ATIPPA STATUTORY REVIEW COMMITTEE 2020

Transcript	Volume 2

Committee Chair: Honourable David B. Orsborn

Tuesday 19 January 2021

CHAIR ORSBORN: Good morning.

Welcome to this continuing public consultation session of the 2020 ATIPPA review committee.

Our first presentation this morning is from the Law Society of Newfoundland and Labrador. We have Brenda Grimes, Q.C. and Aimee Rowe.

Counsel, I've read your submission, so please proceed as you see fit.

Thank you.

MS. GRIMES: Good morning, Chair Orsborn.

Thank you for providing the Law Society with an opportunity to participate in the review process.

I will say that I don't know if you're experiencing the same technical difficulties on your end, but our video feed is going in and out. Can you still hear me, at least?

CHAIR ORSBORN: I can hear you very well, thank you.

MS. GRIMES: Okay.

My name is Brenda Grimes and I am the executive director of the Law Society of Newfoundland and Labrador. With me is Law Society's general counsel, Aimee Rowe.

With your permission, I would like to make a brief comment about the Law Society and its mandate, in order to provide some context for our submissions on the issue of protection of solicitor-client privilege, following which Ms. Rowe will summarize the substance of our position. Is that okay with you?

CHAIR ORSBORN: Yes, thank you.

MS. GRIMES: The Law Society's primary role as set out in our enabling legislation is "to regulate the practice of law and the legal profession in the public interest." In addition to the various processes and programs designed to further this role, the Law Society, as a member of the Federation of Law Societies, works with all other law societies in Canada to set national standards for the profession and, where appropriate, will advocate both at a local level and, through the federation, at a national level on matters which fundamentally affect the public interest.

In furtherance of its regulatory mandate, the Law Society's governing body adopts rules and standards of professional conduct which members of the legal profession must adhere to. Of particular relevance to our submissions today is the Law Society's *Code of Professional Conduct*, which provides that in addition to the legal obligation to protect solicitor-client privilege, lawyers are ethically obliged to "hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship …." That can be found at section 3.3-1 of the *Code of Professional Conduct*.

The importance of solicitor-client privilege cannot be understated. In our view, it is imperative that any exceptions to solicitor-client privilege be clear and unambiguous so that lawyers can properly advise their clients with respect to the creation of records, properly advise their clients with respect to required disclosure and comply with their legal and ethical obligations relating to privilege. That is why, as outlined in our written submissions to the committee, the Law Society has intervened on three matters before the court involving solicitor-client privilege and has also filed an application to intervene on another matter.

That is also why, at the national level, the Federation of Law Societies has regularly intervened in legal proceedings or made submissions to the federal government in instances where legislation or proposed legislation has either been silent or unclear regarding the appropriate processes to be followed when an assertion of solicitor-client privilege has been made.

With that as a backdrop, I'm going to turn the substantive portion of our submission over to Ms. Rowe.

Thank you.

CHAIR ORSBORN: Thank you.

MS. ROWE: Good morning, Chair Orsborn.

As outlined in our written submission, the Law Society has taken the position that the Office of the Information and Privacy Commissioner does not and should not have the authority to compel the production of solicitor-client privileged information. This position is supported first by an interpretation of the act in accordance with the Supreme Court of Canada's decision in Alberta versus the University of Calgary and, secondly, on the basis of policy.

As outlined in the University of Calgary decision, "To give effect to solicitor-client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so." In his written submission to the committee the Privacy Commissioner has stated that the statutory language in the Access To Information And Protection Of Privacy Act is more than sufficient to ensure the Commissioner's authority to compel the production of and review of records where there has been a complaint about a refusal of access on the basis of a claim of solicitor-client privilege. Notwithstanding his decision, he has suggested that it would be advisable to amend the legislation to clarify this.

While we do not agree with the Privacy Commissioner's interpretation of the law in this regard, we do agree that clarification is required. The provisions of the legislation relied on by the Commissioner, in particular sections 97(5), 97(6) and 100, address the manner which solicitor-client privilege information which has been disclosed to the Privacy Commissioner, may be reviewed by the Privacy Commissioner and the status of the information, once the records have been produced to the Privacy Commissioner. Neither section explicitly addresses the production of solicitor-client privileged records at first instance and the Commissioner has not pointed to a provision that does so.

The act does not clearly and unambiguously abrogate or set aside the privilege and, therefore, the Commissioner cannot compel the production of records claimed to be subject to the solicitor-client privilege. The Law Society's position on this issue is also reflected in the submission filed on behalf of the Department of Justice, the Canadian Bar Association and Memorial University.

We note also that –

CHAIR ORSBORN: If I could stop you for a moment, Ms. Rowe, are you asking me to give you an interpretation of the act as it is? Or are you suggesting what, in your view, the act should say? I know there are present proceedings before the courts that deal with the interpretation of the act as it stands. Do I take it more that you're suggesting that there should be clarification in the act and that clarification should be such that there should be no production of solicitor-client material to the Privacy Commissioner?

MS. ROWE: Yes, Chair Orsborn, that is what we're going to suggest. We will make specific recommendations about how we believe the legislation could be amended. We're certainly not looking for you to give us an interpretation of the act, we're simply reiterating our position about how the act reads, in our opinion, so that it can form a basis for how we believe it should be amended.

CHAIR ORSBORN: Do I understand correctly from the 2014-15 review that was conducted by the committee chaired by prior Chief Justice Wells that they canvassed this area and concluded that it was appropriate with the limitations that the solicitor-client material could be reviewed by the Commissioner? Do I understand that was the position taken by that review?

MS. ROWE: I reviewed that and I agree. I think that the Legislature at the time certainly intended that these types of records would be reviewable by the Commissioner; however, I'm not sure that there is an appreciation of solicitor-client privilege to the extent that it exists today outside of the law of evidence, more as a substantive principle.

In particular, I think that the University of Calgary decision has changed the law with respect to how the legislation relating to the abrogation of privilege should be interpreted. It seems to me that as time progresses there's more

and more weight given to solicitor-client privilege as a fundamental policy of the law. While that might have been the intention in 2014, I would suggest that it shouldn't be the intention in 2021.

CHAIR ORSBORN: Yeah, the University of Calgary case certainly suggests that you can do it though, if the legislation is clear enough. Is that a correct interpretation of it?

MS. ROWE: I would add a limitation to that in that it has to comply with constitutional limitations. I would suggest, in the context of a request from the Privacy Commissioner, it would be a very rare circumstance where it would be: one, absolutely necessary; or, two, minimally impairing that the information be disclosed to the Commissioner for review.

CHAIR ORSBORN: That's a little different issue then. That would suggest that in cases of if production were allowed by the statute, it should be limited, certainly, by the absolutely necessary requirement. Is that fair?

MS. ROWE: Yes, that is fair. From the Law Society's perspective, we would suggest that it would be extremely difficult to draft legislation that would be compliant with both of those things because the legislation would likely be broad stroked. So to capture most of the circumstances, I would suggest it would be unconstitutional to request these documents.

CHAIR ORSBORN: Unconstitutional in what sense?

MS. ROWE: I think there are ways that – for example, Memorial University has highlighted that it has created kind of an informal routine of providing the Privacy Commissioner with a listing of documents and reasons as to why they're solicitor-client privileged. I would suggest that's an appropriate approach.

The Commissioner himself is not impartial and does not actually have the authority to order that the documents be disclosed to an applicant. Without those two things there's no reason why the Commissioner should have the authority to review the documents at first instance. It's a breach of privilege to provide these documents to the Commissioner and that is outlined in the University of Calgary decision.

CHAIR ORSBORN: Okay, can I go back to my question then, in terms of – you said it was unconstitutional. In what sense?

MS. ROWE: In that it would, I would say, probably never be absolutely necessary that the Commissioner review the documents. If it's not absolutely necessary, then it's not constitutional.

CHAIR ORSBORN: All right, thank you.

I'm sorry, I interrupted you. Just continue.

MS. ROWE: That's okay. I'm just trying to pick up where I was and not be redundant.

I did also want to highlight that in addition to the Canadian Bar Association, the Department of Justice and Memorial University, the City of St. John's has also recommended that the act explicitly enshrine the paramountcy of solicitor-client privilege.

In their submissions, the Office of the Information and Privacy Commissioner and the Centre for Law and Democracy have suggested that the disclosure of solicitor-client privileged information to the Commissioner makes sense from a policy perspective, because the only recourse left to an applicant would be to lodge a time-consuming, resource-intensive and costly court process. However, this policy consideration must be weighed against implications that disclosure to the Commissioner might have on the access to justice and the administration of justice.

As noted at paragraph 34 of the University of Calgary decision: "Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive …." Legal advice helps to inform decision-making; therefore, compromised legal advice can result in compromised decision-making. We would add that the act was not intended to grant unfettered access to records.

Exemptions to access are outlined in sections 27 to 41 of the act. Section 30 of the act specifically

provides that: "The head of a public body may refuse to disclose to an applicant information … that is subject to solicitor and client privilege" and "shall refuse to disclose to an applicant information that is subject to solicitor and client privilege … of a person other than a public body."

In terms of the effect a disclosure to the Commissioner would have on the administration of justice, we further note that disclosure to the Commissioner himself is a breach of privilege. The Commissioner is not an impartial adjudicator and the Commissioner does not have any particular expertise in determining whether or not a document is subject to solicitor-client privilege.

I've already addressed, through your questions, the issues in terms of constitutionality, but I would like to highlight a quote from Blood Tribe Department of Health versus Canada Privacy Commissioner, a Supreme Court of Canada decision, at paragraph 22 where the court said, "a court's power to review a privileged document in order to determine a disputed claim for privilege does not flow from its power to compel production. Rather, the court's power to review a document in such circumstances derives from its power to adjudicate disputed claims over legal rights. The Privacy Commissioner has no such power."

In our case, the Privacy Commissioner does not have the authority, as we discussed, to order disclosure of records claimed to be subject to solicitor-client privilege. He can only make the recommendation. Absent this authority, it's neither necessary nor desirable for him to review the records at first instance.

We would suggest that streamlined court processes could be developed to deal with issues where a listing is insufficient or is challenged by the Commissioner. For example, if the Commissioner is dissatisfied with a list of documents, type of documents, he could be required to file a desktop type of application requesting that the court review the record and make a determination with respect to privilege. We would therefore suggest that the burden in such circumstances should fall to the Commissioner as opposed to an applicant.

CHAIR ORSBORN: You're suggesting that –

MS. ROWE: This type of –

CHAIR ORSBORN: Sorry, you're suggesting then, as a matter of practice if not a matter of law, that there should be a listing provided with some general description of the documents, something like that which goes back, I think, to your earlier practices some years ago?

MS. ROWE: I think that would be the appropriate approach, certainly at first instance.

CHAIR ORSBORN: Somehow the legislation would have to address the situation where a public body would just say: No, I'm giving you nothing, not even a listing.

MS. ROWE: I think that the legislation could be amended to require that the public body provide the listing and I don't feel that there'd be a real explanation as to why they couldn't provide it. Certainly, the Privacy Commissioner could, if the public body fails to do so, challenge that in the court, or there could be provisions for a penalty if the public body fails to do so.

CHAIR ORSBORN: So the process would be that a listing would be provided with the appropriate backup and, perhaps, an affidavit from a solicitor confirming the circumstances and the privilege. If the Commissioner felt – and I did talk to the Commissioner about this issue yesterday and they said, in circumstances such as that, where we would have a listing and the backup affidavit, they were of the view that it would be extremely unusual if they were then to think it was necessary to see the documents themselves.

I take it that if it got to that point of it being absolutely necessary for the Commissioner to review the documents, you would say at that point that either the Commissioner or the public body should go off to court and say this is not absolutely necessary, something like that, to preclude production to the Commissioner. Do I have you correctly?

MS. ROWE: Yes.

CHAIR ORSBORN: Yes, okay.

MS. ROWE: That type of approach – apologies. Did you have another question?

CHAIR ORSBORN: I'll come back to it. Go ahead.

MS. ROWE: Sorry.

This type of approach is similar to the procedure followed during law office searches, which was outlined by the Supreme Court of Canada in Lavallee. When a search warrant is issued for a law office, the lawyer that has custody of the solicitor-client-privileged record is required to assert the privilege. Where the lawyer is conflicted from doing so, the Law Society will step in to do so on behalf of the client. The documents are then sealed until the court makes the final determination on whether or not the documents are privileged.

I note that even as an independent party to the search warrant, counsel for the Law Society does not make a final determination on privilege; the court does.

In Lavallee, the Supreme Court of Canada noted that "Reasonableness dictates that courts must retain a discretion to decide whether materials seized in a lawyer's office should remain inaccessible to the State as privileged information if and when, in the circumstances, it is in the interest of justice to do so."

As an alternative, Chair Orsborn, the act could be amended to provide for the appointment of an independent arbitrator to resolve these types of feuds; however, we note that such an appointment may result in even more issues, particularly as it relates to the independence and the qualifications of the arbitrator. We would recommend, if that was the case, that any decision of an arbitrator should be subject to statutory appeal or right of judicial review. It might cut down on some of the cases that go to court, but I'm not sure it would have a real impact.

In terms of minimal impairment, I did want to add that from our perspective, we would suggest that it would be difficult to draft legislation that expressly abrogates solicitor-client privilege in a manner that does not minimally impair the privilege. Should the Commissioner incorrectly recommend disclosure of the record subject to solicitor-client privilege, or order it, if that was permitted, the privilege would be forever compromised. This is particularly vexing in circumstances where the public body wouldn't have the resources to challenge the recommendation. If the committee determines that the Commissioner should have access to records claimed to be subject to solicitor-client privilege, there should be clear processes and policies in place that outline the circumstances in which the record should be reviewed and who can review the record.

As we've discussed I think several times this morning, the records should only be requested where they're absolutely necessary and, as you've indicated, the Privacy Commissioner has indicated that would be in rare circumstances. Ultimately, we believe that the assertion that the express abrogation of solicitor-client privilege to the Commissioner will reduce costs is tenuous, as it is likely that even with such express authority public bodies will challenge the constitutionality of the provision.

CHAIR ORSBORN: Constitutionality on what basis?

MS. ROWE: On the basis that it's not absolutely necessary that the Commissioner review the documents, because the Commissioner can only make a recommendation.

CHAIR ORSBORN: Okay.

MS. ROWE: The Commissioner is not impartial, so shouldn't really be looking at these documents.

With respect to who can review the records, I know that the Centre for Law and Democracy has recommended that language be added to the act on the minimum qualification of Commissioners. We would suggest that solicitor-client privilege is a legal concept and that advice relating to what constitutes solicitor-client privilege is legal advice.

In accordance with section 76 of the Law Society Act, subject to a few exceptions, none of which apply to within circumstances, only a member in good standing with the Law Society

or a professional law corporation holding a valid licence is entitled to engage in the practice of law. The provision of legal advice constitutes the practice of law in accordance with section 2(f) of the Law Society Act. Therefore, we believe that only practising members of the Law Society should be permitted to review the record and make recommendations with respect to disclosure of the record.

CHAIR ORSBORN: Is that an issue for the access to information act or an issue between the Commissioner and the Law Society if they were, in fact, reviewing documents?

MS. ROWE: It certainly would be an issue between the Commissioner and the Law Society. However, I do believe that the act provides for the appointment of the Commissioner and for the appointment of, I guess, employees or analysts with the Commissioner. So there could be regulations that provide guidelines on that, I would presume.

To summarize, the Law Society respectfully recommends that the act be amended to first clarify that in the course of an investigation the Commissioner does not have the authority to compel production of records claimed to be subject to solicitor-client privilege; two, clarify that the burden on the public body under section 30 of the act is to provide the Commissioner with a listing of solicitor-client and/or litigation privileged information, with submissions as to why such information is privileged; and three, provide for a streamlined court processes that would permit the Commissioner to efficiently challenge the claim to solicitor-client privilege on behalf of an applicant.

CHAIR ORSBORN: Just let me work through that. If a public body provides a listing and supporting information, the Commissioner says, yes, thank you very much but on the basis of what you have given me, I still consider it absolutely necessary for me to review the documents in order to determine whether or not they are privileged. Therefore, I am going to order that you produce the documents to me. Are you suggesting that the Commissioner then should go to court or, rather, the public body should go to court to challenge the order?

MS. ROWE: I'm suggesting that the Commissioner should, because the Commissioner makes the recommendation. I'm suggesting that the burden on the public body is to provide the list of documents. After that, it's the burden on the Commissioner to establish before the court why that list of documents is not sufficient.

CHAIR ORSBORN: Okay.

MS. ROWE: Alternatively, should the committee recommend that the act be amended to provide the Commissioner with the authority to compel the production of solicitor-client privileged records, the Law Society respectfully recommends that the act also be amended to specify circumstances under which documents can be reviewed and who can review them. More particularly, record claims to be subject to privilege may only be reviewed when absolutely necessary and the privilege will be minimally impaired.

Again, this is where the Commissioner should really consider whether a listing would suffice. Secondly, only practising members of the Law Society may review the documents and provide legal advice and/or recommendations with respect thereto.

Those are our submissions. I want to thank you again for the opportunity to make them.

CHAIR ORSBORN: Yeah, I just have one question that occurred to me as you were going through. I'm not sure what turns on it, but you were talking about the ethical obligations and clients not being comfortable in disclosing the information to clients for the purpose of getting advice if there was a prospect of the privilege being breached.

Is that really a practical consideration in situations where under our act you have, number one, if it were to be the case, disclosure to the Commissioner? The Commissioner is bound by oaths of secrecy and there's a legislative provision to say that disclosure to the Commissioner doesn't waive the privilege. Is the concern of the client in that context a real concern?

MS. ROWE: I think it is. It is outlined in the University of Calgary decision that disclosure to the Commissioner alone is a breach of the privilege from a client's perspective. Any time you water down a constitutional or a fundamental policy of the law, it's damaged. So I think it is.

I think also from a lawyer's perspective, if the act did say that it's required by law, that's not as clear-cut as one would think because whether it's required by law, it still requires us to consider whether it's constitutional. Even though an act might say you have to give this to the Commissioner, that doesn't stop there for a lawyer.

Lawyers are conscious all the time about what our ethical obligations are. It can be very unclear for how to follow through with that and how far you have to take it in order to challenge whether it is absolutely necessary, whether it is in accordance with the law to disclose.

CHAIR ORSBORN: Thank you, Ms. Rowe and Ms. Grimes. I appreciate your submissions. It will all be taken into account.

Thank you very much.

MS. ROWE: Thank you.

CHAIR ORSBORN: We're now going live to hear from Koren Thomson on behalf of the Canadian Bar Association.

Ms. Thomson, thank you.

MS. THOMSON: (Inaudible.)

CHAIR ORSBORN: Do you have you mic turned on?

MS. THOMSON: (Inaudible.)

CHAIR ORSBORN: Yeah, it should turn red. Good.

MS. THOMSON: Thank you, Justice Orsborn, Chairperson of the committee.

As you've indicated, my name is Koren Thomson. I'm a partner with Stewart McKelvey and I am the chair of the Access and Privacy Section of the Newfoundland and Labrador Branch of the Canadian Bar Association. I'm here today to provide submissions on behalf of CBA-NL, the Newfoundland and Labrador branch, and its 350 members with respect to privilege under the *Access to Information and Protection of Privacy Act, 2015*, and, more particularly, what it should look like in the next iteration of the statute.

As outlined in our submissions, we have three recommendations: One is that the Office of the Information and Privacy Commissioner should not be permitted to review records over which solicitor-client and litigation privilege is claimed; the second is that the public interest override ought not to apply to solicitor-client and litigation-privileged records; and the third is that the ATIPPA should be amended to specifically include settlement privilege.

With respect to the first recommendation, CBA-NL is of the view that the ATIPPA does not provide the Information and Privacy Commissioner with the authority to compel production of solicitor-client and litigation-privileged records. Rather than speak about how the current legislation is interpreted, I prefer to emphasize today why that power of production should not be provided in the next version of the legislation.

In order to do that, as I understand there are members of the public potentially watching, I think it's necessary to consider the purposes of those privileges. Solicitor-client privilege protects the relationship between the lawyers and clients, ensuring confidentially so that individuals may speak freely with their lawyers to secure the best legal advice possible.

In the University of Calgary decision, which was referred to in our submissions at paragraph 34, the Supreme Court indicated the importance of this privilege when it stated: "It is indisputable that solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice …. Lawyers have the unique role of providing advice to clients within a complex legal system …. Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive …. It

is therefore in the public interest to protect solicitor-client privilege. For this reason, 'privilege is jealously guarded and should only be set aside in the most unusual circumstances' ...."

The harm that the privilege is intended to protect against is the stifling of that confidentiality and the consequential decrease that we can expect in the seeking and giving of legal advice and, really, the quality of the legal advice that is delivered as a result.

Whereas solicitor-client privilege protects the relationship, as I am sure you are aware, litigation privilege creates a zone of privacy, protecting those documents that are created for the dominant purposes of litigation. In Lizotte, which was actually a companion case to the University of Calgary decision, the Supreme Court of Canada stressed the importance of litigation privilege when it wrote "like solicitor-client privilege, litigation privilege is fundamental to the proper functioning of our legal system and is central to the adversarial system…. The parties' ability to confidently develop strategies knowing that they cannot be compelled to disclose them is essential to the effectiveness of the adversarial process."

Erosion of that privilege, or the potential erosion through compulsion to disclose what would otherwise be protected records, would have what the Supreme Court of Canada described as "a chilling effect on parties preparing for litigation ...." That's a quote from Lizotte.

It should also be noted that in it's use in the Hosiery decision, which is an older decision that the Supreme Court of Canada referenced, the Supreme Court noted that it could mean – sorry it was the Exchequer Court but the Supreme Court quoted them –that litigation privilege records could end up before the court in a manner other than what was contemplated when they were created, and could be used to distort the truth to the prejudice of the client when it's presented by somebody who's adverse in interest.

CHAIR ORSBORN: Are you suggesting that litigation privilege should survive the litigation that it was created for?

MS. THOMSON: No, I'm not. No. The point I'd like to emphasize is the harm that the privileges are intended to protect against is incurred with compulsory disclosure to the Information and Privacy Commissioner. Ms. Rowe touched on this briefly, but I would like to emphasize that the Office of the Information and Privacy Commissioner and the Commissioner is not a neutral decision-maker under the legislation.

Section 3(2)(f), which falls under the purpose provisions in facilitating democracy tells, us that the Information and Privacy Commissioner is an advocate for access to information and the decision-maker under the statute. He reviews public bodies' decisions. As a decision-maker, he has quasi-order-making power meaning he's able to file his recommendations as an order with the court under section 51 if the circumstances permit.

As an advocate for access, he may and often does interpret exceptions to access narrowly. With few exceptions, he's provided an automatic right of intervention on appeals and declarations before the court where he becomes a party to the litigation.

Similar to the Commissioner in the University of Calgary case and the insurance syndicate in Lizotte, disclosure to the Commissioner is itself an infringement of solicitor-client privilege. You've asked Ms. Rowe this question and so I'd like to take the opportunity to answer it. It doesn't matter if there's a section in the legislation that says that privilege is not waived with disclosure to the Commissioner, and that's because the harm that's intended to be guarded by those privileges is in fact incurred through production to the Commissioner due to his roles and powers under the act as it's currently drafted.

His role and his powers enable the Office of the Information and Privacy Commissioner, a body which is adverse in interest in many respects, to gain knowledge of advice provided to public bodies by their lawyers. It stifles the confidentiality that's intended to protect that relationship, with the result that the quality of the information that's shared, things that could be put into writing and perhaps should be put

into writing, are impacted and the quality of the legal advice can be compromised.

CHAIR ORSBORN: You'll accept that the Supreme Court of Canada did say in the University of Calgary that if the language is clear enough it can be done.

MS. THOMSON: If the language is clear enough it can be done. But I would suggest that it's entirely inappropriate for it to be done in circumstances where the legislation specifically puts the person to whom you are required to provide the documents in an adverse position. That's a policy choice. I would suggest that the principles are so significant for the administration of justice as fundamental rights that it would be completely adverse to the importance of the adversary process and the administration of justice to attempt to do it that way.

CHAIR ORSBORN: If you follow through the discussion that I had with Ms. Rowe, if you have a scenario where a public body claimed privilege – a public body provides a listing of the documents and what have you – the Commissioner looks at it and says: Thank you very much but I believe it's absolutely necessary for you to produce the documents and I want the documents, at that point the public body would be able to go to court and say no?

MS. THOMSON: I think that would be entirely appropriate, yes.

CHAIR ORSBORN: Yeah.

MS. THOMSON: Public bodies do routinely provide listings to the Information and Privacy Commissioner. I haven't. I'm here on behalf of the CBA and I have not canvassed the membership with respect to that particular point, but in my experience there are different levels of resources allocated to the public bodies to which the ATIPPA applies.

I think a requirement to get a sworn affidavit from certain public bodies may be a bit more onerous and require a higher cost of compliance than perhaps they have the ability to provide. It applies to small municipalities that have two people working in their office. They may not even have a Commissioner who can execute an affidavit on their behalf. Perhaps, if you're inclined to go that way, a regulation that specifies the form that should be provided to the OIPC in satisfaction of that requirement could be appropriate, could be something to contemplate.

CHAIR ORSBORN: Even if the Commissioner couldn't compel it and it had to be decided by a court, that two-person municipal body would still have to provide information to the court.

MS. THOMSON: That's correct. The information would –

CHAIR ORSBORN: They would have to do it somewhere.

MS. THOMSON: – have to go before the court and legal fees would have to be incurred, presumably, unless they're going to represent themselves.

As Ms. Rowe suggested, the other option is to have the Commissioner have a desktop application where the Privacy Commissioner puts the records before the court and simply asks for a determination. Although, I'm not sure that can be done in a vacuum.

CHAIR ORSBORN: No but at some point the public body is going to have to defend it to a court if they want to withhold production of the full documents.

MS. THOMSON: Absolutely.

CHAIR ORSBORN: Whether you do it day one or day 10, the expense will still have to be incurred –

MS. THOMSON: Yes.

CHAIR ORSBORN: – if your position is that, really, the only final determination can be made by a court.

MS. THOMSON: Yes.

CHAIR ORSBORN: Okay.

MS. THOMSON: Returning to my arguments, I think the same argument applies with respect to litigation privilege. If the Commissioner is given

insight into litigation strategies, that can be used against the client, or otherwise distorted when presented to the court or presented in terms of the Commissioner's arguments to the court. This, Chairperson, may be most evident by considering someone with an access and privacy practice, such as myself.

I have a robust access and privacy practice. I routinely advise public bodies with respect to the interpretation of the ATIPPA, with respect to access to information requests that come before them, with respect to submissions to the OIPC in regard to complaints and in respect of ATIPPA appeals and declarations before the court to which the OIPC is a body. I have advised public bodies, when they have received requests for records that are solicitor and client and litigation privileged, on the files in which I'm involved. If those requests go before the Commissioner, the Commissioner is gaining insight into the public body's legal advice and strategies with respect to the statute that he is intended to administer, and that's entirely inappropriate.

I ask: Why should the Commissioner be entitled to my client's solicitor and client privilege and litigation records in that respect? The short answer is that he shouldn't be. I don't think it would be effective to attempt to draw a line in the statute between advice or litigation-privileged records that pertain to access to information and other advice. I'm not sure if that would be workable, but it's clear because of the role that he has, the legislation has put him in a position of being adverse in interest in many respects, not all.

It's the CBA-NL's position that he should not have the power to compel production over a solicitor and client and litigation-privileged records. The privileges are simply too significant and fundamental. They're necessary for the effective administration of justice and they're a cornerstone of our democratic system, upon which the ATIPPA is supposed to further. Our position is only the courts, the only neutral decision-maker under the ATIPPA, should actually have the authority to review the records.

CHAIR ORSBORN: The litigation privilege, I assume that if – a finding that something is subject to litigation privilege carries with it the implication, I take it, that the litigation is still ongoing. We're not looking at something 10 years down the road.

MS. THOMSON: That's correct.

CHAIR ORSBORN: Okay.

MS. THOMSON: Yeah, or there's similar litigation with the same parties and so the same sort of issues are arising. Yes. We're not purporting to expand the privileges.

CHAIR ORSBORN: No.

MS. THOMSON: But these considerations do and often come into –

CHAIR ORSBORN: So there's litigation privilege while that privilege exists.

MS. THOMSON: Exactly.

CHAIR ORSBORN: Okay.

MS. THOMSON: Yeah.

CHAIR ORSBORN: In terms of drawing lines, can you draw a line with respect to litigation where the Commissioner is either a party or an intervener?

MS. THOMSON: I don't think so. The reason being is that sometimes – well, it would require a legal determination as to when litigation privilege arises, because in some cases you'll be receiving access to information requests with the expectation that litigation is forthcoming.

CHAIR ORSBORN: Yeah, let me ask you about that and it's a little bit off topic. I've heard from any number of public bodies that they get somewhat aggrieved when they get extensive requests for access to information apparently for purposes of discovery in legal proceedings.

MS. THOMSON: Yes.

CHAIR ORSBORN: Is that an appropriate use of the act? If you're not prepared to answer that right now, that's fair enough.

MS. THOMSON: I am prepared to answer it in terms of my own perspective. I cannot comment on the membership of the CBA –

CHAIR ORSBORN: Fair enough.

MS. THOMSON: – because we haven't canvassed the members in that respect.

My perspective is that using the access to information regime for discovery purposes in advance of bringing a claim is entirely appropriate. Somebody is trying to determine if they have a right to bring an action. I think that's probably what the legislation – one of the ways in which it's intended to be used. It's to provide transparency and it's to hold public bodies accountable. If you're getting information to hold them accountable by eventually pursuing litigation against them, I think that's probably entirely appropriate.

If you're using it as a discovery mechanism while you're within the confines of ongoing litigation, I think that's entirely inappropriate. Section 3(3) indicates that the act is in addition to and does not replace other means of gaining access to information. I would suggest that it should be interpreted narrowly to suggest that if you have another means, a more appropriate means, then that is the path that you should go down, particularly because disclosure under ATIPPA is disclosure to the world.

If you're getting it for the purposes of litigation, it should be done in the confines of the litigation when principles such as the implied undertaking apply. Otherwise seeking it through the access to information regime is simply a means of potentially overburdening the public body.

CHAIR ORSBORN: How does the public body find out? Should they be able to ask: Are you currently in litigation?

MS. THOMSON: I think it becomes quite obvious, once the request comes in, due to the people that would have to search for the record. For instance, if a public body is in – I don't know – a tort claim with an individual and general counsel and that public body knows about it, or people have had to provide evidence to their lawyers incident reports of a slip and fall, and all of a sudden the people who provided those records get asked to provide records to an ATIPP coordinator, they will know or ought to know, hopefully, to say to the ATIPP coordinator: I've already provided these records in the context of this litigation.

Depending upon the public body, the short answer is, no. They may not know and maybe they should be able to ask, but I don't know if there's an appropriate way to handle that under the statute.

CHAIR ORSBORN: A litigant might get their neighbour to ask for it.

MS. THOMSON: That could be considered an abuse of process. There is case law that suggests if you are actually collaborating with another person for the purposes of gaining access to information under the legislation, it could be indicative of bad faith or ulterior motives. It's something that could fall under reasons for warranting a disregard under section 21.

CHAIR ORSBORN: I probably sidetracked you with that question.

MS. THOMSON: It's an interesting conversation. I appreciated it.

With respect to the second point that the public interest override should not apply to the section 30(1) exception which is where litigation privilege and solicitor-and-client privilege currently reside, I do not intend to spend a lot of time on this. The point is simply that solicitor-and-client privilege and litigation privilege, already by their nature consider the public interest. That is why they exist.

Making those exceptions, subject to the public interest override, do nothing more than provide for a second means of review and an opportunity for the public body to be ordered to produce those records notwithstanding a valid claim for privilege. I don't know a circumstance in which that could occur but the risk of it is just unnecessary.

CHAIR ORSBORN: Yes, I pursued that with the Commissioner yesterday in general terms in the public interest override, in terms of who decides it in the first instance in any event. I assume that the head of the public body would have to have determined that an exception applies.

MS. THOMSON: Yes.

CHAIR ORSBORN: Then, presumably, it would be up to the head of the public body, at least according to the Wells committee, at a very high level to determine whether the public interest requires its production.

MS. THOMSON: That's right.

CHAIR ORSBORN: Who challenges it? The Commissioner?

MS. THOMSON: Right, so the analysis under section 9 is you would determine if an exception applies. A public body determines that section 30(1) applies; section 9 then requires them to determine if the public interest in the information nonetheless outweighs the reasons for the exception.

CHAIR ORSBORN: Overrides the exception.

MS. THOMSON: They're incompatible because there's already a public interest consideration in finding that those exceptions apply. It's a discretionary exception, so the public body has the opportunity to release the information. In the event they determine that they're fine with doing so, it is their privilege to waive.

With respect to the third point I'll also be brief, that is, that settlement privilege ought to be an exception to disclosure. The Information and Privacy Commissioner takes a view that the common law settlement privilege does not shield from disclosure what would otherwise be protected when we are under the access to information regime. The reasoning, the OIPC argues, is that the ATIPPA is a complete code, but I would refer the committee to paragraph 71 of the Richmond (City) decision, which states that settlement privilege is –

CHAIR ORSBORN: Sorry, which decision?

MS. THOMSON: The Richmond (City) decision from British Columbia.

It says that "settlement privilege is a fundamental common law privilege, and it ought not to be taken as having been abrogated absent clear and explicit statutory language. There is an overriding public interest in settlement. It would be unreasonable and unjust to deprive government litigants, and litigants with claims against government or subject to claims by government, of the settlement privilege available to all other litigants. It would discourage third parties from engaging in meaningful settlement negotiations with government institutions."

ATIPPA does not contain clear and explicit statutory language to suggest that settlement privilege has been abrogated and it's our recommendation that it should not contain such language. Settlement privilege ought to be an exception.

CHAIR ORSBORN: How long would that privilege last?

MS. THOMSON: Well, the Supreme Court of Canada in the Sable decision says that it no longer ends with settlement, so I guess in perpetuity or until they decide that it's in the public interest that they disclose it. I mean, it's their privilege.

CHAIR ORSBORN: Yes. Which decision was that you said?

MS. THOMSON: Sable.

CHAIR ORSBORN: Sable? When was that?

MS. THOMSON: It was a 2013 decision. It is referenced in the Richmond (City) case.

CHAIR ORSBORN: In the University of Calgary case, there's a reference to settlement privilege simply being an evidentiary privilege for the purposes of the proceedings.

MS. THOMSON: I didn't catch that in the Calgary case and I did contemplate whether or not it was a privilege in the law of evidence. What struck me about the University of Calgary decision is that it also says that when solicitor-and-client privilege is engaged in the context of access to information legislation, it's engaged as a substantive right.

I would question – and I would suggest I could see myself being asked to argue if it ever came before the courts – that when you're dealing with settlement privilege in the context of access

to information legislation, you're dealing with it as a substantive right and not as an evidentiary right.

CHAIR ORSBORN: Okay.

Justice Côté, speaking for the majority at paragraph 44, talked about some categories of privilege, et cetera, "and the privilege over settlement discussions, only operate in the evidentiary context of a court proceeding." Is that not a little more problematic in, say, public body litigation, where a public body pays out a bunch of money to settle a claim? You're suggesting the amount of that payment should forever be protected by settlement privilege?

MS. THOMSON: Well, they have the option of disclosing it if it's in the public interest that the public have that information. I wouldn't want to limit myself to considerations of simply the settlement amounts because what we're talking about, also, are the settlement discussions and settlement agreements, which typically contain provisions with respect to confidentiality. There may or may not be admissions that could be held against those parties by another third party if it's made public.

I think I know where you're going, if I may ask. Your reference to your laws of evidence, if you're considering whether or not it's included, if the Commissioner should be entitled to review those records. My personal view –

CHAIR ORSBORN: No, I'm not so much thinking of a review. Let's say some third party takes the government to court and there's a decision made that the government is liable, the damage is to be assessed. A month after they say: We have reached a settlement, the amount of damages, thank you very much; and then the CBC wants to know what the amount of damages was.

MS. THOMSON: Yes. It's money coming out of the public purse, so I definitely understand why members of the public would feel as though they are entitled to that information. Maybe that is an example of where the public interest override would be a greater consideration. But my concern with settlement privilege being overridden in the legislation is less so with respect to the dollar figures and more with respect to the terms of settlement.

CHAIR ORSBORN: Should there be a sunset clause involved in it?

MS. THOMSON: That's a question of policy.

CHAIR ORSBORN: Well, I guess, how long does a privilege need to be protected after a settlement?

MS. THOMSON: I think it would depend upon what is on the horizon. Are there other legal disputes pending with respect to similar issues? Think about class actions that might settle with certain members of the class, but other members of the class persist, and that can go on for years.

CHAIR ORSBORN: Yeah, that's a –

MS. THOMSON: Right, so I don't know if I –

CHAIR ORSBORN: The litigation still on going, but once the litigation is over, for all intents and purposes.

MS. THOMSON: I guess it's a possibility. It's a reasonable possibility; 10 years, but I'm just picking that number. I, obviously, have not canvassed the CBA's membership with respect to that issue.

CHAIR ORSBORN: You're suggesting that it – we haven't talked about the review of documents. It's not really a question of characterizing, like solicitor-client privilege, to determine whether documents are characterized as such or not; a little different type of document when you're dealing with settlements and discussions and whatnot. But you're suggesting, essentially, a blanket, permanent privilege subject to the public interest override. Is that fair?

MS. THOMSON: I think that's fair.

CHAIR ORSBORN: Okay.

MS. THOMSON: With respect to the review of the documents, I was giving it some thought on my way over here this morning because I think that the interest that someone of privilege is intended to protect is less of a concern when

reviewed by the IPC – is concerned. But it could arise in some situations, particularly with respect to investigations relating to privacy breaches.

So the OIPC does an independent review of privacy breaches and can make recommendations and there could also be the threat of litigation or ongoing litigation with respect to the same matters before the court. I think that there is the potential there for the IPC to be in a bit of an adverse position if they were to receive documents that reflects statements or admissions that were made in the context of mediations or settlements.

I don't think it's necessary to make the rest of the points. I think that we've canvassed them. So I will just conclude by saying that it is the recommendation of the Newfoundland Canadian Bar Association that the ATIPPA be amended to specifically include a provision for protection of solicitor – sorry, not solicitor and client – settlement privileged records.

CHAIR ORSBORN: Settlement, yeah.

MS. THOMSON: Do you have any further questions for me?

CHAIR ORSBORN: No, I think you covered it all.

MS. THOMSON: If I may make one more statement, Chairperson Orsborn. You did ask me a question about discovery proceedings. It's not directly on point, but it's related, and it's not on behalf of the CBA, but I do think it is worth considering. When you're thinking about that issue, it's not just request for documents that could necessarily be overlapping with court proceedings; there could be requests for inspection of records, in-person examinations that are before the court, that are then duplicated under the access to information legislation. I think that would also be an abuse of process.

CHAIR ORSBORN: So essentially drawing the line once the proceedings are started.

MS. THOMSON: That's right.

CHAIR ORSBORN: Is that fair?

MS. THOMSON: Yeah.

CHAIR ORSBORN: Yeah.

All right, Ms. Thomson, thank you for your submissions and for the discussion. We'll adjourn until 11:15 when we hear from the school district.

MS. THOMSON: Thank you very much.

CHAIR ORSBORN: Thank you.

Recess

CHAIR ORSBORN: Good morning.

Welcome to the results of the public consultation sessions of the 2020 ATIPPA review committee. During these sessions we'll have presentations from the Newfoundland and Labrador English School District, College of the North Atlantic and Memorial University.

Just to repeat briefly what I said yesterday, I view this review as a collaborative process with the sessions intended to provide a forum for the public expression of the views of each presenter. It's 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 interests of the public as a whole in transparent, accountable and excellent governance. I would ask that the submissions of all presenters reflect the objectives of the act.

I just remind, also, that we will be having round tables on section 33 and section 39. If you're intending to participate in those round tables and to the extent that your submissions address those sections directly, they could perhaps be deferred.

I now call on the Newfoundland and Labrador English School District. The presenter will be Bernadette Cole Gendron.

Welcome, thank you.

MS. COLE GENDRON: Thank you, Justice Orsborn.

I'm here today on behalf of the Newfoundland and Labrador English School District. I'm in-house legal counsel with the school district.

Just by way of background, the English School District is the public entity that is responsible for delivery of educational programs to all English-speaking children in the province. Of course, since 2013 we became one provincial district. The district has over 63,000 students, over 250 schools and over 11,000 employees, just to give you an idea of the scope of the organization.

In terms of the submissions, of course, subject to any questions you have on the submissions that I've already put in writing, I'm just going to briefly touch on a few of the main points I want to make. The first issue that's dealt with in our original submissions is the use of ATIPP to get access to documents that are also a part of an ongoing judicial or quasi-judicial process. By quasi-judicial or administrative, we're looking at human rights cases, for example, or labour arbitrations.

There seems to be a potential, at least, for the act to be used as a way of getting access to documents that really should be dealt with through those processes and oftentimes are. Sometimes, then, there's a duplicity of requests and documentation being provided.

CHAIR ORSBORN: How would you suggest the coordinator find out?

MS. COLE GENDRON: Well, the issue I know with our coordinator – of course, they always send out to the interest of people in the organization who might have records to produce records. Then, when it comes to electronic records, our coordinator is responsible for carrying out requests.

When you're dealing with complex legal cases and a significant amount of documents, it would be very time-consuming for, say, our ATIPP coordinator going through electronic documents cross-referencing what has been provided and what hasn't. Sometimes when I'm involved at the level of providing advice, there's a general sense of this information probably should have been provided and then it's tracking down has it, has it not.

Generally, documents are put together and released, because to go through the process of determining what may have already been provided to the applicant – and when I say, to the applicant, usually it's to the applicant's legal counsel, of course.

CHAIR ORSBORN: How do you find out if there is an ongoing legal process?

MS. COLE GENDRON: We would know based on the ATIPP coordinator. When they get the request for information, they would know. These proceedings generally involving the school district tend to be fairly public, so in many cases it's known. Or documents are sent out and then, of course, when it's flagged that it's an ongoing legal issue, they would know I would be involved in it and we have to review documents for solicitor-client privilege, things of that nature. We're talking about cases where you have ongoing statements of claim that have already been served on the district, or human rights complaints or labour arbitrations that we're already involved in and engaged in.

In some cases, it might be akin to, for example, if they're making an application to court, almost like a fishing expedition: Documents are being provided, routinely being exchanged between representatives. Even in labour arbitrations, of course, individuals are individually represented. They would have either legal counsel through the union or a union representative, ongoing discussions and exchange of documentation where necessary and there's an ability to engage an arbitrator, if necessary, to get orders for production.

But in most cases, say, for our organization, we're talking about day-to-day labour arbitrations, discipline cases – pretty simple stuff. When you have those processes going on and there is exchange of information and information that would be relevant to the issues, I don't know why there would be a separate process. Some people want to engage that every time.

I think it seems to be, perhaps, looking for the smoking gun sometimes, that people feel there are things that are there that aren't being disclosed and this is like an extra way of searching for documents. But, again, when we get into more complicated legal cases, we've had extensive – you have cases where there have been extensive documents already put forth in these proceedings and shared with legal counsel,

but then applicants may continually file ATIPP requests for documents that would certainly fall under the umbrella.

CHAIR ORSBORN: Just take me through the process then. A coordinator gets the request. The coordinator believes that it's part of an ongoing process. What does the coordinator do? Refuse it, disregard it or what?

MS. COLE GENDRON: The coordinator actually reports to me as legal counsel. Generally, the coordinator would contact me. The issue is, again, in order to say that it's an ongoing legal matter, but in order to go through and indicate everything that's being solicitor-client privileged or litigation privileged, a lot of it is more general information that wouldn't fall under that.

The issue is the coordinator would generally put it together and release it, so it's a lot of time and resources that would go into it. The other option is has it already been provided, and to go through, a lot of times, those documents to determine and then engaging our outside legal counsel because litigation matters we use outside legal counsel. Then you're engaging a lot of people to determine can we say this document has already been provided?

CHAIR ORSBORN: Yeah, I'm just asking for what would happen within the context of ATIPPA and the coordinator or yourself are of the view, number one, there's an ongoing legal process or, alternatively, the document has already been provided. What does the coordinator do with the request?

MS. COLE GENDRON: Generally, they process the request.

CHAIR ORSBORN: What should they do, in your view?

MS. COLE GENDRON: Under the act, I think they would have to process the request, unless they could go back and ask for a disregard on one of the bases that, say, the information has already been provided.

CHAIR ORSBORN: What are you asking should happen in order to address the problem that you're talking about?

MS. COLE GENDRON: I think it's something that should probably be looked at in the disregard provisions. If there's another process ongoing – legal process or quasi-judicial or judicial process – by which there's an ability to access that information and it is likely going to be accessed because it's relevant to that case, then there should be some ability potentially to disregard. That's what we'd be looking at.

CHAIR ORSBORN: Apply for a disregard or do it unilaterally?

MS. COLE GENDRON: I would – I hadn't really thought that through. Looking at the disregards, I think applying for a disregard would be appropriate, because doing things unilaterally – at the end of the day we are public bodies and trying to maintain the principles of the act on transparency and accountability. It's difficult to just make unilateral decisions on these types of things, so I think the ability to apply for a disregard would probably be more appropriate.

CHAIR ORSBORN: Similarly, if information had already been provided?

MS. COLE GENDRON: Yes, because I think that's one of the provisions now in disregard, I believe. That you're required to provide a request for a disregard if it's already been provided.

CHAIR ORSBORN: Okay. I interrupted you.

MS. COLE GENDRON: Oh, no problem.

That's the issue, is that a lot of times you have the agent – either legal counsel or, for example, a union or association representative – who is involved with our representative, exchanging information and then the individual making ATIPP requests as well. You do get two streams of things going on there and there's a lot of duplication.

CHAIR ORSBORN: Okay.

MS. COLE GENDRON: I noted in there as well, one of the things, particularly from law firms – and I'm not going to suggest we've had that a lot of times. We have had a case where what was going to be a significant, likely

litigation – a law firm was involved as the applicant. Then the law firm became dissolved and was no longer representing the party who they would have been making the application request on behalf of. I think that issue has been raised by other parties.

It raised the question: Who was the applicant? That led to the case was in court on a third party notice where the third party was challenging it. It came to a question of: When is the matter withdrawn when, essentially, the applicant no longer existed but was clearly representing someone else? I believe the Commissioner raised that issue yesterday in their submissions as well.

The only other point I want to make in our initial submissions was whether under section 21 – again, on the disregard provisions – there should be some consideration given to the number of requests that an individual can make. Right now, there are limitations there on – you can apply for a disregard on the basis that a request is overly broad. But what we are finding now is that some applicants, instead of coming in with one request that's overly broad, simply file 10 individual requests at the same time. It would appear that's probably a way to get around us being able to apply for a disregard on the basis of it being overly broad. It's not uncommon to start a search and for an ATIPP coordinator to say the first hit: Thousands of emails, so it's simply too much information. We've gotten disregards on that.

It appears as people become more familiar with the process in the act, that now there may be – is that a loophole in the act and is that the intention? That was all filed as one request. We think it would meet the request for a disregard, but if an individual files 10 individual requests at the same time, it doesn't appear right now to clearly fall under the ability to apply for a disregard.

The main points I wanted to make today were actually the submissions that we made in response to the OIPC submissions, which two of their submissions touched specifically upon the *Schools Act, 1997*, and the reference in ATIPPA 2015 to the Schools Act, which states that – it's one of the two provisions of the Schools Act. Section 62(2) and section 12 are two of the provisions that are listed in Schedule A of ATIPPA as applying to the exclusion of ATIPPA, because they have their own provisions on access, use or disclosure of information. The OIPC have put in submissions indicating that they feel it should be taken out and simply filed under ATIPPA.

I'll address each of the –

CHAIR ORSBORN: What's the status of the review of the act?

MS. COLE GENDRON: The Schools Act? We are advised – because while we're involved in that through consultations, the Department of Education is responsible for that. I'm advised it's still active. Of course, right now government is in caretaker mode because of the election that's called, so there wouldn't be anything actively happening with it.

I was told before that it's still open; consultations are still intending to be had on that. We've made some submissions. I know the OIPC has also made submissions – some of them in response to our submissions – on these very issues of collection of information and disclosure of information.

CHAIR ORSBORN: How long has that review been going on?

MS. COLE GENDRON: I want to say we made our submissions probably about a year ago, I believe. Now, don't quote me on that, but I feel like it's been within the last year. Then, with COVID, obviously, there's been some delay on that.

We are advised that it's still ongoing and it's our intention to continue with that review. Besides some changes, the *Schools Act, 1997*, is a very old piece of legislation that needs a lot of updating. I think that's probably why the review would take so long because I think we're looking at or they're considering some pretty significant changes because of how old and dated the act is.

CHAIR ORSBORN: You anticipate that those two sections would be addressed in the review?

MS. COLE GENDRON: These two? Well, section 62(2) I can say has not up to now because it wasn't something that was flagged as an issue. Section 12, absolutely. In light of issues that we've had back and forth with the OIPC, which they've indicated – some reports that have gone there – there have been ongoing discussions. Certainly, a lot of discussions back and forth with the OIPC on these cases that have raised some issues.

Some of them have led to submissions we've already made on the Schools Act in relation to collection of information when it was pointed out that we don't really have any authority in the act to collect information. That's already part of our submissions, based on feedback from the OIPC on our day-to-day dealings that we often have with them on issues.

In light of some of the other issues that have been raised here, we have flagged some things and discussed that with the department. They've ensured us that those consultations are still ongoing and because it has been a period of time since we made submissions, that we would be back again to have a lot more input, as well as the OIPC. Their intention is certainly to sit down and have some very detailed consultations with the OIPC on privacy issues.

CHAIR ORSBORN: Yes, leaving it as it stands doesn't address the issue that is out there in terms of the difference between an access and a review.

MS. COLE GENDRON: I'm going to address that in my submissions. I explained how that works and why I don't believe that's an issue. I don't think my interpretation of it is quite the same as the OIPC's.

CHAIR ORSBORN: No, I'm not sure I'm going to give you an interpretation of the act.

MS. COLE GENDRON: No, I'll give you my interpretation of why I don't think the issue that they've raised is really an issue and based on their interpretation, which I don't believe is correct.

First up, just in terms of section 62(2) of the Schools Act – which is the section that talks about closed board meetings – that section of the act is a mandatory provision that provides that access shall not be granted to anyone for minutes of closed board meetings. The OIPC raised some concerns that there are no limits in the legislation on what the board chooses to do in closed board meetings. Certainly, yes, that's an issue. One can question, however, how prescriptive can you get in legislation about what can be covered off.

Our bylaws do – I pointed that out in there – set out a list of items that can be discussed at a closed board meeting. Those bylaws, I've also indicated, are looking at the principles of transparency and accountability. They are public documents. The process for change requires a notice of motion, tabling of changes, discussion and debate, voting at two public board meetings and then approval by the minister. It's not quite accurate to suggest that the school board can really do whatever it wants in terms of a closed meeting. There are parameters that we've set up for that.

In my time with the district, which has been almost three years, closed board meetings are primarily used for discipline, terminations – because the act requires the board to be responsible for termination of employment, of employees – as well as student appeals. That could be appeals on discipline, could be appeals on the new provisions in the Schools Act of removing a student from school where they pose a harm to another student or teacher. So, in those meetings, as you can appreciate, some really private information and sensitive information of youth would be discussed in those meetings.

CHAIR ORSBORN: If you took away section 62 out of Schedule A, would that information still not be protected?

MS. COLE GENDRON: Well, the OIPC's suggestion is that it would be covered then by section 28. So then we're into whether there's a conflict, if we leave section 62(2) and 28(1). I think the OIPC's submissions were clear that if it was out, they saw it falling under section 28, which raised the issue as I've put in my submissions, there's a time limit of protection if the information is greater than 15 years; 15 years under section 28(2) of ATIPP it's no longer protected and there would be no rationale in

putting a time limit on the protection of that type of personal information.

CHAIR ORSBORN: If it were personal information, would it not be protected anyway?

MS. COLE GENDRON: Well, then you're into redacting and – that's the whole issue of when you make an ATIPP request, if everything in it is personal information, you're required to provide it and redact all the information. That is the current process that is done, and it's our understanding is the Commissioner's interpretation of what needs to be done under the legislation. So then it's: you're doing the process for what purpose.

The whole point of it being mandatory is that when a decision is made to have something dealt with at a closed-board meeting, the consideration is already there. We've already determined that the information that's going to be discussed is of such a nature that it shouldn't be disclosed. So why go through an ATIPP process and go through that, rather than keeping the mandatory provision that is there now with the protections that our bylaws set out, what things would fall under a closed-board meeting.

The other provision that is of more concern for the school district, or certainly as much a concern, is section 12 and the, I guess, comments and the interpretations in the submissions of the OIPC given on section 12. They provided the summary of two reports that have been issued in relation to this section.

I disagree with the interpretation of section 12 and the interplay with the ATIPPA. There's a lot of focus put on whether there's a conflict and which one applies. Section 17(2) that this falls under, subsection (1) talks about a conflict. Then subsection (2) says where there is another provision in another act that provides for access or disclosure of information, then that section is what applies. I don't even think we need to go through the exercise of whether or not there's a conflict. So there seems to be an inherent disagreement on how the two sections even interact.

I think it is important, first and foremost, to note that – keep in mind that everything that's covered under this section we're talking about is student records, personal information and highly sensitive personal information. We're talking about everything from demographic information of students to educational assessments, medical information, behaviour management plans or any information relating to students with exceptionalities. There's a wealth of very sensitive information in these student records.

What the Schools Act does – and we would note not perfectly because of the age of the act and clearly we need to make some changes to that provision, and it is on the radar, but the way the act is set up now it is set up to make it clear that only parents would ever be able to access student records and no one else. Even then it says "may" and that is, of course, not very often would information be withheld from a parent, but it has been done. One of the reports, in fact, that the OIPC mentioned in their submissions have to do with a request from a biological parent for access to student information. That was denied and the individual went to the OIPC and filed a complaint and they did an investigation and issued a report, ultimately agreeing with the school district.

In both of those cases that are referenced in there shows, in my opinion, that the way we assess those requests were appropriate despite maybe not having a lot of provisions in the Schools Act and maybe provisions we need there. But the school district with 63,000-plus students and twice that many parents, or more, every day have to deal with these issues: a request for information and access to information when it comes to parents and their child's student records. It's very common. It's something that we are well versed to deal with.

There was a suggestion, again, in the OIPC's submissions that the two cases that went before them, and reports that are referenced, were indicative of the confusion or evidence of the confusion that exists because there are two processes. I don't agree with that. I don't think there's any evidence of confusion. If a parent wants information on their student, I would suggest the first thing a parent would do would be to contact the principal of the school. That's not a complicated process. We have a student-record policy. There is a very simple form attached to that policy. If they want an entire

record, for our own record-keeping purposes, we would have them fill out that form.

CHAIR ORSBORN: Do you get many ATIPP requests for student records.

MS. COLE GENDRON: No. None. The only times we've dealt with ATIPP on student records are these two reports, where we were trying to protect the information, and, again, the very sensitive information of youth.

CHAIR ORSBORN: Were those requests from people that were not entitled to review the records under section 12?

MS. COLE GENDRON: One was. The other one wasn't. The other one was – as it's referenced in the report – a biological parent of the student.

CHAIR ORSBORN: Related to that, part of the submission of the College of the North Atlantic talks about situations where the educational institution may want to share some of the, say, medical or other information with a care provider, councillor or whatever. Do you run into that situation and how do you deal with the release of information (inaudible)?

MS. COLE GENDRON: Yes, we deal with that by consent. We recently had that issue when we had primarily students who are 16, 17 and may be living separate and apart from parents, for example, living on their own; maybe availing of services through Choices for Youth, things of that nature. That became an issue for us about a year ago, where we realized we should have something formalizing that, so we have consent documents that we've put in place. That's how we deal with that right now, through direct consent.

CHAIR ORSBORN: Okay.

MS. COLE GENDRON: It's our position that the act right now provides a very high level of protection for the sensitive information that's in there.

When we look at health information, for example, they have their own act: the *Personal Health Information Act*. This is the type of information – some of it in there may in fact be medical evidence – that would be certainly as sensitive as that. We believe it does require specific attention, and not just fall into personal information under ATIPP. I think a lot may be lost on that.

One of the things I noted in there, because I had to look at the legislation when we had the request from the parent, trying to find out: Okay, how do we withhold information from a parent? Again, that's in recognition of the definition of parent under the Schools Act, which, again, we have already flagged; that's a biological parent. Well, we've already flagged that for review, there are issues with respect to that.

These are ongoing, live issues that we are dealing with all the time. Again, the two cases we dealt with went to the OIPC on review and they agreed with our position. It's kind of a situation where if it's not broke, don't fix it.

The only provision that I could see in ATIPPA that talks about a parent requesting information on a child is a general provision that says a parent has a right, the same rights as a child, I think, in terms of exercising rights under the act, as opposed to the specifics we get into. Every single case where we deal with student records is generally in response to parents.

In situations where – we have a lot of parents in our system that are separated, divorced, figuring out legal rights and who has the rights to information, so it is more complicated, I would say, than a lot of other type areas of law. We have to apply the *Children's Law Act*; there are lots of different pieces of legislation and court orders we have to look at in making those decisions. I don't think it's as simple as an ATIPP request for personal information under the act.

I said I did want to address the point, Chair, that you raised in the beginning about the issue of the right to review versus getting a right to access. I think that is referenced. That's in section 12(3): "A parent or student, if the student is 19 years of age or older, shall review the student record at a time and with a person designated by the board …." The OIPC has that portion of the provision in there and suggests that is restricting the rights of parents.

I think if we read on, looking at the entire section, it says, "and receive an explanation and interpretation of information in the student record from that person." While I'm not going to purport to say that I've done the back research on when the legislation was put in or that provision or I certainly wasn't involved in it, just my reading of that, I would suggest it's more plausible that was actually put in there as a greater right to parents, not to limit it.

It's not just we're going to give you documents – which is all they would be entitled to under ATIPP – so now go figure them out. This, I think, was intended to give parents a greater right that we won't just give you documents, we will sit down with you and review those documents and explain what those documents mean, because the parents may not be able to understand that.

I think it's actually meant to give a greater right. But now, in light of if you're just looking at the word, "review," well, is it limiting it? I can tell you that we have never denied and I've been three years there. It's not even common practice to consider setting something up, sitting down and going through things with parents; it is parents request a copy of a record, a copy of a document and they're given that. I think there's a suggestion there that because – the act has stated there that parents may have a problem with getting documentation, but that is not the case in practice.

CHAIR ORSBORN: Yeah and I'm not sure it's my role to give you an interpretation of the Schools Act.

MS. COLE GENDRON: No.

CHAIR ORSBORN: But I take your position to be that you're comfortable with the purpose-built solution by –

MS. COLE GENDRON: Yeah.

CHAIR ORSBORN: – section 62 and section 12. Leave well enough alone until it comes to review.

MS. COLE GENDRON: Comes to review. Absolutely, that's our main position. I think the Department of Education submissions are the same on that.

Subject to any questions that you have, those are my submissions.

CHAIR ORSBORN: No, everything is covered.

MS. COLE GENDRON: Okay.

CHAIR ORSBORN: Thank you, Ms. Cole Gendron.

The second presentation is from the College of the North Atlantic. Perhaps I could ask Ms. Staeben-Simmons and Ms. Cole Gendron to switch seats so it will be a little bit easier to talk to.

You better bring your identification with you. Thank you.

The next presentation is on behalf of the College of the North Atlantic. Present on behalf of the college: Heidi Staeben-Simmons, the associate vice-president of public affairs and, Donna Eldridge, the access and privacy coordinator. Thank you both.

Ms. Staeben-Simmons.

MS. STAEBEN-SIMMONS: Good morning and thank you for the opportunity to be here.

Just in terms of context for you, the College of the North Atlantic is Newfoundland and Labrador's public college. Its network represents 17 campuses across Newfoundland and Labrador, approximately 8,500 students, 1,250 employees, about $5 million in applied research projects annually and a diverse and varied portfolio of entrepreneurial, international educational contracts across the globe including, and probably most significantly, in China and Qatar. We're committed to providing accessible, responsive, quality learning opportunities to prepare people in a valued and meaningful way to the social and economic development in terms of a global context.

That's a little bit about us. I think it's important to state, at this point, that the college values and fully embraces the principles of the ATIPP

legislation to facilitate the openness and exchange of information to the residents of Newfoundland and Labrador. In our submission to you in November, we presented issues that were important to us in relation to strengthening the Access to Information and Protection of Privacy Act. I'll summarize some of those points here today.

In relation to access to information provisions within the act, CNA has several thoughts in terms of the application. The first one this morning that we wanted to talk about with you would be the role of the applicant and the need for them to participate in the process, or what happens when they don't participate in the process. We have processed lots of ATI requests with an email address as contact information. While this has worked in most instances, there are some situations where the applicant has been non-responsive. As a result, we end up making assumptions about what information it is they are looking for.

We feel we have a duty to assist, of course, under the act in sections 13(1) and 13(2), but there's no corresponding duty or onus on an applicant. We really feel that the applicant needs to be an active participant in the process. Minimally, they would provide clarification to us to allow us to find the records that they are seeking and respond to correspondence when their feedback is sought. We would suggest provision within the act to allow a public body to discontinue a request, or subsequent investigation or potential court challenge, when an applicant ceases to respond within a reasonable time frame and their duty to assist under the act – there would be some onus on them.

In our submission, we also highlighted categories of records which, as a post-secondary institution, we believe need some greater protection under the act. We see a need to create more appropriate access and privacy provisions around educational records. I listened with interest to Bernadette there a few moments ago. We would submit that records of an educational institution are unique and require greater and more specific protection under the act.

Like personal health information, educational information is comprised of unique records for students. The collection, use and disclosure of these records can be different from the normal transaction of government services. For example, the college is sometimes required to collect and use a wide variety of personal information, some of which is highly sensitive to those individuals such as personal information related to disability accommodations, educational counselling – those types of sensitive records.

CHAIR ORSBORN: Are you saying that's not protected now?

MS. STAEBEN-SIMMONS: No, we're looking for a little bit greater protection. They are protected.

CHAIR ORSBORN: Greater protection in what sense?

MS. STAEBEN-SIMMONS: If you'll indulge me and then I'll answer. Okay.

Decisions must be made and plans executed to ensure that all students get a fair opportunity to succeed and have excellence within their education. Sometimes, we need to consult guidance counsellors, high school guidance counsellors, community-based psychological counsellors, those types of individuals in the community. All this is with a view to carrying out the best possible outcomes for students, so it's a little bit of mixed message there.

CHAIR ORSBORN: Can you seek consent in those situations?

MS. STAEBEN-SIMMONS: Well, we can. Consent is not always timely and not always well understood so that it's given and provided. If we don't have consent we can't, obviously, have those conversations and we can't provide the best possible pathway for students.

CHAIR ORSBORN: So you're looking for some kind of provision that would allow you to disclose personal information without consent in some kind of circumstance.

MS. STAEBEN-SIMMONS: Within what we would call a circle of care, similar to what they have within the *Personal Health Information*

Act, so those individuals who are involved in the delivery of particular services to a student.

CHAIR ORSBORN: Does it happen very often?

MS. STAEBEN-SIMMONS: I wouldn't say that it's frequent but it does happen.

CHAIR ORSBORN: That you can't get consent.

MS. STAEBEN-SIMMONS: Yes.

CHAIR ORSBORN: Okay.

MS. STAEBEN-SIMMONS: Further to this, we would look at section 67 of the act and that it would be expanded to include more general outreach to college alumni. Much of our engagement to our alumni goes beyond fundraising. We would enhance our relationship with our alumni in a number of ways, such as co-operative educational opportunities for our students, mentoring, peer-tutoring opportunities and networking events. We would ask that section 67 be amended to explicitly allow for these activities.

CHAIR ORSBORN: With the opt-out.

MS. STAEBEN-SIMMONS: Right.

CHAIR ORSBORN: Okay.

MS. STAEBEN-SIMMONS: The final category of records that we would like to receive greater protection under the act are records which relate to contracts which the public body enters into as a service provider to third party entities, and is earning revenue rather than expending public funds.

Particularly at College of the North Atlantic, we have a division that supports engagement and partnerships with industry, community donors, researchers and other post-secondary institutions. These contracts we secure with outside entities have resulted in significant financial gain, as well as experiential benefits for our staff and for our students.

We have a whole internationalization strategy that is premised on the pursuit of activities that add both value and revenue to the core teaching and learning functions of the college, while supporting provincial goals with respect to entrepreneurship, research, innovation, immigration and export development. There are tangible benefits, such as revenue, and intangible benefits, such as the experience of our staff and experiential learning opportunities, as I mentioned.

These are commercial contracts with these entities and often require us to ensure confidentiality of their records which are shared with us. To be clear, these are not College of the North Atlantic records. These are records of other entities that are shared with us as a part of our contractual arrangement for which they are paying for our service. When we talk about these records we agree to confidentiality terms, such as non-disclosure agreements –

CHAIR ORSBORN: Can you give me an example of a record?

MS. STAEBEN-SIMMONS: An applied research project with a company who is looking for a real-world solution to a practical problem that they are having within their company. They share with us their records that are sensitive to their personal business information so that we can examine their operation with our students and look at real-world solutions from a research-based perspective to the problem that they are having.

CHAIR ORSBORN: Those records are in your custody for the purposes of ATIPPA?

MS. STAEBEN-SIMMONS: Yes.

CHAIR ORSBORN: Okay.

MS. STAEBEN-SIMMONS: Within some of these arrangements we have promises not to share the information without their consent. Then, adherence to their own records retention and disposal schedules and sometimes not retaining any copy of the information.

Section 35 of the act protects records which, if released, could harm the economic interests of a public body, but we would request a provision within the act that recognizes the harm that

results when records related to a service provider contract are not protected from disclosure.

CHAIR ORSBORN: Harm to …?

MS. STAEBEN-SIMMONS: Potentially the third party and to the economic interests of the entity.

CHAIR ORSBORN: Has it caused you practical problems so far?

MS. STAEBEN-SIMMONS: Yes.

To the extent that you can, can you explain? If you can. If you can't, I understand.

MS. STAEBEN-SIMMONS: Can you think of anything that we could share, Donna?

CHAIR ORSBORN: If you can't, that's fine.

MS. STAEBEN-SIMMONS: Some of this is quite sensitive, as you can appreciate.

CHAIR ORSBORN: Just give me a little bit of a context of what you've been dealing with.

MS. STAEBEN-SIMMONS: Sure, I understand. Yes.

MS. ELDRIDGE: Sure.

For example, if someone comes to the college requesting records in relation to our operations – I'm really careful what to say here. For example, we're operating in an international environment. If we were to release things such as their payroll information and we're, perhaps, providing highly skilled instructors, people with sought-after talents and skills, we're now showing the world what they're being paid. That could potentially come back on them, because someone might go back and say: Okay, I'm going to offer you 10 per cent of what these guys are offering you and then poach their staff.

The other piece of that is that it affects the college's reputation and might then interfere with us down the road getting another contract because, well, if they gave away our salary grid –

CHAIR ORSBORN: Has it interfered so far?

MS. STAEBEN-SIMMONS: Yes. I would say yes to that.

CHAIR ORSBORN: You've lost international contracts because of the possibility of disclosure?

MS. STAEBEN-SIMMONS: I would not say lost, but it's …

CHAIR ORSBORN: Likely lost?

MS. STAEBEN-SIMMONS: Yes.

CHAIR ORSBORN: All right.

Have you had ATIPPA requests for this type of information?

MS. STAEBEN-SIMMONS: Oh, most definitely.

CHAIR ORSBORN: They've been ordered to be – you've released them or refused and gone through the complaint process?

MS. STAEBEN-SIMMONS: In some instances we have released and in others we have gone through the complaint process.

CHAIR ORSBORN: The results of the complaint process?

MS. STAEBEN-SIMMONS: I believe we have a number of cases right now in the court system.

CHAIR ORSBORN: Just specify for me again the protection that you're advocating for. An amendment to section 35?

MS. STAEBEN-SIMMONS: Yes, amendment to section 35 that would recognize the potential for harm or the harm that could result when these records are released.

CHAIR ORSBORN: So harm to the public body through release of information in your custody which belongs to a third party?

MS. STAEBEN-SIMMONS: Correct.

CHAIR ORSBORN: Okay.

Do you know of other institutions across the country, similar to yours, who have this problem or if they have particular protection in their provincial legislation?

MS. ELDRIDGE: We've actually had that conversation with the Information and Privacy Commissioner's office some time ago and the fact that this is fairly unique.

CHAIR ORSBORN: The operation that you have is unique?

MS. ELDRIDGE: In the fact that usually ATIPP legislations look at us receiving and paying for the service. We are being paid for the services so it is a different situation. The records that come in, we have possession of them to do the work that has been assigned to us and for no other reason. They're not created by us for the people of Newfoundland and Labrador, for our students or for other government, we're actually doing something with them for the third party.

CHAIR ORSBORN: But presumably you're doing it in the interest of the province.

MS. ELDRIDGE: Well, in the interest of the province because we're making money.

CHAIR ORSBORN: I guess the question is: Do you know if there are other institutions that engage such contracts or projects across the country? If so, do you know what, if any, protection they have for that information?

MS. STAEBEN-SIMMONS: There are definitely other institutions across the country who would be engaging in similar activities. I'm not sure in terms of the implications of their particular provincial legislation.

CHAIR ORSBORN: Okay, thanks.

MS. ELDRIDGE: If I may, I think there are other institutions who are in similar situations who are similarly trying to find a solution.

CHAIR ORSBORN: I see. Thank you.

MS. STAEBEN-SIMMONS: I just want to move, if you would, the act sets a very high standard for access to information and protection of privacy and our experience with that is very positive. There are a couple of suggestions we would have concerning the resource requirements for administration. Two notable issues include: the timelines for review or complaint process with the OIPC and the disconnect between the fee schedule and the actual work involved in an ATI request.

The first would be an increase in the time frame set out in section 46 of the act in which a formal investigation of the OPIC must be completed. The only option to dispute the recommendations of a report of the Commissioner's formal investigation is to seek a declaration in Supreme Court. It is therefore critical on the entity, such as ourselves, that a public body have the time to take the necessary steps, complete the consultation and develop the necessary responses to make thoughtful and thorough representation to the OIPC.

Furthermore, we would support the idea that there would be a less extreme, maybe, and costly way for the public body to disagree with the recommendations of the Commissioner once a decision on that investigation is received by the public body. While we believe that more time during the investigation phase will decrease the number of matters ending up in a formal report of the OIPC, we would also believe that there should be a dispute-resolution mechanism outside of a lengthy and costly court process.

We would also just suggest that the current fee structure does not adequately address the burdensome requests placed on a public body. The current fee structure, we would suggest, should be revised to include a more realistic analysis of the work involved in completing an ATI request. In our experience, in our practical experience, the most time-consuming work involved in processing a request is excluded from consideration when assessing a fee under the current structure.

As an example, section 25 specifically includes the time required to review and redact records responsive to a request. The majority of our requests involve all documents on a given subject, so it's very broad in nature. The process to complete the line-by-line review involves reading and understanding the information, consulting with record owners to determine if there are circumstances about the record which

need to be considered when applying exception and it may even require consultation with other public bodies.

The application of exceptions to disclosure also requires the exercise of discretion and, in most cases, requires consideration of the public interest override provisions within the act. Depending on the volume of records sought by an applicant, this could require the time and attention of several, if not many, employees in addition to the access and privacy coordinator. This time certainly has a cost and we would respectfully suggest some revision to section 25 to reflect that.

CHAIR ORSBORN: Do you charge any fees now?

MS. ELDRIDGE: We have not charged any fees recently at all.

MS. STAEBEN-SIMMONS: No.

CHAIR ORSBORN: That's my sense from looking at the material. I think, the last – maybe it was'18-'19 or'19-'20, I'm not sure which, but right across the province it was less than $600 charged in total.

MS. ELDRIDGE: Yes, I can really see that.

CHAIR ORSBORN: And perhaps because of the – it's not a lot of time spent in locating electronic records but in terms of the reviewing and redacting, I can understand there's where the time is.

MS. ELDRIDGE: Exactly.

CHAIR ORSBORN: Having said that, are you looking at putting in fees from an economic point of view, or 90 per cent of the submissions that have mentioned fees, one can put in to deter nuisance requests, is your impetus for a fee economical or cut down on what are called nuisance requests?

MS. STAEBEN-SIMMONS: I think one might do the other. I think a small reasonable fee would be our expectation.

CHAIR ORSBORN: To assist you economically or to cut down on the requests?

MS. STAEBEN-SIMMONS: It would probably cut down on the number of requests.

CHAIR ORSBORN: And to cut down on requests that should be cut down on – if there are such requests – is it appropriate to try and achieve that by way of a fee for all requesters as opposed to addressing the – I call them – "improper" by themselves?

MR. STAEBEN-SIMMONS: You –

CHAIR ORSBORN: Should the province pay for the sins of the few?

MR. STAEBEN-SIMMONS: Yeah. I think, though, in practical terms, most people expect that they would pay a small, reasonable fee for some type of government service.

MS. ELDRIDGE: If I may, from my perspective, I think it's about efficiency. Over the years, I've seen that somebody who wants any and all records, when they see that there's a fee involved, they will all of a sudden have this epiphany and they can suddenly see clearly what they actually want. A lot of times the fee estimate ends there.

That, in my mind, suggests that you would achieve some efficiencies right there. The individual would still get what they're looking for, but there's a 15-hour grace period. If you can get a request that's 15 hours, away you go, there's no fee involved.

I think the theme that kind of runs through this whole process for me is getting the applicant engaged, zeroing in on what you want and then efficiently and quickly getting them what they're looking for.

CHAIR ORSBORN: Could that be done through the clarification process?

MS. ELDRIDGE: If the applicant is engaged, yes. If they refuse to participate –

CHAIR ORSBORN: Well, that's a different issue.

MS. ELDRIDGE: – that's a different issue, but a lot of times the fee assessment will draw them back.

CHAIR ORSBORN: Yeah, and if they refuse to co-operate, well, thank you very much, goodbye.

MS. ELDRIDGE: Then they have to pay the fee or – yes.

CHAIR ORSBORN: The fee issue, as I understand it, was fairly substantially discussed by the Wells committee.

MS. ELDRIDGE: It was.

CHAIR ORSBORN: And they came to a certain conclusion that there should be no fee, but there should be some limited cost recovery. So are you suggesting that we should reverse that or suggesting we should change that –

MS. STAEBEN-SIMMONS: Potentially, yes.

CHAIR ORSBORN: – based on your experience?

MS. STAEBEN-SIMMONS: Yes.

CHAIR ORSBORN: Okay. All right.

MS. STAEBEN-SIMMONS: If you will, just a few moments on privacy breaches.

CHAIR ORSBORN: Yeah, how do you define minor?

MS. STAEBEN-SIMMONS: Yeah, how do you define minor. We really feel that not all privacy breaches are equal, right.

CHAIR ORSBORN: I understand that, but from –

MS. STAEBEN-SIMMONS: Yeah.

CHAIR ORSBORN: – a legislative point of view, I can understand the position, you have to –

MS. STAEBEN-SIMMONS: Yeah.

CHAIR ORSBORN: – send every breach, whenever it happens.

MS. STAEBEN-SIMMONS: Right.

CHAIR ORSBORN: But how does one legislatively draw the line from –

MS. STAEBEN-SIMMONS: Right.

CHAIR ORSBORN: – immediate to quarterly or whatever?

MS. STAEBEN-SIMMONS: Right. So a majority of our privacy breaches are what I would call misdirected emails. They are internal to the college. So if I receive something that was supposed to come for Donna, I fully understand my obligations under the act to deal with that. So the potential for harm is very, very minor in the potential for risk and exposure. So we would ask that there be some consideration for that type of an approach.

CHAIR ORSBORN: Yeah, I'm trying to –

MS. STAEBEN-SIMMONS: Yeah.

CHAIR ORSBORN: – understand a little more, you know, what kind of language might be put around it.

MS. STAEBEN-SIMMONS: Yeah.

CHAIR ORSBORN: Again, from the stats from the OIPC, I think there was, from their reporting, 104 email breaches, I think, right across the province.

MS. STAEBEN-SIMMONS: Right.

CHAIR ORSBORN: For the year.

MS. STAEBEN-SIMMONS: Right.

CHAIR ORSBORN: Can you suggest any language that would help draw the line. Perhaps minor and unintentional is not – it's always open to interpretation.

MS. STAEBEN-SIMMONS: No, I know.

MS. ELDRIDGE: Perhaps we could define the breaches that must be reported immediately. My thoughts would be a wilful breach, a breach involving certain pieces of information. Like say, for example, the misdirected email contains a copy of a psycho-educational assessment that hasn't been password protected. That would be a

major breach, even though the person receiving it may also be subject to ATIPPA. There would be something around the intent of the individual and something around the content.

If an email simply contains a student number and a grade and it goes to the wrong person, even if it's within government, where everybody is also subject to ATIPPA, that's not the level of a breach that a wilful exposure of someone's personal information would come. It's not the same as if that contained a social insurance number or maybe the T4 of an employee.

I think maybe define what has to be reported immediately and what can wait and be reported quarterly. It just seems odd to me that they're given the same weight when the significance to the individual is very, very different.

CHAIR ORSBORN: Thank you.

MS. STAEBEN-SIMMONS: I think that sums up our comments for you. We're participating in one of the round tables next week on workplace investigations, so we're very eager to have that dialogue with you.

Thank you very much.

CHAIR ORSBORN: That's a problematic section and, I think, recognized by all involved.

MS. STAEBEN-SIMMONS: Yes.

CHAIR ORSBORN: Thank you very much, Ms. Staeben-Simmons and Ms. Eldridge.

University, do you want to take the front seats?

MS. STAEBEN-SIMMONS: Thank you so much.

CHAIR ORSBORN: Oh, wait now. Wait, I'm sorry.

Because of COVID, it would be best if everyone spoke from assigned seats. Are you okay from back there, rather than switching around? My apologies.

UNIDENTIFIED FEMALE SPEAKER: (Inaudible) move out of the way?

CHAIR ORSBORN: Maybe if you just moved your chair across to the left about three feet, you'd be out of the way.

All right, thank you.

Next presentation from Memorial University, and on behalf of the university we have Morgan Cooper, the general counsel; Stephen Greene is the chief information officer; and Rosemary Thorne is the access and privacy advisor.

Thank you.

As I've indicated, I have read the submission, so please present as you see appropriate. I'm not sure who's leading it.

MS. THORNE: I think I will begin.

CHAIR ORSBORN: Thank you.

MS. THORNE: Good morning. Thank you, Chair Orsborn.

Let me begin by saying or reminding us that Memorial University is Newfoundland and Labrador's only university. We're a multi-campus, multidisciplinary, public, teaching, research university. Memorial has more than 19,000 students who avail of more than 300 program options spread across five campuses. We have more than 90,000 alumni active throughout the world and we are one of the top 20 research universities in Canada, we have more than 30 search centres.

I should mention Morgan Cooper and Steve Greene are with me. I think that, specifically, Morgan will address solicitor-client privilege and Steve would like to talk about IT security and additional protection for IT security information. And, if it's all right with you, I thought what we would do is just simply go over two or three particular areas. As you say, I know you've read the submission in full.

CHAIR ORSBORN: That's fine. I have read the submissions, yes.

MS. THORNE: Okay.

CHAIR ORSBORN: Some of the issues we might have touched on earlier.

MS. THORNE: Right.

So then, in addition to solicitor-client privilege and IT security, the other areas that we would like to talk about are workplace investigations in the context of personal opinions. We are not participating in the round table on section 33 and so, if it's all right, we'll talk a little bit about workplace investigations today.

So workplace investigations, personal opinions, misuse of the act and, then, of course, privileged information and IT security. Those recommendations: workplace investigations is recommendation three in our written submission; personal opinions is recommendation one in our submission.

In the context of workplace investigations, all employers, whether public or private, have a very serious responsibility to ensure a safe environment for employees to be able to come forward when they have concerns about the workplace. They need to be able to come forward confidentially and they need to be able to feel comfortable that their concerns will be addressed. If you think in the context of sexual harassment, for example, any workplace investigation is highly sensitive and needs to be handled with special sensitivity.

When you receive an ATIPP request in the middle of a workplace investigation, it can challenge the integrity of the investigation, it can constrain an already strained workplace environment and it can create strained relations between the people affected.

CHAIR ORSBORN: I think even the Commissioner would agree with you there. Even their recommendations suggest that no release of information until the investigation is done.

MS. THORNE: Yes, so I think that the Commissioner is totally aligned with Memorial University, certainly on that point.

One of the points that I wanted to make, though, is section 33 and the way that it's been interpreted. It's being interpreted to say that it trumps all other exceptions to disclosure, bar none.

CHAIR ORSBORN: The Commissioner is on board with you there as well, I think.

MS. THORNE: Yes.

CHAIR ORSBORN: In terms of exceptions.

MS. THORNE: And, specifically, what it protects or what it grants or mandates access to is information, relevant information, created or gathered for the investigation.

So when we receive an ATIPP request, however, pertaining to a workplace investigation, it is not: May I please have all of the records that were created or gathered and that are relevant to this investigation? Rather, the request is: All records from multiple parties dating back, perhaps two or three months, before a formal complaint was ever made and it's all records in which the complaint or the respondent or whoever the requestor is, is referenced in some way.

As the person responsible, then, for processing the request, we have 100, 500 pages of records and email threads, some of them are clearly subject to section 33: a complaint, the appointment of the investigator, the notice to the parties that an investigator has been appointed, the investigator's interactions, the notes, interactions with witnesses, the report, notice of the report, response to the report. These things are all subject to section 33 and I think it probably makes sense, in some cases, that the parties will get full access to all of that information, but the concern is all the extraneous records that are also responsive to the request. So these are not, what I call, section 33 records, so other exceptions to disclosure would apply to those.

That's one of the things that I wanted to raise because some of those records are, for example, an employee reaching out to a colleague, to the person down the hall, to a supervisor to express concerns.

CHAIR ORSBORN: These are workplace conduct issues short of a formal investigation?

MS. THORNE: Yes. Well, before, possibly, a formal investigation and they're looking for a listening ear. They may be looking for some guidance. It could be, as I say, in the subject of a

sexual harassment or is this sexual harassment? I don't know.

CHAIR ORSBORN: Let's see if I understand the context. Let's assume that Ms. Staeben-Simmons is my immediate supervisor and you're her supervisor. I come to you and I say: I'm not very happy with the way she's treating me, she looks down on me. She says my work is awful. I'm really thinking about quitting. What can I do? You don't write anything down; you give me some advice. I follow that advice and then things are fine, afterwards.

MS. THORNE: Right.

CHAIR ORSBORN: Change the situation to where you write something down.

MS. THORNE: Exactly.

CHAIR ORSBORN: Is that information accessible to Ms. Staeben-Simmons?

MS. THORNE: Potentially, under the ATIPP Act

CHAIR ORSBORN: Because it would be my opinion about her.

MS. THORNE: Yes.

CHAIR ORSBORN: Okay.

MS. THORNE: The challenge, of course – and this is where it leads me into opinions – is that in the scenario you've described, not only is your opinion about her not your personal information and it's hers instead, but because of the definition, you've lost all rights to it, as it were. In other words, section 40 and all of the nuance in section 40 cannot be applied. Section 19, in terms of notice of opinion disclosure, cannot be applied simply because the definition is not engaged. Because of the definition, you no longer have a privacy interest. We see this as a problem. We did recommend in our submission a couple of suggestions as to how that might be resolved, and you will have read those I'm sure.

What I wanted to draw to your attention today is British Columbia. British Columbia has what might be the easiest and cleanest solution to the whole challenge around personal opinions in which their definition of personal information is quite simply any information about an identifiable person, with the exception of business card information.

Then, in their section that is equivalent to our section 40, their section 22, they have two subsections: subsection (5) and subsection (6). These recognize the challenge, I think, it doesn't necessarily talk about personal opinions, but let me just read the opening statements. It says: "On refusing, under this section," – meaning section 22 – "to disclose personal information supplied in confidence about an applicant," – an ATIPP applicant – "the head of the public body must give the applicant a summary of the information …." There are some limitations on that which you can read yourself. Then, it also says: "The head of the public body may allow the third party to prepare the summary" to be disclosed to the applicant.

I think that this nicely resolves the problem. It recognizes the privacy interests of both parties. I think that it is a good solution to the challenge that we've described in that regard.

You did, thoughtfully, let us know in advance of a couple of questions that you had. Would you like me to address those?

CHAIR ORSBORN: As you see fit.

MS. THORNE: So one of them was in connection with – one of the recommendations that we had made would be that in the definition of personal information correspondence – and this came from Ontario's FIPPA, *Freedom of Information and Protection of Privacy Act* – "correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies that correspondence that would reveal the contents of the original correspondence." So in Ontario that is captured as personal information. We suggested that this might be something to be considered.

CHAIR ORSBORN: These are, say, a letter from a member of the public to the university?

MS. THORNE: Yes, precisely. So you had said: Is this a recommendation intended only to apply to MUN? I would say no. What you're

suggesting is exactly what I'm thinking of, is that from time to time – so we obviously collect a great deal of personal information for programming purposes. It's required, it's necessary in order to deliver the programs, but we receive unsolicited correspondence as well. Sometimes that can contain sensitive personal information about the author or about third parties and so on. I'm sure most public bodies –

CHAIR ORSBORN: And is that not protected?

MS. THORNE: – would receive that.

Well, again, it would have to be reviewed line by line, and bearing in mind the current definition of personal information, you might be challenged to – you might be able to protect the identity of the person sending it, but certainly anyone who was the subject of the letter would have a right of access if it's an opinion about them, in some way, right.

Now, as I say, I'm not –

CHAIR ORSBORN: That whole issue about who's personal opinion belongs to who –

MS. THORNE: Precisely.

CHAIR ORSBORN: – was the subject of consideration by Chief Justice Wells and came down on the side of what we have. So are you suggesting that be reversed?

MS. THORNE: I'm suggesting, in fact, and I think the cleanest solution is the one I mentioned earlier, which is to adopt the approach in BC, which says that personal information is quite simply any information about an identifiable person, and then allow the remainder of the act, and, in particular, all of the nuance that is in section 40, allows a public body to then assess. In fact, section 40 is, I feel, as someone who administers the legislation, a very, very helpful tool in making those assessments. If the information in question is excluded and section 40 doesn't get engaged because of the definition, then we have a problem.

Yes, we did recommend – and I know that the OIPC is aligned in this respect – with regard to a workplace investigation, that an ATIPP request not be permitted until after the investigation is complete. I would certainly endorse that and the university endorses that. We just don't get requests for workplace investigations that are ongoing; we get requests for ongoing grievances, arbitration procedures and so on.

We did not raise this in our written submission, but I want to raise it to you now as something that you can consider. I do think that at least one other public body raised it, and that is Ontario's FIPPA, section 65(7) – so subsection (7) or (6), I think. Sorry, section 65(6) of Ontario's act. They are unique in Canada in this approach, but I suspect that they adopted these provisions during a review of their act because it excludes records pertaining to labour relations, employment matters and so on. That might be a solution to address a lot of the concerns that public bodies have expressed in respect of section 33; in other words, allow the processes that are well established and that are in place to govern how they're handled and not ATIPPA. I put that out there for your consideration.

Misuse of ATIPPA – I wish, to be honest, that we were not even discussing it. It's unfortunate that we have had some significant experience, however. I feel an obligation, therefore, to raise it as you carry out this statutory review. I will say we've had to seek recourse under section 21 multiple times – 15 times in total since 2005.

CHAIR ORSBORN: How many?

MS. THORNE: Fifteen.

CHAIR ORSBORN: Fifteen?

MS. THORNE: Fifteen.

Maybe that's not a lot. I don't know how the other public bodies – I have no idea, but I know that in terms of the resources that it consumes it's quite significant.

Section 21 is very, very helpful and it is largely consistent with ATIPP legislation across the country. However, we've been told that the act, the ATIPPA 2015, does not give the Commissioner the authority to approve prospective disregards. So there's no real remedial authority for the Commissioner to deal with misuse or abuse of the right to make a request.

Now, in other provinces – and I'm thinking here specifically of British Columbia, Alberta and Ontario – they are able to set limits and impose constraints on applicants who abuse the right to make a request. The remedies may range from restricting the applicant from making any requests for a period of time, or restricting the applicant from making any requests until the backlog is handled.

CHAIR ORSBORN: Essentially, giving the Commissioner the ability, on application, to declare someone a vexatious applicant and put limits in place in terms of new applications without leave of the Commissioner or certain time limits, something like that.

MS. THORNE: Precisely.

I do understand that one of the issues that's been pointed out to me – and I see it myself in the act. I don't know if adding an S to make the word "request" plural would solve all the problems. Probably not. I do know that in our section 21 it refers to authority to disregard a request or the request, and in some of the other jurisdictions it refers to requests plural. I don't know if that would make a big difference or not, but there it is.

I would like and I believe it's very important for the Commissioner and the court – and I don't know how the court views the act and authority to put those constraints, but I think that the Commissioner ought to have the authority. The challenge is – and, actually, I have a quote here, if I may, from former Information and Privacy Commissioner, David Loukidelis, from BC. This is in the City of White Rock report in 2017, so F17-18.

He says: "The right of access should only be used in good faith. It must not be abused. By overburdening a public body, misuse by one person of the right of access can threaten or diminish a legitimate exercise of that same right by others, including as regards to their own personal information. Such abuse also harms the public interest, since it unnecessarily adds to public bodies costs of complying with the Act. Section 43" – which is the equivalent of our section 21 – "exists, of course, to guard against abuse of the right of access."

Anyways, going back, the challenge for us is that in our framework it is the Commissioner who approves the disregard. It seems to me that a cleaner solution might be that the – and I know that this is controversial as well, but I'm just trying to think of it in terms of the rights of the applicant as well. If the public body made the decision to disregard and then the complainant – or the applicant, rather – could complain to the OIPC, they can undertake an investigation, they can issue a report, publish a report and there's a great deal of benefit then. The parties could appeal to court if necessary. Other than that, I can't suggest what the solution might be. The Commissioner could both approve a disregard and impose limits based on representations from the public body, but I think the applicant ought to have some ability to engage in the process as well. For procedural fairness, in fact, the applicant should be able to be engaged.

Those are all of my things that I wanted to address. The only other thing I wanted to say is over the past couple of weeks I've picked away at my statistics. I thought you would be interested to know that in terms of numbers, I've figured that we spend, on average, 25 hours on each request. That does not include the administrative time that's required for reporting to the ATIPP office in the Department of Justice and Public Safety and our own internal administrative and reporting requirements. You can probably add another five hours if you take those into account, so 25 to 30 hours per request.

Granted, we've had requests that have taken us as few as seven hours and we've had requests that have taken as much as 172 hours. This is clear, actual devoted time working on the request. It can be a substantial piece of work because the act is highly prescriptive, and so there's a great deal of work.

That's all I will say, unless you have any other questions for me and then, apart from that, I'll –

CHAIR ORSBORN: No, we can move on. We may have talked too much because we have 25 minutes. I don't know how that fits into your presentations.

Mr. Cooper who's going to – do you have your mic turned on?

MR. COOPER: Do I understand, Mr. Chair, that we're very limited now in terms of time? In which case, I'll –

CHAIR ORSBORN: Yeah, we have a break at 1 o'clock and then we have other presenters at 2 o'clock. If we need to arrange for you to come back, I'm quite happy to do that.

MR. COOPER: No, I believe I can be very brief in my comments. Ms. Thorne was very, I believe, articulate in the information provided and the positions that she's put forward on behalf of Memorial University.

Rather than repeating those comments, I would like to make a couple of observations. One is around the issue of solicitor-client privilege and the Commissioner's relationship in terms of production and review of solicitor-client documentation.

What I would like to say is that memorial is very much supportive of the submissions that you have received from the CBA, the Law Society of Newfoundland and Labrador, the Department of Justice and if I find a consistency in the submissions is a proposition that the current legislation is not sufficient with respect to principles articulated by the Supreme Court of Canada, the University of Calgary, in particular, to provide that power to review solicitor-client documents.

The comments that I want to make, and I think you may have heard them before but I think it's important to reinforce, is that when we look at – and when I say we, it's Memorial University, the client, in this case – the role of the courts and their particular obligations with respect to the rule of law, and the fair and impartial administration of justice, the confidence and, I believe, obligation of those bodies to make decisions without reference to, either government dictate or the weight of public opinion, those attributes of our judicial system and the courts are the very things that cause my client, and I believe other public bodies, in the case of this issue, to have confidence in the organizations.

When it comes to Memorial University of Newfoundland, I can say, frankly, that many of the ATIPP requests identify as responsive records, records that reside in the office of general counsel. That's not an unusual circumstance, but the likelihood and the potential that we engage in an adverse position, relative to the Commissioner – I say that valuing the relationship we have with the office and the Commissioner on a regular basis – but to the extent that we may be adverse in position to the interests of the Commissioner with their different mandates – everything from investigation to adjudication to public education and the like – is such that, you know, when we look at some of the principles articulated by the Supreme Court of Canada in terms of absolute necessity with respect to the review of solicitor-client privileged documents.

I just raise the question for your consideration about how you reconcile absolute necessity with the fact that the Privacy Commissioner has access or recourse to the courts for that particular determination. When I think about the need to minimally impair such a fundamental right, and I believe these views are consistent with what you've seen in the submissions before you, and I know submissions of the Federation of Law Societies of Canada at the federal level before various Senate committees and the two Supreme Court of Canada cases that the parties reference. So I wanted to express that view on behalf of Memorial University of Newfoundland.

The last issue I just –

CHAIR ORSBORN: I'll just stop you there. Are you contemplating a scenario, then, where – I'm trying to follow the reasoning in the University of Calgary case that if solicitor-client privilege were claimed over documents that it could be – the Commissioner could be provided with a summary of the documents, listing or what have you, and the Commissioner would look at that. If the Commissioner then determined that it was absolutely necessary for him to look at the documents in order to determine, for his purposes, whether or not they were privileged and ordered production of the documents, then at that point you would then go to court for a determination of privilege. Is that the kind of scenario you were contemplating?

MR. COOPER: Yes, in fact, I don't put it out as a question for answer, obviously, but a

question for consideration. If a Commissioner has to make a determination, with respect to what documents they can or cannot review, it necessarily involves the application, I believe, of the legal test articulated by the courts and the Supreme Court of Canada, in particular.

With respect to the exercise and the application of those principles, if a body could be an applicant, not only the public body that's appearing before the Commissioner that makes that particular determination, if they believe that determination is – I won't use the term judicial review, but if they believe that determination exceeded their jurisdiction in the broadest sense, I would have thought that there would be – the Commissioner made a statutory public figure in their own right – an opportunity to have that decision reviewed before records are seen, which you can't undo solicitor-client privilege. It's in the records, they've been reviewed. It's just thinking about that particular relationship between the courts and the Commissioner. I wanted to put that forward.

I know other parties have raised a chilling effect as well, certainly the Law Society of Newfoundland. Again, it just comes back to the fundamental importance of solicitor-client privilege and the notion that a particular structure that allows an administrative body to review solicitor-client documents may have the impact of having clients, who are having communications with their solicitors, that they may be more circumspect as to that advice, how it's received, how it's given, how the communications are delivered by reason of a reticence and a greater confidence in the judiciary to make those determinations. I believe that's important.

CHAIR ORSBORN: In the scenario that I posed to you, it would be up to the public body, though, as to whether or not the Commissioner got the material or not. I mean, if the Commissioner would look at what material had been provided, affidavit material or whatever, in support of the claim of privilege and said: Well, I still think it's absolutely necessary that I see the documents to determine the privilege. The public body says: No, we're going to go off to court.

MR. COOPER: But I think that's precisely to the extent that we say no and we can go off to court, you will avoid, I'm assuming, the efficacy of having the Commissioner make the determination and then review the documents in question.

CHAIR ORSBORN: You're going to have to provide the same information to the court anyway, aren't you, to sustain the claim of privilege? It's got to be done somewhere.

MR. COOPER: I think that's right. I think it has to be done somewhere. I'm very aware of a comment you made in the Eastern Health case, just a few years back, about the unenviable position that, as a Justice of the Superior Court, you were placed in, in to having to make the determinations in a very complex case. That reality is correct, whether or not the decision is made by a Superior Court or an initial review is made by an administrative tribunal, appropriately vested with the power under the act.

We're simply expressing a view consistent with other bodies that have submitted to you. We're simply indicating that we believe the courts are the right body having regard to their obligations with respect to the rule of law and their relationship – we have the confidence and we believe the judiciary is the right body to make determinations for one or more fundamental privileges that exist in law and that support the rule of law in this country. You can't understate the importance of the position.

Mr. Chair, if I may, the last comment I would make – because I'm painfully aware that I have exceeded time – is simply an observation based on, to a certain extent, personal experience as a former board chair/labour arbitrator. I would say I find the act in this province – and I don't think it's uniform across the country. I find it curious to the extent that it allows an applicant to either appeal a decision of the public body to the Commissioner, which I think is actually quite right given the specialized expertise and steps toward the mandate of the Commissioner and their resources dedicated to exactly this task, or to make the direct right of appeal to the courts.

I would submit, as in the case of other administrative tribunals that exercise quasi-

judicial type powers, that it's quite appropriate and even when I look at principles of the Supreme Court of Canada and Weber about exclusive jurisdiction, let's let these tribunals who have the expertise deal with these issues in the first instance and the courts under judicial review or an appeal, as the case may be, have an opportunity to engage in those processes.

We also find it odd and there have been some suggestions that the right of appeal directly to the court may be broader than the right of appeal provided to an applicant under the statute. It strikes me as a little bit of a disconnect. I thought they would align.

We would suggest that a right of appeal, in the first instance, to the Commissioner with a subsequent right of appeal or review to the Supreme Court would certainly help the court, I believe, in terms of its resource issues, which are numerous – it's not just the Commissioner that has resource issues – but more importantly that determinations that may go to the court – and I say may because it may not have to go to the court – are informed by the expertise that rests in our Privacy Commissioner office.

CHAIR ORSBORN: We have a bit of time, but I may well need you to come back at some point because I wanted to – and perhaps Mr. Greene is going to touch on it – get a better understanding – while the direct right of appeal is one thing, I raised that with the Commissioner and they thought there may be some prejudice to third parties to doing away with that and we got to work through that.

This whole process that follows a recommendation to reconsider or a recommendation to conduct a new search, there's some confusion around what happens after that now. I may not have time to do it now, but I'd like the opportunity at some point to talk through that and make sure I understand it fully and understand your positions on it.

Mr. Greene.

MR. GREENE: Thank you for the opportunity to participate in the public hearings.

My part in the discussions today really talk about ATIPP and how it intersects with IT security. IT security was discussed in a recommendation provided in our supplemental submission. Since the original ATIPP legislation back in 2005 and the subsequent revisions, a lot of things have changed in our digital ecosystem. One area in particular that has changed more than most is the area of IT security and a protection of the assets that we house.

Back in 2015 when ATIPPA was originally introduced, IT systems were simpler and systems were easier to defend. In today's world, we live in a complex, interconnected world and threats against IT systems have increased dramatically. Offensive and defensive tools have advanced at an alarming rate.

If you look at pretty much any major news publication or any published statistics around cybersecurity, you'll find ample references or links to major and even small organizations that have been breached. Breached organizations can be small, large, well funded, well staffed. Nobody is immune to these threats. These threats are real.

So how does this link to ATIPPA? We have one of the largest IT environments in the province and we are connected or have interconnected relationships to other public bodies, including core government, the health authorities and other educational institutions.

At Memorial, we see billions – with a "b" – of IT probes against our infrastructure on a monthly basis. These scans come from all areas of the world. These scans gather intelligence about our networks, our systems, our users' data and our collective cyber stance. This intelligence in the wrong hands can be used to breach environments. Today's cybercriminals can be individuals, groups. They can be well-funded government or state-sponsored entities. Breaches can actually happen internal or external.

Security breaches always start with information and intelligence. The current section used to exempt security information or system information in ATIPPA is section 31(1)(l). We have direct and real experience dealing with this section of the legislation. This section is very broad and general, which in some cases is good. But we worry that differing opinions, rulings and interpretations of section 31 could have

dangerous, unintended consequences and create precedent not only for Memorial, but for public bodies across the province and across the country.

As the CIO of one of the largest public bodies in the province, we are responsible for IT security. It's important that we have the safeguards to protect the data we hold. To accomplish this, we need to protect the information about our systems, our architectures, those with privileged access, patching levels and vulnerabilities. Cyber threats have grown exponentially over the last number of years and will continue to grow and be of great concern.

I strongly oppose the release of system configuration and personnel data tasked with protecting the IT systems and the data we collectively hold. When ATIPPA was designed and created, the intent was to provide openness, accountability and transparency around decision-making in public bodies. I do not believe the intention was to disclose the security configuration logs and system administrators who actually protect this information.

Hackers need to gather information to breach an organization. We strongly recommend the modernization of the language in ATIPPA, specifically section 31(1)(l), to prevent the disclosure of security-related information.

CHAIR ORSBORN: It wouldn't protect you from hackers though, would it?

MR. GREENE: No. Well, it's a part of the puzzle. The more information you put in the public domain, even if you release it to a single individual you lose control over configuration data. Information about – I'll use the example of system administrators. If you release who has privileged access in your environment, it essentially provides a target list for those that want to start a phishing campaign or spear-phishing campaign against your organization to try to gain access to systems.

I've discussed this issue with CIOs of other public bodies in the province, including core government, health and education. We've talked to our own internal cyber experts, we've talked to vendors with expertise in cybersecurity and CIOs across the country and organizations providing cybersecurity at the federal level, including the Canadian Centre for Cyber Security. We've seen overwhelming support for our position on this issue.

As I mentioned before, you do not have to search long and hard to find ample information about how problematic cyber breaches and threats are in today's world. In the education vertical alone, numerous educational institutions, numerous health bodies and numerous government bodies across the country have been breached. I was reading an article on CNN just before I came in the building and it listed 500 educational institutions, 1,200 health institutions and, I think, 130 government entities, if you look at the US jurisdiction, and these threats are real.

Making cybersecurity information public can provide potential hackers or criminals with the architectures and target lists for phishing and spear-phishing campaigns. At Memorial alone, we see millions of malicious emails a day. We block over 90 per cent of email entering our institution because it's malicious in nature. To put this in context, if IT security exemptions are not made clear in the legislation, how do you prevent a requester from asking about systems used in another public body?

CHAIR ORSBORN: That's hard for a layman to appreciate. You say millions of malicious emails every day.

MR. GREENE: Yes.

CHAIR ORSBORN: How do you define a malicious email?

MR. GREENE: A malicious email could be an example of a phishing email that's trying to get you to click on a link and provide your credentials so that somebody with malicious intent would have your credentials to actually access systems within your organization.

CHAIR ORSBORN: You say you get a millions a day. I presume this is across all of the employees, professors and everybody else.

MR. GREENE: Correct.

CHAIR ORSBORN: How do you keep track of that?

MR. GREENE: We have a vast number of different cybersecurity tools. The challenge is the threats advance at the same rate that tools and defences advance, so it's a continuous battle.

If unprotected, the next request might not be at the university. It might be at Justice; it might be at the RNC. It could be the health authorities, child, youth and family services, or it could be around research that we have at MUN.

As an IT leader, it's one of the things that keeps me up at night, to think about putting too much information about your cyberstance out in the public domain. Once this type of information is released, even to a single individual, it's no longer controlled and you have no idea as to where that information is disseminated.

CHAIR ORSBORN: You said too much information about cyber …?

MR. GREENE: Cybersecurity.

CHAIR ORSBORN: Security, okay.

MR. GREENE: Yeah, that would be around systems, patch levels, users with elevated access, et cetera.

In closing, I strongly support ATIPPA and the openness, accountability and transparency that comes with it; however, I encourage you to consider our recommendation related to modernizing the language related to the protection of how we defend IT systems in our public bodies. I encourage you to consider the similar context presented by the OCIO at core government.

CHAIR ORSBORN: Thank you, Mr. Greene, very much.

With your indulgence, university representatives, I think I will have Ms. Ding contact you. We have some blocks of time up until next Wednesday when we start the round tables, and particularly because where government has backed off now given the caretaker convention, so we do have a bit of time in the interim.

I would like to work through your positions on – you refer to them as hard and soft recommendations. I want to make sure that I do understand your positions and try to understand what you might suggest as solutions to those issues.

With your permission, I'll get Ms. Ding to contact you and see if we can work in another session. I would suspect we'd need probably an hour, maybe an hour and a half.

MS. THORNE: Okay. We would be glad to do that.

CHAIR ORSBORN: Yeah.

All right. Thank you very much.

I will adjourn until 2 o'clock.

Thank you.

Recess

CHAIR ORSBORN: Welcome to this public consultation session of the 2020 ATIPPA Statutory Review Committee.

During the afternoon sessions, we will have presentations from the Oil and Gas company and from Nalcor. With the Oil and Gas company, we have Alex Templeton and Mr. Jim Keating. I will ask you to make your submissions now, please. Thank you.

I have read the materials so you can summarize as you see fit.

Thank you.

MR. TEMPLETON: Thank you, Mr. Chair.

We're here today on behalf of the Oil and Gas Corporation of Newfoundland and Labrador to make submissions to the Review Committee. We're thankful for the opportunity to, obviously, come and provide some input. My name, as you have noted, is Alex Templeton, I'm a lawyer with McInnes Cooper. With me is Mr. Jim Keating who is the CEO of the Oil and Gas

Corporation. We will be presenting on behalf of the corporation today.

Generally, I'll provide sort of an outline as to how I thought we might use the time today, at least as a relative road map, but, of course, we are welcome to any interjection and discussion that you might be interested in. Obviously, we're here in the spirit of being interested in whatever it is you are specifically interested in, trying to be as helpful as we can in your mandate.

We thought what we would do is at the outset call on Mr. Keating to provide an overview of the Oil and Gas company and its business and some of the relative ways that it manages and collects and uses data. After that, I will speak to the Oil and Gas company as a public body to which the ATIPPA applies and some of the particulars of its experience with the ATIPPA.

Following that, I'll speak specifically to section 23 of the *Oil and Gas Corporation Act* and the nature of that specialty provision in terms of its protection of commercially sensitive information that comes into the possession of the corporation.

I'll spend only a few moments speaking to section 39 of the act. I understand there is a round table that's going to be taking place. It is not our intent to participate in that round table, but, in any event, I do expect that much of the substance of what will be discussed at that round table is also a shared and common experience of the Oil and Gas Corporation.

Finally, as time dictates, we will then send it back to Mr. Keating to then discuss, particularly, the practical necessity that surrounds the use of section 23, not only in the context of its appearing as a specially identified exception to the right of access with respect to the ATIPPA, but as to its daily usefulness to the corporation and why it is so important to the corporation.

That being sort of our overview, I think I'd like to just turn it over to Mr. Keating right now to provide that initial overview of the Oil and Gas company and its business.

CHAIR ORSBORN: Mr. Keating, thank you.

MR. KEATING: Thank you, Mr. Chair.

The Oil and Gas Corporation of Newfoundland and Labrador formally has been in existence just over a year, the corporation which we represent; however, its story goes back almost 15 years. Time goes by very fast for me, having been there since the inception.

In 2005, I joined, at that time, Newfoundland and Labrador Hydro as vice-president of business development. One of my first duties as a vice-president of business development was to develop this new business of oil and gas equity participation. Very soon after, through 2007 into 2008, we acquired our first beneficial working interests, then were incorporated as the Energy Corporation of Newfoundland and Labrador's subsidiary to present-day Nalcor Energy. It had been in this capacity of corporate structure, I guess, up until this past year. We were spun out by statute two years ago or formally incorporated on January 1, 2020.

The Oil and Gas Corporation, just very briefly, is 33 positions. We are responsible for managing, on behalf of the province, through Nalcor Energy's interest in three producing fields: 4.9 per cent of the Hebron field, 10 per cent of the Hibernia South Extension and 5 per cent of the White Rose expansion area.

CHAIR ORSBORN: When you say manage, you're speaking in capacity as managing on behalf of the shareholder?

MR. KEATING: Managing on behalf of the shareholder.

CHAIR ORSBORN: What does that mean?

MR. KEATING: Right now, the assets of those three projects are owned by Nalcor Energy. So Nalcor Energy, through a management services agreement with OilCo, of which I'm the acting CEO, we will manage those assets on its behalf, as we were doing as a subsidiary. It's an artifact of the incorporative model that wasn't the intent, as it was supposed to have been the assignment of those assets to the new corporation, but the government, our shareholder at the time, thought it best to retain those assets in Nalcor because they provide a very strong revenue, maybe 65 per cent of net income, and free cash is generated by these assets for the benefit of Nalcor.

So maybe at some point in the future, it has yet to be determined, those assets could be assigned to the newfound corporation. But until then, all the resources, people, processes, technology and whatnot that's required to manage those is going to continue to do so under a services agreement between the two Crowns.

CHAIR ORSBORN: That's where you get your revenue from, then, is it?

MR. KEATING: Yeah, so OilCo, Newfoundland and Labrador's Oil and Gas Corporation, has revenue from three sources. One source is a fee, which we collect from Nalcor Energy, which is set on a yearly basis and which covers the cost of directly managing those assets. The other source of revenue is from many seismic sales. We are a partner with two global seismic companies and we have a revenue-sharing arrangement on provision of geoscience data. The third, of course, is direct contribution from the shareholder to cover whatever costs or expenses or investments we need to make on their behalf that those revenues will not cover.

CHAIR ORSBORN: Is that a revenue or …?

MR. KEATING: Those are costs –

CHAIR ORSBORN: (Inaudible) revenue or (inaudible).

MR. KEATING: It's a revenue to us, shareholder equity.

CHAIR ORSBORN: Okay. You record that – that's my accountant coming out now – you record that as revenue?

MR. KEATING: No, we don't.

CHAIR ORSBORN: Okay.

MR. KEATING: So the complement of these 33 people are now located in a different physical building from Nalcor. We're across town at Hebron Way. Yet, we do have some extended provisions for services, the least of which would be IT, IM and IS services. Nalcor Energy has a fairly sophisticated data-protection system. So we avail of everything from their email domain, server space, firewalls and whatnot. There are some vestiges of the service that goes both ways and which we rely upon. That's important because in terms of data and information, the Oil and Gas Corporation of Newfoundland and Labrador has in possession maybe 450 terabytes of data and information. The vast majority of that is geoscience data.

Just to finish that overview, the company has gross revenues of anywhere between $300 and $400 million a year. That's projected out over the next several years based on current production and recent oil price strip pricing assumptions. The balance of that, in terms of free cash – effectively dividend – would be about 160 to 180, with royalties of 30 to 50, depending. That's our business to date. The asset value of the business today is excess of $1 billion.

CHAIR ORSBORN: Your dividends would be from where?

MR. KEATING: The dividends that these assets, under our management, provide are paid from the subsidiary of Nalcor Oil and Gas Inc., a subsidiary to Nalcor parent.

CHAIR ORSBORN: Okay, so it's not –

MR. KEATING: Those are –

CHAIR ORSBORN: – a stream from –

MR. KEATING: – dividends from the subsidiary to the parent corporation.

CHAIR ORSBORN: It's not a stream of dividend income to you as a shareholder?

MR. KEATING: No, there's no dividend stream from OilCo direct to the shareholder, being the government.

CHAIR ORSBORN: Okay, and no dividend stream to you as a shareholder of anything?

MR. KEATING: No.

That's the general overview of the corporation.

MR. TEMPLETON: Thank you.

On that basis we'll move then just to discuss the Oil and Gas Co. as a public body under the ATIPPA, 2015. Obviously, the Oil and Gas Co. is a creature of statute, established under the *Oil and Gas Corporation Act*. By its nature, the objectives and powers that Mr. Keating has just described in general terms are reflected in the statute. Much of these objectives, as you would appreciate, require a certain degree of confidence around commercially sensitive information. We will discuss that at some length.

Notwithstanding those strictures, the reality is obviously that the corporation is a public body to which the ATIPPA applies. As a result of that, the corporation has obligations under the ATIPPA and is committed to fulfilling those obligations towards achieving the objectives of the ATIPPA. Including, of course, the idea of ensuring that citizens have the information that they require for the purposes of participating, in a meaningful way, in the democratic process, obviously increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable, and balancing that with those specific confidentiality needs that are necessary to the functioning of government enterprises.

CHAIR ORSBORN: I would think in terms of trying to match OilCo with the objectives of the act, it would be primarily in the area of transparency. Democratic governance doesn't fit – what you do doesn't.

MR. TEMPLETON: Well, certainly, to the extent that one plays into the other in terms of that accountability of government generally. But, yes, I would agree with you that, obviously, it's increasing transparency in government and public bodies.

Towards achieving those ends, there is a recognition that the public must have a meaningful right of access. The exceptions to that right of access should properly be prescribed and limited to correspond to the overriding purpose of the act and the overriding importance of those principles to our government. They should only be applied as necessary for the ability to preserve the ability of government to function and to accommodate those established objectives that are set out in the legislation.

In terms of the limited exceptions that most frequently arise with respect to the Oil and Gas company, it is those exceptions that are oriented towards protecting from harm the confidential proprietary and other rights of third parties that most frequently come into play. As you would understand as well, certain of these exceptions are mandatory in nature have been identified by the Legislature as being required to be invoked. Others account for a degree of discretion on the heads of the public bodies. Finally, in general terms, it is appropriate that the corporation as a public body should work with the Information and Privacy Commissioner, as well as an independent reviewer and overseer of the act, to ensure that the act is, in fact, functioning properly.

Of the general experience with the act, section 23 is of particular interest in terms of the Oil and Gas Corporation and it's a unique provision that needs to properly be highlighted. As you would appreciate, the nature of that exception, with respect to commercially sensitive information, is that it is recognized as a superseding exception to the right of access under the ATIPPA.

The way that this operates, from a functional perspective, is that by operation of subsection 7(2) of the Access to Information act, there is a recognition that certain speciality exceptions to the right of access should supersede the act, should have priority over the act. Subsection 7(2) points to the special provisions that have been itemized in Schedule A of the act. Of course, section 23 of the *Oil and Gas Corporation Act* is one of those speciality provisions that have been specifically itemized in Schedule A of the act. The nature of the identification of it in Schedule A confirms the priority, again, as a limited exception that section 23 should have over the ATIPPA generally.

We can stop there as well in terms of identifying – when we look at the various exceptions that are listed in Schedule A, one of the things that I was mindful of in preparing for today is to look at the other types of provisions that are also identified in Schedule A, particularly those that

apply to commercially sensitive information in an oil and gas context.

I bring the Chair's attention to one of the provisions that is listed there, section 115 of the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*. The nature of that provision, section 115, relates to information that is collected and stored with the Canada-Newfoundland and Labrador Offshore Petroleum Board, as you would understand. Section 115 of the provincial act is also mirrored in the federal statute, the Accord Implementation Act, federally, section 119.

What this is, is it's a privilege that applies, similarly recognized through the federal *Access to Information Act* as the specialty provision, which sets out a privilege that applies to information that is deposited with the C-NLOPB as regulator, and specifically delineates different circumstances whereby that privilege lifts the extent of time to which that privilege should apply.

All of this is of some interest because it is a similar treatment, in many respects, identifying that there are sensitivities to this operational information that properly warrants their being exempt from the public right of access under access to information regimes. What we see there is that in similar form, section 23 of the *Oil and Gas Corporation Act*, in many ways, the protections that are placed on commercially sensitive information in that context correspond or align with those that are set out in the Accord Implementation legislation.

As you would understand from our submission as well, the nature of section 23 and the ability to rely on section 23 is obviously integral, critical to the Oil and Gas Corporation's mandate, that mandate being set out in section 7 of the act, in terms of objectives. It is finely tailored to meet that objective and that has been the case since the enactment of the statute.

We've included in our submission, as I'm sure you would have appreciated, *Hansard* excerpts, where, at the time of enacting the statute, questions were put to the government of the day as to why this provision should be put in place, explanation was given as to why this was so critical to the functioning of the corporation and what we see in the *Hansard* are two concepts of policy that underlay and support that provision.

The first concept is that in terms of the co-venturers that partner with the Oil and Gas Corporation, in terms of those opportunities that Mr. Keating had identified at the outset, those corporations without the benefit of section 23, it's arguable that those corporations would not enter into agreements with the Crown corporation, if there was a possibility that their commercial information was going to be disclosed or at a greater risk of disclosure.

CHAIR ORSBORN: You say arguable, you don't know if they would or not?

MR. TEMPLETON: Well, I certainly think that that was one of the underlying rationales that were put out there. Mr. Keating will be able to speak to the practical realities of that. I think he's best suited to speak to that. But, certainly, it was one of the rationales that were set out by the government of the day when the statute was established.

The second aspect of it supporting is that if there wasn't this sort of cone of confidentiality that applied to this information, or that now was to be lifted, the potential for adverse financial consequences would be relatively great in terms of the competitive market in which the Oil and Gas Corporation and its co-venturers are in business.

So it's this dichotomy, these two sort of underlying pillars of policy that at least were offered as the explanation of the day as to why the confidentiality should attach.

CHAIR ORSBORN: Do you want to explain the competitive market to me a little bit more, please, so I understand it?

MR. TEMPLETON: Again, I think, Mr. Keating is probably best suited; I'll defer to him to speak to those practical realities in due time.

Section 23 also arose, these underlying policy considerations supporting section 23 also were the subject of some comment in the 2014 review committee's work, at least the equivalent provision that you will hear from, I'm sure the

representatives of Nalcor in respect of, so we've also included in our submission the treatment of that in the past. Again, the same recognition coming forward that the nature of – at that time it was Nalcor operating in that competitive commercial world – the necessity to keep that operational information confidential from competitors in that area. These were the underlying supports for the nature of the information that's captured by these specialty provisions being identified and set to one side with a priority and confidence, and not just leaving them to be dealt with by the general provisions of the act.

CHAIR ORSBORN: Who are your competitors?

MR. TEMPLETON: Well, again, I'll leave it to Mr. Keating. I'll defer to Mr. Keating to speak to the competitive interests that are at play in the market.

When we talk about that body of data, that body of information, having a special priority, there are also the general provisions of the act that do apply to information in the hands of a public body. It's in that regard that I'm talking about section 39, which applies to harm to third party interests. So only in summary, we have identified that there is some concern in terms of the application of section 39 being a three-part test.

CHAIR ORSBORN: If you didn't have section 23, you mean.

MR. TEMPLETON: Right. It's not to say that section 23, in all terms, will apply to the same subject matter as section 39. Section 39 is more of a general statute, a general provision. The commercial harm that arises, you could approach the data from the perspective that there are different interests at play. For example, the commercial sensitivity of the data associated with the co-venturers, in these matters with the Oil and Gas Corporation, is one thing. There is also, potentially, commercial information that it will have from service providers that it deals with on a daily basis in the operation of its own office. I would suggest to you that it wouldn't use the same provision to apply –

CHAIR ORSBORN: Would it come within the definition of commercially sensitive information? Because, looking at the definition, it seems to be quite broad.

MR. TEMPLETON: Right. There's a question, though: What was it intended to apply to? I would suggest to you that the idea of third party information in a service context, arguably it would be section 39 that should answer to that.

In that instance, as I expect you will hear in the round table on section 39, there are concerns as to the ability of companies to meet that threshold on a couple of different grounds: one, around them being supplied in confidence and whether or not it should be afforded that characterization of being supplied in confidence; the other around the reasonable apprehension of harm arising should that information be disclosed pursuant to an access request. I think that in practice the threshold has been quite high to be able to meet that three-part test.

CHAIR ORSBORN: That goes more to the application of the act than its wording?

MR. TEMPLETON: Yes. Like I said, I think we're just raising it as something that we have also encountered, but like I said, it's probably best that be discussed in the round table. I'm sure that's where you were going to get into the –

CHAIR ORSBORN: The way section 23 is set up now, it gives the company a discretion to release its information. Third party is mandatory, but your information is discretionary. I mean, I appreciate that's not within the confines of the ATIPPA, but my understanding is that discretion involves a public interest consideration to it. Would you agree with that?

MR. TEMPLETON: Yes, that is correct. You've touched on an important distinction as to the triggering of that. There was a discretionary element to it when we were speaking of information that is pertaining to the corporation itself. When we're dealing with information that is properly pertaining to third parties, then it is a mandatory triggering, as I'm sure you would have recognized as well.

The nature of that is very much tailored to not only the structure of the act as whole, in terms of being a specialty provision that is exceptional and that has very limited application in a very specific context. That is different than the mass of information that would then be subject to section 39. It arises in the context of the access to information right, but as I'll turn it over to Mr. Keating to discuss, from a practical perspective the provision of the *Oil and Gas Corporation Act* has a daily usefulness beyond its use in actually answering to access to information requests.

I'll turn it over to Mr. Keating now to speak to the practical realities of that.

MR. KEATING: Mr. Chair, you raised questions about the competitiveness in the global situation which we find ourselves in at OilCo, and I'll start there and I'll move on to some of those questions you raised.

The oil and gas industry, obviously, it's well known in terms of the commodity, being oil, is widely traded and widely held, but the main source of competitiveness is actually in access of multi-national companies to licences or leases. Effectively, the real estate by which the oil or gas is produced. That is really the nexus of the competitive nature of what we're focused on.

At any given time, there are some 30 or 40 jurisdictions around the world that offer licence rounds, lease rounds where they attempt to effectively attract foreign direct investment. There are no less than 60 to 70 state-owned oil and gas companies, and probably an equal number of maybe publicly traded, but privately held companies that are capable of working in our offshore. So you can safely assume that there are probably 50 to 100 corporate participants that could conceivably invest in our offshore.

Our mandate, I guess since inception, was to attract that investment for benefit of the province, the benefit of Newfoundlanders and Labradorians. One way in order to do that was to capture beneficial working interests in the projects as they existed at the time of inception, and then on a go-forward basis as new discoveries were made. One of the challenges, in terms of making sure that we were seen as a destination of choice for ever scarcer global capital – and today, of course, it's highlighted in the COVID price collapse that that capital could go effectively anywhere, highly mobile.

As the government of the day put forth its intent to acquire a working interest, we need to be mindful that the provincial government has no legislative authority or mandate, actually, to acquire that working interest. So to a certain extent, you needed a willing buyer and willing seller. The authorities, I think, that the provincial government would've had to effectively create the leverage necessary to get the best deal for the people of the province largely comes through their fundamental decisions in the development, application and approval process.

With that as the backdrop then, what my fledgling group of new subsidiary oil and gas people needed to determine was what were the roadblocks or impediments to acquiring that working interest. Almost first and foremost and chiefly was the knowledge that the at-the-day, 2005-vintage ATIPPA was not providing the comfort of security of these third parties primarily, their data. That manifested itself through very one-sided and effectively egregious confidentiality arrangements that we would have to take at inception.

As we tried to navigate our way through that to understand the thinking of the oil and gas companies – and I have to be mindful, too, that in those early days a lot of the employees of Newfoundland and Labrador Hydro, then the Energy Corporation – Nalcor Energy – and now Oil and Gas Corporation and all of its successors have come from the private sector. I myself was a vice-president of current-day Equinor. We had known some of the impediments that acquiring a working interest would take.

With regard to the protection of data, amongst other things we could never be in receipt of any fiscal data from the oil and gas companies; rather, it would be stored or sent to our external counsel and we would have to review that data there, until and unless we took undertakings, even personal undertakings, in our confidentiality agreements. We were faced with concerns from the oil and gas companies as to the degree that even if we were to communicate and share such data with our shareholder, who

were guiding and managing the acquisition, that would have been a risk that was beyond the pale for many of the investors.

That began the construction of the language in 5.4 and 23 as it is today. It was through that exercise that it become clear that for us to achieve equitable status at the decision-making table, at the management committees of these various assets, we had to provide for them the most protections that we could over their data, knowing that their data and information – whether it's about their activities; their investments, quality investments; the quality of the reservoirs; the size, scale, timing of their projects – all that had market consequences for them.

Largely, they're all traded companies. The scale and scope of these investments are material, so they would have almost always been compelling their own disclosures. My full of that, in looking at the wording of the existing ATIPPA, looking to more specific wording, we arrived as to where we are. In general context, it was effectively a condition precedent for us to acquire those working interests in those fields.

What Mr. Templeton referred to in terms of their reliance upon those provisions, even when we're not actually fielding requests, speaks to the nature that it puts us more in line with commercial parties. We are able to have open discussions about the management, the direction and policy of our offshore in a more free and open way with these co-venturers, with petroleum companies, their associations, because they understand and have comfort in the provisions of how that information and data is going to be protected, maintained and managed within OilCo and Nalcor Energy.

CHAIR ORSBORN: You, I presume, provide reporting from time to time to your shareholder.

MR. KEATING: Yes. To offset that, at the same time the *Energy Corporation Act* – and it's mirrored in OilCo – we took on private sector-like obligations for disclosure, quarterly reports, annual reports and websites. I don't have the numbers with me; my colleagues behind me may be able to inform you, Mr. Chair, more fully.

We've attempted to provide almost a disproportionate level of access to information and knowledge and understanding of our offshore than you would see today from, actually, our co-venturers themselves. I think not only is it a personal point of pride – because I think it's important that Newfoundlanders and Labradorians understand their most important industry – but as a publicly owned company that they have comfort and confidence in our decision-making and our approach towards this sector.

It's with that obligation we publish our financial reports. We present to our shareholder on a regular basis. We've even evolved to a point where we've defined what would be called derivative data. If we were to receive direct information or data from a co-venturer or an operator, we'd make sure that the shareholder, the Department of Natural Resources, Department of Finance as the case may be – I would want them to be with me in that knowledge of where we believe the offshore or any particular asset would be heading. I would be able to prepare and present to government as broad and as deep an understanding as I think would be necessary to get that alignment, whilst knowing that the act protects not only that derivative data that I'm able to share, but it actually provides the comfort that the government can ask for it.

It's a two-way street. I think that's one of the benefits of this level of protection, it actually provides for a deeper discussion on some of these very commercial decisions that are being made almost on a daily basis.

CHAIR ORSBORN: Once the records, whatever they are, pass into government's hands, they would then become subject to the ATIPPA regime.

MR. KEATING: I think the way the act is for us today is that the records, if they come from us – that the head of the public body, being the deputy minister or the minister as the case may be, would need to treat that information as it would be ours. They'd have to review that – I'm just looking around to get a nod here.

CHAIR ORSBORN: Somewhere in the act, is it?

MR. KEATING: That's somewhere in the act, I'm hoping.

CHAIR ORSBORN: Yeah, sorry. My apologies, I should've seen it.

MR. KEATING: No, no, it's my understanding but, yeah, it's a good question.

CHAIR ORSBORN: It retains its character.

MR. KEATING: Yes.

CHAIR ORSBORN: Okay.

MR. KEATING: Which is a special feature to actually allow that conduit or pipeline – to borrow an oil vernacular – so that it's not just one sided, that we have the information and government cannot; that there is a way that we are able to disseminate that information whilst keeping it protected and of a specialized nature.

CHAIR ORSBORN: Okay, thank you.

MR. TEMPLETON: Unless there are any further questions that you have, that's our presentation for today.

Thank you very much for the opportunity.

CHAIR ORSBORN: Thank you. I appreciate that.

The next presentation is from Nalcor Energy. We have Grant Hiscock and Peter Hickman. Peter Hickman is counsel; Mr. Hiscock is access and privacy officer.

Whoever is going – Mr. Hickman.

MR. HICKMAN: I'll start, thank you.

Just by way of introduction, as you've said, I'm Peter Hickman, senior VP and chief legal officer and corporate secretary for Nalcor. Grant Hiscock is here. He is the access and privacy officer for Nalcor.

I'm here for a couple of reasons. The ATIPP function resides in the legal department at Nalcor. As well, I've been around for more years than I want to remember; therefore, I have a bit of a background in Nalcor's relationship with this act. I thought I might be able to add something to the discussion this afternoon.

Grant is here because in his role as the access and privacy officer, he acts as the ATIPP coordinator for all of the companies of the Nalcor group, including Newfoundland and Labrador Hydro, which, as you probably know, is a more separate entity these days. One of the few services that Nalcor continues to provide to the company is the ATIPP function. Grant acts as ATIPP coordinator for that company as well and he is obviously more familiar with the act on a day-to-day basis than me.

Grant's presentation will primarily deal with and expand upon our submission dealing with 5.4 and in answer to the addressed questions that were forwarded to us after your review of our submission. He will also touch briefly on a few other items that were raised in other submissions to provide our perspective on these items. When Grant completes his presentation, I would like just to take a few minutes to address the matter of privileged documents.

Before I pass it on to Grant, I assume that Nalcor needs no introduction, and if it doesn't, that's great. In our submission, we did outline the various segments of the corporation. Unless you want me to, I wasn't intending to –

CHAIR ORSBORN: I understand there are aspects of your operation that are regulated and are subject to ATIPPA?

MR. HICKMAN: Yes.

CHAIR ORSBORN: You can explain that to me if you want.

MR. HICKMAN: I'll explain that, yes.

All parts of the organization are subject to ATIPPA. Newfoundland Hydro and Churchill Falls (Labrador) Corporation do not have, I'll say, the benefit of section 5.4 of the *Energy Corporation Act*.

CHAIR ORSBORN: Okay.

It is being raised before me in submissions a suggestion that Nalcor is the equivalent of

Manitoba Hydro and Manitoba Hydro works quite comfortably under the Manitoba ATIPPA.

MR. HICKMAN: Yeah.

CHAIR ORSBORN: Is Manitoba Hydro sort of the equivalent of Newfoundland Hydro and that's where it ends, as opposed to it being equivalent to Nalcor as a whole? I'm not familiar with the extent of operations of Manitoba Hydro. It's simply been said to me that here is a state-owned energy company that works within provincial ATIPPA, so why can't Nalcor?

MR. HICKMAN: Yeah, and Grant will address that question in his presentation.

I will say that Manitoba Hydro, and I'm no expert on Manitoba Hydro, but it certainly is the regulated utility like Newfoundland and Labrador Hydro, but it has presently undertaken a major hydroelectric development in that province, similar to what Nalcor is doing with respect to Muskrat Falls.

I guess there's a little bit of a – it's a similar outfit. Obviously, not in oil and gas, no doubt about that, but it is energy, it is a hydroelectric utility.

Just to make sure we're clear, and I think it's outlined in here, with respect to Nalcor Energy Oil and Gas Inc., as Mr. Keating stated, that company which is a subsidiary, wholly-owned subsidiary of Nalcor, owns the equity interest of the province's equity interest in these various oil fields and the – it's a technicality, but the services agreement we have with the Oil and Gas Corporation is actually between Nalcor Energy Oil and Gas Corporation and the Oil and Gas, not Nalcor – a fine point there.

That's all I feel necessary to talk about the corporation, so I'll hand it over to Mr. Hiscock.

MR. HISCOCK: Thanks, Mr. Hickman, and feel free to jump in at any point here.

I just want to say that the Access to Information and Protection of Privacy Act is a great piece of legislation. We've had a valuable opportunity to discuss some of the more important issues. We appreciate the openness of this entire process, including the focus I'm hearing from the day-to-day users. I know I was on the phone with you, Chair Orsborn, before the holidays and had an opportunity to bring up some more informal points and have a chat. So, as part of the process, I thought that was great.

Before starting work with Nalcor in 2019, I did work within the federal ATIPP system for approximately seven years. The federal system has many positives as well but I can say that my experience in the provincial system has been fantastic. The guidance and leadership from both the ATIPP office and the OIPC is paramount to the efficiency and transparency behind the act.

Informally amongst ATIPP co-ordinators, we often refer to the ATIPP office kind of as the coach in this process and the OIPC kind of as the referee, although we do get great guidance from both groups.

The recommendations made by Justice Wells in 2014 and the review that you are currently undertaking is also critically important to the evolution of access to information and the protection of privacy in Newfoundland and Labrador. Like many, I also feel that we are leading the way when it comes to access to information and the protection of privacy. We're certainly looking forward to future improvements.

I will also say that I feel that this leadership is aided by the additional and limited exception available to Nalcor through section 5.4 of the *Energy Corporation Act*, and we're going to touch on that in more detail shortly.

So, again, the past improvements to the act have gone a long way towards improving the process and the experience of public bodies and ATIPP applicants. To that point, I don't feel that wholesale changes are certainly not required; however, there are some areas for improvement needed and certainly some areas requiring a review.

Our focus during this hearing will be on section 5.4 of the *Energy Corporation Act*. I will also be addressing the seven questions provided by the Chair in advance of these hearings. Thank you, Chair Orsborn, for sharing those with us in advance.

While there are other important issues to discuss, many of them touched on yesterday, Nalcor is confident that between the corporation's submission and the other submissions and discussions at these hearings, including the points just brought forward by Mr. Templeton and Mr. Keating, the important issues are being brought forward for your review and consideration. Nalcor, the Oil and Gas Corporation of Newfoundland and Labrador, is unique in our access to the exception dealing with commercially sensitive information in section 5.4 of the ECA and section 23 of the *Oil and Gas Corporation Act*, respectively. So I want to use this time to focus on that area.

The importance of section 5.4 of the ECA to Nalcor Energy, its business partners, and the economy of the province in general, simply cannot be overstated. Nalcor agrees with the great points brought forward by Mr. Keating and Mr. Templeton and I would like to add to that discussion.

I'm going to skip over the part on the history of the *Energy Corporation Act*, as I think a good job was done on that previously, and kind of just jump into our position here.

So in order to optimize Nalcor's ability to operate successfully and maximize the return to the people of Newfoundland and Labrador from the province's natural resources, it is imperative that Nalcor retain its current ability to avail of section 5.4 of the ECA. This includes the ability for the Nalcor board to retain the final decision regarding commercially sensitive information absent, obviously, a complaint to the Supreme Court.

Nalcor must operate like a commercial enterprise when it comes to oil and gas, as well as other major projects within the corporation. We want the best business partners and vendors and some expectation of confidentiality regarding commercially sensitive information is critical to fostering those relationships and optimizing the corporation's business efforts. The expectation has also been built up over time that our business partners can expect a certain level of confidentiality and we will need to maintain that into the future.

Nalcor's goal is not to avoid transparency or to stifle recourse available to the applicant. The applicant always has a right to complain to the Supreme Court with respect to Nalcor's use of section 5.4 of the ECA. I'll touch on that area next.

I want to touch a little bit on the onus of the applicant to initiate court proceedings versus that onus being on Nalcor Energy. We have many business partners, and we deal with many business partners and community groups and there is an expectation there that Nalcor is going to protect their information both now and into the future.

This expectation is not going to disappear and it is critical to having an open and productive relationships. In many of the corporation's business relationships and relationships with community groups, Nalcor would be expected to protect commercially sensitive information in the same manner that it historically has done and does today, regardless of the application of section 5.4 of the ECA moving forward.

Our business partners, oil and gas companies and other important groups such as the Innu Nation who spoke to section 5.4 in their own submission to the committee, our relationships with all of these groups may, in fact, dictate that we have to go to the Supreme Court with respect to any decision to release commercially sensitive information. One quick example of that can be found directly in one of the contracts with one of our key business partners. I'll just give you a short excerpt from that contract, but it states that Nalcor must argue disclosure at every stage of the process. This is aside from noting the protections afforded in the ECA.

Similar wording exists in the contracts with oil and gas companies and other business partners in that we must take the required steps to protect their commercially sensitive information regardless of section 5.4. Although 5.4 certainly makes it more efficient to do so.

The result is that Nalcor will likely have to pursue legal action in many, if not, all cases. The applicant, on the other hand, can choose to take that step. Although our response to the OIPC through our new recommended process, which I'm going to touch on shortly, will provide the

applicant with much more information that they can then use in their deliberations of whether or not to go to the Supreme Court at all. There is going to be a benefit to the applicant there too.

CHAIR ORSBORN: Just help me understand the process as it's laid out now in 5.4. You take the position that certain information is commercially sensitive and then that the CEO forms a belief that the release of that information may harm the corporation or a third party, then release is stopped. Correct?

MR. HISCOCK: Yes, correct.

CHAIR ORSBORN: So, the applicant then goes to the Commissioner and the Commissioner has the ability to do what? Simply look at the information to see if it's commercially sensitive or to look at the opinions of the CEO that harm would result?

MR. HISCOCK: In this case, the big thing, it's a sign-off from the CEO and also the certification from our board of directors.

CHAIR ORSBORN: Yeah, okay.

MR. HISCOCK: Yeah, so –

CHAIR ORSBORN: That's on the harm aspect of it, but looking at the act, it says "the commissioner shall, where he or she determines that the information is commercially sensitive …" accept the certification.

So is the only role of the OIPC to determine whether something is commercially sensitive?

MR. HISCOCK: Right now, the OIPC can weigh in on whether something is commercially sensitive.

CHAIR ORSBORN: But that's the extent of it, isn't it?

MR. HISCOCK: That's the extent of it. That is correct. They can weigh in on it; they can give us our feedback.

CHAIR ORSBORN: Right. Okay. The OIPC then, I'm not quite sure what they have to do. If they determine it's commercially sensitive, if they uphold the decision, then, of the CEO, what happens? How does the appeal proceed?

MR. HISCOCK: At that point, it would be on the applicant to appeal to the Supreme Court.

CHAIR ORSBORN: Okay. What limits are placed on the court? Is it, again, the court simply determining whether the information is commercially sensitive?

MR. HISCOCK: Exactly. They would be determining that.

CHAIR ORSBORN: That would be the only area of dispute all the way through this process, whether the information comes within the definition of commercially sensitive?

MR. HISCOCK: That's my understanding. Correct.

CHAIR ORSBORN: No assessment of the opinion of the CEO that a competitive position would be harmed, a negotiating position interfered with. Once it's certified, that's done?

MR. HISCOCK: Once it's certified, as of today, that's largely done. The OIPC will weigh in. They'll make some comments here and there, but yes.

CHAIR ORSBORN: Not a lot left out of that definition, is there, commercially sensitive?

MR. HISCOCK: It's a fairly broad definition.

MR. HICKMAN: We have not been – I was going to say we've never been to court. There's been one maybe years ago with this where someone appealed to court.

I agree the act is pretty constrained. I believe the court can go dig a little bit deeper than that. I mean, certainly, if we would take the position that it's third party information, that this is customarily dealt with on a confidential basis, they can question it. But I agree; there's only so far they can go with it, if there's a certification of the CEO, but it is limited. I think a court would go a little bit farther than that.

CHAIR ORSBORN: Maybe. I don't know; I haven't been in the position. Certainly, at the

Commissioner's level, the Commissioner is required to accept the certification that it's harm or confidential or whatever. The only assessment of the Commissioner, as this is structured, is to whether or not it comes through in the definition?

MR. HICKMAN: Exactly.

CHAIR ORSBORN: Okay.

MR. HISCOCK: I just want to touch on the recommendation that we have come up with for a moment. It was in our submission, but I think it's an important one to go over. Again, it is simply a five-step process. So just to go through that.

"If a complaint is received by Nalcor in relation to the use section 5.4, Nalcor will develop an information package that clearly explains the justification for utilizing that section of the ECA." We would then take that information package –

CHAIR ORSBORN: Okay, let me just stop you there.

Justification in terms of classifying something as commercially sensitive? Or justification in terms of harm or confidentiality?

MR. HISCOCK: In terms of classifying something as commercially sensitive. Both, actually, because we would need to speak to the harm within that section of the act.

CHAIR ORSBORN: Okay. So that would go one step beyond the legislation in that you would be informally explaining to the Commissioner why the CEO reached the opinion and why the board certified that something was harmful or confidential.

MR. HISCOCK: Yeah, and the board certification will actually come later in this new process.

MR. HICKMAN: Yeah.

CHAIR ORSBORN: Yeah, okay.

MR. HISCOCK: Yeah.

In number two, that information package will then be shared directly with the OIPC. They will then be given an opportunity to comment on whatever they want to comment on, whether it's commercial sensitivity or whether they have any recommendations. We're going to keep that process fairly open.

CHAIR ORSBORN: Well, that was my question, because in number three there you talk about: OIPC can review, provide a response to the board with any comments, et cetera, with respect to the commercial sensitivity.

MR. HISCOCK: Yes.

CHAIR ORSBORN: But are you saying it goes beyond that?

MR. HISCOCK: With respect to the commercial sensitivity, yeah, and they could even speak about harm if they have an opinion as to what the harm will be.

CHAIR ORSBORN: (Inaudible) my question. Okay.

MR. HISCOCK: Yeah. We –

CHAIR ORSBORN: So you're suggesting that the OIPC would have a chance to comment on the two-level decisions that have to be made. One: Is it commercially sensitive? Number two: Should it be protected?

MR. HISCOCK: Yes, they will be able to comment on that and we will feed that into our board.

The board of directors will then review the original information package, as well as the OIPC's response, and factor all of that into their decision. The other benefit that we're going to get here is that that formal decision will need to be made available back to the OIPC and back to the applicant as well.

The final decision from Nalcor's board of directors will be shared with the OIPC detailing, not only our position, but our position as it stands to the comments brought forward by the OIPC. We're inserting them, to a degree, into our own information-making process.

CHAIR ORSBORN: The board looks at all aspects of the decision, not just the commercial sensitivity, but also the harm issue.

MR. HISCOCK: Yes.

CHAIR ORSBORN: Okay. Are you suggesting that this be incorporated into legislation somehow, or made a more sort of formal practice?

MR. HISCOCK: Yeah, I'm suggesting that while this may be slightly different than the recommendation 3 that stemmed out of the –

CHAIR ORSBORN: Yeah, I was going to ask you about that.

MR. HISCOCK: – Inquiry Respecting the Muskrat Falls Project, our preference would be to not implement that recommendation and, in lieu of that, implement this process which we feel improves openness and transparency without having the negative impact of worsening our business relationships that we rely on with our business partners.

CHAIR ORSBORN: I don't know if you're able to expand on that recommendation. The way it reads is it should amend 5.4 to authorize the OIPC to determine if you're required to disclose information it wishes to withhold on the grounds of commercial sensitivity. But the Commissioner already has that power, doesn't he, to rule on whether or not it's commercially sensitive?

MR. HISCOCK: They can make a ruling on whether or not they think it's commercially sensitive but if we had the sign-off from our CEO and by our board, for lack of a better term, it doesn't carry a whole lot of meaning then, because that effectively shuts that information down from going out the door.

This new process would have much more of a back and forth between the Nalcor board and the –

CHAIR ORSBORN: I am trying to understand that the extent of the recommendation, it seems to focus on commercial sensitivity. As the statute stands now, the OIPC can assess it for commercial sensitivity whether it comes within the definition.

MR. HISCOCK: Yes.

CHAIR ORSBORN: So I am trying to understand how the – can you help me? Does the recommendation go beyond that? It's focused on commercial sensitivity.

MR. HICKMAN: If I may, I had the benefit of sitting in this room when some of this discussion was going on and there was some attention given to 5.4 and one of the key aspects was that it felt that the people who were critical of it, who felt that the Commissioner was somewhat powerless. We have, as Grant has explained, he can say well, this is what I think but if the CEO, with the board's agreement, signs off on it, then whatever the Commissioner finds is really of no effect.

We interpret that – we being Nalcor – recommendation to mean, in essence, this exception should be treated like the other exceptions in the ATIPP Act, in that the Commissioner, if there's a complaint – we would have the opportunity to put forward our position and he would review it and then he would issue a response which may be recommending disclosure of some or all of the information, and then we would have to follow the rest of the act. That's how we've interpreted it.

CHAIR ORSBORN: So 5.4 would be essentially a part of ATIPPA subject to the Commissioner, okay.

MR. HICKMAN: Exactly. Yeah, that's the way we would interpret it.

CHAIR ORSBORN: That is what I assumed, okay.

MR. HICKMAN: If I may go back as to why Mr. Keating and Mr. Templeton explained why it is important to the oil and gas business. We believe it's important to the rest of our organization too that this sort of final say, subject to appeal to the court, rests with the board.

The process we're suggesting is – we understand the concern that people have. There's this balance of the public's interest of disclosure and understanding what's going on, balanced with the commercial interests that we, as a corporation, have and our partners have. Ultimately, if they're in the best interests of Nalcor, they're in the best interests of the province.

The process we're putting forward is to shine a bit of a brighter light on it, transparency to the process. We have to fully explain why we took the position, explain that to the Commissioner; he then can turn and then fully explain his position. Then our board can take – this is sort of like a fresh set of eyes – a look at it. They may defer it from the CEO, in some respects. Whether or not they do, their final decision in that regard would be outlined as well for the applicant to see.

It's about putting more transparency on the process. Right now, I think that this is part of the process; it's just like whatever Nalcor says is (inaudible).

CHAIR ORSBORN: Yeah. Trying to work through the recommendations of Justice LeBlanc. Just assume, for the sake of argument only, that you had the harm and confidentiality provisions in 5.4 and then you had the commercially sensitive argument. What would be the prejudice to Nalcor if the commercial sensitivity and the reason for non-disclosure were subject to review by the Commissioner with the possibility of a recommendation for release, which could then be taken to court? What would the prejudice to Nalcor be?

MR. HISCOCK: The difficulty for Nalcor there is –

CHAIR ORSBORN: Can you get your mic on?

MR. HISCOCK: The difficulty for Nalcor there, when it comes to our business partners and oil and gas companies as well, is knowing that there may be a third party deciding whether or not their information gets released. To a slightly lesser degree, they're going to look at that the same as if they never had access to that provision, because it is going outside of the relationship between the business partner and Nalcor and they are losing some control there.

While it's not completely the same as if it went away, some of our business partners would take a great deal of concern over the fact that we're introducing someone else into it.

CHAIR ORSBORN: As of now, the Commissioner can't order release. He can recommend it.

MR. HISCOCK: Exactly, they can recommend it.

CHAIR ORSBORN: Are you suggesting that your partners would get upset if the Commissioner had the power to recommend but not order?

MR. HISCOCK: I think – and correct me if I'm wrong – if the Commissioner has the power to recommend and then they put that on us, in most cases outside of 5.4 we would then need to take that to court.

CHAIR ORSBORN: Yeah.

MR. HISCOCK: Right, so –

CHAIR ORSBORN: Where you felt that something should not be –

MR. HISCOCK: Yeah.

CHAIR ORSBORN: – released.

MR. HISCOCK: If that's the way it was going to work around section 5.4, then absolutely and, Jim, correct me if I'm wrong – Mr. Keating. Our business partners would have concerns around that because it's now the relationship between us and our business partners, and we're now introducing another body that has the authority, potentially, to make their life a lot more difficult when it comes to trying to keep that commercially sensitive information close to their chest.

MR. HICKMAN: Yeah and I think it would be whittling away at these protections that our partners feel they have with respect to disclosure of information. This is a world they're not used to. We talk about oil and gas because they were

sort of the genesis of this, but we do have others such as Emera and the Innu –

CHAIR ORSBORN: That's the world they're in, isn't it.

MR. HICKMAN: Pardon?

CHAIR ORSBORN: I say that's the world they're in.

MR. HICKMAN: Yeah, it's the world they're in. Yeah, exactly.

There are the Emeras of the world – who are a key partner of ours – and the Innu, as Grant pointed out and as you know, highlight in their submission. Each layer that goes makes them a lot less comfortable and, we believe, a lot less able to share with us or likely to share with us key information. Or even in some instances, if they're not in relationship with us now, to not get into a relationship with us, which we believe would be harmful to the business that we're in and thus the province.

Yes, there's no doubt that ultimately if an applicant under the present situation can still go to Supreme Court and appeal it, it's a little bit constrained, as we discussed earlier, about how far even a court can go in its review. As I say, the more this is whittled away, the more uncomfortable they get and that puts us in a difficult position.

I think Grant mentioned earlier in some instances we would have to pursue, go to court over this. In just about all instances we're going to want to, because it's in our best interests and the interest of our partners to go to court to contest such a recommendation. While maybe that's fine and Nalcor has to do that all the time, that's time, expense and resources.

If the position now is the applicant, if they feel strongly about it they'll go to court, that's great; we'll be there and we'll be there to contest their application. But I can say that we would – it would be almost automatic that we would be in court over any recommendation that would be for us to disclose information that we felt should be retained under 5.4.

I'm not meaning that as a threat or anything like that, I'm just saying that's the way it is. That's the world we live in. We're playing in a commercial world and there are expectations on us from our partners.

MR. HISCOCK: While our recommendation – and I'm happy to go into more detail on that – may not specifically address Recommendation 3 coming out of the Inquiry Respecting the Muskrat Falls Project, if implemented it will still have the benefit of improving transparency without putting business relationships and, ultimately, the economy of the province, at stake.

We submit that the onus should be on the applicant to choose whether or not to proceed with a complaint to the Supreme Court, rather than implementing a system that would quite possibly see Nalcor in court with respect to all OIPC decisions that recommend the release of commercially sensitive information. Overall, this will provide for dramatically more information being provided to the applicant with a greater level of transparency, while protecting Nalcor's ability to sometimes operate like a true commercial entity, when it is required to do so, to maximize the return to the province.

Not only will this provide for greater involvement by the OIPC, but it will better inform the applicant and the general public. Additionally, this new process may be financially beneficial to the applicant who may have previously considered a complaint directly to the Supreme Court. They will now be receiving significantly more information in advance of any deliberations regarding possible court proceedings that should prove helpful in their decision-making.

This is ultimately about balance. Nalcor does understand the concerns of the public and of this committee in weighing the needs of the applicants with the needs of the public bodies. From a public-facing point of view, this new approach puts more onus on both Nalcor and on the Information Commissioner to better inform the applicant while, again – and not sound too repetitive – still affording Nalcor the protections that it needs to operate successfully and maximize the return to the province.

CHAIR ORSBORN: It doesn't mention it specifically but your proposal would contemplate the sharing of the information package that you provide the OIPC – the sharing of that with the applicant.

MR. HISCOCK: Yes.

Before I dive into your questions – and that might create a bit of discussion – I just wanted to touch on one final point here which is that Nalcor does not use section 5.4 of the ECA without serious consideration. We will always look to the ATIPPA first. We limit the use as much as possible.

The other thing is, too, most applicants now understand its use and importance. The majority of historical complaints, actually, that we have received, even going back 10 years, they're all coming from a similar source and dealing with a similar issue. I won't go into any more details there as to avoid revealing any information about the applicant. Outside of one area, we receive very little complaints on the use of 5.4. Like I said, we don't use it easily.

Additional protections are sometimes needed. Any changes to section 39 would not necessarily negate the additional need for Nalcor to have protections afforded by the ECA, unless section 39 was to be altered in an impactful way and include language similar to what is found in the ECA.

One other thing I want to mention here is our commitment to going above and beyond and meeting with applicants by always being available, whether it's over the phone, email or in person. I'm certainly looking forward to being able to do that again once that's a normal course of day-to-day life, but we do that when it comes to section 5.4 as well. We're not trying to hide information; we're certainly open to talking about it. It's happened in the past. If we need to redact or withhold information under 5.4 and an applicant wants to have a chat with me about why we withheld it, I'll certainly do that, without giving away confidential information.

That brings me to the end of the main points that we wanted to bring up, I'd now like to get into the seven questions that you kindly provided to us last week.

The first question that was raised: The reference to "current confusion" in section 39, is it a matter of wording of the legislation or its current interpretation by the OIPC? The issue is the fact that contracts – and you've probably heard this before – and many other agreements are deemed to be negotiated and not supplied "in confidence," as a word in section 39 of the act states, and it is very confusing to third parties.

Based on this, many, if not all, contracts and many other types of agreements essentially cannot meet the full three-part test required in order to apply section 39. That becomes extremely difficult, ignoring the ECA and the *Oil and Gas Corporation Act*, when you're talking about project agreements with oil companies and contracts with major business partners for major projects, it does become challenging.

Nalcor's suggestion at page 7: Does it refer to the OIPC assessing commercial sensitivity or to a review of the CEO's 5.4 beliefs?

CHAIR ORSBORN: We just discussed that.

MR. HISCOCK: We just discussed that. Okay, so I'll move past that one.

Recommendation 3 of the Muskrat Falls inquiry report, we did kind of touch on this one as well, so I'll keep moving.

Number four: Why should a third party business dealing with Nalcor have greater information protection than when dealing with other public bodies, i.e., the Department of Industry, Energy and Technology?

This one is interesting because I think this is less about why Nalcor and its business partners require greater information protection than other public bodies, and more about the past and future policy direction that the government wants to take with respect to Nalcor.

After the *Energy Corporation Act* was created, government developed an understanding regarding the need for section 5.4 of the ECA in order for Nalcor to be in a position to effectively compete and engage in business relationships with various oil and gas companies and, eventually, other business partners as well.

As discussed in our submission, without the protections afforded by the ECA, the oil and gas companies would have never given us a seat at the management table. We would have been flying at least partially blind with respect to key decisions regarding the province's own assets. Thankfully, the need for the exception was realized and it was implemented. While it was initially created for the oil and gas business, it is also very beneficial to other elements of Nalcor's operations, such as the Lower Churchill Project, that would also require the protection afforded by 5.4.

CHAIR ORSBORN: Yeah, so I take it then, going back to what Mr. Templeton said earlier, that if you have a contract for office supplies, you would assess their request for information under that contract under section 39, as opposed to 5.4.

MR. HISCOCK: For a contract for office supplies, yes, we would go to the ATIPP Act first and deal with that within the ATIPP Act.

CHAIR ORSBORN: Okay.

MR. HISCOCK: We try not to use the *Energy Corporation Act* unless we need to.

CHAIR ORSBORN: Yeah, I think the question sort of assumed that you would use 5.4 for everything to do with all of the contracts you have if you –

MR. HISCOCK: No, if there are elements that can be dealt with under a normal part of the act, then we will go that way. Absolutely.

CHAIR ORSBORN: Okay.

MR. HISCOCK: Yeah.

CHAIR ORSBORN: So, in that sense, the third party contractor dealing with you is on the same footing as dealing with the Department of Education or whatever?

MR. HISCOCK: Right, right.

CHAIR ORSBORN: All right.

MR. HISCOCK: Altering the protection afforded to Nalcor by the ECA would essentially represent a change in policy direction for how Nalcor is to conduct business and how the corporation can compete to ensure that we receive the maximum return on the province's natural resources.

NL Hydro is a monopoly and cannot access the extra protection afforded by the ECA. Businesses and individuals must do business with NL Hydro. Being a monopoly, competition is not as much of an issue and information should rightfully flow more seamlessly to the general public. Nalcor oil and gas, Nalcor oil and the Oil and Gas Corporation of Newfoundland and Labrador are not monopolies and consistently engage in competitive commercial activities.

Oil and gas companies and other business partners have options for who they choose to engage and do business with. By changing the way the ECA is currently applied, these companies and business partners may choose to do business elsewhere and with other partners, and with partners that can provide a greater degree of protection over information that is truly commercially sensitive and could have grave consequences for Nalcor, but more importantly for our business partners, if it were to be released. Because there is a commercial component to Nalcor's operations and a component that requires us to compete on a global stage, we must have the ability to apply section 5.4 of the ECA.

This next piece is an interesting question, actually: It has been suggested that Manitoba Hydro is able to function while being subject to the province's access to information laws. Assuming that is the case, what is the difference with Nalcor?

One point that I just want to make, I want to be clear here that NL Hydro, as I just stated, cannot avail of the *Energy Corporation Act* and that NL Hydro is governed only by the ATIPPA, with respect to access to information, just like Manitoba Hydro is bound by the *Freedom of Information and Protection of Privacy Act*, or the FIPPA. I'll still address this question, as it is an important one, and I understand that the question is really getting at the fact that both organizations – Manitoba Hydro and Nalcor through the Lower Churchill Project – have

developed major hydroelectric projects, but the distinction must be made that it isn't quite an apples-to-apples comparison.

It's interesting to note – I always enjoy talking to other ATIPP coordinators, whether it's within the province, on the federal system or in another province. I did speak with an individual within Manitoba Hydro and I can tell you that they absolutely wish that they had a similar exception. There are cases when their act doesn't provide the necessary protections for commercially sensitive information and there have been cases where there is a concern regarding the impact on those relationships.

We have discussed how Newfoundland and Labrador is really leading the way on access to information and protection of privacy. I also firmly believe that this notion applies to our development and use of section 5.4 of the ECA. I'm all for broadening information disclosure and I understand that represents progress as it comes to access to information, but I think progress, in a way, can sometimes be determined by the restrictions that are in the act and what those restrictions protect. I do think that is the case here.

I don't think this is an archaic exception. It is a progressive one and one that other jurisdictions may also like to have access to, albeit only in limited circumstances where it is absolutely required, the same as Nalcor.

One other important point that I want to make – and I know, Justice Orsborn, you're well aware of this because you brought it up yesterday in one of your questions – the Manitoba *Freedom of Information and Protection of Privacy Act* deals with third party business information in section 18 of that act. That section does contain one small difference from the NL ATIPPA that can have major implications for the ability to apply the exception.

In the Manitoba act, the head of a public body shall refuse to disclose information that reveals trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party supplied in confidence, or the disclosure of which would reasonably be expected to cause harm. I won't go through the harm definitions; they're the same as in our act. It's essentially a one-part test as opposed to a three-part test.

Comparing us to Manitoba Hydro today, I do feel that it's a bit of an apples-to-oranges comparison. Having said that – and for all the reasons discussed so far, especially the uniqueness of Nalcor Energy when compared to other Crowns – if similar language was to be found in our section 39 of the ATIPPA, I don't think that would necessarily negate the need for Nalcor to retain the ability to apply section 5.4 of the ECA like we do today. The two organizations have been historically guided by different policy directions to get to where they are today.

Question number 6: Do you consider Nalcor to be part of the normal expected functions of a democratic government, or rather a strictly commercial entity that happens to have government as its only shareholder? I touched on this a little bit in some previous responses, but we absolutely see Nalcor to be part of the normal expected functions of a democratic government. However, given the history, from a commercial and policy direction perspective, we feel that Nalcor and, more importantly, its business partners, require the additional protections provided by the ECA in order to ensure that we can compete and drive increased economic growth. We're absolutely part of the democratic process but we do have some differences.

The last question that you brought up to us was: Assume that commercial information currently held by Nalcor remained subject to section 5.4. See submission of the Innu Nation on page 2.

CHAIR ORSBORN: Yeah, they raised the issue of having gone in good faith with you, with Nalcor.

MR. HISCOCK: Yes.

CHAIR ORSBORN: They say what happens to us if that protection is gone.

MR. HISCOCK: Yes, so they had some grave concerns as well. As specifically as possible, please explain the effect of removing 5.4 with respect to (inaudible) acquired information.

The big thing there is we will not receive the necessary information required. Our partners will be reluctant to share key information. Oil and gas companies surely will not grant us a seat at their management table with respect to decisions on our own assets and resources, thereby impacting our ability to effectively compete.

One other point I want to raise is since the inception of the ECA in 2007, we since have had two new corporations created with a similar commercial sensitivity exception: the *Oil and Gas Corporation Act*, obviously, as well as the *Innovation and Business Investment Corporation Act*, which was put together in 2018. I just want to make the simple point that not too long ago government still understood the requirements for some of these types of language. Nalcor suggests that when it comes to information that relates to areas of the Crown that may be required to compete with private industry and drive economic growth and innovation, the requirement for these elevated levels of protection will certainly not disappear.

We are leading the way here for the entire country. Sometimes restrictions are also needed to balance the needs of the public to obtain the information of public bodies, with the requirement of some of those public bodies to compete with and do business with private companies who require a greater degree of information protection. We don't feel that this process is broken, but our recommendation noted in our submission will provide many additional benefits as described here today.

CHAIR ORSBORN: If I can just go back to that and to Judge LeBlanc's recommendation. Is it fair for me to take from that recommendation – and I didn't sit through the days of hearings that Mr. Hickman did – that he's not suggesting that 5.4 should be taken away, but suggesting that it should remain but with the insertion of the Privacy Commissioner in the full sense. You would disagree with the full sense part of it and want it back up to a more informal process. Is that …?

MR. HISCOCK: Exactly.

CHAIR ORSBORN: Okay. It's not within this recommendation, as you see it, from Justice LeBlanc; a recommendation that 5.4 should be done away with in terms of ATIPP.

Any final comments, Mr. Hickman?

MR. HICKMAN: If I may. This was mentioned earlier. I was going to just touch briefly on the solicitor-client settlement and litigation privileges. This has not been an issue for us. The information that people have asked us to disclose to them has – I'm struggling to think of an instance where privileged information was part of the records.

This hasn't been an issue for us so, to be quite frank, it wasn't on our radar. I've read the various submissions with some interest I have to say. I'm not at all going to go into great detail and repeat what was said very well by others. I just wanted to point out we support the positions put forward by the Department of Justice, the CBA and the Law Society. For those reasons, for the reasons they've outlined, we do not believe that ATIPPA provided the Commissioner with the authority to compel production to himself of records over which privilege is claimed, nor should he be provided with such authority. As I said, I'm not going to get into detail on that. Just put our support behind those submissions.

There are two things I just wanted to address or mention. First of all, in, I believe it was the Department of Justice's submission, they cite the University of Calgary decision of the Supreme Court. One of the points they make is that the courts can only compel production of documents to them, for which privilege is being claimed, when it's absolutely necessary – quote, unquote. It brings into question to us whether the Commissioner should be provided with absolute or unfettered power to compel production to himself of such records.

CHAIR ORSBORN: Yeah, that's a discussion we've had with a number of parties and with the Commissioner. I think I'm being fair to the Commissioner when the Commissioner basically said: We get an affidavit listing and whatnot in order to make an assessment of whether it's privileged or not, and if it was absolutely necessary after the receipt of that information to look at the documents to determine whether or not they're privileged.

If the Commissioner would have come to that conclusion – which the Commissioner himself said he thought would be unlikely – and pursue getting the documents, the public body would simply say: Well, no thank you, we're going off to court.

MR. HICKMAN: Okay. It's a bit of a balance –

CHAIR ORSBORN: There's a general sense that rather than having everybody run off to court every time –

MR. HICKMAN: Yes.

CHAIR ORSBORN: – there's a middle ground there where the Commissioner could look at probably the same stuff the court would look at before you decided if you have to see the records.

MR. HICKMAN: I get you. Okay.

CHAIR ORSBORN: Okay.

MR. HICKMAN: Okay, I understand. That's encouraging.

CHAIR ORSBORN: Yeah, well, I haven't decided anything yet.

MR. HICKMAN: No, no, I understand.

CHAIR ORSBORN: That's the tenor of the discussion we've had so far.

MR. HICKMAN: Well, I support that tenor.

The second point I just wanted to make: If, in fact, there is a recommendation that the Commissioner not be provided with the authority to compel production of records to himself over which privilege has been claimed, there is, I'll call, a loophole. In the past, when he hasn't been provided with the records, he has said: You haven't fulfilled your burden of proof, so my recommendation is you disclose it, and then off to court they go.

I wouldn't want that loophole to continue. I don't think the loophole should continue to exist, if, as I said, the recommendation is made that the Commissioner not be provided with authority to compel production of records over which privilege is claimed.

CHAIR ORSBORN: Are you dealing just with the privilege there?

MR. HICKMAN: Pardon?

CHAIR ORSBORN: You're dealing just with privilege?

MR. HICKMAN: Yes, I'm just dealing with privilege.

CHAIR ORSBORN: I think that probably arises in the situation where there's a request of records, the public body says: I'm sorry, they're privileged. Go away.

MR. HICKMAN: Then he says –

CHAIR ORSBORN: Without giving the Commissioner anything at all to support the claim for privilege.

MR. HICKMAN: Yes, exactly.

That was the end of my comments on privilege, other than to thank you and thank everybody else involved in this process for this opportunity. I'll echo Grant's sentiments about – they're not here but maybe they're listening – the ATIPP Office and the OIPC. We've had a very good relationship with them. They've been very helpful to us over the years, certainly, since Grant has been here and to the years prior to that. That's very much appreciated.

CHAIR ORSBORN: That's the general sense I have, both from the submissions – and as I indicated in my earlier comment yesterday morning, I held a number of anonymous sessions, coordinated both in person, on Skype and in my survey. By and large, all the coordinators have been quite complimentary of the support they have received both from the ATIPP office and from the OIPC office.

I think, as I said yesterday morning, there is a general consensus among the public bodies that are tasked with complying with the act, that the act and its principles need to be supported, so that is encouraging. There are going to be differences of opinion that we'll talk about, but

by and large I think the act is regarded as most beneficial for our system of governance from everything I've heard.

MR. HICKMAN: Yes, no doubt.

If there are any further questions moving forward, please, obviously, feel free to contact us.

CHAIR ORSBORN: Thank you very much. I appreciate your attendance.