Kenneth Kavanagh

December 3, 2020

Honourable David B. Orsborn
Committee Chair
ATIPPA Statutory Review Committee 2020
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> ***"Nothing could be more axiomatic for a democracy than the principle of exposing the process of government to relentless public criticism and scrutiny." (Francis E. Rourke, US author and political science professor, 1960.)***

Greetings Mr. Orsborn:

Firstly, I want to thank your office for granting me a couple of days beyond the deadline to submit my thoughts on the statutory review of ***Access to Information and Protection of Privacy Act (ATIPPA, 2015)***. Quite frankly, I had not been aware that this review was happening until I saw a news item on the submission to you by the Privacy Commissioner, Mr. Michael Harvey. Perhaps it was my preoccupation with Covid-19 but, for some reason, I missed the establishment of the review Committee and your appointment as Chair back in July. In any event, I appreciate this opportunity express my views.

My first awareness and interest in ATIPPA began in June of 2012 with the tabling of a piece of controversial legislation introduced by the Kathy Dunderdale government, now infamously known as Bill 29. Billed as an Act to "reform" (meaning to improve) citizen's right to access to information, it was a surreptitious attempt to "suppress" access to information. It received strong and widespread condemnation. Perhaps the most poignant condemnation came from Tony Mendel, Executive Director of Law and Democracy and an international expert on access-to-information laws, who essentially stated that Bill 29 would rank the NL below Third World countries in terms of access laws.

As a parent, former educator and community leader who believes that the very essence of true democracy is an informed, engaged and participatory citizenry, I was so angry and concerned that I decided that I had to participate in the second legislative review of ATIPPA in 2014. As a private citizen, in August of 2014, I submitted an 11-page written submission. In the afternoon of Wednesday, August 20th, I presented at a public hearing.

In addition to my general concern regarding the critical importance of access to information to a vibrant and healthy democracy, two specific matters motivate me to participate in this third statutory review of ATIPPA: 1) Bill 29; and 2) Muskrat Falls.

Bill 29 may be a 2012 attempt/event that was rightly vanquished by the people but it can return in a different form, in a different degree and by a different government. Whatever might have been changed and/or gained from the last review can be challenged and/or changed by a new government!

A case in point is the matter of solicitor-client privilege and how the Williams/Dunderdale governments abused this legal concept to deny damning information to the public. This abuse was not some idle speculation but was verified and substantiated by none other than Clyde Wells, Chair of the 2014 ATIPPA Review Committee when, on August 19th, 2014, he publically stated: ***"It's clear that solicitor-client privilege was being abused and being asserted to prevent the release of the documents."***

Clearly, the 2014 ATIPPA Review Committee properly and adequately addressed this matter both in its final report and in the draft legislation developed by the Review Committee, now known as **Access to Information and Protection of Privacy Act, 2015, *SNL2015, c.A-1.2 ("ATIPPA, 2015")***. That draft Bill was adopted unanimously, with two minor & unrelated amendments, by the House of Assembly on May 14th, 2015.

I have to say that it was disappointing and disconcerting to learn from page 9 of the Privacy Commissioner's submission to you that this present government seems to be doing an about-face on the matter of solicitor-client privilege.

Mr. Chair, I cannot say that I was surprised to see this reversal. It seems to be a common practice for political parties, while in opposition, to criticize and decry the party in power for its lack of openness, transparency and accountability and to pledge the opposite if elected, only to renege on that promise when in power.

Only minutes after winning the leadership of the Liberal Party, Dwight Ball promised that ***"the first order of business of a new Liberal government would be to repeal Bill 29."*** ***"We will repeal Bill 29 and clean the dust of secrecy from government and all its institutions, including Nalcor Energy,"*** he would go on to say.

The dissonance and hypocrisy between these words of the Premier-to-be and the actions of the Department of Justice & Public Safety (as described on page 9 of the Privacy Commissioner's submission) is both disappointing and worrisome.

Mr. Chair, I don't want to waste any more of your time or mine, so let me conclude this matter by saying that I have read the full text of Privacy Commissioner, Mr. Michael Harvey's November 25th submission to you and I concur fully and completely with his views and recommendations as they are articulated from pages 6 to 13.

Your Honour, I want to emphatically state here that, whatever you may garner and report from this statutory review, please do not move us back towards the intended culture and time of Bill 29.

Now, I would like to focus on my 2nd major motivation to participate in this present review and that is the matter of Muskrat Falls project or, as referred to by one individual as ***"that bastard child of ego and ambition."***

While denying and supressing information about Muskrat Falls was not the sole reason for Bill 29, it certainly was at the core of the Dunderdale government's strategy in bringing forward such a regressive and draconian piece of legislation.

A common descriptive term that has emerged from the public discourse about this disastrous mega-project is "democratic deficit." Clearly, the citizens of this province – the people who will shoulder the severe and long-term fiscal impacts of this mammoth blunder – were not properly informed and consulted about the physical, environmental and fiscal risks of this project. And the culprits who created and used this democratic deficit were both the Government and that " 'public body' called Nalcor.

I would respectfully suggest, Mr. Chair, that ATIPPA and this statutory review of ***ATIPPA, 2015*** speaks to the "informed" side of the democratic deficit.

And may I also suggest, Mr. Chair, that a $33M, six-volume, 1,000-page comprehensive report titled ***Muskrat Falls: A Misguided Project*** substantiates the claim that a deliberate strategy of denying, hiding and suppressing information was at the heart of the sanctioning of this project.

Here are just five (5) references from the report:

> LeBlanc found that Martin and members of his team, including Bennett, ***"concealed information that would undermine the business case reported to the public, to [the provincial government] and to Nalcor's board of directors."***
>
> LeBlanc said the project team ***"did its best to narrow consultants' terms of reference to forestall independent review and it tried to influence the editing of reports to make conclusions appear more favourable to the project."***
>
> In an especially damning sentence, LeBlanc said Martin ***"failed to communicate the full cost of the project (including strategic risk exposure)" to the government and Nalcor's board.***
>
> Not to leave the politicians out, he stated: ***"There is also no doubt that GNL politicians and officials must be faulted for failing to provide a reasonable level of oversight of Nalcor, for placing an unjustified amount of trust and blind faith in that corporation and for the naivety that they demonstrated in accepting, without a comprehensive independent review, Nalcor's DG3 (Decision Gate 3) cost estimate and schedule."***

> And finally: ***"The cost estimate for the project was knowingly understated in several ways, resulting in a budget that proved to be inadequate as soon as bids for major contracts were received."***

No doubt, there are several factors and flaws that led to the Muskrat Falls boondoggle but I would strongly contend that the denying, hiding and suppressing of information was a critical feature.

Let me conclude with a reference to the quote from Francis E, Rourke at the beginning of this correspondence. I fully agree that "***exposing of the process of government to relentless public criticism and scrutiny***" is essential to a strong and healthy democracy. While having strong access to information laws is not the only element we need to enable that public criticism and scrutiny, such laws are an important tool.

Newfoundland and Labrador's first ATIPPA came into force in 2005. Bill 29 severely weakened that statute. Thankfully, the second legislative review in 2014, not only erased the regressive impacts of Bill 29 but produced a very strong access to information law.

Now it is your turn during this present legislative review, Judge Orsborn, and I urge you to not to cause ***ATIPPA, 2015*** to regress to the days of Bill 29. Instead, I hope your deliberations will lead to an even stronger ATIPPA that provides our citizens the rightful tool to demand openness, transparency and accountability of our governments and our public bodies.

I wish you well in your work and look forward to reading your report.

Respectfully submitted.

Ken Kavanagh