

CONFIDENTIALITY ORDER

Proposed Inclusion of Surrey Federal Lands in the Agricultural Land Reserve ALC File: 66884

1. This is a procedural order addressing confidentiality issues in this matter. The background to and context of the procedural order is as follows.
2. The Agricultural Land Commission (the "**Commission**"), acting under s. 17(1) of the *Agricultural Land Commission Act*, has initiated a proposal (the "**Inclusion Proposal**") to include the following lands located within the City of Surrey into the Agricultural Land Reserve:

19233 40 Ave (PID 014-120-321)
3948 192 St (PID 014-119-129)
3884 192 St (PID 014-120-178)
19305 36 Ave (PID 014-120-224)
19498 40 Ave (PID 014-120-291)
(the "**Properties**").

3. The Katzie First Nation, Kwantlen First Nation and Semiahmoo First Nation (together "**KKS**") assert Aboriginal title and rights with respect to the Properties.
4. The owner of the Properties is His Majesty the King in right of the Government of Canada.
5. The KKS state that they have engaged in a multi-year negotiation process with His Majesty the King in right of the Government of Canada with respect to the Properties.
6. The KKS offer to share information about their proposed use of the Properties, the scope of work that has taken place in the negotiation process and the current status of that process towards concluding an agreement (the "**Proposed KKS Information**"), but seek a non-disclosure agreement with the Commission to protect the sensitive and confidential nature of the negotiation details.
7. The Commission, which is the decision-maker on this matter, is comprised of 18 Commission members (one of whom is the Chair). The members of the Commission reside throughout the province, in accordance with s. 5(1) of the *Agricultural Land Commission Act*.
8. Section 14(2) of the *Agricultural Land Commission Act* provides that a member of the Commission who was not present at a meeting to determine an application or other matter may vote on the application only if a summary of the meeting is given to the member before they vote.
9. The Commission finds that it is desirable in the interests of justice to facilitate the submission by the KKS of the Proposed KKS Information on the decision-making record of the Inclusion Proposal.
10. The Commission finds that it is practical and efficient in light of the number of members of the Commission and their distribution around the province for a subset of members of

the Commission to meet with representatives of KKS to discuss the Inclusion Proposal and the Proposed KKS Information. The Commission directs that after the meeting or meetings, a draft written summary of the meeting or meetings will be prepared and provided to the KKS for comment. Following the comment process, the written summary will be finalized and become part of the decision-making record provided to all members of the Commission as part of its deliberations (the "**KKS Information Summary**").

11. The Commission as decision-maker on the Inclusion Proposal considers that it would or may be inappropriate to bind itself contractually, through a non-disclosure agreement, with respect to evidence on the record of the Inclusion Proposal.
12. The Commission does not have a formal policy with regard to confidentiality issues in a Commission-initiated inclusion proposal. In the context of an appeal under section 55 of the *Agricultural Land Commission Act*, the Commission's Rules of Practice and Procedure for Appeals (ALC Appeal Rules) set out at Rule 15 a test informed by legal jurisprudence. The Commission normally presumes that members of the public are entitled to access to materials filed in an appeal. The Commission may decide to impose one or more restrictions on that access if it considers that:
 - a. the restriction is necessary in order to prevent a serious risk to the administration of justice because reasonably alternative measures will not prevent the risk; and
 - b. the salutary (beneficial) effects of the restriction outweigh the deleterious effects of the restriction on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the appellant to a fair and public hearing, and the efficacy of the administration of justice.
13. The Commission finds that it should consider confidentiality issues in this Inclusion Proposal by using the test from the ALC Appeal Rules, adapted where necessary to the context.
14. The Commission finds that disclosure of the Proposed KKS Information and the KKS Information Summary (including the draft version and any KKS comments on the KKS Information Summary) could pose a serious risk to the administration of justice including harm to intergovernmental relations or negotiations, to interests of an Indigenous people, and to business interests of KKS, including for the reasons submitted by KKS.
15. The Commission finds that a confidentiality order with regard to the Proposed KKS Information and the KKS Information Summary (including the draft version and any comments on the KKS Information Summary) is necessary in order to prevent a serious risk to the administration of justice because reasonably alternative measures will not prevent the risk. A further restriction on the scope of the confidentiality order would discourage full and frank sharing of information by the KKS.
16. Because the Inclusion Proposal is Commission-initiated, there is no applicant who could be prejudiced by a confidentiality order. However, the process is meant to be a public one and the public has an interest in open proceedings which must be considered.
17. The Commission finds that the salutary effects of the confidentiality order outweigh the deleterious effects of the restriction on the rights and interests of the public, including the effects on the right to free expression and the efficacy of the administration of justice.

(The right of the appellant on an appeal under section 55 to a fair and public hearing does not apply in this matter.) The KKS submissions to date were not made on a confidential basis, and adequately convey to the public the KKS position on the Inclusion Proposal. The Proposed KKS Information and KKS Information Summary are more specific in nature, involving the current state of ongoing negotiations which are sensitive and confidential. There is minimal public interest in exposing the details of these negotiations before they are concluded.

18. The Government of Canada has made submissions on the Inclusion Proposal. By the nature of the Proposed KKS Information, some or all of it will be known to the Government of Canada. If the Government of Canada seeks access to the Proposed KKS Information and/or KKS Information Summary, it may make a written request for access and the Commission will consider varying this confidentiality order after KKS has an opportunity to provide its position.

IT WAS

MOVED BY: Ione Smith

SECONDED BY: Richard Mumford

THAT the Commission will receive the Proposed KKS Information and the KKS Information Summary on a confidential basis. The Proposed KKS Information and the KKS Information Report will form part of the decision-making record for the Inclusion Proposal, but will not be made available to the public. The draft version of the KKS Information Summary and any KKS comments on the KKS Information Summary will also be confidential and will not be made available to the public.

THAT this confidentiality order is not itself confidential, and will be made available to the public.

THAT this confidentiality order may be varied by further order of the Commission.



Chair Jennifer Dyson