

BY E-MAIL ONLY

September 30, 2015

Gunn Métis Local 55
Mitchell Couling

**RE: Application by Gunn Metis Local 55 for Confidentiality Under Section 49 of the
Alberta Energy Regulator Rules of Practice (Confidentiality Request)
Pembina Pipeline Corporation
Applications No. 1806873 etc.**

Dear Mr. Couling:

Decision

By way of a letter from its legal counsel dated September 18, 2015, Gunn Métis Local 55 (GML) made a request to keep confidential the whole or parts of a document titled the “Lac Ste. Anne Métis Traditional Land Use and Ecological Knowledge Study” (the Study).

This panel is of the view that it is important to respect cultural sensitivities and the significance of traditional knowledge. In some cases, that may mean that such information is protected by a confidentiality order. In this case the request is granted in respect of the maps appended to the Study.

Background

In the letter of September 18, 2015, GML requested “that a study which will form part of GML’s evidence be treated as confidential pursuant to rule 49 of the Alberta Energy Regulator Rules of Practice.” GML also requested that the relevant parts of the hearing of this matter be held in camera to maintain the confidentiality of the Study. Finally, GML asked that if the Regulator were to find that only parts of the Study satisfied the requirements for confidentiality then it should grant confidentiality over those parts.

GML based its request on the grounds that the information in the Study satisfies both the test for personal information set out in section 49(4)(a) of the *Alberta Energy Regulator Rules of Practice* (the Rules) and the test for information that is commercial, financial, scientific or technical in nature set out in section 49(4)(b) of the Rules.

The panel sought comments from Pembina Pipeline Corporation (Pembina) and hearing participants in respect of the GML request for confidentiality for the Study. By letter dated September 28, 2015 Pembina indicated that it did not object to the GML request provided certain conditions are met regarding timing and completion of an appropriate confidentiality undertaking. Pembina provided a form of undertaking worked out between it and GML that Pembina is prepared to sign in the event the request was granted in whole or in part. No other hearing participants provided comments regarding the request.

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For the purposes of the application the panel and Pembina were provided with copies of the Study. Pembina agreed that it would keep the Study confidential and not use it for any purpose other than responding to the application.

GML had previously requested a confidentiality order for maps forming exhibits to affidavits of two GML members, Dale Friedel and Leo Rondiak, filed in support of GML's statement of concern in this matter. The hearing panel acknowledges that the request was granted by the AER prior to the matter being referred to the hearing commissioners. GML refers to that ruling in its September 18th request and notes that the request was granted on the basis that the information in those maps was "commercial, financial, scientific or technical in nature, and its disclosure could be expected to cause significant harm to the competitive position of a party." Confidentiality was not sought with respect to the affidavits. Those affidavits contain information relating to the individuals' and GML community's patterns of use and occupation of their traditional territory.

Reasons

Requests for keeping confidential documentary information that is to be filed in a proceeding are governed by section 49 of the Rules. Section 49 makes clear that confidentiality is the exception to the rule that all information filed in a proceeding is to be placed on the public record. This is to protect the public interest in an open, transparent process that is fair and can be seen to be fair. It is also to ensure accountability: accountability requires that those who may be affected as well as the general public can access and evaluate the same information considered by the decision maker.

Because confidentiality is the exception, the onus is on the participant making the request to show how the information for which the request is made meets the criteria set out in section 49 of the Rules. The relevant portions are subsections 49(4)(a) and (b) which provide:

- (4) The Regulator may, with or without a hearing, grant a request for confidentiality on any terms it considers appropriate
 - (a) if
 - (i) disclosure of the information could reasonably be expected to reveal personal information that has consistently been treated as confidential by the person the information is about, and

- (ii) the Regulator considers that the person's interest in confidentiality outweighs the public interest in disclosing the information on the public record of the proceeding,
- or
- (b) if the information is commercial, financial, scientific or technical in nature and the Regulator is of the opinion that disclosure of the information on the public record of the proceeding could reasonably be expected
 - (i) to cause significant harm to the competitive position of a party, or
 - (ii) to result in undue financial loss or gain to any person or organization

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The information in the Study does not easily fit in the categories prescribed by section 49(4)(a) or (b). However, because we are dealing with a request in respect of information, some of which might be considered to be aboriginal or indigenous traditional knowledge, this panel is of the view that the Rules should be given a liberal interpretation to ensure that the unique nature of the information is taken into account.

None of the information in the Study can be related to a particular individual and it is therefore not personal information in that sense. This is particularly the case when the information in the Study is compared to the affidavit evidence of Mr. Friedel and Mr. Rondiak.

GML's counsel states that the information forms part of GML's cultural heritage and argues that if the Study were to form part of the public record harm could result if it were to be "exploited by third parties for other matters and without the consent of GML and its members".

An aboriginal community's relationship to its traditional territory as revealed through its patterns of use is important and valuable wisdom. However, regardless of whether the Study or parts of it can be characterized as personal information for the purposes of rule 49(4)(a), except for the maps, it does not reveal anything more detailed or personal than is already on the record in this proceeding.

In addition, even if information in the Study including the maps were considered to be personal in nature, no evidence was provided in support of the assertion that the information has consistently been treated as confidential by the person the information is about, whether the person in question is an individual or the GML community as a whole.

With respect to the second part of the section 49(4)(a) test, the applicant must satisfy the Regulator that their interest in confidentiality outweighs the public interest in a fully open, public process. In this case the GML submitted that there would be "no benefit to the public from learning of these valued locations". GML also referred to the potential for exploitation by third parties of information that forms part of the cultural heritage of GML. It is the potential for the less tangible, unquantifiable harms to GML's cultural

heritage resulting from unfettered public access to information not already on the record that would not outweighed by the public interest in a fully open process.

GML has not satisfied all elements of the section 49(4)(a) test in this case.

With respect to the section 49(4)(b) test, if the provisions of that section are given a large and liberal interpretation, the maps appended to the Study can be said to contain information that is commercial, financial, scientific or technical in nature, if they are viewed together with the maps which are the subject of the original confidentiality order.

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The maps appended to the Study, when viewed together with the maps that are the subject of the original confidentiality order, reveal information that could be used by others in ways that are inconsistent with the value of that information to GML. In addition, and specifically as it relates to section 49(4)(b), they reveal information that could be used by others in a way that results in harm to the competitive position of GML harvesters or undue hardship.

As a result, the GML request for confidentiality is granted in respect of the maps that are appended to the Study. However, the request for confidentiality regarding the remainder of the Study is denied. Logistics regarding the in camera portion of the hearing will be provided in due course.

If you have any questions with respect to this matter, please contact Robert Mueller by phone at 403-297-7322 or email to robert.mueller@aer.ca.

Sincerely,

Robert Mueller
Legal Counsel

cc: Ashley Karg, AER
Greg McLean, AER
Rachel Ruddell, AER
Pembina Pipeline Corporation, Douglas Crowther,

Pembina Pipeline Corporation, Dennis Langen,
Driftpile First Nation, Keltie Lambert
Alexander First Nation, Caroline O'Driscoll
Grassroots Alberta Landowner Association, Debbie Bishop,

Derek Nielsen, Jack N. Agrios