CANDOUR IN JUDICIAL REVIEW PROCEEDINGS IN CANADA

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To date, Canada knows no 'duty of candour' in judicial review proceedings. Such a duty, requiring individuals and government alike to make full and timely disclosure of relevant material, has long existed in other jurisdictions. In this paper, I discuss the potential recognition of a duty of candour in Canadian administrative law. Indeed, I will argue that a principle of candour is already immanent in the Canadian law of judicial review of administrative action. This principle has various manifestations, which I will describe. Building on these manifestations, I will conclude by suggesting that the principle should be recognized by the courts, who should feel comfortable imposing disclosure requirements on administrative decision-makers in judicial review proceedings.

In Part I, I introduce the duty of candour. In Part II, I explain why candour matters by describing how judicial review operates on the basis of a limited record. In Part III, I outline some barriers to the production of a complete record (i.e., a record that would permit a reviewing court to determine whether the decision in question satisfies the standards of administrative law) before, in Part IV describing why the resultant situation is problematic. In Part V, however, I outline the ways in which Canadian courts have managed or circumvented these barriers. These judicial strategies lead me to consider that a principle of candour is already immanent in Canadian law, and I conclude by suggesting that this be made explicit.

À ce jour, le Canada ignore l'« obligation de franchise » dans les procédures de révision judiciaire. Cette obligation, qui exige que les particuliers et l'État produisent rapidement l'entièreté des documents pertinents, existe depuis longtemps dans d'autres pays. Dans cet article, l'auteur aborde l'éventuelle reconnaissance de l'obligation de franchise en droit administratif canadien. En effet, il soutient qu'un principe de franchise est déjà inhérent aux procédures de révision judiciaire d'instances administratives au Canada. Ce principe se manifeste de diverses façons décrites dans cet article. Faisant fond sur ces manifestations, l'auteur conclut en plaidant pour la reconnaissance du principe d'obligation de franchise par les tribunaux, qui devraient se sentir à l'aise d'imposer une obligation de divulguer aux décideurs administratifs dans les procédures de révision judiciaire.

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Dans la première partie, l'auteur présente l'obligation de franchise, et explique dans la deuxième partie pourquoi la franchise est importante en décrivant le fonctionnement de la révision judiciaire sur la foi d'un dossier limité. Il continue avec une troisième partie qui porte sur certains obstacles à la production d'un dossier complet (un dossier qui permettrait à l'instance révisionnelle de déterminer si la décision rendue répondait aux normes du droit administratif), puis, en quatrième partie, il explique pourquoi la situation qui en résulte est problématique. Il exposera cependant, dans une cinquième partie, les manières dont les tribunaux canadiens ont réussi à gérer ou à contourner ces obstacles. Ces stratégies judiciaires permettent de conclure qu'un principe de franchise est déjà implicite en droit canadien, et il propose de le rendre explicite.

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Introduction

In this paper, I will assess the prospects for a duty of candour in the Canadian law of judicial review of administrative action. Such a duty is a well-established feature of the administrative law of other jurisdictions. It requires respondents and applicants in litigation about the lawfulness of administrative action to make full and timely disclosure of material relevant to the questions of lawfulness before the court.

Heretofore, no equivalent duty has been recognized in Canada. I will argue, however, that there is already a principle of candour immanent in the Canadian law of judicial review of administrative action. This principle has various manifestations, which I will describe. Building on these manifestations, I will conclude by suggesting that the principle should be recognized by the courts, who should feel comfortable imposing disclosure requirements on administrative decision-makers in judicial review proceedings.

I proceed as follows. In Part I, I introduce the duty of candour. In Part II, I explain why candour matters by describing how judicial review operates on the basis of a limited record. In Part III, I outline some barriers to the production of a complete record (i.e., a record that would permit a reviewing court to determine whether the decision in question satisfies the standards of administrative law). In Part IV, however, I outline the ways in which Canadian courts have managed or circumvented these barriers. These judicial strategies lead me to consider that a principle of candour is already immanent in Canadian law, and I conclude by suggesting that this be made explicit.

I. The Duty of Candour

A) Defining the Duty of Candour

The duty of candour requires parties to judicial review applications, especially government respondents, "to make full and fair disclosure."[2] They must "explain fully what has occurred and why."[3] The duty has been recognized by the English courts[4] and by courts in other jurisdictions,

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[2] *R v Lancashire County Council ex p. Huddleston*, [1986] 2 All ER 941 (EWCA Civ) at 945 [*Lancashire County Council]*. For general discussion, see especially Elizabeth O'Loughlin, Cassandra Somers-Joce, & Gabriel Tan *Transparency and Judicial Review: An Empirical Study of the Duty of Candour* (Durham: Nuffield Foundation, 2024).

[3] *Lancashire County Council, supra* note 2 at 945.

[4] *Ibid*.

such as New Zealand,[5] Ireland,[6] and Northern Ireland,[7] whilst in Australia government respondents are subject to duties of "model litigants."[8] These are courts in jurisdictions with significant family resemblances to the Canadian system and thus, appropriate points of comparison.[9]

B) Content of the Duty of Candour

Under the duty of candour, a duty is owed to the court "to cooperate and to make candid disclosure, by way of affidavit, of the relevant facts and so far as they are not apparent from contemporaneous documents which have been disclosed, the reasoning behind the decision challenged in the judicial review proceedings."[10] The duty lies more heavily on the government, as that is where relevant information is most likely to be held, but it is also owed by applicants.[11] To discharge the duty, the parties must act with "frankness and openness"[12] by providing "a true and comprehensive account of the way the relevant decisions in the case were arrived at",[13] "based on a rigorous analysis of the evidence."[14] This extends to providing

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5 *Ririnui v Landcorp Farming Ltd,* [2016] NZSC 62 at para 105.

6 *O'Neill v Governor of Castlerea Prisoni,* [2004] 1 IR 298 at 316; *Murtagh v Kilrane*, [2017] IEHC 384 (though note that the ordinary civil procedure principles of discovery apply to judicial review proceedings in Ireland: Paul Daly, Gerard Hogan & David Morgan , *Administrative Law in Ireland*, 5th ed (Dublin: Round Hall, 2019), at paras 18-81) [Daly, Hogan, & Morgan]. See also *RAS Medical Limited trading as Parkwest Clinic v Royal College of Surgeons in Ireland*, [2019] IESC 4 at para 6.9.

7 See e.g. *Re Downes,* [2006] NIQB 77 at para 31 [*Re Downes*]; *Bryson v Police Service Of Northern Ireland*, [2019] NIQB 51 at para 46.

8 Greg Weeks, Ellen Rock, & Janina Boughey, *Governmental Liability: Principles and Remedies* (Canberra: Lexus Nexus 2019) at ch 17 [Weeks, Rock, & Boughey].

9 Mathias Reimann and Reinhard Zimmermann 2 ed, *The Oxford Handbook of Comparative Law* (Oxford University Press: Oxford, 2006) at ch 43, 1259, 1266.

10 *Belize Alliance of Conservation Non-Governmental Organizations v The Department of the Environment* [2004] UKPC 6, [2004] Env LR 761 at para 86, per Lord Walker (dissenting, but not on this point).

11 *R (Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416 at para 46 [*Khan*], Daly, Hogan, & Morgan *supra* note 6 at paras 18-149, 18-155. I will not be pursuing the duty as it applies to applicants: in Canada, the underlying rationales for candour apply with greatest force to government respondents (see especially Part IVC below). As the law currently stands it is, moreover, difficult to imagine situations in which an applicant would have (and hold back) relevant information.

12 *Re Downes, supra* note 7 at para 31.

13 *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs*, [2002] All ER (D) 450 (EWCA Civ) at 1409; *Khan, supra* note 11 at para 46.

14 Treasury Solicitor's Department, *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* (London: Treasury Solicitor's Department, January 2010) at 2-3 [Treasury Solicitor Department].

an explanation in comprehensible terms of dense technical or scientific material.[15]

Relevance is the touchstone; litigation advantage is irrelevant. "Embarrassing" or "damaging" material must be disclosed, as must "inconvenient" facts or relevant considerations.[16] The respondent must identify "the good, the bad, and the ugly."[17] In short, the respondent must place "all the cards face upwards on the table."[18]These cards must be arrayed in a comprehensible way, not in an "undigested pile."[19] The duty of candour is owed to the courts to ensure that they can perform their reviewing function.[20] Accordingly, it is not a duty to off-load a huge amount of documentation on the claimant and ask it, as it were, to find the "needle in the haystack"[21], but rather a duty to throw as much light as possible on the relevant facts. In public law litigation, the government may not adopt a "win a case at all costs" mentality,[22] because the respondent and the courts are engaged in the "common enterprise" of fulfilling "the public interest in upholding the rule of law."[23] The duty applies with greater force in situations where fundamental rights are at stake;[24] in such circumstances, it is "even more acute."[25]

It has been said that the duty of candour is the "constitutional corollary" of deference to the executive: in return for deference, the courts expect "ministerial candour with the Courts about their policy."[26] Accordingly, it applies "with greatest force at the outset of the proceedings."[27]

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15 *R (Mott) v Environment Agency*, [2016] EWCA Civ 564 at para 64.

16 *Treasury' Solicitor Department*, *supra* note 14 at 2-3.

17 *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs*, [2018] EWHC (Admin) 1508 at para 20 [*R (Hoareau)*].

18 *Lancashire County Council*, *supra* note 2.

19 *Khan, supra* note 11 at para 46.

20 *R (Hoareau)*, *supra* note 17 at paras 19–20.

21 *Ibid*.

22 *Abraha v Secretary of State for the Home Department*, [2015] EWHC 1980 (Admin) at para 111 [*Abraha*].

23 *R (Hoareau)*, *supra* note 17 at paras 19-20.

24 *I v Secretary of State for the Home Department*, [2010] EWCA Civ 727 at para 54.

25 *R (Al-Sweady) v Secretary of State for Defence*, [2009] EWHC (Admin) 2387 at paras 25-26; *J R (K) v London Borough of Brent*, [2018] EWHC (Admin) 1068 at para 11.

26 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*, [1988] NZCA 198 at 554.

27 *Bryson v Police Service of Northern Ireland*, [2019] NIQB 51 at para 40.

C) The Basis of the Duty of Candour

The duty of candour is rooted, fundamentally, in the proposition that the government should abide by the law.

Courts around the common law world have long recognized that in order to perform their reviewing function, they must be "as fully informed as reasonably possible of the facts and issues as they presented themselves at the time to the authority whose decision is under review."[28] Accordingly, it has been said that the duty of candour is "essential for the maintenance of the rule of law", as discharging the duty is necessary to permit the courts to ensure that the government has complied with the law.[29] As such, the duty is premised on the existence of a collaborative relationship between the government and the courts, a "partnership based on a common aim, namely the maintenance of the highest standards of public administration."[30] It is "the duty of the executive to assist the court in arriving at the proper and just result." Indeed, this duty can be grounded in deeper soil still, the "standard of fair play to be observed by the Crown in dealing with subjects",[31] or the Crown's status as "the source and fountain of justice",[32] through the Attorney General.[33] It reflects the Crown's long-standing commitment to the accurate resolution of disputes between citizens and the state.

II. The Importance of the "Record" in Judicial Review Proceedings

In the previous section, I introduced the duty of candour in judicial review proceedings, which has been recognized by courts across the common law world.

In this and subsequent sections I will consider the potential for a duty of candour in judicial review proceedings in Canada. I begin by assessing

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28 *Fiordland Venison Ltd v Minister of Agriculture and Fisheries*, [1978] 2 NZLR 341 at 346.

29 *Abraha*, *supra* note 22 at paras 111, 124.

30 *Lancashire County Council*, *supra* note 2 at 945.

31 *Melbourne Steamship Co Ltd v Moorehead,* (1912) 8 CLR 330 at 342.

32 Gabrielle Appleby, "The Government as Litigant" (2014) 37:1 *U of NSW L J* 94.

33 See also *Dyson v Attorney-General*, [1911] 1 KB 410 citing *Sebel Products v Commissioner of Customs and Excise*, [1949] ch 409 at 421, 422; *Deare v Attorney General,* (1835) 1 Y & C Ex 196 at 208: "[i]t has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of justice, where any real point of difficulty that requires judicial decision has occurred."

a potential obstacle, namely the fact that judicial review is conducted on the basis of the "record" before the reviewing court.

Historically, judicial review is a proceeding conducted on the papers. A reviewing court does not receive live evidence but rather hears arguments about whether the "record" before it reveals that the decision under review was lawful. This jurisdiction is supervisory, designed to permit courts to ensure that administrative decision-makers act in accordance with law.

This historical practice is reflected in Canadian statutory provisions relevant to judicial review. For instance, in Ontario, the *Judicial Review Procedure Act* provides that the person who has been served with a notice of application for judicial review shall file "the record of the proceedings" with the court.[34] In British Columbia, on receipt of an application for judicial review, "the court may direct that the record of the proceeding, or any part of it, be filed in the court." (*Judicial Review Procedure Act*, RSBC 1996, c 241, s. 17).

The "record" may also be defined by statute. In BC, the "record" is defined as including the following:

> (a) a document by which the proceeding is commenced;
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> (b) a notice of a hearing in the proceeding;
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> (c) an intermediate order made by the tribunal;
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> (d) a document produced in evidence at a hearing before the tribunal, subject to any limitation expressly imposed by any other enactment on the extent to which or the purpose for which a document may be used in evidence in a proceeding;
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> (e) a transcript, if any, of the oral evidence given at a hearing;
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> (f) the decision of the tribunal and any reasons given by it;
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> (g) in relation to a decision whether to give consent referred to in section 22 (2),
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> (i) a document or other evidence before the Indigenous governing body, subject to which or the purpose for which a document or other evidence may be used in a proceeding, and

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34 RSO 1990, c J1, s 10.

(ii) the decision of the Indigenous governing body and any reasons given by it …

In Ontario, the obligation on an administrative decision-maker to build a "record" is found in the Statutory Powers Procedure Act:

A tribunal shall compile a record of any proceeding in which a hearing has been held which shall include,

(a) any application, complaint, reference or other document, if any, by which the proceeding was commenced;

(b) the notice of any hearing;

(c) any interlocutory orders made by the tribunal;

(d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;

(e) the transcript, if any, of the oral evidence given at the hearing; and

(f) the decision of the tribunal and the reasons therefor, where reasons have been given.

Issues relating to the definition of the "record" in jurisdictions across Canada are addressed in detail in the essays in Volume 29 of the Canadian Journal of Administrative Law & Practice. For now, I simply want to highlight a common feature:, that the definition of the "record" is not exhaustive. These statutory provisions set out bare minima for a decision-maker to comply with, making it possible in principle to expand the "record" to include other documents.

Indeed, as early as 1960, the Court of Appeal of New Brunswick commented that in the exercise of its supervisory jurisdiction, it was "free to examine all the material the board has made available to us."[35] It has long been recognized that an applicant for judicial review who complains of procedural unfairness may provide relevant information by way of affidavit where the relevant information is not in the record prepared by the decision-maker, and that an affidavit may provide background context (including context about the absence of evidence on key points) without

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[35] *Re Universal Constructors & Engineers Ltd and Labour Relations Board of New Brunswick*, (1960) 27 DLR (2d) 423 at 428.

which the reviewing court would be unable to perform its function of ensuring lawfulness.[36]

In recent decades, there has been pressure to further expand the content of the record.

First, the frontiers of judicial review have advanced. The definitions quoted above are all premised on an adjudicative decision-making model, with a decision made after an adversarial hearing. Judicial review now uncontroversially extends, however, to decisions outside the adjudicative paradigm, such as exercises of ministerial discretion, prison discipline, commissions of inquiry and investigations. The information courts require to ensure that decision-makers in these domains acted lawfully will be somewhat different from the information contained in the definitions above.

Second, the subject matter of judicial review has changed. Justice Richards (as he then was) made this point eloquently in *Hartwig v Commission of Inquiry into matters relating to the death of Neil Stonechild*.[37] He noted that judicial understandings of the scope of the "record" are rooted in jurisprudence from an earlier era when the supervisory jurisdiction was limited to "jurisdictional errors."[38] But an applicant for judicial review today may attack findings of fact and legal conclusions that in bygone days would have been 'within jurisdiction' and beyond the authority of the courts to assess. In *Hartwig*, the problem was that the applicants wished to introduce evidence that was before the tribunal but that the tribunal had not included in its record:

> Each applicant argues that various findings made by the Commission are unreasonable or patently unreasonable. There is no suggestion from the minister or elsewhere that, if they have standing, the applicants are not entitled to make these submissions. But, of course, the only way their positions can be properly advanced is if they are entitled to point to the evidence placed before the Commission and attempt to show how it was misunderstood, overlooked, or otherwise wrongly interpreted. As a result, the position taken by the minister as to the scope of the materials properly before the court would, as a matter of practical reality, deny the applicants any prospect of successfully advancing the arguments they are otherwise entitled to make.[39]

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[36] See generally *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 23–25.

[37] 2007 SKCA 74.

[38] *Ibid* at para 16.

[39] *Ibid* at para 20.

Justice Richards held that it was "necessary to revisit and revise traditional notions about the scope of the material properly before a court on a judicial review application"[40] and that in this instance, the applicants could "bring forward" by affidavit the evidence relevant to their claims of unlawfulness.[41]

Third, the change to the frontiers and subject matter of judicial review has been accompanied by an expanded requirement of reasonableness imposed by courts on administrative decision-makers as part of the supervisory jurisdiction. In Canada, this requirement finds expression in the *Canada (Minister of Citizenship and Immigration) v Vavilov* framework for substantive review, which lends itself to arguments based on material an administrative decision-maker might not necessarily have referenced.[42] Indeed, where the applicant contends that a decision-maker failed to grapple with a submission or did not demonstrate responsive justification to important individual interests, or departed from its own previous decisions, the relevant material might not appear in the record.[43]

A particular flashpoint, both before and after *Vavilov*, has been judicial review of decisions taking the form of regulations. In *Sobeys West Inc v College of Pharmacists of British Columbia*,[44] 'big box' pharmacies challenged a regulation that they argued, unjustifiably favoured the interests of the members of the college over those of the public. At first instance, they succeeded, largely on the basis of extrinsic evidence considered by the reviewing court. But the Court of Appeal of British Columbia reversed, holding that the extrinsic evidence did not form part of the record. It was enough for Justice Newbury that there was "some evidence anecdotal though it may have been in whole or in part—to support [the College's] concerns."[45] By contrast, in *Portnov v Canada (Attorney General)*,[46] Justice Stratas emphasized the availability of means of expanding the record for decision, at least where an applicant has "pleaded grounds that might have supported a plausible claim for disclosure of information."[47] In its most recent pronouncement on the standard of review of regulations, the Supreme Court of Canada suggested that the "consequences" of regulations can be taken into account as long as the point of doing so is

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40 *Ibid* at para 31.

41 *Ibid* at para 33.

42 2019 SCC 65 at para 24 [*Vavilov*].

43 *Ibid* at paras 127 – 128.

44 2016 BCCA 41.

45 *Ibid* at para 70.

46 2021 FCA 171.

47 *Ibid* at para 51. See further Wihak and Oliphant, "Evidentiary Rules in a Post-*Dunsmuir* World: Modernizing the Scope of Admissible Evidence on Judicial Review" (2015) 28 CJLAP 323.

not to put in issue the necessity, wisdom, or desirability of the regulations, suggesting that material about consequences can be put before the court to determine "whether the statutory delegate was reasonably authorized to enact subordinate legislation that would have such consequences."[48]

Courts can (and have) expanded the definition of the record in response to such pressures.

To begin with, the definition of the "record" is in the hands of the courts, either because the relevant statutes are entirely silent or because the statutes do not provide exhaustive definitions. Once the "record" is defined, the courts can rely on their inherent powers to compel administrative decision-makers to comply and furnish relevant information, or to permit applicants to introduce the information (as in *Hartwig*).

In addition, procedural provisions may permit applicants (and respondents) to create an expanded record. For example, the *Federal Courts Rules*[49] permit an applicant to request information held by the decision-maker; the decision-maker may object to production, but if the information is produced, the applicant can bring it before the court in the form of supporting exhibits to an affidavit.[50] Under the same *Rules*,[51] and again via affidavit parties may introduce evidence in their possession into the record,[52] which may be expanded still further if the parties conduct cross-examinations on the affidavits.[53]

Nonetheless, Canadian courts have generally been cautious about expanding the scope of the "record", even where such procedural provisions are available. Justice Swinton eloquently summarized the key reasons for concern in *142445 Ontario Limited (Utilities Kingston) v International Brotherhood of Electrical Workers, Local 636*:

> One of the purposes of administrative tribunals is to provide an expeditious and inexpensive method of settling disputes. Often, these proceedings are much less formal than judicial proceedings. In keeping with this objective, a number of tribunals do not transcribe their proceedings—for example, the Ontario Labour Relations Board, the Human Rights Tribunal of Ontario, and labour arbitrators under the *Labour Relations Act.* If extensive affidavits can be filed on applications

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48 *Auer v Auer*, 2024 SCC 36 at para 58.

49 SOR/98-106.

50 *Ibid*, s 306, 309(2)(d), 312, 317, 318; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 92-96.

51 *Ibid*, s 306-307.

52 *Ibid* s 309.

53 *Ibid* s 308; *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268, at paras 19-24.

> for judicial review in order to permit parties to challenge findings of fact before such tribunals, there would be a significant incentive for parties to seek judicial review since they could then attempt to reframe the evidence that was before the arbitrator. As a result, the process of judicial review is likely to be more prolonged and more costly.
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> Moreover, there may be real difficulties in trying to recreate the evidence before the tribunal, where the parties have conflicting views as to what has been said. Where there is a dispute about the evidence, the reviewing court will be put in the unfortunate position of trying to determine what the evidence was before the tribunal in order that it can then decide whether the decision was unreasonable. Such a process is unfair to the administrative tribunal and undermines its role as a fact finder in a specialized area of expertise.[54]

Yet these concerns apply with greatest force to administrative tribunals. In judicial review of adjudicative decisions made after an adversarial process, the pressure to expand the scope of the record is not as great as in other areas. Even though the adversarial process leading to the typical adjudicative decision is not necessarily a trial-type proceeding, it is nonetheless generally the product of robust engagement by two or more well-equipped antagonists: more often than not, relevant material will find its way into the record. By contrast, where an exercise of discretion or the making of a regulation or by-law is concerned there is no adversarial process apt to generate a detailed record for decision. Moreover, the respondent will often have relevant information in its possession to which the applicant is not necessarily privy. Here the pressure on the scope of the record is greater, and the policy concerns set out by Justice Swinton apply with less force. Of course, there are other concerns as far as other types of decision are concerned; I will address these below.

In short, the prospects for a duty of candour in Canadian administrative law must reckon with the limited scope of the "record" but must also be assessed in light of the possibility that the "record" can be expanded.

III. Barriers to Disclosure

In previous sections, I have introduced the concept of the duty of candour in judicial review proceedings and described the centrality of the 'record' to judicial review of administrative action. In this section, I will consider several barriers to the disclosure of relevant information, which further limit the content of the record and thereby prevent or hinder the

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54 2009 CanLII 24643 (ON Div Ct.) at paras 31-33. See also Paul Daly, "Updating the Procedural Law of Judicial Review of Administrative Action" (2018) 51:3 UBC L Rev 705.

development of candour in Canada: deliberative secrecy, public interest immunity, and certificates issued under the *Canada Evidence Act*.

A) Deliberative Secrecy

Deliberative secrecy shields "[t]he how and the why of decision-making … to protect the decision maker and the decision-making process."[55] Deliberative secrecy is the rule for administrative tribunals.[56] This "core value" of Canadian administrative law[57] prevents courts from examining the internal records of administrative decision-making bodies or compelling decision-makers to testify about their reasoning processes. Only where there is evidence of a breach of natural justice can a reviewing court pierce the veil of deliberative secrecy.[58]

The Supreme Court of Canada has created some doubt about the application of the deliberative secrecy rule by referring specifically to the deliberative secrecy of "adjudicative" functions in *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*.[59] This was an unusual case, however, as deliberative secrecy was held not to apply because the Commission scolaire was acting as an employer. The better view is that deliberative secrecy applies generally, wherever it is necessary in order to permit decision-makers to discharge their functions in view of the purposes of the deliberative secrecy rule. These are to promote finality in decision-making, encourage frank and open debate among those appointed to decision-making bodies, prevent decision-makers from having to spend more time testifying about their work than actually doing it and avoid a chilling effect on decision-makers.[60]

These considerations indeed apply with their greatest force to adjudicative functions, though not necessarily exclusively to adjudication. The post-*Commission scolaire de Laval* decision in *West Moberly First Nations v British Columbia*[61] is particularly significant: the court found

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55 *Cherubini Metal Works Ltd v Nova Scotia (Attorney General)*, 2007 NSCA 37 at paras 18, 20.

56 *Tremblay v Quebec (Commission des affaires sociales)*, [1992] 1 SCR 952, at 964-965; *Agnew v Ontario Assn of Architects* (1987), 64 OR (2d) 8 (ON Div Ct.); *Noble China Inc v Lei*, (1998) 42 OR (3d) 69 (SC).

57 *Milner Power Inc v Alberta (Energy and Utilities Board)*, 2007 ABCA 265 at para 59 [*Milner*].

58 *Ellis-Don Ltd v Ontario (Labour Relations Board)*, 2001 SCC 4 at paras 51-55.

59 2016 SCC 8 at para 60.

60 *Milner, supra* note 57; *Taylor v WSIB*, 2017 ONSC 1223 at paras 59-62; *West Moberly First Nations v British Columbia*, 2018 BCSC 1835 at para 208; *Raymond v Halifax (Regional Municipality)*, 2018 NSSC 149 at para 32.

61 2018 BCSC 1835.

that the information-gathering aspect of an environmental review panel process was subject to deliberative secrecy. Similarly, in *Taseko Mines Limited v Canada (Environment)*,[62] a non-adjudicative environmental review panel process was held to be subject to deliberative secrecy and in *Stevens v Canada (Attorney General)*,[63] so too was a commission of inquiry. In each of these instances, deliberative secrecy would foster good decision-making much more than it would hinder external oversight.

Where the functions at issue are discretionary, however, the purposes of the deliberative secrecy rule are not engaged to the same extent, if at all. Hence the conclusion in *Apotex Inc v Alberta* that no deliberative secrecy shielded a minister exercising a discretionary power.[64] The fact that ministers benefit from additional privileges against disclosure (as described below) militates against giving deliberative secrecy too wide a scope but in general, the concerns for good decision-making are not as forceful where a discretionary power is at issue, especially because disclosure of considerations thought to be relevant might facilitate the consistent exercise of the power in the future. And I would also suggest that the fact that ministers are politically accountable for their actions (whereas tribunal members are shielded from popular scrutiny) also tends to favour disclosure, which could then nourish public debate.

B) Public Interest Privilege

Originally known as Crown privilege, public interest privilege (or public interest immunity) "protects information from disclosure in litigation on the ground that the public interest in keeping the information secret outweighs the public interest in revealing the information for the purpose of resolving the litigation."[65] In an earlier era, public interest immunity meant that "documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld," to be determined by the Crown either by having regard "to the contents of the particular document" or "by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production."[66]

This seemingly draconian position was, to be fair, premised on the assumption that the Crown would ordinarily disclose relevant information: "[t]his was up to the executive, and since the Crown usually granted

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62 2015 FCA 254.

63 2003 FC 1259.

64 (1996) 38 Alta LR (3d) 153 (QB).

65 Halsbury's Laws of Canada, 1st ed, *Evidence* at HEV 191 (2022 reissue).

66 *Duncan v Cammell, Laird*, [1942] AC 624 at 636.

disclosure, it was therefore thought that there was no serious problem."[67] With a state more active in regulating and managing economic activity and assuming welfare functions, reliance on the good graces of the Crown to ensure meaningful disclosure became inadequate. Both branches of public interest immunity–contents and class–have been pared back over the years.

The House of Lords, which was responsible for the expansive definition just quoted, engaged in a significant pruning exercise just a couple of decades later in *Conway v Rimmer*.[68] The Supreme Court of Canada followed suit in *Carey v Ontario*, moving decisively away from the "excessive views" expressed in *Duncan*.[69] An objection based on public immunity will generally be raised "by means of a certificate by the affidavit of a Minister or … of a senior public servant."[70] Ultimately, however, "it is for the court and not the Crown to determine the issue",[71] giving "due consideration" to the Minister's view but noting first that "its weight will vary with the nature of the public interest sought to be protected" and second that "it must be weighed against the need of producing it in the particular case."[72] Accordingly, there is no general protection for a class of documents—even Cabinet-level documents—with a contextual analysis required in all cases:

> Cabinet documents, like other evidence, must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decisionmaking process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decisionmaking process concerned is only one of many variables to be taken into account. The nature of the policy concerned, and the particular contents of the documents are, I would have thought, even more important. So far as the protection of the decisionmaking process is concerned, too, the time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low-level policy that has long become of little public interest is involved. To these considerations, and they are not all, one must, of course, add the importance of producing the documents in the interests of the administration of justice. On the latter question, such issues as the importance of

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67 SI Bushnell, "Crown Privilege" (1973) 51:4 Can Bar Rev 551 at 560; see also *Robinson v State of South Australia (No. 2)*, [1931] AC 704 (PC) at 714.

68 [1968] AC 910.

69 [1986] 2 SCR 637 at para 35.

70 *Ibid* at para 38.

71 *Ibid* at para 39.

72 *Ibid* at para 38.

> the case and the need or desirability of producing the documents to ensure that it can be adequately and fairly presented are factors to be placed in the balance. In doing this, it is well to remember that only the particular facts relating to the case are revealed. This is not a serious departure from the general regime of secrecy that surrounds high-level government decisions.[73]

The issue of class privilege arose more recently in *Vancouver Airport Authority v Commissioner of Competition*.[74] Here, the Commissioner unsuccessfully invoked public interest privilege over a class of 1, 200 documents to protect the identities of third-party sources who had handed over sensitive information. As Justice Stratas observed, "it is perhaps not far from the truth to say that it is now practically impossible for a court, acting on its own, to recognize a new class privilege",[75] as a class privilege "can be blunt, sweeping, and indiscriminate in operation and, thus, can work against the truth-seeking purpose of a court or administrative proceeding."[76] He accordingly refused to recognize a new class of public interest privilege in this case.

Although recent jurisprudence favours a contextual test and is leery of class privilege, it is still entirely possible for public interest privilege to be successfully asserted. In *Canada (Attorney General) v Slansky*, for example, the majority of the Federal Court of Appeal recognized public interest privilege in a report prepared for the Canadian Judicial Council to advise it in relation to allegations made against a judge, because information in the report was generated on the basis of undertakings of confidentiality.[77] In *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, a unanimous Supreme Court held that a Cabinet submission (prepared by the Attorney General) on the government's response to the recommendations of an independent commission did not need to be disclosed in judicial review proceedings, because the Association had not provided a sufficiently strong case in favour of disclosure. [78] Where public interest privilege applies, the record for judicial review will therefore be narrower than otherwise it might have been.

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73 *Ibid* at paras 79-80; see also *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at para 101 [*Provincial Court Judges' Association of British Columbia*].

74 2018 FCA 24.

75 *Ibid* at para 62.

76 *Ibid* at para 49.

77 2013 FCA 199.

78 *Provincial Court Judges' Association of British Columbia, supra* note 73.

C) The Canada Evidence Act

Sections 37 and 38 of the *Canada Evidence Act*[79] codify the common law of public interest immunity: s. 37 is a general provision, whilst s. 38 puts specific arrangements in place for national security matters.

Section 39, however, goes much further than the common law, setting an absolute bar on the disclosure of federal cabinet-level material where a minister or the Clerk of the Privy Council certifies that the material is covered by cabinet confidentiality. Whereas at common law (and under ss. 37 and 38), the judge conducts a balancing act to determine whether disclosure would be in the public interest, where s. 39 is invoked, "the Clerk or minister balances the competing interests. If the Clerk or minister validly certifies information as confidential, a judge or tribunal must refuse any application for disclosure, without examining the information."[80] It is "the most drastic privilege on the books",[81] as "[c]ourts are simply barred by section 39 from reviewing the documents and thus the ambit of Cabinet secrecy."[82]

Cabinet-level material is broadly defined in s. 39(2), subject only to limited exceptions set out in s. 39(4). The power to issue a s. 39 certificate must also be exercised for proper purposes, that is, to safeguard the public interest, and not, for example, to thwart public inquiry or gain a tactical advantage in litigation; "If it can be shown from the evidence or the circumstances that the power of certification was exercised for purposes outside those contemplated by s. 39, the certification may be set aside as an unauthorized exercise of executive power."[83] However, the circumstances in which this may happen are likely to be highly unusual, as the certificate itself is the primary basis for determining the lawfulness of the exercise of the power:

> As noted, the clerk must determine two things: (1) that the information is a cabinet confidence within s. 39; and (2) that it is desirable that confidentiality be retained, taking into account the competing interests in disclosure and retaining confidentiality. What formal certification requirements flow from this? The second, discretionary element may be taken as satisfied by the act of certification. However, the first element of the clerk's decision requires that her certificate bring the information within the ambit of the Act. This means that the clerk or minister

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79 RSC 1985, c C-5.

80 *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para 17 [*Babcock*].

81 *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 at para 114 [*Canada (Citizenship and Immigration)*].

82 *Singh v Canada (Attorney General) (CA)*, [2000] 3 FC 185 at para 41.

83 *Babcock*, *supra* note 80 at para 25.

> must provide a description of the information 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; the possibility of analogous categories flows from the general language of the introductory portion of s. 39(2). This follows from the principle that the clerk or minister must exercise her statutory power properly in accordance with the statute. The kind of description required for claims of solicitor-client privilege under the civil rules of court will generally suffice. The date, title, author and recipient of the document containing the information should normally be disclosed. If confidentiality concerns prevent disclosure of any of these preliminary indicia of identification, then the onus falls on the government to establish this, should a challenge ensue. On the other hand, if the documents containing the information are properly identified, a person seeking production and the court must accept the clerk's determination. The only argument that can be made is that, on the description, they do not fall within s. 39, or that the clerk has otherwise exceeded the powers conferred upon her.[84]

In *Babcock v Canada (Attorney General)*, the Supreme Court of Canada upheld section 39 against a constitutional challenge. The cogency of this decision has been strongly questioned by Professor Campagnolo.[85] In particular, the Supreme Court did not analyze whether s. 39 is inconsistent with s. 96 of the *Constitution Act, 1867,* on the basis that it prevents meaningful scrutiny of the lawfulness of government action, part of the core powers of Canada's superior courts. Certification by the clerk—who is a participant in cabinet-level discussions and therefore someone with an interest in the question of disclosure—is effectively immune from judicial oversight. As the Supreme Court remarked with a large dose of understatement in *Babcock*, the "limitations" on what the clerk is required to make available for scrutiny "may have the practical effect of making it difficult to set aside a s. 39 certification."[86]

Nonetheless, section 39 remains on the books, and given the "limited scope of review" it contemplates, successful applications are few and far between.[87]

In subsequent sections I will critically analyze the scope of the record in judicial review proceedings and suggest approaches courts might take (and, indeed, have taken) to alleviate the resultant difficulties.

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84 *Ibid* at paras 28, 40.

85 Yan Campagnolo *Behind Closed Doors: The Law and Politics of Cabinet Secrecy* (Vancouver: UBC Press, 2021).

86 *Babcock*, *supra* note 80 at para 40.

87 *Canada (Environment) v Canada (Information Commissioner)*, 2003 FCA 68 at para 21, a rare case of a successful application, affirming *Canada (Information Commissioner) v Canada (Minister of the Environment) (TD)*, [2001] 3 FC 514 but varying the order.

IV. Why a Limited Record is Problematic

I turn now to critical analysis. I will suggest in this section that a limited record can undermine judicial review by preventing courts from performing their constitutional duty of assessing the lawfulness of administrative action and by interfering with the open-justice principle, which is inextricably linked with the constitutional right of freedom of expression. Each of these concerns is grounded in constitutional considerations unique to Canada but also maps onto a rationale for the duty of candour recognized elsewhere in the common law world.

A) Lawfulness

In Canadian administrative law, reasonableness is the presumptive standard of review of administrative decisions save for situations where there is a statutory right of appeal, a legislatively prescribed standard of review, or a need to apply correctness review to ensure the coherence of the legal system, the applicable standard will be reasonableness. [88] Reasonableness involves respectful but robust scrutiny of the reasons offered for a decision with a view to determining whether they adequately justify the conclusions reached by the decision-maker.[89] In conducting reasonableness review, the reviewing court should read these reasons in light of the record.

Reasons will not always be available where it is not feasible to provide them (such as with the adoption of a bylaw by a municipality), but in most instances, reasoned decision-making is "the lynchpin of institutional legitimacy" for the administrative state.[90] Indeed, "reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible, and transparent, not in the abstract but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party."[91]

The difficulty created by a limited record is that it makes the task of assessing the reasonableness of a decision much more difficult, if not impossible. This in turn creates a constitutional problem, for there is a guaranteed constitutional minimum of judicial review. The Supreme Court of Canada held in *Crevier v AG (Québec)* that an administrative decision-

88 *Vavilov, supra* note 42 at para 24.
89 *Vavilov, supra* note 42 at para 12.
90 *Ibid* at para 74.
91 *Ibid* at para 95.

maker "cannot constitutionally be immunized from review of decisions on questions of jurisdiction."[92] The reason given by Chief Justice Laskin was that giving an administrative decision-maker the authority "to determine the limits of its jurisdiction without appeal or other review" would usurp the functions of the courts.[93]

As the concept of jurisdiction has ebbed and flowed in Canadian law, the contours of this limit have shifted and are somewhat blurred. At a minimum, which might be called the narrow view, it is clear that it is constitutionally impermissible to "immunize administrators completely from judicial review, whether that be done by full privative clauses *or the withholding of evidence or explanations essential for a meaningful review*."[94] This is because there is a "right" to seek judicial review.[95]

Some courts have taken the broader view that this right extends to assessing the reasonableness of all aspects of administrative decisions. In *Canada (Attorney General) v Best Buy Canada Ltd*,[96] the majority of the Federal Court of Appeal (in an analysis subsequently endorsed by a unanimous panel in *BCE Inc v Québecor Média Inc*[97]) went somewhat further. Justice Gleason observed that "[a] complete bar on the availability of judicial review *for any type of issue* would offend the rule of law"[98] and held accordingly that "review is available under the reasonableness standard…even in the face of a privative clause" or a clause granting a limited right of appeal.[99]

Regardless of whether one adopts the narrower or broader view of the guaranteed constitutional minimum of judicial review, it is clear that a limited record can stand in the way of meaningful oversight. This risk is particularly acute in non-adjudicative settings. Two recent decisions provide helpful illustrations of this proposition.

In *CM v Alberta*, the applicants challenged a decision loosening various COVID-19 restrictions, including the removal of a mask-wearing requirement for elementary school students. There was controversy over whether the decision had been made by the provincial health officer or

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92 [1981] 2 SCR 220 at 236.

93 *Ibid* at 238.

94 *Canada (Citizenship and Immigration), supra* note 81 at para 102 [emphasis added]. See also *Yatar v TD Insurance Meloche Monnex*, 2022 ONCA 446 at para 40.

95 *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 at para 49.

96 2021 FCA 161 [*Best Buy*].

97 2022 FCA 152 at para 58.

98 *Best Buy*, *supra* note 96 at para 112 [emphasis added].

99 *Ibid* at para 117.

whether she had acted under dictation from the provincial cabinet. [100] Acting under dictation is unlawful. But it was not clear from the decision, or the record provided to the reviewing court who had, in substance, taken the decision. The challengers sought disclosure of cabinet minutes and a PowerPoint presentation. Justice Dunlop ordered disclosure on the basis that the requested documents did not reveal cabinet deliberations and thus fell outside the scope of public interest immunity. The broader point is that without this material, it would not ultimately have been possible for the court to determine whether the decision had been properly made.

In *Canadian Constitution Foundation v Canada (Attorney General)*, Justice Mosley dealt with a motion relating to applications for judicial review of the decision by the federal government to proclaim a public order emergency in Ottawa in February 2022.[101] The record originally delivered to the Federal Court consisted essentially of the text of the decision itself and measures made under the authority of the decision[102] —other material was withheld on the basis that it was protected by cabinet confidentiality.[103] The applicants sought disclosure of minutes of meetings of an entity called the Incident Response Group (a committee of ministers and senior officials feeding information and recommendations to cabinet) in the days before the proclamation and the minutes of the cabinet meeting on the day of the proclamation.

After the applicants' disclosure motion was filed, the respondents provided redacted minutes but maintained that the record for decision as originally delivered was complete: this was the information before the Governor in Council when, acting on the advice of ministers, it made the proclamation and measures. Justice Mosley rejected this proposition, but the facts illustrate how a limited record might obfuscate the reasons for a decision and prevent meaningful judicial review.[104] If a court has before it only the decision itself, with no supporting reasons, it must attempt to apply reasonableness review in a vacuum.

It might be objected that in *Vavilov*, the Supreme Court of Canada suggested that reasonableness review can be conducted in the absence of reasons, but the cases therein mentioned involved situations that did not lend themselves to the production of formal reasons *and* where the record could reveal the rationale of a decision.[105] These passages from *Vavilov* are not, in my view, best read as an invitation to a decision-maker to escape

100 2022 ABQB 462 [*CM*].

101 2022 FC 1233.

102 *Ibid* at para 15.

103 *Ibid* at para 16.

104 *Ibid* at paras 62-64.

105 *Vavilov, supra* note 42 at paras 136-138.

judicial scrutiny by refusing to provide reasons or a record. As has been said elsewhere, candour is the "constitutional corollary" of deference.[106] And in *Vavilov*, in insisting on a 'culture of justification' in the exercise of public power,[107] the Supreme Court emphasized that reasoned decision-making is the lynchpin of institutional legitimacy.[108] This objection must therefore fail.

In general, a limited record for review will affect a court's ability to exert meaningful scrutiny over the lawfulness of administrative action. With adjudicative decisions supported by reasons, the limited record is unlikely to prevent the courts from performing their constitutional duty of supervising the lawfulness of public administration. But with non-adjudicative decisions, the risk that this will occur is greater.

B) Open Justice

The open justice principle is an important principle of Canadian law. It is "one of the hallmarks of a democratic society"[109] and is "deeply embedded in the common law tradition."[110]

For example, in *AG (Nova Scotia) v MacIntyre*, the Supreme Court of Canada considered whether journalists could be permitted to examine the fruits of a search warrant and the warrant itself after it had been executed.[111] Justice Dickson accepted that it might be appropriate to restrict access to determinations about whether to grant a search warrant and to prevent the general public from accessing warrants where nothing had been seized. However, "[a]t every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law."[112] Public access helps to ensure that powers are used non-arbitrarily.[113] Accordingly, while access "can be denied when the ends of justice would be subverted by disclosure or the judicial documents

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106 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*, [1988] NZCA 1988 at 554.

107 See generally Paul Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (Vancouver: University of British Columbia Press, 2023).

108 *Vavilov, supra* note 42 at para 74.

109 *Re Southam Inc and The Queen* (No.1) (1983), 41 OR (2d) 113 (CA), at 119 [*Re Southam*].

110 *Canadian Broadcasting Corp. v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para 21.

111 [1982] 1 SCR 175 [*MacIntyre*].

112 *Ibid* at 186.

113 *Re Southam supra* note 109.

might be used for an improper purpose," the "presumption…is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right [of public access]."[114]

Indeed, the open-justice principle is tied to the *Charter* because of its importance for freedom of expression:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.[115]

The open-justice principle, with its constitutional underpinning, has been extended to administrative tribunals. Justice Rouleau applied it to immigration detention reviews in *Southam Inc v Canada (Minister of Employment and Immigration)*, observing that "[t]he legitimacy of such tribunals' authority requires that confidence in their integrity and understanding of their operations be maintained, and this can be effected only if their proceedings are open to the public."[116] More recently, in *Canadian Broadcasting Corporation v Ferrier*,[117] Justice Sharpe determined that the open justice principle applied to a preliminary stage in a police board disciplinary process, noting that the *Charter* guarantee of freedom of expression gives individuals a right to attend police board hearings and concluding that the "presumption of an open hearing" applied.[118]

The concern in these cases is that restrictions on what is disclosed in judicial and administrative proceedings can increase the risk of arbitrary decisions and sap the legitimacy of administrative decision-makers. Similarly, decisions that are shrouded in secrecy because relevant information is not made available to those challenging the legality of the decisions are more likely to be arbitrary and to undermine public confidence in the administrative state. The same concerns that underlie

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114 *MacIntyre*, *supra* note 111 at 189.

115 *Canadian Broadcasting Corp. v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para 21.

116 [1987] 3 FC 329 at 336. See also *Toronto Star v AG Ontario*, 2018 ONSC 2586 at paras 54-56.

117 2019 ONCA 1025.

118 *Ibid* at para 59. See also *Langenfeld v Toronto Police Services Board*, 2019 ONCA 716. Compare *Canadian Broadcasting Corporation v Canada (Parole Board)*, 2023 FCA 166, suggesting that only tribunals holding adversarial hearings are subject to the open court principle.

the open justice principle militate in favour of an expansive record for the purposes of judicial review.

Furthermore, because these concerns are inextricably related to the *Charter* guarantee of freedom of expression, they make a compelling case for more comprehensive disclosure. In *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, the Court commented that "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".[119]

In judicial review proceedings, the "meaningful public debate" is about whether the decision being challenged is reasonable. Impeding the courts from adjudicating on whether a decision-maker acted reasonably by limiting the record to which the judge (and counsel for the parties) has access undermines this constitutionally guaranteed meaningful public debate. There is, accordingly, in the Supreme Court's own terms, a "*prima facie* case" for "disclosure of documents in government hands" where the reasonableness of the "conduct of government institutions" is at issue.

None of the cases cited in this section stands for the proposition that there is an absolute right to disclosure of relevant material in all circumstances. In *Criminal Lawyers' Association*, the Court made clear that the *prima facie* case can be rebutted by the presence of other compelling considerations.[120] Similarly, a duty of candour does not require divulging every last piece of relevant information regardless of the consequences of disclosure. But this only means that candour has limits, not that no duty of candour exists or should be recognized. In the next section, I will discuss some recent cases addressing the limits of the duty of candour.

C) Comparing Canada

The concerns for ensuring lawfulness and open justice in Canada are analogous to the concerns that have animated the duty of candour elsewhere in the common law world.

First, candour supports the rule of law by permitting courts to evaluate the lawfulness of government action based on complete information about

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119 2010 SCC 23 at para 37.

120 *Ibid* at para 38.

the decision-making process and decision. In Canada, this concern has constitutional underpinning.

Second, both courts and the executive have a shared interest in ensuring lawfulness. In Canada, the citizenry as a whole share that interest, which is inextricably related to s. 2(b) of the *Charter* and the constitutional guarantee of freedom of expression. Indeed, the case for candour is *a fortiori* in Canada: whereas the basis of the duty of candour in comparable jurisdictions is the common law, in Canada the duty of candour can be grounded in the Constitution.

V. Solving the Limited Record Problem

In previous sections, I introduced the duty of candour in judicial review proceedings, explained the limited content of the record for judicial review purposes in Canada, and critically analyzed the current state of the law. In this section, I discuss some solutions for the limited record problem: taking a muscular approach to public interest immunity, liberally interpreting procedural provisions relating to the record, and drawing negative inferences where a respondent has failed to disclose material on a relevant point. Each of these solutions has been adopted or proposed in recent judicial decisions. Not only do these decisions respond effectively to the problems created by a limited record for judicial review, they can also be interpreted as concrete manifestations of a duty of candour. Indeed, I will suggest, these instances demonstrate that a duty of candour already exists as a general principle of Canadian administrative law.[121]

A) Muscular Approaches to Public Interest Privilege

In *CM,* where the applicants challenged the lawfulness of a decision easing COVID-19 restrictions, the Government of Alberta asserted public interest privilege over Cabinet minutes, and a PowerPoint presentation made to Cabinet.[122] Justice Dunlop rejected the assertion of privilege. In the particular context of this case, where the applicants alleged that the Chief Medical Officer of Health had unlawfully subdelegated her authority to Cabinet (and/or acted under the dictation of Cabinet), "even if there is a public interest in keeping Cabinet decisions secret in general, in this case the interests of justice tip the balance in favour of disclosure."[123] This was because neither the PowerPoint presentation nor the minutes contained

[121] In formulating these thoughts, I benefited from discussions with Marie-Hélène Lyonnais and Peter Wills. See also Marie-Hélène Lyonnais, "Performing Reasonableness Review in the Digital Age: Challenges and Ways Forward" (2024), 37 Can J Admin L & Prac 31.

[122] *CM*, *supra* note 100.

[123] *Ibid* at para 12.

"Cabinet members' statements or Cabinet discussions or deliberations."[124] "The documents before me do not reveal Cabinet deliberations. They contain information and options provided by the Chief Medical Officer of Health to Cabinet, one recommendation, and Cabinet decisions."[125] Accordingly, the assertion of privilege could not succeed, Justice Dunlop having taken a muscular approach to the scope of public interest privilege, hewing closely to the deliberations/decisions distinction.[126]

In my view, this approach is appropriate, as assertions of privilege should be met with careful scrutiny[127] In its most recent analysis of public interest privilege, the Supreme Court of Canada was cautious about giving access to Cabinet deliberations, but it is not clear that the same caution should apply to Cabinet *documents*. [128] It is also notable that even cabinet *deliberations* do not benefit from an absolute bar on disclosure.[129]

B) Liberal Interpretations of Procedural Provisions

Procedural provisions relating to the content of the record on judicial review have been described as "tools to compel the production of evidence or the provision of information."[130]

A good example is *Canada Mink Breeders Association v British Columbia.*[131] At issue here was a Cabinet decision taken during the COVID-19 pandemic to phase out mink farming in the province by 2025. In defending the lawfulness of the decision, the respondents only produced some of the material that was before Cabinet when the decision was taken.

The applicants sought, under s. 17 of the *Judicial Review Procedure Act*, which allows a reviewing court to compel production of a record of decision, "specific disclosure of the complete record of documents before those involved in the cabinet decision."[132] Notice that the applicants

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124 *Ibid* at para 8.

125 *Ibid* at para 13.

126 *Cf Ontario (Attorney General) v Ontario (Information and Privacy Commissioner),* 2024 SCC 4, where the Supreme Court of Canada emphasized in the context of access to information that it is important to take account of constitutional conventions and traditions relating to the role of cabinet in making any distinction between deliberations and decisions.

127 *Canadian Council for Refugees*, *supra* note 81 at para 108.

128 *Provincial Court Judges' Association of British Columbia, supra* note 73.

129 *Nova Scotia (Attorney General) v Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21.

130 *Canadian Council for Refugees*, *supra* note 81 at para 107.

131 2022 BCSC 1731.

132 *Ibid* at para 16.

sought Cabinet documents; they did not seek to have cabinet deliberations disclosed.

Justice Milman held that it was appropriate to order disclosure, "particularly [of those documents] that will enable the court to reconstruct what was before cabinet when it made the impugned decision."[133] Disclosure was ordered of "the documents in [the respondents'] possession or control reflecting the information and submissions that were directly or indirectly considered by cabinet in making the impugned decision."[134] The "scope of the record" flowed from Justice Milman's analysis of the applicant's pleadings, which cast doubt on whether cabinet used its powers for proper purposes.[135] On appeal, the British Columbia Court of Appeal largely endorsed this analysis, rejecting in particular "that the record for the purposes of judicial review should be reduced or limited by the grounds of review a petitioner is entitled to advance, so that not everything before a decision maker needs to be produced", and accepting that additional evidence can in principle be added to the record to support arguable grounds of judicial review, but striking the words "or indirectly" from the judge's order on the basis that these would unduly expand the scope of the record to material not *before* the decision maker at the point of decision. [136]

It is also notable that in *Canadian Constitution Foundation v Canada (Attorney General)*, Justice Mosley poured cold water on the proposition that Cabinet minutes and minutes of a Cabinet sub-committee should not be disclosed for the purposes of the judicial review of Cabinet's decision to proclaim a public order emergency:

> The relevance of the material in question in these proceedings has not been contested. The IRG and Cabinet minutes are relevant and thus producible pursuant to Rule 317, as they provide an account of the collective reasoning process engaged in by members of these two bodies in reaching the decision under review.[137]

As in *Mink Breeders*, the pleadings made these documents relevant. Disclosure of the documents could, thus, be required. Giving a liberal interpretation to the definition of the "record" and to procedural provisions relating to disclosure allows applicants and respondents to put more detailed material before the reviewing court.

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133 *Ibid* at para 23.

134 *Ibid* at para 35.

135 *Ibid* at paras 24, 34.

136 2023 BCCA 310 at paras 26, 66-74, 76.

137 2022 FC 1233 at para 39.

C) Negative Inferences

Even where a government respondent is entitled to assert privilege and does so successfully, a court may nonetheless hold the assertion of privilege against the respondent. As the Supreme Court of Canada noted in *Babcock)*, "the refusal to disclose information may permit a court to draw an adverse inference."[138]

For example, in *Gitxaala Nation v Canada*, a variety of parties challenged the Order in Council authorizing the 'Northern Gateway' pipeline project. [139] A central issue was whether the federal Cabinet had discharged its duty to consult Indigenous peoples before issuing the Order in Council. On this, the reasons and record were deficient. It was clear from the Order in Council that the project had been approved because it was "required by present and future public convenience and necessity, … [would] diversify Canada's energy export markets and [would] contribute to Canada's long-term economic prosperity."[140] But the Order in Council was virtually silent on whether and how the Crown had discharged the duty to consult, reciting only that consultation had occurred. Indeed, the materials that might have shed light on the duty to consult had been the subject of a privilege claim: "Canada was not willing to provide even a general summary of the sorts of recommendations and information provided to the Governor in Council."[141] In the circumstances, the Order in Council was unlawful:

> Nowhere in the Order in Council does the Governor in Council express itself on whether Canada had fulfilled the duty to consult. This raises the serious question of whether the Governor in Council actually considered that issue and whether it actually concluded that it was satisfied that Canada had fulfilled its duty to consult. All parties acknowledge that the Governor in Council had to consider and be satisfied on the issue of the duty to consult before it made the Order in Council. Similarly, the Order in Council does not suggest that the Governor in Council received information from the consultations and considered it. There is nothing in the record before us to assist us on these matters. This is a troubling and unacceptable gap.[142]

Here, Canada was perfectly entitled to claim privilege. But doing so ended up casting doubt on the cogency of its reasons for concluding that it

138 *Babcock*, *supra* note 80 at para 36.

139 2016 FCA 187.

140 *Ibid* at para 313.

141 *Ibid* at para 319.

142 *Ibid* at paras 321-323. Compare *Coldwater FN v Canada*, 2020 FCA 34, where the federal Cabinet voluntarily offered additional information to fill what might otherwise have been a troubling and unacceptable gap.

had complied with the duty to consult. A negative inference was drawn against it. Put another way, a failure to be candid can cost a government respondent: a court may infer that, on a critical issue, neither its reasons nor the record offered adequate justification for the challenged decision.

Each of these instances is, I suggest, an example of Canadian courts giving concrete effect to a general duty of candour. There seems to be a duty of candour after all, with these cases being specific manifestations of the duty. Taking a muscular approach to public interest privilege, liberally interpreting procedural provisions, and drawing negative inferences are different ways of giving effect to a duty on respondents to be candid in defending applications for judicial review. This is not yet the positive duty that has been recognized in other jurisdictions, but the implication of these decisions is that respondents claim privilege at their own risk.

It is important to note that a duty of candour does not necessarily equate to a duty of transparency. Privilege is "not an all-or-nothing proposition", as an order accepting a claim of privilege can be narrowly tailored to ensure transparency,[143] for example, by putting sensitive material before the reviewing court but not on the public record; and, as we have just seen, a respondent may voluntarily offer access to sensitive material, or a public summary of sensitive material. Courts can also use their inherent powers to appoint special advocates, or *amicus curiae*, who have access to sensitive information and report back to the court without fully informing the parties.[144] By the same token, courts can order that certain of their proceedings be held *in camera* or that material be disclosed only to counsel.[145] In this regard, "[t]he measures to which a court can resort are limited only by its creativity and the obligation to afford procedural fairness to the highest extent possible."[146] Simply put, courts can tailor the duty of candour to the circumstances and ensure that disclosure does not imperil the public interest.

Conclusion

In this paper, I have considered the prospects of developing a 'duty of candour' in the Canadian law of judicial review of administrative action akin to the duty that exists in other common law jurisdictions. In brief, the approach there seeks to ensure that 'all cards are placed face up on the table' so a court can apply the principles of administrative law to determine whether the challenged decision is lawful or not. I began by introducing

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143 *Lukács v Canada (Transportation Agency)*, 2016 FCA 103 at para 13.

144 *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38.

145 *Canadian Council for Refugees*, *supra* note 81 at paras 118-119.

146 *Ibid* at para 120.

the approach in comparable jurisdictions before outlining the importance of the "record" in Canadian administrative law and explaining some of the doctrinal barriers to disclosure of material that might hinder the development of a duty of candour. At that point, my analysis took a critical turn: I outlined why these barriers are problematic before identifying how courts have sought to solve the resulting problem. In noting how courts have responded to the problem, I developed an argument that a duty of candour is already immanent in Canadian law. That is, there is already an expectation that parties to judicial review proceedings will be transparent, placing their cards face up on the table, and this expectation conditions the approach judges take to statutory or regulatory provisions, or common law rules, that limit the scope of the material that can be made available to a reviewing court. In short, I say that Canada already has a duty of candour, albeit one that has yet to be recognized as such.