ATIPPA, 2015 Review Commission: Submission of the Department of Justice and Public Safety

November 2020

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Introduction

The *Access to Information and Protection of Privacy Act, 2015* (the "Act" or "ATIPPA, 2015") plays a substantial role in the daily operations of the Department of Justice and Public Safety ("JPS"). The Minister of Justice and Public Safety is the minister responsible for the administration of the Act and as such the Access to Information and Protection of Privacy Office falls under JPS. JPS also houses the solicitors who provide advice to government and routinely provide advice on matters related to the Act. Similar to other public bodies, JPS also regularly receives and responds to requests for access to information.

Through JPS's daily interaction with the Act, officials have noted ways in which the functioning of the Act can be clarified and improved. Outlined below are the issues JPS believes should be considered by the ATIPPA, 2015 Review Commission. These issues are both substantive and procedural and include recommendations made by the Commission of Inquiry Respecting the Muskrat Falls Project. JPS believes that in reviewing and modifying the Province's access to information and protection of privacy legislation, we can better ensure and balance the objectives of the Act including transparency and the protection of personal and privileged information.

Part I: Substantive Issues

1. Solicitor-Client Privilege

Issue

Section 30(1) of the ATIPPA, 2015 allows a public body to withhold from disclosure any information that is subject to solicitor-client privilege. The issue JPS wishes to address in relation to this exemption is whether the Act grants Newfoundland and Labrador's Information and Privacy Commissioner (the "Commissioner") the authority to compel production of documents subject to solicitor-client privilege.

This issue was addressed by the Commissioner in the recent decision, *Newfoundland and Labrador (Justice and Public Safety) (Re)*, A-2019-019. During the investigation process, the Commissioner asked to review documents JPS claimed were subject to solicitor-client privilege. JPS refused to produce these documents as production is not required by the Act. The Commissioner, not accepting the head of the JPS's assurances that the documents were solicitor-client privileged, then asked for an affidavit describing the records, signed by someone who had reviewed the records and who had knowledge of and experience with the Act. In his decision, the Commissioner found that the Act grants the Commissioner the authority to review documents subject to solicitor-client

privilege. JPS disagrees and the matter is currently before the Supreme Court of Newfoundland and Labrador.

The Supreme Court of Canada and courts in all Canadian jurisdictions have consistently expressed the importance of solicitor-client privilege and its fundamental relationship to the proper functioning of our legal system. The SCC has also found that solicitor-client privilege is more than a rule of evidence, it is a substantive rule that cannot be set aside by inference, but rather, only by clear, explicit, and unequivocal legislative language.

This was addressed by the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53. In this decision, the SCC was asked to interpret s. 56(3) of Alberta's *Freedom of Information and Protection of Privacy Act* (FOIPP) which provides:

> (3) Despite any other enactment or **any privilege of the law of evidence**, a public body must produce to the Commissioner within 10 days any record or any copy of any record required under subsection (1) or (2). (emphasis added)

The majority held that the expression "any privilege of the law of evidence" does not require a public body to produce to the Commissioner those documents over which solicitor-client privilege is claimed. At paragraph 2, Côté J. summarized the majority ruling as follows:

> I conclude that s. 56(3) does not require a public body to produce to the Commissioner documents over which solicitor-client privilege is claimed. As this Court held in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, **solicitor-client privilege cannot be set aside by inference but only by legislative language that is clear, explicit and unequivocal.** In the present case, the provision at issue does not meet this standard and therefore fails to evince clear and unambiguous legislative intent to set aside solicitor-client privilege. It is well established that solicitor-client privilege is no longer merely a privilege of the law of evidence, having evolved into a substantive protection. Therefore, I am of the view that solicitor-client privilege is not captured by the expression "privilege of the law of evidence". Moreover, a reading of s. 56(3) in the context of the statute as a whole also supports the conclusion that the legislature did not intend to set aside solicitor-client privilege. Further, even if s. 56(3) could be construed as authorizing the Commissioner to review documents over which privilege is claimed, this was not an appropriate case in which to order production of the documents for review. (emphasis added)

Section 97 of the ATIPPA, 2015 deals with the Commissioner's power to compel production of documents. Subsections 97(1), (3), and (4) currently provide:

> 97. (1) This section and section 98 apply to a record notwithstanding
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> …
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> (d) **a privilege under the law of evidence**.
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> (3) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.
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> (4) As soon as possible and in any event not later than 10 business days after a request is made by the commissioner, the head of a public body shall produce to the commissioner a record or a copy of a record required under this section. (emphasis added)

The wording in s. 97(1)(d) is essentially the same as that at issue in the *University of Calgary*. In that case the majority of the SCC found that solicitor-client privilege cannot be set aside by inference and found that the words "privilege of the law of evidence" did not meet the required standard of clear, explicit, and unequivocal legislative language. As such, this term does not capture solicitor-client privilege. Applying this reasoning, "a privilege under the law of evidence" in s. 97(1) of the Act does not include solicitor-client privilege and would not require production of privileged documents to the Commissioner.

The majority in the *University of Calgary* also considered the context of the statute as a whole and found that this supported their conclusion that the legislature did not intend to set aside solicitor-client privilege. Some of these contextual factors are equally applicable to the ATIPPA, 2015. For example, s. 30(1) of the Act (like s. 27(1) of FOIPP) unequivocally establishes that a public body may refuse to disclose "information that is subject to solicitor and client privilege". As the SCC stated, this indicates that the legislature turned its mind to the specific issue of solicitor-client privilege and could have used the same clear, explicit, and unequivocal language in s. 97(1).

JPS does note that the legislature included a reference to solicitor-client privilege in ss. 97(5) and 100 of the Act:

> 97(5) The head of a public body may require the commissioner to examine the original record at a site determined by the head where
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> (a) the head of the public body has a reasonable basis for concern about the security of a record that is subject to solicitor and client privilege or litigation privilege;
>
> 100(1) Where a person speaks to, supplies information to or produces a record during an investigation by the commissioner under this Act, what he or she says, the information supplied and the record produced are privileged

> in the same manner as if they were said, supplied or produced in a proceeding in a court.
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> (2) The solicitor and client privilege or litigation privilege of the records shall not be affected by production to the commissioner.

These subsections do contemplate the Commissioner viewing documents subject to solicitor-client privilege. What these subsections do not say is that a public body must be compelled to produce such documents to the Commissioner. These subsections are providing procedural safeguards around the disclosure of solicitor-client privileged documents and the conditions within which they can be viewed should a public body choose to disclose them to the Commissioner. Solicitor-client privilege belongs to the client, and as is made clear in section 30(1) of the Act (which uses the permissive "may"), it is a discretionary privilege that a public body can choose to waive should they wish. Should a public body choose to disclose, the Act provides options as to how and where such disclosure will take place. This is different than providing the Commissioner the power to compel production of documents over which a fundamental privilege has been asserted.

As stated by the Supreme Court of Canada, solicitor-client privilege can only be set aside by clear, explicit, and unequivocal legislative language. It cannot be set aside by a mere inference. Sections 97 and 100 do not clearly, explicitly, or unequivocally state that the Commissioner has the power to compel production of solicitor-client documents. Relying on these two sections for such authority is merely an inference which is insufficient in relation to solicitor-client privilege.

The Report of the 2014 Statutory Review Committee did recommend that the Act include no restriction on the right of the Commissioner to require production of any record for which solicitor-client privilege has been claimed. However, the Committee did not have the benefit of the *University of Calgary* decision which further outlined and examined the law surrounding solicitor-client privilege in the context of access to information legislation. Furthermore, the legislature chose not to include an explicit and unequivocal provision in the Act which would allow the Commissioner to compel production.

Even if the legislature had chosen to include a provision in the Act which allowed the Commissioner to compel production of solicitor-client privileged documents, it does not mean the Commissioner should compel production in relation to all matters involving solicitor-client privilege.

In the *University of Calgary*, the Supreme Court of Canada is clear that such power would only be appropriate to use in rare cases where there is some argument that it is "absolutely necessary" to do so. The SCC in *Goodis v. Ontario (Minister of Correctional Services)*, 2006 SCC 31, stated that "[a]bsolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case."

While the Commissioner in *University of Calgary* argued that she has an adjudicative function akin to that of a superior court to determine whether a public body has validly claimed solicitor-client privilege, the majority of the SCC noted that "even courts will decline to review solicitor-client documents to ensure the privilege is properly asserted unless there is evidence or argument establishing the necessity of doing so to fairly decide the issue." Because there was no evidence or argument made to suggest that solicitor-client privilege had been falsely claimed by the public body the SCC concluded that it would not have been an appropriate case to compel production of such records even if the power existed to do so.

Recommendation

The Department recommends that the Act be amended to clarify that the Commissioner cannot compel production of documents subject to solicitor-client privilege.

2. Settlement Privilege

Issue

Settlement privilege is a fundamental common law privilege that has significance for the proper and efficient functioning of our legal system. Currently, settlement privilege is not explicitly included as an exemption to disclosure in the ATIPPA, 2015. While there is case law that finds settlement privilege cannot be abrogated absent clear and explicit statutory language, the Commissioner has disagreed with this interpretation and has found that settlement privilege does not exist as an exception to access for public bodies subject to the Act. For the reasons outlined below, JPS believes that settlement privilege should be explicitly included in the Act as an exemption to disclosure similar to solicitor-client privilege and litigation privilege.

In *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, the Supreme Court of Canada discussed the ways in which settlement privilege has become an "enduringly successful" means of confronting barriers to access to justice. Regarding the importance of settlement, the SCC stated at paragraph 11:

> [11] Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in *Sparling v. Southam Inc*. (1988), 1988 CanLII 4694 (ON SC), 66 O.R. (2d) 225 (H.C.J.):
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> > . . . the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest

> in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system. [p. 230]

This observation was cited with approval in *Kelvin Energy Ltd. v. Lee*, 1992 CanLII 38 (SCC), [1992] 3 S.C.R. 235, at p. 259, where L'Heureux-Dubé J. acknowledged that promoting settlement was "sound judicial policy" that "contributes to the effective administration of justice".

Settlement privilege promotes settlement and it carries a *prima facie* presumption of inadmissibility. The SCC in *Sable* stated that settlement privilege applies to settlement negotiations, including communications and documents not expressly marked "without prejudice". Settlement privilege also applies to the negotiated settlement amount and applies whether or not a settlement is reached. At paragraph 13 of the *Sable* decision, the SCC further outlined the ways in which settlement privilege is a vital feature of settlement which is itself important to the administration of justice:

> [13]…The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597, at p. 605:
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> > . . . parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations . . . may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in Scott *Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.
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> **What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.** (emphasis added)

As stated, there is no explicit reference to settlement privilege in the ATIPPA, 2015. However, it is JPS's position that as a common law privilege, settlement privilege remains applicable regardless of whether or not it is explicitly included in the legislation.

In *Richmond (City) v. Campbell*, 2017 BCSC 331, the City sought an order from the Court quashing the Commissioner's order requiring it to create and disclose records of total aggregate legal fees and settlement amounts regarding two claims against the City. The Court determined that while the legal advice exception in British Columbia's *Freedom of Information and Protection of Privacy Act* (which simply refers to "information that is

subject to solicitor client privilege") could not be extended to include settlement privilege, settlement privilege cannot be abrogated absent clear and explicit statutory language. At paragraphs 71 to 73, the Court states:

> [71] As discussed in para. 38 of *Magnotta OCA*, settlement privilege is a fundamental common law privilege, and it ought not to be taken as having been abrogated absent clear and explicit statutory language. There is an overriding public interest in settlement. It would be unreasonable and unjust to deprive government litigants, and litigants with claims against government or subject to claims by government, of the settlement privilege available to all other litigants. It would discourage third parties from engaging in meaningful settlement negotiations with government institutions.
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> [72] *FIPPA* does not contain express language that would abrogate settlement privilege and, accordingly, it should not be interpreted to have done so.
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> [73] I therefore conclude that OIPC was incorrect in ordering the City to provide information concerning the amount of its settlements with the two Previous Grievers, whether that information was in aggregated form or not, because that information was protected by the common law settlement privilege.

Section 30 of ATIPPA, 2015 protects information "subject to solicitor and client privilege or litigation privilege of a public body". While this section does not reference settlement privilege, neither does the Act expressly abrogate settlement privilege. The case law from British Columbia supports a position that common law settlement privilege continues to apply even though it has not been expressly included as an exemption in the Act.

The Commissioner, however, has found differently. In *Paradise (Town) (Re)*, A-2018-022, the Commissioner found that the reasoning of the British Columbia Supreme Court in *Richmond* was deficient in that there was "no evidence that the Court took into account the many factors relevant to statutory interpretation…". The Commissioner also distinguished *Richmond* as:

> [64]…the purpose section of BC's FIPPA is a much-abbreviated version of that found in the ATIPPA, 2015, without reference to facilitating democracy, participating in the democratic process, or many of the other elements in the purpose section of the ATIPPA, 2015.

The Commissioner ultimately found that the Act is a "complete, exhaustive code" and that "settlement privilege does not exist as a free-standing exception overriding the ATIPPA, 2015." The Commissioner also found that there may be circumstances in which s. 35(1)(g) of the Act could be used to protect some of the same information protected by settlement privilege. This provision is applicable to situations in which the financial or

economic interests of a government or public body may be prejudiced. However, the purpose behind settlement privilege is broader than preventing prejudice to financial or economic interest. As described above, settlement privilege has an effect on the efficient and proper functioning of our judicial system.

Furthermore, settlement privilege belongs to all parties to a matter and cannot be unilaterally waived or overridden by just one of the parties. Settlement privilege therefore does not belong only to the public body. In cases where there are co-defendants and joint settlements, settlement privilege belongs to the plaintiff and all defendants, some of whom may not be public bodies, but private citizens and entities. They should not have their right to settlement privilege abrogated without clear, explicit legislative language.

Breaching settlement privilege also has an effect on a public body's settlement strategy. The Province is often a defendant in many similar claims, for example, matters relating to historic abuse or highway maintenance. Plaintiffs who are aware of how similar claims are settled have insight into the Province's settlement position. This leads to an increasingly high bar for settlement which is not in the public interest as it leads to an increase in the expenditure of public funds.

As outlined above, the Supreme Court of Canada has clearly stated the significance of settlement privilege and its importance to the administration of and access to justice. Settlement is generally encouraged by the courts as a cost-effective and efficient means of dealing with disputes that could otherwise take years and substantial cost to resolve. Settlement privilege is a fundamental common law privilege that plays a key role in promoting settlement. Furthermore, there is public interest in the maintenance of settlement privilege for public bodies. Public bodies are responsible for public funds and must be allowed the protection of settlement privilege as a means of properly and meaningfully engaging in settlement negotiations in which public money will be at issue.

Recommendation

While JPS believes that settlement privilege remains applicable though it is not explicitly included in the Act, to ensure that this fundamental privilege is protected, JPS recommends that it be explicitly included as an exemption to disclosure. JPS acknowledges that there must be a balance between the public interest in settlement privilege and the public's right to know how public funds are distributed. To address these concerns, similar to both solicitor-client privilege and litigation privilege, an exemption for settlement privilege should be a discretionary exemption subject to the public interest override found in s. 9 of the Act.

3. Business Interests of a Third Party

Issue

Businesses are reluctant to disclose information, and in certain circumstances will not disclose information, to the Government of Newfoundland and Labrador as they are concerned it will be released to the public if an ATIPP request is made, noting the high evidentiary burden relied upon in sections 39(c)(i) and (iii).

Section 39 of the ATIPPA, 2015 sets out the test to be applied when a public body seeks to withhold disclosure to an applicant for 3rd party business information/records. At issue for JPS is the high standard needed to satisfy the three-part test, particularly at sections 39(1)(c)(i) and (iii). Businesses and their respective legal counsel have continued to express concern that the standard set out in case law and decisions from the Office of the Information and Privacy Commissioner ("OIPC") with respect to harm and showing undue financial hardship, is, quite simply, unattainable, and as such, parties are reluctant or unwilling to provide documents to JPS solicitors and other GNL departments.

Documents which have been withheld include agreements that GNL would deem material, and may include lease agreements, supply agreements, retail branding agreements, or management services agreements. While some agreements or documents have been completely withheld, others have been received in redacted formats. When agreements are received in a redacted form, it is difficult, if not impossible for JPS solicitors to determine for the benefit of their clients the significance of the redacted material.

At times, JPS solicitors have been asked to review documents at an external party's location. When documents are reviewed at these locations, JPS solicitors can only take notes, as the documents are in the custody and control of another party and may be restricted at a future time. Receipt of redacted documents leaves the open question about information that has been redacted and whether it would have an impact on the decision making of a GNL department (including JPS) had said department reviewed the entire document.

As a result of the high legislative standard for withholding documents in the custody of the government, at minimum, there is a risk that decisions are being made without information that could be crucial to a decision maker. JPS solicitors are unable to have unfettered long-term access to documents that could be essential to providing comprehensive legal advice to their client departments, whether now or in the future. The risk that third parties may choose not to do business with GNL because of the Act should not be discounted. There are parties who have expressed their frustration with the operation and the reach of the Act following receipt of various ATIPP requests.

The Report of the 2014 Statutory Review of the *Access to Information and Protection of Privacy Act* (the "Wells Report"), examined Bill 29 (the legislative scheme for access to

information prior to ATIPPA, 2015) with respect to disclosure of business information of a third party. The Wells Report indicated that submissions made by the public and opposition parties (Liberal and NDP) proposed that a more stringent test was required when looking to withhold disclosure of third party information. The Wells Report noted at pages 127-128 that:

> If there are not high standards of proof for invoking the section 27 exemption, then it could appear that a major objective of the *Act* is to protect business interests of third parties. Section 27 is linked to the purpose of the *Act*, which is expressed as giving the public a right of access, subject to the need, in limited circumstances, to withhold information.
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> […]
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> The public has an interest in understanding the interplay between government and the businesses that provide goods and services to public bodies… People have a right to know that tax dollars are being spent as the legislature intended, and that their government is getting the best value. It can only be certain of that if it has maximum access to information. Otherwise, openness and transparency are a political mirage.
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> […]
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> The amendments brought about by Bill 29 effectively broadened the exceptions by weakening the test to be applied to business interests of a third party.

The legislative changes proposed and ultimately adopted by the legislature from the Wells Report sought to balance the public's right to information, with appropriate safeguards that would protect third party business interests. However, in application, sections 39(1)(c)(i) and (iii) have functioned to create an unattainable standard that third parties are not able to satisfy, therefore creating the reluctance and unwillingness of third parties and their solicitors to provide documentation to the government out of concern that their information, which they consider confidential and/or of a sensitive nature, will be disclosed.

The Supreme Court of Canada in *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, addressed the standard to be applied when withholding information from disclosure based on harm to a third party. The court indicated that:

> [199] …A third party claiming an exemption under s. 20(1) of the Act must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur. This approach, in my view, is faithful to the text of the provision as well as to its purpose.

> […]
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> [206] To conclude, the accepted formulation of "reasonable expectation of probable harm" captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.

A review of applicable case law and OIPC decisions in the province confirms that the standard as set out in *Merck Frosst Canada Ltd. V Canada (Health)* is difficult to satisfy. To date, when determining whether a public body may withhold documents from disclosure, the OIPC has frequently recommended that documents continue to be withheld pursuant to section 39.

In Report A-2015-006, the then Information and Privacy Commissioner agreed with the partial withholding of the information of a third party under section 39. At paragraph 19 of the report the Commissioner noted:

> [19] The third party has also satisfied me that it has met the requirements of the third part of the test. The third party has provided considerable information from areas in which it commercially operates. I am persuaded that disclosing the identity and detailed conclusions contained in the second part of the Information Note would significantly harm the third party's competitive position, or result in undue loss to it, or gain to competitors, under clauses 39(1)(c)(i) and (iii). I therefore recommend that the Department continue to withhold that information about the third party in this part, including its identity.

A jurisdictional scan was completed and found that while several jurisdictions mirror our three-part test, jurisdictions such as Manitoba and Nunavut are more flexible, and do not require all three elements be shown in order for information to be withheld by a public body. In Manitoba and Nunavut, the lists of requirements contained in their legislation are disjunctive, meaning that a public body can withhold information if it meets any of the paragraphs outlined in the legislation.

The Wells Report attempted to balance the business interests of a third party with the public's right to information from government. Ultimately, the adoption of the Wells Report, and the three-part test as currently contained in section 39, has created an unattainable standard for businesses to meet when attempting to withhold information from release.

Recommendation

Consideration should be given to amending the three-part test contained in section 39 of the Act to create a test that balances the government's obligation to release information through an access to information request, with third party business interests.

4. Admissibility of Evidence

Issue

Section 99(2) of the ATIPPA, 2015 prevents the Information and Privacy Commissioner or individuals acting for or under the direction of the Commissioner from being called to give evidence with respect to an offence as described in s. 115.

Section 115 of the Act sets out the circumstances where an offence has occurred under the Act. Once there is a decision to proceed with prosecution of an alleged offence, the matter is referred to the Department of Justice and Public Safety (Public Prosecutions) for prosecution.

If an offence as described in s. 115 proceeds to litigation, and is not resolved by way of guilty plea, the provincial prosecutor assigned the file must prove the offence beyond a reasonable doubt and in compliance with the standards for evidence as set out in s. 99 of the Act. Section 99(2) prohibits a prosecutor or another individual involved in litigation under the Act from calling the Commissioner or any individual acting under the Commissioner to give evidence in court.

The Office of the Information and Privacy Commissioner is responsible for carrying out investigations of alleged offences under the Act and ultimately determines whether a charge should be laid pursuant to s. 115. In the course of an investigation by the OIPC, the investigator has the ability to critically analyze evidence collected and determine what further evidence may be required to prove an offence. In the course of an investigation an OIPC investigator may interview witnesses, examine computer systems, check work-logs, etc. The OIPC investigator will determine, based on information available or not available to them, whether there are reasonable grounds to lay a charge under the Act.

As such, investigations under the Act are largely dependent on circumstantial evidence, particularly offences that fall under s. 115(2)(a). In a prosecution of an offence under this section, information that rules out alternate theories about a possible offence are as important as information that would confirm that a certain individual is responsible for a breach and offence as charged. In many instances, the OIPC investigator would best be able to speak to the circumstantial nature of the offence and why certain information is or is not important, or why emphasis should be placed on certain information or lack thereof. Not having the ability to call an OIPC investigator as a witness to speak to an offence

under the ATIPPA, 2015 has a direct impact on all prosecutions under the Act, and the success of those prosecutions.

In the normal course of criminal prosecutions, investigators are frequently called to testify and explain the process they took while investigating a matter and why certain decisions were made in the course of an investigation. The evidence given on behalf of investigators in criminal prosecutions is critical and is frequently used as a means to complement and/or bolster additional witness evidence and the theory of the prosecution's case.

A jurisdictional scan was completed and Ontario and Nunavut are the only other jurisdictions that have legislation that prohibits their respective OIPC offices and/or investigators from being called to court as witnesses. All other provinces are either silent on calling their respective OIPC investigators or have provisions that only allow their OIPC investigators to be called as witnesses for offences under their respective legislation.

Recommendation

Consideration should be given to removing s. 99(2) from the Act.

In the alternative, s. 99(2) should be amended to allow OIPC investigators to be called as witnesses for offences under the Act.

Part II: Schedule A

5. *Evidence Act*

Issue

Schedule A of the ATIPPA, 2015, includes section 8.1 of the *Evidence Act* at subsection (f). Section 8.1 of the *Evidence Act* at subsection (2) sets out three committees, namely, (a) quality assurance committee, under the *Patient Safety Act*¸ (b) quality assurance activity committee, as defined under the *Patient Safety Act*, and (c) the Child Death Review Committee, under the *Fatalities Investigations Act,* as being excluded from being compelled to give evidence in a legal proceeding, as defined by the section.

The Department of Justice and Public Safety is recommending that Schedule A of the ATIPPA, 2015 subsection (f) remain as is, to protect the integrity of the above noted committees.

The conduct of quality assurance activities within the health care system is critical to patient safety and to ensuring the safe delivery of health services to patients. Quality assurance is a means of identifying system improvements and to be effective, health

professionals, particularly physicians, must participate in reviews and investigations in a frank and open manner.

Quality assurance activities are critically important to patient safety processes within the regional health authorities, which require the participation of physicians and other health care providers. However, there has been a general concern among physicians, as communicated by the Canadian Medical Protective Association, that their views of a colleague's work could be disclosed in a trial or made public. Sections 10 and 15 of the *Patient Safety Act*, as well as section 8.1 of the *Evidence Act* therefore protect quality assurance information in order to encourage frank and open participation within the process.

The Child Death Review Committee (CDRC), as organized under s. 13.1 of the *Fatalities Investigations Act,* evaluates the facts and circumstances of child deaths, deaths related to pregnancy, and still births/neonatal deaths in the province. The CDRC receives confidential information, including medical information and often information pertaining to the life circumstances of children, from the Office of the Chief Medical Officer as it relates to the above noted deaths. As such, this information is highly confidential and should continue to be protected from access requests under the ATIPPA, 2015.

Recommendation

Schedule A of the Act should continue to contain the *Evidence Act* s. 8.1 as means of protecting vulnerable and private information from access requests under the ATIPPA, 2015.

6. *Fatalities Investigations Act*

Issue

Section 7 of the ATIPPA, 2015 addresses conflict between the Act and other legislation. Section 7(1) finds that in such cases, the ATIPPA, 2015 shall prevail. However, s. 7(2) creates exemptions to s. 7(1) when a provision of another act prohibits or restricts access to a record and is listed in Schedule A of the ATIPPA, 2015. Section 24(1) of the *Fatalities Investigations Act* ("FIA") has been included in Schedule A and states:

> 24. (1) All reports, certificates and other records made by a person under this Act are the property of the government of the province and shall not be released without the permission of the Chief Medical Examiner.

When a death occurs in the Province in certain circumstances (including deaths as a result of violence, accident or suicide; unexpected deaths; institutional deaths; and employment related deaths) the Chief Medical Examiner (CME) is responsible for

investigating the cause, manner, date, time, and place of the death as well as identifying the deceased person. The Office of the Chief Medical Examiner (OCME) creates records relating to such deaths which can include certificates of death, autopsy reports, and other documents related to post-mortem investigations. The OCME therefore creates singular records about complex situations most often relating to the death of an individual.

The inclusion of s. 24(1) of the FIA in Schedule A of the ATIPPA, 2015 was addressed in the Report of the 2014 Statutory Review. At page 153 of the Report, it was found that:

> …Obviously details of such deaths and certificates resulting from post-mortem examinations cannot be made available for public access on demand, nor should they even be subject to the possibility of a commissioner recommending that they be released publicly. Access to such documents is better regulated by provisions in the special statute governing all aspects of the matters to which they relate than by provisions designed for management of general access to public records.

Recommendation

JPS agrees with the statement above and contends that s. 24(1) of the *Fatalities Investigations Act* should continue to be included in Schedule A. Because of the sensitive nature of the information within the custody of the OCME, which often concerns deaths other than by natural causes and highly sensitive personal health information which could have implications for the deceased's family, such information should not be available for public review unless the Chief Medical Examiner agrees that it should be released. The CME is in a better position to make this determination than an ATIPP coordinator or the Commissioner, as the CME, a trained pathologist, has a more complete understanding of the nature of the information and the impact its release could have.

Part III: Recommendations of the Commission of Inquiry Respecting the Muskrat Falls Project

7. Recommendation 16

The Commission of Inquiry Respecting Muskrat Falls (the "Muskrat Falls Inquiry") was established by the Government of Newfoundland and Labrador on November 20, 2017, in accordance with Part I of the *Public Inquiries Act, 2006*. The Muskrat Falls Inquiry was tasked with inquiring into a number of issues related to the Muskrat Falls Project. On

March 5, 2020 the Report of the Muskrat Falls Inquiry was released. Recommendation 16 of the Report states:

> 16. To improve the ability of future Commissions of Inquiry to fufill mandates given pursuant to the *Public Inquiries Act, 2006*, the Act should be amended to provide for the following:
>
> > a. A Commission should be exempted from the *Access to Information and Protection of Privacy Act* legislation so that its investigations can be conducted fully and without potential interference or influence. This exemption should continue at least until each Commission files its final report.
> >
> > b. Documents received from third parties on a confidential basis should be returnable to those third parties without the Commission retaining copies, if such is determined necessary by the Commissioner.
> >
> > c. Documents that have been entered at Commission proceedings as "Confidential Exhibits" or that have been sealed by the Commissioner should not be subject to further disclosure, even subsequent to the fulfilment of the Commission's mandate.

7.1 Exemption from ATIPPA

Issue

The Report of the Muskrat Falls Inquiry has recommended that commissions of inquiry be exempted from ATIPP legislation. The Inquiry itself was exempted from the ATIPPA, 2015 by its inclusion in Schedule B of the Act. Bodies listed in Schedule B are not considered "public bodies" and therefore are not subject to the Act. For the reasons below, JPS suggests that commissions of inquiry be exempted from access to information legislation while those commissions of inquiry are ongoing, prior to the release of a final report.

Describing the role of commissions of inquiry in his text *The Conduct of Public Inquiries: Law, Policy, and Practice*, Ed Ratushny states:

> …a commission of inquiry is a unique institution serving special purposes in our political-legal system. As (then) Justice Antonio Lamer stated: "There is no doubt that commissions of inquiry at both the federal and provincial levels have played an important role in the *regular machinery of government*…[and]…in particular serve *to supplement* the activities of the mainstream institutions of government. Justice Cory explained why

> commissions of inquiry are able to make a special contribution to the role of government: "As *ad hoc* bodies, commissions of inquiry are free of many of the institutional impediments which at times constrain the operation of the various branches of government. They are created as needed…." They have now become "an integral part of our democratic culture."[1]

As described by Ratushny, a commission of inquiry is a useful tool in our political-legal system as it is generally free of the constraints that can hinder the expeditious operation of government. The application of access to information legislation to an ongoing commission of inquiry defeats this purpose as the process of responding to access requests while a commission of inquiry is in operation unnecessarily disrupts the functioning of the commission of inquiry. It can impede the work of the commission staff, including the Commissioner; interfere with ongoing investigations conducted by the commission; and expend unnecessary time and personnel resources which would be more appropriately utilized to fulfill the commission of inquiry's mandate.

Recommendation

JPS recommends that, similar to the way in which the Court of Appeal is exempted from the ATIPPA, 2015, commissions of inquiry established pursuant to the *Public Inquiries Act, 2006* be exempted from the definition of "public body" while the commission is ongoing and up until the release of a final report.

7.2 Confidential Documents of Third Parties and Confidential Exhibits

Issue

In its Report, the Muskrat Falls Inquiry also recommended that confidential third party information received at a commission of inquiry be returned to the third party without retaining copies and that confidential exhibits not be subject to further disclosure, even at the conclusion of the commission of inquiry.

Section 28 of the *Public Inquiries Act, 2006* states:

> 28. The Lieutenant-Governor in Council shall adopt policies and procedures for the preservation of the records of a commission or inquiry and shall ensure that confidentiality is preserved for information that is confidential or privileged.

However, upon conclusion of a commission of inquiry, generally, all materials are returned to government. When this information is returned, it is subject to the same access to

[1] Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law Inc., 2009) at 19.

information rules as all other government information, regardless of any order made by a commissioner. This raises the concerns noted above relating to third party information and information provided to a commission of inquiry on a confidential basis. There must be a balance between a third party's right to privacy and the transparency and public interest associated with commissions of inquiry.

Recommendation

JPS recommends that s. 28 of the *Public Inquiries Act, 2006* be included in Schedule A of the ATIPPA, 2015.

Conclusion

The *Access to Information and Protection of Privacy Act, 2015* serves an essential role in ensuring transparency within government while also protecting the right of citizens to maintain privacy over their personal information. The recommendations put forward by the Department of Justice and Public Safety further these purposes while also maintaining adherence to rules of law established through our common law judicial system. As the Province is bound by our legal system in largely the same way as private individuals and businesses, adherence to these rules is necessary to protect the proper functioning of our legal system and the expenditure of public funds.