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Mr. Blaine Calkins

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● (0855)

[*English*]

The Chair (Mr. Blaine Calkins (Red Deer—Lacombe, CPC)): Good morning colleagues.

We thank you very much for coming today. We have some distinguished folks here at our last meeting as we transition from the Access to Information Act to our study on the privacy legislation. There isn't a better segue to the legislative changes that we've heard so much about in Newfoundland and Labrador than to have the three members of the Independent Statutory Review Committee from that province.

We're pleased to have with us Clyde Wells, Jennifer Stoddart, and Doug Letto—a former Premier of Newfoundland, a former Information Commissioner for Canada, and a man with a distinguished career in the media dealing with these issues. The committee is absolutely thrilled.

Typically, we start with an opening comment. I'm not sure if there will be just one of you or if each of you will have an opening comment. Has that been decided yet?

Mr. Clyde Wells (Member, Independent Statutory Review Committee): I will explain our position at the outset.

The Chair: That is quite all right.

Colleagues, this will be our last meeting on access to information. We should soon have a full translated version of our report on access to information. We'll move to the consideration of that draft report on Thursday. This is our last chance to ask probing questions on this issue, and we can still add information to the report on Thursday.

Without further ado, are you ready?

Very good. Mr. Wells, please begin.

Mr. Clyde Wells: Mr. Chairman, and members of the committee, thank you very much.

I want at the outset to emphasize, for the record and for the media and members of the public present, that we're here at the invitation of this committee. We're not here seeking to make a presentation on behalf of anybody, and in particular I want to emphasize for you that we are not speaking on behalf of the Government of Newfoundland and Labrador or any agency of that government.

We're here because in an earlier life, a year or so ago, we were the members of a committee that was then functioning. That committee has now finished. We have no jurisdiction left to do anything or to express any views on behalf of any committees. I want the record to be very clear that we're here as individuals who happen to have been involved in that endeavour. You have asked us to come and speak with you about our experience in that, and we're happy to do that, but we're not representing anybody other than ourselves.

It may be helpful for me to outline how we approached the work that we were given. The preparation of the report and the drafting of the legislation were driven by the findings of the committee that were derived from four major factors.

The first was the circumstances that gave rise to the appointment of the committee some two years ahead of its statutorily scheduled time. I won't say anything about that unless you ask, and then we'll provide you with whatever information we have available. Otherwise, we'll say nothing about it.

Second, there's the premier's publicly stated description when he announced the appointment of the committee. He asked the committee to provide recommendations for "a strong statutory framework for access to information and protection of privacy, which when measured against international standards, will rank among the best." We more or less took that to heart and set that as an umbrella objective of what we were doing. We used that constantly as a guide when we were developing it. We will elaborate on that and any questions you may have.

The third is the specific directions that were in the terms of reference. There was nothing terribly remarkable about them. They were essentially what one might expect in terms of reference for a committee being asked to do this kind of work.

The fourth was the committee's assessment of the practices and procedures of the Office of the Information and Privacy Commissioner as it had been working and as it was then working in the discharge of that office's oversight duties and how, even though well intentioned, those practices and procedures resulted in diminishing public access instead of enhancing it. We had to look very carefully at the way that functioned.

We concluded at the outset that we could not pursue and achieve the objectives that we were being asked to achieve without first assessing the stature of the right of access. What was it? What were its underlying principles? Why was it there? From that we would develop a guide as to what its character should be, what the rights were and their extent, and the limitations on them.

The extremes we heard from people were quite wide, indeed. They ranged from the view of the Centre for Law and Democracy, which categorized it as a human right and all of its characteristics and rights, with virtually no limitation to be determined because of the fact it was described as a human right. They ranged from that position to the view expressed by a professor from the university that the government "does not exist to finance the provision of information to its critics" and secondly, that "if requests are too frequent then the government will be required to divert excessive public funds to subsidize an insatiable appetite for information searches."

● (0900)

Well, we didn't accept either of those extremes. Instead, we looked at how access to information rights had been treated and assessed in Canada. We did go to the Supreme Court side. We considered the decisions of the Supreme Court, and how they viewed it.

It was not described by them as either a human right or a constitutional right, but a quasi-constitutional right. They described its purpose as being to facilitate democracy, to enable people to participate meaningfully in the democratic process and, finally, to enable the citizenry to hold politicians and public servants to account. Those are the purposes of access to information.

From that, we decided early on that if we were to be successful in the objective, it would be best for us to include in our report an actual piece of legislation that we would recommend. Instead of describing what we thought it should be, we thought the best approach would be to actually draft the legislation that we would recommend. Then there could be no doubt, no misinterpreting, no misunderstanding, or no difficulty in interpreting what the committee was recommending, as the committee was expressing it in the legislation. We engaged the services of a person experienced in legislative drafting, and she did a great job for us. That was the approach we took to it.

The next slide shows the areas we looked at in particular, described in general terms. We will be happy to discuss any of them in detail, but rather than talk about things you're not interested in hearing about, we'd sooner give you the general framework, and you can ask whatever questions you want.

It first became necessary for us to repeal the sections of what was described as "Bill 29". This was the legislation the government brought in a couple of years before that and created such a furor in the province and needed to be repealed, because it was the antithesis of what good access to information legislation should be. We had to deal with those issues.

Seen in the next slide is the next matter we dealt with, which was about the administrative matters, including the role of the coordinators in the different departments and agencies of government, and the question of fees, what they should be, whether they should be, and what limitations there should be on them. In particular, in dealing with the duty to assist, it was about emphasizing or trying to provide a basis for building within the public service a culture of obligation, an obligation to provide information to the public that didn't seem to exist earlier, and to also provide for limiting the power to disregard requests. There was a statutory power, as there is in the federal legislation, to disregard requests.

The next area we looked at was the office of the commissioner. We were not happy with the results of the existing ombudsman model. The commissioner's office was resisting an order-making model and emphasizing for us the flaws and defects in an order-making model. They made a good deal of sense, so we developed a hybrid, a combination of the two. It starts out, of course, being an ombudsman model, but the treatment of the recommendation of the commissioner after the recommendation is made and the procedures that have to be followed gives it the effect of being an order-making model. As far as the public, the requesters, are concerned, the burden shifts to the government department to establish that the information requested ought not to be released, instead of the other way around.

● (0905)

We discussed in detail the total role of the commissioner, not just the general administration of the office and the time limits for responses. We were very concerned about the time that had been consumed in getting access. As a matter of fact, the overwhelming majority of the complaints that we heard were about the time it took. They were focused on the departments and agencies of government as being the cause of this and had totally overlooked the impact of the role of the commissioner's office in these delays. We had to do a detailed examination of that.

The other general area that we looked at was modernizing the existing system, particularly in light of the instruction from the government to provide recommendations for legislation that, when examined or compared with other legislation in the world, would rank among the best. We had to do some modernizing of the existing system, and we did. We expanded the public interest overrider provided specifically for public interest override. That seems now to have been well received. We made recommendations for the provision of data sets and recommendations for implementation of a duty to document—not in the access to information statute, but in the statute regulating maintenance of information and documentation in government services generally, which is where we thought they should be. We gave the general recommendation in our report.

We also dealt with the development of publication schemes and acting proactively in getting information out without waiting for it to be requested, recognizing the importance to the general public of having this information. If they are to participate meaningfully in the democratic process, the general public needs the information. We felt there was an obligation on government and all of its agencies to be engaged in active publication of the information without waiting for requests.

We also felt there should be better development of privacy information assessments for new governmental programs and legislation and that before any of it was proceeded with, there should be an assessment of the impact on privacy rights, so we provided for PIAs as well.

Finally, we addressed requests for exemptions and kept those exemptions at a minimum. We rejected most of the ones that had been requested specifically to us and eliminated a good deal of the other exemptions that were in the old legislation. That enabled us to produce the legislation that government readily adopted without changing one single item in the legislation.

We were happy with that result, needless to say, and we're happy that generally speaking, we've heard good comment and widespread acceptance of the approach from stakeholders all across the country.

That's where we're going to stop, Mr. Chair, and leave it to you.

Did you want to add anything, Jennifer? I'm sorry.

● (0910)

Ms. Jennifer Stoddart (Member, Independent Statutory Review Committee): That's quite all right. Thank you.

Mr. Clyde Wells: Doug.

Mr. Doug Letto (Member, Independent Statutory Review Committee): I'm good. We'll react to whatever questions come our way.

Mr. Clyde Wells: Ladies and gentlemen, it's in your hands to decide what you want to hear from us.

The Chair: Absolutely. Thank you very much, Mr. Wells.

We'll now move to our round of seven-minute questions. We'll start with Mr. Erskine-Smith from the Liberal Party.

Mr. Nathaniel Erskine-Smith (Beaches—East York, Lib.): Thank you to the witnesses for joining us today. Commissioner Legault has proposed repealing all exclusions and moving to exemptions throughout the act. I wonder to what extent you address this in your proposals and what your thoughts are on moving to a complete exemption-based system.

Mr. Clyde Wells: We didn't remove all exemptions. There are certain things that so clearly and manifestly should not be subject to disclosure that they speak for themselves; you don't have to make the case.

The most obvious one that I can think of is the preliminary police investigation of alleged crimes—for example, police reports that they file saying that they think Clyde Wells is guilty of a particularly offensive crime or robbery or fraud or whatever else. This is in the nature of police work. If they don't do that and are not free to express those opinions and explore them, they can't possibly do their investigative work properly and fully. To require those to be released would totally offend privacy so greatly—

Mr. Nathaniel Erskine-Smith: If I could jump in, it's not a matter of requiring their disclosure. My understanding of the exemption-based system is that it simply allows the commissioner to review, whereas an exclusion would preclude the commissioner from even reviewing that information.

The reason I ask what your thoughts are in moving to an exemption-based system is that if cabinet confidence, for example, right now is an exclusion, the commissioner can't even review whether that refusal to disclose is acceptable or not. Should the commissioner have that power to review?

Mr. Clyde Wells: Exemption from commissioner's review is different.

We eliminated that because we felt the commissioner was a trusted servant of the public. Lawyers in the Department of Justice are entrusted with solicitor-client information. Why wouldn't the lawyers in the commissioner's office be entrusted with it? They can only properly discharge their duty to determine whether or not something is genuinely a solicitor-client privilege if they can look at it and assess it. If they can't see it, they can't possibly do it.

The need for total elimination of the exemptions and allowing the commissioner's office to examine it was demonstrated clearly by information provided to us by that office. When a court decided that you couldn't get access to solicitor-client information and that the commissioner couldn't assess it, all of a sudden there was an overwhelming increase in claims of solicitor-client privilege. The court of appeal set that decision aside and said that the commissioner could look at it. When the commissioner did get a look at it, 80% of them had nothing whatsoever to do with solicitor-client privilege. They weren't even remotely connected to it. When one public servant heard the courts say they didn't have to disclose solicitor-client privilege, that public servant was quoted as saying that they just claimed solicitor-client privilege to avoid disclosure.

Clearly, the system can only work fairly and in the public interest if the commissioner can look at all of it.

Mr. Nathaniel Erskine-Smith: I'm with you, and I agree with respect to the commissioner's powers to.... To put it another way, there's a difference between an injury-based model whereby the commissioner can review information and assess whether it's in the public interest to disclose the information overall, based on an assessment of the balance of interest. On the other hand, there could be mandatory exemptions whereby the commissioner, even upon review, might say that this does fall within cabinet confidence and, therefore, despite the injury test, it falls within these parameters and it's going to be excluded. To what extent did you look at the injury-based model versus mandatory exemptions? Yes, review, but if they fall within those four corners, exclude it.

● (0915)

Mr. Clyde Wells: Injury is obviously a consideration that must be taken into account. In the end we looked at applying the principle of a public interest override. We greatly expanded the public interest override. Even where there is an absolute right to entitlement—I've forgotten the phrase we used—if it could be clearly demonstrated that the public interest in disclosure outweighed the factors dictating non-disclosure, then it had to be disclosed in the public interest.

Mr. Nathaniel Erskine-Smith: That's with reference to all information. All information would be subject to that public interest override?

Mr. Clyde Wells: All information—

Mr. Doug Letto: In about eight categories.

Mr. Clyde Wells: We added eight categories.

Mr. Doug Letto: Albeit not with respect to cabinet. However, we added that if the clerk of the cabinet felt that it was in the public interest to release cabinet information, even though there was a prohibition against it, they should do it.

The public interest override in my view is a stream that runs through our legislation now. It was much more limited in the prior situation, and it even includes the area of fees that people can request, that even when fees can legitimately be charged, if it's in the public interest to release that information for free, officials should take that stance.

Ms. Jennifer Stoddart: We also broadened it in terms of, as my colleagues said, the contents of what we mean by public interest. Previously, if I remember correctly, it was usually health, safety, harm to some individual, and environmental issues. We broadened it to include democratic factors. There were four of them, for the understanding of rights and liberties, justice, and so on of the public good, to encourage transparency as to the acts of public servants, to enhance the democratic process.

Mr. Nathaniel Erskine-Smith: My last question is with respect to extending the coverage of the act.

The commissioner has proposed extending coverage to ministers' offices and to the Prime Minister's Office, but also beyond that to private bodies that receive a loan or a grant in the amount of $5 million, or bodies that act in the public interest, meaning if they act on behalf of the federal government with respect to certain policies or if they engage in regulation-making. I wonder what your views are on that, and whether you engaged in that discussion in your committee.

Mr. Clyde Wells: I don't recall that we had an extensive discussion on that issue specifically, but the standard that had been applied, which we didn't alter, was that any organization was subject to act if the majority of its board of directors was appointed by the government. If it was a non-profit organization that received money, the government appointed the majority of the board of directors or controlled it; but if it was a private organization, that's a different thing.

The Chair: We will now move to Mr. Jeneroux for seven minutes, please.

Mr. Matt Jeneroux (Edmonton Riverbend, CPC): Ms. Stoddart, I'm sure you're very familiar with committees, so it's good to have you back again.

I do want to get the perspective of all three of you, perhaps, on the model that Newfoundland and Labrador has, which is a hybrid model, as you know. The recommendation from the Information Commissioner was to move to an order-making model here at the federal level. Why wasn't the direction that was taken in your province, and do you perhaps have any thoughts on some of the flaws you may have come across in your study of that as a committee?

Mr. Clyde Wells: We had a great deal of discussion about the issue, as you can well imagine. It started at the outset with the commissioner complaining about the inordinate delays, of sometimes two, three, and four years, before the information was released —an incredible portion. All the details of what they were are in our report, so I don't want to go into them now, but the standard and times involved were so unacceptable that we couldn't let them remain.

We were the ones who raised, with the commissioner, an order-making model, and we were inclined to go to that model, but the commissioner kept speaking against it and expressing his view that the ombudsman model worked better. He argued that the order-making model would introduce even longer delays than were already being experienced because they would have to do a detailed assessment and write a supporting decision that would stand up to legal scrutiny on appeal of any such order. He believed it would introduce even longer delays because of the hearing processes, and so on. That made some sense, at least to me, having experience with delays in courts with hearings and processes.

We wanted to find a procedure that would work best. By the end of the hearing, there had been an overwhelming number of complaints about delays and so on. As a result of the discussions, it started to come to light what was driving some of the inherent delays, and the commissioner came around and said, “Well, we could live with an order-making model. It may work all right, but we think the ombudsman model is best for Newfoundland and Labrador.”

When we then did the detailed assessment of what was driving it —and all that information is in the report—it was clear that the commissioner's office was the cause of 90% of the delay. The procedures and the approach being taken weren't greatly different from what they were in most other provinces.

So the delay was just inordinate. We worked on a system that would speed it up, and the hybrid model is what we produced.

When the commissioner made his recommendations, we had very strict time limits placed on the time frame. There is provision for expansion, but it's very rigidly controlled. When the recommendation of the commissioner is made, if it's unacceptable to the public body, the public body has two choices: follow the recommendation and release it if it requires release, or apply to the court right away, within 10 days, for an order that you would not be required to release it.

As a result, the burden shifts to the public body, not to the requester to provide it. That's effectively making it an order, but it doesn't place the commissioner in the position where he or his office feels they have to go through these processes of hearings and to write this learned, extensive “court of appeal” type of judgment on the issue that takes all of this time, and then have the appeal of it go to a court, which hears the issue *de novo*, all over again.

One of the witnesses said to us, “We can understand having these rights, but why do you have two complete hearings?” And that made a lot of sense. So it was to avoid these problems, and this is where we see there would be delays in an order-making type of oversight system. You would not avoid the delays.

That was my point of view on it.

Doug, you may have something you want to add to that.

● (0920)

Mr. Doug Letto: Not different, but fundamentally, I think when people ask for information they want it. Any process that becomes very legalistic and drawn out reduces and diminishes the public confidence in that law. We certainly saw that in Newfoundland and Labrador. It was clear from the people who appeared in front of us that they had zero confidence in the ability of public officials to provide information on a timely basis. That, along with the commissioner's comments, I think persuaded us that what people want is a quick decision on whether they can have the information they request; and if they can't, that there's a fair procedure in place to be able to appeal it. For me, it came down not to the legalistic aspect of it, but to the fact that if the public are to have confidence in their laws, the laws have to actually work and not entangle people in protracted legal discussions and debates. I knew this as a journalist. There would be information that would be released in our newsroom that came out three years after it was requested. As a senior editorial leader, I would say, "Which request was that?" The distance, the time lag between the request and when the information actually appeared, prompted us all to wonder what it was all about and whether anybody was interested in it any more.

I think, fundamentally, people want a quick decision when they ask for information. It doesn't necessarily mean they should get the information, but if they can't, they need to know why and need to know how to be able to address it if they want to appeal it.

● (0925)

Mr. Matt Jeneroux: Do we have time for Ms. Stoddart?

The Chair: Yes.

Ms. Jennifer Stoddart: I have had the advantage of working provincially and federally in both tribunal systems and the ombudsman system. The current flaws of both of those systems are not really in their legal aspects, but in the fact that the legislation that sets them up does not create a balance between the requester, whether it's for personal information or other information, and access-to-information systems, because the processes are open-ended. Therefore, the person who holds the information and does not want to release it can usually go on and on. If there aren't extensions, they can simply delay, and the commissioner's office rarely has any kind of coercive power.

By adding these short delays, where basically it's not the burden of proof but the burden to act that is on the body with the information, I think we levelled the playing field in favour of the person who's requesting that information. As Mr. Wells has said, either you give the information or you move to the next step, which is taking it up to a place where it can be decided upon finally. What we see now across Canada with the existing systems—I don't think one is faster than the other, but I haven't done that study, perhaps the committee has—is the ability to prolong the delays indefinitely. The more powerful you are, as an information holder, whether it be personal information or third-party information, the longer you can delay the process. I think the ingenious part of this kind of all-Newfoundland solution is the fact that it has changed that fundamental balance in favour of the citizen requester.

The Chair: Thank you very much. That ends that round.

We now move to Mr. Blaikie, for seven minutes, please.

Mr. Daniel Blaikie (Elmwood—Transcona, NDP): We've already heard the President of the Treasury Board state that the government is looking at an order-making model and him muse that perhaps when they bring in such a model they'll also include a ministerial veto over whatever orders may be issued by the Information Commissioner. I was wondering if you could speak to the effect that such a veto may have on the integrity of the access regime.

Mr. Clyde Wells: I've not been aware of it, so this is just an immediate reaction to your question.

It would lower public confidence in it down to, perhaps, an unacceptable level. The mere fact that it can be done would be enough to damage the integrity of the system, in my view. I could it see at the federal level; I can't see it at a provincial level. I could see a need at the federal level where national security or national defence is involved. I could see a ministerial veto or an order in council veto at that level, but I would think it would have to be very severely limited and constrained. There could clearly be justification for it in that kind of circumstance, in my view. However, there could be no justification for it if it dealt with development of agricultural policy or immigration policy, or anything else of that nature. But where national security or national defence issues were involved, I could see a need for it there.

That's simply a personal view.

Mr. Doug Letto: I believe it's part of the U.K. legislation. It's been used sparingly by the U.K. government. Even when it's used in the areas of national security and foreign affairs, it creates a loud public discussion. I don't want to give advice to the government on how to proceed, but the U.K. example might be something that you could look at. It would be interesting to learn how it's been used, how it's been viewed, and the rules on when the ministerial veto can be applied. I believe the government has stated in some kind of document the conditions that must be present for that to happen.

Ms. Jennifer Stoddart: I would encourage you to ask why a government veto ought to be used rather than having a conditional preliminary conclusion by the commissioner, the tribunal, pending an appeal to the federal court. The court is used to dealing with national security issues, international issues, and so on. This way, therefore, you would presumably limit the chain of decision-making to objective decision-makers.

● (0930)

Mr. Clyde Wells: The hybrid model would greatly assist in achieving this goal.

Mr. Daniel Blaikie: Part of your review and your recommendations for the new act in Newfoundland and Labrador had a public interest override component. That's kind of a priority rule. Ministerial veto is another kind of priority rule. If you were wanting to have in federal legislation some kind of public-interest override, how do you think that would interact with a ministerial veto? What would be the consequences of trying to maintain both at the same time? Does one end up trumping the other?

Mr. Doug Letto: Certainly, they would be competing themes—there's no question about that. I would go back to our view of what access to information is, which is to provide access to information held by public bodies in order to allow citizens to participate more fully in their democracy. I would say that this trumps almost everything else.

It's difficult to give public officials the authority to say that, on the balance of probabilities, maybe they shouldn't be releasing certain information, even though the public really does have a right to know. That's why I said initially that the public interest is a stream that runs through the legislation that we proposed and that was accepted. I would think that the more you erode that, the more you erode public confidence in what a modern access to information law should be.

Sadly, I think Canadian laws, until we were asked to do this job in Newfoundland and Labrador, lived in the dark ages. They truly did. They were put in place in the early 1980s, and nothing has been done since. The circumstances that gave rise to the review of the act in Newfoundland and Labrador, two years before, was in response to a political situation that had developed. I think that it's frankly time that Canadians have modern access to information laws that put the citizen at the forefront of what the law should be about, rather than protecting officials and governments.

Ms. Jennifer Stoddart: Being the only non-Newfoundlander who was honoured to be on this committee, I would say that the actions of the government in passing this Bill 29, which was repealed by the committee we served on, was akin to the government's giving itself, giving the cabinet, a sort of veto power. I say that because so many things were off limits. This created in the Newfoundland population a monumental surge of public anger against the lack of transparency, which led eventually to this commission. When these things are vetoed and vetoed, and not examined by the Federal Court and found to be impossible to reveal, or only partially revealable, because of national security concerns, we get the kind of reaction we saw in Newfoundland. We heard ordinary citizens come day after day and talk about the injustice of not being able to get certain government information, or even to learn why their requests had been rejected.

Mr. Clyde Wells: It's an injustice for a cabinet officer to be able to declare, no, and that the commissioner can't even look at it. That just destroyed public confidence in the integrity of the system. If you give a minister or the cabinet the broad ability to veto the release of information, I fear it would lower public confidence in the integrity of the system, more than anything else.

The Chair: We now move to our last questioner for the seven-minute round.

Mr. Bratina, please.

Mr. Bob Bratina (Hamilton East—Stoney Creek, Lib.): Thanks for this opportunity. This is something we've been looking forward to.

One of the things you talked about was measuring against international standards, so the buildup to the outcome must have been interesting. We learned, much to our chagrin, that on a list of ranking of countries, Canada was somewhere around 59th. The number one country in the world in terms of access to information was Serbia.

Tell me about the buildup process and looking at these other countries and so on.

● (0935)

Mr. Clyde Wells: We did a good deal of that, but you have to be careful about these rankings by the Centre for Law and Democracy and others that rank the most unexpected countries as numbers one, two, three, and four. For example, I have always felt that the constitution of Pakistan is one of the best organized federal constitutions I have ever read, but I really wouldn't want to be a federalist in Pakistan. What's written is one thing; what's practised is often something else.

The important thing is to look at the whole picture, which is what we did. In particular, we paid a great a deal of attention to the legislation in countries that had a similar historical and cultural background as Canada. That took us to some western European countries, U.K., Australia, New Zealand, the United States. We looked at the practices there, and in Mexico, and two or three others. I forget all of them. We did a fairly broad examination of what was in the procedures in these other systems and took that into account and dealt with it, and we explained in the report how we dealt with it. That was certainly worth doing.

As Doug mentioned with the U.K. system, we took a good deal of guidance from what they were doing there. In the last decade or so, they have done a major refurbishing of their system, and we saw a lot of good points in it. Australia and New Zealand had made some major improvements, and we took some guidance from them as well.

Mr. Bob Bratina: You have such vast experience in all this, and there's a tension, obviously, between the public and the journalists wanting to know things and the things that you and your colleagues would know, and that terrible things would happen if everybody found out about this stuff. That tension is fine.

However, I think you mentioned that the commissioner was nervous about allowing all of these things to get out there. So based on your experience, what would be so terrible about having a much more open regime than what we've experienced so far?

Mr. Clyde Wells: Our report indicates that nothing would be terrible about it. We recommended a much more open regime, and the structure we put in place in the legislation we drafted provides for a much more open regime. However, it doesn't provide for a totally open regime.

Government still has to function and has to function efficiently. It sometimes makes it a great deal more difficult if, every hour on the hour, government has to report to the public exactly what it's thinking and that it may or may not go in this direction or another direction. It would create a great deal of confusion and result in public chaos, as well as governmental chaos.

Some level of confidentiality in the process of government is essential to the efficient working of a cabinet system of government in a parliamentary system. You have to have that.

There are also certain things like the following. For instance, you can't have judges' notes and drafts of decisions released. You can't require that they be released. You can't have police investigations, prosecutors' decisions—preliminary assessments and decisions—released. If you do, you run the risk of brandishing about people's names, who could end up being determined to be totally innocent. That's grossly unfair to people. You can't do that. There are certain things that must be kept confidential.

However, the overwhelming majority of the information that government possesses can be made public, if not immediately, then on a very timely basis after the decisions are made. It's more difficult to have the process during which matters are being considered before decisions are made.... You can't be making that public. That would make government very difficult. However, once decisions are made, the overwhelming majority should be made public if we're to have a proper democracy.

● (0940)

Mr. Bob Bratina: This is based on public interest.

Are you confident in your own mind through all your years in public office what the public interest is and should be?

Mr. Clyde Wells: Government—

Mr. Bob Bratina: Or is there contention at all about the public interest?

Mr. Clyde Wells: No, I don't have any doubts about it.

Everything government does, in the end, must be in the public interest, or government shouldn't do it. That's the standard I would apply.

If it's not in the public interest, government shouldn't be involved, because it's in the private or personal interests of those involved in government or their friends in the private sector. Everything government does should be in the public interest, and government should be able to demonstrate by the release of information relating to it that it has acted and performed in the public interest in the long run.

Certain circumstances, the ones I've mentioned, are justifiably off limits and shouldn't be released for the reasons we've given. In some cases—matters affecting national security, national defence, and international relations—they must have a level of confidentiality, and understandably so. Other than that, the day-to-day affairs of the governing of Canada and all it's provinces must be in the public interest.

The public can only exercise their democratic right on the basis of judging the government's performance in the public interest. If they don't have the information, they can't judge. At least they don't have the ability to judge. They're being deprived of the ability to judge, and that shouldn't be in a democracy.

Mr. Bob Bratina: How's my time?

The Chair: It looks like it's up. We're at seven and a half minutes, Mr. Bratina.

We now move to the five-minute round, starting with Mr. Kelly.

Mr. Pat Kelly (Calgary Rocky Ridge, CPC): I'd like to have each of you comment on the duty to document. I understand you had recommended a duty to document, but did not include it in the act itself that was rewritten. Could you explain to the committee how the duty to document works in Newfoundland and Labrador? I'll start with that, please.

Mr. Clyde Wells: There are two critical factors in the decision.

One is that you can't be held properly to account, as government should be held fully to account to the public, if the decisions and activities of government are not properly documented. There's nothing to release. You can't ask individuals involved to release their thoughts or their conclusions. The decisions of government and all the day-to-day activities of government that result in decisions, particularly those involving expenditure, public money, and the imposition of taxation, must and should be documented.

When we looked at it, we thought that it didn't seem to be the right place to put those obligations when there exists a Management of Information Act, spelling out in detail exactly how all of the offices of the government and the public servants involved are supposed to document information that exists already. We weren't satisfied that the duty to document was adequately expressed in it. All we emphasized was that there should be a statutory provision for a clear duty to document and to maintain proper documents.

We felt that the Access to Information Act wasn't the right place to put it. That covered a different area altogether, and given that there was a management of information statute already in existence, that was the proper place for it to be.

Do you want to add anything to that, Doug?

Mr. Doug Letto: I think that's what it came down to. We felt that was the logical place, because the Management of Information Act provides both for the creation and disposal of records at various times, when they're no longer needed, and so on. We thought that would be the ideal place to put it, because there is also an associated committee in place that oversees record-making within the government.

The concern emanated from something that many people said to us, which was the increasing tendency to make decisions without their being written down anywhere. It's happened in the electronic age where we can send pings to each other and there's no record of them. It creates obvious problems for governments if people.... For example, if I'm an employee, and I'm being asked to implement a decision for which there's no paper trail and no record, how am I to know how I'm supposed to carry out that decision?

We saw it as a very important thing, but logically we felt that it belonged in the Management of Information Act. That hasn't yet been put before the legislature, and I have no idea what the thinking of the current government is on that.

● (0945)

Ms. Jennifer Stoddart: Doug, could you go back to the slide entitled “Modernizing the law”?

I say so because I would just like to add that the recommendation of the duty to document, wherever it is contained in terms of the statute, is part of a suite of recommendations that we made, which include the provision of data sets—and for that we had to change the definition of public record—and publication schemes, for which we recommended that the commissioner set up templates and then different public bodies, depending on their type would automatically publish the information—with the personal information redacted of course—after a certain time period.

This part is central to modern thinking on access to information, which is no longer about a body of information. You, as a citizen, first of all, try to figure out what you should be asking, where you should be asking it, and then you ask for that piece of information. But it's up to the government, as the holder of the information on behalf of all of us, to make this information known and to make it easily available. You think of research, and innovation, and how much of this information needs to be out in the public, and simply to play the goalie, shall we say, so that the information is safely released in a way that doesn't harm individuals.

The Chair: That takes us to the five minutes.

Now we move to Mr. Saini, please.

Mr. Raj Saini (Kitchener Centre, Lib.): When the Information Commissioner was here during her last appearance she raised certain concerns about the hybrid model similar to the one you have put in place in Newfoundland and Labrador. One concern is the size of jurisdictions. She mentioned that in her office she receives approximately 70,000 cases per year compared to about 700 in Newfoundland.

Do you think that the hybrid model as developed would be as successful at the federal level as it is at the provincial level?

Mr. Clyde Wells: The commissioner would have a better basis for expressing an opinion on that than I would.

I don't see why the numbers make the difference on that issue. There are obvious circumstances where numbers do make a difference, but what's the difference if you have to make 70,000 orders as opposed to 700 recommendations? If you have a hybrid model where 700 recommendations are involved, why do you need an order model because 70,000 recommendations are involved? Why would there be a difference merely because of numbers?

You'd still have perhaps an even greater burden in the order-making model with 70,000 requests than you would with an order-making model with 700 requests. I would think the burden would be greater to use an order-making model than the hybrid model. That's my guess. The commissioner would know better than I.

Mr. Doug Letto: I believe that the 700 number is the number of access to information requests in Newfoundland and Labrador, most of which will never cross the commissioner's desk because they're resolved with the provision of the information that people require. I'm not sure how many the commissioner reviews per year because people have a complaint, but it would be far fewer than that.

Mr. Clyde Wells: Yes, I think he wrote something like 32 decisions in one year.

Mr. Doug Letto: Yes.

Mr. Clyde Wells: It was the average.

Mr. Raj Saini: Now that we're going through this operational review, can you suggest some ways we could adapt your model at the federal level? Are there certain specific recommendations you may have?

Mr. Clyde Wells: There would be different considerations to different parts of it. If you're just thinking about the resolution part, whether it's a hybrid or order-making model. I don't see there being any great difficulty moving from your present ombudsman model to a hybrid model.

I would think it would be even easier to move from an ombudsman model to a hybrid model than from an ombudsman model to an order-making model because you'd have to put in place procedures and rules and hearing practices, and so on. If you're going to give a body the power to make an enforceable order, one of the requirements in our system, relying on the rule of law, is that you proceed in a manner that gives all interested parties a right to be heard and in fair circumstances and so on, and to make presentations and file documents and file evidence. Then you do an assessment, write a decision on it, and issue the order as a result of that decision, justifying the order you're about to issue.

It seems to me that it would be far more burdensome to move from the existing ombudsman model to that model, than from the existing model to making the recommendation as they do now and leaving the burden on the public body to challenge the decision.

● (0950)

Mr. Raj Saini: The other question we've been discussing is the question of fees. I know that in Newfoundland there's no upfront fee for an access to information request, but there's a time limit. I think it's 10 hours or 15 hours. I can't remember the exact number. Beyond that, you start charging a certain amount of money.

Mr. Clyde Wells: You can charge a certain amount of money beyond 15 hours.

Mr. Raj Saini: Have you found it to be burdensome to collect the revenue? Or is it more of a barrier in some ways?

Mr. Clyde Wells: That was always there. We reduced the burden of collecting the money and accounting for it. For example, there was a requirement to pay a $5 fee, and I believe the federal system still has that. You still pay a $5 fee. The cost of receiving, recording, treating, banking, and administering a $5 fee must be probably $150 for each one. What's the point of it? What does it achieve?

Five dollars is nothing of a deterrent. If you want to deter foolish and nonsensical requests, $5 is not going to do it. But look at the burden you place on government offices and the cost that's added to it to collect and administer a $5 fee. It doesn't make sense.

Mr. Raj Saini: In terms of the way you've structured it, whereby the $5 fee is obviously eliminated except for those requests that take a certain period of time or a protracted period of time, do you believe that it's in the government's interest to have fees collected when something is very cumbersome or will take a protracted period of time?

Mr. Clyde Wells: You have to think of the overall public interest. The general public of Canada or of the Province of Newfoundland and Labrador, whichever you're dealing with, has an interest in making sure government expends its funds wisely and soundly and doesn't waste them.

Why should a particular citizen who will make a request for an incredible amount of material be able to place that burden on the taxpayers generally? Or why should a collection of such citizens be able to place a burden of 10,000 such requests on the taxpayers generally? If they're going to make a request, they have to be prepared to pay the cost of it, because it can get to be extreme.

What we did put in was a provision for waiving that fee in circumstances where it's clearly justified, one of which Mr. Letto mentioned. Where it's determined that it's in the public interest to make the information public, the fee wouldn't be charged.

Mr. Doug Letto: I think something else that's worth thinking about are the various parts of the act that we recommended, such as the duty to assist. If I, as a citizen, make a request that will have three public servants working for eight months on my request, part of the duty to assist is to say, “Mr. Letto, you've made this huge request that's going to take a huge amount of time, so can we discuss what it is that you actually want so that the request that goes forward is actually one that specifically gets to what you want and doesn't end up costing you any money?” That's part of the duty to assist.

Mr. Clyde Wells: That's part of it.

Mr. Doug Letto: The other part of the fees aspect is that even if it turns out that certain fees should be charged, that matter can be appealed to the commissioner. The commissioner is the independent arbiter of whether the fee that's being estimated is a legitimate fee or not. All parts of the act kind of come together in being able to address those kinds of issues. I think that it's actually a much fairer system than we previously had and a model that I think is really worth looking at.

● (0955)

The Chair: Okay.

Mr. Clyde Wells: It could be applied nationally as well.

The Chair: All right. Fantastic.

We'll now move to Mr. Jeneroux, please, for somewhere in the neighbourhood of five minutes.

Mr. Matt Jeneroux: I want to get back to a bit of what Mr. Saini touched on, which is the transition that happened between the commissioner to the hybrid model in your province. You indicated that what we should be expecting if there were to be change to an order-making model would be significant. Just to clarify, what was the model previous to the hybrid model?

Mr. Clyde Wells: It was a pure ombudsman model. The commissioner made his recommendation and the public servant could ignore it. If the public servant wouldn't comply with it, the requester had the obligation to then go to court, create money, engage a lawyer, and so on. This was a tremendous deterrent. Most people would not take that step. Very few would.

Mr. Matt Jeneroux: Yes. I agree with you.

Mr. Clyde Wells: That's why we changed the wording and moved the burden from the requester to the department.

Mr. Matt Jeneroux: If you're looking at a sliding scale, you made one step. What we would be looking at, in your opinion, would be a giant step, or two steps, in getting from an ombudsman to an order-making model.

Mr. Clyde Wells: It's an easy step. You just switch the burdens.

We've stayed with the ombudsman model where what the commissioner directs is a recommendation. The public servant has to comply, unless it goes to court to get an order to set it aside.

Mr. Matt Jeneroux: Also talking about your current model, right now—and correct me if I'm wrong—you have a combined information and privacy commissioner in one office. Was that up for review at all during your committee? Were there any suggestions, perhaps from some of the witnesses, on switching that?

Mr. Clyde Wells: There was no recommendation to us and no complaint about that system. It worked fairly well. As a matter of fact, the privacy side of it had been enacted only a short time before. It started out as being just a statute with respect to access to information, and the privacy sections were implemented some years after the initial one.

Mr. Doug Letto: I think Ms. Stoddart was of the view that one of the things a lot of people passed over was that Bill 29,with all of its implications for access, actually advanced the cause of privacy in Newfoundland and Labrador substantially, because it modernized the whole privacy aspect of the law.

Ms. Jennifer Stoddart: Yes. The privacy parts were the poor cousins of the existing legislation. People had relatively few rights of recourse to the commissioner, so we tidied that up.

However, our work in Newfoundland was not really so much about personal information. There are large parts about personal information. A lot of the population's concerns about personal information were in reaction to health information; there had been some controversies about use of personal information. Newfoundland has a very new, modern, and contemporary public health information act, so it's a different context from this.

Mr. Matt Jeneroux: Ms. Stoddart, along that same line, we have had witnesses here who have indicated that they see a benefit in combining the two offices. From what I understand, in your past career here in Parliament representing one of the offices, it's always been separated.

Is there any direction you can give us on whether to keep it separate, or are you of the opinion there ever should be a time to perhaps combine it?

Ms. Jennifer Stoddart: I won't speak directly to that. I think the present Privacy Commissioner can certainly inform you about that. But there was a government study made of that in 2005, with a very important Supreme Court justice who recommended keeping the offices separate.

On the other hand, I notice in looking around the world that Canada is probably one of the last jurisdictions to have separate commissioners. I believe Australia is putting both offices together, and so on.

I think the government will have to make that decision and examine the practical consequences in the Canadian system of either keeping the status quo, which was the last expert recommendation, or of moving ahead.

Certainly, there is the important issue and fact—as some of the people who have appeared before you have noted—that the acts are read together. That's what the Supreme Court has said. Many parts of them are identical. They refer one to the other. So if you change the Access to Information Act in the way we changed it in Newfoundland, for example, then you have to ask yourself parallel questions about the Privacy Act.

● (1000)

The Chair: That takes us to five minutes.

We now go to Mr. Long, please.

Mr. Wayne Long (Saint John—Rothesay, Lib.): Mr. Wells, I want to thank you for your contribution to our country. I've admired you from afar for many years.

You were premier from 1989 to 1996. Newfoundland has had through three or four premiers since then.

Mr. Clyde Wells: I've lost count, but I think there have been five, at least.

Mr. Wayne Long: Now we have Premier Ball.

A voice: There have been seven.

Mr. Wayne Long: There have been seven.

Mr. Clyde Wells: I did lose count.

Mr. Wayne Long: I guess that is a lot.

One of the things we've talked about—and certainly our commissioners have talked about—is the culture of secrecy, the culture of delay, and the government being seen as laggards. We hear that again and again.

With respect to Newfoundland and Labrador when you were premier, and again, fast-forward to Premier Ball, I think you've evolved from some openness to proactive disclosure, to Bill 29, which seemed to take you backwards, and then to a new act in 2014.

Can you share with me what you've seen, how you've seen the culture in Newfoundland evolve, and where it really started to go wrong, or is it just something that's always been that way?

Mr. Clyde Wells: There was a time when there was no access to information. I think Newfoundland was the second jurisdiction to implement a freedom of information act, Nova Scotia being the first, and then I think the federal one was implemented. I believe Newfoundland's was in 1982 and Nova Scotia's in 1978, something along those lines. So this is a fairly recent phenomenon in this country, and most members of the public service and most politicians were always imbued with the idea that you don't talk about anything you do in government. It was a breach of your oath of confidence. Every civil servant takes an oath of confidentiality that they will not disclose these things. That was the culture prior to access to information.

It's going to take some time before that culture gets changed. The culture couldn't change in the 30 years between 1982 and 2012, when they brought in Bill 29. Bill 29 took us back to that old culture. Even though there had been some departure from it in the prior 30 years, Bill 29 took us back to it. Don't blame government. I was part of government in the sixties with Mr. Smallwood and outside the cabinet room, you never talked about anything government did. It just wasn't done, unless it were something that was debated on the floor of the House of Assembly.

The culture has come a long way since those times. Bill 29 saw a retrenchment back to the old ways to some degree, and that's what caused a massive public reaction that resulted in the committee being put in place.

Mr. Wayne Long: What would have been in the government's mind at that time with respect to Bill 29? I've read a lot about it, but it seems like there was just a large public outcry right from the get-go on that. What were they thinking?

Mr. Clyde Wells: The matter that is a public issue right now in Newfoundland was probably the driving force. All this came about at a time when the government was involved in promoting a major Newfoundland government public undertaking in the development of Muskrat Falls, a $7-billion project. A $7-billion obligation on the backs of a mere 525,000 people is a pretty heavy burden to carry, so people were naturally concerned, but government was struggling ahead. That was coupled with the fact that the whole question of the development of Labrador power on the Churchill River is a controversial matter, coupled with the fact that the government was not readily making information available, on the basis that it was confidential. They were negotiating with Nova Scotia and with potential contractors and designers, and they just weren't making information available. The public couldn't get adequate information on what the government was about to undertake with this thing. It was all of those things. When you bring Bill 29 into that political milieu, you can understand that it just created a massive public reaction. Those were the primary factors.

You would know better. You were in the news media at the time.

● (1005)

Mr. Doug Letto: As imperfect as the existing access law was, there was a feeling that the commissioner was the arbiter of what happened. Even though the commissioner couldn't order public bodies to do things, Bill 29 expressly forbade him from doing certain things. For example, the clerk of the cabinet could declare a document a cabinet document, and the commissioner had no recourse to determine whether it was. It was the same thing with respect to solicitor-client privilege. Ultimately, when the court case proceeded, as Mr. Wells discussed, 80% of the documents for which solicitor-client privilege was being claimed as a protection didn't deal with solicitor-client privilege at all. As a result, there was this huge, if you would, deficit of faith in what this law was, emanating from Bill 29. There was a real perception that the commissioner, perhaps not having had the strongest legislative position prior to that, had an even weaker ability then to be able to ensure that public bodies were doing what they should have been doing, and that the commissioner had the right to actually investigate and determine what was being done.

The Chair: Good, thank you very much. Mr. Long.

We now go to Mr. Blaikie for the last of our official statutory rounds of questioning, and then we'll have, I think, plenty of time. As long as our guests are able to stay a little bit longer, we'll still have plenty of time. So anybody who has any other questions, please have them prepared.

Mr. Blaikie, please.

Mr. Daniel Blaikie: I want to ask, with respect to the public interest override, did you provide a definition of the public interest in the legislation or is it really at the discretion of the commissioner?

Mr. Clyde Wells: Mr. Letto.

Mr. Doug Letto: Yes, we did. I think Mr. Wells stated it. Let me just see exactly what it is.

Mr. Clyde Wells: We didn't organize this with an index, did we?

Mr. Doug Letto: Fair enough. Actually, I think it's exactly as you stated it a few minutes ago. I have the legislation here, too.

Go ahead.

Ms. Jennifer Stoddart: I have made some notes on this, thinking it was one of the interesting things we did. We mentioned, as I referred to earlier, that the public interest includes not only health and safety or environmental factors—chemicals in a river or something like that—but also good governance, which is part of our constitution, namely, peace, order, and good governance; transparency, which is a more recent notion; and accountability, which is certainly part of the private sector privacy act federally, PIPEDA. Accountability of government has been taken up across the world, so there's accountability for your actions and accountability for what you have done. That accountability of government to citizens is part of the public interest override. Finally, I noted in reviewing this that it includes ensuring the honesty of public officials. Sometimes it's in the public interest for the public to know what public officials are doing. I think we meant both elected and non-elected officials in that.

Mr. Daniel Blaikie: And so those elements are explicitly mentioned in the act for guidance for the commissioner?

Mr. Clyde Wells: I would have to take a look at the act. I've been away from it for nearly two years now.

Mr. Daniel Blaikie: Fair enough.

Mr. Doug Letto: This is the clause itself,

> Where the head of a public body may refuse to disclose information to an applicant under a provision listed...that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.

Then it gives various categories of information for which that override would take place.

Mr. Clyde Wells: We added eight additional categories to what was already there.

Mr. Doug Letto: That's correct. We added it as well to the possible waiver of fees. We added it as well to cabinet confidences where the clerk might have been otherwise barred from releasing information but where it's felt that it's in the public interest that it should be released. I believe it's also stated somewhere in the purpose of the act.

● (1010)

Mr. Clyde Wells: Yes.

Mr. Doug Letto: Public interest is identified.

Mr. Daniel Blaikie: I have a better sense of the mechanics. In some cases it may be that a government department is saying that they are not going to release something. The commissioner looks at it and says that it falls under the appropriate categories in there, so there is cause under the act for them not to release that information; but because it would be in the public interest, the commissioner makes a recommendation in the Newfoundland model to say that this should be released. Then, if the government wanted to challenge that, they would have 10 days to go to court to say that it doesn't really fall under the criteria of the public interest override, and they want to maintain a right under other provisions of the act to not release it.

Mr. Doug Letto: The commissioner has provided a good guidance document. This is one of the things we suggested in our report, that they provide a strong guidance document for public officials on the public interest override.

This is really quite evident in the U.K. act, and the commissioner has produced, I think, 10 guidance documents now on the new access law, including in the area of the public interest override explaining to officials how they are to interpret what it means and how it might be applied.

It's to codify, in a sense. It's not the right word, but it certainly puts in clear language how it is that people should make those decisions, so we thought that would be extremely helpful so people could understand the concept because it really was introducing a new concept outside the areas of health, public safety, and the environment, which had been in place.

Mr. Clyde Wells: The standard ones.

Mr. Doug Letto: Yes, and they are the standard ones in all Canadian legislation.

The Chair: We now move to a number of questioners, and we'll try to keep it around five minutes.

We welcome to our committee Mr. Scarpaleggia, who is substituting on a regular basis now.

Mr. Francis Scarpaleggia (Lac-Saint-Louis, Lib.): Thank you.

As the chair said, I am substituting, so if my questions seem a bit rudimentary, please forgive me.

In terms of those items that should definitely not be a subject of release, such as preliminary police reports, judges' notes, and so on, should those specifically be excluded or exempted subject to review? I'm not quite sure how you think that should be handled.

Mr. Clyde Wells: I think there are only one or two items that are outside of the commissioner's purview to review, one of which would be judge's notes. There's no way you're going to get—

Mr. Francis Scarpaleggia: So that wouldn't be within the purview?

Mr. Clyde Wells: Subsection 5(1) in the act spells it out.

Mr. Francis Scarpaleggia: Oh, I see.

Mr. Clyde Wells: It applies to all records in the custody of or under the control of a public body, but does not apply to a record in a court file, a record of a judge of the Court of Appeal, trial division or provincial court, a judicial administration record or a record relating to support services provided to judges of the courts.

Mr. Francis Scarpaleggia: Thank you for that clarification.

I'm interested in the points you made about chaos and governing and so on. How does the act in Newfoundland apply to, or does it apply to, cabinet documents and the documents in ministerial offices? I'm trying to get a better sense—

Mr. Clyde Wells: The commissioner can review all cabinet documents without exception to determine whether or not they fall within the limited exceptions.

Mr. Francis Scarpaleggia: In practice, does that mean that a debate in cabinet, for example, could theoretically be released and could be made public a month later or a year later?

Mr. Clyde Wells: Debates are not documented, at least they were not for the cabinet I was familiar with. There was no document showing that minister so-and-so said this or minister somebody else said the opposite.

Mr. Francis Scarpaleggia: I see.

Mr. Clyde Wells: I don't know whether they are at the federal level. I've never been in a federal cabinet, but I've been in a couple of provincial cabinets, and those were never recorded. The decisions and conclusions are recorded.

Mr. Francis Scarpaleggia: The decisions are recorded, and I understand.

I was going to ask you about the duty to document, but you mentioned that's in the access to information act. You mentioned that in Newfoundland, or if it's not in the legislation, is it your opinion, that when it comes to private organizations that receive funding from government, they shouldn't necessarily fall under the purview of access to information unless there's a majority of government-appointed board members?

Mr. Clyde Wells: There's nothing in our legislation that deals with quantum of funding that a person or a corporation or an association might receive from government. The determining standard is whether or not the government effectively controls it. That's the standard: by share ownership, or by establishment under a statute, or by appointment of the majority of the board of directors.

● (1015)

Mr. Francis Scarpaleggia: Do you feel that's the best approach? That's in contrast to, I believe, what's being recommended, which is that organizations receive a certain amount of funding that would be subject to the act. Do you think it's best to leave that one alone?

Mr. Clyde Wells: I would look at it this way: Why is $5 million different from $6 million?

Mr. Francis Scarpaleggia: We always draw the line somewhere.

Mr. Clyde Wells: I know, but is it on a principled basis? What's the principled basis for drawing the line? If it's on the basis of receiving an amount of money, whatever amount, then that's the principled basis, namely, the receipt of money, and there shouldn't be a limitation on it. That would be my thinking.

If you're going to do it on the basis of government control, if government is controlling the thing, then it should be accountable to the public. If it's an agency that government controls by appointing the director, that's the principled basis for doing it. I don't see an amount of money as being a principle basis.

Mr. Francis Scarpaleggia: Wouldn't the principle be for some that the minute you give public funds to anyone, the public has some kind of right to information?

Mr. Clyde Wells: I can agree with that if that's the principle to apply.

Mr. Francis Scarpaleggia: But is it practical in your view? For example, for a small sum of money, it creates an extraordinary burden on the organization to the point where they might say they don't want government funding at that point. Then that could compromise their ability to grow and prosper and so on.

Mr. Clyde Wells: I can see that. My own view—and this is just my view personally—is that government control of the organization is a more important basis. Why would you bring in the local theatre society? Because government provided a certain amount. Why would they have to report on all aspects of their operations? Because government provided money beyond a certain point. I think it's better to do it on the basis of the extent to which government controls it.

Mr. Francis Scarpaleggia: It's much clearer, I agree.

Thank you very much, Mr. Wells.

Ms. Jennifer Stoddart: Could I add, Mr. Chair, that this question came up in Quebec about 20 years ago, and by the time it got to the Court of Appeal it was maybe 15 years ago. The principle that was retained under the law and that was proven in the case of Hydro-Québec International was that it was effectively under the control of the Quebec government. There were all kinds of other arguments raised and so on, but that was recognized.

I believe that interpretation is still used. In Quebec, if you're under the effective control of the government, whether your sources of income are independent or whatever, if you're a government creature in some way, you're subject to access to information.

Mr. Francis Scarpaleggia: If you're a large organization, such as defence contractor, and you're receiving big contracts, you may not be theoretically under the effective control of the government, but there's influence.

But I take your point.

Ms. Jennifer Stoddart: Yes, but then there are other sections of access to information about third-party information that are very important that come into effect.

Mr. Francis Scarpaleggia: Thank you.

The Chair: That's a great conversation.

Mr. Lightbound.

Mr. Joël Lightbound (Louis-Hébert, Lib.): I would like to hear more. You mentioned earlier the duty to assist, and one part of that was to narrow or better target an access to information demand. That was one part. You mentioned other parts, but I'd like you to elaborate on the duty to assist and how it materialized in your legislation.

Mr. Doug Letto: There was already a duty to assist, but there was not much in the way of a narrative around how that should happen.

● (1020)

Ms. Jennifer Stoddart: There was a counter-narrative.

Mr. Doug Letto: It was a counter-narrative.

Many of the people who came before us felt that public bodies, in some cases, were not welcoming of their effort to find information. We discussed it not only in terms of what we were hearing in our province, but we also looked at guidance from other places. We quickly came to the conclusion that the citizen who is coming to a public body for information is coming because they she wanted it. They want some information. They may not know exactly what they want.

As the holder of the information, there is a certain obligation to help them arrive at that happy moment where you can say, “This is what I want.” The first part of it is actually to engage with that person right from the start, to respond to them quickly and say, “Mr./Ms. Smith, we have your request for information. We're starting the process.”

We actually recommended that instead of your having this letter or application going into the system for information and then your hearing that you either will or won't get the information, there be progress reports at specific times. I think that within 10 days there's a requirement that an acknowledgement be sent out.

Part of the duty to assist is not just to say, “You can't have this information because of section whatever”, but to explain to people in language they can understand why that's the case. More importantly, you need to to work with people on their requests to say, “There is some confusion about what you are asking”, and to engage with that person to help them get to a place where they get what they want or what they think they want.

One of the good things that's happened is that all the access coordinators have now gone through customer service training.

Mr. Clyde Wells: We specifically recommended that they take the approach that they were dealing with customers whom they wish to attract back for the service, and that they had to provide good customer service. I think we spelled that out in the report.

Mr. Doug Letto: It's to have a good relationship from the start of the request all the way through.

Mr. Joël Lightbound: How has it worked so far? Do you have any data on the impact that this change of—

Mr. Doug Letto: I don't. What I have is an anecdote from a person we dealt with in the access to information system and whom I spoke with recently. This person talked about how the coordinators now feel they are on firmer ground in dealing with requesters, that they now feel that the legislation supports them in trying to help find conclusions to a requester's request for information.

That is a pretty good place to be.

Mr. Joël Lightbound: You mentioned coordinators. Previous witnesses have said in this committee that giving greater political autonomy and independence to coordinators could serve a certain purpose in terms of how they process requests and how they act. I was wondering if your committee delved into that and looked at the role of coordinators and how they can be better protected, so to speak, within the legislation.

Mr. Doug Letto: I'll mention one point and then pass it on to Mr. Wells and Ms. Stoddart.

The feedback from the coordinators and the role that we laid out for them is that they feel much more empowered in their position. Sadly, many of the people who were in coordinating positions were the most junior employees in the department or agency, and they always felt reluctant to tell directors and others that they felt the information should be released. They didn't feel they had the pull to do it within the hierarchical structure of the organization.

The legislative recommendations that we made and that were implemented have changed the field and changed the culture around it. They now have a legal right to be able to pursue people to get information that the law says they should have, unless there is a reason not to provide it.

Mr. Clyde Wells: We made specific recommendations to enhance their stature within the organizations for which they were the coordinators. The indications are that it is working, as Doug said.

I spoke with somebody from the commissioner's office about four or five months ago, and he gave me an update that led me to believe that the commissioner's office had received very well the recommendations we had made and that they were working with the new legislation to make it effective. The efforts the commissioner's office has made, the improvements they have made to their website, and the information they have on it indicate that they have totally bought into the new approach and are working to make it effective.

Ms. Jennifer Stoddart: Perhaps the committee should know that at some points we probe very deeply into the process, not just the law, but what is really happening.

One of the innovative things we did was to poll anonymously the coordinators and the participants in the system to see how autonomous they felt and what the problems were from their point of view. That certainly informed our suggestions for the coordinators.

One of the rather shocking things we found out was that, at the time of our hearings, access to information requests were coordinated through a central point, and they were put through a kind of triage system. As I remember, the triage was media—i.e., it is Doug Letto asking, and the names were kept on—constituents, and members of the House of Assembly. Then they were distributed to specific cabinet offices and so on.

● (1025)

Mr. Clyde Wells: They went up to the cabinet minister's executive assistant. If the request originated from a member of the House of Assembly—I guess with the emphasis on opposition members—or came from the media, or....

What was the third one? I have forgotten.

Ms. Jennifer Stoddart: I think it was constituents or different electoral....

Mr. Clyde Wells: Organizations....

Ms. Jennifer Stoddart: Like different ridings....

Mr. Clyde Wells: Any of those requests had to go to the minister's office before they could be released.

Ms. Jennifer Stoddart: People were labelled as they made the requests. We heard many insinuations of people thinking that somehow their access to information requests were treated in a partisan way.

I don't say we ever got proof of that. I remember that the minister honestly thought that this was helpful in speeding up the process, and that may be so. However, the public certainly perceived—several people were very involved in the access to information system—that the reason they weren't getting the information was that they had been treated in a partisan way.

That is being changed now, and I think it gives much greater satisfaction.

Mr. Clyde Wells: It was perceived as a filter through which all the information going to those requesters was filtered before it got out, and that is probably the practical result of it.

Mr. Doug Letto: The request now.... If Mr. Lightbound went to you, the requester's name would be on it for the coordinator to use, but anybody else who is involved in helping collect the information from that request would have no idea who is requesting the information.

Mr. Clyde Wells: Coordinators are required to keep it confidential, and all of the dealings with the requester must go through the coordinator. The deputy minister or the director can't do it. There are some possible exceptions where it may become necessary, when they are requesting information directly related to that individual and the name has to be used, but other than that the requester's name is confidential.

The Chair: Good.

Let's go to Mr. Kelly, then.

Mr. Pat Kelly: Early on in our committee's work we heard from representatives from the Department of Citizenship and Immigration and the Department of National Defence, which are the recipients of the most ATIP requests by some margin. There were concerns about their ability to process requests in terms of human resources. I seem to recall that each department, probably about 1% of each department, is devoted to dealing with information requests. We've also heard much in the way of the need to change culture. We've heard it today. We've heard almost every day about the need to transition from a culture of secrecy to one of openness by default.

In part, the way we can most clearly address the need for openness by default is perhaps proactive disclosure. Some have commented that the existing problems with backlogged information requests and the challenges these departments have in processing these requests owe to our not being open by default and not proactively disclosing information. If we were and did proactively disclose information, we wouldn't have as many requests to process and we could make this whole system much easier.

Along with the change to your model in Newfoundland and Labrador, what has happened at the actual department levels in terms of proactive disclosure and establishing the culture of openness by default?

● (1030)

Mr. Clyde Wells: We dealt with publication schemes and recommended that there be provision for proactive publication. I don't know what the statutory provision is, but there were clear recommendations.

Mr. Pat Kelly: Perhaps you could also address whether these steps have had a measurable effect on the number of complaints to the commission, or ones that have required orders to be made.

Mr. Clyde Wells: The information we have is that the number of requests for information has increased fairly significantly. That's to be expected. When everything opens up, people will start to try it out. I would expect the number of requests to go up and then to settle back to a reasonable level. There may, indeed, be even more requests than there were in the past, because many of the people who came before us said that in the past they hadn't even bothered making the requests because they knew they wouldn't get the information. When people have that kind of attitude because of the culture involved, the number of requests would not be high.

There's been an increase. I can't say there's been any basis for measuring a decrease on the basis of implementation of publications schemes. It's perhaps too early to tell just yet. Perhaps in a couple of years, you would get better information on that. It would be interesting to see that.

Mr. Doug Letto: I checked last week with the agency that we reported through. The number of requests has gone from about 700 the year before the new act to about 1,400 so far this year. The number of pages released to the public has increased from 16,000 to about 54,000. I don't know why. It may well be because we've suggested that more information be made available. It might be because people aren't being dissuaded by estimates of large fees. No one really knows the reason for it. I expect it will settle down to some reasonable place.

In terms of concerns about the demand this will put on agencies, it sounds crude and rough to say it this way, but I don't think access laws are intended to allow public officials and politicians to sleep at night. That's not the purpose. The purpose is so that the citizen, who wants to know what their government is doing in their name, can have access to that information.

Mr. Pat Kelly: We had suggested that we go beyond citizens, too. That's of concern to the Department of Citizenship and Immigration who sees the potential for a very large expansion of requests.

Mr. Doug Letto: That's right, because you don't have to be a citizen to make an application.

Mr. Clyde Wells: You don't now, under the existing legislation.

Mr. Doug Letto: No.

Mr. Clyde Wells: But a landed immigrant or a resident—

Mr. Pat Kelly: You go through an intermediary. The request is made by an intermediary who is a Canadian citizen.

Mr. Doug Letto: I would say this. With regard to Bill 29, whatever the motivation for the act as it materialized, the report that had been done prior to ours was replete with examples of senior public servants asking for exclusions and exemptions in the act, and they were put in place. The attitude was that “We have to restrict the amount of information that's available under the business interest clause because people won't do business with the province.” There was this fear that somehow the whole public enterprise that is government would collapse if people could have more information about it.

That's where the retrenchment started, and that's where the diminishment of access rights began. Our committee had five separate instances where people, representing either public agencies or agencies that had some connection with the government, asked to be excluded from the act. They had this apprehension that hugely negative things would happen if people had access to certain information. They painted a picture of what might happen, not what did happen.

There's tremendous pressure to exclude from the act various organizations and agencies. I would ask you to be aware that that's a natural tendency on the part of public agencies that will appear in front of you that may not want as much access to their information.

● (1035)

The Chair: Colleagues, if I may, I'd like to ask a few questions while we have some time. I seem to exercise this right probably more than I should as chair. First of all, I want to thank all of you for coming and making your way here today. I found the conversation to be very enlightening.

As we wind down our study on access to information, we'll be going through the draft report that our analysts have prepared for us and will likely add some of the testimony that we've heard today. This meeting is also a segue into our resuming the existing study we have on the privacy legislation.

Given the fact that your study actually rewrote the legislation, because it's a joint role and responsibility in Newfoundland and Labrador.... Here at the federal level, of course, we have a commissioner for each role. Even though the budgets for the Privacy Commissioner and Information Commissioner are basically jointly held when it comes to the estimates and how those budgets are passed, each one has its own autonomy and authority to look after its legislative mandate.

Ms. Stoddart, I think you are uniquely positioned as a former privacy commissioner to tell us any of the things we need to look for as we move forward and transition into the study of the privacy legislation. My question for you is severalfold.

One, does it make sense at the federal level to even look at a potential model in which Canada would have commissioner for both access to information and privacy, or should we maintain the current yin versus yang, where we have an Access to Information Commissioner and a Privacy Commissioner? Would it make any sense having one such commissioner in terms of economy of scale, and would it make any sense in terms of the entirety of the process and an overall oversight point of view?

We also received a letter from the Privacy Commissioner as part of our mandate, who was very much concerned about opening up and broadening access to information as it pertains particularly to individuals' personal information and the ability of the Information Commissioner to have order-making powers to that effect. I'm wondering if you can give us any insight as we move forward on some of those concerns that have been brought up?

Ms. Jennifer Stoddart: I think all those concerns are valid, and I would encourage the committee to look with an open mind at all the possibilities, at this point, and all the factors that should be considered.

I have a few comments. First of all, when I came to the Office of the Privacy Commissioner, I understood that there was a history of, shall we say, less than complete co-operation between the two commissioners and their offices. I felt strongly that was not in the interest of the Canadian public. Mr. Robert Marleau, who was the interim privacy commissioner after John Reid, and I did the most possible to set up cordial relations, which continued between me and Commissioner Legault. That situation of competition, I guess—I don't know what it was, I wasn't there but just heard about it—had been extant for several years. I don't think that's appropriate between government agencies. We know it happens, but we know that individuals all have their own personal information rights and their access to information rights. It's important that if there are two commissioners, it be made clear that they and their offices should work together.

One of the results of that competition, shall I say, was that the offices then developed their separate administrations. You could logically ask, "Why isn't there one administration for the two offices?" That was how it developed, so there are things like that you should know.

Secondly, I was fortunate in the time I was federal commissioner to benefit from several fairly generous increases in funding from Treasury Board and the government on submission of the appropriate proposals and requests. I don't know what the budget is now. I think it's about $17 million or $18 million, or something like that. It depends on how you count it with benefits and so on. The point I'd like to make is that I believe it is still far in excess of the Access to Information Commissioner's budget. Worldwide, even when you look at a joined-up commission, like in the U.K.—it's always been that way in the U.K.—since the access to information law was passed, it was added to the duties of the existing privacy commissioner.

It's in the nature of the access to information function that it tends to take a lot of the funds, and there is perhaps an understandable pushback from the government of the day to not be as excited about funding more access to information requests about its own activities. The Privacy Commissioner rarely gets into such a possible contradictory position with the government, because lately many of the privacy issues have been about technology and about third parties, notably what the private sector is doing or what we should be doing in terms of national security and about surveillance policy, for example, in which the government is actively looking for advice.

We have two different positions, and the Canadian privacy office has been able to do good work—I am partial—over the years because of the generous budgets and because of the support it got from the Canadian government. There are a few things to take into account. There's a bit of jurisprudence where the Access to Information Commissioner is contesting a decision of the Privacy Commissioner, but it's usually settled in a way that doesn't involve going to court.

● (1040)

The Chair: Excellent, thank you very much.

I have one other question. There are a lot of information requests that are of general interest, whether it's the media or interested citizens accessing information as it pertains to how the government conducts itself. However, there are also a lot of information requests that come from individual Canadians wanting to find out information about their particular file, whether it's a file that might be with Citizenship and Immigration, or with a particular department or agency, or whether they're applying for something. I'm wondering, in the course of your deliberations and study, and in your recommendations, what was done when a citizen found out information was being held about them by the government that was either incorrect, factually wrong, or for which there needed to be some kind of recourse. What system did you put in place, or does that fall beyond the scope of the access to information and privacy office in order to correct information that the government holds about individual citizens?

Mr. Clyde Wells: That's provided for in the legislation and there's a right to have your information corrected. When you discover that the information the government holds is in error, there's a statutory obligation to correct that information and to remove the incorrect record about the individual. There is clearly a right to have it done.

Ms. Jennifer Stoddart: We broadened the rights of citizens to requests to know about different treatments of their personal information in the hands of government.

Before our committee's work, they could only refer to the commissioner at very limited times. The commissioner could not do his own audit of personal information practices. He could not conduct his own investigation, as I remember.

All this was broadened so that people had the complete right to look at what was being done, what their personal information was. The commissioner could investigate on his own initiative, and all that could go to the commissioner and then off to the Newfoundland Supreme Court.

We broadened the privacy rights.

The Chair: Mr. Erskine-Smith wants to ask a question.

Mr. Nathaniel Erskine-Smith: I want to follow up on the Information Commissioner bracketing the institutions funded in part by government, institutions that perform a public function on behalf of the federal government, and specifically those organizations with the authority to regulate and set standards on behalf of the federal government, where the federal government defers to those organizations.

Mr. Wells, you mentioned having a principle here. Would there not be a principle that we would extend access to information to these organizations?

Mr. Clyde Wells: For all those organizations, I assume that individuals would be appointed by government.

Mr. Nathaniel Erskine-Smith: No, not always.

Ms. Jennifer Stoddart: Can you give us an example like the Standards Council of Canada?

Mr. Nathaniel Erskine-Smith: The example that the Information Commissioner gives is Nav Canada.

Mr. Clyde Wells: Nav Canada?

Mr. Nathaniel Erskine-Smith: I don't suggest there are a great many. I think Mr. Wells is correct that the vast majority of them will have the majority of their boards of directors appointed by the government. But in cases where the majority of directors have not been appointed by the government, why would we not have access to information laws apply where these organizations do regulate on behalf of the government and there is deference by government to them?

● (1045)

Mr. Clyde Wells: I agree. There should be access to their information. On a principled basis, they should be included—

Mr. Nathaniel Erskine-Smith: And to follow up on that—

Mr. Clyde Wells: —where they're exercising regulatory power.

Mr. Nathaniel Erskine-Smith: That's exactly right.

For institutions funded in part by government, $5 million is a significant amount of money. I would put to you that the principle is a *de minimis* principle, and I think Mr. Scarpaleggia picked up on this.

Take the Pan Am Games, for example, which hundreds of millions of taxpayer dollars funded. The Taxpayers Federation would think as a matter of principle taxpayers ought to know how that money was spent.

There is a principle for extending coverage of the act to organizations where a significant amount of public money has been spent at the very least on access to information coverage being extended to how those funds were expended.

Do you agree?

Mr. Clyde Wells: You can get information from the government records and the government can release it, and under the legislation that we had there would be no limitation on releasing that third-party information. I would think that a government advancing $100 million to an agency like the Canadian Olympic Association would require that organization to report to government exactly what it did with the money and government would report to the public.

Mr. Nathaniel Erskine-Smith: So if not directly, indirectly, as taxpayers we ought to have that information.

Mr. Clyde Wells: You're entitled to that information from government offices. If government isn't requiring the agency to provide it, government would be derelict in its duty.

The Chair: I would think so too.

Mr. Clyde Wells: But the source of accessing the information would be through the government.

The Chair: Thank you very much.

Mr. Clyde Wells: Mr. Chair, there's one thing that I've been thinking about for the last few minutes that I overlooked mentioning in choosing between a hybrid model or an order-making model.

Another reason for going with a hybrid model is that one of the primary responsibilities of the commissioner is to be an advocate for the release of information and to advocate for the rights of citizens to access information and to promote ideas and means by which such information can be accessed.

If the person who has that responsibility also has the responsibility to be the independent arbiter between the holder of the information and the requester of the information, there's a conflict of interest.

The Chair: There is a conflict.

Mr. Clyde Wells: But in the hybrid model, that conflict disappears.

I'm sorry I overlooked emphasizing that.

The Chair: I would excuse that because it's a very important point you just made, Mr. Wells.

On behalf of the committee, I want to thank you all for coming here and having this discussion with us. We hope that if we need to call you back in the future as we move through.... And we commend you for the excellent work that led to the legislative changes in Newfoundland and Labrador, which I think is head and shoulders above anything else we have in the country right now.

We thank you very much for your time, your dedication, your patience, and your wisdom. Keep doing the great work.

Mr. Clyde Wells: Thank you very much for your kind comments.

The Chair: Thank you.

We'll see you all on Thursday, colleagues.

The committee is adjourned.