

NALCOR ENERGY

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

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CORPORATE OVERVIEW

Nalcor Energy (Nalcor) is Newfoundland and Labrador's energy company. Nalcor is a Crown Corporation established in 2007 under a special act of the Legislature of the Province of Newfoundland and Labrador (Province). Under the *Energy Corporation Act (ECA)*, the Corporation's business includes the development, generation, transmission and sale of electricity including energy trading; and the development, production and sale of oil and gas. In carrying out its business activities, Nalcor ensures that the Province obtains maximum benefits from Newfoundland and Labrador's natural resources. The success of Nalcor and its lines of business have a direct impact on the people of Newfoundland and Labrador. Therefore, it is one of the Corporation's responsibilities to keep the public informed of its operations and business objectives.

Nalcor's operating structure is comprised of five lines of business based upon a combination of regulatory/corporate status and management accountability. The following summary provides a brief overview of the nature of the operations included in each of the Corporation's operating segments.

NL Hydro (NLH) A Crown Corporation – is comprised of both regulated and non-regulated activities.

- **NLH Regulated** activities encompass sales of electricity to customers within the Province that are regulated by the Newfoundland and Labrador Board of Commissioners of Public Utilities (PUB).
- **NLH Non-Regulated** activities include the sale of power purchased from Churchill Falls (Labrador) Corporation (CF(L)Co) to mining operations in Labrador West as well as operating activities that NLH manages that are not subject to rate regulation by the PUB.

Power Development – is comprised of the following:

- **Muskrat Falls** includes the 824 megawatt (MW) hydroelectric generating facility in Labrador on the lower Churchill River. Once complete, this asset will become part of the Power Supply operating segment.
- **Other** activities include ongoing and potential future power development activities, such as Gull Island.

Power Supply – is comprised of the following:

- **Lower Churchill Project (LCP) Transmission** includes the construction and operation of the Labrador-Island Link (LIL) and Labrador Transmission Assets (LTA), which consists of transmission lines connecting the Muskrat Falls Generating Station, the Churchill Falls Generating Station, and certain portions of the transmission system in Labrador to the island of Newfoundland.
- **Churchill Falls** owns and operates a hydroelectric generating facility which presently sells electricity to Hydro-Quebec and NLH.

- **Energy Trading** includes energy trading and commercial activities related to securing and optimizing markets to extract the greatest value from Nalcor's existing generation resources through the participation in export electricity markets.
- **Other** activities include Nalcor's operation of the Menihek Generating Station, Power Supply management and administration and community development related to Power Supply.

Oil and Gas – Nalcor Oil and Gas's existing equity interests in offshore developments Hibernia Southern Extension, Hebron and White Rose remain in Nalcor Oil and Gas, and effective January 1, 2020 are now managed by the Oil and Gas Corporation of Newfoundland and Labrador, a Crown corporation in its own right.

Corporate – includes corporate support, business development and shared services functions.

NALCOR'S APPROACH TO INFORMATION SHARING

Public accountability and transparency is a cornerstone of Nalcor's corporate culture. As part of its regular business operations, Nalcor uses multiple avenues to proactively provide timely and accurate information to the public, government and stakeholders. These include annual business reports, audited financial statements, public Annual General Meetings (AGM), responses to public requests for information, public notices, media briefings, stakeholder briefings and meetings, as well as public information sessions, open houses and industry presentations throughout the Province and beyond.

Each year, Nalcor publishes its Business and Financial Report. This annual report consists of Nalcor's corporate profile, a review of its business performance, management's discussion and analysis, audited consolidated financial statements, operating and financial statistics, and information on Nalcor's corporate governance (<https://nalcorenergy.com/newsroom/publications/>). Nalcor, in accordance with the *Transparency and Accountability Act*, also submits an Annual Performance Report to the Provincial Government. The Annual Performance Report is available on Nalcor's website (<https://nalcorenergy.com/about/transparency-accountability/reports/transparency/>). In addition to Nalcor, NLH also submits a separate Annual Performance Report in accordance with the *Transparency and Accountability Act* (<https://nlhydro.com/about-hydro/publications/>). Further, NLH's regulatory filings, including rate and capital applications, quarterly and annual reports, are filed and published with the PUB (<http://www.pub.nf.ca/>).

Information, records and reports are made readily accessible to the public through various communication mediums, including the Nalcor website (www.nalcorenergy.com), social media, print, direct mail, and newsletters. Reports and updates related to the Muskrat Falls Project are also available to the public on the project's website (<https://muskratfalls.nalcorenergy.com/>).

To facilitate the public's ease of access to information, Nalcor has a dedicated transparency and accountability page on its website that houses frequently requested information including

performance and environmental reports, Nalcor’s Code of Conduct, audit practices, links to other reports and detailed information on all lines of business. It also provides an opportunity to request further information. Nalcor also has a full-time Access and Privacy Officer who has the task of promptly and comprehensively responding to access to information requests. Nalcor also posts responses to its access to information requests on the Nalcor website (<https://nalcorenergy.com/about/transparency-accountability/atippa/responses/>).

Since 2016, Nalcor has received the following number of requests:

| Year | # of ATIPP Requests | # of Requests (incl. Consultations) |
|--------------|---------------------|-------------------------------------|
| 2016 | 63 | 101 |
| 2017 | 68 | 108 |
| 2018 | 93 | 117 |
| 2019 | 62 | 77 |
| 2020 to date | 24 | 31 |
| Total | 310 | 434 |

In addition, since January 2019 NLH has responded to 1,491 formal Requests for Information (RFIs) through the PUB’s regulatory process and approximately 1,500 interactions through social media. Nalcor has also responded to 287 RFIs through the PUB’s Reference Question regarding Rate Mitigation Options and Impacts. The Commission of Inquiry Respecting the Muskrat Falls Project (Muskrat Falls Inquiry) concluded in 2019 after a year of public hearings. Nalcor cooperated fully with the Inquiry submitting over four million documents, making a number of presentations and providing numerous witnesses. Since 2009, Nalcor has held a public AGM to discuss and answer questions about the Corporation’s results and achievements for the preceding year and plans for the current year. Videos of the AGMs are available online at <http://nalcorenergy.com/annual-general-meeting.asp>. Nalcor is also very active in providing information, engaging in conversations and answering inquiries from stakeholders through its social media channels, including Twitter and Facebook. (<http://nalcorenergy.com/social-media.asp>).

Nalcor believes that the public should have multiple access points to corporate information, both informal and formal, and it strives to proactively provide information to the public without the need for those seeking information to utilize the formal ATIPPA process. In fact, Nalcor has invited applicants, when appropriate, to its offices to discuss the content of their request and to provide one-to-one information in a way that is more meaningful than simply providing documents without context. Further to this, in some instances where requests for information are made outside the ATIPPA process, which contain information Nalcor may view as sensitive, Nalcor has suggested and recommended that the individual file an ATIPPA request so that the Applicant has recourse to the protections afforded within the ATIPPA, such as requesting that the Information and Privacy Commissioner review the decision made by Nalcor or appealing the decision made by Nalcor directly to the Supreme Court Trial Division.

As noted, Nalcor has an Access and Privacy Officer on staff to marshal the sources of the information requested from the appropriate people and places and coordinates the responses submitted under the ATIPPA for Nalcor and its subsidiaries. The Officer responds to each ATIPPA request after consultation with relevant Nalcor employees. When responding to ATIPPA requests, Nalcor looks to both the ATIPPA and the ECA for guidance. To ensure consistency, Nalcor has developed a standardized process for responding to ATIPPA requests that allows for streamlined internal consultation in order to provide the relevant records within the statutory time limits.

SECTION 5.4 OF THE ENERGY CORPORATION ACT

The ATIPPA applies to Nalcor and its subsidiaries. The exceptions to disclosure found in the ATTIPPA are supplemented by section 5.4 of the ECA, which deals with the disclosure of commercially sensitive information by Nalcor and its subsidiaries, not including NLH and CF(L)Co. The continued availability of section 5.4 of the ECA for Nalcor is critical to the Corporation's operations and to ensure that the Province obtains maximum benefits from Newfoundland and Labrador's natural resources. This criticality is compounded by the extremely limited application of section 39 of the ATIPPA, as outlined below.

Without Nalcor having the ability to avail of section 5.4 of the ECA for sensitive commercial information, and with the current confusion surrounding section 39 of the ATIPPA, Nalcor may find itself in a position where commercially-sensitive information should be withheld from the public, but there is no available, and suitable exception to apply. While all public bodies face difficulties in navigating through section 39, in Nalcor's case, the inability to utilize section 5.4 of the ECA can have the very real impact of resulting in financial harm to the Province of Newfoundland and Labrador, especially if there are no relevant exceptions available under section 35 of the ATIPPA – "disclosure harmful to the financial or economic interests of a public body." Nalcor's business often involves, and will continue to involve, complex commercial relationships such as those it presently has with Emera and various oil and gas companies. Its projects, both present and future, involve partners and contractors who by necessity provide Nalcor with information that to them is very commercially sensitive. Nalcor must be able to deal with these entities in carrying out its business and they in turn need to be comfortable that Nalcor can control the confidentiality of their information. Without the benefit of section 5.4, businesses will begin to fear that by submitting sensitive information to Nalcor, they are taking a risk that it may become available to the general public, even if their expectation is that it will not. If companies become worried that by conducting business with Nalcor, they may be putting sensitive and potentially harmful corporate information at risk, they will avoid sharing that information and doing business with the Corporation completely. This could very well result in uncompetitive bids being received for projects, the best vendors avoiding doing business with Nalcor, and a loss of possible business opportunities in relation to new ventures. Given the magnitude of the cost of projects undertaken by Nalcor and the complexity of its developments, it will handicap Nalcor's ability to meet its mandate and ensure that the Province obtains maximum benefits from Newfoundland and Labrador's natural resources. For these reasons, it is critically important that Nalcor's current ability to apply section 5.4 of the

ECA remains unchanged.

When Nalcor Oil and Gas was created, it was mandated to take an equity interest in new developments. The then existing participants in the offshore oil and gas industry resisted the involvement of a Crown agent at their management table for various reasons. One reason they resisted Government involvement is that information in the possession of the Crown is subject to disclosure obligations, such as the ATIPPA, even with regard to third party information. As a way to assuage this anxiety, the Crown put in place section 5.4 of the ECA in order to provide comfort to the offshore participants that they could treat Nalcor Oil and Gas in the same fashion that they treat their other business partners, without fearing for the sanctity of their commercially-sensitive information. When the Project Agreements were drafted, every one of them expressly dealt directly with the ATIPPA and section 5.4 of the ECA provisions and Nalcor Oil and Gas's obligations thereunder. Without the additional protections afforded by section 5.4 of the ECA, Nalcor Oil and Gas's partners in co-ventures may quite legitimately plead that the protections that have been afforded to their information have now been pulled from under them, with the result being that at best there will no longer be full disclosure to Nalcor Oil and Gas with respect to the Corporation's assets, and at worst that the Corporation will have to return the information hitherto provided to Nalcor Oil and Gas.

The application of section 5.4 of the ECA is of critical importance with respect to the communication and agreements with oil companies. Disclosing an oil company's commercially sensitive information may financially harm that organization and will assuredly damage the negotiating power that organization may have in future joint ventures. Changing the legislation under section 5.4 of the ECA is in and of itself a breach of the assurances given to Nalcor Oil and Gas's co-venture partners at the time that they entered into the Project Agreements. Breaches, perceived or real, to this commitment to confidentiality will threaten Nalcor's ability to have meaningful input and involvement in the management of its assets and potentially threaten involvement in future business dealings. The potential impact to the various companies that Nalcor engages with is unfathomable, and could have negative consequences for some of those companies on a global scale.

While Nalcor Oil and Gas's interests in offshore developments are now managed by the Oil and Gas Corporation of Newfoundland and Labrador, the existing equity interests remain in Nalcor 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 either or both of these organizations will negatively impact both organizations with respect to their ability to maintain successful business relationships that drive economic growth and prosperity.

It has been pointed out by some that section 5.4 of the ECA is unique to Newfoundland and Labrador. It was put in place by the Government to address the commercial nature of Nalcor's business. For instance, Newfoundland and Labrador and Alberta are similar in that the oil and gas industry is of critical importance to both economies. Also similar, is the protection afforded to the business information of third parties through the Provinces' respective access to

information acts. The similarities end there, however. Nalcor Oil and Gas requires the protection afforded it in section 5.4 of the ECA with respect to commercially sensitive information as it is a state owned oil and gas company. The ECA provides the expected level of commercial confidentiality that was, and continues to be, an absolute requirement to protect the Province's revenue generating ability and to ensure the optimization of Nalcor Oil and Gas's valuable business relationships. On the other hand, Alberta does not have a state owned oil and gas company, which is the critical difference between the two regimes.

A change to the current application of section 5.4 of the ECA would ultimately be a policy decision that would speak to the value that the Provincial Government places on Nalcor Oil and Gas as well as the equity involvement for these three projects and any more that may come the Province's way. Altering the current protection afforded by the ECA would fundamentally change the way oil and gas relationships in Newfoundland and Labrador progress and may cause irreparable harm to the future of the industry in the Province. Oil and gas companies would close the veil of confidentiality with Nalcor and there would be perpetual concern that future legislative changes may have an impact on past, current and future levels of confidentiality. Needless to say, Nalcor's ability to meet its mandate would be dramatically impacted.

These same concerns are extremely prevalent with respect to the Muskrat Falls Project due to the large number of commercial relationships involved, and the extremely high value of the associated contracts. These concerns will also exist with respect to any future developments undertaken by the Corporation, which is why the current and continued application of section 5.4 of the ECA is critical to Nalcor as a whole. It is also important to remember that the regulated component of Nalcor Energy's operations, NLH, as well as CF(L)Co, cannot avail of the ECA, and must work within the limits of the ATIPPA. The protections in the ECA validly protect the components of Nalcor Energy that really require those protections in order to maximize the benefits received from the Province's natural resources. Nalcor regularly engages with non-public body business partners, such as Emera, that expect a higher level of protection surrounding their commercial information. This expectation is critical to ensuring that Nalcor can have the best players at the table and for the best prices when it comes to current and future major projects. Aspects of the business of Nalcor are arguably more commercially complex than those of Government or other public bodies, justifying Nalcor's need to at times rely on section 5.4 to protect its commercial relationships.

Nalcor does not apply section 5.4 of the ECA unless the Corporation feels that it is absolutely necessary to do so. The Access and Privacy Officer will always look to the ATIPPA first, but there are circumstances when section 5.4 of the ECA is absolutely required. Since 2016, Nalcor has applied this exception with respect to approximately 10% of its overall requests. In the limited number of cases where complaints were received with respect to the use of section 5.4, Nalcor's Board of Directors agreed that the information was indeed commercially-sensitive and its release would be harmful to both Nalcor and various third parties. In these cases, it was critical to have the ability to apply section 5.4 of the ECA and protect the information from public release.

Nalcor appreciates the concerns raised during the Commission of Inquiry Respecting the Muskrat Falls Project with respect to information sharing. The Final Report of the Muskrat Falls Inquiry touched on a number of access to information related points. While the Commissioner did not recommend that section 5.4 be removed from the ECA, one of the key recommendations stemming from his report related to that section:

“The Government of Newfoundland and Labrador should amend s. 5.4 of the Energy Corporation Act to authorize the Information and Privacy Commissioner to determine if Nalcor is required to disclose information it wishes to withhold on the grounds of “commercial sensitivity.”

The Corporation respectfully submits that the acceptance of this recommendation will not be in the best interests of the Province. Section 5.4 presently permits an Applicant to appeal to the Supreme Court if he/she does not agree with Nalcor’s use of the exception. Nalcor believes that this is the appropriate venue for a review of Nalcor’s position, as it will ensure that the review is fulsome and provides the parties with the opportunity to present their arguments and evidence in a judicial forum.

Notwithstanding Nalcor’s position noted above, the Corporation does understand that there is a need for an improved process with respect to complaints received regarding section 5.4 of the ECA. Therefore, to improve transparency and accountability, and for complaints where the Applicant would prefer to avoid making an appeal directly to the Supreme Court, Nalcor suggests the following approach for consideration:

1. If a complaint is received by Nalcor in relation to the use of section 5.4, Nalcor will develop an information package that clearly explains the justification for utilizing that section of the ECA.
2. The information package will then be shared directly with the Office of the Information and Privacy Commissioner (OIPC) before any information is shared with Nalcor’s Board of Directors.
3. The OIPC will then have time to review Nalcor’s submission and provide a response to the Nalcor Board with any comments, feedback and recommendations with respect to the commercial sensitivity of the applicable records.
4. Nalcor’s Board of Directors will then review Nalcor’s information package and the OIPC’s response and factor them into the Board’s discussion and ultimate decision regarding whether the applicable information should be released or withheld from disclosure under the section 5.4 exception.
5. The final decision from Nalcor’s Board of Directors will be shared with the OIPC detailing Nalcor’s consideration of the OIPC’s feedback.

It is submitted that this proposed process will improve transparency and accountability and will effectively insert the OIPC into Nalcor’s decision-making process regarding the use of section

5.4 of the ECA. Of critical importance to Nalcor (and its business partners) is that while this process provides for a more fulsome dialogue with respect to the application of section 5.4, it ensures that the Nalcor Board retains the final decision with respect to whether the information is disclosed.

Nalcor has explained how fundamentally important section 5.4 of the ECA is for Nalcor's various partners and contractors and that changing its application may result in financial harm to the Province. Where the economy of the Province is so reliant on its energy resources, altering the current application of section 5.4 of the ECA may have drastic consequences of great economic impact. The recommendation put forth in this section addresses the concerns regarding accountability and transparency without completely changing the landscape with respect to the business dealings and relationships that Nalcor requires in order to successfully meet its mandate. Similar to the concerns regarding oil and gas, changes to section 5.4 of the ECA for other Nalcor operations would essentially represent a policy decision that would change how Nalcor can conduct its business. It is the Corporation's position that any changes would certainly have a financial impact, which over time could grow to be quite substantial. In addition, receiving sub-optimum bids on projects due to vendors' concerns regarding the sharing of commercially-sensitive information with Nalcor may impact the quality, schedule and budget of various key projects.

SECTION 39 OF THE ATIPPA

In general, the current ATIPPA is a strong piece of legislation that certainly does not require wholesale changes; however, as noted in the previous section, section 39 of the ATIPPA has created some confusion for individuals processing ATIPP requests and is one section that requires serious consideration for change. The three-part test that is required for Section 39 is extremely difficult to meet in cases where Nalcor or any of its subsidiaries, including NLH and CF(L)Co, requires an exception to protect potentially sensitive and harmful third-party business information.

The difficulty with the test lies in part (b) – “the head of a public body shall refuse to disclose to an Applicant information that is 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” therefore the three-part test cannot be met. Contracts may contain extremely sensitive information and the current legislation essentially disallows the application of section 39 for contracts. While section 35 – “disclosure harmful to the financial or economic interests of a public body” can sometimes apply to third-party business information, the primary exception that should effectively speak to third-party business information is section 39, which is often unusable within the current legislation, even when many of the elements within the exception are met.

There are similarities in the language used within section 39 across the country. Nalcor recommends that the Committee reach out to other jurisdictions to share information on the difficulties encountered surrounding section 39 in an effort to find a solution that may work for

all. Difficulties encountered in Newfoundland and Labrador are likely present in other areas of the country as well.

TIME EXTENSIONS

Currently, if an extension of time is required to complete a request, an application for an extension to the statutory time limit must be submitted to the OIPC within 15 days of the date in which the request was received. This process works well and the OIPC has developed a stringent application process where significant information must be shared to obtain approval for an extension request. The current process provides for balance in terms of weighing the needs of the Applicant with the needs of the public body to ensure that it has the appropriate amount of time to respond to more challenging requests and requests dealing with high numbers of records.

While the current process is working well, there is an opportunity to reduce the amount of capacity required by the OIPC for processing extension requests and allow for extensions where the Access and Privacy Officer engages directly with the Applicant in terms of a possible limited extension request (maximum of 10 days for example). The process would work by having the Access and Privacy Officer request an extension directly from the Applicant. This will allow for a process that would provide a limited number of extension days without the need for OIPC involvement or approval. The consent of the Applicant, or lack thereof, would need to be documented. In cases where the Applicant denies the extension, the normal process with the OIPC would ensue.

CONCLUSION

Nalcor believes the sharing of information is an important part of openly engaging the public and creating a broader understanding of the Corporation's core businesses and operations. This belief supports Nalcor's continued commitment to transparency and accountability.

The Corporation's main concern lies with the future ability to protect the commercial information of both Nalcor and the many third parties that the Corporation engages with. Nalcor recommends that no changes be made to the current language and application of section 5.4 of the ECA. The Corporation would be more than willing to appear formally during the Committee hearings to speak further to this extremely important topic.

Nalcor believes that progressive freedom of information legislation, such as the ATIPPA, is essential to support the rights of citizens to access government and public body information. It also helps define limitations or exceptions to these rights, and clarifies the recourse available to those who feel their information rights have not been respected. While additional enhancements are required, the ATIPPA is an effective piece of legislation and the enhancements and changes made in previous reviews have certainly gone a long way towards improving public transparency and accountability.