

2024 01G 0937

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

NEIL BOSE, THE PRESIDENT AND
VICE-CHANCELLOR *PRO TEMPORE* OF MEMORIAL
UNIVERSITY OF NEWFOUNDLAND

APPLICANT

ORIGINATING APPLICATION
(EX PARTE)

Summary of Current Document	
Court file number:	2020 01G 0937
Date of filing of document:	February 16 2024
Name of party or person filing:	Neil Bose, The President and Vice-Chancellor <i>Pro Tempore</i> of Memorial University of Newfoundland
Application to which document being filed relates:	Originating Application pursuant to section 50(2)(a) of the <i>Access to Information and Protection of Privacy Act, 2015, c A-1.2</i> seeking a declaration that the Applicant is not required to comply with recommendations of the Information and Privacy Commissioner of Newfoundland and Labrador.
Statement of purpose in filing:	To commence Application

KOREN A. THOMSON
STEWART MCKELVEY
Suite 1100, Cabot Place
100 New Gower Street
St. John's, NL A1C 6K3
Solicitors for the Applicant

NATURE OF APPLICATION

1. This is an Originating Application (*Ex Parte*) by the Applicant ("Memorial University"), pursuant to section 50(2)(a) of the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c A-1.2 (the "ATIPPA"), seeking a declaration that Memorial University is not required to comply with recommendations of the Information and Privacy Commissioner of Newfoundland and Labrador.

MATERIAL FACTS

2. The Information and Privacy Commissioner of Newfoundland and Labrador (the "OIPC") investigated consolidated complaints regarding four access to information requests made to Memorial University, each framed as follows:
 - (a) bonuses / special payments paid to C-Core executives and bonuses paid to C-Core management employees from January 1, 2019 to October 23, 2023;
 - (b) all bonuses and special payments paid to Genesis executives and all incentives paid to Genesis management employees from January 1, 2019 to October 23, 2023;
 - (c) all vehicle allowances paid to Genesis executive and management staff from January 1, 2019 to present; and,
 - (d) all vehicle allowances paid to Canadian Centre for Fisheries Innovation executive and management staff from January 1, 2019 to November 2, 2023(the "Requests").
3. Memorial University had denied the Requests on the basis that it does not have custody and control over the information sought in the Requests, being information belonging to, and under the control of C-Core, Genesis and the Canadian Centre for Fisheries Innovations respectively, all of which are separately incorporated entities (the "SIEs"). It maintained that position during the OIPC's investigation.
4. During the course of the OIPC Investigation, and despite the suggestion of Memorial University that it do so, the OIPC declined to exercise its discretion under section 96(1) of the ATIPPA to seek material evidence from the corporations in possession of the specific evidence the OIPC sought from Memorial University, being the SIEs.

5. During the course of the OIPC Investigations, Memorial University submitted, *inter alia*:
- (a) The information sought in the Requests is remuneration information of employees of third party corporations, being the SIEs.
 - (b) The remuneration of the SIEs' employees is not funded by Memorial University.
 - (c) Memorial University is the sole shareholder or member (as applicable), of the SIEs. However, the SIEs operate under their own articles of incorporation, with their own Board of Directors, policies and procedures, and employ their own staff under contracts of employment.
 - (d) Memorial University has bare possession of the information sought as payroll agent for the SIEs. As payroll agent, Memorial University has no authority to regulate the content, use or disposal of the information sought. The SIEs are the principal in respect of the information sought.
 - (e) As sole shareholder or member (as applicable), Memorial University obtains copies of the SIEs' annual financial statements pursuant to section 262 of the *Corporations Act*, RSNL c C-36.
 - (f) The financial statements of the SIEs are reflected in Memorial University's Consolidated Financial Statements. As a result, Memorial University is obligated to maintain a copy of the SIEs' financial statements pursuant to section 260 of the *Corporations Act*.
 - (g) The information sought does not appear as a line item in the SIEs' Financial Statements, nor in Memorial University's Consolidated Financial Statements.
 - (h) The information sought was reflected in the Auditor General's Audit Report of Memorial University published by the Government of Newfoundland and Labrador in or about October 2023. The Government of Newfoundland and Labrador redacted the information being sought here from the published Audit Report.
 - (i) The information sought was provided to the Auditor General voluntarily by the SIEs for the purposes of conducting the audit of Memorial University under the *Auditor Generals Act, 2021*, SNL 2021, c A-22.1.

6. The investigation culminated in the issuance of Report A-2024-006 (the "Report"). In the Report, the OIPC did not acknowledge, and/or failed to consider, relevant information and argument put forward by Memorial University. The OIPC determined:
 - (a) That Memorial University had not conducted a search for records and could not conduct a custody and control analysis until a search for records had been done. In this regard the OIPC determined that Memorial University breached the duty to assist.
 - (b) Despite the finding in (a), that Memorial University has custody and control over the records.
7. In the Report, the OIPC recommended that Memorial University:
 - (a) Conduct a reasonable search for records requested in the Requests;
 - (b) If necessary, request responsive records from C-Core, Genesis Group Inc., and the Canadian Centre for Fisheries and Innovation; and,
 - (c) Provide its final response to the Requests to the Complainant within 30 business days.
8. Memorial University repeats the forgoing and maintains that it does not have custody and control of the information sought in the Requests, the particulars of which will be set out in affidavit evidence to be presented at trial.

OTHER PERTINENT INFORMATION

9. Sections 50(1) and (2) of the ATIPPA state:

50. (1) This section applies to a recommendation of the commissioner under section 47 that the head of the public body

(a) grant the applicant access to the record or part of the record; or

(b) make the requested correction to personal information.

(2) Where the head of the public body decides not to comply with a recommendation of the commissioner referred to in subsection (1) in whole or in part, the head shall, not later than 10 business days after receipt of that recommendation, apply to the Trial Division for a declaration that the public body is not required to comply with that recommendation because

(a) the head of the public body is authorized under this Part to refuse access to the record or part of the record, and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception;

(b) the head of the public body is required under this Part to refuse access to the record or part of the record; or

(c) the decision of the head of the public body not to make the requested correction to personal information is in accordance with this Act or the regulations.

RELIEF REQUESTED

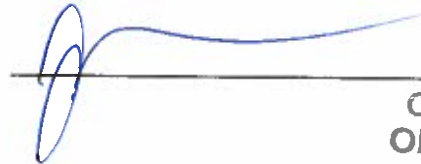
10. Memorial University therefore seeks a declaration pursuant to section 50(2)(a) of the ATIPPA that it is authorized to refuse the Requests on the basis that the information sought in the Requests is not within the custody and control of Memorial University.

Dated at St. John's, this 16th day of February, 2024.



**KOREN A. THOMSON
STEWART MCKELVEY
Suite 1100, Cabot Place
100 New Gower Street
St. John's, NL A1C 6K3
Solicitor for the Applicant**

ISSUED at St. John's, in the Province of Newfoundland and Labrador, this 16 day of Feb., 2024.



**COURT
OFFICER**

2024 01G 0937

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

NEIL BOSE, THE PRESIDENT AND
VICE-CHANCELLOR *PRO TEMPORE* OF MEMORIAL
UNIVERSITY OF NEWFOUNDLAND

APPLICANT

AFFIDAVIT OF MAGGIE NOSEWORTHY

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Name of party or person filing:	Neil Bose, The President and Vice-Chancellor <i>Pro Tempore</i> of Memorial University of Newfoundland
Application to which document being filed relates:	Originating Application pursuant to section 50(2)(a) of the <i>Access to Information and Protection of Privacy Act, 2015</i> , c A-1.2 seeking a declaration that the Applicant is not required to comply with recommendations of the Information and Privacy Commissioner of Newfoundland and Labrador.
Statement of purpose in filing:	To Support Application

I, MAGGIE NOSEWORTHY, of the City of St. John's, in the Province of Newfoundland and Labrador, make oath and say as follows:

1. I am the University Access and Privacy Advisor of Memorial University of Newfoundland, the Applicant in the within matter ("Memorial University"). As University Access and Privacy Advisor I manage access to information requests and complaints under the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c A-1.2 (the "ATIPPA"). As such I have knowledge of the matters herein deposed, and am authorized by Memorial University to execute this Affidavit.
2. The Information and Privacy Commissioner of Newfoundland and Labrador (the "OIPC") investigated consolidated complaints regarding four access to information requests made to Memorial University, each framed as follows:

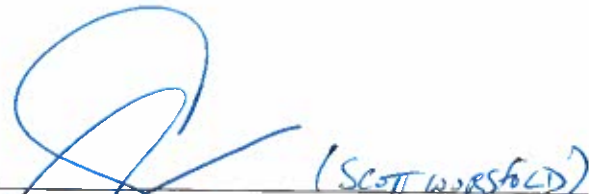
- (a) bonuses / special payments paid to C-Core executives and bonuses paid to C-Core management employees from January 1, 2019 to October 23, 2023;
 - (b) all bonuses and special payments paid to Genesis executives and all incentives paid to Genesis management employees from January 1, 2019 to October 23, 2023;
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 - (d) all vehicle allowances paid to Canadian Centre for Fisheries Innovation executive and management staff from January 1, 2019 to November 2, 2023

(the "Requests").
3. Memorial University had denied the Requests on the basis that it does not have custody and control over the information sought in the Requests, being information belonging to, and under the control of C-Core, Genesis and the Canadian Centre for Fisheries Innovations respectively, all of which are separately incorporated entities (the "SIEs"). It maintained that position during the OIPC's investigation.
4. During the course of the OIPC Investigation, and despite my recommendation that they do so, the OIPC declined to exercise its discretion under section 96(1) of the ATIPPA to seek material evidence from the corporations in possession of the evidence the OIPC sought from Memorial, being the SIEs.
5. During the course of the OIPC Investigations, Memorial University submitted, *inter alia*:
- (a) The information sought in the Requests is remuneration information of employees of third party corporations, being the SIEs.
 - (b) The remuneration of the SIEs' employees is not funded by Memorial University.
 - (c) Memorial University is the sole shareholder or member (as applicable), of the SIEs. However, the SIEs operate under their own articles of incorporation, with their own Board of Directors, policies and procedures, and employ their own staff under contracts of employment.

- (d) Memorial University has bare possession of the information sought as payroll agent for the SIEs. As payroll agent, Memorial University has no authority to regulate the content, use or disposal of the information sought. The SIEs are the principal in respect of the information sought.
 - (e) As sole shareholder or member (as applicable), Memorial University obtains copies of the SIEs' annual financial statements pursuant to section 262 of the *Corporations Act*, RSNL c C-36.
 - (f) The financial statements of the SIEs are reflected in Memorial University's Consolidated Financial Statements. As a result, Memorial University is obligated to maintain a copy of the SIEs' financial statements pursuant to section 260 of the *Corporations Act*.
 - (g) The information sought does not appear as a line item in the SIEs' Financial Statements, nor in Memorial University's Consolidated Financial Statements.
 - (h) The information sought was reflected in the Auditor General's Audit Report of Memorial University published by the Government of Newfoundland and Labrador in or about October 2023. The Government of Newfoundland and Labrador redacted the information sought from the published Audit Report.
 - (i) The information sought was provided to the Auditor General voluntarily by the SIEs for the purposes of conducting the audit of Memorial University under the *Auditor General's Act, 2021*, SNL 2021, c A-22.1.
6. The investigation culminated in the issuance of Report A-2024-006 (the "Report"). In the Report, the OIPC did not acknowledge, and/or consider information and argument put forward by Memorial University. The OIPC determined:
- (a) That Memorial University had not conducted a search for records and could not conduct a custody and control analysis until a search for records had been done. In this regard the OIPC determined that Memorial University breached the duty to assist.
 - (b) Despite the finding in (a), that Memorial University has custody and control over the records.

7. In the Report, the OIPC recommended that Memorial University:
- (a) Conduct a reasonable search for records requested in the Requests;
 - (b) If necessary, request responsive records from C-Core, Genesis Group Inc., and the Canadian Centre for Fisheries and Innovation; and,
 - (c) Provide its final response to the Requests to the Complainant within 30 business days.
8. I swear that the information contained herein is true to the best of my knowledge, information and belief, and I make this Affidavit in support of Memorial University's Originating Application (*Ex Parte*) for a declaration under section 50(2)(a) of the ATIPPA that it does not have to comply with the OIPC's recommendations in Report A-2024-006.

SWORN TO at St. John's, in the Province of Newfoundland and Labrador, the 16 day of February, 2024 before me:


A Barrister of the Supreme Court of Newfoundland and Labrador


MAGGIE NOSEWORTHY

2024 01G 0937

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
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BETWEEN:

NEIL BOSE, THE PRESIDENT AND
VICE-CHANCELLOR *PRO TEMPORE* OF MEMORIAL
UNIVERSITY OF NEWFOUNDLAND

APPLICANT

AFFIDAVIT OF SERVICE

I, _____ (your name), of _____ (City of
residence) Newfoundland and Labrador, make oath and say as follows:

(PERSONAL SERVICE)

1. On _____ (date), at _____ (time), I served
_____, of _____
(identify person served) with the Originating Application (*Ex Partes*) and Order
(Identify documents served) by leaving a copy with him (or her) at
(address where service was made) or by leaving a copy of the document with
(identify person by name and title) at _____
(address where service was made) _____.

2. I was able to identify the person by means of _____.

(state the means by which the person's identity was ascertained).

**(SERVICE BY LEAVING A COPY WITH AN ADULT PERSON IN THE SAME HOUSEHOLD AS
AN ALTERNATIVE TO PERSONAL SERVICE)**

1. I served _____ (identify person served) with
the _____ (Identify documents served) by

leaving a copy in a sealed envelope on _____ (Date), at
(time), with a person _____ (insert name if known) who
appeared to be an adult member of the same household in which
(Identify person served) is residing, at _____ (Address
where service was made) and by sending a copy by regular lettermail (or registered or
certified mail) on _____ (Date) to _____ (identify
person served) at the same address.

2. I ascertained that the person was an adult member of the household by means of
(state how it was ascertained that the person was an adult member of the household).
3. Before serving the documents in this way, I made an unsuccessful attempt to serve
(identify person) personally at the same address on _____ (date).
(If more than one attempt has been made, add: and again on
(date).

(SERVICE BY REGISTERED MAIL AS AN ALTERNATIVE TO PERSONAL SERVICE)

1. On _____ (date), I sent to _____ (identify
person served) by registered mail with Canada Post Corporation item #
attached to the envelope, a copy of the
(identify documents served).
2. Attached is the confirmation of delivery receipt obtained from Canada post Corporation for
item # _____ showing the envelope was delivered to
(identify person served) on _____ (date of receipt).

3. The item # on the confirmation of delivery receipt is identical to the item number on the registered mail receipt obtained from Canada Post Corporation for the envelope sent to _____ (address where mail was delivered).

(SERVICE BY CERTIFIED MAIL AS AN ALTERNATIVE TO PERSONAL SERVICE)

1. On _____ (date), I sent to _____ (identify person served) by certified mail a copy of the _____ (identify documents served).

2. I received the attached receipt card from Canada Post Corporation which indicates the documents were received on (date) and which bears a signature that purports to be the signature of _____ (identify person).

(SERVICE BY REGULAR LETTERMAIL AS AN ALTERNATIVE TO PERSONAL SERVICE)

1. On _____ (date), I sent to the _____ (identify person served) by regular lettermail a copy of the _____ (identify documents served) together with an acknowledgement of receipt form.

2. On _____ (date), I received the attached acknowledgement of receipt form bearing a signature that purports to be the signature of _____ (identify person).

SWORN/AFFIRMED before me at _____, in the Province of Newfoundland and Labrador, this _____ day of _____, 2024.

A Commissioner for taking affidavits.