

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

AND:

**MICHAEL HARVEY
in his capacity as
THE INFORMATION AND PRIVACY
COMMISSIONER OF NEWFOUNDLAND & LABRADOR**

FIRST INTERVENOR

AND:

**MATTHEW BARTER, THE ACCESS TO
INFORMATION REQUESTER AND
COMPLAINANT BEFORE THE COMMISSIONER**

SECOND INTERVENOR

AND:

GENESIS GROUP INC.

THIRD INTERVENOR

AND:

C-CORE

FOURTH INTERVENOR

A CASE-MANAGED PROCEEDING BEFORE THE HONOURABLE JUSTICE STACK

BRIEF OF MEMORIAL UNIVERSITY OF NEWFOUNDLAND

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2024 01G 0937
Date of Filing Document:	September 13, 2024
Name of Party Filing or Person:	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 ATIPPA, 2015, c A-1.2</i>
Statement of Purpose in filing:	To support the above-noted Originating Application

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PART I: INTRODUCTION

1. At the heart of this appeal is a question of when, if ever, the *Access to Information and Protection of Privacy Act*, SNL 2015 c A-1.2 (the "**ATIPPA**") can and should extend to third parties with corporate relationships to public bodies.
2. Determination of whether a public body has custody and control over information owned by an entity to which the *ATIPPA* does not directly apply, must be considered in light of the statute's purpose. The overarching purpose of the *ATIPPA* is to facilitate democracy. This purpose is achieved by, *inter alia*, enabling the public access to information required to foster participation in the democratic process, and increasing transparency to hold public bodies accountable to the public.
3. In this case, the third-party entities are Genesis Group Inc. ("Genesis"), the Canadian Centre for Fisheries Innovation ("CCFI") and C-Core-separately incorporated entities ("SIEs") of Memorial University of Newfoundland ("Memorial"). The SIEs have structured their relationship with Memorial so as to delineate separate legal personas with separate governance, while authorizing the use of Memorial as payroll agent. It is within this context, that Memorial has come into possession of the remuneration information requested in the underlying access to information requests.
4. As a result of the unique corporate relationship between Memorial and each of the SIEs, Memorial acknowledges that there may be occasions where Memorial has custody and control over some SIE records. However, Memorial only has possession of the specific information at issue in this appeal because it is payroll information provided to Memorial in the capacity as payroll agent for each of the SIEs. Memorial is not the principal of this information and has no authority to regulate the records related to it. The employees whose remuneration is in issue, are not employees of Memorial, nor is their remuneration funded by Memorial.
5. Application of the "custody and control" test in these circumstances confirm that Memorial does not have custody and control of the information sought. The application of the *ATIPPA* to the underlying remuneration information extends far beyond the purpose of the *ATIPPA*. It would not promote democracy, or increase the transparency and accountability of Memorial.

PART II: STATEMENT OF FACTS

(A) Procedural History

6. The Information and Privacy Commissioner of Newfoundland and Labrador (the “OIPC”) investigated consolidated complaints regarding four access to information requests made to Memorial by the Second Intervenor, 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
- (collectively, the “**Requested Information**”).¹
7. Memorial denied the requests on the basis that it does not have custody and control over the Requested Information, being information belonging to, and under the control of the SIEs.
8. The investigation culminated in the issuance of Report A-2024-006 (the “**Report**”). The OIPC determined that:
- (a) Memorial 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 breached the duty to assist.²
 - (b) Despite the finding in (a), that Memorial has custody and control over the records.³

¹ *Memorial University of Newfoundland, Re, Report A-2024-006*, 2024 CanLII 16508 (NL IPC) at para 1 [OIPC Report A-2024-006] [Tab 8]

² *Ibid* at paras 9-12

³ *Ibid* at para 31.

9. The OIPC recommended that Memorial:

- (i) Conduct a reasonable search for records;
- (ii) If necessary, request responsive records from C-Core, Genesis Group Inc., and CCFI; and,
- (iii) Provide its final response to the Requests to the Complainant within 30 business days

(the “Recommendations”).⁴

10. Memorial seeks a declaration pursuant to section 50(2)(a) of the *ATIPPA* that it does not have to comply with the Recommendations on the grounds that it does not have custody or control of the Requested Information.

(B) Facts before this Honourable Court

11. Memorial is a corporation continued pursuant to section 3(1) of the *Memorial University Act*.⁵
12. Memorial's powers and authority are set out in subsection 3(3) of the *Memorial University Act*, which speaks to Memorial's purposes. It reads:

3. (1) The Memorial University of Newfoundland, consisting of a Chancellor, Convocation, Board of Regents, Senate, faculty councils and the faculties, is continued as a corporation.

(2) Another university having corporate powers capable of being exercised within the province shall not be known by the same name.

(3) The university shall have full power and authority to establish and maintain those faculties, colleges, schools, institutions, departments, chairs and courses that may seem appropriate to the board, and

(a) to give instructions and training in all branches of knowledge and learning, including physical instruction and training;

⁴ *Ibid* at para 34.

⁵ *Memorial University Act*, RSNL 1990, c M-7 [“*Memorial University Act*”] [Tab 25].

(b) to grant degrees, including honorary degrees, diplomas and certificates of proficiency;

(c) to provide facilities for the prosecution of original research in every branch of knowledge and learning and to conduct and carry on that research work; and

(d) generally, to promote and carry on the work of a university in all its branches.⁶

13. As a corporation, Memorial has the capacity to create separately incorporated entities, including the SIEs.
14. Memorial does not dispute that it has a connection to the SIEs. The particulars of Memorial's relationship with the SIEs are described below.

(a) Genesis Group Inc.

15. Genesis, formerly known as Seabright Corporation Limited, was incorporated under the *Companies Act*, RSN 1970, c. 54 as a corporation with share capital. It operates as a non-profit technology incubator that facilitates entrepreneurship and provides services and mentorship to early stage start-up companies.⁷
16. Memorial is Genesis' sole shareholder and ownership of voting shares of Genesis is restricted to Memorial.⁸
17. Genesis is governed by a 12-person Board of Directors, 11 of whom are voting directors. The directors are elected by Memorial's Board of Regents after receiving recommendations from Genesis' Board of Directors and Memorial's President.⁹
18. Genesis' Board of Directors owe a fiduciary duty to act at all times in the best interests of Genesis in its decision making.¹⁰ Genesis' By-Law No. 1 also dictates that the directors must manage Genesis' business and affairs at all times which must be conducted in support of Genesis' mission statement.

⁶ *Ibid.*

⁷ Affidavit of Karla Connolly at para 3.

⁸ Affidavit of Karla Connolly at para 5.

⁹ Affidavit of Karla Connolly at para 6.

¹⁰ Affidavit of Karla Connolly at Exhibit C, s. 11.8.

19. Genesis' mission extends beyond Memorial and the university community. Specifically, Genesis' mission as set out in Genesis' By-Law No. 1, is to perform as a technology incubator as Genesis assists and encourages academics and companies associated with both Memorial and the local community in commercializing their technological ideas, concepts and intellectual property.¹¹
20. Genesis performs various duties in fulfillment of its mission, including:
- (a) creating a support network to assist knowledge-based businesses and entrepreneurs in the development of high growth enterprises;
 - (b) to arrange and provide for mentorship of individuals involved in the development of knowledge based business and high growth enterprises;
 - (c) to provide support, guidance and assistance to those individuals involved in research and the practical applications of research, teaching and mentoring; and
 - (d) to facilitate and make appropriate arrangements as necessary to encourage voluntary participation in Genesis' affairs by the community at large.¹²
21. To accomplish its mission, Genesis governs itself and operates independently from Memorial in the following ways:
- (a) Genesis does not receive funding from Memorial and Memorial does not dictate how Genesis is to spend the funding it receives from other sources;¹³
 - (b) Genesis secures more than approximately 50% of its annual operating revenues from private sources;¹⁴
 - (c) Genesis exercises its ability to freely negotiate and enter into contracts with innovation enterprises in a manner that fosters economic growth for the province

¹¹ Affidavit of Karla Connolly at para 3. See Also, Exhibit B, section 1.

¹² Affidavit of Karla Connolly at Exhibit C, section 2.1.

¹³ Affidavit of Karla Connolly at para 12.

¹⁴ Affidavit of Karla Connolly at para 4.

as a whole, while also protecting such enterprises' proprietary and commercially sensitive information;¹⁵ and,

- (d) Genesis employs 16 people all of whom have employment contracts with Genesis. Genesis decides how much and in what form these individuals are paid, as the conditions of employment are decided by Genesis' CEO and subject to approval by Genesis Board of Directors.¹⁶
22. In its operations, Genesis uses assets and facilities owned by Memorial, the use of which is governed by an agreement (the "**Management Agreement**") dictating that Genesis is appointed as Memorial's managing agent of the property.¹⁷
23. Similarly, under Genesis' By-Law No. 1, Genesis may enter into royalty and license agreements as agent of Memorial. However, any royalties or other revenues generated from royalty or license arrangements are used solely to further Genesis' business or are held by Genesis as Memorial's agent.¹⁸
24. The Management Agreement sets out the responsibilities of Memorial and Genesis and the parameters of their agency relationship. While Genesis is authorized to act as agent on behalf of Memorial in relation to management of Genesis' assets, Memorial is authorized to serve as payroll agent for Genesis.¹⁹
25. To facilitate this, Genesis provides the necessary instructions and details to Memorial's HR Department to process payroll, and deposits funds to Memorial to account for payroll payments.²⁰ This is done to ensure Memorial's HR Department can remunerate wages, less appropriate deductions and payroll taxes.²¹
26. Genesis employees are compensated through revenues and funds raised by Genesis. Genesis employees are not paid out of Memorial's funds.²²

¹⁵ Affidavit of Karla Connolly at para 11.

¹⁶ Affidavit of Karla Connolly at paras 8-9.

¹⁷ Affidavit of Karla Connolly para 13.

¹⁸ Affidavit of Karla Connolly at para 14.

¹⁹ Affidavit of Karla Connolly at Exhibit C, section 3.

²⁰ Affidavit of Karla Connolly at para 16.

²¹ Affidavit of Kelly Martin at para 6.

²² Affidavit of Kelly Martin at para 7.

27. Memorial can generate payroll reports for Genesis that contain the Requested Information, to ensure that Genesis has the requisite data to inform Genesis' operational decision-making.²³ However, Memorial does not have authority over the content or use of the employee information that Memorial receives from Genesis to process payroll.²⁴ Memorial does not use information provided by Genesis to facilitate payroll processing or Genesis' payroll reports for the benefit of Memorial.²⁵
28. As sole shareholder of Genesis, Memorial is obligated under section 260(1) of the *Corporations Act* to keep copies of Genesis' financial statements and for incorporation in Memorial's Consolidated Financial Statements:
260. (1) A corporation shall keep at its registered office a copy of the financial statements of each of its subsidiary bodies corporate and of each body corporate the accounts of which are consolidated in the financial statements of the corporation.²⁶
29. Genesis is accountable to Memorial in its capacity as Genesis' sole shareholder. Genesis has statutory obligations under the *Corporations Act* and obligations set out in Genesis By-Law No. 1 to hold an annual meeting with Memorial (the "AGM Requirement") where Genesis will provide their special purpose financial statements, their auditor's report, and further information respecting its financial position as required.²⁷
30. The Requested Information is not specified in any of the reports or statements provided to Memorial by Genesis under the AGM Requirement or section 262 of the *Corporations Act*.²⁸ The Requested Information also does not appear as a line item in Memorial's consolidated financial statements that incorporate Genesis' information.²⁹
31. The Requested Information was reflected in the Independent Audit Report of Memorial within the Audit Overview. It stated what Genesis executives were paid out in bonuses and incentives during the audit period.³⁰

²³ Affidavit of Kelly Martin at para 18.

²⁴ Affidavit of Karla Connolly at para 16.

²⁵ Affidavit of Kelly Martin at para 19.

²⁶ *Corporations Act*, RSNL 1990 c C-36 at s. 260(1) [*Corporations Act*] [Tab 23].

²⁷ Affidavit of Karla Connolly at para 17.

²⁸ Affidavit of Karla Connolly at paras 17-18.

²⁹ Affidavit of Karla Connolly at para

³⁰ Affidavit of Karla Connolly at Exhibit I, p. 2.

32. Genesis voluntarily submitted the Requested Information to the Auditor General on a confidential basis and repeatedly advised the Auditor General that the information being provided was confidential employee information that the Auditor General lacked jurisdiction to audit or include within the Independent Audit Report.³¹

(b) C-Core

33. C-Core is a not-for-profit corporation incorporated under the *Canada Not-for-Profit Corporations Act*, S.C. 2009, c. 23. Under this legislation, corporations have members instead of shareholders.³²

34. Memorial's President is the sole member of C-Core. Accordingly, C-Core presents its financial reporting to the President, which includes a copy of the annual audited financial statements of C-Core as well as recommendations as to individuals to receive appointment or reappointment to C-Core's Board of Directors.³³

35. C-Core maintains a Board of Directors and is governed by the *Canada Not-For Profit Corporations Act*, C-Core's By-Laws, and an agreement signed by Memorial and C-Core (the "**Relationship Agreement**").

36. C-Core's mandate involves working closely with industry to provide unique and timely engineering solutions to meet the needs of resource industries. C-Core provides research-based advisory services and funds their operations from project revenues from C-Core research projects.³⁴

37. C-Core does not act as agent for Memorial in any capacity. Rather, C-Core and Memorial have a "synergistic relationship that contributes to the mandates of both organizations."³⁵

38. As outlined in the Relationship Agreement, C-Core supports Memorial's mandate by fulfilling the following responsibilities:

- (a) Encourages and enables student participation in a variety of programs;

³¹ Affidavit of Karla Connolly at para 23.

³² Affidavit of Paul Griffin at para 5.

³³ Affidavit of Paul Griffin at para 7.

³⁴ Affidavit of Paul Griffin at para 9. See also Affidavit of Paul Griffin at Exhibit C.

³⁵ Affidavit of Paul Griffin at Exhibit C.

- (b) Supports delivery of academic programs and provides opportunities for research related to its business from time to time;
- (c) Offers opportunities for Memorial students to gain work-related experience;
- (d) Assists and works with Memorial to identify and achieve desirably faculty appointments to Memorial; and,
- (e) Complies with any lease agreements with Memorial from time to time in respect of any premises of Memorial which are occupied by C-Core.³⁶

39. C-Core supports its own mandate by, *inter alia*:

- (a) Raising or earning money in such a manner as C-Core sees fit to fund the business activities of C-Core;
- (b) Accepting any bequests, gifts or donations, or providing a fund or endowment and invest any such funds and apply the income arriving therefrom, or to resort to the capital thereof, for any of the objects of C-Core;
- (c) Operating and managing its business in such a manner as to incur operating costs which do not exceed the moneys made available to C-Core for such operation;
- (d) Hiring in its own name, supervising or dismissing as may be necessary from time to time all persons required for proper operation of the business of C-Core;
- (e) Specifying duties and arranging for the preparation of any work schedules necessary to direct the activities of any persons employed by C-Core, and provide such supervision as may be reasonably necessary in C-Core's opinion to verify the adequacy with which any duties and work is being performed; and
- (f) Holding regular meetings of its Board of Directors at least semi-annually, keeping minutes of those meetings and ensuring that all corporate record-keeping is done in accordance with its governing legislation, including the filing of annual returns, notices of directors, annual shareholders or member meetings.³⁷

³⁶ Affidavit of Paul Griffin at Exhibit C, section 2.

³⁷ Affidavit of Paul Griffin at Exhibit C, section 2.

40. The Relationship Agreement expressly contemplates that C-Core has sole authority to hire employees required to facilitate C-Core's operations.³⁸ C-Core must ensure all employment advertising and letters of offer of employment by C-Core shall be on the letterhead of C-Core and clearly state that C-Core is the employer.³⁹
41. C-Core has also agreed in the Relationship Agreement that with respect to any contracts, cheques, pay stubs, purchase orders, T-4 slips or other documents whereby C-Core undertakes any obligations or liabilities, it is clearly indicated that the obligor is C-Core and not Memorial.⁴⁰
42. C-Core is contractually authorized under the Relationship Agreement to sever its relationship from Memorial entirely and convert to a corporation with share capital operating for profit.⁴¹
43. Similar to Genesis, Memorial is the payroll agent for C-Core and this arrangement is authorized by the Relationship Agreement.⁴²
44. C-Core funds the costs of its own payroll,⁴³ and does not receive annual or supporting operational funding from Memorial.⁴⁴
45. The payroll services that Memorial performs for C-Core are based on information provided by C-Core. Memorial is required to keep and maintain proper records regarding all financial transactions processed by Memorial for C-Core.⁴⁵
46. C-Core and Memorial are also party to a lease agreement. C-Core provided buildings to Memorial and those buildings were leased back for nominal rent as a result.⁴⁶
47. Unlike Genesis, Memorial's Board of Regents does not appoint C-Core's Board of Directors and C-Core does not report or seek instruction from the Board of Regents in

³⁸ Affidavit of Paul Griffin at Exhibit C.

³⁹ Affidavit of Paul Griffin at Exhibit C, section 5.

⁴⁰ Affidavit of Paul Griffin at Exhibit C, section 10.1.

⁴¹ Affidavit of Paul Griffin at Exhibit C, section 9.5.

⁴² Affidavit of Paul Griffin at Exhibit C, section 3.

⁴³ Affidavit of Paul Griffin at para 9.

⁴⁴ Affidavit of Kelly Martin at para 7.

⁴⁵ Affidavit of Paul Griffin at Exhibit C, section 3.

⁴⁶ Affidavit of Paul Griffin at para 11.

relation to the appointment of C-Core directors.⁴⁷ The Board of Regents is also not recognized in C-Core's By-Laws or the Relationship Agreement as having any authority over C-Core.⁴⁸

48. C-Core manages its own policies and procedures without reference to or approval by Memorial, including its own budgeting process and strategic planning.⁴⁹
49. C-Core's General Operating By-Law articulates that two of the directors will be drawn from Memorial; however, all directors are obliged to act honestly and in good faith with a view to the best interests of C-Core.⁵⁰
50. C-Core's Board of Directors are also required to respect the confidentiality of matters brought before the Board or any committee. Further, all employees and volunteers must keep confidential matters that come to their attention as part of their employment.⁵¹
51. C-Core submits its financial statements to the President of Memorial as member but has never otherwise provided financial information to Memorial for consolidated financials.⁵²
52. C-Core provided financial information to the Auditor General, including the Requested Information, which was later incorporated into the Independent Audit Report of Memorial.⁵³ C-Core provided this information in accordance with C-Core's powers and responsibilities under the Relationship Agreement at section 2.14 which states that C-Core will comply with audit requests or requirements from an auditing entity that Memorial is required by legislation to comply with.⁵⁴

(c) Memorial's Use of the Requested Information as Payroll Agent

53. The Genesis Management Agreement and the C-Core Relationship Agreement (collectively, the "**Agreements**") authorize the SIEs to use Memorial as a payroll agent.

⁴⁷ Affidavit of Paul Griffin at para 13.

⁴⁸ Affidavit of Paul Griffin at para 12.

⁴⁹ Affidavit of Paul Griffin at para 12.

⁵⁰ Affidavit of Paul Griffin at Exhibit B, section 9.01.

⁵¹ Affidavit of Paul Griffin at Exhibit B, section 6.11.

⁵² Affidavit of Paul Griffin at para 15.

⁵³ Affidavit of Paul Griffin at para 16.

⁵⁴ Affidavit of Paul Griffin at para 16. See also Affidavit of Paul Griffin, Exhibit C at section 2.

54. As part of this arrangement, Memorial agrees to provide payroll services for all Genesis and C-Core employees, which includes making all payroll reports, returns and remittances required by law.⁵⁵ Memorial also acts as payroll agent for the SIEs who are not subject to a Management Agreement, including CCFI.⁵⁶
55. By providing payroll services to the SIEs, Memorial acts much like any other third-party payroll agent.⁵⁷
56. The Affidavit of Kelly Martin, Memorial's payroll manager, describes Memorial's duties as payroll agent, the particulars of which are summarized as follows:
- (a) Memorial's HR Department will administer SIE payroll but the SIEs fund the cost of their own payroll. SIE employees are not paid out of Memorial's operating funds.⁵⁸
 - (b) The SIEs must provide instructions to Memorial regarding each of their employee's pay and benefits structure to facilitate payroll administration. Memorial does not dictate what information is provided and can only administer payroll based on the SIEs' instructions.⁵⁹
 - (c) Memorial receives the information from the SIEs using a case management system called LBI. The SIEs will transmit their employee payroll information, which may include the Requested Information from time to time, via emails sent to myhr@mun.ca. Each time an SIE sends information, there is automatically a new "case" with their payroll request created through LBI.⁶⁰
 - (d) Once Memorial HR receives the information required to facilitate payroll processing, Memorial HR stores the payroll information in an online records system called On-Base. Within On-Base, only Memorial HR employees can access the SIE employee payroll information.⁶¹

⁵⁵ Affidavit of Karla Connolly at Exhibit C. See also Affidavit of Paul Griffin at Exhibit C.

⁵⁶ Affidavit of Kelly Martin at para 2.

⁵⁷ Affidavit of Kelly Martin at para 5.

⁵⁸ Affidavit of Kelly Martin at paras 6-7.

⁵⁹ Affidavit of Kelly Martin at para 7.

⁶⁰ Affidavit of Kelly Martin at paras 8-9.

⁶¹ Affidavit of Kelly Martin at para 12.

- (e) Access to the SIE payroll information, including the Requested Information, is restricted to Memorial's HR employees who require it to administer payroll.⁶²
- (f) The SIEs' payroll information is not used by Memorial's HR employees for any other purpose except for administering payroll.⁶³
- (g) BannerHR is the software used by Memorial HR to facilitate payroll administration for Memorial employees and the SIEs. The SIE employee information is inputted into BannerHR by Memorial HR payroll officers to run payroll.⁶⁴
- (h) SIE payroll information is segregated in BannerHR and is only accessible to Memorial HR's payroll employees and the SIEs themselves. Each SIE has distinct organization numbers in BannerHR which allows for the segregation of information.⁶⁵
- (i) The SIEs can run payroll reports in BannerHR which could include the Requested Information. Memorial's payroll manager can also run these reports for data quality review purposes and for the SIEs if required.⁶⁶
- (j) Payroll reports containing SIE remuneration information are not used for the benefit of Memorial. Instead, access to SIE payroll reports in BannerHR is a restricted permission granted to Memorial's payroll employees by virtue of Memorial's role as payroll agent for the SIEs.⁶⁷
- (k) Memorial's payroll manager has increased permissions that allow her to run more detailed payroll reports, which could include the Requested Information. Memorial's payroll manager and its payroll systems analyst have access to this data for the purposes of quality review and ensuring the SIEs have the appropriate information to support their operational decision making.⁶⁸

⁶² Affidavit of Kelly Martin at para 12.

⁶³ Affidavit of Kelly Martin at para 19.

⁶⁴ Affidavit of Kelly Martin at para 14.

⁶⁵ Affidavit of Kelly Martin at para 15.

⁶⁶ Affidavit of Kelly Martin at para 18.

⁶⁷ Affidavit of Kelly Martin at para 18.

⁶⁸ Affidavit of Kelly Martin at para 18.

- (l) Memorial's payroll manager has never been asked to produce a report with the remuneration details of any of the SIE employees for the benefit of Memorial, nor would she produce such a report to anyone internally at Memorial.⁶⁹
- (m) If a senior official of Memorial asked for such a report, the payroll manager would check with Memorial's Office of General Counsel as to whether she is allowed to produce it.⁷⁰
- (n) Memorial's payroll manager treats the SIE payroll information as belonging to the SIEs.⁷¹

PART III: ISSUES

57. The issues to be determined on this appeal are as follows:

- (a) Are the SIEs public bodies pursuant to the *ATIPPA*?
- (b) Is the Requested Information within Memorial's custody and control?
 - (i) Does the requested information relate to a university matter?
 - (ii) Could Memorial reasonably expect to obtain a copy of the Requested Information upon request?
- (c) Did Memorial breach the duty to assist?

PART IV: LAW & ARGUMENT

(A) THE SIES ARE NOT PUBLIC BODIES UNDER THE *ATIPPA*

58. Determining whether the SIEs are public bodies subject to the *ATIPPA* is an exercise of statutory interpretation.

59. The modern principle of statutory interpretation and the *Interpretation Act*⁷² dictates that the *ATIPPA* must be interpreted in light of its purpose to facilitate democracy.⁷³

⁶⁹ Affidavit of Kelly Martin at para 20.

⁷⁰ Affidavit of Kelly Martin at para 20.

⁷¹ Affidavit of Kelly Martin at para 21.

⁷² *Interpretation Act*, RSNL 1990 c I-19 at s. 16. [*Interpretation Act*] [Tab 24].

⁷³ *City of Ottawa v. Ontario*, 2010 ONSC 6835 at para 27 citing *Dagg v. Canada (Minister of Finance)* at paras 61-62 [Tab 3].

60. The Newfoundland and Labrador Court of Appeal in *Archean Resources v. Newfoundland*⁷⁴ confirmed that the *Interpretation Act* enunciates a principle of harmonization which the judiciary is directed to adopt and apply in statutory interpretation exercises. Green J.A. noted that courts must “apply an interpretation that fairly reconciles the language used in the enactment with the broader objects of the legislation to as to achieve the general goal,” to effectively determine the general ambit of the impact of a legislative act and whether the facts before the court should fall inside or outside that ambit.⁷⁵
61. The *ATIPPA* fulfills its purpose by increasing transparency to hold public bodies accountable through access to information, and protecting the privacy of individuals.⁷⁶
62. The *ATIPPA* applies to “all records in the custody of or under the control of a public body,” except for those records explicitly excluded in section 5.
63. An exhaustive list of entities that constitute a “public body” for the purposes of the *ATIPPA* is enumerated at section 2(x). Section 2(x)(iii) and (iv) captures Memorial within the definition of a public body:
2. In this Act,
- (x) “public body” means
- (iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an *ATIPPA*, the Lieutenant-Governor in Council or a minister,
- (iv) a local public body,⁷⁷
64. The definition of a “local public body” under the *ATIPPA* includes an educational body.⁷⁸

⁷⁴ *Archean Resources v. Newfoundland*, 2002 NFCA 43 (CanLII) at para 23 [*Archean Resources*] [Tab 1].

⁷⁵ *Ibid* at para 23.

⁷⁶ *Access to Information and Protection of Privacy ATIPPA*, 2015, SNL 2015, c A-1.2 [*ATIPPA*] at s 3(1) [Tab 21].

⁷⁷ *Ibid* at s. 2(x)(iii)-(iv).

⁷⁸ *Ibid* at s. 2(p)(i).

65. The *ATIPPA*'s language is straightforward and confirms that the legislation does not apply to the SIEs in their own right. Similarly, the sections of the *ATIPPA* applicable to Memorial also do not apply to the SIEs by extension.
66. The Legislature specifically turned its mind to whether the subsidiary corporations of public bodies should be captured by the *ATIPPA*. The Report of the 2014 Statutory Review of *ATIPPA*, which is described by the Newfoundland and Labrador Court of Appeal as an authoritative text on legislative intention,⁷⁹ recommended the inclusion of additional language to the definition of public bodies to include municipally owned and directed corporations.⁸⁰ This recommendation was accepted by government and the *ATIPPA* was amended to expand the definition of a "public body" to include subsidiaries of municipalities.
67. The Legislature did not expand the definition to capture subsidiaries of educational bodies. Had it intended for the *ATIPPA* to apply directly to the SIEs, it would have included them within the purview of a "public body" by definition.
68. Further, the Legislature has declined to extend the scope of legislation that governs Memorial to the SIEs in other statutes. For instance, the SIEs are not included in the definition of "public body" in the *Public Sector Compensation Transparency Regulations* under the *Public Sector Compensation Transparency ATIPPA*. Consequently, the SIE employee salaries are not disclosed in the proverbial "sunshine list" pursuant to those statutes.⁸¹
69. Similar reasoning applies upon examination of the *Memorial University Act*. As explained herein, the Legislature did not confer upon Memorial's Board of Regents the power to fix the remuneration of employees of the SIEs. Instead, the Board of Regents' authority in this regard is limited to employees of Memorial.⁸²

⁷⁹ *Newfoundland and Labrador v. Newfoundland and Labrador Teachers' Association*, 2018 NLCA 54 (CanLII) at para 43 [Tab 14].

⁸⁰ *Report of the 2014 Statutory Review of the Access to Information Act, vol. 2* (St. John's, NL: Queen's Printer, 2015) at p. 288 [ATIPPA 2014 Statutory Review] [Tab 26].

⁸¹ Affidavit of Karla Connolly at para 27.

⁸² *Memorial University Act*, *supra* note 5 at s. 34.

70. Memorial does not dispute that it has a connection to the SIEs. However, the mere existence of this connection is not sufficient to extend application of the *ATIPPA* to the SIEs contrary to the express intentions of the Legislature.
71. The Ontario Court of Appeal in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* confirmed that a separate entity with a connection to a public body will not be subject to access legislation just by virtue of their administrative relationship.⁸³
72. The Ontario Ministry of the Attorney General ("MAG") received requests for records held by the Children's Lawyer for Ontario. The Children's Lawyer took the position that Ontario's access legislation did not apply to private litigation files prepared or collected during the course of her independent legal representation of children. Accordingly, MAG concluded that it did not have custody or control of the records and the legislation did not apply to the Children's Lawyer.
73. Upon review, the Ontario Court of Appeal concluded that the Ontario IPC erred by starting from the assumption that the access legislation applied because the Children's Lawyer was a branch of MAG.⁸⁴ It was not disputed that the Children's Lawyer and MAG had an administrative relationship, however application of the legislation to the Children's Lawyer failed to account for the fact that the Children's Lawyer operated separately and apart from MAG in the course of her duties.
74. *Children's Lawyer* stands for the premise that an organization's administrative structure is not determinative of custody or control of requested information based on the following:

99 While the Children's Lawyer is administratively structured under and has a funding relationship with MAG, **they are not connected with respect to her core functions: there is no statutory relationship between the two entities; she does not receive direction from MAG; she does not report to MAG; and her fiduciary duties are to her child clients, not to MAG.**

101 When representing children, the Children's Lawyer operates separate and apart from MAG, does not take direction or obtain input from MAG, does not provide MAG with access to records relating to children and MAG does not have authority to request

⁸³ 2018 ONCA 559 at paras 94-106 [*Children's Lawyer*] [Tab 15].

⁸⁴ *Ibid* at para 95.

them. The Children's Lawyer is solely responsible for record keeping in relation to her clients without any direction from MAG.

102 Thus, the Children's Lawyer is not a branch of MAG for the purposes of the children's records. Again, an organization's administrative structure is not determinative of custody or control for purposes of FIPPA.

(emphasis added)

75. This principle applies to Memorial and the SIEs. By their own evidence, the SIEs maintain that they function independently of Memorial and the obligations imposed upon public bodies by virtue of the *ATIPPA*.⁸⁵ Evidence from both C-Core and Genesis emphasize that they operate in accordance with their own By-Laws and Articles of Incorporation, and pursuant to the mutually-agreed upon terms of the Agreements,⁸⁶ none of which afford Memorial control over the Requested Information.
76. C-Core explains that they do not report to Memorial for decision-making purposes. C-Core emphasizes that it manages its own policies and procedures⁸⁷ without reference to or approval by Memorial. Memorial's Board of Regents is not recognized by C-Core as having any authority over its own budgeting processes or strategic plans. Contrarily, the Relationship Agreement dictates that C-Core is responsible for its own management and strategic planning with no deferral to planning authority of the Board of Regents.⁸⁸ Accordingly, there is no provision in the Relationship Agreement that requires C-Core to comply with directives or direction as set by Memorial's Board of Regents.⁸⁹
77. The Affidavit of Karla Connolly states that Genesis does not receive funding from Memorial and does not receive direction from Memorial as to how Genesis can spend the funding they earn from other sources.⁹⁰ Further, Genesis operates under the premise that it is not subject to the *ATIPPA* or legislation that applies to public bodies.⁹¹ Genesis explains that

⁸⁵ Affidavit of Paul Griffin at para 12.

⁸⁶ See generally the Affidavit of Paul Griffin and Affidavit of Karla Connolly.

⁸⁷ Affidavit of Paul Griffin at para 12.

⁸⁸ Affidavit of Paul Griffin at para 12. See also Exhibit C, sections 2 and 3.

⁸⁹ Affidavit of Paul Griffin at para 12.

⁹⁰ Affidavit of Karla Connolly at para 12.

⁹¹ Affidavit of Karla Connolly at paras 20, 23, 27 and 28.

Province has recurrently demonstrated its legislative intent that Genesis remain exempt from the application of public-sector legislation.⁹²

78. Both C-Core and Genesis have prescribed statutory disclosure obligations under the *Corporations Act* and the *Canada Not-for-Profit Corporations Act, supra*, to provide financial information respecting their operations to Memorial/ Memorial's President as their sole shareholder and member (as applicable).⁹³ These obligations are also reflected in Genesis' By-Law No. 1 and C-Core's General Operating By-Law No. 1.⁹⁴ The records that must be produced by C-Core and Genesis include their annual audited financial statements which are provided at an annual general meeting with the member/shareholder.⁹⁵ However, these disclosure obligations do not extend to the Requested Information, as the Requested Information does not appear as a line item in C-Core or Genesis' financial statements.⁹⁶
79. The SIEs have their own Boards of Directors that owe a fiduciary duty to the SIE that they serve. Despite any connections that a member of the Board of Directors of an SIE may have to Memorial, this does not justify extension of the *ATIPPA* to the SIEs.
80. For example, C-Core emphasizes that Memorial's Board of Regents does not appoint C-Core's Board of Directors, and that C-Core has never sought instruction from the Board of Regents with respect to the appointment of C-Core directors.⁹⁷ Any such direction from the Board of Regents to attempt to provide instructions on director appointments would be contrary to C-Core's By-Laws and the Relationship Agreement.⁹⁸ While two of C-Core's directors must be drawn from Memorial, the directors must keep confidential matters brought before them in the course of their appointment.⁹⁹ Further, C-Core directors have

⁹² Affidavit of Karla Connolly at para 20.

⁹³ *Corporations Act, supra* note 26 at s. 258(1) and *Canada Not-for-Profit Corporations Act, SC 2009 c 23* at s. 172(1) [Tab 22].

⁹⁴ Affidavit of Paul Griffin at para 7. See also the Affidavit of Karla Connolly at para 17.

⁹⁵ Affidavit of Paul Griffin at para 7. See also the Affidavit of Karla Connolly at para 17.

⁹⁶ Affidavit of Paul Griffin at Exhibit D. See also Affidavit of Karla Connolly at para 18.

⁹⁷ Affidavit of Paul Griffin at para 13.

⁹⁸ Affidavit of Paul Griffin at para 13.

⁹⁹ Affidavit of Paul Griffin at Exhibit B, section 6.11.

a duty to act honestly and in good faith with a view to the best interests of C-Core and must comply with C-Core's Articles, By-Laws and Policies.¹⁰⁰

81. Unlike C-Core, Genesis is governed by a Board of Directors elected by Memorial's Board of Regents after receiving recommendations from Genesis' Board of Directors and Memorial's President.¹⁰¹ However, despite the Board of Regents' authority in this regard, Genesis' directors also owe a fiduciary duty to act at all times in the best interests of Genesis in its decision making.¹⁰² Genesis' By-Law No. 1 also dictates that the directors must manage Genesis' business and affairs at all times which must be conducted in support of Genesis' mission statement. The fiduciary duty that the directors owe to Genesis is also expressly stated in the Management Agreement.¹⁰³
82. Accordingly, the directors of both C-Core and Genesis have obligations to act on the direction of the SIEs. Their relationship to the SIEs is governed by their fiduciary duty and while they may be tangentially connected to Memorial, they do not act on the direction of Memorial.
83. Further, Memorial and the SIEs clearly have separate mandates. While they may collaborate and in Genesis' case, engage in an agency relationship with respect to the use of Memorial's assets in pursuance of its mandate, the core functions of Genesis and C-Core are distinct from Memorial's.
84. Application of the *ATIPPA* to the SIEs would serve to undermine the specific measures of independence that Memorial and the SIEs have agreed to abide by, including adhering to separate By-Laws, Articles of Incorporation and the Agreements. The independence of Memorial and the SIEs serves important functions for the SIEs' businesses.
85. Genesis, for example, is a small enterprise that assists start-ups and contracts with innovation enterprises to foster economic growth for the Province. Genesis has stated that subjecting its business to the reporting and transparency requirements mandated by the *ATIPPA* would inhibit its ability to contract with new innovation enterprises.¹⁰⁴

¹⁰⁰ Affidavit of Paul Griffin at Exhibit B, section 9.01.

¹⁰¹ Affidavit of Karla Connolly at para 6.

¹⁰² Affidavit of Karla Connolly at Exhibit C, s. 11.8.

¹⁰³ Affidavit of Karla Connolly at Exhibit C, section 11.8.

¹⁰⁴ Affidavit of Karla Connolly at para 31.

86. Consequently, imposing the obligations of the *ATIPPA* upon the SIEs would not only contravene the Legislature's intent, but it could hinder the ability of the SIEs to derive revenue in support of their operations, disrupt the status quo maintained between the entities and undermine the independence that exists between Memorial and the SIEs for a legitimate and important purpose.

(B) REQUESTED INFORMATION IS NOT WITHIN MEMORIAL'S CUSTODY AND CONTROL

87. The right of access to records in the custody and control of a public body is provided under sections 5(1) and 8(1) of the *ATIPPA*, which state:

5. (1) This Act applies to all records in the custody of or under the control of a public body but does not apply to

...

8. (1) A person who makes a request under section 11 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.¹⁰⁵

88. The Supreme Court of Canada delineated a two-part custody and control test in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*.¹⁰⁶ Although not defined in access legislation, "control" is afforded a broad and liberal interpretation to create a meaningful right of access to government information. However, this interpretation cannot stretch beyond reason.¹⁰⁷

89. According to *National Defence*, a public body has custody and control over requested information if the following two questions are answered affirmatively:

1. Do the contents of the document relate to a departmental [Memorial] matter?
2. Could the government institution reasonably expect to obtain a copy of the document upon request?¹⁰⁸

90. The inquiry into custody and control ends if the contents of the records do not relate to a Memorial matter. Step one of *National Defence* therefore serves as a "useful screening

¹⁰⁵ *ATIPPA*, *supra* note 76 at ss. 5(1) and 8(1) [*ATIPPA*].

¹⁰⁶ *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 [*National Defence*] [Tab 2].

¹⁰⁷ *Ibid* at para 48

¹⁰⁸ *Ibid* at paras 55-56.

device” aimed at ensuring access legislation does not capture information unrelated to matters of a government institution.¹⁰⁹

91. In the event that the Requested Information *does* relate to a Memorial matter, then it is necessary to determine whether Memorial can reasonably expect to obtain a copy of the Requested Information.
92. Memorial maintains that the Requested Information does not relate to a Memorial matter. Alternatively, Memorial cannot reasonably expect to obtain the Requested Information from the SIEs in any capacity other than agent - upon request.

I. The Requested Information does not relate to a Memorial matter

93. Section 3(1) of the *Memorial University Act* speaks to the powers of Memorial and Memorial’s Board of Regents, which provides insight into the decision-making functions of Memorial. It states:

3. (1) The Memorial University of Newfoundland, consisting of a Chancellor, Convocation, Board of Regents, Senate, faculty councils and the faculties, is continued as a corporation.

(2) Another university having corporate powers capable of being exercised within the province shall not be known by the same name.

(3) The university shall have full power and authority to establish and maintain those faculties, colleges, schools, institutions, departments, chairs and courses that may seem appropriate to the board, and

(a) to give instructions and training in all branches of knowledge and learning, including physical instruction and training;

(b) to grant degrees, including honorary degrees, diplomas and certificates of proficiency;

(c) to provide facilities for the prosecution of original research in every branch of knowledge and learning and to conduct and carry on that research work; and

(d) generally, to promote and carry on the work of a university in all its branches.¹¹⁰

¹⁰⁹ *Ibid* at para 55.

¹¹⁰ *Memorial University Act*, *supra* note 5 at s. 3.

94. Underscoring these powers and authorities is a theme central to Memorial's mission: facilitating teaching and learning.
95. The Requested Information relates to the remuneration of employees of SIEs, which is not integral to a university matter. Rather, this case is akin to *University of Toronto, Re*, where the Ontario Information and Privacy Commissioner ("IPC") confirmed that requested records must arise out of a decision-making function of the institution or be integral to an institutional matter to satisfy step one of the *National Defence* test.¹¹¹ It is not enough for requested records to indirectly relate to a public body. Instead, consideration must be given to the context of the creation of a record in determining what constitutes a university matter.
96. In that case, the University of Toronto received a request from a student of the Toronto School of Theology ("TST") and University of Toronto's conjoint ThD program seeking emails between professors of TST discussing his exam results. The university argued that it did not have custody and control of the records as they belonged to TST.
97. The relationship between TST and the university was set out in the terms of a Memorandum of Agreement ("MOA"). Despite being separate legal entities, the MOA provided that the university had a limited right of access to TST data for the purpose of auditing student grant monies that the university flowed through to TST. TST had to maintain all comprehensive records for students enrolled in the conjoint program, but agreed to share data related to operating funds about them with the university. Consequently, the Commissioner found that the university enjoyed a limited right of access to some of TST's data, but the access did not extend to comprehensive student records.
98. Under the terms of the MOA, the university was also an IT service provider to TST, engaged in the provision of IT and email services. Despite this, the university maintained that it had no right of access to TST data "beyond the limits enjoyed by any arm's length IT service provider."¹¹²

¹¹¹ *University of Toronto, Re*, (Order PO-4176), Ontario Information and Privacy Commissioner, 2021 CarswellOnt 11969 at para 130 [*University of Toronto, Re*] [Tab 17].

¹¹² *Ibid* at para 112.

99. The Ontario IPC found that responsive records in the form of emails were not within the custody and control of the university, despite the relatedness of the two entities. While the emails related to the university in a broad sense because they were about a student enrolled in a joint-program, this was not sufficient to satisfy step one of the *National Defence* test because the emails arose out of the decision-making functions of TST.
100. Memorial maintains bare possession of the Requested Information as payroll agent for the SIEs.¹¹³ This information does not arise out of a decision-making function of Memorial. It arises out of a decision-making function of the SIEs.
101. Memorial acknowledges that there may be instances where it has custody and control of SIE information. For instance, Genesis' records relating to management of Memorial's assets may come into Memorial's possession because Genesis is Memorial's agent in this respect. This would be consistent with *YUDC v. Information and Privacy Commissioner*, which confirmed that York University had control over records related to renovations of a university building that were possessed by its subsidiary corporation ("YUDC"), because the records related to the university's mandate to manage and lease its real property and to have any revenues applied to achieve its objects and purposes.¹¹⁴ Unlike the circumstances of *YUDC*, there is no identifiable connection between the Requested Information and Memorial's mandate or core functions. Such information is not at issue in this appeal.
102. For greater certainty, the *Memorial University Act* specifically contemplates what powers the Board of Regents have to fix the remuneration:

34. (1) The board shall have the following powers

...

(n) to pay money, directly or indirectly, as contributions towards pensions, annuities, retiring allowances and gratuities for **employees of the university upon terms that the board may prescribe**,¹¹⁵

(emphasis added)

¹¹³ Affidavit of Karla Connolly at Exhibit C. See also the Affidavit of Paul Griffin at Exhibit C.

¹¹⁴ *YUDC v. Information and Privacy Commissioner*, 2022 ONSC 1755 at para 48 [*YUDC*] [Tab 18].

¹¹⁵ *Memorial University Act*, *supra* note 5 at s. 34(1).

103. If the information sought related to the salaries and benefits of Memorial's employees, there would be a clear link between that information and Memorial's functions or mandate as there was in *YUDC*. However, Memorial's powers to fix salaries and benefits is explicitly limited to "employees of the university," and does not extend to SIE employees.
104. Both C-Core and Genesis hire their own employees.¹¹⁶ Genesis in particular describes that their employees are retained by signing employment contracts which assume that Genesis is a private corporation, not subject to the *ATIPPA*.¹¹⁷ Similarly, C-Core is responsible for ensuring all letters of offer of employment visibly identify that C-Core is the employer.¹¹⁸ Therefore, records related to the remuneration of employees of C-Core and Genesis, whose functions extend far beyond Memorial's mandate, do not relate to a university matter.

II. Memorial could not obtain the Requested Information upon request

105. In the alternative, if the Requested Information relates to a university matter, this Court must consider all relevant factors, including the substantive content of the record, the circumstances in which it was created and the legal relationship between the public body and record holder, to determine whether Memorial could reasonably expect to obtain a copy upon request.¹¹⁹
106. The Ontario IPC in *Vaughan (City), Re (Order MO-2750)*¹²⁰ adopted a non-exhaustive list of potentially relevant factors to aid in the determination of custody and control:
- (a) Was the record created by an officer or employee of the institution?
 - (b) What use did the creator intend to make of the record?
 - (c) Is the activity in question a "core", "central" or "basic" function of the institution?
 - (d) Does the content of the record relate to the institution's mandate and functions?

¹¹⁶ Affidavit of Karla Connolly at para 9.

¹¹⁷ Affidavit of Karla Connolly at para 9.

¹¹⁸ Affidavit of Paul Griffin at Exhibit C, section 5.

¹¹⁹ *National Defence*, *supra* note 106 at para 56.

¹²⁰ *Vaughn City, Re*, Order MO-2750, Ontario Information and Privacy Commissioner, 2012 CarswellOnt 17579 at para 21 [*Order MO-2750*] [Tab 19].

- (e) Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- (f) If the institution does have possession of the record, is it more than "bare possession"?
- (g) If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
- (h) Does the institution have a right to possession of the record?
- (i) Does the institution have the authority to regulate the record's content, use and disposal?
- (j) Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?
- (k) To what extent has the institution relied upon the record?
- (l) How closely is the record integrated with other records held by the institution?
- (m) What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?¹²¹

107. If it is determined that the Requested Information relates to a Memorial matter and the second step of *National Defence* is engaged, application of the relevant factors set out in *Vaughan (City), Re, supra*, must be considered contextually and in light of the purposes of the *ATIPPA* to determine if Memorial could reasonably expect to obtain a copy of the Requested Information upon request.

¹²¹ These factors were adopted by the OIPC in *Memorial University (Re)*, 2017 CanLII 53403 (NL IPC) [Tab 9].

108. Given the independence of the SIEs, a finding that Memorial has custody and control of the Requested Information would not serve the purposes of the *ATIPPA* as it would not provide insight into the activities and decision-making of public institutions.¹²²
109. The preceding analysis applies the relevant factors to this matter. When considered in light of all relevant circumstances and the objectives of the *ATIPPA*, it is evident that Memorial does not control the Requested Information.

(a) Was the record created by an officer or employee of the institution?

110. The Requested Information is determined and created by the SIEs. The SIEs have full autonomy to decide the compensation and benefits structure afforded to their employees, and Memorial is not involved in those decisions.¹²³
111. The SIEs will send the Requested Information to Memorial via email so that Memorial HR employees can input the information into a system called BannerHR to process payroll.¹²⁴
112. Memorial comes into bare possession of the Requested Information when the SIEs provide direction to Memorial because Memorial acts on the instructions of the SIEs to administer payroll. Memorial does not have the right to use this information for its benefit.¹²⁵
113. Because of Memorial's duties as payroll agent for the SIEs, Memorial's payroll manager can produce a detailed payroll report for the benefit of the SIE which could include the Requested Information.¹²⁶
114. The Affidavit of Kelly Martin explains that Ms. Martin does not access the Requested Information for the benefit of Memorial because she views this information as belonging to the SIEs. Therefore, while access is possible, this case is aligned with the Ontario Court of Appeal's decision in *Walmsley v. Ontario (Attorney General)*.¹²⁷ In *Walmsley* the Court found that the committee members' access to the requested documents was of limited

¹²² *University of Toronto, Re, supra* note 111 at para 103.

¹²³ For instance, with respect to Genesis see Affidavit of Karla Connolly at para 8.

¹²⁴ Affidavit of Kelly Martin at para 8.

¹²⁵ See *Report A-2024-006, supra* note 1 at para 7. The OIPC noted that "bare possession" depends on whether Memorial has ownership of the record without the right to use it for its benefit. See also the Affidavit of Kelly Martin at para 19.

¹²⁶ Affidavit of Kelly Martin at para 18.

¹²⁷ *Walmsley v. Ontario (Attorney General)*, (1997), 1997 CanLII (ON CA) [*Walmsley*] [Tab 20].

relevance. Instead, the case turned on the fact that the Ministry of the Attorney General had no contractual or statutory right to dictate the creation, use or maintenance of the records at issue. The lack of basis upon which to assert the right to control of the documents meant there was no basis for a finding that the Ministry had a property right in them.¹²⁸

(b) What use did the creator intend to make of the record?

115. Records that could include the Requested Information are:

- (a) Directions received by the SIEs to facilitate payroll administration that are saved in On-Base¹²⁹; and
- (b) Payroll reports which may be run in BannerHR.¹³⁰

116. Memorial's payroll manager has access to the SIE payroll reports for purposes of quality review, and the SIEs can run payroll reports regarding their own information.¹³¹ These reports are solely used to benefit the SIEs and are not used to the advantage of Memorial.

117. Therefore, the nature of the Requested Information and the use to which Memorial puts it clearly demonstrates that the Requested Information is provided to Memorial for the purpose of facilitating payment to the SIEs and fulfilling Memorial's role as payroll agent.

(c) Is the activity in question a core, central or basic function of the institution?

118. Remuneration of SIE employees is not in fulfillment of a core, central or basic function of Memorial.

119. The Agreements clearly define the respective responsibilities that C-Core and Genesis owe to Memorial, and vice versa; however, the Agreements make it clear that both C-Core and Genesis hire their own employees to fulfill their own mandates.¹³²

¹²⁸ *Ibid* at para 23.

¹²⁹ Affidavit of Kelly Martin at para 11.

¹³⁰ Affidavit of Kelly Martin at para 18.

¹³¹ Affidavit of Kelly Martin at para 18.

¹³² Affidavit of Karla Connolly, Exhibit C at section 5. See also Affidavit of Paul Griffin at Exhibit C at section 5.

120. Genesis' Management Agreement describes an agency relationship between Genesis and Memorial in two ways:
- (a) Genesis is authorized to act as agent on behalf of Memorial in respect of Memorial's assets and facilities that Genesis uses;¹³³ and
 - (b) Memorial provides in-kind administrative services to Genesis including payroll services. In this respect, Memorial has an obligation as agent to ensure Genesis' employees are delivered their wages less applicable remittances and deductions.
121. The presence of an agency relationship is an important consideration in the custody and control analysis. The Ontario IPC has noted the general principle that an agent has a duty to produce to the principal all documents they possess which relate to the principal's affairs.¹³⁴ However, this reasoning is not strictly applied in access to information cases, as the mere existence of an agency relationship is not necessarily determinative of control. Instead, assessment hinges on whether the agency relationship affords the right to control or possess the documents.¹³⁵
122. In *David v. Ontario (Information and Privacy Commissioner)*, the Ontario Superior Court noted that a municipality did not have custody or control over the notes of a city investigator despite their contents relating to the task that he was engaged to do for the municipality. Although hired by the municipality to prepare a report, the investigator was to conduct the inquiry and make his report independently. The Court noted that the investigator was not an agent in the traditional sense of one who has the authority to bind their principal because the investigator did not have this power or authority. Accordingly, the investigator was not an agent of the municipality such that the municipality could control his notes or exercise a right to possess them.¹³⁶
123. *David* is both analogous and distinguishable in the present matter. For instance, it is likely that Memorial's agency relationship with Genesis in regards to Genesis' management of Memorial assets is a traditional relationship in which Genesis as agent binds Memorial,

¹³³ Affidavit of Karla Connolly at para 13.

¹³⁴ *Kitchener (City), Re*, 1999 CarswellOnt 7704 [*Kitchener (City), Re*] at para 25 [Tab 6].

¹³⁵ *Walmsley*, *supra* note 127 at para 23. See also *David v. Ontario (Information and Privacy Commissioner)* [2006] OJ no 4351 at para 11 [Tab 5].

¹³⁶ *David v. Ontario (Information and Privacy Commissioner)*, at paras 11, 23 and 30.

the principal, such that Memorial may request records from Genesis' related to this arrangement. Further, it's possible that Genesis as agent is fulfilling a core central function of Memorial since it is involved in managing assets and facilities owned by Memorial itself. This would support Memorial's right of access to Genesis' information as managing agent.

124. However, Genesis' Management Agreement specifically demonstrates the mutual intention of both parties to ensure that this agency relationship respecting Genesis' management of Memorial's assets does not extend to the in-kind administrative services that Memorial carries out for Genesis, including payroll services. In other words, the same reasoning in *David* applies with respect to the Requested Information. The agency relationship between Memorial and Genesis, whereby Memorial as agent receives the Requested Information from the principal of that information, does not carry with it a right of control over the principal's information.
125. Unlike Genesis, C-Core does not act as agent for Memorial in any capacity, making it even more evident that C-Core does not fulfill a core, central or basic function for Memorial. Instead, C-Core and Memorial enjoy a collaborative relationship whereby C-Core maintains independence from Memorial.
126. However, the same reasoning applies with respect to Memorial's relationship to C-Core as payroll agent, as it does to Memorial's payroll agency relationship with Genesis. Memorial cannot rely on its agency relationship with C-Core to request or control the Requested Information for Memorial's benefit. Rather, C-Core and Genesis as principals have the right to possess and control any records related to the provision of payroll services from Memorial and not vice versa.

(d) Does the content of the record relate to the institution's mandate and functions?

127. The content of the Requested Information directly relates to the employee remuneration information of SIEs' employees.
128. Genesis' mission focuses on assisting and encouraging those associated with Memorial *and* in the local community in the commercialization of technological ideas, concepts and intellectual property. As a social enterprise, Genesis' mission is to create a culture of

entrepreneurship and the development of sustainable businesses to the benefit of the Province as a whole.¹³⁷

129. C-Core's mandate involves working closely with industry to provide unique and timely engineering solutions to meet the needs of resource industries. C-Core provides research-based advisory services and funds their operations from project revenues from C-Core research projects.¹³⁸
130. By contrast, Memorial is an educational body with a mandate focused on teaching and learning, research, scholarship, creative activity and public engagement.
131. Memorial has agreed to provide administrative payroll services to the SIEs as an in-kind service.¹³⁹ Apart from the mutually agreed upon terms set out in the Agreements, Memorial is not obliged to administer payroll for the SIEs as part of Memorial's functions or mandate.
132. By acting as payroll agent for the SIEs, Memorial is going beyond its mandate and functions and is fulfilling the role of a third-party payroll administrator.¹⁴⁰ The Agreements do not require the SIEs to use Memorial to administer their payroll and could hire a third-party payroll agent to provide this service.
133. The *Memorial University Act* also grants Memorial's Board of Regents authority to pay money to employees as contributions to pensions, allowances and gratuities; however, this power is expressly limited to "employees of the university."¹⁴¹ The Ontario IPC has held that the relationship between an institution's public mandate and the records in question is crucial when a public body's bare possession of information is questioned. Further, the relationship between the institution's mandate and records must be considered within the context of whether a finding that the records are in the institution's custody and/or control would advance the transparency purposes of the *ATIPPA*.¹⁴²

¹³⁷ Affidavit of Karla Connolly at Exhibit A, section 1.

¹³⁸ Affidavit of Paul Griffin at para 9. See also Affidavit of Paul Griffin at Exhibit C.

¹³⁹ Affidavit of Karla Connolly at Exhibit C and Affidavit of Paul Griffin at Exhibit C. See also the Affidavit of Kelly Martin at para 5.

¹⁴⁰ Affidavit of Kelly Martin at para 5.

¹⁴¹ *Memorial University Act*, *supra* note 5 at s. 34(1)(n).

¹⁴² *University of Ottawa, Re, Order PO-3009-F*, [2011] OIPC No. 152 (QL) at para 97 [*University of Ottawa, Re*] at [Tab 16].

134. A finding that Memorial has custody and control over the Requested Information would do nothing to further the transparency objectives of the *ATIPPA*. As explained, such a finding would directly undermine the measures of independence that Memorial and the SIEs have maintained since their incorporation and disrupt the SIEs' operations.
135. Consequently, the fact that the Requested Information does not relate to Memorial's mandate cannot be understated and is determinative of Memorial's lack of control over the Requested Information.

(e) Does the institution have more than bare possession or any right of possession to the record?

136. Memorial's possession of the Requested Information is not sufficient to establish custody under the *ATIPPA*. Instead, Memorial houses the Requested Information for payroll processing and maintains bare possession only.
137. Further, any assumption that Memorial has more than bare possession of the Requested Information on the basis that Memorial has consolidated financial statements is flawed.
138. Memorial has bare possession of the Requested Information because Memorial is the SIEs' payroll agent. Memorial does not have bare possession of the Requested Information by virtue of obtaining copies of the SIEs' financial statements.
139. The instant matter is analogous to *University of Toronto, Re, supra*. In that case, the Ontario IPC acknowledged that the University of Toronto had access to the responsive records because it provided IT services to TST and its member schools. The emails requested existed on the university's servers. However, when viewed in the context of all relevant factors, and the purpose of the access legislation, the university's possession of the records was not sufficient to determine a locus of control.¹⁴³
140. Similarly, Memorial merely houses the Requested Information and does not use any SIE payroll information for its benefit.¹⁴⁴ SIE payroll information is used to ensure SIE employees get paid based on the instructions the SIEs provide to Memorial and in accordance with applicable law and accounting principles.

¹⁴³ *University of Toronto, Re, supra* note 111 at para 135.

¹⁴⁴ Affidavit of Kelly Martin at para 19.

141. Memorial has no authority to do anything with the Requested Information other than to facilitate payroll for the SIEs in accordance with the terms set out in the Agreements. Memorial keeps the records provided to it by the SIEs for payroll purposes only for the benefit of the SIEs as the principals of this information.
142. Memorial's case is therefore distinguishable from the Ontario IPC's decision in *Laurentian University, Re*, where a university unsuccessfully argued that it had bare possession over requested information it obtained by virtue of providing HR services to related entities.¹⁴⁵
143. Laurentian University received access requests seeking employment information belonging to the Presidents of three federated universities which were organizationally related to Laurentian, but also distinct. Custody and control of the records was at issue because Laurentian and the federated universities were parties to agreements dictating that Laurentian could include the federated university employees within Laurentian's benefits and pension plan. In this respect, employees of the federated universities could opt into Laurentian's benefits plan, with Laurentian as plan administrator, and receive the same benefits as Laurentian employees.¹⁴⁶ To administer the plan, Laurentian received and used the requested employee information from the federated universities, which amounted to more than bare possession resulting from its role as administrator.¹⁴⁷
144. Unlike the circumstances in *Laurentian*, Memorial and the SIEs have not agreed to allow the SIE employees to opt-in to Memorial's payroll. Instead, Memorial is fulfilling the role of a third-party payroll service provider because the SIEs are not paid out of Memorial's funds and Memorial does not have control over what wages and benefits the SIEs' employees receive.
145. Memorial does not have a statutory right to possession of the Requested Information. In contrast, Memorial and its President have statutory rights to obtain specific financial reports from Genesis and C-Core by virtue of their member/shareholder relationships (as applicable), but these rights do not extend to the Requested Information.

¹⁴⁵ *Laurentian University, Re*, PO-4066, 2020 CarswellOnt 14341 [*Laurentian*] [Tab 7].

¹⁴⁶ *Ibid* at para 37.

¹⁴⁷ *Ibid* at para 148.

146. As Genesis' sole shareholder, Memorial has a right to Genesis' financial statements, Genesis' auditor report, and any further information required by their articles or bylaws.¹⁴⁸ The Requested Information is not required to appear in these documents, and accordingly, does not have to be produced under Genesis' articles or bylaws.¹⁴⁹
147. The President, as sole member in relation to C-Core, has similar rights and is presented C-Core's audited financial statements in accordance with C-Core's By-Law No. 1.¹⁵⁰
148. The SIEs are not obligated to include detailed information about their salary expenditures, or structure of employee compensation, as a line item in the statements and reports that they provide to Memorial. In fact, the Affidavit of Paul Griffin provides examples of C-Core's financial statements submitted to the President at Exhibit "D". The Statement of Operations included in C-Core's AGM Package notes "staff salaries" as a lump sum expense but does not list the Requested Information as a line item anywhere in the package.¹⁵¹
149. Under the Agreements, Memorial has authority to maintain and keep detailed and proper records regarding all financial transactions processed for the SIEs, but the Agreements do not afford Memorial the right to do anything with the information other than to facilitate payroll and store the affiliated records.¹⁵²
150. Finally, the relationship between Memorial's Board of Regents and the SIEs do not override the obligations and fiduciary duty of the SIEs' directors to act in the best interests of the SIEs.
151. Genesis' Board of Directors is elected by Memorial's Board of Regents, and C-Core's Board of Directors must draw two directors from Memorial. Despite this, the Boards of Directors of the SIEs have their own obligations to the SIEs as set out in Genesis' By-Law No. 1 and C-Core's General Operating By-Law. Specifically, C-Core imposes confidentiality obligations on its directors¹⁵³ and Genesis' Management Agreement

¹⁴⁸ *Corporations Act*, *supra* note 26 at s. 258(1)(a)-(c).

¹⁴⁹ Affidavit of Paul Griffin at para 7 and Exhibit D. See also Affidavit of Karla Connolly at paras 17-19.

¹⁵⁰ Affidavit of Paul Griffin at para 7.

¹⁵¹ Affidavit of Paul Griffin at Exhibit D, p. 55.

¹⁵² Affidavit of Paul Griffin at Exhibit C, section 3. See also Affidavit of Karla Connolly at Exhibit C, section 3.

¹⁵³ Affidavit of Paul Griffin at Exhibit B, section 6.11.

expressly states that its directors has a fiduciary duty to act at all times in the best interests of Genesis in decision-making.¹⁵⁴

152. This is similar to the scenario described in OIPC Report A-2021-008. That case involved an access to information request for Board minutes of the Long Pond Harbour Authority. The Town was a member of the Long Pond Harbour Authority and appointed directors to its Board. The Town had possession of the records sought as they were sent to the directors' Town email addresses. The OIPC was satisfied that the directors owed a fiduciary duty to the Long Pond Harbour Authority. As a result, the Town could not assert custody and control over the records, notwithstanding the fact that they were in the Town's possession.¹⁵⁵
153. Any right that Memorial has to the Requested Information is defined by Memorial's relationship to the SIEs as their payroll agent and dictated by the Agreements. Beyond this, Memorial does not have any entitlement, statutory or otherwise, to possess SIEs' payroll information.

(f) Does the institution have authority to regulate the record's content, use and disposal?

154. A public body's ability to regulate the content, use and disposal of a record held by an entity not subject to the *ATIPPA* is indicative of control.
155. As described herein, Memorial's use of the Requested Information is defined by Memorial's relationship to the SIEs as their payroll agent. Information pertaining to remuneration of SIEs is strictly accessed by Memorial's HR employees to administer SIE payroll.
156. For further clarity, the content of the Requested Information is dictated by the directions the SIEs provide to Memorial via email. Memorial HR employees then input this information into its payroll processing software to administer wages to the SIE employees.¹⁵⁶

¹⁵⁴ Affidavit of Karla Connolly at Exhibit C, section 11.8.

¹⁵⁵ *Conception Bay South (Town), (Re)*, OIPC Report A-2021-008, 2021 CanLII 10799 (NL IPC) at paras 27-29 [Tab 4].

¹⁵⁶ Affidavit of Kelly Martin at paras 8-16.

157. Under the Agreements, Memorial has to house financial records for the benefit of the SIEs, but the Agreements do not confer rights to Memorial to regulate, use, or dispose of these records.¹⁵⁷

(g) Are there any limits on the use to which the institution may put the record?

158. The scope of the Agreements define how Memorial is expected to use SIE payroll information. Memorial's use of the Requested Information is accordingly limited to a narrow purpose of administering payroll.

159. As payroll agent, there is no further authorization denoted in the Agreements for Memorial to use the Requested Information for any other purpose.¹⁵⁸ In this respect, Memorial's case is similar to *Walmsley, supra*, where the Ontario Court of Appeal determined that, although there were elements of an agency relationship between two entities, for the purposes of custody and control, there was no evidence suggesting that the agency carried with it a right to control the records sought.¹⁵⁹

160. Further, Memorial has internal limits applied to the use of SIE payroll information to ensure access to the Requested Information is limited for payroll purposes.

161. Access permissions to the SIE payroll information is restricted within Memorial's HR department. Memorial processes payroll for the SIEs using a system called "BannerHR."¹⁶⁰ Payroll officers will input payroll information provided by the SIEs into BannerHR and administer the payroll accordingly. Only Memorial HR employees tasked with administering payroll can access the SIE payroll information, including the Requested Information.¹⁶¹ In this respect, access permissions in BannerHR are task specific.

162. BannerHR also classifies payroll data in a way that restricts permissions. For instance, each SIE has its own organization and fund numbers which allow the SIEs to run their own payroll expense reports.¹⁶²

¹⁵⁷ Affidavit of Karla Connolly at Exhibit C, section 3.

¹⁵⁸ Affidavit of Karla Connolly at Exhibit C, section 3.

¹⁵⁹ *Walmsley, supra* note 127 at para 23.

¹⁶⁰ Affidavit of Kelly Martin at paras 13-15.

¹⁶¹ Affidavit of Kelly Martin at para 16.

¹⁶² Affidavit of Kelly Martin at paras 17-19.

163. Access to detailed payroll reports, which could include the Requested Information for the purposes of reviewing data, is limited to Memorial's payroll manager and payroll systems analyst. These reports are used to ensure data is available to the SIEs to enable their internal operational decision-making.¹⁶³
164. Accordingly, Memorial's HR employees have a restricted right of access to the Requested Information.
165. Limits on a public institution's ability to access information indicates an inability to obtain the records upon request, and by extension, a lack of control. For example, the Ontario IPC declined to find that a university had control of records held by a separately incorporated but related entity where that university had a restricted right of access to the information based on its agreement to provide services to the entity.¹⁶⁴
166. As described above, limits on the use of the Requested Information exist. Furthermore, Memorial's payroll manager would not share a detailed payroll expense report containing SIE payroll information, including the Requested Information, within Memorial unless advised by the Office of the General Counsel that it was lawful to do so.¹⁶⁵ Use of SIE payroll information is limited because the payroll manager views this information as belonging to the SIEs.¹⁶⁶

(h) To what extent does the institution rely upon the record?

167. Memorial HR relies on the Requested Information to the extent that they need to in order to satisfy their role as payroll agent for the SIEs. Memorial HR does not rely on the Requested Information to enable the functioning of Memorial.
168. As referenced herein, Memorial HR has no control over the Requested Information beyond receiving it from the SIEs and inputting it into BannerHR to process payroll.

¹⁶³ Affidavit of Kelly Martin at paras 17-19.

¹⁶⁴ *University of Toronto, Re, supra* note 111 at para 136.

¹⁶⁵ Affidavit of Kelly Martin at para 20.

¹⁶⁶ Affidavit of Kelly Martin paras 20.

169. SIE employees are not employees of Memorial as they receive their own employment contracts and offer letters,¹⁶⁷ and Memorial does not facilitate payment to them as part of any initiative to further Memorial's objectives.

(i) How closely is the record integrated with other records held by the institution?

170. SIE payroll information, including the Requested Information, is segregated within BannerHR through codification, and other systems relied on by Memorial HR to process SIE payroll.¹⁶⁸ Accordingly, the Requested Information is not closely integrated with Memorial's payroll records.

171. Memorial uses BannerHR to process payroll for all their payroll clients, including the SIEs. However, SIEs are associated with distinct organization numbers and position codes in BannerHR to ensure segregation and organization. This also enables Memorial to restrict access to SIE payroll information in BannerHR.¹⁶⁹

172. Part of Memorial's duty as payroll agent includes running payroll expense reports for the SIEs.¹⁷⁰ However, the SIEs can only access their own payroll data and reports within BannerHR. Their permissions are restricted to ensure that the payroll data associated with each organization number is only accessible to that organization and Memorial's HR employees,¹⁷¹ which again reflects segregation.

173. The SIEs submit their own payroll information to Memorial to enable payroll administration through a case management system called "LBI." The use of LBI also ensures segregation of SIE data, as each new set of instructions emailed from a SIE to myhr@mun.ca updating or requesting a payroll change will automatically create a new "case." A payroll officer will then act on these instructions to implement the SIEs request.¹⁷²

174. Employee payroll information received from the SIEs is downloaded and saved in a records management system called On-Base which houses the personnel files for both Memorial employees and Memorial's payroll clients. Memorial limits access to the personnel files of SIE employees in On-Base to Memorial HR employees since those files

¹⁶⁷ Affidavit of Paul Griffin, Exhibit C at section 5.4. See also Affidavit of Karla Connolly at para 9.

¹⁶⁸ Affidavit of Kelly Martin at para 15.

¹⁶⁹ Affidavit of Kelly Martin at para 15.

¹⁷⁰ Affidavit of Karla Connolly at para 16.

¹⁷¹ Affidavit of Kelly Martin at para 17.

¹⁷² Affidavit of Kelly Martin at paras 8-9.

are used solely for the purposes of processing payroll. The SIEs can also request access to their own employee personnel files within On-Base.¹⁷³

175. In short, the Requested Information is not closely segregated with other information held by Memorial.

(C) MEMORIAL DID NOT BREACH THE DUTY TO ASSIST

176. Memorial did not breach the duty to assist by failing to search for records that Memorial determined were not within its custody and control. Memorial does not have a duty to search for records to which the *ATIPPA* does not apply.

177. Section 5 of the *ATIPPA* notes that the *ATIPPA* applies to “all records in the custody or control of a public body.” Section 8 confers access rights to a person who makes a request for records “in the custody or under the control of a public body.” Consequently, application of the *ATIPPA* does not extend to those records deemed to be outside the custody or control of a public body.

178. Section 13(1) of the *ATIPPA* governs a public body’s duty to assist an applicant:

13. (1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

179. The OIPC recognizes three components that constitute the duty to assist:

[8] It is a long held position of this Office that the duty to assist has three components, as outlined in Report A-2009-011:

[80] ... First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner.¹⁷⁴

180. The OIPC has also acknowledged that the standard for assessing a public body’s efforts with respect to the duty to assist is reasonableness, not perfection.¹⁷⁵

¹⁷³ Affidavit of Kelly Martin at para 12.

¹⁷⁴ *Memorial University (Re)*, 2020 CanLII 35643 (NL IPC) at para 20 citing OIPC Report A-2018-020 [Tab 10].

¹⁷⁵ *Ibid.*

181. The OIPC's conclusion that Memorial breached the duty to assist was partly based on the determination that the SIEs are significantly connected to Memorial and that by failing to conduct a search for records, Memorial ignored those connections.¹⁷⁶
182. The OIPC also states that Memorial has a duty to conduct a search for records unless it can provide strong evidence that it is highly unlikely that such records would be in Memorial's custody and control, such that a search would be a waste of Memorial's resources.
183. In the present matter, Memorial did not determine from the outset that it did not have responsive records. Instead, it determined upon careful consideration of the Requests and how Memorial would come to have possession of such information, that the Requested Information belonged to the SIEs and was not within Memorial's custody and control. Accordingly, the *ATIPPA* did not apply to the Requested Information.
184. A requirement to search for records despite determining that the records are outside of Memorial's custody and control does not make logical sense when considered in light of Memorial's access request process. If Memorial receives a request for records that it confirms are not within its custody and control, Memorial would not conduct a search for those records because it would be a waste of resources to carry out the search.
185. The OIPC confirmed in Report A-2023-051, that the duty to assist may not always require searching for records:

The duty to assist requires that a public body make a reasonable effort and respond without delay to an access request. A reasonable effort does not require a thorough search for records if the public body officials responding to the request know that what is being requested does not involve the public body.

(emphasis added)¹⁷⁷

186. In that case, an applicant requested information from the House of Assembly related to work conducted by the Office of the Auditor General ("OAG"). The House immediately knew that it did not possess responsive records by virtue of the relationship between the

¹⁷⁶ *OIPC Report A-2024-006*, *supra* note 1 at para 11.

¹⁷⁷ *Newfoundland and Labrador (House of Assembly) (Re)*, 2023 CanLII 121464 (NL IPC) at para 10 [Tab 13].

House and the OAG. The House knew that the *Auditor General, 2021* explicitly removes the House from any preparation of Auditor General reports and informed the applicant that it had no responsive records.¹⁷⁸

187. The House did not have to carry out a search to know that it did not possess the records. Instead, the House knew it had no right to the information sought based on its mandate and connection to the OAG:

The House understands its mandate. It should not have to expend resources searching for records on a matter in which it knows it has no role.¹⁷⁹

(emphasis added)

188. The same reasoning applies to Memorial. Memorial knew the Requested Information did not involve or belong to Memorial. Memorial was also aware that it had no entitlement to obtain the Requested Information from the SIEs.
189. Contrary to the OIPC's conclusions, Memorial did not presume it lacked custody and control over the Requested Information solely because the SIEs are separately incorporated and not subject to the *ATIPPA*. Memorial's determination of custody and control was based on the contextual elements of Memorial's relationship to the SIEs. It was also based on Memorial's knowledge of its own mandate and core functions.
190. Further, Memorial had strong evidence from the OIPC that it did not have custody and control over the records. The OIPC had previously decided in two prior decisions that other SIEs related to Memorial were not subject to the *ATIPPA* because of their distinct status as separately incorporated entities.¹⁸⁰
191. Regardless of the stance the OIPC now holds in relation to those decisions and the SIEs, it was not unreasonable for Memorial to look to OIPC precedent at the time to inform its analysis of custody and control and the decision not to conduct a search for records held by entities to which the *ATIPPA* does not apply.

¹⁷⁸ *Ibid* at para 6.

¹⁷⁹ *Ibid* at para 13.

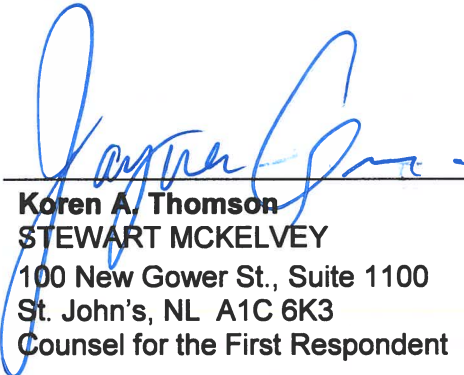
¹⁸⁰ OIPC Report A-2023-029, 2023 CanLII 64130 (NL IPC) [Tab 12] and OIPC Report A-2023-020, 2023 CanLII 39561 (NL IPC) [Tab 11].

192. Therefore, at the time Memorial received the Second Intervenor's requests, there was strong evidence to support Memorial's decision that it did not have custody and control over the Requested Information, including Memorial's knowledge of its own mandate, its connection to the SIEs and the OIPC's prior conclusions that the SIEs were not subject to the *ATIPPA*. Based on this evidence, Memorial concluded that a search for records would be a poor use of Memorial's limited resources.

PART V: ORDER OR RELIEF SOUGHT

193. Memorial repeats the foregoing, and respectfully requests 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, with leave to make further submissions with regards to costs.

ALL OF WHICH HIS RESPECTFULLY SUBMITTED, THIS 13th DAY OF SEPTEMBER, 2024.



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