



HOUSE OF ASSEMBLY
Newfoundland and Labrador

OFFICE OF THE SPEAKER

November 27, 2020

Mr. David B. Orsborn
Committee Chair
Access to Information and Protection of Privacy Act
Statutory Review, 2020
Via email: admin@nlatippareview.ca

Dear Mr. Orsborn:

I am writing in response to your September 29, 2020 correspondence with the House of Assembly ATIPPA Coordinator, Mr. Don Hynes. As Speaker of the House of Assembly, it is not my intent to make a formal presentation to the ATIPPA Review Committee. However, there are three matters that I would bring to your attention as you complete your mandate.

1. Section 4, Excluded Public Bodies

- Section 4 of the *Access to Information and Protection of Privacy Act, 2015* (“the Act”) currently provides that the Lieutenant-Governor in Council, upon the recommendation of the **Management Commission**, may by order amend the schedule of excluded public bodies when the House of Assembly is not in session. The section also provides that such an order does not extend beyond the end of the next sitting of the House, presumably to allow time for a Bill to be brought before the House to effect the change in the Legislature should government wish to do so.
- The House of Assembly recommends that the review committee consider whether the Management Commission is indeed the appropriate body to make a recommendation contemplated by section 4.
- In section 20 of the *House of Assembly Accountability, Integrity and Administration Act*, (“HOAAIA”) the duties and responsibilities of the Management Commission are generally described as follows: “*responsible for the financial stewardship of all public money, within the meaning of the Financial Administration Act, that may be voted by the House of Assembly for the use and operation of the House of Assembly and statutory offices, and for all matters of financial and administrative policy affecting the House of Assembly, its members, offices and staff and in connection with them*”. Paragraphs 20(1)(a) to (g) detail further the responsibilities of the Commission in relation to the foregoing.

- The House of Assembly Management Commission is the non-partisan body which oversees the financial and administrative operations of the House of Assembly. It does not generally make policy decisions or recommendations which are outside the financial and administrative operations of the House of Assembly and statutory offices.
- However, paragraph 20(1)(g) of the HOAAIA also states that the commission shall “*exercise other powers given to the commission and to perform other duties imposed on the commission under this or another Act”.*
- Therefore, while the Commission may make a recommendation further to the power given to it under section 4 of the Act, this is not a matter within the broader mandate of the Commission for financial and administrative oversight of the House of Assembly.
- This issue came to light in 2018 when the Commission was asked to consider an exemption under section 4 of the Act. It was noted to be the first time such a matter was brought before the Commission. Members of the Commission considered the substance of the matter which was complex in nature but also expressed reservations about the Management Commission making such a recommendation outside of the parliamentary processes of the House of Assembly.
- Further, some Members spoke to the fact that, as members of the Commission, they were ‘not acting as representatives of their respective caucuses’, but as individual members exercising a fiduciary responsibility over the financial and administrative operations of the House of Assembly.
- After a comprehensive debate, an amendment was moved to the resolution to defer the matter to consideration by the whole House, as the House was scheduled to sit within a short period of time. The amendment was deemed out of order.
- The vote on the recommendation resulted in a tie, and the matter was resolved when the deputy chair of the Management Commission exercised a casting vote in favour of the recommendation.¹

2. Section 85, Appointment of the Information and Privacy Commissioner

- Section 85 of the Act provides for a process by which a Commissioner, a statutory officer of the House of Assembly, is appointed. This process requires that the Speaker establish a selection committee comprising the Clerk of the Executive Council or his or her deputy; the Clerk of the House of Assembly or, where the Clerk is unavailable, the Clerk Assistant of the House of Assembly; the Chief Judge of the Provincial Court or another judge of that court designated by the Chief Judge; and the President of Memorial University or a vice-president of Memorial University designated by the President.

¹ The agenda, briefing materials and Hansard of the February 1, 2018 meeting of the Management Commission can be found here: <https://www.assembly.nl.ca/ManComm/Meetings/>

- The selection committee is required to develop a roster of qualified candidates and may publicly invite expressions of interest for the position. The selection committee submits the roster to the Speaker of the House of Assembly, at which point the Speaker is required to **consult** with the Premier, the Leader of the Official Opposition and the leader or member of a registered political party that is represented on the House of Assembly Management Commission. The Speaker then is required to **cause to be placed** before the House of Assembly a resolution to appoint as commissioner **one of the individuals named on the roster**.
- The issue that arises is how the name of ‘one of the individuals named on the roster’ is chosen to be put forward in the resolution, in particular where no unanimity exists among the individuals with whom the Speaker must consult.
- The selection committee is required to provide a roster of candidates to the Speaker, but the Act is silent as to whether the candidates must be ranked. Further, it does not indicate whether the Speaker is bound to put forward the name of a first ranked candidate, if any, in a subsequent resolution. The decision to appoint a statutory officer is a decision of the House, not a decision of the Speaker. If, after consultation, a preferred candidate is not agreed by those with whom the Speaker consults, there is no clear direction in section 85 as to how the Speaker may proceed.
- With respect to process, the Speaker of the House has no ability to put forward a resolution for the consideration of the House, yet the Speaker is required by the Act to ‘cause a resolution to be placed before the House’. Therefore, the matter of moving the resolution must necessarily fall to the Government House Leader, who is responsible for the business of the House.
- One further consideration for a Speaker may be whether the House sits in a majority or a minority configuration, which can result in added complexity if confidence is at issue.
- You may wish to review Hansard respecting the appointment of the Information and Privacy Commissioner in July 2019 for discussion of this matter by Members of the House of Assembly.

3. Time limits related to “the next sitting” of the House of Assembly

- Sections 4, 7, 88 and 89 of the current Act tie various limitations to the ‘end of the next sitting of the House of Assembly’. Sections 4 and 7 relate to orders made under the Act when the House is not sitting which cannot remain in force beyond the end of the next sitting. Section 88 refers to a suspension of a Commissioner, and section 89 relates to the appointment of an acting commissioner. Neither the suspension nor the appointment can extend beyond ‘the end of the next sitting of the House of Assembly.’”

- Tying these events to a sitting of the House may be problematic on a number of fronts:
 - A sitting of the House is not defined in legislation or the Standing Orders of the House.
 - Technically a sitting is the sitting day, i.e. the period of time from when the Speaker assumes the chair to the daily adjournment. A period of continuous sitting days is more appropriately referred to as a sitting period.
 - The House of Assembly has two traditional sitting periods – Spring and Fall - which are commonly referred to as the Spring sitting and the Fall sitting.
 - Should the House meet outside these two periods, that period is referred to as an extraordinary sitting. An extraordinary sitting could be a single day or weeks. The timing of an extraordinary is unscheduled and its length is uncertain. As an example, in 2017 there were 2 extraordinary sittings – 1 day and 1 week; in 2019 there was one extraordinary sitting of 3 weeks and in 2020 there have been 4 extraordinary sittings of 1 day, 1 day, 2 weeks and 1 week.

- The Committee may wish to consider the use of the term “sitting” in the above noted provisions. There is a significant possibility that the House could meet for a “sitting”, extraordinary or otherwise, resulting in an unintended outcome. For example, an amendment to a schedule could expire more quickly than expected. As well, the use of the term could impact the suspension period or acting appointment period of a commissioner, which shorten the time period during which the recruitment process described in the Act must be conducted.

Finally, I would like to underscore for the review committee the importance of parliamentary privilege the functioning and independence of the Legislature. Section 41 of the Act acknowledges that privilege and provides a mandatory exemption from access. The House of Assembly confirms its support for that provision, and would refer the committee to some recent decisions respecting the nature of privilege and its importance, noted below.²

Thank you for the invitation to provide feedback to the committee for the Statutory Review, 2020, *Access to Information and Protection of Privacy Act*. Should you have any questions or wish to discuss this further, please contact Don Hynes, House of Assembly ATIPP Coordinator at 729-7408.

Kind regards,



Scott Reid, MHA
Speaker of the House of Assembly
Chair of the Management Commission

² *Duffy v. Senate of Canada*, 2018 ONSC, 7523; *Canada (Board of Internal Economy) v. Boulterice*, 2019 FCA 33, [2019] 3 FCR 145, leave to appeal SCC dismissed 2019-07-18