ATIPPA STATUTORY REVIEW COMMITTEE 2020

Transcript Volume 7

Committee Chair: Honourable David B. Orsborn

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CHAIR ORSBORN: Good morning.

Welcome to this public consultation session of the 2020 review of the Access to Information and Protection of Privacy Act.

Section 39 of the act, the section dealing with third party business interests, has generated a lot of comment and a number of suggestions for change. I felt it would better help me appreciate the issues and concerns if I were to hold a session devoted only to section 39 in a format that might allow a little freer discussion and a focused exchange of views.

A number of those who made written submissions have agreed to participate this morning. This morning we have on video, on behalf of the Centre for Law and Democracy, J. Y. Hoh, and on behalf of the Newfoundland and Labrador Aquaculture Industry Association, Mark Lane.

Present in person we have Michael Harvey, Information and Privacy Commissioner, and from his office, Sean Murray; from the Heavy Civil Association of Newfoundland and Labrador, Jim Organ; Edward Hollett on his own behalf; on behalf of the College of the North Atlantic, Heidi Staeben-Simmons and Donna Eldridge; and on behalf of the City of St. John's, Katie Philpott.

Welcome to you all. Thank you for your participation.

You will note the absence of representatives from government departments and the ATIPP Office in the Department of Justice. Their absence is because of the election and the observance of the caretaker convention. I have received written submissions from Executive Council, from departments and from the ATIPP Office, many of which submissions dealt with section 39. Those submissions are on the committee website.

The absence of government and the ATIPP Office from these discussions is unfortunate but unavoidable. At some point after the formation of a new government, there will be public sessions with presentations from the ATIPP Office and from the Department of Justice on behalf of government departments. The Office of the Information and Privacy Commissioner will then follow with its comments on all presentations.

In today's session, may I suggest that each party first give a summary of their views and suggestions? At some point, I'll likely have some questions, perhaps to one participant, perhaps to all. I'll manage the format as we go and we will see how it proceeds.

My terms of reference require me to review the list of provisions in Schedule A to the act to determine the necessity for their continued inclusion in that Schedule. I'm also asked to consider the recommendation of Justice Richard LeBlanc in his report on the Muskrat Falls inquiry concerning section 5.4 of the *Energy Corporation Act* and the oversight by the Office of the Information and Privacy Commissioner on the operation of that particular legislation. At some point in the discussion, I would appreciate any views you may have on these issues.

As I've said before, this committee is not considered, by me at least, to be an adjudicative or dispute-resolution forum. I consider it appropriate to adopt a collaborative approach. Accordingly, there will not be any particular order of presentation.

In order to keep the webcast audio as clear as possible, may I ask that if you are appearing remotely, you mute your sound if you are not talking. If present in person, please only turn on your microphone when you are talking and turn the mic towards you.

I think perhaps, then, I'll turn first to the video participants this morning and Mr. Hoh, on behalf of the Centre for Law and Democracy.

Mr. Hoh, thank you.

MR. HOH: Thank you very much to the Chair.

Before I begin, can I just confirm that everyone in the room can hear me clearly?

CHAIR ORSBORN: Yes, we can hear you. Thank you.

MR. HOH: Fantastic.

Just as a first point, our executive director, Mr. Mendel, sends his apologies for not being able to be here today. He had a few pressing other issues and he very much wanted to be here.

CHAIR ORSBORN: Thank you.

MR. HOH: I'm just going to make a few quick points about section 39 and the accompanying notification procedure under section 19.

The global experience with third party business interests has been that public officials are generally leaning towards not releasing information that might engage those interests; in other words, they tend to err on the side of caution. In some cases, very rightfully so because third party business interests are, indeed, very worthy of protection, but we think that the right balance to strike is one that doesn't convert caution into an overabundance of caution because that can cause the right of access to be unduly restricted.

Moving straight to the way the provision works, section 39, the way we understand it is there are three main outcomes that can come from an exception operating. In the case where the public official determines that the exception does apply, the information is not disclosed. In the situation where the public official determines clearly that the exception does not apply, the information should be disclosed. Then section 19 comes in where there's a sort of uncertainty or – to use the language of the statute – where there is reason to believe that there might be engagement of these third party business interests. In which case the section 19 procedure is engaged, which triggers a potential right to appeal, which then could frustrate any right of access until the entire appeals procedure is completed.

The problem here is that we understand, from some reports of the Information Commissioner, that in some cases even if the public official has made a clear determination that the exception does not apply and that information should be released, sometimes the section 19 notification procedure is still triggered. If that happens, then the right to access is frustrated until the appeal procedure is completely extinguished.

We think that shouldn't happen. If that is indeed happening on the ground, then it may be useful to introduce explicit language into the law to make it very, very clear that the section 19 procedure should not be triggered once the public official has made it very, very clear that the third party exception does not apply.

I think that it's also important to note that the language of section 19, itself, is already weighted against disclosure. The wording is fairly tentative; it's not a high barrier to clear. The public official only needs reason to believe that section 39 might be engaged. That could potentially really apply to situations where the public official is fairly sure, like 80 per cent, but not a hundred per cent sure that the exception applies, but has sort of like a small, minor reason to believe that it might be engaged. In those situations, the section 19 procedure is still being triggered which might result in a delay of access. It's already weighted one way, so I think there might be some room to further reduce the number of situations in which the notification procedure is triggered.

So just to give a bit of information on the international experience, almost all jurisdictions – not just in Canada but globally – have a specialized exception for third party business interests. I think that really kind of speaks to how important protecting that interest is to many governments, because they almost uniformly all have it. But most international jurisdictions don't have this kind of notification regime, so it's just sort of treated as a regular exception. Either the public official deems the exception to apply, in which case the information is not released, or it doesn't apply, in which case the information is released, subject to external appeal.

Now, public officials can get that determination wrong, they're not perfect, but if on the off chance that they do get that wrong, there's always the option later for the affected third party to sort of claim compensation.

We think that really that model is sort of the better one. We do understand the utility of the section 19 notification procedure in place now in Newfoundland, but if there is going to be a notification procedure, it should operate so that

if the exception doesn't apply, the procedure doesn't frustrate the right of access.

Just two more quick points very briefly. The first is on the sunset clause, which is 50 years long. I think our position on that is that's really quite a bit too long. The international standard for sunset clauses generally has been that 15-20 years is generally long enough for any information to no longer be sensitive. Our third point, not to keep banging the drum on this, but it has to do with the public interest override. We do think it really should apply in this situation as in all exceptions. There may be many situations where there might be damage to third party commercial interests that might be very well in the public interest to release, such as any kind of unethical behaviour on the part of the business or corporation.

That's all I had for opening remarks today. I hand my time back to the Chair.

CHAIR ORSBORN: Thank you, Mr. Hoh.

I turn now to another participant on video, Mr. Mark Lane from the Aquaculture Industry Association. Mr. Lane, if you're there, Sir.

MR. LANE: I can hear you, Mr. Chair.

CHAIR ORSBORN: Yeah, we can hear you.

MR. LANE: Thank you.

For those of you who may not know, my name is Mark Lane, as the Chair had mentioned. I am the Executive Director for the Newfoundland Aquaculture Industry Association.

Thank you, first of all, Mr. Chair, for the opportunity to make an oral presentation here this morning at the round table in relation to section 39 of the ATIPP Act, 2015. For the benefit of those who may be joining us online or in person this morning, I just want to give a brief one-minute overview of what NAIA actually is.

We are a membership-based industry association that represents the interests of more than 135 international companies – seafood farmers and their suppliers – that have operations and business interests in the Province of Newfoundland and Labrador. We passionately advocate, as most industry associations do, on behalf of our members to facilitate and to promote the responsible development of the aquaculture industry in this province.

Just a bit of context of why we're important and why this is relevant is that as the global population continues to grow, so too does the demand for food and, certainly, seafood. Just a few years ago, that seafood consumed from farmed origins surpassed that of wild; therefore, in this province we have an opportunity to embrace that, of course, for business opportunity.

In relation, then, to why we're here this morning, the actual ATIPP Act, we routinely share information, a lot of information, with public bodies within the provincial government, the federal government and stakeholders. We do that as a matter of licensing and, certainly, of statutory compliance. We're also subject to regulatory auditing, inspection, third party certification, so it's generally accepted in the membership of NAIA that such reporting and collection of information is absolutely paramount and a hallmark of responsible regulatory oversight.

The *Aquaculture Act* in itself directs, obviously, licensees – so members, seafood farmers – to share information with government. Just a couple of examples: Within the *Aquaculture Act*, which relates to aquaculture licensing, we must provide the Minister of Fisheries, Forestry and Agriculture and the department with records and information that may be kept and may be shared that he or she – the minister in this case – would consider to be advisable.

In subsection 6(4) in that same act, the *Aquaculture Act*, which relates to inspection, it provides that a person responsible for aquaculture gear or equipment in an aquaculture facility or other prescribed place shall provide information, documents and samples, et cetera. Again, another requirement to provide information.

Then, of course, we have the Newfoundland and Labrador Aquaculture Policies and Procedures, which was issued under the act in 2019, which likewise includes policies which involve the reporting and collection of business information

of aquaculture licensees. For example, Application Requirements require farmers to provide production numbers, financial information, proprietary information, fish health management plans, production plans and any and all other such business information to government, that which they deem to be relevant.

Under the aquaculture policy 7, Annual Reporting, we are required to annually report to government information related to our business operations and licensed aquaculture sites. Then, of course, without getting into too much detail, Mr. Chair, there are multiple policies such as the Aquaculture Inspection Program, the Public Reporting component, aquaculture policy 17, et cetera.

Why this is relevant is that, as a result of these requirements, the Government of Newfoundland and Labrador has in its possession, in its custody and, certainly, in its control, an ever-growing collection of business and commercially sensitive information related to aquaculture licensees and their commercial activities. With ATIPPA, 2015 that applies to all records in the custody of or under the control of public bodies, such as the Government of Newfoundland and Labrador. Therefore, all of this information, which I outlined previously, which is collected and we do that as a part of the regulatory requirements, these records that are collected by the government, pursuant to the aquaculture licence conditions, the requirements of the *Aquaculture Act* and the aquaculture policies are then records to which ATIPPA, 2015 could apply.

With relation specifically to section 39, which is why we're here this morning, when public bodies are preparing responses to access – and I guess the biggest part we have with section 39, point-blank, is that there's a three-part test. The three-part test of that would be whether or not the information would reveal trade secrets or a third party.

I won't go through all of that, Mr. Chair, we are all quite familiar with section 39. But what we find is that we find it challenging, specifically related to this section of the act, section 39, that the three-part test, the second part and certainly the third, we typically find ourselves not qualifying for that; therefore, our proprietary information is, in fact, released to the general public, because it's subject to and under the control of the provincial government.

As I said, in practice, the three-part test is seldom met. The difficulty lies, I guess, probably specifically in the second part of that test which requires that the information be supplied implicitly, explicitly or in confidence. While some third party business information may be supplied in confidence, others such as contracts are deemed to be negotiated or supplied; therefore, fail to meet the requirements of that part of the test, the second part of the test. Such records, as I had indicated, may contain and most often do contain commercially sensitive information. However, the current section 39, as it's written and phrased, disallows the application of section 39 to our records and therefore our proprietary information is released to the general public.

I know in my oral presentation previously, Mr. Chair, you had asked for a specific example. For the benefit of the viewers today and in your presence, a specific example would be our production numbers, fish stocking densities, number of cages on site, et cetera. That information is proprietary to each individual company because not every company farms the same way. Therefore, with the release of that information, in some instances proprietary and confidential information can be compromised in a general or in a public forum. Equally problematic, to the second component of the test, is the application of the third which is routinely accorded an unduly high threshold to substantiate.

I think I'll leave it there, Mr. Chair. We have two other recommendations, which are unrelated to section 39, but I'll leave it there for now. If there are any questions, I'll certainly entertain those. If there's any explanation required on your part, or for the benefit of others in attendance on the other two written submissions in relation to Schedule A of the *Aquaculture Act* – it's not included in Schedule A of the ATIPP Act or in relation to it being treated equally as other industries, I'm here at your disposal, Sir.

CHAIR ORSBORN: Can I assume that it would be your position that you are essentially

in the same position as those who are in the offshore fish business, and with the *Fisheries Act* and related being included in Schedule A, that you think there's a bit of a disconnect there between your business and the offshore fish business? Is that fair?

MR. LANE: Yes, Sir. Well, the offshore oil and gas, for example, is also included in Schedule A, so we should be afforded that same level of protection. As I said, the amount of information that my members are now reporting to government, which end up in mainstream media from time to time, is exorbitant.

There are only three seafood farmers, for example, farming salmon in the Province of Newfoundland; therefore, the disclosure of proprietary information or confidential information, specifically related to the business operation aspect, could be quite compromising to companies. Yes, we would like to be afforded that same level of protection by having the *Aquaculture Act* included in Schedule A.

CHAIR ORSBORN: Okay.

I said before, this is not an adjudicated forum but I still like to ask a couple of questions.

MR. LANE: No problem, Sir.

CHAIR ORSBORN: You mentioned issues of confidentiality and trying to satisfy that part of the test. Just leaving that aside for a moment and looking at the harm side of it, either on the competitive side or financial loss or whatever, in situations where your members have been required – or the public body has been required – to release information related to your members, are you able to give me any specific examples, without naming names, of harm that has come to your members, or loss to one of your members or decisions by a company not to operate in the province?

MR. LANE: Well, generally speaking, as I had mentioned before, Mr. Chair, there are a number of individuals and organizations who are in opposition to our industry, like any industry. These individuals continuously request information from the Department of Fisheries and Aquaculture and other departments in the provincial government.

So then, I read about proprietary information in mainstream media; as I said, for example, the stocking densities, number of cages on sites and configuration of sites. We have absolutely no issue reporting items of interest to the general public; for example, disease detection, mortality events, et cetera. That's no problem. The issue we find ourselves in, as you had alluded to, is that there is confidential, proprietary information released. When that's reported in mainstream media such as, for example, a trade magazine like *Intrafish* or *FishFarmingExpert*, for example, or *SeafoodSource*, people reach out to me globally and ask: If I come to invest in the Province of Newfoundland and Labrador, will my business plan, will my intentions, will my proprietary information be released as I have seen other's released in the past?

Therefore, the way that we are operating in this province, having afforded no protection of any information provided to government, it is an absolute investment deterrent, I think it's safe to say, from people coming into the province. With the operators here, we have a collaborative relationship, obviously, through NAIA and just through business in general, but trade secrets or proprietary information related to specific operations and how people are farming and how they are operating their standard operating procedures, that type of information then is released to the public.

It's a good thing we're all friends in the industry, but we do have some issues whereby companies are seeing information that they shouldn't.

CHAIR ORSBORN: Okay.

When you use the term "proprietary information," are you equating that to what would be considered a trade secret?

MR. LANE: I would. I'm using "trade secret" because I think that's the exact language in the *Aquaculture Act*, I think, or the ATIPP Act. I can't remember offhand, Mr. Chair, but I did see that language.

In terms of us, we are an open book. I would think we are probably – well, we are certainly the most transparent industry in food, but probably the most transparent industry in the

province overall of any sector. A lot of these requests that go into government there's no accountability; it's done by those who want to kill the industry, in some instances. It's really unfair that these individuals take the information without any accountability on their part because it's done anonymously and done for free at the expense of the taxpayers. They get this information and they maliciously, in some cases, misconstrue that information in a public forum.

We find that very disheartening that they can get access to proprietary information or confidential information of a competitive nature and use that against us ourselves in a court of public opinion on *Open Line* or in some other trade magazine and use that information maliciously against us. It's twofold: It's competitors getting information that they probably shouldn't get and then it's also those who oppose industry getting information and then using it maliciously to cause harm.

CHAIR ORSBORN: All right.

Thank you, Mr. Lane.

MR. LANE: Thank you, Mr. Chair, for the opportunity.

CHAIR ORSBORN: Mr. Organ.

MR. ORGAN: Thank you, Mr. Chair, for the opportunity to come here today and say a few words. I would have been here before and did a more detailed presentation to yourself.

Maybe, first of all, my name again is Jim Organ. I'm the executive director of the Heavy Civil Association of Newfoundland and Labrador. Our association represents the contractors and their suppliers who do roadwork, paving and water- and sewer-type work throughout the province, bridges. We talk about it in terms of horizontal construction and building construction being vertical.

With that said, certainly, I do want to reiterate that our industry has no issue with the freedom of information act, in general, and understand the benefits of open and transparent government business dealings, no question about that whatsoever. My point is similar to what we had just heard from the aquaculture industry, but it's going to be a little more definitive, so it will be a little bit shorter.

To get to the crux of the matter, while all contractor total prices – the total bid price for work that contractors bid on here in Newfoundland and Labrador in a public forum – absolutely need to be released to ensure openness and transparency, our board of directors and virtually all of our members truly cannot envision a circumstance within the general public realm where the unit pricing would be of particular interest to anybody.

Who would be requesting industry-specific unit price information? If it is being requested by other industry companies then, in our opinion, our view, this truly reinforces the concept that this information does have value. Again, intuitively, disclosure would be harmful to business interests of a third party and should fall under the sections within the act which are there to protect proprietary information.

One more little rant here, just to go a little, tiny bit deeper. Section 39, we feel a lot of it is truly open to interpretation, how you interpret the words within those three clauses. There must be a clear cause-and-effect relationship between the disclosure and alleged harm, the harm must be more than trivial or inconsequential and the likelihood of harm must be genuine and conceivable.

Within our industry, when we're referring to unit pricing, the words within those three sections, depending upon how they're interpreted – and today the interpretation leans towards proof of harm and we find that creates a little bit of a Catch-22. To satisfy those three items, when it comes to unit pricing for a contract or bid, a third party contractor whose unit pricing is being requested needs to be able to objectively prove that a specific negative, harmful outcome is sure to happen based on a subjective determination of a future circumstance. We find it extremely difficult to be able to prove that harm on what might happen down the road.

Again, I just go back to the intuitive aspect. Unit pricing, third party invoicing, subcontractor invoicing, we cannot envision a point where a member of the general public would have any

interest whatsoever in that type of information. The total bid price, absolutely; the components of that bid price, similar to the components of a vehicle which you might purchase, the only people who are going to be interested in the components, the building blocks of the total tender are other companies, competitors. That reinforces what we believe to be the proprietary nature of that information.

We feel the act was put there for the general public, for open transparency and not to provide contractors or competitors the ability to gain access to proprietary corporate information from another company.

CHAIR ORSBORN: Okay.

A couple of questions. Again, you mentioned proprietary information. Would the nature of the information you're talking about, the unit pricing, would that come within what you consider to be a trade secret?

MR. ORGAN: We feel that would fall within a broad category of trade secrets, absolutely. Many of our larger contractors spend years; they hire engineering staff with a tremendous amount of expertise. There are different programs and flow charts, which are established, and years of experience to develop unit pricing based upon particular jobs in particular areas, depending upon what that tender request may be. So yes.

CHAIR ORSBORN: Okay.

You talked about the level of harm that needs to be established. Is it your understanding that the present regime requires that it be proven that harm is sure to follow?

MR. ORGAN: Currently, that has been our experience when we've had discussions on this. Without the ability to definitively prove and depict harm from the release of that information, if we're not able to do that, then the information is released, has been released. We feel that it comes down to the interpretation of the act, the interpretation of those three clauses and we feel even if there was – in section 1, it says there must be a clear cause. I mean, even if it was something along the lines of there should be an intuitively reasonable cause-and-effect relationship, something that would allow you a little bit of leeway and room to objectively look at a request and say: That's not reasonable that that request is being made. I could understand that it is proprietary, it could be confidential and it could be the release of trade secrets, so we shouldn't give it out.

CHAIR ORSBORN: Is your concern, then, with the interpretation and application of the harms test, as opposed to the wording in the legislation?

MR. ORGAN: At the end of the day, our concern is that we feel the proprietary information, being unit pricing or subcontractor invoicing, again, we go back to the fact that we feel there's no reason for anyone from the general public to need that information. The total price: $1million to do five miles of road. Absolutely, they should have the total tender price, they should know where the government is spending their money. But how the contractor goes about developing that $5-million price tag, at the end of the day, the components of the successful bid, in our mind, it is proprietary, it is confidential and it should be kept within the realms of confidentiality.

CHAIR ORSBORN: Okay.

Thank you, Sir.

MR. ORGAN: Thank you, Mr. Chair.

CHAIR ORSBORN: Let's switch back to the second row.

The College of the North Atlantic.

MS. ELDRIDGE: (Inaudible.)

CHAIR ORSBORN: Ms. Eldridge, thank you.

MS. ELDRIDGE: Thank you again for the opportunity to participate in this round table.

The College of the North Atlantic has developed many successful and profitable business relationships with third party entities. While most of these involve the acquisition of goods and services, CNA also acts as a service provider in a significant number of partnerships. We respectfully submit that contractor records do no belong to the college nor are they

government records. We are given limited and temporary possession of third party business information, and sometimes the personal information of their clients and staff, for the sole purpose of administering the contracts we have engaged in. These contracts generate revenue which is then used for the benefit of the college and for the province.

By virtue of the fact that these records do not belong to us, the need to consider harm is not necessary. Disclosure in and of itself causes harm. It violates our contractual obligations and leaves us at a disadvantage when competing for similar contracts. We suggest that section 39 should be altered to address separately issues, records collected and used in relation to acquiring products and services versus giving the services and the products. We do not dispute the need to disclose how money is spent within government. We do, however, feel that third party contracts where we are service providers need more protection.

With relation to records where we are acquiring services, we support the idea put forward by some of our colleagues that there is a need for more process around determining what, if any, harm would result if records containing third party business information were released as part of an ATI request. When business information is considered for release there is a notification process under section 19. This would allow representation by third parties as to whether or not their information should be released.

For example, section 19(2) to (4) could be enhanced to allow for a five business day period for a third party to review the records being considered for release, consult with the ATIPP coordinator and decide if they consent to the disclosure. Please note the five days should not be included in the normal time frame for the completion of an ATI request. I respectfully suggest that this time and money saved by this consultation, in terms of the complaints that are avoided and the court appeals that are avoiding, negate any inconvenience that the extra five days would cause.

Thank you once again for this opportunity to participate.

CHAIR ORSBORN: All right, on the issue of your sort of outbound contracts, if you will, in terms of the harm that can result there, are you looking at harm to the people that you're providing the service to or harm to the college itself?

MS. ELDRIDGE: I think when we spoke last week concerning this issue, as well, contractor records, there is definitely harm to the college, which could be considered under the business section involving business interest of the college.

CHAIR ORSBORN: That could be under section 35, couldn't it?

MS. ELDRIDGE: Right. But I'm thinking more specifically here, that they could be added almost like as a section 33(3) where we look at records provided by a third party in relation to a contract that we are completing for them.

CHAIR ORSBORN: You say they belong to that third party, but in terms of custody or control, you certainly have them in your custody, don't you?

MS. ELDRIDGE: We have argued in the past that we have what is called bare possession. We have the records, they're given to us specifically so that we can do the job. I think about it in terms of when we turn over our cafeteria in one of our campuses to a third party to serve food to our students, it's a similar thing. They're allowing to use their records for a very specific purpose, for a very specific time and often they will want us to agree that their records retention disposal schedule applies and that we will not retain any copies of the records. The third party is making the distinction, they're not yours; we're going to tell you what to do with them and how you can do it.

CHAIR ORSBORN: Are you able to give me any examples of adverse consequences that have come to either one of your third party people that you provide services to or to the college because of disclosure information?

MS. ELDRIDGE: I will let Heidi jump in there.

MS. STAEBEN-SIMMONS: I listened with interest to Mark Lane in his remarks and I think

while I can't think of anything specific, it's certainly a deterrent when third parties recognize or understand that the information that we have at times, if we are ATIPPed, we are obligated to disclose. I think that they are surprised and I think it can be a deterrent for future potential investment or future potential contractor relationships.

CHAIR ORSBORN: Have you noticed that in practice?

MS. STAEBEN-SIMMONS: Yes.

CHAIR ORSBORN: That has been a deterrent, you've lost business because of it?

MS. STAEBEN-SIMMONS: I would say the answer to that would be yes.

CHAIR ORSBORN: Okay.

Thank you.

Stay in that row, Mr. Hollett.

MR. HOLLETT: Thank you, Mr. Commissioner, for the opportunity to appear here as the one odd person on the agenda, since I don't represent a particular organization. I represent myself in a broad category for the benefit of everybody else. What that means is somebody who's been on both sides of the processing of ATIPP requests. I've also been involved in organizations that had their interests represented as third parties.

MS. MULROONEY: You need to turn on your mic.

MR. HOLLETT: I thought I did turn it on. Is it on now?

CHAIR ORSBORN: Yes, it is.

MR. HOLLETT: Sorry, I had it backwards.

As I said, I'm the odd person out here, since I represent myself and not a particular organization, but I do have the experience of having been involved in ATIPP requests and having been representing a third party that's had its interests subject to ATIPP.

I want to refer generally here and speak to the point about the public interest in this, in the matter of disclosure, and particularly for the benefit of those who only talk about the media and other people with ill motive. There are other groups and individuals, third party researchers generally, who have an interest in access to government information. The broad principles that are being applied here are those of accountability for public money and public regulation, protection of the environment, the effective regulation of the various industries and businesses involved and the disposal of public money or the disbursement of public money. All of these things are, I would argue, part of the public interest.

The end result is that if you look at it in broad terms, I think section 39 for the first time in a very long time provides a very clear, very simple and robust means of a process to approach dealing with third party interests. I'm particularly here today because I was struck by the presentation from Nalcor and to deal with the Nalcor issue. Unfortunately, Nalcor is not represented here, which I think says a great deal about the nature of the organization itself.

Coming at it with the position that section 39 provides generally clear instruction and a robust and reliable test, as well as an effective process, specifically with the presentation made by Nalcor, I would suggest that the resolution of the problem that Nalcor outlines is actually to repeal section 5.4 of its act and bring the corporation completely under section 39, which I think is much more effective.

That section of the *Energy Corporation Act* is the product of a unique set of circumstances obtained at the time related to a unique project and the circumstances in which that project came about, namely Hebron and the acquisition of the first equity stakes. In a broader policy sense, I think we have now, and what's evolved since 2008, is a robust system that would work quite well, providing an independent arbiter in the form of the Information and Privacy Commissioner and, ultimately, recourse to the courts for any matters that remain difficult or that anybody wanted to dispute.

That's really my presentation in a nutshell in that respect. I look forward to the opportunity to

deal with some of the other issues, but I think that's really just a matter of tidying up. There are some other potential resolutions to Nalcor's particular problems with the matter of third party interests, but those are policy matters or policy approaches. For example, divesting of Nalcor entirely would solve Nalcor's problem, but that's, I think, beyond the scope of what we're talking about here.

Just to reiterate, and in very short term, from the standpoint of all the people who have an interest in using the Access to Information Act, the existing act works very well. Section 39 provides, I think, a clear and reasonable approach to be taken and then in any individual case we can argue about the merits of particular points of view. We do have in the Information and Privacy Commissioner, these days, an experienced office with a great deal of resources available and a demonstrated ability to deal with cases like this, and it provides an administrative, non-judicial adjudicator for any disputes. The point being made by the Executive Council – its officials are best able to make those determinations – I think is fair. For those things that go to dispute, the IPC is in a good position to make the decision and ultimately there is the recourse to the courts.

With that, I'll leave it and we can carry on with the rest of the conversation, if you have any questions, Sir.

CHAIR ORSBORN: Yeah, just one question, I don't like to use the word jurisdiction but you talked about repealing section 5.4 of the *Energy Corporation Act*. There's a question of whether or not a recommendation of that nature, sort of repealing legislation outside the ATIPPA, comes within my terms of references or not. I think, certainly, Chief Justice Wells in his 2014 review considered that kind of legislation to be sort of based on policy decisions of government at the time. Justice LeBlanc's recommendation, if I read it correctly, talks about amending it, not with respect to the substance of it, I don't think, but with respect to how the oversight mechanism might work.

MR. HOLLETT: I agree. My comment comes, actually, as a result of your commission to look at Justice LeBlanc's recommendations.

One of the difficulties with Justice LeBlanc's recommendations, in several instances, is that I'm not sure how one would actually go about doing it. For example, the notion of withholding information from the premier and other ministers or, in one point, I believe, he admonishes people to always tell the truth, but in the case of this particular one, I understand how he was trying to navigate around that issue of whether it was within his power to recommend certain things. You may not be able to do it, Sir, but I'll put it on the record for you, and then you can carry on and do what you want to do. I think that's actually a more robust way to do it.

The suggestion from Justice LeBlanc, I think, if I read it correctly and if my notes are clear enough, it would effectively accomplish the end goal without making the change I've recommended. In other words, by making the IPC the arbiter, if I read it correctly, to determine the commercial sensitivity. I think that comes as close as you can get to the answer to the question without having to dance around those issues with jurisdiction.

CHAIR ORSBORN: Yeah. My understanding as to the way that section is structured now is the OIPC can, indeed, look at commercial sensitivity. If the OIPC concludes that the information is commercially sensitive, and the definition is extremely broad, you would be unlikely to come across information that wasn't commercially sensitive, but once the OIPC has decided about the character of the information, then I think they're done. As I read the legislation, they have to accept the certification of the CEO and the board.

Looking at the recommendation, I was wondering if Justice LeBlanc was contemplating a more robust review by the OIPC in the sense of even leaving the harms test within there – one, one, one, and not a group – if he was considering or suggesting, at least, that the OIPC should be able to look at the harm that was being asserted, rather than just the character of the information, and I don't know.

MR. HOLLETT: I don't know either, off the top of my head and without the detailed notes in front of me. Again, we're leaving aside the matter of jurisdiction. From my standpoint, the easiest way to do it would be to change the

legislation. How you would go about recommending doing that, Sir, I'm afraid I can't deal with that.

CHAIR ORSBORN: You have similar provisions in the oil and gas act and the innovation and business investment act, as well, I believe; very similar structure.

MR. HOLLETT: Yeah. I think one of the difficulties we have here is actually that broader question that we really couldn't get into, which is whether or not government ought to be in these things.

CHAIR ORSBORN: Yes.

MR. HOLLETT: What winds up happening is we wind up with several different pieces of legislation and we get into the confusion. Simple and streamlined as best we can get it, and section 39 provisions, if we were to copy those over in some form into the other legislation, would work, I think, much more effectively.

CHAIR ORSBORN: All right, thank you, Mr. Hollett.

Right in the back, Ms. Philpott from the City of St. John's.

MS. PHILPOTT: Thank you.

CHAIR ORSBORN: You can turn your mic off, if you would, thank you, Mr. Hollett.

MS. PHILPOTT: Thank you.

The city believes that a public body's duty to protect records from disclosure –

CHAIR ORSBORN: Just shift your mic in a little bit closer to you, please.

MS. PHILPOTT: Oh, sorry.

CHAIR ORSBORN: Thank you.

MS. PHILPOTT: Is that better?

Our duty to protect records from disclosure that would be harmful to the business interest of a third party oftentimes translates to a duty to consult. The third party is in, of course, a better position than the public body is to determine whether something is a trade secret or whether the disclosure would be harmful to their competitive position or result in undue financial loss. Without these consultations, the public body risks disclosing information that does harm their business interest, and with no limitation of liability provisions, there's concern that the public body will attract liability for any losses. So consultation often becomes a prudent and necessary step to determine whether exceptions apply.

Our ATIPP coordinator, who unfortunately can't attend today, also noted that there are instances where there's no formal notification, but the third party finds out about the pending disclosure, and a lot of time is then spent back and forth educating the third party about the act, even though there are guidance documents, of course, provided by the OIPC. In her experience, third parties typically do come to an understanding of the act and that disclosure is necessary after explanation, but that time spent by the ATIPP coordinator educating the third party and having that education piece necessarily protracts the process through no fault of the public body.

Additionally, a requirement in 39(1)(b) requiring information be supplied implicitly or explicitly in confidence can raise issues as the third party may not specify, at the time, something is confidential when perhaps it is. That implicit confidentiality can be difficult for a public body to discern, again, without consultation.

We have also experienced, as a result of this subsection, third parties putting blanket confidentiality clauses covering things that we know from guidance documents should be released. Things like pricing – contract terms. These clauses can require that there be consultation first, prior to disclosure, and notification. So, again, we have this issue of going back – education – all taking time from the public body.

Currently, the act is not set up in a way that recognizes the consultation and discussions that occur. The section 19 notification provisions exist, but those provisions come into play in a very limited scenario, and it's after the intent is

formed, not prior to. Even those provisions do not suspend the timeline or give additional time.

The city's recommendation, respectfully, is that section 39 allow for a suspension of time or an additional time period to recognize the important consultations and discussions that need to take place when the public body is determining whether to disclose these kinds of records.

Those are the city's comments on this section.

Thank you.

CHAIR ORSBORN: Do you draw a distinction between consultation and notification?

MS. PHILPOTT: I think consultation, obviously, alerts the third party to the possibility of disclosure but the consultation is done in a more informal way. It's information gathering. It's going through the act having those discussions. It's not a formal notification done under section 19.

CHAIR ORSBORN: You talk about educating the third parties, is this in situations where you've determined that there's no reason why the information shouldn't be released? You let the third party know and then they want to know why or …? Is that the way it works?

MS. PHILPOTT: Yes, my understanding is there have been instances where the information would not be subject to the exception but the third party finds out about the pending disclosure and is quite concerned. Then there's time having to go back and forth explaining how the act works. That also happens with contracts. Again, like with those clauses that are being put in saying you have to consult with us, first, prior to disclosure, and going back and saying, no, there's no duty to notify or consult with you under this act. This is public information.

CHAIR ORSBORN: Once you have decided, though, that the information should be disclosed and the third party comes running in saying we found out about this, then you say they need to be educated. Why don't you just go ahead and disclose it anyway, and go ahead and educate the third party afterwards?

MS. PHILPOTT: I think that can be done, but I believe there's importance of maintaining relationships, especially with long-standing contracts that we have to assure them that there are no issues, and also to assure ourselves that we're not releasing anything because there are considerations of liability there.

CHAIR ORSBORN: I would assume with the long-standing relationships you have, they are, by now, well aware of the ATIPPA.

MS. PHILPOTT: Yes, by now, we would hope so, but, yes, we definitely have lots of discussions back and forth trying to explain the finer points and the nuances of the act.

CHAIR ORSBORN: Thank you, Ms. Philpott.

Mr. Harvey, Mr. Murray.

MR. HARVEY: Thank you, Sir.

Thank you for the opportunity to talk to you here today and thank you to everyone here for all of the statements and submissions they've made. They've generated, I think, a lot for discussion.

This is the second of two round tables, but this one is a little bit different than yesterday. Yesterday, there was a consensus in the room that there was a problem with the statute that needed to be remedied, and we certainly were part of that consensus. Today is a bit different. We here at the OIPC – and I'm also glad to hear from Mr. Hollett at least. I expect there are others out there who actually don't believe that there's a problem with the statute. That's not to say there isn't a problem, but our feeling is that there isn't a problem with the statute.

This statutory language is found in Ontario, Alberta, British Columbia, Nova Scotia, PEI and Yukon. It's been in some of those jurisdictions for many decades and has been operating in that way. There are many recommendations. Certainly, I've signed many recommendations and so have my predecessors. There are many reports that have been issued by my colleagues in other jurisdictions and there's extensive case law on the statutory language. That, in itself, is a reason that we would be wary about changing the legislative language and going to something that is novel, because all of that body of law and

all those reports provide us guidance in how to interpret the situations.

Another way in which the situation that we're dealing with today is different – because I would argue that yesterday, we struggled. You put some really pointed questions to the room yesterday on where is the public interest in section 33 and we struggled to talk about the public interest vis-à-vis the private interests that really are the focus of section 33. Here, the public interest – and Mr. Hollett also spoke about this, but Mr. Organ spoke about it as well, about where it is.

We would argue our view differs from that expressed by Mr. Organ. We view that there is a pretty clear public interest here in section 39, that it can be clearly identified and the policy intent of section 39 can be clearly identified. That is that the public has a right to transparency in how public bodies spend their money and do business with commercial third parties. They have a right to know how their money is being spent and what they're getting for it. This, I think, is a point on which we respectfully differ with Mr. Organ, but not just, of course, with Mr. Organ, with many commercial third parties in which we've addressed their complaints and their views that, for example, the price of the road should be known, but not the price of what goes in it.

I think the example that Mr. Organ offered is a good one to maybe probe into because I think we've all had the experience of buying a car. I think we all would want to know not just the price of the car, but also that the components of the car are quality components. I think the public, when they want to know what the government is paying for a road, wants to know that – and I'm far from an expert in road construction, but let's say the roadbed is appropriately thick and that the contractors, in trying to offer an attractive total price, have not cheaped out on the components of the road.

As it relates to unit pricing, we recently dealt with a report that landed on my desk in which the language talked about the cost. I probed the analysts that prepared this and I said: What are we talking about here? Are we talking about the cost that is being faced by the department that was procuring this service? Or are we talking about the cost that was being faced by the company in the cost that it was incurring? Because this really strikes at the heart of what should be proprietary and what should not.

Of course, it turned out to be these are the costs that were being charged to the department; this is the price list that was being charged to the department. Our position is that it is vital and the public interest is that that information should be available. If, however, it was the cost that the company was facing in providing this service – so what is the unit cost that the company incurs in answering, let's say, an additional telephone call or providing an additional service – that is an element that should be proprietary.

I want to just explore this a little bit more because it goes into the heart of what is in the public interest, what should be made transparent and what should be kept back. Like I argued, the public has a right to transparency about how the government is spending their money and how they're doing in business. The argument – and we've used this on a number of occasions – if the Premier's office is ordering a chicken dinner, then the public has a right to know what are the prices, what was on the menu and what was purchased. They do not have a right, and they shouldn't have a right, to know the 11 herbs and spices or, really, the things that made that chicken so attractive to –

CHAIR ORSBORN: You're assuming that the recipe comes with the chicken, are you, so the Premier has it?

MR. HARVEY: Well, if the Premier – and I'll come back to that. The Premier wouldn't even normally have that proprietary information, but I'll come back to that point because I think that's important.

I want to get back to the public interest question. The public interest question is that the public has the right to have access to the pricing information, but there's also a public interest in them not having access to information that is truly proprietary: trade secrets, the things that make these companies able to push their prices down so low. The recipe for the chicken or, for that matter, the KFC's business logistics or their delivery logistics, the things that make them available to provide that service at that price,

this information should be protected. We would argue that the current structure of the statute allows for that protection to be offered.

Part of the reason why I can argue that is based on really what we experience. We have dealt with a number – and it's been well observed that our reports on section 39, and there are lot of them, tend to find against the third party. What happens is the party gets a notification under section 19. They make a complaint to our office. We do an investigation and we almost, without exception, find out that section 39 fails on usually test two, which is that the information was supplied in confidence or on part three, which is that it would be harmful to release. I think it usually doesn't even get to part three, but that's a separate discussion.

What we don't find – this is the mystery of the missing complaints. Where are all the complaints that we receive in situations like Mr. Lane from the Aquaculture Association talked about? We do not get complaints in situations where there is proprietary information.

Mr. Lane clearly provided examples where the government would have proprietary information and that people are seeking access to it. He claimed there were examples whereby this information was going out. We do not have those complaints. Where are they? We don't see them. If this was a big problem, we're not seeing it.

CHAIR ORSBORN: I could play devil's advocate, I suppose. Looking at the last five years there were close to 50, I think, reports that have dealt with section 39. Three or four of them were allowed. They involved either Nalcor or Vale, I believe. I don't think I saw one, other than those, where section 39 was upheld. So there may be a feeling that there's no point in complaining.

MR. HARVEY: Perhaps so, but we would expect to see that there would be at least some examples of proprietary information that would come forward. On the other hand, even in 2018-2019 alone, the ATIPP office in their annual report cites that there were 122 examples whereby public bodies did use the exception. So the exception is being used, and we are not getting complaints about it. What we appear to be getting complaints about are companies looking for each other's pricing information and unsuccessfully doing so. So that in itself is a certain problem because companies trying to get at their pricing information, it does create a delay of access; the appeals process creates a delay of access. We feel that this is a problem in the administration of the notification process, which has been addressed through amendments to the procurement act, and we just feel that compliance with those procurement (inaudible) –

CHAIR ORSBORN: I have a question about that I was going to ask you later.

MR. HARVEY: Yeah.

CHAIR ORSBORN: I'll ask you a question now, and others can comment on it either now or later. It's a hypothetical question, I'm just trying to get my head around the various interests that are involved. It asks you to assume that you are satisfied that a particular piece of information in the hands of a public body is in fact a trade secret. Just accept that, and it comes under whatever the definition of trade secret there is where there's some value to the secrecy and whatnot. Just assume that for the sake of argument.

Assume also that it has not been clearly demonstrated that the public interest and disclosure would outweigh the value of the secrecy. Just assume that the public interest override is not applicable, just assume that. With nothing more, should that information be released?

MR. HARVEY: I want to make sure I understand your question correctly. You're asking if the information passes part 3.

CHAIR ORSBORN: Forget the parts.

MR. HARVEY: Okay.

CHAIR ORSBORN: The information is a trade secret.

MR. HARVEY: Yes.

CHAIR ORSBORN: You're satisfied that it is a trade secret. You're also satisfied in the circumstances that the public override has been considered and it's not applicable. The public interest and disclosure does not outweigh the harm that would flow from the loss of secrecy; just those two factors. Forget the legislation. Should that information be released?

MR. HARVEY: In my view – and I'll ask for Sean also to comment on this – assuming I understand your question correctly, from a policy perspective there is a public interest in companies being able to protect things that are truly proprietary to them because that is what provides for efficiency gains and innovation. I think my answer is yes that –

CHAIR ORSBORN: That it should be released

MR. HARVEY: That it should not be released. That it should be protected.

CHAIR ORSBORN: Okay.

MR. HARVEY: If it is indeed truly proprietary.

CHAIR ORSBORN: All right.

I'll put the same question a little different way: Assume that you're – and forget parts and stuff like that –

MR. HARVEY: Okay.

CHAIR ORSBORN: Assume that you're satisfied that the release of commercial information would significantly harm the competitive position of a company, just assume that. You're satisfied that is the case and you're also satisfied on the public interest override, that the public interest does not override the significant harm. Without more, should that information be released?

MR. HARVEY: So what's important, I think, to understand is harm to the competitive position, if what we're talking about is the release of information that would promote competition and so –

CHAIR ORSBORN: No. Let me back up. You're satisfied that release of information – use the words of the statute – would significantly harm the competitive position. You are satisfied of that, just assume that as you've accepted that and assume that the public interest override is not applicable in this case. On that scenario, should the information be released?

MR. HARVEY: I think my argument would be, if I could distinguish – again, I want to go back to being able to distinguish things that would promote competition and I think making pricing information promotes competition, so that information should be released if it promotes greater competition and to the extent that one party's competitive position is undermined, makes it have to compete more –

CHAIR ORSBORN: Even if it were established that there would be significant harm to the competitive position, you'd release it.

MR. HARVEY: If the idea is that it creates a more level playing field and the company has to work harder on that level playing field, then I think it should be released.

If, on the other hand, it creates an unlevel playing field – if the release of this information undermines the company to fairly compete on that playing field, then I think that should be protected.

CHAIR ORSBORN: Let's use different factors.

Assume that you're satisfied that the release of information would cause undue financial harm or undue financial loss. Assume that you're satisfied of that and assume, again, that there's a public interest override that doesn't kick in.

MR. HARVEY: I'm trying not to equivocate here the question that I think would turn on the nature of undue.

CHAIR ORSBORN: No, I'm asking you to accept that you're satisfied that there would be undue loss.

MR. HARVEY: There would be undue loss.

CHAIR ORSBORN: Yes. You're satisfied that there would be undue financial loss. Leave aside what it takes to get to that point.

MR. HARVEY: Yes. In that case –

CHAIR ORSBORN: Assume that you're there.

MR. HARVEY: – if I'm happy that its release would provide undue, then I would argue in favour of protecting, all else held equal.

CHAIR ORSBORN: Yes, that makes sense.

I guess my question is: If one is satisfied that there is, indeed, undue financial loss, whatever the factor is, if you are satisfied of that and let's assume that there's a public interest override and it's also the case that, in this case, the public interest override doesn't kick in, why do we need any more factors thrown in there, like confidentiality?

MR. HARVEY: So why does it need to be provided exclusively in confidence?

CHAIR ORSBORN: Yes. Why do you need that factor?

MR. HARVEY: The considerations we've given seem to have focused on really the third part, rather than the necessity of the second part. I'll be honest, it's a question I haven't really turned my mind to. I guess the challenge is maybe the opposite problem is that we faced, in that companies have tended to say: Well, everything I've given to government, it must be confidential. As opposed to saying: This particular thing is our secret.

I would suggest maybe – and I'm not sure that this is quite the question you're getting at, but I'll offer it anyway – that part of the challenge is in trying to compel third party businesses to identify what is confidential is to force them to really identify for the public body what – if we're going to give you our recipe, this is it. Third parties have claimed difficulty in being able to identify, of all the information that they have related to a third party business, what is or is not, indeed, proprietary.

The second part of the test tries to force the third party to identify this. It's this thing here. It's not our menu; it's not our price list; it's these 11 herbs and spices. This is the confidential bit. This helps a public body, I think, in understanding and differentiate what, indeed, is proprietary, or what at least the company holds to be proprietary, and what is not.

I'm not sure that answers your question.

CHAIR ORSBORN: No.

MR. HARVEY: No.

CHAIR ORSBORN: I guess I'm trying to get my head around, as you started off, the interests that are involved in section 39. As I understand it, they are interests that are of value to a third party and whether it's of a trade secret or other information what would trigger harm. I know the three-part test is in seven or eight provinces, but I'm trying to get my head around what the examination of the question of confidentiality adds to anything. There are all kinds of words going around, whether it's supplied or negotiated; if you say it's subject to ATIPPA, you've lost your confidentiality and all of this.

To put it simply, in not very elegant terms: Who cares? Take the trade secret. If you are satisfied that it's a trade secret or if you are satisfied that significant harm would flow either to a competitive position or financial loss, part and parcel to that is I suspect it would be pretty difficult to show significant loss if the information was public anyway.

MR. HARVEY: Yeah. I would say that if I ended up with a report in which it was found that the information had passed the third part of the test but failed the second part – now, I've never seen such a situation. I don't know if we ever encountered such a situation where it was legitimately a trade secret and its release would cause harm.

CHAIR ORSBORN: No, fair enough.

MR. HARVEY: Nevertheless, they didn't explicitly provide it in confidence and therefore it fails that part of the test.

CHAIR ORSBORN: It would be difficult to find if it was a trade secret without the confidentiality.

MR. HARVEY: It would, but I would certainly feel quite uncomfortable having to recommend

the release of that information. Although I would because that's what the law says.

CHAIR ORSBORN: Yeah, well, you have the same issue with section 33.

MR. HARVEY: Exactly. I think that's a valid point that you make. Sean may have some – I see him going with his finger, so I'm sure he has some thoughts on the matter.

I will say that I do want to reiterate the point I made before that a number of public bodies have claimed that they find it difficult sometimes. This is why they require consultation to help differentiate what truly is proprietary from not. We think these claims are often exaggerated by public bodies. Nevertheless, trying to get the third party to be specific about what's confidential, given that the easy answer is to stamp confidential over everything, which I think there are findings that that doesn't really work, but –

CHAIR ORSBORN: The section is addressed to harm, as opposed to some kind of class of information that somebody put a stamp on.

MR. HARVEY: Yes.

With that said, I'll give Sean a chance to jump in.

MR. MURRAY: Yeah, I've heard some comments here on assertions about what may or may not qualify as a trade secret here today, and I think we need to be careful in proceeding on any sort of assumptions in that regard. There are certainly, as we've discussed, decades of case law out there, about what a trade secret is within the context of access to information.

CHAIR ORSBORN: Please don't misunderstand my question. The premise of the question was that the adjudicator is satisfied –

MR. MURRAY: I know. That was just my preliminary ground setting here.

Moving on from that. What is or is not a trade secret is one thing, but further to that, I think one of the reasons why we still need the other parts of the three-part test is something could technically be a trade secret. There may be still a trade secret somewhere about how a certain company makes its vacuum-tube radios or some other device that is no longer on the market anymore. I don't have the case law in front of me, but it might meet the definition of trade secret.

I think we need to be careful in separating these things out because what we could find is that information that really should be released, and I think meets the purpose of the statute and the purpose of the exception as it exists now, could end up being withheld because it might technically meet one of those definitions. But when you consider it in the larger context – and I think that's the purpose of section 39 as it exists now, is it requires a larger context to be considered.

CHAIR ORSBORN: Would that larger context be a counter for if you utilize the override?

MR. MURRAY: No, because the public interest override, the threshold is so high that we have not seen it used successfully yet in five years. I don't rely on that to be a practical solution for day-to-day statutory interpretation. It's unlikely to be the solution to that.

The other thing I think about this discussion is I think we really need to reorient ourselves and start approaching things more from the point of view of the purpose of the act is that information in the custody or control of a public body is public information, period. Further to that, the rest of the act says here are some exceptions to that. I think we're making a mistake if we start our analysis from the point of view of what information does the public need. Can we shave some off that? Is there really a necessity for this to go out to the public?

I think we have it backwards if we start from there. We really need to go back to first principles, go back to the purpose of the act and start there. Really, what we need to be reflecting on is that there is a long history – not only in the recent history of ATIPPA, 2015 but in the jurisdictions that have been mentioned – where we have the same provision that we have now. In Ontario, Alberta and BC, we have some of Canada's biggest corporations headquartered; they have to function within this provision that we have, this section 39 equivalent provision.

Those laws have been in place for decades. I'm sure there would have been successful lobbying by industries there, but their statutes, certainly Ontario's, is not subject to a statutory review so it hasn't come up much. If there was really a problem, do you think that the Ford government, the Harris government, some government in BC would not have changed it by now? I really don't think so.

I think just stepping back and taking the 5,000-foot view of things, we've seen a lot of assertions of problems. I attended a CBA conference a few years ago about access and privacy, and everywhere in Canada third parties complain about the third party business exception. It doesn't matter which version they have. The experience that we've heard mentioned by the City of St. John's that you have to explain it to third parties, et cetera, that's just common. That's the cost of doing business here. These are just things we have to deal with.

The thing that the Commissioner mentioned earlier, the fact that public bodies are claiming section 39, they are claiming it when it's called for. At our office, I don't know if I've ever seen a trade secret, to be quite honest. When I've looked at the case log that's out there, why would a company give a trade secret to the government?

What we're normally seeing at our office, in terms of reviews, are reviews having to do with access to procurement records. Really, that doesn't come up in the procurement context. Why would you give your trade secret when you're bidding on a contract? It doesn't come up.

I think what we're talking about, about trade secrets, is we're taking something that is pretty hypothetical and would rarely occur. In fact, if it ever did occur, I think there would be harm to the financial and economic interest of a public body to be disclosing trade secrets because they probably would have acquired it in order to assess some very in-depth partnership with other parties. They would expose themselves to some liability. Trade secrets on their own – it is very rare and there may be other provisions that would protect it.

MR. HARVEY: Do you mind, Sir, if I (inaudible)?

CHAIR ORSBORN: Yeah by all means, take a break.

Let me just ask Mr. Murray one question, and just get away from trade secrets for a moment, the same question I asked Mr. Harvey.

Assume that you are satisfied that disclosure of information would cause undue financial loss, assume you are satisfied with that. Assume also that the public good interest override does not apply. Should the information be released?

MR. MURRAY: Well, again, I think your hypothetical situation is not one that I've ever seen. So I don't think it happens. I think we want to say, well, yes, if it's that bad, I suppose, but it's not – I think by sort of deconstructing section 39 you're removing it from the actual circumstances that tend to occur.

CHAIR ORSBORN: But presumably there could be a situation where somebody could establish undue financial loss?

MR. MURRAY: Without having – like in a procurement situation, is that what you're – or what kind of –?

CHAIR ORSBORN: Whatever.

MR. MURRAY: I don't know. I mean, I don't – all I can tell you is –

CHAIR ORSBORN: I'm just saying (inaudible) what's there in the statute.

MR. MURRAY: All I can tell you is I've been doing this for 15 years and I haven't encountered a situation where we're looking at the three-part test and we're saying the other two parts don't apply, but geez, look at this, it could somehow really cause harm to a third party, their business interests. I think it's not something I've seen.

CHAIR ORSBORN: Okay, yeah.

Mr. Harvey and then Mr. Organ.

MR. HARVEY: So I'm satisfied to give up my hot pursuit.

CHAIR ORSBORN: I'm sorry.

MR. HARVEY: I'm satisfied to give up my hot pursuit question, as you want to proceed to a break and I think Mr. Organ wants to get in. I'll make the point later.

CHAIR ORSBORN: Mr. Organ.

MR. ORGAN: Thank you.

I just wanted to say a few words based upon the discussion that was just had. The last discussion there, I do think that was a pretty broad brush, and I'm not sure, personally, if I agree that because it's done in certain other jurisdictions we should just follow suit and not question that, not try to make improvements to what we have in place today.

Mr. Harvey, I thought you had a great discussion there. You brought up some of the items that I had mentioned. I just want to add to that a little bit. This is probably my fault for not going deep enough, but you did suggest – and this is just for your own, you know, please take it into consideration the examples I put forward here – not examples, the reality that I put forward here.

Let's just take a mile of paving. Both the Department of Transportation and municipal affairs, they both operate the same way for our industry contractors bidding on public work. So that mile of pavement, the general public absolutely should need to know what that cost for that mile of pavement. You did make a suggestion that maybe they should need to know the unit pricing to ensure that they're getting quality goods, and that's the reason that unit pricing should be given out. Unto itself, that makes sense, and I know we can't all be experts in all of the industries and every industry has its own little niche or there are differences and nuances within every industry.

I would like to put forward – the Department of Transportation and municipal affairs, but let me just stick with Department of Transportation, that mile of paving, that will come with a master spec: Here's how you have to build that road. Here's exactly how much bedding you need. Here's exactly how much pavement. That list goes on and on and on. Also, within the tender that the contractor would bid on, there would be a list: The crushed stone must be this density and must be this size; the sand must be such and such; the pavement itself must contain so much liquid asphalt and the liquid asphalt that goes in could be one of, let me say, 20 different categories, different varieties.

They're not bidding on a general, just figure out how to go out and do a mile of paving. What they're bidding on is something that has a blueprint, a design for every single step of the way. The Department of Transportation would be on site every single step of the way and any relevant testing would be done every single step of the way. The sand is tested before it gets used; the gravel is tested before it gets used. The paving density is tested; the liquid asphalt content is tested.

In my mind, the government has already provided that level playing field and everybody knows exactly what they're getting. No matter which contractor gets that job, it's exactly the same end product. The quality-component piece and understanding the quality-component piece, that has nothing to do with the unit pricing.

Again, specific to my industry, I know it's only a small niche industry, but still there are thousands of people employed every day. I had a contractor on the phone from the Southern Shore yesterday saying: Jim, I can't believe it; I was on MERX and, Jim, they have my unit pricing out there. Jim, the next fellow down the road with a backhoe, he can just use my unit pricing and bid the job based on my unit pricing. That took me years to put that unit pricing in place.

Again, I know you're putting up your hand and I know that's hard to prove. It goes back to my comment earlier about subjectivity in trying to prove an objective result, at the end of the day, down the road.

I'm just asking that you take that into consideration that I don't think it's a broad brush and I don't think that unit pricing is something that the general public, in our industry, should have, needs to have, would want to have.

Contractors come to us all the time: Yes, I requested so-and-so's pricing. Everyone is doing it. That's why I do it, so I can see what unit pricing my competitor used.

CHAIR ORSBORN: With respect, Mr. Organ, I think, for this purpose, I'm the one that needs to be convinced, not Mr. Harvey –

MR. ORGAN: I'm sorry.

CHAIR ORSBORN: – in this particular forum.

MR. ORGAN: Again, I didn't mean to be aggressive on that, but I just wanted – please, take that into consideration. Every industry is different, there are nuances and the nuances should be considered.

CHAIR ORSBORN: Thank you.

MR. ORGAN: Thank you.

CHAIR ORSBORN: Perhaps we'll take a break until quarter after 11.

I'm finding the discussion interesting and I'm trying to get my head around the interests that are at stake in section 39. I guess I would ask you each to just take an objective look at it and just say – and I appreciate this is a common provision – what would be lost if the confidentiality section were taken out? What difference would it make? I would be interested in your views on that and, in essence, rather than focusing on the character of information, that one would focus on the harm that would flow from any disclosure. I think it would be a useful discussion, for me, anyway.

Another area that I would like your comment on is the sole issue of the *Public Procurement Act*. The *Public Procurement Act* looks like it's almost a complete code for public procurement and, I guess, I would like to know, again, for my interest as much as anything, what ATIPPA adds to that? What can you get under ATIPPA that you could not get under the *Public Procurement Act*, which talks about proactive disclosure in a number of areas?

If anybody else has any further comments on the notification provisions, which seem to come up periodically; if there's a difference between notification and consulting; if it's suggested that a public body should only be allowed to talk to a third party at some point, or should they be free to talk to them at any point without going through a formal notification. That's come up a fair bit.

I guess, for my own interest, I'll probably have a discussion perhaps with the Commissioner, more so than anybody else, about this phrase: detailed and convincing. It shows up all across the country and I would like to know if that's being, sort of, taken as a legal mantra or simply used in generic terms for assessment of evidence.

Let's come back at 11:15.

Thank you all.

Recess

CHAIR ORSBORN: Anybody want to take a crack at opening discussion?

Mr. Murray.

MR. MURRAY: I know you asked some specific questions and I do want to address those as well; however, I have some other points that I've been saving up, if it's okay.

Just in reference to some of the other points that have been made, one of the things that Mr. Organ said is the fact that people requesting the information shows that it has value. We certainly don't disagree that it has value. The test in the act is that it must harm the business interests of the public bodies. Having value and harming significantly the business interests of a third party may be two different parts of the spectrum.

Regarding the aquaculture industry, certainly a quick google search will make it clear that the industry is certainly growing at quite a healthy rate in this province. Companies are moving here from outside Canada and other jurisdictions and setting up here. There's millions and millions of dollars of investment going into aquaculture all the time, which sort of goes to some of what you've heard here today in terms of the assertions of harm. It's actually very similar to the types of submissions we get from

third parties, very high-level assertions of harm. We get very little in the way of specifics.

That's – companies that are moving here from outside of Canada and other jurisdictions and setting up here and there's –

CHAIR ORSBORN: I'm sorry, who's that?

MR. MURRAY: That was a recording of me that was played somehow.

CHAIR ORSBORN: I need to hear you twice?

MR. MURRAY: Hopefully not.

In terms of what the public interest is and information about aquaculture, clearly, if the government has put provisions in place in aquaculture legislation about requiring certain information to be disclosed by aquaculture companies, there's a policy decision that has been made specific to the aquaculture industry. Perhaps they should direct their concerns in that direction.

He characterized it that there are critics opposed to their industry. I think, standing back a little bit, there seems to be some public debate about aquaculture. So for people asking for information about it, I don't see anything wrong with that.

CHAIR ORSBORN: If I can just stop you this time, you're talking about a policy decision.

MR. MURRAY: Yeah.

CHAIR ORSBORN: Obviously, some kind of policy decision made because of some of the confidentiality provisions in the *Aquaculture Act*. It talks about prescribing information as confidential, which Chief Justice Wells frowned on doing that by regulation nonetheless. Presumably, if the government wished to protect the information further, they would then need to make a further policy decision to make the section 9(4) – put it in Schedule A would they not?

MR. MURRAY: They would. I haven't seen any evidence that is called for and I think that's the perspective that I would take on Schedule A. It's really incumbent upon someone to make the argument that it's necessary to put something in Schedule A.

CHAIR ORSBORN: If you don't put it in Schedule A, what's the point of the confidentiality provisions in the *Aquaculture Act*?

MR. MURRAY: Well, I don't have those confidentiality provisions in front of me, so I'm not sure what they apply to. Have you? I don't.

CHAIR ORSBORN: I don't think I brought it out with me, but it talks about financial backing, financial information, technology and what have you.

MR. MURRAY: Right, so just because that confidentiality provision is not in Schedule A doesn't mean that it's a free-for-all on that information. All the other exceptions in ATIPPA still apply.

CHAIR ORSBORN: No, I understand. Yeah.

MR. MURRAY: Right, so we would have to see the specific records and circumstances.

CHAIR ORSBORN: I guess my question is: Does a confidentiality provision in legislation add anything at all, unless it's in Schedule A?

MR. MURRAY: It may not.

CHAIR ORSBORN: Yeah.

MR. MURRAY: Yeah. I'll try to whip through my other points here so we can go on with the questions that you posed.

The topic was raised of public bodies as service providers, which I think is similar to where Nalcor is coming from as well, that they're in business in some respect, instead of being purely a public service entity. My view is that section 35 exists for those purposes. If there's harm to the financial or economic interest of a public body, that exception is there.

In terms of extra days for third party consultation being built into the act, our office is here if any public body has trouble doing their third party consultation or notification within the 20-business day period. It does happen, and

we're usually pretty understanding about providing the necessary time for those consultations to occur. The thing is that extra time is not necessary every time. The 20 business days would often be sufficient for more routine consultations. If you have a fairly specific record and you get your consultation out the door fairly quickly, you may be able to do that in 20 business days.

I don't have the statistics as to how often public bodies need to provide – we know how many extensions we grant but we don't know how many that we don't grant. We don't know how many times they're not going to us because they don't need that time. It's built into the act already that they can get extra time if they need it.

The City of St. John's mentioned concern about liability. It's important, I think, for the city, and anyone else who's wondering about that, to understand that section 114 exists which protects public bodies from disclosing, not disclosing, notifying, failing to notify, things like that as long as it's in good faith. There is a protection in the act for that.

In terms of the difficulties with dealing with third parties and explaining the process to them, something that we've emphasized a lot over the years is that the initial stage of a procurement process is really the ideal time to have that discussion with third parties, so that they know what to expect if they're dealing with a public body. We've spent a lot of time talking to the procurement office of government, which has changed recently and has new legislation, as you mentioned.

We've told them, for example, about an international movement. Countries all over the world are moving towards what's called open contracting, so just when the contract is signed, posting it online essentially. That's going on all over the world; we're seeing more and more of that.

CHAIR ORSBORN: That is, or at least is supposed to be happening now under the new legislation, is it not?

MR. MURRAY: To an extent, yes. That's one of the things that Mr. Organ mentioned. He mentioned MERX. MERX is the online system that the public procurement officer is using to make some procurement information available publicly. Someone is not getting that through ATIPPA per se; they're getting that through the Procurement Act.

Maybe I can segue into your question about that, that the procurement process is governed by the *Public Procurement Act* and do we need ATIPPA. One thing I would say about that is that the *Public Procurement Act* deals more specifically with the details of a contract itself. But if someone had any questions about some ancillary records or records having to do with third parties that are not involved in procurement, you can file a request for records that is broader than simply the contract itself, so there's still a need for the ATIPP process.

We would certainly prefer to have as much information as would normally be accessible through ATIPP, as much of that online as possible in order to lighten the load on coordinators. Rather than just going through the process of processing requests, if they're already clear that certain types of information is going to be released regardless, it certainly saves everyone time and effort to have that online in the first place and, hopefully, there will be need for fewer requests.

CHAIR ORSBORN: Okay. A little bit off topic, but what's your assessment or experience in terms of the proactive disclosure of government, generally?

MR. MURRAY: It varies. I haven't had occasion lately to look at the MERX site and how it's working, but that's of interest to us. I know the City of St. John's, for example, in its city council minutes for many years has been publishing all the bidders for different things. If the city is buying fire trucks, they will list all the bids they received and who the winning bidder was. That's great. They're being proactive there.

CHAIR ORSBORN: That's in a sense, I suppose, covered in the procurement legislation in that the opening of bids is published.

MR. MURRAY: Right. But they're not always going online, whereas the city council minutes are online. I think that the MERX process does

bring more of that online, which I think is positive.

You mentioned earlier, perhaps the reason why some third parties don't file appeals is that they've seen our decisions, therefore they're not bothering. Of course, as we discussed that in an earlier session, third parties have the option of going directly to court. We've provided a list of all the third parties that have gone to court in recent years. Most of them have either lost or withdrawn. Actually, more of them have withdrawn than anything else.

CHAIR ORSBORN: Yes. Do you have any sense of why those matters are discontinued a year after they –?

MR. MURRAY: I can only guess, I think it's that the third parties know that their cases are not strong but they want to kick the can down the road as far as they can and then they'll just give in. That's my guess but I can only say that's a guess.

MS. ELDRIDGE: If I may, can I just pass a comment there?

Back in 2016, we received – I'm just going to tell you a little story – three requests. One was specifically for a tender document and the other request was around all records related to a tender request. Those are two very different things, but it was the records of the same contractor and the contractor went to court and said no, don't release those.

Four years later, it finally was withdrawn, but the reason it was withdrawn was because their lawyer said let's talk about why we feel this shouldn't go out. There was some negotiation back and forth and we decided, okay, there's a lot of information here that falls under – well, they called it cyber security, but, again, Memorial has talked a lot about in their submission, about the enhancement that they'd like to see to that provision of the act.

At the end of the day, I think it's that consultation that I'm talking about under section 19 that may have avoided –

CHAIR ORSBORN: One would hope that that kind of discussion would take place earlier –

MS. ELDRIDGE: Right.

CHAIR ORSBORN: – either at the complaint stage or even if it was a direct appeal. One would expect that the counsel would get together, I would have thought, fairly quickly.

MS. ELDRIDGE: It would help a lot, I think.

Just really quickly, the five days that I was envisioning in the section 19 would be more to say to the third party: You've got five days and if you don't say anything I'm going to take that as your response. Do you know what I mean? It's just a matter of putting rigour –

CHAIR ORSBORN: Putting notice on them to put up or shut up.

MS. ELDRIDGE: But then, as the coordinator, I'm not penalized because they took the full five days to say nothing.

CHAIR ORSBORN: I'm sorry?

MS. ELDRIDGE: As a coordinator, I'm not losing days because they've chosen to just let the clock run.

CHAIR ORSBORN: Right. Thank you.

MR. MURRAY: I just want to wrap up a couple of comments.

CHAIR ORSBORN: Yes, thank you, Mr. Murray.

MR. MURRAY: On that point, there's nothing to stop a coordinator from saying: We're considering this and if you could please provide your comments by Friday. I don't think we need a statutory provision for that.

Regarding the fact of third parties going to court – and I'm presenting my comments to you but certainly any entities that involve third parties here that would wish to comment on this, I'd certainly be interested in knowing. We've heard presentations from associations involving multi-million dollar industries here and if they feel that we are interpreting the act too narrowly in some way, the ATIPPA does not require them to go through our office. They can go directly to court, and we're not seeing that happen.

We don't think we are interpreting the statute too narrowly. I think, as we mentioned earlier, in the last year the statistics are available, 122 times public bodies claimed section 39 and refused access to applicants without it going to a third party. The fact is that section 39 is a mandatory exception, so public bodies can't mess around with that. If they assess the information and they determine that section 39 applies, they have to refuse access.

CHAIR ORSBORN: Should it be mandatory?

MR. MURRAY: Yes, it should. I have no problem with that. The times that it comes for notification to third parties are when public bodies are less than certain. They think section 39 might apply, but they're not certain and so they notify third parties.

CHAIR ORSBORN: Do you draw a distinction between consulting and notifying?

MR. MURRAY: Well, there's no prohibition in the statute against a public body consulting with a third party. I know of a coordinator in at least one public body who does – they have sort of third parties they deal with all the time and so they have sort of evolved a process where there's a lot of consultation as opposed to notification. But, at the end of the day, if the coordinator assesses the information, with or without consultation, and they are not sure that the section applies but they think it might, they can certainly issue a section 19(5) notification.

CHAIR ORSBORN: Okay.

In terms of the override, the Centre for Law and Democracy suggested that the override should essentially apply to all of the exceptions. I take it you would disagree with that.

MR. MURRAY: No, we agree that it should apply to section 39, but we just –

CHAIR ORSBORN: Okay, that was my question, then.

MR. MURRAY: Yeah. We just think that it's not something that's going to arise very often –

CHAIR ORSBORN: No.

MR. MURRAY: – just because of how section 9 works, the threshold is pretty high. In principle, it should be there. We can certainly imagine a circumstance where the public interest might override the provision, but it's no going to be very common (inaudible) –

CHAIR ORSBORN: So you would phrase it as a mandatory exception, but subject to the override.

MR. MURRAY: That's how it is in some other jurisdictions, so that can certainly be done.

CHAIR ORSBORN: Okay.

MR. MURRAY: Yeah.

CHAIR ORSBORN: Ms. Philpott.

MS. PHILPOTT: Thank you.

I just want to respond to a couple of things that were brought up by Mr. Murray.

Earlier he mentioned, basically, about the – I think it was at the education piece and dealing with different contractors, and I think he referred to it as just the cost of doing business. The city has no issue with educating people on the act. The ATIPP coordinator does that in her job. However, the cost is a time cost, as well, and so that is where we are making submissions on. Not so much the act and the test that's prescribed, but how much time we have to ensure that we're properly applying that exception.

I think it was raised that there's already an extension provision in section 23, just use that. We don't need to build anything additional into the act. The issue with that is that forming an application for an extension is still a procedure that needs to be done and another burden on an ATIPP coordinator. Certainly, if self-extensions were allowed, there wouldn't be a need for a suspension of the time period or an extra time period for these consultations. But bearing in mind the limited time that is given, the city is recommending that there either be a suspension, or something like the college has suggested, of a five-day period.

Also, the issue on the limitation of liability provision in section 114, that still requires, in

that section, good faith or reasonable care. That's a standard that we'll have to prove that was met. That's going to necessarily come back to whether meaningful consultations or conversations were had, or at least whether certain things were looked into or discussions were done. That still gets us back to the issue of necessarily having to consult and discuss in order to be prudent.

Those would just be the few responses I had. Thanks.

CHAIR ORSBORN: Thank you, Ms. Philpott.

Anything further from the college?

Mr. Hollett.

MR. HOLLETT: Only to the extent, Commissioner, of just reminding – going back to Mr. Organ's comments earlier, and this brings us back to the point about who's requesting information – it isn't just his competitors who may be interested in the information that he and his members are submitting. There are third parties who will be, at some point, assessing the information received or may be assessing the information received, not only to look at the companies involved but, particularly, to look at government and how government operates. I don't think we should lose sight of this.

There's a tendency, I think, particularly in dealing with section 39, to assume that the only people who are interested in it are the other people in the same business. That's not true. There are a great many people who will be interested in the information, either contemporaneous to a controversial event – at the same time as a controversial event – or subsequently.

I can think off the top of my head of a notion that given what the Heavy Civil Association members would have to go through in a particular contract. It would be an assessment, in some instances, of whether or not they were actually being asked to meet too high a standard and that tendering was too specific. That's a common complaint in this province.

The other issue then – to go back to this; I've wrestled with this issue – raised about confidentiality. I frankly don't quite follow the concern about it. I don't know quite where your question is going, where you're going or what the point is. It seems to me to be actually quite straightforward in the current act. As Mr. Harvey and Mr. Murray have explained, we do have this quite clear distinction between proprietary information and not proprietary information is the way I'd put it.

The example that came to mind, as the conversation was going on earlier, was actually the composition of a drug or for Mr. Lane, the composition of a particular feed that might be used that would clearly – at one point government requested samples of drugs that would have to be approved to be entered on the formulary. Government acquired, in the process, patented information or information related to a patent that would be implicitly confidential. That seems to me to be quite easy.

Now, earlier on in this process of dealing with that, that might not have been quite so clear, but these days, after as Mr. Harvey pointed out, findings in jurisdictions across the country, that sort of information is pretty easy to define. A similar notion would be if a particular one of Mr. Lane's members had developed a particular feed combination that had to be supplied to government in the interest of environmental protection, but it was proprietary in nature. That seems to me to be fairly straightforward, but bid pricing and the details of bid pricing not so much so.

The example I'd use – and it reinforces ad nauseam a point, I think, that has been made in other places – in my experience with the Department of National Defence at one point, in headquarters in Ottawa, one of the most frequent users of ATIPPA were the companies that supplied temporary labour, temporary services, secretarial services and clerical services. They would frequently – every month – submit access requests for the work that had been done and any forecasts of anticipated work, the bids or the tenders that had been let and the contracts that had been entered into.

That became the point where at one point, about 20 years ago now, the department was receiving about 1,000 requests a year, most of which were related to that sort of information. Proactive

disclosure was the way it was taken care of. I think those are just examples to reinforce earlier arguments. The only point I would leave with this is that just remember there are more people interested in this information than just the particular competitors in any given situation or, as Mr. Lane intimated, people are interested in doing harm.

Commissioner, to go to your other question, it also talks about why use this act versus others. For many people in my situation, who are interested in these sorts of things for organizations that are interested in it, ATIPPA is the one piece of legislation that will allow them to gain access to government information that in many cases they wouldn't have gotten otherwise.

While the conversation was going on earlier, I happened to look up the *Fisheries Act*. It's from 1995; it's 25 years old. I'd have to do a little bit more research to find it, but I suspect that given Chief Justice Wells was the premier at the time and given his more recent attitudes towards disclosure, I suspect those provisions were simply an administrative carry-over from an earlier version of the act that made some sense at the time, but have since passed out of use. If you were to put him on the stand or somebody like him now, you'd find a difference. I think that's, in some cases, what we're looking at here: simply, things that have carried over. A more efficient administration might be to take it out.

CHAIR ORSBORN: Interesting you bring that up. This is online, but just let me read you the submission from the Department of Fisheries. Each of the departments that has Schedule A information, I asked for their views on that in their submissions.

This is what the Department of Fisheries says: "Being able to protect this information is vital. Please allow me to offer a few illustrative examples of why:

"In 2020, 37 species are being processed in Newfoundland and Labrador. In some instances, there are very few plants processing a particular species type, which increases the likelihood that the company could be identified if information was publicly released. This release of information has the potential for third party harm."

It goes on: "Marketing of raw material from Newfoundland and Labrador occurs inside and outside of the province. Should any sensitive information be released, it would cause undue harm to the individual company and potentially the industry. For instance, if sensitive information relating to one company is released and shows poor quality product, this could cause outside buyers to view the entire industry as producing poor quality."

It goes on: "These companies are competing for raw material starting with the harvesters at the wharves. Release of sensitive information through any means has the potential to create a competitive advantage for others competing for the purchase." They go on then. They talk about the three-part test and the difficulty in proving that something was supplied in confidence.

You say it's a 1995 act; that's the current rationale for it. Make of it what you will, but I just thought of it then when you say it's older legislation, but it's regarded, at least within the department, of having some current value.

MR. MURRAY: Can I address that a little bit, if it's okay?

The harm to the competitive position of a third party is something that gets raised from time to time; we've discussed it a little bit here this morning. We're talking about some information in a contract, usually. Certainly, whenever a company goes to bid on a contract, there are a lot of factors that go into that, and there are a lot of givens that each company is working with: their own costs, their own rental costs, their labour costs, their insurance costs, their transportation costs – it goes on and on.

Even if another competitor finds out what a company bid on a particular job or what they got the contract for, what the contract price was, even if there are unit prices in there, those unit prices and the ultimate contract, so many different factors go into coming up with those prices. It could be that they have a lot of materials of a certain kind on hand right now that they've purchased at an advantageous price recently, but the next time they go to bid on that

contract, they may not be able to get that price or maybe they will get a better one. You might see what happened in a past contract, but that does not necessarily impact the future contract.

I think what could impact the competitiveness for that contract is if third parties were required to disclose their inputs: the prices that they paid for their raw materials, the wages they pay their employees, what they pay for rent on their premises – all those things. If a third party could get all that information and factor it in, certainly it would harm their competitive position.

CHAIR ORSBORN: That goes to your profit margin, doesn't it?

MR. MURRAY: Yes.

You asked the question about what if we removed the in-confidence provision entirely.

CHAIR ORSBORN: Yes.

MR. MURRAY: Okay.

I think that's a necessary provision to protect the interests of third parties. Even though we've found that in the procurement context, in most cases third parties are not able to meet that threshold of supplied implicitly or explicitly in confidence, but that's not necessarily in every instance.

Certainly there's case law out there that says that if the information is immutable – for example, if for some reason information ends up in a contract which probably shouldn't be there anyways, but if it does end up in a contract, which is something that could not be subject to negotiation, so something that the third party could not change, such as, for example, the hourly wage it pays to its employees – that's not something they negotiate with the third party. That might be subject to a union process.

There could be something in a contract that could be immutable, that would meet that threshold. It's just not commonly seen, because that stuff doesn't commonly go in contracts. But requests for information that involve third parties are not always procurement information. A third party could provide information to a public body that could meet all three parts of the test, but it may not be a part of a procurement process, so you don't have to worry about it being deemed to be negotiated because it's in a contract. It could be supplied in confidence.

CHAIR ORSBORN: All right.

On the example that you mentioned about the immutable information and you can foresee some kind of character information that would satisfy the confidentiality aspect of it, in order to prevent disclosure, the harm would also need to be established. Is that true?

MR. MURRAY: Yes.

CHAIR ORSBORN: Okay. So if the harm is established, who cares about the immutability?

MR. MURRAY: Right. What we do then, again, is we can cause other problems for ourselves because the three –

CHAIR ORSBORN: Who's ourselves?

MR. MURRAY: Well, the whole environment in the province: coordinators, third parties, public bodies, what have you, the general public, public interest.

You're throwing a hypothetical or a thought at us right now that is not something I've had time to prepare a submission on, and maybe we can do that.

CHAIR ORSBORN: Yes, perhaps.

It's something that occurred to me going through the material. The thrust of the section, as I understand it, is to prevent disclosure when harm could result, either to a competitive position or financial loss or through the loss of a trade secret where there's value to that secret. If one or other of those is satisfied, if the harm is indeed proven to the appropriate standard – risk of harm – or, as a fact, the trade secret is proven, I'm trying to understand what the confidentiality aspect adds to the analysis and to the level of protection.

MR. MURRAY: There could be circumstances where one or both of those thresholds could be met and the second would not be, and there could be a reason why – it's hard to actually

even imagine what the facts would be around that.

CHAIR ORSBORN: Yes.

MR. MURRAY: I think that's one of the things: We're looking at a pretty hypothetical circumstance, which we really haven't encountered.

CHAIR ORSBORN: I understand, yes.

MR. MURRAY: I think we're better off focusing on the act from a practical standpoint, where we know a lot of the kinds of information that public bodies have and that come to us in terms of review. We've seen many different types of third party information and the really unusual examples that you propose I don't think are ones that we typically see.

Again, I'm very much of the view that we should be starting our analysis from the standpoint of: The information is public. What is the minimum amount of information under the statute that should be protected in the exceptions? If you see some potential redundancy in there, I wouldn't rush to chuck that out, because we don't know what unforeseen impacts that could have.

MR. HOLLETT: If I could, just to begin shift the conversation slightly about this particular reference to information supplied in confidence, implicitly or explicitly. In the sense that this section of the act is an instruction to the ATIPP coordinators, I think this might shed another perspective on it.

Government obtains information by a great many means. If you go back to the Cameron commission, there was an extensive discussion about disclosure in the breast cancer inquiry. There was some evidence that was led pertaining to this issue, and Commissioner Cameron was quite surprised to find ATIPP coordinators who were deleting, censoring and otherwise holding back publicly available information that the government had acquired.

To my mind, in reading this and in thinking about it since you raised the question earlier, the only thing that this reference to "supplied in confidence" means is it directs an individual looking at this to determine that the information was received from the company in confidence. We've considered it here in the context of the Procurement Act, but over the last six months we've seen government receive submissions from third parties in the oil industry seeking financial assistance or in relation to the potential closure of the Come By Chance Refinery.

The companies have supplied information, in confidence, and I think with the expectation that it's in confidence. That information might well fall within the general circumstances here, but it would allow somebody in looking at the information that government has at its disposal to be able to distinguish between what government received as a result of a direct contact from the company and what it obtained from other sources that may not be confidential, that may not have come from the company but that other people could assemble by just simply doing a Google search and by some other process.

The only possible value, I think, I can see in it right at the top and the reason I'd be hesitant to suggest discarding it is for that reason. Government obtains information for many reasons and from many sources, and in the practical business of sorting through sheets of paper and emails and so on, that confidentiality issue may be an issue; it may be something on which a decision will turn. I have no examples I can give you, but it is one that I can see very clearly being a practical matter. For somebody determining an answer to an ATIPP request, this information would be covered and it would be confidential and, therefore, we're not going to release it, and other information that was gained by another means, we wouldn't.

CHAIR ORSBORN: Appreciate that I'm arguing with you, to some extent, but the coordinator says: Well, that's confidential, therefore, we can't release it. That's not the end of the story, though, is it?

MR. HOLLETT: No, the confidentiality puts it into the separate pile and allows for other provisions of that section to apply, so you can then screen it for that purpose. Whereas, for example, if you're talking about –

CHAIR ORSBORN: That's my point. It may well flag it with the coordinator, but if one or other of the other elements cannot be established, then who cares if it's confidential?

MR. HOLLETT: Exactly. That may be the point. I think if we look at that section in that sense –

CHAIR ORSBORN: As a statutory requirement, I'm not talking about as an internal government requirement or whatever and as something to flag for a coordinator, but in terms of the statutory requirements, I'm – and I'm coming at it as the uninitiated. I haven't worked with it for years or whatever and looking at it and looking at the reports and looking at the harm that the retention of the information is meant to address, my understanding is not there yet, as to why that is there as a separate, stand-alone criteria. I understand it completely from an internal, flagging-it point of view: Yes, we take a look at this. Now, can harm be established – thinking of can harm be established, then fair enough.

MR. HOLLETT: I think, just to echo Mr. Murray's point, that if individually or collectively we had a moment to go back to do some research, we could make submissions and get into an argument about it.

CHAIR ORSBORN: Yes. I've had the luxury of thinking about it for a while.

MR. HOLLETT: And we haven't, but that's the only thing I can think of.

It does, though, go back also to your point about the *Fisheries Act*, which is I think you could actually use the same logic that the department has justified and bringing it under section 39. The existing version of section 39, which is significantly better than the FOIA was in 1995, would still obtain. But that's another argument and I don't think we need to go down that rabbit hole.

CHAIR ORSBORN: Ms. Eldridge.

MS. ELDRIDGE: Just in listening to this – and, again, I haven't developed a formal submission or anything, but when you think about it, in my practical experience, the confidentiality piece or the second part of the three-part test is usually where we get cut off and we don't consider harm. That becomes a huge issue. If we're dealing with the Commissioner or whatever and we say: Okay, we're not going to talk about harm. It becomes almost an injustice to what we're trying to do and it fails on that piece.

Back in the day when this first started, it was an "or" situation –

CHAIR ORSBORN: You appreciate the Commissioner's position, though, if one part of the test is not there, then you're done.

MS. ELDRIDGE: Agreed. I absolutely agree. I mean, as I said in our submission, we believe that the OIPC has done an excellent job getting guidance documents out and what have you. We're certainly not meaning any slight.

I guess, to my point, originally this was an "or" situation. If either of those three pieces of the three-part test applied, then you could apply section 39. Now you have to look at all of them. I think that the middle one – the confidentiality piece – is almost like a stumbling block to getting to the real issue, which is the harm that could come to the third party. I think the idea of adding in the public interest override there actually gets to the real practical value of releasing these records or not releasing these records, of making the fair assessment because I think that's more of what's important here.

I do ATI requests and privacy breaches for a living. From my perspective, it's really pretty simple: What is the real harm? What is going to happen? What am I hearing from the third parties? What am I hearing from people within my organization as to the harm that this is going to cause? Usually, for us, harm is considered in terms of: Could this have financial repercussions? Is this going to cause us to lose some time? Is it not in line with our mandate, which for us it's to deliver education to our students?

I guess I just wanted to get in there with that point. That from my perspective, the confidentiality piece is almost like a deterrent to assessing the real value, which is the harm that could result from releasing the records and, again, the public interest.

Thank you.

CHAIR ORSBORN: Thank you.

Did you have your hand up earlier, Mr. Harvey?

MR. HARVEY: Well, sure, I've been collecting a number of kind of wrap-up statements, but I don't know that we're quite there. But give me the nod when you're ready for that.

Just to respond to a couple of the things that have been said so far, and some of this is going to kind of echo the things that Mr. Murray has said. When I think practically about how the analysis is done on the three-part test, so an ATIPP coordinator is thinking about the three-part tests in sequence. Even though in the act each of the three parts stands on their own, they also have a logical sequence to them where you can imagine that part number one is potentially broader than part number two, which in turn is potentially broader than part number three. So there's a logic to why you would consider them in sequence.

It does become a kind of screening operation to help assist in the processing of documents to say, okay, well is this indeed commercial information? Then, yes, the exception applies. Then you move on to the second part and it helps when you're processing 1,000 to 6,000 pages of responsive records to be able to proceed down through that checklist.

When it comes to our office, however, the hypothetical notion has been raised: Well, what if we had a record that would have passed on the third test and the first test but failed on the second test and therefore removing, if we truly want this to be a harmless based exception and I think we believe that it should be a harm's based exception, then would removing the second part of the test, which is kind of class-based, therefore allow us to more quickly get to the heart of the matter which is the harm's-based question?

If that had been a real problem, if we were indeed stumbling and we do, I would say, a lot of the cases that we've reviewed fail on the second part of the test, but that's not to say that the analysis on the third part of the test doesn't get done. Often when we write reports, we will say: The record doesn't pass the second part of the test, therefore, we recommend its release and we don't need to go into the third part of the test.

Although, there's been a number of reports that I've signed over the last year and a bit where we've said: Well, it fails on the second part of the test, but we're going to talk about the third part of the test anyway. Even in the reports where we don't talk about it, the analysis is done. I mean, we would give consideration and we would receive submissions from the third party and from the public body about the third part of the test.

CHAIR ORSBORN: Do you happen to run into a situation where the second part has not been satisfied but you found that the third part was satisfied?

MR. HARVEY: We have not run into that situation, we just haven't.

Now, that said, there's no question that the third part of the test is a high bar and that's why, I mean, practically speaking, it assists in having this kind of sequential process in the act because if an ATIPP coordinator is to know that – there's a lot of work. If I'm going to demonstrate that this is truly proprietary information and its release is truly going to cause harm, then, yeah, I need to hold it back. Well, all of the detailed work, then, might need to be done in that regard, doesn't need to be done if it fails the second part of the test.

We have not seen those examples and those cases. I think its presence there presents a very useful and practical purpose, but, again, I also want to reiterate that I think it presents the other purpose in helping identify for ATIPP coordinators what is truly proprietary, and helping protect third parties in helping them focus on what's truly proprietary.

When I think about this question, of what is proprietary and what is not, and what do we end up dealing with and what do we end up not dealing with, I'll go back to the comments that were made by Mr. Lane of the aquaculture association. He talked about all of the truly technical trade secrets and proprietary information that would be in the possession of the Department of Fisheries and land resources

and that they come into possession of information through the regulatory process. Then he moved on to talk about the challenges that he has because contracts are held to be negotiated and not supplied and, therefore, cannot be withheld under section 39.

I was confused at that point because he's muddling two issues. If all of this information that the aquaculture association and the Fisheries and land resources were talking about in their submission is truly proprietary, then, indeed, it would be subject to section 39 and subject to protection, but these contracts are not that. All that regulatory information is separate. That's not what we're talking about, so confusing the two issues I think doesn't help. It's what should be available to the public is available to the public, and what should be protected is being protected. I think we have evidence – Sean mentioned it earlier and I mentioned it as well, but 122 examples where public bodies in 2018-19 used this exception and used it, I'll say, successfully, in the sense that: Where are the complaints?

Essentially, our take on this whole section of the act is, really, there's no problem. Even though it's problematic, I'll say, in that it makes things uncomfortable – it causes work for public servants, and third parties might not be happy about it because they might be revealing more than what they want to – I'd argue that just because it's problematic and just because it creates work doesn't necessarily mean that there is actually a problem. Doing business with government may require hard work and being transparent may require hard work. That is kind of the nature of the game.

There have been assertions made that these rules are deterring people from bidding on government work. We have not seen evidence of that. The assertion is commonly made but where is the evidence? There are assertions made that the release of unit pricing, for example, creates harm. Where is the evidence? I mean we would consider evidence that would be – in terms of the interpretation of the existing language, we are available and we would consider evidence being brought forward. Oftentimes, when it comes to our consideration of the third part of the test, we conclude that the evidence was not sufficient to demonstrate, but often – and, usually, I would say – there really isn't any evidence at all aside from an assertion.

The courts have also weighed in on that and found that there is not sufficient evidence.

CHAIR ORSBORN: Sorry, I keep coming back to it. You have the situation then that stuff comes in to you and you're satisfied, in this particular case, on the evidence that's brought before you that the third part is established. Let's assume that. The contract or whatever it is, the documents also say they were subject to ATIPPA so that takes away the confidentiality aspect of it, so the information then gets released, even though you concluded there would be significant harm?

MR. HARVEY: If I were to be in that situation, I would comment on that in the conclusion section of the report. I would comment that this was an unusual situation in which they failed on the second part of the test, but they would have passed on the third part of the test and the first part of the test. So while under normal circumstance such information would have been released, I'm compelled to recommend – sorry, while usually it would be withheld, I would be compelled to recommend that it be released.

I've been in situations, as well, where I've made recommendations that I know darn well are going to be appealed to the court because of the situation. I would expect in that situation it would be appealed, but I don't think because we can imagine that hypothetical situation, that the solution is to take out that section of the act. I would say that the solution is for public bodies to do better education of the third parties that they do business with, that they come into contact with, on exactly how to identify information that's confidential.

I'll tell a bit of story myself. Some years ago when I was the executive in a provincial government department, I attended a meeting at the premises of a third party business. Also, there were a number of executive level officials from other government departments attending there as well. The third party business asked me to sign, to even enter their premises, a non-disclosure agreement that basically says I was not to utter a word about anything that I saw there to anyone at all, period.

I told them that I couldn't sign such a thing; that, at the very least, I'd have to be able to tell my deputy minister about the things that I saw. In any case, even beyond that, the NDA would not be compliant with ATIPPA, certainly not. I didn't even know what I would see. So the third party business said: Yes, don't worry about that. Just don't sign it and come on in anyway. So all is fair and good. In having that conversation with them, I had advised them of what level of protection that I could offer, subject to ATIPPA.

Then, later – I mean later in my relationship with this company – I was very specific. Every time they would be giving me information I would reference: Listen, you have to understand that any assurances of confidentiality that I provide you, I can only provide you subject to ATIPPA, and if there's anything you really want to hold confidential, you need to be specific about it and here's how. At the meeting I happened to, on the side, ask the senior officials from other government departments, who really should've known better, did they sign the NDA. They said: Oh, yes, we signed that.

I guess the moral of my story is I don't think that – and I certainly can't speak to the situation at the City of St. John's, but I know that the extent to which government departments are educating their third party business interests varies considerably. I know that, in our assessment, some of them do a pretty good job, and I'd name those and give them pats on the back, except that would leave the ones that I don't name to be conspicuous in their absence. But a lot of this could be dealt with better if government departments did a better job of educating the third party business interests on how to set themselves up to actually truly hold their information compliant.

One problem that we have really struggled with, with respect to compliance, is in the *Public Procurement Regulations* there is a requirement, and a very explicit requirement that was developed based on consultation with us, that bids be specific about what is confidential – they can't just put on the bottom of every page "this is all confidential"; they need to be specific about it – and that a bid that did not meet that is a non-compliant bid. We've since found that there are examples of bids that are subject to access requests that are not compliant with that. I would argue that those are non-compliant bids and they should have not been awarded the contract.

We've tried to press the Public Procurement Agency to do better in letting bidders know and drawing this fact, this aspect of the regulations, to the attention of bidders. That work being done up front could avoid much of this problem later on.

CHAIR ORSBORN: Is that regulation directed to confidentiality or to exemptions, generally?

MR. MURRAY: It's regulation 8(2) of the public procurement statute. I believe it says that bidders have to identify any information that they believe would be subject to an exception under the ATIPPA.

CHAIR ORSBORN: Right. Yes, qualifies as an exemption.

MR. MURRAY: So it doesn't specifically say confidentiality, but it says the section of the act, I believe. But I stand to be corrected on that.

CHAIR ORSBORN: And you've taken the position that if they don't specify, therefore, it's not confidential?

MR. MURRAY: Well, the ATIPPA requires that information for the second part of the test needs to be explicitly or implicitly in confidence.

CHAIR ORSBORN: Right.

MR. MURRAY: In a procurement context there is a requirement on bidders to be explicit, so it's difficult to later come back and make the implicit argument. That's our position right now. We haven't had any of those matters go to court yet. Ultimately, we may get an interpretation from a court on the interplay between those regulations and our act, so we'll see where that goes if that does occur.

CHAIR ORSBORN: Let me just ask you this, and I'm sorry if it seems like I'm putting you on the hot seat. This is not just your office, but in other decisions from commissions that I've seen, they used this phrase in dealing with the harm exceptions: We have to have detailed and

convincing evidence. Now, I'm not sure what the word "convincing" adds to it because you have to be satisfied that it takes you wherever you have to go. But I wonder if the word "detailed" somehow might cause a higher level of scrutiny of the quality of evidence that might be required.

This is from the Supreme Court of Canada, from the Community Safety case in 2014, and this is in the access to information context. They talk about what has to be proven with this reasonably expected, which has more words put around that and it's a difficult thing to conceptualize. They try to "mark out a middle ground between that which is probable and that which is merely possible." You have to go above "a mere possibility of harm in order to reach that middle ground …." The middle ground, I think, you can say a real risk of harm or something along that line.

They go on to say: "This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and 'inherent probabilities or improbabilities or the seriousness of the allegations or consequences.'"

The same thing was picked up in the Federal Court of Appeal in 2017 and reflected in a report from your office in 2018. This is in the context of proof of harm or risk of harm. You say: As FCA mentioned "there is an element of forecasting and speculation inherent to establishing a reasonable expectation of probable harm. As long as their prediction is grounded in ascertainable facts, credible inferences and relevant experience, it is unassailable." That strikes me as a little more nuanced approach to it then simply saying: We want detailed and convincing evidence.

Do you have any comment on that in terms of the degree of assessment of the evidence that you consider required?

MR. MURRAY: I'd have to take that and look at it a little bit more closely and compare the two, to be really very detailed in a response. I think it has not been a big struggle in terms of looking at the evidence that we've received about harm. It is much more common for us to receive, like I said, submissions about harm similar to just the very high-level commentary we've heard today.

CHAIR ORSBORN: Sure, I appreciate that.

MR. MURRAY: I could look at that more closely, but that hasn't been one of the big challenges. One of the big challenges is that really because of the way the notification process works and the whole process works, a lot of the matters that come to us, they're not really close to the harm threshold.

Public bodies, as we said, claimed it 122 times last year. They're getting it right. It's a mandatory exception; they have to claim it. When they are giving a section 19(5) notification to a public body, they're saying: We don't think this applies, basically, because we're intending to release it.

They've assessed it. If they thought it was going to apply, they have to claim it. They think it doesn't apply but they think it might: There's a possibility, so we feel we have to notify. Basically, I think, public bodies are getting it right because in the cases that we've seen – certainly the ones that have come to us for a complaint – the threshold is that the public body is intending to disclose. The Department of Justice or ATIPP Office has proposed maybe moving that to a lower threshold of considering, that we're considering disclosing and that would trigger notification. We used to be there.

The problem with that is any time you see a third party mentioned in the records, you pretty much have to consider does section 39 apply or not, or, certainly, that's the way it could be interpreted. I think we're already in a circumstance where a lot of third party notifications that are issued – and we're not saying that they're necessarily getting it wrong, but a lot of them that are issued end up not meeting the third party test when we examine them and when courts have examined them.

CHAIR ORSBORN: Go back to what I said earlier, that there is a difference, then, between notifying and consulting though, I take it.

MR. MURRAY: Yes, but I'm talking about considering.

CHAIR ORSBORN: Yes.

MR. MURRAY: Yes, so considering – if we're doing a formal notification –

CHAIR ORSBORN: In terms of the threshold for a formal notification.

MR. MURRAY: A formal notification is what I'm talking about. Right now, the top group is in the 122: Access has been refused by the public body. The next group has gotten the section 19 notification under our current statute. That's where they're intending to disclose the information that might meet the section 39. The ATIPP Office, with considering, would be talking about introducing a further group that would be further away, again, from meeting the requirements of section 39.

The current group that are already getting notification, hardly any of them are actually discharging their burden of proof. We're talking about adding another group below that – are further away because the threshold for notification would only be considering. As the Centre for Law and Democracy mentioned, the more people you notify – as has been mentioned here today, a lot of third parties, it may be the first time they've heard of this. If they get notified that they have a right to appeal, they might just appeal.

If you want to throw the option to appeal out more widely, I think you can expect more appeals.

MR. HARVEY: If I could just immediately follow up on that point, because you asked about this a number of times, the difference between consultation and notification is consultation does not trigger the right to appeal to our office. It's notification that does.

CHAIR ORSBORN: I understand.

MR. HARVEY: That's the critical thing. If anything, we're constantly trying to impress upon public bodies that only notify if you are truly uncertain. What we find is that public bodies, many, if they have even the glimmer of uncertainty, then they'll consult.

You asked about interest a number of times too. If the third party has an interest in, let's say, their competitors not having access to their pricing, and we've argued that there's a public interest, that the competitors do have access to the pricing because that levels the competitive playing field to the benefit of the taxpayer. If the third party has an interest in delaying access to that pricing, let's say through another procurement round, then the simple act of making a complaint to our office and then making an appeal to the court can delay the access to that pricing information for another procurement round.

The third party that's making the complaint achieves its objective, but the public purpose in there being open access to this pricing information is therefore confounded. That's why we really try to impress upon the public bodies only do the formal notification if you truly intend to release.

As Mr. Murray suggested, if we relax that to consider, well sure, consider anything; any glimmer of thought at all qualifies as consideration. Then we will end up with – I'm speculating of course, but I think I can reasonably speculate – more third party complaints to this office, more appeals to the court and the right of access, which serves that public purpose, to be limited.

CHAIR ORSBORN: Following on from that, let's assume you go through the consultation process and you get to the point you mentioned where public bodies – I think you used the phrase "truly uncertain." What do they do at that point?

MR. MURRAY: If they're uncertain as to whether the exception applies but they think it might apply – and might is a pretty low threshold as well – then, yes, they have to issue a section 19(5) notification to the public body that they intend to release it. That then triggers the right of appeal.

Because they can only withhold it if they can defend, that section applies if they feel they discharge their burden of proof.

CHAIR ORSBORN: But they have to reach the intent to release before.

MR. MURRAY: They do.

CHAIR ORSBORN: Even though they're uncertain, they have to have the intention to release it.

MR. MURRAY: Well, again, turning the act around to the right of access perspective, there is a right of access to a record unless an exception applies. If the public body cannot say for certain that the exception applies, then they have to release it. If they're not certain that it applies but they think it might, that's the sweet spot for notification. That's when it should occur.

If they're sure that it doesn't apply, then they should not be notifying anyone.

CHAIR ORSBORN: I think I asked this question previously. What has your experience been in terms of the success of informal resolution when, let's say, a third party has filed a complaint?

MR. MURRAY: We do resolve them quite often. I don't have any stats in front of me; we can get those if you want. A lot of it has to do with communicating with the third party and explaining the process and the act, which, in many cases, they are just encountering for the first time.

CHAIR ORSBORN: Yeah, that goes back to Ms. Philpott's point.

MR. MURRAY: Yeah.

CHAIR ORSBORN: The reason for the question is whether or not there is merit in retaining the direct right of appeal for a third party.

MR. MURRAY: We do resolve a lot informally, it's true. However, the direct right of appeal, there are times when a public body – and not a public body, sorry; this goes for both applicants and third parties. There are applicants and third parties that have been through our process a few times over the years. Once they get a sense of what our take is on something, sometimes they are just of the view that it's more efficient for me to put this in front of a judge because that's where I'm going anyway. I pretty well know where the Commissioner is going based on his past decisions on this, so I want this to go in front of a court because I'm taking this all the way.

It's requiring someone to come to our office first. It could make it become a hoop-jumping exercise; everyone knows where we're going with this sort of thing. They've already made up their mind what our decision is likely to be, so they don't want to waste their time coming to our office. Now, we always, obviously, have an open mind and we're willing to consider whatever evidence people come forward with. The arguments and the records are different every time. We do our due diligence every time something comes to our office. From the applicant or third party's point of view, they're thinking about their assessment of where their own best chances may lie, and if they want to take something further, then, you know …

CHAIR ORSBORN: Yeah. From what I've read in a number of submissions, it's generally felt that the informal resolution process works pretty well.

MR. MURRAY: That's, I think, the main thing we do, which is contrary to – I think the perception is that we're more of a tribunal type of organization; issuing formal decisions all the time is certainly what we do, but we're really about helping people comply with the act. Two-thirds to three-quarters of the access to information files are resolved informally.

CHAIR ORSBORN: Looking at the balance, then, a third party is going to go to court anyway, as opposed to third parties who go to court, but whose complaint may well have been resolved if they had come to you. Where does one draw if –?

MR. MURRAY: We do sometimes get the case, as well, where the third party files a complaint and they're just not interested in discussing a formal resolution at all. They make that clear right off the bat. Sometimes those are the ones that end up in court.

CHAIR ORSBORN: Yes. So on balance, you would keep the direct appeal there.

MR. MURRAY: It hasn't hurt. Not very many entities do the direct appeal. We've gathered

some stats on that, which we will provide to you in our follow-up submission, but it's not used very often.

CHAIR ORSBORN: Okay.

Did I get cut you off earlier? No. Okay.

Did I understand you correctly to say earlier, either Mr. Harvey or Mr. Murray, that even though it's a mandatory exception, there should be the public interest override?

MR. MURRAY: Yes. That is the case in some jurisdictions which do have a public interest override of their third party business exception.

CHAIR ORSBORN: Yes. They have one-part tests though, that crowd.

MR. MURRAY: Yes, but it's still mandatory, so you can still do a public interest override of a mandatory exception. There is even public interest override for a personal information exception in some statutes as well.

I don't think that's necessarily a roadblock. I do think it's important that it be mandatory. One reason is that to be fair to the third party businesses that are out there, if they do have a level of clarity about what information they can reasonably expect to be protected and what information they can't, I think that does promote good working relationships between public bodies and third parties. Having it be discretionary would, I think, introduce an element of uncertainty there that could be harmful.

CHAIR ORSBORN: Any further comments?

Thank you all very much.

If you have any further thoughts on the issues, I've talked about a lot – and Mr. Murray mentioned clarity has been beneficial to the third parties. A third party may well say: Well, I don't really know if something is going to be confidential or not because even if I mark it confidential, it might not be – consider that.

If any of you have any further thoughts on what – and I'm repeating myself, I know it's in common usage – the confidentiality requirement adds to the assessment at the OIPC level, not at the coordinator level. What does that add to the assessment of the interests that are involved in section 39? Because an outside observer looking at the reports could come to the conclusion that there has been a lot of time spent on arguing whether something is negotiated or supplied and whether they put something in a RFP or didn't, without getting to the real issue of whether or not harm has been established or whether, in fact, it is a trade secret and there's value in the secrecy. If any of you have any further thoughts or comments on that, I would be more than happy to receive them.

I don't know when this committee of one is going to get back into public session; that is going to depend on the election, what happens after the election and how soon whatever government we have is able to make submissions to us.

With that, we will adjourn – as I used to say in court – *sine die*.