Court File No. C69150

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

ATTORNEY GENERAL FOR ONTARIO

Applicant

- and -

INFORMATION AND PRIVACY COMMISSIONER and CANADIAN BROADCASTING CORPORATION

Respondents

APPLICATION UNDER the *Judicial Review Procedure Act*, RSO 1990, c J.1

FACTUM OF THE INTERVENERS THE CENTRE FOR FREE EXPRESSION, CANADIAN JOURNALISTS FOR FREE EXPRESSION, THE CANADIAN ASSOCIATION OF JOURNALISTS, ABORIGINAL PEOPLES TELEVISION NETWORK, and NEWS MEDIA CANADA

May 24, 2021

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I. OVERVIEW

1. Access to information legislation is critical to supporting democracy. It allows members of the public to understand the actions and priorities of the state and ensures that government remain accountable to the people. This is why exemptions to the right of access that are included in these statutes are narrow and limited.

2. In this case, the government has sought to dramatically expand the scope of one tailored exemption in the *Freedom of Information and Protection of Privacy Act* [***FIPPA***]. The consequence of its position would be to shield vast quantities of government records from public scrutiny under the guise of protecting the "deliberations of cabinet". The records that would be captured by the position urged by the Cabinet Office would capture any record that revealed the policy priories of the government, even when they have no meaningful connection to anything that could fairly be characterized as 'cabinet deliberations'.

3. The interveners are civil society and media organizations who rely on access to information statutes in order to uphold the public's right to know. They intervene to help illustrate how the Information and Privacy Commissioner [**IPC**] recognized the overbroad nature of the government's position, and reasonably interpreted s. 12(1) of the *FIPPA* to protect cabinet deliberations, while upholding the public's right of access.

II. THE FACTS

4. The focus of the Appellants' submissions in this Court has shifted somewhat from the main thrust of Cabinet Office's representations to the IPC. A court reviewing a decision for reasonableness must "read the decision maker's reasons in light of the history and context of the

proceedings in which they were made."[1] This includes careful attention to the submissions made by the parties.[2] Courts must be cautious before holding a decision to be unreasonable on the basis of arguments never made to the decision maker.[3] The IPC's reasons should be read in the context of the sweeping position Cabinet Office took to the scope of s. 12(1) of the *FIPPA*.

A. WHAT WAS ARGUED BEFORE THE INFORMATION COMMISSIONER

5. Cabinet Office claimed that the Letters were exempted under s. 12(1) for three separate, but related reasons:[4]

a. The letters were placed on the agenda of an early Cabinet meeting and were distributed to Ministers at that time. Disclosure of the letters would reveal the substance of discussions and deliberations that took place at that Cabinet meeting related to the guidance and policy priorities expressed in the letters;

b. The letters would disclose the substance of the Premier's own deliberative process in arriving at the policy priorities identified in the letters. Given the special role played by the Premier in setting the priorities and agenda of Cabinet, disclosing the substance of the Premier's deliberations could not be separated from disclosing the substance of Cabinet's deliberations as a whole; and

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[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 94 [*Vavilov*].
[2] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, at para. 18; *Canadian National v. Teamsters Canada*, 2020 ONSC 7286 (Div Ct) at para. 25.
[3] *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67 at para. 52 [*Canada Post*].
[4] *Representations of Cabinet Office, dated December 13, 2018* [*CO Representations*] at paras. 18-22, **Joint Appeal Book and Compendium [*JABC*], Tab 7, pp. 84-86 (of the pdf)**.

c. Disclosure of the letters would identify proposed legislative, fiscal and operational matters that would have to return to Cabinet at a later date for further discussion, deliberation and debate. Disclosure of the letters would therefore disclose the substance of future Cabinet deliberations over those matters.

6. Cabinet Office's submissions invoked the theme of a "continuum" of Cabinet's deliberative process, all of which fell within s. 12(1).[5] This continuum begins with the Premier deliberating on what the priorities of his government will be.[6] It extends not only to the actual content of Cabinet discussions on the topics identified by the Premier as priorities, but the topics themselves.[7] It covers matters that have not actually been the topic of Cabinet discussions so long as they relate to the Premier's policy priorities,[8] or which would need to be discussed by Cabinet *if* they were to be implemented.[9] The continuum only ends when a matter is actually implemented or made public, such as when legislation is tabled in the legislature.[10]

7. The IPC rejected this sweeping approach to s. 12(1), in which a record that falls anywhere within this continuum would be subject to a mandatory exemption that is not subject to the public interest override in s. 23.[11] Instead, it adopted an interpretation of s. 12(1) that was grounded in its text: "substance of deliberations". The IPC held that this phrase covered Cabinet member's views, opinions, thoughts, ideas or concerns that are actually expressed in the course

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[5] *CO Representations, supra*, para. 47, **JABC, Tab 7, pp. 95-96**; *Reply Representation of Cabinet Office, dated February 14, 2019* [*CO Reply*], para. 9, **JABC, Tab 9, p. 108**. See also Order PO-3973 [*Decision*], paras. 84, 121, **JABC, Tab 4, pp. 50, 60**.
[6] *CO Representations, supra*, para. 49, **JABC, Tab 7, p. 96**; *CO Reply, supra*, para. 9, **JABC, Tab 9, p. 108**.
[7] *CO Reply, supra*, para. 10, **JABC, Tab 9, p. 109**.
[8] *CO Submissions, supra*, paras. 45-46, **JABC, Tab 7, p. 95**.
[9] *Sur-Reply Submissions of Cabinet Office, dated April 12, 2019* [*CO Sur-Reply*], para. 35, **JABC, Tab 10, p. 124**.
[10] *Decision, supra*, para. 22, **JABC, Tab 3, p. 19**.
[11] See, for example, *Decision, supra*, paras. 118, 121, **JABC, Tab 4, pp. 59-60**.

of Cabinet's deliberative process.[12] For a record to fall within this exemption, there had to be sufficient evidence to establish a link between a record and that substance of deliberations.[13]

8. In reading s. 12(1) this way, the IPC did not only consider the text of the provision. He also examined its context and purpose. His reasons reflected a concern about the overall purposes of access to information legislation; the statutory purpose clause of the *FIPPA* in particular;[14] and the underlying purpose for the s. 12 exemption.[15]

9. The Divisional Court also rejected the expansive 'continuum' argument that was put forward to the IPC.[16] The Court recognized that accepting Cabinet Office's position would lead to the overbroad interpretation of s. 12(1) as capturing all records revealing the policy initiatives of Cabinet, regardless of whether they actually disclosed the substance of any deliberations or even permitted accurate inferences to be drawn about to any Cabinet discussions.[17]

B. WHAT WAS NOT ARGUED BEFORE THE INFORMATION COMMISSIONER

10. There are aspects of the argument made by the Appellant before this Court was not made by Cabinet Office to the IPC. This is particularly the case with respect to the submissions made by the Appellant about the role, importance and application of paragraphs (a)-(f) of s. 12(1).

11. Cabinet Office took the position, as the Appellant does now, that paragraphs (a) to (f) of s. 12(1) have the effect of expanding the meaning of "substance of deliberations", in that it

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[12] *Decision*, *supra*, para. 98, **JABC, Tab 4, p. 54**.
[13] *Decision*, *supra*, para.11, **JABC, Tab 4, p. 31**.
[14] *Decision*, *supra*, paras. 105-107, **JABC, Tab 4, pp. 56-57**
[15] *Decision*, *supra*, paras. 108, 123, **JABC, Tab 4, pp. 57, 60-61**.
[16] *Ontario (Attorney General) v. Information and Privacy Commissioner*, 2020 ONSC 5085 [*Div Court Decision*], para. 29, **JABC, Tab 3, p. 21**.
[17] *Div Court Decision*, *supra*, para. 30, **JABC, Tab 3, p. 21**.

required the opening words of s. 12(1) to be given a meaning that encompassed all of the records that are listed on the paragraphs that follow.

12. However, Cabinet Office did not make any submissions on the French version of the *FIPPA*,[18] nor did it rely on the legislative history of the *FIPPA* when it and predecessor bills were before the legislature.[19]

13. With respect to the direct applicability of s. 12(1)(a), the Appellant relies on a single sentence in the last paragraph of Cabinet Office's sur-reply representations to claim that both the IPC and the Divisional Court misapprehended Cabinet Office's position and that, in fact, it had claimed that s. 12(1)(a) applied to the records.[20] However, this sentence needs to be read alongside Cabinet Office's earlier assertion in those same representations that s. 12(1)(a) did *not* apply to the Letters:

> Cabinet office submits it is not relying specifically on subsection 12(1)(a), but rather on the introductory wording of subsection 12(1) because disclosure of the mandate letters would reflect the substance of Cabinet deliberations… All references to subsection 12(1)(a) have been made to indicate that the phrase "substance of deliberations" necessarily includes the subject matter ant outcomes of decision-making by the Premier and Cabinet.[21]

14. The IPC responded to the arguments that were made by Cabinet Office about the impact of paragraphs (a)-(f) of s. 12(1) on the opening words of the provision. Relying on both earlier decisions of his office as well as Supreme Court jurisprudence, the IPC gave the phrase

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[18] See *Factum of the Appellant*, paras. 58-59.
[19] See *Factum of the Appellant*, para. 61.
[20] *Factum of the Appellant*, para. 64; *CO Sur-Reply, supra*, para. 36, **JABC, Tab 10, p. 125**.
[21] *CO Sur-Reply, supra*, para. 19, **JABC, Tab 10, pp. 120-121**.

"substance of deliberations" its ordinary meaning, and paras. (a)-(f) as identifying additional records that might otherwise be seen as falling outside the scope of s. 12(1).[22]

III. ISSUES & THE LAW

15. The IPC was interpreting its home statute, and so the standard of review is reasonableness. The issue on appeal is whether the IPC's reasons reflect an interpretation of s. 12(1) that is consistent with its text, context and purpose.[23] The Interveners submit that the IPC's reasons, read as a whole and in light of the record before him, provided a clear chain of reasoning that was attentive to text, context and purpose. More specifically, the interveners submit that the IPC's interpretation of s. 12(1):

a. Reflected the overall context and purpose of the *FIPPA* itself, in which exceptions to the right of access are to be interpreted narrowly;

b. Read the provision purposively by being attentive to the specific harms that the cabinet records exemption was designed to avoid; and

c. Respected the purpose of the *Act* by rejecting a reading of s. 12(1) that would have undermined the values that *FIPPA* was intended to promote.

A. THE IPC'S INTERPRETATION REFLECTED THE CONTEXT AND PURPOSE OF THE *FIPPA* AS A WHOLE

16. The core argument of the Appellant is that the IPC interpreted s. 12(1) narrowly and restrictively, when it should have been given a broad and expansive scope. This position fails to give effect to the accepted principles of statutory interpretation that apply to freedom of

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[22] *Decision*, *supra*, paras. 99-102, **JABC, Tab 4, pp. 54-55**.
[23] *Vavilov*, *supra* at paras. 119-120.

information legislation generally, and *FIPPA* in particular. These statutes are to be read as providing generous right of public access, subject only to limited exceptions.

17. The interpretation of access to information legislation must begin with the overall purpose of those statutes as expressed by the Supreme Court in *Dagg*:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:
>
> > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.
>
> See also: Canadian Bar Association, *Freedom of Information in Canada: A Model Bill* (1979), at p. 6.
>
> Access laws operate on the premise that politically relevant information should be distributed as widely as reasonably possible.[24]

18. In order to ensure government information is available to the public "as widely as reasonably possible", Information Commissioners and Courts alike read access legislation generously.

19. Giving a statute a broad and generous interpretation does not require that each and every provision of the statute be read broadly. Often it is necessary to read provisions of an act narrowly in order to ensure that the overall remedial purpose of the law is given full force.[25] Exemptions contained in access to information legislation is an example of this. In order to

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[24] *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 at paras. 61-62.
[25] *Divito v Canada (Public Safety and Emergency Preparedness)*, [2013] 3 SCR 157 at para. 75.

preserve a broad right of access, exemptions must be limited. This is particularly true for exemptions like s. 12(1), which are both mandatory, rather than discretionary, and which are not subject to the public interest override in s. 23. These provisions create a strict zero-sum game: the broader they are interpreted, the narrower the public's right of access to information.

20. Courts have historically sought to construe exemptions narrowly.[26] In interpreting *FIPPA*'s sister statute, the *Municipal Freedom of Information and Protection of Privacy Act*, this Court has relied on the requirement of broad, generous construction of statutes to grant a broad right of access, and a correspondingly narrow scope for exemptions.[27] The exact same principles inform the interpretation of the *FIPPA.*

21. The IPCs reasons reflect this accepted approach to interpreting statutes like *FIPPA*. In considering Cabinet Office's broad claims about the scope of the phrase "substance of deliberations" in s. 12(1), the IPC was rightly concerned that it failed to strike the right balance between public's right to know what the government is doing, and the governments more limited right to consider what it might to behind closed doors.[28] This led the IPC to prefer the tailored approach adopted by the Nova Scotia Court of Appeal in *O'Connor*,[29] which focused not on the kind or body of information, but rather on whether its disclosure would reveal the actual

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[26] *Lavigne v Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773 at para. 30; *Cash Converters Canada Inc. v Oshawa (City)* (2007), 86 OR (3d) 401 (CA) at para. 29; *Canada (Information Commissioner) v Canada (Minister of National Defence)*, [2011] 2 SCR 306 at para 83 (*per* Lebel J, concurring).

[27] *City of Toronto Economic Development Corporation v Information and Privacy Commissioner/Ontario* (2008), 292 DLR (4th) 706 (Ont CA) at paras. 27-30; *Toronto Police Services Board v Ontario (Information and Privacy Commissioner)* (2009), 93 OR (3d) 563 (CA) at para. 43.

[28] *Decision*, *supra* at para. 108, **AR, Tab 2, p. 40**.

[29] *O'Connor v Nova Scotia* (2001), 209 DLR (4th) 429 (NSCA).

substance of Cabinet deliberations themselves. In the IPC's view, O'Connor better reflected the balance that *FIPPA* strikes in favour of a generous right of access.[30]

22. Contrary to the submissions of the Appellant, the IPC did not adopt a "balancing test" in s. 12(1).[31] Throughout his reasons, the IPC was clear that the only test was whether there was evidence before him that demonstrated that disclosure of a record would reveal the substance of deliberations of Cabinet. The IPC's reference to 'balancing' was a reference to the balance that the Legislature had struct in enacting the *FIPPA*: the balance between the public's interest in a broad right of access and Cabinet's need for a zone of liberative privacy.[32]

23. In assessing the overall context in which s. 12(1) operated, the IPC also relied on the explicit purpose clause set out in s. 1 of the *FIPPA*,[33] which provides that that the purpose of the Act is to "provide a right of access to information under the control of institutions in accordance with the principles that… necessary exemptions from the right of access should be **limited and specific**".[34]

24. One of the hallmarks of a reasonable interpretation of a provision of a home statute is careful attention to how the provision fits into the broader statutory scheme.[35] Decision makers must provide interpretations of statutes that "conform to any interpretative constraints in the

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[30] *Decision*, *supra* at paras. 93-97, **JABC, Tab 4, pp. 52-54**.
[31] *Appellant's Factum*, paras. 86-97.
[32] *Decision*, *supra*, paras. 105-108, **JABC, Tab 4, pp. 56-57**.
[33] *Decision*, *supra*, para. 107, **JABC, Tab 4, pp. 56-57**.
[34] *FIPPA*, s. 1(a)(ii) [Emphasis added].
[35] *Wawanesa Mutual Insurance Company v Axa Insurance (Canada)* (2012), 112 OR (3d) 354 (CA) at para. 34 [*Wawanesa*].

governing statutory scheme".[36] This includes explicit purpose provisions like that contained in the *FIPPA*.[37] The IPC's reasons did exactly this.

B. THE IPC'S DECISION REFLECTS A PURPOSIVE INTERPRETATION THAT IS SENSITIVE TO THE HARMS THAT S. 12(1) IS MEANT TO AVOID

25. Each exemption in the *FIPPA* is designed to avoid a specific harm. A purposive interpretation of these exemptions should permit them to address those harms, but to go no further. It would be contrary to the objectives of the *FIPPA* to interpret an exemption as going beyond what is necessary in order to avoid the specific harm it targets. An interpretation that exempts more information than is necessary to accomplish its aim is not reasonable.[38]

26. The harm that s. 12(1) is designed to avoid was articulated in the Williams Commission Report, which identified three justifications for a Cabinet records exemption:

> First, the routine disclosure of Cabinet deliberative materials would bring and abrupt and, in our view, undesirable end to the tradition of collective ministerial responsibility. In Chapter 5 of this report, we expressed our conviction that the notion of collective ministerial responsibility retains a contemporary relevance. The requirement that each member of the Cabinet assume personal responsibility for government policy ensures that all members of the government of the day can be held accountable to the public, and encourages frank and vigorous exchanges of views in Cabinet discussions. The tradition of confidentiality of Cabinet discussions can also be supported on the basis that it permits public officials to provide the Cabinet with candid advice. Further, there is an evident public interest in ensuring that the decision-making processes of the Cabinet can be conducted as expeditiously as is possible.[39]

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[36] *Canada Post*, *supra* at para. 42.
[37] *Canada Post*, *supra* at para. 54.
[38] *Carleton University v Information and Privacy Commissioner of Ontario and John Doe*, 2018 ONSC 3696 (Div Ct) at paras. 28-29.
[39] Commission on Freedom of Information and Individual Privacy, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, Vol. II – Freedom of Information* (Toronto: Queen's Printer, 1980) at 284-285 [*Williams Report*].

27. Of these concerns, the most pressing was the need to ensure members of Cabinet could express their views freely to their Cabinet colleagues without subsequently being identified as disagreeing with the policy of the government:

> If Cabinet discussions were to become a matter of public record, individual ministers would be inhibited from expressing their frank opinions for fear of later being identified as dissidents. Moreover, if government policy were presented as a series of opposing views, the ability of members of the public and of the legislature to hold all ministers responsible for government policy would be diminished.[40]

28. It was reasonable for the IPC to be attentive to these particular harms when interpreting the phrase "substance of deliberations" in s. 12(1). It was reasonable to avoid giving the phrase an interpretation that would exempt records from disclosure when their disclosure would not reasonably lead to any of the above-noted harms.

29. The IPC had before him copies of the Letters, as well as examples of other mandate letters from previous Ontario governments and other jurisdictions, all of which had been released. He found as a fact that the requested Letters were "largely similar to their counterparts in their overall approach, level of detail and purpose."[41] While rightly noting that the fact that other governments had released mandate letters was not determinative of the question before him, the IPC did note that the fact that similar letters had been released without harming cabinet deliberations had some relevance.[42]

30. The IPC also considered the Letters themselves and noted that none of them contained any information about the views, opinions, thoughts or ideas of Cabinet members expressed

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[40] *Williams Report*, *supra* at 85.
[41] *Decision*, *supra* at para. 78, **JABC, Tab 4, pp. 49-50**.
[42] *Decision*, *supra* at para. 77, **JABC, Tab 4, p. 49**.

during the deliberative process, and that there was no evidence that their production give rise to any chilling effect on Cabinet deliberations themselves.[43]

31. The IPC's approach to the issue of harm was a proper exercise in purposive interpretation. The purpose of s. 12(1) is to ensure that members of Cabinet can speak freely, with candour and without fear that the views that they express *inside the cabinet room* will be made public. The fact that the release of documents substantially the same as the Letters had never given rise to this problem was relevant in assessing whether the Letters were the kinds of documents meant to be captured by s. 12(1). It was relevant to the question of whether, in fact, their release would "reveal the substance of deliberations" of Cabinet.

C. THE IPC REJECTED AN INTERPRETATION THAT WOULD RESULT IN ABSURD CONSEQUENCES

32. When courts interpret provisions of statutes in light of their text, context and purpose, they must consider whether a proposed interpretation produces a just and reasonable result.[44] The Supreme Court has noted that "[s]ince it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments, judicial interpretations should be adopted which avoid such results."[45] A reasonable interpretation of a statutory provision is one that avoids absurd or unjust results, such as results that are inconsistent with, or contrary to the overall purpose of the legislation being interpreted.

33. In this case, the IPC reasonably rejected the interpretation urged by Cabinet Office in part because, if accepted, it would produce results that undermine the purposes of access to information legislation.

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[43] *Decision*, *supra* at paras. 115, 123, **JABC, Tab 4, pp. 58, 60**.
[44] *Wawanesa*, *supra* at para. 34.
[45] *Ontario v Canada Pacific Ltd.*, [1995] 2 SCR 1031 at para. 65.

34. Cabinet Office's key organizing principle for their interpretation of s. 12(1) – the "continuum of deliberations" had a massive scope. It would capture not only records that would reveal the content of the Premier's own deliberative process in setting the priorities of his or her government,[46] but any record disclosing the very priorities or "topics" themselves.[47] This is because the priorities themselves initiate the continuum of Cabinet's deliberations,[48] and, on this theory, "topics" of deliberation are the "substance" of deliberations.[49]

35. It would capture records that are passed across the Cabinet table, whether or not they are discussed by Ministers.[50]

36. It would capture any record that disclosed a policy priority that had not yet even been discussed at any Cabinet meeting if information related to it would in the future have to be discussed in Cabinet for approval. This is true even if it is never in fact brought to Cabinet.[51] Nearly all government policy matters must be considered by a Cabinet committee and so would fall within the continuum of deliberations. This includes anything that would require legislation or regulations to implement (Legislation and Regulations Committee), anything requiring the expenditure of funds (Treasury Board) or anything involving the allocation of human resources within the public survive (Management Board).[52]

37. On this approach, s. 12(1) would sweep in vast swaths of government records, shielding them behind a mandatory exemption that is not subject to the *FIPPA*'s public interest override.

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[46] *CO Representations*, *supra*, para. 49, **JABC, Tab 7, p. 96**.
[47] *CO Reply*, *supra*, paras. 9-10, **JABC, Tab 9, pp. 108-109.**
[48] *CO Representations*, *supra*, para. 47, **JABC, Tab 7, p. 95-96.**
[49] *CO Reply*, *supra*, para. 13, **JABC, Tab 9, p. 110** *CO Sur-Reply*, *supra*, paras. 11-13, **JABC, Tab 10, pp. 118-119**.
[50] *CO Representations*, *supra*, paras. 45-47, **JABC, Tab 7, pp. 95-96**.
[51] *CO Representations*, *supra*, para. 50, **JABC, Tab 7, p. 97**; *CO Reply*, *supra*, para. 9, **JABC, Tab 9, p. 108**.
[52] *CO Representations*, *supra*, paras. 51-52, **JABC, Tab 7, p. 97**.

Nearly everything that the executive branch of government does relates to operational, legislative or financial matters. If it is enough that a record shows such a subject-matter to be a policy priority of government, it is not clear what limit s. 12(1) would be.

38. The Appellant's more refined argument on appeal, in which it submits the words "substance of deliberations" must capture all records contained in paragraphs (a)-(f) suffers from the same flaw. If the "substance of deliberations" of Cabinet must also include both the topics of deliberation and the outcomes of deliberation; and if every policy matter of any import must be deliberated upon by Cabinet; and if it is enough for a record to merely have information that relates to such a matter, then s. 12(1) is nearly limitless.

39. The IPC recognized the risk of such an over-broad approach and rejected it.[53] Rather than stretching the meaning of the phrase "substance of deliberation" to include all of the records listed in paragraphs (a)-(f), he viewed the paragraphs as adding additional categories of records that would not otherwise have been viewed as falling in the opening words of s. 12(1). In doing so, he directly explained why the approach now urged by the Appellant should not be adopted.[54]

40. On appeal, the Appellant has cited *Sullivan* to support the claim that illustrative lists sometimes expand the scope of opening words in a statute.[55] The IPC relied on jurisprudence from the Supreme Court to support the view that when a general term precedes an enumeration of specific examples, the purpose of the examples is to remove the ambiguity as to whether those specific examples should be captured.[56]

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[53] *Decision*, *supra* at para. 118, **JABC, Tab 4, p. 49**.
[54] *Decision*, *supra* at paras. 99-103, **JABC, Tab 4, pp. 54-55**.
[55] *Appellant's Factum*, para. 57.
[56] *Decision*, *supra*, paras. 102-103, **JABC, Tab 4, p. 55**, citing *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 SCR 1029 at 1040-1041.

41. Even if the Appellant's proposed interpretation was a reasonable one (the Interveners submit that it is not, for all of the reasons set out above) it was for the IPC to choose as between two plausible ways of reading how the opening words of s. 12(1) interacted with the paragraphs that followed from it.

42. In selecting the approach that did not dramatically expand s. 12(1) of the *FIPPA*, the IPC avoided a significant, even shocking reduction in the public's right of access to information. It was proper for the IPC to consider the need to avoid such a result when interpreting the *FIPPA*.

IV. ORDER REQUESTED

43. The Interveners ask that the Court dispose of this appeal in a manner consistent with these submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DONE at the City of Toronto, this 24th day of May, 2021.

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Schedule A – Authorities Cited

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12. *Wawanesa Mutual Insurance Company v Axa Insurance (Canada)* (2012), 112 OR (3d) 354 (CA)
13. *Carleton University v Information and Privacy Commissioner of Ontario and John Doe*, 2018 ONSC 3696 (Div Ct)
14. Commission on Freedom of Information and Individual Privacy, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, Vol. II – Freedom of Information*
15. *Ontario v Canada Pacific Ltd.*, [1995] 2 SCR 1031
16. *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 SCR 1029

Schedule B - Legislation

Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31

Purposes

1. The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Cabinet Records

12. (1) 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,

(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;

(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;

(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

(f) draft legislation or regulations.

Exemptions not to apply

23. An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Court File No. C69150

Attorney General of Ontario	and	**Information and Privacy Commissioner and the Canadian Broadcasting Corporation**
Applicant		Respondents

COURT OF APPEAL FOR ONTARIO

FACTUM OF THE INTERVENERS, THE CENTRE FOR FREE EXPRESSION, CANADIAN JOURNALISTS FOR FREE EXPRESSION, THE CANADIAN ASSOCIATION OF JOURNALISTS, ABORIGINAL PEOPLES TELEVISION NETWORK, and NEWS MEDIA CANADA

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