COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner), 2022 ONCA 74
DATE: 20220126
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Gillese, Lauwers and Sossin JJ.A.

BETWEEN

Attorney General for Ontario

Applicant (Appellant)

and

Information and Privacy Commissioner and Canadian Broadcasting Corporation

Respondents (Respondents)

Judie Im and Nadia Laeeque, for the appellant

Justin Safayeni and Spencer Bass, for the respondent Canadian Broadcasting Company

William S. Challis, for the respondent Information and Privacy Commissioner

Daniel Sheppard, for the interveners Centre for Free Expression, Canadian Journalists for Free Expression, The Canadian Association of Journalists, Aboriginal Peoples Television Network, and News Media Canada

Heard: August 31, 2021 by video conference

On appeal from the order of the Divisional Court of Justices Swinton, Penny and Kristjanson, dated August 27, 2020, with reasons reported at 2020 ONSC 5085, affirming the decision of the Information and Privacy Commissioner, dated on July 15, 2019, with reasons reported at PA18-390.

Sossin J.A.:

A. OVERVIEW

[1] At issue in this appeal is whether the public is entitled to access the mandate letters provided to Cabinet ministers by the Premier of Ontario following the formation of the new government after the 2018 provincial election.

[2] A journalist with the CBC requested access to the 23 letters sent by the newly elected Premier, Doug Ford, to Ontario's Cabinet ministers who, together with him, comprise the Executive Committee, commonly known as the Cabinet.

[3] Cabinet Office refused the CBC's request. The CBC appealed the refusal to the Information and Privacy Commissioner of Ontario (the "IPC"). Mediation did not resolve the issues and so the parties proceeded to the adjudication stage, where they engaged in a lengthy process of written submissions.

[4] The Cabinet Office opposed disclosure of the letters on the basis of the Cabinet privilege exemption under s. 12(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. By *Order PO–3973; Cabinet Office (Re)*, [2019] O.I.P.C. No. 155, the Commissioner, Brian Beamish, ordered the letters to be disclosed to the requester, the CBC.

[5] The Divisional Court dismissed the Attorney General for Ontario's application for judicial review of the IPC Order, who now appeals to this court.

[6] Aside from the AG Ontario and CBC, this court heard submissions from the IPC on issues relating to the standard of review, the IPC process and the principles governing the interpretation of the Act. This court also heard submissions by a coalition of media and free-expression organizations as interveners. They appeared to help illustrate how the IPC's approach protects cabinet deliberations and upholds the public right of access. The interveners Centre for Free Expression, Canadian Journalists for Free Expression, The Canadian Association of Journalists, and Aboriginal Peoples Television Network presented submissions before the Divisional Court and were granted leave to intervene before this Court, with the addition of News Media Canada.

[7] For the reasons that follow, I would dismiss the appeal.

(1) The Legislation

[8] Section 12(1) of the Act is particularly at issue in this appeal. It provides:

> 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:
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> a. an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
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> 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.

(2) The Procedural History

[9] Cabinet Office provided the IPC with a copy of the Cabinet agenda that indicated the Letters were distributed on July 11, 2018.

[10] In detailed reasons, the IPC determined that the Letters did not fall within the exclusion set out in s. 12(1) of the Act. With respect to the content of the Letters, the IPC found:

> [79] The mandate letters are directives from the Premier to each of his ministers. They contain general statements about the government's overall priorities and provide guidance to each minister as to each ministry's priorities and his or her own role.

[11] The IPC stated that the opening words of s. 12(1) required Cabinet Office to provide sufficient evidence to establish a link between Cabinet deliberations and

the content of the mandate letters, which are the records in issue. That is, if a record does not appear in the list from sub-paras. (a) to (f), s. 12(1) applies only if the record permits accurate inferences regarding actual Cabinet deliberations. It is not enough that the documents reveal the outcome of those deliberations; they must reveal its substance.

[12] The IPC found no evidence that the records were tabled at a Cabinet meeting or that their contents were the subject of Cabinet deliberations. Even the agenda provided by the Cabinet Office did not indicate that the Letters were tabled for discussion. The Letters did not assess the reasons for or against a particular course of action, nor did they outline the views, opinions, thoughts, or ideas of cabinet members. Consequently, the Cabinet Office failed to show that the Letters would reveal the substance of any Cabinet deliberations.

[13] The Divisional Court found the IPC's decision to be reasonable. It characterized the case as an application of well-settled principles to particular facts. In the court's view, the IPC used the absence of deliberation about the letters as evidence that s. 12(1) did not apply, not as a means to narrow the scope of the exclusion. Since the Letters did not disclose or invite any deliberation from Cabinet, the IPC's conclusion that they did not meet the exception in the opening words of s. 12(1) was reasonable. Further, the Divisional Court found that the IPC did not apply an unreasonably stringent test by requiring Cabinet Office to show that the

Letters would be placed before specific Cabinet meetings in the future. The IPC simply found that the Cabinet Office had not discharged its burden to prove a link between the Letters and the substance of future Cabinet deliberations.

B. DETAILED BACKGROUND

(1) The Media Request

[14] The CBC made an access request to Cabinet Office under the Act for a copy of each of the Letters sent by the premier to Cabinet Ministers for all of Ontario's 22 ministries, and two non-portfolio responsibilities.

(2) The Cabinet Office Response

[15] Cabinet Office denied the CBC access in full to the Letters, claiming the application of the mandatory exemption in s. 12(1) of the Act (Cabinet records).

[16] Cabinet Office described the Letters in the following terms:

> Mandate letters are customarily the first communication to ministers through which the Premier translates party values and policy priorities into a plan of action for the government. For this reason, mandate letters outline the key policy priorities of the Premier that each minister is responsible for leading. Policy priorities are assigned to each minister based on the operational and/or statutory mandate of their ministry.
>
> In addition, mandate letters can include advice, instructions and guidance to each minister in carrying out his or her ministerial duties and responsibilities. This guidance is often placed in the context of the values that are important to the Premier and party.

> Each member of the Executive Council who receives a mandate letter is accountable to the Premier and his or her Cabinet colleagues for assisting the government to achieve the priorities and objectives described in that letter.

[17] Cabinet Office asserted that s. 12(1) applies "where records reflect the policy-making and priority setting functions" of the Premier.

[18] Cabinet Office submitted that the Letters were distributed to the Ministers at a July 11, 2018, meeting and took the position that disclosure of the Letters would reveal deliberations that took place in relation to the Letters at that Cabinet meeting.

[19] Cabinet Office also submitted that the Letters included "the substance of deliberations of Cabinet" because the deliberations of the Premier, when setting policy priorities for Cabinet, are inherently part of Cabinet's deliberative process. Cabinet Office further submitted that the Letters are exempt from disclosure because they would reveal the substance of future deliberations of Cabinet.

(3) The IPC Decision

[20] The IPC rejected Cabinet Office's argument that the Letters were exempt because they reflected the Premier's policymaking and priority setting functions.

[21] The IPC reviewed evidence regarding the preparation of previous mandate letters made publicly available in Ontario and elsewhere in Canada, and concluded, "[t]his evidence contradicts the view that disclosure of letters of this

nature would impinge on Cabinet deliberations; and I find no material difference in the nature of letters in issue before me to suggest a different result in this case."

[22] The IPC found no evidence to support Cabinet Office's position that the Letters would reveal prior deliberations by the Premier or Cabinet Ministers, that they were discussed at a meeting of Cabinet, or that the Letters would be the basis of discussion at future Cabinet meetings.

[23] After reviewing the submissions by the parties in detail, the IPC made the following findings of fact:

a. There is nothing on the face of the Letters or in the representations of Cabinet Office to indicate that the Letters themselves were intended to serve, or did serve, as Cabinet submissions or as the basis for discussions by Cabinet as a whole: at para. 113.

b. Cabinet Office provided no evidence that the Letters were themselves, in fact, discussed at the Cabinet meeting when they were provided to each minister or that they were tabled or made generally available for discussion: at para. 114.

c. There is no evidence that the Letters were distributed to Cabinet as a whole at that time or that any specific contents of the Letters were actually the subject of the deliberations of Cabinet: at para. 114.

d. The Letters do not reveal any discussions weighing or examining the reasons for or against a course of action with a view to making a decision: at para. 115.

e. The Letters do not reveal any views, opinions, thoughts, ideas and concerns expressed by Cabinet members in the course of the deliberative process: at para. 115.

f. The Letters do not provide insight into the substance of any specific deliberations that may have occurred among Cabinet ministers: at para. 115.

g. There is no evidence that the Letters themselves would be placed before Cabinet in future meetings: at para. 116.

h. The Letters do not reveal the substance of any material upon which Cabinet members will actually deliberate in the future and do not reveal the substance of any such future deliberations: at para. 119.

i. There is no persuasive evidence that disclosure would give rise to a chilling effect on Cabinet deliberations: at para. 123.

j. The Letters do not reveal the substance of the Premier's deliberations but, rather, the product of his deliberations: at para. 134.

[24] Based on these findings of fact, the IPC held that s. 12(1) did not apply to the records at issue, and ordered Cabinet Office to disclose the letters to the appellant.

(4) The Divisional Court Decision

[25] Assessing the IPC decision on a reasonableness standard, the Divisional Court dismissed the application for judicial review brought by the AG Ontario.

[26] Writing for the Divisional Court, Penny J. explained that the Decision was largely fact-based, and resulted from the absence of evidence led by the AG Ontario that the Letters fell within the terms of s. 12(1) of the Act:

> [24] I cannot agree with the Attorney General that there is any fundamental error in the interpretation of the Act. In my view this is entirely a case of the application of well-settled principles to the particular facts. The burden of proof was undeniably on the government to demonstrate that the Letters fell within the s. 12(1) exemption. The

> government chose to enter as evidence only the Letters themselves and a heavily redacted copy of the agenda for the meeting at which the Letters were, apparently, delivered. The IPC simply held that, on this record, the government had failed to satisfy its evidentiary burden. This is a sufficiency of evidence case, nothing more.

[27] Throughout its decision, the Divisional Court relied on the IPC's findings on the record to determine that the IPC Decision was reasonable. For example, with respect to whether the Letters were discussed at a Cabinet meeting, the Divisional Court held:

> [37] As is often said, inferences must be grounded in evidence from which the suggested inference may reasonably be drawn. Inferences unsupported by evidence, or which do not reasonably follow from the established facts, are mere speculation.
>
> [38] Regarding the meeting agenda itself, the subject of the Letters does not appear in the numbered list of agenda items (there are seven, all completely redacted). Rather, reference to the Letters appears at the end of the agenda under a heading "Chair Notes: Mandate Letters".
>
> [39] Nothing about the content of this Note supports an inference that the mandate Letters were discussed at the Cabinet meeting. Rather, if anything, the content of the Note suggests the opposite.
>
> [40] As noted earlier, the Letters themselves do not suggest they are drafts subject to negotiation or in any way invite dialogue about their content. While it may be true that some of the mandates identified would likely require a return to Cabinet at some future time, this is nowhere specified or contemplated.
>
> [41] In these circumstances, there was a clear evidentiary basis to reject the Attorney General's argument that it

> was "reasonable to expect" certain unspecified aspects of the Letters "would have" been discussed at the initial Cabinet meeting. The IPC's decision to do so was not unreasonable.

[28] With respect to whether the Letters would reveal deliberations of future Cabinet meetings, the Divisional Court held:

> [49] Again, the IPC based this conclusion on an assessment of the evidence. The IPC simply found that the Cabinet Office had not discharged its burden to prove a link between the Letters and the substance of future Cabinet decisions. Given the paucity of evidence provided by the Cabinet office, this was not an unreasonable conclusion.

[29] Finally, the Divisional Court rejected the AG Ontario submission that it was unreasonable for the IPC to require "stringent" evidence from Cabinet Office to support the argument that the Letters fell within the scope of s. 12(1) of the Act. On this point, writing for the court, Penny J. stated:

> [55] There is no merit to the Attorney General's argument on this issue. The IPC clearly recognized, and applied, the correct standard of proof – it was the government's onus to demonstrate that it met the requirements to come within the s. 12(1) exemption on a balance of probabilities. The Attorney General's submission amounts to no more than an invitation for this Court to re-weigh the evidence and overturn the findings of the IPC with which the Cabinet Office disagrees. The IPC identified the correct legal principles, applied them to the interpretation of the opening words of s. 12(1), reviewed the record and the submissions before him in light of that legal test and explained the basis for his decision in thorough and cogent reasons. There was nothing

unreasonable about the IPC's approach to or conclusions on the standard of proof.

C. ISSUES ON APPEAL

[30] The AG Ontario raises the following three issues in this appeal:

a. The IPC erred in exercising the statutory authority to grant a right of access that is inconsistent with the purposes of the Act and the Cabinet records exemption;

b. The IPC erred in exercising the statutory authority to grant a right of access based on an erroneous interpretation of s. 12(1) of the Act; and

c. The IPC erred in exercising the statutory authority to grant a right of access based on an erroneous injection of a balancing test into s. 12(1) of the Act.

[31] Each issue is addressed below.

D. ANALYSIS

(1) The Standard of Review

[32] On an appeal from an order of the Divisional Court concerning an application for judicial review of an administrative decision, this court must determine whether the Divisional Court identified the appropriate standard of review and applied it properly. In order to make this determination, the court "steps into the shoes" of the Divisional Court: see e.g., *Canadian Federation of Students v. Ontario (Colleges and Universities)*, 2021 ONCA 553, at para. 20; *Longueépée v. University of Waterloo*, 2020 ONCA 830, 153 O.R. (3d) 641, at paras. 47-48,

applying *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-46.

[33] The AG Ontario submits that, in upholding the IPC's interpretation of s.12(1) of the Act, the Divisional Court failed to conduct a sufficiently "robust" reasonableness review as required by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1.

[34] I do not accept this submission.

[35] The Divisional Court acknowledged *Vavilov* as its point of departure for reviewing the reasonableness of the IPC decision. In identifying reasonableness as the standard of review, the Divisional Court stated, at para. 17:

> Reasonableness is the appropriate standard of review in this case. The reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision-makers.

[36] I see no error in the Divisional Court's approach to the standard of review.

(2) The IPC's exercise of statutory authority to grant a right of access was consistent with the purposes of the Act and the Cabinet records exemption

[37] The IPC described his approach to the interpretation of s. 12(1) as protective of communications within Cabinet's deliberative process that would reveal the substance of its formulation of government policies.

[38] The IPC emphasized, however, that without additional evidence or context showing how the Letters would reveal the substance of deliberations, the introductory words of s. 12(1) did not shield the policy choices themselves.

[39] The Divisional Court approached the issue as to the proper interpretation of s. 12(1) as one on which the parties agreed:

> [19] It is also accepted by the parties and the IPC that in order for the exemption under s. 12(1) to apply, disclosure of the record must "reveal the substance of deliberations" of Cabinet or "permit the drawing of accurate inferences" about past or future Cabinet deliberations. It is also accepted that the use of the term "including" in the introductory words of s. 12(1) means that any record which would reveal the substance of deliberations or permit the drawing of accurate inferences qualifies for the exemption; the specifically enumerated categories of record in subparagraphs (a) to (f) must be interpreted as providing an expanded definition of, or at the very least the removal of any ambiguity about, the types of records that are exempt from disclosure.

[40] The AG Ontario takes issue with this characterization. It argues that the IPC erred by taking a narrow and restrictive view of the opening words of s. 12(1) inconsistent with the purposes of the Act and of the Cabinet records exemption.

[41] The AG Ontario argues that s. 12(1) should be read in concert with the specific examples of exclusions set out in the subparagraphs (a) through (f), and in particular "(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees."

[42] The AG Ontario submits that the use of the term “including” in the introductory portion of s. 12 makes clear that the records set out in the subparagraphs constitute records whose “disclosure would reveal the substance of deliberations of the Executive Council or its committees.” It characterizes this interpretive approach as the “illustrative approach.” Therefore, s. 12(1) exempts the Letters from disclosure by analogy to the records described in subparagraphs (a) to (f).

[43] In contrast, the CBC, in supporting the approach taken by the IPC as reasonable, characterized the proper approach to the interpretation of s. 12(1) as the “expansive approach.” Under the expansive approach, the use of the term “including” in s. 12(1) indicates that the records specified in the following subparagraphs expand on the general language in the introductory portion of s. 12(1) by setting out records which, while not necessarily revelatory of the deliberations of Cabinet or its committees, may be so in certain circumstances and are, therefore, exempt from disclosure. Consequently, CBC argued that the letters fall outside of s. 12(1)’s scope because they do not reveal the substance of Cabinet deliberations or meet any of the expanded categories set out in subparagraphs (a) to (f).

[44] As both the CBC and IPC note in their submissions, the expansive approach is in keeping with a long line of decisions by the IPC dealing with exemptions under

s. 12(1). For example, in *Order P-266*, [1991] O.I.P.C. No. 10, at p. 7, the IPC explicitly stated that the "use of the word 'including' in subsection 12(1) of the Act [*sic*] should be interpreted as providing an expanded definition of the types of records which are deemed to qualify as subject of the Cabinet records exemption, regardless of whether they meet the definition found in the introductory wording of subsection 12(1)": citing *Order 22*, [1988] O.I.P.C. No. 22 (emphasis added).

[45] Indeed, the IPC has used the same words to describe s.12(1) since *Order P-901*, [1995] O.I.P.C. No. 148. In that decision, at p. 4, the IPC stated:

> [T]he use of the term "including" in the introductory wording of section 12(1) means that the disclosure of any record which would reveal the substance of deliberations of the Executive Council or its committees (not just the types of records listed in the various parts of section 12(1)), qualifies for exemption under section 12(1).

[46] Other orders have held that a record which has never been placed before an Executive Council or its committees may nonetheless qualify for exemption under the introductory wording of s. 12(1): see e.g. *Interim Order PO-1742-I*, [2000] O.I.P.C., at para. 36; *Order PO-2707; Ministry of Education*, [2008] O.I.P.C. No. 166, at para. 26. This result will occur where a government organization establishes that the disclosure of the record would reveal the substance of deliberations of an Executive Council or its committees, or that its release would

permit the drawing of accurate inferences with respect to the substance of deliberations of an Executive Council or its committees.

[47] As the Divisional Court highlighted, the subparagraphs of s. 12(1) "clarify that the exemption applies to specific types of records that might otherwise be thought to fall outside the opening words": at para. 27.

[48] The IPC's *Order P-901* further stands for the proposition that s. 12(1) is not limited to its subparagraphs. Any record can fall under the Cabinet records exemption so long as it would reveal the substance of deliberation of an Executive Council or its committees, or permit the drawing of accurate inferences.

[49] While previous IPC decisions do not bind the IPC in relation to future interpretations of s.12(1), the IPC's consistency in its approach to its governing statute may be taken as an indicator of the reasonableness of this decision. As the Supreme Court stated in *Vavilov*:

> [129] Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that

> outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge. [Citations omitted.]

[50] Even if this interpretation of s.12(1) were not long-standing, in my view, the IPC would be acting reasonably in adopting it. The use of the term “including” prior to setting out the ss. 12(1)(a) to (f) is ambiguous.

[51] In the face of ambiguous wording, the obligation on an administrative decision-maker is to provide a reasoned explanation for the interpretation adopted that is alive to the text, context and purpose of the provision; *Vavilov*, at para. 120. The IPC has done this.

[52] The IPC’s approach to s. 12(1) is also consistent with the general purpose of the Act, which 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”. This is a point underscored by the interveners, who argue that provisions of the Act which exempt access should generally be interpreted narrowly.

[53] Before moving to the IPC’s exercise of statutory authority, I will briefly address two of the AG Ontario’s arguments which were not put before the IPC.

[54] First, the AG Ontario points to the French translation of the term “including” in the Act, which is “notamment,” as opposed to “en outre.” The AG Ontario argues

that, in other statutory settings, “en outre” is used to indicate an expansive rather than inclusive set of specified subsections.

[55] As the AG Ontario could have, but did not make this argument before the IPC, it should not be determinative of a finding that the IPC acted unreasonably in its interpretation: see *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 22-26.

[56] However, even if it had been argued earlier, the French version of the provision is not conclusive of a particular, proper interpretation of s. 12(1) of the Act. The French dictionary definitions of “notamment” and “en outre” both refer to “including”. Thus, neither rule in nor rule out either interpretive approach.

[57] Second, the AG Ontario raised the legislative history of s. 12(1), and the fact that, in the debates surrounding draft legislation preceding the Act, the legislature rejected a proposal to use the term “solely” rather than “including” to limit the exemption to specific records. The AG Ontario argues that this aspect of the legislative history provides further support for the illustrative approach.

[58] Again, this legislative history argument was not before the IPC. In any event, this argument also fails to establish that the IPC’s adoption of the expansive approach was unreasonable. While the legislative history establishes that the term “solely” was not adopted, it does not lead to the conclusion that the term “including” is capable of only one reasonable interpretation.

[59] In my view, the AG Ontario has failed to establish that the IPC's interpretation of s. 12(1) was unreasonable, and that the Divisional Court erred in finding the IPC's interpretation reasonable.

(3) The IPC's exercise of its statutory authority under s. 12(1) of the Act was reasonable

[60] The AG Ontario argues that the IPC's decision to order disclosure of the Letters was unreasonable as the letters represented "decisions" of the Premier which would reveal the substance of the deliberations leading up to these decisions. In its factum, the AG Ontario describes the Letters in the following terms:

> [23] The Letters are a way by which this Premier has chosen to discharge his constitutional duties as first minister to develop and prioritize the policies and operational agenda of the new government. The Letters represent the first communication to the ministers from the Premier to establish policy priorities and a plan of action for their development and implementation over the term of the current government.
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> …
>
> [25] In addition to setting out the policy priorities of the new government, the Letters also include opinion, advice, instructions and guidance from the Premier to the newly appointed ministers as to how to carry out their new ministerial duties and responsibilities. Each member of the Executive Council who received a Letter is accountable to the Premier and their other Cabinet colleagues for assisting the government in achieving the policy objectives described in the Letters.

[61] The CBC takes the position that the AG Ontario has failed to lead any evidence that the disclosure of the Letters would reveal the substance of deliberations, either the Premier's or Cabinet's.

[62] Beside the Letters themselves, the AG Ontario relies on the agenda for the July 11, 2018 Cabinet meeting, which refers to the distribution of the mandate letters as a "Chair note."

[63] As noted above, the AG Ontario argued before the IPC that the Letters meet the threshold for excluded records under s. 12(1) of the Act on three grounds:

a. the Letters disclosed the deliberations of the Premier in setting Cabinet's policy priorities which are inherently part of the deliberative process of Cabinet;

b. the Letters were the subject of deliberations at the meeting of Cabinet where the letters were placed on the agenda; and

c. the deliberations at future Cabinet meetings where the policy priorities set out in the letters would be further discussed.

[64] With respect to AG Ontario's second argument and the reference to Letters in a Cabinet agenda, the IPC's interpretation of s. 12(1) precluded the argument that all matters on a Cabinet agenda were presumptively excluded. Such a finding might flow from the illustrative approach to the subsection s. 12(1)(a) to (f), and the reference specifically in s. 12(1)(a) to "an agenda, minute, or other record of the deliberations or decisions of the Executive Council or committees" (emphasis added). However, the IPC rejected this approach.

[65] Similarly, the IPC found no evidence to support AG Ontario's first and third arguments. The IPC reiterated that the mere stating of a policy priority does not reveal the deliberations leading to that outcome.

[66] The IPC found that the AG Ontario provided no evidence that the Letters were actually discussed at the Cabinet meeting where their distribution was referenced in the agenda. Further, the IPC found that there was no evidence offered for the assertion that the Letters were tabled for future discussion by Cabinet.

[67] The IPC also found no basis for the argument that the Letters themselves revealed the deliberations of the Premier.

[68] The AG Ontario argued before the IPC that the Premier's articulation of policy priorities represented a step in Cabinet's deliberative "continuum" and should not be seen as the culmination of the government's policy decision-making. According to the AG Ontario, the deliberative process of the Executive Council continues once the Premier establishes and communicates his policy priorities to ministers through the Letters. The policy priorities will involve further deliberation and decision-making by Cabinet in future.

[69] The IPC accepted that, where a record discloses deliberations by the Premier, this record may be exempted under s. 12(1). In other words, IPC recognized the distinct role of the Premier in relation to Cabinet. But the IPC

rejected the AG Ontario's view of the deliberative process as unduly broad. In its decision, the IPC stated:

> [121] The submission advanced by Cabinet Office that the mandate letters "open the dialogue" and initiate a continuum of the deliberative process as a "blueprint" for future Cabinet discussions suffers from the same deficiency. I am asked to accept that deliberations on "nearly all" of the policy initiatives would take place at some point in future Cabinet meetings. I am also asked to find that section 12(1) applies to policy initiatives that may never return to Cabinet at all or that may be altered or amended in significant and unspecified ways. With respect, Cabinet Office has it backwards. I must be satisfied on the evidence of the likelihood that that disclosure of the letters "would reveal" or, at a minimum, permit accurate inferences to be drawn concerning the substance of future Cabinet deliberations.
>
> [122] That is not to say that deliberations will not ensue a later date in relation to the subject matter of certain priorities. However, any such deliberations would be in relation to proposals or other materials yet to be developed by individual ministers and later brought before Cabinet. Such materials, when developed, may well reveal the substance of future Cabinet deliberations if and when they occur. However, the evidence before me does not establish that disclosure of the mandate letters themselves will permit accurate inferences to be drawn in that respect. At most, Cabinet Office's submissions indicates that the subject matter of future deliberations may be revealed by disclosure.

[70] On the question of the "continuum" approach to disclosure of deliberations, Penny J. stated:

> [29] As to the Attorney General's "continuum" argument, the introductory words of s. 12(1) do not protect all

> records leading up to any particular government decision; they protect the substance of deliberations of Cabinet (which includes, as found previously by the IPC, the Premier's deliberations in setting Cabinet's priorities). The Letters, on their face however, do not disclose or invite any deliberative process. The Cabinet Office's own submissions describe the Letters as "the *culmination* of an extensive deliberative process by the Premier [that] reflect his/her *determination*, as first minister, of the priorities of the new government". In the absence of any other evidence, the IPC's conclusion that the Letters do not disclose deliberative processes was a reasonable one. [Emphasis in original.]

[71] The IPC also considered its own previous decisions with respect to the role of the Premier's Office. In Order PO-1725, [1999] O.I.P.C. No. 153, the IPC considered a request for a scheduling book prepared by a Premier Office senior staff member. After a lengthy review of the Premier's role and the importance of his or her staff, the IPC concluded that the records fell under s. 12(1).

[72] In this case, the issue for the IPC was not whether records which disclose the deliberations of the Premier are caught by the exclusion under s. 12(1), but rather whether the Letters and the agenda constitute sufficient evidence that the deliberations of the Premier would be revealed by disclosure of the Letters.

[73] On this point, at para. 132, the IPC found on the record before him that the "disclosure of the policy initiatives in the mandate letters would not provide any insight into the deliberative considerations or consultative process by which the Premier arrived at them."

[74] For the Divisional Court, Penny J. distinguished the IPC Order PO-1725 as well, stating, at para. 31:

> The decision of the IPC in Order PO – 1725 does not support the Attorney General's argument. Again, this is on essentially factual and evidentiary grounds. In Order PO – 1725, the IPC found that the Premier's "consultations with a view to establishing Cabinet priorities are an integral part of Cabinet's substantive deliberative process" and that the records reflecting those "consultations" constitute the "substance of deliberations". It was this deliberative or consultative aspect of the Premier's priority-setting process which lay at the heart of the IPC's decision in that case. There is no evidence of any such consultative or deliberative process in establishing the Premier's priorities here. In fact, in Order PO – 1725, the IPC specifically found that (apart from the formal agenda document itself) the subject matter of items considered or to be considered by Cabinet will not "normally be found to reveal the substance of Cabinet deliberations, unless either the context or other additional information would permit the reader to draw accurate inferences" as to actual deliberations which took place at a particular Cabinet meeting. [Emphasis added.]

[75] I agree with the IPC and the Divisional Court. The scheduling book at issue in Order PO-1725 was far closer to the Premier's deliberative process than the Letters at issue here. The scheduling book contained "references to particular Bills or pending legislation, [and] more generalized references to possible programs and initiatives": at p. 15. Therefore, it is apparent that the IPC applied s. 12(1) in Order PO-1725 because the scheduling book revealed the thoughts and opinion of the Premier and, consequently, Cabinet.

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

[77] In my view, this application of s. 12(1) by the IPC to the Letters was reasonable, and the Divisional Court committed no error in so finding.

(4) The IPC did not introduce a new balancing test into the exercise of its statutory authority under s. 12(1) of the Act

[78] The AG Ontario argued that the IPC injected a balancing test into s. 12(1) despite its exclusion from the "public interest override."

[79] The AG Ontario refers to s. 23 of the Act which permits disclosure of exempt records if there is "a compelling public interest in disclosure that clearly outweighs the purpose of the exemption." Section 23, however, expressly does not apply to Cabinet records that are otherwise caught by s. 12.

[80] The AG Ontario argues that the IPC's reference to the "public interest" as a balancing factor, relying in part on the Nova Scotia Court of Appeal in *O'Connor v. Nova Scotia*, 2001 NSCA 132, 197 N.S.R. (2d) 154, thus constitutes a reversible error.

[81] I disagree.

[82] In my view, the IPC did not inject a new balancing test into the analysis of s. 12(1). Rather, the IPC, relying on *O'Connor*, recognized that s. 12(1) itself strikes a balance between a citizen's right to know what government is doing and a government's right to consider what it might do behind closed doors: Order PO-3973, at para. 97. The Court, at para. 1 in *O'Connor*, stated that this context calls for an interpretation of the Act that attempts to balance these two public rights.

[83] While the Divisional Court highlighted the factual distinctions between this case and *O'Connor*, where there was substantial evidence that the records at issue would reveal Cabinet deliberations, the reference to the balance reflected in the Act is appropriate in the context of this case as well.

[84] I see no error in the IPCs reference to these general observations by the Nova Scotia Court of Appeal in *O'Connor* as part of its analysis. His reference focuses on the Court of Appeal's analysis linking the records at issue with the substance of deliberation. That is exactly the thrust of the opening words exception in s. 12(1).

[85] Generally, the AG Ontario submits that the Divisional Court erred in failing to conduct a proper *Vavilov* review of the IPC's statutory analysis.

[86] I would not accept this submission.

[87] The Divisional Court committed no error arising from *Vavilov* in its finding that the Decision was reasonable.

DISPOSITION

[88] For the reasons set out above, I would dismiss the appeal.

[89] If the AG Ontario and CBC cannot agree on costs, brief written submissions may be provided to the court (not to exceed three pages double-spaced) within 15 days of the release date of these reasons.

[90] Neither the interveners nor the IPC sought costs and I would order none.

"L. Sossin J.A."
"I agree. E.E. Gillese J.A."

Lauwers J.A. (dissenting):

A. OVERVIEW

[91] The Information and Privacy Commissioner ordered Cabinet Office to disclose to the CBC the mandate letters Premier Ford gave to Cabinet ministers at a Cabinet meeting. The distribution of the letters was on the meeting's agenda. The Commissioner determined that the exemption from disclosure for Cabinet records set out in the *Freedom of Information and Protection of Privacy Act*[1] did not apply to the mandate letters. The issue is whether the Commissioner's interpretation of the exemption was reasonable.

[92] Section 12(1) of the Act sets out the relevant exemption from public disclosure for Cabinet records: "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…". These opening words are followed by subparagraphs (a) to (f), which list specific kinds of records that are exempted, such as agendas or minutes of Cabinet deliberations.

[93] The purpose of the exemption is to establish a robust and well-protected sphere of confidentiality within which Cabinet can function effectively, one that is consistent with the established conventions and traditions of Cabinet government.

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[1] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 12(1).

I conclude that the Commissioner's interpretation was unreasonable because the effect of his order, contrary to the legislature's intention, was to breach, erode, or undermine those traditions. I therefore dissent.

[94] Because the mandate letters are part of the Premier's deliberative process, in his role as head of Cabinet, and initiate Cabinet's mandate going forward, they are, perforce, part of Cabinet's deliberative process. They are records that would reveal the nature of Cabinet deliberations – understood as including the topics, subject matters, things, or "body of information" Cabinet would be discussing, as well as the deliberations themselves – within the meaning of "the substance of deliberations" in the opening words of s. 12(1). This is dispositive of the appeal, which I would allow on this basis alone.

[95] I would also allow the appeal on the grounds that the Commissioner prescribes a new test that a record must meet to qualify for exemption from disclosure under the opening words of s. 12(1): "If a record does not appear at paragraphs (a) to (f), it will only qualify for the exemption if the context or other information would permit accurate inferences to be drawn as to actual Cabinet deliberations at a specific Cabinet meeting."[2] This new test is fundamentally incompatible with the text, context, and purpose of s. 12(1) of the Act.

[2] *Order PO-3973; Cabinet Office (Re)*, [2019] O.I.P.C. No. 155, at para. 101 (emphasis added).

[96] Turning to my colleague's reasons, he states that "[t]he use of the term 'including' prior to setting out the ss. 12(1)(a) to (f) is ambiguous."[3] He takes the position that this ambiguity opens up a policy choice that the Commissioner is entitled to make under the Act between two competing approaches, one broad and one narrow, and the Commissioner did not err in preferring the narrow approach to limit the exemption.

[97] I disagree. The ostensible presence of an ambiguity in s. 12(1) of the Act does not open up a policy choice for the Commissioner to make. The legislature made the policy choice as to the reach of the protected sphere of Cabinet confidentiality in enacting s. 12(1). The Commissioner's task was to identify and apply that legislative choice. This he failed to do, as did the Divisional Court.

B. THE ISSUES

[98] I frame my analysis around this sequence of questions:

1) What are the relevant principles of statutory interpretation and what is the applicable standard of review?
2) What is the pertinent context within which s. 12(1) of the Act is to be interpreted?
3) What is the purpose of s. 12(1)?
4) In light of that context and that purpose, what interpretation of the text of s. 12(1) should the Commissioner have adopted?
5) Is the Commissioner's new test compatible with s. 12(1)?
6) Should the disclosure of the mandate letters be remitted to the Commissioner for disposition in accordance with these reasons?

[3] Reasons of Sossin J.A., at para. 50.

C. THE ANALYSIS

[99] I begin with two observations. First, Cabinet mandate letters are a relatively recent form of political document issued by prime ministers and premiers. They have been used as a form of public letter to frame an area of public policy and often reiterate campaign promises. Of course, prime ministers and premiers are free to craft and issue such letters for public consumption. But the issue in this case is different. Can the Commissioner compel the disclosure of mandate letters, in the face of the exemption from disclosure for Cabinet records in s. 12(1) of the Act, when the Premier chooses to keep them private? This issue engages constitutional conventions and traditions surrounding the Premier's role in matters pertaining to Cabinet deliberations, and it has broader implications.

[100] My second observation is that an ultimate decision forcing disclosure of the mandate letters in this case is likely to be a one-off. Why do I say that? Because the Premier's response in the future will predictably take one of three forms: to draft mandate letters for purely public consumption as others have done; to tie mandate letters even more closely to the Cabinet decision-making process in order to better substantiate the claim to an exemption from public disclosure under s. 12(1) of the Act; or to give up drafting mandate letters altogether.

[101] That said, the Commissioner's incursion into the ordinary operations of Cabinet is not benign or unimportant, and it should not be trivialized. The

Commissioner overstepped and the Divisional Court was wrong to uphold his decision. It was neither the legislature's intention nor the purpose of s. 12(1) of the Act to force Cabinet to change its customary way of operating. The basis on which the Commissioner overstepped could give rise to future problems of a markedly more serious nature than the disclosure of mandate letters might suggest.

[102] I now turn to the questions that frame my analysis.

(1) What are the relevant principles of statutory interpretation and what is the applicable standard of review?

[103] The interpreter's task in statutory interpretation is to discern the legislature's intention in order to give effect to it.[4] The interpreter must attend to text, context, and purpose.[5]

[104] Section 1 of the Act stipulates two purposes. The first purpose is: "(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, [and] (ii) necessary exemptions from the right of access should be limited and specific". The second purpose – to protect the privacy of individuals – is not engaged in this appeal.

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[4] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, at paras. 117, 121.
[5] *Vavilov*, at paras. 118-24.

[105] Section 12(1) of the Act sets out the relevant exemption from public disclosure for Cabinet records. The interpreter must reconcile the public access to information purpose of the Act set out in s. 1(a) with the purpose for the exemption from disclosure for Cabinet records set out in s. 12(1).

[106] The standard of review to be applied to a specialized tribunal's statutory interpretation is ordinarily reasonableness.[6] However, because questions regarding "the relationship between the legislature and the other branches of the state… require a final and determinate answer from the courts,"[7] when the interpretation engages a constitutional question, the standard is correctness.

[107] This case presents a conundrum. Constitutional conventions are engaged, which gives a constitutional dimension to the interpretation exercise. But constitutional conventions are not law beyond a legislature's reach. Good constitutional order requires at least a presumption that the legislature did not intend to abrogate any constitutional conventions absent a clear signal to the contrary. All the signals in the Act's development and in its text are in the direction of respect for those conventions and the associated traditions and practices.

[108] I conclude that the Commissioner's interpretation of s. 12(1) was unreasonable. I would leave for another day the thorny question of whether the

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[6] *Vavilov*, at paras. 115, 119.
[7] *Vavilov*, at para. 55.

constitutional overlay in this case – that is, the constitutional conventions and associated traditions and practices surrounding the role of the Premier in matters pertaining to Cabinet deliberations – requires the Commissioner to be correct in his interpretation.

(2) What is the pertinent context within which s. 12(1) of the Act is to be interpreted?

[109] The word “context” in the phrase, “text, context, and purpose”, has an external dimension, outside the Act’s text, which positions the legislation in the larger world. The context also has an internal dimension by which the Act as a whole must be given a coherent interpretation that reconciles its access to information purpose in s. 1(a) with the purpose for the Cabinet records disclosure exemption in s. 12(1). I begin with the external dimension and then turn to the internal.

(a) The external contextual dimension

[110] In this section of the reasons, I consider the constitutional context and then the policies supporting public access to government information.

(i) The constitutional context

[111] The policy work behind the Act was largely done by the Commission on Freedom of Information and Individual Privacy, which was headed by Dr. D.

Carlton Williams.[8] The Williams Report noted that the "terms of reference directed us to consider possible changes in public information practices which would be 'compatible with the parliamentary traditions of the Government of Ontario.'"[9] These include those constitutional conventions and traditions surrounding the role of the Premier in matters pertaining to Cabinet deliberations. Such conventions and traditions form the deep contextual backdrop, which must not be ignored, forgotten, or paid mere lip service. The Report was sensitive to the political realities of Cabinet government and to how access to information should function, as is the Act, properly interpreted. The Commissioner was not similarly sensitive, nor was the Divisional Court.

The Westminster model of responsible government in Canada

[112] The *Constitution Act, 1867* established a modified Westminster model of responsible government in Canada via the preamble, which mandates "a Constitution similar in Principle to that of the United Kingdom." As Professor Peter Hogg notes: "[T]he rules which govern [responsible government in Canada] are almost entirely 'conventional', that is to say, they are not to be found in the ordinary legal sources of statute or decided cases."[10] The various elements of the

[8] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*, vol. 2 (Toronto: Queen's Printer of Ontario, 1980) (the "Williams Report" by the "Williams Commission").
[9] Williams Report, at p. 83.
[10] Peter W. Hogg, *Constitutional Law in Canada*, loose-leaf, 5th ed. (Toronto: Thomson Reuters Canada Ltd., 2007), at para. 9-3. The most significant modification is the country's federal structure. In this

Westminster model form a tradition. A tradition is like an iceberg. The bulk of it is not immediately visible. Understanding a tradition in order to do no harm to it requires careful, attentive, and sensitive work.

[113] I accept Hogg's general description of the Canadian version of the Westminster model of responsible government. He observes that "the forms of monarchical government are retained, but real power is exercised by the elected politicians who give advice to the Queen and her representatives."[11] By convention, the Governor General selects as Prime Minister the "person who can form a government that will enjoy the confidence of the House of Commons."[12] Hogg notes: "Responsible government transfers the real power to the elected Prime Minister", who is the "political head of state".[13]

[114] The Prime Minister has two significant powers. The first is "the power to select the other ministers, and the power to promote, demote or dismiss them at pleasure."[14] The Governor General appoints the ministers on the Prime Minister's

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section, I pick out of Professor Hogg's text some pertinent descriptive statements that are indisputable, though not, as he points out, absolute or without exception. The concepts applicable to the federal government apply with necessary modifications to the provinces; the Premiers are the Prime Minister's equivalent: Hogg, at paras. 9-1, 9-3. Ontario's Executive Council, the provincial equivalent of the Privy Council, is mandated by the *Executive Council Act*, R.S.O. 1990, c. E.25, although a number of other pieces of legislation affect its composition and functions: see F.F. Schindeler, *Responsible Government in Ontario* (Toronto: University of Toronto Press, 1969), at p. 30.

[11] Hogg, at para. 9-1.

[12] Hogg, at para. 9-4.

[13] Hogg, at para. 9-1.

[14] Hogg, at para. 9-6.

advice.[15] The second power is to seek dissolution for an election.[16] Hogg observes that these powers, along with the "special authority" that comes from having won an election, "ensures that the Prime Minister's voice will be the most influential one within the cabinet."[17]

[115] The appointed ministers meeting together as a group constitute Cabinet, which is "in most matters the supreme executive authority."[18] Functionally, Cabinet "formulates and carries out all executive policies, and it is responsible for the administration of all the departments of government."[19] Hogg adds that full Cabinet's role in decision-making "may depend in large measure upon the discretion of the Prime Minister" because "the Prime Minister calls the meetings of cabinet, settles the agenda, presides over the meetings, and 'defines the consensus' on each topic."[20] Accordingly, "[t]he Prime Minister (or provincial Premier) effectively controls the executive branch of government through his control over ministerial appointments and over the cabinet."[21]

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[15] Hogg, at para. 9-4.
[16] Hogg, at para. 9-6.
[17] Hogg, at para. 9-6.
[18] Hogg, at para. 9-5.
[19] Hogg, at para. 9-5.
[20] Hogg, at para. 9-5 (footnote omitted).
[21] Hogg, at para. 9-6.

The separation of powers

[116] The constitutional doctrine of the separation of powers has applied since Confederation. The courts have policed the division of powers and, since 1982, also compliance with the *Charter*.[22] Although the separation of powers in Canada is not strict, Canadian constitutional law "recognize[s] and sustain[s] some notion of the separation of powers."[23]

[117] The three branches are the executive, the legislative, and the judicial.[24] Most of the case law on the separation of powers has considered the line between the judicial and the legislative branches, which is necessary to ensure impartial justice. The line between the executive and the legislative is less distinct and has been addressed less often.

[118] Karakatsanis J. observed: "All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy."[25] She added a relevant caution: "However, each branch will be unable to fulfill its role if it is unduly interfered with by the others." Karakatsanis J. cited the words of McLachlin J.: "It is fundamental to the working of government as a whole

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[22] *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 43, at paras. 27-31, a decision that concerned the appointment of *amicus curiae* by judges.
[23] *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at paras. 10-11, *per* Lamer C.J. And see Côté J.'s partially dissenting reasons in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, 455 D.L.R. (4th) 1, at para. 279.
[24] The precise status in the constitutional pantheon of certain officials created by statute, such as the Auditor General, the Ombudsman and the Information and Privacy Commissioner, is unclear.
[25] *Criminal Lawyers' Association of Ontario*, at para. 29.

that all these parts play their proper role", to which McLachlin J. added her own caution: "It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other."[26]

[119] A functional and purposive approach must be taken to the question of what powers and privileges each branch has in relation to the others. The analysis must engage what each branch functionally needs in order to perform its expected role within the constitutional polity. This flows ineluctably from the nature of the Westminster model of responsible government, as the cases have recognized.

The executive-legislative separation

[120] Some commentators, including Hogg, posit that in the Westminster model, "there is no separation of powers between the executive and legislative branches" because "[t]he head of the executive branch, the cabinet, draws its personnel and its power to govern from the legislative branch, the Parliament; and the cabinet controls the Parliament."[27] However, in my view, this position is insufficiently nuanced because it ignores the realities of how responsible government functions in practice and the constitutional conventions that hedge that practice about.[28]

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[26] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 389, cited in *Criminal Lawyers' Association of Ontario*, at para. 29.
[27] Hogg, at para. 9-12.
[28] These practical realities were well known to the Williams Commission, which took them into account. See below at paras. 132-37.

[121] Professor Dennis Baker disputes Hogg's assertion that the separation of powers between the executive and legislative branches would "make little sense in a system of responsible government".[29] To the contrary, Baker states: "Far from being antithetical to responsible government… the executive-legislative separation is logically necessary for responsible government to work."[30] I agree with Baker.

[122] Bitter historical experience, Baker notes, made "neither legislative nor monarchical absolutism… particularly appealing." He explains:

> While the pre-Civil War experience with Charles I confirmed the fears of a king with absolute prerogatives, the subsequent experience with the Long Parliament raised serious doubts about legislative supremacy. Following Montesquieu, Blackstone understood this history as confirming the desirability of *partial* executive and legislative independence since "either total union or total disjunction would in the long run lead to tyranny."[31]

[123] This insight led to the development of the mixed polity of the Westminster model. Baker explains: "To fulfill its purpose of moderate government, the separation of powers might permit significant inter-branch interactions, even exertions of influence and control, but must prohibit arrangements that place one power entirely in the hands of another."[32]

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[29] Hogg, at para. 7-15, cited in Dennis René Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation*, (Montreal: McGill-Queens University Press, 2010), at p. 61.
[30] Baker, at p. 61.
[31] Baker, p. 58 (emphasis in original; footnotes omitted).
[32] Baker, p. 60. Apart from constitutional conventions, Baker notes, at pp. 61-62, that ss. 53 and 54 of the *Constitution Act, 1867* apportion responsibilities over public finances between the executive and legislative branches, thus explicitly recognizing the separation of powers beyond the constitutional

[124] Baker argues that “the separation of powers continues to play a vital [role] in Canada‘s constitutional design”, albeit one that has been obscured by what he calls “the exaggerated claim of executive-legislative fusion”.[33] “Viewed through this lens,” he notes, “the fundamental rule of the separation of powers (the power of no branch may be wholly exercised by another) can be easily discerned.”[34] Each branch has a sphere of independence, but each is sufficiently hobbled to require the support of the others, which leads to a measure of interdependence. For example, the legislative branch has no executive capacity and the executive branch cannot enact legislation.[35]

[125] The concept of fusion implies that executive control of the legislative branch is absolute, but this does not bear close scrutiny. It is more accurate to say that there is “a considerable degree of integration” between the legislative and executive branches.[36]

[126] However, most telling, in my view, is Baker’s observation that: “[T]he subtle interplay of formal and informal power maintains and animates an effective

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conventions, citing Janet Ajzenstat, *The Once and Future Canadian Democracy: An Essay in Political Thought* (Montreal and Kingston: McGill-Queen’s University Press, 2003), at p. 65.

[33] Baker, at p. 83.

[34] Baker, at p. 83.

[35] See Baker, Chapter 3, especially pp. 61-63.

[36] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, citing *Attorney General of Quebec v. Blaikie et al.*, [1981] 1 S.C.R. 312, at p. 320. In *Wells*, the court also stated that even though the “separation of powers is not a rigid and absolute structure”, the court “should not be blind to the reality of Canadian governance that, except in certain rare cases, the executive frequently and *de facto* controls the legislature”: at para. 54.

institutional separation between the legislature and the executive."[37] This is the Anglo-Canadian version of constitutional checks and balances. It raises squarely the issue of Cabinet functionality; Cabinet serves as a "connecting link" between the two branches.[38]

Cabinet, in functional terms

[127] I now look more closely at the role of Cabinet within the Westminster system. In functional terms, Cabinet is to be understood as "a forum, presided over by the Prime Minister, where Ministers meet to propose, debate and decide government policy and action."[39] It is "the place where Ministers decide, as a group, how the executive power should be exercised."[40]

[128] Several building blocks are essential for Cabinet to be able to function effectively as a political body nested in Parliament or in the Legislative Assembly. These building blocks are fostered and protected by constitutional conventions. I focus on three: candour, solidarity, and confidentiality. Necessary and tight links among these conventions make possible the proper functioning of our

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[37] Baker, at p. 83.
[38] The description of Cabinet as a "connecting link" is drawn from Walter Bagehot's *The English Constitution*, 7th ed. (London: Kegan Paul, Trench, Trübner & Co., 1894), at p. 11. However, although I accept this connecting link concept, I reject Bagehot's overall executive-legislative fusionist view.
[39] Yan Campagnolo, "The Political Legitimacy of Cabinet Secrecy" (2017) 51:1 R.J.T.U.M. 51, at p. 60. Campagnolo also explains, at pp. 60-61, that unlike the Privy Council, Cabinet has no legal existence or power. Rather, it is "an informal advisory body". Executive power is "exercised by the Governor in Council or individual Ministers", although "from a conventional perspective, the Governor in Council or individual Ministers act on the advice of the Cabinet."
[40] Campagnolo, at p. 60.

parliamentary system in which the risk of a vote of no-confidence is ever-present. This risk is particularly acute in minority governments but still exists in a majority, if only as a more remote possibility. The Prime Minister and Cabinet must accommodate Cabinet's own internal tensions, occasionally balky bureaucrats, hear from caucus and secure caucus support, marshal sufficient support in the House (challenging in minority times), and attune the government's program both to day-to-day contingencies and to past and future electoral commitments designed to secure re-election.

[129] Cabinet functionality depends on its members being free to communicate with complete candour. As McLachlin C.J. noted: "Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny".[41] Cabinet could not carry out its policy-making and policy-vetting responsibilities if its members were inhibited in their debate by the prospect of public disclosure.

[130] As for solidarity, all ministers accept responsibility collectively for Cabinet decisions and must resign or expect dismissal if they publicly dissent.[42] Ministers could not credibly offer public support and positive explanations for policy

[41] *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at para. 18.
[42] Sir W. Ivor Jennings, *Cabinet Government*, 2nd ed. (Cambridge: Cambridge University Press, 1951), at pp. 257-58. See also Hogg, at para. 9-7.

decisions they opposed in Cabinet deliberations were that opposition to become publicly known.

[131] Confidentiality links candour and solidarity. The confidentiality of Cabinet's deliberations enables frank discussion and dissent during its meetings while preserving public-facing collective responsibility for its decisions.[43] These three essential constitutional conventions underwrite the protected sphere in Cabinet within which government policy can be developed and debated, as the cases recognize.[44]

(ii) The policy context for access to information

[132] The Williams Report led to the enactment of the Act in 1988. The policy development process was sensitive to the political realities of Cabinet government and the functional issues because, to repeat, the terms of reference directed the Commission to consider changes that were "compatible with the parliamentary traditions of the Government of Ontario."[45]

[133] The Williams Report recognized the tension between "a compelling public interest in open government", on the one hand, and "a compelling public interest

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[43] See Campagnolo, at p. 63, and a publication from the Privy Council Office that, among other things, summarizes the principles of Cabinet solidarity and confidentiality: Canada, Privy Council Office, *Open and Accountable Government* (2015), online: <http://pm.gc.ca/eng/news/2015/11/27/open-and-accountable-government>.
[44] In addition to the text above, see below at paras. 163-65.
[45] Williams Report, at p. 83.

in effective government", on the other, which recognizes "the critical needs of government for confidentiality".[46] The Report did not set about to substantially depart from Cabinet's current practices or well-established traditions, which are rooted in constitutional conventions, nor did its recommendations do so. The Report, as an added example, noted the need to preserve the anonymity of public servants,[47] because not doing so "would mark a significant departure from this well-established tradition",[48] which was not desired.

[134] The goal was to provide public accessibility to government documents in order to facilitate "[i]ncreased access to information about the operations of government".[49] The Williams Report recognized that there was a "need to render government more accountable to the electorate", and that "facilitating informed public participation in the formulation of public policy" was desirable.[50] Achieving these ends would enhance the ability of the public to hold elected representatives accountable and the ability of members of the legislature to hold the executive accountable. The Report was confident that the "critical balance between the public interest in access and the government need for confidentiality" could be

[46] Williams Report, at p. 235.
[47] Williams Report, at p. 86.
[48] Williams Report, at p. 90 (emphasis added).
[49] Williams Report, at p. 77.
[50] Williams Report, at p. 77.

"achieved by means of statutory exemptions from the general rule of public access."[51]

[135] Pertinent to the task of interpreting the exemption in s. 12(1) of the Act, the Williams Report stated: "[I]t is obvious that the confidentiality of Cabinet deliberations must be preserved in a freedom of information scheme".[52] The question was "how an exemption relating to this matter should be drafted".[53] The Report listed documents considered to be "Cabinet documents":

> [A]gendas, informal or formal minutes of the meetings of Cabinet committees or full Cabinet, records of decision, draft legislation, Cabinet submissions and supporting material, memoranda to and from ministers relating to matters before Cabinet, memoranda prepared by Cabinet officials for the purpose of providing advice to Cabinet, and briefing materials prepared for ministers to enable them to participate effectively in Cabinet discussions.[54]

[136] The Williams Report noted: "The disclosure of <u>many</u> of these documents would have the effect of disclosing the nature of Cabinet discussions and the advice given or received by Cabinet members", and accordingly "<u>all</u> such material should be considered exempt under a freedom of information scheme."[55]

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[51] Williams Report, at p. 277.
[52] Williams Report, at p. 285.
[53] Williams Report, at p. 285.
[54] Williams Report, at p. 285 (footnote omitted).
[55] Williams Report, at p. 285 (emphasis added).

[137] I now turn to the internal dimension of the context by which the Act as a whole must be given a coherent interpretation that reconciles its purpose of promoting access to information with the purpose of its s. 12(1) Cabinet records exemption.

(b) The internal dimension

[138] Two observations: First, it was open to the legislature to enact legislation requiring Cabinet to be much more forthcoming in its disclosure than Cabinet's prior practices or well-established traditions would permit or require.[56] Instead, the enacted legislation contains provisions that are substantially similar to those proposed in the relevant sections of the Williams Report. Second, while providing a right of access to government information, the Act shares the Report's real diffidence around "Cabinet records".

[139] Against the rich background of the external dimension described above, I look at s. 12(1) from the perspective of the text and the legislative history, which together show the legislature's intent.

[140] The full text of s. 12(1) provides:

> (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:

[56] This is what the Nova Scotia legislature did, as I discuss below at para. 162.

> (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. [Emphasis added.]

The meaning of the underlined words – "the substance of deliberations" and "including" – is hotly disputed in this case.

(i) The text

[141] The first perspective relates to the strength of the provision's language. I infer that the exemption in s. 12(1) for Cabinet records is intended to be especially

strong. The text in the opening words of s. 12(1) is imperative: "A head shall refuse to disclose a record…" (emphasis added). This mandatory wording leaves the head no discretion. Similar language is found in other sections such as s. 21 (personal privacy). Contrast this with the permissive and discretionary language about records covered in certain other sections, including s. 13(1) (advice to government), which the "head may refuse to disclose" (emphasis added). This inference about the strength of the s. 12(1) exemption is reinforced by contrasting s. 23 of the Act, which builds in flexibility and allows exemptions from disclosure to be lifted where there is a "compelling public interest". It is especially instructive that the s. 23 public interest override does *not* apply to Cabinet records under s. 12(1), even though it does to a refusal under s. 13. Nor does the purpose language in s. 1(a) of the Act, which provides that "necessary exemptions from the right of access should be limited and specific", take priority over the s. 12(1) exemption.

(ii) The legislative history

[142] The second perspective on the text takes into account the legislative history, which can provide guidance in statutory interpretation.[57] The Attorney General for Ontario points out that a proposed amendment to Bill 34 (the predecessor draft Bill to the Act) would have limited the exemption from disclosure in s. 12(1) "solely" to

[57] See *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, 449 D.L.R. (4th) 1, at paras. 12-14, citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43.

the records listed in the subparagraphs.[58] The amendment was defeated. This reinforces the view that the expression "the substance of deliberations" was meant to be broad enough to encompass the listed records without being limited to only those records.

[143] I make four additional points. First, I set out above the Williams Report's explanation for the list of particular records it would have included in the subparagraphs. However, here I focus on different words: "The disclosure of many of these documents would have the effect of disclosing the nature of Cabinet discussions and the advice given or received by Cabinet members."[59] In other words, the Report's focus was less on the list of records than on the principle: keeping confidential "the nature of Cabinet discussions" so that those discussions could proceed unharried by outside influences. In other words, even though not all the listed documents – only many – would or would always have the effect of disclosing Cabinet discussions, it is noteworthy that the Report recommended that "all such material should be considered exempt under a freedom of information scheme."[60]

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[58] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 33rd Parl., 1st Sess., No. 113 (10 February 1986), at p. 3955 (Norman Sterling).
[59] Williams Report, at p. 285 (emphasis added).
[60] Williams Report, at p. 285 (emphasis added).

[144] My second point is that it is instructive to contrast the wording of the Williams Report recommendation on Cabinet records with the opening words of s. 12(1)[61]:

***Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 12(1)**	**Text of the Williams Report**
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,	1. We recommend that the proposed freedom of information law contain an exemption for documents whose disclosure would reveal the substance of Cabinet deliberations and, in particular, that the following kinds of Cabinet documents be the subject of this exemption:

[145] Note the use of the words, "the following kinds of Cabinet documents" in the Williams Report. This is another way of expressing and underlining the Report's worry about keeping "the nature of Cabinet discussions" confidential.

[146] Third, the Williams Report gave two signal cautions that also made their way into the Act. Any disclosure regime must not have the effect of rushing Cabinet into a decision. Accordingly, there should be no disclosure of material forwarded before Cabinet's consideration of it.[62] Further, the Report accepted that "[t]here may be many situations in which Cabinet might properly wish to delay public announcements of its decisions."[63]

[61] The full contrasting text is set out in the Appendix.
[62] Williams Report, at p. 287.
[63] Williams Report, at p. 286.

[147] My fourth point is that the Act expands the reach of the exemption beyond the Report's recommendations in several ways. Notably, s. 12(1) of the Act generally uses the formulation "of the Executive Council or its committees" while the Report only used a similar formula once.[64] Next, the Report would have limited the exemption under subparagraph (b) to "records containing proposals or recommendations submitted, or prepared for submission, by a Cabinet Minister to Cabinet", but the Act provides a broader, more generic exemption: "policy options or recommendations submitted, or prepared for submission". Finally, the Report would have limited the exemption under subparagraph (c) to the time "before such decisions are made" while the Act states: "before those decisions are made and implemented". The enacted language is more protective of Cabinet records than the proposed language in the Williams Report.

[148] I noted above that the Williams Report evinced real diffidence around the confidentiality of Cabinet records. The Commission appears to have favoured setting clear rules for Cabinet records.[65] The practical reason for such a blanket

[64] Emphasis added throughout.

[65] The Report's recommendations focused on the protection of physical Cabinet records. This concern with physical documents may relate to the historical formalization of Cabinet meetings. As Campagnolo notes, at pp. 72-77, prior to the 20th century, Cabinet meetings were informal affairs with no organized system of record-keeping. The only official document recording Cabinet discussions was a letter from the Prime Minister to the Sovereign. However, due to the increasing complexity of state activities, measures were taken to improve executive decision-making efficiency, including the introduction of Cabinet secretariats. Yet, the establishment of Cabinet secretariats was accompanied by a new risk: that the written records of Cabinet meetings could be potentially accessible, including by members of an incoming government following a change of power. This led to the development of conventions that focused on the protection of physical records of Cabinet's deliberations.

rule is to avoid disputes over specific documents of the sort this case exemplifies. I will return to this point below.

(3) What is the purpose of s. 12(1) of the Act?

[149] The consideration of the external and the internal contextual dimensions set out above leads me to conclude that the purpose for the exemption from the disclosure of Cabinet records in s. 12(1) of the Act is to establish a robust and well-protected sphere of confidentiality within which Cabinet can function effectively, one that is consistent with the established conventions and traditions of Cabinet government. "The preservation of the confidentiality of Cabinet discussions… [is] a necessary feature of a freedom of information scheme 'compatible with the parliamentary traditions of the Government of Ontario'", the Williams Report noted, warning that giving "the public a right of access to documents revealing the nature of Cabinet deliberations would be a substantial departure from current practice."[66]

[150] This purpose – to establish a robust and well-protected sphere of confidentiality within which Cabinet can function effectively – is reinforced by the mandatory and absolute nature of the protection in s. 12(1) and by the exclusion of s. 12(1) from the s. 23 public interest override. It is also more modestly reinforced by the slight adjustments in s. 12(1)'s subparagraphs in favour of more

[66] Williams Report, at p. 85.

confidentiality made by the legislature to the language proposed in the Williams Report.

[151] At bottom, s. 12(1)'s purpose resonates profoundly with the values and virtues of Ontario's version of Westminster responsible government, and facilitates what Baker called, to repeat: "the subtle interplay of formal and informal power [that] maintains and animates an effective institutional separation between the legislature and the executive."[67]

(4) In light of the context and purposes, what interpretation of the text of s. 12(1) should the Commissioner have adopted?

[152] The analysis of this question is divided into three sections: the approach to be applied to the interpretation of s. 12(1) of the Act; the role of the functional approach; and the Premier's role in Cabinet in the interpretation exercise. In my view, the "illustrative approach" best captures the purpose of the exemption, and is supported by the functional approach to Cabinet government discussed above, taking into account the particular role played therein by the Premier.

(a) Two approaches to the interpretation of s. 12(1) of the Act

[153] When the word "including" is used in legislation, the issue often is which of two approaches, the "expansive approach" or the "illustrative approach", was legislatively intended. Professor Ruth Sullivan states that: "The purpose of a list of

[67] Baker, at p. 83.

examples following the word ‘including’ is normally to emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude something that is meant to be included.”[68] Sullivan adds: “It is not always obvious whether a list that follows ‘includes’ is meant to expand the scope of the stipulated definition or merely illustrate it.”[69]

[154] In interpreting s. 12(1), the Commissioner did not take the “illustrative approach”, which is endorsed by the Attorney General for Ontario. Instead he took the competing “expansive approach”, which is endorsed by the CBC and the interveners.

[155] The expansive approach holds that, but for their express inclusion in s. 12(1)’s subparagraphs, the listed records would not necessarily be caught by the opening words and so would otherwise require specific exemption from disclosure.[70] The subparagraphs are thus said to “expand” the scope of the general exemption of records that “would reveal the substance of deliberations” by going beyond the underlined words to the list in the subparagraphs. The expansive approach takes a correlatively narrow view of the meaning of that expression.

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[68] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto.: LexisNexis Canada, 2014), at para. 4-38.
[69] Sullivan, at paras. 4-41 to 4-42, citing *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] S.C.R. 231.
[70] Reasons of Sossin J.A., at para. 43.

[156] Take the word “agenda” in subparagraph (a) as an example. Because an agenda sets out a list of topics for discussion at a meeting, it could not reveal any actual deliberations. The expansive approach argues that “agenda” should not be understood to be included in the expression “the substance of deliberations” because that expression refers only to actual deliberations at the Cabinet table. Or, as my colleague puts it, the Commissioner’s approach is only “protective of communications within Cabinet’s deliberative process that would reveal the substance of its formulation of government policies.”[71] But for its inclusion in subparagraph (a), a Cabinet agenda would be disclosable under s. 1 of the Act. On the expansive approach, the same argument would apply to the records in subparagraphs (b), (c), (e), and (f), which are all records prepared by someone else for Cabinet to discuss and would not thereby describe any actual deliberations.

[157] By contrast, the illustrative approach holds that subparagraphs (a) to (f) serve to identify or “illustrate” the types of records that, if disclosed, would reveal the substance of deliberations. The list of protected records in the subparagraphs informs the interpretation of “the substance of deliberations” and posits a different meaning: this expression refers to the nature of the topics, subject matters, or

[71] Reasons of Sossin J.A., at para. 37.

things Cabinet would be discussing, as well as to the deliberations themselves. The illustrative approach takes a broader view of the exemption.

[158] In my opinion, the illustrative approach best achieves and instantiates the purpose of s. 12(1), which is to establish a robust and well-protected sphere of confidentiality within which Cabinet can function effectively. This result flows from the purpose of the legislation and the legislative history of s. 12(1) of the Act discussed above, and by the functional and purposive approach taken in the cases on the operation of the separated powers, and the particular role assigned to the Premier.

[159] I am fortified in my view by the decision of the British Columbia Court of Appeal in *Aquasource.*[72] That court took the same approach to Cabinet records as the Williams Commission, and adopted a broad reading of "the substance of deliberations" in s. 12(1) of B.C.'s legislation, which provided:

> 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.[73]

[72] *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 58 B.C.L.R. (3d) 61.
[73] *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 16, s. 12(1).

[160] Donald J.A. held that the phrase “the substance of deliberations”, when read together with the clause, “including any advice, recommendations, policy considerations or draft legislation or regulations”, plainly refers to “the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision”.[74] Accordingly, s. 12(1) “must be read as widely protecting the confidence of Cabinet communications.”[75] Donald J.A. concluded that the test for whether something is protected under s. 12(1) is: “Does the information sought to be disclosed form the basis for Cabinet deliberations?”[76] In my view, the *Aquasource* approach is sound.

[161] The Commissioner rejected this approach, preferring the analysis of the Nova Scotia Court of Appeal in *O’Connor.*[77] I disagree with my colleague that the Commissioner made appropriate use of *O’Connor*. In that case, the court rejected Donald J.A.’s focus on the “body of information” Cabinet considered in its deliberations, and instead adopted a narrower test for Nova Scotia’s Cabinet records exemption.[78] The Commissioner preferred the statutory interpretation of *O’Connor* to that of *Aquasource* on the basis that “the general approach articulated

[74] *Aquasource*, at para. 39 (emphasis added).
[75] *Aquasource*, at para. 41.
[76] *Aquasource*, at para. 48.
[77] *O’Connor v. Nova Scotia (Deputy Minister of the Priorities & Planning Secretariat)*, 2001 NSCA 132, 197 N.S.R. (2d) 154.
[78] *O’Connor*, at paras. 90-92.

by the Nova Scotia Court of Appeal in *O'Connor*… aligns more closely with the language of the [Ontario] exemption".[79]

[162] In applying the *O'Connor* approach to the words of s. 12(1) of the Ontario Act, the Commissioner failed to adequately take into account the salient differences between the respective statutes. In *O'Connor*, Saunders J.A. found that his province's access to information legislation is uniquely and "deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada", including Ontario.[80] It is decidedly not the case that the *O'Connor* approach "aligns more closely with the language of the [Ontario] exemption". There is simply no basis on which the Commissioner could reasonably prefer *O'Connor* to *Aquasource*. Given the text, context, and purpose of Ontario's Act, the opening words of s. 12(1) of the Act create a broader sphere of protection surrounding Cabinet confidentiality. This includes protection over "the body of information" Cabinet will consider in its deliberations.

(b) The functional approach in interpretation

[163] I now go deeper into the constitutional backdrop and draw on the cases describing what is necessary for the proper and effective functioning of Cabinet

[79] *Order PO-3973*, at para. 97.
[80] *O'Connor*, at para. 57.

government. The functional approach is evident in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, where McLachlin C.J. and Abella J. make several pertinent observations.[81] They note: “It may also be that a particular government function is incompatible with access to certain documents.” The example they give is the need to preserve secrecy and privacy in judicial deliberations. Public access “would impair the proper functioning of the court by preventing full and frank deliberation and discussion at the pre-judgment stage.” They add: “The principle of Cabinet confidence for internal government discussions offers another example.” They urge that attention be paid to the “historic function of a particular institution [which] may assist in determining the bounds of institutional confidentiality” because “certain government functions and activities require privacy”.[82] They explain: “Certain types of documents may remain exempt from disclosure because disclosure would impact the proper functioning of affected institutions.”

[164] La Forest J. stated in *Carey v. Ontario*: “I would agree that the business of government is sufficiently difficult that those charged with the responsibility for running the country should not be put in a position where they might be subject to

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[81] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 40.
[82] *Ontario (Public Safety and Security)*, at para. 40, citing *Montréal (City) v. 2952-1366 Québec Inc*., 2005 SCC 62, [2005] 3 S.C.R. 141.

harassment making Cabinet government unmanageable."[83] In making this statement, he cited Lord Reid's trenchant observation in *Conway v. Rimmer*:

> [The premature disclosure of Cabinet confidences] would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind.[84]

McLachlin C.J. added her agreement in *Babcock* and pointed out that: "[M]inisters undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making."[85]

[165] Manageability and reasonable functionality underpin the functional approach taken by the courts. I note that *Babcock* is cited several times in the Commissioner's reasons, mostly in reciting Cabinet Office's submissions, but he ignores its teaching. Instead, he should have paid more respectful attention to the constitutional backdrop, as the Assistant Commissioner did in Order PO-1725.[86]

(c) The Premier's role in Cabinet

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[83] *Carey v. Ontario*, [1986] 2 S.C.R. 637, 1986 CanLII 7, at para. 50.
[84] *Conway v. Rimmer*, [1968] A.C. 910 (H.L.), at p. 952, cited in *Carey*, at para. 49.
[85] *Babcock*, at para. 18.
[86] *Order PO-1725*, [1999] O.I.P.C. No. 153.

[166] Neither the premiers nor the Prime Minister are expressly mentioned in the *Constitution Act, 1867*. Their constitutional roles and functions are conventional, not prescribed, which makes it essential to be careful in discerning what is at stake when a convention is touched. Neither the reason for, nor the proper reach of, a convention is necessarily completely obvious.

[167] In Order PO-1725, Assistant Commissioner Tom Mitchinson provided an insightful articulation of the Premier's role in Cabinet. The requester in that case sought access to the electronic and hardcopy appointment books of a named senior employee in the Premier's office, whose "job title and employment responsibilities deal directly and primarily with policy formulation and the overall priority-setting and co-ordination of the government's policy agenda."[87] Many entries were found to qualify for exemption from disclosure under the opening words of s. 12(1), although some were not.[88]

[168] The Assistant Commissioner considered carefully the "constitutional conventions and traditions surrounding the role of the Premier in matters pertaining to Cabinet deliberations."[89] The Assistant Commissioner reviewed the authorities on the conventions surrounding the Premier and Cabinet, and accepted the

[87] *Order PO-1725*, at para. 57.
[88] *Order PO-1725*, at paras. 61-64.
[89] *Order PO-1725*, at para. 50.

description of the integral role the Premier plays in the functioning of Cabinet presented by Dussault and Borgeat, who state:

> [Cabinet] is responsible for determining the ways and means of economic, social and cultural progress and is called upon to translate into legislation and into concrete programs the values underlying its rise to power or its remaining in power. Above all, therefore, it represents a centre for reflection and decision. By its very nature, the Cabinet is an institution for compromise, with respect to which its primary role is to determine priorities, to plan and to establish political strategy.
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> …
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> [T]he ultimate responsibility for decision-making, although ascribable to Cabinet members as a group, is conferred in particular upon the Prime Minister who dominates its activities. This results since he or she is the head of Cabinet and receives technical briefs and also since he or she has the power to determine the agenda for meetings and to exert control over the support staff. The Prime Minister has recently been termed "the guiding force, co-ordinator and arbitrator of the executive decision-making process". Possessing, *inter alia*, such powers as the authority to appoint his or her colleagues, the Prime Minister dominates the administrative machinery.[90]

Dussault and Borgeat noted that, while ministers are generally viewed as equals, the Prime Minister or Premier is "without doubt 'a little more equal' than the others".[91]

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[90] René Dussault and Louis Borgeat, *Administrative Law, A Treatise*, 2nd ed. (Toronto: Carswell, 1985), at pp. 59-60 (footnotes omitted), cited in *Order PO-1725*, at para. 52.

[91] Dussault and Borgeat, at p. 61. For additional discussion of Cabinet, see generally Dussault and Borgeat, at pp. 51-63.

[169] Against this background, the Assistant Commissioner framed three broad principles that guided his disposition, which warrant reproduction:

> Firstly, by virtue of the Premier's unique role in setting the priorities and supervising the policy making, legislative and administrative agendas of Cabinet, the deliberations of the Premier, unlike those of individual ministers of the Crown, cannot be separated from the deliberations of Cabinet as a whole. The Premier's consultations with a view to establishing Cabinet priorities are an integral part of Cabinet's substantive deliberative processes. To the extent that records reflect consultations bearing on the policy making and priority setting functions within the constitutionally recognized sphere of the Premier's authority as first minister, those records, by definition, may be seen as reflecting the substance of deliberations of the whole Cabinet.
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> Secondly, in our modern parliamentary democracy, the Premier functions by and large through the instrumentality of staff within his Office.
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> …
>
> Thirdly, the Premier's policy-making and priority setting functions do not occur in a vacuum, but within the political framework which brought the ruling party to power. Cabinet, and the Premier in his capacity as leader of the winning party, are charged with the task of prioritizing and implementing the major policy choices of party members by translating political party values into strategies for legislation and other programs. By virtue of his dual role as party leader and head of Cabinet, the Premier is at the apex of both the political and legislative policy-making functions. In the person of the Premier, Cabinet deliberations cannot be divorced from the consensus

> building process that must occur within the democratic political environment.[92]

[170] These words reveal the radical discontinuity between the approach taken in Order PO-1725 and by the Commissioner in this case. The Assistant Commissioner unequivocally found that, owing to the constitutional conventions and traditions, "the deliberations of the Premier, unlike those of individual ministers of the Crown, cannot be separated from the deliberations of Cabinet as a whole." The Commissioner quotes this statement early in his reasons in reciting the submissions of Cabinet Office,[93] but he never directly engages with the statement's implications for the interpretation of s. 12(1).

[171] The Commissioner's chain of reasoning rests on two propositions. First, s. 12(1) implicitly distinguishes between the "substance of deliberations" and the "outcome of deliberations". Second, s. 12(1) of the Act applies only to "Cabinet as a whole"; because the mandate letters are at best outcomes of the Premier's deliberations, they do not fall within the expression "substance of deliberations". In addition, the Commissioner construed Order PO-1725 too narrowly. I address each point in turn.

(i) The distinction between outcomes and deliberations is not material in this case

[92] *Order PO-1725*, at paras. 54-56 (emphasis added).
[93] *Order PO-3973*, at para. 23.

[172] The Commissioner's view is that the mandate letters are at best "outcomes" of the Premier's deliberations that do not fall within the "substance of deliberations" of "Cabinet as a whole".[94] I reject the relevance of this distinction in this case.

[173] I accept that there are circumstances where the distinction between the "substance" and the "outcome" of deliberations would be meaningful, such as when the outcome of Cabinet's deliberations on an issue has been publicized but "the substantive details of the matters deliberated upon by Cabinet" to reach that outcome have not.[95] However, I would qualify the distinction in two ways.

[174] First, the Act is concerned about premature disclosure. For example, subparagraph (c) expressly exempts materials used in reaching a decision "before those decisions are made and implemented". Further, s. 18(1)(g), exempts: "information… where the disclosure could reasonably be expected to result in

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[94] I also note that the Commissioner followed a line of IPC cases that draws a distinction between the "substance" and the "subject matter" of deliberations: see Information and Privacy Commissioner of Ontario*, Order PO-3719* (2017), at para. 42; *Order PO-3720; Ontario (Ministry of Finance) (Re)*, [2017] O.I.P.C. No. 58, at paras. 33, 42, and 44; *Interim Order MO-2964-I; Greater Sudbury (City) (Re)*, [2013] O.I.P.C. No. 254, at paras. 37-39, 43, and *Interim Order MO-3684-I; North Bay (City) (Re)*, [2018] O.I.P.C. No. 236, at paras. 18-21. As I indicated above, I reject this distinction because, understood in its proper context, s. 12(1) aims to protect the confidentiality of certain kinds of documents whose disclosure would reveal the matters Cabinet would be discussing, not just the content of its discussions. I also note that much of this IPC case law is rooted in the interpretation of the meaning of "the substance of deliberations" as it appears in s. 6(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act*. R.S.O. 1990, c. M.56. This section permits a head to refuse to disclose a record "that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public" (emphasis added). Although both provisions use the phrase "the substance of deliberations", the s. 6(1)(b) exemption is unrelated to Cabinet records and therefore does not engage the constitutional conventions surrounding Cabinet confidentiality. As a result, the case law interpreting the scope of s. 6(1)(b) is of limited use in discerning the scope of s. 12(1).

[95] *Order PO-3752; Ontario (Ministry of Energy)*, [2017] O.I.P.C. No. 145, at para. 40.

premature disclosure of a pending policy decision". In construing the Act coherently, the concern about premature disclosure counsels caution in making an overly sharp distinction between deliberations and outcomes in a chain of reasoning in assessing the application of s. 12(1).

[175] Second, chains of deliberative reasoning are usually comprised of alternating outcomes and further deliberations until the end of the chain when the ultimate outcome appears. There is no sense in which the Act would require the disclosure of any "interim" outcome in a chain of deliberative reasoning. In Cabinet, where that deliberative chain culminates in draft legislation or regulations, it is still protected from disclosure.

[176] The question arises: If the mandate letters are disclosable on the basis that they are merely the outcomes of the Premier's deliberations and are not therefore part of Cabinet deliberations, what other decisions of the Premier sent in documentary form to Cabinet ministers would not also be disclosable? The ramifications could force large and ultimately unproductive changes in the way the Premier communicates with ministers. Consider, for example, the content of a new mandate letter written to a minister just appointed to replace an underperforming minister. It is hard to imagine that such a new letter would not reflect in its instructions to the new minister the Premier's displeasure with the performance of

the old minister, quite likely the subject of Cabinet discussion, especially when compared to the mandate letter to the old minister.

(ii) The Premier is not separate from Cabinet

[177] As the above discussion of Order PO-1725 reveals, it is a novel proposition – one that I reject in this case – that the Premier's deliberations as head of Cabinet can be separated from those of the rest of Cabinet, specified by the Commissioner several times as "Cabinet as a whole", for the purpose of applying the Act.[96]

[178] Drawing a hard line between the Premier's deliberative process and that of the rest of Cabinet would not respect the way Cabinet functions because it would interfere with "the subtle interplay of formal and informal power [that] maintains and animates an effective institutional separation between the legislature and the executive."[97] Doing so would be contrary to the instructions given to the Williams Commission, and faithfully reflected both in its Report and in the Act, that reforms be "compatible with the parliamentary traditions of the Government of Ontario."[98]

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[96] The Premier is not generally set apart from Cabinet. As Hogg notes: "Not only do conventions presuppose the existence of law, much law presupposes the existence of conventions." The *Constitution Act, 1867* was drafted the way it was because the framers knew that the extensive powers vested in the Queen and Governor General would be exercised in accordance with the conventions of responsible government, that is to say, under the advice (meaning direction) of the cabinet or in some cases the Prime Minister. Modern statutes continue this strange practice of ignoring the Prime Minister (or provincial Premier) and his cabinet. They always grant powers to the Governor General in Council (or the Lieutenant Governor in Council) when they intend to grant powers to the cabinet. The numerous statutes that do this are of course enacted in the certain knowledge that the conventions of responsible government will shift the effective power into the hands of the elected ministry where it belongs": at para. 1-14 (footnote omitted).

[97] Baker, at p. 83.

[98] Williams Report, at p. 83.

[179] The Premier sets the "agenda" of the government and Cabinet in the large sense.[99] His mandate letters reflect the outcome of a deliberative process on the Premier's part, assisted no doubt by staff and political advisers. However, as Cabinet Office put it before the Commissioner, the letters also "initiate a continuing deliberative process at Cabinet".[100] They signal the tasks – the agenda – that the Premier expects each minister to undertake within the minister's portfolio. In my view, the Premier's deliberations leading to the mandate letters, and the letters themselves, are part of Cabinet's deliberative process. The entire set of mandate letters should be seen as the starting instructions for Cabinet in the new mandate, or as "blueprint[s] to inform discussion at the Cabinet table".[101] While they contain some campaign-style language, to varying degrees they also go further and, in some instances, signal the need for further policy work that will inevitably return to Cabinet. They are records that would reveal the nature of Cabinet deliberations within the meaning of "the substance of deliberations".

(iii) The Commissioner overstates the holding in Order PO-1725

[180] The Commissioner overstates the holding in Order PO-1725 in asserting that the records at issue in that case "were deliberative in nature because they

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[99] I do not use the word "agenda" in the technical meaning given by the Act: see *Order PO-1725*, at para. 60.
[100] *Order PO-3973*, at para. 27.
[101] *Order PO-3973*, at para. 27.

provided a roadmap revealing how and why policy choices were made by the Premier."[102]

[181] The holding in Order PO-1725 does not go that far. First, the Assistant Commissioner noted: "While many of these references consist of abbreviations, acronyms or initials, persons knowledgeable in the affairs of government would likely be in a position to identify most of these references both as to subject matter and the persons or entities involved."[103] He added:

> To the extent that the records reveal the issues and options upon which the Premier or the named individual is reflecting in formulating and establishing Cabinet's "agenda" – used here in its broadest sense – these records would tend to reveal the substance of this deliberative process and, therefore, the substance of the deliberations of Cabinet in the context of the Premier's unique role within that body.[104]

[182] Note that the "substance of the deliberative process" can only mean the subject matter under consideration, not the Premier's actual deliberations. The Assistant Commissioner noted: "It is only by virtue of the capacity of these entries to reflect the Premier's deliberations in establishing Cabinet's priorities that they fall within the introductory wording of section 12(1) by revealing the substance of that exercise."[105]

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[102] *Order PO-3973*, at para. 130.
[103] *Order PO-1725*, at para. 58.
[104] *Order PO-1725*, at para. 59.
[105] *Order PO-1725*, at para. 60.

[183] There is, with respect, no way that the scheduling entries could reveal the Premier's actual deliberations, only their subject matter. The entries would provide a form of roadmap as to the activities of the named employee, but they would not reveal "how and why policy choices were made by the Premier." The Commissioner's conclusion is completely speculative.

[184] To conclude, because the mandate letters are the product of the Premier's deliberations, in his role as head of Cabinet, and initiate Cabinet's mandate going forward, they are, perforce, part of Cabinet's deliberations and are fully protected from disclosure by the opening words of s. 12(1). As I stated at the outset, this determination is dispositive of the appeal.

(d) The test applied

[185] The design of the s. 12(1) exemption aims to protect the confidentiality of certain kinds of documents whose disclosure would reveal the nature of Cabinet's deliberations, that is, the topics, subject matters, things or the body of information Cabinet would be discussing.

[186] The pertinent question is whether the particular record resembles or is analogous to a record in the list or would otherwise reveal the nature of Cabinet deliberations. The mandate letters are analogous to the records listed in ss. 12(1)(d) and (e), respectively: "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", there being no doubt that the Premier is a Cabinet minister; and "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". It is no stretch to apply these words to the mandate letters.

[187] The design of the s. 12(1) exemption emplaces metaphorical bollards in the form of categorical exemptions in order to provide robust protection of the sphere of confidentiality within which Cabinet can function effectively. Departing from this interpretation would engage the Commissioner and the court in a deconstructive exercise in which every questioned record would be parsed and pared down to some irreducible core of actual communications at the Cabinet table. The Commissioner's analysis portends this outcome.

(5) Is the Commissioner's new test compatible with s. 12(1)?

[188] At the outset, I stated that I would also allow the appeal on the basis that the Commissioner's new test for an exemption from disclosure is fundamentally incompatible with the text, context, and purpose of s. 12(1) of the Act. I address the general approach to establishing an exemption, the Commissioner's new test, and problems with the new test and why it is unreasonable.

(a) Establishing an exemption from disclosure

[189] It is axiomatic that the party invoking the s. 12(1) exemption must explain why it applies. To some extent, that explanation will lay out the nature of the record and how it relates to s. 12(1), both the opening words and any applicable subparagraph. The forensic pattern is seen in the old case of *Conway*, which was a civil action by a former probationary police constable against his former superintendent for damages for malicious prosecution. The Home Secretary asserted absolute Crown privilege in certain documents. However, because the documents concerned internal police administration, the court concluded that they might not be Crown-privileged, properly speaking. Afterwards, Lord Reid examined the documents and ordered them to be produced in the civil action.

[190] Note the tension. There is a certain performative inconsistency. The party claiming the exemption is required to disclose the records in some measure in order to prove entitlement. In practice, this is done under seal with numerous redactions, as in this case. But the tension sets a conundrum for the party seeking the exemption and for the decision-maker charged with policing the Act. How much disclosure is required to justify the application of the Cabinet records exemption? There is a considerable distance from the fairly respectful treatment the Premier's Office received in Order PO-1725 to the dismissive and intrusive approach taken by the Commissioner in this case.

[191] The Assistant Commissioner's approach in Order PO-1725 was altogether more consistent with the broad interpretive approach explained earlier than the order under appeal. The Commissioner was unreasonable in failing to take the same approach to the mandate letters.

[192] In my view, the content of the mandate letters on their face constitutes sufficient evidence to trigger the exemption from disclosure provided for in the opening words of s. 12(1), quite apart from the evidence that they were on a Cabinet agenda and distributed on that occasion. Nothing more was reasonably required by way of evidence.

(b) The Commissioner's new test

[193] The test for the opening words exemption expressed in Order PO-1725 was that the disclosure "would permit the drawing of accurate inferences with respect to the deliberations of Cabinet or its committees."[106] However, the Commissioner ratchetted up this test by incorporating language drawn from Order PO-1725's discussion of the "agenda" exemption in subparagraph (a). The Assistant Commissioner explained why the appointment book entries in Order PO-1725 did not meet the definition of "agenda". In this context he said:

> Nor would such an entry, standing alone, normally be found to reveal the substance of Cabinet deliberations, unless either the context or other additional information

[106] *Order PO-1725*, at para. 48.

> would permit the reader to draw accurate inferences as to actual deliberations occurring at a specific Cabinet meeting. Therefore, none of the entries in the records at issue in these appeals is an "agenda", nor could any of these records be said to reveal any part of a Cabinet agenda.[107]

[194] The Commissioner adopted the underlined words as the proper test under the opening words of s. 12(1). He stated: "If a record does not appear at paragraphs (a) to (f), it will only qualify for the exemption if the context or other information would permit accurate inferences to be drawn as to actual Cabinet deliberations at a specific Cabinet meeting."[108] But he took the underlined phrase from Order PO-1725 entirely out of its context (i.e., a technical discussion of the exemption for a Cabinet "agenda") and then adopted the words as his new test. The person seeking the exemption in the opening words of s. 12(1) must show that disclosure "would permit accurate inferences to be drawn as to actual Cabinet deliberations at a specific Cabinet meeting", on the balance of probabilities.

[195] Notably, this new test is not consistent with the Assistant Commissioner's actual holding in Order PO-1725, where the test was whether the disclosure "would permit the drawing of accurate inferences" with respect to Cabinet deliberations. Because the appointment book entries could signal to an astute observer what was on the table at a Cabinet meeting – that is, what was discussed and not the

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[107] *Order PO-1725*, at p. 60 (emphasis added).
[108] *Order PO-3973*, at para. 101.

deliberations themselves – this was itself sufficient to trigger the exemption.[109] In other words, the "accurate inferences" were about the subject matter of the deliberations, not the actual deliberations as in who said what to whom.

[196] The Commissioner considerably heightened the test for the exemption from disclosure. He went too far. He was right to reject CBC's submission that the opening words exemption be limited "to records which permit accurate inferences to be drawn regarding discussion of the pros and cons of a course of action."[110] However, I find perplexing his additional comment that in his view, "the words of the exemption may extend more generally to include Cabinet members' views, opinions, thoughts, ideas and concerns expressed within the course of Cabinet's deliberative process."[111] Is there really any doubt that those items would be covered by the exemption? Why use the word "may"?

[197] In any event, the Commissioner's new test does not fall far short of CBC's proposal.

(c) Problems with the new test

[198] I noted above that the Commissioner's approach would engage the IPC and the court in a deconstructive exercise in which every questioned record would be parsed and pared down to some irreducible core of actual communications at the

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[109] *Order PO-1725*, at paras. 58-59.
[110] *Order PO-3973*, at para. 98.
[111] *Order PO-3973*, at para. 98 (emphasis added).

Cabinet table, with everything else being disclosable. The Commissioner's forensic approach bears this out. He stated that "evidence of a document actually having been placed before Cabinet provides 'strong but not necessarily determinative evidence that disclosing its content could reveal the substance of deliberations.'"[112] He required an institution to provide "evidence establishing a linkage between the content of a record and the substance of Cabinet deliberations."[113]

[199] The Commissioner then assessed the evidence:

> Cabinet Office does not claim or provide evidence that the mandate letters were themselves, in fact, discussed at the Cabinet meeting when they were provided to each minister or that they were tabled or made generally available for discussion. There is no evidence that the mandate letters were distributed to Cabinet as a whole at that time or that any specific contents of the letters were actually the subject of the deliberations of Cabinet.[114]

[200] The Commissioner took the view that the assumption that the mandate letters "would have been discussed" at the meeting on which they were listed as an agenda item falls "well short of the standard in section 12(1) that disclosure of the mandate letters *would reveal* the substance of any Cabinet deliberations at the initial Cabinet meeting."[115] He added: "Without additional evidence of what

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[112] *Order PO-3973*, at para. 96, citing *Order PO-2320; Ontario (Ministry of Finance)*, [2004] O.I.P.C. No. 201, at para. 31.
[113] *Order PO-3973*, at para. 96.
[114] *Order PO-3973*, at para. 114.
[115] *Order PO-3973*, at para. 114 (emphasis in original).

transpired in the course of the initial Cabinet meeting, the mandate letters at best provide an indication of topics that *may* have arisen during that meeting."[116]

[201] The Commissioner, in effect, suggested that only an affidavit by someone present at the Cabinet meeting and knowledgeable about what happened at it would be sufficient. That stance would presumably permit cross-examination. About what, precisely? One can imagine the cross-examination. Which letter was discussed, on the theory that any one not discussed would be disclosable? What in the letter was discussed, on the theory that anything discussed could be redacted and the rest disclosed? Was it just the reiterated campaign promise or did the discussion go to the new policy requirements because if it did not then that part of the letter would be disclosable?

[202] The degree of micromanagement implicit in the Commissioner's new test is palpable and entirely inconsistent with functional Cabinet government. One could get no deeper into the bowels of Cabinet government than this, which is precisely the mischief that s. 12(1) of the Act was designed to prevent.

[203] I turn now to the future orientation. The mandate letters reveal prospective deliberations by Cabinet, which past IPC decisions have recognized may be sufficient to trigger exemption under the opening words of s. 12(1).[117] The

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[116] *Order PO-3973*, at para. 115 (emphasis in original).
[117] See, for example, *Order PO-2707; Ministry of Education*, [2008] O.I.P.C. No. 166, at para. 64.

Commissioner acknowledged that the opening words of s. 12 do, in general, contemplate the possibility of a prospective application,[118] but he rejected Cabinet Office's argument that the letters should be exempt from disclosure on the basis that they would reveal the substance of future Cabinet deliberations. It is worth attending to his precise words:

> [T]here is no evidence that the mandate letters themselves would be placed before Cabinet in future meetings. The evidence before me establishes only that the subject matter of a number of unspecified policy initiatives in the letters would be considered at some point in future Cabinet meetings. This, too, is insufficient on its own to establish that disclosure of the letters would reveal the substance of any specific Cabinet deliberations occurring at a future date.[119]

[204] The Commissioner added:

> While the mandate letters may be said to reveal the subject matter of what *may* come back to Cabinet for deliberation at some point in the future, they do not reveal the substance of any minister's actual proposals or plans for implementation, or the results of any consultations or program reviews and options. Consequently, they do not reveal the substance of any material upon which Cabinet members will actually deliberate in the future and, for that reason, do not reveal the substance of any such future deliberations.[120]

[205] Based on his interpretation of s. 12(1), the Commissioner viewed his factual finding that the subject matter of policy initiatives discussed in the letters would be

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[118] *Order PO-3973*, at para. 120.
[119] *Order PO-3973*, at para. 116.
[120] *Order PO-3973*, at para. 119 (emphasis in original).

considered at future Cabinet meetings as insufficient to exempt the mandate letters. However, when considered in view of the reasonable interpretation of s. 12(1), the mandate letters plainly fall within the meaning of the section's opening words.

[206] Meeting the new test would require an affiant to provide future details that do not exist and would not exist until the policy development process is complete and the matter is before Cabinet. The Commissioner misapprehends the fluid nature and process of Cabinet government on which the categorical exemption in s. 12(1) rests.

[207] In terms of the mischief, I can do no better than to repeat the words of Lord Reid, approved by the Supreme Court: "The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind."[121]

[208] To conclude, the purpose of s. 12(1) is to set a robust and well-protected sphere of confidentiality within which Cabinet can function effectively. Accordingly, the expression "the substance of deliberations" in s. 12(1) is properly understood

[121] *Conway*, at p. 952.

as including the nature of the topics, the subject matters, things or "body of information" Cabinet would be discussing, as well as the deliberations themselves.

[209] The subjects covered in the mandate letters fall within this understanding. Such a reading would avoid the slippery slope to the kind of intrusive incursion into Cabinet proceedings that the Commissioner undertook in this case in seeking to determine whether there was actual discussion of the mandate letters at the relevant Cabinet meeting. The Commissioner's new test is incompatible with s. 12(1) of the Act and is plainly unreasonable.

[210] In light of the foregoing, and my earlier dispositive conclusion that the mandate letters are part of Cabinet's deliberative process and therefore exempt from disclosure, I would allow the appeal and set aside the Commissioner's order directing the release of the mandate letters.

(6) Should the issue of the disclosure of the mandate letters be remitted to the Commissioner for disposition in accordance with these reasons?

[211] The standard remedy in cases where the reviewing court has determined that an administrative decision-maker's statutory interpretation cannot be sustained is for the court to remit the matter back to the decision-maker for reconsideration.[122] This remedy reflects respect for the legislature's intention that the administrative decision-maker should decide the issue. However, remedies are

[122] *Vavilov*, at para. 141.

discretionary.[123] When it is evident "that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose", the court may decline to remit the matter.[124]

[212] In this case, remitting the matter for reconsideration would serve no useful purpose, and I would not do so. The conclusion that the mandate letters qualify for exemption under the opening words of s. 12(1) flows inevitably from a reasonable interpretation of the provision. Although a reviewing court should not substitute its own decisions for those of an administrative decision-maker lightly, remitting this matter to the Commissioner for reconsideration would be pointless.[125]

Released: January 26, 2022 "E.E.G."

"P. Lauwers J.A."

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[123] *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [2020] F.C.J. No. 671, at para. 99, leave to appeal granted, [2020] S.C.C.A. No. 392 ("*Entertainment Software Association* (FCA)"), citing *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 and *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6.
[124] *Vavilov*, at para. 142.
[125] See *Entertainment Software Association* (FCA), at para. 100; *Vavilov*, at para. 142; and *Giguère v. Chambre des notaires du Québec*, 2004 SCC 1, [2004] 1 S.C.R. 3, at para. 66, *per* Deschamps J. (dissenting).

APPENDIX: S. 12(1) AND THE WILLIAMS REPORT RECOMMENDATIONS

***Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 12(1)**	**Text of the Williams Report**
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,	1. We recommend that the proposed freedom of information law contain an exemption for documents whose disclosure would reveal the substance of Cabinet deliberations and, in particular, that the following kinds of Cabinet documents be the subject of this exemption:
(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;	a. agenda, minutes or other records of the deliberations or decisions of Cabinet or its committees;
(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;	b. records containing proposals or recommendations submitted, or prepared for submission, by a Cabinet minister to Cabinet;
(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;	c. records containing background explanations, analyses of problems or policy options submitted or prepared for submission by a Cabinet minister to Cabinet for consideration by Cabinet in making decisions, before such decisions are made;
(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;	d. records 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	e. records containing briefings to Cabinet ministers in relation to matters that are before or are proposed to be brought before Cabinet, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;
(f) draft legislation or regulations.	f. draft legislation.