Transcript of the Public Hearings of the Statutory Review Committee on Access to Information and Protection of Privacy

Date: Wednesday, August 20, 2014 (2:00 - 4:00 p.m.)

Presenter: Jim Keating
Vice-President (Oil) Nalcor Energy

Tracey Pennell
Legal Counsel/ATIPP Coordinator

ATIPPA Review Committee Members:
Clyde K. Wells, Chair
Doug Letto, Member
Jennifer Stoddart, Member

C. WELLS:

We're ready whenever you are. Mr. Keating.

J. KEATING:

Good afternoon. It's our pleasure to present to you today Nalcor's submission for consideration by the Independent Statutory Review Committee of the *Access to Information and Protection of Privacy Act*. My name is Jim Keating, Vice President of Oil and Gas. And I'm joined today by Tracey Pennell, Legal Counsel and ATIPPA Coordinator for Nalcor Energy. Together, Tracey and I will share Nalcor's perspectives on the value of access to information, while outlining and providing detail around how Nalcor demonstrates its commitment to transparency and accountability.

Nalcor is a Crown corporation that acts on behalf of the people of Newfoundland and Labrador. The company understands the importance of accountability and transparency to the citizens of the province and is committed to being open, transparent and accountable across its operations.

Nalcor fully realizes the necessity of the *Access to Information and Protection of Privacy Act* and its role to ensure the accountability of public bodies, like Nalcor.

Under the *Energy Corporation Act*, Nalcor's mandate is to ensure the province obtains maximum benefits from Newfoundland and Labrador's natural resources. It is the company's responsibility to keep the public fully informed on its operations and business objectives.

Our goal here today is to provide clear and accurate information and interpretation of Nalcor's processes, resources and track record for responding to formal and informal inquiries and, by so doing, building an understanding around how we provide information.

Finally, we hope to highlight the mandate of Nalcor Energy which is to maximize benefits of the province's natural resources for Newfoundland and Labradorians.

I would like to take a moment to talk about how Nalcor's mandate and our responsibility to communicate and engage with the people of Newfoundland and Labrador happens in a meaningful way.

In 2007, Nalcor was established as the energy corporation for the Province of Newfoundland and Labrador pursuant to s. 3(1) of the *Energy Corporation Act*. Our business includes the generation, transmission and sale of electricity; the exploration, development, production and sale of oil and gas; industrial fabrication; and energy marketing.

Through our work, Nalcor employees share the company's seven core values which are: Open communication; accountability; safety; honesty and trust; teamwork; respect and dignity; and leadership.

It is important to note when we speak here today we are speaking to both our shareholders, the people from Newfoundland and Labrador, and our business partners but, more importantly, our nearly 1500

employees. It is to our company's core values of open communication and honesty and trust that this presentation is made. We understand that by our words and our actions we create and sustain these guiding values and thereby establish and sustain our culture.

Nalcor believes the public should have multiple access points to company information; both informal and formal, and we strive to proactively provide information to the public without the need to use the formal ATIPPA process.

I will now outline Nalcor's approach to how we achieve this. Through our annual business reports, audited financial statements, public annual general meetings, responses to public requests for information, media briefings, stakeholder briefing and meetings, as well as public information sessions, open houses, and industry presentations Nalcor provides both proactive and responsive information to our shareholders. Nalcor, in accordance with the *Transparency and Accountability Act* also submits an annual performance report and a strategic plan to the

provincial government which are posted to Nalcor's website.

In addition, Hydro submits a separate annual performance report in accordance with the *Transparency and Accountability Act*. Further, Hydro's regulatory filings, including rate and capital applications, quarterly and annual reports are filed and published with the Board of Commissioner's Public Utilities.

Information, records and reports are made readily accessible to the public through various communication mediums, including the Nalcor website, social media, print, direct mail and newsletters. For example. We've had over a million web page visits in 2013.

Nalcor has a dedicated transparency and accountability page on its website that houses frequently requested information, including performance and environmental reports, Nalcor's code of conduct and audit practices. It also provides an opportunity to request further information.

In addition, Nalcor's Corporate Communications and Stakeholder Engagement Department regularly receives questions and queries. For instance, since January 2014, the company has answered approximately 780 questions. Hydro has responded to approximately 1800 formal requests for information to the Public Utility Board Regulatory Process. This information is also available publicly and the company directs requesters to specific locations for this information.

So as you can see, Nalcor believes the public should have multiple access points to company information. We strive to proactively provide that information to the public. In fact, Nalcor has invited applicant's in some cases to its offices to discuss the content of the request and provide information in a way that is even more meaningful to the applicant than simply providing base documents and/or records.

Further to this, in some instances where requests for information are made outside the ATIPPA process, Nalcor has recommended that the individual file an ATIPPA request so the applicant has recourse through

the protections afforded within ATIPPA.

In the past five years, Nalcor has received 35 ATIPPA requests. The table providing more detail on these requests is attached in our own written submission. This table will also be available on Nalcor's transparency and accountability section of the company's website following the presentation.

Now I'd like to take some time to discuss the notion, a very important notion of public interest. Disclosure under ATIPPA often requires a balancing test. That's important for us as executives when posed with questions and queries through this process. In this balancing test, we look at any number of relevant public interests that may be weighed one against the other, when considering the release of information. We believe a public body can withhold information only if the public interest, in maintaining the exemption, outweighs the public interest of disclosure. Nalcor considers that the best practice for a public body to weigh the benefits in maintaining an discretionary exemption against the benefits of disclosure.

Typically, the public interest is served where access to the information either facilitates the accountability and transparency of public bodies for their decisions, facilitates accountability and transparency for expenditures, allows individuals to understand decisions made by public bodies that affect their lives and in some cases assist individuals in challenging those decisions. It furthers the awareness and understanding of current issues or brings to light information affecting public safety. However, public interest is also served by not disclosing information if the information has more factors in favor of nondisclosure in the public interest than factors in favour of disclosure, or would cause harm to third party, or result in the loss of value to the people of the province, or similar information already interests in the public domain.

It is through this lens that Nalcor undertakes its review regarding information that may meet exemptions to the Act. All requests for information received by Nalcor, whether formal ATIPPA requests or general inquiries, are responded to in the interest of

openness, transparency and public accountability.

Another important consideration is how information sensitivity may change over time. In other words, when releasing information Nalcor also considers the timing of disclosure. Information not released at one point in time does not mean that that information will be permanently withheld. In general, the sensitivity of information will decline over time to the extent that any harm arising from disclosure will at the outset be minimal and outweighed by the public interest ultimately in disclosure.

At this time, my colleague Tracey Pennell, will described Nalcor's ATIPPA process and most importantly describe *how* the company applies the Act.

T. PENNELL:

Thanks, Jim. Thank you for having us here today. We do appreciate the opportunity. And while I don't think I have ever been accused of being quiet, I have been accused of speaking quickly. So if at any point I tend to speed up just let me know and I will slow down and try to be mindful of that for sure.

C. WELLS:

Thank you.

T. PENNELL:

Just to clarify because some of the statements that have been made throughout this process, Nalcor Energy is subject to the ATIPPA. So the exemptions that are found in the ATIPPA are supplemented by section 5.4 of the *Energy Corporation Act* which governs the disclosure of commercially sensitive information. The interaction between the *Energy Corporation Act* and the ATIPPA is governed by section 6 of the ATIPPA Act which deals with conflicts and section 5 of the ATIPPA regulations which indicates which provisions of specific legislation prevail over the disclosure exemptions in the ATIPPA.

Section 5.4 is one of those provisions. However, when determining if information is exempt from disclosure we first consider the ATIPPA and then the *Energy Corporation Act*. Section 5.4 of the *Energy Corporation Act* is only applied when the public interest, in withholding information, outweighs the public interest in disclosure. In responding to the 35 requests that we've received since 2009,

section 5.4 of the Energy Corporation Act has been used in three instances.

I am now going to talk about how we respond to the request and our process around that. So Nalcor does have an access to information coordinator. That would be me. And I'm responsible for coordinating requests as they come in and working with our employees to ensure that the requests are responded to and that the applicant is aware of what our process is and to keep them fully up to date.

And as I mentioned above, when we were respond to requests we do look to both the ATIPPA and the Energy Corporation Act for guidance. So to ensure consistency in our response we have developed a standardized process that we use to ensure that we are following the same mechanism and that requests are answered in fully open and transparent manner and that everyone is aware that this is how we respond to the request.

So there is a chart in our submission that kind of summarizes what our process, is and I will give you

the opportunity to let me know if it is something you want me to summarize or take you through.

C. WELLS:

Are you talking about this chart on page 4?

T. PENNELL:

Yes.

C. WELLS:

Yes. You probably know that I referred to it yesterday ahead of your appearance and for that I seek your apology.

T. PENNELL:

Quite okay.

C. WELLS:

But I was not too critical of Nalcor in doing so. As a matter of fact, I thought it spells out the approach fairly well and gives the impression, whether or not that's the way it operates in practice may be another matter about which I know nothing at this stage, but certainly looking at it gives the impression that when a request is received, it is acknowledged immediately, within two or three days, and initial plan is developed and the approach is taken. Any third party notice or clarification that is required is done, and by the end of 10 days a

complete response plan is in place and the applicant is notified of what the response is. It seems to me that's pretty god. That's consistent with what I read in the government's policy, manual on policies, just it matches it.

T. PENNELL:

Yes, it's based on that and then it's just kind of tailored to us.

C. WELLS:

And that's how I would see it operating. So that seemed very good. What I don't know is what percentage of your requests get that treatment and get responded to that quickly?

T. PENNELL:

Every single one of the requests that we get in are treated to this process. How quickly we respond depends on the request. If it's extremely detailed ....

C. WELLS:

The extent of it, yes.

T. PENNELL:

Yes. So if it is really broad, encompasses a lot of documents, it might take us longer to respond. If it's a fairly easy request, very narrow, specific,

only a couple of documents, that will be responded to much quickly. But this process is followed for every request that we get in.

C. WELLS:

So you could get your answers out in 10 or 12 days?

T. PENNELL:

Depending on what the request is.

C. WELLS:

Depending on what it is.

T. PENNELL:

Yes, depending on the request.

J. KEATING:

I guess I could add as being someone on the very front end and the back end of that process where I come into play, yes, indeed, that it is applied that way and the strength of it is, is it provides certainty and clarity to all the folks that we have to engage sometimes and to understand what our expectations are to respond to the request. So, for example, the pivotal start of that process is where Tracey usually calls the vice president, and which I'm one, and says there is an ATIPPA request. The question is to this and we need to proceed. You need to give thought to who in your department, if it

applies to, say, Oil and Gas, should we assemble in a meeting within really the first couple of days to plan to respond.

C. WELLS:

So you get involved in the response?

J. KEATING:

Right at the outset.

C. WELLS:

In the first couple of days.

J. KEATING:

I think one of the first calls she makes is to the business unit responsible, VP typically, and then that'll allow me to hear the type of question and who and what in my department would know how to get the right answer. And of course because the vice-president can probably compel action. That's why the process includes us at the beginning. Of course it is a check point in the middle where she then assumes that I've given direction to respond, she then brings that to either my attention or the people that are delegated the responsibility to say how are we doing.

C. WELLS:

That's what I was going to ask you. What is that

status check on response and program at 15 days in?

T. PENNELL:

So I've had my meeting with the employees who are responsible for finding the information we've discussed, the request, what's involved. They have given an estimate of time as to long it will take, what's involved. At that point, that's me calling them and saying hi, how are we doing? Where are we in this process?

C. WELLS:

What progress have you made?

J. KEATING:

What progress have you made?

T. PENNELL:

What progress have you made? Have been there any problems? Do I need to notify the applicant that we may need a time extension? Has third party notification been determined at that point, that wasn't identified earlier? Okay. Who is the third party? Then we do the third party notification, notify the applicant of that. So it is just keeping an eye on the process as it goes along to ensure that we're staying on time and that we have all the information that we need from the applicant in order

to respond to the request.

C. WELLS:

How long have you been following this practice?

T. PENNELL:

I've been ATIPP coordinator since January, and so I updated it when I took it over to kind of make it more mine. But we have had a formal process in place for a couple of years.

J. KEATING:

Yes, this survey or, I guess, the length of time I know that I've been involved in the process, without exception, has to be at least four or five years that we've, I guess, detailed the process and set the expectations. So it goes back to maybe Tracey's predecessor as well in that role.

C. WELLS:

What portion of your requests results in complaints to the Commissioner?

T. PENNELL:

We have had one applicant who had filed numerous requests to us at the same time. So even though it's numerous requests, its's one applicant. He has made a complaint. And we have another applicant who had, again, multiple requests. Asked the Commissioner to

review and we resolved that one informally. So we've had, I guess, two applicants.

C. WELLS:

Two applicants.

T. PENNELL:

Yes.

C. WELLS:

Okay, sorry to interrupt.

T. PENNELL:

No.

J. KEATING:

Yes. No, no. I think it's worthwhile to point out, while there may be four or five that have gone beyond 30 days, there has been probably eight or nine that's gone within 10 or 15, under. And because we're planful. We are trying to make sure we allocate the resources. It is based on the 30-day window and that's basically, again it sets the expectation inside the corporation as to how we need to act.

D. LETTO:

I was going to ask about that. If you're involved in the people at your level what's the reaction underneath you to getting information? Does that tell people that you can't drag your feet?

J. KEATING:

Well, because it happens, I guess, so rare. Of 35 in, was it four or five years?

T. PENNELL:

Five years.

J. KEATING:

In five years. So, again, in my business unit, a handful, maybe six or seven may have been related to Oil and Gas. They're special. So when Tracey calls me, I'm interested typically because if there is an interest in information, then it's in some way I almost feel like a failure that in some of the proactive efforts to provide information, either that information wasn't there, in some of the informal queries somehow we didn't satisfy the request. So it is almost as if some party felt that they had to avail of the process, which is seldom used in our experience, and I just want to cure it. That's how I feel. I just want to nip it. And invariably where we can, we do. And sometimes, though, I can understand why then the application of the process, because it does touch into again some more relevance in our presentation here about some of the exclusionary aspects of data, but for the most part

....

D. LETTO:

It sends a clear message to the people underneath you that this is serious business and that they have to attend to it.

J. KEATING:

Certainly, and without taking any further steam away from Tracey's presentation, we do have in some part of the *ECNL Act*, the provisions by which the head of the public body, the CEO must make a determination. So I know, and that's for me the neatest way to cure ills is to know that your CEO is going to have to make, ultimately, a determination in a timely fashion. So I need to know that I have to understand what the request is for and why and the particulars of it, because I need to then relate to that to my boss who may ultimately have to rely upon some power that he may have or some exclusionary process. That is something, I think, has been of benefit to Nalcor in that it provides to me the ability to mobilize people to do their best to satisfy the request, simply because if there is an exclusion that we would rely on we need to make sure that our CEO is comfortable enough understand that he understands the

ramifications of taking personal accountability, and, of course, then bring onboard, making them avail of it. So we need to know right up front, right away, if that's where this is heading. And again, over 35, I don't think we've ever had to rely on the CEO to make the declaration. We've had maybe four or five that exclusions would be in that area but for the most part we've been able to resolve the requests satisfactorily for all parties. So it is compelling action.

C. WELLS:

Thank you.

T. PENNELL:

So that's our process. And we do use it for every request that comes in. Hopefully the applicant is fully satisfied at the end of the process. The other part of our presentation is about our responses to recommendations that had been made by other parties throughout this process.

C. WELLS:

Well, before you go there maybe we could address any questions we have about your own operation.

T. PENNELL:

Yes, sure can.

C. WELLS:

One of the focus of complaints we've had about both government and departments and public bodies that would be affected by this, and Nalcor in particular, was the provision, the changes made in the 2012 amendment, so-called Bill 29 amendment, that deprived or changed the right of the Commissioner to review documents that were claimed to be solicitor-client privileged or claimed to be Cabinet confidences prevented the Commissioner from reviewing those to satisfy himself that the claims were validly made. It became an issue a few years ago. It went to court. A number of claims were backed up and by the time the court process was resolved and it was determined that, indeed, the Commissioner did have power to review those. There were 15 different instances of documents claimed to have been solicitor-client privileged. And when the Commissioner got to look at them the Commissioner advised us that 12 of the 15 born no relationship whatsoever. And I was careful to ask him the question, "Is this just marginally close?". No, no, he said, there is just no connection whatsoever, which means that the agencies involved were simply

using the solicitor-client relationship as a shield just to prevent it and nobody could look at it once they said solicitor-client privileged.

You can understand how the impact of that has in public confidence and the integrity of the system. I just goes down to zero forthwith. We've talked to government about this and sought their views about whether or not there's a compelling reason why the Commissioner shouldn't be able to look at Cabinet documents or solicitor-client-privileged documents to determine that indeed they are what they're claimed to be. Not to decide they are going to be released but to determine that they are that and to give a recommendation to the public body involved. And we've asked them to tell us if there is any compelling reason why we shouldn't go back to the way it was prior to Bill 29. I'm going to ask you the same question with respect to 5.4(2) that allows the CEO to identify something as ....

T. PENNELL:

Commerciality sensitive.

C. WELLS:

Commercially sensitive. And if it has the

approbation of the Board of Directors, the Commissioner has effectively no jurisdiction. He can look at it but he's compelled to determine to accept the assertion.

T. PENNELL:

Right.

C. WELLS:

Why can't we go back to the way things were before? Is there any compelling reason why the Commissioner can't be entrusted with looking at the documents to draw a conclusion that they are what they are purported to be?

T. PENNELL:

There is nothing in the legislation that actually precludes him from looking at them. We have had an incidence where our use of section 5.4, in addition to our uses of one of the sections under the ATIPPA have been asked to be reviewed by the Privacy Commissioner and it was all by the one applicant, and in that instance we invited the investigator assigned to the file to our offices and we explained our history with this applicant because we do have other court cases with him, and showed him the information that related to the original request that had come

from the applicant and explained why we felt that that information fell within the definition of commercially sensitive information and just gave him our reasoning and our justification for relying on the provisions in our attempt to resolve this matter. So we've never not let him look at the documentation.

C. WELLS:

No, and maybe that's bad statement. That really relates to the circumstances for solicitor-client-privileged documents and Cabinet confidences. In your case he may be able to look at it but his decision is made for him by the statute or by the board and the chief executive of it.

T. PENNELL:

Right. And that's if we utilize that power.

C. WELLS:

Yes.

T. PENNELL:

And to date, we haven't. It is a strong power to have, and we recognize that, and it is not a power that we take lightly. So, there is personal accountability to our CEO and our Board of Directors if we rely on that provision.

C. WELLS:

And you can't rely on it without involving your CEO and the Board of Directors because it is only where they certified and the Board has approved it that the Commissioner is compelled to make a decision in a certain direction.

T. PENNELL:

That's the only opportunity, right. And that's the only instance, that that's exactly it. It is our CEO and it is our Board of Directors that need to personally agree that the information that we want withhold is commercially sensitive. And in 2008 when these amendments were brought in and this ability was given to Nalcor, it was done so to recognize the types of information that, as a partner business ventures and the offshore, the types of information that we were now going to have access to, and that it's different than the normal provision of goods and services and the information that a public body might have in that type of relationship. So the provisions that were brought in at that time were done so to recognize the reality that Nalcor's competitive companies would face. And I think Jim can probably speak a bit better to that.

J. KEATING:

Yes. So I guess it's worthwhile to kind of bring us back to the time in 2007 and 8 where, by this amendment to the *ECNL Act,* the *Energy Corporation Act* was envisaged, if the first Act gave us the foundation and the mandate and the structure, the amendment basically told us how and mostly how to act within a commercial context, which we understood was very important to address and to at least fix at this point in time. We had taken negotiations on two large offshore oil and gas projects. We had progressed to a point where progress was now slowing largely on the notion that if Nalcor Energy - which we are today, we were Energy Corporation then - were to be a minority interest partner, five percent or ten percent partner in a joint venture, the review both that we undertook with our external and internal councils plus, of course, the review that our future partners took on the existing legislation as it was then - I think it was 2005 provisions - they had serious concerns that we wouldn't have found the protection, that typical of what an ongoing business concern would have, either in relation to their information, third party, or in relation to any of

the learnings we would have of our own on that and so they felt at risk. So this was in a time when, again, if you can imagine we were inserting ourselves into existing commercial documents amongst existing co-venturers on an ongoing project. Challenging. And as we went through the list of things that we needed to achieve to gain entry and of course to get benefit for the people of Newfoundland and Labrador, it seemed that this risk was something that was unbearable for the offshore oil and gas companies. So what we sought to do was look at that Act and say, well, where is it deficient. And I believe in section 27, in particular, the test was different. It was three parts of a test.

C. WELLS:

Three parts had to be satisfied, yes.

J. KEATING:

Three parts of a test. And there were terms, I wish I had them here handy, it is substantial harm.

T. PENNELL:

Substantial harm. It is a very high level test.

J. KEATING:

If you're Exxon/Mobil, your $500,000 billion company, they had concern how do you assign substantial harm

to a company like that, and so on. So they would provide us this input to say we think you need to toughen your provisions. So then, I guess, whether it is a style of draft or the fact that we had an Act in process that provisions were put within the *ECNL Act* that strengthened or provided certainty, provided clarity among the notion what is commercially sensitive information, and that's laid out. So in one way we see that as specifity. It provides clarity as to what we're really talking about when we're talking about commercial information which they thought we thought was necessary, only to the fact that we're acting within a partnership and at any given time there is information that we would either produce or receive or we send out amongst ourselves to, of course, driven by profit.

So, this is something that, I guess, we put our minds to. We had drafted. And even to this day have had not to rely upon it but for, I think, that example you mentioned, Tracey. And here we are now. Then the next step was if those are the provisions that give them comfort, give us comfort that we're able to participate commercially with regards to the

definition of commercially sensitive information, then what then is the power of the head of the public body to basically make that declaration? Why was that important?

Well, back at that time there was a review undertaken that looked at the decisions, and there are only a few, I think, in jurisdictions, including ours and in Canada, that showed that there may be a risk, especially if the preponderance or the onus is on the third party to prove the substantial harm or the undue harm is the other, that there seemed to be a bend that oil companies acting normally wouldn't see. It would be different if the issue were one time. Transactions were a funding of a government, a body to a contractor to build a project, or if it were acquiring services but this is an ongoing business and at any time that they could see themselves that through Nalcor there would be a pipeline, likely, of commercially sensitive information that their competitors may opt to take or any interested party. But I think it was in that context that they wanted to hold, then, someone accountable.

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

C. WELLS:

Background.

J. KEATING:

Of the background and why that's important and it's there. In the light of day, I suppose, we haven't

had, but for that particular instance, to rely upon it. I think the fact that it's specified what commercially sensitive information is provides clarity to anyone who wants to acquire it is to what their expectations are to achieve it. In particular, with the provision that the head of the body can make the determination.

Now, here is the interesting thing about, I guess, how we act. Because we've had maybe three or four, five, maybe 5.4 type of requests that have come across us, we don't immediately in that 30-day period, for example, go and get the CEO's signature and the board's approval and call it a day, mostly because we're interested in the process. We're interested in making sure that we're doing it right. So even in the case of the litigation case that Tracey spoke of, we believe, and I think we've got support at least from some judgment up to this point, that we behaved in a manner that's consistent with the Act. And the judge in that particular case said that we acted reasonably in applying the test. But notwithstanding, we still wanted to make sure we were acting in good faith and that we reached out and

tried to resolve the issue. So we haven't actually executed the exclusion. I think the exclusion still sits in the Commissioner's Office. So it's our hope sometime that that will be resolved but, again, that's worthwhile to point out.

C. WELLS:

Mr. Keating, your explanation has a clear level of rationale in the business world and it would be very difficult to challenge it on the face of it. It just seems clearly rational. That's my immediate reaction to it. I have to think it through over time but that's my immediate reaction to it. But then there is the other side. And in the normal, every day world perception is often as bad or strong or is unacceptable as a bad reality and the perception that it could be that is often that problematic. So it's important to address that concern as well. So it is important that the public of the province have confidence that this system will work well. As it stands at the moment, theoretically I don't suggest that the power is going to be abused or, but theoretically it could be. The CEO could say absolutely, that's specialized business information that could cause substantial harm and the board

endorses it and that's it. Nobody can look at it. The Commissioner is directed, and in that case he shall uphold the decision of the Chief Executive. So there is no means by which the public can have confidence that that was clearly and properly asserted. The Commissioner is directed by the statute to uphold the decision. Does that mean simply affirming that you don't have to release the material because it's been certified by the Chief Executive Officer and ratified by the Board, or does it go so far as to require the Commissioner, notwithstanding his own opinion, to say it is okay anyway, even though he thinks and knows it's suspect? Is he to say well, yes, I must uphold the decision. You don't have to release it. But in my view it is not valid. It is not properly ....

J. KEATING:

I guess as an executive of this corporation who understands it's our ability to operate is entirely given to us by the trust that we create, I would say I would welcome the opinion of the Commissioner to make the determination that we are acting reasonably. Nalcor Energy probably is under review, examination, circumspect, audit at any time with dozens of

organizations, regulatory bodies and so on. It is basically our DNA is to hold up the body of what we do and have others make a judgment. All we're interested in is if through that process there is some commercially sensitive information that can be detrimental to the public interest or a third party that that is protected. But we will go through any process to make sure that the people of the province understand what we're doing is the right thing.

C. WELLS:

Okay. I'm going to ask you. I have drawn a conclusion from what you've just said but, so that there won't be any doubt when we sit back to think about this, I just want you to affirm. I get that you just said that you would welcome the opportunity for the Commissioner to review what you've done to determine the propriety.

J. KEATING:

That's correct.

C. WELLS:

Does that include the Commissioner saying we've reviewed it and even though the CEO has said it's commercially sensitive and the Board has ratified that decision, in my view it shouldn't be made in

that direction?

J. KEATING:

If that's the answer, that is the answer.

C. WELLS:

And you don't mind?

J. KEATING:

We don't mind that.

C. WELLS:

Interpreting section 5.4(2) to accord that jurisdiction, is that acceptable to you?

J. KEATING:

Yes, I would say. Again, consistent. We're a learning organization, always will be. If the learned people at the Office the Commissioner believe we veered and we put our best foot forward and made explanations to them then we're going to take that and learn from it. Should, though, that notwithstanding there still should be a disagreement between the head of the body and the Commissioner, so should it be and that's often resolved in courts. And we're entirely fine with that process. And I think we would add, I think society would have a value from it and we would have an additional value if we had that step, may be even before that in

particular in this case.

C. WELLS:

I thank you for that acknowledgment. Thank you very much.

T. PENNELL:

Did you want to make sure you didn't have anymore questions before we get on to our responses? I believe you do? Okay.

C. WELLS:

Ms. Stoddart does, yes.

J. STODDART:

Yes. Thank you for much for your presentation and we're very interested in many parts of it, including how you deal with ATIPP requests, ATIPPA requests. I'd just like to come back to this extraordinary section 5.4 of the ECA and ask you what would happen if it didn't exist? It is an extraordinary provision and it's effect or its apprehended effect comes up as a theme in presentations to this Panel because of people's concern about information that is by law withheld from them, can be withheld from them. And in trying to understand this issue I turn back - as you know perhaps, in a previous life I was Access and Privacy Commissioner of Quebec - to the case of Hydro

Quebec that I think is in a business line, not unlike yours, whose size, the implications of its business dealing, its financial arrangements, it's borrowing on international markets may be similar to yours. Although I don't know enough about it to draw any comparisons but it seems to me it is a good comparator. Hydro Quebec has no special exceptions under the Quebec Access to Information Protection of Privacy law. I just checked it on its website. It relies on the general provisions about confidential business information, third party information, trade secrets, et cetera et, cetera. And so I'm just wondering, I'm not saying that Hydro Quebec would perhaps welcome a special provision but they don't have one. I don't think they ever had one. I am almost sure that's a fact. And so that leads me to think that perhaps if you were only governed by the general provisions of ATIPPA, in spite of the representations made to you, which - and I'm not in the business world - it seems to me would be made to Hydro Quebec must be doing the same kind of things that you do. I suggest to you that you might be able to live within ATIPPA as Hydro Quebec seems to be able to function within the ordinary provincial

statute.

J. KEATING:

And we would agree, again, 100 percent that in how that's envisioned and how that's actually enacted here is that the *Energy Corporation Act* will name subsidiary companies who are then, I guess, governed by 5.4, but there is a market (phonetic) difference and that is Newfoundland and Labrador Hydro. It is not covered under 5.4. It is covered under the regular ATIPPA provincial provisions. So our analog to Hydro Quebec, to Manitoba Hydro, we're not different. There is no greater provision to our Crown corporation, I guess, monopolistic utility that provides electricity service. The differences are really targeted towards those new business areas where we're a joint venture partner on long-term legacy projects usually in the minority interest. This's something special that doesn't exist anywhere in Canada in terms of a state participation.

J. STODDART:

Well, I'd have to look into it but my understanding is that Hydro Quebec, only one of its business lines is provide hydroelectricity to the residents and the businesses of the province. And it just wears this

kind of one hat but one of its subsidiaries, for example, is Hydro Quebec International that sells hydro across North America, et cetera, et cetera. So it seems to me, I understand the distinction but I think -

J. KEATING:

Okay, to be fair, there may be -

J. STODDART:

- that Hydro Quebec does encompass ....

J. KEATING:

- a subsidiary of Hydro Quebec and a subsidiary of Nalcor that may have common business and they may have different provisions, I guess. But on the whole, the Newfoundland and Labrador Hydro, which effectively does the day-to-day generation, transmission, distribution of electricity, that's governed under the regular ATIPPA provisions here.

J. STODDART:

But then I'm saying to you, why could you not be governed by the regular ATIPPA? Your answer was: well, we're really different because we do more than provide electricity.

J. KEATING:

Right. Yes.

J. STODDART:

So, and I'm saying that I understand Hydro Quebec does a lot more than provide just electricity. So I come back to my question: why could you not live with the ordinary ATIPPA requirements without this extraordinary shield that you now have?

J. KEATING:

Sure. And I'll attempt and Tracey can clean me up. I guess when I look at the oil and gas code, because temporarily we're in the minds of the folks that were drafting this and it was the formulation of this oil and gas company. Subsequent to that, we have other subsidiaries - the energy marketing arm and so on. But back in the day it was Newfoundland and Labrador Hydro, CFL Co., and the oil corporation. So in the context of the oil corporation, I guess, as I said, our future partners at the time as well as our external councils, we did look and evaluate jurisprudence that existed both from courts and from commissioner's findings and/or the bare words on the Act as it existed then, which is a key differentiating aspect - not the current 27 - and found that to be deficient. So then the question was, how and where do we cure and then maybe it is an

art of draft or maybe it is the way we wanted to actually minimize and focus the exceptions just to this newfound entity and not maybe have it more broad and capture other crowns or what have you. So it was thought to carve it out and put it in this *Energy Corporation Act*. I think that's my understanding of how that applied. And then I guess the rest just history follows from that. Is that pretty good?

J. STODDART:

So you felt, if I can paraphrase you, that the pre-2012 commercial interest section which was narrower than the current one was insufficient to protect the business interests in the context that Nalcor found itself pre-2012?

J. KEATING:

That's correct.

C. WELLS:

And that's what resulted in 5.4.

J. KEATING:

And that's what resulted in 5.4.

J. STODDART:

Okay. But now that the test has been broadened, it is a different context.

J. KEATING:

So it is true. I don't think anyone has put their mind to what 5.4 now looks like in light of the new 27, 24 and 43. I guess under the new legislation, I don't think no one's looked at that.

C. WELLS:

The need for it may be lesser or not at all.

J. KEATING:

The need could change. All I would say, I would suggest as a recommendation is that, again, certainty and clarity are very important to multinational companies. In particular, when you have provisions on that you need to make sure you give some legislative stability and so we'd have to look at that in that lens as well as within the meaning of the Act.

T. PENNELL:

And when the legislative review would have been done at the time to determine what protections the ATIPPA afforded and could a section like 5.4 be brought in, one of the things that our review found was that this type of exemption for public bodies is not completely unusual. If you look at the federal *Access to Information Act*, CBC actually has an exclusion for

exempt for disclosing any information relating to a journalistic, creative or programming activities. I would say that that's core business activities of the CBC, not related to their administrative duties or other things like that. But their core business activities are exempt for disclosure. And 5.4 is really trying to get at that. It is the core commercially sensitive information that we would have in our possession as a result of being in a partnership with these companies that are meant to protect. If you want Jim's travel claims - sorry for offering this up but - I am sure you could get them. It's not all information. And I think that that nuance sometimes gets lost.

C. WELLS:

As a matter of interest, is CFL Co. subject to ATIPPA or protected by 5.4?

T. PENNELL:

Yes. No, it is subject to ATIPPA.

C. WELLS:

Subject to ATIPPA.

D. LETTO:

Can I ask you for some details. When we talked about 5.4 maybe 15 minutes ago I think you said that in

three instances information has not been disclosed.

T. PENNELL:

Yes.

D. LETTO:

Could you tell us about the nature of those requests?

T. PENNELL:

The first request that's listed in the table had to do with information surrounding the expropriation of the Abitibi assets by government and Hydro's subsequent operation of those assets and the NAFTA claim that surrounded it and the settlement with the third parties that were affected. That's my understanding of the request. It predates me but that's what was covered by that request. And when I actually looked at the material that was withheld it was a small portion of material. It wasn't large swaths. It was small information that ....

D. LETTO:

Well, given Mr. Keating's point that the sensitivity of information diminishes over time, it would seem to me, I'm not sure if all of the procedures and processes have been completed with respect to that.

T. PENNELL:

No, they haven't. They are still ongoing.

Unfortunately for that but.

D. LETTO:

So when that's done, will Nalcor consider just releasing it because the window, as it were, when there is concern about harm is closed.

T. PENNELL:

I'd have to go and review again the information that was released, and for a period of time there is no further harm in releasing that. I don't think that we would have any problem releasing information.

J. KEATING:

We would always have a bias to disclose and that's ....

T. PENNELL:

Yes. We look at the request as they come in and look at them at that time. If we were asked 10 years down the road, then we would look at the information in that context as well.

D. LETTO:

So that's the first one where information wasn't disclosed. Could you give us the detail of the other two, just in terms of what was requested?

T. PENNELL:

I sure can. Just let me get to the .... The second

and third request were actually by the same applicant and it was in relation to seismic data that the Nalcor oil may or may not have in its possession.

C. WELLS:

And you don't even have to disclose whether or not you do.

J. KEATING:

That's correct.

T. PENNELL:

This particular matter is currently before the courts.

C. WELLS:

Oh okay.

T. PENNELL:

And part of the matter has been stayed. Part of the information that we withheld has been upheld by the courts as meeting the definition of commercially sensitive and properly being withheld. The applicant has appealed that. Well, he's filed notice to appeal that decision. The Information and Privacy Commissioner's Office has filed notice of intention to appeal in that decision, and that is currently on hold pending resolution of another court case that the applicant is involved in; not with us. So it is

a bit convoluted but that's what those two had to do with it.

D. LETTO:

I've seen it may or may not disclose thing in relation to national security matters and whether you have the atom bomb or not. Isn't it a bit of an overstretch to kind of start applying it in these sorts of cases?

J. KEATING:

Well, actually if you can, I can answer that because that's key, actually, to some of the activities we're doing right now. Obviously a single oil and gas project in Newfoundland and Labrador has the ability to provide 30, 40 billion dollars of nominal value over its lifetime. So for half a million people that's a big thing. Seismic data, seismic information is the cornerstone, the foundation by which all that ancillary activity is derived. And what we had faced for the last 20 or 30 years is basically chilling for that type of activity, in some ways due to the litigation of this particular applicant, number one. Number two, is market forces and what have you but it was incumbent on Nalcor to be an actor and to cure that. So what we determined

over the course of the last several years, in particular with this applicant, and this gets into a vexatious argument as well in a different category we might talk about soon ....

C. WELLS:

That's another day (phonetic).

J. KEATING:

This is why I might spend a little time on this because this is helpful to give light on this.

D. LETTO:

The Act is full of potential, isn't it?

J. KEATING:

The Act is full of potential. There is a poster boy there somewhere and we have him. So I should say then it's important to us, it is important to the economy. And this data, if we were to have some precedent out there that this applicant we're looking for, we would have to change the entire licensing process in our opinion of how we award licenses because it is a competitive bid, sealed bid process whereby no one knows who bids. You don't bid based on what you promise to do, you bid on a cash value of your work undertaking. How that bid is formulated is through reviewing seismic data on a particular area.

So if I were to understand what companies, how many companies and when they looked at what data I could determine the level of interest, the level of expense and likely gain a lot of insight into that activity. If we had somehow through this pipeline, this back door, provided this qualified seismic data is now some sort of public information, which this applicant was looking for, we would have radically altered, I won't say nuclear bomb, but in our world it's pretty significant. So that's why we had to put focus on it.

D. LETTO:

That's why we had to convince the (inaudible) with national security.

J. KEATING:

It is provincial security for sure.

D. LETTO:

Okay, I understand your point. And what was the third?

T. PENNELL:

Again, it was the same applicant asking.

D. LETTO:

The same type of matter?

T. PENNELL:

Yes. It was very much the same question just asked a different way.

J. KEATING:

And maybe I will add. In that particular case this did go to court and there was a judgment which is stayed and I can probably shed some light on the fact that the judge, I think Justice Hall in that matter, did look at how we behaved and how we adjudicated 5.4. And in that judgment, he states that, "The applicant contends that Nalcor in its response to the applicant may not refuse to confirm nor deny the existence of requested information. I cannot accept this argument for it is clear to me that the information provided by the consultant is clearly commercially sensitive information and the acknowledgment of the very existence of it is also commercially sensitive to the consultant and Nalcor." And Hall further states that, "The intent on the part of the legislature to provide extensive confidentiality" - that's my emphasis - "for Nalcor in relation to disclosure of this type of information sought by the applicant under section 5.4 rectifies the mischief which is apparent in such disclosure."

So that, to us, was important and was very important.

D. LETTO:

Something I brought to the attention of the provincial officials yesterday was the UK Act with respect to commercial interest has a very kind of simple provisions as it relates to protection of that stuff. One is that it is intended to protect trade secrets, and the second - I don't have it in front of me but - anything that could or could be perceived to bring harm to the legitimate business interests of a person or a public authority. That's kind of essentially it. It sounds really straightforward and simple. We've got the provision in the Energy Corporation Act. We've got the big provision in ATIPPA. Could that kind of simplicity deal with it?

T. PENNELL:

I guess we would need to see the guidance of how that section has been interpreted. And like Jim mentioned earlier, when the ECNL Corporation legislation was brought in we did a jurisdictional scan of how our current 27 was being applied and it was a very high bar that third parties had to meet in order to protect their information. So I guess it would

depend on how that section was interpreted.

J. KEATING:

I'd say, too, and to build on that, one thing about the UK experience because, again, it is an international-focused company, we do a lot of best practice reviews and understanding of how our regimes work and all sorts of things. And we do, actually I think we appended some guidance from the UK with regards to frivolous and vexatious. We look at other jurisdictions, in particular the Commonwealth. But here's, I think, the elegance I think there is in the UK system, is that while their legislation is very simple they do provide very high value interpretive guides. And the strength of that is compelling because it tells the actors what to expect. And I think some of the challenge we have with actors with the uncertainty of how to act sometimes don't. And so the elegance of what the UK does is provide that clarity, certainty, as if to whether you're an applicant or respondent or even the commission itself, it basically says here's how it goes. What's interesting to me, which is helpful in the UK system, is that they do really talk about this balance of public interests and it is the cumulative effect of

public interest. So they see that there are interests in favoring disclosure as well as nondisclosure. And there was one case I remember reading, which to me was insightful just on inspection was the notion NGOs wanted to know where cellphone towers were in a county, in an area, and because for all the epidemiological reasons or what you use for transmission, whatever. For all kinds of reasons they wanted to know where they were. So the company which wasn't a Crown, it was a private company, was ordered to disclose in the public interest. The company who knew the locations of these was hesitant and said no, I don't think it is in the public interest to disclose. Why? Well, because if I disclose where those towers are, I now created a vulnerability in security of your communication system. Now, a dilemma. So this went from court to court, appeal to appeal, all the way to the Supreme Court and in the end nondisclosure. So to me, it is instructional. I take solace when I read these things, that if you apply the full spirit and intent of the law, you get to the right answer. It is my summary. So the UK, in short, provided lots of guidance in that area.

D. LETTO:

I think it is kind of comforting to hear that there is that kind of balancing. I think one of the disturbing things that people have brought to our attention over and over is that very important sections of ATIPPA are not subject to any kind of balancing. They are subject only to a declaration that something is off balance.

T. PENNELL:

And one of our practices, even though it is not mandated in the legislation, is to have that balancing discussion, and if it's a discretionary exemption then it's up to us whether or not we ultimately rely upon it. So it might meet the test of exemption but simply because it meets the test doesn't mean that it should be withheld. And that's the discussion that we will have internally.

C. WELLS:

Internally, even though it is not required by statute.

T. PENNELL:

Right. It is an internal discussion that we have and we talk about the pros and the cons. And yes, there is a presumption that if something meets an exemption

then there could be harm if the information is disclosed but you look at the severity of the harm, is it truly harmful, and the you look at the benefits that would come from releasing the information and that's something that we undertake.

D. LETTO:

And I note, Mr. Keating, your point about the various guidance manuals that the UK Information Commissioner's Office has produced. I have read a lot of them and copied a lot and handed it to the others because I found them extraordinarily helpful to understand what the law is supposed to mean and how it should be applied and how to apply the various tests.

T. PENNELL:

They're fantastic.

J. KEATING:

And the particular interest is actually, I think largely they are drafted by the Commissioner's Office themselves. So it not a government department that's writing it.

C. WELLS:

It is the objective in their (inaudible).

J. KEATING:

Absolutely. So I do believe that the confidence to execute this stuff is entirely there.

D. LETTO:

The Chair raised a point yesterday that I think, may be the day before, that one of the people who submitted wasn't aware of is that the ATIPP office also provides some guidance on how to apply the access and the privacy provisions and it is not really well known outside government that these exist.

T. PENNELL:

Yes, and I knew it was there because when I got appointed the coordinator first thing I did was okay, what do I need to know and I went on the ATIPPA office's website and it is there on their website and it is very easy to find once you're on their website. I didn't know it existed to go look there but that was great. And I also went to the Privacy Commissioner's website to see what guidance documents they have there. So having that type of documentation, I think especially one that would come from the independent body that is responsible for interpreting and ensuring compliance with the Act, is

a great asset, for sure.

C. WELLS:

Okay. You're back on your program now.

T. PENNELL:

Okay. Hopefully, might be short. The very last part of our submission is that our responses to recommendations that have been made by others. Let me get back to it. I flipped to the chart. So we acknowledge that participating in this review and providing context from our experiences as a Crown corporation that does operate in a commercial nature can add some valuable perspective. And we are very thankful to be here and we understand that this review is an important step in ensuring that our province's access to legislation is up to date with current best practices and standards on an international basis. And so the responses that we offer are based on our experiences as a respondent in the ATIPP process, in response to direct recommendations that have been made by others throughout the hearings.

So our first response for consideration is that section 27 of the Act remain unchanged. Section 27

is designed to protect commercial interest information of a third party which, if disclosed, would harm that third party's business interests. And public bodies do disclose a great deal of information about their businesses when they interact with public bodies in government. And generally that's in the relationship of providing a good or service with government or public body, or seeking financial assistance from government, whether it be a loan or a grant. And it's through those relationships that government or a public body will acquire information. And the exemption to this disclosure of this information recognizes that that type of information is a valuable business asset to that corporation and that disclosure of it could harm or would cause harm to third party if disclosed to another.

The current version of section 27 is based upon recommendation 15 of Mr. Cummings from his review that he undertook in January 2011 which recommended that section 27 be modelled on section 18 of Manitoba 's *Freedom of Information and Protection of Privacy Act*. And in his report, Mr. Cummings recognized

that, parties dealing with government often raise access to their information as an issue which can complicate their commercial dealings. And while it is recognized and accepted by businesses that there will be a certain level of disclosure when they deal with a public body the disclosure should not come at a cost to them in terms of harming their commercial position.

So we submit that section 27 balances the requirement for the provision of information for those who supplied goods and services to government or a public body against the need to ensure that those companies are not harmed in that process.

C. WELLS:

The only question I have is when you look at 27 as it was prior to Bill 29 it protected trade secrets of a third party or the commercial financial labor relations, et cetera, interest of the third party. Protected both, provided it had been supplied in confidence and the disclosure of it could reasonably be expected to adversely or significantly affect third parties. So it had to meet those ....

T. PENNELL:

Three part tests, yes.

C. WELLS:

The three part test. And it seemed to protect the genuine commercial financial interest provided that that was supplied in confidence and that the disclosure of it could reasonably be expected to significantly adversely affect. As it stands now it protects those two classes, trade secrets and commercial financial, and that's been expanded a bit, or, either that, so that's there's no test, no qualifier. That's protected and that's either one. To what extent would the position of Nalcor be seriously adversely affected if there was a reversion to the pre-Bill 29 version? How would Nalcor be adversely affected or threatened as a result, bearing in mind your 5.4?

J. KEATING:

Right on. Okay, so you mean without 5.4?

C. WELLS:

No, bearing in mind that you have 5.4.

J. KEATING:

Remind me that we have 5.4.

C. WELLS:

Yes. There's two circumstances - either without 5.4. And it is not within our mandate to recommend changes to the electrical corporation or the *Energy Corporation Act*. We are mandated to deal with changes. Now that doesn't mean that we're muzzled and can't say anything else. We can always make what judge's call obiter dicta. We could always express other words.

J. KEATING:

That's right. That's right. And to that we would welcome. I would say just on my read, I'm the engineer, so it's my naïvety here that, again, step aside one moment this three-part test having to come together, it is the what do we mean by harm significantly? It is the quality of the harm, significantly the competitive position. If I'm a small business and I lose a $10,000 and I've got 100,000 annual, that's material to me, I can probably get there. If I'm a big oil company and I might lose $20 million business but I'm a $500 billion entity, I have a hard time showing how that was significant in that context. So that's important. And then I go down to the result in undue financial loss. Again,

these are companies that are in the business of competition, profit making, and spend a great deal of time, effort and money to take the marginal opportunities that exist because it has a collective benefit to them. And if we were to somehow provide a weakness into that company's ability, because that's the way you do it in Newfoundland and Labrador, it could have an effect that reverberates in other jurisdictions. So that's not lost on us either. So it is not maybe the loss we can demonstrate here in this particular context of activities. It may be the fact that they're trying to negotiate similar contracts similarly in other places but we just happen to provide the recipe book as to how to have them lose money. So to me, the test that we'd have to reach in the pre-2012 is probably not appropriate.

C. WELLS:

In looking at the public interest in Newfoundland you can hardly expect the legislature to be overwhelmingly concerned about how a major oil company might have difficulty persuading jurisdiction of a state in the US to enact its access to information. That's sort of beyond the interest of the legislature of Newfoundland and Labrador.

J. KEATING:

Entirely.

T. PENNELL:

I think we have to remember as well, though, that section 27, I think when that was enacted it contemplated the normal course of business that governments and businesses will have, and that's generally in the provision of goods and services. And they're looking for money from government, whether it providing a good or service or having financial assistance. Section 5.4 was brought in to deal with our commercial partnership relationships. So when I look at section 27, I'm thinking of Hydro. I am thinking of CFL Co. I am thinking of normal businesses that we do as a public body with other companies. I'm not thinking about the relationship that we have with ExxonMobil.

C. WELLS:

And what's wrong with in that context having to meet the standard that it's implicitly or explicitly supplied in confidence? That's a separate standard. That's surely is not problematic?

T. PENNELL:

No, I think that information is supplied in that

context, yes.

C. WELLS:

And the other qualifier is the disclosure of which could reasonably be expected to harm significantly the competitive .... If it is going to cause the company to buy 10 more pencils that's not a big harm.

T. PENNELL:

No, no.

C. WELLS:

It's harm but it's not a big harm.

T. PENNELL:

And I think the third section, section 27(2), still has a harm test to it. A third party business wouldn't just simply be able to claim the harm. I think they still need to show that there is a probability of harm. And the harm itself would have to have an impact on that company. If that harm test still exists, I do think that the previous section 27 set quite a high bar. And determined on the business that was before the review and asking to justify their decision, they may not have the means to make the representation to the Privacy Commissioner to prove their point and show that their harm is substantial.

So you have to look at the swath of businesses that the public body is going to interact with and recognize not all of them are going to be large corporations with the disposal or the ability to come before a panel and say this is what my harm is and this is what it's going to cost me. Some are going to be smaller businesses that might not be as sophisticated as what a larger business is.

C. WELLS:

Bearing in mind that you've got section 5.4 of your Act to protect your international, and that's there, bearing in mind that you have that is there any underlying reason? What's the underlying reason?

J. KEATING:

Oh, I see. Given that, how this works.

C. WELLS:

If you have that section 5.4 to protect you, is there any underlying reason why you need to have the post-Bill 29 version of section 27, rather than the pre-Bill 29?

J. KEATING:

I'd say from the point of view of Nalcor Energy we were focused on 5.4 as it is the enabling legislation for us to get, the changes as a result of the

previously legislation I'd say largely, not that we're indifferent too, because we're a concerned member of society like everybody else, but I can't say there was any motivation for Nalcor Energy at all in any of the context of any of the changes to legislation for any purpose. So I don't think we have a specific interest to protect that this ....

C. WELLS:

So given the existence of section 5.4.

J. KEATING:

Given 5.4, I think that's wholly ....

C. WELLS:

You're less concerned about section 27.

J. KEATING:

Immensely.

C. WELLS:

Okay, sorry to interrupt there, interfere with your flow.

T. PENNELL:

No, no, totally fine. The second response that we have for consideration is that section 43.1(1) remain unchanged. Access to information legislation is designed to give individuals greater access to information with the intention of making public

bodies such as Nalcor more transparent and accountable. And while most people will exercise this right responsibly a few may misuse it or abuse it by submitting requests that are intended to annoy, disrupt or have a disproportionate effect on the company.

Section 43.4(1) - it's a bit of a mouthful - permits public bodies to disregard requests that are repetitive or systemic, frivolous or vexatious, or made in bad faith or trivial. And requests that fall under this section will typically include aggressive or abusive language, be a substantial burden on the authority, be as a result of personal grudges, unfounded accusations, have no obvious intent to actually obtain any information result in frequent or overlapping requests or have a deliberate intention to cause annoyance. And like other exemptions that exist in the ATIPPA, the determination as to whether a request qualifies under this section lies with the public body. The public body is often best situated to know the impact a request will have on its operations and what the request actually entails. It will often be familiar with the applicants in case of

the repetitive requests. And a request on its surface might seem quite reasonable, however, knowing the intricacies of what's involved in the request and what's actually covered by the request might reveal that that request itself is frivolous or vexatious.

So currently if the applicant disagrees with the public body's use of section 43.1(1) it can ask the Information Commissioner to review that decision. The Commissioner's role is to oversee the ATIPPA and ensure that it is being followed which includes investigating complaints from applicants who believe the ATIPPA is not being complied with. If the decision-making ability was to lie with the Commissioner, as has been suggested, an applicant's only recourse would be to the Supreme Court Trial Division. The role of the Commissioner as an independent investigator body is removed in this circumstance.

C. WELLS:

How is it removed?

T. PENNELL:

Well, they're the one that is making the determination up front and if the applicant disagrees

with it ....

C. WELLS:

It is just the timing when it's made, when it's not exercised, not removal. It is still there but it is just exercised at a different time.

T. PENNELL:

I guess if the decision like other exemptions that are applied in the ATIPPA lie with the public body and I would argue that this is very similar. It is an exemption that lies in the ATIPPA that a public body can apply. That lies with the public body.

C. WELLS:

Are you sure you're taking into account the horrors for most people of average means seeking information of what it means to appeal to a court, to take an action in court? It's frightening.

T. PENNELL:

It is. Very much so.

C. WELLS:

So, isn't the better way to do it, the more efficient way and the way that would leave a clear impression that it is not just the unilateral action of the public body just asserting it because it can and to have confidence in the system, to have the public

body make its case at the outset to the Commissioner and get the Commissioner's approbation for deeming it to be frivolous and vexatious. Then, if the Commissioner decides that it's not frivolous or vexatious, you deal with it. If the Commissioner decides that it is frivolous and vexatious then the general public at least have confidence that it is not just the unilateral assertion of one side with no oversight or anything.

T. PENNELL:

But there is oversight.

C. WELLS:

Well, not really, if you got to appeal to the court.

T. PENNELL:

But that's an option but an applicant always has an option to ask the Privacy Commissioner to review our decision. That is there in the legislation.

C. WELLS:

Oh, I understand.

T. PENNELL:

So the direct result doesn't have to be the court. And we feel that having the public body make the determination, any decision that we make under this Act you have to be able to justify it. You don't

just make the decision.

J. KEATING:

So yes, maybe it is by virtue of the experience we've actually had we can probably better describe the process that we've undertaken.

T. PENNELL:

We have used the section in response to one applicant. We received seven requests on the one day from this applicant. We had received previous requests from him as well. And while one of the seven was a very discrete, insular request, the other six were very broad, very overlapping and very extensive and all related back to that original request that he made. Based on the request and our duty to accommodate, we did contact the applicant and had multiple back and forths through e-mails, because he does live in a different province, asking for clarification of the requests, if it was possible to narrow the requests, because oftentimes the request asks for the same information in another way. For example, in one request he would ask for letters. In the second request, he'd ask for correspondence but the following language was the exact same.

J. KEATING:

Tracey, why don't I just read the request out? It is very simple and you get a sense of it, if that's okay?

C. WELLS:

Sure. If you wish, yes.

J. KEATING:

Yes. So we had seven requests. This is one of six that very were typical, with just slight changes in wording. "Copies of all operating documents and related correspondence and records relating to interests held in production licenses, significant discovery licenses and exploration licenses by Nalcor and/or Newfoundland Hydro from the timeframe 1990 to 2013". That's every single piece of paper in the Oil and Gas department. I'd be at a loss to try to think of something that did not relate to activities in the license in my department in those categories.

And then others would be "copies of all communications related to Nalcor in licenses" and so on so on and so on. So, our efforts was to say, we'd like to help you. What are you getting at? What can we do? So we didn't even make the determination

offhand that that was frivolous and vexatious. Felt that way. We didn't make the determine because, as always, we try to engage the applicant, kind of get a better understanding, because oftentimes and in some cases we'd invite them in. We'd share the information informally and they're better off. They have more information than they had probably bargained for, and that's a good practice. But in this particular case, I think that the timing of it, the broad nature, understanding the litigation that was going on and was meant to bring to a halt the oil and gas functioning department of the company. I could not think of a clearer vexatious request. And I guess to your point, attempts to try narrow that were rebuffed and no interest in narrowing it.

T. PENNELL:

We did. We consulted with the ATIPP office with government and asked their advice as to how to proceed with the applicant and how we can try to resolve to meet his need. And it was after our attempts to work with the applicant failed and he basically just refused to say anything else, other than answer my requests, that we looked to section 43.1(1) to see if it met that test.

D. LETTO:

Which one was this? Which section?

T. PENNELL:

This is 43.1(1), yes, the vexatious. And we went through that section to see if these requests met that test and we felt that it did, and so we applied it and we wrote to the applicant and said that we were relying on this provision to disregard his six requests. And in our letter to him we set out our rationale for doing. So he asked the Information and Privacy Commissioner's Office to review that decision, and when that was done, when we were notified that our decision was under review we asked the Office of OPEC, okay, well, what can we do? Would a meeting between us, you and them help to resolve this? How can we resolve it?

J. KEATING:

Knowing that we're stressing somewhat the normal role of that office. Almost that's arbitration. Simply because it is such a unique experience for us. We felt we would never want to rely upon it normally. But this was otherwise. I don't know how to proceed.

T. PENNELL:

Very unique experience for us. So we invited the

investigator over and that's where we went through the information and the previous requests and our history with this applicant. And following that meeting our action in the first litigation was actually stayed and those things happened and OPEC has issued a notice of intention to appeal. So our files with the Information and Privacy Commissioner's Office have been put on hold pending resolution litigation. But subsequent to that we still said okay, what can we do to try and resolve this. So we contacted the applicant to determine if he would be open to a meeting to discuss all four sets of his requests. And we had that meeting and at that meeting we told him the information that we had or didn't have that he thought we had. Unfortunately, he was unsatisfied with our response and everything remains before the courts.

C. WELLS:

Unresolved?

T. PENNELL:

Yes.

J. STODDART:

I just wanted a clarification. You mentioned a duty to accommodate. I wondered, I never heard of a duty

to accommodate in the context of access and privacy. I wondered if you were referring to the duty to assist?

T. PENNELL:

Yes, sorry. I misspoke. Duty to assist.

J. STODDART:

Because that is a separation jurisprudential notion, due to accommodate, and I just wondered if that had arrived and I missed it. Thank you.

T. PENNELL:

No.

J. KEATING:

She has many files on her desk.

J. STODDART:

Okay, yes.

T. PENNELL:

And I actually have a close friend that works at the Human Rights Commission so I often hear the duty to accommodate.

J. STODDART:

Okay, where you have to accommodate, yes. Okay, thank you.

D. LETTO:

If you look at 43.1(a)(b) and (c) and you think about

the language that's in there - frivolous or vexatious, bad faith or is trivial - on the face of it if you were a requester you'd be thinking this is open to a lot of subjective interpretation. I'm not suggesting that's the case with Nalcor. And in the vein of what Mr. Keating was speaking of earlier, is there enough guidance for both requesters and for public bodies to be able to properly assess requests through those lenses?

T. PENNELL:

Well, as a lawyer as well as the access to information coordinator the term "frivolous and vexatious" is a well-known legal term. So for me that is a term that I am familiar with and it is through that --

C. WELLS:

Well understood.

T. PENNELL:

Right, exactly. And so, but that's for me as a lawyer, knowing that that term is a well-known term of art the legal world and that there are court decisions that will define what that means. The ATIPPA guidance document published by government does have a little section devoted to it. However, we've

attached the UK guidance document on vexatious request. They've shortened it to vexatious requests but it essentially is very similar to our section, and that document provides a great deal of guidance in how to apply that test.

D. LETTO:

And it is 36 pages.

T. PENNELL:

Yes, exactly, it is 36 pages and it provides examples of what would be systemic, what would be overly burdensome, what would be frivolous. And that's the type, the document is one of the documents that we looked at when we made our decision.

J. KEATING:

Even an engineer can understand.

T. PENNELL:

Even an engineer can understand it.

D. LETTO:

And this is a worthwhile point to discuss from the consideration that we've also been asked to suggest ways to make the Act more user friendly. And it would seem to me that any guidance can be useful to the requester as well.

T. PENNELL:

Any guidance yes, it would be useful.

D. LETTO:

Just clarify one thing. The CBC was here a couple of days ago and they talked about 43.1(a) as well as (b) and (c) but they concerned with the idea that the head of the public body may disregard one or more requests under subsection 8 blah, blah, blah because they are systemic or repetitive nature, they'd unreasonably interfere with the operations of the public body. So their concern was that as a big organization sometimes, and they've streamlined their processes and I am guessing others have as well, it is possible that it can become one or more requests to the same body from the same organization. I take it from what you said, though, in your vetting process that you go through a process of trying to understand what it is that the requester is after.

T. PENNELL:

Yes.

D. LETTO:

And does that in many cases, I saw your tables at your back where you talked about how you worked through some of this. Does that process work

frequently for the requester?

T. PENNELL:

I would hope so. I would like to think so that it does. We have had instances where an applicant would submit a request and they were looking, one in particular was looking for a value on a copy of a contract. Turns out that contract was well over 4,000 pages. Okay, that's not what I'm looking for. I am not looking for that level of detail. I am more looking at the value of it. So it's just kind of getting a handle as to what it is they're looking for sometimes can better help us understand what their request is and the basis for their request.

C. WELLS:

And you can narrow down the scope.

T. PENNELL:

And we can narrow down the scope.

C. WELLS:

And that's completely consistent with the practices in this manual.

T. PENNELL:

Yes.

D. LETTO:

So your practice is not that you're going to rush to

judgment and say that's a repetitive blah, blah, blah?

T. PENNELL:

No, that's a high school. Like, this is a high test. And someone who is making a request once a month asking for a document here, a document there, that's not going to meet that test. In this instance where we had those six requests asking for every single document within oil and gas six different ways, we also have litigation with this applicant. He was uncooperative in trying to help us understand his request. It is those scenarios and they're not going to happen very often.

D. LETTO:

I have laid the groundwork for this question then. Would you have some guidance for us on how to proceed in terms of suggesting that these sorts of documents be produced so that it can be easier for people to understand the Act?

T. PENNELL:

Having the independent oversight body produce these documents per section and have them available on the website for every applicant and responder to have access to would be a great asset, very valuable

asset.

J. KEATING:

They are the subject matter expertise. And more importantly again, as I think I alluded at the outset it gives insight as to what you'd expect from both sides of that engagement - both the requester and the provider. And that if the glue in between was clear to say this is how I expect you to behave, this is largely a behavior issue. I believe the legislation works properly when behavior is modified correctly and that's only through information and understanding. So again, you can look at, in the UK they did their review a couple of years, Australia not so long, New Zealand. Everyone does these reviews and there is always a step change, improvement and learnings that all can share. I just found as we introduced some of these more contentious issues, gosh knows Nalcor is in the middle of contentious issues, we all find that the more information you provide to substantiate the underpinnings, the rationale, the where tos and the why fors, we're all better offer. So as Tracey would say, subject matter experts drafting it out, having that reviewed and understood and disseminated, I

think that would be entirely instructional. As it is right now, we kind of piece it together ourselves and try to act in the best way possible.

D. LETTO:

I'm probably like a guest who's overstayed his welcome. That's all. Thank you.

T. PENNELL:

You're a valuable member of this Panel.

D. LETTO:

Could you say that louder into the microphone please?

T. PENNELL:

Doug Letto is a valuable member of this Panel.

D. LETTO:

Thank you.

C. WELLS:

Okay. I'll leave it to you to tell us, you got one more response that you want to make.

T. PENNELL:

We have one more response, yes, and that is the application fee that is provided for in section 68 requires review. Every application request for information has to be accompanied by a $5 check. And as Mr. Cummings indicated in his 2011 review, a fee is really only meaningful and useful if it affects a

person's behavior. So in this case the fees are there to deter unreasonable requests. In our experience $5 might not actually have a very meaningful impact on a person's behavior. And we don't cash those $5 checks that we receive. And in cases where we receive requests for information and we don't actually have any response of documents we will frequently give back the $5 check, as we had no documents or records that were helpful or responsive to the applicant. So we would recommend that the Review Committee review the fee structure, whether it is the amount or the requirement for it, but the fee itself should be reviewed.

C. WELLS:

I can understand how you're not cashing the checks. I would expect the cost to your organization of processing and managing all of that would greatly exceed the $5 you'd get.

T. PENNELL:

Yes.

C. WELLS:

So is your recommendation that it be eliminated altogether?

T. PENNELL:

A recommendation is that it be reviewed and if there is going to be a fee that it be a meaningful fee.

J. KEATING:

And should it not be required that would be okay with us, too.

T. PENNELL:

That would be fine, too.

J. KEATING:

And I should add, it is in the context of knowing that there is other legislation provisions like the frivolous and vexatious that it attempts to achieve the goal that the $5 was intended to do. Maybe it is not needed. So I guess what we would say is that it's not material to how we behave. Shall I conclude?

C. WELLS:

We're at the conclusion stage now.

J. KEATING:

Okay, we'll now conclude. I should say, the written submission had the benefit of only understanding some part of the public discourse through your review. We didn't have time, of course, to write in that written submission which we probably largely addressed here

today though verbally. So that's the only caveat that our written submission ....

C. WELLS:

That's posted on our website for all to see.

J. KEATING:

Exactly. Exactly.

T. PENNELL:

And it is posted on our website for all to see as well.

J. KEATING:

In some ways it is not a fulsome description of what we said simply because we were only looking and responding to what we think we thought were (inaudible) at that time.

C. WELLS:

You were elaborating on the matters you wanted to highlight.

J. KEATING:

Exactly, as we heard them. But and nevertheless I just have a brief note to conclude. Nalcor believes that the sharing of information is an important part of an openly engaging and opening engaging the public creating a broader understanding of the company's core business and operations and, in turn, be granted

a license to operate. This belief supports Nalcor's continued commitment to transparency and accountability. We believe that the freedom of information legislation is important and essential to support the rights of citizens to access government public body information. It also helps to define limitations or exceptions to those rights and clarifies the recourse available to those who feel their informational rights have not been respected. And in particular, for a Crown corporation entrusted with really oversight of largely 35 to 40 percent of the gross domestic product we touch in some way, both either through oil or electricity, what have you, that license to operate through this avenue is important for us to make sure it is done right.

So with this submission we hope to have provided insight from our own experiences and to add value to help advance, enhance and strengthen the *Access to Information of Protection of Privacy Act* and, in turn, through this engagement and its outcomes understand how we can be a better company. Thank you.

T. PENNELL:

Thank you very much.

C. WELLS:

I want to thank you and the Nalcor Corporation for making the effort to express your views to us and make known, because Nalcor is part of the public focus on the perceived deals of existing ATIPPA, so it was important that you express your views and state your position so that we could better understand it. And we thank you for doing it.

J. KEATING:

Thank you.

C. WELLS:

We will take a 10-minute adjournment. Oh, my commanding officer says five minutes.

(Afternoon Recess)

C E R T I F I C A T E

I, Beverly Guest, of Elite Transcription, of Goulds in the Province of Newfoundland and Labrador, hereby certify that the foregoing, numbered 1 to 89, dated August 20, 2014, is a true and correct transcript of the proceedings which has been transcribed by me to the best of my knowledge, skill and ability.

Certified By:

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Beverly Guest