Opening Comments – Public Consultations – January 18, 2021

Good Morning. Welcome to the public consultation sessions of the 2020 Statutory Review of the *Access to Information and Protection of Privacy Act, 2015*. My name is David Orsborn and I have been asked to act as a committee of one to conduct the five-year review required by s. 117 of the *Act*.

It is my task to examine, as instructed by my Terms of Reference "public and public body experience in using and administering" the *Act*. The Terms of Reference include a number of other specific areas for examination, including a direction to consider and report on three specific recommendations of the Muskrat Falls Inquiry chaired by Justice Richard LeBlanc. My report must be delivered to the Minister of Justice on or before March 31, 2021.

The current legislation is the product of the extensive review and study conducted in 2014 by a three-person committee chaired by the Honourable Clyde K. Wells, Q.C. Their work has been widely acclaimed as establishing a solid and principled foundation for the access to information and protection of privacy regime in Newfoundland and Labrador.

That review confirmed that the public right of access to information is a high order quasi-constitutional right. The report and s. 3 of the *Act* explain why this right exists – it is to ensure "that citizens have the information required to participate meaningfully in the democratic process" and to increase "transparency in government and public bodies so that elected officials, officers and employees of public bodies (– and there are well over 400 public bodies -) remain accountable".

But just as access to information is fundamental to our democratic system of governance, so too is the proper protection of personal information held by public bodies. While privacy protection, as noted by the Wells Committee, does not generate the same level of public interest as access to information, it is an aspect of public body information management that will become increasingly important as more and more data comes into the electronic hands of public bodies.

There are three main components of the *Act*. The first consists of the substantive provisions which confirm the public rights of access to information and personal information privacy and which set out various exceptions to those rights. The second is what I would call procedural – how those rights are to be exercised.

The third main aspect of the *Act* addresses the Office of the Information and Privacy Commissioner, the statutory office which is given the difficult task of overseeing the application of the *Act*, advocating for access to information and the protection of privacy and, at the same time, providing independent review of decisions made by public bodies under the *Act*.

I believe it is helpful to keep in mind the different nature of these aspects of the *Act* when considering recommendations for change.

This then is the context for this review.

The Committee has a website – www.nlatippareview.ca, and these public sessions will be livestreamed on that website. With respect to the Website setup, please let me express my gratitude to Necie Mouland and Katie Murray, both of Executive Council, for their work in helping us design and populate the website – it is due to their efforts that, among the many background pictures of puffins on the website, you can actually find a lovely shot of the Pinware River, in Labrador.

Our ability to livestream these sessions and to accommodate video appearances is all made possible by the efforts of three folks from the Broadcast Services staff of the House of Assembly. My thanks to Cathy Simms, Calvin Tobin and Darren Churchill for their assistance to date and for their ongoing technical supervision during these sessions.

To date the Committee has received 46 written submissions. Those submissions are posted on the Committee website. In addition, and similar to the process followed by the Wells Committee, I have received input on an anonymous basis from a number of ATIPP coordinators, the public servants tasked with the day to day administration of the *Act*. I have held five in-person or Skype group sessions with coordinators and have received 39 responses to written survey questions. These responses, with any identifying information redacted, will be included as an appendix to my final report.

The present sessions – which are open to the public – will be a combination of in-person and virtual presentations and will respect all necessary COVID protocols. The Office of the Information and Privacy Commissioner and a number of public bodies, private individuals and interested groups are scheduled to make submissions. After those what I will call general submissions, I will ask the Office of the Information and Privacy Commissioner for any concluding response or comments.

But there are two particular areas which have generated a lot of comment – the *Act*'s provisions relating to access to information in the context of workplace investigations – s. 33, and those relating to the protection of third party commercial interests – s. 39. I thought it would be helpful, to me at least, to hear views on these issues in separate focused round-table type sessions; the s. 33 session is scheduled for Wednesday, January 27, the s. 39 session for January 28.

Accordingly I ask that where a presenter is intending to participate in either or both of these sessions, they delay making their submission on the s. 33 and s. 39 issues until that particular session. I appreciate that there is some degree of overlap with other sections – particularly s. 19 – so I will leave it to each presenter to decide at what point they wish to make submissions on any related sections.

We all know, of course, that an election has just been called. There is an unwritten constitutional convention – the "Caretaker Convention" – that places constraints on an incumbent government with respect to its continued participation in ongoing public consultation or engagement sessions. I have been advised by the Deputy Minister of Justice that, during this caretaker period – from now until the formation of a new government – government public body representatives will not be able to make presentations.

This circumstance makes it necessary to consider its effect on the Committee process and schedule. I do not consider it either fair to other presenters or necessary to simply adjourn the Committee until a new government is in place. But I also consider it fair – and necessary for my own consideration – to ensure that a new government have the opportunity to consider its positions and to present and explain them in a public setting. Accordingly. what I am going to do is to proceed with all presentations, including the round tables, as presently scheduled, with the exception of the presentations of the ATIPPA Office, the Department of Justice on behalf of the Executive Council and government departments, and the response of the Office of the Information and Privacy Commissioner.

As soon as possible following the formation of a new government, I will schedule the presentations from government – these presentations will include any submissions on the roundtable issues. The Office of the Information and Privacy Commissioner will then be given the opportunity to provide its public response to all presentations.

Whether I will need to seek an extension beyond March 31 is a matter for later consideration.

The hearing schedule allots a specific time for each submission. I have reviewed all the submissions and I believe that the time allotted should be more than sufficient for a summary of the main points of each and for discussion of any questions I may have.

These sessions are intended to provide a forum for the public expression of the views of each presenter; it is not an adjudicative forum nor one for the airing of individual disputes or grievances. The *Act* is a high level public interest Act intended, in its access provisions, to protect and advance the interest of the public as a whole in transparent, accountable and excellent governance. I would ask that your submissions reflect the objectives of the *Act*.

All submissions made, whether in writing or verbally, will be carefully considered as I later work through the issues raised by the Terms of Reference. I do consider this review to be a collaborative effort, so during my consideration, I will consult further if and as I feel it necessary to fully appreciate the concerns and positions put to me.

My considerations will be informed both by the experience of the last five years and by what may reasonably be anticipated as technology advances and as changes to program delivery challenge our ability to properly protect personal information and privacy.

Let me say at the outset that, in the context of this review of the *Act*, change simply for the sake of change does not commend itself to me. Where the 2014 Review considered various opinions on a substantive issue and reached a reasoned conclusion, any adjustment to that substantive conclusion should in my view be contemplated only where a material change in circumstances or environment, or other compelling reason, requires its reconsideration. But on matters of procedure, five years of experience and increased usage can be an invaluable teacher. Where that experience suggests that the "on the ground" daily process of realizing the *Act's* substantive rights could be improved, such suggestions should be seriously considered.

To all who have and will contribute to this process, my thanks for your commitment to access to information and the protection of privacy and for your thoughtful and considered submissions. While there will be differences of opinion on some issues, it has become quite clear to me that overall, there is a common commitment to the *Act* and its principles – and that is a tribute to you all.

And with that long introduction – only for the first day – I ask the Commissioner to speak to the submissions of his Office.