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Supreme Court confirms need for Cabinet secrecy | Sara Blake

By **Sara Blake**

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Law360 Canada (February 5, 2024, 12:16 PM EST) -- I'm not surprised that the Supreme Court of Canada unanimously confirmed the need to respect Cabinet secrecy: *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* 2024 SCC 4. This decision strongly defends and strengthens Cabinet secrecy as an essential constitutional convention.

The circumstances of this case placed the issue centrally at the heart of effective democracy — between the public's need to know the policies of the elected government so that they can hold government to account and the government's need for deliberative secrecy while it develops policy.

A journalist made an access-to-information request for letters written by the premier shortly after his party was elected to form the new government. The letters were addressed to each newly appointed minister identifying the premier's views as to the policy priorities of each ministry. These letters began the policy-development processes for the newly elected government's term in office.

The court began by identifying the competing public interests.

On one side, access to information promotes transparency, accountability and meaningful public participation. Without adequate knowledge of what is going on, legislators and the public cannot hold government to account nor meaningfully contribute to decision making, policy formation, and law making.

On the other side, in our Westminster system of government, the executive requires certain spheres of confidentiality to fulfil its constitutional role. Cabinet confidentiality grants the executive the necessary latitude to govern in an effective, collectively responsible manner. It is essential to good government as it promotes deliberative candour, ministerial solidarity and governmental efficiency by protecting Cabinet's deliberations. Cabinet secrecy is necessary for the stability and legitimacy of our democracy.

The court elaborated, highlighting three rationales for Cabinet secrecy.

First, responsible government is a fundamental principle of our system of government. Government is "responsible" in that the executive is accountable to, and must maintain the confidence of, the legislative assembly. Cabinet ministers are both individually responsible for their own conduct and respective departments, and collectively responsible for government policy and action. The court explained that, in our constitutional democracy, the confidentiality of Cabinet deliberations is a precondition to responsible government because it enables collective ministerial responsibility.

Second, the court explained that collective ministerial responsibility requires that ministers be able to speak freely when deliberating without fear that what they say might be subject to public scrutiny. This is necessary so ministers do not censor themselves in policy debate and so ministers can stand together in public, and be held responsible as a whole, once a policy decision has been made and announced. At base, Cabinet confidentiality promotes executive accountability by permitting private disagreement and candour in ministerial deliberations, despite public solidarity.

Third, the convention of Cabinet confidentiality promotes the efficiency of the collective decision-making process. Thus, Cabinet secrecy promotes candour, solidarity and efficiency, all in aid of effective government. The policymaking process includes false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. The court noted that exposure of policy priorities at an early stage of the deliberative process to journalists or political opponents is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness. This rationale is supported by an oft-cited quote from the House of Lords:

> The premature disclosure of Cabinet secrets "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."

The court elaborated on the deliberative process of policy development at the Cabinet level. To begin, Cabinet's deliberative process consists of discussion, consultation, and policy formulation among the premier, individual ministers, and Cabinet as a whole — informed by the advice of civil servants. The premier is the first minister who, as head of Cabinet, enjoys extensive powers within Cabinet's deliberative process by convention. In many regards, the role and activities of the premier are inseparable from Cabinet and its deliberations. First ministers preside over Cabinet, set Cabinet agendas, determine Cabinet's membership and its internal structure (e.g., the number, nature, and membership of Cabinet committees), set Cabinet procedures, and have the right to identify the consensus and determine what Cabinet has decided. The process is dynamic, fluid and continues to evolve as leadership changes hands. Cabinet enjoys tremendous flexibility in terms of its organization, its processes and its composition. The decision-making process in Cabinet extends beyond formal meetings of Cabinet or its committees, and encompasses one-on-one conversations in the corridors, in the first minister's office, over the phone or however and wherever they may take place.

The court ruled that the policy priorities communicated to ministers by the premier's letters at the outset of governance are the initiation of Cabinet's deliberative process, and are subject to change. The court found that many if not most of the policy priorities would require decisions from Cabinet, both as to their substance and as to how they should be communicated to the public. Ministers may seek to persuade the premier and the rest of Cabinet that priorities should be added, abandoned or approached in a different way. Moreover, the premier may revise priorities at any point throughout the process — whether due to Cabinet colleagues' views, advice from civil servants, or events and changing circumstances.

The court concluded that the constitutional convention allows Cabinet to control both when and how to communicate its policy choices to the public.

The court compared Cabinet confidentiality to deliberative secrecy of judges. In my view, this comparison is apt given that the rationales for secrecy are similar. In both circumstances, analyses and discussions may go in many directions before a decision is made. The common law recognizes a need for zones of confidentiality to allow them to think and discuss issues and options freely so that they can make a decision or policy choice without exposing their rejected ideas to undeserved public criticism.

Just as the public is entitled to know a court's reasons for its published decisions, the public is entitled to know the government's rationale for its announced policy choices.

But to publicly expose ideas that were discussed but ultimately rejected would unfairly expose ministers to unwarranted criticism by those with an axe to grind or who seek to use the rejected ideas for public entertainment. These uses serve no public purpose but, rather, have the effect of diminishing public respect for government. As the court said, effective government requires that ministers be free to exchange ideas on questions of policy without public exposure.

In this appeal, the parties had agreed that the standard of review was reasonableness. The court said

it was not bound by the parties' agreement but did not determine the standard of review, saying that, on either standard, the interpretation by the Information and Privacy Commissioner of the statutory exemption for Cabinet records from access to information was not justified.

Justice Suzanne Côté, in a concurring opinion, ruled that the standard of correctness review should be applied because the scope of Cabinet privilege is a general question of law of central importance to the legal system as a whole. She noted that the correctness standard applied to other common law legal concepts, such as solicitor-client privilege and parliamentary privilege, and ruled that the same standard should be applied to Cabinet privilege because, like parliamentary privilege, it is a constitutional convention. She ruled that the commissioner's interpretation of the exemption for Cabinet records was incorrect for the reasons given by the majority.

I agree with Justice Côté that the standard of review of correctness should have been applied and, in fact, was applied by the majority.

Sara Blake is the author of Administrative Law in Canada, 7th edition, LexisNexis Canada. Her practice is restricted to clients who exercise statutory and regulatory powers.

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