SCC File No.: 40078

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

ATTORNEY GENERAL FOR ONTARIO

APPELLANT

-and-

INFORMATION AND PRIVACY COMMISSIONER and CANADIAN BROADCASTING CORPORATION

RESPONDENTS

-and-

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INTERVENERS

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF ALBERTA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

A. Overview

1. Cabinet confidence is a current and pressing issue across Canada, including in Alberta. This Court's decisions in *Babcock* and in *Carey* recognize that deference is due under the Constitution to the executive branch, particularly when it is exercising its political decision-making role. Cabinet confidences ought to be disclosed only when necessary and where the disclosure does not offend the public interest in the proper functioning of government. The Attorney General of Alberta ("**AGAB**") submits that this must be integral to any interpretation of the Cabinet confidence exception at issue in this appeal.

2. This Court's decision will shape the law that applies to the communication of information at the highest levels of governments, both provincial and federal.

B. Statement of Facts

3. The AGAB adopts the facts as set out in the Appellant's factum.

PART II –QUESTION IN ISSUE

4. This factum of the AGAB is directed solely at the principles governing the interpretation of section 12 of the *Freedom of Information and Protection of Privacy Act*,[1] (the "**Cabinet Confidence Exception**").

5. The AGAB takes no position on the outcome of the appeal, however, it submits that the Cabinet Confidence Exception should be interpreted in a broad manner that furthers its purpose of fostering the proper functioning of government. In particular, the AGAB submits that the Cabinet Confidence Exception:

   (a) is not dependent on matters of form, such as whether the deliberations are oral or written, or occur inside or outside a cabinet meeting; and

   (b) extends to protect the subject matter of Cabinet discussions.

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[1] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31 ("***Ontario's FOIPPA***").

PART III– ARGUMENT

A. The Role of Cabinet

6. A fundamental principle of the Westminster system of government is the principle of "responsible government". While legally, the executive power is vested in the King as represented by the Governor General (or Lieutenant Governors), by convention, the executive power is exercised by the Governor General in accordance with the advice of current ministers, i.e., the government.[2] As a collective, the First Minister and their Ministers comprise "Cabinet", which Hogg describes as being, "in most matters the supreme executive authority"[3].

7. Justice Lauwers, in dissent in the ONCA Decision noted:

> In functional terms, Cabinet is to be understood as "a forum, presided over by the Prime Minister, where Ministers meet to propose, debate and decide government policy and action." It is "the place where Ministers decide, as a group, how the executive power should be exercised."[4]

8. Justice Lauwers further noted that candour, solidarity, and confidentiality were "building blocks" that were "essential for Cabinet to able to function effectively as a political body nested in Parliament or in the Legislative Assembly:"[5]

> Cabinet functionality depends on its members being free to communicate with complete candour. […] Cabinet could not carry out its policy-making and policy-vetting responsibilities if its members were inhibited in their debate by the prospect of public disclosure.
>
> As for solidarity, all ministers accept responsibility collectively for Cabinet decisions and must resign or expect dismissal if they publicly dissent. Ministers could not credibly offer public support and positive explanations for policy decisions they opposed in Cabinet deliberations were that opposition to become publicly known.
>
> Confidentiality links candour and solidarity. The confidentiality of Cabinet's deliberations enables frank discussion and dissent during its

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[2] *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2022 ONCA 74 ("**ONCA Decision**") at paras. 113-115 (footnotes omitted).

[3] Peter W. Hogg, *Constitutional Law in Canada*, loose-leaf, 5th ed. (Toronto: Thomson Reuters Canada Ltd., 2007) ("**Hogg**"), at § 9.5 as cited by Lauwers, JA in ONCA Decision at para. 115.

[4] ONCA Decision at para. 127 (footnotes omitted).

[5] ONCA Decision at para. 128.

> meetings while preserving public-facing collective responsibility for its decisions. These three essential constitutional conventions underwrite the protected sphere in Cabinet within which government policy can be developed and debated, as the cases recognize.[6]

B. Cabinet Secrecy

9. Given its role as the entity that directs government policy and decision-making, Cabinet must have a zone of privacy within which to deliberate. In his article, *The Political Legitimacy of Cabinet Secrecy*, Professor Yan Campagnolo describes the secrecy convention as "one of the cornerstones of the Westminster system of government" and further writes:

> It is widely accepted, even in Western democracies, that the "Government cannot function completely in the open"; it must be able to protect the confidential nature of its decision-making process, especially at the highest level of the State.[7]

10. While these comments relate to the convention of Cabinet secrecy, Courts across the common law jurisdictions have given effect to such protections by recognizing the concept of "public interest immunity".

C. Public Interest Immunity

11. In *Carey*[8], this Court considered public interest immunity in the context of the disclosure of Cabinet documents in civil proceedings. The Court observed that it was appropriate to shift the emphasis from the public interest (in keeping certain information regarding government activities confidential) to the interest in providing litigants all evidence that may be of assistance to the fair disposition of issues arising in litigation. This was due to the expansion of state activities from the political sphere to increased government action in the commercial sphere.

12. Justice La Forest, writing for the Court, considered two rationales for non-disclosure of Cabinet documents: (1) candour; and (2) political repercussions.

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[6] ONCA Decision at paras. 128-131.

[7] Yan Campagnolo, "The Political Legitimacy of Cabinet Secrecy" (2017) 51 RJTUM 51 ("**Campagnolo**") at p. 61 (footnotes omitted).

[8] *Carey v Ontario*, 1986 CanLII 7 (SCC), [1986] 2 SCR 637 ("***Carey***").

13. First, La Forest J. noted the concern that the disclosure of Cabinet document "would lead to a decrease in completeness, in candour and in frankness of such documents if it were known that they could be produced in litigation and this in turn would detrimentally affect government policy and the public interest."[9] However, La Forest J. found that the importance of the candour argument was easy to exaggerate and doubted that the "candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation".[10]

14. Second, the Court considered the "political repercussions that might result if Cabinet minutes and the like were disclosed before such time as they were of historical interest only".[11] In considering this rationale, the Court quoted Lord Reid, who stated:

> […] To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. […].[12]

15. While the Court agreed with this concern, it disagreed with the "absolute character of the protection accorded [Cabinet's] deliberations or policy formulation without regard to the subject matter, to whether they are contemporary or no longer of public interest, or to the importance of their revelation for the purpose of litigation."[13]

16. While this Court in *Carey* decided that a blanket prohibition of disclosure of Cabinet documents as a class was no longer appropriate, it recognized that the disclosure of Cabinet discussions and planning at the policy development stage, *or other circumstances when there is keen public interest in the subject matter*, might seriously inhibit the proper functioning of government.

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[9] *Carey* at para. 44.

[10] *Carey* at para. 46.

[11] *Carey* at para. 49.

[12] *Carey* at para. 49.

[13] *Carey* at para. 50.

17. This Court, in *Babcock*, recognized that Cabinet confidentiality is essential to good government. McLachlin CJ, writing for the majority, noted:

> **The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions.** The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny: […] If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. The rationale for recognizing and protecting Cabinet confidences is well summarized by the views of Lord Salisbury in the Report of the Committee of Privy Counsellors on Ministerial Memoirs (January 1976), at p. 13:
>
> > A Cabinet discussion was not the occasion for the deliverance of considered judgements but an opportunity for the pursuit of practical conclusions. **It could only be made completely effective for this purpose if the flow of suggestions which accompanied it attained the freedom and fulness which belong to private conversations — members must feel themselves untrammelled by any consideration of consistency with the past or self-justification in the future. . ..** The first rule of Cabinet conduct, he used to declare, was that no member should ever "Hansardise" another, — ever compare his present contribution to the common fund of counsel with a previously expressed opinion. . ..
>
> The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. […] **Thus, ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making.** [Emphasis added][14]

18. Public interest immunity must be considered through the lens of its overall purpose: maintaining the secrecy of Cabinet deliberations and respecting the confidentiality of Cabinet decision-making.

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[14] *Babcock v Canada (Attorney General)*, 2002 SCC 57 ("***Babcock***") at para. 18.

D. Freedom of information legislation balances competing interests

19. There can be no doubt that the purpose of freedom of information legislation in Canada is to provide a right of access to records held by public bodies. However, this right to access is not absolute. It is specifically limited by exceptions enumerated by legislation.

20. *Ontario's FOIPPA* is alive to the problems posed by revealing the subject matter of Cabinet discussions. Section 12(1) prohibits the disclosure of a record "where the disclosure would reveal the substance of deliberations of the Executive Council or its committees".[15] Subparagraphs (a) to (f) of s. 12(1) list certain records to which the prohibition applies, including an "agenda".

21. In the ONCA Decision, Justice Lauwers noted that the "purpose of [s. 12(1)] is to establish a **robust and well-protected sphere of confidentiality** within which Cabinet can function effectively, **one that is consistent with the established conventions and traditions of Cabinet government**." [Emphasis added][16]

22. As further noted by Justice Lauwers, "[g]ood constitutional order requires at least a presumption that the legislature did not intend to abrogate any constitutional conventions absent a clear signal to the contrary".[17]

23. The overall goal of freedom of information legislation is to facilitate democracy and improve the workings of government. Therefore, the AGAB submits that any interpretation of the Cabinet confidentiality exception must be broad and purposive, with the view of fostering the proper functioning of government. Consequently, it should not favour form over substance and it must protect the subject matter of Cabinet deliberations.

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[15] *Ontario's FOIPPA*, s. 12(1).

[16] ONCA Decision at para. 93.

[17] ONCA Decision at para. 107. See also *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 ("***BC Judges***") per Karakatsanis, J. at para. 98: "As with any common law rule, Parliament or a legislature may limit or do away with public interest immunity, provided it clearly expresses its intention to do so".

E. A broad and purposive interpretation focuses on substance over form

24. Placing the focus of the analysis on the substance of the information at issue affects other aspects of the interpretation of the Cabinet Confidence Exception. In this case, the information in question consisted of the Premier's "policy priorities… advice, instructions and guidance".[18] This was set out in mandate letters and placed on a Cabinet agenda, distributed to Cabinet members at a Cabinet meeting.

25. Section 12(1) of *Ontario's FOIPPA* expressly includes an "agenda" as a record that would reveal the substance of deliberations of Executive Council if disclosed.[19] Nonetheless, the Ontario Information and Privacy Commissioner (the "**IPC**") held, without consideration of the practical impacts on government, that the subject matter of deliberations could not be equated with a Cabinet agenda item and did not qualify as the substance of deliberations.[20]

26. The fact that this information took the form of mandate letters, rather than oral communications from the Premier to the relevant ministers in the Cabinet room, appears to have impacted on the decisions below. In the AGAB's submission, the form by which that information is communicated – in writing or orally – is of little or no relevance to the analysis. Focusing on the vehicle by which Cabinet communicates does not answer the question of what Cabinet is communicating. Mandate letters are only one way that Cabinet communicates. Any record that conveys the subject and the substance of Cabinet deliberations should be protected.

27. Further, an artificial distinction should not be drawn between the First Minister's deliberations and those of their cabinet. Such a distinction does not consider the purpose of s. 12 of *Ontario's FOIPPA* or how Cabinet functions.

28. Justice Lauwers cautioned that "[d]rawing a hard line between the Premier's deliberative process and that of the rest of Cabinet would not respect the way Cabinet functions because it would

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[18] ONCA Decision at para. 60.

[19] *Ontario's FOIPPA*, s. 12(1).

[20] *Cabinet Office (Re)*, 2019 CanLII 76037 ("**IPC Decision**") at para. 99.

interfere with 'the subtle interplay of formal and informal power [that] maintains and animates an effective institutional separation between the legislature and the executive.''[21]

29. A purposive and functional approach to the Cabinet Confidence Exception requires viewing Cabinet as a group of individual members, not a place. Cabinet consists of the senior executive: the Premier and the Premier's chosen ministers. This is reflected in s. 12 of *Ontario's FOIPPA* and its reference to records "…reflecting consultation among ministers of the Crown…"[22]

30. Whether a Premier's or minister's formulation of Cabinet policy occurs inside or outside the Cabinet meeting room should not be determinative of whether the information is, in fact, a Cabinet confidence.

F. A broad and purposive interpretation must protect the subject matter of Cabinet deliberations

31. While the subject matter or the topic of the deliberations, on its face, may not reveal the substance of deliberation, inferences can be drawn from the subject and the surrounding circumstances. The AGAB submits that, necessarily, the *subject matter* of deliberations reveals the *substance* of deliberations. This must be recognized when interpreting and applying s. 12(1) of *Ontario's FOIPPA*.

Disclosing the subject of deliberations creates risk to candour and risk of ill-informed criticism

32. Disclosure or release of any record containing, referencing, or reflecting the subject matters before Cabinet would, on its own, often be sufficient to create ill-informed conclusions. There are several hypothetical examples of subject matters for discussion that can readily be offered in support of this position, including abortion, election dates, and provincial sales taxes.[23]

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[21] ONCA Decision at para. 178.

[22] *Ontario's FOIPPA*, s. 12.

[23] A case currently before the Alberta Courts, *Energy (Re)*, Order F2022-20, 2022 CanLII 29391 (AB OPIC) is a more concrete example. That case deals with an access for information request involving the decision to rescind a policy relating to restrictions on coal exploration and development in Alberta.

33. The potential for ill-informed conclusions arising from the release of the subject matters of the deliberations, even if the deliberations themselves are not released, also strikes right to the candour concern. Cabinet must be free to discuss (or not) any issues that are required for good governance. Disclosure of the topic of discussion could have as chilling an effect over candour as disclosure of the content of those discussions. Cabinet members might not only be reluctant to speak freely about matters; Cabinet might be reluctant to allow issues to be spoken to at all.

34. In the absence of clear language that abrogates the common law of public interest immunity, s. 12(1) of *Ontario's FOIPPA*, and, in particular, "substance of deliberations" should be interpreted and applied in such a way to give effect to the disclosure concerns identified by this Court in *Carey*, *Babcock*, and *BC Judges*.

35. It should further be recognized that the landscape in which *Carey* was decided has changed significantly. Consequently, the risk to Cabinet's candour stemming from the off chance of litigation occurring on a specific issue may be different from the risk to Cabinet's candour stemming from the proliferation and routine occurrence of access for information requests today vs then.

The legislator has given guidance as to when disclosure of Cabinet information is harmless

36. Finally, the legislature has turned its mind to when the disclosure of Cabinet information would no longer pose a threat to the proper workings of government. Section 12(2) of *Ontario's FOIPPA* provides that the exemption does not apply to records that are more than twenty years old (s. 12(2)(a)) or to records for which consent to access has been given (s. 12(2)(b)).[24]

37. This is how the legislature has chosen to balance the right of access with the importance of the Cabinet secrecy. These are factors that must be considered when engaging in a broad and purposive interpretation and application of the Cabinet Confidence Exception in *Ontario's FOIPPA*.

[24] *Ontario's FOIPPA*, s. 12(2).

G. Conclusion

38. The AGAB submits that any interpretation of the Cabinet Confidence Exception should be purposive with the aim of promoting the effective operation of Cabinet, as intended by the legislator in freedom of information legislation. The scope of the protection provided by the Cabinet Confidence Exception in s. 12 of *Ontario's FOIPPA* has the potential to impact how Cabinet communicates and operates. The operation of Cabinet, in turn, impacts the ability of government to govern effectively.

PART IV– COSTS

39. The AGAB does not seeks costs and asks that costs not be awarded against it.

PART V – ORDER SOUGHT

40. The AGAB does not seek any order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of November, 2022.

Sean P. McDonough | Melissa N. Burkett
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PART VII – TABLE OF AUTHORITIES & LEGISLATION

Case Law:	**Paragraph References**
Babcock v Canada (Attorney General), 2002 SCC 57	17, 34
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