



Canada Energy
Regulator

Régie de l'énergie
du Canada

Suite 210
517 Tenth Avenue SW
Calgary, Alberta
T2R 0A8

517, Dixième Avenue S.-O.
bureau 210
Calgary (Alberta)
T2R 0A8

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Mr. Lars Olthafer
Blake, Cassels & Graydon LLP
Barristers & Solicitors
855 – 2nd Street SW
Calgary, AB T2P 4J8
Email [REDACTED]

Dear Mr. Olthafer:

**Trans-Northern Pipelines Inc. (TNPI)
NEB Inspection Officer Order MP-002-2019 – Information Request
Request for Confidential Treatment of Historical Spills, Leaks and Damage
Incident Inventory Information**

On 23 August 2019, TNPI responded to an Information Request (IR) from the former National Energy Board (NEB or Board) to provide its releases and potentially contaminated/contaminated site inventory. In its response, TNPI requested that the information be treated confidentially pursuant to section 16.1 of the *National Energy Board Act* (NEB Act)¹ and not be made part of the NEB's public record or otherwise disclosed to the public.

On 2 October 2019, an Inspection Officer Order, MP-002-2019², was issued to TNPI to provide the Canada Energy Regulator (CER) with the specific information required pertaining to the company's releases and potentially contaminated/contaminated site inventory as the information provided in its response to the IR of 23 August 2019 was "not reflective of the information provided and demonstrated...nor what the NEB requested in the Information Request."³

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¹ On 21 June 2019, the *Canadian Energy Regulator Act* (CER Act) received Royal Assent. On 8 August 2019, the Government of Canada announced that the CER Act would come into force on 28 August 2019 (commencement day). The National Energy Board has now been replaced by the Canada Energy Regulator (CER). Section 36 of the transitional provisions associated with the CER Act states that applications pending before the Commission immediately before the commencement day are to be dealt with by the Commission of the CER and continued in accordance with the NEB Act as that Act read immediately before the commencement day.

² Canada Energy Regulator, Inspection Officer Order No. MP-002-2019 (2 October 2019) <https://www.cer-rec.gc.ca/sftnvrnmnt/ndstrprfrmnc/rprtcmplncnfrcmnt/nsptnffcrdr/2019/MP-002-2019/mp-002-2019-eng.html>.

³ *Ibid.*

On 9 October 2019, in response to Order MP-002-2019, TNPI submitted the information required as set out in the Order, accompanied with a letter to the now CER again requesting confidential treatment over the information, this time under section 60 of the *Canadian Energy Regulator Act* (CER Act).

Facts

On or about 30-31 July 2019, a (then) NEB Inspection Officer conducted an implementation assessment meeting to assess the contaminated sites management aspects of TNPI's environmental protection program, at TNPI's main office in Richmond Hill, Ontario.

As a result of the implementation assessment meeting, a NEB Inspection Officer Order, MP-001-2019⁴, was issued to TNPI to address multiple non-compliances identified with TNPI's Environmental Protection Program and Management System requirements pursuant to the *National Energy Board Onshore Pipeline Regulations* (OPR).

After the meeting, an IR was sent from NEB Staff to TNPI in early August 2019, requesting the releases and potentially contaminated/contaminated sites inventory that had been shared at the above referenced meeting. After various means of correspondence between the parties regarding the IR, on 23 August 2019, TNPI submitted a simplified version of the releases and potentially contaminated/contaminated site inventory (August Contaminated Site Inventory) with a request for confidentiality pursuant to section 16.1 of the NEB Act.

As stated above, the 23 August 2019 submission was found to be insufficient such that a CER Inspection Officer Order (MP-002-2019) was issued on 2 October 2019 to TNPI, to provide the CER with the specific information previously required by the Regulator pertaining to the company's releases and potentially contaminated/contaminated site inventory.

On 9 October 2019, TNPI submitted all of the required information as set out in Order MP-002-2019 (October Contaminated Site Inventory) to the CER, with another request that the information be treated confidentially, this time pursuant to section 60 of the CER Act. This secondary submission met the requirements of Order MP-002-2019 as determined by the Inspection Officer, and the Order is now closed.

Commission's Reasons and Decision

For the reasons provided below, the Commission denies the request for confidential treatment.

A. Preliminary Matter – Applicability of section 16.1 of the NEB Act or section 60 of the CER Act

The leading case on general confidentiality orders is the Supreme Court of Canada decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (*Sierra Club*). The Court explains the relationship between the confidentiality order and the fundamental principle of open and accessible court proceedings:

In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to

⁴ Canada Energy Regulator, Inspection Officer Order No. MP-001-2019 (2 August 2019) <http://www.cer-rec.gc.ca/sftnvrnmnt/ndstrprfrmnc/rprtcmplncnfrcmnt/nbspctnffcrrdr/2019/MP-001-2019/mp-001-2019-eng.html>.

freedom of expression enshrined in s. 2(b) of the *Charter: New Brunswick, supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick, supra*, at para.22.⁵

The NEB in past decisions echoed this sentiment, for example, in Ruling Number 3 during the Emera Brunswick hearing (GH-1-2006) (*Emera*)⁶, regarding the application of section 16.1, it stated:

This section provides an exception to the fundamental principle that the Board's proceedings are to be open, accessible and transparent. As an exception, the onus is not upon the parties opposing confidentiality to show why the information should be public; rather those seeking a confidentiality order have the onus to show why this extraordinary order should be granted to keep information in a public proceeding confidential.⁷

Section 16.1 of the NEB Act states the following (and section 60 of the CER Act has very similar wording⁸):

In any *proceedings* under this Act, the Board may take measures and make any order that it considers necessary to ensure the confidentiality of any information *likely to be disclosed* in the *proceedings* if the Board is satisfied that...[emphasis added].

As stated by the NEB in *Emera*, section 16.1 under the NEB Act is an exception to the principle of natural justice and procedural fairness that the (now) Commission's proceedings are to be "open, accessible and transparent." As such, the Commission must ensure in any application that is seeking to utilize either section 16.1 of the former NEB Act or section 60 of the CER Act that it is properly before them, and within the scope of their authority, before applying such an "extraordinary" exception.

In order to make this determination the Commission must consider the word "proceeding" as it is used in the aforementioned sections. The Commission is of the view that when Parliament refers to a "proceeding" in the sections noted above, its intent is to capture only the regulatory process before an adjudicative body such as the Commission. The Commission is not persuaded that an activity such as the issuance of an inspection officer order and the reply received in response thereto, as set out in this matter, are intended to be encompassed within the term "proceeding."

⁵ *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#) at para 52.

⁶ National Energy Board, Ruling #3 – EBPC Notice of Motion to file a negotiated toll agreement in confidence (31 August 2006) ([A13213](#)).

⁷ *Ibid.*

⁸ Section 60 of the CER Act: The Commission or a designated officer may take any measures and make any order that the Commission or designated officer considers necessary to ensure the confidentiality of any information likely to be disclosed in any proceedings under this Act if the Commission or designated officer is satisfied that...

Further, the confidentiality provisions apply only to “information likely to be disclosed” in a proceeding. These provisions are clearly applicable for example, in a public hearing or other regulatory matter being heard by the Commission with a public record. In contrast, the information sought to be protected here is not information that is generally posted publicly by the CER. Public access to this information can, however, be sought via an application made under the *Access to Information Act*. Any Commission decision regarding confidential treatment over this information, it should be noted, has no impact on the independent authority of an officer acting pursuant to an access to information request under the *Access to Information Act*.

In the absence of a proceeding, a lack of “interested” parties further demonstrates that section 16.1 under the NEB Act and section 60 under the CER Act are intended to be and must be interpreted in a narrow manner. On the facts of this application, there are no other identifiable parties from whom to seek submissions or to whom any confidentiality order could attach or issue.

For the above reasons, the Commission denies the confidentiality application of TNPI. The August Contaminated Site Inventory and the October Contaminated Site Inventory (Contaminated Site Inventories) were provided in response to an Inspection Officer Order, and the issuance of such order and its response as set out in this matter, are not proceedings under the CER Act or NEB Act as required in order to apply the confidentiality provisions pursuant to section 16.1 of the NEB Act and section 60 of the CER Act.

B. Alternative Analysis under section 16.1 of the NEB Act and section 60 of the CER Act

Alternatively, in the event that the issuance of the Inspection Officer Order or TNPI’s response to it were determined to constitute a proceeding, the Commission would be of the view that the confidentiality provisions under the NEB Act and the CER Act would apply. In this scenario, the Commission would deny the confidentiality request.

The Commission’s assessment of the 23 August 2019 request for confidential treatment under the NEB Act follows below. The subsequent request filed on 9 October 2019 will be considered under the CER Act as it is a separate confidentiality request pertaining to similar material, however ultimately it is a separate submission under a new Act.

Test to be Applied under section 16.1 of the NEB Act

In order for a party to be successful on a request for confidentiality under section 16.1, it must meet one of two tests, in subsections a) and b), respectively. Under subsection 16.1(a), the Commission may issue an order if it is satisfied that disclosure could reasonably result in a material loss or gain to a person directly affected by the proceedings, or if disclosure could reasonably be expected to prejudice the person’s competitive position. Under subsection 16.1(b) the Commission may issue an order if it is satisfied that the documents constitute financial, commercial, scientific, or technical information that has consistently been treated confidentially, and if the Commission considers that the person’s interest in confidentiality outweighs the public interest in disclosure.

In its letter of 23 August 2019, TNPI provides the following arguments as to why the information it submitted should be treated confidentially, but does not indicate under which branch of the tests in either Act it is making its submission. The letter states the following:

- 1) The “disclosure of the information could result in the erroneous identification of properties as once being or currently contaminated or potentially contaminated with the attendant unnecessary and unwarranted potential impacts to current landowners’ property and other interests.”
- 2) The “enclosed spreadsheet includes technical and potentially commercially and financially sensitive information regarding historical incidents and suspected incidents that TNPI has consistently treated as confidential and that is of primary interest to the Board in the discharge of its regulatory mandate and not the general public. As such, it is respectfully submitted that TNPI’s interest in confidentiality, and avoidance of the potential unnecessary and unwarranted harm to owners of potentially erroneously identified affected properties and to TNPI, outweighs the Public interest in disclosure of the information.”

First part of the Test: subsection 16.1(a)

As stated, TNPI did not identify which part of the test it was attempting to meet in its submissions. It appears its first argument identified at 1) above may be in relation to meeting the test under subsection 16.1(a). TNPI argued that there could be “unnecessary and unwarranted potential impacts to current landowners’ property and other interests.” The Commission is of the view that TNPI is attempting to argue by inference that the landowners’ properties could be “stigmatized” (to use the word generally used by industry, not by TNPI) should the information not be protected by confidentiality. The Commission however finds that (i) not only has TNPI failed to provide any evidence in support of this argument but that (ii) the stated rationale for the application does not involve interests or impacts that the legislation noted above was intended to provide protections and safeguards for.

TNPI also argued that release of the historical information to the public could give rise to unwarranted assumptions regarding the current condition of the incident or suspected locations (as approximated) and could reasonably be expected to prejudice TNPI’s competitive position relative to other refined products transportation alternatives.

The Commission is not persuaded that TNPI’s own lack of diligence in determining the locations of the releases and potentially contaminated/contaminated sites is a valid justification to grant confidential treatment.

In addition, TNPI argues that the release of this information “could reasonably be expected to prejudice TNPI’s competitive position relative to other refined products transportation alternatives.” As best as the Commission can ascertain, TNPI is arguing that should the Commission not grant confidential treatment over the August Contaminated Sites Inventory, the information would be at an increased risk of becoming public. The release of the information could then presumably create media attention, causing some customers to source their refined products elsewhere.

The Commission is not persuaded that TNPI can meet the test by asserting that the locations of the releases and potentially contaminated/contaminated sites should be cloaked in confidentiality simply because this information could result in harm to its public reputation, thereby causing its customers to switch to other means of transportation.

As explained by the Court in *Sierra Club of Canada v. Canada (Minister of Finance)*:

In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields "where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).⁹

In the same manner here, TNPI has not indicated anything more than if this information should be made public this could cause it to lose business. There is no greater interest or principle at stake – no breach of a confidentiality agreement for example, which were the facts in *Sierra*, and also in several cases that have received confidential treatment before the NEB, now the Commission.¹⁰

For these reasons, the Commission has determined that the nature of the information does not meet the test for confidentiality set out in subsection 16.1(a) of the NEB Act.

Second Part of the Test: subsection 16.1(b)

In order to satisfy the test for confidentiality in the second part of the test, part 16.1(b), three requirements must be met by the applicant. First, the information must be financial, commercial, scientific or technical. Second, the information must have been consistently treated as confidential information. Third, the Commission must be of the view that the interest in confidentiality outweighs the public interest in disclosure of the proceedings.

⁹ *Supra* note 5, at para 55.

¹⁰ National Energy Board, Ruling No. 2 – Enbridge Pipelines Inc. – Line 3 Replacement Program – Order No. MO-026-2017 (12 May 2012) ([A83513](#)); National Energy Board, New Brunswick Power Corporation – International Power Line Project Woodstock to Houlton, Maine – Confidential Filing (11 July 2018) ([A92933](#)); National Energy Board, Manitoba Hydro Request for Confidentiality of redacted contract provisions (17 October 2013) ([A54811](#)).

TNPI submits:

“...the enclosed spreadsheet includes technical and potentially commercially and financially sensitive information regarding historical incidents and suspected incidents that TNPI has consistently treated as confidential and that is of primary interest to the Board in the discharge of its regulatory mandate and not the general public.

The Commission is of the view that the information is technical in nature and is in agreement that TNPI has likely carefully treated it as confidential.

The Commission must now consider whether TNPI's interest in confidentiality outweighs the public interest in the potential disclosure of the information in the August Contaminated Sites Inventory.

TNPI submitted the following:

...the enclosed spreadsheet includes technical and potentially commercially and financially sensitive information regarding historical incidents and suspected incidents that TNPI has consistently treated as confidential and that is of primary interest to the Board in the discharge of its regulatory mandate and not the general public. As such, it is respectfully submitted that TNPI's interest in confidentiality, and avoidance of the potential unnecessary and unwarranted harm to owners of potentially erroneously identified affected properties and to TNPI, outweighs the public interest in disclosure of the information.

The Commission disagrees with TNPI's submission above and finds the public would have a strong interest in this information, which outweighs any risk of “unnecessary and unwarranted harm to owners” should the location of the releases and contaminated sites or potentially contaminated sites identify some affected properties “erroneously.” The lack of accuracy of the information provided by TNPI to the CER in the August Contaminated Site Inventory, should not be used as a reason to justify granting confidential treatment over the information in order to attempt to prevent it from being accessible to residents, landowners or the public.

For the reasons above, the Commission finds the public interest in the potential disclosure of the information in the August Contaminated Site Inventory outweighs TNPI's interest in its confidentiality. As a result, the Commission has determined that TNPI has also not met the second part of the test for section 16.1 under the NEB Act. The Commission will not grant confidential treatment over the August Contaminated Site Inventory.

Test under section 60 of the CER Act

As stated, the second letter sent by TNPI on 9 October 2019 contained a subsequent application for confidential treatment for the October Contaminated Site Inventory. The letter contained the same arguments from TNPI as referenced above as to why the information submitted should be treated confidentially. Again TNPI did not specify under which branch of the tests in section 60 it was making its submission.

The Commission assessed the October application under section 60 of the CER Act. The test under section 60 is nearly identical to section 16.1, but for the addition of subsection (c), a third possible ground for confidential treatment:

60 The Commission or a designated officer may take any measures and make any order that the Commission or designated officer considers necessary to ensure the confidentiality of any information likely to be disclosed in any proceedings under this Act if the Commission or designated officer is satisfied that

- (a)** disclosure of the information could reasonably be expected to result in a material loss or gain to a person directly affected by the proceedings, or could reasonably be expected to prejudice the person's competitive position;
- (b)** the information is financial, commercial, scientific or technical information that is confidential information provided to the Regulator and
 - (i)** the information has been consistently treated as confidential information by a person directly affected by the proceedings, and
 - (ii)** the Commission or designated officer considers that the person's interest in confidentiality outweighs the public interest in disclosure of the proceedings; or
- (c)** there is a real and substantial risk that disclosure of the information will compromise the safety and well-being of persons or cause harm to property or the environment.

For the same reasons given above relating to the August Contaminated Site Inventory, the Commission also finds that TNPI does not meet the test in the CER Act as set out under (a) and (b) above for the October Contaminated Site Inventory, as these provisions are substantially similar to the test under the NEB Act.

Subsection 60 (c) requires consideration as to whether the disclosure of the October Contaminated Sites Inventory would compromise the safety and well-being of persons or cause harm to property or the environment. The Commission is of the view that disclosure of this information would not be the cause of any harm to property or the environment, but rather any harm that may exist has already been caused by the releases or the presence of the contaminated sites or potentially contaminated sites.

As a result, TNPI, in its confidentiality request related to the October Contaminated Sites Inventory has not met any of the three parts of the test under section 60 of the CER Act and as such the Commission will not grant confidential treatment over this material.

As stated earlier, the Commission denies the application of TNPI. The Contaminated Site Inventories were provided in response to an Inspection Officer Order, and the issuance of such order and its response as set out in this matter are not a proceeding before the Commission, as required in order to apply the confidentiality provisions pursuant to section 16.1 of the NEB Act and section 60 of the CER Act.

Further, under the alternative analysis provided, the Commission has determined that TNPI has failed to meet the tests under section 16.1 of the NEB Act and section 60 of the CER Act and cannot be granted confidential treatment over the Contaminated Sites Inventories.

Yours sincerely,

Original signed by

Jean-Denis Charlebois
Secretary of the Commission