Reconciling Cabinet Secrecy with the Rule of Law

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ABSTRACT

This dissertation explores the tension between government openness and secrecy. It focuses on Cabinet secrecy, that is, the doctrine protecting the confidentiality of the collective decision-making process at the top of the executive branch in Westminster jurisdictions. I argue that Cabinet secrecy is crucial to the proper functioning of the system of responsible government as it fosters the candour of ministerial discussions, protects the efficiency of the decision-making process, and enables Ministers to remain united in public notwithstanding any disagreement they may have in private. Yet, excessive secrecy can hamper government accountability by depriving citizens, parliamentarians and judges of the information needed to hold public officials responsible for their decisions and actions. An important question is who should have the final authority over the disclosure of Cabinet secrets when a dispute arises, the Government or the Courts? Under the common law, Courts in the United Kingdom, Australia, New Zealand and Canada (at the provincial level) asserted the authority to review and overrule Cabinet immunity claims to prevent abuses of power. In Canada, at the federal level, by the enactment of sections 39 of the Canada Evidence Act and 69 of the Access to Information Act, Parliament deprived the Courts of the power to inspect and order the disclosure of Cabinet secrets. An examination of the relevant cases shows that the absence of meaningful judicial review has led to an overbroad application of Cabinet immunity by
public officials. Based on David Dyzenhaus’ theory of law as justification, I argue that the statutory regime offends the rule of law and the Canadian Constitution because it violates the requirements of procedural fairness (the right to an independent and impartial decision-maker and the right to reasons) and the separation of powers principle (the Courts’ authority to control the admissibility of evidence and the legality of executive action). Then, in the light of the best practices in Westminster jurisdictions, I make policy recommendations with the objective of reconciling Cabinet secrecy with the rule of law, especially by narrowing the scope of Cabinet immunity and ensuring that such claims are subject to meaningful oversight and review.