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Confidential Information and Governments: Balancing the Public's Right to Access Government Records and an Oil and Gas Company's Right to Protect Confidential Information

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Confidential Information and
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Right to Access Government Records
and an Oil and Gas Company's Right
to Protect its Confidential Information

This paper explores the relationship between the public's right to access records in the custody or under the control of the government with the oil and gas industry's need to protect its confidential information from disclosure. Focusing on practical issues, the authors review the law of confidence, the structure of the access to information legislation and related case law, the public policy considerations supporting same, and some of the risks and pitfalls that organizations can avoid if they consider such legislation when interacting with public bodies.

L'article examine la relation entre le droit du public d'avoir accès à des dossiers sous la garde ou le contrôle du gouvernement et le besoin de l'industrie des hydrocarbures de protéger ses renseignements confidentiels contre la divulgation. Les auteurs s'intéressent particulièrement aux enjeux pratiques et examinent la relation de confiance, la structure des lois d'accès à l'information et la jurisprudence connexe, les considérations de politique publique qui appuient ainsi que certains des risques et des pièges que les organisations peuvent éviter si elles prennent ces lois en compte lorsqu'elles interagissent avec des organismes publics.

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Introduction

While confidential information has long been protected and managed in the oil and gas industry through contract and the common law, the introduction over the past thirty years of various access to information legislation, whereby the public is granted a right to access records under the control of a government institution subject to limited and specific exceptions, has materially changed the landscape for how private commercial interests interact and contract with the government.

Of particular concern is the growing trend of political parties, the press and competitors using the access to information legislation to obtain significant and material commercial information about the activities, prospects and strategies of the private commercial interests in the hands of the government. It is now not uncommon to see access to information requests being advanced in respect of major new government proposals or initiatives in respect of the oil and gas industry. Of equal concern is the use of access to information requests to fish for information in the midst of litigation, where the rules of court would not allow access to the information, or to access information to ground an action where there is merely suspicion of an actionable wrong.

Similarly, in the wake of the so-called “sponsorship scandal,” the Gomery Commission produced a report criticizing the actions of senior public officials and their secrecy. The report found that while “[t]here are valid arguments for secrecy concerning certain government operations... the arguments in favor of secrecy have been over-emphasized since the [access to information] legislation was first proclaimed into force on July 1, 1983.”¹ The report went on to say that: “[c]ountless individuals reported that senior officials, both political and administrative, find various ways to deny providing information to the public.”²

With increased public scrutiny and an increasing sophistication in the scope and focus of the access requests made each year, participants in the oil and gas industry are well-advised to structure their interactions with government to take advantage of the limited and specific exemptions, or run the risk of their confidential information being disclosed.

In this paper, we seek to provide a practical overview of the landscape and issues that can arise when a private entity interacts with the government. First, we explore what is “confidential information,” providing a foundation for our subsequent discussion of the access to information legislation and how it interacts with a private entity’s confidential information. Second, we describe the public policy that led to the adoption of the access to information legislation and the specific provisions that address how a private entity’s confidential information, in the hands of the government, may be protected under such legislation. Finally, we look to the specific example of how Newfoundland and Labrador has structured its access legislation in the context of Nalcor Energy (Nalcor), and its subsidiary,

1. Privy Council Office, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations* (Ottawa: Privy Council Office, 2005), online: Government of Canada Publications <<http://publications.gc.ca/site/eng/287355/publication.html>> at 179-180 [*Restoring Accountability*].

2. *Ibid* at 43-44.

Nalcor Energy—Oil and Gas Inc. (Nalcor Oil and Gas), in order to strike a balance between public policy and the needs of the oil and gas industry.

I. *Confidential information and trade secrets*

Before proceeding with an overview of the law of confidence, it should be noted that there is a tendency in industry to use the terms “confidential information” and “trade secrets” interchangeably. From a legal point of view this can be somewhat misleading, as a trade secret is merely a subset of confidential information.³ While it is true that all trade secrets are confidential information, it is not necessarily true that all confidential information is a trade secret. That being said, it is useful to first set out what may constitute confidential information and trade secrets, prior to discussing confidential information in the hands of the government. As will be discussed in further detail below, the distinction between confidential information and trade secrets is important in the context of access to information legislation.

1. *Confidential information defined*

In its decision with respect to *Lac Minerals Ltd. v. International Corona Resources Ltd.*,⁴ the Supreme Court of Canada reviewed the law of confidential information and, commenting favourably on the decision of Lord Greene in *Saltman Engineering*,⁵ adopted the following definition:

The information, to be confidential, must I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.⁶

Unfortunately, this broad definition has not been particularly useful in determining whether or not a particular set of information is confidential information capable of protection.

In an effort to refine this definition, Canadian courts continue to employ, to some degree, the following criteria when assessing whether or not information disclosed in a given situation has the necessary quality of confidentiality:

3. *Cadbury Schweppes Inc v FBI Foods Ltd*, [1999] 1 SCR 142 [*Cadbury*].
 4. *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 [*Lac Minerals*].
 5. *Saltman Engineering Co v Campbell Engineering Co*, (1948) 65 RPC 203 (CA) [*Saltman*].
 6. *Saltman*, *ibid*, cited in *Lac Minerals*, *supra* note 4 at para 156.

- (a) [t]he extent to which the information is known outside the business;
- (b) [t]he extent to which it is known by employees and others involved in the business;
- (c) [the extent of] [m]easures taken to guard the secrecy of the information;
- (d) [t]he value of the information to the holder of the secret and to his competitors;
- (e) [t]he [amount of] effort or money expended in developing the information;
- (f) [t]he ease or difficulty with which the information can be properly acquired or duplicated by others;
- (g) [w]hether the holder of the secret and the taker treat the information as secret;
- (h) custom in the industry concerning this specific type of information.⁷

While these criteria are useful in assessing whether or not a particular set of information would be considered confidential, they are not exhaustive and may include criteria required for a trade secret. As such, we must always return to the broad definition set down by Lord Greene in *Saltman engineering*, adopted by the Supreme Court of Canada: “[t]he information, to be confidential, must...have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge.”⁸

2. *What is a trade secret?*

Notwithstanding views to the contrary, the terms “trade secret” and “confidential information” are not synonymous. The Supreme Court of Canada in *R. v. Stewart*,⁹ and again in *Cadbury*,¹⁰ has held that a trade secret is a subset of confidential information.¹¹

While it has been argued that the law of trade secrets should be codified,¹² the definition has been left to the common law. Fortunately,

7. *GasTOPS Ltd v Forsyth*, [2009] OJ No 3969 (QL) (ON Sup Ct) at para 124, aff'd 2012 ONCA 134, 288 OAC 201 [*GasTOPS*]; *Stonetile (Canada) Ltd v Castcon Ltd*, 2010 ABQB 392, 488 AR 375; *Ali Arc Industries et al v S&V Manufacturing Ltd et al*, 2011 MBQB 95, 265 Man R (2d) 1. See also David Vaver, “Civil Liability for Taking or Using Trade Secrets in Canada” (1981) 5 Can Bus LJ 253 at 255-256.

8. *Saltman*, *supra* note 5, cited in *Lac Minerals*, *supra* note 4 at para 156.

9. *R v Stewart*, [1988] 1 SCR 963 [*Stewart*].

10. *Cadbury*, *supra* note 3.

11. Lamer J commented in *Stewart*, *supra* note 9 at para 23 that “a trade secret...is a particular kind of confidential information....”

12. Institute of Law Research and Reform and a Federal Provincial Working Party, *Trade Secrets* (Edmonton, 1986), online: <<http://www.law.ualberta.ca/alri/docs/fr046.pdf>>.

the courts have, from time to time, undertaken detailed analyses of the case law and have restated the definition. For example, we can look to Brockenshire J, in *Dent Wizard International Corp. v. Long*,¹³ quoting Chevrier J in *Crain Ltd. v. Ashton et al.*,¹⁴ who employed the following definitions of a trade secret:

- (1) A trade secret... is a property right,¹⁵ and differs from a patent in that as soon as the secret is discovered, either by an examination of the product or any other honest way, the discoverer has the full right of using it...
- (2) A trade secret is a plan or process, tool, mechanism, or compound known only to its owner and those of his employees to whom it is necessary to confide it.
- (3) The term 'trade secret' as usually understood, means a secret formula or process not patented, but known only to certain individuals, used in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on.
- (4) A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. A trade secret is a process or device for continuous use in the operation of the business. The subject matter of a trade secret must be secret.¹⁶

On the basis that a trade secret can exist in the original combination, characteristics of components, or in the unique design of the product as a whole, it is interesting to note that a product may still be protected under trade secret notwithstanding that all of its the components are in the public domain.¹⁷

Whether or not a particular set of information is a trade secret is a question of fact and "the onus rests on the plaintiff to establish the

13. *Dent Wizard International Corp v Long*, [1996] OJ No 4702 (QL) (Ct J Gen Div) [*Dent*].

14. *RI Crain Ltd v RW & Ashton Press Manufacturing Co*, [1949] OWN 246 (H Ct J).

15. Given the decision of the Supreme Court of Canada in *Cadbury*, *supra* note 3, and the discussion of the *sui generis* nature of confidential information contained therein, one should not rely on the statement that a trade secret is a "proprietary" right.

16. *Dent*, *supra* note 13 at para 18.

17. *Computer Workshops Ltd v Banner Capital Market Brokers Ltd* (1988), 64 OR (2d) 266 (ON H Ct J), cited in *GasTOPS*, *supra* note 7 at para 135.

confidential nature of the information.”¹⁸ In establishing whether or not the information is a trade secret, it is useful to employ the following criteria:

1. the information must be specific, not general;
2. the information is treated as confidential, and regarded as secret, by the company;
3. the information must not be generally known to the public, but it may be acquired from materials available to the public with the expenditure of time and effort; and
4. the information should only be given to employees on a need to know basis, and to third parties provided they agree not to disclose it without the express authorization of the company.¹⁹

Therefore, for a trade secret to exist one would need to prove that the information in question was more than merely information that has the “necessary quality of confidence.” For example, in the oil and gas industry, seismic data is treated as confidential information. That being said, it is a question of fact whether or not the specific geophysical data resulting from a seismic survey is capable of being construed as a trade secret. Certainly, the know-how relating to obtaining and acquiring the geophysical data could qualify as a process or methodology capable of being protected as a trade secret. However, it is unclear whether the actual raw data itself is capable of being construed as a trade secret. As discussed below, this can be an important distinction in the context of the access to information legislation.

In analyzing whether the raw data is a trade secret or not, it is important to realize that trade secrets generally deal with applied science: the process of changing something into something else. Unfortunately, raw data concerning the geophysical formations is not information about a process, and as such may not be protected under a strict definition of trade secret.

3. *Breach of confidence*

In attempting to define “confidential information,” it is also helpful to review the requirements that the courts have imposed before granting a remedy in respect of a breach of confidence. In its decision in *Computer Workshops Ltd. v. Banner Capital MarketBrokers Ltd.*,²⁰ the Ontario Court

18. *Consolidated Textiles Ltd v Central Dynamics Ltd*, [1974] 2 FC 814, cited in *Dent*, *supra* note 13 at para 19.

19. See *Software Solutions Associates Inc v Depow*, [1989] 99 NBR (2d) 110 at para 71 (QB (TD)), cited in *CPC International Inc v Seaforth Creamery Inc* (1996), 69 CPR (3d) 297 at para 22 (ON Ct J Gen Div).

20. *Computer Workshops Ltd v Banner Capital MarketBrokers Ltd* (1990), 1 OR (3d) 398 (ONCA).

of Appeal relied upon the following quote from Lord Greene MR's seminal decision in *Saltman Engineering*:

If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied of the plaintiff, he will be guilty of an infringement of the plaintiff's rights.²¹

Initially adopted by the Supreme Court in *Lac Minerals*, it is now settled that the test for breach of confidence in Canada consists of establishing the following three elements: (i) that the information conveyed was confidential; (ii) that it was communicated in confidence; and (iii) that it was misused by the party to whom it was communicated.²²

The test is objective. As Granger J explained in *GasTOPS*:

The courts have used a 'reasonable person' test to determine whether information embodies the necessary quality of confidence. The courts examine whether a person, acting reasonably, should have expected the information to be confidential: if the person should have realized that the information was to be maintained in privacy, there will be an implied obligation to maintain it in confidence. In *Coco v AN Clark (Engineers) Ltd*, Megarry J stated:

It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture...I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.²³

In *Tree Savers International Ltd. v. Savoy*, the Alberta Court of Appeal cited the Supreme Court of Canada in *Lac Minerals*, and the finding that "there [may]...be a breach of confidence even though there ha[s] been no express warning that...the information was confidential."²⁴

What happens to a third party who receives the confidential information of another? It is relatively settled law that a third party who has knowledge of a confidence is bound by it, and if the third party breaches the confidence, the disclosing party has the same remedies that it would have as against

21. *Saltman*, *supra* note 5, cited in *Lac Minerals*, *supra* note 4.

22. *Lac Minerals*, *supra* note 4 at para 129.

23. [1969] RPC 41 at 48.

24. *TreeSavers International Ltd v Savoy* (1992), 120 AR 368 (ABCA).

the confidant.²⁵ For example, the Supreme Court of Canada, in *Cadbury*, held:

Equity will pursue the information into the hands of a third party who receives it with the knowledge that it was communicated in breach of confidence (or afterwards acquires notice of that fact even if innocent at the time of acquisition) and imposes its remedies.²⁶

Again, the test in this instance is an objective one. In *London & Provincial Sporting News Agency v. Levy*,²⁷ the court found the third party recipient of confidential information liable for breach of confidence where the third party knew or ought to have known that the information came from the plaintiff, or at any rate the third party had a very certain suspicion that it was the plaintiff's information and had deliberately refrained from asking a direct question.

In *Malone v. Commissioner of Police of the Metropolis (No 2)*, Megarry VC stated:

If A makes a confidential communication to B, then A may not only restrain B from divulging or using the confidence, but also may restrain C from divulging or using it if C has acquired it from B, even if he acquired it without notice of any impropriety.... In such cases it seems plain that, however innocent the acquisition of the knowledge, what will be restrained is the use or disclosure of it after notice of the impropriety.²⁸

Therefore, users of confidential information must be vigilant in ensuring that the information that they receive is provided to them in a manner that guarantees they can use such information without concern that such use may violate a confidence of a third party. Also, the users must have adequate protocols in place to ensure that they can stop using any information for which they receive notice of such an obligation.

4. Confidential information in the hands of the government

As a heavily regulated industry, oil and gas companies are often required to provide their confidential information to various government authorities by statute, royalty agreements or other prescribed procedures.²⁹ Unfortunately, there is very little case law dealing with the effect of compulsory disclosure of confidential information under statute.

25. *International Tools Ltd v Kollar*, [1968] 1 OR 669 (ONCA).

26. *Cadbury*, *supra* note 3 at para 19.

27. *London & Provincial Sporting News Agency v Levy*, [1928], MacG Cop Cas 340.

28. *Malone v Commissioner of Police of the Metropolis (No 2)*, [1979] 2 All ER 620 (Ch).

29. See, e.g., the Canada–Newfoundland Offshore Petroleum Board or the Canada–Nova Scotia Offshore Petroleum Board.

The leading text, often quoted by the courts, is *Breach of Confidence*, where the author, Gurry, argues that there exists two classes of statutes that affect the confidential nature of information disclosed. The first class consists of compulsory public disclosure of specified information (e.g., certain *Companies Acts* and the requirements therein to file financial statements). The second class consists of those statutes that do not require compulsory public disclosure, but which may require only limited disclosure of specific information to government departments, agencies or other designated bodies.³⁰ The author states:

In general, the disclosure required by this type of statute does not destroy the confidentiality of information, for the number of people given access to the information is limited and, normally, they are obliged by the statute to respect its confidentiality.³¹

Gurry further states:

Most of the statutes which require some form of compulsory disclosure fall into this latter category. In every case, however, it will depend entirely on the provisions of the relevant statute and these should be consulted in order to determine the extent of disclosure required, and the size of the audience to whom disclosure must be made. If the audience is the public at large, then the information will lose any confidential characteristics it might otherwise have on disclosure. If, however, the audience is a limited one consisting of a [g]overnment department or official, then confidentiality is still possible.³²

In addition, Gurry states that:

In principle, the courts have recognized that an obligation of confidence may attach to a [s]tate agency empowered to acquire information from subjects.³³

In support of this position, Gurry points to Lord Reid's dicta, in *Conway v. Rimmer*,³⁴ wherein Lord Reid states:

If the state insists on a man disclosing his private affairs for a particular purpose it requires a very strong case to justify that disclosure being used for other purposes.³⁵

30. Francis Gurry, *Breach of Confidence* (Oxford: Clarendon Press, 1984).

31. *Ibid* at 87.

32. *Ibid* at 87-88.

33. *Ibid* at 227.

34. *Conway v Rimmer*, [1968] AC 910 at 946.

35. Gurry, *supra* note 30 at 227-228.

In Canada, the courts have had a number of opportunities to consider the obligations of a government agency to balance the public interest in access to information with the public interest in maintaining the confidentiality of third party information obtained by an agency.³⁶ In upholding the decision of the Patented Medicine Review Board to not release information of a third party, the Federal Court found in *CIBA–Geigy Canada Ltd. v. Canada (Patented Medicine Prices Review Board)*³⁷ that because the Board and its staff received a constant supply of information in respect to the pricing of medicines, the scheme under the *Patent Act* was similar to other statutory schemes (such as the Canadian Radio–Television Telecommunications Commission and the National Energy Board) designed to regulate monopolies. The Court, in this instance, stated,

[i]n my view, information supplied pursuant to a “statutory authority for purposes of economic regulation is, prima facie, confidential.”³⁸

The Court agreed that the Board had properly decided not to disclose all of the information in its possession, as certain aspects of the information included third party confidential information, which if released, may have impacted the Board’s ability to collect further third party confidential information in the future, and thus reduce its ability to meet its legislated mandate.³⁹

This theme of protection of confidential information in the hands of a government agency is picked up again in *Crestbrook Forest Industries Ltd. v. Canada*, wherein the plaintiff appealed an income tax assessment from Revenue Canada that was based on a report prepared from information on commissions and discounts allowed to buyers of the pulp and newsprint industry. This information was voluntarily provided to Revenue Canada on the basis that it would be received in the strictest of confidence. In determining that the confidential information would be restricted in its disclosure to counsel and expert advisors involved in the reassessment, the trial court indicated that there is a clear public interest in the need of the plaintiff to prove its case, which must be balanced with the needs of the interveners (information suppliers) to have the confidentiality of information submitted to Revenue Canada protected. Accordingly, the

36. See, e.g., *Ciba–Geigy Can Ltd v Canada (Patented Medicine Prices Review Board)*, [1994] 3 FC 425 (FCTD) [*Ciba*]; *Apotex Inc v Canada (AG)*, (1993) 63 FTR 197 (TD); *Merck Frost Canada Inc v Canada (Minister of National Health and Welfare)*, [1994] FCJ No 404 (TD) (QL).

37. *Ciba*, *supra* note 36.

38. *Ibid* at para 27.

39. *Ibid* at paras 30-32.

Court of first instance found a balance between disclosure and protection of the confidential information.⁴⁰

The Federal Court of Appeal found that Joyal J had not taken into consideration the fact that the documents in question were obtained by the Crown from taxpayers on a voluntary basis and for a specific and defined purpose.⁴¹ As such, the Crown was not entitled to make use of that information for a different purpose in circumstances where such use would inevitably result in breach of the Crown's undertaking in confidence. Accordingly, the Court of Appeal reversed the decision at trial and denied disclosure of the documents. In reaching their decision, the Court of Appeal referred to the decision of the Supreme Court of Canada in *Lac Minerals*, where LaForest, J., speaking for the majority, said:

In establishing a breach of duty of confidence, the relevant question to be asked is, 'what is the confidEE entitled to do with the information?' and not, 'to what use he is prohibited from putting it?' *Any use other than a permitted use is prohibited and amounts to a breach of duty.* When information is provided in confidence, the obligation is on the confidEE to show that the use to which he put the information is not a prohibited use.⁴²

It would appear, therefore, that the law in Canada is that confidential information provided to the Crown for a specific purpose does not entitle the Crown to use that information for any other purpose, especially where such use would inevitably result in a breach of the Crown's undertaking of confidence.

It is useful to note that in Alberta, a successful action for breach of confidence was maintained against the Province of Alberta. In the case of *Pharand Ski Corp.*, the plaintiff corporation provided information to the provincial government regarding Mount Allan as a viable ski hill site for the Olympics and as a recreational ski area thereafter.⁴³ The corporation provided a confidential analysis in support of their view, in confidence. The corporation asked for and received confirmation from the government that their report would be kept confidential; however, the government did release the confidential information to the Olympic Organizing Committee as well as other individuals, resulting in the corporation being excluded from the development of the site for which they spearheaded the analysis.

40. *Crestbrook Forest Industries Ltd v Canada*, (1991), 48 FTR 225 (TD).

41. *Crestbrook Forest Industries Ltd v Canada* (1992), 41 CPR (3d) 34 (FTR).

42. *Ibid* at para 6 [emphasis in original].

43. *Pharand Ski Corp v Alberta* (1991), 116 AR 326 (QB).

The court awarded the corporation damages in excess of \$1.3 million. Given that the corporation received assurances of confidentiality from the government, this case shows that:

- (1) confidential information provided to a government agency retains its confidential nature; and
- (2) the government can be liable for breach of confidence.

II. *Access to information legislation*

The historical attempts to legislate privacy and access to information span several sessions of Parliament over almost twenty years as Canadians grappled with how to balance the public's right to access the records and information of their government with the legitimate need to have certain exceptions to such right.

Starting in 1965, there were various attempts by MP Barry Mather to introduce such legislation, but none of these went further than Second Reading. MP Gerald Baldwin attempted to bring forward access to information legislation on several occasions beginning in 1973, but he too failed. In the 1976 Throne Speech, the Liberals announced they would prepare a Green Paper on freedom of information.⁴⁴ However, even before that paper was tabled, opposition MP Gerald Baldwin made strong assertions about the contents that the legislation should have and considered the objections by the governing party to open government and court review of disclosure denials to be indefensible.⁴⁵ In 1979 the Conservatives introduced Bill C-15, which contained the *Freedom of Information Act*.⁴⁶ Bill C-15 died when the minority Conservative government fell.

Finally, in the 1980 Liberal Throne Speech, the government promised to introduce freedom of information legislation. On 17 July 1980, the government introduced Bill C-43,⁴⁷ *An Act to enact the Access to Information Act and the Privacy Act, to amend the Federal Court Act and the Canada Evidence Act and to amend certain other acts in consequence thereof*; it was proclaimed in force 1 July 1983.⁴⁸

44. "Speech from the Throne," *House of Commons Debates*, 30th Parl, 2nd Sess (12 October 1976) at 3.

45. *House of Commons Debates*, 30th Parl, 2nd Sess, (25 October 1976) at 428 (Hon Gerald Baldwin).

46. Bill C-15, 1st Sess, 31st Parl, 1979.

47. Bill C-43, 1st Sess, 32nd Parl, 1980.

48. Michel W Drapeau & Marc-Aurèle Racicot, *Federal Access to Information and Privacy Legislation Annotated 2012* (Toronto: Carswell, 2011) at xv.

Following the introduction of the federal *Access to Information Act*,⁴⁹ each of the provinces and territories has adopted similar legislation (shown in order of commencement date):

JURISDICTION	NAME OF LEGISLATION	COMMENCEMENT DATE	THIRD PARTY SECTION ⁵⁰
Federal	<i>Access to Information Act</i> , RSC 1985, c A-1	7 July 1982	3 August 2007
Ontario	<i>Freedom of Information and Protection of Privacy Act</i> , RSO 1990, c F-31	1 January 1988	1 January 1998
Saskatchewan	<i>Freedom of Information and Protection of Privacy Act</i> , SS 1990-91, c F-22.01	1 April 1992	1 April 1992
British Columbia	<i>Freedom of Information and Protection of Privacy Act</i> , RSBC 1996, c 165	30 June 1992	28 March 2003
Nova Scotia	<i>Freedom of Information and Protection of Privacy Act</i> , SNS 1993, c 5	1 July 1994	1 July 1994
Yukon	<i>Access to Information and Protection of Privacy Act</i> , RSY 2002, c 1	3 May 1995	3 May 1995
Alberta	<i>Freedom of Information and Protection of Privacy Act</i> , RSA 2000, c F-25	1 October 1995	16 May 2003
Northwest Territories	<i>Access to Information and Protection of Privacy Act</i> , SNWT 1994, c 20	31 December 1996	31 December 1996
Nunavut	<i>Access to Information and Protection of Privacy Act</i> , SNWT (Nu) 1994, c 20	31 December 1996	31 December 1996
Manitoba	<i>Freedom of Information and Protection of Privacy Act</i> , CCSM c F175	4 May 1998	4 May 1998
Prince Edward Island	<i>Freedom of Information and Protection of Privacy Act</i> , RSPEI 1988, c F-15.01	1 November 2002	15 December 2005
Newfoundland and Labrador	<i>Access to Information and Protection of Privacy Act</i> , SNL 2002, c A-1.1	17 January 2005	17 January 2005
New Brunswick	<i>Right to Information and Protection of Privacy Act</i> , SNB 2009, c R-10.6	19 June 2009	19 June 2009

49. *Access to Information Act*, RSC 1985, c A-1 [AIA].

50. Indicates last change to "disclosure harmful to business interests of a third party" section in noted legislation.

Although not identical, each law is generally based on the same principle, which can best be seen through the purpose statements for such legislation. For example, section 2 of the *AIA* states:

Purpose

2.(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

Complementary procedures

(2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.⁵¹

In the instant case, we are concerned with the application of this purpose to the information that the oil and gas industry regularly provides to the federal and provincial governments and, in particular, how the oil and gas industry may best protect its interests by structuring its affairs to capitalize on the specific exemptions to disclosure within the access to information legislation applicable to it.

1. *Understanding the statutory structure*

a. *Federal*

Akin to its provincial counterparts, the *AIA* protects, among other types of information, financial, scientific, technical and commercial information so long as the applicable third party consistently treats such information

51. *AIA*, *supra* note 49, s 2. This was contained in Sched. 1, s 2 of the 1983 Act, but when the Act was revised in 1985 it became simply section 2. The clause is the same today as it was in 1983. For example, the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 2 [*Alberta Act*], states:

“The purposes of this Act are: (a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act, (b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information, (c) to allow individuals, subject to limited and specific exceptions as set out in this Act, a right of access to personal information about themselves that is held by a public body, (d) to allow individuals a right to request corrections to personal information about themselves that is held by a public body, and (e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.

supplied to a public body as confidential.⁵² Unlike some provincial legislation, the *AIA* does not additionally require that the disclosure of this information could reasonably be expected to, for example, significantly harm the competitive position of the third party, or result in undue financial loss or gain to any person or organization. As such, the head of a federal public body (or, more likely, the applicable third party) must only demonstrate that the information supplied to the public body was consistently treated as confidential by the third party in order to preclude its disclosure.

In addition to protecting the foregoing, the *AIA* also protects: (i) “trade secrets of a third party”⁵³; (ii) certain emergency management plans that may concern the “vulnerability of [a] third party’s buildings, structures, networks or systems”⁵⁴; (iii) information, the “disclosure of which could reasonably be expected to result in material financial loss or gain to, or prejudice the competitive position of, a third party”⁵⁵; and (iv) information, the “disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.”⁵⁶ The *Act* also protects information containing the “results of product or environmental testing” carried out by, or on behalf of, government,⁵⁷ as well as any “written explanation of the methods used” in conducting such tests.⁵⁸ The foregoing notwithstanding, the *AIA* provides that the head of a public body may disclose any of the foregoing types of information if the third party consents to its release,⁵⁹ or where “disclosure [of such information] would be in the public interest [if] it relates to public health, public safety or the protection of the environment.”⁶⁰

b. *Alberta*

Like the *AIA*, Alberta’s *Freedom of Information and Protection of Privacy Act*⁶¹ sets out specific exceptions to the general rights of access. For example, section 16 protects information that, if released, would harm a third party’s business interests. More specifically, this provision protects information that would reveal trade secrets or commercial, financial,

52. *AIA*, *supra* note 49, s 20(1)(a).

53. *Ibid*, s 20(1)(b).

54. *Ibid*, s 20(1)(b.1).

55. *Ibid*, s 20(1)(c).

56. *Ibid*, s 20(1)(d).

57. Other than “preliminary testing conducted for the purpose of developing methods of testing.” *Ibid*, ss 20(2), 20(4).

58. *Ibid*, s 20(3).

59. *Ibid*, s 20(5).

60. *Ibid*, s 20(6).

61. *Alberta Act*, *supra* note 51.

labour relations or technical information of a third party, which has been supplied, either “explicitly or implicitly, in confidence.”⁶² Unlike the *AIA*, such information, if released, must be “reasonably 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,
- (iii) result in undue financial loss or gain to any person or organization, 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.⁶³

Subsection 16(3), however, provides exceptions under which information can be released under the *Act*. In effect, disclosure may be made by a public body where: (i) the third party has consented; (ii) an Alberta or Federal enactment authorized the disclosure; (iii) the information relates to a non-arm’s length transaction involving the public body; or (iv) where the information is under the control of the Provincial Archives or is more than 49 years old.

Any information to which this *Act* applies must be disclosed by a public body if it relates to a “risk of significant harm to the environment or to the health or safety of the public,” or if it is “clearly in the public interest.”⁶⁴

c. *Newfoundland and Labrador*

The Newfoundland and Labrador *Access to Information and Protection of Privacy Act*⁶⁵ is organized similarly to Alberta’s Act, and allows for the potential to protect a third party’s trade secrets, or commercial, financial, labour relations, scientific and technical information.⁶⁶

Unlike the aforementioned four exceptions provided under subsection 16(3) of Alberta’s Act, section 27(3) of *ATIPPA* states that the exceptions to disclosure prescribed under section 27 do not apply if: “(a) the third party consents to the disclosure; or (b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and

62. *Ibid*, s 16(1)(a)(i),(ii).

63. *Ibid*, s 16(1)(c).

64. *Ibid*, s 32(1)(a) & (b).

65. *Access to Information and Protection of Privacy Act*, SNL 2002 c A-1.1 [*ATIPPA*].

66. *Ibid*, s 27.

Labrador or the archives of a public body...that [have] been in existence for 50 years or more.” Of note is the fact that *ATIPPA* does not provide an exception for: (i) an enactment of Newfoundland and Labrador or Canada authorizing or requiring the information to be disclosed; or (ii) the information relates to a nonarm’s length transaction between a public body and another party.

d. *Other provinces*

All the Canadian common law provinces have comparable provisions protecting third party information from requests for information. The Ontario statute, which has been litigated more than the other provincial statutes, is similar to the legislated scheme of the Alberta and Newfoundland legislation: the applicable information, for example, must have been provided in confidence, either implicitly or explicitly, and if disclosed is reasonably expected to cause one of the same four results.⁶⁷

The provisions governing the third party business exception in British Columbia, Manitoba, the Yukon, Nova Scotia, New Brunswick, and Prince Edward Island, are nearly identical to the Alberta and Newfoundland provisions.⁶⁸ The acts in Saskatchewan and the Northwest Territories are also similar, but provide specific protections for information given to the government in connection with financial assistance.⁶⁹ For further details with respect to each of the applicable acts, see Appendix A.

2. *Judicial consideration of the third party business information exception*

a. *General test*

As above, the following three-part test generally governs the application of the third party business information exception under provincial legislation:

- (1) the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;

67. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F-31, s 17(1) [*Ontario Act*].

68. *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s 21 [*BC Act*]; *Freedom of Information and Protection of Privacy Act*, CCSM c F175, s 18 [*Manitoba Act*]; *Access to Information and Protection of Privacy Act*, RSY 2002, c 1 s 24(1) [*Yukon Act*]; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, s 21 [*Nova Scotia Act*]; *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6, s 22 [*New Brunswick Act*]; *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, s 14 [*Prince Edward Island Act*]; *AFIPPA*, *supra* note 65, s 27.

69. *Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01, s 19 [*Saskatchewan Act*]; *Access of Information and Protection of Privacy Act*, SNWT 1994, c 20, s 24 [*Northwest Territories Act*].

- (2) the information must have been supplied to the [government body] in confidence, either implicitly or explicitly; and
- (3) the prospect of disclosure must give rise to a reasonable expectation that one of the [specified] injuries—significant prejudice to a competitive position, significant interference with contractual or other negotiations, similar information no longer being supplied to the government institution, or undue loss or gain—will occur.⁷⁰

b. *Type of information*

The legislation and case law generally indicates that the first step in the analysis is the determination of whether or not the record reveals specific types of information. The exception will only apply if the information is a trade secret or scientific, technical, commercial, financial or related to labour relations.

In the recent case *Merck Frosst Canada Ltd. v. Canada (Minister of Health)*,⁷¹ the Federal Court of Appeal dealt with several issues connected to the expectation under the *AIA* and set out the test: “the information [must] be financial, commercial, scientific or technical; [as well as] confidential; and [have been] consistently treated as confidential.”⁷² The analysis of whether the information is financial, commercial, scientific or technical will precede the confidentiality analysis. For example, in *Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)*,⁷³ Rothstein JA found that certain records, although confidential, did not fit within the allowed categories of information. Thus, the records were not protected under the exception. The confidential nature of the information was irrelevant.⁷⁴

Trade secret

The courts have indicated that for the purposes of the *AIA*, a trade secret will be interpreted narrowly. A party relying on section 21(1)(a), for example, will have to provide “specific, objective, and detailed evidence”

70. *Ontario Act*, *supra* note 67, s 17(1)(a); *Ontario (Workers' Compensation Board) v Ontario (Assistant Information & Privacy Commissioner)* (1998), 41 OR (3d) 464, at paras 22-28. See also *Ontario First Nations Ltd Partnership v Ontario (Information and Privacy Commissioner)* (2006), 209 OAC 158 at para 8; *Atlantic Highways Corp (Re)*, [1997] NSJ No 238 at para 29.

71. *Merck Frosst Canada Ltd v Canada (Minister of Health)*, 2009 FCA 166, 179 ACWS (3d) 2 [Merck].

72. *Ibid* at para 63.

73. *Chippewas of Nawash First Nation v Canada (Minister of Indian & Northern Affairs)* (2009), 177 FTR 160 (FCA) [Chippewas].

74. *Ibid* at para 5.

that the “information [is] a trade secret” and meet “a high threshold.”⁷⁵ As previously discussed, a trade secret is highly technical in nature, such as the physical composition of product or a manufacturing process, and inherently confidential.⁷⁶

Financial information

In *Chippewas*, records of correspondence, meeting minutes, and resolutions connected to certain First Nations were held not to be financial information. Some of the records referred to land and Rothstein JA dismissed the argument that reference to an asset was sufficient to qualify a document as financial information. He concluded by stating that “[without defining what financial information consists of, we are satisfied that merely because documents contain references to land, they do not constitute financial information.”⁷⁷

Commercial information

Commercial information has been defined as information that relates solely to the buying, selling or exchange of merchandise and goods.⁷⁸ In *Ontario First Nations*, records that spoke to accountability measures were not considered to be commercial information as they did not involve the “exchange of merchandise or services.”

Labour relations

In the context of the *Nova Scotia Act*, the courts have favoured an expansive definition of “labour relations” that includes worker-employer relationships regardless of whether the relationship is governed by a collective bargaining agreement.⁷⁹

c. *Confidential information supplied by a third party*

Supplied by the third party

The information at issue must have been “supplied” by the third party and therefore, the courts have held that negotiated agreements between the third party and the government agency will not generally meet this

75. *Merck*, *supra* note 71 at para 54.

76. *Astrazeneca Inc v Canada (Health)*, 2005 FC 189 at paras 62-65, 275 FTR 133, cited in *Merck*, *supra* note 71 at para 53.

77. *Chippewas*, *supra* note 73 at para 5.

78. *Ontario First Nations Ltd Partnership v Ontario (Information and Privacy Commissioner)*, (2006) 209 OAC 158 at para 9 (ON Sup Ct J).

79. *Halifax Herald Ltd v Nova Scotia (Workers' Compensation Board)*, 2008 NSSC 369 at paras 54 & 56 [*Halifax Herald*].

criterion.⁸⁰ As Kelen J held in *Aventis Pasteur Ltd. v. Canada (Attorney General)*:

To hold otherwise would broaden the scope of the exemption and prevent the public from having access to much of the information contained in government contracts.⁸¹

If, however, an agreement contains attachments or information that was supplied by the third party and otherwise meets the requirements for the exception, those aspects of the agreement may not be subject to disclosure.⁸²

Determining whether information contained in an agreement between the government and a third party was supplied by the third party, will be informed by whether the information is immutable and whether it may indirectly disclose confidential information that was supplied by a third party. Information supplied by the third party will be considered immutable where it is not susceptible to change. For example, information regarding third party contract costs will not generally be susceptible to be changed through negotiations. Thus, it will often be considered information supplied by a third party. On the other hand, if a third party provides a bid or offer to the government, which is then incorporated into an agreement, this information is susceptible to modification by negotiation. Therefore it will generally not be considered to have been provided by the third party. The susceptibility or possibility that the information may be modified by negotiation is the relevant factor, not whether the information actually is modified by negotiation. However, this consideration is not a test, but is only a factor to be assessed in considering whether a particular piece of information was supplied by a third party.⁸³

An agreement may also contain information that will meet the “supplied” criterion if the negotiated information allows a reasonably informed observer to accurately infer underlying confidential information.⁸⁴

Confidential

Confidentiality, as discussed previously, depends on the content, purpose, circumstances of its compilation and communication of the information.

80. *Canada Post Corp v National Capital Commission*, 2002 FCT 700, 221 FTR 56; *Aventis Pasteur Ltd v Canada (AG)*, 2004 FC 1371, 262 FTR 73 [*Aventis Pasteur*].

81. *Ibid* at para 23.

82. *Boeing Co v Ontario (Ministry of Economic Development and Trade)*, (2005) 200 OAC 134 at para 20. See also *Canadian Protective Assn v Loukidelis* (2008), 298 DLR (4th) 134 (ON Sup Ct).

83. *Canadian Pacific Railway v British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603 at paras 70-77, 2002 CarswellBC 1022 (WL Can) [*CPR*]. See also *Jill Schmidt Health Services Inc v British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 101 at paras 32-39, 102 ACWS (3d) 449.

84. *CPR, ibid*.

In *Air Atonabee Ltd v Canada (Minister of Transport)* (1989),⁸⁵ this assessment was broken down into three parts. Firstly, the content of the information should not be available to the public, nor should it be accessible to a member of the public through his own observation or independent study.⁸⁶ To be considered available to the public, the information need not be available from a single public source, it can require time and expense to collect.⁸⁷ Secondly, the information should originate and be communicated in a reasonable expectation of confidence that it will not be disclosed. Thirdly, information should have been communicated within a relationship with the government that is either a fiduciary relationship or one that is not contrary to the public interest and that relationship will be fostered for public benefit by confidential communication.⁸⁸ It is on this basis that the Federal Court of Appeal ruled in *Canada (Minister of Public Works and Government Services) v. Hi-Rise Group Inc.*, that a third party “could not reasonably expect that amounts paid or payable to it out of public funds pursuant to the ensuing contract would remain confidential by reason of the fact that the process which led to the grant of the contract was confidential.”⁸⁹

Relying upon a permutation of those stated above, the British Columbia Privacy Commissioner considered the phrase “received in confidence” from section 16 of the British Columbia *Freedom of Information and Protections of Privacy Act*,⁹⁰ and outlined seven relevant factors:

1. What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?
2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
3. Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may not actually have understood there was a true expectation of confidentiality.)

85. *Air Atonabee Ltd v Canada (Minister of Transport)* (1989), 27 FTR 194 (TD) [*Air Atonabee*].

86. *Ibid* at 210, quoted with approval in *Merck, supra* note 72 at para 65; *Canadian Imperial Bank of Commerce v Canada (Chief Commissioner, Human Rights Commission)*, 2007 FCA 272 at para 61, [2008] 2 FCR 509 [CIBC]; *HJ Heinz Co of Canada Ltd v Canada (AG)*, 2006 SCC 13 at para 51, [2006] 1 SCR 441.

87. *Cyanamid Canada Inc v Canada (Minister of National Health and Welfare)*, [1992] FCJ no 950 (QL), (1992) 45 CPR 3d 390 (FCA) at 403 (in CPR).

88. *Air Atonabee, supra* note 85 at 210.

89. *Canada (Minister of Public Works and Government Services) v Hi-Rise Group Inc*, 2004 FCA 99 at para 42, 238 DLR (4th) 44.

90. *BC Act, supra* note 68, s 16.

4. Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)
5. Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?
6. Do the actions of the public body and the supplier of the record—including after the supply—provide objective evidence of an expectation of or concern for confidentiality?
7. What is the past practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers?⁹¹

The Nova Scotia courts have adopted these factors as relevant to the third party business interest expectation despite the slight difference in wording.⁹² The factors are applied in conjunction with the *Air Atonabee* test.⁹³

d. *Reasonable expectation of harm*

The legislation sets out an exhaustive list of the effects of disclosure that will trigger this exception.⁹⁴ There is very little case law dealing with these individual categories. Rather, precedent has focused on the standard of proof and evidentiary onus of establishing the requisite level of harm.

With respect to the competitive or negotiation position of a third party, the harm must be “significant.” To assess the significance of the harm, the Alberta Act Guidelines and Practice (2009) states that a public body must assess, among other things: (i) the nature of the information; (ii) the third party’s “representations regarding the harm involved”; (iii) if possible, an “objective appraisal of that harm, including any monetary or other value placed on it”; and (iv) the impact of the disclosure on the third party, and its “ability to withstand this.”⁹⁵

91. *Re Vancouver Police Board’s Refusal to Disclose Complaint-Related Records*, 1999 CanLII 4253 (BC IPC).

92. *Halifax Herald*, *supra* note 79 at para 67; *Keating v Nova Scotia (AG)*, 2001 NSSC 85, 194 NSR (2d) 290 at para 56; *Chesal v Nova Scotia (AG)*, 2003 NSCA 124 at para 76-77, 219 NSR (2d) 139.

93. *Halifax Herald*, *supra* note 79 at paras 77-90.

94. Jay Krushell, *Annotated Freedom of Information and Protection of Privacy Act* (Edmonton: Queen’s Printer of Alberta, 2010).

95. Government of Alberta, *FOIP Guidelines and Practices, 2009 Edition*, online: Service Alberta <<http://www.servicealberta.ca/foip/resources/guidelines-and-practices.cfm>> at 106 [*FOIP Guidelines*].

The following test is often relied upon by the Alberta Privacy Commissioner:

[T]here must be a clear cause and effect relationship between disclosure of the withheld information and the outcome or harm alleged; the outcome or harm that would be caused by the disclosure must constitute damage or detriment and not simply hindrance or minimal interference; and the likelihood of the outcome or harm must be genuine, and conceivable.⁹⁶

The Alberta Act Guidelines and Practice has also stated that the disclosure of a third party's "history and general information about its plans" will not result in "significant harm," while a third party's "strategic position with respect to its dealings with one public body...intended to serve as a blueprint for [its current and potential] commercial relationships with other similar public bodies," will.⁹⁷ In relation to financial loss or gain, the harm must result in an "undue" effect. Predictions of future harm must be based on a reasonable expectation of harm. Meeting this standard will generally require detailed and convincing evidence.⁹⁸

With respect to the reasonable expectation of loss or prejudice, the party seeking to block disclosure must establish that loss or prejudice is probable.⁹⁹ The mere possibility of harm will not satisfy the requirements. In *Merck*, for example, the court concluded that affidavit evidence speaking to the "likely risk of significant commercial or financial repercussions" was insufficient to warrant the application of the exception because the "statements [were]...vague, speculative and silent as to specifically how and why the disclosure of the requested information would be likely to bring about the harm alleged."¹⁰⁰

The party seeking to rely on the exception will have to provide specific evidence as to how the information would be harmful and the extent to which it will affect the third party. In *CPR*, evidence that certain information would be harmful to a third party's negotiation of a collective bargaining agreement with employee unions was insufficient without further details of the scope of the collective agreement and when it would next be negotiated.¹⁰¹

96. *Re Alberta Employment and Immigration*, Order F2010-029, 2010 CanLII 96618 at para 76 (AB OIPC).

97. *FOIP Guidelines*, *supra* note 95 at 107.

98. *Ontario (Ministry of Transportation) v Ontario (Information and Privacy Commissioner)* (2005), 202 OAC 379 at para 37 (Ont CA).

99. *Merck*, *supra* note 71 at para 84.

100. *Ibid* at paras 56, 93.

101. *CPR*, *supra* note 83 at paras 86, 88.

In *Halifax Herald*, the trial judge found that disclosure of the twenty-five employers with the most workplace accidents would not cause those employers significant harm. Embarrassment or stigmatism, without more, will not likely meet the requirement of significant harm.¹⁰²

The court will not find a reasonable expectation of loss or a prejudiced competitive position if the information is otherwise available in the public domain.¹⁰³ The specific information at issue must, however, be in the public domain. Similar information, or even the same type of information, will not suffice.¹⁰⁴ In *Rubin v. Canada (Minister of Health)*,¹⁰⁵ Rothstein JA explained that “the burden is on the [government] to provide evidence that there has not been public disclosure of [the] information.”¹⁰⁶ This will likely be considered closely with the confidentiality requirements.

Given the relatively recent enactment of the many provincial access to information acts, there is a paucity of case law that deals with the foregoing business interests exemption, as the courts have not had the opportunity to thoroughly consider and delineate the scope of this provision. As such, a certain veil of uncertainty remains with respect to the extent to which this provision can be relied upon by a third party to protect its information in the hands of the government.

III. *One province’s approach—contracting with Nalcor*

Created pursuant to the Newfoundland *Energy Corporation Act*,¹⁰⁷ Nalcor was incorporated for the purpose of “invest[ing] in, engag[ing] in, and carry[ing] out activities in all areas of the energy sector in [Newfoundland and Labrador] and elsewhere,”¹⁰⁸ and to date has three subsidiaries: Nalcor Oil and Gas, Nalcor Energy–Bull Arm Fabrication Inc., and Newfoundland and Labrador Hydro (NL Hydro).

Recognizing that industry requires certainty when dealing with its confidential information in the hands of the government, that it is in Newfoundland and Labrador’s interest to attract oil and gas investment, and that the access to information regimes generally may create uncertainty and thus act as impediment to investment, Nalcor Energy and each of its subsidiaries, except NL Hydro, the Province’s publicly-owned generation

102. *Supra* note 79.

103. *Merck*, *supra* note 71 at para 81.

104. *CIBC*, *supra* note 86 at para 61 (FCA).

105. *Rubin v Canada (Minister of Health)*, 2003 FCA 37, 238 FTR 159.

106. *Ibid* at para 4.

107. *Energy Corporation Act*, SNL 2007, c E-11.01 [ECNL].

108. *Ibid*, s 5(1).

company, have a special exemption under *ATIPPA* (collectively, “Nalcor Subsidiaries”).¹⁰⁹

Section 5.4 of the *ECNL*, which reads as follows, is integral to Nalcor’s ability to protect a third party’s confidential information:

Notwithstanding section 6 of the *Access to Information and Protection of Privacy Act*, in addition to the information that shall or may be refused under Part III of that Act, the chief executive officer of the corporation or a subsidiary, or the head of another public body,

- (a) may refuse to disclose to an applicant under that Act commercially sensitive information of the corporation or the subsidiary; and
- (b) shall refuse to disclose to an applicant under that Act commercially sensitive information of a third party

where the chief executive officer of the corporation or the subsidiary to which the requested information relates reasonably believes

- (c) that the disclosure of the information may
 - (i) harm the competitive position of,
 - (ii) interfere with the negotiating position of, or
 - (iii) result in financial loss or harm to the corporation, the subsidiary or the third party; or
- (d) that information similar to the information requested to be disclosed
 - (i) is treated consistently in a confidential manner by the third party, or
 - (ii) is customarily not provided to competitors by the corporation, the subsidiary or the third party. [Emphasis added.]¹¹⁰

In effect, this section states that the CEO of Nalcor or a Nalcor Subsidiary may refuse to disclose commercially sensitive information to an applicant where the CEO reasonably believes that disclosure may harm the competitive position, interfere with negotiating position, or result in financial loss or harm to the corporation.

In addition, the CEO of such a corporation may refuse disclosure if that information or similar information is treated consistently in a confidential manner by a third party or is ordinarily not provided to competitors by the corporation or the third party. If the information at issue is the commercially sensitive information of a third party, the CEO in this instance must refuse to disclose such information if the aforementioned criteria are met.

It is section 5.4 that carries the real power for Nalcor. These provisions effectively exempt Nalcor and the Nalcor Subsidiaries from the broad and

109. *ATIPPA*, *supra* note 65.

110. *ECNL*, *supra* note 107 at s 5.4(1) [Emphasis added].

uncertain applications of the *ATIPPA*. Arguably, under section 5.4(d)(ii), Nalcor can behave as a company at arm's length from the government—despite the fact that it is a public body under the *ATIPPA*. We note, however, that a full exemption was not given to Nalcor. As a result, Nalcor and the Nalcor Subsidiaries must still follow the process outlined in *ATIPPA*, if provided with a request from an applicant. This means that Nalcor must still respond to an access request, if only to say that the existence of the record is subject to section 5.4(d)(ii) and therefore may be exempted. The response could be production of a redacted form of the document, or the very existence of the document could be denied.

The reasons for this exemption are obvious when one contemplates the realities of working with large companies in the offshore of Newfoundland and Labrador. Land acquisition in this area is based upon a secret competitive bid process and information is tightly guarded.¹¹¹ Third party companies will not deal with a government body in the same fashion as they would with another third party if they are concerned about their information being disclosed to competitors or to the public through an *ATIPPA* request. This is particularly so in the case of publicly traded companies, which have additional duties to securities regulators to ensure that information that may affect stock price is controlled. Also, it is the purview of a project operator to control the orderly flow of information relating to a joint venture.

When a government agency compels the release of information, as happens in the context of royalty administration, a company has no choice but to abide. Where a company is created by a government to gather knowledge and information regarding offshore oil and gas and must therefore form partnerships and relationships with other third party oil companies, for the relationship to be meaningful, it cannot be based

111. As explained in Newfoundland and Labrador, Department of Natural Resources, *2007 Energy Plan: Focusing Our Energy*, (St. John's, NL: Newfoundland and Labrador Department of Natural Resources, 2007), online: Department of Natural Resources <http://www.nr.gov.nl.ca/nr/energy/plan/pdf/energy_report.pdf> at 23 [*2007 Energy Plan*]: In the offshore, the province proposes to improve the existing exploration phase process. Currently, companies identify lands they wish to explore and nominate those lands to the Canada–Newfoundland and Labrador Offshore Petroleum Board (C-NLOPB). The C-NLOPB decides which lands will be posted for bid, depending on the level of interest expressed. Following posting, companies “bid” on the lands by offering to spend a specific amount on seismic or drilling activity. If an Exploration License is awarded, the company then has five years (extendable to nine years if an acceptable plan is agreed to) to expend the bid amount. If the bid amount is not fully expended and a significant discovery has not occurred, the companies must return the exploration rights plus the C-NLOPB retains twenty-five per cent of the unexpended commitment. The province proposes to improve this phase by ensuring companies outline detailed plans and timelines for execution for exploration activity, and to establish a reporting and monitoring program that will ensure the activity is being pursued as planned.

on compulsory behavior. To have Nalcor at the table with its partners, in a fashion that does not allow for the free flow of information, would defeat its statutorily-prescribed objectives. Indeed, the Government of Newfoundland and Labrador seeks to “[take an] equity ownership in projects to ensure first-hand knowledge of how resources are managed, to share in that management, to foster closer government/industry alignment of interests and to provide an additional source of revenue.”¹¹²

This additional protection was provided to Nalcor and the Nalcor Subsidiaries in order to ensure that they could work and operate in the realm of private industry. Without this additional protection, third party companies would be reluctant to do business with the province’s oil company for fear that their information might be disclosed to the public through an *ATIPPA* request.

1. *Comparing the two regimes*

When one compares the protections provided for under section 27 of *ATIPPA* with those provided under *ECNL*, it is evident that the compulsory requirement on a head of a public body not to disclose confidential information of third parties if it is supplied in confidence and could reasonably be expected to cause harm, is different than that of section 5.4 of the *ECNL*. The *ECNL* requirement states that the CEO shall refuse to disclose such commercially sensitive information if he or she has the reasonably held view that the release may harm a party, or is kept confidential by the owner, or is not customarily provided to competitors.

The CEO under section 5.4 of the *ECNL* does not have to inquire whether the information was supplied in confidence or whether it may cause harm. There is a lengthy definition of what constitutes “commercially

112. 2007 *Energy Plan*, *ibid* at 18.

sensitive information” in the *ECNL*,¹¹³ but there is no such exhaustive list in *ATIPPA*, further broadening the scope around which the CEO may act under *ECNL*. This puts the CEO of Nalcor, for example, in a position where he may act in a fashion entirely consistent with the CEO of a third party corporation with respect to commercially sensitive information.

Pursuant to the province’s energy policy (as articulated in its *2007 Energy Plan: Focusing Our Energy*),¹¹⁴ Nalcor will receive ten percent of certain new off-shore development projects.¹¹⁵ When these deals are then negotiated, one of the main issues will be the exchange of information, as only where the partners feel completely comfortable will there be a full exchange of information. Otherwise, Nalcor Oil and Gas can take an interest in the field, but not get any information that is critical to the fulfillment of its mandate. The ultimate goal of a company like Nalcor Oil and Gas is that it will enter the market like a regular oil company and seek out opportunities and partnerships in satisfaction of its mandate. The parties may have been forced to the table and compelled to share in the resource in the case of an energy plan sharing of the field, but without

113. According to section 2(b.1) of the *ECNL*, *supra* note 107:

“[c]ommercially 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 agreement 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).

114. *2007 Energy Plan*, *supra* note 111.

115. “The [p]rovincial [g]overnment will require a [ten] per cent equity position in future offshore petroleum projects that require Development Plan approval, where it fits our strategic long-term objectives.” *Ibid* at 20.

that compulsion, and comfort level, it is hard to imagine that many deals involving sensitive commercial information would be successful.

2. *Where the shareholder is the Crown*

The issue becomes a concern for third parties contracting with a public body, who share its information with its shareholder, the Crown. Also at issue is the confidence that third parties have that the public body will fulfill their duty to keep commercially sensitive information confidential, in the atmosphere of transparency created by the *ATIPPA*.¹¹⁶

Once the information has been disseminated to the Crown, the protection which the corporation has under *ECNL* is lost.¹¹⁷ The Crown, as shareholder, must be kept apprised of all that its corporate agents are engaged in, so as to be accountable to the public. To address this, third party companies have attempted to place onerous requirements on Nalcor and the Nalcor Subsidiaries. These confidentiality provisions typically require that Nalcor ensure that any party, including its affiliates and the Crown, be bound by the same confidentiality arrangements.

Government officials must be able to speak generally about the basic terms and conditions of a Crown corporation's dealings. Inquiries regarding contractual timeframes around consent to release information or notice will likely be resisted. These inquiries rob time and resources to identify what agreement may apply and to comply with same. Politicians generally do not have the time, nor the appetite to open multiple confidentiality agreements to answer questions. Price, status of negotiation (unless the negotiation itself is a secret), parties, and schedule are all facts that could be refused under section 5.4(1)(d) by the CEO of the public body, but may in some cases be provided to the Crown shareholder and which a third party corporation must expect will be disseminated to the public without notice or authorization, but this is always done per the terms of the confidentiality agreements in place between the parties. If the information is of a particularly sensitive nature, that is not the case, but where the commercial value or level of sensitivity is low (i.e., the date that a given memorandum of understanding is signed, and the price paid by Nalcor for a particular license asset per the Energy Plan) the opposing commercial entity (oil company) will expect that the information will be transmitted to the Crown and ultimately to the public shareholder. Nalcor, therefore, must keep an eye to the level of shield that the Crown has available to

116. *ATIPPA*, *supra* note 65.

117. *ECNL*, *supra* note 107.

it under section 27 of *ATIPPA* when reporting commercially sensitive or confidential matters to its shareholder, the Crown.

For example, contracts that the government has entered into, despite the fact that they may disclose confidential information, have not been protected from disclosure by access to information legislation throughout Canada. Contracts with a public body, however, and the terms and conditions of them, may be the very information that an arm's length partner in an oil and gas deal may wish be kept confidential. The solution to this problem is to provide to the Crown basic derivative data and information without disclosing matters that would be so commercially sensitive as to be damaging to the third party.

Any requests received by the Crown for these types of information must pass the third party confidentiality tests of *ATIPPA*, and any other confidentiality requirements. One may see the importance of ensuring that the terms and conditions around any confidentiality agreement between third parties and a company like Nalcor should be well thought through. A third party cannot insist upon terms and conditions that would refuse any disclosure of any information of any sort whatsoever to the Crown. Additional provisions that require Nalcor to ensure that the Crown or any other recipient of confidential information, keep it confidential, are considered reasonable and "market."

Each year an annual report is tabled to the board of directors and ultimately to the House of Assembly (Provincial Legislature). That document contains summaries of the activities of the Crown corporation and budget information, but is specifically drafted with the public eye in mind so that third party information is protected.¹¹⁸ Therefore, despite the provisions of the *ECNL*, by entering into a contract with a Crown corporation with similar protections, it must be realized that some reporting latitude must be provided. As an example of wording that could potentially satisfy and strike the balance between the parties is set out in Appendix B.

For example, a contract where the Crown is a party may be requested from the Crown and then disclosed. Third party contracts with public bodies are rarely supplied to the Crown as they require the additional protection of the *ECNL*. If it is provided to the Crown under a confidentiality obligation, the Crown would then be able to resist an *ATIPPA* request for a copy of that contract. This is the common concern raised by third party corporations;

118. See, e.g., Nalcor Energy, *2010 Business and Financial Report*, online: Nalcor Energy <http://www.nalcorenergy.com/uploads/file/nalcor%202010%20business%20and%20financial%20report_final_may%203%202011.pdf>.

they do not want their various agreements, including seismic licensing agreements, in the public domain.

It is worth noting that almost identical provisions to section 5.4 of the *ECNL* were adopted in the *Research and Development Council Act*.¹¹⁹

3. *Canada–Newfoundland offshore petroleum board*

Adding further to the complexities of the matter, the federal government of Canada and the provincial government of Newfoundland and Labrador may also be able to access certain information about Nalcor's or other industry participants' activities in the custody or control of the Canada–Newfoundland Offshore Petroleum Board (the CNLOPB). In effect, section 18(1) of the *Canada–Newfoundland Atlantic Accord Implementation Act*¹²⁰ provides that the Federal Minister of Natural Resources and the applicable Provincial Minister of Newfoundland, without third party consent, may access *any information or documentation* relating to petroleum resource activities in the offshore area that is provided for the purposes of this *Act* or any regulation made thereunder.¹²¹

4. *Testing the new regime*

One of the concerns is whether section 5.4(d)(ii) of the *ENCL*¹²² really changes the game for Nalcor and the Nalcor Subsidiaries. Can Nalcor simply refuse disclosure in most instances? The companies that deal with Nalcor expect such a response, but as of the date of this paper, this section has yet to be judicially considered. Balanced against that shield is that the *ATIPPA* is drafted with the spirit of disclosure, and as a public body, Nalcor ought to follow that spirit, to the extent that it can within its exemptions.

Recent decisions from the courts of Newfoundland and Labrador regarding solicitor-client privilege (as well as an amendment to the *ATIPPA*) highlight the potential issue and its partial resolution. In *Newfoundland and Labrador (Information and Privacy Commissioner) v Newfoundland and Labrador (Attorney General)*,¹²³ a request was made of the Crown to

119. *Research and Development Council Act*, SNL 2008, c R-13, s 21.

120. *Canada–Newfoundland Atlantic Accord Implementation Act*, SC 1987, c 3 [*Accords Act*].

121. The *Accords Act*, *ibid* has defined “offshore area” to mean
those submarine areas lying seaward of the low water mark of the Province and extending,
at any location, as far as
(a) any prescribed line, or
(b) where no line is prescribed at that location, the outer edge of the continental margin or
a distance of two hundred nautical miles from the baselines from which the breadth of
the territorial sea of Canada is measured, whichever is the greater[.]

122. *ECNL*, *supra* note 107.

123. *Newfoundland and Labrador (Information and Privacy Commissioner) v Newfoundland and Labrador (Attorney General)*, 2011 NLCA 69, rev'g *Imperial Tobacco Co v Newfoundland and Labrador (AG)*, 2007 NLTD 172, 276 Nfld & PEIR 123.

produce solicitor-client privileged material. The Crown refused to disclose even the existence of such material, the privacy commissioner challenged this and the matter landed before Justice Marshall. She ruled that matters of solicitor-client privilege ought to be determined by a judge, and not by a privacy commissioner, in that the privacy commissioner does not have the same independence as a court and does not have the power to determine legal rights, despite their ability to compel production. On appeal, however, Harrington JA, for the Court of Appeal, found that s. 52 of the ATIPPA was “unambiguous and explicitly permits the Commissioner to abrogate a claim to solicitor-client privilege in order to verify the legitimacy of such a claim in the discharge of his statutory mandate.”¹²⁴

In a possible reaction to this decision, s. 52 of the ATIPPA was amended in 2012¹²⁵ to provide that the commissioner has the power to compel production of records from a public body “...except any record which contains information that is solicitor and client privileged or which is an official cabinet record” (s. 52(2)), and that the obligation on the head of a public body to provide such records does not extend to information which is solicitor and client privileged (s. 52(4)).

In *Imperial Tobacco Co. v. Newfoundland and Labrador (Attorney General)*¹²⁶ the Newfoundland and Labrador Supreme Court was asked to review the Government of Newfoundland’s decision to rely on solicitor-client privilege as the basis of denying a request to access a contingency fee agreement that it had entered into with a law firm in Missouri with respect to its planned legal action against certain tobacco companies. The court held that the government met the following three criteria to establish privilege:

- (i) there must be a communication between a solicitor, acting in his or her professional capacity, and the client; (ii) the communication must entail the seeking or giving of legal advice; and (iii) the communication must be intended to be confidential by the parties.¹²⁷

However, on account that the government had announced its arrangement publicly, Green CJTD held that it could not subsequently rely on a “self-serving *ex post facto* assertion of an intention to maintain [this agreement’s] confidentiality.”¹²⁸ The additional finding made by the Court was that in

124. *Ibid* at para 84.

125. SNL 2012, c 25, s 28.

126. *Imperial Tobacco Co v Newfoundland and Labrador (AG)*, 2007 NLTD 172, 276 Nfld & PEIR 123.

127. *Ibid* at para 107 [Emphasis in original].

128. *Ibid* at para 113.

most circumstances the commercial arrangements between the solicitor and client, while confidential, are not subject to legal privilege.¹²⁹

The other issue that arises in the circumstance where the information is not owned by a third party partner, but is similar to information owned by that partner, is whether it would be in the interest of those partners of a public body to be invited to seek intervener status in the event that an *ATIPPA* request is refused and the decision matter is challenged. Watering down of the section through judicial precedent could have a ripple effect that would quite arguably threaten the shield surrounding third party information. However, the mere suggestion to partners that they ought to expend money to hire lawyers to intervene in a matter that on its face has nothing to do with them, but the outcome of which could affect their dealings with the Crown, could have a chilling effect on free-handed dealing with those public bodies. This too is a bridge yet to be crossed.

The use of confidentiality agreements in advance of the sharing of confidential information does not change the obligation of Nalcor under section 5.4 of the *ECNL*, but it does ensure that if a request is made, that intervener status may, on the face of the confidentiality agreement, be applied for, and the provisions of the confidentiality agreement, if in place, will be available for a remedy. Also, it ensures that when the parties looking at the information are taking a consideration of the options, the obligations under the confidentiality agreement will come to mind.

5. *Can the existence of the information be denied?*

Subsection 12(2) of the *ATIPPA* sets out the specific cases where the head of the public body can deny the existence of a record.¹³⁰ That the record may harm a third party's commercial interests is not a specific exemption. Section 63 of this *Act* makes it clear that an adjudicative body that sits on appeal or review of the process cannot order a public body to disclose information that has the protection of an exemption, even if it is discretionary.¹³¹

The *ATIPPA*¹³² requires that the information be supplied on a confidential basis and that it be consistently treated that way to meet the exclusion.¹³³ The fact that the information was disclosed and the relationship grounded on the basis of a confidentiality agreement with strict terms relating to disclosure to third parties, and an obligation on the part of the receiving

129. *Ibid.*

130. *ATIPPA*, *supra* note 65, s 12(2).

131. *Ibid.*, s 63.

132. *Ibid.*

133. Colin McNairn & Christopher Woodbury, *Government Information: Access and Privacy* (Scarborough: Carswell, 1992) at 4-10, 5-7 to 5-12.

party to put forward all reasonable arguments and challenges to disclosure, may satisfy a court that the information would not have been disclosed had it been known that it could be released to the public. That is also evidence in favour of the argument that a competitor of the corporation would not release the information.

The *ATIPPA* also has a specific injury test, which states that if the release would interrupt the flow of information, the release can be refused.¹³⁴ Taking section 27(1)(c)(ii) in light of the expectations set up by the *ECNL*,¹³⁵ this section carries more weight.

In the case of a bidder on a contract where the structure of the bid is revealed and that would compromise the competitive advantage in the acquisition of future contracts, the form of the bids can be considered protected information. The fact that the bid was made is not. The evidence must be detailed and convincing in its quality and cogency to be accepted prior to a refusal to allow the existence of information to be made under Ontario's act.¹³⁶

Where there is a denial of the existence of information, there will be a presumption that the information exists.¹³⁷ The presumption of proof lies with the public body in refusing access to the record. This makes sense as the trier of fact has to have some facts around to govern the trial of the matter. The trier of fact cannot leave the entire factual context in the realm of the theoretical. The owner of the information would have to review the information in advance of such a reply to establish the defence to the disclosure. It would therefore not be enough for the owner of the information to deny the existence of the information without looking at it to make the determination that it falls within the exception pleading that they need not even enter into the exercise because any information would not normally be shared.

Examples of cases where the very existence of the information would be denied are cases where the knowledge of the record could threaten national defence (NATO maneuvers, for example) or in the case of a third party, where a decision of a public body—a denial of an application for example, released in advance of the final decision, could adversely affect

134. *ATIPPA*, *supra* note 65.

135. *ECNL*, *supra* note 107.

136. McNaim & Woodbury, *supra* note 131 at 4-10 (Order No. PO-1818 of Ontario Information and Privacy Commissioner, Sept 22 2000 (Re Ministry of National Resources at pp 2-3), Order No MO-1504 of Ontario Information and Privacy Commissioner, 30 January 2002 (Re City of Greater Sudbury at p 9).

137. McNaim & Woodbury, *ibid* at 5-9, para 5.5.

a third party or the case where the disclosure could threaten the safety of an individual, such as the location of a witness.¹³⁸

In the example of a contract entered into between an oil company and Nalcor, no such impediment to release the existence of the contract would be ordinarily raised, except perhaps in the case of documents in advance of formal negotiations, the existence of which could affect the competitive position or stock price of a third party. There is no explicit exception for third party documents, but does that mean that the existence must always otherwise be disclosed? Firstly, it is always open for a government body to simply not respond. Subsection 12(1)(a) of *ATIPPA* allows for a public body to simply refuse access to a record.¹³⁹ If so, under section 28 of *ATIPPA*, notice can be given to a third party of the request allowing them standing to refuse the information.¹⁴⁰ Where the mere attendance at a hearing for such a purpose could affect the third party, it is the writer's belief that the existence of the information ought to be refused where the mischief created by disclosure would outweigh the disclosure. Secondly, the notwithstanding provisions of subsection 12(2) of *ATIPPA* are not exclusive in that there is nothing to say that these are the only cases where existence of information may be refused.¹⁴¹ That door remains open, from an interpretative perspective. Taking the simple example of the staking of mining claims, if a competitor asked if one was out in the field the previous day, or where they had been looking around, or where they intended to stake a claim, even the acknowledgement would be refused. Considering that the knowledge of the existence of a record is in and of itself information, and would not be disclosed to a competitor, such information ought to fall within the scope of section 5.4(1)(d) as information that would not customarily be disclosed to a competitor, despite section 12 of *ATIPPA* which sets out the specific exemptions for refusal to acknowledge existence.¹⁴²

a. *Severance*

One of the issues relating to the denial of the existence of information is the concept of severance. The *ATIPPA* allows for severance in subsection 7(2), where the document can be severed.¹⁴³ It is reasonable to conclude, therefore, that in some instances, one record may support several facts (e.g. in the case of an email, for example, that the record exists, the time

138. *Ibid* at 5-10, para 5.5.

139. *ATIPPA*, *supra* note 65, s 12(1)(a).

140. *Ibid*, s 28.

141. *Ibid*.

142. *Ibid*.

143. *Ibid*.

of the conversation, the parties to the conversation and the contents of the dialogue). Each of them may be subject to a separate analysis with respect to whether or not it is subject to an exemption. It ought not therefore be a stretch to conclude that the existence of the record itself may provide such information as may hurt the interests of a third party or which might, under the *ECNL* exclusion, be information that would not normally be shared with competitors.¹⁴⁴

b. *Mediation material and its treatment under ATIPPA*

*Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*¹⁴⁵ and *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*¹⁴⁶ are cases that involved the requested disclosure of mediation materials prepared in the course of a dispute between the parties. As they were not the subject of a specific exemption, the requesting party asked for them. The court found that there were strong policy reasons to extend the privilege to mediation materials even though the materials were not protected under solicitor-client privilege, nor were they subject to privilege according to any rule of evidence and the matter was not in court. The court applied the *Wigmore* test as set out by the Supreme Court in *Slavutych v Baker*¹⁴⁷:

- (1) The communication must originate in a confidence that they will not be disclosed;
- (2) The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose;
- (3) The relationship must be one which, in the opinion the community, ought to be "sedulously fostered"; and
- (4) The injury caused to the relationship by disclosure of the communication must be greater than the benefit gained for the correct disposal of the litigation.

In the case of a request to a public body, the first two elements of the test are met due to the confidentiality agreements and context. Confidentiality is absolutely critical to open frank discussion between the parties. As for the third, there is significant public interest in maintaining a level of secrecy and confidentiality when dealing with third party oil companies.

144. McNairn & Woodbury, *supra* note 131 at 5-21.

145. *Newfoundland AG*, *supra* note 123.

146. *Newfoundland and Labrador (AG) v Newfoundland and Labrador (Information and Privacy Commissioner)*, 2010 CarswellNfld 40 (NLTD) (WL Can).

147. *Slavutych v Baker*, [1976] 1 SCR 254.

The public body, in the case of Nalcor, was conceived to behave in a manner consistent with the rules of third parties, and the enacting legislation in section 5.4 of the *ECNL* contemplated the maintenance of such confidentiality. As for the fourth part of the test, the injury would be the chilling effect over the flow of information from third party companies, which would make the stated purpose of public bodies, such as Nalcor, impossible to achieve. Any good that would be achieved in releasing the information would undo the good contemplated in setting up the corporation on the first instance.¹⁴⁸

A class of privilege was created for the purposes of the *Act*, which was neither solicitor-client nor evidentiary based, but one which, if breached, would threaten the integrity of the system. This shows that there are circumstances where a court can see past the specific exemptions to create good policy, thereby extending the exemptions to disclosure.

c. *Royalty regulations as a model*

Under the provincial royalty regulations, a great deal of data is required for the royalty taker to ensure that it receives its proper royalty entitlement. There are specific sections of the regulations that deal with this information. Here the information is subject to *ATIPPA*, but it is an offence for anyone employed in the administration of the regulations to use it improperly.¹⁴⁹

Conclusion

ATIPPA and associated provisions of the *ECNL* work to strike a balance between government transparency and the goal of creating public bodies that can work with third party companies while maintaining a level of confidentiality to enable a free flow of information between them. Notwithstanding the lack of judicial consideration regarding these relatively new statutes, well-worded confidentiality agreements will likely suffice to allow for the movement of information between the parties and sufficient for the government to comment publicly on the issues and with facts that the public body is responsible for, and to satisfy the requirements of the *ATIPPA*. It is anticipated that this will provide companies in the oil and gas industry with certain comfort when dealing with Nalcor and the Nalcor Subsidiaries.

Given the increased frequency with which access to information statutes in Canada will be relied upon to gain material commercial information

148. Kris Klein & Denis Kratchanov, *The Klein & Kratchanov Report: The Canadian Source for Legal Developments in Privacy and Access*, Vol 2 Issue 8 (Scarborough: Carswell, 2010), reporting on *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 SCR 574, per Abella J.

149. *Royalty Regulations, 2003* under the *Petroleum and Natural Gas Act*, NL R 71/03, s 47.

about the activities, prospects and strategies of the private parties in the hands of the government, it is expected that the jurisprudence considering such legislation will expand in time to provide additional colour to the ability of the government to protect a third party's confidential information from its competitors, the media, and other members of the public. As this body of law develops, oil industry participants will be able to better determine how to structure their interactions with government by relying upon the protections afforded by contract law, the common law, and the foregoing access to information legislation.

Appendix A

Comparison of “Disclosure Harmful to Business Interests of a Third Party” Provisions in Various Access to Information Legislation in Canada

There are three common structures in the statutory provisions of the provinces and territories, and a fourth, unique format in the federal statute. The *Alberta Act*¹⁵⁰ format is the most common, and is shared by British Columbia, Ontario, Yukon, Nova Scotia, PEI, and Newfoundland and Labrador. A second format is reflected in the Saskatchewan, Northwest Territories, and Nunavut statutes. A third format is seen in the Manitoba and New Brunswick statutes.

The following provides an overview of the difference between the federal and each of the provincial “disclosure harmful to business interests of a third party” provisions. For further details, see also the attached table comparing these applicable sections set out below.

1. *Alberta*

The outline of the relevant section of the *Alberta Act* is a mandatory refusal to disclose certain information based on three criteria, followed by a separate provision requiring refusal to disclose tax-related information, and lastly, exceptions where disclosure may be permitted. Alberta and the six provinces and territories following have substantially the same outline, with variations noted in the analysis below.

a. *Mandatory Refusal to Disclose*

The first subsection provides criteria as to when refusal to disclose is mandatory. First, the information must fall within one of two categories, “trade secrets” or “commercial, financial, labour relations, scientific or technical information.” Second, the information must be supplied to the public body, explicitly or implicitly, in confidence. Third, disclosure of the information must be expected to have one of the following effects:

- harm significantly the competitive position or interfere significantly with the negotiating position of the third party;
 - 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;
 - result in undue financial loss or gain to any person or organization;
- or

150. *Alberta Act*, *supra* note 51.

- 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.

A second subsection requires a public body to refuse to disclose when the information requested was collected on a tax return or collected for the purpose of determining tax liability of collecting a tax.

Exceptions

The third subsection provides for four scenarios where the mandatory refusal does not apply. They are the following:

- the third party consents to the disclosure;
- an enactment of Alberta or Canada authorizes or requires the information to be disclosed,
- the information relates to a nonarm's length transaction between a public body and another party; or
- the information is in a record that is in the custody or under the control of the Provincial Archives of Alberta or the archives of a public body and has been in existence for fifty years or more.

2. *Ontario*

a. *Mandatory Refusal to Disclose*

While the structure of the *Ontario Act* is slightly different, the three criteria for mandatory refusal to disclose are found in much the same language. Like the *Alberta Act*, the *Ontario Act* has a separate provision mandating refusal to disclose tax-related information.¹⁵¹

Exceptions

The *Ontario Act* allows the public body discretion to disclose when the third party consents to the disclosure.

3. *British Columbia*

a. *Mandatory Refusal to Disclose*

The *BC Act* has virtually identical criteria for refusal to disclose.¹⁵² Like the *Alberta Act*, the *BC Act* has a separate provision mandating refusal to disclose tax-related information.

151. *Ontario Act*, *supra* note 67, s 17.

152. *BC Act*, *supra* note 68, s 21.

Exceptions

The *BC Act* provisions are only overruled when the third party consents to the disclosure or the information is in archives and has been in existence for fifty years or more, two of four exceptions in the *Alberta Act*.

4. *Yukon*

a. *Mandatory Refusal to Disclose*

The *Yukon Act*¹⁵³ has virtually identical criteria for refusal to disclose. Like the *Alberta Act*, the *Yukon Act* has a separate provision mandating refusal to disclose tax-related information.

Exceptions

The *Yukon Act* provisions are only overruled when the third party consents to the disclosure. Furthermore, the mandatory refusal to disclose tax related information does not apply to records under the *Assessment and Taxation Act* that describe a property and the assessment of the property.

5. *Nova Scotia*

a. *Mandatory Refusal to Disclose*

The *Nova Scotia Act*¹⁵⁴ has virtually identical criteria for refusal to disclose. Like the *Alberta Act*, the *Nova Scotia Act* has a separate provision mandating refusal to disclose tax-related information.

Exceptions

The *Nova Scotia Act* provisions are only overruled when the third party consents to the disclosure.

Other Variations

This section of the *Nova Scotia Act* also includes mandatory disclosure for reports prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an enactment.

6. *Prince Edward Island*

a. *Mandatory Refusal to Disclose*

The *Prince Edward Island Act*,¹⁵⁵ has virtually identical criteria for refusal to disclose. Like the *Alberta Act*, the *Prince Edward Island Act* has a separate provision mandating refusal to disclose tax-related information.

153. *Access to Information and Protection of Privacy Act*, RSY 2002, c 1, s 24.

154. *FIPPA*, *supra* note 678, s 21.

155. *Prince Edward Island Act*, *supra* note 68, s 14.

Exceptions

The *Prince Edward Island Act* has virtually identical exceptions to the mandatory refusal to disclose.

7. *Newfoundland and Labrador*a. *Mandatory Refusal to Disclose*

The *ATIPPA* has virtually identical criteria for refusal to disclose. Like the *Alberta Act*, the *ATIPPA* has a separate provision mandating refusal to disclose tax-related information.

Exceptions

The *ATIPPA* provisions are only overruled where the third party consents to the disclosure or the information is in archives and has been in existence for fifty years or more, two of four exceptions in the *Alberta Act*.

8. *Saskatchewan*

The relevant section of the Saskatchewan statute follows a somewhat different outline. While much of the language is similar to the *Alberta Act*, the outline first includes a mandatory refusal to disclose records containing various types of information, followed by listed exceptions to the rule.¹⁵⁶ This is different than the three criteria plus exceptions structure seen in the *Alberta Act*. Two territories (Northwest Territories and Nunavut) follow the *Saskatchewan Act* outline.

a. *Mandatory Refusal to Disclose*

The *Saskatchewan Act*, requires disclosure of a record to be refused if it contains any of six types of information. While some of the types of information are similar to the criteria in the *Alberta Act*, the following are not seen in the *Alberta Act* in any format:

- a statement of financial account relating to a third party with respect to the provision of routine services from a government institution;
- a statement of financial assistance provided to a third party by a prescribed Crown corporation that is a government institution; and
- information supplied by a third party to support an application for financial assistance.

Absent from the *Saskatchewan Act* is the requirement that information not be disclosed if it will result in the information no longer being supplied

156. *Saskatchewan Act*, *supra* note 69, s 19.

to the public body. The *Saskatchewan Act* also contains no provision mandating refusal to disclose tax-related information.

Exceptions

Of the exceptions seen in the *Alberta Act*, the *Saskatchewan Act* allows a public body discretion to disclose a record only where the third party consents to the disclosure. The *Saskatchewan Act* also allows an additional discretion for a public body to disclose a record if it is in the public interest as it relates to public health, public safety or protection of the environment, and if the public interest in disclosure clearly outweighs any financial loss or gain, prejudice to competitive position, and interference with contractual or other negotiations of a third party.

9. *Northwest Territories*

a. *Mandatory Refusal to Disclose*

The *Northwest Territories Act*¹⁵⁷ has substantially the same structure as the *Saskatchewan Act*. The *Northwest Territories Act* requires disclosure of a record to be refused if it contains any of the six types of information listed in the *Saskatchewan Act*. The *Northwest Territories Act* includes a seventh type of information, tax-related information, which is similar to the provision seen in the *Alberta Act*.

Exceptions

The *Northwest Territories Act* allows the public body discretion to disclose where the third party consents to the disclosure or if an act or regulation of the Northwest Territories or Canada authorizes or requires the disclosure. These are two of the four exceptions seen in the *Alberta Act*.

10. *Nunavut*

a. *Mandatory Refusal to Disclose*

The *Nunavut Act*¹⁵⁸ has substantially the same structure as the *Saskatchewan Act*. The *Nunavut Act* requires disclosure of a record to be refused if it contains any of the six types of information listed in the *Saskatchewan Act*. The *Nunavut Act* includes a seventh type of information, tax-related information, similar to the *Alberta Act*.

Exceptions

The *Nunavut Act* allows the public body discretion to disclose where the third party consents to the disclosure or if an act or regulation of the

157. *Northwest Territories Act*, *supra* note 69, s 24.

158. *Access to Information and Protection of Privacy Act*, SNWT (Nu) 1994, c 20, s 24 [*Nunavut Act*].

Northwest Territories or Canada authorizes or requires the disclosure. These are two of the four exceptions seen in the *Alberta Act*.

11. *Manitoba*

The relevant section of the Manitoba statute provides a third general outline. It requires a public body to refuse disclosure that would reveal certain information, followed by a mandatory refusal for tax-related information, and finally, exceptions. This is different from the three criteria seen in the *Alberta Act* and slightly different that records containing certain types of information as seen in the *Saskatchewan Act*. The New Brunswick statute follows the same structure.

a. *Mandatory Refusal to Disclose*

The *Manitoba Act*,¹⁵⁹ requires a public body to “refuse to disclose... information that [will] reveal” any of the three following types of information:

- (a) a trade secret of a third party;
- (b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by a third party; or
- (c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to [have a number of effects, the same as those listed in the *Alberta Act* criteria.]”

Much of the language used is similar to the *Alberta Act*, with a different structure. Of note is the additional requirement that information supplied confidentially must also be treated as such consistently by the third party. Like the *Alberta Act*, the *Manitoba Act* has a separate provision mandating refusal to disclose tax-related information.

Exceptions

The *Manitoba Act* includes two of the four exceptions found in the *Alberta Act* but does not provide an exception for archived records over fifty years old or information relating to a non-arm’s length transaction. There are also additional exceptions to the mandated refusal to disclose. These include information that is publicly available and information that discloses the final results of a product or environmental test conduct by or for the public body, unless the test was done for a fee paid by the third party. Lastly,

159. *Manitoba Act*, *supra* note 68, s 18.

the *Manitoba Act* allows a public body discretion to disclose information if it is in the public interest for the purposes of public health or safety or protection of the environment, improved competition, or government regulation of undesirable trade practices.

12. *New Brunswick*

a. *Mandatory Refusal to Disclose*

The *New Brunswick Act*¹⁶⁰ is virtually identical to the *Manitoba Act*, including a separate provision mandating refusal to disclose tax-related information.

Exceptions

The *New Brunswick Act* contains the same exceptions to refusal to disclose that are seen in the *Manitoba Act*, including those that are different than the *Alberta Act*. The *New Brunswick Act* allows a public body discretion to disclose information if it is in the public interest for the purposes of improved competition or government regulation of undesirable trade practices.

Other Variations

The *New Brunswick Act* contains a mandatory disclosure where it is in the public interest for the purposes of public health or safety or protection of the environment.

13. *Canada*

The federal provision has a very different and unique structure. The first subsection protects much the same information as the *Alberta Act* but the second, third and fourth subsections deal with product and environmental testing and are not addressed here. Two exceptions follow, in subsections five and six.

a. *Mandatory Refusal to Disclose*

With regard to third party information, the *AIA* provides for a mandatory refusal to disclose the following:

- trade secrets of a third party;
- financial, commercial, scientific or technical information that is confidential and is treated consistently in a confidential manner by the third party;
- information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably

160. *New Brunswick Act*, *supra* note 68.

- be expected to prejudice the competitive position of, a third party;
or
- information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

While much of the same information is protected under the *AIA*, there is no provision for refusal to disclose information that would result in similar information no longer being supplied to the public body. Nor is tax-related information protected from disclosure under the *Act*.

Exceptions

The *AIA* allows a public body to disclose if the third party consents to the disclosure. The *AIA* also allows a public body to disclose the information protected in subsection one (excluding trade secrets) if the disclosure is in the public interest as it relates to public health, public safety or protection of the environment, and the disclosure outweighs any financial loss or gain, prejudice to security of structure, networks or systems, or prejudice to competitive position or interference with negotiations of the third party.

Subsections corresponding to the *Alberta Act* are identified below. Additional sections which are not found in the *Alberta Act* are not noted in the table.

Table 1: Comparison of Third Party Business Interest Exemption

	ON	BC	YK	NS
AB				
16(1) The head of a public body must refuse to disclose to an applicant information	17(1)	21(1)	24(1)	21(1)
(a) that would reveal	17(1)	21(1)(a)	24(1)(a)	21(1)(a)
(i) trade secrets of a third party, or	17(1)	21(1)(a)(i)	24(1)(a)(i)	21(1)(a)(i)
(ii) commercial, financial, labour relations, scientific or technical information of a third party,	17(1)	21(1)(a)(ii)	24(1)(a)(ii)	21(1)(a)(ii)
(b) that is supplied, explicitly or implicitly, in confidence, and	17(1)	21(1)(b)	24(1)(b)	21(1)(b)
(c) the disclosure of which could reasonably be expected to	17(1)	21(1)(c)	24(1)(c)	21(1)(c)
(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,	17(1)(a)	21(1)(c)(i)	24(1)(c)(i)	21(1)(c)(i)
(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,	17(1)(b)	21(1)(c)(ii)	24(1)(c)(ii)	21(1)(c)(ii)
(iii) result in undue financial loss or gain to any person or organization, or	17(1)(c)	21(1)(c)(iii)	24(1)(c)(iii)	21(1)(c)(iii)
(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.	17(1)(d)	21(1)(c)(iv)	24(1)(c)(iv)	21(1)(c)(iv)

Table 1: Comparison of Third Party Business Interest Exemption (cont'd)

	ON	BC	YK	NS
AB				
(2) The head of a public body must refuse to disclose to an applicant information about a third party that was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax.	17(2)	21(2)	24(2)	21(2)
(3) Subsections (1) and (2) do not apply if	17(3)	21(3)	24(3)	21(4)
(a) the third party consents to the disclosure.	17(3)	21(3)(a)	24(3)	24(4)
(b) an enactment of Alberta or Canada authorizes or requires the information to be disclosed,	N/A	N/A	N/A	N/A
(c) the information relates to a non-arm's length transaction between a public body and another party, or	N/A	N/A	N/A	N/A
(d) the information is in a record that is in the custody or under the control of the Provincial Archives of Alberta or the archives of a public body and has been in existence for 50 years or more.	65(1)	21(3)(b)	N/A	N/A

Table 2: Table of Concordance: FOIP Third Party Business Interest Exemption

	PEI	NFLD	SK	NWT
AB				
16(1) The head of a public body must refuse to disclose to an applicant information	14(1)	27(1)	19(1)	24(1)
(a) that would reveal	14(1)(a)	27(1)(a)	N/A	24(1)(a)
(i) trade secrets of a third party, or	14(1)(a)(i)	27(1)(a)(i)	19(1)(a)	24(1)(a)
(ii) commercial, financial, labour relations, scientific or technical information of a third party,	14(1)(a)(ii)	27(1)(a)(ii)	19(1)(b)	24(1)(b)
(b) that is supplied, explicitly or implicitly, in confidence, and	14(1)(b)	27(1)(b)	19(1)(b)	24(1)(b)(i)
(c) the disclosure of which could reasonably be expected to	14(1)(c)	27(1)(c)	19(1)(c)	24(1)(c)
(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,	14(1)(c)(i)	27(1)(c)(i)	19(1)(c)(ii)-(iii)	24(1)(c)(ii)-(iii)
(iii) result in undue financial loss or gain to any person or organization, or	14(1)(c)(ii)	27(1)(c)(ii)	N/A	24(1)(c)(iv)
(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.	14(1)(c)(iii)	27(1)(c)(iii)	19(1)(c)(i)	24(1)(c)(i)
	14(1)(c)(iv)	27(1)(c)(iv)	N/A	N/A

Table 2: Table of Concordance: FOIP Third Party Business Interest Exemption (cont'd)					
AB	NU	MB	NB	Fed	
2 The head of a public body must refuse to disclose to an applicant information about a third party that was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax	14(2)	27(2)	N/A	24(1)(d)	
3 Subsections (1) and (2) do not apply if	14(3)	27(3)	19(2)	24(2)	
(a) the third party consents to the disclosure,	14(3)(a)	27(3)(a)	19(2)	24(2)(a)	
(b) an enactment of Alberta or Canada authorizes or requires the information to be disclosed,	14(3)(b)	N/A	N/A	24(2)(b)	
(c) the information relates to a non-arm's length transaction between a public body and another party, or	14(3)(c)	N/A	N/A	N/A	
(d) the information is in a record that is in the custody or under the control of the Provincial Archives of Alberta or the archives of a public body and has been in existence for 50 years or more.	14(3)(d)	27(3)(b)	N/A	N/A	
16(1) The head of a public body must refuse to disclose to an applicant information	24(1)	18(1)	22(1)	20(1)	
(a) that would reveal	24(1)(a)	18(1)	22(1)	N/A	
(i) trade secrets of a third party, or	24(1)(a)	18(1)(a)	22(1)(a)	20(1)(a)	
(ii) commercial, financial, labour relations, scientific or technical information of a third party,	24(1)(b)	18(1)(b)-(c)	22(1)(b)-(c)	20(1)(b)	
(b) that is supplied, explicitly or implicitly, in confidence, and	24(1)(b)(i)	18(1)(b)	22(1)(b)	20(1)(b)	

Table 2: Table of Concordance: FOIP Third Party Business Interest Exemption (cont'd)

	NU	MB	NB	Fed
AB				
(c) the disclosure of which could reasonably be expected to	24(1)(c)	18(1)(c)	22(1)(c)	20(1)(c)-(d)
(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,	24(1)(c)(ii)-(iii)	18(1)(c)(i)-(ii)	22(1)(c)(i)-(ii)	20(1)(c)-(d)
(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,	24(1)(c)(iv)	18(1)(c)(iv)	22(1)(c)(iv)	N/A
(iii) result in undue financial loss or gain to any person or organization, or	24(1)(c)(i)	18(1)(c)(iii)	22(1)(c)(iii)	20(1)(c)-(d)
(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,	N/A	18(1)(c)(v)	22(1)(c)(v)	N/A
(2) The head of a public body must refuse to disclose to an applicant information about a third party that was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax.	24(1)(d)	18(2)	22(2)	N/A

Table 2: Table of Concordance: FOIP Third Party Business Interest Exemption (cont'd)

AB	NU	MB	NB	Fed		
(3) Subsections (1) and (2) do not apply if	24(2)	18(3)	22(3)	N/A		
(a) the third party consents to the disclosure,	24(2)(a)	18(3)(a)	22(3)(a)	20(5)		
(b) an enactment of Alberta or Canada authorizes or requires the information to be disclosed,	24(2)(b)	18(3)(c)	22(3)(c)	N/A		
(c) the information relates to a non-arm's length transaction between a public body and another party, or	N/A	N/A	N/A	N/A		
(d) the information is in a record that is in the custody or under the control of the Provincial Archives of Alberta or the archives of a public body and has been in existence for 50 years or more	N/A	N/A	N/A	N/A		

Appendix B

Sample Contract Provision

The following sample is provided for discussion purposes only and may not be appropriate in all circumstances. It is important to note that this sample cannot and should not replace a careful review of the facts and law applicable in each instance.

4. This Reciprocal Confidentiality Agreement (the RCA) shall not apply to:
 - (a) Confidential Information already in possession of the public or which becomes available to the public other than through: (i) the act or omission of the Receiving Party; or (ii) the act or omission of any Person to whom the Confidential Information is disclosed by the Receiving Party pursuant to this RCA;
 - (b) Confidential Information which was or becomes available to the Receiving Party on a non-confidential basis from a source other than a Party to this RCA which disclosure is not in breach or violation of any law or other obligation;
 - (c) Confidential Information which has been independently acquired or developed by the Receiving Party or its Representatives without breaching any of the obligations of this RCA; or
 - (d) Confidential Information obtained by a Party on a non-confidential basis pursuant to any applicable legislation.
5. Notwithstanding any other provision of this Agreement, the Public Body may, at its discretion, disclose to any Person or entity, including its shareholders and Affiliates, the existence, general nature, status, discussions and negotiations taking place concerning the Project including, but not limited to status, cost, budget and schedule,
6. The Receiving Party or its Representatives may disclose the Confidential Information to the extent such information is required to be disclosed under any applicable law. The Receiving Party shall, prior to such disclosure, provide reasonable notice in writing to the Disclosing Party so that it may seek a protective order or other appropriate remedy or waive compliance with the provisions of this RCA.
7. The Receiving Party may disclose the Confidential Information without the Disclosing Party's prior written consent to an Affiliate, provided that the Receiving Party shall be responsible to the Disclosing Party

for the compliance of such Affiliate with the terms of this RCA as though such Affiliate were the Receiving Party.

8. Subject to paragraph 9 and 10, the Receiving Party shall be entitled to disclose the Confidential Information without the Disclosing Party's prior written consent to each of its Representatives to the extent that such Representative has a clear need to know in connection with the Project.
9. The Receiving Party shall be responsible for ensuring that all Persons to whom the Confidential Information is disclosed under this RCA shall keep such information strictly confidential, shall not disclose or divulge the same to any unauthorized Person, and shall comply with the use restrictions set forth in this RCA and any requirement to return or destroy such Confidential Information.
10. The Receiving Party and its Representatives shall only use or permit the use of the Confidential Information disclosed under this RCA in connection with the Project.
11. (a) The Parties agree that disclosure of the Confidential Information for purposes other than those set out in this RCA could reasonably be expected to result in undue financial loss or gain to the Parties or others, and could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the Disclosing Party.
- (b) The Parties acknowledge that the Province, the Public Body and its Affiliates are, at all times relevant to this RCA, subject to the provisions of Newfoundland and Labrador legislation as such legislation may be amended or varied, including, but not limited to, the *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1 as amended (*ATIPPA*) and the *Energy Corporation Act*, SNL 2007, c P-I 1.01, as amended (*ECNL*). The Parties acknowledge that the Province, the Public Body's Affiliates may incur disclosure obligations pursuant to the provisions of *ATIPPA* or other provincial legislation, and disclosure pursuant to such an obligation shall not be a breach of this RCA. To the extent the Confidential Information supplied meets the third party confidential information tests set out in *ATIPPA* or commercially sensitive information tests set out in the *ECNL*, section 27 of *ATIPPA* or section 5.4 of the *ECNL*, as applicable, such sections will require the Province to assert and maintain its assertion that disclosure of such information be refused if requested by a third

party. Where there is a challenge to such refusal, a review by the Access to Information and Privacy Commissioner, and ultimately the Supreme Court of Newfoundland Trial Division may occur. The Public Body will support the Disclosing Party in its arguments in support of non-disclosure under *ATIPPA* and the *ECNL* at each step in the process.