File No. 40078

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

BETWEEN:

**ATTORNEY GENERAL FOR ONTARIO**

Appellant

AND:

**INFORMATION AND PRIVACY COMMISSIONER and CANADIAN BROADCASTING CORPORATION**

Respondents

AND:

**ATTORNEY GENERAL OF BRITISH COLUMBIA**
**ATTORNEY GENERAL OF ALBERTA**
**CANADIAN CIVIL LIBERTIES ASSOCIATION**
**BC FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION**
**CENTRE FOR FREE EXPRESSION, CANADIAN JOURNALISTS FOR FREE EXPRESSION AND CANADIAN ASSOCIATION OF JOURNALISTS**
**ABORIGINAL PEOPLES TELEVISION NETWORK**

Interveners

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# FACTUM OF THE INTERVENER ATTORNEY GENERAL OF BRITISH COLOMBIA

**(Pursuant to Rules 42 of the *Rules of the Supreme Court of Canada*)**

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## PART 1: STATEMENT OF FACTS

### A. Overview

1. This appeal addresses the scope of protection of executive council and its committees' ("Cabinet") information and documents. This issue arises in the context of mandate letters handed out at a Cabinet meeting and engages s. 12 of Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 c. F. 31 ("*FIPPA*").

2. Without taking a position on the specific issue of the mandate letters, the Attorney General of British Columbia (the "AGBC") says that statutory protections for Cabinet information and documents should be widely construed, as set out in the British Columbia Court of Appeal decision of *Aquasource Ltd. v. British Columbia (Information and Privacy Commission)* (1998), 58 B.C.L.R. (3d) 61 ("*Aquasource*").

3. The AGBC submits s. 12 of *FIPPA* must be read as widely protecting the confidence of Cabinet communications, and must extend to topics of discussion at Cabinet and committee meetings, because disclosure of such information would reveal the substance of Cabinet's deliberations.

4. The AGBC also submits that the evidentiary burden placed on a party seeking to rely on s. 12 of *FIPPA* to refuse access (or a similar provision in a related access to information statute) should require as little intrusion into Cabinet confidences as possible.

### B. Facts

5. The AGBC adopts the facts as set out in the appellant's factum.

## PART II – POINTS IN ISSUE

6. The AGBC's position is that statutory protection against production of Cabinet information and documents should be widely protected.

7. The AGBC also says that in order to invoke s. 12(1) of *FIPPA* a party seeking to withhold records should adduce evidence that establishes that disclosure of documents, alone or in combination with other available information, would allow accurate inferences to be drawn about the substance of Cabinet deliberations.[1]

## PART III – ARGUMENT

8. Access to information legislation provides the public with a mechanism to obtain government information and documents. However, as with all rights recognized in law, the right of access to information is subject to reasonable limits. All Canadian jurisdictions with access to information legislation balance access rights with the protection of other interests that would be adversely affected by otherwise unlimited disclosure of such information.

9. This appeal centres on a prohibition of access to information from Cabinet in Ontario. Section 12(1) of *FIPPA* provides that a head of a government institution "shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees" (the "Opening Words Exemption"). The section then sets out a non-exhaustive list of documents included in this protection. The Court is now called upon to determine the scope of information from Cabinet that qualifies for this exemption from a right to access.

10. In this appeal the documents at issue are mandate letters handed out at a Cabinet meeting. The Ontario government took the position that the mandate letters set out the priorities for the newly formed government, and their disclosure would reveal

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[1] *British Columbia (Transportation and Infrastructure) (Re)*, 2014 BCIPC 23 (CanLII), at para. 12

deliberations that took place at that Cabinet meeting as well as future meetings.[2] The mandate letters were not publicly disclosed or prepared for the public's consumption as a public relations document, and there is evidence that they were handed out at a Cabinet meeting and appeared on the Cabinet meeting agenda.[3]

11. Traditionally exempted as a class, Cabinet documents have been broadly defined as all documents relating to high level policy formulation including, Cabinet minutes, minutes of discussion between heads of departments, papers brought into existence for the purpose of preparing a Cabinet submission and high-level government memoranda.[4] In *Carey v. Ontario*, La Forest J. adopted Thorson J.A.'s broad characterization of the class sought to be protected in the court below as "documents prepared by government departments and agencies in formulating government policies, decisions made by Cabinet, and the like."[5] In *Conway v. Rimmer*, Lord Reid did not think it was possible to limit the types of documents subject to public interest immunity but thought it included "all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies."[6]

12. Under the common law, Cabinet confidences are protected from disclosure under the doctrine of public interest immunity.[7] So then, how does access to information legislation modify the common law, and what evidence is necessary when a public body must defend its decision to withhold information under s. 12(1)?

13. The AGBC submits routine disclosure of Cabinet documents should not be permitted, and the protections and scope of documents protected should be broadly

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[2] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2022 ONCA 74 at paras. 18-19
[3] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2022 ONCA 74 at para. 26
[4] *Conway v. Rimmer*, [1968] 1 All ER 874 at 888
[5] *Carey v. Ontario*, [1986] 2 S.C.R. 637, 35 D.L.R. (4th) 161 at para. 41
[6] *Conway v. Rimmer*, [1968] 1 All ER 874 at 888

construed in the same manner as British Columbia's similar section was interpreted in *Aquasource*.[8]

## A. Why Cabinet confidences should be protected

14. Cabinet confidentiality is essential to good government[9] and should extend to all documentation of Cabinet's process during its deliberations.[10] This ensures protection of the ministers' collective decision-making,[11] thereby supporting Cabinet unity. Just as the courts are entitled to deliberative secrecy, Cabinet is entitled to a measure of secrecy.[12]

15. The advice and recommendations provided to Cabinet can put a member in a challenging position. Premature disclosure of these types of documents can create ill-informed or captious public criticism.[13] Cabinet members who know that their work might one day be subject to intense public scrutiny will be more likely to self-censor their thoughts during a Cabinet meeting. Similarly, they may hesitate to request advice or recommendations in writing concerning a controversial matter. Cabinet members may hesitate to consider matters from all viewpoints if there is a risk that these considerations will be made public since they can be subject to criticism by persons without full knowledge of the background.[14]

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[7] *Carey v. Ontario*, [1986] 2 S.C.R. 637, 35 D.L.R. (4th) 161 at para. 75; see also *Gloucester Properties v. British Columbia* (1981), 32 B.C.L.R. 61 in the context of s. 9 of the *Crown Proceedings Act* at paras. 14 and 29

[8] *Aquasource*, at para, 48; see also *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at paras. 95-97

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

[10] Nicholas D'Ombrain, "Cabinet Secrecy" (Canadian Public Administration), Vol 47, No 3 (Fall 2004) at pp 335-336, 340 and 352, Crown Privilege (Ontario: Canada Law Book, 1990) at pp 47-50

[11] Nicolas D'Ombrain, "Cabinet Secrecy" (Canadian Public Administration), Vol 47, No 3 (Fall 2004) at pp 335-336

[12] *Babcock v. Canada*, 2002 SCC 57 at para. 18

[13] *Conway v. Rimmer*, [1968] 1 All ER 874 at 888

[14] *Conway v. Rimmer*, [1968] 1 All ER 874 at 888

16. Documents informing Ministers of their priorities while in office are useful. Requiring that advice, recommendations, or positions be disclosed without consent of the governing party risks introducing actual or perceived partisan considerations into the decision-making process[15] and may have a negative impact on good governance. The scope of the protection of these documents must be carefully considered by the Court.

**B. What should the scope of protection be?**

17. One of the issues the Court needs to resolve is how to interpret s. 12 of *FIPPA*, in the context of *O'Connor v. Nova Scotia*, 2001 NSCA 132 and *Aquasource* where different findings were made on the legal test needed to be met to withhold Cabinet information and records.

18. Much of the difference between the Nova Scotia *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993 c. 5 (the "*Nova Scotia Act*") and the British Columbia *Freedom of Information and Protection of Privacy Act*, R.S.B.C. c. 165 (the "*British Columbia Act*") relates to the specific wording of the exclusion section in context with the purpose statement in each Act. The purpose section of the *Nova Scotia Act* is different from the *British Columbia Act*, and there is a mandatory requirement to withhold Cabinet documents in s. 12 of the *British Columbia Act*, while s. 13 of the *Nova Scotia Act* only sets out a discretionary power to withhold Cabinet documents. As such, s. 12 of *FIPPA* is closer in wording to the *British Columbia Act* than the *Nova Scotia Act* since its purpose section does not require full accountability to the public and has a mandatory requirement to withhold Cabinet documents.

19. The AGBC submits that when considering s. 12 of *FIPPA* the test set out in *O'Connor v. Nova Scotia*, 2001 NSCA 132 of "accurate inferences about Cabinet

[15] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 45

deliberations"[16] should not be adopted as it is too narrow. This Court should be informed by the approach taken in British Columbia when considering s.12 of *FIPPA*. The AGBC submits that the British Columbia Court of Appeal has struck the right balance when considering s. 12 of the *British Columbia Act*.

20. As a starting point, the duty to disclose information under the *British Columbia Act* does not extend to Cabinet confidences. Section 12(1) of the *British Columbia Act* explicitly provides that advice, recommendations and policy considerations submitted, or prepared for submission, to Cabinet (or its committees) fall within the meaning of "substance of deliberations":

> 12(1) 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[17]. [emphasis added]

21. In addition to advice, recommendations and policy considerations, the "substance of deliberations" includes the body of information considered by Cabinet or its committees, or that would be considered, in the case of submissions not yet presented, in making a decision.[18]

22. The British Columbia Court of Appeal considered the interpretation of the "substance of deliberations" in s. 12 of the *British Columbia Act* in *Aquasource* finding:

> … Standing alone, "substance of deliberations" is capable of a range of meanings. However, the phrase becomes clearer when read together with "including any advice,

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[16] *O'Connor v. Nova Scotia*, 2001 NSCA 132 at para. 92
[17] *BC Act* s. 12(1)
[18] Aquasource, at paras. 39 and 48. See also section 12(1)(e) of *FIPPA*, where it is clear the proposed protections related to records to brief a Minister in relations to matters that are before or are proposed to be brought before the Executive Council.

> recommendations, policy considerations or draft legislation or regulations submitted …". 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. An exception to this is found in s. 12(2)(c) relating to background explanations or analysis which I will discuss later.[19]

23. Donald J.A. expanded on this point and found that both "substance" and "deliberations" should be given weight when determining the meaning of the section, and further decided that the class of things set out after the word "including" extends the meaning of the "substance of deliberations". If substance of deliberations extends only to what was discussed at the Cabinet table – as opposed to briefing documents containing advice or recommendations that would permit accurate inferences about such deliberations – then the protection offered under s. 12 would be illusory given that cabinet does not keep a record of what was discussed at the Cabinet table. Therefore, the provision should be read widely as protecting Cabinet confidences.[20]

24. After reviewing several authorities that support the conclusion that subsection 12(1) of the *British Columbia Act* must be read as extending the words "substance of deliberations" to all the items in the list that follow those words, Donald J.A found the test that emerges is "does the information sought to be disclosed form the basis for Cabinet deliberations?"[21]

25. Following the British Columbia Court of Appeal's decision in *Aquasource* as well as the reasoning in Order F09-26, *British Columbia (Ministry of Transportation and Infrastructure) (Re)*, 2009 BCIPCD No. 32, the AGBC submits that types of information listed after the word "including" in s. 12(1) would necessarily reveal the substance of deliberations of Cabinet or of its committees. Further, disclosure of

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[19] *Aquasource* at para. 39
[20] *Aquasource* at paras. 40-41
[21] *Aquasource* at para. 48

other information not specifically listed in s. 12(1) of the *British Columbia Act* would also reveal the substance of deliberations.

26. The British Columbia Court of Appeal in *Aquasource* confirmed the approach taken in various Orders of the British Columbia Information and Privacy Commissioner of BC ("OIPC") that the word "reveal"[22] includes allowing accurate inferences to be drawn. The British Columbia Court of Appeal in *Aquasource* quoted and agreed with the following statement by the OIPC's:

> The information contained in Cabinet submissions forms the basis for Cabinet deliberations and therefore **disclosure of the record would 'reveal' the substance of Cabinet deliberations, because it would permit the drawing of accurate inferences with respect to the deliberations.**[23]
>
> [emphasis added]

27. Therefore, if disclosing certain information pertaining to meetings of Cabinet or one of its committees would allow someone to draw an accurate inference about the substance of deliberations of Cabinet or the committee, that would invoke the protections afforded by s. 12 of the *British Columbia Act*.

28. The second step in the s. 12 analysis should be to decide whether any of the circumstances under s. 12(2) apply, in which case the information would not be withheld under section 12(1) of the *British Columbia Act*.

## C. How should governments be able to assert this privilege

29. The AGBC submits, without opining on the specifics of the mandate letters, that clarity regarding the types of evidence required to support withholding Cabinet documents should be included in the reasons for judgment.

30. Consistent with *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia* the AGBC asserts that the evidentiary requirement

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[22] As used in sections 12 and 13 of *FIPPA*.
[23] *Aquasource* at para. 48

should intrude as little as possible into Cabinet confidences, and care should be taken by courts to avoid inadvertently ordering disclosure of a document which should in fact be withheld on the basis its disclosure will allow accurate inferences to be drawn about Cabinet deliberations.[24]

31. The AGBC submits the types of evidence required should depend on the facts of each case. For example, at common law, this Court has held that the government should submit a detailed affidavit in support of an assertion of public interest immunity.[25] Senior adjudicators for the OIPC have considered this issue and held that at least some inferential evidence that a document will disclose the "substance of Cabinet deliberations" is usually necessary to prove that a document should be withheld under s. 12 of the *British Columbia Act.*[26] However in some circumstances documentary evidence alone should suffice (for example in the case of records that have been submitted directly to a Cabinet committee that reveal Cabinet's deliberations).[27]

32. The AGBC submits that inspection of withheld documents should not be routinely required. In some circumstances, it may be clear from the type and nature of the records themselves, or from the government's submissions, that s. 12 applies.[28] In such cases, inspection of the document should not be required, and in cases where

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[24] *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at para. 103

[25] *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at para. 102, citing *Carey v. Ontario*, [1986] 2 S.C.R. 637, at pp. 653 & 654

[26] Order 01-02; *British Columbia (Office of the Premier and Executive Council Operations)*, 2001 BCIPC 2 (CanLII) at para. 10. See also *Order F14-20; British Columbia (Transportation and Infrastructure)*, 2014 BCIPC 23 (CanLII) at para 12

[27] *Order F14-20; British Columbia (Transportation and Infrastructure)*, 2014 BCIPC 23 (CanLII) at para. 15

[28] *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at para. 103, citing *Carey v. Ontario*, [1986] 2 S.C.R. 637, at pp. 671 and 681 para 108. See also: Order 01-02; *British Columbia (Office of the Premier and Executive Council Operations)*, 2001 BCIPC 2 (CanLII) at paras. 24-25

inspection of a withheld document is necessary, the inspection should be done *in camera.*[29]

33. The AGBC submits that where affidavit evidence is required, and where such evidence would need to include Cabinet confidences, the affidavit should be received and reviewed *in camera.*

**D. Conclusion**

34. Regardless of the specific outcome on the mandate letters, the Court's decision should be informed by the importance of Cabinet documents and the balance that should be struck between access rights and the harm to the public interest that could result from overly broad disclosure of information. The AGBC also submits that the Court should provide guidance with respect to the manner in which governments are required to prove public interest immunity.

## PART IV – SUBMISSIONS AS TO COSTS

35. The AGBC does not seek costs and asks that no costs be sought against him.

## PART V – ORDER SOUGHT

36. The AGBC makes no submissions on the specific outcome of this case.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 23 day of November, 2022.

Tara Callan, Tamara Saunders, and Layli Antinuk, Counsel for the Intervener, the Attorney General of British Columbia

[29] *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at paragraph 103

## PART VI: TABLE OF AUTHORITIES

| Tab | Authorities | Paragraph reference |
|---|---|---|
| 1. | *Aquasource Ltd. v. British Columbia (Information and Privacy Commission)* (1998), 58 B.C.L.R. (3d) 61 | 2, 13, 17, 21, 22, 23, 24, 25, 26 |
| 2. | *Babcock v. Canada (Attorney General)*, 2002 SCC 57 | 14 |
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| 5. | *Carey v. Ontario*, [1986] 2 S.C.R. 637, 35 D.L.R. (4th) 161 | 5, 12, 31, 32 |
| 6. | *Conway v. Rimmer*, [1942] A.C. 624 at 952; [1968] 1 All ER 874 | 11, 15 |
| 7. | *Gloucester Properties v. British Columbia* (1981), 32 B.C.L.R. 61 | 12 |
| 8. | *John Doe v. Ontario (Finance),* 2014 SCC 36 | 16 |
| 9. | *O'Connor v. Nova Scotia,* 2001 NSCA 132 | 17, 19 |
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| | **Other Sources / Text** | |

## PART VII: LEGISLATION