

November 27, 2020

## COVID-19 and Cabinet Secrets

By: Shaun Fluker

**Matter Commented On:** [CMOH Order 38-2020](#)

The Opposition is [calling](#) for the release of public health recommendations made by the Chief Medical Officer of Health to cabinet which informed the decision announced on November 24 to declare a second public health emergency and to impose enhanced measures to contain the spread of COVID-19. These enhanced measures are described at [COVID-19 info for Albertans: Mandatory public health measures](#) and those which came into force on November 24 are set out in [CMOH Order 38-2020](#). In response to questions from the media at the November 26 [update](#), both the Minister of Health and the Chief Medical Officer of Health stated the recommendations cannot be disclosed because of cabinet confidence – a constitutional convention in a Westminster government which keeps cabinet deliberations in secret for purposes of governance (see [here](#) for a discussion of these important functions). This convention is also codified in section 22 of the *Freedom of Information and Protection of Privacy Act*, [RSA 2000, c F-25](#). What does the common law say on this?

To begin with, it is important to clarify that this matter of cabinet confidence will shift from being a convention to a legal question if and when one or more of these public health measures is questioned in judicial review (or maybe a post-pandemic public inquiry?). The determination of whether the recommendations made by the Chief Medical Officer of Health are protected from disclosure then becomes a justiciable issue. Accordingly, the last word on this is unlikely to rest with the Minister of Health or any other member of cabinet if resistance continues unabated in the face of calls for disclosure.

Once it enters the realm of law, cabinet confidence does not provide absolute immunity from disclosure. In *Babcock v Canada (Attorney General)*, [2002 SCC 57 \(CanLII\)](#), the Supreme Court summarized this principle as follows (at paras 18 - 19):

The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny . . . . If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. . . .

The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. In addition to ensuring candour in Cabinet discussions, this Court in *Carey v. Ontario*, 1986 CanLII 7 (SCC), [1986] 2 S.C.R. 637, at p. 659, recognized another important reason for protecting Cabinet documents, namely to avoid “creat[ing] or fan[ning] ill-informed or captious public or political criticism”. Thus, ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making.

At one time, the common law viewed Cabinet confidentiality as absolute. However, over time the common law has come to recognize that the public interest in Cabinet confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield: see *Carey, supra*. Courts began to weigh the need to protect confidentiality in government against the public interest in disclosure, for example, preserving the integrity of the judicial system. It follows that there must be some way of determining that the information for which confidentiality is claimed truly relates to Cabinet deliberations and that it is properly withheld. At common law, the courts did this, applying a test that balanced the public interest in maintaining confidentiality against the public interest in disclosure: see *Carey, supra*.

These public interest immunity claims are complicated cases which often involve assertions of serious misconduct on the part of government, and thus consider a range of factors such as whether the disclosure involves core secrets of governance (see [here](#) for a discussion these cases and the considerations made by the courts). Where a reviewing court would land on this assessment in relation to the recommendations made by the Chief Medical Officer of Health (which surely are based on science and her public health expertise) is difficult to predict, however at the very least the recommendations would not be protected with absolute immunity in the context of litigation.

An alternative approach to this dispute might be to begin by questioning exactly who the decision-maker is here. The Chief Medical Officer of Health repeatedly asserts that she is only a source of recommendations, and that cabinet is the decision-maker on these public health measures. Likewise, the Premier and the Minister of Health assert publicly that these are cabinet decisions. In practice, there is little reason to doubt their claims. However, CMOH Order 38-2020 and all the other public health orders are very clearly issued by the Chief Medical Officer of Health herself – not cabinet. Moreover, the only section in the *Public Health Act*, [RSA 2000, c P-37](#) which grants authority to enact these measures is section 29, which grants the Chief Medical Officer of Health the power to “take whatever steps the medical officer of health considers necessary” to address the spread of COVID-19. Nowhere does the Act explicitly give cabinet the power to impose social distancing requirements, gathering restrictions, and the like. Accordingly, there is at least an argument that the recommendations made by the Chief Medical Officer of Health form part of the record for her public health orders, including CMOH Order 38-2020, and not cabinet decisions.

In any event, the assertion of secrecy here seems futile and only fuels speculation that there is actually something to hide. This also has the very unfortunate adverse effect of further eroding the ability of the Premier, the Minister of Health, and the Chief Medical Officer of Health to inspire collective action on the part of everyone to limit the spread of COVID-19. Legal rules and the threat of \$1000 fines will do little in this regard on their own, particularly when the public thinks it is not getting full, true and plain disclosure on the basis for these rules.

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