



SUPREME COURT OF CANADA

CITATION: Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner), 2024 SCC 4

APPEAL HEARD: April 18, 2023
JUDGMENT RENDERED: February 2, 2024
DOCKET: 40078

BETWEEN:

Attorney General of Ontario
Appellant

and

Information and Privacy Commissioner of Ontario and Canadian Broadcasting Corporation
Respondents

- and -

Attorney General of British Columbia, Attorney General of Alberta, Canadian Civil Liberties Association, BC Freedom of Information and Privacy Association, Centre for Free Expression, Canadian Journalists for Free Expression, Canadian Association of Journalists and Aboriginal Peoples Television Network
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and O’Bonsawin JJ.

**REASONS FOR
JUDGMENT:**
(paras. 1 to 64)

Karakatsanis J. (Wagner C.J. and Rowe, Martin, Jamal and
O'Bonsawin JJ. concurring)

**CONCURRING
REASONS:**
(paras. 65 to 83)

Côté J.

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Attorney General of Ontario

Appellant

v.

**Information and Privacy Commissioner of Ontario and
Canadian Broadcasting Corporation**

Respondents

and

**Attorney General of British Columbia,
Attorney General of Alberta,
Canadian Civil Liberties Association,
BC Freedom of Information and Privacy Association,
Centre for Free Expression,
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Canadian Association of Journalists and
Aboriginal Peoples Television Network**

Interveners

**Indexed as: Ontario (Attorney General) v. Ontario (Information and Privacy
Commissioner)**

2024 SCC 4

File No.: 40078.

2023: April 18; 2024: February 2.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and
O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Access to information — Exemptions — Cabinet records — Mandate letters — Cabinet records exempted by provincial legislation from general right of public access to government-held information — Cabinet records exemption applicable when disclosure would reveal substance of cabinet deliberations — Whether cabinet records exemption protects mandate letters prepared for cabinet ministers by premier from disclosure — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F. 31, s. 12(1).

A CBC journalist requested access to 23 mandate letters that the Premier of Ontario delivered to each of his ministers shortly after forming government in 2018. The letters set out the Premier’s views on policy priorities for the government’s term in office. Cabinet Office declined the journalist’s request. It claimed the letters were exempt from disclosure under the Cabinet records exemption in s. 12(1) of Ontario’s *Freedom of Information and Protection of Privacy Act* (“*FIPPA*”), which protects, in its opening words, the confidentiality of records that would reveal the “substance of deliberations” of Cabinet or its committees. The CBC appealed to the Information and Privacy Commissioner of Ontario (“*IPC or Commissioner*”), who found that the letters were not exempt and ordered their disclosure. On judicial review, the Divisional Court found that the *IPC’s* decision was reasonable and a majority of the Court of Appeal agreed.

Held: The appeal should be allowed and the order of the *IPC* set aside.

Per Wagner C.J. and **Karakatsanis**, Rowe, Martin, Jamal and O'Bonsawin JJ.: The mandate letters are protected from disclosure under s. 12(1) of *FIPPA*. The opening words of s. 12(1) demand a substantive analysis of the requested record and its substance to determine whether disclosure of the record would shed light on Cabinet deliberations. Statutory text, purpose, and context lead inexorably to the conclusion that the mandate letters are protected from disclosure under s. 12(1)'s opening words. The mandate letters reflect the view of the Premier on the importance of certain policy priorities and mark the initiation of a fluid process of policy formulation within Cabinet. The letters are revealing of the substance of Cabinet deliberations.

Freedom of information legislation strikes a balance between the public's need to know and the confidentiality the executive requires to govern effectively. All such legislation across Canada balances these two essential goals through a general right of public access to government-held information subject to exemptions or exclusions — including those for Cabinet records or confidences. In Ontario, s. 12(1) of *FIPPA* exempts a list of records, as well as any other records that would reveal the substance of deliberations of Cabinet or its committees. The legislative context shows that this exemption was a critical part of the balance the legislature struck between public access to information and necessary spheres of government confidentiality. But beyond legislation, Cabinet confidentiality is protected as a matter of constitutional convention. Because s. 12(1) was designed to preserve the secrecy of Cabinet's

deliberative process, the constitutional dimension of Cabinet secrecy is crucial context in interpreting s. 12(1).

In Canada's constitutional democracy, the confidentiality of Cabinet deliberations is a precondition to responsible government because it enables collective ministerial responsibility. Responsible government is a fundamental principle of Canada's system of government and the most important non-federal characteristic of the Canadian Constitution. Cabinet secrecy derives from the collective dimension of ministerial responsibility, which requires that ministers be able to speak freely when deliberating without fear that what they say might be subject to public scrutiny. This is necessary so ministers do not censor themselves in policy debate, and so ministers can stand together in public, and be held responsible as a whole, once a policy decision has been made and announced. These purposes are referred to as the candour and solidarity rationales for Cabinet confidentiality. There is also a third rationale for the convention of Cabinet confidentiality: it promotes the efficiency of the collective decision-making process. Thus, Cabinet secrecy promotes candour, solidarity, and efficiency, all in aid of effective government.

The prerogative to determine when and how to announce Cabinet decisions is grounded in the harmful impact that premature disclosure of policy priorities can have on the deliberative process. The efficiency of the deliberative process justifies keeping Cabinet proceedings confidential until a final decision is made and announced. Publicizing Cabinet's decision-making process before the formulation and

announcement of a final decision would increase the public pressure that stakeholders put on ministers and give rise to partisan criticism from their political opponents; this scrutiny would ultimately paralyze the collective decision-making process. The substance of Cabinet deliberations also encompasses discussion of when and how to communicate government priorities.

Cabinet's deliberative process consists of discussion, consultation, and policy formulation between the Premier, individual ministers, and Cabinet as a whole. The first minister, as head of Cabinet, enjoys extensive powers within Cabinet's deliberative process. In many regards, the role and activities of the Premier are inseparable from Cabinet and its deliberations. First ministers preside over Cabinet, set Cabinet agendas, determine Cabinet's membership and internal structure, set Cabinet procedures, and have the right to identify the consensus and determine what Cabinet has decided. Agenda-setting, which occurs at an early stage, is a crucial part of the decision-making process. Though deliberative processes have changed over time at both the provincial and federal levels, the critical role of agenda-setting and the central involvement of the first minister in this exercise have remained constant. Not all stages of Cabinet's deliberative process take place sitting around the Cabinet table behind a closed door. The decision-making process in Cabinet extends beyond formal meetings of Cabinet or its committees. The priorities communicated to ministers by the Premier at the outset of governance are the initiation of Cabinet's deliberative process, and will be revealing of the substance of Cabinet deliberations when compared against subsequent government action.

In approaching assertions of Cabinet confidentiality, administrative decision makers and reviewing courts must be attentive to the vital importance of public access to government-held information but also to Cabinet secrecy's core purpose of enabling effective government, and its underlying rationales of efficiency, candour, and solidarity. They must also be attentive to the dynamic nature of executive decision-making, the function of Cabinet itself and its individual members, the role of the Premier, and Cabinet's prerogative to determine when and how to announce its decisions.

In the instant case, it is not necessary to resolve the issue of standard of review, as the same conclusion follows regardless of whether the standard of review of the IPC's decision is correctness or reasonableness. The narrow zone of protection for Cabinet deliberations created by the IPC's interpretation and application of s. 12(1) is not justified, even on the more deferential standard of reasonableness. The IPC failed to give meaningful weight to the legal and factual context, including traditions and constitutional conventions concerning Cabinet confidentiality, the role of the Premier, and the fluid, dynamic nature of the Cabinet decision-making process. As a result, the IPC's narrow interpretation of the "substance of deliberations" was unreasonable, as was his application of the provision to the mandate letters.

Per Côté J.: There is agreement with the majority's interpretation of s. 12(1) of *FIPPA*, and with its conclusion that the mandate letters at issue are exempt from disclosure under that provision. However, there is disagreement with the

majority's statement that it is not necessary to resolve the question of the applicable standard of review.

The Court has recognized that correctness review is necessary to resolve general questions of law — such as the appropriateness of limits on solicitor-client privilege and the scope of parliamentary privilege — that are of fundamental importance and broad applicability, with significant legal consequences for the justice system as a whole. The scope of Cabinet privilege is not a question particular to Ontario's specific regulatory regime and there is no principled reason why Cabinet privilege should be treated any differently — or is any less important to the legal system as a whole — than solicitor-client privilege or parliamentary privilege. The scope of Cabinet privilege is a question of central importance to the legal system as a whole. It must be reviewed for correctness because courts, when conducting a reasonableness review, cannot provide the single determinate answer that such questions require.

In the instant case, there is disagreement with the majority that the same conclusion follows regardless of whether the standard of review is correctness or reasonableness. The Commissioner's reasons were intelligible and transparent and a number of relevant factors weigh in favour of the Commissioner's interpretation of s. 12(1). The fact that the majority would have reached a different conclusion does not make the Commissioner's decision unreasonable. A court conducting reasonableness review must focus on the decision the administrative decision maker actually made,

including the justification offered for it, and not on the conclusion the court itself would have reached. The majority fails to apply this methodology in practice.

However, there is agreement with the majority's interpretation of the scope of Cabinet privilege, which is the correct interpretation, and with its conclusion that the mandate letters are exempt from disclosure under s. 12(1). The "substance of deliberations" encompasses Cabinet's deliberative process from beginning to end, including directives and policy priorities communicated by the Premier to individual ministers. By concluding otherwise, the Commissioner adopted an incorrect interpretation.

Cases Cited

By Karakatsanis J.

Applied: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; **referred to:** *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687; *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3; *Carey v. Ontario*, [1986] 2 S.C.R. 637; Order PO-1725, 1999 CanLII 14318; *Northern Regional Health*

Authority v. Horrocks, 2021 SCC 42; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3; *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Conway v. Rimmer*, [1968] A.C. 910.

By Côté J.

Applied: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; **referred to:** *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat)*, 2001 NSCA 132, 197 N.S.R. (2d) 154; *Aquasource Ltd. v. Freedom of Information and Protection of Privacy Commissioner (B.C.)* (1998), 111 B.C.A.C. 95; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555; *Kanhasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R.

909; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3; *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403.

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Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A-1.2, s. 27.

Access to Information and Protection of Privacy Act, S.N.W.T. 1994, c. 20, ss. 13 to 14.

Access to Information and Protection of Privacy Act, C.S.Nu., c. A-20, s. 13.

Access to Information and Protection of Privacy Act, S.Y. 2018, c. 9, s. 67.

Act respecting Access to documents held by public bodies and the Protection of personal information, CQLR, c. A-2.1, ss. 30 to 38.

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Freedom of Information and Protection of Privacy Act, C.C.S.M., c. F175, s. 19.

Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25, s. 22.

Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, s. 12.

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 1(a)(ii), 12(1), 16, 20, 21.

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APPEAL from a judgment of the Ontario Court of Appeal (Gillese, Lauwers and Sossin JJ.A.), 2022 ONCA 74, 160 O.R. (3d) 481, 465 D.L.R. (4th) 707, 93 Admin. L.R. (6th) 17, [2022] O.J. No. 430 (Lexis), 2022 CarswellOnt 859 (WL), affirming a decision of Swinton, Penny and Kristjanson JJ., 2020 ONSC 5085, 93

Admin. L.R. (6th) 1, [2020] O.J. No. 3606 (Lexis), 2020 CarswellOnt 12185 (WL), affirming a decision of the Information and Privacy Commissioner of Ontario, Order PO-3973, 2019 CanLII 76037, [2019] O.I.P.C. No. 155 (Lexis). Appeal allowed.

Judie Im, Nadia Laeeque and Jennifer Boyczuk, for the appellant.

William S. Challis and Linda Chen, for the respondent the Information and Privacy Commissioner of Ontario.

Justin Safayeni, Spencer Bass and Dustin Milligan, for the respondent the Canadian Broadcasting Corporation.

Tara Callan, Tamara Saunders and Layli Antinuk, for the intervener the Attorney General of British Columbia.

Sean McDonough and Melissa Burkett, for the intervener the Attorney General of Alberta.

Iris Fischer and Gregory Sheppard, for the intervener the Canadian Civil Liberties Association.

Sean Hern, K.C., and Benjamin Isitt, for the intervener the BC Freedom of Information and Privacy Association.

Jessica Orkin and Adriel Weaver, for the interveners the Centre for Free Expression, the Canadian Journalists for Free Expression, the Canadian Association of Journalists and the Aboriginal Peoples Television Network.

The judgment of Wagner C.J. and Karakatsanis, Rowe, Martin, Jamal and O’Bonsawin JJ. was delivered by

KARAKATSANIS J. —

I. Introduction

[1] Freedom of information (FOI) legislation strikes a balance between the public’s need to know and the confidentiality the executive requires to govern effectively. Both are crucial to the proper functioning of our democracy. This appeal concerns the balance between these two foundational principles.

[2] Access to information promotes transparency, accountability, and meaningful public participation. Without adequate knowledge of what is going on, legislators and the public can neither hold government to account nor meaningfully contribute to decision making, policy formation, and law making. In this way, FOI legislation is intended not to hinder government but to “improve the workings of government” by making it “more effective, responsive and accountable” to both the legislative branch and the public (*Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 63).

[3] However, in our Westminster system of government, the executive — like the judicial and legislative branches — also requires certain spheres of confidentiality to fulfill its constitutional role. Each of the executive, legislative branch, and judiciary play “critical and complementary roles in our constitutional democracy” and “each branch will be unable to fulfill its role if it is unduly interfered with by the others” (*Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 29). Thus, constitutional conventions flow from the separation of powers and protect the spheres of confidentiality needed for a government institution “to perform its constitutionally-assigned functions” (*British Columbia (Attorney General) v. Provincial Court Judges’ Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506 (*B.C. Judges*), at para. 66). Just as legislative privilege protects the ability of elected representatives to act on the will of the people (*Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687), and deliberative secrecy preserves the independence of the judiciary (*MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at pp. 830-31), Cabinet confidentiality grants the executive the necessary latitude to govern in an effective, collectively responsible manner (*Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at para. 15). Cabinet secrecy is “essential to good government” (*ibid.*), as it promotes deliberative candour, ministerial solidarity, and governmental efficiency by protecting Cabinet’s deliberations (*B.C. Judges*, at paras. 95-97; *Carey v. Ontario*, [1986] 2 S.C.R. 637, at pp. 658-59).

[4] All FOI legislation across Canada balances these two essential goals through a general right of public access to government-held information subject to exemptions or exclusions — including those for Cabinet records or confidences. This appeal implicates that balance in relation to the Cabinet records exemption in s. 12(1) of Ontario’s *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (*FIPPA*). Section 12(1) exempts a list of records, as well as any other records that would reveal the “substance of deliberations” of Cabinet or its committees. The interpretation of “substance of deliberations” by the Information and Privacy Commissioner of Ontario (IPC or Commissioner) is at the heart of this case.

[5] The access to information dispute in this appeal arises out of a Canadian Broadcasting Corporation (CBC) journalist’s request to access 23 letters that the Premier of Ontario delivered to each of his ministers shortly after forming government in 2018 (Letters). These Letters, commonly called “mandate letters”, set out the Premier’s views on policy priorities for the government’s term in office. Cabinet Office declined the journalist’s request, claiming the Letters were exempt from disclosure under s. 12(1) of *FIPPA*.

[6] The CBC appealed to the IPC, who found that the Letters were not exempt and ordered their disclosure (Order PO-3973, 2019 CanLII 76037). On judicial review, the Ontario Divisional Court found that the IPC’s decision was reasonable and a majority of the Ontario Court of Appeal agreed (2020 ONSC 5085, 93 Admin. L.R. (6th) 1; 2022 ONCA 74, 160 O.R. (3d) 481). In dissent, Lauwers J.A. would have found

that the decision was unreasonable for several reasons, but mainly because it eroded the sphere of Cabinet privilege that s. 12(1) is designed to preserve.

[7] As I shall explain, I conclude that the IPC's decision was unreasonable. The Commissioner paid careful attention to the text of the legislation and considered some of the purposes of Cabinet confidentiality. His reasons were intelligible and transparent. But he did not engage meaningfully with the legal and factual context against which s. 12(1) operates — in particular, constitutional conventions and traditions surrounding Cabinet confidentiality and Cabinet's decision-making process, including the role of the Premier within that process. Cabinet confidentiality creates conditions necessary to ensure an effective government. The Commissioner did not consider a key rationale underlying the convention: promoting the efficiency of the collective decision-making process. His failure to grapple with the broader constitutional dimension of Cabinet confidentiality led him to an overly narrow interpretation of s. 12(1). He excluded "outcomes" of the deliberative process, without regard for the impact that premature disclosure of policy priorities at an early stage of the process may have on the efficient workings of government.

[8] Moreover, even on the Commissioner's interpretation of s. 12(1), his application of the standard to the Letters was unreasonable. The IPC's characterization of the Letters as containing only non-exempt "topics" or final "outcomes" of the *Premier's* deliberative process did not account for the broader context of the Cabinet's deliberative process. For one, as head of Cabinet, the Premier's deliberations cannot be

artificially segmented from those of Cabinet. And far from being mere “topics” like items on an agenda, the Letters reflect the views of the Premier on the importance of certain policy priorities, and mark the initiation of a fluid process of policy formulation within Cabinet. The Letters are revealing of the substance of Cabinet deliberations, both on their face and when compared against what government actually does.

[9] I would allow the appeal and set aside the decision of the IPC.

II. Reasons of the IPC

[10] Before the IPC, Cabinet Office submitted the Letters should be protected for three reasons: (1) the Letters were placed on the agenda of Cabinet’s initial meeting, provided to each minister during the meeting, and the Premier’s key messages on policy initiatives would have been discussed at that meeting; (2) the Letters reveal the deliberations of the Premier in setting policy priorities for Cabinet, which are inherently part of the deliberative process of Cabinet; and (3) disclosure of the Letters would reveal the substance of future Cabinet deliberations because many priorities outlined in the Letters require deliberation by Cabinet and its committees before implementation (paras. 26-29). Cabinet Office submitted that prematurely disclosing policy initiatives could endanger free and frank discussion of these initiatives in future Cabinet meetings, and stressed the prerogative of the Premier “to determine the manner and timing by which the government will disclose its policy priorities” (paras. 30 and 32).

[11] The IPC found the Letters were not protected by s. 12(1) and ordered they be disclosed. The IPC began by examining the purpose of the Cabinet records exemption, given two underlying rationales for preserving the confidentiality of Cabinet deliberations: ministerial candour and solidarity. He found that the purpose was “to promote the free and frank discussion among Cabinet members of issues coming before them for decision, without concern for the chilling effect that might result from disclosure of their statements or the material on which they are deliberating” (para. 86).

[12] The IPC rejected the CBC’s argument that “substance of deliberations” should be restricted to records revealing discussion of the pros and cons of a course of action. He recognized that “the exemption may extend more generally to include Cabinet members’ views, opinions, thoughts, ideas and concerns” expressed in the deliberative process and to documents that “were intended to serve, or did serve, as . . . the basis for discussions by Cabinet as a whole” (paras. 98 and 113; see also paras. 116, 119 and 131). The IPC noted that, generally, “[s]ection 12(1) is designed to protect deliberative communications occurring within” Cabinet’s policy-making process, not the “outcomes” of that process (i.e. the decisions themselves) or mere “subjects” or “topics” of deliberation (paras. 92 and 104). Still, he recognized that topics or subject matters will be exempt where “the context or other additional information would permit the reader to draw accurate inferences” as to Cabinet deliberations (para. 100, quoting Order PO-1725, 1999 CanLII 14318 (Ont. I.P.C.), at p. 16). Later in his decision, the IPC relied on past precedent interpreting s. 12(1)(a) to hold that records not falling

within the specific exemptions at s. 12(1)(a) to (f) will only qualify for protection where it is likely disclosure “would permit accurate inferences to be drawn as to actual Cabinet deliberations at a specific Cabinet meeting” (paras. 94, 101 and 121).

[13] In the application, the IPC held the Letters were not protected because nothing suggested they were intended to serve, or served, as the basis for discussions by Cabinet as a whole (paras. 113-14). At most, the Letters indicate topics that *may* have arisen during a Cabinet meeting, or the subject matter of unspecified policy initiatives that *may* be considered in future meetings (paras. 115 and 119). Moreover, rather than being revealing of the views, opinions, thoughts, ideas, and concerns of ministers, the IPC held that the Letters represent “the end point of the Premier’s formulation of the policies and goals to be achieved by each Ministry” — or, “the product of his deliberations” — and fell outside the ambit of s. 12(1) (paras. 132 and 134; see also para. 79).

III. Analysis

[14] Section 12(1) protects the confidentiality of records that “would reveal the substance of [Cabinet] deliberations”. Similar exemptions are found in FOI legislation across the country.¹ The opening words of s. 12(1) provide that “[a] head shall refuse

¹ See *Access to Information Act*, R.S.C. 1985, c. A-1, s. 69; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 22; *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 12; *The Freedom of Information and Protection of Privacy Act*, C.C.S.M., c. F175, s. 19; *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, s. 27; *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c. 20, ss. 13 to 14; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, s. 13; *Access to Information and Protection of Privacy Act*, C.S.Nu., c. A-20, s. 13; *Freedom of Information and Protection of Privacy*

to disclose a record where the disclosure would reveal the substance of deliberations” of Cabinet or its committees. The paragraphs of the provision protect listed records, which need not meet the standard set out in s. 12(1)’s opening words to qualify for protection. Section 12(1) is reproduced in full in the attached Appendix. Only the opening words of the provision are at issue.

[15] Here, the sole issue is whether the public should have access to the Premier’s mandate letters. This turns on the IPC’s interpretation of the opening words of s. 12(1) and its application on these facts. The parties submit that this Court should review the IPC’s decision for reasonableness. We are not bound by that agreement as a “reviewing judge’s selection and application of the standard of review is reviewable for correctness” (*Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, at para. 10; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47).

[16] We note, however, that the case was argued and decided by the courts below based on reasonableness review. Dissenting at the Court of Appeal, Lauwers J.A. raised, without deciding, serious questions as to whether the standard of review ought to be correctness in this case given the constitutional conventions and associated traditions and practices engaged by s. 12(1) (paras. 106-8). In this case, the same conclusion follows regardless of whether the standard of review is correctness or

Act, S.P.E.I. 2001, c. 37, s. 20; *Act respecting Access to documents held by public bodies and the Protection of personal information*, CQLR, c. A-2.1, ss. 30 to 38; *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, s. 16; *Access to Information and Protection of Privacy Act*, S.Y. 2018, c. 9, s. 67.

reasonableness. The narrow zone of protection for Cabinet deliberations created by the IPC's interpretation and application of s. 12(1) is not justified, even on the more deferential standard of reasonableness. In light of this conclusion and considering that the parties had not raised the issue of the applicable standard of review before this Court, it is not necessary to finally resolve the issue here. We therefore make no comment about the "thorny question" raised by Lauwers J.A. (at para. 108) and proceed on the basis of reasonableness review.

[17] Reasonableness review focuses both on the decision maker's reasoning process and the outcome (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 83-84). A reasonable decision is "justified in relation to the constellation of law and facts that are relevant to the decision"; the legal and factual contexts thus "operate as constraints on the decision maker in the exercise of its delegated powers" (para. 105). Relevant contextual constraints may include "the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker . . .; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual" (para. 106).

[18] In conducting reasonableness review, reviewing judges must "be attentive to the application by decision makers of specialized knowledge" and "institutional expertise and experience" (para. 93; see also paras. 232-34). Judges must not reweigh

and reassess the evidence considered by the decision maker, absent a fundamental misapprehension or failure to account for some aspect of the evidence (paras. 125-26). Reasonableness review thus entails deference to the decision maker, and, throughout, I examine the reasons offered by the IPC in light of the parties' arguments and the context of the proceedings.

[19] The appellant Attorney General of Ontario submits the IPC's decision was unreasonable on several bases, including: (1) the IPC's interpretation of s. 12(1) is inconsistent with the purpose of the exemption to broadly protect Cabinet confidentiality, in line with tradition and constitutional convention; (2) the IPC unreasonably established a heightened test for s. 12(1) in requiring evidence that the Letters were connected to "actual Cabinet deliberations at a specific Cabinet meeting"; and (3) the IPC erred in concluding that the Letters were not exempt because they were "outcomes" of the Premier's deliberative process, or mere "topics" and "subjects" of Cabinet meetings.

[20] The respondent CBC seeks to uphold the IPC's decision, noting that the IPC was alive to the purpose of the exemption and reasonably concluded that disclosure of the Letters would not impair that goal. The CBC contends that the IPC's decision did not turn on whether "actual" deliberations occurred at a "specific" Cabinet meeting. Rather, it was driven by a lack of evidence the Letters would disclose the substance of *any* deliberations at *any* Cabinet meeting. The CBC also argues that the IPC recognized that "outcomes" of a deliberative process may be exempt where they would permit

accurate inferences to be drawn as to the substance of Cabinet's deliberations, and reasonably found the Letters did not meet this test. As mandated by the statutory process, the CBC made its submissions without the benefit of viewing the Letters, which had been disclosed only to the IPC and reviewing judges in these proceedings.

[21] As I will explain, I agree with the Attorney General of Ontario that the Commissioner did not adequately grapple with the broader legal and factual context in interpreting s. 12(1). As a result, he unreasonably rejected the arguments of Cabinet Office as to the impact that disclosure of the Letters would have on Cabinet's deliberative process. The legal and factual constraints operating on s. 12(1) implicate constitutional conventions and traditions governing Cabinet confidentiality and Cabinet's deliberative process. Given the centrality of such traditions and conventions to the proper functioning of our democracy, it was vital that the IPC's decision meaningfully consider this context. His failure to do so led him to an unreasonably narrow interpretation of s. 12(1) and caused him to mischaracterize the Letters themselves.

[22] I proceed by assessing the reasonableness of the IPC's interpretation of s. 12(1) against the legislation and the legal backdrop of Cabinet confidentiality. I then assess the Commissioner's characterization of the Letters, given the context advanced by Cabinet Office about the deliberative process and the role of the Premier.

A. The IPC's Interpretation of Section 12(1)

[23] A reasonable decision is justified in relation to the salient aspects of the statute's text, context, and purpose, in line with the modern principle of statutory interpretation (*Vavilov*, at paras. 117-22). A minor omission of some element of text, context, or purpose is unlikely to be a basis for finding the decision unreasonable. Still, a court will intervene where "the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker" (para. 122).

[24] In my view, the IPC's decision demonstrates careful regard for the text of s. 12(1) — for example, noting the meaning of the words "substance", "deliberations", "including", and "would" in the provision (paras. 9, 90-97 and 111). The IPC also noted FOI legislation's general purpose of facilitating democracy (para. 106), and accounted for two of the purposes of Cabinet confidentiality: candour and solidarity (para. 87). But the IPC was not attentive to important legal context surrounding the exemption, which must inform the interpretation of its purpose and text. This omission led the IPC to an overly narrow interpretation of the exemption's purpose and scope.

[25] The parties submit that the purposes informing the legislation were key considerations to the IPC's interpretation of s. 12(1). *FIPPA* was enacted in 1987 based on recommendations made by the Ontario Commission on Freedom of Information and Individual Privacy, headed by Commissioner D. Carlton Williams, in 1980. As the IPC observed, *FIPPA* creates a general right of public access to government information, subject to necessary exemptions which are limited and specific (para. 107, citing s. 1(a)).

[26] The legislative context shows *FIPPA*'s Cabinet records exemption was a critical part of the balance the legislature struck between public access to information and necessary spheres of government confidentiality (see Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 21, 1st Sess., 33rd Parl., July 12, 1985, at pp. 753-55 (Hon. Ian G. Scott) (recognizing that *FIPPA* required “balanc[ing]” of competing interests and that the Cabinet records exemption protected “central institutions of representative government”)). In contemplating the enactment of FOI legislation in Ontario, the official report of the Williams Commission recognized that changes to access to government information practices had to be compatible with the province's traditions and the constitutional conventions related to the effective functioning of Cabinet (Commission on Freedom of Information and Individual Privacy, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (1980) (Williams Report), at pp. 83 and 85).

[27] Beyond legislation, Cabinet confidentiality is protected as a matter of constitutional convention, or the rules of behavior established by government institutions that are not enforced by the courts, but are considered binding by those who operate the Constitution (A. Heard, *Canadian Constitutional Conventions: The Marriage of Law & Politics* (2nd ed. 2014), at p. 5; see also *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at p. 880). Because s. 12(1) was designed to preserve the secrecy of Cabinet's deliberative process, the constitutional dimension of Cabinet secrecy was crucial context in interpreting s. 12(1).

[28] In our constitutional democracy, the confidentiality of Cabinet deliberations is a precondition to responsible government because it enables collective ministerial responsibility. Responsible government is a fundamental principle of our system of government (*OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 38) and the “most important non-federal characteristic of the Canadian Constitution” (P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 9:3). Government is “responsible” in that the executive is accountable to, and must maintain the confidence of, the legislative assembly (§ 9:1; Heard, at p. 90). Cabinet ministers are both *individually* responsible for their own conduct and respective departments, and *collectively* responsible for government policy and action (G. White, *Cabinets and First Ministers* (2005), at pp. 15-16).

[29] Cabinet secrecy derives from the collective dimension of ministerial responsibility (Y. Campagnolo, “The Political Legitimacy of Cabinet Secrecy” (2017), 51 *R.J.T.U.M.* 51, at p. 59). Collective ministerial responsibility requires that ministers be able to speak freely when deliberating without fear that what they say might be subject to public scrutiny (IPC reasons, at paras. 86-87 and 97). This is necessary so ministers do not censor themselves in policy debate, and so ministers can stand together in public, and be held responsible as a whole, once a policy decision has been made and announced. These purposes are referred to by scholars as the “candour” and “solidarity” rationales for Cabinet confidentiality (see Campagnolo (2017), at pp. 66-72). At base, Cabinet confidentiality promotes executive accountability by permitting private disagreement and candour in ministerial deliberations, despite public solidarity

(*ibid.*; see also N. d’Ombain, “Cabinet secrecy” (2004), 47 *Can. Pub. Admin.* 332, at p. 336).

[30] Scholars also refer to a third rationale for the convention of Cabinet confidentiality: it promotes the efficiency of the collective decision-making process (see Campagnolo (2017), at p. 68). Thus, Cabinet secrecy promotes candour, solidarity, and efficiency, all in aid of effective government. This objective is also reflected in the jurisprudence of this Court. In *Carey*, this Court observed that the very purpose of the confidentiality is the proper functioning of government (pp. 664, 670-71 and 673). In *Babcock*, McLachlin C.J. stated: “Cabinet confidentiality is essential to good government” (para. 15). And in *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3, this Court noted that exposure of policy priorities at an early stage of the deliberative process to journalists or political opponents “is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness” (para. 44, quoting *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245, at para. 31).

[31] Cabinet confidentiality is therefore “not just a convenient political dodge; it is essential to effective government” (see *White*, at p. 139; see also p. 138). Our jurisprudence focuses broadly on the value of deliberative secrecy to the effective operation of government institutions, including Cabinet. It also recognizes that too much openness can impair that aim (see *Babcock*, at para. 18; *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, [2010] 1 S.C.R. 815

(*Criminal Lawyers' Association 2010*), at para. 40; *B.C. Judges*, at para. 96; see also *John Doe*, at para. 44; Williams Report, at p. 235).

[32] The IPC demonstrated appreciation for the import of the candour and solidarity rationales supporting Cabinet confidentiality, citing this Court's decision in *Babcock* (see para. 87). These rationales informed the IPC's articulation of the purpose of s. 12(1) as "promot[ing] the free and frank discussion among Cabinet members of issues coming before them for decision, without concern for the chilling effect that might result from disclosure of their statements or the material on which they are deliberating" (para. 86). But the IPC's engagement with the convention of Cabinet confidentiality essentially stopped there (see para. 87). Despite the submissions of Cabinet Office that disclosure of the mandate Letters could harm the efficacy of the Cabinet decision-making process (A.R., vol. III, at pp. 101-2), the Commissioner did not engage with a core purpose of Cabinet secrecy to promote the efficiency of the collective decision making, nor with the ultimate goal of this constitutional convention: effective government. This was critical context to interpreting s. 12(1).

[33] Ministerial candour and solidarity are components of effective governance, to be sure, but they are only part of the foundation on which Cabinet confidentiality and effective governance rests — and thus the legal context within which s. 12(1) operates. To reasonably interpret the opening words of s. 12(1), it was therefore critical that the IPC fully consider the function of Cabinet within our system of government, and the bounds of confidentiality necessary for it to discharge that function effectively

(see *Criminal Lawyers' Association 2010*, at para. 40; C.A. reasons, at para. 163). The IPC's failure to do so was material. It led him to: (1) ascribe an overly narrow purpose to s. 12(1); and (2) neglect important arguments made by Cabinet Office that informed the scope of the exemption.

[34] First, had the IPC recognized that the fundamental focus of deliberative secrecy is *effective* government, the Commissioner could not have framed the purpose to focus only on "free and frank discussion among Cabinet members". Rather, as Lauwers J.A. noted, a contextual interpretation of s. 12(1) instructs that the provision more broadly aims to establish the confidentiality necessary for the executive to function effectively (paras. 187 and 208).

[35] Second, had the IPC framed the purpose of s. 12(1) more broadly, he may not have rejected a central argument from Cabinet Office going to the scope of s. 12(1). Cabinet Office argued that, along with ensuring ministerial candour and solidarity, Cabinet secrecy also helps to ensure the deliberative process runs efficiently by preserving the confidentiality of deliberations until a final decision has been made and announced (IPC reasons, at paras. 30-32; A.R., vol. III, at pp. 90, 101-2, 228 and 232). In this Court, Cabinet Office and the intervener the Canadian Civil Liberties Association submitted that the Cabinet secrecy convention is aimed at the efficiency of the deliberative process (A.F., at paras. 11 and 54; I.F., at paras. 7-8). This argument rests on the third rationale underlying the convention of Cabinet secrecy. Lord Reid famously explained the value of Cabinet confidentiality to government efficiency in

Conway v. Rimmer, [1968] A.C. 910 (H.L.), at p. 952, in words quoted with approval by this Court in *Carey*, at pp. 658-59:

[The premature disclosure of Cabinet secrets] 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.

[36] The prerogative to determine when and how to announce Cabinet decisions is grounded in the harmful impact that premature disclosure of policy priorities can have on the deliberative process. As Professor Campagnolo explains, as a matter of convention, the efficiency of the deliberative process justifies “keeping Cabinet proceedings confidential until a final decision is made and announced by ministers” (*Behind Closed Doors: The Law and Politics of Cabinet Secrecy* (2021), at p. 26). Publicizing Cabinet’s decision-making process before the formulation and announcement of a final decision “would increase the public pressure that stakeholders put on ministers and give rise to partisan criticism from their political opponents”; this scrutiny “would ultimately paralyze the collective decision-making process” (p. 26).

[37] Because the IPC largely did not engage with this important argument, he did not acknowledge Cabinet Office’s submission that determining “when and how” to communicate policy priorities to the public and opposition parties is itself an important part of Cabinet’s deliberative process (A.R., vol. III, at p. 103 (emphasis added); see also White, at pp. 22-23). Materials presented to Cabinet seeking a decision on a policy

matter invariably include a communications strategy, which also requires Cabinet deliberation and approval (see, e.g., Privy Council Office, *A drafter's guide to cabinet documents* (2013), at pp. 6, 11 and 27). Cabinet may charge individual ministers with public communications related to their respective portfolios. And as a matter of tradition, Cabinet often makes important announcements of policy decisions in the Legislative Assembly (Williams Report, at p. 286).

[38] That is what happened in this case. The day after the Letters were distributed to Cabinet ministers, the Lieutenant Governor delivered the new government's Speech from the Throne in the Ontario Legislative Assembly, setting out the government's agenda for the legislative session (Office of the Premier, *A Government for the People: Speech from the Throne*, July 12, 2018 (online)). Certain policy priorities named in the Letters were announced, while others were kept confidential. And the priorities that *were* announced were framed at a high level of generality not necessarily reflective of their description in the Letters. Clearly, government's desire to make information public is not relevant to the question of whether that information is protected. However, it shows how the substance of Cabinet deliberations also encompasses discussion of when and how to communicate government priorities.

[39] The failure to engage meaningfully with Cabinet Office's arguments about the fundamental underpinnings of Cabinet confidentiality had implications for the IPC's interpretation of the scope of s. 12(1). The IPC concluded that "outcomes" of the

deliberative process are not encompassed by the opening words of s. 12(1), full stop, without acknowledging that an important part of Cabinet confidentiality is government's prerogative to decide how and when to announce policy priorities (see para. 104). Because the IPC ultimately characterized the Letters as non-exempt outcomes or products of the Premier's deliberative process, as I explain below, this omission was material.

[40] As *Vavilov* makes clear, failing to meaningfully grapple with central arguments raised by the parties is a marker of unreasonableness (para. 128); and overlooking a salient part of statutory context is unreasonable where the decision maker may have arrived at a different interpretation had it considered the key element (para. 122).

B. The IPC's Application of Section 12(1) to the Letters

[41] In considering how the exemption applied to the Letters, the IPC's reasons also did not sufficiently engage with important conventions and traditions surrounding the Cabinet decision-making process, including the role of the Premier within that process.

[42] Before the IPC, Cabinet Office relied on IPC precedent recognizing that constitutional conventions surrounding the Premier make his role of establishing the priorities and agenda for Cabinet inseparable from the deliberations of Cabinet (A.R., vol. III, at pp. 92-94, citing Order PO-1725). Also, in arguing that disclosure of the

Letters would reveal the substance of future Cabinet deliberations, Cabinet Office stressed that, given conventions and practice, “many of the policy priorities assigned to each minister in the mandate letters will require each minister to develop an operational, legislative or financial policy proposal that would return to [Cabinet] and its committees for decision-making before implementation” (A.R., vol III., at p. 100). Cabinet Office submitted that Cabinet deliberations occur on a “continuum” and that the mandate Letters “initiate a continuing deliberative process at Cabinet that necessarily extends beyond the initial Cabinet meeting” (IPC reasons, at para. 27).

[43] The IPC held that the Letters were not revealing of the Premier’s deliberations nor of future Cabinet deliberations. The Commissioner concluded that the Letters did not disclose the substance of the Premier’s deliberations because they were the “end point” or “product” of his deliberative process. As to future Cabinet deliberations, the IPC stated that where a record does not fall within the specific categories of records listed at s. 12(1)(a) to (f), it will be protected only “where . . . the context or additional information would permit accurate inferences to be drawn as to actual deliberations at a specific Cabinet meeting” (para. 110).

[44] I agree with the CBC that, on a generous reading of the reasons, the IPC did not understand the deliberative process to be limited to discussions at a specific meeting of Cabinet. Still, the IPC rejected Cabinet Office’s argument that the Letters start a continuing deliberative process in part because Cabinet Office had not shown that the priorities discussed in the Letters would be discussed at a future Cabinet

meeting (para. 116). And, as to those priorities which the IPC accepted would return to Cabinet, the IPC found they were also non-exempt because they were mere topics that did not reveal the substance of deliberations.

[45] In my view, this reasoning and the conclusions the Commissioner drew about the Letters are not justifiable, given two key contextual constraints: the nature of the Cabinet decision-making process and the Premier's role as head of Cabinet within that process. These constitutional conventions run counter to the IPC's reasoning. I shall explain.

[46] To begin, Cabinet's deliberative process consists of discussion, consultation, and policy formulation between the Premier, individual ministers, and Cabinet as a whole — informed by the advice of civil servants every step along the way. The first minister, as head of Cabinet, enjoys extensive powers within Cabinet's deliberative process by convention. In many regards, the role and activities of the Premier are inseparable from Cabinet and its deliberations. First ministers preside over Cabinet, set Cabinet agendas, determine Cabinet's membership and its internal structure (e.g., the number, nature, and membership of Cabinet committees), set Cabinet procedures, and have the right to identify the consensus and determine what Cabinet has decided (Hogg and Wright, at §§ 9:5-9:6).

[47] As this Court recognized in *John Doe*, “the policy-making process include[s] false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighting of the

relative importance of the relevant factors as a problem is studied more closely” (para. 44, quoting *Canadian Council of Christian Charities*, at para. 31). In other words, the process is dynamic, fluid, and continues to evolve as leadership changes hands. Cabinet enjoys tremendous flexibility in terms of its organization, its processes, and its composition (White, at p. 34).

[48] Agenda-setting, which occurs at an early stage, is “a crucial part” of the decision-making process (S. Brooks, *Canadian Democracy* (9th ed. 2020), at p. 241). The role of the first minister and of Cabinet in establishing the government’s policy and budget priorities “is institutionalized through the formal structure of cabinet decision-making” (*ibid.*). Though deliberative processes have changed over time at both the provincial and federal levels, the critical role of agenda-setting and the central involvement of the first minister in this exercise have remained constant.

[49] The dynamic and fluid nature of Cabinet’s deliberative process also means that not all stages of the process take place sitting around the Cabinet table behind a closed door. The decision-making process in Cabinet extends beyond formal meetings of Cabinet or its committees, and encompasses “[o]ne-on-one conversations in the corridors . . . , in the [first minister’s] office . . . , over the phone, or however and wherever they may take place” (Brooks, at p. 242). As Professor Brooks writes, “[n]o organization chart can capture this informal but crucial aspect” of the deliberative process, nor the centrality of the first minister’s role within it (*ibid.*).

[50] The IPC ostensibly recognized the role of the Premier in Cabinet's decision-making process, citing past IPC precedent which recognized that "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 . . . cannot be separated from the deliberations of the Cabinet as a whole" (para. 23, quoting Order PO-1725, at pp. 14-16). Still, a number of the IPC's conclusions conflict with the role of the Premier within Cabinet and the nature of the Cabinet decision-making process — both of which are essential elements of the statutory context surrounding s. 12(1) (see *Vavilov*, at para. 120).

[51] For one, in characterizing the Letters as non-exempt outcomes of the Premier's deliberative process, the IPC drew an artificial dichotomy between the Premier's deliberative process, and the rest of Cabinet's (see, e.g., para. 132). That dichotomy not only contradicts past IPC precedent, but, more important, runs counter to the constitutional role of the Premier as first minister in Cabinet.

[52] The priorities communicated to ministers by the Premier at the outset of governance are the initiation of Cabinet's deliberative process, and are subject to change. Ministers may seek to persuade the Premier and the rest of Cabinet that priorities should be added, abandoned, or approached in a different way (see, e.g., H. Bakvis, "Prime Minister and Cabinet in Canada: An Autocracy in Need of Reform?" (2000), 35:4 *J. Can. Stud.* 60, at pp. 65-66 (discussing the important role of individual ministers and their ability to shape the government's priorities)). Moreover, the Premier

may revise priorities at any point throughout the process — whether due to Cabinet colleagues' views, advice from civil servants, or events and changing circumstances.

[53] The Letters on their face contain communications between the Premier and Cabinet ministers about policy priorities, many if not most of which would require decisions from Cabinet, both as to their substance and as to how they should be communicated to the public. Cabinet “formulates and carries out all executive policies,” and all major government policy matters are forwarded to Cabinet for decision (Hogg and Wright, at § 9:5; M. Schacter and P. Haid, *Cabinet Decision-Making in Canada: Lessons and Practices* (1999), at p. 1; see also Brooks, at p. 236). There is no basis in convention or past precedent to separate the Premier's role in this process from the rest of Cabinet. Disclosure of the Premier's initial priorities, when compared against later announcements of government policy and what government actually accomplished, would reveal the substance of what happened during Cabinet's deliberative process. The IPC's characterization of the Letters as “the end point of the Premier's formulation of the policies and goals to be achieved by each Ministry”, or “the product of his deliberations” was thus beside the point, and an unreasonable basis upon which to deny protection under s. 12(1) (paras. 132 and 134 (emphasis added); see also para. 79).

[54] Relatedly, to the extent the IPC required evidence linking the Letters to “actual Cabinet deliberations at a specific Cabinet meeting”, that approach was unreasonable. Such a requirement is far too narrow and does not account for the

realities of the deliberative process, including the Premier's priority-setting and supervisory functions, which are not necessarily performed at a specific Cabinet meeting and may occur throughout the continuum of Cabinet's deliberative process. Accordingly, it would be unreasonable for the Commissioner to establish a heightened test for exemption from disclosure that would require evidence linking the record to "actual Cabinet deliberations at a specific Cabinet meeting".

[55] I agree with the CBC that the IPC did not adopt this test throughout his reasons. Still, his focus on actual deliberations at a specific Cabinet meeting underscored his finding that the fact that some policy priorities "may never return to Cabinet at all or . . . may be altered or amended in significant . . . ways" was a "deficiency" in Cabinet Office's continuum argument and meant that the Letters could not be exempted in their entirety (para. 121). This determination was unreasonable because it did not account for the fact that disclosure of early policy priorities not acted on, or changed in significant ways before implementation, would be revealing of the substance of Cabinet deliberations — whether the decision to abandon or alter the priority was the decision of Cabinet, its committees, or the Premier.

[56] Finally, the IPC concluded that the Letters were not exempt because even the priorities that would return to Cabinet in the future constituted mere "topics" or subject matters of potential future deliberations. This conclusion, too, was tainted by a failure to evaluate the Letters in context. The IPC stated that topics or subject matters of Cabinet deliberations will not be protected under s. 12(1) unless their disclosure

would permit accurate inferences to be drawn as to the substance of those deliberations (paras. 99-101). However, the IPC did not consider the broader context in discerning whether the Letters met his test.

[57] As noted, the Letters are communications between the Premier and his Cabinet colleagues relating to policy priorities that are or will be before Cabinet; they cannot be written off as mere “topics” like general items on an agenda. The Letters reveal the Premier’s initial views on priorities for the new government — priorities subject to change as the deliberative process unfolds. The communication of the Premier’s initial views to other members of Cabinet are part of Cabinet’s decision-making process, and will be revealing of the substance of Cabinet deliberations when compared against subsequent government action. This context is crucial. And it mitigates the IPC’s concern that exempting priorities contained in mandate letters would result in the exemption “encompass[ing] any record that was not placed or intended to be placed before Cabinet if it contains information that Cabinet Office claims may become the subject of a future Cabinet meeting” (para. 118). The IPC’s characterization of the Letters as mere topics thus rested on a fundamental misapprehension of the factual and legal context, ran counter to the text of the Letters and was unreasonable (see *Vavilov*, at para. 126).

C. Conclusion

[58] In sum, the IPC failed to give meaningful weight to the legal and factual context, including traditions and constitutional conventions concerning Cabinet

confidentiality, the role of the Premier, and the fluid, dynamic nature of the Cabinet decision-making process. The IPC's lack of appreciation for the contextual constraints bearing upon its decision led him to unreasonable interpretive approaches and conclusions. He characterized the Letters as outcomes of the *Premier's* deliberative process; found they were mere topics that did not permit accurate inferences as to Cabinet deliberations; and required evidence from Cabinet Office to show that disclosure of the Letters would permit accurate inferences to be drawn as to "actual Cabinet deliberations at a specific Cabinet meeting" (para. 100; see also paras. 116-17). As a result, the IPC's narrow interpretation of the "substance of deliberations" was unreasonable. And even on his understanding of the provision, his application of the provision to the Letters was unreasonable. The Letters, along with the representations of Cabinet Office, were clearly sufficient to establish the Letters fell within s. 12(1). The IPC's decision ordering disclosure must be set aside.

[59] I would add this. There can be no doubt that, as the CBC submits, public access to government-held information is vital to our democratic process (see R.F., at para. 49, citing *John Doe*, at para. 41). As this Court noted in *Dagg*, "without an adequate knowledge of what is going on", neither legislators nor the public can hope to hold government accountable or contribute to the policy-making process (para. 61, quoting D. C. Rowat, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480). Still, *FIPPA* contemplates that, where engaged, other weighty public interests — whether national security, personal privacy, or the

confidentiality of Cabinet deliberations — are important enough to outweigh the public’s interest in access to information (see *FIPPA*, ss. 16, 20 and 21).

[60] Given the key role Cabinet confidentiality plays in the proper functioning of our Westminster system of government, cases about its proper scope raise important issues for the stability and legitimacy of our democracy. Cabinet confidentiality both enables the proper functioning of responsible government by promoting collective ministerial accountability to the legislature and affords the executive the operational space it needs to function effectively (*B.C. Judges*, at paras. 65-67 and 96; *Carey*, at p. 659; see also *Criminal Lawyers’ Association 2010*, at para. 40). These functions are crucial both to the principle of responsible government and to the separation of powers. Spheres of confidentiality insulated from “undue external interference” are essential to the executive’s ability to “perform its constitutionally-assigned functions” (*B.C. Judges*, at paras. 66 and 96).

[61] In approaching assertions of Cabinet confidentiality, administrative decision makers and reviewing courts must be attentive not only to the vital importance of public access to government-held information but also to Cabinet secrecy’s core purpose of enabling effective government, and its underlying rationales of efficiency, candour, and solidarity. They must also be attentive to the dynamic and fluid nature of executive decision making, the function of Cabinet itself and its individual members, the role of the Premier, and Cabinet’s prerogative to determine when and how to announce its decisions.

[62] Such an approach reflects the opening words of s. 12(1), which mandate a substantive analysis of the requested record and its substance to determine whether disclosure of the record would shed light on Cabinet deliberations, rather than categorically excluding certain types of information from protection. Thus, “deliberations” understood purposively can include outcomes or decisions of Cabinet’s deliberative process, topics of deliberation, and priorities identified by the Premier, even if they do not ultimately result in government action. And decision makers should always be attentive to what even generally phrased records could reveal about those deliberations to a sophisticated reader when placed in the broader context. The identification and discussion of policy priorities in communications *among Cabinet members* are more likely to reveal the substance of deliberations, especially when considered alongside other available information, including what Cabinet chooses to do.

[63] As to remedy in this case, where “the interplay of text, context and purpose leaves room for a single reasonable interpretation”, it “would serve no useful purpose” to remit the question to the original decision maker (*Vavilov*, at para. 124). Here, statutory text, purpose, and context lead inexorably to the conclusion that the Letters are protected from disclosure under s. 12(1)’s opening words. I would not remit the matter to the IPC.

[64] I would allow the appeal and set aside the order of the IPC, with costs to the appellant payable by the CBC. The private record of proceedings filed with this

Court will remain in the Court file but shall be confidential, sealed, and not form part of the public record.

The following are the reasons delivered by

CÔTÉ J. —

I. Introduction

[65] I agree with my colleague’s interpretation of s. 12(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (“Act”), and with her conclusion that the mandate letters at issue are exempt from disclosure under that provision. However, I do not agree that “the same conclusion follows regardless of whether the standard of review is correctness or reasonableness” (para. 16). Indeed, according to *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, “[r]easonableness review is methodologically distinct from correctness review” (para. 12; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, at para. 58). For the reasons I explain below, I would consider the issue raised in this appeal — the scope of Cabinet privilege — to be a general question of law of central importance to the legal system as a whole. I would therefore review the Information and Privacy Commissioner’s decision on a standard of correctness.

II. Standard of Review

[66] A reviewing judge's selection and application of the standard of review are reviewable for correctness (*Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, at para. 10). As my colleague notes, this Court held in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, that an appellate court “‘step[s] into the shoes of the lower court’ such that the ‘appellate court’s focus is, in effect, on the administrative decision’” (para. 46, quoting *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247 (emphasis deleted)). Our Court is not bound by the standard of review applied in the lower courts, nor is it bound by the parties’ agreement with respect to the applicable standard of review. It performs its own review of the Commissioner’s decision (see *Horrocks*, at para. 10, citing D. J. M. Brown, with the assistance of D. Fairlie, *Civil Appeals* (loose-leaf), at § 14:45).

[67] Following the teachings of *Vavilov*, “a reviewing court must be prepared to derogate from the presumption of reasonableness review where respect for the rule of law requires a singular, determinate and final answer to the question before it” (para. 32). The applicable standard of review is an essential question, one that my colleague — and Lauwers J.A. — have deemed serious (see Karakatsanis J.’s reasons, at para. 16; 2022 ONCA 74, 160 O.R. (3d) 481, at paras. 106-8). Therefore, I cannot agree that “it is not necessary to finally resolve” the question of the applicable standard of review (Karakatsanis J.’s reasons, at para. 16). In my view, the scope of Cabinet privilege falls within the already existing *Vavilov* category of general questions of law

of central importance to the legal system as a whole. This question is thus subject to correctness review. Let me explain.

[68] In *Vavilov*, our Court recognized that “correctness review is necessary to resolve general questions of law that are of ‘fundamental importance and broad applicability’, with significant legal consequences for the justice system as a whole or for other institutions of government” (para. 59). Our Court provided specific examples of this kind of question: “. . . when an administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process (*Toronto (City)*, at para. 15); the scope of the state’s duty of religious neutrality (*Saguenay*, at para. 49); the appropriateness of limits on solicitor-client privilege (*University of Calgary*, at para. 20); and the scope of parliamentary privilege (*Chagnon*, at para. 17)” (para. 60).

[69] There is no principled reason why Cabinet privilege should be treated any differently — or is any less important to the legal system as a whole — than solicitor-client privilege or parliamentary privilege. Writing for the majority of the Court in *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687, my colleague noted that parliamentary privilege helps preserve the separation of powers and plays an important role in our Westminster model of parliamentary democracy (para. 1). This is echoed in her consideration of the importance of Cabinet privilege in this case, which implicates constitutional traditions and conventions “crucial to the proper functioning of our democracy” (para. 1; see also paras. 3, 7, 21, 27-28 and 60). Indeed, “[j]ust as legislative privilege protects the ability

of elected representatives to act on the will of the people”, she states, citing *Chagnon*, “Cabinet confidentiality grants the executive the necessary latitude to govern in an effective, collectively responsible manner” (para. 3).

[70] The scope of Cabinet privilege is not a question particular to Ontario’s specific regulatory regime (see *Vavilov*, at para. 61; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 60). As my colleague notes, similar exemptions are found in freedom of information legislation across the country (para. 14). This is evidenced by the Commissioner’s reliance on the Nova Scotia Court of Appeal’s decision in *O’Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat)*, 2001 NSCA 132, 197 N.S.R. (2d) 154, in contrast to the different approach taken by the British Columbia Court of Appeal in *Aquasource Ltd. v. Freedom of Information and Protection of Privacy Commissioner (B.C.)* (1998), 111 B.C.A.C. 95. Further, courts must determine the scope of Cabinet privilege, including under s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, when dealing with questions of admissibility of evidence. Indeed, my colleague’s interpretation of the purpose of Cabinet privilege is largely based on common law jurisprudence or jurisprudence concerning freedom of information legislation from other jurisdictions (see, e.g., paras. 3 and 31). This confirms the wide-ranging implications of decisions on the nature and scope of Cabinet privilege.

[71] For these reasons, I would find that the scope of Cabinet privilege is a question of central importance to the legal system as a whole that requires a final and

determinate answer. In both *Chagnon* and *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, our Court relied on constitutional dimensions in identifying parliamentary privilege and solicitor-client privilege as questions of law of central importance (see *Chagnon*, at paras. 1-4 and 23-25; *University of Calgary*, at para. 20). As a result, it is unnecessary to decide whether the constitutional overlay in this case also places this question within the separate *Vavilov* category of constitutional questions (see C.A. reasons, at para. 108).

III. A “Reasons First” Approach

[72] As I stated at the beginning of these reasons, I do not agree that the same conclusion follows regardless of whether the standard of review is correctness or reasonableness. It must never be forgotten that “[r]easonableness review is methodologically distinct from correctness review” (*Vavilov*, at para. 12; *Mason*, at para. 58). General questions of law of central importance to the legal system as a whole must be reviewed for correctness because courts, when conducting a reasonableness review, cannot provide the single determinate answer that such questions require (*Vavilov*, at para. 62). Thus, whether the standard of review is correctness or reasonableness will dictate the kind of review that a court is entitled to undertake, namely whether the review will put the “reasons first” or whether the court will conduct a *de novo* analysis (*Vavilov*, at paras. 83-84 and 116).

[73] What distinguishes reasonableness review from correctness review “is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker’s place” (*Vavilov*, at paras. 15 and 83; *Mason*, at para. 8). A principled approach to reasonableness review is one which puts the administrative decision maker’s reasons first (*Vavilov*, at para. 83; see *Mason*, at paras. 58-63). “The role of courts . . . is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves” (*Vavilov*, at para. 83 (emphasis in original)). Reviewing judges are not to fashion their own yardstick and then use that yardstick to measure what the decision maker did.

[74] With respect, my colleague fails to apply this methodology in practice. She conducts her own interpretation of s. 12(1), and of the importance and nature of Cabinet privilege, and then measures it against that of the Commissioner. The fact that my colleague would have reached a different conclusion than that of the Commissioner does not make the Commissioner’s decision unreasonable. However, on the basis of my colleague’s reasons, which in my view involve a *de facto* correctness review, I conclude that the Commissioner’s decision is incorrect.

IV. Analysis

[75] I agree with my colleague’s interpretation of the scope of Cabinet privilege, which is the correct interpretation, and with her conclusion that the mandate letters are

exempt from disclosure under s. 12(1). The “substance of deliberations” encompasses Cabinet’s deliberative process from beginning to end, including directives and policy priorities communicated by the Premier to individual ministers. By concluding otherwise, the Commissioner adopted an incorrect interpretation. However, I am concerned that my colleague, in applying a standard of reasonableness, has not afforded the Commissioner’s reasons the deference which, time and again, our Court has said such reasons deserve (see *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909, at para. 112, per Moldaver J., dissenting; *Vavilov*, at paras. 13, 15, 83 and 99; *Mason*, at para. 60).

[76] My colleague conducts her own interpretation of the scope of Cabinet privilege under s. 12(1) (see paras. 1-4, 24-33, 36, 46-49 and 59-62) and uses her conclusions as a yardstick against which to measure the Commissioner’s decision. For example, my colleague refers to three rationales for the convention of Cabinet confidentiality: “. . . candour, solidarity, and efficiency . . .” (para. 30). She finds that the Commissioner considered the first two of these rationales but that he “did not engage with a core purpose of Cabinet secrecy to promote the efficiency of the collective decision making” or with the ultimate goal of effective government (para. 32). However, this third rationale of “efficiency”, while an important tenet of Cabinet privilege, has not been articulated by our Court as such. As a result, I do not agree that it was unreasonable for the Commissioner to not address a concept that is fully expressed only in scholarly authority (see Karakatsanis J.’s reasons, at paras. 30 and 36, citing Y. Campagnolo, “The Political Legitimacy of Cabinet Secrecy” (2017),

51 *R.J.T.U.M.* 51, at p. 68, and Y. Campagnolo, *Behind Closed Doors: The Law and Politics of Cabinet Secrecy* (2021), at p. 26).

[77] After her comprehensive discussion of the purpose of Cabinet privilege, my colleague finds that it was “critical that the [Commissioner] fully consider the function of Cabinet within our system of government, and the bounds of confidentiality necessary for it to discharge that function effectively” (para. 33). In my view, the Commissioner did exactly that, referring to this Court’s consideration of the issue in *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3:

Cabinet Office and the appellant each make submissions on the interpretation of the opening words of section 12(1). Both accept that these words should be interpreted in light of their underlying purpose to promote the free and frank discussion among Cabinet members of issues coming before them for decision, without concern for the chilling effect that might result from disclosure of their statements or the material on which they are deliberating. This purpose is reflected in several authorities referred to by the parties, including in the following passage from *Babcock v. Canada (Attorney General)* cited by Cabinet Office:

The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. 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 If Cabinet members’ statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect.

(Order PO-3973, 2019 CanLII 76037, at para. 86, quoting *Babcock*, at para. 18)

[78] At para. 87, the Commissioner justified his reading of *Babcock* as follows:

I note that *Babcock* involved an appeal from the dismissal of an application brought in the course of a civil law suit to compel the production of records that had been certified by the Clerk of the Privy Council to be Cabinet confidences under s. 39 of the *Canada Evidence Act*. The purpose underlying s. 39 described by the Court in *Babcock* is not, as Cabinet Office suggests (see paragraph 47 of this Order), to shield Cabinet ministers from questions or comments from members of the public regarding public policy or other matters that are or may become the subject of Cabinet deliberations. Rather, the concern expressed in *Babcock* is to protect the substance of the deliberations themselves from being revealed by the disclosure of records and exposing *those deliberations* to public comment and criticism with the potential for adverse effects on Cabinet members' candour and solidarity. All of the other authorities I have been referred to in this connection support the same view. [Emphasis in original.]

[79] My colleague says that the Commissioner's "engagement with the convention of Cabinet confidentiality essentially stopped there" (para. 32). Respectfully, I cannot agree. After his consideration of *Babcock*, the Commissioner returned to the underlying purposes of the Act and the Cabinet records exemption — and the function of Cabinet within our system of government — throughout his analysis (see, e.g., paras. 97, 102 and 105-8). He did not "neglect" important arguments made by Cabinet Office (Karakatsanis J.'s reasons, at para. 33). He simply rejected them, and I could not agree more with my colleague when she acknowledges that the Commissioner's reasons were intelligible and transparent (para. 7). The fact that my colleague disagrees with his interpretation, as do I, does not make it unreasonable.

[80] In her conclusion, my colleague finds that the interplay of statutory text, context and purpose leads “inexorably” to a single reasonable interpretation of s. 12(1) (para. 63). It may sometimes become clear that relevant factors weigh “so overwhelmingly” in favour of a particular interpretation that it is the only reasonable interpretation of the provision (*Vavilov*, at para. 124, citing with approval *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52).

[81] However, in this case, there are a number of relevant factors weighing in favour of the Commissioner’s interpretation, many of which my colleague does not consider in her review of his reasoning process. The Commissioner relied on, among other things, the stated purposes of the legislation (see paras. 106-8); the principle that “exemptions from the right of access should be limited and specific” (s. 1(a)(ii) of the Act); our Court’s decisions in *Babcock and Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; appellate jurisprudence across the country, notably *O’Connor*; and a significant body of past administrative decisions. All of these factors lend support to his interpretation.

[82] As Sossin J.A. noted for the majority of the Court of Appeal, the Ontario Information and Privacy Commissioners’ consistency in their long-standing approach to their governing statute may be taken as an indicator of the reasonableness of the Commissioner’s decision (paras. 49-50). I agree. With respect, I have serious concerns with finding a decision that follows decades of administrative jurisprudence — including *O’Connor*, which is arguably the leading appellate decision

on balancing access to information with Cabinet privilege — to be unreasonable. Nonetheless, that is the effect of my colleague's decision in this case.

V. Summary and Disposition

[83] While I agree with my colleague's interpretation of s. 12(1), it is exactly that — her interpretation. Correctness review, in addition to being required by *Vavilov*, serves to eliminate my concerns about the lack of deference accorded to the Commissioner. My colleague's interpretation of s. 12(1) of the Act is correct; the requested letters are exempt from disclosure under that provision. I would therefore allow the appeal and set aside the Commissioner's decision.

APPENDIX

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Cabinet records

12 (1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and
- (f) draft legislation or regulations.

Appeal allowed.

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Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Justice and Solicitor General, Legal Services — Civil Litigation Team, Edmonton.

Solicitors for the intervener the Canadian Civil Liberties Association: Blake, Cassels & Graydon, Toronto.

Solicitors for the intervener the BC Freedom of Information and Privacy Association: Sean Hern, K.C., Victoria; Benjamin Isitt, Victoria.

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