Court File No. 40078

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

BETWEEN:

ATTORNEY GENERAL FOR ONTARIO

Appellant
(Appellant)

-and-

CANADIAN BROADCASTING CORPORATION and
INFORMATION AND PRIVACY COMMISSIONER

Respondent
(Respondent)

AND:

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

Interveners

FACTUM OF THE INTERVENER, BC FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION

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

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PARTS I & II – OVERVIEW and FIPA'S POSITION ON THE QUESTIONS AT ISSUE

1. This appeal concerns the proper interpretation of the Cabinet records exemption in Ontario's *Freedom of Information and Protection of Privacy Act*[1] ("**Ontario *Act***") and the evidentiary burden on the Attorney General of Ontario to establish that the exemption applies to the records at issue.

2. While taking no position on the overall question of whether Order PO-3973 of the Information and Privacy Commissioner ("**IPC**") was reasonable, the BC Freedom of Information and Privacy Association ("**FIPA**") seeks to contribute to the discussion of the questions at issue in two ways:

(a) by observing that a distinct and sufficient evidentiary record supports the appearance of fairness and impartiality in the access to information appeal process; and

(b) by highlighting how the British Columbia Court of Appeal's decision in *Aquasource*[2] and the Nova Scotia Court of Appeal's decision in *O'Connor*[3] both cite with approval a February 1995 decision of then BC Information and Privacy Commissioner David Flaherty in Order 33-1995,[4] but interpret it differently.

PART III – STATEMENT OF ARGUMENT

A. A sufficient evidentiary record is important to the appearance of fairness in the access to information process

3. Requiring public bodies to introduce sufficient evidence about how records in question were, or are, used by the public body is important, not just for the commissioners conducting an

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[1] RSO 1990, c. F.31 at s.12(1)

[2] *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)* (1998), 58 B.C.L.R. (3d) 61 (B.C.C.A) ("***Aquasource***")

[3] *O'Connor v. Nova Scotia*, 2001 NSCA 132 ("***O'Connor***")

[4] BC IPC Order 33-1995, February 2, 1995, (Inquiry re: A Request for Access to Records about the Premier's Council on Native Affairs)

inquiry or courts considering those records on review, but to the appearance of fairness and impartiality in the access to information process itself.

4. Where Cabinet records are at issue, the responding public body has the burden of proving that the exemption applies to the records that are responsive to the request.[5] This flows from the fact that the requestor does not know the contents of the withheld records.

5. Evidence to meet that burden of proof can take different forms, as is the norm in administrative proceedings. As was the case here, the public body can rely on the contents of the withheld documents and inferences that can reasonably be drawn from them. Affidavits often supplement the evidentiary record, whereby a Cabinet administrator or some knowledgeable official speaks to the use or intended use of records that have been withheld. In some cases, oral testimony is received in an inquiry. Evidence can also be tendered in unsworn or hearsay form, subject to the IPC's discretion to admit such evidence into the evidentiary record.

6. Regardless of the particular form that it takes, the public body's burden of proof must be satisfied with evidence so that there is a discrete, objective, verifiable record from which the IPC can make findings of fact. For the requestor, those findings of fact, expressed in a way that does not reveal the contents of the records at issue, are foundational to any appeal or review that may follow.

7. The importance of the IPC constructing the analysis on a satisfactory evidentiary foundation and not simply on submissions of counsel is twofold. First, in a process wherein one of the parties is excluded from seeing the contents of the records at issue, an IPC relying on submissions from lawyers instead of objective evidence can make the process appear to turn upon a private discussion between the IPC and lawyers for the government. Distinguishing between submissions and evidence, and requiring the burden of proof to be met with sufficient evidence, helps to maintain the structure of the quasi-adversarial process, and in turn supports the role of the IPC as an independent adjudicator. It buttresses the appearance of a fair and impartial process.

[5] E.g. s. 53 of the Ontario *Act*

8. Second, conflating evidence and submissions makes the process of judicial review and subsequent appeals vulnerable to changing arguments and positions. On review, the record of the proceedings before the IPC is placed before the court. Subject to the court's willingness to permit new arguments, submissions may evolve, but absent unusual circumstances, the evidentiary record should not.

9. Examples of past decisions where the importance of a sound evidentiary record has been emphasized in relation to Cabinet exemption provisions include:

(a) BC IPC Order 02-38, in which Commissioner Loukidelis wrote, "[a]ffidavit evidence to expressly and directly establish that Cabinet meetings or Cabinet committee meetings were in fact held – and that disputed information is protected under s. 12(1) – should, however, be the norm in such cases."[6]

(b) Ontario IPC Order PO-2320, in which Adjudicator Tom Mitchinson wrote that, "in order to meet the requirements of the introductory wording of section 12(1) the Ministry must provide evidence and argument sufficient to establish a linkage between the content of [the record] and the actual substance of Cabinet deliberations".[7]

(c) Ontario IPC Order PO-2943, in which Adjudicator Steven Faughnan wrote that, "the Ministry's submission that the records would have presumably been discussed with the Minister and his Cabinet colleagues is too vague and simply fails to meet the evidentiary standard of proof required to establish the application of section 12(1)(d) …".[8]

10. In the case at bar, the IPC, the Divisional Court and the Court of Appeal all emphasized the insufficiency of the evidentiary record in support of withholding the mandate letters. FIPA urges this court not to overlook the significance of those findings, not just to the requestor in this case, but to the access to information process itself. Requiring the public body to meet its onus of proof

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[6] BC IPC Order 02-38, July 26, 2002 (Office of the Premier & Executive Council Operations and Ministry of Skills Development) at para. 77

[7] Ontario IPC Order PO-2320, September 13, 2003 (Ministry of Finance)

[8] Ontario IPC Order PO-2943, January 18, 2011 (Ministry of Finance)

with sufficient admissible evidence strengthens the integrity of the access to information process for all Canadians by enhancing the appearance of a fair and impartial adjudication.

B. *Aquasource* and *O'Connor*'s common roots in BC Order 33-1995

11. FIPA recognizes that this court may find *Aquasource* and *O'Connor* to be of limited assistance in view of the differences in text as between s. 12(1) of the Ontario *Act* and the equivalent sections of the legislation in British Columbia[9] and Nova Scotia[10]. However, if the court chooses to look to *Aquasource* and *O'Connor* for guidance, it is useful to observe how they draw support from a common authority but interpret it differently.

12. In *Aquasource*, the requestor was a company that had hoped to sell British Columbia water to Californians. On March 18, 1991, the provincial Cabinet passed an Order in Council effectively preventing the bulk export of water, stymying the requestor's business plans. The requestor sought copies of all information in the provincial government's possession that presented background explanations or analysis for Cabinet's decision to pass the Order in Council. On January 20, 1994, as part of its response to the request, the responding ministry severed sections of a water policy document that had been submitted to Cabinet, and those severed passages were the subject of appeal.

13. In Order No. 48-1995, then Commissioner David Flaherty largely upheld the severing of the records and in doing so addressed the proper interpretation of s. 12(1) of the BC *Act*.[11] He held that the fact a record had been submitted to Cabinet did not necessarily mean that its contents had formed the "substance" of deliberations. He wrote, at page 10:

> I do not automatically assume that Cabinet Submissions in all cases reflect the "substance of Cabinet deliberations" without some at least inferential evidence. I agree that disclosure of a record would "reveal" the substance of deliberations if it would permit the drawing of accurate inferences with respect to the substance of

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[9] s.12(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("**BC *Act***")

[10] s.13(1) of the *Freedom of Information and Protection of Privacy Act*, Stats. N.S. 1993, c. 5 as amended by Stats. N.S. 1999, c. 11 ("**Nova Scotia *Act***")

[11] BC IPC Order No. 48-1995, July 7, 1995 (Ministry of Employment and Investment and the Office of the Premier)

> those deliberations (see Ontario Order P-226, a decision of T.A. Wright, then Assistant Commissioner, March 26, 1991).”
>
> …
>
> The four specific categories of records in section 12(1) are excepted from disclosure only to the extent that they actually reveal the substance of deliberations of the Cabinet. The first sentence in section 12(1) determines the scope of information covered by section 12(1): "information that would reveal the substance of deliberations of the Executive Council or any of its committees." The four categories of records listed later in section 12(1) normally fall within the boundaries set by the opening words of section 12(1). These categories do not expand the coverage of section 12(1), but provide some examples of what falls within the "substance of deliberations."
>
> Public bodies cannot automatically presume that section 12(1) prohibits the disclosure of all information described as "advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees." Public bodies must review each of these records on their own merits to determine if disclosure, or partial disclosure, would reveal the substance of deliberations. Simple labeling may not settle the actual contents of these categories.

14. On judicial review[12] the sufficiency of evidence was a central point of contention for the requestor, which argued that the IPC had not been presented with an evidentiary record that could support an inference that the severed portions of the Cabinet submission would reveal the substance of Cabinet’s deliberations. The reviewing judge disagreed and upheld the IPC’s decision as reasonable. The British Columbia Court of Appeal dismissed the appeal but broadened the interpretation of section 12(1) of the BC *Act* from the IPC’s interpretation. This is further discussed below, in comparison to *O’Connor*.

15. In *O’Connor*, the requestor sought disclosure of the results of a Program Analysis and Options Exercise (“**PAO**”), pursuant to which a new provincial government had embarked on an internal review of all government programs, their cost, relevance, and possible alternatives. The component of the request that made its way to the Nova Scotia Court of Appeal concerned the “results phase” of the PAO, which was to rank and measure the programs under review. Initially it was thought the data from the results phase would contain only background information, but during

[12] *Aquasource v. British Columbia (Information and Privacy Commissioner)* (1996) 45 Admin LR (2d) 214 (B.C.S.C.)

the review the evidence showed that it also included analysis and advice, and the government asserted that much of it fell within the Cabinet deliberations exemption in s.13(1) of the Nova Scotia *Act*.

16. The Nova Scotia *Act* provides that the first stage of a challenge to the public body's refusal to disclose a requested record is a request for review by a Review Officer appointed under the Act.[13] Following a review process, the Review Officer issues a report with recommendations that the public body may accept or reject.[14] The requestor can appeal a rejection of the Review Officer's recommendations to the Nova Scotia Supreme Court, which may hear the appeal *de novo*, as was done in *O'Connor*.[15]

17. Associate Chief Justice MacDonald of the Nova Scotia Supreme Court heard Mr. O'Connor's appeal and largely upheld the government's decision to withhold the impugned records.[16] In doing so, he chose not to follow *Aquasource* for the interpretation of the phrase "substance of deliberations" in s.13(1) of the Nova Scotia *Act* (the wording of which is almost identical to British Columbia's s. 12(1)), and held that a narrower interpretation was warranted. The Nova Scotia Court of Appeal upheld MacDonald ACJ's interpretation of "substance of deliberations".

18. The difference in the Cabinet privilege exemption tests established in the Court of Appeal decisions in *Aquasource* and *O'Connor* is twofold. First, *Aquasource* frames the test for "substance of deliberations" as whether the information sought to be disclosed formed the basis for Cabinet deliberations[17], being the body of information which Cabinet considered in making a decision, or would consider in the case of submissions not yet presented.[18] In contrast, *O'Connor* frames the test as whether it is likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations.[19] In other words, just because the record

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[13] Nova Scotia *Act*, s. 32 and 34
[14] Nova Scotia *Act*, s.37 - s.40
[15] Nova Scotia *Act*, s.41 - s.42
[16] *O'Connor v. Nova Scotia (Priorities and Planning Secretariat)*, 2001 NSSC 6
[17] *Aquasource*, para 48, last sentence
[18] *Aquasource*, para 39
[19] *O'Connor*, para 92

was placed before Cabinet does not mean it is necessarily exempt from disclosure – it must still meet the accurate inferences test.

19. The second difference is that *Aquasource* held the reference to "advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission" in s.12(1) of the BC *Act* were "classes of things that extend the meaning" of "substance of deliberations".[20] Accordingly, records that could be said to fall into those classes would not have to be further examined as to whether they were considered by Cabinet or formed a basis for deliberations. *O'Connor*, by contrast, held that the reference to "advice, recommendations, policy considerations or draft legislation or regulations" in 13(1) of the Nova Scotia *Act* was simply added to provide specific examples of "information" that was nevertheless "subsumed by the accurate inferences test".[21] The result in *O'Connor* is that each record has to be examined as, "there is no shortcut to inspecting the information for what it really is and then conducting the required analysis".[22]

20. Both decisions cited BC IPC Order 33-1995 for the origin of the tests that they articulated but interpreted it differently.[23] Order 33-1995 was issued on February 2, 1995, by then Commissioner David Flaherty, and concerned a request for records relating to a government body called the Premier's Council on Native Affairs ("**PCNA**"). Cabinet privilege was asserted in relation to various records, including minutes from a meeting between a Cabinet committee and the PCNA, and a Cabinet submission relating to the establishing of the PCNA.

21. At paragraph 48 in *Aquasource*, the BC Court of Appeal quoted this paragraph from Order 33-95 in whole:

> The public bodies offered useful descriptions of each type of record at issue in this dispute. A "Cabinet submission" and a Treasury Board Chairman's report contain some information, now severed, that would necessarily be the object of Cabinet's deliberation with respect to "recommendations," "advice," and outlining a suggested course of action. The internal evidence of the language used, the public bodies argue, supports this argument. Furthermore, they argue,

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[20] *Aquasource*, para 41

[21] *O'Connor*, para 95

[22] *O'Connor*, para 94

[23] BC IPC Order 33-1995, February 2, 1995, (Inquiry re: A Request for Access to Records about the Premier's Council on Native Affairs)

> "a Cabinet submission, by its nature and content, comes within the ambit of s. 12(1)."
>
> > It is prepared for Cabinet and its committees. **The information contained in Cabinet submissions forms the basis for Cabinet deliberation 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.** (Argument for the Public Bodies, pp. 9- 10)
>
> I agree with this general characterization of Cabinet submissions and apply it specifically below.[24]
>
> [bolding added]

22. The BC Court of Appeal agreed this was "the right approach"[25], relying on Commissioner Flaherty's phrase, "forms the basis for Cabinet deliberation", which links to the BC Court of Appeal's finding that the exception applied to the "body of information"[26] considered by Cabinet.

23. The Nova Scotia Court of Appeal quoted only the bolded section of the passage quoted above and, relying on the language of "would permit the drawing of accurate inferences with respect to the deliberations", wrote that it "properly described" the approach to be taken and was the approach that the court "favoured"[27].

24. In BC IPC Order 33-1995, Commissioner Flaherty applied the above-quoted "general characterization"[28] to the records at issue. With respect to the requested minutes of the committee meeting, he held they should not be disclosed, "since they include the explicit minutes of a Cabinet Committee …, discussions of substantive matters intended for Cabinet, and a specific proposed recommendation to Cabinet".[29]

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[24] *Aquasource*, para 48
[25] *Aquasource*, para 48
[26] *Aquasource*, para 39
[27] *O'Connor*, para 92
[28] See the last line of the quoted passage in para 21, herein
[29] Order 33-1995 at page 7

25. With respect to the requested Cabinet submission, Cabinet privilege was not claimed in relation to the whole of the record, but rather to certain sections that had been severed by the public body. The Commissioner reviewed the severed sections and concluded:

> This is a seven-page document from 1989. The substantial severances fit the criteria outlined above by the public bodies. The materials include recommendations, advice, and policy options. Other severed material include proposals for specific members of the Council, proposed time frames, suggested locations for meetings, communications strategy, and communications expenditure.
>
> These records do not have to be disclosed, since they clearly fall within the ambit of section 12(1) of the Act.

26. Whether Commissioner Flaherty can be said, in Order 33-1995, to have employed one or the other of the tests later formulated in *Aquasource* and *O'Connor* is difficult to determine. On the one hand, he was clearly reviewing the Cabinet submission for its content, rather than excluding it simply for being part of the "body of information" placed before Cabinet (suggesting an *O'Connor* approach). On the other hand, the Commissioner did not specifically refer to whether the content of the submission allowed for the making of "accurate inferences" about Cabinet deliberations (perhaps indicating an *Aquasource* approach).

27. What we do know, however, is that five months later, Commissioner Flaherty issued his reasons in Order 48-1995 in relation to the Aquasource review.[30] In that decision, as quoted above at paragraph 13 of this factum, Commissioner Flaherty can be seen to be applying the test as it was later articulated in *O'Connor*: more narrowly construing the "substance" of Cabinet deliberations and inspecting each record to determine whether (on a balance of probabilities) it either disclosed deliberations, or allowed for "accurate inferences" to be drawn in relation to them. On that basis, consistent with the *O'Connor* test, Commissioner Flaherty did "not automatically assume that Cabinet submissions in all cases reflected the 'substance of Cabinet deliberations' without at least some inferential evidence".

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[30] In which FIPA was invited to serve as an intervener and advocated for a narrow interpretation of the "substance of deliberations" (see p.3, second para., and p.9, fourth para. of Order 48-1995).

28. Accordingly, to the extent that both *Aquasource* and *O'Connor* relied on Order 33-1995, reading that decision together with Order 48-1995, it strongly appears it was *O'Connor*'s interpretation that more accurately reflected Commissioner Flaherty's approach.

PARTS IV & V – COSTS and ORDERS

29. FIPA is a non-profit organization represented in this intervention by pro bono counsel. FIPA does not seek costs and respectfully asks that none be awarded against it.

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

Sean Hern, KC and Benjamin Isitt
Counsel for the Intervener, BC Freedom of Information and Privacy Association

PART VI – TABLE OF AUTHORITIES

Case Authority	**Paragraph(s)**
Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner) (1998), 58 B.C.L.R. (3d) 61 (B.C.C.A)	2, 11, 12, 14, 17, 18, 19, 22, 26, 28
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BC IPC Order 02-38, July 26, 2002 (Office of the Premier & Executive Council Operations and Ministry of Skills Development)	9(a)
O'Connor v. Nova Scotia, 2001 NSCA 132	2, 11, 15, 18, 19, 23, 26, 27, 28
O'Connor v. Nova Scotia (Priorities and Planning Secretariat), 2001 NSSC 6	17
Ontario IPC Order PO-2320, September 13, 2003 (Ministry of Finance)	9(b)
Ontario IPC Order PO-2943, January 18, 2011 (Ministry of Finance)	9(c)
Statutory Authority	
Freedom of Information and Protection of Privacy Act, RSO 1990, c. F.31, s.12(1) *Loi sur l'accès à l'information et la protection de la vie privée*, LRO 1990, c F.31, s. 12(1)	1, 4, 11
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Freedom of Information and Protection of Privacy Act, Stats. N.S. 1993, c. 5, s. 13(1), 32, 34, 37-40, 41-42	11, 16, 17