

SECRET, NOT SACRED: CONSTITUTIONAL LIMITATIONS ON THE PROTECTION OF CABINET CONFIDENCES UNDER THE *ACCESS TO INFORMATION ACT*

Yan Campagnolo and Vincent Kazmierski*

ABSTRACT

This article explores the impact of the Supreme Court of Canada's recognition of the constitutional protection for access to government information and avenues for securing that protection more effectively. Part I considers the various sources for the constitutional protection of access to government information, especially the unwritten constitutional principle of democracy and sections 2(b) and 3 of the *Canadian Charter of Rights and Freedoms*. Part II examines the limitations of the Court's current approach to protecting access to government information under section 2(b), as set out in *Criminal Lawyers' Association v. Ontario* and *Toronto (City) v. Ontario*. Part III proposes an alternative approach to recognizing constitutional protection for access to government information: a holistic

* Yan Campagnolo, Full Professor, Common Law Section, Faculty of Law, University of Ottawa. Vincent Kazmierski, Associate Professor, Department of Law and Legal Studies, Carleton University. For helpful comments on earlier versions, we are indebted to Jamie Cameron, Sujit Choudhry, Kyle Kirkup, Matt Malone, Richard Moon, Michael Pal, Bruce Ryder, James Turk, and the anonymous reviewers of the *McGill Law Journal*. The authors would like to recognize the excellent research and editing work of Jacob Graff, Desmond Fisher, Clémentine Mattesco, and Andrea Stuhlec-Leonard.

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approach that expands beyond section 2(b) to include section 3 and the principle of democracy. The holistic approach avoids the pitfalls of rooting this protection in either of sections 2(b) or 3, providing a broader justification for the right. Having considered these approaches, the article assesses whether section 69 of the *Access to Information Act*, which excludes “Cabinet confidences” from the scope of the *Act*, violates that constitutional protection. Part IV contends that section 69 infringes the *Charter* in a manner that cannot be justified in a free and democratic society regardless of the approach that is applied. To remedy this infringement, the article recommends that section 69 be modified to limit the range of information captured by the concept of “Cabinet confidences” and to increase supervision of Cabinet privilege claims.

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RÉSUMÉ

Dans cet article, on explore l’incidence de la reconnaissance, par la Cour suprême du Canada, de la protection constitutionnelle du droit d’accès à l’information gouvernementale et les moyens permettant d’assurer plus efficacement cette protection. Dans la Partie I, on examine les diverses sources de cette protection constitutionnelle et, en particulier, le principe constitutionnel non écrit de la démocratie ainsi que l’alinéa 2(b) et l’article 3 de la *Charte canadienne des droits et libertés*. Quant à la Partie II, elle porte sur les limites de l’approche—ancrée spécifiquement dans l’alinéa 2(b)—adoptée par la Cour pour protéger le droit d’accès à l’information gouvernementale dans les arrêts *Criminal Lawyers’ Association c. Ontario* et *Toronto (Cité) c. Ontario*. La Partie III propose une approche alternative permettant de reconnaître la protection constitutionnelle du droit d’accès à l’information gouvernementale : soit une approche holistique qui va au-delà de l’alinéa 2(b) afin d’y inclure l’article 3 et le principe de démocratie. L’approche holistique permet d’éviter les écueils découlant de l’ancrage de cette protection soit dans l’alinéa 2(b), soit dans l’article 3, fournissant ainsi une justification élargie pour la revendication de ce droit. À l’issue d’une analyse de ces approches, les auteurs évaluent dans quelle mesure l’article 69 de la *Loi sur l’accès à l’information*, lequel exclut les « renseignements confidentiels du Cabinet » de la portée de la *Loi*, enfreint cette protection constitutionnelle. Dans la Partie IV, on soutient que l’article 69 porte atteinte à la *Charte* d’une manière qui ne peut se justifier dans le

cadre d'une société libre et démocratique, et ce, quelle que soit l'approche retenue. Pour remédier à cette atteinte, les auteurs recommandent de modifier l'article 69 de façon à restreindre l'éventail des renseignements visés par le concept de « renseignements confidentiels du Cabinet » et d'accroître la supervision des revendications du privilège du Cabinet.

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INTRODUCTION

CAN the government commit to buying a new fleet of modern fighter jets without disclosing their exact cost?¹ Can the Governor in Council authorize invoking emergency legislation to allow the restriction of civil rights to address demonstrations without disclosing the information justifying the declaration of a public order emergency?² Can the executive refuse to disclose information that may indicate whether there is evidence of foreign interference in Canadian elections and how it responded?³ Each of these scenarios reveals some of the ways the federal government's power to keep "confidences of the Queen's Privy Council for Canada" (Cabinet confidences) secret may deny Canadians access to information about the activities of government officials and institutions. They also reveal how this power may, in turn, interfere with Canadians' ability to assess and critique the government's actions and, ultimately, hold it accountable.

This article explores whether constitutional restrictions should be imposed on the government's power to shield information by invoking the legislative protection granted to Cabinet confidences. In particular, it focuses on the sweeping protection granted to Cabinet confidences by

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- 1 See Yan Campagnolo, *Behind Closed Doors: The Law and Politics of Cabinet Secrecy* (Vancouver: UBC Press, 2021) at 57–58 [Campagnolo, *Behind Closed Doors*].
 - 2 See e.g. Sean Fine, "Ottawa Cites Cabinet Confidentiality over Decision to Invoke Emergencies Act, Court Filing Shows", *The Globe and Mail* (22 April 2022), online: <theglobeandmail.com> [perma.cc/F2F9-K3AP]. See also Mel Cappe & Yan Campagnolo, "Cabinet Secrecy Is Essential, But Should Not Be Absolute", *Policy Options* (24 May 2022), online: <policyoptions.irpp.org> [perma.cc/7U3E-3DC6]. The government ultimately gave the Public Order Emergency Commission access to the relevant Cabinet documents (see Canada, Public Order Emergency Commission, *Report of the Public Inquiry into the 2022 Public Order Emergency: Overview*, vol 1, Catalogue No CP32-167/1-2022E-PDF (Ottawa: POEC, February 2023) (Hon Paul S Rouleau) at 17).
 - 3 See e.g. Robert Fife & Steven Chase, "Trudeau Cabinet Withholding Documents on Foreign Interference from Inquiry", *The Globe and Mail* (23 May 2024), online: <theglobeandmail.com> [perma.cc/4Z85-CEN6]. In the end, the government bowed to public pressure and agreed to meaningfully lift the veil of Cabinet secrecy (see Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions, News Release, "Foreign Interference Commission Granted Unprecedented Access to Cabinet Documents" (7 October 2024), online: <foreigninterferencecommission.ca> [perma.cc/EU8Z-XK45]).

section 69 of the federal *Access to Information Act* (ATIA).⁴ The broad scope of the information that may be swept under the definition of “Cabinet confidences” in section 69, combined with the significant restrictions on external review of government decisions stipulating that particular documents contain Cabinet confidences, enables the government to deem swathes of information “sacred” and unreviewable by anyone but anointed members of the government. As will be shown, the scope of this power is far beyond what is necessary to ensure government functions properly. More importantly, by restricting access to key information about government decisions and actions, this broad scope substantially impedes citizens’ ability to meaningfully express themselves about government policies and actions. And this impediment to meaningful political participation arguably amounts to an unjustifiable infringement of the *Canadian Charter of Rights and Freedoms* (Charter).⁵

This article explores how the Supreme Court of Canada has already recognized constitutional protection for access to government information and how that protection may be more effectively secured. Part I considers the various sources for the constitutional protection of access to government information, including the unwritten constitutional principle of democracy and sections 2(b) and 3 of the *Charter*. Part II then examines the limitations of the Court’s current approach to protecting access to government information under section 2(b) by considering the contradictory approaches the Court adopted in *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association* (*Criminal Lawyers’ Association*)⁶ and *Toronto (City) v. Ontario (Attorney General)* (*Toronto (City)*).⁷ In particular, it considers the challenges posed by the Court’s ongoing uncertainty about how to address “positive rights” claims under section 2 of the *Charter*. This uncertainty has led to two contrasting approaches: the “hybrid” *Irwin Toy* approach advanced in *Criminal Lawyers’ Association* and the “simplified” *Dunmore/Baier* approach adopted in *Toronto (City)*. Neither approach is ideal for securing a constitutional right of access to

4 RSC 1985, c A-1 [ATIA]. The rationale and scope of section 69 is explained in Part IV-A, *below*.

5 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

6 2010 SCC 23 [*Criminal Lawyers’ Association*].

7 2021 SCC 34 [*Toronto (City)*].

government information. Part III proposes an alternative, “holistic” approach to recognizing constitutional protection for access to government information that expands beyond section 2(b) to include section 3 of the *Charter* and the unwritten constitutional principle of democracy. The holistic approach avoids the pitfalls of rooting the protection of access to government information in either of sections 2(b) or 3 of the *Charter*, providing a broader justification for recognizing the right.

Having considered these three approaches to recognizing constitutional protection for access to government information, the article turns to the issue of whether section 69 of the *ATIA* violates that constitutional protection. Part IV argues that section 69 infringes the *Charter* regardless of the approach that is applied. Finally, after making the case for infringement, the article assesses whether section 69’s infringement of the *Charter* may be justified in a free and democratic society. Section 69’s exclusion of Cabinet confidences from the ambit of the *ATIA* is a limit prescribed by law, for a pressing and substantial objective, that of maintaining the proper functioning of Cabinet government. The restrictions on access to government information that the exclusion of Cabinet confidences imposes are also rationally connected to the objective pursued; however, they are neither minimally impairing nor proportionate. In light of these findings, the article recommends that section 69 be modified to limit the range of information captured by the concept of “Cabinet confidences” and to increase supervision of Cabinet privilege claims. While Cabinet confidences deserve protection, they should merely be secret rather than have the exalted, unreviewable status of sacred.

I. SOURCES OF THE RIGHT OF ACCESS TO INFORMATION

Access to government information helps citizens play a meaningful role in the democratic process and civil society and enables Parliament and the courts to hold governments to account. This fact has been repeatedly acknowledged by practitioners and academic authorities.⁸ Courts

8 See Donald V Smiley, “Freedom of Information: Rationales and Proposals for Reform” in John D McCamus, ed, *Freedom of Information: Canadian Perspectives*, Osgoode Hall Law School Annual Lecture Series (Toronto: Butterworths, 1981) 1 at 21; Tom Onyshko, “The Federal Court and the *Access to Information Act*” (1993) 22:1 Man LJ 73 at 75; T Murray Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (Ottawa: Canadian Bar Association, 1977) at 154–55; Alasdair Roberts, “Structural

have also recognized it. In *Dagg v. Canada (Minister of Finance)*, Justice Peter Cory, writing for the majority of the Supreme Court of Canada, succinctly summarized the important role of access to government information within Canada's democratic system of government:

The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.⁹

Access to government information is not just crucial to citizens' ability to hold their governments to account through elections; it is also key to enabling legislators and judges to fulfill their roles in holding governments to account through legislative and judicial proceedings. More specifically, Parliament's right to order the production of documents concerning government actions through the exercise of parliamentary privilege strengthens the ability of parliamentarians (particularly members of opposition parties) to hold the government accountable through questioning in the legislature and its committees. Similarly, the ability of judges to fairly adjudicate legal proceedings brought to hold government officials accountable for their actions depends, in part, on their authority to compel those officials to produce documents relevant to the proceedings.¹⁰

Of course, limits on the right of access to government information have also been recognized as legitimate, based on values such as

Pluralism and the Right to Information" (2001) 51:3 UTLJ 243 at 259–60; Donald C Rowat, "How Much Administrative Secrecy?" (1965) 31:4 Can J Econ & Political Science 479 at 480; Gregory Tardi, *The Law of Democratic Governing*, vol 1, *Principles* (Toronto: Thomson Carswell, 2004) at 38.

9 1997 CanLII 358 at para 61 (SCC). See also *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 ("[b]road rights of access to government information serve important public purposes. They help to ensure accountability and ultimately, it is hoped, to strengthen democracy" at para 1).

10 While the refusal to produce documents in litigation can be held against the government when the court weighs the evidence before it (see *RJR-MacDonald Inc v Canada (Attorney General)*, 1995 CanLII 64 at para 166 (SCC)), the court may not be able to fully account for the weight of the suppressed evidence if it cannot review the documents at issue.

government effectiveness, public safety, and national security. These limits have been articulated in both legislation and common law rules. Not surprisingly, debate continues on how best to balance the need to promote political participation and government accountability with the desire to foster effective government and public protection. One key to achieving a proper balance is subjecting government officials' attempts to prevent disclosure of government information to independent review, either by information commissioners, for claims under access to information legislation, or by judges, for claims during judicial proceedings. To this end, access to information legislation and common law and statutory rules for judicial proceedings typically recognize the power of information commissioners and judges to review information that government officials refuse to disclose to determine whether the reasons for refusing correspond to the justifications available under the relevant legislative or common law regimes.¹¹ Legislative provisions that exclude such review stand out as exceptions, whose constitutional validity should be scrutinized. The argument that such provisions should be subject to constitutional scrutiny is supported by unwritten and written constitutional sources.

A. *Unwritten Sources*

Case law now recognizes the important role of unwritten constitutional principles in interpreting and applying the Canadian Constitution. From the outset, this jurisprudence has acknowledged that unwritten principles are necessary for the Constitution to furnish "a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government."¹² The Court has held that unwritten constitutional principles "are the vital unstated assumptions upon which the [Constitution] is based."¹³ As such, unwritten principles cannot supplant the written provisions of the Constitution, but they may aid in interpreting the written provisions and fill gaps in the

11 See *ATIA*, *supra* note 4, s 36(2); *Canada Evidence Act*, RSC 1985, c C-5, ss 37–39 [CEA]. For the approach under the common law, see *Carey v Ontario*, 1986 CanLII 7 (SCC) [Carey].

12 *Reference re Secession of Quebec*, 1998 CanLII 793 at para 32 (SCC).

13 *Ibid* at para 49.

text. The Court has also stated that unwritten principles have “a powerful normative force”¹⁴ and are “capable of limiting government actions.”¹⁵

However, the scope of their normative force and, specifically, the question of whether these principles can serve as “independent” limits on legislation remain topics of debate among the Court’s judges and scholars alike. While some view decisions such as *Babcock v. Canada (Attorney General)*,¹⁶ *British Columbia v. Imperial Tobacco Canada Ltd.*,¹⁷ and *British Columbia (Attorney General) v. Christie*¹⁸ as imposing limits on the application of unwritten constitutional principles, decisions such as *Reference re Supreme Court Act, ss. 5 and 6*¹⁹ and *Reference re Senate Reform*²⁰ have championed a “structural” approach to constitutional interpretation that relies heavily on underlying unwritten constitutional principles. These diverging approaches suggest that the Court continues to explore the role and power of unwritten principles, including their ability to restrict legislative provisions. The fault lines of this debate were most recently revealed in the Court’s 5-4 split decision in *Toronto (City)*, where the majority decision of Chief Justice Richard Wagner and Justice Russell Brown maintained that unwritten principles could not serve as independent means for limiting legislation. In contrast, the dissenting opinion of Justice Rosalie Abella took the position that unwritten principles have always had, and continue to have, the power to limit legislation.²¹

14 *Ibid* at para 54.

15 *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para 54 [*Babcock*].

16 *Ibid*.

17 2005 SCC 49.

18 2007 SCC 21.

19 2014 SCC 21.

20 2014 SCC 32.

21 See *Toronto (City)*, *supra* note 7 at para 170. For a critique of the majority decision in this case, see Vincent Kazmierski, “‘Untethered’: How the Majority Decision in *Toronto (City) v Ontario* Tries (But Fails) to Break Away From the Supreme Court of Canada’s Unwritten Constitutional Principle Jurisprudence” (2022–2023) 54:2 *Ottawa L Rev* 197 [Kazmierski, “Untethered”]. Importantly, while Chief Justice Wagner and Justice Brown did affirm the view that unwritten principles can be used to “fill gaps” in the text of the Constitution and to aid in the interpretation of written constitutional provisions (see *Toronto (City)*, *supra* note 7 at paras 55–56), they did not refer to unwritten principles when interpreting the scope of section 2(b) of the *Charter*.

While the normative scope of unwritten principles remains uncertain, a consensus on the existence and core content of one principle—the principle of democracy—does exist. For example, even though they decided against invalidating legislation using the principle of democracy alone, Chief Justice Wagner and Justice Brown identified the following elements of the principle of democracy in *Toronto (City)*:

Democracy is ... a principle by which our Constitution is to be understood and interpreted. Though not explicitly identified in the text, the basic structure of our Constitution—including its establishment of the House of Commons and of provincial legislatures—connotes certain freely elected, representative, and democratic political institutions.

The democratic principle has both individual and institutional dimensions. It embraces not only the process of representative and responsible government and the right of citizens to participate in that process at the provincial and federal levels, but also substantive goals including the promotion of self-government. ...

In this case, the democratic principle is relevant as a guide to the interpretation of the constitutional text. It supports an understanding of free expression as including political expression made in furtherance of a political campaign.²²

Just as the Supreme Court of Canada has recognized the important role that access to information legislation plays in facilitating democracy by promoting both political participation and government accountability, it has emphasized the broader role of the principle of democracy in promoting these same ideals. For example, in *Reference re Secession of Quebec*, the Court noted that Canada's democratic institutions must "allow for the participation of, and accountability to, the people, through public institutions created under the Constitution" and that they "must be capable of reflecting the aspirations of the people."²³ The Court recognized that

22 *Supra* note 7 at paras 76–78 [footnotes omitted].

23 *Supra* note 12 at para 67. For a detailed discussion of the principle of democracy, see Michael Pal, "The Unwritten Principle of Democracy" (2019) 65:2 McGill LJ 269. See also Vincent Kazmierski, "Something to Talk About: Is There a *Charter* Right to Access Government Information?" (2008) 31:2 Dal LJ 351 [Kazmierski, "Something to Talk About"].

these goals are supported by the interaction of the principles of democracy and the rule of law and has repeatedly highlighted the importance of promoting and protecting both political participation and the accountability of government officials when interpreting the written provisions of the Constitution, especially sections 2(b) and 3 of the *Charter*.

B. *Written Sources*

Section 3 of the *Charter* (democratic rights)—The Court’s section 3 decisions have expanded beyond protecting a procedural right to vote to include a substantive conception of that right.²⁴ To this end, the Court has consistently emphasized the vital role that section 3 plays in enabling voters to *meaningfully* participate in the electoral process. For example, in *Figueroa v. Canada (Attorney General)*, Justice Frank Iacobucci noted that the right to vote is meaningful only if voters have access to information about candidates:

The right to play a meaningful role in the electoral process includes the right of each citizen to exercise the right to vote in a manner that accurately reflects his or her preferences. In order to exercise the right to vote in this manner, citizens must be able to assess the relative strengths and weaknesses of each party’s platform ... [and therefore] must have access to information about each candidate.²⁵

Similarly, in *Harper v. Canada (Attorney General)* (*Harper*), Justice Michel Bastarache noted the importance of access to information to rendering participation in the electoral process meaningful:

This case engages the informational component of an individual’s right to meaningfully participate in the electoral process. The right to meaningful participation includes a citizen’s right to exercise his or her vote in an informed manner. For a voter to be well informed, the citizen must be able to weigh the relative strengths and weaknesses of each candidate and political party.

24 Yasmin Dawood has argued that the Supreme Court has recognized a “bundle of democratic rights” under section 3 of the *Charter* (see “Democracy and the Right to Vote: Rethinking Democratic Rights Under the *Charter*” (2013) 51:1 Osgoode Hall LJ 251 at 259–62).

25 2003 SCC 37 at para 54 [*Figueroa*].

The citizen must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist. In short, the voter has a right to be “reasonably informed of all the possible choices.”²⁶

This point was reiterated by Justice Andromache Karakatsanis in *Ontario (Attorney General) v. Working Families Coalition (Canada) Inc. (Working Families Coalition)*, where she recognized that “true democracy requires that citizens have access to information ... to participate in the governance of the country.”²⁷

Hence, while the Court has not yet recognized that section 3 protects a right of access to government information, it has acknowledged in a number of different cases that meaningful participation in the electoral process requires the capacity to make “informed” choices, which certainly provides a foundation for this type of recognition. Indeed, the Court’s section 2(b) jurisprudence has also highlighted the need to protect “informed” decision-making as a key element of meaningful political participation, reinforcing the argument that access to government information should be protected by section 3 of the *Charter*.

Section 2(b) of the *Charter* (freedom of expression)—The Supreme Court of Canada has emphasized that political expression is at the core of the protection offered by section 2(b) of the *Charter*.²⁸ In *R v. Keegstra*, Chief Justice Brian Dickson described the importance of freedom of expression as follows:

The connection between freedom of expression and the political process is perhaps the linchpin to the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.²⁹

26 2004 SCC 33 at para 71 [*Harper*] [footnotes omitted], citing *Libman v Quebec (Attorney General)*, 1997 CanLII 326 at para 47 (SCC).

27 2025 SCC 5 at para 31 [*Working Families Coalition*]. See also *ibid* at para 55.

28 See *Harper*, *supra* note 26 at para 84.

29 [1990] 3 SCR 697 at 763–64, 1990 CanLII 24 (SCC).

The Court has stated that section 2(b) should protect more than just bare participation, highlighting the need to protect the right of citizens “to play a *meaningful* role in the electoral process.”³⁰ Indeed, echoing its section 3 jurisprudence, the Court has stressed the critical role that section 2(b) of the *Charter* plays in ensuring that citizens receive the information they require to participate meaningfully in the democratic process and, especially, to make informed decisions when voting. For example, in his dissenting reasons in *Thomson Newspapers Co. v. Canada (Attorney General)* (*Thomson Newspapers*), Justice Charles Gonthier remarked that the purpose of section 2(b) includes protecting “the ability of voters to make *informed* choices and the promotion of political and social participation.”³¹ Chief Justice Beverley McLachlin and Justice John Major, in their dissent in *Harper*, also underlined the importance of section 2(b) in ensuring voters have sufficient information to make informed decisions when voting:

Freedom of expression protects not only the individual who speaks the message, but also the recipient. Members of the public—as viewers, listeners and readers—have a right to information on public governance, absent which they cannot cast an informed vote.³²

Chief Justice McLachlin and Justice Major specifically cited the need for information about “public governance” rather than just the political platforms of election candidates.³³

While cases such as *Thomson Newspapers* and *Harper* set out the key role of section 2(b) in guaranteeing meaningful, informed participation in the democratic process and thus hinted that access to government information could be constitutionally protected, the Court has also explicitly recognized that access to government information may require constitutional protection in some circumstances. In *Haig v. Canada (Chief Electoral Officer)*, Justice Claire L’Heureux-Dubé noted, in obiter, that freedom of expression may require positive government action to ensure access to

30 *Harper*, *supra* note 26 at para 13 [emphasis in original], citing *Figueroa*, *supra* note 25 at para 26.

31 1998 CanLII 829 at para 38 (SCC).

32 *Supra* note 26 at para 17 [footnotes omitted].

33 *Ibid.*

government information that is needed to render protected expression meaningful:

Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action may be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring access to certain kinds of information.³⁴

More recently, in *Criminal Lawyers' Association*, the Court explicitly recognized that access to information can receive constitutional protection as a “derivative right” under section 2(b) of the *Charter*, in situations “where it is a necessary precondition of meaningful expression on the functioning of government.”³⁵ Writing for the Court, Chief Justice McLachlin and Justice Abella emphasized that constitutional protection of access to government information could be triggered where such access is necessary to promote public discussion and criticism of government institutions:

In sum, there is a *prima facie* case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded. ... Open government requires that the citizenry be granted access to government records when it is necessary to meaningful public debate on the conduct of government institutions.³⁶

At the same time, Chief Justice McLachlin and Justice Abella were careful to note that constitutional protection of access to government information is limited:

Section 2(b) ... guarantees freedom of expression, but it does not guarantee access to all documents in government hands. Access to documents in government hands is constitutionally protected only where it is shown to be a necessary precondition of

34 [1993] 2 SCR 995 at 1039, 1993 CanLII 58 (SCC) [*Haig*].

35 *Supra* note 6 at para 30. It follows that access to information should also be recognized as a right (“derivative” or other) under section 3 of the *Charter*, where it is a necessary precondition to meaningful participation in the electoral process.

36 *Ibid* at para 37 [emphasis in original].

meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned.³⁷

The recognition of constitutional protection of access to government information in the *Criminal Lawyers' Association* case was a welcome development. However, the Court's current jurisprudence on constitutional protection of access to government information has been caught up in debates over how to protect positive rights (as opposed to negative rights) and has thus become highly convoluted.

II. LIMITS OF THE CURRENT APPROACHES

Part II considers the approach to protecting access to government information under section 2(b) of the *Charter* that was laid out in the decision of the Court in the *Criminal Lawyers' Association* case. It starts by examining the debate over positive rights protection under section 2 of the *Charter* and the way this debate affected both the unanimous reasons in *Criminal Lawyers' Association* and the somewhat contradictory majority reasons in *Toronto (City)*. Part II then sets out a more detailed critique of the ways this debate has unnecessarily complicated the constitutional protection of access to government information.

A. Debate Over Positive Rights Protection

One of the barriers to recognizing the constitutional protection of access to government information under section 2(b) of the *Charter* is that protecting access has typically been viewed as requiring the courts to impose on governments a positive obligation to disclose information.³⁸ Rather than simply requiring governments to refrain from limiting expression, protecting access to information obliges the courts to force governments to provide information they would prefer to keep confidential. This difference creates complications for applying section 2(b) to protect

37 *Ibid* at para 5 [emphasis in original].

38 It is worth noting that this concern does not arise under section 3 of the *Charter*, as the right to vote necessarily entails positive government action to promote the right, such as the positive obligation of governments to organize and hold periodic elections.

access to government information because courts have treated positive rights claims under section 2 of the *Charter* inconsistently.

The Court's approach to positive rights claims under section 2 of the *Charter* was clear after its decisions in *Dunmore v. Ontario (Attorney General)* (*Dunmore*)³⁹ and *Baier v. Alberta* (*Baier*).⁴⁰ In those cases, the majority of the Court set out a new approach to considering section 2 claims that would require positive action by governments. In the case of freedom of expression claims, the *Dunmore/Baier* approach requires asking the following questions:

- (1) Is the claim grounded in freedom of expression, rather than in access to a particular statutory regime? (2) Has the claimant demonstrated that lack of access to a statutory regime has the effect of a substantial interference with freedom of expression, or has the purpose of infringing freedom of expression? (3) Is the government responsible for the inability to exercise the fundamental freedom?⁴¹

Yet, in *Criminal Lawyers' Association*, Chief Justice McLachlin and Justice Abella refused to apply the *Dunmore/Baier* approach. They wrote that the debate about whether to distinguish between negative and positive rights, and thus whether to impose more stringent conditions on the protection of positive rights under section 2 of the *Charter*, was unhelpful: "In our view, nothing would be gained by furthering this debate. Rather, it is our view that the question of access to government information is best approached by building on the methodology set [out] in *Irwin Toy Ltd. v. Quebec (Attorney General)*."⁴² They summarized the three questions to be answered as follows:

- (1) Does the activity in question have expressive content, thereby bringing it within the reach of s. 2(b)? (2) Is there something in the method or location of that expression that would remove that

39 2001 SCC 94 [*Dunmore*].

40 2007 SCC 31 [*Baier*].

41 This is how the test was summarized by Chief Justice Wagner and Justice Brown (see *Toronto (City)*, *supra* note 7 at para 23).

42 *Criminal Lawyers' Association*, *supra* note 6 at para 31 [emphasis in original].

protection? (3) If the activity is protected, does the state action infringe that protection, either in purpose or effect?⁴³

However, in applying the *Irwin Toy Ltd. v. Quebec (Attorney General)* (*Irwin Toy*)⁴⁴ approach to determine whether constitutional protection for access to government information was triggered in *Criminal Lawyers' Association*, Chief Justice McLachlin and Justice Abella modified each step of the test. They did so to accommodate the fact that a request for access to information is categorically different from a more typical form of expression. In so doing, they created what may be characterized as a “hybrid” *Irwin Toy* approach, which modifies parts of the traditional *Irwin Toy* approach while incorporating elements of the *Dunmore/Baier* approach.⁴⁵ In particular, the hybrid *Irwin Toy* approach incorporates the *Dunmore/Baier* requirement that the restriction of access to the statutory platform “substantially imped[e]” meaningful expression before section 2(b) is triggered.

The Supreme Court of Canada’s decision in *Criminal Lawyers' Association* stated that this hybrid approach should be adopted when considering whether restrictions on access to government information breach section 2(b) of the *Charter*. In contrast, the majority reasons in the Court’s more recent decision in *Toronto (City)* reaffirmed that the *Dunmore/Baier* approach is the proper one to consider claims for the constitutional protection of positive rights under section 2 of the *Charter*. Indeed, in *Toronto (City)*, Chief Justice Wagner and Justice Brown specifically rejected the attempt by Justice Abella to apply the hybrid *Irwin Toy* approach to determine whether section 2(b) was violated by attempts to change election laws (the statutory platform) in the middle of a municipal election.

While preferring the *Dunmore/Baier* approach in *Toronto (City)*, Chief Justice Wagner and Justice Brown consolidated the approach to positive rights claims under section 2(b) of the *Charter* from a three-step analysis to a single step that requires courts to consider one question:

43 *Ibid* at para 32 [emphasis in original].

44 1989 CanLII 87 (SCC).

45 See Vincent Kazmierski, “Taking One Step Forward, Preventing Two Steps Back: Applying *Criminal Lawyers' Association* to Invalidate Extreme Legislative Restrictions on Access to Government Information” (2018) 38:2 NJCL 209 at 222–36 [Kazmierski, “Taking One Step Forward”].

[I]s the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression or had the purpose of interfering with freedom of expression?⁴⁶

This method might usefully be described as a “simplified” *Dunmore/Baier* approach.

While more recent decisions seem to favour the simplified *Dunmore/Baier* approach,⁴⁷ the only Supreme Court of Canada decision to explicitly recognize a right of access to government information under section 2(b) of the *Charter* (namely, *Criminal Lawyers’ Association*) applied the hybrid *Irwin Toy* approach.⁴⁸ The conflicting approaches to applying section 2(b) in *Criminal Lawyers’ Association* and *Toronto (City)* suggest that the question of how section 2(b) will be applied in cases concerning restrictions on access to government information remains undetermined. Neither of the Court’s most recent approaches is optimal, however.

B. Critique of the Current Approaches

The Supreme Court of Canada’s approaches to protection under section 2(b) of the *Charter* adopted in *Criminal Lawyers’ Association* and *Toronto (City)* are vulnerable to three main critiques. The first two of these critiques are specific to the hybrid *Irwin Toy* approach the Court adopted in *Criminal Lawyers’ Association*, while the third applies to both the hybrid

46 *Supra* note 7 at para 25.

47 See e.g. *Société des casinos du Québec Inc v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at paras 40–44 [*Société des casinos*].

48 After *Criminal Lawyers’ Association*, *supra* note 6, the hybrid *Irwin Toy* approach was successfully applied to challenge the constitutional validity of the exclusion of records relating to the provision of abortion services in the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F-31, s 65(5.7) [*Ontario FIPPA*] (see *Association for Reformed Political Action Canada v Ontario*, 2017 ONSC 3285 at paras 29–44 [*ARPA*]). But this type of constitutional challenge has typically been unsuccessful (see e.g. *Phillips c Ville de Montréal (SPVM)*, 2021 QCCQ 15135 at paras 31–46; *Fraser v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 821 at paras 95–97, *aff’d* 2023 FCA 167, leave to appeal to SCC refused, 2024 CanLII 30089 (SCC); *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 at paras 646–57).

Irwin Toy approach and the simplified *Dunmore/Baier* approach adopted in *Toronto (City)*.

The first critique of the hybrid *Irwin Toy* approach relates to the Court's reluctance to consider whether access to government information requires positive action by the government. In *Criminal Lawyers' Association*, Chief Justice McLachlin and Justice Abella stated that the distinction between negative and positive rights is unhelpful. Indeed, the distinction is not always warranted, particularly since most rights can be understood to involve both positive and negative aspects. Moreover, applying the "positive rights claim" label and elevated thresholds for protecting such rights can undermine claims for their protection.⁴⁹ Yet, there is clearly a difference between requiring the government to refrain from restricting expression and requiring the government to support expression by providing access to information that renders that expression meaningful. Access to information regimes, like elections, need the support of government action and infrastructure to be effective.⁵⁰ While the test for triggering section 2(b) should be clarified, applying a distinct process when assessing whether such positive obligations trigger section 2(b) is understandable. Chief Justice McLachlin and Justice Abella's attempt to sidestep the question of whether protecting access to government information imposes a positive obligation on government (or at least requires the

49 On the debate concerning positive and negative rights in Canada, see generally Joel Bakan, "Negating Positive Rights: A Note on *Mathur v Ontario*" (2025) 33:3 Const Forum Const 1.

50 Although the right to vote protected by section 3 of the *Charter* would be ineffective without the support of election infrastructure, it has historically been viewed as a negative right. There is now a growing consensus that the right to vote should instead be viewed as a positive right (see generally Michael Pal, "Constitutional Design of Political Rights: The Emerging Model" in James A Gardner, ed, *Comparative Election Law*, Research Handbooks in Comparative Law (Cheltenham, UK: Edward Elgar, 2022) 158). The Supreme Court of Canada has also characterized the right to vote as a positive right. See *Haig*, *supra* note 34 ("[t]he democratic rights guaranteed in the *Charter* are also positive ones. Federal and provincial governments have a mandate to hold regular elections to allow citizens to select their representatives" at 1032). See also *Frank v Canada (Attorney General)*, 2019 SCC 1 ("[w]e start from the premise that s. 3 is a *positive* right which, unlike most *Charter* rights, *requires* legislative specification in order for the right to be operative" at para 113 [emphasis in original]).

support of government infrastructure) ultimately undermines the section 2(b) analysis they proposed.

The second critique also relates to an issue Chief Justice McLachlin and Justice Abella did not adequately address in *Criminal Lawyers' Association*. They failed to consider that, while a request for access to government information may be considered a limited form of expression indicating that the requester desires the requested information, it is unclear how access to information legislation restricts the expression of this desire. The restriction occurs through the government's response to this expression, namely, the refusal to disclose the information requested. In other words, the expression of the request for the information is not restricted; requesters can repeatedly, publicly, and loudly demand access. Instead, it is the access to the information that is restricted. Accordingly, the more important issue is how the request for information is more than just an expressive event: It also serves as a necessary precursor to, or precondition for, further expression.⁵¹ While Chief Justice McLachlin and Justice Abella start their analysis by acknowledging that a request for information may be considered a "necessary precondition of meaningful expression on the functioning of government,"⁵² they subsequently appear to treat the request for information as though it was the expression itself.⁵³

Hence, the combined impact of avoiding consideration of whether a claim for access to government information should be considered a positive rights claim and whether a request for information should be considered a precondition for expression (rather than merely a form of expression itself) significantly weakens the hybrid *Irwin Toy* approach.

The hybrid *Irwin Toy* approach laid out in *Criminal Lawyers' Association* tried to avoid the positive-rights debate by characterizing a request for access to information as no different from any other type of expression, which required modifying several stages of the traditional *Irwin Toy*

51 We are indebted to our colleague Michael Pal for pointing out that a request for access to information can be considered both a form of expression (for the requester) and a precursor to expression (for the requester and other members of the public who receive the requested information).

52 *Criminal Lawyers' Association*, *supra* note 6 at para 30.

53 The focus is on the "demand for access to information" during the inquiry into "expressive content" (see *ibid* at para 34).

approach. The access request had to be considered an attempt to convey a meaning and thus a form of expression triggering section 2(b) protection under the first stage of the traditional *Irwin Toy* approach, despite a lack of obvious restriction on the actual expression of this meaning.

The traditional *Irwin Toy* approach underwent a more significant modification in the second stage of the section 2(b) analysis, where courts consider whether the request is excluded owing to its location or method of expression. In *Criminal Lawyers' Association*, Chief Justice McLachlin and Justice Abella used this stage to consider how requests for information that may contravene certain privileges or impede government functions could be considered restricted methods of expression or restrictions on the location in which expression took place. This modification of the second step of the traditional *Irwin Toy* approach shifted the focus of this stage of the analysis away from methods and locations of expression to consideration of the substance of the expression. Indeed, one cannot assess whether an information request would breach an existing privilege or impede the proper functioning of government without examining the content of the information that would be provided. In this way, the hybrid *Irwin Toy* test represents a fundamental restructuring of the section 2(b) analysis: The substance of the expression is considered at the section 2(b) stage rather than the section 1 stage of the analysis. It would be preferable to avoid this needless restructuring of the section 2(b) analysis by simply acknowledging that requests for access to information are not only forms of expression in and of themselves, but also necessary precursors to expression.

By recognizing the access request as a precondition for expression, as opposed to (or in addition to) expression itself, courts could avoid the confusing reinterpretation of the second step of the traditional *Irwin Toy* approach that is required by the hybrid approach adopted in *Criminal Lawyers' Association*. More specifically, if the request for information is considered a precondition for expression rather than simply a form of expression, then courts need not consider whether the request is excluded because of its location or method of expression under the second stage of the traditional *Irwin Toy* approach.

Acknowledging that a request for access to government information is a necessary precursor to expression also helps to distinguish claims for protection of access under section 2(b) of the *Charter* from other so-called positive rights claims involving access to platforms for expression. For

example, the claimants in *Baier* sought access to a school board's election platform to amplify the impact of their expression (as candidates rather than voters) and thus render their expression concerning educational issues more effective. The majority in *Baier* held that the claimants were still able to meaningfully express themselves about these issues without access to the election platform.⁵⁴ By contrast, access to government information goes beyond amplifying potential expression: It is needed to obtain the raw material to make that expression meaningful. To paraphrase Richard Moon, restrictions on the right of access to government information amount to restrictions on access to the structure or framework of public discourse.⁵⁵

The third critique is that the trigger for section 2(b) should be whether meaningful expression is “substantially impeded,” not whether any type of expression is “effectively precluded.” This critique applies to both the hybrid *Irwin Toy* approach and the simplified *Dunmore/Baier* approach. In *Dunmore*, Justice Marshall Rothstein expressly noted that it was not necessary that “the exercise of a fundamental freedom be impossible” to trigger section 2 protection of a positive obligation.⁵⁶ However, and somewhat problematically, *Criminal Lawyers' Association* and *Toronto (City)* include passages that suggest section 2(b) protection for access to government information can be triggered only if the restriction on access would “effectively preclude” any expression concerning the government activity at issue. For example, in *Criminal Lawyers' Association*, Chief Justice McLachlin and Justice Abella stated that “the claimant must establish that the denial of access *effectively precludes* meaningful commentary.”⁵⁷ In *Toronto (City)*, Chief Justice Wagner and Justice Brown used language suggesting a threshold akin to rendering meaningful expression impossible. For example, they described a need to demonstrate that restricting access to a statutory platform would “*preclude altogether* the possibility of conveying expression on that subject.”⁵⁸ Later, they specifically

54 *Supra* note 40 at paras 47–48, 54.

55 Richard Moon, *The Life and Death of Freedom of Expression* (Toronto: University of Toronto Press, 2024) at 254–57.

56 *Supra* note 39 at para 25.

57 *Supra* note 6 at para 33 [emphasis added].

58 *Toronto (City)*, *supra* note 7 at para 20 [emphasis added].

referenced the language of “effectively precluded” used in *Criminal Lawyers’ Association* and summarized the threshold as follows:

In our view, a substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is “effectively preclude[d]”. While meaningful expression need not be rendered absolutely impossible, we stress that effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases. For example, a statutory reduction of the length of an election campaign to two days may well, as a practical matter, be shown to have the effect of constituting a substantial interference with freedom of expression. In such a case, meaningful expression may very well be found to be effectively precluded.⁵⁹

The distinction between meaningful expression being “rendered absolutely impossible” and it being “effectively precluded” or “precluded altogether” is unclear. A more consistent approach to applying section 2(b) would be to require only that a restriction on access to information “substantially impede” meaningful expression, rather than “effectively preclude” any expression, to trigger section 2(b) protection.⁶⁰ This threshold would still somewhat restrict the application of section 2(b) to protecting access to information, but would remove the expectation that any expression be nearly impossible before triggering section 2(b) protection. More specifically, section 2(b) protection should be triggered when restrictions on access to information would substantially impede *informed* expression concerning the government action at issue. In other words, it should be triggered when the restrictions on access to information would deprive citizens of access to information necessary to render their expression about government action “meaningful.”⁶¹

59 *Ibid* at para 27 [footnotes omitted]. See also *ibid* at para 36.

60 In *Société des casinos*, a section 2(d) case decided in 2024, all the judges referred to the standard of substantial interference or impediment rather than effective preclusion throughout the decision (*supra* note 47).

61 See e.g. *ARPA*, *supra* note 48, in which the Superior Court of Justice found that a provision excluding records relating to abortion from the access to information regime (see *Ontario FIPPA*, *supra* note 48, s 65(5.7)) “substantially impeded meaningful public discussion and criticism about abortion services” because it prevented the

Applying this approach would mean that the government must do more than demonstrate that citizens could still express their views about government action without the restricted information; the continued capacity for *any expression whatsoever* would not be sufficient to defeat a section 2(b) claim. Instead, meaningful expression—defined as expression requiring sufficient information to comment on the reasons behind the government’s action—would need to be possible in order to avoid triggering section 2(b) protection. This approach would accord with the Supreme Court of Canada’s earlier decisions recognizing the role of section 2 in protecting “meaningful” access to fundamental freedoms. For instance, in *Dunmore*, the Court extended section 2(d) to require positive state action to render the freedom of association guarantee “meaningful” for Ontario agricultural workers who, in the absence of legislative protection under the Ontario *Labour Relations Act*, 1995,⁶² had been unable to create or join agricultural associations.⁶³ Such an approach would also align with the Court’s understanding of the concept of “meaningful participation in the electoral process” under section 3 of the *Charter*.⁶⁴

To summarize, where section 2(b) is to be relied on in isolation to secure access to government information, the following clarifications to the test for applying section 2(b) are proposed:

disclosure of more than 50 per cent of the relevant statistical information. Access to these data was required to ensure that an *informed* public debate on abortion could take place (*ARPA*, *supra* note 48 at paras 43–44).

62 *Labour Relations Act*, SO 1995, c 1, Schedule A.

63 See *Dunmore*, *supra* note 39 at paras 41, 67. In that case it was not sufficient that the agricultural workers could hypothetically create agricultural associations (*ibid* at 39–42). See also Kazmierski, “Taking One Step Forward”, *supra* note 45 at 224.

64 In *Working Families Coalition*, Chief Justice Wagner and Justice Moreau, dissenting, stated that a legislative measure infringes the “right to meaningful participation” in the electoral process when it has the effect of “depriving a citizen of a *reasonable opportunity* to introduce their own ideas and opinions into the political discourse or *become informed of facts, ideas, and others’ perspectives*” (*supra* note 27 at para 140 [emphasis added]). While this standard was formulated to assess the validity of restrictions on third-party spending limits, it could also be applied to assess the validity of restrictions on access to government information.

1. The test should recognize that extending constitutional protection to access to government information often requires imposing a positive obligation on government.⁶⁵
2. The test should consider the request for information as a precursor to or precondition for expression rather than only a form of expression in and of itself.
3. The test should recognize that section 2(b) protection is triggered where “meaningful expression” is “substantially impeded” rather than only where expression is “effectively precluded” or “absolutely impossible.” This threshold would trigger section 2(b) protection where the claimant’s ability to make an *informed* critique of government action is substantially impeded. The fact that the claimant could make an *uninformed* critique of government action without the requested information would be irrelevant to the analysis.

Despite the above, for the reasons set out in Part III, the constitutional protection of access to government information should not be rooted in a single element of the constitutional structure, such as section 2(b) of the *Charter*, but rather recognized as emanating from multiple constitutional sources.

III. PROPOSED HOLISTIC APPROACH

Part III puts forth a new, holistic approach to the constitutional protection of access to government information. It starts by establishing the fundamental postulates underlying this approach and then explains why the holistic approach is more consistent with the country’s constitutional framework and values than the approaches the Supreme Court of Canada currently takes.

⁶⁵ The right of access to government information can be seen as a “non-freestanding positive right,” that is, a right that “arise[s] when a state actor has already taken some protective action, but that action falls short in a way that breaches a *Charter* right” (Bakan, *supra* note 49 at 5).

A. *Fundamental Postulates*

As noted above, the Supreme Court of Canada has become embroiled in debates over how best to protect positive rights even as it recognizes the constitutional protection of access to government information. These debates have led to an unnecessarily complicated approach to applying section 2(b) as a source of constitutional protection for access and may also complicate the Court's application of section 3 of the *Charter* in future cases. A much simpler approach to providing constitutional protection of access to information is needed. The proposed approach is rooted in key elements of the Court's decisions that were identified in Part I, especially the following four fundamental postulates:

1. The Constitution of Canada must protect the foundations of the country's democratic process. It does so through both written provisions of the Constitution, such as sections 2 and 3 of the *Charter*, among many others, and unwritten constitutional principles, such as the rule of law and the principle of democracy.
2. The democratic process must promote both the political participation of citizens and the accountability of government officials and institutions.
3. The foundations of the democratic process include the right of citizens to make informed choices when they vote in elections. Such informed choices are impossible without certain levels of access to information about government actions. At a minimum, access to government information is therefore protected through section 3 of the *Charter* as well as the unwritten principle of democracy in order to promote informed voting by citizens during federal and provincial elections (and perhaps other electoral events).
4. The foundations of the democratic process also include the right to participate in meaningful, informed expression concerning political issues and the performance of government officials. Such meaningful discussions are impossible without certain levels of access to information about government actions. At a minimum, access to government information is therefore protected through section 2(b) of the *Charter* as well as the unwritten principle of democracy.

B. *Reasons Supporting a Holistic Approach*

Considering the important and interconnected roles of the unwritten principle of democracy and sections 2(b) and 3 of the *Charter* in protecting the democratic process in Canada, it would be unnecessarily complicated to disentangle how, and under which circumstances, each of these constitutional sources protects a right to government information on its own. For example, the debate over positive and negative rights that has complicated the Supreme Court of Canada's consideration of protection of access to information under section 2(b) of the *Charter* is largely irrelevant to section 3 of the *Charter*, given that the Court has recognized the right to vote is a positive right. Similarly, while it may be technically correct to characterize the protection of access to government information as a *derivative* right under section 2(b) of the *Charter*, the same cannot be said of the protection of this right under section 3. To do so would imply that protections of limits on election spending to ensure citizens can exercise their right to vote in an informed manner should also be viewed as "derivative"—which is not how the Court has interpreted section 3.⁶⁶ Finally, concerns about applying unwritten constitutional principles to overturn legislation are irrelevant where written provisions, such as sections 2(b) and 3 of the *Charter*, are engaged.⁶⁷

The difficulty in disentangling the protection of access to government information provided by the three interconnected constitutional sources outlined in Part I may be illustrated by considering how requests for access to information can transcend artificial boundaries used to apply sections 2(b) and 3 of the *Charter*. To start with section 3, the Supreme Court of Canada's earlier decisions clearly establish that citizens have a

66 See *Harper*, *supra* note 26. See also *Reference re Prov Electoral Boundaries (Sask)*, where the Supreme Court of Canada discussed the ways in which section 3 of the *Charter* protects a right to "effective representation" without ever referring to this right as a "derivative" right (see [1991] 2 SCR 158 at 183–85, 1991 CanLII 61 (SCC)).

67 While some academics have called into question the use of unwritten constitutional principles to strike down legislation (for a classic example, see e.g. Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 *Queen's LJ* 389 at 441), others have recognized that unwritten principles can legitimately be relied upon to strike down legislation in conjunction with the written provisions of the Constitution (for an early proponent of this position, see e.g. Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80:1/2 *Can Bar Rev* 67 at 141–42).

right to make informed choices when voting in federal and provincial elections and that informed choices require access to information about government actions. But when would this right be triggered? Is it only once an election is called and the writ is dropped?⁶⁸ If so, the right of access to government information could be easily undermined by delays in releasing information during the campaign. Countless reports by information commissioners and journalists have identified both intentional and unintentional delays and obfuscation by government officials as endemic problems in Canada's existing access system.⁶⁹ Similarly, the facts of the *Toronto (City)* case have demonstrated the willingness and ability of some governments to tamper with the timeframe and rules of an

68 This point was contemplated by Justices Benjamin Zarnett and Lorne Sossin, when they noted that section 3 of the *Charter* does not provide “a free-standing right to engage in political discourse *outside of elections*” (see *Working Families Coalition (Canada) Inc v Ontario (Attorney General)*, 2023 ONCA 139 at para 66, *aff'd* 2025 SCC 5 [emphasis added]).

69 There is ample evidence of the long-standing nature of this behaviour. For a recent account of the ways government officials have undermined access to information rights, see Robyn Doolittle & Tom Cardoso, “How Canada’s FOI System Broke Under Its Own Weight”, *The Globe and Mail* (9 June 2023), online: <theglobeandmail.com> [perma.cc/MP9M-FEBG]. For judicial commentary on this issue, see *Canadian Council of Christian Charities v Canada (Minister of Finance) (TD)*, where Justice John Evans of the Trial Division of the Federal Court noted that heads of government departments often prefer non-disclosure of government documents: “Heads of government institutions are apt to equate the public interest with the reasons for not disclosing information, and thus to interpret and apply the Act in a manner that gives maximum protection from disclosure for information in their possession” (see 1999 CanLII 8293 at para 13 (FC)). Canadian information commissioners have also made similar comments (see Information Commissioner of Canada, *Annual Report: 2003–2004*, Catalogue No IP1-2004 (Ottawa: OIC, 2004) at 3; Information Commissioner of Canada, *Annual Report: 2004–2005*, Catalogue No IP1-2005 (Ottawa: OIC, 2005)). In 2007, Information Commissioner Robert Marleau echoed the concerns raised by his predecessors:

Despite much progress since 1983, there remain impediments to the full realization of Parliament’s intent as expressed in the [ATIA]. Too often, responses to access requests are late, incomplete, or overly-censored. Too often, access is denied in order to hide wrongdoing, or to protect officials or governments from embarrassment, rather than to serve a legitimate confidentiality requirement [see Information Commissioner of Canada, *Annual Report: 2006–2007*, Catalogue No IP1-2007 (Ottawa: OIC, 2007) at 11].

See also Information Commissioner of Canada, *Annual Report: 2023–2024*, Catalogue No IP1-2024 (Gatineau: OIC, 2024) at 21.

election in ways that may undermine the ability of electors to make informed choices.⁷⁰

In *Working Families Coalition*, Justice Karakatsanis, writing for the majority, stated that “[s]ection 3 protections are engaged in the pre-writ period” but at the same time recognized that “[d]ifferent interests may be relevant [during that] period,” thus suggesting that different scopes of section 3 protections may apply outside elections.⁷¹ If the right of access to government information is to extend beyond the official timeframe allotted for the election campaign, how is this period to be determined? This is a particularly acute problem in parliamentary systems without fixed election dates or with fixed election dates that can be easily amended or ignored.⁷² The complexities of determining when (or to what extent) constitutional protection of access to government information would be triggered under section 3 of the *Charter* is underlined by the fact that protection of the same right under section 2(b) is not artificially limited to particular timeframes, and extends to “everyone,” not just “citizens.”⁷³ Accordingly, would a different scope of access be constitutionally protected before an election is called compared with after the writ is dropped? This is certainly not the approach of any of the legislative frameworks currently protecting access to government information

70 It is important to recall that the majority in *Toronto (City)* declined to apply section 3 of the *Charter* because the facts in the case concerned a municipal election rather than a federal or provincial one (see *Toronto (City)*, *supra* note 7 at para 45).

71 *Supra* note 27 at para 38. In contrast, Chief Justice Wagner and Justice Moreau, dissenting, took the position that “[t]he right to meaningfully participate in the electoral process is not limited to the writ period; it operates at all times ... [and] has no inherent temporal limits” (see *ibid* at para 132).

72 See e.g. the Ford government’s decision to trigger a provincial election in Ontario a full year before the fixed election date established through legislation (Allison Jones & Liam Casey, “Ontario Voters Officially Headed to the Polls Early for Provincial Election”, *Toronto Star* (28 January 2025), online: <thestar.com> [perma.cc/54J7-A525]).

73 It is worth noting that legislative provisions protecting access to government information in Canada are not limited to “citizens” either. Section 2 of the *Charter* states that “[e]veryone has [certain] fundamental freedoms,” while section 3 states that “[e]very citizen of Canada has the right to vote” (see *Charter*, *supra* note 5, ss 2–3 [emphasis added]). Section 4 of the *ATIA* establishes a right of access to government information enjoyed by citizens and permanent residents of Canada (see *ATIA*, *supra* note 4, s 4). In Ontario, the right of access to government information extends to “every person” (see *Ontario FIPPA*, *supra* note 48, s 10(1)).

across Canada. Any such distinction would be arbitrary at best, considering that the right of access to government information could be so easily circumvented through disclosure delays once a writ is dropped.

Moreover, while an argument might be made that protection of access to information under section 2(b) should be limited (or considered “derivative”) because it arguably involves protection of a positive right that has historically been limited under section 2 of the *Charter*, this argument immediately dissolves once section 3 is triggered, given that section 3 inherently requires positive government action to establish and run elections. It would clearly be counterintuitive, then, for a time-limited right of access to information protected through section 3 to be substantively less effective than the right of access protected under section 2(b).

The best way to avoid these unproductive complications and entanglements is to recognize a constitutional right of access to government information that is rooted in the unwritten principle of democracy as well as sections 2(b) and 3 of the *Charter*, without being limited to any of these individual constitutional sources. As discussed elsewhere, the scope of this right should be determined by a “sliding scale” approach that considers the totality of the relevant evidence that supports its recognition, including pragmatic, structural, and historical evidence.⁷⁴

Pragmatic evidence, which relates to the importance of the right in supporting the structure of the Constitution and the democratic nature of the Canadian state, would reveal the key importance of access to government information in promoting political participation and government accountability.

Structural evidence, which pertains to how the proposed right fits with other written and unwritten elements of the constitutional structure, would reflect the key points concerning the overlapping roles of the principle of democracy and sections 2(b) and 3 of the *Charter* in protecting the right of informed decision-making as a vital element of meaningful participation in the democratic process in Canada. It would additionally encompass the way these written and unwritten elements of the Constitution work together in symbiosis. This evidence would include the concerns about limits on the scope of the constitutional protection of access to government information expressed in the Supreme Court of Canada’s

74 See Kazmierski, “Untethered”, *supra* note 21 at 239–43.

decisions, especially *Criminal Lawyers' Association*, without necessarily engaging in debates over positive and negative rights (and the overly technical and fractured approaches these debates have generated).

Historical evidence, which relates to the importance of protecting the right, would show that, in 1982, access to information was deliberately excluded from explicit constitutional protection when the *Charter* was entrenched. However, it would also account for the way concerns about whether the time was ripe for constitutional protection of access at the time of *Charter* entrenchment have been overcome by expectations of political participation and government accountability that have grown over time.⁷⁵

Thus, without descending into a technical positive rights analysis akin to the *Dunmore/Baier* approach, a sliding scale approach to determining the scope of the right of access to government information would evince that, since the Constitution historically did not explicitly protect access to government information and given the need to balance the imperatives of both sections 2(b) and 3 of the *Charter*, constitutional protection of access to government information should be extended only where meaningful participation in the democratic process has been substantially impeded. At the same time, a sliding scale approach would expose the important pragmatic role of access to government information in promoting this meaningful participation in the democratic process, suggesting that the test for triggering this protection should not be limited only to certain timeframes within election cycles or to circumstances where political expression is “effectively precluded” or otherwise impossible.

Considering all the sources of evidence holistically supports the following approach for assessing when and how expansive a constitutional right of access to government information should be recognized:

1. Has meaningful participation in the democratic process been substantially impeded? This question may also be articulated as follows: Has the ability to make informed choices or to engage in expression about political candidates or assess the actions of government officials been substantially impeded?⁷⁶

75 See Kazmierski, “Something to Talk About”, *supra* note 23 at 365–68.

76 The meaning of “substantially impeded” will be articulated by courts; however, it should not require that it is otherwise “impossible” or “nearly impossible” to make

2. Is the substantial impediment above demonstrably justifiable in a free and democratic society?

Such a holistic approach recognizes the multiple sources of the constitutional protection of access to government information and accounts for concerns that such constitutional protection should be triggered in specific circumstances. Additionally, it avoids an unnecessarily complicated formula for triggering constitutional protection of access. In this way, the holistic approach results in a similar test to the one applied under the simplified *Baier/Dunmore* approach suggested by Chief Justice Wagner and Justice Brown in *Toronto (City)* insofar as it attempts to identify one core question to be considered in order to trigger constitutional protection. However, the holistic approach focuses more explicitly on the way constitutional protection of access to information may be triggered by substantial interference with meaningful participation in the democratic process. While the right will likely be triggered only in specific circumstances, those circumstances extend beyond situations where political expression is “effectively precluded” or “precluded altogether.” Finally, unlike the approaches based only on section 2(b) of the *Charter*, the holistic approach would not be subject to the override clause in section 33 of the *Charter*, because it is also based on section 3 and the unwritten principle of democracy. The resulting constitutional right of access to government information would thus be stronger.

Having set out the basic elements of the proposed holistic approach to protecting access to government information, which addresses the flaws in the current approaches applied by the highest court thus far, the article now examines whether the exclusion of Cabinet confidences from the scope of the *ATIA* under section 69 violates the constitutional right of access to government information. Part IV argues that section 69 of the *ATIA* violates the *Charter* regardless of the interpretive approach that is applied: the hybrid *Irwin Toy* approach, the simplified *Dunmore/Baier* approach, or the proposed holistic approach.

IV. CONSTITUTIONALITY OF SECTION 69 OF THE ATIA

The ATIA was adopted to foster government transparency and accountability by providing “a right of access to information in records under the control of a government institution.”⁷⁷ However, section 69 of the ATIA limits this right by excluding Cabinet confidences from the scope of the Act for a period of twenty years (and even after that period, other provisions may still restrict access to certain Cabinet documents).⁷⁸ Section 69 allows the federal government to refuse requests for access to documents containing Cabinet confidences under the ATIA.⁷⁹ Although this provision is meant to protect the collective decision-making process of ministers,⁸⁰ Part IV contends that the exclusion of Cabinet confidences under section 69 goes beyond what is necessary to ensure the proper functioning of Cabinet government.

In the late 1970s in Canada, strong momentum had developed to recognize a right to freedom of information and abolish section 41 of the *Federal Court Act* (FCA),⁸¹ which gave the federal government an absolute privilege over the disclosure of information that would be injurious to international relations, national defence or security, or federal-provincial relations, or that would reveal a Cabinet confidence.⁸² This momentum pushed Pierre Trudeau’s Liberal government to introduce Bill C-43 after the 1980 election.⁸³ A primary purpose of this bill was to enact the ATIA, repeal section 41 of the FCA, and modify the *Canada Evidence Act* (CEA). The bill set out a general right of public access to government information, subject to specific exemptions. When Bill C-43 was first introduced, decisions to withhold documents based on exemptions were to be

77 ATIA, *supra* note 4, s 2(2)(a).

78 *Ibid*, s 69.

79 See Campagnolo, *Behind Closed Doors*, *supra* note 1 at 121–22.

80 *Ibid* at 137–38.

81 RSC 1970, c 10 (2nd Supp) [FCA].

82 For an analysis of this provision, see Yan Campagnolo, “The History, Law and Practice of Cabinet Immunity in Canada” (2017) 47:2 RGD 239 at 243–50 [Campagnolo, “History, Law and Practice”].

83 See Bill C-43, *An Act to enact the Access to Information Act and the Privacy Act, to amend the Federal Court Act and the Canada Evidence Act, and to amend certain other Acts in consequence thereof*, 1st Sess, 32nd Parl, 1982 (assented to 7 July 1982), SC 1980-81-82-83, c 111.

controlled by a two-step independent review, regardless of whether disclosure of the documents would injure international relations, national defence or security, or federal-provincial relations, or would reveal a Cabinet confidence. First, the information commissioner of Canada would be able to examine any government document to determine whether an exemption had been properly applied. Second, the Federal Court would be able to order disclosure if it concluded that an exemption claim was unfounded.⁸⁴

While the original version of the bill subjected Cabinet confidences to this two-step independent review, the final version did not. Shortly after Bill C-43 was tabled, Pierre Trudeau became concerned that Bill C-43 would not properly insulate the collective decision-making process.⁸⁵ As a result, the bill was amended to confer the highest degree of protection on Cabinet confidences.⁸⁶ In the *ATIA*, this was achieved in two ways: Cabinet confidences were “excluded” rather than “exempted” from the scope of the *Act*, and the clauses setting out the powers of the information commissioner and the Federal Court were amended to ensure they could examine only “record[s] to which this [Act] applies”.⁸⁷ Because of these changes, no “outsiders” can examine or order the disclosure of Cabinet confidences.⁸⁸

In addition, a non-substantive definition of “Cabinet confidences” was adopted to pre-empt judicial interpretation of the term.⁸⁹ Subsection 69(1) of the *ATIA* defines Cabinet confidences based on the types of documents in which such information can be found. It provides a list of seven classes of documents deemed to contain Cabinet confidences, such as Cabinet memoranda, agenda, minutes, and decisions, as well as ministerial communications and briefing notes on Cabinet business, discussion papers, and draft legislation.⁹⁰ This list is not exhaustive, however,

84 See Campagnolo, “History, Law and Practice”, *supra* note 82 at 251–52.

85 *Ibid* at 252–53. For the complete legislative history and relevant historical materials, see *Loshaj v Canada (Governor in Council)* (21 October 2024), Toronto T-70-24 (FC) (Affidavit, Campagnolo at 4–12).

86 See Campagnolo, “History, Law and Practice”, *supra* note 82 at 254–60.

87 See *ATIA*, *supra* note 4, ss 36(2), 46.

88 See Campagnolo, “History, Law and Practice”, *supra* note 82 at 255.

89 *Ibid* at 256–57.

90 See *ATIA*, *supra* note 4, ss 69(1)(a)–(f).

since the seventh class of documents deemed to contain Cabinet confidences encompasses all records that contain information about the contents of documents falling within any of the six first classes listed in subsection 69(1).⁹¹

Finally, the revised version of Bill C-43 conferred on the federal government an extensive privilege over the disclosure of Cabinet confidences in litigation. This privilege, which is now found in section 39 of the *CEA* (which replaced section 41 of the *FCA*), supersedes the relevant common law principles. Under the common law in Canada and other Westminster jurisdictions, Cabinet privilege or immunity is relative, not absolute. Courts can thus examine the relevant documents, weigh and balance the competing aspects of the public interest, and decide whether the documents should be disclosed or not.⁹² In contrast, at the federal level, under section 39, objections to the production of Cabinet confidences are final: Courts cannot examine the documents, assess the public interest, or order production. No other category of government information—not even national security information—receives such a high degree of protection.⁹³ The constitutionality of section 39 of the *CEA* is discussed elsewhere.⁹⁴ This article focuses on the constitutionality of section 69 of the *ATIA*, which raises different legal issues.

A. *Section 69 Infringes the Constitutional Right of Access to Information*

How does this exceptional protection of Cabinet confidences affect the constitutional right of access to information recognized by the Supreme Court of Canada? Section A seeks to answer this question by subjecting section 69 of the *ATIA* to the three approaches discussed in Parts II and III, starting with the hybrid *Irwin Toy* test established in *Criminal*

91 *Ibid.*, s 69(1)(g).

92 See generally Yan Campagnolo, “A Rational Approach to Cabinet Immunity Under the Common Law” (2017) 55:1 *Alta L Rev* 43 [Campagnolo, “Common Law”].

93 See generally Campagnolo, *Behind Closed Doors*, *supra* note 1.

94 See generally Yan Campagnolo, “Cabinet Immunity in Canada: The Legal Black Hole” (2017) 63:2 *McGill LJ* 315. This article contends that section 39 of the *CEA* (*supra* note 11) is unconstitutional for two reasons: (1) the decision-making process established by section 39 is inconsistent with the duty to act fairly; and (2) section 39 encroaches on the core jurisdiction of provincial superior courts.

Lawyers' Association, given that it is the most complex and stringent approach.

Criminal Lawyers' Association Approach—Using the test established in *Criminal Lawyers' Association*, section 69 of the *ATIA* will be found to breach the right of access to information derived from section 2(b) of the *Charter* if (1) the denial of access precludes meaningful commentary, (2) the documents are not protected by an existing privilege, and their disclosure would not interfere with the proper functioning of government, and (3) the denial of access has the purpose or effect of infringing the right of access to information.

Step 1: Meaningful Commentary Impeded—In *Criminal Lawyers' Association*, Chief Justice McLachlin and Justice Abella suggested that, where claims for access to government information requests are concerned, “[t]o demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary. If the claimant can show this, there is a *prima facie* case for the production of the documents in question.”⁹⁵

Following this approach, a request to access Cabinet confidences falls within the scope of section 2(b) of the *Charter* if such a request is necessary to enable meaningful commentary on the conduct of government institutions. Indeed, Cabinet documents contain information that reveals the basis of government decisions and provide the relevant contextual information required to meaningfully evaluate political ideas, policies, and conduct.⁹⁶ Access to Cabinet confidences can be a precondition for meaningful expression on political matters. For example, knowledge of the policy options Cabinet considered, the content of the ensuing debate, and the resulting decisions may help citizens meaningfully assess the performance of their government and hold their elected officials accountable.⁹⁷ Conversely, using Cabinet privilege claims to prevent the disclosure of Cabinet confidences can hinder meaningful public debate on the conduct of government institutions and, in turn, meaningful participation in the democratic process. Whether a denial of access precludes meaningful

95 *Supra* note 6 at para 33 [emphasis in original].

96 See Kazmierski, “Something to Talk About”, *supra* note 23 at 357–58.

97 *Ibid* at 395.

commentary is primarily a question of fact, which depends on the subject, timing, and circumstances of the access request.

Looking back at the last twenty years, access to Cabinet confidences has been necessary to enable meaningful commentary on government conduct in several instances. These instances typically arose in the context of political controversies, when credible allegations of misconduct, mismanagement, or criminal wrongdoing were made against government officials. Widely known examples include the sponsorship scandal,⁹⁸ the Mulroney-Schreiber inquiry,⁹⁹ the Mark Norman prosecution,¹⁰⁰ the SNC-Lavalin affair,¹⁰¹ the “Freedom Convoy” protests,¹⁰² and foreign interference in federal elections.¹⁰³ In all these cases, in response to public pressure, the government ultimately yielded and authorized the disclosure of some Cabinet confidences, although its first reflex was typically to protect the information.

Yet, in at least one case, access to Cabinet confidences was denied, even though that access would have allowed for meaningful commentary on political matters. In 2011, Stephen Harper’s Conservative government invoked Cabinet confidentiality to justify refusing to give the House of Commons finance committee documents disclosing the costs of crime bills, corporate tax cuts, and the purchase of F-35 fighter jets.¹⁰⁴ The House needed this financial information to exercise its constitutional role of assessing the proposed legislation. The House has the right to know the costs of legislation before it, and the government cannot rely on

98 See Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who Is Responsible?*, Catalogue No CP32-86/2-2005E (Ottawa: Privy Council Office, 2005) (Hon John H Gomery).

99 See *Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney: Report*, Catalogue No CP32-92/2-2010E (Ottawa: Privy Council Office, 2010) (Hon Jeffrey J Oliphant).

100 See Campagnolo, *Behind Closed Doors*, *supra* note 1 at 50.

101 *Ibid* at 58–60.

102 See Public Order Emergency Commission, *supra* note 2.

103 See Canada, Foreign Interference Commission, *Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions: Final Report*, Catalogue No CP32-169/2-2025E-PDF (Ottawa: FIC, 28 January 2025) (Hon Marie-Josée Hogue).

104 See Yan Campagnolo, “The Political Legitimacy of Cabinet Secrecy” (2017) 51:1 RJTUM 51 at 102–03 [Campagnolo, “Political Legitimacy”].

Cabinet confidentiality to refuse to provide that information.¹⁰⁵ As a result, the House of Commons adopted a motion of non-confidence in the Harper government that triggered a general election in 2011. Although Canadians exercised their right to vote by electing a majority Conservative government, the fact that they did not gain access to the financial information withheld owing to the Harper government's Cabinet privilege claim implies that they lacked information required to express themselves meaningfully on that government's financial decisions during that election.

As this example clearly demonstrates, access to Cabinet confidences is sometimes needed to provide Canadians with the facts necessary to evaluate government policies and practices and, in turn, exercise their right to freedom of expression in an informed and thus meaningful manner.¹⁰⁶ A person or group prevented from doing so as a result of denial of access based on section 69 of the *ATIA* would have standing to challenge the constitutionality of that provision pursuant to step 1 of the *Criminal Lawyers' Association* test. In practice, however, only rarely do circumstances arise where section 2(b) would require the disclosure of Cabinet confidences to enable a specific person or group to meaningfully participate in the democratic process.

Step 2: Limits to the Right of Access—The next step in the hybrid *Irwin Toy* approach is to identify whether this prima facie protection of the right of access to Cabinet confidences should be removed because either those documents are protected by an existing privilege or their production would interfere with the proper functioning of government.

Undoubtedly, Cabinet deliberations and documents should generally remain confidential for some time. Indeed, they have been protected since the inception of Cabinet,¹⁰⁷ and Cabinet confidentiality is considered "one of the corner stones of the Westminster system of

105 For additional context on Harper's 2011 refusal to provide the House of Commons with the costs of proposed legislation, see generally House of Commons, Standing Committee on Procedure and House Affairs, *Evidence*, 40-3, No 49 (16 March 2011); House of Commons, Standing Committee on Procedure and House Affairs, *Evidence*, 40-3, No 50 (17 March 2011).

106 See Kazmierski, "Something to Talk About", *supra* note 23 at 391.

107 See Campagnolo, "Political Legitimacy", *supra* note 104 at 62–63.

government.”¹⁰⁸ Constitutional conventions protect the collective decision-making process in a system of responsible government by maintaining the confidentiality of what is discussed in the Cabinet room, especially the personal views expressed by ministers while deliberating on government policy or action.¹⁰⁹ However, this protection is not absolute and does not apply if the information is no longer sensitive owing to the passage of time or disclosure is required in the public interest. As mentioned above, the latter typically arises when credible allegations of misconduct, mismanagement, or criminal wrongdoing are made against government officials.¹¹⁰

Cabinet confidentiality is protected for three reasons. First, preserving the confidentiality of Cabinet deliberations allows ministers to speak freely during the collective decision-making process to identify and reconcile any disagreements they may have. Cabinet confidentiality therefore “fosters the candour and completeness of ministerial discussions.”¹¹¹ Second, Cabinet confidentiality “safeguards the efficiency of the collective decision-making process” taking place in the Cabinet room by containing “the level of public pressure put on Ministers ... and ... [the] partisan criticism by their political opponents” until “a final decision is made and announced.”¹¹² And, third, keeping disagreements between ministers confidential ensures they all remain responsible for government policy and actions, and prevents their political opponents from exploiting those disagreements to weaken the unity of the ministry. Cabinet confidentiality thus enables members of the government to demonstrate the solidarity required to maintain the support of the House of Commons and remain in power.¹¹³

As the Supreme Court of Canada recognized in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, those reasons demonstrate that Cabinet confidentiality is necessary for a Westminster system of government to function properly.¹¹⁴ Cabinet privilege is thus,

108 Nicholas d’Ombrain, “Cabinet Secrecy” (2004) 47:3 Can Pub Admin 332 at 333.

109 See Campagnolo, “Political Legitimacy”, *supra* note 104 at 65.

110 See Campagnolo, *Behind Closed Doors*, *supra* note 1 at 60.

111 Campagnolo, “Political Legitimacy”, *supra* note 104 at 66.

112 *Ibid* at 67–68.

113 *Ibid* at 68–72.

114 2024 SCC 4 at paras 30–31 [*Ontario (IPC)*].

properly defined, a legitimate and valid limit on the right of access to Cabinet confidences derived from section 2(b) of the *Charter*. However, this conclusion does not imply that requests for information that fall under section 69 of the *ATIA* should automatically be excluded from section 2(b) protection at the second step of the hybrid *Irwin Toy* approach. Indeed, the protection conferred on Cabinet confidences under section 69 is overbroad compared with that established under existing conventions and common law rules and should thus be treated differently.

Under the common law, Cabinet privilege is relative and subject to judicial review.¹¹⁵ The government must justify why the documents should be withheld when it advances a Cabinet privilege claim to prevent their disclosure. Furthermore, the final decision to keep the documents confidential or not lies in the hands of the judiciary, not the executive.¹¹⁶ Even if the government makes a *prima facie* valid objection to the production of Cabinet confidences, the court can examine the information, weigh and balance the competing aspects of the public interest, and decide whether the information should be disclosed.¹¹⁷ The common law approach is consistent with the relevant constitutional conventions.

In contrast, Cabinet privilege under section 69 of the *ATIA* is significantly broader, because the scope of the term “Cabinet confidences” is not properly delineated, and a decision to withhold information on this ground is not subject to meaningful oversight and review. First, the term “Cabinet confidence” is not substantively defined; hence, as long as a document “fits” within one of the seven classes listed in subsection 69(1), it is deemed to contain Cabinet confidences.¹¹⁸ As a result, even documents that are only remotely related to Cabinet proceedings can remain confidential for a period of twenty years pursuant to section 69.¹¹⁹ Second, section 69 is not subject to meaningful oversight and review, because

115 The Supreme Court of Canada recognized that Cabinet privilege is relative, not absolute. Writing for the Court, Justice Gérard La Forest stated that an absolute privilege “would be contrary to the constitutional relationship that ought to prevail between the executive and the courts in this country” (see *Carey*, *supra* note 11 at 654).

116 See Campagnolo, “Common Law”, *supra* note 92 at 67–68.

117 *Ibid* at 72–88. For an overview of the common law approach in Canada, see *Carey*, *supra* note 11; *British Columbia (Attorney General) v Provincial Court Judges’ Association of British Columbia*, 2020 SCC 20.

118 See Campagnolo, “History, Law and Practice”, *supra* note 82 at 262–68.

119 *Ibid* at 267–68.

no independent body can verify that it was properly applied. Since Cabinet confidences are “excluded” from the scope of the *ATIA*, neither the information commissioner nor the Federal Court can examine the documents subject to a Cabinet privilege claim to confirm the validity of the claim.¹²⁰

Cabinet privilege under section 69 must also be distinguished from the extensive privilege granted to Cabinet confidences in the context of litigation under section 39 of the *CEA*.¹²¹ While section 39 is problematic (for reasons explored in a related article),¹²² section 69 is much more so. According to the Supreme Court of Canada, Cabinet privilege claims under section 39 require the government to consider the competing public interests in disclosure and continued confidentiality.¹²³ Hence, these claims could be characterized, to cite the Court, as “appropriate derogations from the scope of the protection offered by s. 2(b) of the *Charter*” insofar as they “represent situations where the public interest in confidentiality outweighs the interests served by disclosure.”¹²⁴ However, the same cannot be said about Cabinet privilege claims under section 69 of the *ATIA*, as government officials are not required to consider the competing aspects of the public interest before excluding documents pursuant to section 69.¹²⁵

In addition, while Cabinet privilege claims under section 39 must be supported by a certificate signed by a minister or the Clerk of the Privy Council and must provide “a description of the information withheld that is sufficient to establish on its face that the information is a Cabinet confidence and that it falls within the categories of s. 39(2) or an analogous category,”¹²⁶ no similar process exists to mitigate the risk that documents may be improperly excluded under section 69. The decision to apply section 69 is made by government officials after consulting the Department

120 This was confirmed by the Federal Court of Appeal in *Canadian Broadcasting Corporation v Canada (Information Commissioner)*, 2011 FCA 326 at paras 49–54. See also *Quinn v Canada (Prime Minister)*, 2011 FC 379 at para 32(ii).

121 See *Criminal Lawyers' Association*, *supra* note 6 at para 39.

122 See the text within note 94.

123 See *Babcock*, *supra* note 15 at para 22.

124 *Criminal Lawyers' Association*, *supra* note 6 at para 39 [emphasis in original].

125 See Campagnolo, “History, Law and Practice”, *supra* note 82 at 290–91.

126 *Babcock*, *supra* note 15 at para 28.

of Justice (or, in rare cases, the Privy Council Office), and no signed certificate is issued.¹²⁷ Additionally, when a complaint concerning section 69 is filed, the written confirmations that the documents contain Cabinet confidences that are sent to the information commissioner are not signed by a minister or the clerk but by lower-level officials.¹²⁸

The protection conferred on Cabinet confidences pursuant to section 69 of the *ATIA* thus differs from the balanced protection granted to this information under the common law and the extensive protection it receives under section 39 of the *CEA*. Section 69 does not involve a weighing and balancing of the competing public interests in disclosure and continued confidentiality, and it is not subject to any form of oversight or review, not even by a minister or the clerk, as is section 39. In light of the foregoing, section 69 should not be viewed as an “existing privilege” limiting the right of access to government information at the second step of the hybrid *Irwin Toy* test set out in *Criminal Lawyers’ Association*.

Moreover, the *prima facie* protection of the right of access to documents classified as Cabinet confidences under section 69 of the *ATIA* should not be removed, because producing these documents would not necessarily interfere with the proper functioning of Cabinet government. The criterion of necessity is key: To be upheld, a provision such as section 69 must be shown to be necessary to “the proper functioning of the governmental institution.”¹²⁹ This criterion is in line with section 19 of the *International Covenant on Civil and Political Rights*, which was ratified by Canada in 1976 and provides that (1) “the right to freedom of expression [includes] freedom to seek, receive and impart information and ideas of all kinds” and (2) it may be subject only to restrictions that “are provided by law and are *necessary*.”¹³⁰

127 The Privy Council Office is consulted in only two situations: when Justice counsel is uncertain about the nature of a document or if a document falls within the scope of the discussion paper exception. See Treasury Board of Canada Secretariat, *Access to Information Manual* (last modified 8 August 2024) at ch 13.4.5, online: <canada.ca> [perma.cc/E2WX-P3XA].

128 *Ibid* at chs 13.4.6–13.4.7.

129 *Criminal Lawyers’ Association*, *supra* note 6 at para 33.

130 19 December 1966, 999 UNTS 171, art 19 (entered into force 23 March 1976, accession by Canada 19 May 1976) [emphasis added].

While some documents protected under section 69 of the *ATIA* would reveal the private views voiced by ministers during the collective decision-making process (that is, core secrets), others contain only factual and background information (that is, non-core secrets) that could be revealed without undermining the proper functioning of Cabinet government.¹³¹ For example, while Cabinet agenda, minutes, and decisions are all protected for twenty years under paragraph 69(1)(c) of the *ATIA*, only minutes reveal ministerial views (core secrets) and would thus require this extended protection. Cabinet agenda and decisions contain respectively a list of the matters discussed by ministers on specific dates and a record of the consensus reached by ministers in these matters (non-core secrets). Although they should remain confidential until a final decision is made and announced to protect the efficiency and effectiveness of the collective decision-making process, there is no apparent reason they need to remain confidential after that point in time to ensure the proper functioning of Cabinet government.¹³²

Government officials can impose even broader restrictions on the right of access to information under paragraph 69(1)(g) of the *ATIA*, which provides for excluding any document that contains information found in documents listed in paragraphs (a) to (f). As shown in Table 1, the number of exclusions under paragraph 69(1)(g) as a proportion of the total number of exclusions under all paragraphs of subsection 69(1) increased steadily between 1990–1991 and 2020–2021, from 30.81 per cent to 77.32 per cent.¹³³ In the most recent reporting year, that figure stood at 72.92 per cent.¹³⁴ These data suggest that the types of documents excluded under section 69 have shifted over the years from official Cabinet documents to other government documents, such as emails and other departmental records, that are only remotely connected to the collective

131 See Campagnolo, “History, Law and Practice”, *supra* note 82 at 262–68.

132 *Ibid* at 264–65.

133 The figures shown in Table 1 are based on data from the Treasury Board of Canada Secretariat compiled by the authors over the years, some of which are available online: <canada.ca> [perma.cc/B4XJ-QCTB].

134 In the 2024–2025 reporting period, 4,029 requests were excluded under section 69, of which 2,938, or 72.92 per cent, fell under paragraph 69(1)(g) (see Treasury Board of Canada Secretariat, *2024–2025 Access to Information Statistics* (last modified 17 December 2025), online: <canada.ca> [perma.cc/7C3N-Q9K9]).

decision-making process.¹³⁵ It is debatable whether disclosing the documents excluded for twenty years under paragraph 69(1)(g) would truly hinder the proper functioning of Cabinet government, especially considering that these documents are excluded by low-level officials whose decisions are not subject to external oversight and review.

Table 1: Cabinet Confidence Exclusions by Document Type

	1990–91	2000–01	2010–11	2020–21
(a) Memoranda to Cabinet	26.33%	30.37%	22.20%	5.65%
(b) Discussion papers	1.40%	0.64%	1.18%	0.81%
(c) Agenda, minutes, and decisions	14.29%	8.25%	4.11%	1.82%
(d) Communications between ministers	9.24%	9.70%	4.28%	4.31%
(e) Notes to ministers	12.32%	13.30%	24.23%	7.74%
(f) Draft legislation	5.60%	3.37%	1.75%	0.87%
(g) Other documents	30.81%	34.38%	42.25%	77.32%

Step 3: Infringement—The last step is to determine whether section 69 of the *ATIA* infringes the right of access to information, either in purpose or in effect. Section 69 infringes the right of access to government information by removing from the scope of the *ATIA* an entire category of core government information. Although the executive should be able to keep some Cabinet documents confidential to ensure the proper functioning of government, Parliament cannot exclude an entire category of core government information from the scope of the *ATIA* without prima facie infringing the constitutional right of access. Indeed, the consequence of excluding an entire category of core information is that the public can never meaningfully discuss or assess certain types of government action and decision-making. In doing so, section 69 prevents meaningful expression on political matters and therefore infringes section 2(b) of the *Charter*.¹³⁶

Note that the infringement of the right of access to government information is inextricably linked to the fact that decisions to withhold Cabinet confidences pursuant to section 69 are not subject to meaningful

135 See Campagnolo, *Behind Closed Doors*, *supra* note 1 at 142.

136 See Kazmierski, “Taking One Step Forward”, *supra* note 45 at 233.

oversight and review. Because the executive has complete control over disclosing Cabinet confidences, there is no guarantee that the documents excluded are truly Cabinet confidences that ought to remain confidential in the interest of good and effective government. There is legitimate reason to doubt that government officials apply section 69 of the *ATIA* in a manner consistent with the letter and spirit of the law, as the discussion paper saga demonstrates.

Discussion papers were introduced in 1977 to accompany memoranda to Cabinet—documents provided to ministers for each Cabinet proposal—and present a neutral and factual discussion of available options to solve particular problems (non-core secrets).¹³⁷ To encourage access to the information contained in discussion papers, section 69 of the *ATIA* was drafted to grant a lower level of protection to this type of document: Discussion papers are no longer protected once Cabinet has made and announced a final decision on the issue at hand or, if no decision is announced, four years after a decision was made.¹³⁸ However, because of various changes made to the format of Cabinet documents shortly after the *ATIA* came into force, obtaining access to the content of discussion papers has become increasingly difficult—and at times even impossible. In 1984, the government undertook a review of the Cabinet Paper System that had the effect of moving the content of discussion papers to memoranda to Cabinet. As a result, the factual and background information discussion papers contained fell within the scope of paragraph 69(1)(a) of the *ATIA* and became confidential for twenty years.¹³⁹

The discussion paper exception was temporarily revived following the 2003 *Ethyl* case, when the Federal Court of Appeal ordered the government to uphold the discussion paper exception by severing and disclosing any part of a Cabinet document that contained “an organized body or corpus of words, which looked upon on its own, comes within the definition [of the term ‘discussion paper’].”¹⁴⁰ But the scope of the exception was again reduced in 2012, when changes to the structure of memoranda to Cabinet by the Harper government intertwined factual and background information with the proposed course of action in the

137 See Campagnolo, “History, Law and Practice”, *supra* note 82 at 273.

138 See *ATIA*, *supra* note 4, s 69(3).

139 See Campagnolo, “History, Law and Practice”, *supra* note 82 at 274–76.

140 *Canada (Environment) v Canada (Information Commissioner)*, 2003 FCA 68 at para 26.

“ministerial recommendation” section.¹⁴¹ Since then, the distinction between facts (non-core secrets) and opinions (core secrets) has been blurred, making it harder to sever the former from the latter and therefore to disclose the content of discussion papers.¹⁴² Furthermore, since neither the information commissioner nor the Federal Court can examine documents that are said to contain Cabinet confidences, they have no way of verifying that the documents withheld under section 69 do not contain a “corpus of words” that should be disclosed pursuant to the discussion paper exception as interpreted by the Federal Court of Appeal.¹⁴³ These changes to the Cabinet Paper System have eroded the right of access that the discussion paper exception was meant to recognize.¹⁴⁴ This example demonstrates that section 69 can be used, and has in fact been used, to withhold information that should be disclosed in accordance with the will of Parliament in order to further political participation and government accountability.

In short, given the overbroad definition of “Cabinet confidences,” the lack of meaningful oversight and review, and the abuse of discretion by government officials, as demonstrated by the discussion paper saga, section 69 of the *ATIA* is inconsistent with the right of access to information derived from section 2(b) of the *Charter*, based on the hybrid *Irwin Toy* test established in *Criminal Lawyers’ Association*. Let us now consider whether section 69 is consistent with the simplified *Dunmore/Baier* test established in *Toronto (City)* or the proposed holistic approach to constitutional protection of access to government information.

Toronto (City) Approach—As noted in Part II, Chief Justice Wagner and Justice Brown rejected the hybrid *Irwin Toy* approach advanced in *Criminal Lawyers’ Association*, preferring a simplified *Dunmore/Baier* approach to considering claims for protection of positive rights under section 2(b) of the *Charter*. This simplified approach consolidated the three steps of the traditional *Dunmore/Baier* approach into one, with a single question: “[I]s the claim grounded in the fundamental *Charter* freedom of

141 See Ken Rubin, “Harper’s Cabinet Need Not Have Any Background Facts, Reinforces Greater Cabinet Secrecy”, *The Hill Times* (14 April 2014), online: <hilltimes.com> [perma.cc/3FD4-8PVB].

142 See Campagnolo, *Behind Closed Doors*, *supra* note 1 at 151–52.

143 *Ibid* at 164.

144 *Ibid* at 152.

expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression?”¹⁴⁵ In describing this simplified approach, Chief Justice Wagner and Justice Brown explicitly noted that section 2(b) “does not remove the authority that a legislature has to create or modify statutory platforms, because it does not include the right to access any statutory platform in particular. However, when a legislature chooses to provide such a platform, then it must comply with the *Charter*.”¹⁴⁶ In other words, they held that, while the legislature may not be mandated to create or modify a particular access to information statutory platform, any access to information regime it has created (in this case, the *ATIA*) must comply with the *Charter*.

When applying the simplified *Dunmore/Baier* test from *Toronto (City)*, the core question thus becomes the following: Does the exclusion of Cabinet confidences pursuant to section 69 of the *ATIA* substantially interfere (or have the purpose of substantially interfering) with freedom of expression? As argued above, “substantial interference” with freedom of expression does not require that expression be “effectively precluded” if no access to the information sought is granted. Rather, based on the relevant precedents, freedom of expression is substantially impeded if refusing to provide access to particular government information would prevent citizens from meaningful participation in the democratic process. This occurs when citizens are hindered in making informed decisions about political candidates or policies or in engaging in meaningful expression about the conduct of government officials or institutions.

Does the exclusion of Cabinet confidences pursuant to section 69 of the *ATIA* interfere with freedom of expression by preventing citizens from meaningfully expressing themselves about government conduct and meaningfully participating in the democratic process? The analysis advanced above suggests it does. The ban on access to Cabinet confidences prevents Canadians from obtaining key information about Cabinet’s policy choices. It thus blocks Canadians from developing informed opinions and meaningfully expressing themselves about those policy choices. In short, in the words of Chief Justice McLachlin and Justice

145 *Toronto (City)*, *supra* note 7 at para 25.

146 *Ibid* [footnotes omitted].

Abella, it prevents “meaningful public debate on the conduct of government institutions.”¹⁴⁷ While some expression concerning these policy choices would be possible without access to Cabinet confidences, it would be very difficult to engage in meaningful, informed expression. Thus, while bald expression is not effectively precluded by the ban on access to Cabinet confidences, meaningful expression is substantially impeded. Accordingly, freedom of expression is infringed, and the issue becomes whether the infringement can be justified in a free and democratic society under the *Charter* section 1 analysis.

Holistic Approach—The final test to be applied in considering the constitutionality of section 69 of the *ATIA* is the holistic approach to constitutional protection of access to government information. Recall that this approach is similar to the simplified *Dunmore/Baier* approach applied by Chief Justice Wagner and Justice Brown in *Toronto (City)*, insofar as the latter approach suggests that the overriding question to be determined when assessing whether a constitutional right of access to information is triggered includes whether the legislation in question substantially interferes with the freedom of expression of Canadians. However, the inquiry under the holistic approach does not limit itself to whether there is substantial interference with expression but continues to whether there is substantial interference with the meaningful participation of Canadians in the democratic process, encompassing elements of both the right to vote and the right to expression in a way that promotes government accountability both during elections and beyond. This expanded inquiry draws from the Supreme Court of Canada’s decisions on the unwritten constitutional principle of democracy and sections 2(b) and 3 of the *Charter*. In so doing, it moves beyond considerations of political expression to include considerations of accountability, regardless of whether sections 2(b) and 3 of the *Charter* are engaged by the facts of a particular case.

While the understanding of the “source” of the constitutional protection for access to government information is quite different under the holistic approach advocated in this article, the methodology is similar (although not identical) to that of the simplified *Baier/Dunmore* approach applied in *Toronto (City)*. Thus, the question central to the analysis under this approach is as follows: Does the exclusion of Cabinet confidences pursuant to section 69 of the *ATIA* substantially interfere with the ability

147 *Criminal Lawyers’ Association*, *supra* note 6 at para 37.

of Canadians to meaningfully participate in the democratic process by denying them access to information they need to engage in informed critiques of government officials and institutions, through either expression, voting, or other means of accountability? Here it is worth reiterating that “substantially impede” does not require that participation in the democratic process be “effectively precluded.” Rather, it requires that participation be impeded by restrictions on access to sufficient information to engage in informed analysis and debate concerning government activity.

Again, the above analysis suggests that the ban on access to Cabinet confidences pursuant to section 69 of the *ATIA* meets the threshold of substantial interference with the right of access to government information. Where access to Cabinet confidences is unduly prohibited, the ability to hold government to account for policy decisions and actions related to those Cabinet confidences is substantially impeded. Indeed, in many cases it is even effectively precluded. Assume, for example, that Justin Trudeau’s government had refused to give the Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions access to the relevant Cabinet confidences.¹⁴⁸ Without access to this information, neither the commissioner nor the public would have been able to make an informed assessment of whether the government acted expeditiously and appropriately once informed of credible threats of foreign interference in Canadian elections. Similarly, imagine that Justin Trudeau’s government had refused to provide access to Cabinet confidences relevant to the Public Inquiry into the 2022 Public Order Emergency. Without access to the assessments of whether sufficient grounds existed to declare a public order emergency, neither the commissioner nor the public could have developed informed views about whether the Governor in Council had acted appropriately in the circumstances. In these cases, a denial of access would have limited the ability of Canadians to engage in an informed public debate on matters of great importance and thus hold elected officials accountable in the next election.

The application of the holistic approach demonstrates that section 69 of the *ATIA* contravenes the constitutional right of access to government information. Thus, whether the hybrid *Irwin Toy* approach developed in *Criminal Lawyers’ Association*, the simplified *Dunmore/Baier* approach developed in *Toronto (City)*, or the holistic approach is applied, section 69

148 See the text within note 3.

infringes the right of access to government information protected by the *Charter*. What remains to be determined is whether the infringement of the right to access under section 69 can be justified in a free and democratic society.

B. Section 69 Cannot Be Justified in a Free and Democratic Society

Once section 69 of the *ATIA* has been shown to infringe the constitutional right of access to government information, the onus shifts onto the government to justify the infringement pursuant to section 1 of the *Charter*. The government must demonstrate that the infringement is prescribed by law and that it is justifiable in a free and democratic society. The latter condition is fulfilled only if the infringement has a pressing and substantial objective, the objective is rationally connected to the infringement, the infringement minimally impairs the right of access to Cabinet confidences, and the deleterious effects of the infringement are proportionate to the salutary impact achieved.¹⁴⁹

Section 69 of the *ATIA* is a limit “prescribed by law” that ensures the confidentiality of Cabinet confidences. This objective can be characterized as pressing and substantial because, as demonstrated above and as the Supreme Court of Canada has now clearly recognized, protecting Cabinet confidences is necessary for the proper functioning of government.¹⁵⁰ Furthermore, the exclusion of Cabinet confidences from the scope of the *ATIA* is rationally connected to the objective of section 69, as it ensures that Cabinet confidences remain confidential despite requests from the public to obtain this information.

However, the infringement of the right of access to information under section 69 is not justifiable in a free and democratic society because it does not meet the last two criteria of the *Oakes* test. Indeed, the infringement under section 69 is not minimally impairing, as a viable alternative to the exclusion of Cabinet confidences from the scope of the *ATIA* exists: a regular exemption.¹⁵¹ If Cabinet confidences were exempted (as

149 See *R v Oakes*, 1986 CanLII 46 at paras 69–70 (SCC) [*Oakes*].

150 See *Ontario (IPC)*, *supra* note 114 at paras 30–31, 60.

151 See Yan Campagnolo, “Rethinking Cabinet Secrecy” (2020) 13:3 JPPL 497 at 515–18 [Campagnolo, “Rethinking Secrecy”]. Similarly, in 2017, the Superior Court of Justice found that a “broad brushed exclusion” of records relating to the provision of

opposed to excluded), Cabinet privilege claims would be subject to meaningful oversight and review, like all the other categories of core government documents, including national security documents.¹⁵² Would exempting rather than excluding Cabinet confidences from the right of access compromise the objective behind section 69? A review of the treatment of Cabinet privilege claims in other Westminster jurisdictions suggests that it would not. In all Canadian provinces and in states such as the United Kingdom, Australia, and New Zealand, Cabinet confidences are exempted rather than excluded from freedom of information legislation. As a result, these claims are in principle subject to review by a supervisory agency (information commissioner or ombudsperson) or a court that can examine and order disclosure of the documents subject to the claim.¹⁵³ These practices suggest that the sweeping protection

abortion services from the access to information regime (see *Ontario FIPPA*, *supra* note 48, s 65(5.7)) was not minimally impairing because the objective of protecting the privacy and safety of patients could have been achieved even while allowing for the disclosure of general and non-identifying information (*ARPA*, *supra* note 48 at para 66).

- 152 Refusals by the government to release documents sought in an access to information request are subject to judicial review by the Federal Court. This applies even to government documents whose disclosure would injure international relations, national defence, national security, or federal-provincial affairs (see *ATIA*, *supra* note 4, s 41).
- 153 In British Columbia, Manitoba, Prince Edward Island, Ontario, and Quebec, both the supervisory agency and the courts can examine documents subject to Cabinet privilege claims and order their disclosure (see *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss 44(1)(b), 58–59.01 [*BC FIPPA*]; *Freedom of Information and Protection of Privacy Act*, CCSM 1997, c F175, ss 50(2), 66.8(2), 71; *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, ss 53(2), 66(2) [*PEI FIPPA*]; *Ontario FIPPA*, *supra* note 48, ss 52(4), 54(1)–(2), 56(2); *Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, CQLR c A-2.1, s 141). In Nova Scotia, Newfoundland and Labrador, Saskatchewan, Nunavut, the Northwest Territories, and the Yukon both the supervisory agency and the courts can examine the documents, but only the courts can order their disclosure (see *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss 38(1)(a), 39(1)(a), 42(5)(a) [*NS FIPPA*]; *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c A-1.2, ss 47, 60(1)(c), 97(3); *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01, ss 54(1)(a), 55, 58(5)(a); *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20, ss 34–35, 39 as enacted for Nunavut, pursuant to the *Nunavut Act*, SC 1993, c 28 [*NU AIPPA*]; *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20, ss 34–35, 39 [*NWT AIPPA*]; *Access to Information and Protection of Privacy Act*, SY 2018, c 9, ss 95(1), 97, 101, 107 [*YK AIPPA*]). This is also the case in the United Kingdom, Australia, and New Zealand (see *Freedom of Information Act*

conferred on Cabinet confidences under section 69—and its infringement of the right of access to government information—is overbroad compared with what is necessary to ensure the proper functioning of a Westminster system of responsible government.

Furthermore, meaningful oversight and review are particularly important to ensuring that section 69 of the *ATIA* is applied reasonably and in good faith. Indeed, “governments should not receive deference in their choices of how to balance disclosure obligations as they are self-interested actors in such choices.”¹⁵⁴ As former federal information commissioner John Reid has noted, without independent oversight, governments risk applying Cabinet confidentiality “broadly ... and too self-servingly.”¹⁵⁵ This position was echoed by the current information commissioner, Caroline Maynard, during the 2020 legislative review of the *ATIA*¹⁵⁶ and by the House of Commons Standing Committee on Access to Information, Privacy and Ethics in its 2023 report on the state of the *ATIA*.¹⁵⁷ By

2000 (UK), ss 50–51, 54–55; *Freedom of Information Act 1982* (Commonwealth), 1982/3, ss 55L(2), 55U(3), 64(2) (Austl); *Official Information Act 1982*, 1982/156, 1, ss 28–29A, 30 (NZ). In Alberta and New Brunswick, the supervisory agency cannot examine Cabinet documents during an investigation but it can order—or, in New Brunswick, recommend—their disclosure if the claim is not founded. The freedom of information legislation of these two provinces does not constrain the power of the courts to examine and order the disclosure of Cabinet documents (see *Access to Information Act*, SA 2024, c A-1.4, ss 27, 50(6)(b) [*AB ATIA*]; *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6, ss 70(1) [*NB RPPA*]).

154 Kazmierski, “Taking One Step Forward”, *supra* note 45 at 242.

155 Information Commissioner of Canada, *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*, Catalogue No IP4-12/2015E-PDF (Gatineau: OIC, 2015) at 60, online (pdf): <oic-ci.gc.ca> [perma.cc/6DHP-3J4Y] [Information Commissioner of Canada, *Right Balance*], citing John Reid, Address (delivered at the Access and Privacy Conference, University of Alberta, 2006) [unpublished].

156 See Information Commissioner of Canada, *Observations and Recommendations from the Information Commissioner on the Government of Canada’s Review of the Access to Information Regime*, Catalogue No IP4-18/2021E-PDF (Ottawa: OIC, January 2021) at 19–20, online (pdf): <oic-ci.gc.ca> [perma.cc/DQ2D-VZYQ]. These recommendations did not, however, receive the government’s support (see Canada, Treasury Board, *Access to Information Review: Report to Parliament*, Catalogue No BT22-273/2022E-PDF (Ottawa: TBS, 2022) at 32–33, online (pdf): <canada.ca> [perma.cc/4WHW-DMGG]).

157 See House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *The State of Canada’s Access to Information System* (June 2023) (Chair: John

preventing such oversight and review, section 69 allows the government to invoke Cabinet privilege in a way that unjustifiably undermines the right of access to information and the meaningful participation of citizens in the democratic process.

It should be reiterated that two exceptions circumscribe the protection of Cabinet confidences under section 69 of the *ATIA*. First, Cabinet confidences are not protected after twenty years,¹⁵⁸ and, second, discussion papers are not protected if the underlying decision has been announced or, if no decision is announced, four years have passed since it was made.¹⁵⁹ However, these exceptions are not enough to consider section 69 minimally impairing. As explained above, the government has taken various measures over the years to circumvent the discussion paper exception to the point where it is now meaningless.¹⁶⁰ As for the twenty-year protection period, it could be shortened to ten or fifteen years,¹⁶¹ as

Brassard) at recommendations 29–30, online: <ourcommons.ca> [perma.cc/MD3M-6QHF].

158 See *ATIA*, *supra* note 4, s 69(3)(a).

159 *Ibid*, s 69(3)(b).

160 In the same vein, Alberta recently abolished an exception that enabled the disclosure of “background facts” presented to the executive council, thus expanding the scope of the protection afforded to Cabinet documents in the province. Compare the former *Freedom of Information and Protection of Privacy Act* (see *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 22(2)(c)), with the new and, in some regards, regressive legislation (see *AB ATIA*, *supra* note 153, s 27(2)).

161 Several parliamentary committees, information commissioners, and government task forces have recommended reducing the protection period at the federal level to fifteen years. See e.g. House of Commons, Standing Committee on Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, Catalogue No XC33-1/1-332-1E-PDF (March 1987) at 33 (Chair: Blaine A Thacker); Information Commissioner of Canada, *Annual Report: 1993–1994*, Catalogue No IP20-1/1994 (Ottawa: OIC, 1994) at 25, online (pdf): <publications.gc.ca> [perma.cc/BE9B-YED2]; Information Commissioner of Canada, *Annual Report: 1995–1996*, Catalogue No IP20-1/1996 (Ottawa: OIC, 1996) at 40–41, online (pdf): <publications.gc.ca> [perma.cc/U7ZH-9MES]; Information Commissioner of Canada, *Annual Report: 2000–2001*, Catalogue No IP20-1/2001 (Ottawa: OIC, 2001) at 50, online (pdf): <publications.gc.ca> [perma.cc/XC82-GJEN]; Canada, Treasury Board, *Access to Information: Making It Work for Canadians; Report of the Access to Information Review Task Force*, Catalogue No BT22-83/2002-MRC (Ottawa: TBS, 2002) at 47, online (pdf): <publications.gc.ca> [perma.cc/YQ94-JZBF]; Information Commissioner of Canada, *Right Balance*, *supra* note 155 at 62.

is the case in some Canadian provinces.¹⁶² And, assuming that a twenty-year protection can be justified for core secrets, it cannot be justified for non-core secrets. Ministers should be able to expect that the views they voiced during Cabinet proceedings will not be made public during their political career,¹⁶³ but there is no reason to protect non-core secrets (under Cabinet privilege) after a decision has been made public. Indeed, by then, disclosing them would not undermine the efficiency and effectiveness of the collective decision-making process (other privileges may nonetheless restrict their disclosure, depending on the nature of the information).¹⁶⁴

Finally, section 69 of the *ATIA* is not justifiable under section 1 of the *Charter* because the positive effects of the infringement do not outweigh the significant restrictions on the right of access to government information and the associated limitation on political expression and accountability.¹⁶⁵ Certainly, restricting access to government documents deemed to contain Cabinet confidences ensures that the information remains confidential and thus promotes the proper functioning of government. However, the benefits of keeping Cabinet confidences confidential must be tempered by the recognition that the same result could be achieved with a narrower provision that is subject to meaningful oversight and review.¹⁶⁶ Section 69 does not meet the proportionality test because it leads to overbroad restrictions on the right of access to government information¹⁶⁷ and gives the executive complete control over its disclosure, which can be abused.

162 In Nova Scotia and the Yukon, Cabinet confidences are protected for ten years (see *NS FIPPA*, *supra* note 153, s 13(2)(a); *YK AIPPA*, *supra* note 153, s 67(3)). They are protected for fifteen years in Alberta, British Columbia, Nunavut, the Northwest Territories, and Prince Edward Island (see *AB ATIA*, *supra* note 153, s 27(3); *BC FIPPA*, *supra* note 153, s 12(2)(a); *NU AIPPA*, *supra* note 153, s 13(3); *NWT AIPPA*, *supra* note 153, s 13(3); *PEI FIPPA*, *supra* note 153, s 20(2)(a)). They can also be disclosed after fifteen years in New Brunswick, but only with the consent of the executive council (see *NB RIPPA*, *supra* note 153, s 17(2)).

163 Campagnolo, "Rethinking Secrecy", *supra* note 151 at 512.

164 *Ibid* at 512, n 93.

165 See Kazmierski, "Taking One Step Forward", *supra* note 45 at 244.

166 See generally *ibid* at 243.

167 In Ontario, the overbroad nature of the exclusion of records relating to the provision of abortion services from the access to information regime (see *Ontario FIPPA*, *supra*

Regarding the overbroad nature of the concept of “Cabinet confidences” under section 69, it is true that the Supreme Court of Canada recently took an expansive view of the scope of Cabinet privilege in the Doug Ford mandate letter case.¹⁶⁸ But even in that case, which did not involve a *Charter* challenge, the scope of the privilege was not open-ended; it was limited to the “substance of deliberations” of Cabinet,¹⁶⁹ and there was no evidence that the Ontario government had abused the privilege (unlike the federal government with the discussion paper exception). More importantly, in Ontario, both the information commissioner and the divisional court have the power to examine Cabinet documents and order their disclosure, which is not the case at the federal level.¹⁷⁰ Hence, while Cabinet privilege was broadly construed in the mandate letter case, it was still somewhat circumscribed. The Constitution can perhaps accommodate an overreaching Cabinet privilege as long as its application is subject to meaningful oversight and review, thus preventing the most egregious executive interpretations.

Two remedies could be granted if section 69 of the *ATIA* were found to be unconstitutional. First, section 69 could be read down to enable the information commissioner and the Federal Court to examine Cabinet confidences to confirm that the provision has been properly applied.¹⁷¹ This shift would prevent abusive restrictions on the right of access to information and would likely make section 69 justifiable under section 1 of the *Charter*.¹⁷² Second, section 69 could be declared unconstitutional, but the effect of the declaration could be suspended to enable Parliament to amend the *ATIA* to transform the Cabinet exclusion into a regular

note 48, s 65(5.7)) was fatal at the proportionality stage (*ARPA*, *supra* note 48 at para 67).

168 See *Ontario (IPC)*, *supra* note 114 at para 62. On the Supreme Court of Canada’s expansive interpretation of Cabinet privilege in *Ontario (IPC)*, see Mel Cappe & Yan Campagnolo, “Debates About Cabinet Secrecy Are Far From Over” (2024) 56:1 *Ottawa L Rev* 7 at 15–20.

169 See *Ontario FIPPA*, *supra* note 48, s 12(1).

170 *Ibid*, ss 52(4), 54(1)–(2), 56(2).

171 On the reading-down remedy, see *Schachter v Canada*, [1992] 2 SCR 679 at 696–97, 1992 CanLII 74 (SCC).

172 Kazmierski, “Taking One Step Forward”, *supra* note 45 at 242, 244.

exemption subject to meaningful oversight and review.¹⁷³ Ideally, the new oversight and review process would involve both a supervising agency and a court of law, but at the very least, it must involve the latter in order to comply with the *Charter*.

CONCLUSION

This article has considered whether the ban on access to federal Cabinet confidences implemented under section 69 of the *ATIA* is constitutional. It has argued that section 69 infringes the *Charter* and that the infringement cannot be justified in a free and democratic society. This violation springs from the fact that section 69 creates unjustifiable limitations on the right of access to government information that is necessary to enable Canadians both to express themselves about the activities of government officials and institutions and to hold these officials and institutions accountable for these activities. The constitutional protection of the right to access government information has been recognized and affirmed by the Supreme Court of Canada, although some uncertainty remains about the best method of applying this constitutional protection. Nonetheless, this article has sought to demonstrate that, regardless of how this constitutional protection is interpreted and applied, the ban on access to Cabinet confidences imposed by section 69 is unconstitutional. If the constitutional right of access means anything, it requires that the *ATIA* apply to all core government information, including Cabinet confidences, subject only to limited exemptions reviewed independently from government.

The article began by considering the way the constitutional protection of access to government information may stem from written provisions of the Constitution, such as sections 2(b) and 3 of the *Charter*, and unwritten constitutional principles, such as the principle of democracy. It then discussed the ways in which the Supreme Court of Canada's decisions to date have recognized the constitutional protection of access to government information under section 2(b) of the *Charter*. It also identified weaknesses in the Court's current approaches to protecting access to government information through section 2(b), many of which are rooted in the way the Court has dealt with the issue of how to protect positive

173 On the temporary suspension of invalidity, see *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 767–69, 1985 CanLII 33 (SCC). For an example in the access to information context, see *ARPA*, *supra* note 48 at para 72.

rights under the *Charter*. In particular, it showed how the Court has developed two distinct approaches to dealing with positive rights claims that have yet to be reconciled: the hybrid *Irwin Toy* approach and the simplified *Dunmore/Baier* approach.

While this article presented specific ways of addressing the particular weaknesses of each approach to improve the manner in which section 2(b) is applied to protect access to government information, it also suggested an alternative, holistic approach that could be used to more coherently justify the constitutional protection of access to government information. This holistic approach recognizes that the constitutional protection of access to government information promotes the same values that underlie the application of sections 2(b) and 3 of the *Charter*, values at the core of the unwritten constitutional principle of democracy. Canadians must be granted access to information to a sufficient extent that they can meaningfully participate in the democratic process and hold government officials and institutions accountable through that participation. The holistic approach avoids the ambiguity of relying on either section 2(b) or 3 of the *Charter* as the source of constitutional protection for access to government information and offers a simplified analysis of whether the right of access to government information has been violated in a particular case.

Recognizing the uncertainty about which approach the Supreme Court of Canada may apply in future cases, this article proceeded to consider whether section 69 of the *ATIA* violates the constitutionally protected right of access to government information under each of the approaches identified: the hybrid *Irwin Toy* approach adopted in the *Criminal Lawyers' Association* case, the simplified *Dunmore/Baier* approach taken in the *Toronto (City)* case, and the proposed holistic approach. Section 69 was found to infringe the *Charter* using all three approaches. Regardless of the approach applied, the provision was found to substantially interfere with the ability of Canadians to participate meaningfully in the democratic process and to hold government officials and institutions accountable.

Under the complex hybrid *Irwin Toy* approach, this substantial interference could not be overcome by the argument that Cabinet confidences are protected by existing privileges because the ban on access to Cabinet confidences imposed by section 69 exceeds the scope of the existing common law and statutory privileges, as well as the protection afforded to

this type of information in other Westminster jurisdictions. In other words, the protection afforded by section 69 goes beyond what is necessary to ensure the proper functioning of Cabinet government. The excessive scope of the ban on access imposed by section 69—especially the lack of meaningful oversight and review—is the primary reason that the infringement of the right of access to government information cannot be justified in a free and democratic society.

The exclusion of Cabinet confidences is provided by a legislative provision—section 69 of the *ATIA*—so it is obviously prescribed by law. In addition, section 69 may be viewed as advancing the pressing and substantial objective of ensuring the proper functioning of Cabinet government and is rationally connected to that pressing and substantial objective. However, the existing ban on access to Cabinet confidences cannot be considered either minimally impairing or proportionate. The non-substantive definition of Cabinet confidences in section 69—and especially paragraph 69(1)(g), which extends the scope of Cabinet confidences to documents that are only tenuously linked to collective decision-making—restricts access far beyond what is necessary to achieve the goal of promoting effective collective decision-making. Moreover, the current limits on review by either the information commissioner or the Federal Court of documents declared (by low-level officials) to contain Cabinet confidences are unnecessarily restrictive and undermine the capacity of the courts to protect the rule of law through judicial review. Access to information legislation in the Canadian provinces, in addition to access legislation in the United Kingdom, New Zealand, and Australia, demonstrates that Cabinet confidences can be protected while maintaining supervisory roles for access commissioners, judges, or both.

In the end, a balanced, proportionate, minimally impairing method of protecting Cabinet confidences entails treating them as secrets to be protected in certain limited and verifiable circumstances rather than as sacred artefacts to be shrouded in mystery for decades, hidden in a black hole beyond the contemplation of judges, commissioners, or citizens.