

NEWFOUNDLAND AND LABRADOR AQUACULTURE INDUSTRY ASSOCIATION (NAIA)

**SUBMISSION TO THE *ACCESS TO INFORMATION AND PROTECTION OF
PRIVACY ACT, 2015* STATUTORY REVIEW COMMITTEE 2020**

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TABLE OF CONTENTS

Background	1
The Aquaculture Industry, Public Reporting and the ATIPPA, 2015.....	2
Subsection 39(1) of the <i>ATIPPA, 2015</i>	4
Subsection 9(4) of the <i>Aquaculture Act</i>	5
Aquaculture Industry Deserves Equal Treatment of Commercially Sensitive Information.....	7
Conclusion.....	8

The Newfoundland and Labrador Aquaculture Industry Association (“**NAIA**”) welcomes the opportunity to make the following submission to the *Access to Information and Protection of Privacy Act, 2015*¹ (the “**ATIPPA, 2015**”) Statutory Review Committee 2020 (the “**Committee**”).

Background

NAIA is a member-based organization that represents the interests of seafood farmers and their suppliers in Newfoundland and Labrador (“**NL**”). NAIA passionately advocates on behalf of its members to facilitate and promote the responsible development of the aquaculture industry in the province.

¹ *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2.



NEWFOUNDLAND AND LABRADOR
AQUACULTURE INDUSTRY ASSOCIATION

Aquaculture is one of the fastest growing sectors in Canada. As the global population continues to grow and the demand for nutritious and safe seafood surpasses the oceans wild fishery capacity, aquaculture continues to grow to fill the gap. The majority of seafood consumed worldwide is now farmed.

In NL, the aquaculture industry contributes significantly to the province's gross domestic product and offers diverse employment opportunities. The industry has particularly increased employment in rural communities throughout the province, and has the potential to grow. Aquaculture production in NL is mostly comprised of growers of high quality salmon and organic mussels. In 2016, the production value of the industry was more than a quarter billion dollars and growing. Significant expansion is expected in the salmon sector, with potential growth of over 50,000 MT anticipated. The mussel sector has grown substantially since 2003, from 1,300 MT to 3,200 MT in 2016, and is poised for future expansion.

In its *Way Forward – Aquaculture Sector Work Plan*², the Government of NL identified a growth target of increasing commercial salmon production to 50,000 MT (from 25,411 MT, valued at \$263 million in 2016) and commercial mussel production to 10,750 MT (from 3,211 MT, valued at \$13.6 million in 2016) by, among other things, increasing the water area available for development in 2018. Such an increase would generate 1100 person years of employment. The target coincides with a further goal of increasing NL's food self-sufficiency to at least 20 percent by 2022 (from approximately 10 percent in 2018).

The Aquaculture Industry, Public Reporting and the ATIPPA, 2015

Participants in the aquaculture industry in NL routinely share information with public bodies as a matter of licensing and statutory compliance. Participants are also subject to regulatory auditing and inspection. It is generally accepted by NAIA's members that such reporting and collection of information is a hallmark of responsible regulatory oversight.

² <https://www.gov.nl.ca/ffa/files/Sector-Workplan-Online.pdf>



NEWFOUNDLAND AND LABRADOR
AQUACULTURE INDUSTRY ASSOCIATION

The *Aquaculture Act*³ directs aquaculture licensees' sharing information with government, for example, as follows:

- Subsection 4(6)(d) of the *Act*, which relates to aquaculture licensing, provides that the Minister of Fisheries, Forestry and Agriculture (the “**Minister**”) may require records to be kept and information and documents to be provided that the Minister considers advisable; and
- Subsection 6(4) of the *Act*, which relates to inspection, provides that a person responsible for aquaculture gear, an aquaculture facility or other prescribed place shall provide the information, documents and samples, and carry out the tests and examinations, that an aquaculture inspector may reasonably require.

The Government of NL's *Aquaculture Policy and Procedures Manual*, issued under the *Aquaculture Act*, likewise includes policies which involve the reporting and collection of business information of aquaculture licensees, for example, as follows:

- *Policy AP 2 – Application Requirements*, which provides for production of financial information, fish health management plans, biosecurity plans, integrated pest management plans, fish disposal plans, production plans and other such business information to government;
- *Policy AP 7 – Annual Reporting*, which provides for annual reporting to government respecting each licensed aquaculture site;
- *Policy AP 11 – Aquaculture Inspection Program*, which provides for inspections to be carried out by government officials to ensure marine and freshwater aquaculture facilities are operating in accordance with the *Aquaculture Act* and its regulations;
- *Policy AP 17 – Public Reporting*, which provides for reporting to be made to government in circumstances of escape, quarantine, depopulation and incident events that occur on licensed aquaculture sites; and
- *Policy AP 32 – Aquatic Animal Health Reporting*, which provides for reporting to be made to government in circumstances of reportable disease events or outbreaks.

³ *Aquaculture Act*, RSNL 1990, c. A-13.



NEWFOUNDLAND AND LABRADOR
AQUACULTURE INDUSTRY ASSOCIATION

As a result of these requirements, the Government of NL has in its custody and control an ever-growing collection of business and commercially sensitive information relating to aquaculture licensees and their activities. The *ATIPPA, 2015* applies to all records in the custody of or under the control of public bodies, save those records expressly listed in subsection 5(1) of the *Act*. The records collected by the Government of NL pursuant to aquaculture license conditions, the requirements of the *Aquaculture Act* and aquaculture policies are records to which the *ATIPPA, 2015* applies.

ATIPPA, 2015 presumes a public right of access to information, subject only to specific exceptions set out in the *Act*.

Subsection 39(1) of the ATIPPA, 2015

When NAIA's members are consulted by public bodies in preparing responses to access to information requests made under the *ATIPPA, 2015*, the primary statutory exception that members look to for protection from disclosure is subsection 39(1), which relates to disclosure that could be harmful to the business interests of third parties. Subsection 39(1) reads:

Disclosure harmful to business interests of a third party

39. (1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,



NEWFOUNDLAND AND LABRADOR
AQUACULTURE INDUSTRY ASSOCIATION

(iii) result in undue financial loss or gain to any person, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

Subsection 39(1) is challenging to substantiate as a result of the applicable three-part test. In practice, the three-part test is seldom met. The difficulty lies in the second part of the test, which requires that the information be supplied, implicitly or explicitly, in confidence. While some third party business information may be supplied in confidence, others, such as contracts, are deemed to be “negotiated” and not “supplied”, and therefore fail to meet the requirements of the test. Such records may contain commercially sensitive information, however the current section 39 disallows the application of section 39 to the records. Equally problematic in application is the third part of the test, which is routinely accorded an unduly high threshold to substantiate. NAIA submits that the sufficiency of section 39 in its current language should be reviewed by the Committee to determine whether amending it would coincide with the provision’s underlying policy justification.

Subsection 9(4) of the *Aquaculture Act*

Respecting information shared with the Government of NL that is deposited with the Registrar of Aquaculture, the legislature has signaled by subsection 9(4) of the *Aquaculture Act* that the industry should have an expectation of confidentiality in relation to certain types of information that it produces. Section 9 reads:

Registrar

9. (1) The minister may designate a person in the department to be Registrar of Aquaculture.

(2) The registrar shall keep copies and records of aquaculture licences, leases of land granted for aquaculture purposes under the *Lands Act*, environmental preview reports and environmental impact statements prepared under the Part X of the *Environmental Protection Act* and other documents that the minister may direct or that may be prescribed.

(3) The records kept by the registrar under subsection (2) shall be open for inspection by members of the public during office hours upon payment of a prescribed fee.



NEWFOUNDLAND AND LABRADOR
AQUACULTURE INDUSTRY ASSOCIATION

(4) Notwithstanding subsection (3), information prescribed as confidential shall not be available to the public.

(5) The registrar may carry out a function or perform a duty delegated to him or her under an Act or regulation of Canada.

(Emphasis added.)

Subsection 11(g) of the *Act* provides for the promulgation of regulations concerning the classifying of information in the records held by the Registrar of Aquaculture as confidential. Likewise, subsection 11.2(r) provides for the promulgation of regulations respecting information and documents to be provided to the Minister by a licensee concerning the use, productivity, investment and obligations of the licensee in respect of an aquaculture facility and other matters pertinent to the conduct of aquaculture and the marketing and sale of aquaculture produce by the licensee.

The *Aquaculture Regulations*⁴ further pronounce on the confidentiality to be afforded information deposited with the Registrar of Aquaculture, as follows:

Confidential Information

5. (1) The Registrar of Aquaculture shall regard as confidential and refuse access to members of the public to information which

(a) describes unique trade practices or technology used by a licensee, unless those trade practices or technology are protected by patent, copyright or industrial design; or

(b) describes information concerning the financial backing, obligations or performance of an aquaculture facility or an aquaculture enterprise.

(2) The Registrar of Aquaculture shall only regard information as confidential and refuse access to members of the public to that information if a request for a designation of confidentiality is made in writing by the licensee with the submission of the information.

(3) The Registrar of Aquaculture shall only regard information concerning unique trade practices or technology as confidential for 3 consecutive calendar years.

⁴ *Aquaculture Regulations*, CNLR 1139/96.



NEWFOUNDLAND AND LABRADOR
AQUACULTURE INDUSTRY ASSOCIATION

(4) The Registrar of Aquaculture shall release information referred to in subsection (1) to a person who is authorized to receive the information by the written consent of the licensee.

(Emphasis added.)

The *ATIPPA, 2015* includes, in section 7, an express provision respecting conflicts between the *ATIPPA, 2015* and other statutes. Subsection 7(1) provides that where there is a conflict between the *ATIPPA, 2015* or a regulation made under the *Act* and another statute or regulation enacted before or after the coming into force of the *Act*, the *ATIPPA, 2015* or the regulation made under it prevails. However, subsection 7(2) provides that notwithstanding subsection 7(1), where access to a record is prohibited or restricted by, or the right to access a record is provided in, a provision designated in Schedule A of the *ATIPPA, 2015* that designated provision prevails over the *ATIPPA, 2015* or a regulation made under it. Subsection 9(4) of the *Aquaculture Act* is not listed in Schedule A, and therefore is not afforded priority over the provisions of the *ATIPPA, 2015*.

NAIA submits that consideration should be given to the inclusion of subsection 9(4) of the *Aquaculture Act* in Schedule A of the *ATIPPA, 2015*. Alternatively, the protection offered by section 39 of the *ATIPPA, 2015* should reflect the confidentiality that is intended to apply to participants in the aquaculture industry signaled by subsection 9(4) of the *Aquaculture Act*. There should be no question that the legislature has signaled that commercially sensitive information in the custody and control of government arising in the aquaculture context should be given confidential status.

Aquaculture Industry Deserves Equal Treatment of Commercially Sensitive Information

NAIA's members observe that other industry sectors in NL are afforded more confidentiality to information that they routinely share with government as regulator than are aquaculture licensees. If regard is given, for example, to the statutory privilege set out in subsection 115(2) of the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and*



NEWFOUNDLAND AND LABRADOR
AQUACULTURE INDUSTRY ASSOCIATION

*Labrador Act*⁵, or section 23 of the recently passed *Oil and Gas Corporation Act*⁶, it is evident that greater protection is given to commercially sensitive information in the context of the oil and gas industry than is given to equally sensitive commercial information in the aquaculture industry context. It is noteworthy that both of the aforementioned provisions applying to the oil and gas sector are given special treatment by their appearing in Schedule A of the *ATIPPA, 2015*, and thus priority over the provisions of the *ATIPPA, 2015* by operation of subsection 7(2) of the *Act*. NAIA submits the aquaculture industry deserves equally robust and protective treatment of its commercially sensitive information in the custody and control of government. The same policy considerations that underlie the oil and gas sector protections are applicable to the aquaculture sector.

Conclusion

NAIA appreciates the opportunity to offer input on behalf of its members to the Committee on how the *ATIPPA, 2015* impacts the aquaculture sector. While responsible regulatory oversight of the aquaculture industry dictates government collecting commercially sensitive information on a routine basis, such information should be afforded confidentially protections that are balanced with that necessity. NAIA submits that adjustments, such as inclusion of subsection 9(4) of the *Aquaculture Act* in Schedule A of the *ATIPPA, 2015*, would bring the treatment of commercially sensitive information collected in the aquaculture context in alignment with how such information is treated in other industry sectors.

⁵ *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, RSNL 1990, c. C-2.

⁶ *Oil and Gas Corporation Act*, SNL 2019, c. O-6.1.