SCC decision: Deliberative secrecy and disclosure of Cabinet mandate letters

February 12, 2024

In *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4, the Supreme Court of Canada (the SCC) held that the Information and Privacy Commissioner of Ontario (the IPC) failed to give sufficient weight to the need for "deliberative secrecy" in finding that the public had a right of access to mandate letters that the Premier of Ontario delivered to each of his ministers shortly after forming government in 2018. The decision confirms the important role that Cabinet confidence plays in Canada's constitutional system and confirms that Canadian freedom of information (FOI) legislation is meant to strike a balance between transparency and confidentiality. In addition, a disagreement between the majority and the concurrence over the appropriate standard of review possibly expands the circumstances in which correctness review will apply and casts doubt on the proper approach to reasonableness review.

Background

Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (FIPPA), provides the public with a presumptive right of access to records in the custody or control of government institutions. However, that right is subject to certain exemptions, including an exemption in s. 12(1) that protects records whose disclosure "would reveal the substance of deliberations of the Executive Council of its committees". The Executive Council is comprised of the Premier and Cabinet ministers and is commonly referred to as the Cabinet.

In this case, a journalist with the Canadian Broadcasting Corporation (CBC) requested access to 23 confidential mandate letters sent by Premier Doug Ford to Ontario's Cabinet ministers. The mandate letters outlined the Premier's plan of action and key policy priorities for each Minister, as well as the Premier's advice, instructions and guidance. The Cabinet Office denied the CBC's access request pursuant to s. 12(1) of FIPPA.

CBC appealed the refusal to the Information and Privacy Commissioner of Ontario (the IPC). The IPC disagreed with the Cabinet Office that the mandate letters were exempt from disclosure, and concluded that there was no evidence to suggest that: (1) the letters would reveal the Premier's or the Cabinet's prior deliberations; (2) that the letters

were actually discussed at a Cabinet meeting; or (3) that the letters would be discussed at future Cabinet meetings. Rather, he held that the letters represented the "end point" of the Premier's deliberations and, at most, indicated topics that may have arisen during Cabinet meetings. The IPC ordered the Cabinet Office to disclose the letters to the CBC.

The Attorney General of Ontario (the AGO) applied to the Divisional Court of Ontario for judicial review of the IPC's decision (2020 ONSC 5085). The Divisional Court confirmed that the IPC's decision was reasonable, finding that the decision was largely fact-based and that there was an absence of evidence to show that the mandate letters were exempt under s. 12(1). A majority of the Court of Appeal for Ontario dismissed the AGO's further appeal, however, Lauwers J.A., in dissent, would have allowed the appeal and held the letters were protected under s. 12(1) (2022 ONCA 74).

Supreme Court of Canada

In a 6-1 decision, Karakatsanis J. for the majority allowed the appeal, setting aside the IPC's order to disclose the letters. Justice Côté, in concurrence, agreed that the letters were protected under s. 12(1), but disagreed with the majority as to the appropriate standard of review.

The standard of review

Both the Divisional Court and the Court of Appeal had applied reasonableness review to the IPC's decision. However, Lauwers J.A. in dissent had opined that the case presents a "conundrum". Per *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the IPC's statutory interpretation would normally be subject to reasonableness review. However, because the particular facts of this case concerned Cabinet records, there was a "constitutional overlay" which could attract correctness review.

Justice Karakatsanis, for the majority, made no comment on this "thorny question", noting that the outcome of the case would be the same on either reasonableness or correctness review. Accordingly, as the parties did not raise the issue of standard of review before the SCC, the majority declined to "resolve" the issue. Instead, the majority proceeded on the basis of reasonableness review, though as noted by Justice Côté, the majority's approach neglected to pay due attention to the reasons of the decision-maker and was, in effect, disguised correctness review.

Justice Côté, however, was critical of the majority's approach, noting that the thorny issue of the application standard of review was an "essential" and "serious" question. She found that the scope of Cabinet privilege was a general question of law of central importance to the legal system as a whole. Per *Vavilov*, this is an existing category of question that attracts correctness review. She emphasized that *Vavilov* had stated that issues about the limits of solicitor-client privilege or parliamentary privilege would be subject to correctness review and noted that Cabinet privilege should be treated similarly.

Justice Côté also disagreed that the same outcome would be reached on either reasonableness or correctness review. She highlighted the different approach required under each type of review, and found that the majority's reasons failed to take a

“reasons first” approach. Instead, she considered that the majority conducted a “de facto” reasonableness review, engaging in their own interpretation of the exemption and then using that as a yardstick by which to measure the IPC’s reasons. However, viewing the majority’s reasons as correctness review, she agreed that the IPC’s decision is incorrect and ought to be set aside.

Balancing values in FIPPA

Karakatsanis J. for the majority emphasized that the purpose of FIPPA, and other FOI legislation, is to “strike[] a balance between the public’s need to know and the confidentiality the executive requires to govern effectively”.

FOI legislation “promotes transparency, accountability, and meaningful public participation”, and “‘improve[s] the workings of government’ by making it ‘more effective, responsible and accountable’”. Equally, however, the majority noted that the workings of government require spheres of confidentiality: “Cabinet confidentiality grants the executive the necessary latitude to govern in an effective, collectively responsible manner” and “promotes deliberative candour, ministerial solidarity, and governmental efficiency”.

The IPC’s failure to engage with the legal and factual context

Karakatsanis J. found the IPC’s decision was unreasonable because it failed to engage with the relevant legal and factual context. In particular, the IPC’s decision did not adequately address the constitutional conventions and traditions surrounding Cabinet confidentiality and Cabinet decision-making, including the role of the Premier.

The majority explained that Cabinet confidentiality is protected as a matter of constitutional convention, with the goal of ensuring effective government. There are three rationales for this convention. Confidentiality is required so that Cabinet ministers may speak freely during Cabinet deliberations, yet still stand together in public and be held collectively responsible for Cabinet policy decisions. These are the “candour” and “solidarity” rationales. However, efficiency of the collective decision-making process is a third rationale.

While the IPC paid due regard to the rationales of candour and solidarity, he failed to consider this third rationale, leading to an overly narrow interpretation of the exemption in s. 12(1) and leading him to neglect certain arguments made by the Cabinet Office. This failure may have caused the IPC to reject the Cabinet Office’s argument that Cabinet confidentiality helps to ensure an efficient deliberative process by preserving confidentiality until a final decision has been made and announced. Premature disclosure of policies can negatively impact the deliberative process, and in turn impair effective government. In other words, when and how the Cabinet decides to announce policy priorities is an important part of Cabinet’s deliberative process and is protected by s. 12(1).

The letters reveal the substance of deliberations, not just outcomes or topics

Karakatsanis J. also disagreed with the IPC's characterization of the mandate letters as containing only "topics" or "final outcomes" of the Premier's deliberative process. This characterization was unreasonable given the nature of Cabinet decision-making and the Premier's role in that process.

Cabinet decision-making is a fluid and dynamic process. Agenda-setting is a critical part of the decision-making process. The Premier, who sets Cabinet agendas, plays a central role in the decision-making process and the Premier's role and activities are inseparable from Cabinet and its deliberations. While the IPC purported to recognize that the Premier's deliberations cannot be separated from Cabinet's deliberations, the IPC drew an "artificial dichotomy" between the Premier's and Cabinet's deliberations when he concluded that the letters were "outcomes" of the Premier's deliberative process. The IPC failed to recognize that the policy priorities stated in the letters initiate Cabinet's deliberative process, are subject to change, and will often trigger subsequent Cabinet decisions.

It was equally unreasonable to consider the letters as mere "topics": the majority held that the letters contained the Premier's initial views, the disclosure of which would reveal the substance of Cabinet deliberations when compared against subsequent government action.

Key takeaways

- The SCC's decision in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* confirms the important role that Cabinet confidentiality plays in Canada's constitutional democracy. Cabinet confidentiality is protected as a matter of constitutional convention, and promotes candour, solidarity and efficiency in Cabinet, aiding effective government.
- FIPPA specifically provides protection for records that would reveal the substance of Cabinet deliberations in s. 12(1), which necessarily includes Cabinet mandate letters. Mandate letters do not contain the culmination of the Premier's deliberations or mere "topics" of discussion for the Cabinet, but rather reflect the beginning of Cabinet's deliberative process on policy priorities. As such, they are exempt from disclosure.
- The framing of the purpose of FOI legislation as striking a balance is significant in that it gives weight to the legislative purpose to exemptions and exclusions in freedom of information statutes that is not uniformly recognized in lower court decisions. The majority finds that transparency, accountability and meaningful public participation and confidentiality are (both) "essential goals" with reference to the exemptions and exclusions enacted by government. It made this finding despite the purpose provision in FIPPA, which stipulates that necessary exemptions from the right of access should be "limited and specific."
- Justice Côté's conclusion that correctness review ought to apply, an issue that the majority preferred not to address, opens the door to expanding the application of the correctness categories set out in *Vavilov*. *Vavilov* held that correctness review will apply where the rule of law requires the standard of correctness, including cases involving constitutional questions, questions of law

of central importance to the legal system as a whole, and questions related to jurisdictional boundaries between two or more administrative bodies. Most recently in *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, the majority of the SCC clarified that a question will be of central importance to the legal system as a whole where it affects the legal system or administration of justice as a whole, has legal implications for many other statutes, or affects other institutions of government. Justice Côté's approach paves the way for arguments that cases involving some constitutional overlay ought to be treated as questions of law of central importance.

- Justice Côté's criticism of the majority's reasonableness review also casts doubt on how to properly carry out a "reasons first" review and what degree of deference is shown to decision-makers. What the majority calls reasonableness review, Côté J. calls "de facto" correctness. The majority's extensive discussion of constitutional conventions and focus on efficiency as a rationale for Cabinet secrecy (a concept that Côté J. indicates has only been fully expressed in scholarly authority, to date) threatens to raise the bar for administrative decision-makers. Administrative decision-makers are experts in their field, but not necessarily scholars of constitutional convention. Yet, where an administrative decision-maker's decision involves some constitutional overlay, the majority's decision in this case suggests that the administrative decision-maker will need to fully address those constitutional elements to be reasonable.

By

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