litigation. Furthermore, section 69 of the *ATIA* excludes Cabinet confidences from the scope of the access-to-information regime, thus putting them outside the reach of the information commissioner and the Federal Court. These provisions shield Cabinet confidences for twenty years. In this context, two specific questions will be addressed: Why has Parliament adopted these draconian provisions, and how have they been interpreted and applied since they were proclaimed into force?

The first part of [Chapter 3](#) will recount how the Liberals retreated, at the eleventh hour, from their promise in the 1980 Throne Speech to abolish the absolute immunity for Cabinet confidences.⁴² This change was made at the direction of Prime Minister Pierre Elliott Trudeau following a string of events that led him to believe that judges could not be trusted to properly handle Cabinet immunity claims. Although this last-minute change to the proposed legislation, which led to the enactment of section 39 of the *CEA* and section 69 of the *ATIA*, was strongly condemned by the opposition parties, none of them have since fixed these controversial provisions while they have held power. This part will show how strange it was that Trudeau, the prime minister who gave unprecedented powers to the courts through the *Canadian Charter of Rights and Freedoms*⁴³ and enabled them to review PII claims pertaining to international relations, national defence, and national security, would not trust them with Cabinet confidences.

The second part of [Chapter 3](#) will demonstrate that the scope of Cabinet immunity under the statutory regime is overbroad and leaves very little room for judicial review of such claims. It will argue that the government has taken advantage of the indeterminacy of the term “Cabinet confidence” and the open-ended nature of section 39 of the *CEA* and section 69 of the *ATIA* to broaden the scope of Cabinet secrecy beyond the level of protection afforded to this kind of information by constitutional conventions and the common law. Moreover, by making administrative changes to the Cabinet Paper System, the executive has narrowed the scope of a crucial exception to Cabinet immunity: the “discussion paper exception.”⁴⁴ This exception was intended to provide some transparency to the public by allowing factual and background information to be disclosed once the underlying Cabinet decision had been made and announced. These problems are made worse by the fact that only a very weak form of judicial review is available for Cabinet immunity claims, which makes challenging them quite difficult in practice.

[Chapter 4](#) will focus on the theoretical problems resulting from the near-absolute immunity granted to federal Cabinet confidences in Canada. Over the years, litigants have tried time and again to challenge the constitutionality of section 39 of the *CEA*, based on unwritten constitutional principles,⁴⁵ the division of powers,⁴⁶ and fundamental rights and freedoms.⁴⁷ In 2002, in *Babcock v. Canada (Attorney General)*, the Supreme Court of Canada ended the debate by holding that section 39 did not offend the rule of law or the provisions of the Constitution.⁴⁸ The Supreme Court concluded that section 39 did not fundamentally alter the relationship between the executive and judicial branches of the state, as judges could review Cabinet immunity claims in very limited circumstances. This conclusion contradicts a remark the Supreme Court made when dealing with Cabinet immunity under the common law in *Carey v. Ontario*.⁴⁹ [Chapter 4](#) will revisit the Supreme Court’s controversial decision in *Babcock* and challenge its reasoning. Two questions will be addressed: Did the Supreme Court articulate a meaningful conception of the rule of law, and is the statutory regime truly consistent with the rule of law and the provisions of the Constitution?

The first part of [Chapter 4](#) will show that the Supreme Court of Canada has adopted a very thin conception of the rule of law in its

decisions so far.⁵⁰ In this conception, a legal rule is valid if it has been adopted by the proper authority using the proper procedure. This conception of the rule of law is of limited use as a normative framework to assess the legality of statutory provisions such as section 39 of the *CEA*, as it does not impose any meaningful constraints on legislative action. Consequently, the chapter will turn to legal scholar and philosopher David Dyzenhaus's "theory of law as a culture of justification," which emphasizes the requirements of fairness, transparency, and accountability.⁵¹ This part of the chapter will contend that the theory of law as a culture of justification provides a better normative framework for assessing legislation because it imposes meaningful constraints on the state, which, in turn, illuminate the flaws of section 39. Moreover, this theory is compatible with the rational approach set out in [Chapter 2](#). Under this theory, an executive decision to suppress relevant evidence in litigation should meet two basic requirements: it must be made by an independent and impartial decision-maker following a fair process, and it must be subject to meaningful judicial review.

The second part of [Chapter 4](#) will argue that section 39 of the *CEA* violates these basic requirements. The decision-making process established by Parliament under section 39 is procedurally unfair because those with the power to suppress Cabinet confidences (namely, ministers and the clerk of the Privy Council) lack the requisite independence and impartiality to do so. The unfairness of the process is aggravated by the fact that the decision-maker is not required to explain why Cabinet confidences should be protected in the public interest under the specific circumstances of a given case. This breach of the duty to act fairly is at odds with the theory of law as a culture of justification and paragraph 2(e) of the *Canadian Bill of Rights*.⁵² In addition, section 39 infringes the core, or inherent, jurisdiction and powers of provincial superior courts, as it deprives them of the authority, first, to control the admissibility of evidence in litigation and, second, to review the legality of executive action. This infringement is inconsistent with the theory of law as a culture of justification and the separation of powers that should prevail pursuant to section 96 of the *Constitution Act, 1867*.⁵³ For these reasons, the second part of this chapter will submit that section 39 is an unlawful

privative clause – a form of “legal black hole” – that offends the rule of law and the provisions of the Constitution.

Finally, the conclusion of the book will provide policy recommendations to improve the federal statutory regime. The aim is to design a system that can protect Cabinet secrets in accordance with the rule of law and the provisions of the Constitution. The recommendations will address the issues identified in the preceding chapters and incorporate best practices from the United Kingdom, Australia, New Zealand, and Canada at the provincial level. In addition, they will take into account the various reports prepared by parliamentary committees, information commissioners, and government task forces on the reform of Cabinet confidences. From a normative perspective, the scope of Cabinet immunity should be proportional to its objective, and Cabinet immunity claims should be subject to meaningful oversight and review. The law should maximize government transparency and accountability while affording sufficient protection to Cabinet proceedings. The key questions are as follows: What measures should be taken to narrow the scope of Cabinet immunity, and which institutions should have the mandate to review the legality of such claims?

The conclusion will set out four measures to meaningfully narrow the scope of Cabinet immunity without compromising the proper functioning of Canada’s system of government. First, section 39 of the *CEA* and section 69 of the *ATIA* should protect Cabinet confidences based on an “injury test” rather than a “class test.” In line with constitutional conventions and the common law, Cabinet confidences should be withheld only where their disclosure would injure the convention of ministerial responsibility, the candour of Cabinet discussion, or the efficiency of the Cabinet decision-making process. Second, sections 39 and 69 should include an explicit “public interest override.” Indeed, Cabinet immunity should be claimed only when the public interest in non-disclosure outweighs the public interest in disclosure. The issue is not only whether disclosing Cabinet confidences would be injurious; it is also whether the cost of disclosure outweighs the benefit. Third, sections 39 and 69 should clearly state that the factual and background information supporting Cabinet decisions will be made public once the decision has been made and announced. To this end, Cabinet documents

should be formatted in a way that enables public officials to sever ministerial views and recommendations from factual and background information. Fourth, the maximum period during which Cabinet immunity can be claimed should correspond to the expected duration of a minister's political career.

The conclusion will also present two measures to ensure that Cabinet immunity claims are subject to meaningful oversight and review. First, in the context of litigation, provincial superior courts and the Federal Court should have the power to inspect Cabinet confidences, assess the competing aspects of the public interest, and order disclosure of these confidences. In addition, to ensure that judges assess Cabinet immunity claims in a methodical manner, Parliament should consider entrenching in section 39 of the *CEA* the rational approach outlined in [Chapter 2](#). Second, under the access-to-information regime, the information commissioner and the Federal Court should have the power to inspect Cabinet confidences to ensure that public officials are not abusing Cabinet immunity. The Federal Court should also have the power to order the disclosure of Cabinet confidences where the immunity has been improperly claimed.

For Cabinet secrecy to remain legitimate, the doctrine's function and importance must be properly explained and understood. However, demystifying Cabinet secrecy will not be enough to maintain its legitimacy: the doctrine must be reformed to ensure that the government applies it reasonably and in a manner that is consistent with the Constitution and best practices in comparable jurisdictions. Cabinet secrecy must, in short, be reconciled with the rule of law. In essence, that is what this book seeks to accomplish.

© UBC Press 2021

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without prior written permission of the publisher.

Library and Archives Canada Cataloguing in Publication

Title: Behind closed doors : the law and politics of Cabinet secrecy / Yan Campagnolo.

Names: Campagnolo, Yan, author.

Description: Includes bibliographical references and index.

Identifiers: Canadiana (print) 20210264799 | Canadiana (ebook) 20210264896 | ISBN 9780774867085 (hardcover) | ISBN 9780774867092 (softcover) | ISBN 9780774867108 (PDF) | ISBN 9780774867115 (EPUB)

Subjects: LCSH: Executive privilege (Government information) – Commonwealth countries. | LCSH: Official secrets – Commonwealth countries. | LCSH: Comparative government.

Classification: LCC JF1525.S4 C36 2021 | DDC 352.23/5 – dc23

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Awards to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada.

Set in Myriad and Sabon by Apex CoVantage, LLC

Copy editor: Stacy Belden

Proofreader: Judith Earnshaw

Indexer: Christine Jacobs

Cover designer: David Drummond

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

www.ubcpres.ca