SCC 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

Appellant

- and -

CANADIAN BROADCASTING CORPORATION and INFORMATION AND PRIVACY COMMISSIONER

Respondents

- and -

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Interveners

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

(Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. The Nature of and Interveners' Interest in this Appeal

1. This appeal arises from the decision of the Information and Privacy Commissioner ("IPC"), based on the record before him, that the mandate letters sent by Premier Doug Ford to Ontario Cabinet ministers did not fall within the exemption set out in s 12(1) of the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*") and were therefore subject to disclosure. While the question at issue is a narrow one – namely, was the IPC's decision reasonable – its determination has potentially wide-ranging consequences. The interpretation and application of s 12(1) of *FIPPA* have profound implications for the ability of the press to report on matters of public concern, for the right of the public to know about government policies and priorities, and for its capacity to participate in the democratic process in an informed and meaningful way.

2. The Centre for Free Expression, Canadian Journalists for Free Expression, the Canadian Association of Journalists, and Aboriginal Peoples Television Network (collectively, the "Coalition") are civil society and media organizations who rely on access to information statutes to uphold the public's right to know, foster discourse and debate about matters of public concern, and promote government accountability. Whether this Court upholds as reasonable the IPC's precedentially grounded, principled, and purposive approach to s 12(1) or instead adopts the sweeping approach Ontario advocates, will significantly shape how – and indeed the degree to which – the members of the Coalition are able to carry out their mandate.

B. Ontario's Position on the Interpretation and Application of s 12(1)

3. The Coalition take no position with respect to any disputed questions of fact. It accepts and adopts the facts set out in the respondents' factums, and relies in particular on the following.

4. The IPC found and Ontario does not dispute that the mandate letters, which were separately provided to each Minister, contain "directives" and "guidance" and were comparable to "job descriptions".[1] They do not reveal any "actual proposals or plans for implementation, any "views,

[1] Order PO-3973 at para 79, Appeal Record of the Appellant ("AR"), Part I, Vol I, Tab 1, p 23 ("IPC Decision").

opinions, thoughts, ideas and concerns expressed by Cabinet members in the course of the deliberative process", or the substance of the Premier's own deliberations.[2]

5. In its submissions to the IPC, Cabinet Office took the position that the mandate letters were nevertheless exempt from disclosure under s 12(1) for three reasons:

i. The mandate letters were placed on the agenda of an early Cabinet meeting, and while not every element of each letter may have been discussed at that meeting, it was "reasonable to expect" that key messages "would have" been the subject of discussion[3];

ii. The mandate letters would reveal the substance of the Premier's deliberations in arriving at policy priorities, which could not be separated from the deliberations of Cabinet as a whole given the Premier's constitutional role[4]; and

iii. The mandate letters would permit the drawing of accurate inferences with respect to current and future Cabinet deliberations because many of the identified policy priorities would require further decision making by Cabinet before they could be implemented, and the mandate letters would therefore reveal the "topics" to be deliberated in later meetings.[5]

6. With respect to the third of those reasons, Cabinet Office submitted that the exemption applied "to the extent that information related to the mandate letters" would be presented to Cabinet in the future,[6] but also that it would not be appropriate to parse out any individual policy priority identified in the mandate letters as not requiring further Cabinet decision making.[7]

7. Cabinet Office's position was that the "substance of deliberations" within s 12 includes all matters falling within a "continuum" of Cabinet's deliberative process – a continuum that begins with the Premier deliberating on what the priorities of government will be, and ends only when a matter is actually implemented or made public, for example through the tabling of legislation. Along the way, it encompasses not only the actual content of Cabinet discussions on the topics identified by the Premier as priorities but also the topics themselves. It also applies to matters that

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[2] IPC Decision at paras 119, 115, 134.
[3] *Representations of Cabinet Office* (13 December 2018) at para 45, AR Part III, Vol III, Tab 28(9), p 98 ("*CO Representations*").
[4] *CO Representations* at paras 48-49, AR Part III, Vol III, Tab 28(9), p 99.
[5] *CO Representations* at para 50, AR Part III, Vol III, Tab 28(9), p 100.
[6] *CO Representations* at para 51, AR Part III, Vol III, Tab 28(9), p 100.
[7] *CO Representations* at para 53, AR Part III, Vol III, Tab 28(9), pp 100-101.

have not been the subject of Cabinet discussions so long as they relate to the Premier's priorities, and regardless of whether they would have to return to Cabinet prior to implementation.

PART II – QUESTIONS IN ISSUE

8. The Coalition intervenes to address the interpretation and application of s 12(1) of *FIPPA*, and in particular the mandatory exemption from the general right of access to records the disclosure of which "would reveal the substance of deliberations" of Cabinet or its committees. The Coalition submits that the sweeping approach to this provision urged by Ontario (a) is inconsistent with the text, context and purpose both of the *FIPPA* as a whole and of the s 12(1) exemption; and (b) would lead to absurd results.

PART III – STATEMENT OF ARGUMENT

9. In conducting reasonableness review, the court must consider the decision maker's reasons in light of the history and context of the proceedings in which they were rendered, including the evidence and the submissions of the parties.[8] Before this Court, as before the courts below, Ontario has advanced several arguments that the respondents submit were not made before the IPC, and are in some respects inconsistent with those that were. But even if these arguments are properly before this Court in reviewing the reasonableness of the IPC's decision, they do not substitute for or supplant the arguments made to the IPC.

10. Ontario's position has been and remains that a record that reveals the Premier's identification of a policy priority forms part of the continuum of Cabinet's deliberative process and is therefore exempt from disclosure under s 12(1).

11. That position is contrary to established principles of statutory interpretation and inconsistent with the context and purpose of both the *FIPPA* as a whole and the exemption specifically. Further, if accepted it would result in a profound reduction in the public's right of access to information about issues of public concern, and in turn their ability to hold government to account and to participate meaningfully in the democratic process. Ontario's position regarding the interpretation of s 12(1) is not merely broad and expansive; it is so capacious and unbounded

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[8] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 94, 106, 127-128.

that it would embrace records that have only an assumed, tangential, speculative, and contingent connection to Cabinet deliberations, rendering vast swaths of government information subject to mandatory exemption.

A. Ontario's Approach is Inconsistent with the Context and Purpose of the *FIPPA* and s 12(1)

12. The general rule of statutory interpretation is that every Act "shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects".[9]

13. As expressed by this Court in *Dagg*, the overarching purpose of access to information legislation is "to facilitate democracy", which it does 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.[10]

14. In order to give effect to this purpose and ensure that relevant information is available to the public "as widely as reasonably possible", Information Commissioners and Courts alike read access legislation generously.[11]

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[9] *Legislation Act*, SO 2006, c 21, Sch F, s 64(1).
[10] *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 at paras 61-62.
[11] See *eg* *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.

15. A generous interpretation does not require that each and every provision of a statute be read broadly. To the contrary, it is often necessary to read provisions of an act narrowly in order to give full and meaningful effect to the law's overarching remedial purpose.[12] Exemptions contained in access to information legislation are one example of where this need arises. In order to preserve a broad right of access, exemptions must be strictly construed.

16. This requirement is codified in s 1 of *FIPPA*, which explicitly provides 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 information should be available to the public and that "necessary exemptions from the right of access should be **limited and specific**".[13] It is also reflected in judicial decisions, which have generally interpreted exemptions to the right of access narrowly.[14]

17. A constrained and restrictive approach is especially important in relation to exemptions like s 12(1), which are mandatory rather than discretionary, and which are not subject to the public interest override in s 23.[15] These provisions create a strict zero-sum game: the broader the effect they are given, the narrower the public's right of access to information.

18. A purposive interpretation of the meaning and scope of an exemption must reflect not only the rationale underlying the general right of access but also the rationale underlying limitations on that right. As this Court has observed, the purpose of exempting certain information from disclosure is similarly to facilitate democracy:

> Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.[16]

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[12] *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 75.
[13] *FIPPA*, s 1(a)(ii) [Emphasis added].
[14] *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para 30; *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at para 83 (*per* Lebel J, concurring); *Cash Converters Canada Inc. v Oshawa (City)* (2007), 86 OR (3d) 401 (CA) at para 29.
[15] See *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3 at para 106, holding that the fact that an exemption under the federal *Access to Information Act* was not subject to the corresponding public interest override reinforced the conclusion that it was intended to have a "narrower ambit" than an exemption that was subject to the override.
[16] *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 1.

19. Section 12(1) of *FIPPA* is intended to prevent a specific harm to government accountability and robust democratic process. The harm that s 12(1) was designed to avoid was articulated in the Williams Commission Report, which identified three justifications for a Cabinet records exemption from the general right of access:

> First, the routine disclosure of Cabinet deliberative materials would bring an 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.[17]

20. Of these concerns, the most pressing was the need to ensure members of Cabinet could express their views freely to their Cabinet colleagues without concern that their disagreement with the policy of government would subsequently be revealed:

> 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.[18]

21. The purpose of s 12(1) is to ensure that members of Cabinet can speak freely, with candour, without concern about external influence, and without fear that the views that they express *inside the cabinet room* will be made public. It is not intended to shield from public view all policy matters that are or might somehow be connected to a Cabinet meeting: the focus is on the protection of the confidentiality of Cabinet deliberations. The appropriate protection of the substance of such Cabinet deliberations requires that the material upon which Cabinet deliberates also be subject to exemption; this in turn requires that material that is demonstrably connected to

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[17] 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*].

[18] *Williams Report*, *supra* at 85.

future Cabinet deliberations receive protection. However, the breadth of the interpretation given to s 12(1) must be calibrated by the provision's purpose, and the phrase "substance of deliberations" must be construed to give effect to that objective.

22. A purposive interpretation of the exemption is one that permits it to address the harms at which it is aimed, but go no further. It would be contrary to the objectives of the *FIPPA* to interpret s 12(1), or any other exemption, as encompassing more than is required to avoid the specific harm it targets. An interpretation that exempts more information than is necessary to accomplish its aim is not reasonable,[19] nor does it reflect the balance struck by the legislature between the public's interest in a broad right of access and Cabinet's need for a zone of deliberative privacy.

23. Yet that is precisely what Ontario advocates. The approach it submits should be adopted would exempt records from disclosure even where their disclosure would not reasonably result in any of the harms s 12(1) is aimed at preventing. This would profoundly skew the balance s 12(1) is intended to achieve, effectively ousting the right of access that lies at the heart of *FIPPA* in favour of confidentiality for its own sake.

24. Ontario bears the burden of establishing that the s 12(1) exemption should apply, but has not adduced any evidence to suggest that disclosure of the mandate letters would have a chilling effect on the full and frank exchange of views in Cabinet discussions. Instead, it simply asserts that disclosure would compromise Cabinet's ability to function effectively. That bare assertion is not merely unsupported but in fact undermined by the available evidence, which amply demonstrates that disclosure is entirely compatible with the purposive protection of the substance of Cabinet deliberations.

25. The requested letters were reviewed by the IPC, who found as a fact that they were largely similar to mandate letters from previous Ontario governments and from other jurisdictions "in their overall approach, level of detail and purpose."[20] Notably, the disclosure of mandate letters is required both federally and in Manitoba, and has been voluntarily undertaken in other jurisdictions – including historically in Ontario – without any evidence of harm to Cabinet's deliberative

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[19] *Carleton University v Information and Privacy Commissioner of Ontario and John Doe*, 2018 ONSC 3696 (Div Ct) at paras 28-29.
[20] IPC Decision at para 78.

process. While not dispositive, this is nonetheless relevant to the purposive interpretation of the exemption contained in s 12(1), and the question whether in fact the disclosure of the mandate letters would reveal the "substance of deliberations" of Cabinet.

B. Ontario's Approach Would Result in Absurd Consequences

26. A purposive approach to statutory interpretation requires that courts consider whether a proposed interpretation produces a just and reasonable result.[21] As this Court has noted, "[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."[22] A result that is inconsistent with or contrary to the purpose of the legislation is unreasonable and unjust.

27. The approach urged by Ontario would, if accepted, profoundly undermine the purpose of access to information legislation and produce absurd results. It would exempt from disclosure not only the mandate letters directly at issue, but also *any* record that revealed that a particular topic had been identified by the Premier as a policy priority.

28. Further, on Ontario's theory, the exemption would be triggered not on the basis of an established linkage between the record sought and the substance of Cabinet deliberations, but simply where it is "reasonable to expect" that some portion of the record "would have been" discussed by Cabinet – or where it could be anticipated that some topic identified in the record *might* be discussed by Cabinet in future *if* the priority were sought to be implemented. The exemption would therefore apply to records that are passed across the Cabinet table, regardless of whether they are in fact the subject of any discussion.[23]

29. As set out above, Ontario's position is that s 12(1) applies to all matters falling along a "continuum of deliberations". As framed by Ontario, this continuum is massive in scope. It would capture not only records that would reveal the content of the Premier's own deliberative process in setting government priorities,[24] but any record disclosing the very priorities or "topics"

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[21] *Wawanesa Mutual Insurance Company v Axa Insurance (Canada)* (2012), 112 OR (3d) 354 (CA) at para 34.
[22] *Ontario v Canada Pacific Ltd.*, [1995] 2 SCR 1031 at para 65.
[23] *CO Representations* at paras 45-47, AR Part III, Vol III, Tab 28(9), pp 98-99.
[24] *CO Representations* at paras 49, AR Part III, Vol III, Tab 28(9), p 99.

themselves, even when the disclosure of such topics reveals nothing about the Premier's deliberations.[25] This is because, in Ontario's submission, the priorities themselves initiate the continuum of Cabinet's deliberations,[26] such that the "topics" of deliberation are necessarily and in all cases indistinguishable from the "substance" of deliberations.[27]

30. Ontario's approach would capture any record disclosing a policy priority that had not yet been discussed at any Cabinet meeting if "information related" to that priority would in the future have to be discussed in Cabinet for approval. Nearly all government policy matters must, in the course of implementation, be considered by a Cabinet committee, and so records relating to nearly all spheres of government policy 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 service (Management Board).[28]

31. Further, in Ontario's submission, the fact that implementation of a policy priority would require Cabinet discussion is sufficient to bring records identifying that policy within the continuum of deliberations even if it is *never* in fact brought to Cabinet.[29] Indeed, Ontario's position is that even priorities that would *not* require further Cabinet decision making cannot appropriately be parsed out from the continuum of deliberations.[30] In other words, the substance of deliberations includes both any priority that would have to be the subject of Cabinet discussions – even if those discussions do not in fact occur – and any priority that would not have to be the subject of Cabinet discussions.

32. 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. Nearly everything that the executive branch of government does relates to operational, legislative

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[25] *Reply Representations of Cabinet Office* (14 February 2019) at paras 9-10, AR Part III, Vol III, Tab 28(15), pp 227-228 ("*CO Reply*")
[26] *CO Representations* at para 47, AR Part III, Vol III, Tab 28(9), pp 98-99.
[27] *CO Reply* at para 13, AR Part III, Vol III, Tab 28(15), p 229.
[28] *CO Representations* at paras 51-52, AR Part III, Vol III, Tab 28(9), p 100.
[29] *CO Representations* at para 50, AR Part III, Vol III, Tab 28(9), p 100.
[30] *CO Representations* at para 53, AR Part III, Vol III, Tab 28(9), pp 100-101.

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 the limits of s 12(1) would be.

33. Ontario's more refined argument on appeal, in which it submits that all of the records described in paragraphs (a) to (f) are illustrative of the "substance of deliberations", suffers from the same flaw. If the "substance of deliberations" of Cabinet must include both the topics of deliberation and the outcomes of deliberation; and if nearly every policy matter must be deliberated by Cabinet; and if it is enough for a record merely to have content that relates to or identifies such a matter, then s 12(1) is nearly limitless.

34. The approach Ontario advocates would dramatically expand the scope of s 12(1) to encompass records the disclosure of which poses no risk of harm to the full and frank exchange of views among Cabinet members, and does not intrude on the zone of deliberative privacy required for Cabinet to function effectively. Such an interpretation would be inconsistent with the objective of the exemption, and entirely contrary to the animating purpose of *FIPPA* more broadly. It would result in a significant, even shocking reduction in the public's right of access to information, and profoundly impair the public's ability to participate in the decision-making process and hold government to account. And it would undermine, rather than facilitate, democracy and good governance. Such an approach should not be adopted unless compelled by clear statutory language.

PARTS IV & V – COSTS AND ORDER REQUESTED

35. The Coalition does not seek costs and asks that none be awarded against it.

36. It takes no position on the outcome of this appeal but respectfully requests that it be determined in accordance with the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of November, 2022

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PART V – LIST OF AUTHORITIES

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