Application for Leave

S.C.C. File No. _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

INFORMATION AND PRIVACY COMMISSIONER OF ALBERTA

APPLICANT
(Appellant)

- and -

IMPERIAL OIL LIMITED

RESPONDENT
(Respondent)

- and -

CITY OF CALGARY, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA, AS REPRESENTED BY THE MINISTER OF ENVIRONMENT, AND THE ENVIRONMENTAL APPEALS BOARD

RESPONDENTS
(Respondents)

APPLICATION FOR LEAVE TO APPEAL
INFORMATION AND PRIVACY COMMISSIONER OF ALBERTA

(Pursuant to Section 40 of the *Supreme Court of Canada Act*, R.S.C. 1985, c. S-26)

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S.C.C. File No. _____

IN THE SUPREME COURT OF CANADA
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BETWEEN:

INFORMATION AND PRIVACY COMMISSIONER OF ALBERTA

APPLICANT
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CITY OF CALGARY, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA, AS REPRESENTED BY THE MINISTER OF ENVIRONMENT, AND THE ENVIRONMENTAL APPEALS BOARD

RESPONDENTS
(Respondents)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
(The Information and Privacy Commissioner of Alberta, Applicant)
(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that the Applicant, Information and Privacy Commissioner of Alberta, hereby applies for leave to appeal to the Court, pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, from the Judgment of the Court of Appeal of Alberta, Court of Appeal File Number abbreviated as No. 1301-0250-AC, made July 16, 2014 and for any further or other order that the Court may deem appropriate.

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. This case raises the following issues of public importance warranting further guidance from this Honourable Court:

Issue I: Does an administrative tribunal have standing to appeal a decision which profoundly impacts its jurisdiction and the administration of its home statue?

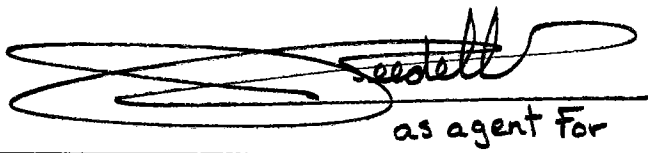
Issue II: Does settlement privilege attach to a concluded agreement in the context of regulatory proceedings brought in the protection of public interest?

Issue III: Can a public body, in this case an environmental regulator, avoid the terms of privacy and access legislation by negotiating a resolution to regulatory proceedings and agreeing to keep that resolution confidential?

Issue IV: Did the IPC unreasonably interpret the test for the "harm to business interests" exception to access articulated in FOIP?

Dated at Calgary, Alberta this 26th day of September, 2014.

SIGNED BY



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NOTICE TO RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the Supreme Court Act.

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PART I. OVERVIEW AND STATEMENT OF FACTS

A. Overview of Position on National Importance

1. This Appeal addresses the nexus between administrative decision-makers and the courts in respect of administrative tribunal standing, a judge-made rule. Can a tribunal, which has standing on judicial review, lack standing to appeal a superior court's decision on judicial review when that decision profoundly impacts, in error, the tribunal's policies or the administration of its home statute? Are tribunals, and therefore the regimes they administer, excluded from the benefit of the checks and balances otherwise available to participants in the legal process?

2. The Alberta Court of Appeal relied on *Northwestern Utilities*[1] and *Brewer*[2] to determine that the Information and Privacy Commissioner ("IPC") lacks standing to appeal a superior court's decision following judicial review of the IPC's Order. Without the IPC's appeal, the impact of the Superior Court's decision on the administration of one of the IPC's home statutes, the *Freedom of Information and Protection of Privacy Act*[3], and on the IPC's jurisdiction and processes, would go unaddressed. The Superior Court then becomes the final authority.

3. This Court last considered tribunal standing in 1979 in *Northwestern Utilities* and in 1989 in *Paccar*[4]. *Northwestern Utilities* involved a statutory right of appeal. *Paccar* addressed the common law right of appeal. These contrasting decisions have produced significant divergence in the treatment of tribunal standing. Courts across Canada have re-evaluated *Northwestern Utilities*' application, and broadened the scope of tribunal standing, without a consistent national approach. Some jurisdictions recognize tribunal standing as a matter of judicial discretion requiring the balancing of various considerations to determine the scope of standing that best suits the public interest[5]. In Alberta, the IPC has status to participate in appeals as a Respondent[6], but, as this case demonstrates, not as an Appellant - notwithstanding the IPC's identical interest in the administration and application of the underlying subject-matter.

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[1] *Northwestern Utilities Ltd. v City of Edmonton*, [1979] 1 SCR 684 [*Northwestern Utilities*]
[2] *Brewer v Fraser Milner Casgrain LLP*, 2008 ABCA 160 [*Brewer*]
[3] RSA 2000, c. F-25 [*FOIP* or *Act*]
[4] *C.A.I.M.A.W. v Paccar of Canada Ltd*, [1989] 2 SCR 983 [*Paccar*]
[5] See for example *Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner)*, [2005] OJ No 1426 [*Children's Lawyer*] at para 39
[6] *Leon's Furniture Ltd v Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94 [*Leon's*] at paras 16-30, 61-65 and 86

4. That *Northwestern Utilities* has been taken as an invariable rule, despite *Paccar*, is reflected in the decision of the Court below when it held that the IPC could not rely on *Paccar* to argue jurisdiction, and the Court's conflating of "jurisdiction" which the IPC can speak to with "true questions of jurisdiction" (which determines the standard of review on judicial review)[7].

5. The significance of the questions of law posed by this case, and their national and public importance, is reflected in the vigorous commentary respecting a tribunal's standing to appeal. It has been noted that the judicial concern for tribunal impartiality, which underlies *Northwestern Utilities*, has been inconsistently weighed against other considerations based on "differing judicial sensibilities". This lends itself to the conclusion that "the *Northwestern Utilities* rules are indeed due for a re-evaluation, both as a matter of their internal coherence and in light of subsequent jurisprudence"[8]. It has been said that[9]:

> An analytical approach that more directly acknowledges these various and sometimes competing considerations is more likely to result in just and proper outcomes, and is more likely to reflect what happens in practice, than an approach focused on "categories and exceptions". ...
>
> Whether or not one agrees that that no harm is added by the act of a tribunal appearing in court to defend a decision on a legal question, it must be acknowledged that the issue whether such appearances warrant condemnation has given rise to dramatically different answers by our appellate courts. [cite omitted] One answer to these differences might be to suggest that it is for the courts of each province to determine their own practice regarding tribunal participation. But surely on an issue that raises questions of propriety note and even impartiality [*sic*]--not to mention having implications for costs orders against administrative tribunals--it is fair to expect clearer guidance from our country's courts.

6. L.A. Jacobs and T.S. Kuttner have said[10]:

> We suggest that the cases be approached within the context of the general shift in the jurisprudence from formalism to functionalism, as epitomized in the pragmatic and functional approach now characteristic of administrative law decisions across a broad band of issues. Within the particular sphere that we are addressing here - the discourse between courts and tribunals in the arena of judicial review - it is not immediately apparent that the courts have embraced the functional over the formal.

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[7] Court of Appeal Judgment at para 28 **[Tab 2D]**, *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*ATA News*], *AUPE v Alberta*, 2014 ABCA 45 at para 18; *Paccar* at para 39;
[8] Falzon, Frank A.V., *Tribunal Standing on Judicial Review*, vol 21 CJALP 21: April 2008 at pp 6-7 [*Falzon*]; emphasis added
[9] *Falzon* at pp 6-7; emphasis added
[10] L.A. Jacobs and T.S. Kuttner, *Discovering What Tribunals Do: Tribunal Standing Before the Courts* (2002), 81 Can. Bar Rev. 616 at p. 645

7. In *Global Securities* the British Columbia Court of Appeal stated in *obiter dicta*[11]:

> What was said in *Northwestern Utilities*, to the extent that it has been taken as an invariable rule, may be due for a reevaluation. The decision of the Ontario Court of Appeal in *Children's Lawyer for Ontario v. Goodis* [cite omitted] provides support for that view. In that case, Goudge J.A. expressed the opinion that the standing of administrative tribunals on reviews of their own decisions must be considered contextually rather than by reference to an *a priori* rule.

8. This case offers an opportunity to re-evaluate and clarify tribunal standing on judicial review and on appeal. The importance of this issue has been influenced by the dramatic expansion of administrative decision-making, the profound changes to the law relating to the review of tribunal decisions, and the reconsideration of other areas of standing (private and public interest) since *Northwestern Utilities* was decided.

9. The substantive issues raised on this appeal were, in the IPC's submission, decided incorrectly and have negatively impacted the IPC's administration of her home statute. The impact on the administration of access to information law across Canada makes each a matter of national importance on which this Court's guidance is needed.

B. Statement of Facts

(i) Introduction to the IPC and FOIP

10. The IPC is appointed pursuant to Part 4 of *FOIP*. She performs adjudicative and other functions under Part 5 of *FOIP, PIPA*[12], and the *HIA*[13]. She is an Officer of the Legislature who oversees the Executive branch of the Alberta Government in relation to information and privacy.

11. The *Administrative Procedures and Jurisdiction Act*[14], and the Alberta *Rules of Court*[15], are silent as to a tribunal's standing to appeal. The IPC does not have a statutory right of appeal; her right of appeal rests in the common law.

12. *FOIP's* purposes, set out in s. 3, include "[allowing] any person a right of access to the records in the custody or under the control of a public body, subject to limited and specific

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[11] *Global Securities Corp v TSX Venture Exchange*, 2006 BCCA 404 [*Global Securities*] at para 60; emphasis added
[12] *Personal Information Protection Act,* SA 2003, C. P-6.5 [*PIPA*]
[13] Part 7 of the *Health Information Act*, RSA 2000, c. H-5 [*HIA*]
[14] RSA 2000, c. A-3
[15] AR 124/2010

exceptions" and "[providing] for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act."

(ii) Events Giving Rise to the Complaint

13. The City, itself a public body, sought from Alberta Environment ("AEV"), a public body, and the IPC ordered, disclosure of an agreement ("Agreement") reached by Imperial Oil ("IOL") and AEV (through the Environment Minister) following mediation in the context of regulatory proceedings under the *EPEA*[16]. AEV is a party to the Agreement and refused disclosure. As an "Affected Party" (as defined in *FOIP*), IOL objected to the Agreement's disclosure to the City.

14. The Agreement addressed the remediation of land in Calgary which was contaminated when IOL, a previous owner of the land, had released hydrocarbons and lead on it. IOL subsequently sold the land to its subsidiary which developed the land as a residential area. The need to remediate the land, to what standard, and the parties' responsibilities were the subject of protracted regulatory and court proceedings. AEV issued environmental protection orders ("EPOs") which IOL contested in regulatory proceedings. Ultimately, after IOL appealed the EPOs to the Environmental Appeals Board ("EAB"), but before the appeals were heard, AEV and IOL engaged in mediation and resolved the matters between them. The Agreement comprised that resolution. AEV cancelled the EPOs.

15. AEV released parts of the Agreement to the public and, given that the Agreement impacted the City, additional parts and details to the City. AEV declined the City's request for additional disclosure. The City complained to the IPC under *FOIP* for access to the Agreement. The IPC convened an inquiry to hear and determine the matter.

(iii) The IPC's Findings

16. The IPC ordered AEV to disclose the Agreement to the City. The then IPC observed that the Agreement was ambiguous as to whether it was to be kept confidential, as some clauses spoke of confidentiality while others spoke of disclosure. He held that it could not be concluded that the Agreement was to be kept confidential. In deciding to order the disclosure of the Agreement, the then IPC considered IOL's argument that the information the City sought was exempt from disclosure under s. 16 of *FOIP*: information that would be harmful to the business

[16] *Environmental Protection and Enhancement Act,* RSA 2000, c. E-12 [*EPEA*]

interests of a third party. IOL was the third party. The IPC found that most of the information in the Agreement was not IOL's commercial, financial, labour relations, scientific or technical information, or was not information that was supplied by IOL to AEV in confidence. As neither ss. 16(1)(a) or (b) were met, it was unnecessary for the IPC to decide whether s. 16(1)(c) applied.

17. Section 24(1) of *FOIP* exempts from disclosure advice developed by or for public bodies. The IPC found that s. 24(1) did not apply to exempt the Agreement from disclosure because it protects information generated during the decision-making process, but not the decision (in this case the Agreement) itself, from public access. As AEV and IOL were involved in developing the Agreement, it was not prepared by or on behalf of a public body as s. 24(1)(a) requires.

18. The IPC found that disclosure of the Agreement would not cause the postulated economic harm to EAB and therefore s. 25 of *FOIP* did not apply to bar disclosure. Withholding the Agreement was not necessary to enable AEV to fulfill its mandate of ensuring that responsible parties met their remediation obligations under the *EPEA*.

19. The IPC held that the Agreement was not subject to privilege such that s. 27 of *FOIP* barred its disclosure. The communications giving rise to the Agreement could be privileged, but not the Agreement. The Wigmore criteria did not apply to cloak the Agreement in privilege. The public interests engaged by the dispute between IOL and AEV and the transparency associated with, and required by, that process meant the Agreement itself could not be privileged.

(iv) The Superior Court Quashed the IPC's Order

20. IOL applied to a Justice of the Court of Queen's Bench for review of the IPC's decision. The Chambers Justice overturned the IPC's decision, holding that the Agreement should not be disclosed, the IPC gave inadequate reasons in support of his conclusion that the Agreement did not contain commercial information, and the scientific and technical information in the Agreement was that of a third party.

21. The Chambers Justice also found that the fact that the Agreement was negotiated did not exempt it from the disclosure provision under s. 16(1)(b). He held that the IPC's finding that the Agreement was not confidential incorrectly interpreted the *EPEA* to remove the EAB's ability to mediate a resolution between parties.

22. The Chambers Justice found that the IPC incorrectly modified the legal test for privilege to add public policy requirements. The test for privilege was satisfied and the IPC's decision was incorrect. The Court held that confidentiality was important and could not be undermined.

(v) The Court of Appeal Held the IPC has no Standing to Appeal

23. The City, a public body, did not appeal the Court's decision. The IPC appealed.

24. The Court of Appeal applied *Northwestern Utilities* and *Brewer*, held that *Paccar* did not apply, and struck the appeal. The Court distinguished between standing to appeal and the ability to make submissions on appeals launched by third parties.

25. The Court held that prior appeals by the IPC and other tribunals carried no weight, and the City's unwillingness to appeal did not establish a right of appeal in the IPC.

26. In response to the IPC's submission that the Superior Court's decision impacted her jurisdiction – a subject matter which, according to *Northwestern Utilities*, she may address – the Court conflated jurisdiction with "true questions of jurisdiction", thereby incorrectly narrowing the meaning of "jurisdiction". The Court held that *Paccar* does not apply, stating only that "The law of judicial review has evolved considerably since 1989"[17]. It is submitted that the jurisdictional error was made by the Chambers Judge, not the IPC. The Court applied *Northwestern* but ignored *Paccar* – the latter being a decision on common law rights of appeal.

27. Despite its striking of the appeal, the Court decided the merits of the appeal in *obiter dicta*, noting that it was "warranted given their importance"[18].

PART II. QUESTIONS IN ISSUE

28. The question at issue is whether the decisions below raise an issue of national importance that this Honourable Court ought to address. The IPC submits the decisions below raise the following questions that warrant the consideration and guidance of this Honourable Court:

> **Issue I:** Does an administrative tribunal have standing to appeal a decision which profoundly impacts its jurisdiction and the administration of its home statue?

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[17] Reasons of the Court of Appeal [*ABCA* Reasons] **[Tab 2D]** at para 28
[18] *ABCA* Reasons **[Tab 2D]** at para 30; emphasis added

Issue II: Does settlement privilege attach to a concluded agreement in the context of regulatory proceedings brought in the protection of public interest?

Issue III: Can a public body, in this case an environmental regulator, avoid the terms of privacy and access legislation by negotiating a resolution to regulatory proceedings and agreeing to keep that resolution confidential?

Issue IV: Did the IPC unreasonably interpret the test for the "harm to business interests" exception to access articulated in *FOIP*?

PART III. STATEMENT OF ARGUMENT

A. Tribunal Standing: Balancing the Appearance of Tribunal Impartiality with Tribunal Participation on Appeal

29. Courts have recognized the "explosion" in the number and variety of administrative tribunals necessitating increased sophistication in the law governing the courts' supervision of tribunals[19]. A tribunal's role in the review and appeal of its decisions remains uncertain.

ISSUE I: Does an administrative tribunal have standing to appeal a decision which profoundly impacts its jurisdiction and the administration of its home statute?

(i) *Northwestern Utilities* is not an Invariable Rule: the Impact of *Paccar*

30. The principle being protected in limiting tribunal participation is impartiality. *Northwestern Utilities* states that a tribunal's impartiality is "discredited" by the "spectacle" of a tribunal defending its own decision because the tribunal's active participation in court makes it an adversary of one of the parties[20]. Implicit in *Northwestern Utilities* - which grants a tribunal standing to argue its own jurisdiction and explain the record - is the notion that a tribunal can, and typically will, be adverse to one of the parties.

31. However, as noted in *Paccar*, valid justice interests beyond tribunal impartiality inform the principle of standing. When the issue is whether the tribunal's decision was reasonable, a powerful policy reason militates in favour of permitting the tribunal to make submissions[21]:

> [T]he tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which

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[19] *Children's Lawyer* at para 18
[20] *Northwestern Utilities* at paras 5255
[21] *Paccar* at para 52

> may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area.

This tribunal expertise theme has been adopted by this Court since its decision in *Dunsmuir*[22].

32. *Paccar* extends tribunal participation to making submissions on the standard of review and the reasonableness of the tribunal's decision[23]. *Paccar* recognizes that private adversarial parties will not, and cannot, provide a court with the complete public context, particularly when a decision will have implications beyond the case itself. *Paccar* eases the restriction on tribunal standing but raises the inevitable point: regardless of whether a tribunal argues the reasonableness or correctness of its decision, it seeks to support its decision against an opposing party's interests. It is submitted that, in the modern regulatory state, this notion must be considered in light of the fact that many tribunals, such as the IPC, have multiple public policy functions and that their adjudicative processes are a tool for advancing public policy. In some cases, many of which the IPC deals with, there is no *lis inter partes* with anyone other than the tribunal, the tribunal is the enforcer of public policy legislation, the parties do not have a right to have a decision arising from a complaint, the IPC may initiate her own processes and the IPC gets to decide whether or not to hold an inquiry.

(ii) The Alberta Court of Appeal's Contradictory Approach to Tribunal Standing

33. The Alberta Court of Appeal states in *Brewer* that some courts of appeal would expand the *Northwestern Utilities* rule "a little" to enable tribunals to argue standard of review based on what it characterized as *obiter dicta* in *Paccar*: "How courts of appeal can contradict the narrower test in the Supreme Court's *Northwestern Utilities* is obscure"[24]. With respect, *Paccar* is not an obscure principle. *Paccar* was a decision of 3 of 6 sitting Justices, with Justice Lamer having articulated the same finding previously in *Bibeault*[25].

34. *Northwestern Utilities* was decided well before the "explosion" in the number, variety and public policy functions of administrative tribunals which has necessitated increasing sophistication in the law governing the courts' supervision of tribunals, and it was a "relator" type action in which the Attorney General maintained the public interest. In all cases, and in

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[22] *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]
[23] *Paccar* at para 48
[24] *Brewer* at para 33
[25] *Bibeault v McCaffry; Vassart v Carrier*, [1984] 1 SCR 176 [*Bibeault*] cited in *Paccar* at para 51

particular in the present case, the Attorney General cannot represent the IPC - in this case it appears in opposition to the IPC as the Minister of Environment. The Attorney General's traditional role in protecting the public interest cannot apply in any case in respect of the administrative regime which the IPC administers. That function can only fall to the IPC, as *FOIP* is applied to public bodies such as the Attorney General.

35. The Alberta Court of Appeal held in *Brewer* that a tribunal does not have standing to appeal a superior court's review quashing the tribunal's decision. *Brewer* contradicts *Paccar* and places Alberta at odds with other jurisdictions which have recognized *Paccar* as an authority and consequently extended a tribunal's participation in a review of its decision.

36. The Alberta Court of Appeal recognized the permissible role of a tribunal in a proceeding is in the discretion of the court and depends on the particular context in *Leon's*[26]. It followed the Ontario Court of Appeal's decision in *Children's Lawyer* that tribunal impartiality is important, as is having all relevant information and arguments put forward[27]:

> However, I agree with the parties that a context-specific solution to the scope of tribunal standing is preferable to precise *a priori* rules that depend either on the grounds being pursued in the application or on the applicable standard of review. For example, a categorical rule denying standing if the attack asserts a denial of natural justice could deprive the court of vital submissions if the attack is based on alleged deficiencies in the structure or operation of the tribunal, since these are submissions that the tribunal is uniquely placed to make. Similarly, a rule that would permit a tribunal standing to defend its decision against the standard of reasonableness but not against one of correctness, would allow unnecessary and prevent useful argument. Because the best argument that a decision is reasonable may be that it is correct, a rule based on this distinction seems tenuously founded at best ....
>
> Nor do I think cases like *Northwestern* and *Paccar, supra*, dictate the use of precise rules of this sort. Particularly in light of the recent evolution of administrative law away from formalism and towards the more flexible practical approach exemplified by *Pushpanathan v. Canada* [cite omitted], I think these cases are best viewed as sources of the fundamental considerations that should inform the court's discretion in the context of a particular case. Resolving the scope of standing on this basis rather than by means of a set of fixed rules is likely to produce the most effective interplay between the array of different administrative decision makers and the courts.

37. *Leon's* and this case demonstrate that the Alberta Court of Appeal has found that the IPC's status on an appeal is determined by whether it is an Appellant or a Respondent, notwithstanding that the IPC's interest would be identical in either capacity.

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[26] *Children's Lawyer* cited with approval in *Leon's* at para 26
[27] *Children's Lawyer* at paras 34 - 35

38. In *Children's Lawyer*, the Ontario Court of Appeal upheld the Superior Court's decision to dismiss an application by the Children's Lawyer for Ontario to refuse or limit the standing of the Ontario Privacy Commissioner. In doing so, that Court noted that the jurisprudence on the issue of the tribunal's standing is a "rather clouded jurisprudential backdrop"[28] .

39. In *Leon's* the Alberta Court of Appeal itself moved away from a strict interpretation of *Brewer*, holding that *obiter dictum* in *Brewer* stated the *Northwestern Utilities* principle in absolute terms that are inconsistent with the Court's own findings in *Rockyview*[29]. Unlike its decision in this matter, the Court below clearly held that "some flexibility is required when defining the proper role of tribunals in judicial review proceedings". It also held[30]:

> [T]he law should acknowledge the multifaceted roles of many modern administrative tribunals, and the realities of the situation. The *Northwestern Utilities* case should be used as a "source of the fundamental considerations". Its principle will often be applied with full vigour to administrative tribunals that are exercising adjudicative functions, where two adverse parties are present and participating. While the involvement of a tribunal should always be measured, there should be no absolute prohibition on them providing submissions to the court. Whether the tribunal will be allowed to participate, and the extent to which it should participate involves the balancing of a number of considerations.

The Court then articulated a non-exhaustive list of relevant factors to consider in establishing a tribunal's appropriate level of participation[31].

40. The Court in *Leon's* made specific findings in respect of the IPC[32]:

> [*PIPA*] gives the Commissioner a wide ranging responsibility to implement the Act, to develop privacy policy, to educate, and to investigate and adjudicate upon complaints. After a complaint is made, carriage of the complaint effectively passes to the Commissioner. If the Commissioner concludes that the complaint warrants further proceedings, the Commissioner's staff prosecutes the complaint, and a delegate appointed by the Commissioner will rule on it. For better or for worse, the Commissioner wears many hats, and he is not merely an adjudicator detached from the dispute itself. The Commissioner is very close to being a true party. It is unrealistic to think that the original complainant would have the resources or the motivation to resist the application for

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[28] *Children's Lawyer* at para 25

[29] *Leon's* at para 19 citing *Rockyview (Municipal District No. 44) v Alberta (Planning Board)* (1982), 22 Alta LR (2d) 87, 40 AR 344 (CA) [*Rockyview*]

[30] *Leon's* at para 28

[31] *Leon's* at para 29. These include the existence of other parties who can effectively make the necessary arguments, maintaining the appearance of independence and impartiality, the effect of tribunal participation on the overall fairness (in fact and in appearance), the role assigned to the tribunal under the statute (where the statute effectively gives carriage of the proceedings to the tribunal, a greater level of participation is tolerable), and the nature of the proposed arguments.

[32] *Leon's* at para 30; emphasis added

> judicial review. If the Commissioner does not resist the judicial review application, no one will. In the circumstances, the Commissioner should be afforded some latitude in the submissions that he can make to the court. In this appeal neither the content of the respondent's arguments, nor their tone, exceed what is appropriate, and the Commissioner's participation, on this record, is unobjectionable.

41. In *Leon's*, the Alberta Court of Appeal recognized that *Northwestern Utilities* and *Paccar* do not articulate an invariable rule, and that a tribunal's participation on a review of its decision is a matter of judicial discretion. *Leon's* moved away from the formalism which had barred tribunal participation to a functional approach which better meets the public interest. Of note in this case is that the finding of the Chambers Judge effectively allowed all public bodies to avoid the effects of *FOIP*'s access provisions on agreements by simply adding a confidentiality provision to the agreement. The City, a public body, was not prepared to appeal that decision. Only the IPC was prepared to challenge that finding.

(iii) *IOL* Marks a Return to Formalism over Function

42. *IOL* finds that a tribunal cannot appeal a review of its decision, and can only appear as a respondent in another party's appeal. The Court of Appeal adopted a formalistic approach and a narrow application of *Northwestern Utilities* as opposed to the discretionary, multi-factored evaluation employed in other jurisdictions and in *Leon's* (and of this Court) where tribunals (including the IPC) have appealed reviews of their decisions.

43. *IOL* makes the superior courts the final arbiters on many judicial reviews. Unless another party appeals, no matter the errors it contains, or its impact on the tribunal's policies, procedures and precedents, any decision in which the superior court determines tribunal jurisdiction and standard of review becomes a binding authority on the tribunal. The superior court by default becomes the final arbiter of matters raising important public interests. Despite courts' repeatedly recognizing the increasing importance of the administrative arm of the justice system, and the expertise inherent in tribunals, a tribunal has no standing to appeal a decision which incorrectly and profoundly impacts its function. The checks and balances within the justice system are denied to tribunals and, therefore, to Albertans impacted by administrative processes.

44. Principles informing public interest standing help in considering the importance of tribunal standing to appeal. This Court held in *Downtown Eastside Sex Workers*[33] that when a court considers whether to grant public interest standing, one of the factors to be considered is whether the party has a genuine interest in the validity of the legislation, which ensures full, complete and competent adversarial presentation of the issues. Another factor is that the matter is a reasonable and effective way to bring the issue to court[34], which ensures that the court has the benefit of the contending views of the persons most directly affected by the issue[35].

45. Those same concerns are present when a superior court issues a decision that adversely affects a tribunal's policies, processes and long-standing precedents. Where no other party appeals, absent tribunal standing to appeal, the errors will go uncorrected despite (1) the tribunal being a party affected by the matter, if not the party most affected, and (2) an appeal being a, if not the most or only, reasonable and effective way to bring the issue to court. Given the parallels between public interest standing and tribunal standing, the same practical and flexible approach should be applied to determine whether a tribunal may initiate an appeal.

46. Standing is the legally protectable stake or interest that a putative litigant has in a dispute that entitles him to bring the controversy before the court to obtain judicial relief. It is an interest in the proceedings. That interest is a constant and does not vary depending on whether a party is a respondent or an appellant.

47. Despite its finding in *Leon's* that the IPC is "very close to being a true party", and its adoption of a discretionary, multi-factored approach to tribunal standing as a respondent to an appeal, in this case the Court applied the formalism in *Brewer* and suggests that all tribunals are the same and are bound by the same restrictive rule on appeal. They are not, and should not be treated as such. As noted in *Leon's*, the IPC determines which matters warrant her attention, runs the proceedings and may initiate an investigation. There may not be more than one party to the proceedings. Should the reviewing court find against the IPC in error, in a manner that impacts the administration of the IPC's home statute (*i.e.* beyond the matter under review), under *IOL* that simply ends the matter and redefines the law and policy. The only ability to remedy any errors made by the superior court is through the Legislature. The IPC and the Legislature are

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[33] *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney Genera)*, 2012 SCC 45 [*Downtown Eastside Sex Workers*]
[34] *Downtown Eastside Sex Workers* at para 52
[35] *Downtown Eastside Sex Workers* at para 49

deprived of full appellate review, and the Legislature faces the prospect of different lower court judges delivering inconsistent decisions, each of which would mandate legislative review.

48. A re-evaluation of the principles articulated in *Northwestern Utilities* is needed. This proposed appeal provides that opportunity.

B. The Substantive Issues Raised by this Matter Demonstrate its National Importance

49. Issues II - IV in this application exemplify why it is necessary that standing to appeal be granted to the IPC. The lower Courts' treatment of these issues contradicts the IPC's treatment of these issues, impacting many years of jurisprudence in the IPC's administration of *FOIP*.

ISSUE II: Does Settlement Privilege Attach to a Concluded Agreement with the Ultimate Decision-Maker in the Context of Regulatory Proceedings Brought in the Protection of Public Interest?

50. This Court's rulings on settlement privilege must not be extended to circumstances in which they do not, and should not, apply. The Court below relied on this Court's decisions in *Sable*[36] and *Union Carbide*[37] to hold that settlement privilege applies to settlement *agreements* reached with the ultimate decision-maker in a regulatory proceeding. The Court of Appeal said that the Agreement is subject to settlement privilege because it is the product of settlement negotiations, and this Court has held that privilege applies to both communications in the context of negotiations and to the outcome of the negotiations. However settlement privilege prevents parties' communications made in the course of brokering settlements from prejudicing them before the decision-maker should negotiations fail.

51. This case, unlike *Sable*, was not a private one litigated in a court. The parties to the Agreement were IOL, the Director under the *EPEA*, private land owners and the EAB's Mediator, and was signed by IOL, its subsidiary, the Director, the Mediator, and the Minister of Environment.

52. Sections 11 and 12 of the *EPEA* Regulations[38] establish the EAB as a mediator which makes recommendations, based on the parties' agreement, to the Minister. As the final decision-maker under the *EPEA*, the Minister confirms, reverses or varies the decision under appeal to the EAB, or makes any decision the Director who issued the decision could have made. Unlike in *Sable*, parties in this process cannot settle as between themselves: the government body, as the

[36] *Sable Offshore Energy Inc v Ameron International Corp*, [2013] 2 SCR 623, 2013 SCC 37 [*Sable*]
[37] *Union Carbide Canada Inc v Bombardier Inc*, 2014 SCC 35, [2014] SCJ No 35 [*Union Carbide*]
[38] *Environmental Appeals Board Regulation*, AR 114/93

ultimate decision-maker, must review the proposed resolution and either vary or approve it. Under the legislated process, the resolution reached is not a final settlement, nor subject to settlement privilege, because the final decision maker must review and approve it. This is to protect the considerable public interest. Settlement privilege's purpose of preventing prejudice before the decision-maker has no application.

53. The Court is asked to clarify whether its decisions mean that agreements negotiated between private entities and government, particularly in a regulatory context when the regulator is a signatory thereto, are exempt from disclosure by virtue of settlement negotiation privilege.

54. It is submitted that this Court was clear in *Sable* that settlement privilege applies only to a final settlement agreement between the parties to the dispute. Neither *Sable* nor *Union Carbide* suggests settlement privilege applies to an agreement reached with the decision-maker itself.

55. Where interim and final decision-makers endorse the agreement, whether by signing the agreement, issuing a report and recommendations, or issuing a final decision, the parties have not themselves settled the matter and settlement privilege does not attach to their agreement.

56. Further, under *IOL*, any settlement negotiated with a public body in a regulatory context would be unavailable to the public. This undermines the transparency of government action and *FOIP*'s ability to enable and protect access to public records. The impact of this finding on the administration of *FOIP* is profound, important and affects every part of the country.

57. The Court below found the facts in this case analogous to *Sable*, because in both cases there was settlement with one party while there remained outstanding issues with another. The Court drew this analogy despite the agreement in *Sable* having arisen from a litigated dispute between private parties, not in a regulatory context where one of the parties to the agreement was the public tribunal and ultimate decision-maker itself. This material difference undermines the analogy of the Court below. In addition, there is no evidence that the City and IOL are engaged in any proceedings, and that the City is a non-settling party in these proceedings.

(i) There are no Parallel Proceedings Between the City and IOL that could Justify Finding that the Agreement Should Not be Disclosed

58. Despite the suggestion of the Court below that there were parallel proceedings between the City and IOL in the remediation of the Lands, there was no evidence of that before the IPC. Had there been, the EAB would have been the body making recommendations and the Minister would have been the final decision-maker (but bound by the terms of the secretive agreement

with one of the parties to the dispute). As a result, the purposes underlying settlement privilege could not have been achieved by withholding the Agreement from other parties.

59. Further, if the IPC is to engage in the balancing in which this Court engaged in *Sable* in anticipation of such hypothetical proceedings, there is no meaningful analogy to the *Sable* case in terms of the factors to be weighed or the applicable result of the balancing.

(ii) If Settlement Privilege Does Potentially Attach to the Agreement, Public Interest Militates in Favour of its Disclosure

60. When the IPC engaged in the balancing of interests to determine if there were any public interest factors that outweighed attaching settlement privilege to the Agreement, he concluded that the most significant factor was the interest of the public in knowing about the remediation of contaminated lands (a factor he regarded as reflected in the openness of the legislated mediation process). The Court below rejected this as a relevant factor.

61. Guidance is needed as to whether public interest in knowing the outcome of settlement negotiations in respect of an environmental dispute is an appropriate factor to consider in deciding whether settlement privilege applies to prevent disclosure. It is submitted this public interest factor outweighs the public interest in protecting the privilege.

ISSUE III: Can a Public Body Avoid the Terms of Privacy and Access Legislation by Negotiating a Resolution to Regulatory Proceedings and Agreeing to Keep that Resolution Confidential?

62. The IPC observed that some clauses in the Agreement spoke of confidentiality while others spoke of disclosure[39]. He held that in view of these contradictions it could not be concluded that the Agreement was to be kept confidential between the parties.

63. The Court below rejected this conclusion, substituting its view that AEV had contracted with IOL that the Agreement is to be kept confidential. The Court had no concerns regarding the clause providing that AEV will "use its best efforts to prevent disclosure" in the event of any access request under *FOIP*. The Court's overall conclusions in this case seemed to be premised on the idea that such a clause can, by showing the intentions of the parties, be relied on to prevent access and disclosure.

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[39] For example, the IPC pointed to clause 13.2, which says that the parties may disclose to a third party and publicly any and all aspects of the result of the mediation as embodied by the Agreement (with a specified exception relating to the property of a single individual).

64. Privacy Commissioners and courts across Canada have instructed public bodies that they cannot rely on confidentiality clauses to contract out of their legislated access and disclosure obligations[40]. The ruling of the Court below supports a loss of access, disclosure and transparency in government. *IOL* allows public bodies to improperly refuse access and disclosure requests, and introduces uncertainty in the law of public access and disclosure.

65. If the confidentiality clauses in the Agreement were intended to permit resisting access requests for the entire Agreement (which the IPC found to be unclear but which the Court below accepted), then those clauses are void as contrary to public policy: except in respect of a narrow category of instances into which the Agreement does not fall. The public body cannot agree to such provisions as they conflict with its disclosure obligations under *FOIP*. The Courts below relied on confidentiality in error to over-ride AEV's obligations under *FOIP*.

66. Before the Chambers Judge the EAB made extensive submissions respecting its long-standing practice of modifying agreements to mediate, and negotiating regulatory matters with private parties on the understanding the negotiated agreements would not be publicly available[41].

67. Assuming, as AEV claims, that AEV can vary the mediation process under the *EPEA*, AEV must comply with its duty under s. 10 of *FOIP* to respond to access requests. It can only enter into an agreement stipulating that it will be kept confidential between the parties if it makes a reasonable determination that the confidential information would not have to be disclosed on an access request: *FOIP* overrides any contrary term respecting confidentiality.

68. In this case, AEV could only enter into an agreement to keep the Agreement confidential, and to resist access requests under *FOIP*, if the information satisfied s. 16(1)(a), (b) and (c) of *FOIP* (which would make it reasonable, if the third party desired confidentiality, for the public body to agree to it). Section 16 could conceivably apply to permit withholding of some minor parts of the Agreement; the terms which ostensibly cloaked the entire Agreement were void as contrary to public policy because s. 16 is clearly not applicable to the balance of the Agreement.

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[40] *Canadian Broadcasting Corp v National Capital Commission*, 1998 CanLII 7774; *St Joseph Corp. v. Canada (Public Works and Government Services)*, 2002 FCT 274; *Ottawa Football Club v Canada (Minister of Fitness and Amateur Sport)*, [1989] 2 FC 480 (FCTD); *Canada (Information Commissioner) v Atlantic Canada Opportunities Agency* [1999] FCJ No 1723; British Columbia Orders 00-47 and 01-20; Alberta: Order 96-016, Saskatchewan Report F-2012-003; Report 2005-003, Review Report LA-2014-003; Ontario: Interim Order, MO-2645-1; Order PO-2598; Order MO-1184; Order PO-2520

[41] Reasons of the Superior Court at paras 126–138 **[Tab 2B]**

69. IOL and the EAB contend that a confidential resolution could be achieved by a modified mediation that did not involve EAB recommendations, or a published decision by the Minister: under that process IOL could withdraw its appeal, the Director could cancel the EPO and, by reference to s. 95(7) of the *EPEA*[42], that would end the EAB's involvement and avoid any need to disclose the outcome. The Court below agreed. If that is the effect of the Agreement (which is not what the IPC found) then this process was designed and implemented to protect the Agreement, a government action, from public disclosure or access, despite its impact on the City (a public body) and the public. It was designed and implemented to enable AEV to resist an access request under *FOIP*. The notion that public bodies can contract out of their access obligations under *FOIP*, which is paramount and quasi-constitutional legislation[43], wholly obviates the efficacy of *FOIP* in respect of all government contracts.

70. The Courts below relied on the confidentiality clauses in the Agreement, in several ways, to reach its conclusion that the Agreement should not be disclosed. The Court of Appeal relied on them to conclude the information in the Agreement had been supplied "in confidence". As well, it concluded that the provisions under the EPEA that required information supplied in environmental appeals to be made public proactively (which would make the s. 16 "harm to business interests" exception inapplicable to the supplied information) were rendered ineffective by the (implied) decision of the Director that confidentiality was reasonable. The Court of Queen's Bench relied on them to hold that violation of such agreed confidentiality would be detrimental to the EAB's ability to negotiate environmental disputes.

71. If it is impermissible for public bodies to enter into confidentiality clauses that conflict with their duties to respond to access requests under *FOIP*, such clauses cannot be relied on to resist access requests when they are made. If (contrary to the IPC's conclusion) the parties did intend to contract out of *FOIP* and to keep the entire Agreement confidential as against access requestors, the clauses are void and cannot be relied on for this purpose. This Court is asked to affirm this important and established principle of access to information law.

ISSUE IV: The IPC Reasonably Interpreted and Applied the Test for "Harm to Business Interests" Exception Under *FOIP*

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[42] *EPEA* s. 95(7)

[43] *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers Local 401*, 2013 SCC 62 at paras 19–22

72. Section 16 of *FOIP*, like similar provisions across Canada, creates an exception to access for particular categories of information, supplied by third parties to public bodies in confidence. The disclosure of that information must harm the third parties' business interests.

73. The IPC applied long-standing and nationally recognized precedents which state that what is agreed to between a third party and a public body does not constitute information that is "supplied by" the third party to the public body within the terms of s. 16(1)(b). An exception to this principle exists: proprietary information that is supplied to the public body prior to or during negotiations and is then incorporated into the agreement in its original state, may be said to be information falling within the terms of s. 16(1)(a) that is supplied within the terms of s. 16(1)(b). Similarly, where an accurate inference about such information may be drawn from the terms of the agreement, the exception applies to the information that permits the inference. The purpose of provisions such as s. 16 is to protect the informational assets of businesses, in the competitive context of the marketplace, from exploitation by market competitors. It is not enough that information refers to commercial, financial, labour relations, scientific, technical information or trade secrets in general; the information must enable accurate inferences as to the specific and specialized uses a third party makes of the information in its business[44].

74. The Court below rejected these principles, concluding that the Agreement contains or constitutes information that IOL developed about the financial, technical and environmental implications of remediation, and then relying on this to exempt the entire Agreement from disclosure. Its findings fail to recognize that contractual terms – those agreed to – between IOL and AEV cannot be withheld unless they contain or would reveal IOL's proprietary, scientific or technical assets. While IOL may have applied scientific or technical information to develop remediation proposals, such proposals are not exempt from disclosure unless they reveal IOL's proprietary, scientific or technical information. Further, only limited portions of the Agreement refer to scientific, technical or financial information, and IOL failed to point to any contractual provisions that could be said to reveal its proprietary information, though it bore the onus of doing so. The Agreement principally addresses matters unrelated to scientific methods or techniques. Further, only limited provisions of the Agreement address the costs of remediation, and those provisions are agreed-upon costs rather than IOL's prior financial position; such information cannot be said to have been supplied by IOL within the terms of the jurisprudence.

[44] Alberta: F2009-015 at para 33; F2010-036 at paras 17 – 19; F2012-06 at paras 59 – 60; F2012-17 at para 17

75. This Honourable Court's guidance is needed to consider and determine the principle that distinguishes between information that is supplied and information that is agreed upon, so as to enable the proper functioning of Canada's access to information regimes.

76. The Court below found that IOL satisfied the "supplied in confidence" provision, and it applied a test for harm to business interests that conflicts with long-standing precedents by privacy commissioners across Canada and recent jurisprudence of this Court. The test for "supplied in confidence" is not subjective. It requires a reasonable expectation of confidentiality. There is no such expectation for information that cannot be withheld under *FOIP*.

77. In *Merck Frosst*[45] this Court held that the long-accepted formulation for the likelihood of harm resulting from disclosure is "a reasonable expectation of probable harm". The Court affirmed the long-standing test, explaining that a third party need not show that harm will come to pass if records are disclosed, but must show more than that such harm is possible[46]. The harm must be more than fanciful, imaginary or contrived. Withholding disclosure on the basis of the mere possibility of harm would thwart the important objectives of access to information[47].

78. The Court below modified the test, stating that there is "some potential for harm to the third party if the protected information is disclosed" - that differs from "a reasonable expectation of probable harm". And, though the IPC had found it unnecessary to decide this question, leaving no decision to review, the Court decided the requirement of s. 16(1)(c) was met and an exception to disclosure applied[48].

79. Despite strong precedent that a link must be established between particular information that meets the test under s. 16(1)(a) and the posited harm, the Court below concluded that withholding the entire Agreement was warranted to avoid interference with IOL's negotiating position in proceedings that may arise with the City in the future.

80. The IPC has previously rejected the notion that harm to position in actual or prospective litigation is a harm to which s. 16(1)(c) applies (as has the IPC of Ontario). Section 16(1)(c) has been interpreted as applying so as to protect the informational assets of business that might be exploited by competitors in the marketplace, rather than other litigants in legal proceedings[49].

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[45] *Merck Frosst Ltd v Canada (Health)*, [2012] SCR 23 [*Merck Frosst*]
[46] *Merck Frosst* at para 196
[47] *Merck Frosst* at paras 197, 199, 204
[48] *ABCA Reasons* at para 87 **[Tab 2D]**
[49] Alberta: F2009-007 paras 65 – 68; F2009-015 at paras 44 – 45; F2013-17 at paras 41-42; Ontario Order PO-2490

81. The Court did not explain how or why an entity that was responsible for remediation could or would refuse to provide information to the public body, either during negotiations or in a formal proceeding, relating to what it thought should be done or how to do it.

82. Without this Court's guidance respecting the reasonable expectation of harm and the need to link particular information to the harm posited, the test in Alberta is now out of step with established precedent and jurisprudence.

PART IV. COSTS SUBMISSIONS

83. This Application for leave to appeal raises issues of national and public importance within the meaning of s. 40(1) of the *Supreme Court Act*. For this reason, if leave to appeal is granted, the IPC requests its costs in the cause.

PART V. NATURE OF ORDER SOUGHT

84. The IPC seeks leave to appeal this matter to the Supreme Court of Canada with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Calgary in the Province of Alberta this 26th day of September, 2014.

as agent for

Glenn Solomon, Q.C. and Elizabeth Aspinall
Counsel for the Applicant

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