The Political Legitimacy of Cabinet Secrecy

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La légitimité politique du secret ministériel

La legitimidad política del secreto ministerial

A legitimidade política do segredo ministerial

内阁机密的政治正当性

Résumé

Dans le système de gouvernement responsable de type Westminster, les conventions constitutionnelles protègent traditionnellement le secret des délibérations du Cabinet. Dans l'ère moderne, où l'ouverture et la transparence sont devenues des valeurs fondamentales, le secret ministériel est désormais perçu avec scepticisme. La justification et la portée de la règle font l'objet de controverses. Cet article aborde ce problème en expliquant les raisons pour lesquelles le secret ministériel est, à l'intérieur de certaines limites, essentiel au bon fonctionnement de notre sys-

Abstract

In the Westminster system of responsible government, constitutional conventions have traditionally safeguarded the secrecy of Cabinet proceedings. In the modern era, where openness and transparency have become fundamental values, Cabinet secrecy is now looked upon with suspicion. The justification and scope of Cabinet secrecy remain contentious. The aim of this article is to address this problem by explaining why Cabinet secrecy is, within limits, essential to the proper functioning of our system of government. Based on the rele-

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tème de gouvernement. Sur la base de la doctrine et des précédents pertinents, l'auteur soutient que le secret ministériel favorise la candeur des discussions ministérielles, protège l'efficacité du processus de décision collectif et permet aux ministres de demeurer unis en public, quelle que soit la nature de leurs désaccords en privé. De plus, le secret ministériel protège la confidentialité des documents du Cabinet créés par un gouvernement en empêchant ses opposants politiques d'y avoir accès lorsqu'il y a un changement de gouvernement. Le fait de forcer les ministres à déterminer publiquement leurs orientations politiques, ou à divulguer prématurément leurs documents du Cabinet, ne favoriserait pas l'ouverture et la transparence gouvernementales. Au contraire, une telle approche porterait atteinte à ces valeurs puisque les véritables discussions entre les ministres se déplaceraient vraisemblablement dans un autre forum privé et les documents du Cabinet cesseraient probablement d'être produits. Cela aurait des effets néfastes sur la qualité des archives historiques nationales. Néanmoins, en dépit de son importance, le secret ministériel n'est pas une règle absolue. Les acteurs politiques reconnaissent que le degré de sensibilité des secrets du Cabinet varie et qu'il diminue avec le passage du temps, jusqu'à ce que ceux-ci deviennent d'intérêt purement historique. Ils acceptent également que la règle puisse faire l'objet d'exceptions lorsque l'intérêt public l'exige, par exemple lorsque de sérieuses allégations de comportement illégal visent des officiers de l'État. Dans la mesure où la règle est adéquatement interprétée et appliquée, l'auteur soutient que le secret ministériel est politiquement légitime au Canada.

vant literature and precedents, it is argued that Cabinet secrecy fosters the candour of ministerial discussions, protects the efficiency of the collective decision-making process, and enables Ministers to remain united in public, whatever disagreements they may have in private. In addition, Cabinet secrecy ensures that the Cabinet documents created by one Ministry do not fall into the hands of its political opponents when there is a change in power. To force Ministers to settle their policy in public, or prematurely publish their Cabinet documents, would not bolster government openness and transparency; it would rather undermine it, as ministerial discussions would likely move underground, and Cabinet documents would probably cease to exist. This would impair the national historical records. Yet, while Cabinet secrecy is an important rule, it is not absolute. Political actors accept that Cabinet secrets are not all equally sensitive and that their degree of sensitivity decreases with the passage of time until they become only of historical interest. They also recognize that the public interest may justify that an exception be made to the rule in some circumstances, for example, when serious allegations of unlawful conduct are made against public officials. It is submitted that, properly construed and applied, Cabinet secrecy is politically legitimate in Canada.

Resumen

En un sistema de gobierno responsable como el de Westminster, las convenciones constitucionales protegen por tradición el secreto de las deliberaciones del gabinete. En la era moderna, en donde la apertura y la transparencia se han convertido en valores fundamentales, el secreto ministerial se observa ahora con escepticismo. La justificación y el alcance de la regla son objeto de controversias. Este artículo aborda este problema al explicar las razones por las cuales el secreto ministerial es, dentro de ciertos límites, esencial para el buen funcionamiento de nuestro sistema de gobierno. Con base en la doctrina y los precedentes pertinentes, el autor afirma que el secreto ministerial favorece discusiones ministeriales abiertas y sin prevenciones, protege la eficacia del proceso colectivo de toma de decisiones y permite a los ministros permanecer unidos frente al público, independientemente de la naturaleza de sus desacuerdos en privado. Además, el secreto ministerial protege la confidencialidad de los documentos del gabinete creados por el Gobierno impidiendo el acceso a sus opositores políticos cuando hay un cambio de Gobierno. El hecho de obligar a los ministros a revelar públicamente sus orientaciones políticas o divulgar prematuramente los documentos del gabinete, no favorecería la apertura ni la transparencia del Gobierno. Por el contrario, tal perspectiva atentaría contra estos valores puesto que las verdaderas discusiones entre los ministros se trasladarían a un recinto privado y los documentos del gabinete cesarían de producirse. Esto tendría efectos adversos en la calidad de los archivos históricos nacionales. Sin embargo, a pesar de su

Resumo

No sistema de Westminster de governo responsável, as convenções constitucionais têm tradicionalmente salvaguardado o segredo das deliberações de Gabinete. Na era moderna, quando abertura e transparência se tornaram valores fundamentais, o segredo ministerial passou a ser visto com suspeita. A justificativa e o escopo do segredo ministerial continuam controversos. O objetivo deste artigo é abordar o problema explicando por que o segredo ministerial é, dentro de certos limites, essencial para o funcionamento apropriado do nosso sistema de governo. Baseado na literatura relevante e em precedentes, argumenta-se que o segredo ministerial favorece a franqueza das discussões ministeriais, protege a eficiência do processo coletivo de tomada de decisões e permite aos ministros permaneceram unidos em público, independentemente de desacordos que tenham tido em privado. Ademais, o segredo ministerial garante que documentos do Gabinete criados por um governo não caiam nas mãos de opositores políticos quando há troca no poder. Forçar ministros a determinarem suas políticas em público ou publicar prematuramente seus documentos de Gabinete não reforçariam a abertura e a transparência governamental; ao contrário, minaria esses valores, já que as discussões ministeriais migrariam para foros privados e os documentos do Gabinete deixariam de existir. O resultado seria que os arquivos históricos nacionais sofreriam. Embora o segredo ministerial seja uma regra importante, não é absoluta. Os atores políticos aceitam que os segredos ministeriais não são todos igualmente sensíveis e que seu nível de sensibilidade

importancia, el secreto ministerial no es una regla absoluta. Los actores políticos reconocen que el grado de sensibilidad de los secretos del gabinete varía y disminuye con el paso del tiempo, hasta que estos adquieren un interés histórico. Estos aceptan igualmente que la regla pueda ser objeto de excepciones cuando el interés público lo requiera, por ejemplo, cuando se hagan acusaciones graves de comportamiento ilegal contra funcionarios estatales. El autor sostiene que el secreto ministerial es legítimo políticamente hablando en Canadá en la medida en que la regla se interprete y aplique correctamente

diminui com a passagem do tempo até que se tornam apenas de interesse histórico. Também reconhecem que o interesse público pode justificar que uma exceção seja feita à regra em certas circunstâncias, por exemplo, quando serias alegações de conduta ilegal são feitas contra agentes públicos. Sustenta-se que, adequadamente interpretado e aplicado, o segredo ministerial é politicamente legitimo no Canada.

摘要

在英国式责任政府体系中，内阁程序的机密性传统上受到宪法惯例的保护。在当代，公开和透明已成为基本价值，内阁机密也因此受到质疑。维持内阁机密的理由和范围依旧存在争议。本文旨在通过解释为何内阁机密在一定限度内对于我们的政府体系正常运行必不可少来探讨这一问题。相关文献和先例认为，内阁机密可以促进内阁讨论的公正性，保障集体决策程序的效率，使得各部长无论私底下有何分歧，对外保持团结一致。此外，内阁机密还能确保某部的内阁文件不会有权力变动而落入政治对手的手中。强迫部长公开确定政策，或贸然公开他们的内阁文件，并不会增强公开性和透明性，反而有损公开和透明，因为这样做的话内阁讨论将被迫转向地下，内阁文件也将不复存。国家历史记录也因此遭殃。可是，尽管内阁机密是一项重要规则，它也不是绝对的。政治家们同意，内阁机密并非具有相同程度的机密性，其机密程度随着时间的推移递减，直到它们仅具有历史价值为止。他们也同意，在某些情况下公共利益可以作为这一规则例外的正当理由，比如，严肃指控针对政府官员的不法行为之时。本文认为，通过恰当的解释和适用，内阁机密在加拿大具有政治上的正当性。

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

In an era where openness and transparency are fundamental values, the ongoing secrecy of Cabinet deliberations and documents is looked upon with suspicion. Why should Cabinet proceedings remain secret in our system of government? Is Cabinet secrecy merely a device enabling public officials to hide relevant information to cover lies and avoid embarrassment? In this article, I take the position that Cabinet secrecy is, within limits, essential to the proper functioning of the Westminster system of responsible government. I will show that two conventions have developed to protect the confidentiality of Cabinet proceedings: the secrecy and the access conventions. The first ensures that the collective decision-making process within the executive branch, in particular the personal views expressed by Ministers when deliberating on government policy and action, remain private. The second ensures that the Cabinet documents created under one political party do not fall into the hands of their opponents. Without these two conventions, our system of government would not work.

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1 The article focuses primarily on the relevant constitutional conventions in Canada, at the federal level, and the United Kingdom. In addition, where appropriate, specific examples are drawn from Canadian provincial jurisdictions, Australia and New Zealand.

2 Geoffrey Marshall & Graeme C. Moodie, *Some Problems of the Constitution* (London: Hutchinson University Library, 1961) at 29.

3 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: MacMillan & Co., 1915) at cxl-cxlvi, 277.

4 Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959) at 136 [Jennings, *Law and Constitution*], cited in *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 888 [*Patriation Reference*].

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

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

I. Conventional Justification for Cabinet Secrecy

What is the "reason" for Cabinet secrecy in the Westminster system of responsible government? What does it seek to protect exactly? Section I will address these questions. It is divided into two subsections, which will examine the justification and scope of the Cabinet secrecy conventions. In the first subsection, I will explain what Cabinet secrecy is meant to protect

and why Cabinet proceedings are deemed confidential. I will set out the three rationales which justify Cabinet secrecy, namely, the candour, the efficiency and the solidarity rationales. In the second subsection, I will review the historical events leading to the establishment of Cabinet secretariats in the United Kingdom and Canada, and the rules that have developed to ensure that the Cabinet documents created under one political party do not fall into the hands of their opponents. I will show that the secrecy convention and the access convention, Canada's two Cabinet secrecy conventions, are of fundamental importance to the system.

A. Secrecy Convention

To properly understand the conventions relating to Cabinet secrecy, it is necessary to first understand the principles underpinning the Westminster system of government. Within this system, one of the most important principles is the principle of responsible government, the idea that the executive branch, the Government, is accountable to the legislative branch, Parliament.[5] This principle was imported through the Preamble to the *Constitution Act, 1867*, which states that Canada has a constitution "similar in principle to that of the United Kingdom."[6] The principle of responsible government has two aspects: individually, Ministers are responsible for their department and their personal conduct; and, collectively, Ministers are responsible for government policy and action. Collective ministerial responsibility, in turn, has three dimensions: the confidence, the solidarity and the secrecy conventions.

First, pursuant to the confidence convention, the Government is subordinated to the will of Parliament. The Prime Minister and the Ministers must collectively maintain the support of the elected House of Parliament, the House of Commons, to remain in power. Without that support, the Government would lose its democratic legitimacy. That is why the person appointed as Prime Minister is usually the leader of the party holding the most seats in the House. If confidence is lost, the Government must resign

5 Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, 2nd ed. (Don Mills, Ont.: Oxford University Press, 2014) at 90.

6 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*]. On the connection between the Preamble and the principle of responsible government, see: Christopher Moore, *1867: How the Fathers Made a Deal* (Toronto: McClelland & Stewart, 1997) at 80-81.

or advise the dissolution of the House to the Sovereign. In other words, Ministers stand or fall as a group. The risk of losing the confidence of the House is obviously more important in minority situations. In majority situations, as a result of party discipline, the Government tends to dominate the House and is not in any significant danger of being defeated.[7]

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

In this context, the Cabinet is a forum, presided over by the Prime Minister, where Ministers meet to propose, debate and decide government policy and action.[11] The Cabinet is the place where Ministers decide, as a group, how the executive power should be exercised. However, the Cabinet, unlike the Privy Council, has no legal existence or power. It is merely an informal advisory body. Jennings rightly states that "[n]either the Cabinet nor the Prime Minister, as such, claims to exercise any powers conferred by law. They take the decisions, but the acts which have legal

7 Ivor Jennings, *Cabinet Government*, 3rd ed. (Cambridge: Cambridge University Press, 1959) at 472-73 [Jennings, *Cabinet Government*].

8 *Constitution Act, 1867*, *supra* note 6, s. 9; *Letters Patent Constituting the Office of the Governor General, 1947*, R.S.C. 1985, App. II, No. 31, s. 2.

9 *Constitution Act, 1867*, *supra* note 6, s. 13.

10 Privy Council members are appointed for life and include current and former Ministers, senior judges, elder statesmen, opposition party leaders, provincial premiers and some members of the royal family. See: Heard, *supra* note 5 at 86.

11 The Prime Minister is the master of the Cabinet: he or she determines the structure of Cabinet committees, their membership and their agenda. See: Canada, Privy Council Office, *Responsibility in the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993) at 24-27; Arnold Heeney, "Cabinet Government in Canada: Some Recent Developments in the Machinery of the Central Executive" (1946) 12:3 Canadian Journal of Economics and Political Science 282 at 282-83.

effect are taken by others – the Queen, the Privy Council, a minister […] and the like."[12] From a legal perspective, the executive power is exercised by the Governor in Council or individual Ministers; however, from a conventional perspective, the Governor in Council or individual Ministers act on the advice of the Cabinet.

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

Third, along with the confidence and solidarity conventions, there is the secrecy convention, which has been described as "one of the cornerstones of the Westminster system of government."[13] It is widely accepted, even in Western democracies, that the "Government cannot function completely in the open"; it must be able to protect the confidential nature of its decision-making process, especially at the highest level of the State.[14] In *Babcock* v. *Canada (Attorney General)*, the Supreme Court of Canada also unanimously recognized that Cabinet secrecy is "essential to good government."[15] I will now review the precedents and the reasons underpinning the secrecy convention.

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

13 Nicholas d'Ombrain, "Cabinet Secrecy" (2004) 47:3 Canadian Public Administration 332 at 333.

14 United Kingdom, Franks Committee, *Report of the Departmental Committee on Section 2 of the Official Secrets Act 1911*, Cmnd 5104 (London: HMSO, 1972) at para. 75.

15 *Babcock* v. *Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 at para. 15 [*Babcock*].

1. Precedents and Scope

a. Precedents

What precedents support the secrecy convention? When they are appointed to the Privy Council, Ministers take an oath pursuant to which they promise to speak their mind freely and to "keep secret all matters committed and revealed to [them] in Council."[16] This duty of secrecy has deep historical roots going back to the time when the Sovereign was an active decision-maker. When the Sovereign made a decision, it would have been improper if any evidence of dissent among his or her advisers came to light, as such evidence would have undermined his or her authority. The oath of Privy Councillor was therefore the primary source of the duty of secrecy and the Sovereign had the power to ensure that Ministers would uphold their oath. Over time, the Constitution evolved into a system of responsible government and the Sovereign stopped being the effective decision-maker. From then on, the affairs of the State were managed by a group of Ministers, who enjoyed the support of the House of Commons. While Ministers continued to be appointed to the Privy Council and swear the oath, the reasons underlying the duty of secrecy expanded. In addition to it being a duty owed to the Sovereign, it became, and now is, a duty that Ministers owe to each other.[17]

The secrecy convention can be observed in the day-to-day workings of government. Since the inception of the Cabinet, Cabinet proceedings have been considered confidential.[18] Ministers have historically been prohibited from taking notes of what happens in the Cabinet room.[19] The application of the secrecy convention can be seen on a daily basis: Ministers do not, in principle, disclose the substance of Cabinet deliberations, nor do they disclose when items will be discussed in the Cabinet room.[20]

16 Order in Council, P.C. 1999-1441 (3 August 1999).

17 A. Lawrence Lowell, *The Government of England*, vol. 1 (New York: MacMillan Company, 1914) at 65-66. See also: Jennings, *Cabinet Government*, *supra* note 7 at 267.

18 Canada, Privy Council Office, *Guidance for Ministers* (Ottawa: Privy Council Office, 1984) at 20.

19 Jennings, *Cabinet Government*, *supra* note 7 at 269-70.

20 In *Attorney General* v. *Jonathan Cape Ltd.*, [1975] 3 All E.R. 484 (Q.B.) at 493 [*Jonathan Cape*], Lord Widgery C.J. noted that "[t]he general understanding of Ministers whilst in office was that information obtained from Cabinet sources was secret and not to be disclosed to outsiders." See also: Stanley de Smith & Rodney

The secrecy convention is applied throughout Westminster States.[21] Its importance was recently affirmed by Prime Minister Justin Trudeau in a document intended to provide guidance to his Ministers:

> We […] share collective responsibility for the actions of the Government. This means that Ministers must be prepared to explain and defend the government's policies and actions before Parliament at all times, and that the government must speak to Parliament and Canadians with a single voice. This in turn requires that Ministers be able to engage in full and frank discussion at Cabinet, with the assurance that what they say will be held in confidence. Ministers are bound to this confidentiality by their oaths as Privy Councillors.[22]

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

b. Scope

What is the scope of the secrecy convention? What would we learn if we were allowed inside the Cabinet room? We would become privy, first

Brazier, *Constitutional and Administrative Law*, 8th ed. (London: Penguin Books, 1998) at 183.

21 Australia, Department of the Prime Minister and Cabinet, *Cabinet Handbook*, 10th ed., 2017 at paras. 26-31, online: <https://www.pmc.gov.au/resource-centre/government/cabinet-handbook-10th edition>; Canada, Privy Council Office, *Open and Accountable Government*, 2015 at v, 2, 27, 34, online: <http://pm.gc.ca/eng/news/2015/11/27/open-and-accountable-government>; New Zealand, Department of the Prime Minister and Cabinet, *Cabinet Manual*, 2017 at paras. 1.49, 5.23, 5.84, online: <https://www.dpmc.govt.nz/our-business-units/cabinet-office/supporting-work-cabinet/cabinet-manual>; United Kingdom, Cabinet Office, *The Cabinet Manual*, 2011 at para. 4.4, online: <https://www.gov.uk/government/publications/cabinet-manual>, and Cabinet Office, *Ministerial Code*, 2016 at para. 2.1, online: <https://www.gov.uk/government/publications/ministerial-code>.

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

and foremost, to information of a political nature, which may be conveniently divided into six categories.[23]

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

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

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

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

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

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[23] See generally: Ward Elcock, "Affidavit", *Attorney General of Canada* v. *Central Cartage Company*, Federal Court of Appeal, Court File No. A-952-88 (24 November 1989) at para. 14 [Elcock, "Affidavit"].

Sixth, we would learn the nature of the compromises that were made to forge a consensus. For example, a decision to finance the building of a factory in an Eastern city may be accepted only if an equal project is developed for a Western city in need of economic development. Consensus is usually forged as a result of some give-and-take.

In this context, the fundamental purpose of the secrecy convention is to protect the collective decision-making process, in particular the personal views expressed by Ministers while deliberating on government policy or action. Nicholas d'Ombrain, an expert on the machinery of government, describes the convention as follows:

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

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

The concept of "Cabinet secrets" can usefully be broken down into two categories, which I will refer to as: core and noncore secrets. "Core secrets" refer to information which reveals the personal views voiced by Ministers when deliberating on government policy and action. This is the heart of what the secrecy convention is intended to protect. In contrast, "noncore secrets" refer to information which relates to the collective decision-making process, but which does not reveal the personal views voiced by Ministers when deliberating on government policy and action. As a matter of convention, core secrets are considered more sensitive than noncore secrets and therefore receive a higher degree of protection. In addition, Cabinet secrets can be found either in official or unofficial

[24] d'Ombrain, *supra* note 13 at 333.

Cabinet documents, depending on whether or not the document in question is part of the formal Cabinet Paper System (such as Cabinet memoranda, agenda, minutes and records of decisions).[25]

2. Public Interest Rationales

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

a. Candour

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

> Originating in a spontaneous gathering of friends, legally unrecognised, [the Cabinet system] had inherited a tradition of freedom and informality which was in his eyes indispensable to its efficiency. A Cabinet discussion was not the occasion for the deliverance of considered judgment but an opportunity for the pursuit of practical conclusions. It could only be made completely effective for this purpose if the flow of suggestions which accompanied it attained the freedom and fullness which belongs to private conversations –

[25] Documents created to be used in the course of the collective decision-making process of the Treasury Board or the Governor in Council would also be considered official Cabinet documents.

[26] See generally: D'Ombrain, *supra* note 13.

[27] Herbert Morrison, *Government and Parliament: A Survey from the Inside*, 3rd ed. (London: Oxford University Press, 1964) at 26-27; United Kingdom, Radcliffe Committee, *Report of the Committee of Privy Councillors on Ministerial Memoirs*, Cmnd 6386 (London: HMSO, 1976) at 19 [*Report on Ministerial Memoirs*].

> members must feel themselves untrammelled by any consideration of consistency with the past or self-justification in the future.[28]

The link between secrecy and candour is a simple fact of human life. We all have views that we would share in the privacy of our homes, with family and friends, which we would not necessarily repeat in public. Similarly, Ministers have views that they would share in the privacy of the Cabinet room, with political allies, which they would not necessarily repeat in public, in particular given the level of public scrutiny they face on a daily basis.

The legal system also recognizes the link between secrecy and candour. Would persons accused of a criminal act speak freely to their legal counsel, if their words could subsequently be used against them? Would jury members voice their true opinion, if their deliberations were televised? Even Supreme Court judges consider that they need some degree of secrecy to protect the candour of their deliberations.[29] So did, historically, the members of the House of Commons' governing body.[30] All branches of the State rely, to various extents, on this rationale to justify the secrecy of their deliberations. The candour rationale provides a solid foundation for the secrecy convention.

b. Efficiency

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

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28 Reproduced in *Report on Ministerial Memoirs*, *supra* note 27 at 13.

29 *Ontario (Public Safety and Security)* v. *Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 at para. 40.

30 The meetings of the House of Commons' Board of Internal Economy were traditionally held *in camera*. Yet, since the enactment of section 51.1 of the *Parliament of Canada Act*, R.S.C., 1985, c. P-1, on June 22, 2017, these meetings are now open to the public, except in the following circumstances: if the Board deals with issues relating to security, employment, staff relations or tenders; if the circumstances prescribed by a Board by-law exist; or if the Members of the Board present at the meeting unanimously agree to hold the meeting *in camera*.

> [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 criticize without adequate knowledge of the background and perhaps with some axe to grind.[31]

The efficiency rationale seeks to prevent the premature disclosure of Cabinet secrets. Hence, it justifies the confidentiality of Cabinet proceedings before a final decision is made and announced by Ministers. The concern is that failure to maintain the confidentiality of Cabinet proceedings would increase the level of public pressure put on Ministers by stakeholders and give rise to partisan criticism by their political opponents. This would ultimately paralyze the collective decision-making process.

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

c. Solidarity

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

This explains why Ministers cannot distance themselves from unpopular decisions by saying to their constituents: "Well, don't condemn me along with the rest of the cabinet, because I disagree with that decision

[31] *Conway* v. *Rimmer*, [1968] 1 All E.R. 874 at 888 (H.L.). See also: *Burmah Oil Co. Ltd.* v. *Bank of England*, [1979] 3 All E.R. 700 at 707 (H.L.); *Carey* v. *Ontario*, [1986] 2 S.C.R. 637 at 659; *Babcock*, *supra* note 15 at para. 18.

and argued all along that another course of action should be followed."[32] Ministers must remain united with their Cabinet colleagues regardless of their personal preferences; if they cannot support a collective decision, they should resign, as did Lucien Bouchard following the failure of the Meech Lake Accord, and Michael Chong to oppose a motion which recognized Québécois as a nation within a united Canada.[33] But, until then, a wall of silence conceals the divisions between them and their colleagues.

Solidarity and secrecy protect Ministers from the attacks of political opponents that would erupt if divisions were perceived in the collective mind. If disagreements between Ministers were made public, their political opponents would exploit these disagreements to weaken the unity of the Ministry and its ability to maintain the support of the House of Commons. Secrecy ensures that Ministers can change their minds during the decision-making process, perhaps even accept the defeat of a proposal, with the knowledge that it will not be used against them. Laurence Lowell observed that "[m]en engaged in a common cause who come together for the purpose of reaching an agreement usually succeed, provided their differences of opinion are not made public."[34] Robert MacGregor Dawson made the same point:

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

Breaches of solidarity have been rare in Canada. Andrew Heard provides two examples in his seminal book on constitutional conventions. First, in 1902, Prime Minister Wilfrid Laurier fired his Public Works Minister, Israel Tarte, for publicly disagreeing with the government's tariffs

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32 Heard, *supra* note 5 at 106-07.

33 *Ibid.* at 108.

34 Lowell, *supra* note 17 at 65.

35 Robert MacGregor Dawson, *The Government of Canada*, revised 3rd ed. (Toronto: University of Toronto Press, 1957) at 219.

policy. Second, in 1916, Prime Minister Robert Borden fired his Defence Minister, Sam Hughes, for insubordination.[36] Suspension of solidarity is also rare. Examples would include the free votes on the death penalty in 1967, 1976 and 1987, and on abortion in 1988.[37]

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

> A decision which has become government policy is not debatable by ministers. All of them are responsible for the decision and all of them must abide by it or else withdraw from the Cabinet. However, regarding policies that are in the formulative stage, regarding the priorities that the government will have to decide upon in the future […] ministers and all members of the government party are encouraged to discuss, not only in the House but in the country.[38]

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

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

When he was Premier of British Columbia, Gordon Campbell experimented with open Cabinet. While in the opposition, he had promised

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36 Heard, *supra* note 5 at 107.

37 *Ibid.* at 108.

38 Reproduced in William A. Matheson, *The Prime Minister and the Cabinet* (Toronto: Methuen, 1976) at 18.

various measures to foster openness and transparency in government. After winning the 2001 election, he opened one Cabinet meeting per month to the public with a live broadcast and online posting of Cabinet agenda, submissions, slides and transcripts. The initiative resulted in 29 open meetings over the first 34 months of his administration. Yet, the open meetings contained "zero debate and not much discussion."[39] Graham White provides the following description:

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

Open Cabinet meetings are staged events and, as such, cannot be compared to closed Cabinet meetings. The real discussions and decisions are still made behind closed doors. Indeed, as noted by the Radcliffe committee on ministerial memoirs, "[n]o one really supposes that a Cabinet ought to meet and hold its debate in the presence of reporters, TV cameras and interested outsiders."[41] Ministers cannot afford to fight each other in public. Hence, if Cabinet meetings were required to be open, the real discussion and decisions would likely move to another private forum.

In summary, in this subsection, I have explained why the secrecy convention is deemed essential to the proper functioning of the Westminster system of responsible government. The convention is supported by a long line of precedents going back to 1867 and consistently applied since then. Indeed, the fact that each Minister who has been appointed to the Privy Council has sworn an oath of secrecy and that this oath is respected on a daily basis, suggest that Ministers feel duty-bound to maintain the secrecy of Cabinet proceedings while in office. I have argued that the rationales underpinning the secrecy convention, namely, the candour, the efficiency

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39 Vaughn Palmer, "Open Cabinet: A Few Hits and What's Missing", *Vancouver Sun* (28 June 2001).

40 Graham White, *Cabinets and First Ministers* (Vancouver: UBC Press, 2005) at 116.

41 *Report on Ministerial Memoirs*, *supra* note 27 at 15.

and the solidarity rationales, provide a compelling reason for the secrecy convention. The Trudeau and Campbell experiments suggest that our system of government cannot function properly without this rule. In this sense, it could therefore be said that Cabinet secrecy is a "necessary evil in the pursuit of good decision making and good governance."[42]

B. Access Convention

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

1. Establishment of the Cabinet Secretariat

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

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42 White, *supra* note 40 at 141.

43 R.K. Middlemas, "Cabinet Secrecy and the Crossman Diaries" (1976) 47:1 Political Quarterly 39 at 40.

a. United Kingdom

At the outset of the First World War, Prime Minister Herbert Asquith refused to create a secretariat because he was concerned that it could weaken Cabinet solidarity and secrecy.[44] However, the informal character of Cabinet meetings, and the lack of proper recordkeeping, compromised the British war effort. In 1916, the new Prime Minister, David Lloyd George, established the War Cabinet to replace the full Cabinet in the handling of the War. Maurice Hankey, a shrewd administrator, was appointed as the first Secretary to the War Cabinet. His mandate was to prepare the agenda, circulate the relevant documents to Ministers, record the minutes of proceedings and communicate the decisions to responsible departments for implementation. Hankey successfully developed a system that provided Ministers with the information needed to make decisions and communicate these decisions to the responsible departments, while preserving Cabinet solidarity and secrecy. All in all, the establishment of the (nonpartisan) secretariat improved the administration of the war effort.[45] In 1919, when the full Cabinet was restored, the secretariat was retained on a permanent basis.

b. Canada

The success of the British experiment led to a recommendation for the establishment of a similar office in Canada as early as 1919.[46] Yet, the recommendation was not immediately implemented. In 1927, Prime Minister Mackenzie King considered the idea of establishing a Cabinet Secretariat, but the candidate he had in mind for the position of secretary declined the offer. The project remained inactive for several years as King was "not a man to reach a decision in a hurry" and the "machinery of

[44] Brian Masschaele, "Memos and Minutes: Arnold Heeney, the Cabinet War Committee, and the Establishment of a Canadian Cabinet Secretariat during the Second World War" (1998) 46 Archivaria 147 at 150.

[45] John F. Naylor, *A Man and an Institution: Sir Maurice Hankey, the Cabinet Secretariat and the Custody of Cabinet Secrecy* (Cambridge: Cambridge University Press, 1984) at 52.

[46] Canada, McLennan Committee, *Report of the Special Committee on the Machinery of Government*, vol. 55, (Ottawa: Journals of the Senate of the Dominion of Canada (1867-1970), 2 July 1919) at 343-44.

government did not interest him" very much.[47] In 1936, King was introduced to Arnold Heeney, the son of a close friend and a Montreal lawyer. King was so impressed by Heeney that he invited him to work for him. Heeney first joined King's team as Principal Secretary, with the perspective of later being appointed Secretary to the Cabinet. In 1938, the Cabinet still had no secretariat nor any organized system of records. When he first arrived in Ottawa, Heeney was shocked by the "incredibly haphazard" manner in which Cabinet business was conducted:

> I found it shattering to discover that the highest committee in the land conducted its business in such a disorderly fashion that it employed no agenda and no minutes were taken. The more I learned about cabinet practice, the more difficult it was for me to understand how such a regime could function at all. In fact the Canadian situation before 1940 was the same as that which existed in Britain before 1916.[48]

Despite these challenges, King "recoiled from efforts to formalize the business of the cabinet, an institution whose genius, historically and in his own experience, had been its flexibility and informality."[49] It was only in 1940 that King reluctantly established the Cabinet Secretariat, as a consequence of the information outburst that occurred during the Second World War. The increase in volume and complexity of government business created needs for greater coordination and for the provision of a definitive record of past decisions and rationales. The Cabinet War Committee, which superseded the full Cabinet from 1939 to 1944, required a more efficient system for making, communicating and implementing decisions. The Cabinet Secretariat was incorporated into the Privy Council Office, which had been the secretariat for the Privy Council since 1867, but until then had not been involved in Cabinet business:

> Since Confederation, there has always been a secretariat for Council in the person of the Clerk of the Privy Council. […] The clerk, however, served no

47 J.R. Mallory, "Mackenzie King and the Origins of the Cabinet Secretariat" (1976) 19:2 Canadian Public Administration 254 at 254.

48 Arnold Heeney, *The Things that Are Caesar's: Memoirs of a Canadian Public Servant* (Toronto: University of Toronto Press, 1972) at 74-75 [Heeney, *The Things that Are Caesar's*]. See also: Arnold Heeney, "Mackenzie King and the Cabinet Secretariat" (1967) 10:3 Canadian Public Administration 366 at 367 [Heeney, "Mackenzie King"].

49 Heeney, *The Things that Are Caesar's*, *supra* note 48 at 79. See also: Heeney, "Mackenzie King", *supra* note 48 at 371.

> function for Cabinet. Before ministers assembled for a meeting, which took place in the Privy Council chambers in the East Block of the Parliament Buildings, the clerk placed at the Prime Minister's chair a set of draft orders which had been prepared for consideration. The clerk withdrew once deliberations began. After the meeting, he returned to find the orders divided between two compartments of a large wooden box at the Prime Minister's place. Those in the right[-]hand side had been approved and were formally drafted and transmitted to Rideau Hall for the Governor General's signature; those in the left-hand side had been deferred or rejected. The clerk thus had nothing more than remote contact with the Cabinet.[50]

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

> [T]he great increase in the work of the Cabinet, of recent years, and particularly since the outbreak of war, has rendered it necessary to make provision for the performance of additional duties of a secretarial nature relating principally to the collecting and putting into shape of agenda of Cabinet meetings, the providing of information and material necessary for the deliberations of the Cabinet and the drawing up of records of the results, for communication to the departments concerned […].
>
> [P]rovision for the performance of the said additional duties […] can most conveniently be made by providing that they be undertaken by the Clerk of the Privy Council, and […] for such purposes it is desirable that he be appointed Secretary to the Cabinet.[51]

Within a few years, the Cabinet Secretariat became accepted as a necessary part of the machinery of government. In 1945, the system that had been developed to support the Cabinet War Committee was extended to the full Cabinet.[52] Heeney credited King for this accomplishment:

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50 Masschaele, *supra* note 44 at 153. See also: Heeney, *The Things that Are Caesar's*, *supra* note 48 at 75; Heeney, "Mackenzie King", *supra* note 48 at 368.

51 Order in Council, P.C. 1940-1121 (25 March 1940).

52 Heeney, *The Things that Are Caesar's*, *supra* note 48 at 79. See also Heeney, "Mackenzie King", *supra* note 48 at 372.

"while he may have had little interest in the administrative process, [he] had a sure and subtle instinct for the business of government."[53]

2. Development of the Access Convention

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

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

This risk focused attention on the necessity for an understanding between incoming and outgoing Ministries. Two considerations had to be reconciled. On the one hand, the documents recording the Cabinet proceedings of former Ministries should be preserved to allow continuity in the administration of public affairs and for historical reasons. Ministers should not be entitled to leave office with documents that might embarrass them. On the other hand, documents recording the Cabinet proceedings of one political party should not be allowed to fall into the hands of

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53 Heeney, *The Things that Are Caesar's*, *supra* note 48 at 81. See also: Heeney, "Mackenzie King", *supra* note 48 at 374. In fact, Heeney championed the creation of the Secretariat "in spite of King's obtuseness" and "succeeded where a lesser man might have failed." See: J.R. Mallory, *The Structure of Canadian Government*, revised ed. (Toronto: Gage Publishing Limited, 1984) at 119 [Mallory, *Canadian Government*].

54 Anson & Keith, *supra* note 12 at 120.

another political party.[55] Indeed, as illustrated by Anson, the temptation to use such information for partisan purposes is difficult to resist. The aim is to maintain a balance between providing incoming Ministers with the information they need to perform their duty without placing outgoing Ministers in a vulnerable position. A new rule, the access convention, was developed for that purpose. The access convention provides that, in principle, Cabinet documents can only be examined by the Ministers who were members of the Cabinet when they were created. Thus, when there is a change in power, the incoming Ministry cannot access the Cabinet documents of the outgoing Ministry.

a. United Kingdom

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

> Ministers of a former Administration, whether currently in office or not, may see but may not retain official documents which they saw as members of that Administration. Ministers of a current Administration may not see documents of a former Administration of a different political party, other than documents which can be regarded as being in the public domain, official communications to overseas Governments, and written opinions of the Law Officers. Ministers of a current Administration may normally see documents of a former Administration of the same political party, whether or not they

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

[56] Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1984) at 74, n. 34.

[57] Hunt, *supra* note 55 at 517.

> saw those documents as members of that Administration, provided that the requirement to see them arises in the course of their Ministerial duties.[58]

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

b. Canada

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

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

> In order that these papers may be useful, they have to be written frankly and confidentially, frequently revealing differences of view between Ministers or opinions of Ministers which would not be put on paper if it were felt they would ultimately fall into the hands of members of another political party. It

[58] See: U.K., H.C., *Parliamentary History of England*, vol. 35, col. 29-30W (17 January 1983).

> seems to be in the long term interest of all parties and of effective government that Cabinet papers can continue to be prepared on this basis.[59]

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

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

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

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

[59] Memorandum from Robert Bryce to Louis St. Laurent entitled "Cabinet Papers and a Change in Government" (14 June 1957), reproduced in 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 at 231-32.

> papers of a previous administration. He had spoken to Earl Attlee about the matter and had found that the procedures followed were in accordance with the account which had been given to him by Mr. St. Laurent before he resigned as Prime Minister. Briefly, the practice was that the Cabinet papers of an outgoing administration were left in the custody of the Secretary to the Cabinet, who furnished to the new administration the information necessary to carry on the process of government with continuity.
>
> The Prime Minister suggested that the same procedure be followed in Canada.
>
> The Cabinet noted with approval the proposal of the Prime Minister that the procedure in the United Kingdom on access to records of a previous administration be followed in Canada.[60]

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

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

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

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60 Extract from Cabinet Conclusions entitled "United Kingdom Cabinet Office: Procedures on Access to Records of a Previous Administration" (6 July 1957), reproduced in Côté, *supra* note 59 at 233.

61 Heeney, *The Things that Are Caesar's*, *supra* note 48 at 80. See also: Heeney, "Mackenzie King", *supra* note 48 at 373.

Ministers."[62] From a conventional perspective, former Prime Ministers maintain control over the Cabinet documents created under their leadership and may agree to their disclosure to the current Ministry or to the public.[63]

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

62 Hunt, *supra* note 55 at 516.

63 *Ibid.* at 517-18.

64 Letter from Robert Bryce to Lester B. Pearson (17 April 1963); Letter from Lester B. Pearson to Robert Bryce (12 June 1963). These letters were released by the Privy Council Office under the *Access to Information Act*, R.S.C. 1985, c. A-1 [*ATIA*] (A-2016-00370).

65 Letter from Michael Pitfield to Pierre Elliott Trudeau (1 June 1979); Letter from Pierre Elliott Trudeau to Michael Pitfield (1 June 1979); Letter from Michael Pitfield to Joe Clark (1 June 1979). These letters were released by the Privy Council Office under the *ATIA*, *supra* note 64 (A-2016-00370).

66 Letter from Marcel Massé to Joe Clark (29 February 1980); Letter from Joe Clark to Marcel Massé (29 February 1980); Letter from Marcel Massé to Pierre Elliott Trudeau (29 February 1980). These letters were released by the Privy Council Office under the *ATIA*, *supra* note 64 (A-2016-00370).

67 Letter from Gordon Osbaldeston to John Turner (12 September 1984); Letter from Gordon Osbaldeston to Brian Mulroney (14 September 1984). These letters were released by the Privy Council Office under the *ATIA*, *supra* note 64 (A-2016-00370).

68 Letter from Glen Shortliffe to Brian Mulroney (24 June 1993); Letter from Glen Shortliffe to Kim Campbell (30 June 1993). These letters were released by the Privy Council Office under the *ATIA*, *supra* note 64 (A-2016-00370).

69 Letter from Glen Shortliffe to Kim Campbell (undated); Letter from Glen Shortliffe to Jean Chrétien (3 November 1993). These letters were released by the Privy Council Office under the *ATIA*, *supra* note 64 (A-2016-00370).

70 The Privy Council Office has confirmed that the access convention was applied in 2003 when Paul Martin replaced Jean Chrétien, although the relevant letters have not yet been made public.

71 The Privy Council Office has confirmed that the access convention was applied in 2006 when Stephen Harper defeated Paul Martin, although the relevant letters have

and, in 2015, when Justin Trudeau defeated Stephen Harper.[72] An analysis of the letters and the information, which are currently part of the public record, shows that three major changes have taken place in the scope of the convention.

First, the types of Cabinet documents subject to the access convention have increased significantly. In 1957 and 1963, the convention was only applied to "Cabinet and Cabinet committee minutes, conclusions and documents." The focus was primarily on official Cabinet documents, especially those which revealed the personal views expressed by Ministers while deliberating on government policy and action (core secrets), such as Cabinet minutes. But, as of 1979, the access convention has been applied to all documents which reveal Cabinet secrets, whether they are official or unofficial, and whether they reveal core or noncore secrets. In other words, the scope of the convention was broadened to replicate the scope of Cabinet immunity under statutory law. This extension appears unnecessary considering that the noncore secrets of a former Ministry, especially the decisions made and the background information underpinning these decisions, can be revealed to the current Ministry without endangering the proper functioning of the Westminster system of responsible government.

Second, from 1957 to 1984, the access convention was only applied when there was a change in power between political parties. For this reason, the convention was not applied in 1968, when Trudeau replaced Pearson.[73] Yet, it has been reported that the convention was applied when Turner replaced Trudeau as leader of the Liberal Party in 1984,[74] although there is no official exchange of letters in the Privy Council Office's archives supporting this report. The historical record confirms, however, that the

not yet been made public.

72 The Privy Council Office has confirmed that the access convention was applied in 2015 when Justin Trudeau defeated Stephen Harper, although the relevant letters have not yet been made public.

73 Henry F. Davis & André Millar, *Manual of Official Procedure of the Government of Canada* (Ottawa: Privy Council Office, 1968) at 97. Likewise, the access convention was not applied when St. Laurent replaced King in 1948.

74 See: d'Ombrain, *supra* note 13 at 357, n. 50: "Starting in 1984, when John Turner took over from Trudeau, the convention was extended to cover the documents of successive administrations of the same political party. This was a stretch from Bryce's wording based on British practice concerning the protection of one party's cabinet secrets from an opposing party."

convention was applied when Campbell replaced Mulroney as leader of the Conservative Party in 1993 and when Martin replaced Chrétien as leader of the Liberal Party in 2003. This would suggest that the convention now applies when there is a change of leadership within a political party. Such an extension of the convention appears inconsistent with its purpose, that is, to prevent that the deliberations of one political party be exploited by opposing political parties for partisan purposes. There is no clear public policy rationale for applying the rule when there is a change of leadership within the same political party. It is thus doubtful that the current administrative practice can be elevated to the rank of constitutional conventions, as it is not necessary to the proper functioning of our system of government.

Third, since the adoption of provisions of the *Canada Evidence Act* and the *Access to Information Act* in 1982, the temporal scope of Cabinet immunity has been limited to a period of 20 years.[75] This legal limit, established by Parliament, also reduces the scope of the access convention. Moreover, these provisions contain an exception for discussion papers, a special type of Cabinet document, which are meant to provide background explanations, analyses of problems and policy options to the Cabinet for the purpose of making decisions. Discussion papers are no longer subject to Cabinet immunity when the underlying Cabinet decision has been made public.[76] Finally, the Supreme Court of Canada has indirectly limited the scope of the convention in *Babcock* by ruling that Cabinet documents can only be protected in the context of litigation when the public interest requires it.[77] These limited exceptions to the convention do not undermine its purpose.

In summary, in this subsection, I have shown that the organized system of Cabinet records that is currently in place would not have been created if the confidentiality of these records could not have been preserved. The purpose of the access convention is to prevent having the personal views expressed by Ministers during the decision-making process, which may be recorded in Cabinet document, fall into the hands of their political

75 See: *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 39(4)(a) [*CEA*]; *ATIA*, *supra* note 64, s. 69(3)(a).

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

77 *Babcock*, *supra* note 15 at para. 22.

opponents when there is a change in power, as the information could be used for partisan purposes. In light of the foregoing, I have argued that the scope of the convention may have been unnecessarily extended in Canada: first, by applying it to documents which do not reveal the personal views expressed by Ministers during the decision-making process; and, second, by applying it when there is a change of leadership within the same political party.

II. Conventional Limits to Cabinet Secrecy

What are the limits to Cabinet secrecy in the Westminster system of responsible government? When can Cabinet secrets be revealed and by whom? Section II will address these questions. I will identify the conventional limits to Cabinet secrecy. By conventional limits, I mean the limits that have been voluntarily accepted by political actors, rather than the legal limits imposed by the Courts or Parliament. While Cabinet secrets are protected for 20 years under statutory law,[78] the duty of secrecy may lapse before then under convention. The duty ends when the reason for it no longer exists or when a more compelling public interest overrides it.[79] The passage of time constitutes an important limit to Cabinet secrecy: at some point, Cabinet secrets become only of historical interest and can be disclosed without any risk of injury. Yet, there is no clear rule to assess precisely when that moment comes. Similarly, there are circumstances in which the conventions ensuring the secrecy of Cabinet proceedings have been relaxed, or even breached, by the relevant political actors. I have divided them into two groups. In the first subsection, I will review the situations in which former Ministers are entitled to disclose Cabinet secrets. In the second subsection, I will examine the situations in which the Government has made an exception to the Cabinet secrecy conventions in the public interest.

A. Voluntary Disclosure by Former Ministers

There are mainly two situations in which former Ministers may legitimately reveal the substance of Cabinet deliberations: first, when they resign; and, second, when they publish their political memoirs. Former

78 *CEA*, *supra* note 75, s. 39(4)(a); *ATIA*, *supra* note 64, s. 69(3)(a).

79 Lowell, *supra* note 17 at 65-66.

Ministers are not bound by the 20-year period set out in statutes. The statutes enable the Government to refuse the disclosure of Cabinet secrets, but do not impose a legally-enforceable duty of secrecy on Ministers. While Ministers are morally bound by their oath as Privy Councillors, the oath cannot silence them until the end of time. Indeed, the oath is not justiciable and political sanctions are inefficient against an individual who is no longer in office. It must be recognized that "[a]t some point of time the secrets of one period must become the common learning of another."[80]

1. Ministerial Resignation

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

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80 *Report on Ministerial Memoirs*, *supra* note 27 at 29.

81 Heard, *supra* note 5 at 110.

82 Mallory, *Canadian Government*, *supra* note 53 at 94. See also: Anson & Keith, *supra* note 12 at 121.

83 Letter from William Lyon Mackenzie King to The Earl of Athlone (17 November 1944); Letter from The Earl of Athlone to William Lyon Mackenzie King (18 November 1944). These letters are reproduced in Elcock, "Affidavit", Exhibits C and D, *supra* note 23.

2. Ministerial Memoirs

Former Ministers may reveal the substance of Cabinet deliberations in their political memoirs or other works related to their experience in office. Indeed, those who have held public office have a rich knowledge and a unique perspective on the historical events that have shaped the nation. At one point, they must be able to share their experience with members of civil society. To that end, former Ministers have access to all the Cabinet documents within the custody of the Secretary to the Cabinet issued to them when they were in office. Former Ministers cannot, however, publish Cabinet documents of less than 20 years of age without authorization. As a rule, former Ministers must seek the guidance of the Secretary to the Cabinet before publishing their memoirs.[84] There does not seem to be any case where the Government tried to stop the publication of political memoirs in Canada. But this course of action is not unprecedented in the United Kingdom. The drama surrounding the publication of the Crossman diaries is a powerful illustration of the tensions which come into play when a former Minister decides to publish his or her political memoirs.

a. *Crossman*'s Case

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

Before their publication, a copy of the diaries was sent to the Secretary to the Cabinet, John Hunt, for official scrutiny. After some back and forth with the executors, Hunt objected to the publication of the diaries on the basis that they revealed a "blow by blow" account of Cabinet deliberations

[84] Canada, Privy Council Office, *Guidance for Ministers*, *supra* note 18 at 42.

as well as differences of views between Ministers.[85] Despite Hunt's objection, an extract of the diaries was published in *The Sunday Times* in January 1975. In reaction, the British Government filed legal proceedings against the executors, the publisher and the newspaper to prevent further publication. The case was unusual for it did not involve a situation in which the Government was resisting the disclosure of Cabinet documents in court. On the contrary, the Government was proactively seeking a permanent injunction to prohibit the publication of memoirs on the basis that they revealed the substance of Cabinet deliberations. This was a draconian remedy which had not been sought before. If granted, it would have significantly limited former Ministers' freedom of speech.

In the proceedings, the Government relied on the secrecy convention. The defendants replied that Cabinet secrecy was exclusively based on a political rule, an obligation founded in conscience, and that the Courts could not prevent the publication of the diaries on that basis. For this reason, the Government had to find a legal rule to justify the injunction. It argued that the breach of confidence doctrine (pursuant to which a person should not profit from the wrongful publication of information received in confidence), which had until now only been applied to "private" secrets, should be extended to "public" secrets in the interest of good government. The High Court, *per* Lord Widgery C.J., agreed and laid down this test:

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

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

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85 *Jonathan Cape*, *supra* note 20 at 489.

86 *Ibid.* at 495.

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

While the decision was controversial, the Government did not appeal it. Volume one of Crossman's diaries was published in 1975; volumes two and three of the diaries were published in 1976 and 1977, respectively, without objection from the Government.[88] The publication of Crossman's diaries has been described "as a defeat of the Cabinet Office's excessive claim to defend Cabinet secrecy."[89] The diaries were a source of inspiration for the popular BBC satirical sitcoms *Yes Minister* and *Yes Prime Minister* aired in the 1980s. *Crossman*'s case weakened the duty of secrecy felt by former Ministers and numerous memoirs have since been published in the United Kingdom.[90] In comparison, in Canada, few Ministers have published their memoirs, much to the regret of political scientists whose insight is incomplete as a result.[91]

b. Radcliffe Committee's Report

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

> There is a public interest at stake in the dissemination of that kind of informed experience of the affairs of government that an ex-Minister is pecu-

87 *Ibid.* at 496.

88 Richard Crossman, *The Diaries of a Cabinet Minister*, vol. 1-3 (London: Hamish Hamilton Limited & Jonathan Cape Limited, 1975-1977).

89 Naylor, *supra* note 45 at 311.

90 Heard, *supra* note 5 at 111.

91 David E. Smith, "The Federal Cabinet in Canadian Politics" in Michael S. Whittington & Glen Williams, eds., *Canadian Politics in the 1980s*, 2nd ed. (Toronto: Methuen, 1984) 351 at 351-52.

> liarly equipped to supply […]. There is also another type of public interest involved in securing that a man who has held public office in the service of his country and has been exposed to controversy and criticism as to his discharge of it should be enabled to offer to the public a reasoned and documented account of his stewardship at the end of the day.[92]

The Radcliffe Committee did not think that the legal framework developed by Lord Widgery was helpful for two reasons. First, it did not provide a uniform code of working rules capable of providing clear guidance to former Ministers (rather, it adopted an individualized approach ascertained through litigation). Second, litigation is not the best way to arbitrate such disputes because they require political and administrative judgment. In addition, the Radcliffe Committee did not think that legislation offered the right solution because formal sanctions would be needed to enforce it.[93] On the contrary, it considered that the ministerial duty of secrecy should remain conventional. It thus proposed a set of "guidelines."

Under these guidelines, Ministers would be allowed to publish an account of their time in office subject to two exceptions: first, they should not disclose information that could injure national security and international relations; and, second, for 15 years, they should not disclose information that could injure the confidential relationships between Ministers, such as the personal views expressed by their colleagues on government action and policy.[94] Furthermore, Ministers should submit a draft of their memoirs to the Secretary to the Cabinet for two reasons: first, so that he or she can ensure that the memoirs do not disclose information injurious to national security and international relations; and, second, so that he or she can give advice on the treatment of the confidential relationships between Ministers. While former Ministers are expected to take the Secre-

92 *Report on Ministerial Memoirs*, *supra* note 27 at 16.

93 *Ibid.* at 25-26: "[Ministers] should be able, surely, to conduct themselves properly and recognise their obligations without the creation of statutory offenses or statutory penalties. To be driven to suggest otherwise would be to acknowledge a sad decline in the prestige of modern government."

94 *Ibid.* at 30. The Radcliffe Committee chose the period of 15 years for two reasons: first, a Minister who has something to write about should be able to do it during his or her own lifetime; and, second, the 15-year period, which corresponds to the maximum duration of three successive legislatures, is sufficiently long to protect the proper functioning of the system of responsible government.

tary to the Cabinet's advice into consideration, they ultimately retain control over the contents of their memoirs.[95]

The Committee's guidelines were accepted by the Government[96] and remain in force today.[97] These rules provide clear guidance to former Ministers, something that was missing from the individualized approach taken by Lord Widgery. Insofar as they follow these rules, former Ministers can expect that the Government will not interfere with the publication of their memoirs; and the Government can be confident that Cabinet proceedings will not be prematurely disclosed. The fact that the guidelines remain in force in the United Kingdom suggests that they strike an appropriate balance between the various interests involved. It is interesting to note that if the 15-year *moratorium* proposed by the Radcliffe Committee had been adopted by Lord Widgery, the first volume of Crossman's diaries would not have been published before 1979 as opposed to 1975. By that time, neither Prime Minister Wilson nor the Labour Party would have been in power. The publication of the diaries in this context would have been less likely to injure Crossman's former party and colleagues.

In summary, in this subsection, I have shown that former Ministers can reveal Cabinet secrets when they resign from office or publish their memoirs. In these circumstances, there is little that the Government can do to silence former Ministers given that political sanctions are ineffective against them. In addition, the Courts have been reluctant to issue injunctions preventing former Ministers from revealing Cabinet secrets in their

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95 *Ibid.* at 27-29. These rules were laid down in 1946 by Lord Morrison, on behalf of Prime Minister Attlee, in a statement to the House of Commons. They were based on a memorandum drafted by the Secretary to the Cabinet, Edward Bridges, and approved by the Cabinet. The statement and memorandum are reprinted in the *Report on Ministerial Memoirs*, *supra* note 27 at 5-9. For an overview of the Radcliffe Committee's guidelines, see: Geoffrey Marshall, *Ministerial Responsibility* (Oxford: Oxford University Press, 1989) at 68-71.

96 Naylor, *supra* note 45 at 312.

97 United Kingdom, Cabinet Office, *Cabinet Manual*, *supra* note 21 at paras. 11.30-11.31; United Kingdom, Cabinet Office, *Ministerial Code*, *supra* note 21 at para. 8.10. While the Australian *Cabinet Handbook*, *supra* note 21, remains silent on this issue, the New Zealand *Cabinet Manual*, *supra* note 21, adopts, at paras. 8.120-8.123, rules that are similar to those recommended by the Radcliffe Committee in 1976. The Canadian version, *Open and Accountable Government*, *supra* note 21, does not contain much guidance on the publication of ministerial memoirs, except for the advice to consult the Secretary to the Cabinet.

memoirs, as evidenced by *Crossman*'s case. Ultimately, what Ministers chose to reveal in their memoirs is a matter of judgment. There is no evidence suggesting that these exceptions to the rule have unduly undermined the proper functioning of the Westminster system of responsible government.

B. Voluntary Disclosure by the Government

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

1. Executive Institutions

a. Commissions of Inquiry

Under the *Inquiries Act*, the Governor in Council can establish a commission of inquiry to investigate "any matter connected with the good government of Canada."[98] While they are part of the executive branch of the State, commissions of inquiry operate at arm's length from the core Executive. Commissioners have the power to summon witnesses, and compel them to give evidence under oath and produce documents.[99] Three commissions of inquiry have had access to Cabinet documents to fulfil their mandates: the McDonald Commission; the Gomery Commission; and the Oliphant Commission.

[98] *Inquiries Act*, R.S.C. 1985, c. I-11, s. 2.
[99] *Ibid.*, ss. 4-5.

The McDonald Commission was the first outside institution to have access to Cabinet documents. It was established in 1977 to investigate the actions of the RCMP Security Service following serious allegations that it had committed illegal and unauthorized acts, such as warrantless break-ins, mail opening and electronic surveillance as well as barn-burning and theft.[100] These actions could not be viewed as isolated cases of abuse of power by the RCMP. The underlining problem was the lack of legal framework for the RCMP Security Service and the lack of oversight. During the investigation, members of the RCMP attempted to implicate Ministers in unlawful activities. The Commissioners accordingly extended their investigation beyond the RCMP to the Cabinet. Prime Minister Trudeau first resisted the Commissioners' requests to access Cabinet documents, but eventually had to consent given the seriousness of the allegations and the public pressure. The Governor in Council made an exception to the secrecy and the access conventions and, as a result, the Commissioners were given access to the Cabinet documents that were relevant to their mandate.[101] In the end, the Commissioners found no evidence that Ministers had authorized unlawful activities.

The Gomery Commission was established in 2004 to investigate the sponsorship scandal.[102] Before accepting his mandate, the Commissioner insisted on obtaining access to the relevant Cabinet documents.[103] While Prime Minister Martin first resisted, like Trudeau, he ultimately accepted. The Governor in Council once again made an exception to the secrecy and the access conventions by giving the Commissioner access to the relevant documents of the Chrétien and Martin Ministries.[104] In this context, when a commission is established in the interest of good government,

100 Order in Council, P.C. 1977-1911 (6 July 1977) established the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, and appointed Justice David McDonald as well as Messrs. Donald S. Rickerd and Guy Gilbert as Commissioners.

101 Order in Council, P.C. 1979-887 (22 March 1979); Order in Council, P.C. 1979-1616 (2 June 1979).

102 Order in Council, P.C. 2004-110 (19 February 2004) established the Commission of Inquiry into the Sponsorship Program and Advertising Activities, and appointed Justice John H. Gomery as Commissioner.

103 François Perreault, *Gomery: l'enquête* (Montréal: Éditions de l'Homme, 2006) at 37-44.

104 Order in Council, P.C. 2004-119 (20 February 2004); Order in Council, P.C. 2004-986 (14 September 2004).

after serious allegations of government misconduct, it is difficult for a Prime Minister to deny access to the relevant Cabinet documents. How can a commissioner carry out his or her mandate without access to all the relevant information? If the public interest requires that a commission of inquiry be created, it surely requires that its commissioner be given the tools to do its work. In the end, the Commissioner cleared Martin of blame, but was harsh on Chrétien who, in his view, had failed to take measures that could have prevented the problem. The Commissioner's finding against Chrétien was later quashed by the Federal Court of Canada on the basis of a reasonable apprehension of bias.[105]

The Oliphant Commission was established in 2008 to investigate three cash payments, of between $75,000 and $100,000 each, made by Karlheinz Schreiber to Brian Mulroney shortly after Mulroney stepped down as Prime Minister.[106] The allegations raised questions about the integrity of the Office of the Prime Minister. The focus of the Inquiry was the Bear Head Project, a proposal by the German company to build a tank factory in Nova Scotia. As the proposal had been submitted to the Cabinet, the Commissioner needed access to Cabinet documents to fulfil his mandate. Some of the documents were available as they had been created more than 20 years earlier, but others were still considered confidential. As a result, the Commissioner had access to only half of the story. In order for him to have access to the full story, Mulroney's consent, as former Prime Minister, was needed. If Mulroney had refused to authorize the disclosure of the documents, a political crisis would likely have ensued, as he was the individual under investigation. Yet, ultimately, after examining the documents through his lawyer, Mulroney gave his consent and the crisis was averted. The Governor in Council made an exception to the secrecy and the access conventions by giving the Commissioner access to 142 Cabinet documents, and allowed witnesses to testify about them.[107] An appropriate balance was reached between secrecy and transparency as a result of this limited disclosure: the Commissioner was given access to

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

106 Order in Council, P.C. 2008-1092 (12 June 2008) established the Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings between Karlheinz Schreiber and the Right Honourable Brian Mulroney, and appointed Justice Jeffrey J. Oliphant as Commissioner.

107 Order in Council, P.C. 2009-534 (10 April 2009).

the information he required to carry out the investigation, but Cabinet secrecy, as a rule, was not unduly undermined. In the end, the Commissioner concluded that Mulroney had failed to live up to the standard of conduct that he had himself adopted as Prime Minister by accepting cash payments from Schreiber and attempting to conceal these payments.

b. Criminal Prosecutions

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

Bissonnette was Minister of State for Small Business and Minister of Transport in the Mulroney Ministry. In 1987, he was charged with fraud and breach of trust under the *Criminal Code* in relation to the sale of land to Swiss-based Oerlikon Aerospace.[108] It was alleged that Bissonnette and his business associates made a number of transactions to drive up the price of land in St. Jean, Quebec, before selling it to Oerlikon for the construction of a factory. These transactions drove the price of the land from $ 800,000 to almost $ 2.9 million in 11 days. Oerlikon contracted to buy the land 13 weeks before being awarded a $ 600 million contract to build a low-level air defence system by the Government. The RCMP sought access to Cabinet documents relevant to the case. In 1987, the Governor in Council granted access to 11 Cabinet documents and allowed witnesses to testify about them "for the purposes of the proceedings" against Bissonnette.[109] While the Minister was acquitted by a local jury, one of his closest business associates was convicted of fraud.

[108] *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*].
[109] Order in Council, P.C. 1987-2284 (6 November 1987).

Munro was, *inter alia*, Minister of Indian Affairs and Northern Development in the second Trudeau Ministry. From 1985 to 1989, the RCMP investigated allegations concerning the misuse of public funds by Munro to finance his 1984 campaign for the leadership of the Liberal Party. Munro was suspected of having arranged a $ 1.5 million grant to the Assembly of First Nations, as Minister, so part of the funds could be channelled back into his leadership campaign. In 1989, Munro and eight individuals were charged under the *Criminal Code* with fraud and other related infractions. In 1990, given the "particular nature of the charges," in the "interest of the proper administration of the criminal justice system," the Governor in Council made an exception to the secrecy and the access conventions, which enabled both Munro and the RCMP to access the relevant Cabinet documents produced under the Trudeau Ministries, and use them in the criminal proceedings.[110] The charges against Munro were ultimately thrown out and he received a $ 1.4 million indemnification from the Government.

2. Legislative Institutions

a. Auditor General

The Auditor General is an officer of Parliament appointed by the Governor in Council under the *Auditor General Act*.[111] His or her mandate is to audit government spending to provide information that will enable Parliament to hold the Government accountable for the expenditure of public funds. Before 1986, the Auditor General did not have access to Cabinet documents for carrying out his or her audits, but a legal battle between the Auditor General and the Government resulted in a voluntary softening of Cabinet secrecy.

In the early 1980s, Auditor General Ken Dye sought to obtain access to information relating to the $ 1.7 billion acquisition of Petrofina by Petro-Canada to conduct a performance ("value for money") audit. Dye's requests were rejected by Petro-Canada, the Governor in Council and the Prime Minister on the basis that he was exceeding the scope of his statutory authority and the information sought was protected by Cabinet

110 Order in Council, P.C. 1990-2228, 1990-2229 and 1990-2230 (11 October 1990).
111 R.S.C. 1985, c. A-17 [*AGA*].

secrecy. In a letter to Dye, Prime Minister Trudeau adopted an uncompromising posture :

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

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

The matter was heard by Associate Chief Justice Jerome, a former Liberal Member of Parliament and Speaker of the House of Commons. While Jerome A.C.J. recognized the existence of the secrecy convention in Canada, he stressed that a political rule cannot, in our system of government, supersede a legal rule.[113] In addition, Jerome A.C.J. did not agree that there was a conflict between sections 13 of the *AGA* and 36.3 of the *CEA* : even though the certificate prevented him from ordering the production of Cabinet secrets, it did not prevent him from issuing a declaration that the Auditor General was entitled to have access to the information sought. Finally, Jerome A.C.J. did not agree that the Auditor General's only remedy was to report the denial of access to the House of Commons. In his view, this remedy was ineffective given that the governing party con-

112 Reproduced in *Canada (Auditor General)* v. *Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49 at 69-71 [*Auditor General*, SCC].

113 *Canada (Auditor General)* v. *Canada (Minister of Energy, Mines and Resources)*, [1985] 1 F.C. 719 at 739-42.

trolled a majority of seats in the House. As a result of party discipline, any attempt to force the production of the information or to adopt a motion of non-confidence would fail.[114] Jerome A.C.J. thus issued a declaratory judgment in favour of the Auditor General.

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

> The judgment leaves the auditor general with access to it all and he has no obligation not to disclose it […]. We don't think a cabinet government can function with this judgment as it stands today […]. Cabinet ministers must be free to speak their mind to one another frankly, to disagree with each other, to put their regional interests as forcefully as they can. They cannot do so if the necessary confidentiality of cabinet proceedings […] is removed.[115]

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

(a) a Submission to the Governor in Council;
(b) a Submission to the Treasury Board;
(c) any explanations, analyses of problems or policy options contained in a Memorandum or Discussion Paper presented to Council in making decisions but not information revealing a recommendation or proposal presented to Council by a Minister of the Crown;
(d) a final decision of Council; and
(e) a decision of Treasury Board.

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114 *Ibid.* at 749-50.

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

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

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

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

On appeal, the Federal Court of Appeal and the Supreme Court of Canada sided with the Government.[118] The important point made by the Supreme Court was that the Auditor General did not have a legally enforceable right to access Cabinet documents. Whenever the Auditor General is denied access to Cabinet documents which are required for auditing purposes, his or her only remedy is to report the denial of access to the House of Commons.[119] The House may adopt a motion to compel the production of the information ; it may also adopt a motion of non-confidence. It may be that, if the governing political party controls a majority of seats in the House, no sanction will be taken against the Gov-

116 *Ibid.*

117 *Ibid.*

118 *Canada (Auditor General)* v. *Canada (Minister of Energy, Mines and Resources)*, [1987] 1 F.C. 406 (C.A.) ; *Auditor General*, SCC, *supra* note 112.

119 *AGA*, *supra* note 111, s. 7(1)(b).

ernment. Yet, from a legal perspective, the composition of the House is irrelevant.[120]

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

In addition to the 1985 Order in Council, two other Orders in Council were adopted in 2006 and 2017 to further clarify the scope of the Auditor General's access to Cabinet documents.[121] The Office of the Auditor General, the Privy Council Office and the Treasury Board also signed two agreements in 2010 to provide guidance on the interpretation and application of the Orders in Council and set out a process to settle disputes on access to Cabinet documents.[122] All in all, these documents have not significantly altered the scope of the 1985 Order in Council. Over the years, the Government and the Auditor General have sought to maintain a proper balance between transparency and secrecy: the Government has recognized that the Auditor General may have access to noncore secrets

120 *Auditor General*, SCC, *supra* note 112 at 103-04.

121 See Orders in Council P.C. 2006-1289 (6 November 2006) and P.C. 2017-517 (12 May 2017).

122 See the following two documents signed by the Privy Council Office, the Treasury Board Secretariat and the Office of the Auditor General: Guidance to Deputy Heads, Departmental and Entity Legal Counsel and OAG Audit Liaisons on providing the Auditor Access to Information in certain Confidences of the Queen's Privy Council (Cabinet confidences) (12 May 2010); and 2010 Protocol Agreement on Access by the Office of the Auditor General to Cabinet Documents (12 May 2010).

contained in some Cabinet documents for auditing purposes and, in turn, the Auditor General has accepted that he or she cannot have access to core secrets and must, in any event, keep the information confidential.

b. House of Commons

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

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

A similar conclusion was reached in Australia. In *Egan* v. *Chadwick*, a 2-1 majority of the New South Wales Court of Appeal decided that the legislature's power to compel the production of documents did not extend to Cabinet documents.[124] The majority reasoned that the legislature's power to request the production of documents is derived from its power to hold the government to account, which stems from the principle of responsible government. As such, this power is also limited by the principle of responsible government. As the Westminster system of government cannot function without the secrecy convention, on which depends the confidence and solidarity conventions, the legislature cannot force a Min-

123 Canada, *House of Commons Debates*, 23rd Parl., 1st Sess., vol. 1 (6 November 1957) at 813 (Hon. Roland Michener).

124 *Egan* v. *Chadwick*, [1999] NSWCA 176 [*Egan*].

ister to table Cabinet documents or reveal the substance of Cabinet proceedings:

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

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

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

> [P]rocedural authorities are categorical in repeatedly asserting the powers of the House in ordering the production of documents. No exceptions are made for any category of government documents, even those related to national security.
>
> Therefore, the Chair must conclude that it is perfectly within the existing privileges of the House to order production of the documents in question.[126]

This was a very sweeping statement by Milliken, one suggesting that the House of Commons could even request the production of Cabinet documents, a position that was not shared by Michener in 1957 or the

125 *Ibid.* at paras. 43, 46, 54, 55 (Spigelman C.J.), 154 (Meagher J.).

126 Canada, *House of Commons Debates*, 40th Parl., 3rd Sess., No. 34 (27 April 2010) at 1530 (Hon. Peter Milliken).

New South Wales Court of Appeal in 1999. Nothing, however, suggests that Milliken had in mind Cabinet documents when he made that statement as the Government was invoking national security to justify the redactions.

On June 15, 2010, following Milliken's ruling, all the political parties, except the New Democratic Party, signed a "Memorandum of Understanding" to resolve the crisis.[127] Their leaders, Stephen Harper, Michael Ignatieff and Gilles Duceppe, agreed to establish an *ad hoc* committee of Members of Parliament as well as a panel of arbiters, composed of three former judges, to review the documents and decide which ones could be released. But the *ad hoc* committee did not have access to Cabinet documents. Only the panel of arbiters would have access to them and decide if they should be released or not. Obviously, the Conservatives did not want their Cabinet secrets to fall into the hands of their political opponents. This "Memorandum of Understanding" was sufficient to put an end to the crisis. Ultimately, the panel of arbiters did not review any Cabinet document, as it was dismantled as soon as the Conservatives won a majority one year later.

Second, on March 25, 2011, the Government was found in contempt of Parliament and lost the confidence of the House of Commons, thus triggering the 41st Canadian general election.[128] The loss of confidence was caused by the Government's refusal to give the House Finance Committee documents disclosing the costs of crime bills, corporate tax cuts and the purchase of F-35 fighter jets. The Government claimed that the "documents" sought were protected by Cabinet secrecy. The claim was challenged by Opposition parties, who insisted that they needed the "information" to properly assess the proposed legislation. The consensus of all the experts that were called to testify before the House of Commons' Procedure and House Affairs Committee, including a former Secretary to the Cabinet, Mel Cappe, was that the House has the right to know the costs of proposed legislation and the Government cannot rely on Cabinet secrecy to refuse to provide the information.[129]

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127 Heather MacIvor, "The Speaker's Ruling on Afghan Detainee Documents: The Last Hurrah for Parliamentary Privilege? " (2010) 19:1 Const. Forum Const. 129.

128 Canada, *House of Commons Debates*, 40th Parl., 3rd Sess., No. 149 (25 March 2011) at 1420.

129 Canada, House of Commons, Standing Committee on Procedure and House Affairs, *Evidence*, Nos. 49-50 (16-17 March 2011) [*Standing Committee Evidence*].

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

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

130 *Egan*, *supra* note 124 at para. 71 (Spigelman C.J.).

131 *Standing Committee Evidence*, *supra* note 129 at 1405. See also : Beverly Duffy, "Orders for Papers and Cabinet Confidentiality post Egan v Chadwick" (2006) 21 : 2 Australasian Parliamentary Review 93 at 104. The same problems seem to exist in New South Wales : "An increasing number of documents are not being returned to the [legislative] Council on the grounds of cabinet confidentiality and yet the House has no way of knowing if the government's claims relate to 'true' cabinet documents or a wider class of documents that should not attract this immunity. An important step in enabling the [legislative] Council to fulfil its accountability function is to ensure such documents are evaluated by the independent legal arbiter."

use the information for partisan ends. Yet, the Government should not rely on Cabinet secrecy to refuse to disclose the financial and background information the House needs to assess the costs of proposed legislation.

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

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

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

[132] Jennings, *Law and Constitution*, *supra* note 4 at 136, cited in the *Patriation Reference*, *supra* note 4 at 888.

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

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

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

The access convention, which is set in motion when there is a change of Ministry, aims to prevent the new Ministry from examining the core secrets recorded in former Ministries' Cabinet documents. Yet, the new Ministry can be informed of the noncore secrets recorded in former Min-

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

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

Second, disclosure can be made by the Government in the public interest. Executive institutions, such as commissions of inquiry and the RCMP, have been given broad access to Cabinet documents to investigate serious allegations of misconduct, mismanagement or criminal wrongdoing by public officials. Legislative institutions were given limited access to Cabinet documents. Confidential access to the noncore secrets contained in certain Cabinet documents related to public expenditures was given to the Auditor General. Nonetheless, the Government has always refused to produce Cabinet documents at the request of the House of Commons. The Government is justified in refusing to share the core secrets contained in Cabinet documents, but it is not justified in refusing to share noncore secrets, especially when the information is needed by the House of Commons to perform its constitutional role. The disclosure of noncore secrets after a decision has been made public does not endanger ministerial solidarity, the candour of ministerial discussions or the efficiency of the decision-making process.

While conventions are binding on political actors, they are not enforceable in court. The consequences for their breach are political, not

legal. As such, the Government could not rely on the Cabinet secrecy conventions to prevent the disclosure of Cabinet secrets in litigation or under the access to information regime. It was therefore necessary for the Courts and Parliament to devise positive legal rules to regulate whether Cabinet deliberations and documents should be protected or disclosed in these circumstances. The Cabinet secrecy conventions provided the rationale for the extension of the doctrine of public interest immunity to Cabinet secrets by the Courts under the common law.[133] It also provided the rationale for the adoption of sections 39 of the *Canada Evidence Act* and 69 of the *Access to Information Act* by Parliament.[134] The common law and statutory rules should be interpreted and applied in light of the justification and scope of the Cabinet secrecy conventions given that they draw their legitimacy from them. This implies that there should not be automatic rules with respect to Cabinet secrets. Whether Cabinet secrets should be protected or disclosed depends on the context and the requirements of the public interest. While the Government is the final arbiter of the public interest under convention, it cannot, as I argue elsewhere, be the final arbiter of the public interest under the law, as this is a role for the Courts in a system governed by the rule of law.[135]

133 See: Yan Campagnolo, "A Rational Approach to Cabinet Immunity under the Common law" (2017) 55:1 Alta. L. Rev. 43.

134 See: Yan Campagnolo, "The History, Law and Practice of Cabinet Immunity in Canada" (2017) 47:2 R.G.D. 239.

135 See: Yan Campagnolo, "Cabinet Immunity in Canada: The Legal Black Hole" 63:2 McGill L.J. [forthcoming in 2018].