File Number: 40078

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

ATTORNEY GENERAL FOR ONTARIO

Applicant
(Appellant)

and

INFORMATION AND PRIVACY COMMISSIONER and
CANADIAN BROADCASTING CORPORATION

Respondents
(Respondents)

MEMORANDUM OF ARGUMENT
(INFORMATION AND PRIVACY COMMISSIONER, RESPONDENT)

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PART I - OVERVIEW & STATEMENT OF FACTS

1. The Information and Privacy Commissioner of Ontario (the "IPC") responds to an application by the Attorney General for Ontario (the "Applicant") for leave to appeal from the majority judgment of the Court of Appeal dated January 26, 2022.[1] That judgment dismissed an appeal from the decision of the Divisional Court dated August 27, 2020,[2] which dismissed the Applicant's application for judicial review of the IPC's Order PO-3973 (the "IPC Decision") dated July 15, 2019.[3] The IPC Decision found that 23 mandate letters (the "Letters") prepared by the Premier for his Cabinet ministers following the election in 2018 are not protected under the exemption at s. 12(1) of the *Freedom of Information and Protection of Privacy Act* (the "*Act*")[4] and ordered Cabinet Office to disclose them to the Canadian Broadcasting Corporation ("CBC").

2. The IPC Decision followed a long line of IPC decisions interpreting s. 12(1) that were not in dispute in the IPC's inquiry. Those decisions hold that, to qualify for the exemption under the opening words of s. 12(1), it must be shown that disclosure of the records would reveal the substance of deliberations of the Cabinet or would permit the drawing of accurate inferences in that respect. In order to meet this test, Cabinet Office must provide sufficient evidence to establish a link between the content of the records and the substance of Cabinet deliberations.

3. The IPC held that Cabinet Office failed to establish that disclosure of the Letters would satisfy that test. The IPC found that Cabinet Office did not provide sufficient evidence linking the content of the Letters with the substance of deliberations at Cabinet's initial meeting or future meetings. Further, neither the content and context of the letters nor other evidence established that disclosure would reveal the substance of the Premier's deliberations.

4. On judicial review, the Divisional Court found that the IPC gave thorough and cogent reasons for its findings and upheld the IPC Decision as reasonable. The Applicant unsuccessfully appealed that ruling to the Court of Appeal and now seeks leave to appeal to this Court.

5. The proposed appeal raises no issues of public importance. Leave should be denied.

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[1] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2022 ONCA 74 ("Court of Appeal Decision").
[2] *Attorney General for Ontario v. Information and Privacy Commissioner*, 2020 ONSC 5085 ("Divisional Court Decision").
[3] Order PO-3973, *Cabinet Office (Re)*, 2019 CanLII 76037 (ON IPC) ("Order PO-3973")
[4] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c F.31 *("FIPPA*" in footnotes).

6. There was no dispute in the IPC's inquiry concerning the purpose of the s. 12(1) exemption, the principles underlying Cabinet confidentiality, and the Premier's unique policy-setting role within Cabinet. The IPC accepted Cabinet Office's position that records reflecting the Premier's deliberations in formulating government policies could reveal the substance of the deliberations of Cabinet as a whole. However, the IPC found on the evidence that the Letters did not do so in this case. Given that the IPC accepted the governing legal principles, and simply concluded that the applicable test was not met in this case, this issue provides no basis for granting leave to appeal.

7. The IPC Decision turned wholly on the facts, and the insufficiency of evidence required to establish that the test under the opening words of s. 12(1) was met. The Divisional Court described the issue below as "entirely a case of the application of well-settled principles to the particular facts ... This is a sufficiency of evidence case, nothing more."[5] In light the purely factual basis for the IPC Decision, any ruling from this Court would be of little precedential value to other provincial access to information commissioners or parties in future cases involving cabinet records exemptions in other jurisdictions. An appeal of this nature does not warrant this Court's attention.

8. There are no relevant inconsistencies in decisions of the appellate courts in Canada interpreting cabinet records exemptions in other provincial access to information statutes that the proposed appeal would resolve. The Applicant claims the IPC should have favoured an interpretive approach taken by the British Columbia ("B.C.") Court of Appeal in *Aquasource*[6] over the approach taken by the Nova Scotia Court of Appeal in *O'Connor*.[7] However, any purported inconsistencies can be explained by material textual differences in the various statutes, as well as factual distinctions in the cases. Consideration of any potential inconsistencies as between those other two rulings should be reserved for a case where they are squarely in issue on the record before the Court. In this case, the IPC found that even on the *Aquasource* approach, Cabinet Office had failed to satisfy the test for bringing the Letters within the scope of the exemption.

9. The arguments the Applicant advances in the proposed appeal resile from the submissions made by Cabinet Office and raise new arguments not raised in the IPC's inquiry. In particular, and in contrast to Cabinet Office's submissions before the IPC, the Applicant argues that the IPC

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[5] Divisional Court Decision, at para. 24.
[6] *Aquasource Ltd v Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia*, 1998 CanLII 6444, [1999] 6 WWR 1 (BC CA) ("*Aquasource*").
[7] *O'Connor v Nova Scotia*, 2001 NSCA 132 ("*O'Connor*").

should have adopted an "illustrative" approach to the opening words of s. 12(1) that would broaden the scope of the exemption beyond the meaning the IPC has previously ascribed to them. This Court should decline to hear a proposed appeal where the principal issue of interpretation raised is one that was not raised before the IPC for consideration and ruling at first instance.

A. BACKGROUND FACTS

(i) THE IPC'S INQUIRY

10. In response to a request for copies of the Letters, Cabinet Office identified 23 responsive records and denied access to all of them, claiming the exemption at s. 12(1) of the *Act*:[8]

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
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> (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
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> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
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> (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
>
> (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and
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> (f) draft legislation or regulations.

11. The CBC appealed Cabinet Office's denial of access to the IPC.

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[8] *FIPPA*, s. 12(1).

12. In its submissions to the IPC in the appeal, Cabinet Office maintained that it was relying solely on the opening words of s. 12(1) and not on any of the subparagraphs listed under s. 12(1).[9] In support of its decision to deny access, Cabinet Office offered as evidence the Letters themselves and a heavily redacted copy of the agenda for the Cabinet's initial meeting in July 2018.[10]

13. There was no dispute in the IPC's inquiry regarding the IPC's longstanding interpretation of the opening words of s. 12(1) or the legal and evidentiary tests applied to determine whether a record qualifies for exemption under the opening words.[11]

14. Cabinet Office agreed with and adopted the IPC's legal test, which asks whether "disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or … would permit the drawing of accurate inferences with respect to these deliberations."[12] As the majority of the court below recognized, the IPC has applied this test for decades.[13]

15. Cabinet Office agreed with and adopted the IPC's approach to interpreting the word "including" that precedes the categories of records listed at subparagraphs (a) to (f) of s. 12(1). It submitted that "[t]he use of the word 'including' in section 12(1) provides an expanded definition of the types of records deemed to be subject to the Cabinet records exemption."[14] Cabinet Office relied on the IPC's seminal 1988 ruling on this point, holding that the types of records listed at (a) to (f) are deemed to be exempt "regardless of whether they meet the definition found in the introductory text of subsection 12(1)"[15] (emphasis added).

16. Cabinet Office also agreed with the IPC's longstanding evidentiary test: in order to meet the requirements of the opening words of s. 12(1), it must provide sufficient evidence to establish "a linkage between the content of the record and the actual substance of Cabinet deliberations".[16]

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[9] Order PO-3973, at para. 4; Cabinet Representations, at para. 10, and Sur--Reply Representations, at para. 19 ("Cabinet Submissions"), Application Record, Tabs 4B, 4D, pp. 199, 227.

[10] Divisional Court Decision, at para. 21.
[11] Order PO-3973, at para. 18.
[12] Order PO-3973, at para. 10.
[13] Court of Appeal Decision, at para. 42.
[14] Cabinet Submissions, at para 13, Application Record, Tab 4B, p. 200.

[15] Order 22, Ontario (Management Board of Cabinet), 1988 CanLII 1402, at p. 7.
[16] Order PO-3973, at para. 11.

17. Cabinet Office claimed that disclosure of the Letters would reveal the substance of deliberations of: (i) the Premier in setting Cabinet's policy priorities; (ii) Cabinet at the initial Cabinet meeting; and (iii) Cabinet at future Cabinet meetings.[17]

18. In support of its claim that the Letters would reveal the substance of the Premier's deliberations, Cabinet Office submitted that, by virtue of the Premier's role as First Minister, "the deliberations of the Premier when establishing the policy priorities of the Executive Council are necessarily part of the deliberative process of Cabinet as a whole. Accordingly, disclosure of the results of that deliberative process – the Premier's articulation of policy priorities in the mandate letters – would necessarily reveal the substance of the deliberations of the Executive Council."[18]

19. With reference to the initial Cabinet meeting, Cabinet Office advised that "a mandate letter was provided to each of the [ ] ministers",[19] and maintained that this was sufficient to establish that disclosure of the Letters would reveal the substance of Cabinet's deliberations at the initial meeting. Cabinet Office submitted that, "while not every element of the policy priorities included in each mandate letter may have been discussed at that first Cabinet meeting, it is reasonable to expect that the Premier's key messages ... would have been discussed with Cabinet."[20]

20. With reference to its claim regarding future Cabinet meetings, Cabinet Office stated that "many of the policy priorities assigned to each minister in the mandate letters would require each respective minister to develop a proposal that would be brought to the Executive Council for decision-making prior to implementation." Cabinet Office submitted that disclosure would therefore allow a sophisticated reader to draw accurate inferences about the substance of future Cabinet deliberations as they relate to those policy priorities.[21]

(ii) THE IPC'S DECISION INTERPRETING S. 12(1)

21. The IPC agreed with Cabinet Office that the opening words of s. 12(1) should be interpreted in accordance with the purpose of the exemption – to promote free and frank discussion among Cabinet members without concern for the chilling effect that might result from disclosure of their

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[17] Order PO-3973, at paras. 81-83.
[18] Order PO-3973, at para. 28.
[19] Cabinet Submissions, at para. 5, p. 198.
[20] Order PO-3973, at para. 26,
[21] Order PO-3973, at paras. 15, 29.

statements or the material on which they are deliberating. The IPC accepted the authorities cited by Cabinet Office in this connection, including *Babcock v Canada (Attorney General)* and the *Williams Commission Report*, describing the need to protect Cabinet deliberations from exposure to public comment and criticism that could undermine Cabinet members' candour and solidarity.[22]

22. The IPC also accepted the principle set out in Order PO-1725 that the deliberations of the Premier are inseparable from those of Cabinet as a whole:[23]

> ... [B]y virtue of the Premier's unique role in setting the priorities and supervising the policy making, legislative and administrative agendas of Cabinet, the deliberations of the Premier, unlike those of individual ministers of the Crown, cannot be separated from the deliberations of the Cabinet as a whole. The Premier's consultations with a view to establishing Cabinet priorities are an integral part of Cabinet's substantive deliberative process.[24]

23. The IPC examined the B.C. Court of Appeal decision in *Aquasource*, cited by Cabinet Office, which held that the "substance of deliberations" in the differently worded exemption in the B.C. statute "refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision."[25] The IPC accepted that submissions prepared for future consideration could be exempt as revealing the substance of deliberations, but explained that "not all records that could potentially be discussed at future Cabinet meetings are necessarily exempt from disclosure ... The requirement remains that there be a substantial evidentiary link between the records themselves and any deliberations past or future."[26]

24. The IPC observed that *Aquasource* offered "some assistance with respect to records actually submitted to Cabinet or prepared specifically for future submission to Cabinet",[27] but even accepting that approach, found the Letters did not satisfy either branch of the *Aquasource* test.[28]

25. The IPC preferred the approach of the Nova Scotia Court of Appeal in *O'Connor*, which asks: "Is it likely that the disclosure of the information would permit the reader to draw accurate

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[22] Order PO-3973, at paras. 20-23, 86-87.
[23] Order PO-3973, at paras. 128-131.
[24] Order PO-3973, at para. 23.
[25] Order PO-3973, at paras. 29, 93.
[26] Order PO-3973, at para. 93.
[27] Order PO-3973, at para. 97.
[28] Order PO-3973, at paras. 113, 117.

inferences about Cabinet deliberations."[29] This is the same approach the IPC had applied for decades and, in the IPC's view, better respected the balance struck by the legislature between "the citizen's right to access information relating to the workings of government [and] the ability of Cabinet to carry out its deliberations in confidence and in private."[30]

26. The IPC rejected Cabinet Office's argument that the presence of the words "agenda" and "decisions" at s. 12(1)(a) means that "subject matters" and "outcomes" of Cabinet deliberations necessarily qualify under the opening words of s. 12(1). The IPC explained that subparagraphs (a) to (f) "clarify that the exemption applies to specific types of records that might otherwise be thought to fall outside the opening words of section 12(1) because they do not obviously 'reveal the substance of deliberations of the Executive Council ... Other records or information not described in those paragraphs must satisfy the opening words of section 12(1) in order to qualify for the exemption."[31]

27. The IPC stated that the opening words of s. 12(1) are "designed to protect deliberative communications occurring within the process by which the policies of Cabinet or its committees (and by extension the Premier) are formulated."[32] However, unless "the context or other information would permit accurate inferences to be drawn about actual deliberations,"[33] the introductory words "are not intended to encompass the outcome of the deliberative process in the formulation of government policy – i.e., the policy initiatives themselves."[34]

28. The IPC observed that this interpretation serves the overarching purpose of the *Act*: to facilitate democracy while respecting the purpose of the exemption – to promote candour within the deliberative process.[35] Further, it is consistent with the purpose clause of the *Act*, which states that "necessary exemptions from the right of access should be limited and specific".[36]

(iii) THE IPC'S DECISION APPLYING THE OPENING WORDS OF S. 12(1)

(a) The Letters do not reveal the substance of Premier's deliberations

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[29] Order PO-3973, at paras. 50, 111; *O'Connor*, at paras. 91-92.
[30] Order PO-3973, at para. 97; *O'Connor*, at para. 1.
[31] Order PO-3973, at para. 102-103,
[32] Order PO-3973, at para. 104,
[33] Order PO-3973, at para. 101,
[34] Order PO-3973, at para, 104.
[35] Order PO-3973, at paras. 105-106.
[36] Order PO-3973, at para. 107; *FIPPA*, s. 1.

29. The IPC characterized the Letters as "directives from the Premier to each of his ministers" that were not given "to kick off a debate about whether they should be adopted or amended or rejected. They are orders - job descriptions if you like."[37]

30. Relying on the IPC's Order PO-1725, Cabinet Office maintained that the opening words of s. 12(1) apply "where records reflect the policy-making and priority setting functions of the Premier" (emphasis added). The IPC stated that this framed the exemption too broadly:

> Not all records that reflect the Premier's policy making and priority setting "functions" are caught by the exemption at section 12(1). Order PO-1725 makes it clear that records detailing actual "meetings and discussions", revealing the "issues and options" and reflecting the Premier's "consultations" with a view to formulating and establishing policy initiatives may be considered to reveal the substance of deliberations subject to section 12(1). In that case, the records taken in context were deliberative in nature because they provided a roadmap revealing how and why policy choices were made by the Premier. [38]

31. The IPC found the reasoning in Order PO-1725 did not apply here:

> In the case before me, the mandate letters do not reflect or reveal the substance of any meetings, discussions or consultations or the issues and options considered by the Premier bearing on policy making and priority setting. They represent the policy priorities that were established once any issues and options had been considered and any consultations in that respect by the Premier or within the Premier's Office had concluded.… [D]isclosure of the policy initiatives in the mandate letters would not provide any insight into the deliberative considerations or consultative process by which the Premier arrived at them...[39]

(b) The initial Cabinet meeting and future Cabinet meetings

32. The IPC did not agree with Cabinet Office that, simply because the Letters were placed on the initial meeting agenda when they were given to each minister, their disclosure would necessarily reveal the substance of discussions about their contents.[40] In contrast to the records at issue in *Aquasource*, "[t]here is nothing on the face of the letters or in the representations of Cabinet Office to indicate that the letters themselves were intended to serve, or did serve, as Cabinet submissions."[41]

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[37] Order PO-3973, at para. 79.
[38] Order PO-3973, at para. 130.

[39] Order PO-3973, at para. 132.
[40] Order PO-3973, at para. 112.
[41] Order PO-3973, at para. 113.

33. The IPC's central findings with respect to the initial Cabinet meeting are set out here:

> Cabinet Office does not claim or provide evidence that the mandate letters were themselves, in fact, discussed at the Cabinet meeting when they were provided to each minister or that they were tabled or made generally available for discussion. There is no evidence that the mandate letters were distributed to Cabinet as a whole at that time or that any specific contents of the letters were actually the subject of the deliberations of Cabinet. Instead, Cabinet Office states that "it would be reasonable to expect that the Premier's key messages … would have been discussed with Cabinet." Given the nature of the records at issue and the fact that they were separately provided to each minister, this assumption falls well short of the standard in section 12(1) that disclosure of the mandate letters would reveal the substance of any Cabinet deliberations at the initial Cabinet meeting.
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> ... Without additional evidence of what transpired in the course of the initial Cabinet meeting, the mandate letters at best provide an indication of topics that may have arisen during that meeting. They do not provide insight into the substance of any specific deliberations that may have occurred among Cabinet ministers.[42]

34. The IPC's central findings with respect to future meetings are set out here:

> Cabinet Office offers no evidence that any specific parts of the mandate letters themselves were intended to be considered by Cabinet at any point in the future. Rather, Cabinet Office indicates that "many of the policy priorities assigned to each minister in the mandate letters would require each respective minister to develop a proposal that would be brought to the Executive Council for decision-making prior to implementation."
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> ....
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> ... While the mandate letters may be said to reveal the subject matter of what may come back to Cabinet for deliberation at some point in the future, they do not reveal the substance of any minister's actual proposals or plans for implementation, or the results of any consultations or program reviews and options. Consequently, they do not reveal the substance of any material upon which Cabinet members will actually deliberate in the future and, for that reason, do not reveal the substance of any such future deliberations.[43] (Original emphasis)

35. The IPC found Cabinet Office's argument that the Letters initiate a continuum of deliberations as a "blueprint" for future Cabinet discussions suffered from the same deficiency:

> I am asked to accept that deliberations on "nearly all" of the policy initiatives would take place at some point in future Cabinet meetings. I am also asked to find that

[42] Order PO-3973, at paras. 114-115.
[43] Order PO-3973, at paras. 116-119.

> section 12(1) applies to policy initiatives that may never return to Cabinet at all or that may be altered or amended in significant and unspecified ways. With respect, Cabinet Office has it backwards. I must be satisfied on the evidence of the likelihood that disclosure of the letters "would reveal" or, at a minimum, permit accurate inferences to be drawn concerning the substance of future Cabinet deliberations.
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> ... Materials yet to be developed by individual ministers and later brought before Cabinet ... may well reveal the substance of future Cabinet deliberations if and when they occur. However, the evidence before me does not establish that disclosure of the mandate letters themselves will permit accurate inferences to be drawn in that respect. At most, Cabinet Office's submissions indicates (sic) that the subject matter of future deliberations may be revealed by disclosure. [44]

36. The IPC found no persuasive evidence or argument that disclosure would give rise to a chilling effect on Cabinet deliberations:

> Ministers remain at liberty to express their views on policy matters in the course Cabinet meetings as they see fit, without fear that any views expressed will be made public or become the subject of comment, criticism or questions. And each minister is equally at liberty to govern his or her own public responses to questions or comments about policy matters in accordance with his or her duties as a member of Cabinet.[45]

37. The IPC stated that Cabinet Office's position "would lead to a broader application of s. 12(1) than could have been intended, with the result that all records revealing policy initiatives of Cabinet or the Premier would be exempt pursuant to the introductory wording in section 12(1)... [H]ad that been the intention, the legislature would have stated so explicitly when enumerating the categories of records and information protected at paragraphs (a) to (f) of section 12(1)."[46]

B. PROCEDURAL HISTORY

(i) THE DIVISIONAL COURT DECISIONS

38. In a unanimous decision, the Divisional Court upheld the IPC Decision as reasonable.

39. The Court considered this to be merely "a sufficiency of evidence case, nothing more" engaging "the application of well-settled principles to the particular facts."[47] In particular, the Court

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[44] Order PO-3973, at paras. 121-122.
[45] Order PO-3973, at paras. 123, 125-126.
[46] Order PO-3973, at para. 135.
[47] Divisional Court Decision, at para 24.

found that the IPC's interpretation of the *Act* and the opening words of s. 12(1) was based on the following well-settled principles of law that were not in dispute:

(i) "[I]n order for the exemption under s. 12(1) to apply, disclosure of the record must 'reveal the substance of deliberations' of Cabinet or 'permit the drawing of accurate inferences' about past or future Cabinet deliberations." [48]

(ii) "[T]he specifically enumerated categories of record (sic) in subparagraphs (a) to (f) must be interpreted as providing an expanded definition of, or at the very least the removal of any ambiguity about, the types of records that are exempt from disclosure."[49]

(iii) "[F]or the exemption in the introductory words [ ] to apply, the institution had the evidentiary burden of establishing a 'linkage' between the content of the record and the actual substance of Cabinet deliberations, past or future."[50]

40. The Court rejected the Applicant's argument that because s. 12(1)(a) exempts the "decisions" of Cabinet, the "outcome" of the Premier's deliberations is part of the substance of those deliberations. The Court found the IPC Decision "does not undermine the protection afforded under s. 12(1)(a) ... [I]t is concerned only with the introductory language of s. 12(1)."[51]

41. In any event, all the IPC concluded is that the Letters did not disclose the substance of the Premier's deliberations "as a matter of fact based on the evidence." [52] The Court confirmed that "the letters on their face do not disclose or invite any deliberative process" and "there is no evidence of any such consultative or deliberative process in establishing the Premier's priorities here."[53]

42. The Court found the IPC made no error in rejecting the submission that it was "reasonable to expect" unspecified aspects of the Letters "would have been discussed" at the initial meeting. The Court stated that "all that was before the IPC in this case was a single, heavily redacted agenda and the Letters themselves", and that a short note on the agenda, in fact, "suggests the opposite."[54]

43. The Court did not agree that the IPC erred in interpreting the exemption by requiring evidence the Letters would be placed before Cabinet in future meetings. This finding merely

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[48] Divisional Court Decision, at paras. 19, 27.
[49] Divisional Court Decision, at para. 19,
[50] Divisional Court Decision, at paras. 8.
[51] Divisional Court Decision, at para.26.
[52] Divisional Court Decision, at para. 25.
[53] Divisional Court Decision, at paras. 29, 31.
[54] Divisional Court Decision, at paras. 36-41.

addressed Cabinet Office's reliance on *Aquasource*, which invited consideration of "submissions not yet presented." Here, the Applicant mischaracterized the IPC's finding as a legal test.[55]

44. The Court stated that the IPC Decision regarding future Cabinet meetings was grounded in "two key, well-recognized, principles": (1) disclosing the subject matter of deliberations generally does not amount to disclosing their substance; and (2) the prospect that records may inform Cabinet deliberations in an unspecified way at some indeterminate point in the future is not sufficient to bring them within the scope of the opening words of s. 12(1).[56] Here, the Court agreed that any link between the letters and future Cabinet deliberations was "too [ ] remote."[57]

45. The Court concluded that "the IPC identified the correct legal principles, applied them to the interpretation of the opening words of s. 12(1), reviewed the record and the submissions before him in light of that legal test and explained the basis for his decision in thorough and cogent reasons." Given "the paucity of evidence", the Court found the IPC was reasonable in finding Cabinet Office failed to satisfy its burden of establishing the Letters fell within the opening words of s. 12(1).[58]

(ii) THE COURT OF APPEAL DECISION

46. The majority of the Court of Appeal agreed with the Divisional Court that the IPC Decision was reasonable and dismissed the appeal.

47. Justice Sossin (with Gillese J.A. concurring) identified no error in the Divisional Court's approach to the standard of review in this case, rejecting the Applicant's argument that its reasonableness review was not sufficiently "robust".[59]

48. On appeal, the Applicant raised a new argument, not raised before the IPC or the Divisional Court, which it characterised as the "illustrative approach" versus the IPC's "expansive approach". The Applicant claimed that the use of the term "including" in the opening words of s. 12(1) signifies that the categories of records set out in subparagraphs (a) to (f) are examples of records that "would reveal the substance of deliberations" of Cabinet. According to this approach, the

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[55] Divisional Court Decision, at paras. 46-48.
[56] Divisional Court Decision, at para. 51.
[57] Divisional Court Decision, at paras. 49 51.
[58] Divisional Court Decision, at paras. 49-55.
[59] Court of Appeal Decision, at paras. 33-35.

opening words would exempt records that are analogous to those described in subparagraphs (a) to (f) regardless of whether they would actually reveal the substance of any deliberations.[60]

49. The majority agreed with the Divisional Court that the IPC's interpretation on this point was reasonable: if the records do not fall within any of the subparagraphs, the test for the opening words of s. 12(1) must be met on its own terms.[61] The majority noted that the consistency in the IPC's past approach is "an indicator of the reasonableness of this decision".[62] But the majority went further and found the IPC's interpretation was alive to the text, context, and purpose of the provision, and consistent with the purposes of the *Act* as a whole and s. 12(1) in particular.[63]

50. Finally, the majority held that the IPC's application of the test to the matter before it was reasonable in light of the IPC's findings of fact and the deficiencies in the evidence identified by the Divisional Court and the majority in their reasons.[64] The majority agreed with the IPC's finding that "the mere stating of a policy priority does not reveal the deliberations leading to that outcome."[65] In particular, the IPC properly recognized the distinct role of the Premier within Cabinet, but determined that the evidence was insufficient to establish that the Letters would disclose the Premier's deliberations.[66]

51. Justice Lauwers dissented. He conceded the standard of review is reasonableness but suggested correctness was preferred and proceed to analyze the case on that basis.[67] This led him to conclude that a "robust and well-protected sphere" for Cabinet records was intended.[68]

PART II - STATEMENT OF QUESTIONS IN ISSUE

52. The issue on this application is whether the proposed appeal raises an issue of national and public importance that warrants this Court's consideration. The IPC submits that it does not. Accordingly, the application should be dismissed.

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[60] Court of Appeal Decision, at para. 42.
[61] Court of Appeal Decision, at paras. 44, 46.
[62] Court of Appeal Decision, at para. 49.
[63] Court of Appeal Decision, at para. 51.
[64] Court of Appeal Decision, at paras. 23, 26-29, 65-66, 69-74.
[65] Court of Appeal Decision, at para. 64.
[66] Court of Appeal Decision, at para. 79.
[67] Court of Appeal Decision, at para. 91.
[68] Court of Appeal Decision, at para. 149.

PART III - STATEMENT OF ARGUMENT

A. THIS IS A FACT-BASED CASE

53. The central question in this case is whether, based on the evidence advanced in the IPC's inquiry, Cabinet Office discharged its burden of establishing that disclosure of the Letters would reveal or permit accurate inferences to be drawn about the substance of deliberations of the Premier and Cabinet. Until this matter reached the Court of Appeal, all parties were in agreement with the IPC's longstanding interpretation of the exemption and the legal and evidentiary tests to be applied. The Divisional Court observed that "this is entirely a case of the application of well-settled principles of law to the particular facts," "a sufficiency of evidence, case, nothing more."[69]

54. The Applicant resiles from the positions advanced by Cabinet Office in the IPC's inquiry where the settled legal and evidentiary tests were accepted. The Applicant's reframing of the case – arguing in favour of an "illustrative" approach – does not change its fundamental character as an effort to re-litigate the IPC's findings of fact under the cover of a legal test more favourable to the evidence presented.

55. The Applicant's claim that it could not provide better evidence due to oaths of secrecy, as well as Justice Lauwers' concern about cross-examining Ministers on their affidavits, are unsupported on the record, by the provisions of the *Act* and by previous IPC decisions. The *Act* protects a party's confidential evidence and submissions from disclosure to another party, thus precluding cross-examination.[70] The IPC *Code of Procedure* addresses confidentiality concerns[71] which Cabinet Office availed itself of in this case.[72] In many cases, affidavit evidence is not required where credible information is provided in the form of submissions. [73]

56. At the end of the day, the IPC decision turned solely on the facts in light of the evidence and submissions presented. A ruling by the Court in the proposed appeal would offer little guidance that could be of any precedential value to other provincial commissioners or parties.

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[69] Divisional Court Decision, at para. 24.
[70] *FIPPA*, ss. 52(2), (3), (13), 55(1).
[71] *Practice Direction No. 7,* IPC *Code of Procedure*,.
[72] Cabinet Office Submissions, at paras. 4, 25 (redacted), and Appendix "A" (redacted), Application Record, Tabs 4C and 4D, pp. 224, 229, 239.
[73] Order PO-3977, Ontario (Environment, Conservation and Parks) (Re), 2019 CanLII 75679 (ON IPC), at paras. 7, 17, 34-35, 37.

B. THE PURPOSE OF THE EXEMPTION AND THE PREMIER'S ROLE ARE NOT IN ISSUE

57. The Applicant claims the IPC erred by giving the opening words of s. 12(1) a narrow and restrictive interpretation inconsistent with the purposes of the *Act* and the exemption, as articulated in judgments of this Court and the *Williams Commission Report*.

58. There is no controversy for this Court to resolve in this regard. The IPC took full account of the purpose the exemption, as set out in the authorities referred to by Cabinet Office, "to promote free and frank discussion among Cabinet members without concern for the chilling effect" that would result from revealing the substance of their deliberations.[74] The IPC found "no persuasive evidence or argument ... that disclosure [of the Letters] would give rise to a chilling effect on Cabinet deliberations."[75] The Applicant does not explain how this conclusion is incorrect.

59. Citing the dissent, the Applicant claims the IPC Decision drew a line between the deliberations of the Premier and Cabinet as a whole. This is patently not the case. The IPC accepted that the deliberations of the Premier are inseparable from those of Cabinet in light of the Premier's unique role as First Minister.[76] As the Court of Appeal stated: "[T]he issue for the IPC was not whether records which disclose the deliberations of the Premier are caught by the exclusion under s. 12(1), but rather whether the Letters and the agenda constitute sufficient evidence that the deliberations of the Premier would be revealed by disclosure."[77]

60. The IPC was prepared to find that records that actually provided insight into the Premier's deliberative processes would be exempt under the opening words of s. 12(1).[78] The majority of the Court Appeal agreed, however, that the IPC properly distinguished the contents of the Letters from the deliberative communications at issue in Order PO-1725 and found, as a matter of fact, that they did not meet the "opening words" test.[79]

61. The Applicant argues the IPC Decision amounts to an "incursion" into Cabinet proceedings that will "change" how it operates. The IPC Decision changes nothing. It is entirely grounded in

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[74] Order PO-3973, at paras. 20-24, 47, 86-87.
[75] Order PO-3973, at para. 123,
[76] Order PO-3973, at paras. 128-129, 131.
[77] Court of Appeal Decision, at para. 72.
[78] Order PO-3973, at paras. 131-132,
[79] Court of Appeal Decision, at paras. 75-76.

the IPC's longstanding decisions interpreting the opening words of s. 12(1). The evidence and submissions advanced in the IPC's inquiry simply failed to meet the established legal and evidentiary tests. The Applicant does not explain how those same tests have proven inadequate in protecting Cabinet deliberations in the past or would do so in the future.

C. THE APPLICANT'S NEW "ILLUSTRATIVE" ARGUMENT

62. The Applicant claims the IPC erred in failing to hold that the categories of records listed at subparagraphs (a) to (f) "illustrate" and broaden the scope of the opening words.

63. This submission was not made to the IPC during its inquiry and resiles from Cabinet Office's reliance on decades old IPC decisions to the opposite effect that it cited as authoritative.

64. This Court should decline to hear the proposed appeal where the principal issue of interpretation raised – in fact, the only true issue of interpretation – is one which the decision maker did not have the opportunity to consider and rule on at first instance.

65. The courts have a discretion not to consider an issue raised for the first time on judicial review, or on further appeal, that was not raised before the tribunal. Reliance on new submissions, particularly when challenging an expert tribunal's longstanding interpretation of its home statute, undermines the integrity of the decision-making process and the legislature's intent that the decision maker should have the opportunity to deal with the issue at first instance and make its views known, so the court can benefit from its analysis.[80]

D. THE PROPOSED APPEAL WILL NOT RESOLVE INCONSISTENT APPELLATE DECISIONS

66. The Applicant claims the IPC erred in rejecting the "body of information" approach in *Aquasource*. This is not a question that warrants granting leave: there are no true inconsistencies between the IPC approach and *Aquasource* given the different statutory language; and the outcome of the proposed appeal would be no different on the Applicant's preferred *Aquasource* approach.

67. The Applicant fails to examine the significant and material textual differences in the B.C. and Ontario exemptions. The exemption in the B.C statute is as follows:

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[80] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, at paras. 22-25,

> The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees[81] (emphasis added).

68. The B.C. Court's analysis in *Aquasource* focused on the above-underlined words common to the listed categories of records that follow the word "including". Because "information contained in Cabinet submissions forms the basis for Cabinet deliberations", the Court reasoned:

> That list makes it plain that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision...
>
> From that acceptance there emerges this test: Does the information sought to be disclosed form the basis for Cabinet deliberations?[82] (emphasis added)

69. In contrast to the B.C. exemption, Ontario's exemption contains no common "Cabinet submissions" denominator among the various categories of records listed at subparagraphs (a) to (f) that can be transposed, and lend meaning, to the opening words of s. 12(1). The structure of the Ontario exemption is fundamentally different in this important respect.

70. The IPC explained that accepting Cabinet Office's submissions based on *Aquasource* would run afoul of one of the fundamental purposes of the *Act* that "necessary exemptions from the right of access should be limited and specific" (emphasis added). As the IPC stated, "Cabinet Office's position in this case would lead to a far broader application of section 12(1) than could have been intended, with the result that all records revealing policy initiatives of Cabinet or the Premier would be exempt pursuant to the introductory wording in section 12(1)."[83]

71. By extension, the outcome of the Applicant's newly-minted "illustrative approach" is that any number of unspecified documents would be deemed to be exempt under the opening words of s. 12(1), provided they are analogous to the records listed at subparagraphs (a) to (f). This would be the case, without any onus on Cabinet Office to show that disclosure of any analogous records would permit any accurate inferences to be drawn about the substance of any deliberations.

72. The Applicant claims the IPC erred in preferring the "*O'Connor* approach" because the

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[81] *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 12(1).
[82] *Aquasource*, at para. 39, 48.
[83] Order PO-3973, at para. 135.

Nova Scotia exemption is discretionary, and because that statute's purpose clause is more "comprehensive". In contrast, Ontario's statute has a different purpose clause and the exemption at s. 12(1) is mandatory and not covered by the public interest override at s. 23 of the *Act*.

73. These submissions do not advance the Applicant's case.

74. First, it is wrong to suggest the IPC applied any new or different test from *O'Connor*. In this case, the IPC applied the same "accurate inferences" test that it has applied for decades. *O'Connor* adopted and lent support to the same approach. The IPC's references to *O'Connor* do not reflect a departure from the test Cabinet Office accepted and endeavoured, but failed, to meet.

75. Second, the Nova Scotia statute's purpose clause[84] does little more than reflect the principles underlying the "overarching purpose" of all access to information legislation as articulated by this Court in *Dagg v. Canada*.[85] The Ontario Court of Appeal has rejected any construction of the *Act* that is not similarly "generous" to access rights.[86]

76. Third, the mandatory nature of an exemption does not factor into its interpretation. Newfoundland's access commissioner adopted the so-called "*O'Connor* approach"[87] when interpreting that province's mandatory exemption.[88] In any event, the principal difference between s. 12(1) and discretionary exemptions in the *Act* is that under s. 12(2)(b) the discretion to disclose a record that qualifies for exemption is left to the Executive Council to which it relates.[89]

77. Fourth, this Court has rejected the argument that the omission of an exemption from the public interest override should broaden its scope. In *Merck Frosst*, this Court concluded that the opposite was true, finding that the intention to ascribe "a narrower ambit" for an exemption under the federal *Access to Information Act* was "reinforced by the fact that the [ ] exemption is not subject to the public interest override" (emphasis added). The Court explained that "This approach also accords with the principle that exceptions to the right of access should be limited and specific

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[84] *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, s. 2.
[85] *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403, at paras. 61-63.
[86] *Toronto Police Services Board v Ontario (Information and Privacy Commissioner)*, 2009 ONCA 20, at paras. 43-45.
[87] *Newfoundland and Labrador (Innovation, Trade and Rural Development)*, 2008 CanLII 31395 (NLIPC), 2008 CanLII 31395 (NLIPC), at paras. 33, 35, 67-68.

[88] *Access to Information and Protection of Privacy Act*, SNL 2002, c. A – 1.1 s. 18.
[89] *FIPPA*, s. 12(2)(b).

[ ]. In this way, the *Act*'s purpose of providing broad access rights is protected." [90]

E. THE APPLICANT'S OTHER ARGUMENTS ARE NOT SUPPORTED

78. The IPC did not find, as the Applicant claims, that the policy initiatives in the Letters failed to qualify for the exemption because they reflected "outcomes" of the Premier's deliberations, but rather because their disclosure "would not provide any insight into the deliberative considerations or consultative process by which the Premier arrived at them."[91] The Court of Appeal agreed that "the Letters are the culmination of [the Premier's] deliberative process" and continued:

> While they highlight the decisions the Premier ultimately made, they do not shed light on the process used to make those decisions, or the alternatives rejected along the way. Accordingly, the Letters do not threaten to divulge Cabinet's deliberative process or its formulation of policies. [92]

79. The IPC did not hold, as the Applicant claims, that "the Letters needed to be distributed to 'Cabinet as a whole' in order to be exempt". In assessing whether the Letters would reveal the substance of deliberations at the initial Cabinet meeting, the IPC observed: "There is no evidence that the letters were distributed to Cabinet as a whole at that time or that any specific contents of the letters were actually the subject of the deliberations of Cabinet."[93] Here, the Applicant misconstrues the IPC's finding as if it were a legal test. This was just one of several evidentiary deficiencies the IPC identified in disposing of the exemption claim.

80. Similarly, the IPC did not, as the Applicant claims, impose a new 'heightened test' by requiring "evidence of actual deliberations" or "actual discussions" at a specific Cabinet meeting. Citing Order PO-1725, the IPC stated that a record not listed at subparagraphs (a) to (f) will qualify under the opening words "if the context or other information would permit accurate inferences to be drawn as to actual Cabinet deliberations at a specific Cabinet meeting" (emphasis added).[94]

81. Further, the Divisional Court "d[id] not read the IPC Decision as requiring evidence that the Letters themselves would be placed before specific future Cabinet meetings in order to satisfy the

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[90] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 106.

[91] Order PO-3973, at para. 132.
[92] Court of Appeal Decision, at para.76.
[93] Order PO-3973, at para. 114
[94] Order PO-3973, at para. 101.

opening words of s. 12(1).” In fact, it stated that the “IPC Decision expressly recognized that this is not the test.”[95] For example, the IPC found that the Letters do “[not] meet the test for exemption because they do not indicate what material will ultimately return to Cabinet”,[96] not what specific meeting at which that might occur.

82. In any event, nothing in the IPC Decision turned on the so-called ‘heightened test’. The IPC found the Letters “do not provide any insight into the deliberations of the Premier in formulating them” nor any “insight into the substance of any specific deliberations that may have occurred among Cabinet ministers” at the initial meeting. At best, they “reveal the subject matter of what may come back to Cabinet for deliberation at some point in the future.” In short, there was no evidence showing how the Letters would reveal deliberations in any context.[97]

83. The Applicant cites the IPC’s Order PO-2417 to show that evidence a record was “actually discussed” by Cabinet is not required. In some cases this is true. The record in that case was a submission containing policy options and recommendations that was prepared for a Cabinet committee and given to committee members during the course of a program review. Based on "detailed confidential representations”, the IPC was “satisfied that the report [w]as part of the Cabinet submission process”.[98] That is not the case here.

PART IV - COSTS

84. The IPC does not seek costs and asks that none be awarded against it.

PART V - ORDER SOUGHT

85. The IPC respectfully requests that this application be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 8TH DAY OF APRIL, 2022

William S. Challis, Lawyer for the Respondent IPC

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[95] Divisional Court Decision, at para. 47.
[96] Order PO-3973, at para. 119
[97] Order PO-3973, at paras. 115, 119, 132.
[98] Order PO-2417, *Ontario (Consumer and Business Services) (Re)*, 2005 CanLII 56533 (ON IPC), at pp. 2-4.

PART VI - TABLE OF AUTHORITIES

	Decisions	**Cited at para(s):**
1.	*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61	82
2.	*Aquasource Ltd v Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia*, 1998 CanLII 6444, [1999] 6 WWR 1 (BC CA)	8. 24- 26, 34, 45, 68, 70, 72
3.	*Attorney General for Ontario v. Information and Privacy Commissioner*, 2020 ONSC 5085	1, 5, 12, 39-47, 55, 83
4.	*Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403,	72
5.	*Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3	79
6.	*Newfoundland and Labrador (Innovation, Trade and Rural Development)*, 2008 CanLII 31395 (NLIPC)	30, 78
7.	*O'Connor v Nova Scotia*, 2001 NSCA 132	8, 27, 74, 76, 77, 79
8.	*Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2022 ONCA 74	1, 4, 16, 48, 49, 50, 51, 52, 53, 61, 80
9.	Order 22, *Ontario (Management Board of Cabinet) (Re)*, 1988 CanLII 1402 (ON IPC)	15
10.	Order PO-2417, *Ontario (Consumer and Business Services) (Re)*, 2005 CanLII 56533 (ON IPC)	85
11.	Order PO-3973, *Cabinet Office (Re)*, 2019 CanLII 76037 (ON IPC)	1, 12-37, 58-60, 79, 78-82
12.	Order PO-3977, *Ontario (Environment, Conservation and Parks) (Re)*, 2019 CanLII 75679 (ON IPC)	57

	Statutes	**Cited at para(s):**
1.	*Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c F.31, ss. 1, 12(1), 12(2)(b), 52(2), (3), (13), 55(1)	1, 2, 6, 710, 12-18, 27-29, 32. 37, 39, 46, 47, 50, 51, 59, 61, 63, 71, 72, 73, 74, 78, 82, 83
2.	*Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss. 12(1)	69, 71
3.	*Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, s. 2	77
4.	*Access to Information and Protection of Privacy Act*, SNL 2002, c. A – 1.1 s. 18. [Past version: in force between Jun 4, 2008 and Dec 17, 2008]	78
	Secondary Sources	**Cited at para(s):**
1.	*Practice Direction No. 7, IPC Code of Procedure*	57