SUPREME COURT OF YUKON

Citation: *Mercer v Commissioner in Executive Council (The)*, 2021 YKSC 24

Date: 20210503
S.C. No. 20-AP002
Registry: Whitehorse

BETWEEN:

ROSS MERCER
TRENT ANDREW JAMIESON
DOUGLAS CRAIG WALKER
ALLAN PATRICK MYTRASH
MARTIN GREGORY LOOS
JAN ERIK MARTENSSON
CLAYTON ROBERT THOMAS

PETITIONERS

AND

THE COMMISSIONER IN EXECUTIVE COUNCIL

RESPONDENT

Before Chief Justice S.M. Duncan

Appearances:
Vincent Larochelle — Counsel for the Petitioners

Catherine Boies Parker, Q.C. and
Emma Ronsley — Counsel for the Respondent

REASONS FOR DECISION

Introduction

[1] "In the context of the fluid, but still ever dangerous COVID-19 pandemic, governments the world over are having to respond in various ways to ensure the safety of their citizenry and to prevent the needless spread of a potentially deadly disease.

These responses include what most governments say are unprecedented, but necessary restrictions to what are our fundamental freedoms" (*Springs of Living Water Centre Inc. v. The Government of Manitoba*, 2020 MBQB 185 at para 2).

[2] This is an application by the petitioners in litigation they have commenced against the respondent Commissioner in Executive Council to quash its decision to extend the declaration of the state of emergency in the Yukon in June 2020. The declaration of a state of emergency is an order in council signed by the Commissioner on the advice of and with the consent of the Executive Council. It gives powers to the Minister to respond to the ongoing COVID-19 pandemic.

[3] This application is made under Rule 54 of the Supreme Court of Yukon *Rules of Court* for the production of documents in the possession of the respondent which "informed [its] understanding" of COVID-19 before declaring the June 2020 extension to the state of emergency. The relief sought by the petitioners at the hearing was narrower than in their notice of application. The petitioners now seek an order declaring that the materials requested by the petitioners under Rule 54 are relevant to the judicial review application; and an order that the respondent produce forthwith to the court registry all materials, documents, information, etc. which are relevant to the adjudication of the judicial review application.

[4] The respondent states in making its decision it relied on one document, a memorandum to the Executive Council, dated June 9, 2020. The respondent objects to production of the memorandum on the basis of public interest immunity. It also objects on the basis of solicitor-client privilege, but this does not appear to be a ground of dispute and was not argued so will not be addressed here.

[5] A determination of the public interest immunity issue requires a balancing of two public interests: first, the public interest in preserving Cabinet confidentiality and second, the public interest in the administration of justice.

[6] I will briefly review the background of this matter, set out the positions of the parties, provide a ruling on the admissibility of the petitioners' affidavits, provide an analysis of the public interest immunity claim and set out my conclusion.

[7] The Commissioner in Executive Council means the Commissioner acting by and with the advice and consent of the Executive Council. Executive Council is made up of Ministers who are the heads of government departments. It is also referred to as Cabinet. In this case, the Commissioner signed the orders in council declaring the states of emergency, on the advice and with the consent of Executive Council. I have used the term Cabinet interchangeably with Executive Council.

Background

[8] Subsection 6(1) of the *Civil Emergency Measures Act*, RSY 2002, c 34 ("*CEMA*"), provides that the Commissioner in Executive Council may declare that a state of emergency exists in the Yukon or in any part thereof if it is of the opinion that a peacetime disaster exists. Subsection 6(4) provides that a state of emergency shall cease to exist after 90 days, unless extended by declaration of the Commissioner in Executive Council.

[9] A peacetime disaster is defined in s 1 of *CEMA* as: "… a disaster, real or apprehended, resulting from … epidemic … whereby injury or loss is or may be caused to persons or property in the Yukon".

[10] Subsection 9(1) of *CEMA* sets out what the Minister may do once a state of emergency has been declared. They include those actions considered necessary for:

> (a) …
>
> (i) the protection of persons and property,
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> (ii) maintaining, clearing and controlling the use of roads and streets,
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> (iii) requisitioning or otherwise obtaining and distributing accommodation, food and clothing and providing other welfare services,
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> (iv) providing and maintaining water supplies, electrical power and sewage disposal,
>
> (v) assisting in the enforcement of the law,
>
> (vi) fighting or preventing fire, and
>
> (vii) protecting the health, safety and welfare of the inhabitants of the area;

The Minister may also:

> (b) make regulations considered proper to put into effect any civil emergency plan; and
>
> (c) require any municipality to provide assistance as considered necessary during the emergency and authorize the payment of the cost of that assistance out of the revenues of the Government of the Yukon.

[11] On June 12, 2020, the Commissioner in Executive Council exercised its discretion to extend the declaration of the state of emergency that had been initially declared in the Yukon on March 27, 2020, as a result of the global COVID-19 pandemic. As of June 12, 2020, the Commissioner in Executive Council was of the opinion that the ongoing COVID-19 pandemic was still a peacetime disaster under *CEMA*.

[12] A public health emergency under the *Public Health and Safety Act*, RSY 2002, c 176, had been declared by the chief medical officer of health on March 18, 2020. There is no temporal limit on that declaration. The powers provided to the chief medical officer of health on declaring a public health emergency are more limited than those available to the Minister under *CEMA*.

[13] The memorandum over which public interest immunity is claimed contained confidential advice and a recommendation to assist Cabinet in its deliberations about whether or not to extend the state of emergency in June 2020. The memorandum was issued by the Minister of Community Services to the other Ministers of Cabinet. It was prepared by Ministry staff, reviewed by legal counsel and the Deputy Minister of Community Services before the Minister's review.

[14] The order in council extending the declaration of the state of emergency in June expired in September 2020. It was extended again at that time. In November 2020, the legislature debated the issue and unanimously agreed to the motion: "THAT this House supports the current state of emergency in Yukon". On Friday, December 4, 2020, a further motion was introduced in the legislature: "THAT it is the opinion of this House that the current state of emergency, established under the *Civil Emergency Measure* [as written] *Act* and expiring on December 8, 2019 [as written], should be extended." During the debate on the motion in December 2020, the Minister of Community Services clarified that the three main non-exclusive reasons for the declaration were:

(a) the ability to put in place isolation requirements;

(b) the ability to put in place border controls; and

(c) the ability to put in place enforcement to support the first two things.

The December motion was also unanimously agreed to by the legislature.

[15] The declaration of the state of emergency remains in effect at the date this application was argued and at the date of writing these reasons.

[16] The underlying petition is brought by seven individuals against the Commissioner in Executive Council. Six of the seven individuals are residents of the Yukon, with social, economic and family ties here. One of the individuals is a resident of Atlin, British Columbia. They are asking this Court to quash the declaration of the state of emergency on June 12, 2020, on the grounds that the decision was:

(a) unreasonable or egregious because:

(i) it was made for irrelevant or improper purposes; and

(ii) it failed to consider relevant factors;

(b) incorrect because it was inconsistent with and failed to interpret *CEMA* properly;

(c) inconsistent with or frustrated the unwritten principles of the Canadian Constitution and other principles of Canadian society, namely the rule of law, democracy, parliamentary accountability of government, and the separation of powers; and

(d) inadequately justified by the respondent.

[17] Full affidavit evidence on the merits of the judicial review has not yet been submitted. The petitioners rely for their argument on the merits in part on the absence of any known person in the Yukon in June 2020 who was positive for COVID-19. They intend to argue that the process of declaring a state of emergency and its extension was done behind closed doors, without revealing the factors, evidence and data on

which it was based, and without public debate or consultation, thus usurping the regular democratic processes and constitutional principles noted above. They will argue that the publicly declared rationale for the state of emergency of allowing the government to act quickly was not grounded in necessity, but was convenient or expedient. The petitioners say that nothing in the Yukon situation warranted a declaration of a state of emergency. No explanation was provided by the respondent to those affected by the decision about why it was in their best interests.

Positions of the Parties

[18] The respondent concedes it has the onus to persuade the court of a valid claim of public interest immunity over a document. It relies on the balancing test, fleshed out by the factors set out in *Carey v. Ontario*, [1986] 2 S.C.R. 637 ("*Carey*"). The respondent agrees that Cabinet documents do not enjoy an absolute privilege. They do not assert a class privilege over the memorandum. Instead, they say that most of the non-exhaustive factors identified in *Carey* are met in this case.

[19] The first factor set out in *Carey* is the level of the decision-making process: here the Commissioner in Executive Council is the highest level of decision-making in government, with the exception of decisions made by the Queen or her representatives. Courts have held that documents prepared for Cabinet decisions may always give rise to some kind of harm if disclosed. Confidentiality helps to ensure the quality and completeness of the material presented to Cabinet, and helps to preserve Cabinet solidarity and unified messaging.

[20] The second factor is the nature of the policy concerned: the decision in this case to extend the declaration of the state of emergency because of the COVID-19

pandemic is a significant and sensitive public health decision. It is polycentric, meaning that it takes into account a variety of interests. It affects everyone. It attracts strong opinions. This decision and subsequent extensions depend on current and evolving information. All of this favours confidentiality, especially given the importance of a unified approach from the executive in a matter where voluntary public compliance is necessary.

[21] The third factor is the particular contents of the document: the respondent does not rely on the contents of the document so considers this a neutral factor.

[22] The fourth factor is the timing of disclosure: the declaration of the state of emergency has been extended since September 2020 and still exists. The ongoing, fluid nature of the pandemic requires a flexible and often rapid response from government. This supports maintaining the confidentiality of the document because of the need to preserve a unified message from the executive in a context where compliance of the public with public health measures is essential for public health and safety.

[23] The fifth factor is the importance of producing the document in the interests of the administration of justice: the respondent made several submissions on this point. This factor has been interpreted to require an assessment of the significance of the litigation before the court, as well as the importance of the document at issue to that litigation (*Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21 at para 68).

[24] The respondent argues that the litigation is not significant enough to justify disclosure of the Cabinet document because:

(a) the litigation does not affect the petitioners' legal rights, and the nature of the petitioner's concerns appears to be largely political;

(b) there is in fact no live dispute between the parties because the declaration of the state of emergency that is being challenged (that is, June 12, 2020) expired after 90 days; subsequent extensions of the declaration of a state of emergency have occurred, but they are not specifically challenged; and information presented to Cabinet in June 2020 may not be necessary, relevant, or helpful for the development of guidance by the court for future declarations, as the petitioners argue;

(c) the legislature unanimously endorsed and approved the state of emergency declaration after full debate when sittings resumed in November 2020, as well as in December 2020, diminishing the argument that there was an improper shift of power from the legislature to the executive.

[25] The respondent says in order to make this assessment of the significance of the litigation, the court must define the scope of the judicial review. The scope defines the issues and the issues determine the importance of the document to the litigation. In this case, the respondent says the court has a limited supervisory role of Cabinet's exercise of discretion to declare a state of emergency. The court cannot question motives of Cabinet, review the merits or reasonableness of Cabinet's opinion, or substitute its opinion for that of Cabinet. In the absence of an allegation of bad faith or unconscionable action, the respondent says the court is limited to determining whether there was some basis for Cabinet's opinion that as of June 2020 the effects of the

COVID-19 pandemic constituted a peacetime disaster. There was a plethora of publicly available information at that time to justify and explain Cabinet's opinion to the extent necessary for the narrow basis of judicial review. The respondent says the petitioners can make their arguments in this case on the limited justiciable issues, without reference to the Cabinet memorandum.

[26] The sixth and final factor from *Carey* is inapplicable as the petitioners do not allege unconscionable or bad faith behaviour by government.

[27] The respondent relies on the affidavit from Stephen Mills, Deputy Minister of the Executive Council Office and Cabinet Secretary, as evidence of the harm created if the document were ordered to be produced. He attests among other things that the contemporaneous disclosure of the document will detrimentally affect the completeness and candour of advice and submissions to Cabinet related to its ongoing decision-making and planning around the COVID-19 pandemic. He also refers to other specific harms, outlined below.

[28] The petitioners agree with the respondent about the applicability of the balancing test. The petitioners focus on what they describe as the more modern approach to Cabinet confidentiality, criticizing the absolute nature of Cabinet secrecy and emphasizing instead the importance of transparency and openness of government. They say there is a significant distinction between a document placed before Cabinet and the discussion at Cabinet meetings. In this case, the petitioners say it is not clear that a document prepared by civil servants and lawyers reveals discussions of Cabinet. The affidavit of Stephen Mills contains general and vague assertions, insufficient to indicate harm resulting from disclosure.

[29] The focus of the petitioners' argument is on the importance of this litigation to the administration of justice. The petitioners rely on the seven factors set out by the authors of *The Law of Evidence in Canada* (Toronto: Butterworths, 1999), endorsed by multiple courts, including the court in *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2002 BCSC 1509 at para 20.

[30] First, is the document probative and necessary for the proper determination of the issues: in this case, the petitioners say the memorandum is probative for the underlying issue of whether the state of emergency was properly extended in June 2020. It is also necessary to determine the scope of the judicial review and for the expert to render his opinion.

[31] Second, the subject matter of the litigation: here the petitioners characterize the litigation as the effect of state action on the legal rights of individuals and in particular, the improper and unauthorized shifting of power from the legislature to the executive. The failure of the government to disclose the document Cabinet had before them in making this decision means the petitioners are prevented from testing whether the government acted properly, and whether the government encroached on unwritten constitutional principles.

[32] Third, the effect of non-disclosure on the public perception of the administration of justice: here, the denial of disclosure of the document to a fair-minded and reasonable observer is a denial of justice. The petitioners say that non-disclosure would give the public the impression of no theoretical or practical limits to the respondent's use of emergency powers.

[33] Fourth, whether the litigation involves an allegation of government wrongdoing: although the petitioners do not allege unconscionable or bad faith government behaviour, they allege the decision to extend the state of emergency was made for improper purposes, is inconsistent with *CEMA* and may be an encroachment on unwritten constitutional principles.

[34] Fifth, the length of time that has passed since the document was provided to Cabinet: the declaration of the state of emergency that is challenged expired in September 2020. The decision is no longer in the deliberative stage, and a significant amount of time has passed. This favours disclosure as any potential harm is reduced the more time that passes from the date of the decision.

[35] Sixth, the level of government from which the document emanated: the petitioners concede that the high level of decision making in this case is a factor that could favour confidentiality, except that it is only one factor or variable among many.

[36] Seventh, the sensitivity of the contents of the communication: the petitioners state that the respondent provided no evidence to support the sensitivity of any information contained in the documents.

[37] Finally, in response to the respondent's argument that the scope of the judicial review is limited, the petitioners disagree, and suggest they will be proposing a new legal test. The new legal test requires a broader understanding of justiciability, that is, a determination of whether the encroachment on constitutional principles by the government through their extension of the state of emergency is reasonably justified. In the course of that inquiry, all of the information used by the government in its decision-making is important.

Preliminary Issue – Admissibility of Affidavit Evidence

[38] The respondent objects to the admissibility of the petitioners' affidavits in whole or in part. The respondent argues that the affidavit of Ross Mercer, one of the petitioners, contains opinion, argument and statements of belief without provision of the source of information. Further, the affidavit of Dr. Joel Kettner contains opinion evidence but does not comply with the requirements of Rule 34 of the Supreme Court of Yukon *Rules of Court*. It does not set out the facts and assumptions on which the opinion is based, describe the documents reviewed and relied on, or include the certification about the duty of the expert to the court. The respondent says Dr. Kettner's affidavit evidence is also irrelevant and unnecessary for the determination of whether the public interest in Cabinet confidentiality outweighs the public interest in the administration of justice and he was not qualified properly as an expert for the purposes of giving an opinion on the issue before the Court.

[39] I will admit the affidavit of Ross Mercer, but will strike the paragraphs that offend Rule 49 of the *Rules of Court*. I agree with the respondent that much of the affidavit contains opinion and argument, and not fact, and the source of information and belief is not identified as required by the *Rules*. Specifically, the following paragraphs will be struck for those reasons: 8, 12, 13, 16, 17, 21, 23, 25, 27, 28, 31, 34, 35, 36, 37, 38, 43, 44, 45, 48, 49, 53, 54, 62, 63, 64, 66, 71, 72, 73, 74, 75, 76, 78, 80, 86, 87, 88, 91, 93, 97, 98, 100, 101, 102, 103, 106 and 107.

[40] The affidavit of Dr. Kettner is not admissible on this application. Although he appears to be a qualified public health expert, the nature of his affidavit evidence is directed to the underlying issues in the judicial review as articulated by the petitioners.

His opinion about the threat of COVID-19 in the Yukon in or around June 2020 goes to the reasonability of the declaration of the state of emergency at that time. If this issue is justiciable, it is to be argued in the underlying petition. Dr. Kettner's opinion about the lack of information and data used to assess the magnitude of the threat and the need for transparency generally is also an argument on the merits of this petition. He does not express any opinion, nor is he qualified to do so, on the balancing of the public interests necessary to determine whether the memorandum to Cabinet should be disclosed. Finally, I agree with the respondent that Dr. Kettner's affidavit does not comply with the Rule 34, although its lack of relevance and necessity outweighs this technical objection.

Analysis

[41] The decision to protect a Cabinet document from disclosure by public interest immunity requires a balancing of the public interest in Cabinet confidentiality with the public interest in the administration of justice, usually determined in this context by assessing the significance of the litigation. The factors set out by the court in *Carey* are helpful to this analysis. These factors have been applied most often in decisions by subsequent courts. The factors set out in *The Law of Evidence* are also helpful in clarifying the interests at stake. The factors in the two lists overlap. Neither list of factors is exhaustive. As both counsel noted, and I agree, context in these types of cases is most important to the balancing test.

[42] In this case, I consider five factors that are part of both tests to be applicable: the level of decision-making; the nature of the policy/decision; the timing of the

decision; and the importance of the litigation; and finally, the importance of the document to the litigation.

[43] At the outset, it is useful to consider the purpose of Cabinet secrecy. As a matter of constitutional convention, Cabinet deliberations are confidential. Cabinet ministers swear an oath of secrecy. The reasons for this include ensuring Cabinet ministers have the freedom to discuss, deliberate, and disagree unreservedly, without fear of political repercussions, all of which is fundamental to good decision–making. It is important not to subject Cabinet members to criticism for publicly defending a policy that is known to be inconsistent with private views.

[44] As noted by the Supreme Court of Canada in *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at para 18:

> … Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny: see *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185 (C.A.) at paras. 21-22. If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. The rationale for recognizing and protecting Cabinet confidences is well summarized by the views of Lord Salisbury in the *Report of the Committee of Privy Counsellors on Ministerial Memoirs (*January 1976), at p. 13:
>
> > A Cabinet discussion was not the occasion for the deliverance of considered judgements but an opportunity for the pursuit of practical conclusions. It could only be made completely effective for this purpose if the flow of suggestions which accompanied it attained the freedom and fulness which belong to private conversations – members must feel themselves untrammelled by any consideration of

> consistency with the past or self-justification in the future. …
>
> … In addition to ensuring candour in Cabinet discussions, this Court in *Carey v. Ontario*, [1986] 2 S.C.R. 637 at p. 659, recognized another important reason for protecting Cabinet documents, namely to avoid "creat[ing] or fan[ning] ill-informed or captious public or political criticism". …

[45] However, courts have acknowledged that Cabinet secrecy is not absolute. While it is important for the functioning of government, it should not be a shield to protect wrongdoing. It may also be unnecessary in circumstances where the decision has no ongoing import and time has passed.

[46] As noted by the court in *Carey* at para 50:

> … [T]he business of government is sufficiently difficult that those charged with the responsibility for running the country should not be put in a position where they might be subject to harassment making Cabinet government unmanageable. What I would quarrel with is the absolute character of the protection accorded their deliberations or policy formulation without regard to subject matter, to whether they are contemporary or no longer of public interest, or to the importance of their revelation for the purpose of litigation. …

[47] A good summary of the limits on Cabinet secrecy appears in the abstract of *The Political Legitimacy of Cabinet Secrecy* by Yan Campagnolo (2017), 51 RJTUM 51:

> … Yet, while Cabinet secrecy is an important rule, it is not absolute. Political actors accept that Cabinet secrets are not all equally sensitive and that their degree of sensitivity decreases with the passage of time until they become only of historical interest. They also recognize that the public interest may justify that an exception be made to the rule in some circumstances, for example, when serious allegations of unlawful conduct are made against public officials. …

[48] Cabinet documents in some cases may be distinguishable from Cabinet discussions. Non-disclosure on the basis of public interest immunity depends on the

nature of the document and its use by Cabinet. Generally, documents providing advice and recommendations from civil servants are more likely to be subject to secrecy. The Supreme Court of Canada addressed the rationale for this in *John Doe v. Ontario (Finance)*, 2014 SCC 36:

> [45] Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at p. 86; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 at pp. 44-45). The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.
>
> [46] Interpreting "advice" in s. 13(1) [*Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 31] as including opinions of a public servant as to the range of alternative policy options accords with the balance struck by the legislature between the goal of preserving an effective public service capable of producing full, free and frank advice and the goal of providing a meaningful right of access.

[49] The point here is that the quality of advice and recommendations to Cabinet may be compromised if there is a risk of their disclosure. A consequent impact is the potential reduction in the quality of the Cabinet discussion and ultimate decision because of the absence of a full, frank, and politically neutral presentation of the options and recommendations.

[50] Before addressing the applicability of the specific factors here, I will address the petitioners' argument about the affidavit of Stephen Mills. Although the petitioners do

not object to the admissibility of Stephen Mills' affidavit, they say that it is insufficient to show the harm that may ensue from disclosure of this document. They say the affidavit is perfunctory at best, makes bald assertions of harm to the public interest on the basis of the candour and completeness arguments, and does not provide a sufficient explanation of how disclosure of the memorandum would be harmful to the public interest.

[51] On review of the affidavit, it is my view that it does set out specific harms Stephen Mills believes may result from disclosure. After referring to the general arguments relating to disclosure undermining of frankness and candour in Cabinet, and the proper functioning of Cabinet and the public service, Stephen Mills addresses more specifically the kind of government decision-making required by the COVID-19 pandemic. He writes that the protection of public health and safety and associated economic and social impacts continue to be of immediate and pressing concern to the government; and the pandemic response requires accelerated approaches to decision-making as well as coordination across sectors of government and with other territories and provinces. The polycentric nature of the decision-making requires a consideration of competing interests; interests that give rise to differing viewpoints about the actions government should take in managing the COVID-19 pandemic. Stephen Mills concludes in his affidavit that disclosure of the memorandum in the context of the ongoing COVID-19 pandemic, in the midst of competing interests and differing viewpoints, and the need for voluntary compliance by citizens in order to prevent the spread of the virus, could be harmful. The memorandum, containing advice and a

recommendation, negates unified communication strategies necessary to promote public understanding and engagement.

[52] Turning to the consideration of the most relevant factors in this case, the first is the level of decision-making. Cabinet's decision to declare a state of emergency is the highest level of decision-making other than a decision made by the Queen or her representatives. The Supreme Court of Canada in *Carey* at para 79, noted that documents concerning the decision-making process at the highest level of government cannot be ignored, and "[c]ourts must proceed with caution in having them produced." The high level of decision making here is a factor in favour of confidentiality.

[53] Secondly, the subject matter of the policy decision in this case is sensitive. I disagree with the petitioners' argument that the respondent has not provided evidence about the sensitivity of the decision. Unlike the decision at issue in *Carey*, the decision in this case is not about a 12-year-old tourism policy. Nor is it a decision related to commercial litigation. Instead, it is a public health decision that affects everyone. It must take into account many different social, economic and political interests. As noted in the exhibit to the affidavit of Stephen Mills at para 18, the document "A Path Forward", a plan prepared by Government of Yukon to explain the lifting of COVID-19 restrictions states:

> …[T]he Government's response to COVID-19 includes a range of public health measures as well as various financial and other relief for Yukoners with implications across many sectors of Government. The Government's response to COVID-19 is a polycentric area of decision-making that engages *inter alia* consideration of broad health, social, and economic interests. ...

[54] The broad ranging nature of the decision and its far-reaching impacts necessarily make it a sensitive one. The balancing of interests that must occur in making such a decision requires open and frank discussions by the decision-makers, unfettered by concern for political repercussions. Similarly, the documents on which such discussions are based must be as candid, thorough and direct as possible, in order to ensure a comprehensive and unabridged discussion. These kinds of discussion lead to better decisions. Concerns about document disclosure could inhibit this process. The importance of this policy decision, its broad-reaching effects, and the variety of consideration of interests all favour confidentiality of the memorandum.

[55] The third factor is the timing of this decision. This is a significant factor in this case. The COVID-19 pandemic is ongoing: at the time of writing, the pandemic is in its third wave and in some places the situation is the worst it has been since March 2020 in terms of numbers of people who are infected and hospitalized, particularly in intensive care units. The Supreme Court of Canada in *Carey* placed significant weight on the timing factor, saying at para 79:

> … [T] he 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.

[56] In this case, the Commissioner in Executive Council's declaration of a state of emergency and the extensions are unprecedented responses to a new, evolving and uncertain global public health crisis. New information and resources are regularly becoming available. The situation continues to change. Decisions of government in the

midst of the pandemic must continually adapt to new, often incomplete, and changing information.

[57] Governments must be able to respond on an ongoing basis with appropriate measures swiftly and fluidly, balancing public health and safety with economic and other social factors, in the context of unpredictable external circumstances. The extensions of the declaration of a state of emergency are made in this context.

[58] Further, these types of decisions necessarily involve competing interests. As noted by Stephen Mills in his affidavit at para 18, "[c]ompeting interests can give rise to differing viewpoints regarding how best to protect Yukoners from COVID-19 and manage associated impacts." Decisions of government related to the pandemic evoke keen interest among citizens and are subject to public scrutiny. While this may sound like an argument in favour of full disclosure of all Cabinet documents and discussions, in order to increase public confidence in the administration of justice and Cabinet decision-making processes, in fact, it supports confidentiality for the reasons articulated above, traditionally relied on to validate Cabinet secrecy.

[59] In uncertain times, where there are significant interests at stake, and where the situation is ongoing and evolving, high-level decision makers need to be able to receive full information and have candid discussions. By publicly releasing information that was relied on for a Cabinet decision made eight or nine months ago, a decision that is ongoing today, in changed circumstances, may result in misinterpretation and misunderstanding of the decision-making process. In this case, for example, information received in June 2020 may be out of date today. Release of such

information may "create or fan ill-informed or captious public or political criticism" (*Rogers v. Home Secretary*, [1973] A.C. 388 (H.L.), as quoted in *Carey* at para 49).

[60] Many of the government measures in place, such as isolations, quarantines, mask-wearing, social distancing, restricted gatherings, and vaccinations depend on the compliance of individuals. To achieve this, a unified message from the executive is crucial. Disclosure of documents that may already be outdated and which reveal Cabinet discussions does not contribute to this objective.

[61] If the COVID-19 pandemic were over, or if there were no longer a declaration of a state of emergency, this timing factor may have less weight. A Cabinet decision that has passed and has no current import is of a different quality than one such as this. However, the fact that the pandemic is ongoing and the state of emergency still exists favours maintaining confidentiality of the document.

[62] The fourth factor is the importance of this litigation. This raises the issue of the proper role of the Court in this judicial review, which in turn raises the scope of this judicial review.

[63] The respondent states it is necessary for the Court to identify the parameters of its supervisory role in the context of this judicial review. The respondent says that the scope of a judicial review that seeks to quash an order in council is limited to whether the decision to extend the state of emergency was made for an improper or irrelevant purpose, defined as "egregious" in the jurisprudence. The Ontario Court of Appeal in *Wildlands League v. Ontario (Natural Resources and Forestry)*, 2016 ONCA 741, leave ref'd 2017 CanLII 25784 (SCC), stated at para 46:

> And, finally, striking down regulations as being inconsistent with a statutory purpose requires that they be 'irrelevant',

> ‘extraneous’, or ‘completely unrelated’ to the statutory purpose. ‘[I]t would take an egregious case to warrant such action’: [*Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64] at para. 28.

[64] In this case, the respondent says the petitioners have to show that there was no evidence for Cabinet’s opinion that the COVID-19 pandemic continued to be a state of emergency in June 2020. This is the extent of the scope of judicial review. The respondent says there is publicly available information providing some evidence in support of Cabinet’s opinion. The petitioners cannot rely on a new legal test, as they have proposed, that expands the scope of judicial review, as a basis for disclosure of the memorandum.

[65] The petitioners say it is unnecessary to define the scope of the judicial review at this stage of the proceeding or the legal standard or test to be applied. However, in the alternative, if determining the scope is necessary, the petitioners describe this litigation as a challenge to the improper shifting of power from the legislative branch to the executive branch. They say it is similar to the case of *David Suzuki Foundation et al v. The AG for BC*, 2004 BCSC 620, in which the court’s jurisdictional supervisory role was described as determining whether the Cabinet acted within the boundary of the enabling statute. The petitioners say they intend to argue the applicability of a new legal test: that is, this Court has the power to review a decision of the executive on a correctness standard on the basis that:

(a) it offends the separation of powers or other constitutional principles;

(b) the exercise of a statutory power must be reasonably justified if it encroaches on a constitutional principle and the statute must be interpreted to comply with constitutional principles; and

(c) the decision was made for improper purposes or motives as measured against the requirements of necessity, imminency and temporariness.

[66] Regardless of the acceptance of this test or standard of review, the petitioners say they will argue that the respondent's decision is egregious and unreasonable. Either approach will require the Court to assess the respondent's understanding of the COVID-19 threat in June 2020 and the information or documents on which the understanding was based. The memorandum is crucial to understanding if the respondent invoked emergency powers in a well-grounded belief of imminent threat.

[67] It is important to note that the petitioners are not claiming that the government acted unconscionably or in bad faith, or engaged in wrongdoing. If this were the case, the public interest in disclosure might very well outweigh the public interest in Cabinet confidentiality, because there might be an argument that the document is being used to shield bad behaviour. This is not relevant here.

[68] It is difficult to make a definitive determination at this point on the justiciability of the issues raised by the petitioners because full affidavit evidence and argument have not been presented. To the extent a determination of the scope of judicial review must be made in order to decide about disclosure of the memorandum, I agree with the respondent that the petitioners cannot rely on a new, unestablished legal test and standard to define the scope at this stage. This is insufficient to justify the need to produce the memorandum. Given the uncertainty about the proper scope of this judicial review, the public interest in confidentiality over the memorandum outweighs this consideration.

[69] While I agree with the respondent that the Court does have a supervisory role to review an egregious decision by the Commissioner in Executive Council, this determination does not automatically require the disclosure of the memorandum. The petitioners can make their arguments on this point without the memorandum. A significant amount of public information about the COVID-19 pandemic in June 2020 is available to the petitioners to enable their arguments about improper purpose, inconsistency with the statute and with unwritten constitutional principles, and failure to adequately justify the decision. This includes information publicly referred to by the executive at the time of the announcement of the declaration as well as in the legislature at the time the declaration was ratified/endorsed. The fifth factor also favours confidentiality.

[70] I acknowledge that non-disclosure of a document provided to Cabinet may breed distrust among some. I understand that members of the public seek to know the details and basis of a decision made by Cabinet that has significant consequences for them. However, I cannot ignore the long accepted tradition of Cabinet confidentiality, upheld even in modern times where transparency and openness are valued. The purposes of maintaining confidentiality over the memorandum in this case include ensuring a unified message from the executive in a time of uncertainty; encouraging compliance with necessary public health measures by emphasizing common shared interests among members of the public; and preserving Cabinet's ability to receive complete, uncensored information, and debate a sensitive matter rigorously, honestly, and without fear of political repercussion, in order to arrive at the best decision possible. These are sufficient public interest reasons to protect the confidentiality of the

memorandum in this case, especially where governments are being required to act in unprecedented ways to respond to the many challenges of the COVID-19 pandemic.

[71] I find it is not necessary for me to view the document in this case because it is clear in my view that public interest immunity applies for the reasons set out above. The reasons have little to do with the content of the document and much to do with the entire context including the nature of the decision, the timing and the subject matter of the litigation.

[72] Finally, the petitioners request a declaration that the memorandum is relevant. Relevance of the memorandum is not the test for disclosure where public interest immunity is claimed. The respondent concedes that the memorandum is relevant as it was before Cabinet when it made its decision. As has occurred in this case, response to a public interest immunity claim requires arguments that the public interest in the administration of justice, and particularly the litigation before the Court, outweighs the public interest in Cabinet confidentiality.

Conclusion

[73] To conclude, the memorandum to Cabinet dated June 9, 2020, is subject to public interest immunity and is not required to be produced. There is no need to address the relevance declaration and in any event relevance of the memorandum is not disputed. The petitioners' application is dismissed.

[74] Costs of this application shall be addressed after the hearing of this petition.

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DUNCAN C.J.