

Transcript Episode 5 Denise Doiron

Ron Kruzeniski:

Today I have the pleasure of interviewing Denise Doiron, who's the Access and Privacy Commissioner for PEI. Welcome, Denise.

Denise Doiron:

Hi, Ron. Thanks for having me. And I just need to let you know this is my very first podcast ever. So, I will do my best for you and hope I can provide the information that you and your audience are looking for.

Ron Kruzeniski:

Well, I'm going to start with an easy question.

Denise Doiron:

Yes.

Ron Kruzeniski:

Prior to you becoming Commissioner... Why don't you tell a bit about what you did prior to becoming Commissioner?

Denise Doiron:

Okay. Well, Ron, it's pretty boring lawyery type stuff. I spent most of my career with the provincial government here in PEI in some capacity or other. The bulk of my career, I'd say about 12 years, was spent in general practice in the legal services section of the Attorney General's office, doing a bit of everything over those years, but for most departments. But I specialized primarily in child protection, adult protection, and general litigation. I also worked on the implementation team of our FOIPP Act about 20 years ago and spent a couple of years as the public trustee, public guardian, official guardian for PEI right about the same time you did. That's where we met. So, it's good to see you again. The last 10 years before becoming Commissioner, I was actually internal counsel with Health PEI, which is our provincial health authority. So, I guess I've been around for a long time.

Ron Kruzeniski:

It sounds like really an interesting set of experiences. And-

Denise Doiron:

It really was interesting, but it never ceases to amaze me just how old I feel when I talk about it.

Ron Kruzeniski:

Well, today I wanted to talk a little bit about Bill 118, and it deals with non-disclosure agreements that you know, and I know many lawyers promote and encourage when agreements are set up. Can you tell me a bit about this bill and how it arrived in the legislative assembly? And really, PEI has taken the lead across the country on this one.

Denise Doiron:

Sure, Ron. Most of what I can tell you, though, is really from the news because it was a little bit of a different way for it to get to the legislature. And as you said, it is a bit of an anomaly across the country. PEI usually is not the first out of the gate to do anything unique like this. So, this is really a different situation that we've found ourselves in, but not a bad one, though. So, from what I understand, this started out as something kind of different, not really a non-disclosure agreements act. What it started out with is an interest by one of our opposition MLAs, actually, Lynne Lund, in matters of access to justice and mental health services and those sorts of things. And through some of that work that she was doing and that interest, she learned about these non-disclosure agreements being signed by folks, mostly women who had made allegations of some sort of harassment or discrimination at work or some other institution and had settled with their employer or the institution in exchange for often a monetary settlement, but also a requirement to sign non-disclosure agreements.

And what MLA Lund was apparently hearing from these folks was that a lot of these NDAs were being written in an extremely restrictive manner, very protective of the alleged perpetrators and the employers or institutions. And she was hearing about victims who believe that they actually weren't able to talk about anything that happened to them, to anyone, including friends, family members, medical personnel, mental health services or other support services personnel. And they felt that they were restricted from also going to the police in some of the more serious cases to pursue criminal charges. And they felt that the NDAs were requiring them to basically keep silent at all costs or return any sort of settlement funds they may have agreed to for the matter to become resolved.

So, through a lot of discussions with affected individuals and people in interest groups, women's groups and those sorts of things, she became pretty concerned about some of these stories and some of the stuff she was hearing, and also found that it was a pretty prevalent practice in cases of harassment or discrimination, not just here, but right across the country. And she was concerned enough that she pursued the possibility of legislation to address the issues. And her goal was to allow potential victims to both settle the claims, but to be able to seek the help they needed and potentially pursue other justice avenues if that was something that was appropriate.

So, Bill 118 was born, and it was brought to the legislature as a private member's bill. And I don't know about other provinces, but here in PEI, private members' bills are not that common. And when they do come forward, they often don't get a lot of support and often are not passed. Or if they are, they're redeveloped by the governing party to something that looks often substantially different. But the fall legislature this year, MLA Lund brought the private members' bill forward, and it passed, and I believe it passed unanimously with all three of our parties and received Royal Assent on November 17th, just last month.

Ron Kruzeniski:

Wow. So, who will it apply to in terms of public bodies or private bodies?

Denise Doiron:

Well, currently, the bill doesn't have any restrictions on its application. It talks about what's called responsible parties, and those are defined as persons who have an obligation in law to take reasonable steps to prevent harassment and discrimination in the place where the harassment or discrimination occurred or is alleged to have occurred. So, it doesn't talk about organizations as such. So, it doesn't talk about a business, or a public body, or a Crown corporation, or a university, or what have you. It's really about the people who have a legal obligation to ensure that the harassment or discrimination doesn't take place within whatever place, the institution or the business or employment area, what have you.

So, it's really about responsible persons, not organizations, but because of that, it really should apply to all employers, organizations, institutions and such, and that would include government and Crown corporations and public bodies.

Ron Kruzeniski:

And you partly touched on it, but what would you say the main elements or features of the bill are?

Denise Doiron:

Well, it's a pretty short bill. It's only a little over three pages, but it's fairly well-packed with information that I think is pretty relevant. And I'm not sure I could say there's one main feature. There are a number of aspects of this bill that are pretty important. One of the big features is that in cases of harassment or discrimination, non-disclosure agreements can only be entered into and will only be enforceable if the relevant person, that's the person alleging harassment or discrimination took place, wants one. And what it says in the bill is it has to be the expressed wish and preference of the relevant person or it just won't happen. And if one does happen, then it's not going to be enforceable.

In addition, the relevant person has to have been given the opportunity to receive independent legal advice before signing it. And there has to have been no undue attempts to influence the relevant person about whether to include a requirement to not disclose any material information about the event or events. And the non-disclosure agreement can't adversely affect the health or safety of a third party or the public interest, and it has to be of a set and limited duration. Those are standard features that all NDAs are going to have to comply with. And it also has to include an opportunity for the relevant person to decide whether to waive their own confidentiality in the future. So, if you enter into an NDA now, you do have to have the opportunity to be able to waive that if you want to talk about anything in the future yourself.

And another feature that's a great feature that I think should be more widely used is that any NDA that is entered into between a responsible party and a relevant person must be written in plain language. That's a problem now because these NDAs are pretty well all based on non-disclosure agreements from the civil litigation world and are written by lawyers trying to cover all potential bases. They're often a bit convoluted and hard to understand, and they pretty well all contain a lot of legalese. Requiring them to be written in a plain language format, I think, is good for everybody, and I think it's a standard that probably should be applied in more areas than just this one.

One other aspect that I think is good here, Ron, and it's that the bill, it sets out multiple circumstances where the non-disclosure requirement doesn't apply. So, statutorily doesn't apply. So, even if you enter into an NDA, then there are certain circumstances where a person can still make disclosures without fearing any reprisals or having to repay any settlement funds that they receive and those sorts of things. So, most of them are pretty standard, but one of the more interesting ones is that it exempts the non-disclosure from artistic expression by the relevant person, as long as there's no identifying of the responsible party or the person who committed (or is alleged to have committed) the offence or the terms of the NDA.

And I think that one came forward primarily because a lot of the individuals in this province who were talking about having been the victim of some sort of harassment or discrimination, and having had to sign an NDA, and being afraid to disclose it, including to mental health professionals or medical professionals, were feeling the need to express themselves in some way just for personal emotional reasons. And there were a number of people who have written songs or had some other sort of artistic expression of their feelings because they felt they weren't allowed to talk about it with anyone. So, that actually has been codified and put into our statute as well.

Ron Kruzeniski:

So, you said it got Royal Assent on November 17th. Did it come into force that day? Is it now part of the law of PEI?

Denise Doiron:

No, not yet. So, when it was passed in the legislature, there was a provision in it that specifically stated it would come into force on a date six months from the date of Royal Assent or some date earlier than that if the lieutenant governor and council set an earlier date. To my knowledge, there hasn't been an earlier date, so it's going to be six months from November. So, the planned proclamation date, enforced date, is the 17th of May of 2022.

Ron Kruzeniski:

So, for those that are listening to us and are interested, is there a spot that they can go to get a summary of the bill or the actual bill itself?

Denise Doiron:

Yes, actually, the bill itself is on the government website. There's a couple of ways you can get to it. If you Google "The Legislative Assembly of PEI," the list of clickable things under the Legislative Assembly of PEI, there's one that says "House Records." If you click on that, it takes you to a landing page, and one of the choices is "Bills." So, if you click on "Bills" and then the search engine, the keyword search, just put in "non-disclosure," and that's the only thing that comes up. The bill's right there. You just click on it and you get the PDF version of the bill as it is. Or you can just go to www.assembly.pe.ca/legislative-business/houserecords and then click on "Bills" and put in "non-disclosure" into the keyword search again, and you get it.

Ron Kruzeniski:

Great. Well, I want to thank you for doing this. And we're recording this just before Christmas, taking you away from many busy PEI activities. And it'll probably get posted in January, but I'd like to end by wishing you, Denise, and your family just the best of this holiday season.

Denise Doiron:

Thank you, Ron. Thanks for having me, and I wish you and your family the best of the holiday season and a safe, happy, and most importantly healthy 2022.

Ron Kruzeniski:

Well, thank you.