

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 AND LABRADOR INTERVENOR

AND: MATT BARTER, THE ACCESS TO INFORMATION
REQUESTER AND COMPLAINANT BEFORE THE
COMMISSIONER FIRST INTERVENOR

AND: GENESIS GROUP INC. SECOND INTERVENOR

AND: C-CORE THIRD INTERVENOR

COMMISSIONER'S MEMORANDUM OF FACT AND LAW

Court File Number (s):	2024 01G 0937
Date of Filing:	December 13, 2024
Name of Filing Party/Person:	Information and Privacy Commissioner of Newfoundland and Labrador
Application to which document being filed relates:	Application for a declaration pursuant to s. 50 of the <i>Access to Information and Protection of Privacy Act</i> , 2015 S.N.L. 2015, c. A -1.2

Koren Thomson
Stewart McKelvey
Solicitors for the Applicant
100 New Gower Street, Suite 1100
St. John's, NL A1C 5V3

Matt Barter
The Requester
47 Patrick's Path
Torbay, NL A1K 1J8

J. Alexander Templeton
McInnes Cooper
Solicitors for Genesis Group Inc.
10 Forth William Place, 5th Floor
St. John's, NL A1C 1K4

G. Todd Stanley, K.C.
Cox and Palmer
Solicitors for C-Core
Suite 1100, 235 Water Street
St. John's, NL A1C 1B6

OVERVIEW:

1. The Applicant, Memorial University of Newfoundland (“MUN”) is a public body that is subject to and must operate in accordance with the *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015 c. A-1.2¹ (“ATIPPA”).
2. In the event a public body decides not to comply with the recommendations in a Commissioner’s Report, s.50(2) of the ATIPPA permits a public body to apply to court not to follow the recommendation in three specific circumstances. The Originating Application before the Court sets out the relief that MUN is seeking, that is:

“a declaration pursuant to s.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.”

3. This is a narrow issue, and it is unnecessary to engage in an analysis of whether MUN’S Separately Incorporated Entities (SIEs) are public bodies pursuant to the ATIPPA. The Commissioner’s recommendation was not based upon such a finding. Whether the SIE’s are public bodies is a red herring, as the real question is whether MUN, which is a public body, has custody or control over records responsive to the Second Intervenor’s (Barter’s) access to information requests.
4. While issue and umbrage has been taken with Commissioner’s Report A-2024-006², it must be recognized that this proceeding is not an appeal of the Commissioner’s findings and recommendations. It is also not a judicial review of the Commissioner’s Report, but rather is a *de novo* proceeding which is based upon a review of the evidence before the Court. While prior Commissioner’s Reports may assist and provide guidance to the Court, each Commissioner’s Report is based upon the specific request for access before the

¹ ATIPPA – Tab 1

² Commissioner’s Report A-2024-006 - Record – Tab 1

Commissioner, and the evidence and arguments presented to the Commissioner. It is common for new evidence and arguments to be presented during the *de novo* court proceedings that were not before the Commissioner.

5. While significant emphasis has been placed upon corporate law principles in the submissions of MUN, Genesis Group Inc. (“Genesis”) and C-Core, this case is fundamentally about access to information and the principles of transparency and accountability in public institutions. Can a public body create or facilitate the creation of and operation of corporate structures which could limit exposure of records to access to information requests, thus impairing the statutory rights of citizens? As will be discussed herein, while corporate law principles may assist the Court in determining the matter, this is not a pure private law matter, but a matter involving one of the largest public bodies in the province that has significant connections and interrelationships with the SIE’s. Ultimately, the matter before the Court is one of statute law, and ATIPPA is the applicable statute. It is within this context that the custody and control analysis must occur.

CONCISE STATEMENT OF FACTS:

6. This application arises out of the following four access to information requests:
 - 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 (OIPC File 0020-062-23-125);
 - 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 (OIPC File 0020-062-23-126);
 - c. all vehicle allowances paid to Genesis executive and management staff from January 1, 2019 to present (OIPC File 0020-062-23-126);
 - d. all vehicle allowances paid to Centre for Fisheries Innovation executive and management staff from January 1, 2019, to November 2, 2023.

7. Without even attempting to conduct a search for the requested records to determine if they were in its custody or control³, MUN denied the requests.
8. On November 6, 2023, Barter filed four Complaints with the Office of the Information and Privacy Commissioner with respect to MUN's decision to deny access.
9. Attempts to resolve the issues informally between Barter and MUN pursuant to s.44(3) of the ATIPPA were unsuccessful, and the matter proceeded to formal investigation pursuant to s.44(4).
10. At the conclusion of the formal investigation process the Commissioner issued Report A-2024-006 pursuant to s.48 of the ATIPPA which stated, in part, at paragraphs 13 and 23:

.....With that said, the recommendations made in this Report are **not dependent upon whether the SIEs are public bodies, part of Memorial, or third parties**. The recommendations are **based on an assessment of Memorial's relationship to the records requested by the Complainant**.

From our investigation and based upon the balance of probabilities, C-Core, Genesis, and CCFI are part of Memorial and subject to ATIPPA, 2015. There is significant evidence to support this claim. **However, my recommendation in this Report is not based upon this position; instead it is clear that Memorial has custody or control over the records in question regardless of whether the SIEs are part of Memorial, third parties, or their own public bodies.**⁴ [Emphasis added]

11. At paragraph 34 of the Report the Commissioner recommended the following:
Memorial University of Newfoundland **conduct a reasonable search for the records** described in the four access to information requests that are addressed in this Report; **if necessary, request** any responsive records from C-Core, Genesis Group Inc., and the Canadian Centre for Fisheries Innovation; and that Memorial provide its final response to these requests

³ Commissioner's Report A-2024-006 at para. 6 – Record – Tab 1

⁴ Commissioner's Report A-2024-006 at para.13-23 – Record – Tab 1

to the Complainant within 30 business days of receipt of this Report⁵.
[Emphasis added]

12. On February 16, 2024, MUN applied pursuant to s.50 (2) of the ATIPPA for a declaration that it did not have to comply with the Commissioner's recommendation.

LIST OF ISSUES:

Issue 1: What is the correct procedure to be followed on an application for a declaration by a public body pursuant to s.50 (2) of the ATIPPA?

Issue 2: Whether MUN had custody or control of the requested records?

LAW AND ARGUMENT:

Issue 1: What is the correct procedure to be followed on an application for a declaration by a public body pursuant to s.50(2) of the ATIPPA?

13. Section 50(2) states:

50(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.

⁵Commissioner's Report A-2024-006 at para.34 – Record – Tab 1

14. The ATIPPA sets out the procedure that is to be followed. Section 50(5) states:

50(5) Sections 57 to 60 apply, with the necessary modifications, to an application by the head of a public body to the Trial Division for a declaration.⁶

15. By operation of s.50(5), the conduct of the Application is governed by s. 59(1) which states:

59. (1) The Trial Division shall review the decision, act or failure to act of the head of a public body that relates to a request for access to a record or correction of personal information under this Act **as a new matter and may receive evidence by affidavit.**⁷ [Emphasis added]

16. Pursuant to s. 59(1), the Trial Division “shall” review the decision, act or failure to act of the head of a public body that relates to a request for access to a record as a new matter and may receive evidence by affidavit.

17. The General Division review process was confirmed by the Newfoundland and Labrador Court of Appeal in *Newfoundland and Labrador v. Newfoundland and Labrador Teachers’ Association*, 2018 NLCA 54, wherein White J.A. stated the following:

When a decision to disclose information under the Act is appealed to the Supreme Court, **it is heard as a new matter and not using an administrative law standard of review: see s. 59(1).**⁸ (Emphasis added)

18. By operation of s.59(2) and s. 43(1), the burden of proof is on MUN. These sections state:

59 (2) The burden of proof in section 43 applies, with the necessary modifications, to an appeal.

43. (1) On an investigation of a complaint from a decision to refuse access to a record or part of a record, **the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record.**⁹ [Emphasis added]

⁶ATIPPA, s. 50(5) – Tab 1

⁷ ATIPPA – s.59(1) – Tab 1

⁸ *Newfoundland and Labrador v. Newfoundland and Labrador Teachers’ Association*, 2018 NLCA 54 – Tab 2

⁹ ATIPPA – s.59(2) and 43(1) – Tab 1

19. Guidance with respect to the purpose and interpretation of access to information legislation is found in *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23 wherein Justice Cromwell, on behalf of the majority, stated the following at paragraphs 21-22:

21 The purpose of the Act is to provide a right of access to information in records under the control of a government institution. The Act has three guiding principles: first, that government information should be available to the public; second, that necessary exceptions to the right of access should be limited and specific; and third, that decisions on the disclosure of government information should be reviewed independently of government (s. 2(1)). (Emphasis added)

22 In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 61, La Forest J. (dissenting, but not on this point) underlined that the overarching purpose of the Act is to facilitate democracy and that it does this in two related ways: by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and officials may be held meaningfully to account to the public. This purpose was reiterated by the Court very recently, in the context of Ontario's access to information legislation, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815. The Court noted, at para. 1, that access to information legislation "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society". Thus, access to information legislation is intended to facilitate one of the foundations of our society, democracy. The legislation must be given a broad and purposive interpretation, and due account must be taken of s. 4(1), that the Act is to apply notwithstanding the provision of any other Act of Parliament: *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110, at p. 128; *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, [1996] 3 F.C. 609, at para. 49, aff'd (2000), 25 Admin. L.R. (3d) 305 (F.C.A.).¹⁰ (Emphasis added)

20. It is necessary when interpreting the ATIPPA that its purposes enumerated in s.3 are considered within the context of the access to information request and the guidance provided by the Supreme

¹⁰*Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23 at paras. 21-22 – Tab 3

Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23 to promote accountability and transparency.

Issue 2: Whether MUN had custody or control over the requested records?

21. In deciding the declaration application, the issue of whether MUN has custody or control of the records must be determined. In doing so, the relationship between MUN, Genesis, C-Core, and the Canadian Centre for Fisheries Innovation (“CCFI”) must be analyzed separately as there may be differences in the relationship which impact the custody and control analysis.

22. In *Information Commissioner of Canada v. Minister of National Defence* [2011] 2 S.C.R. 306¹¹, the Supreme Court of Canada engaged in an analysis of s. 4 of the federal access to information act. While much of the judgment focused on the meaning of “government institution”, the Court also considered the phrase “any record under the control of a government institution.” At paragraph 54-56, Charron SCJ provides the following guidance:

[54] Further, the Commissioner’s argument on the deficiency of the control test crafted by the courts below presupposes that the two-part distillation of the test, particularly as articulated by the Federal Court of Appeal, is not intended to fully capture the principles upon which the test was crafted. **I do not read the judgments below as having that effect. As Kelen J. made clear, the notion of control must be given a broad and liberal meaning in order to create a meaningful right of access to government information. While physical control over a document will obviously play a leading role in any case, it is not determinative of the issue of control.** Thus, if the record requested is located in a Minister’s office, this does not end the inquiry. The Minister’s office does not become a “black hole” as contended. Rather, this is the point at which the two-step inquiry commences. Where the documents requested are not in the physical possession of the government institution, the inquiry proceeds as follows.

¹¹ *Information Commissioner of Canada v. Minister of National Defence* [2011] 2 S.C.R. 306 at paras. 54-56 – Tab 4

[55] Step one of the test acts as a useful screening device. **It asks whether the record relates to a departmental matter.** If it does not, that indeed ends the inquiry. The Commissioner agrees that the Access to Information Act is not intended to capture non-departmental matters in the possession of Ministers of the Crown. **If the record requested relates to a departmental matter, the inquiry into control continues.**

[56] Under **step two, all relevant factors must be considered** in order to determine whether the government institution **could reasonably expect to obtain a copy upon request.** These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on “past practices and prevalent expectations” that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the Access to Information Act (A.F., at para. 169). The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, **reasonably should be able to obtain a copy of the record, the test is made out** and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, **the word “could” is to be understood accordingly.** [Emphasis added]

23. Given the foregoing, the law is clear that the court must apply a broad and purposive approach to the phrase “custody and control” in the access to information context which gives meaning to the requester’s statutory right of access.

24. In the current case, the Two-Step test may be stated as follows:

Step 1: Do the responsive records relate to a MUN matter?

Step 2: Considering all relevant factors, should a senior official at MUN reasonably be able to obtain a copy of the records? If so, MUN has custody and control of the records.

25. In determining whether MUN has custody or control of the requested records the first step of the analysis asks whether the record “relates to” a university matter. The terms

“custody or control” are not defined in the ATIPPA and are fluid contextual concepts. In keeping with the guidance provided by the Supreme Court of Canada, the question of whether a record “relates to” MUN should also be interpreted broadly to achieve the purposes of the legislation.

26. Useful guidance with respect to the phrase “related to” in this jurisdiction is found in *Carter v. Municipal Construction Ltd.* 2001 CanLII 37655 (NLSC)¹² wherein Green J. discussed the scope of Rule 32 of the *Rules of the Supreme Court, 1986*. While not an access to information decision, the Court did opine on the meaning of “related to” in the context of document production and concluded that is to be interpreted liberally. A liberal interpretation of “related to” should also be applied in the access to information context to achieve transparency and accountability in public institutions.

27. In *Carter*, Green J. concluded what “related to” meant in the context of Rule 32 at paragraph 21:

[21] I would therefore state the rule as to what **constitutes a document relating to a matter in question in the proceeding** as follows: A document will be said to “relate” to a matter in question in the proceeding where it is **reasonable to suppose it may throw any light on the case in the sense that it contains information which may either directly or indirectly enable the party receiving or seeking the information to advance his or her own case or to damage the case of his or her adversary or which may fairly lead him or her to a train of inquiry which may do so.** With all due respect to those who have expressed a contrary view, I do not believe that the test for determining production of documents prior to trial should be tied to the concept of relevance at trial.¹³

28. The test with respect to document production in civil proceedings can easily be transposed and applied to the access to information context by inquiring as to whether the requested records in the access to information requests relate to the workings of a

¹² *Carter v. Municipal Construction Ltd.* 2001 CanLII 37655 (NLSC) – Tab 5

¹³ *Carter v. Municipal Construction Ltd.* 2001 CanLII 37655 (NLSC) at para. 21- Tab 5

public body which a requester may have a statutory right to access, subject to the exceptions in the ATIPPA.

29. To give meaning to the access to information requester's statutory right of access the first step in the custody or control analysis should be a low threshold. The record should not have to be material or relevant, but simply relate to the operations of MUN. This interpretation promotes the purposes of the ATIPPA without prematurely dismissing the request. By proceeding in this fashion, the court can continue to step two of the analysis and consider all relevant factors as outlined by the Supreme Court of Canada to determine whether a senior official of MUN should reasonably be able to request a copy of the requested records.
30. In *Information Commissioner of Canada v. Minister of National Defence* [2011] 2 S.C.R. 306 Charron SCJ. stated that "While control is to be given the broadest possible interpretation, it cannot be stretched beyond reason."¹⁴ By applying a low threshold as to whether the records relate to a public body the Court would be giving the "broadest possible meaning to custody and control". The obvious cases of truly independent third parties may be screened out as this initial stage, but in cases that are not patently obvious, the analysis can continue to examine the true relationship between the entities involved.
31. MUN has the burden of proof to demonstrate that it does not have custody or control of the requested records. While MUN, Genesis and C-Core have placed considerable emphasis on the separate legal entity corporate law principle, it is necessary for the Court to review the evidence to determine if the responsive records relate to a university matter. A contextual review of the evidence is necessary to determine what the relationship is between MUN, Genesis, C-Core, and the CCFI.

¹⁴ *Information Commissioner of Canada v. Minister of National Defence* [2011] 2 S.C.R. 306 at para. 48 – Tab 4

32. In the event the Court concludes that the records may relate to MUN, the Court must then consider all relevant factors to determine whether a senior official at MUN should reasonably expect to be able to obtain a copy of the requested records. The list of all relevant factors is not exhaustive, but generally includes:

- 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. Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?
- d. Is the activity in question a “core”, “central”, or “basic function” of the institution?
- e. Does the content of the record relate to the institutions mandate and functions?
- f. 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?
- g. If the institution does have possession of the record, is it more than “bare possession”?
- h. 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?
- i. Does the institution have a right to possession of the record?
- j. Does the institution have the authority to regulate the record’s content, use and disposal?
- k. Are there any limits on the use to which the institution may put the record, what are those limits, and way do they apply to the record?
- l. To what extent has the institution relied upon the record?
- m. How closely is the record integrated with other records held by the institution?¹⁵

¹⁵ Commissioner’s Report A-2024-006 at para. 30 – Tab 1

33. The factors set out above must be considered in light of the evidence before the Court with respect to MUN's relationship with Genesis, C-Core, and the Centre for Fisheries Innovation.

Evidence of Genesis:

34. Karla Connolly, Interim President and Chief Executive Officer of Genesis, filed an Affidavit and Exhibits in this proceeding. The Commissioner highlights the following sections of By-Law No.1¹⁶ which are relevant factors to the custody and control analysis:

Article 1: The mission of the Corporation is to act as a not for profit support network to assist and encourage academics and others associated with **Memorial University** and the local community in the commercialization of technological ideas, concepts and other forms of sustainable business to the benefit of Canada but with the primary emphasis on Newfoundland and Labrador.

Article 7: **Requiring Approval:** Notwithstanding paragraph 6 hereof, the directors shall not sign in the name and on behalf of the Corporation instruments in writing authorizing any work, repairs, alterations or redecoration with an estimate cost of (\$10,000.00) or more for any one item without first obtaining the approval of the President of Memorial University to proceed with such work, except for monthly or recurring operating charges or unless the approval of Memorial University has been implied by the approval of budget estimates, or where the work is urgently necessary to prevent injury, damages and/or the imposition of penalties , fines, imprisonment or other liabilities.

Article 12: Election and Term: **The directors shall be elected yearly by the Board of Regents of Memorial University, upon recommendation of the President of Memorial University,** to hold office until the next annual meeting of the shareholders of the Corporation or until their successors shall have been duly elected.

Article 13: Removal of Directors: **The Board of Regents of Memorial University may remove any director or directors from office before the expiration of their term of office and may elect any person in his/her stead for the remainder of the term.**

¹⁶ Affidavit of Karla Connolly , Ex. B - By Law No. 1

- Article 24: Remuneration of Directors: The directors of the Corporation shall be paid such remuneration, if any, **as may be approved by the Board of Regents of Memorial University of Newfoundland...**
- Article 45: Voting shares: **Ownership of the voting shares of the Corporation shall be restricted to Memorial University.**
- Article 69: The Corporation may acquire shares or other securities in other bodies corporate **as agent of Memorial University**, for purposes deemed appropriate by the officers and/or directors of the Corporation.....
- Article 72: Royalty Agreements: The Corporation may enter into royalty arrangements **as agent of Memorial University**, for purposes deemed appropriate by the officers and/or directors of the Corporation, including the recovery of costs incurred by the Corporation in supporting the development of related inventions, discoveries or creations, and patenting processes.¹⁷

35. In addition to By-Law No. 1, the Amendment to By-Law No. 1 is relevant:

- Article 70: Revenue on Dispositions: Any revenue on the disposition of shares or other securities held by the Corporation in other bodies corporate, including dividends, received in respect of such shares shall, **with the prior approval of the sole shareholder**, be used solely to further the Mission of the Corporation, as set out in paragraph 1 hereof, or to be held by the Corporation **as agent of Memorial University.**¹⁸

36. A review of the By-Laws of the Corporation, as well as the Shareholder Resolutions which appear as exhibits to the Affidavit of Kayle Connelly, demonstrate significant control exercised by MUN over Genesis. MUN is its shole shareholder, responsible for the appointment and removal of directors, responsible for remuneration of directors, and acts as agent for Memorial University.

¹⁷ Affidavit of Karla Connolly , Ex. B - By-Law No. 1

¹⁸ Affidavit of Karly Connolly, Ex.B – By Law No. 1

37. The Amended and Restated Management Agreement dated July 4, 2014¹⁹, is also relevant to the custody and control analysis. This agreement demonstrates Genesis acts as the Agent of MUN in various instances.

38. In light of this evidentiary background the Court must determine whether an official at MUN should reasonably be able to obtain a copy of the requested records. If it is more likely than not that the record can be obtained by MUN, it is in its custody and control.

C-Core Evidence:

39. Paul Griffin, the President and Chief Executive Officer of C-Core, provided an Affidavit dated September 6, 2024, which includes an “Agreement” between MUN and C-Core which details the relationship between the parties. The agreement demonstrates that it is not totally separate from MUN. Article 9.5 states:

If C-Core wishes to be totally separate from the University (including withdrawal of University’s provision of services) or wishes to convert into a corporation with share capital which operates for profit, C-Core agrees to negotiate with the Separately Incorporated Entity Standing Committee to ensure that the interests of the University are protected and balanced with the interests of C-Core.²⁰ [Emphasis added]

40. Clause 9.5 confirms that MUN and C-Core are not totally separate entities. If so, the provision of this clause in the Agreement would be redundant. In addition, it is noteworthy that to become “totally separate” it must negotiate with the Separately Incorporated Entity Standing Committee – a committee of the Board of Regents of MUN.

41. Other relevant provisions of the Agreement between MUN and C-Core relevant to the custody and control analysis include:

¹⁹ Affidavit of Karly Connolly, Ex. C – Amended and Restated Management Agreement.

²⁰ Affidavit of Paul Griffin, Ex. C – Agreement

- Article 2.14: **If the University is required by legislation to comply with any information requests, audit requirements, or investigation requirements from an entity (the "Auditing Entity"), C-Core agrees that it will provide the same access and cooperation to the Auditing Entity in respect of its documents and information as is required of the University.**
- Article 2.16: **Not to amend its Articles or By-Laws in respect of the provisions dealing with the appointment or election of directors without first notifying the President of the University.**
- Article 2.19: **Inform the Board of Regents via the Separately Incorporated Entity Standing Committee of all material decisions as soon as practicable following such decisions.**
- Article 3.2: **The University shall keep and maintain full, detailed and proper records regarding financial transactions processed by the University for C-Core.**
- Article 4.5: **The University agrees that if the University has any concerns in respect of any of the policies of C-Core, it shall raise those concerns with C-Core through the Separately Incorporated Entity Standing Committee.**
- Article 6.4: **C-Core shall not sell any facilities owned by C-Core and occupying the University land without the prior written consent of the University.**
- Article 9.1: **Prior to the winding up of C-Core, and following the payment of all then existing liabilities of C-Core, C-Core agrees to convey all of its assets to the University.²¹ [Emphasis added]**

42. In light of this evidentiary background the Court must determine whether an official at MUN should reasonably be able to obtain a copy of the requested records from C-Core. If it is more likely than not that the record can be obtained by MUN it is in its custody and control.

²¹ Affidavit of Paul Griffin, Ex. C – Agreement

Evidence with respect to the CCFI

43. Unlike Genesis and C-Core, CCFI has not intervened in this proceeding. Its failure to intervene does not alleviate the burden of proof on MUN to demonstrate that it does not have custody or control of the requested records that relate to CCFI.
44. The evidence relied upon by the public body is limited to a five-page affidavit of Kelly Martin. This affidavit does not address the specifics of the relationship between MUN and the CCFI except to say that it acts as a payroll agent. Given the detailed evidence provided by Genesis and C-Core, one would reasonably have expected MUN to provide greater detail on specifics of the relationship it has with the CCFI to allow the Court to conduct a contextual analysis of the custody and control analysis. The absence of such evidence before the Court should be analyzed in the context of whether MUN has satisfied the burden of proof.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this ^{13th} day of December 2024.



Andrew A. Fitzgerald, K.C.
Learmonth, Boulos & Fitzgerald
Solicitors for the Intervenor
Suite 804, TD Place
140 Water Street
St. John's, NL A1C 6H6

To:

Supreme Court Registry
Supreme Court of Newfoundland and Labrador
General Division
Court House
Duckworth Street
St. John's, NL A1C 5M3

Koren Thomson
Stewart McKelvey
Solicitors for the Applicant
100 New Gower Street, Suite 1100
St. John's, NL A1C 5V3

Matt Barter
The Requester
47 Patrick's Path
Torbay, NL A1K 1J8

J. Alex Templeton
McInnes Cooper
Solicitors for Genesis Group Inc.
10 Fort William Place, 5th Floor
St. John's, NL A1C 1K4

G. Todd Stanley, K.C.
Solicitors for C-Core
Cox and Palmer
Scotia Centre
Suite 1100, 235 Water St,
St. John's, NL A1C 1B6