

**OIL AND GAS CORPORATION OF NEWFOUNDLAND AND LABRADOR**  
**SUBMISSION TO THE ACCESS TO INFORMATION AND PROTECTION OF**  
**PRIVACY ACT, 2015 STATUTORY REVIEW COMMITTEE 2020**

November 2020

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The Oil and Gas Corporation of Newfoundland and Labrador (the “**Oil & Gas Co.**”) welcomes the opportunity to make the following submission to the *Access to Information and Protection of Privacy Act, 2015*<sup>1</sup> (the “**ATIPPA, 2015**”) Statutory Review Committee 2020 (the “**Committee**”).

**Background**

The Oil & Gas Co. is a Crown corporation established in 2019 by enactment of the *Oil and Gas Corporation Act*<sup>2</sup>. Reporting directly to the Minister of Industry, Energy and Technology<sup>3</sup>, the Oil & Gas Co. focuses on maximizing opportunities for growth in the province’s offshore oil and gas industry and positioning the province as a globally preferred location for oil and gas development. The Oil & Gas Co.’s activities aim at maximizing exploration investments in Newfoundland and

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

<sup>2</sup> *Oil and Gas Corporation Act*, SNL 2019, c. O-6.1.

<sup>3</sup> *Department of Natural Resources Notice, 2019*, NLR 99/19, s. 5(1), Schedule A.

Labrador, to acquire and manage the Province's equity interests in oil and gas projects, and enhancing local supply chain development in support of *Advance 2030 – the Way Forward on Oil and Gas*<sup>4</sup>.

The objects of the Oil & Gas Co., as expressed in subsection 7(1) of the *Oil and Gas Corporation Act*, are to invest in, engage in and carry out prescribed activities in the province and elsewhere, in accordance with the priorities of the government of the province. The prescribed activities are:

- the exploration for, development, production, refining, marketing and transportation of hydrocarbons and products from hydrocarbons; and
- research and development.<sup>5</sup>

In addition, the Oil & Gas Co. has discretion to invest in and engage in other activities that the Lieutenant-Governor in Council approves.<sup>6</sup>

The Oil & Gas Co. partners with private sector oil and gas companies and other service providers to pursue its mandated activities. The entity will hold the Province's future equity interests and currently manages all of the Province's interests in existing oil and gas assets; Hebron, White Rose, and Hibernia South Extension and is responsible for the Bull Arm Fabrication Site. While the Oil & Gas Co. is overseen by government, as a directly held Crown corporation, the corporation has operational autonomy for the specific purpose of keeping the day-to-day activities at arm's length from government.<sup>7</sup>

The resource potential in Newfoundland and Labrador's offshore is significant, with over 650 leads and prospects identified to date. Only ten per cent of the province's offshore potential has been explored, and that has already yielded a combined resource potential of 63.3 billion barrels of oil and 224.1 trillion cubic feet of gas. The Oil & Gas Co.'s engagement in offshore seismic work and other geoscience research is intent on unlocking that resource potential. The Oil & Gas Co. therefore has custody and control of data, information, plans, and perspectives of all its offshore licence holders and service providers. In this regard, the corporation strives to maintain a level and competitive playing field in its efforts to attract and manage the foreign direct investment so critical to the provincial economy.

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<sup>4</sup> <https://www.gov.nl.ca/iet/files/advance30-pdf-oil-gas-sector-final-online.pdf>

<sup>5</sup> *Oil and Gas Corporation Act*, SNL 2019, c. O-6.1, subsection 7(1).

<sup>6</sup> *Ibid*, subsection 7(2).

<sup>7</sup> See the general powers set out in *Ibid*, section 9.

### **The Oil & Gas Co. and the ATIPPA, 2015**

The Oil & Gas Co. is a public body for the purpose of the *ATIPPA, 2015*<sup>8</sup>. As such, the *ATIPPA, 2015* applies to all records in the custody of or under the control of the Oil & Gas Co., save those records expressly listed in subsection 5(1) of the *Act*.

As a public body for the purpose of *ATIPPA, 2015*, Oil & Gas Co. is committed to fulfilling its administrative duties under the *Act*, towards achieving the *Act*'s purpose respecting transparency and accountability. That purpose, as set out in section 3 of the *Act*, is to facilitate democracy through:

- ensuring that citizens have the information required to participate meaningfully in the democratic process;
- increasing transparency in government and public bodies, including the Oil & Gas Co., so that elected officials, officers and employees of public bodies remain accountable; and
- protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies, including the Oil & Gas Co.

Oil & Gas Co. is mindful that the *ATIPPA, 2015*'s purpose is achieved through, among other things:

- giving the public a right of access to records;
- specifying the limited exceptions to the right of access that are necessary to (i) preserve the ability of government to function efficiently as a cabinet government in a parliamentary democracy, (ii) accommodate established and accepted rights and privileges of others, and (iii) protect from harm the confidential proprietary and other rights of third parties;
- providing that some discretionary exemptions will not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception; and
- providing for an oversight agency that, among other things, provides independent review of decisions made by public bodies under the *Act*.<sup>9</sup>

Oil & Gas Co. has an Access and Privacy Officer on staff to coordinate responses to access requests submitted under the *ATIPPA, 2015*. The Officer responds to each access request after

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<sup>8</sup> *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2, subsection 2(x).

<sup>9</sup> *Ibid*, subsection 3(2).

consultation with relevant Oil & Gas Co. employees and, where applicable, third parties. In such circumstances, Oil & Gas Co. looks to both the *ATIPPA, 2015* and the *Oil and Gas Corporation Act* for direction.

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. Included in the list of provisions designated in Schedule A is section 23 of the *Oil and Gas Corporation Act*, which (as discussed further herein below) is one that restricts access to commercially sensitive information. Therefore, subsection 7(2) of the *ATIPPA, 2015* confirms the priority of section 23 of the *Oil and Gas Corporation Act*.

The Oil & Gas Co., being a newly formed Crown corporation, has yet to receive an access to information request under the *ATIPPA, 2015*.

### **Section 23 of the *Oil and Gas Corporation Act***

The general exceptions to access found in the *ATIPPA, 2015* are supplemented by section 23 of the *Oil and Gas Corporation Act*. Section 23 restricts the public right of access to records in the custody or control of the Oil & Gas Co. that contain commercially sensitive information. It is the Oil & Gas Co.'s submission that no amendment or repeal of section 23 should be recommended by the Committee, for the reasons reviewed herein below.

The term “*commercially sensitive information*” is defined in subsection 2(d) of the *Act*, as follows:

**2. In this Act**

...

(d) “commercially sensitive information” means information relating to the business affairs or activities of the corporation or a subsidiary, or of a third party provided to the corporation or the subsidiary by the third party, and includes

(i) scientific or technical information, including trade secrets, industrial secrets, technological processes, technical solutions, manufacturing processes, operating processes and logistics methods,

- (ii) strategic business planning information,
  - (iii) financial or commercial information, including financial statements, details respecting revenues, costs and commercial agreements and arrangements respecting individual business activities, investments, operations or projects and from which such information may reasonably be derived,
  - (iv) information respecting positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the corporation, a subsidiary or a third party, or considerations that relate to those negotiations, whether the negotiations are continuing or have been concluded or terminated,
  - (v) financial, commercial, scientific or technical information of a third party provided to the corporation or a subsidiary in confidence,
  - (vi) information respecting legal arrangements or agreements, including copies of the agreements or arrangements, which relate to the nature or structure of partnerships, joint ventures, or other joint business investments or activities,
  - (vii) economic and financial models used for strategic decision making, including the information used as inputs into those models, and
  - (viii) commercial information of a kind similar to that referred to in subparagraphs (i) to (vii),
- but does not include information relating to an independent contractor's
- (ix) name,
  - (x) position or function with the corporation,
  - (xi) remuneration, and
  - (xii) payments received from the corporation;

Section 23 provides that in addition to the information that shall or may be refused under Part II, Division 2 of the *ATIPPA, 2015*, the Chief Executive Officer of the Oil & Gas Co. or a subsidiary, or the head of another public body, in a prescribed circumstance, (i) may refuse to disclose to an applicant under the *ATIPPA, 2015* commercially sensitive information of the Oil & Gas Co. or the subsidiary, and (ii) shall refuse to disclose to an applicant under the *ATIPPA, 2015* commercially sensitive information of a third party.<sup>10</sup>

The prescribed circumstance for such refusals is where the Chief Executive Officer of the Oil & Gas Co. or the subsidiary to which the requested information relates, taking into account sound and fair business practices, (i) reasonably believes that the disclosure of the information may

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<sup>10</sup> *Oil and Gas Corporation Act*, SNL 2019, c. O-6.1, subsection 23(1)(a) and (b).

harm the competitive position of, interfere with the negotiating position of, or result in financial loss or harm to the Oil & Gas Co., the subsidiary or the third party, or (ii) reasonably believes that information similar to the information requested to be disclosed is treated consistently in a confidential manner by the third party, or is customarily not provided to competitors by the corporation, the subsidiary or the third party.<sup>11</sup>

Section 23 of the *Oil and Gas Corporation Act* is critical to the Oil & Gas Co.'s ability to pursue the objects expressed in section 7 of the *Act*. When the Bill proposing enactment of the *Oil and Gas Corporation Act* was debated in the House of Assembly, the Minister of Natural Resources commented on the necessity for section 23 in light of the underlying policy rationale and the competitive commercial context in which the Oil & Gas Co. operates, as follows:

*"Section 23 speaks to the provisions for records of commercially sensitive information. Additional rights to protect commercial information are required given the commercial nature of the contracts the corporation requires to conduct its business. Oil and gas companies would not enter into agreements with a Crown corporation if there is a possibility that their commercial information was going to be disclosed."*

*If you recall, Mr. Speaker – and I'm sure you do – Chief Justice Wells even made that comment when he brought into effect the ATIPPA legislation. This section outlines the procedures to be followed as it relates to the Access to Information and Protection of Privacy Act, the Auditor General Act, and the Citizens' Representative Act."<sup>12</sup>*

(Emphasis added.)

In response to concerns raised by opposition and independent Members of the House of Assembly respecting section 23, the Minister further commented:

*"The Oil and Gas company, as a subsidiary of Nalcor, this was under the Energy Corporation Act as well and it was really put in there because of that commercially sensitive information from the Oil and Gas company. That was one of the reasons why it was in the Energy Corporation Act. I do know that Chief Justice Wells who is reviewing ATIPPA legislation did say and did recognize that commercially sensitive information is required or you wouldn't be able to have the information required to make informed decisions that are essential, especially under oil and gas.*

*I will say that ATIPPA does apply to the Oil and Gas Corporation; however, there is a section on commercially sensitive information that does prevail. So I will say that it is very similar to what is in the Energy Corporation Act, recognizing what Chief Justice Wells who wrote the ATIPPA legislation and who did give his considered opinion that – and I can quote here: It requires to keep certain aspects of its operation's information confidential from competitors. If it did not, it could run the risk of failure with the potential for massive, adverse financial consequences to the people of the province. As well, it partners with one*

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<sup>11</sup> *Ibid*, subsection 23(1)(c) and (d).

<sup>12</sup> House of Assembly Proceedings, Vol. XLVIII No. 54, March 11, 2019.

or more private sector commercial entities and the significant part of its commercially competitive activity. Those commercial partners would not be prepared to disclose sufficient information – unquote.

*That was from Chief Justice Wells in the day. So he recognized that there is a requirement and I will say that I believe that there has been limited cause for concern – I don't know of any – but limited cause for concern about the oil and gas company.*"<sup>13</sup>

(Emphasis added.)

In further response, the Minister commented:

"I will say this, Justice Wells, in his deliberations around ATIPPA and around the Energy Corporation Act, did recognize commercial sensitivity, as the Member opposite has said. He talked a lot about the commercial risks and the risks around public disclosure and the fact that if there is a risk of disclosure that perhaps we won't get the information that we require from our commercial partners. The commercial partners would be reluctant to give information in case it ever became public and disclosed.

*The Privacy Commissioner, under the ATIPPA legislation, is required to be as open and transparent as they possibly can. That is a good thing for the province.*

*I will say to the Member opposite that, of course, the Privacy Commissioner will pass comment and pass judgment. I will give him an incident. In the last 10 years, I understand – I'll say that – there's been once that the oil and gas corporation within Nalcor had to go to the CEO and make a determination. They couldn't release information once in that 10-year period, and the Privacy Commissioner agreed. The Privacy Commissioner can weigh in on the fact and could actually go to court if they thought it should be released.*

*So, I'll say it's an element of risk, Mr. Chair, an element of ensuring that the information is able to flow between the Crown corporation and its private sector partners. Most of them, I think almost all of them, are publicly traded. There are a lot of rules around publicly traded information, Mr. Chair. I would think that there is a requirement and an understanding of commercial sensitivity risk. I'm sure if there is anything that is required to be released, that the Privacy Commissioner can weigh into that and can go to court, if required."*<sup>14</sup>

(Emphasis added.)

As referenced by the Minister, the 2014 Independent Statutory Review Committee chaired by Clyde K. Wells addressed, among other things, section 5.4 of the *Energy Corporation Act*<sup>15</sup>, which provision is substantially similar to section 23 of the *Oil and Gas Corporation Act* and is also listed in Schedule A of the *ATIPPA, 2015*. In its final report, the committee summarized the similar policy reasons underlying section 5.4, as follows:

*"At the public hearing, Tracey Pennell, Legal Counsel and ATIPP Coordinator, and James Keating, Vice President (Oil and Gas), explained the corporation's position with respect to section 5.4 of the Energy Corporation Act. It gives the chief executive officer (CEO) of the*

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<sup>13</sup> *Ibid.*

<sup>14</sup> House of Assembly Proceedings, Vol. XLVIII No. 55, March 12, 2019.

<sup>15</sup> *Energy Corporation Act*, SNL 2007, c. E-11.01.

corporation the right to declare a record to be commercially sensitive to the corporation or a third party. Such a declaration, when it is ratified by the board of directors, would entitle the corporation to refuse to disclose a record. [...]

Mr. Keating gave an example to demonstrate his view that Nalcor Energy needs the protection offered by section 5.4:

*We had taken negotiations on two large offshore oil and gas projects. We had progressed to a point where progress was now slowing largely on the notion that if Nalcor Energy – which we are today, we were Energy Corporation then – were to be a minority interest partner, five percent or ten percent partner in a joint venture, the review both that we undertook with our external and internal counsels plus, of course, the review that our future partners took on the existing legislation as it was then – I think it was 2005 provisions – they had serious concerns that we wouldn't have found the protection, that typical of what an ongoing business concern would have, either in relation to their information, third party, or in relation to any other learnings we would have of our own on that and so they felt at risk. So this was in a time when, again, if you can imagine we were inserting ourselves into existing commercial documents amongst existing co-venturers on an ongoing project. Challenging. And as we went through the list of things that we needed to achieve to gain entry and of course to get benefit for the people of Newfoundland and Labrador, it seemed that this risk was something that was unbearable for the offshore oil and gas companies. So what we sought to do was look at that Act and say, well, where is it deficient. And I believe in section 27, in particular, the test was different. It was three parts of a test...*

*And why this is important is because at that time when we were drafting these agreements there were notions of sovereign immunity. There were notions of legislative stability. So commercial companies, when they do a deal with state-owned enterprise, especially on 30-year oil developments, they want to know that the relationship that we're going to enjoy from here today, they can bank on, quite frankly. They have certainty in. And one would say that if you had, either where you're a Crown agent or Crown corporation and a government and even an arm's length body, which were given the responsibility to oversee an Act, that wasn't enough for the private sector partners to ensure protection of their information. So, that's why they wanted to make sure there is a clear line of sight to the head of the corporation body in case there was breach, intentional or accidental. So that's, I guess, some of the formulation.*

Mr. Keating argued that section 5.4 does not prevent the Commissioner from expressing his disagreement with the determination of the CEO and board of directors.

...  
*As in the case with the Adoption Act, 2013 and the Children and Youth Care and Protection Act, the legislature has specified that notwithstanding the ATIPPA, those provisions shall prevail. The same comments the Committee made with respect to the impropriety of the Committee questioning the legislature's judgment in the matter apply here with even more force. The legislature specified that this statute is to apply notwithstanding section 6 of the ATIPPA. Section 6(1) is the provision that gives the ATIPPA priority over all other statutes. The legislature has clearly specified that this statute is to have priority, even in the face of the priority specified in section 6 of the ATIPPA.*

*Again, it may be helpful to participants to know that the Committee believes there is a sound basis for the approach taken.*

*The comments of Mr. Keating, excerpted above, explain in detail the underlying reasons for the presence of this section in the Energy Corporation Act. The compelling factor is that*



Nalcor Energy is operating, on behalf of the people of the province, in the competitive commercial world. That requires it to keep certain aspects of its operations information confidential from competitors. If it did not, it could run the risk of failure, with the potential for massive adverse financial consequences for the people of the province. As well, it partners with one or more private sector commercial entities in a significant part of its commercially competitive activity. Those commercial partners would not be prepared to disclose significant information to Nalcor Energy if Nalcor Energy were subject to the risk of disclosure of that information through the ATIPPA.<sup>16</sup>

(Emphasis added.)

As is the case in respect of section 5.4 of the *Energy Corporation Act*, the legislature has specified that notwithstanding the *ATIPPA, 2015*, section 23 of the *Oil and Gas Corporation Act* should prevail. With respect, this Committee's jurisdiction is to recommend changes to the *ATIPPA, 2015* to ensure that the objectives of the *Act* are realized. Where the legislature has enacted in another statute that it is to prevail notwithstanding the *ATIPPA, 2015*, the Oil & Gas Co. respectfully submits that it is not appropriate for the Committee to question the legislature's judgment in enacting that other statute.

The *Oil and Gas Corporation Act* is a specialty statute. It provides for all actions necessary to achieve the corporation's objects expressed in subsection 7(1). Section 23 protects commercially sensitive information that must be kept confidential from competitors. The processes in place for the management of access to and disclosure of information under the *ATIPPA, 2015* are not at all suitable for the management of the sort of commercially sensitive information to which section 23 applies. Clearly, the public interest is best served by access to this kind of information being regulated by a specialty statute.

As in the case of section 5.4 of the *Energy Corporation Act*, the compelling factor supporting the protection of commercially sensitive information is that the Oil & Gas Co. is operating, on behalf of the people of the province, in the competitive commercial world. That requires it to keep certain aspects of its operations information confidential from competitors. If it did not, it could run the risk of failure, with the potential for massive adverse financial consequences for the people of the province. As well, the Oil & Gas Co. partners with one or more private sector commercial entities in a significant part of its commercially sensitive activity. Those commercial partners would not be prepared to disclose significant information to the Oil & Gas Co. if the corporation were subject to the risk of disclosure of that information through the *ATIPPA, 2015*.

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<sup>16</sup> [https://www.parcnl.ca/documents/full\\_report.pdf](https://www.parcnl.ca/documents/full_report.pdf)

While the Oil & Gas Co. manages Nalcor Energy’s oil and gas interests in offshore developments, the existing equity interests remain, for the time being, in Nalcor Energy Oil and Gas. From an access to information standpoint, this translates into an equal need for both organizations to have the capacity to adequately protect commercially sensitive information from public disclosure. Altering this ability for one organization would have the consequential impact of opening the floodgates for both organizations with respect to the ability to maintain successful business relationships that drive economic growth and prosperity.

It is further noteworthy (i) that Oil & Gas Co. has not yet availed of section 23 of the *Oil and Gas Corporation Act* in response to an access request, and (ii) that since 2016, Nalcor Energy Oil and Gas has only availed of section 5.4 of the *Energy Corporation Act* on one occasion in response to an access request, as reflected in the following table:

Year	# of Requests	# of Requests (including consults)	# Requests s. 5.4 of ECA Applied	Complaints Received /CEO Certification Required
2016	2-both disregarded	5	0	0
2017	2	3	0	0
2018	1	2	0	0
2019	9	9	1	1
2020 to date	1	2	0	0

**Section 39 of the ATIPPA, 2015**

Section 39 of the *ATIPPA, 2015* sets out a mandatory exception to the public right of access in circumstances of disclosure harmful to business interests of third parties. Subsections 39(1)(a) to (c) provide a three-part test, all of which must be met for section 39 to apply.

In practice, the three-part test is seldom met. The difficulty lies in the second part of the test, which requires that the information was supplied, implicitly or explicitly, in confidence. While some third party business information may be supplied in confidence, contracts are deemed to be “negotiated” and not “supplied”, and therefore fail to meet the requirements of the test. Contracts

may contain commercially sensitive information, however the current section 39 disallows the application of section 39 to contracts. The Oil & Gas Co. 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.

### **Conclusion**

The Oil & Gas Co. primary concern respecting the *ATIPPA, 2015* is continuation of the priority given to section 23 of the *Oil and Gas Corporation Act*, for the policy reasons discussed above regarding the competitive commercial context in which the Oil & Gas Co. operates. The Oil & Gas Co.'s and its co-venturers rely on the protection provided by section 23 to protect their commercially sensitive information from disclosure to competitors. The Oil & Gas Co. recommends that no changes be made that might disrupt the application of section 23 of the *Oil and Gas Corporation Act*, and that section 23 continue to be listed as included in Schedule A of the *ATIPPA, 2015* for purposes of the application of subsection 7(2) of that *Act*.