



Pic Mobert First Nation

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Friday, November-30-12

WITHOUT PREJUDICE

Dr. Louis LaPierre
Panel Chair
Marathon Joint Review Panel Secretariat
160 Elgin Street, 22nd Floor
Ottawa ON K1A 0H3

By Email: MarathonMine.Review@ceaa-acee.gc.ca

Re: Pic Mobert First Nation (PMFN) – Formal request for confidentiality regarding the Marathon Platinum Group Metals and Copper Mine project (Marathon PGM)

Dear Dr. LaPierre,

As outlined in the *Procedures for Requesting Confidentiality*¹, an interested party requiring that specific information should be kept confidential, must make a request to the Panel in writing, who will then solicit input from other interested parties to canvas any concerns with the proposed request.

Pic Mobert First Nation is formally requesting that any information provided to the Joint Review Panel, Federal Ministry, Provincial Ministry and Stillwater Canada Inc., with regard to the Stillwater Canada Copper Mine Project be treated as confidential.

This involves the site-specific information regarding the local project area and Regional Study Area regarding any and all Traditional Ecological Knowledge (TEK), traditional land use (TLU) studies, and historical documents presented or conveyed by PMFN through research reports, correspondence, transcripts, maps, and community hearings, all of which is “Confidential Information”, including any part of the Panel’s review thereof with respect to the Stillwater Canada Copper Mine Project. We further request our submissions to the Panel be held in camera and that any Confidential Information be sealed and later destroyed or returned to PMFN, and that Undertakings be provided to PMFN by the above named parties that they will not share, distribute or discuss the Confidential Information in public or with unauthorized parties.

Specifically, PMFN does not want any of their Confidential Information distributed to any party other than Stillwater Canada Inc.’s named representatives, Canada and Ontario’s named representatives, Mark O’Brien and Candace Anderson, and the Panel members. We also entreat that our Confidential Information not be reproduced in any decision written by the Panel or referenced in any way.

¹ CEAR Doc. 212

To further inform this request, PMFN acknowledges the overlapping territories of Pic River First Nation, and Pays Plat First Nation in the Regional Study Area; and that there may be other Aboriginal users of the area. PMFN takes no position with respect to the claims or traditional uses of the area by various First Nations or Aboriginal groups. PMFN will not be presenting any information to the Panel that purports exclusivity to the area, but will only be providing their own historical information and use of the project locality and beyond, including the Regional Study Area.

The *Canadian Environmental Assessment Act* grants the Joint Review Panel the power to keep information confidential where the disclosure of the information would cause specific, direct and substantial harm to a witness or specific harm to the *environment* as defined by the Joint Review Panel. Furthermore, section 45(4) considers any information that requires protection privileged and cannot be made available to the public without the express authorization of the witness.²

Specific to the Stillwater Project, the Joint Review Panel procedural session delivered on October 16, 2012, the definition of “environment” was clarified as it pertains to the Project. The Panel’s mandate to “conduct an assessment of the environmental effects of the project” is predicated upon the definition of “Environment” defined as inclusive of:

“The natural environment and the social, economic, and cultural conditions that influence the life of humans or a community”³

The Confidential Information of PMFN is not protected under current Canadian copyright or trademark law. With no protection, and potential exposure in the public forum, the TEK, TLU and subsequent reports are open for evaluation and interpretation by present day and even future proponents, government and members of the general public. Pic Moberg First Nation members currently exercise their Aboriginal and Treaty rights within their traditional lands generally; and within the vegetation, wildlife, and biodiversity of the Regional Study Area for the project particularly. Due to the specific nature of PMFN’s TEK, TLU and reports, the value to keep it protected is unquestionable because of the very personal connections to traditional practices and lands. If there is exposure of the Confidential Information in the public; it’s our belief that our Aboriginal rights, customs, and traditions will be derogated and debased.

Since we started participating in the CEAA process, we have experienced some negative backlash in a small but unfortunate minority of members of the public. The project is under a severe amount of public scrutiny and we have heard comments that PMFN should not be involved. This backlash is also evident through comments posted on the CEAA website regarding another First Nation’s request for confidentiality, Pays Plat First Nation (Oct. 2012). We believe that any disclosure of our Confidential Information in the public domain and even in making the request to the Panel to keep it confidential; will bring more backlash upon PMFN. We have serious concerns over protecting our members’ identities, knowledge and integrity with respect to our Confidential Information generally and in particular for those using the area now and in the past.

² *Canadian Environmental Assessment Act*, 2012 s. 45 (3) and 45 (4), formerly s. 35 of the *Canadian Environmental Assessment Act*, 1992

³ Sapagnulo, C. (2012, October 16). “Joint Review Panel Process Information Sessions September/October 2012”. PowerPoint lecture presented in the Community Hall of Pic Moberg First Nation.

Furthermore, the Confidential Information was generated from interviews with Pic Mobert members conducted in confidence, which was a condition for many of the elders when providing the interviews; some of these elders have sadly passed on. We submit that any portrayal of our Confidential Information in the public domain through the CEAA process will detrimentally impact PMFN's undertaking to their own members to protect the Information and breaches our own community cultural and social norms; these are harms which we clearly would like to prevent.

Pic Mobert First Nation is not a signatory to the Robinson Superior Treaty of 1850. We previously filed an Aboriginal Title claim against Ontario and Canada (CV-2006-142). This claim is now in abeyance by agreement and court order, pending resolution of the case regarding treaty adherence, *Michano et al v. Canada* (A.G.) [CV-07-018]. In the treaty adherence case, Pic River First Nation is litigating the issue of whether or not they adhered to the 1850 Treaty; PMFN is an intervener in this case, along with several other First Nations. The abeyance order essentially allows PMFN's claim to be decided based upon the outcome of the Pic River First Nation action. PMFN has submitted documents in its possession to date, which relate to the issues in the case during the disclosure process in July 2012.

Much of our historical documents come from public sources, however some of it cannot be accessed unless PMFN provides express permission, even if it is a public source of information. The research reports and analysis of the documents that are generated belong strictly to PMFN and this is created value that the First Nation holds title to. It is our position that any of our documents that enter into the public domain where other parties can discuss or critique them, will have the potential to seriously undermine the above noted court processes, especially since the Court dates for the Treaty adherence case will not be set until 2014. Additionally, in these processes, there is an expectation of privacy and such documents are protected.

In addition to the foregoing, and in the alternative, PMFN is preparing and will be submitting a Specific Land Claim to Canada and Ontario for larger reserve lands. In order to prepare this land claim, PMFN has retained a qualified research firm to examine PMFN's history and use of the territory prior to, and subsequent to, the 1850 Treaty. This research is underway and should be completed sometime early in the New Year.

If the Confidential Information is released to the public, PMFN will lose control of the Information as this will be posted on the CEAA website and various other public websites. The loss will be specific to PMFN, its membership and future generations. The cumulative impact will affect the economics of the community, as future proponents will undoubtedly find their Consultation and Accommodation, and ultimately their mitigation measures based upon any PMFN TEK and TLU released through the Panel Hearings even though this information is intended only for the Stillwater project. PMFN's unique cultural dialogue with the land will be compromised if we lose the interpretation of our own TEK, TLU and research reports through these becoming available for anyone to access, critique and draw conclusions about.

We note that previous review panels have kept information related to the precise location of a species at risk confidential, or information related to the location of an Aboriginal sacred site held in confidence, however, the non-disclosure of information is the exception and not the rule.⁴ PMFN contends that, in the case of the Stillwater Project, given the above tangible and grave concerns, the Panel ought to err on the side of the exception in this case.

⁴ CEAR Doc. 207

A similar request was put forth, weighed and granted by the Joint Review Panel in the CEEA hearings involving Esketemc First Nation regarding the Prosperity Gold-Copper Mine Project. The Esketemc First Nation was successful in protecting the confidentiality of their TEK and TLU and related reports because of the potential to cause significant harm to the environment or to the community members. An *in camera* session was also granted in that case so the Esketemc could provide culturally sensitive information to the Panel and the proponent.

Parallel to Joint Review Panel's confidentiality undertakings with the Prosperity Gold-Copper Mine Project, PMFN likewise seeks to enshrine the value of Traditional Ecological Knowledge through the strictest assurance of non-disclosure in the public forum. We specifically seek that all oral and written submissions involving PMFN Confidential Information be subject to conditions established through a confidential ruling and only be disclosed to the Panel and specified representatives of Stillwater Canada Inc., and the Federal and Provincial representatives responsible for consultation on this project. We also ask that our Confidential Information be presented via *in camera* sessions, and as per Section 2.6⁵, that Confidentiality Undertakings be issued and signed by the Panel, the Panel's Secretariat, and specified representatives from Stillwater Canada Inc., Canada and Ontario. Furthermore, PMFN requests all Confidential Information be sealed and destroyed or returned to PMFN and that the signatories to the Confidentiality Undertaking be subject to document control provisions which we ask the Panel to implement through creating the Confidentiality Undertaking.

Section 2.4 of the Procedures for Requesting Confidentiality⁶ refers to the posting of such a request on the Public Registry. PMFN agrees with posting the request on said registry; however we take exception to the provision of opportunity to interested parties to comment on PMFN's confidentiality request. Our application for confidentiality is solely to the Joint Review Panel who was afforded the powers to grant confidentiality under section 45 of the CEEA, and not to other "interested parties."

We are resolute that the exposure of PMFN Confidential Information in the public forum constitutes specific, direct and substantial harm to the environment and membership of PMFN. For all of the above foregoing reasons, we submit that any release into the public domain will certainly influence and hinder the social, economic and cultural conditions which constitute the community of PMFN and this is completely unacceptable to PMFN.

PMFN is respectful of the powers granted to the Panel through the Canadian Environmental Assessment Act to ensure that the proper level of sufficiency of review is undertaken by the affected parties, however we respectfully request that the Panel uphold the sanctity of our peoples Confidential Information as accrued since time immemorial by acknowledging the necessity for protection of our Information through a positive confidentiality ruling.

⁵ Ibid

⁶ Ibid

Respectfully,

<original signed by>

Chief Johanna Desmoulin
Pic Mobert First Nation

Cc. Theresa Bananish, Bananish Law: <email address removed>
Jennifer Jacques, Lands and Resources Department: <email address removed>
Doug Thomson, Legal counsel for SCI: <email address removed>
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