

Transcript Episode 7 Jill Clayton

Ron Kruzeniski:

Today I have the pleasure of talking with Jill Clayton. She is the Information and Privacy Commissioner for Alberta. She was appointed in 2012, and her term expires in 2022. And I thought it was a perfect opportunity to talk to someone that can reflect on 10 years of accomplishments, 10 years of challenges, her thoughts about where this whole access and privacy may be going in the future. And if you would like to see her full resume, it is on the Alberta Access and Privacy website, and you can see all the details.

And I think also, I want to recognize Jill's contributions to the Federal Provincial Access and Privacy Commissioners across Canada. Over that 10 years she has done a lot for that group, and has spoken at many presentations across the country.

Welcome, Jill.

Jill Clayton:

Oh, thank you so much, Ron. I'm delighted to be here.

Ron Kruzeniski:

So, I'm going to start with an easy one. You were appointed in about 2012. What were you doing before being appointed, and has that 10 years gone quickly?

Jill Clayton:

That is a good question. So yes, I was first appointed on February 1st of 2012, and then I was reappointed for a second five-year term in 2017. So it's all running out. My term ends January 31st of this year. And before that, I actually came to Edmonton from Vancouver. I'd been in Vancouver for about a year. I was doing some work with ICBC, so the Insurance Corporation of British Columbia. I was heading up their FOIP shop there, and I'd been there for about a year. I'd gone out to Vancouver.

Before that, I was actually with the OIPC here in Alberta, but in Calgary. So I was Assistant Commissioner, and before that, had been Director for the Private Sector Privacy team in Calgary. And well, I've been in that office for seven years. So I'm actually coming up to 10 years as Commissioner, and more than 17 years in the Office. And yes, it's gone ridiculously fast.

Ron Kruzeniski:

Well, with that much experience, I think the next question is a really good one. And in your last Annual Report for 2021, in your Commissioner's Message, you certainly highlighted a number of important issues. And I just wondered if you would share with our audience some of the highlights you've seen and/or see as issues coming up in the future.

Jill Clayton:

Okay. Well, thanks for that question, Ron. Because yes, we put out our Annual Report, we do at the same time every year. And it coordinates with the time that I'll be in front of the Standing Committee, making a presentation and budget submission. So it came out in, I guess, end of November last year. And there's always a section on trends and issues, which is something that I had introduced to the Annual Report back when I started as Commissioner. So I always find that useful, because I'm trying to focus on... This comes from, I think, an archive and history background, where... I think of the Annual

Report, decades from now, someone can go back to that and see what was going on around the OIPC at the time. But I also put some thought into my Commissioner's Message to reflect a little bit on where we've been over the last 10 years, but also to be a little bit more forward-thinking.

So the first thing that I would say, though, is that in my Commissioner's Message, obviously, the big thing we've been looking at that has really had a huge impact over the last couple of years, and I suspect will continue to impact us going forward, is the pandemic. So that's had a huge impact, not only on the entities that we regulate: so, the public bodies, health custodians, and the private sector organizations, but also on the office itself. So we've had folks working from home, whereas we had not had that to any extent at all, really, before the pandemic.

We are introducing all sorts of new technologies ourselves. We're having meetings by WebEx and Zoom. We are just starting to do access files using a VPN. Yeah, we've seen our own changes. And obviously, that's had just a massive impact on work that we've done with the regulated entities. So again, working from home, introduction of new technology, videoconferencing, virtual health apps, vaccine passports, or in Alberta, what we call the Restriction Exemption Program.

We've seen lots of calls for more and more government information related to the pandemic. So obviously, there's a question of proactive disclosure of information by governments, but also, challenges for public bodies to respond to access requests. And then, of course, we've seen breaches. So carrying on a long tradition in the office, we receive more breaches year after year after year, but now those have a bit of a pandemic flavour to them. So we're seeing COVID-related issues, so healthcare workers who are looking up COVID test results. We're seeing ransomware, lots of attacks on electronic information systems. And lots of transmission errors. Because more and more people are working from home and not interacting in person, we're sending things. And sometimes we're sending things to the wrong place. So that was a piece of the Commissioner's Message, something I wanted to highlight.

Another aspect of the Commissioner's Message that I wanted to highlight what we've seen in the last few years of the office, just again, this huge increase in the number of files coming to the office, and the number of cases we opened year after year. This is the first year, I think we had over 4,200 cases, which is massive. When I started as Commissioner, I think we were around about 1,000 total across three pieces of legislation, maybe even a little bit below that. So that's a huge change over 10 years.

We've seen the staff in the office grow from, I think it was about 38 when I started as Commissioner, and now we're at about 50. So 48 FTEs, with a couple of extra folks on wages or in temporary positions, and some contract staff on top of that. So large increase in staff. Huge increase in files. We close more files. So I'm super happy about that, and just cannot say enough about my colleagues and the work that they do.

But also, one of the things I've noticed over the years is just the change in the types of files that we see. So we do a lot more what I would say proactive work through privacy impact assessment reviews. We do a lot of work in the self-reported breach arena. Mandatory reporting in the private sector and the health sector has led to a significant chunk of our workload is related to breaches and cleaning up after breaches, helping entities to clean up after breaches. We don't see nearly as much one-on-one investigations anymore, where less of our workload is related to investigating a particular matter that an individual might bring to us. We do still do requests for reviews and review responses to access requests, but that's a smaller chunk of the work that we do. So that's been a big change in 10 years.

And then one other thing that I would mention that I highlighted in the Annual Report were a few just issues to be aware of as we go forward. So obviously, privacy and technology, that was one of them. I mentioned just in the last year this huge explosion in virtual care. And in particular, what we're seeing are governments and health custodians using private sector solutions to deliver virtual care, what I

would call private sector solution. And so there's this merging of public, private, and health, which I think is quite interesting. And we'll see more of that going forward.

Other technology issues, facial recognition technology, we've had a number of public reports around that in the last year and a bit. Artificial intelligence, there's a technology we should be looking at as we go forward.

Other issues, access. We've seen some real challenges in Alberta, I think, for public bodies responding to access requests. It's interesting to me to see reports out of Ontario and B.C. that looks like the experience there has been different, but we've really seen, again, an increase in time extension requests, and public bodies struggling to respond when they're not in the office and they don't have access to records. And we have a new centralized system in Alberta. So that's definitely something that I think bears looking at. Might be something for the next Commissioner.

The last thing I would mention is legislative reform. So I spent some time in the Annual Report and my Commissioner's Message talking about that. I've talked about that before. We haven't seen really significant legislative reform in the 10 years that I've been Commissioner, other than mandatory breach reporting in the health sector, and then some unannounced changes to The Health Information Act and Bill 46, about a year and a half ago.

But I think we're lagging behind, certainly, in our private sector legislation. We haven't seen meaningful legislative reform to our public sector law in over a decade. So that's another topic that I highlighted in the Annual Report.

Ron Kruzeniski:

Well, I really commend your Commissioner's Message to others that are listening to this. And fact is, in reviewing it myself, I said, "I'm going to take a copy of these four pages and put it in my folder when I do my Annual Report." Not that I would plagiarize Jill, but the headings, I think, really covered the waterfront of issues that I think we encounter in Alberta, Saskatchewan, and across Canada. So thank you for that summary. That's great.

Now I hope my next question isn't repetitive, but I've got about just slightly under two and a half years left in my term. It's funny how you start to think about, "What do you want to leave? What's your greatest accomplishment or the things you're really proud of?" Which then turns into, "Well, what's your legacy for the next Commissioner?" So what are the contributions that you're particularly proud of over the last 10 years?

Jill Clayton:

Well, Ron, it's interesting, because as you come to the end of your term, you do start to think about these things, don't you? I have to say, I've never really liked this idea of leaving a legacy, and I don't like to think that that has driven choices that I've made. One thing that I have noticed... And I've been around long enough to see a lot of Commissioners come and go in other jurisdictions as well. And not to mention, I've worked with my predecessors here in Alberta, and... Something that I'm always really struck by is that no one jurisdiction is like another jurisdiction. And what works in one may not work in another. What seems like a solution that might be employed in a different province, well, I can think of a few examples of things I saw in other jurisdictions and tried here, and they just didn't really pan out.

But Commissioners bring their own background, of course, and their own interests, and they're driven by idiosyncratic kinds of things, and their education, their experience, their background, what they think is important. And every commissioner brings their own stamp. And I think about my predecessors, and

they're quite different from me. And they developed the office in different ways. But all of that, it's all a foundation that you build on, as you just said.

So I will say that I have been thinking about this a little bit, and I appreciate our conversation today. Gave me another opportunity to think about that a little bit. I will say I very consciously, at the start of all of this, did think that something I wanted to do was to use all aspects of the powers that are granted to me under the legislation. So I've never liked this idea that I would ask for reform of the legislation, or I would have some means available to me and not use it. There's this idea that you use all the tools in your toolbox. So there were certain aspects of the legislative mandate that I personally was interested in and wanted to focus on, and wanted to develop and put some energy into.

So one of them is our research mandate. So I very consciously put effort into certainly my first term. Every year, we would spend some resources, time, and energy doing some kind of research project. So in my first year, we did a survey of the general population. We did a stakeholder survey. Asked a lot of questions about issues that were important to public bodies and custodians and organizations and the public and used that to inform the business plan going forward over the next few years.

We commissioned research on topics I was interested in and had been concerned about so, things like deputizing the private sector; information-sharing initiatives; and more recently, when the provincial government was going to centralize their Access FOIP shop, we had done some research into different models of centralized, decentralized, and hybrid. And so I'm proud of that work. I think it was very conscious, and something very deliberate.

Another thing I really wanted to do, and I think we've done, has been to do proactive reviews of systemic issues. So not just wait for individuals to bring complaints to our office. So sometimes, as a result of something we became aware of, we would go out and do this kind of review. And then I can actually remember very early on... There's been a lot of change to provincial government since I've been Commissioner, but... One of the early premiers had an interest in transparency, and had introduced proactive disclosure initiatives around expenses and salaries. And I remember speaking with one of the new ministers or associate ministers and saying, "there would be a benefit to both of us if you want to go forward with this. We think this is a great idea, but then why don't you ask us to review it?"

And it was early enough, I think, in that premier's mandate that they were keen to work with us on something like that, invite us in to do this proactive review. And so we ended up publishing a report on that, publishing reports on things like use of the public interest override and FOIP, a proactive report on whether or not health custodians were prepared for mandatory breach reporting, some proactive stuff we did around looking at what was causing delays in responses to access requests. So those kinds of things. Again, it was pretty conscious that we would do those sorts of bigger systemic reviews, if you will, not in response to requests to investigate necessarily, but because I thought they were important issues, and I wanted to shine a light on them.

Another thing that part of this using all the parts of my powers was enforcement. And something that had bothered me for years is this idea that privacy laws have no teeth. And there are provisions in the laws for fines and offences and things like that, but they're not necessarily used all that often. There's a whole host of reasons for that. But I wanted to show that the laws do have teeth, or at least we've had a fair amount of success under The Health Information Act, in terms of some comprehensive offence investigations.

We turn investigations over to the Crown. I think we're at close to 20 convictions now under the Health Information Act. That is a power available to me. There's nobody else who is going to do it. The police are not super-keen on that kind of thing in our experience, although there's recently been a FOIP matter that has been successfully prosecuted, but I see that as a gap. Nobody else is really going to do that. So I

think that's up to me. And I think I have the power, and I want to be using it. So that was one driver, using all parts of my powers.

Another driver for me was to be as efficient and effective as possible. None of us ever have the resources that we want. I've mentioned already that as our case types have changed a lot over the years, and I would much rather be doing work upfront to prevent things from going terribly, terribly wrong. And so we've spent a lot of time, certainly, in the early years, restructuring the office, building a new case management system, looking at new ways of doing things, process reviews. A continuous improvement model, moving towards more electronic system, providing more guidance so that entities know how to comply beforehand, as opposed to finding out they're doing everything wrong after the fact.

So we publish advisories. We publish guidance. We do joint work with the rest of our colleagues across the country, of course, including your office, Ron. But joint investigations and joint guidance, and joint resolutions and those kinds of things, I think I'm wholeheartedly into that. I think that's how we make the best use of the limited resources and capitalize on some of the experiences and knowledge and resources, frankly, that other offices have.

And then I think I would say that a third driver for me that has impacted what the office has done and what we've accomplished was this idea, and I've already alluded to this, that every Commissioner brings their own background and experience. So when I started as Commissioner, I think about half of the Commissioners were lawyers, and about half were not. I think I may be the only one now that is a non-lawyer. But my background is in history and planning. And then I spent a lot of years doing archives and information management consulting. So I'm all about managing information. And one of the things that I see in both access and privacy is that both of these things are absolutely rooted fundamentally in information management, records management.

So certainly, where I've had opportunities to shine a light on the fundamental importance of records and information management issues, I've taken those opportunities. So we've issued reports. After Alberta was completely caught off guard with a change in government in 2015, all these calls about "were records being shredded in the aftermath of the election?" So we did a joint investigation with the Ombudsman Public Interest Commissioner at the time, and we looked at whether or not records were being shredded. For me, that was a really important way of highlighting the work that the senior records officers do in government.

We did a similar investigation on the destruction of emails. This was brought to our attention, and I wanted to, again, highlight the importance of email management. We see access requests these days that the response of records package is 20,000, 40,000, 60,000 pages of records, databases. I wanted to do an investigation that looked at that kind of records management issue.

We did another one that looked at the management of CCTV video records in remand centres. So using what you bring as your own background and experience and thing you're interested in. I also had an interest from my early planning days. I have a master's degree in planning, and thought about doing something around disaster planning. So early on, when there was a disaster in Calgary around a fire in a technical centre, we did an early report where we looked at some of the businesses that had been affected by that, so we could say some stuff around disaster planning, business continuity planning.

So those kinds of, again, focusing on some of the things that are of interest. And then of course, in terms of contributions, you have to address what comes before you as it comes up. We could spend three or four of these podcasts talking about issues related to solicitor-client privilege. That became a huge issue when we were looking at potential allegations of political interference and access requests across government. We investigated 23 public bodies in that, and couldn't get records. We actually received 500 pages that were completely redacted.

So that was a challenge. We issued a special report to the Legislative Assembly on the need to amend the legislation. That problem has not gone away. We ended up in the Supreme Court on that. We didn't fare well there. We lost. I'm still hoping that we'll see some amendments to legislation, so that the next Commissioner doesn't have to deal with this problem. We saw an early charter challenge to PIPA was actually struck down by the Supreme Court around issues related to free expression and the activities of a union. That led to some changes to PIPA.

But I'll end on this and say that probably the biggest personal contribution that I have had, besides these sorts of things that the office is focused on and how I've directed the office, probably has to do with self-reported breaches in the private sector. I was dealing with that before I left the office, so back when I was Assistant Commissioner and Director. And then I came back, and I've been personally involved in issuing more than something like 1500 breach notification decisions. And a good chunk of those are on our website, hundreds, literally hundreds of breach notification decisions.

So I know that other jurisdictions come to us and ask about this threshold, real risk of significant harm. Other jurisdictions globally talk to us about our processes. We've seen the real risk of significant harm in that threshold introduced in legislation in other jurisdictions. So I think that's been what Alberta has done since amending the legislation came into force back in 2010. What Alberta has done in that area around breaches and around flushing out what that looks like and influencing other jurisdictions has been really significant. I'll leave that there.

Ron Kruzeniski:

Well, that's a pretty impressive list. Of course, as I think about my couple years left, I think about what concerns me that I haven't been able to achieve. But at least I've got two more years to maybe get those off my list, maybe. So are there things that you disappointed you couldn't quite achieve, maybe running out of time or just not able to move the decision-makers in government to do it? Are there anything on the "I regret I couldn't get this done" list?

Jill Clayton:

Well, first of all, I will say that, does the last year ever go quickly? And then you think you have enough time, and then you realize that you're packing up, in my case, 10 years' of stuff. And wow, do you ever run out of time quickly. There's so much to be done. And it's hard to get yourself out some of the ongoing everyday stuff, because it's constant. And then there are some things that I can pass off to other people. Then there's some things that only I feel like I should do, rather, it's not fair to pass this off to somebody else. So wow, does it ever go quickly. And I've been thinking about it for quite some time, but it just sneaks up on you, that's for sure.

But yes, I think there are not so much regrets, because I think we've tried to do these things, but you can't do everything. And you think 10 years is a long time, but as I said, it does go really quickly. So things that I would've liked to achieve that we have not achieved, I've already mentioned the solicitor-client privilege issue. That is one that continues to be really problematic for the office. Everything functioned a particular way for about 18 years, where if needed, if privilege was being claimed, we would get a copy of the records. And we would review them and we would say, "yea or nay, this has been properly claimed, or it has not been." Go back and rethink it, that sort of thing. And it all worked really well until it didn't.

And then I think ideally, certainly, I've heard from people involved in the drafting of the legislation at the time, I know what the intent was based on these conversations I've had with people. But the Supreme Court found that the language was not good enough for me to be able to compel the production of those records for our review. They can still be given to me, and the review still has to be done, and

there's still provisions in the legislation that require that. But it's become so much more complicated. Certainly, public bodies in particular will understand that to mean that they can't give us the records for review, or they don't want to give us the records for review.

But it's turned into now we have a protocol where we expect a description of the records, and even that becomes challenging. Clearly, the courts aren't all that interested. We get different responses from the courts on these things. There is no mechanism to get the records before the court, and we know that somebody has to be reviewing this claim.

So I know my ideal solution would be that we just carry on the way we carried on for 18 years, make the legislation clearer, as has happened federally, for example. And as has happened in other jurisdictions, where it is crystal clear, you make the language absolutely clear. So I've asked for that, and obviously haven't been successful at that.

Failing that, let's make it crystal clear how I can get these records to the courts, because at the moment, where it's not working, it takes years before a matter is heard by the court. Then there's a protocol that has to be invoked there. And again, it literally takes years. And so this is not the way to get access to records, or even to get these things decided in a timely way. I'm still hopeful that maybe something will come out of any upcoming reviews or reform of legislation.

So that would be the next thing that I regret, or that I feel that we haven't achieved. I've certainly asked for legislative reform on certain topics to include political parties, to include nonprofits. I don't think it's a secret that I was disappointed at the last review of Alberta's PIPA. We haven't seen anything meaningful in the public sector in the 10 years I've been Commissioner, and even before that.

We hadn't seen anything meaningful in the health sector other than, as I said, mandatory breach reporting. Took four years before that, that that was passed. And it took four years for that to come into force, but it did come into force in 2018. And then there was significant amendments to The Health Information Act, as I said, I think towards the end of 2019. But that did not involve any kind of broad public consultation. So I'm fearful about some of the changes that were introduced, and I commented publicly on that.

I will say, though, I'm, at this point, feeling a little bit optimistic. It looks like, and I did allude to this in the Annual Report message as well, there has been some consultation by the minister responsible for our public sector and private sector laws, consultation with public, a stakeholder survey as well, and some in-depth focused consultation. So I'm hopeful. We've been asked for our opinion. We've had some meaningful dialogue, which is a fantastic thing. There's often dialogue and consultation, but it's not always meaningful, as I'm sure you know, Ron. Things are looking positive. I'm hopeful that there will be some significant change going forward.

Other things we didn't achieve, one thing I wanted to look at, I've mentioned, again, that a couple of years ago, the provincial government centralized the responding to access requests function, and we commissioned some research. We shared that with them. They went ahead with this. I would have loved to have enough time to, and certainly... Maybe I shouldn't say this, but... Had intended to go and take a look at how well that was working. Were response times getting faster? Was it more efficient? Was it working better? Less red tape? But then the pandemic hit. So I haven't really had a chance to do that. And I don't think during the pandemic is the time I want to take a look at that. So I did mention in the Annual Report, that might be something that the next Commissioner might like to do.

And then I think the only other thing I would mention is that it's interesting, because I think a lot of people who know Alberta would say that it had been pretty politically stable for a very long time. But I would say this last 10 years, it has been pretty unstable. There's been a lot of change. So I've been Commissioner for 10 years. There have been five premiers in that 10 years, and there's been over eight

responsible ministers, and then associate ministers for the legislation that I oversee. So that's a lot of change in leadership. There's been three different governing parties. So that's a lot of change in 10 years.

And of course, Alberta has had some economic challenges, certainly, in this last decade. And that definitely translates to budget issues. And as an office, we've had this massively increasing workload, but we haven't really had a commensurate increase in resources. So if it had been a more economically viable decade, I suppose... I talked already about some of the things that I wanted to do more proactive work, and using all my powers and to do research, and those kinds of things... I would've liked to have more resources to more fully develop a policy shop here.

I'm certainly envious of my colleagues in other jurisdictions who've got lots of people who are able to work on policy. It was an early intent, but then the workload just got out of control. And so rather than have people doing policy work, we really needed all hands on deck just to respond to things walking in the door. So if I had more time or if things were a bit different, I might realign some priorities in the office to more fully develop that, or ideally have some more people around to do that kind of work. But again, perhaps that's something that the next Commissioner will decide to focus on.

Ron Kruzeniski:

So, your term expires January 31, but as I understand it, you basically stay in office until the replacement is appointed, which can take a number of months. But I did note that you said you had a master's in planning. So do you have your future planned out once you leave office here?

Jill Clayton:

Ron, there's an irony there, in that I do not. I've never been one to actually plan out my future in that kind of way. I have been incredibly fortunate. I've had tremendous advice from my parents. They've always said, "you should do something that you're really passionate about and interested in." And I've followed that advice, and I've done some interesting things. And I've always taken opportunities when they've been presented in front of me. And I've just been incredibly fortunate to get to do work that I love, both before and after in getting to this office. So nobody can say that it was planned that I was going to go from a degree in history, and then a master's degree in urban planning, of all things, to being Information and Privacy Commissioner. Anyway, it's been a very fortunate, happy coincidence for me that it's all worked out the way it has. I've been very, very lucky.

Ron Kruzeniski:

So, does this mean until that opportunity comes, you'll be skiing in Banff or Jasper every day, and just waiting for the opportunity?

Jill Clayton:

Absolutely not. I don't like the cold weather, so no. Nope. My skiing days are well behind me. Well behind me. No, I think I will say that again, I have been incredibly fortunate. I have loved every second of this, of the work I've done with the office and the work that I've done as Commissioner. But you throw yourself whole hog into this sort of thing, right? You're a champion and a cheerleader, and you've got to keep your energy up. And you've got to continue to engage, even if it's not going the way you necessarily want it to go.

And you're always thinking ahead and strategizing, and "What are we going to do next? And what about the money and the budgets?" I think there's a lot of challenges, and I've enjoyed all of that, too. I mean, that's part of what makes this such a fantastic experience. That, and being able to work with wonderful

colleagues, both in the office and across the country. But I could use a break from that. I wouldn't mind. I wouldn't mind not having to make as many decisions in a day for a while. So I'll take a little bit of a break, and figure out what I'm going to do next.

Ron Kruzeniski:

So, Jill, I want to thank you very much for doing this podcast. And I want to thank you for your contributions not only to Albertans, but to Canadians and the Federal Provincial Commissioners when we get together, and our meetings and your presentations there, and other conferences that I would all of a sudden look at the agenda and see that you were making a presentation. Thank you for all of that. And I just hope that perfect opportunity comes along at the right time, sometime in 2022, and you know it's the right thing for you. So thanks for doing this podcast.

Jill Clayton:

Well, thanks so much, Ron, for inviting me to do this. It's been a real joy to work with you over the years, and with our other colleagues across the country. And yeah, thanks for today. It's fun to reflect, think back on all this stuff.