



COMMISSION OF INQUIRY
RESPECTING THE MUSKRAT FALLS PROJECT

Commissioner's Ruling on Disclosure of Compensation – Paul Harrington

Commissioner: Honourable Justice Richard LeBlanc

Tuesday

20 November 2018

All right, obviously I've given this matter some thought. And I needed some blanks filled in and I think I've got those filled in now for myself, so I'm ready to provide a decision with regards to this.

I think the best way to look at this is to compare the two pieces of legislation that are really involved here, and that is the *Public Inquiries Act, 2006* and the ATIPPA legislation.

So if I look at the Public Inquiries Act, section 3 basically indicates that a Lieutenant-Governor in Council – in other words the government – can “establish a commission of inquiry to inquire and report on a matter that the Lieutenant-Governor in Council considers to be of public concern.”

Section 6(2) of the act talks about the fact that there should be oral hearings, and when there are oral hearings conducted they should be conducted in public. But there are opportunities where a commissioner can have hearings in private where the decision is made that the public interest, in holding the hearing or part of it, is outweighed by another – in public is outweighed by another consideration. And it lists some things like the consequences of disclosure of personal matters, issues related to public security and the rights of a person to have a fair trial.

Section 7(2) sets out the ability to restrict or prohibit the reporting on proceedings. Section 8 talks about the fact that a person who appears before a commission to give evidence has the same immunities as a witness appearing before a court. And I think we would agree here that those immunities are not the type of immunities that we're talking about here with regards to the issue of a pay rate, and for the reasons set out by Ms. Hutchings. Section 9 basically indicates that the commission can summons a person to be a witness and to give evidence and require a person to produce documents and records.

Section 12 – which I think is a key piece of this – talks about the issue of privilege. And section 12(1) basically sets out that persons have the same privilege related to disclosure of information and production of a record, documents, or other things as a person would have in a court of law. So it's equivalent to what a person would have in a court of law. Subsection (2) indicates that there's no ability to withhold or refuse to disclose on the grounds that disclosure would be injurious to the public interest or, alternatively, violate a Crown privilege; so, again, limiting the area in which privilege can be asserted.

And more specifically to this particular application is the fact that sub (3) indicates that a person must disclose information to the commission, even where the disclosure is prohibited by another act or regulation. Now, that seems to be a provision that is being equated to, or at least linked to, the ATIPPA legislation – and I'm going to speak to that in a moment – but I'm not so certain – and basically it's my view that it – the ATIPPA legislation is not what is being referred to, even if subsection (3) of section 12 said something differently.

Section 13 of the Public Inquiries Act that a person can apply to a court to exclude a record or document or thing that is within the operation of section 12(2) or 12(3). Well, in the circumstances here, I don't think it falls within 12(2) or 12(3). And, as a result, as I'm going to refer to in a few moments, I do believe that I have the jurisdiction to make this decision at this particular time. And section 14, obviously, sets out a contempt authority

Now, the *Access to Information and Protection of Privacy Act, 2015*, basically refers to the fact that it applies to a public body, which is said to include a commission. Now, as was pointed out by Mr. Fitzgerald, there has been an exemption granted to this Commission of Inquiry pursuant to section 4 of that act. And to be very forthright about this, this was done at the request of the Commission of Inquiry, at my request, based upon the fact that I felt that the application of the ATIPPA legislation to such things as the investigation and the strategy, and whatever being utilized by Commission counsel and by the Commission in general, was not – was a matter that would not – that would hinder, basically, the full operation of this particular Inquiry. But at the same time this exemption was granted by government, and I take the point raised by Mr. Fitzgerald that it is an indication of – by government with regards to this.

Section 3 of the act talks about the purpose of the legislation, and I think this is important. The act is basically designed to ensure that citizens have information required to participate meaningfully in the democratic process. That's a very general statement but it's loaded. It also provides that the legislation will increase transparency in government and public bodies for accountability purposes. And, also, the act does consider the protection of privacy of information, of personal information about individuals that are held or used by public bodies. So in that – and section 2(u) talks about what is personal information and refers to a person's educational, financial, criminal or employment status or history.

Section 8 of the act talks about that a person can make an application to have access to records by application. So the point again raised by Mr. Fitzgerald related to the fact that this does apply to records, documents, and what they refer to other things, talks about the application being made under section 11 of the act.

Section 9 talks about the ability of a public body to refuse to disclose information but, obviously, the test is where the public interest is outweighed by the privacy interest involved. And there are very limited areas that are set out in section 2 – 9(2) of the act.

So having looked at those two pieces of legislation – and I've only referred to some of it, but I've obviously reviewed all of the legislation that exists – this is not a case where I believe the ATIPPA legislation applies. Even without the section 4 exemption, I don't believe the ATIPPA legislation applies to this Commission of Inquiry. This Commission of Inquiry is investigating the Muskrat Falls Project Terms of Reference. If it's to those Terms of Reference – if information is relative to those Terms of Reference, then the right to have a person or witness disclose exists. And ATTIPA does not – is not at play here.

Now, having said that, I understand that Mr. Harrington has made an application under the ATTIPA legislation; however, having said that and accepting that that is the case, the pure test here for me is the issue of whether this is relevant, whether this information is relevant to this particular Commission of Inquiry's Terms of Reference.

This – the fact that Mr. Harrington has an application before the court related to that ATTIPA legislation is a matter, obviously, I'm taking into account. And I've taken that into account more – and not with regards to the issue of relevance and the issue of disclosure before the Commission of Inquiry – but to consider what injury or what negative impacts could exist for

Mr. Harrington here. And so I have considered that, but as I said, the fact that that application exists and the fact that it's awaiting even another case – the teachers' case before the Supreme Court of Canada leave application – that is really of little consequence to my determination as to the relevance of this particular information for the purposes of meeting the Terms of Reference of this Inquiry.

You know, if Mr. Harrington was appearing before a court of law, the ATTIPA legislation would have no application with regards to his being asked a question, and if the court determined that it was relevant to the issue before the court to his being required to provide that answer. The same thing applies with regards to this particular matter. The interest at stake for Mr. Harrington here are not similar to the interests at stake in the Gomery Inquiry, or the Cornwall Inquiry or whatever. There are no criminal proceedings here ongoing. There is no suggestion of criminal proceedings here, there's no investigations that I'm – been aware of related to criminal charges. And nor are there any specific civil cases that relate to Mr. Harrington, other than, as I say, his application under the ATTIPA legislation.

So I basically have to look at what it is Commission counsel – why it is Commission counsel seek to have this information placed before me.

Having heard what – you know, and I will say this too, the issue of relevance and Ms. Hutchings pointed me to the Rules of Procedure and rule 29 – obviously, that is an issue. But the threshold for relevancy here, I think, is somewhat less than the threshold in a criminal case or even in a civil case. Because this is an Inquiry; this is an investigation into a project that is a matter of public concern in this province.

So when I look at the basis upon which Ms. O'Brien has set out why Commission counsel wish to ask this question, I have to say that I believe it meets that relevancy test. In fact, I have no doubt that it does not. And when I think about – and I have thought about whether or not there was another way. Perhaps this information could be disclosed by asking general questions, whatever the situation is. I don't think that that can happen here. Again, this is a public inquiry. I'm being advised by Commission counsel that this is information that I may well need to ultimately, at the end of the day, to make a decision. And in the circumstances, as a result of that and having considered what the argument is here with regards to relevancy, I do believe that it is relevant.

And as a result, basically, I am of the view that Mr. Harrington can be asked questions here related to his daily rate of pay, which is what I understand is being questioned and generally with regards to his pay scale. So, you know, I'm not – Mr. Harrington, I'm not disregarding your concern here, but I have come to the point in time where the public interest here outweighs that privacy interest that you have in this particular case.

Now, the next step is whether or not in the circumstances this should be part of a public inquiry, or alternatively should be somehow dealt with other restrictions, i.e., for instance, having an in camera hearing, making a non-publication order or whatever. Ms. Hutchings has already indicated that, you know, that may not meet Mr. Harrington's needs, in any event, because of the people that would be present even if we were to have an in camera hearing. But I have considered that, and I've already had to begin to think about the whole aspect of in camera

hearings and hearings in the public with regards to some of the things that are coming before me in the next couple of days and weeks with regards to Nalcor Energy.

Again, my view is that, as far as is possible, this is a public inquiry, it should be held in public. Unless there's a very good reason in the circumstances that outweighs that public interest, then the hearing should be public. You know, some of the things that we're talking about – and just so I can be fair to Mr. Harrington here, when we look at, for instance, my decision here that we are going to conduct a hearing on water management in private, when I look at the interest at stake there and compare it now to other interests at stake with regards to questions that will be asked with regards to privacy hearings, I think, I will have to look to see whether or not there is a distinction.

In this particular case for Mr. Harrington, I understand what his interest is here; however, as I say, the public interest, the fact that the government has called a public inquiry into this project, the information is relevant to those Terms of Reference, and I've decided that based upon what I've been told here this morning by Commission counsel, I think all of that means that this has to be in public and there will be no restrictions with regards to that.

So, Ms. O'Brien, you can proceed with your questions on – with regards to the issue of the day rate.