

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH
AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES
(1976)**

between

**THEODORE DAVID EINARSSON, HAROLD PAUL EINARSSON, RUSSELL JOHN
EINARSSON, AND GEOPHYSICAL SERVICE INCORPORATED**

(“Claimants”)

-and-

GOVERNMENT OF CANADA

(“Respondent”)

(ICSID CASE NO. UNCT/20/6)

CONFIDENTIALITY ORDER

Members of the Tribunal

Ms. Carita Wallgren-Lindholm (Presiding Arbitrator)

Mr. Trey Gowdy

Mr. Toby Landau, QC

Secretary of the Tribunal

Ms. Geraldine R. Fischer

13 June 2022

DEFINITIONS

1. For the purposes of this Confidentiality Order:
 - a. “Disputing Party” means either the Claimants or the Respondent.
 - b. “Confidential Information” means information that is not publicly available and is designated by a Disputing Party as confidential on the grounds that it is:
 - i. Business Confidential Information of a Disputing Party or of a provincial, territorial, or municipal government;
 - ii. Business Confidential Information relating to a third party;
 - iii. information otherwise protected from disclosure under the applicable domestic law of the disputing State party including, but not limited to, and as amended, *Canada's Access to Information Act*, the *Canada Evidence Act*, *Canada's Privacy Act*, or any domestic law of any Province governing access to information and protection of privacy; or
 - iv. information that is deemed to be financial, commercial, scientific or technical information supplied by third parties that has been treated as Confidential Information by those third parties.
 - c. “Business Confidential Information” includes:
 - i. trade secrets;
 - ii. financial, commercial, scientific or technical information that is treated consistently in a confidential manner by the Disputing Party, provincial, territorial or municipal government or third party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or detailed accounting or financial records not otherwise disclosed in the public domain;
 - iii. information the disclosure of which could result in material financial loss or gain to the Disputing Party, provincial, territorial, or municipal government or third party to which it relates;
 - iv. information the disclosure of which could interfere with contractual or other negotiations of the Disputing Party, provincial, territorial, or municipal government or third party to which it relates; or
 - v. other communications treated as confidential in furtherance of settlement between the Disputing Parties.
 - d. “Written Submission” includes a brief, memorial, witness statement, exhibit or expert report.
 - e. “Public Document” means a Written Submission, transcript, order or award that contains no Confidential Information and no redactions of such information.
 - f. “Public Version” means the version of a Written Submission, transcript, order or award that has been redacted to remove all Confidential Information.
 - g. “Confidential Version” means the version of a Written Submission, transcript, order or award that contains Confidential Information that has not been redacted.
 - h. “Seismic Materials” means:
 - i. unprocessed seismic field data, or unprocessed seismic, magnetic and gravity data;
 - ii. seismic related navigation data;
 - iii. processed and reprocessed seismic data;

- iv. selections, arrangements and compilations of raw, processed and reprocessed seismic data;
 - v. productions and reproductions of seismic data in various forms and media including physical, electronic, magnetic and digital works;
 - vi. interpretations, derivations and translations of the seismic data; and
 - vii. related seismic data materials and all derivatives of the foregoing, including notes, selections, arrangements, compilations, insertions, extractions and reproductions.
- i. “Protected Seismic Data” means Seismic Material that a Party designates as subject to protection in accordance with this Confidentiality Order.

OBJECTIVE/PURPOSE

2. The Disputing Parties agree to respect and maintain the confidentiality of information exchanged in this arbitration in accordance with the terms of this Confidentiality Order.
3. A Disputing Party may designate Confidential Information and Protected Seismic Data contained in any document that the Disputing Party produces to the other Disputing Party, and in any Written Submission, transcript, order or award. These designations shall be made in accordance with the procedures set out in this Confidentiality Order.

PROTECTED SEISMIC DATA

4. For the purposes of this Confidentiality Order, a Disputing Party may designate Seismic Materials contained in any document that the Disputing Party produces to the other Disputing Party or in any Written Submission, transcript, order or award as “Protected Seismic Data”, regardless of whether such material is publicly available. The designation of Seismic Material as Protected Seismic Data for the purposes of this Confidentiality Order is without prejudice to and does not otherwise affect any rights and obligations with respect to such material, including the disclosure of Seismic Materials pursuant to the applicable domestic regulatory regime and the treatment of Seismic Materials obtained outside the context of this arbitration.

DOCUMENTS EXCHANGED IN DOCUMENT PRODUCTION

5. A document produced in this arbitration by a Disputing Party to the other Disputing Party shall be protected from disclosure as though it contained Confidential Information in its entirety, except that (a) should the document be filed by one of the Disputing Parties as part of a Written Submission, the Disputing Parties must follow the process for designating Confidential Information and Protected Seismic Data as set out in this Confidentiality Order; and (b) any produced documents that are already publicly available need not be treated as Confidential Information protected from disclosure, with the exception of any Protected Seismic Data.

WRITTEN SUBMISSIONS

Confidential Information Filings

6. A Disputing Party shall provide, within 14 calendar days from the date that a Written Submission is filed under paragraph 10.2 of Procedural Order No. 1, a preliminary Confidential Version of the Written Submission and its exhibits containing the proposed designations of Confidential Information and Protected Seismic Data in the Written Submission and exhibits, if any, of the Disputing Party making the filing. Single brackets ([]) or highlighting shall be used to surround designated Confidential Information and Protected Seismic Data.
7. A Disputing Party shall have 14 calendar days from the date of receiving the other Disputing Party's proposed designations of Confidential Information and Protected Seismic Data in a Written Submission to object to those proposed designations and to provide its own further proposed designations of Confidential Information and Protected Seismic Data, if any, in the Written Submission.
8. If such objections or further proposed designations are provided, the Disputing Parties shall attempt to agree on the final designations of Confidential Information and Protected Seismic Data in the Written Submission within 14 calendar days of the receipt of the objections. If the Disputing Parties do not agree on the final designations of Confidential Information and Protected Seismic Data within 14 days of the receipt of the objections, a Disputing Party may submit any outstanding objections to the Tribunal for resolution. The Tribunal may invite further submissions on proposed designations of Confidential Information and Protected Seismic Data.

All Filings

9. Within 10 calendar days from the date on which the final designations of Confidential Information and Protected Seismic Data have been confirmed by agreement of the Disputing Parties, by the failure of a Disputing Party to make or object to any designation or by order of the Tribunal, the Disputing Party that originally filed the Written Submission shall file:
 - a. a final Confidential Version of the Written Submission reflecting the final designations of Confidential Information and Protected Seismic Data; and
 - b. a final Public Version of the Written Submission, with all Confidential Information and Protected Seismic Data redacted.
10. Each page of a Confidential Version must be labeled, "Confidential Information, Unauthorized Disclosure Prohibited". Each page of a Public Version must be labeled "Public Version".
11. Where whole documents or multiple pages of Confidential Versions have been redacted entirely, such pages need not be reproduced in redacted form in the Public Version. Instead, a summary page stating the number of pages that have been redacted in their entirety will suffice.

12. A procedural timetable for Confidential Information and Protected Seismic Data designations in Written Submissions is provided in Schedule 1 of this Confidentiality Order.

TRANSCRIPTS, ORDERS, AWARDS

13. The Disputing Parties shall have 14 calendar days from the receipt of a transcript or order to designate information as Confidential Information and Protected Seismic Data in the transcript or order and to exchange such designations. The Disputing Parties shall have an additional 14 calendar days from the receipt of such designations to raise any objections to the other Disputing Party's designations. At the conclusion of that period, if the Disputing Parties are unable within 14 calendar days to agree on any designations of Confidential Information and Protected Seismic Data, a Disputing Party may submit the issues to the Tribunal for resolution.
14. If the Tribunal's award discloses Confidential Information and Protected Seismic Data, the Tribunal shall issue the following versions of the award, as applicable:
 - a. a Confidential Version of the award; and
 - b. a Public Version of the award, with all Confidential Information and Protected Seismic Data redacted.
15. The Disputing Parties shall have 30 calendar days from the receipt of an award to designate information as Confidential Information and Protected Seismic Data in the award and to exchange such designations. The Disputing Parties shall have an additional 14 calendar days from the receipt of such designations to raise any objections to the other Disputing Party's designations. At the conclusion of that period, if the Disputing Parties are, within 14 calendar days, unable to agree on any designations of Confidential Information and Protected Seismic Data, a Disputing Party may submit the issues to the Tribunal for resolution.
16. Within 10 calendar days after any objections to proposed designations of Confidential Information and Protected Seismic Data have been resolved by agreement of the Disputing Parties or by order of the Tribunal, the Disputing Parties shall consolidate their final designations and file with the Tribunal, as appropriate, a final Confidential Version, and Public Version of the transcript, order or award.
17. A procedural timetable for Confidential Information and Protected Seismic Data designations in transcripts, orders and awards is provided in Schedule 2 of this Confidentiality Order.

TREATMENT OF CONFIDENTIAL INFORMATION

18. Until the elapse of any period for a Disputing Party to provide the other Disputing Party with its proposed designations of Confidential Information and Protected Seismic Data therein, or such earlier time should the Disputing Parties communicate in writing that they have no proposed designations or requests for changes of bracketed information, a Written Submission (including exhibits), transcript, order or award shall be deemed to be designated as Confidential. Thereafter, until the final designations of Confidential Information and Protected Seismic Data have been confirmed by agreement of the Disputing Parties, by the failure of a Disputing Party to make or object to any designation, or by order of the Tribunal,

each Disputing Party's proposed designations of Confidential Information and Protected Seismic Data shall be presumed valid. For greater certainty, the Disputing Parties and the Tribunal shall not disclose the Written Submission (including exhibits), transcript, order or award to any person not authorized to receive Confidential Information and Protected Seismic Data under the terms of this Confidentiality Order until the Confidential Information and Protected Seismic Data has been designated in accordance with the terms of this Confidentiality Order.

19. Materials already exchanged by the Disputing Parties before the execution of this Confidentiality Order can be designated as confidential by notifying the other Disputing Party of such designation within 14 calendar days from the execution of this Confidentiality Order. Confidential Versions and Public Versions of the materials shall also be provided to the other Disputing Party, as appropriate.
20. The time periods set out in this Confidentiality Order may be amended by agreement of the Disputing Parties, or by order of the Tribunal after hearing the Disputing Parties and taking into account all relevant circumstances.
21. Except with the prior written consent of the Disputing Party that claimed confidentiality with respect to the information, and, in the case of materials from provincial, territorial or municipal governments or third parties, the owner of such Confidential Information and Protected Seismic Data, Confidential Information and Protected Seismic Data may be used only in these proceedings and may be disclosed only for such purposes to and among:
 - a. Members of the Tribunal (and their assistants, if any) and officials of the Secretariat of the International Centre for Settlement of Investment Disputes Secretariat (the "Registry") to whom disclosure is reasonably considered by one or more Members of the Tribunal to be necessary;
 - b. counsel to a Disputing Party (and their support staff) or counsel to provincial, territorial or municipal governments whose involvement in the preparation or conduct of these proceedings is reasonably considered by a Disputing Party to be necessary in connection with preparation of the Disputing Party's case;
 - c. officials or employees of the Disputing Parties or of provincial, territorial, or municipal governments to whom disclosure is reasonably considered by the Disputing Party to be necessary in connection with preparation of the Disputing Party's case;
 - d. independent experts or consultants retained or consulted by the Disputing Parties or by provincial, territorial, or municipal governments in connection with these proceedings;
 - e. witnesses, who in good faith are reasonably expected by a Disputing Party to offer evidence in these proceedings but only to the extent material to their expected testimony; or
 - f. court reporters and other hearing support staff.
22. No Disputing Party shall file any Confidential Information or Protected Seismic Data covered by the terms of this Confidentiality Order in any Court without first bringing this Confidentiality Order to the attention of the Court and seeking directions concerning the filing

of such material in a manner that protects its confidentiality. A Disputing Party shall notify the other Disputing Party and any affected parties prior to requesting such direction from the Court.

23. Inadvertent or improper disclosure of Confidential Information or Protected Seismic Data, as set forth in the present Order, does not constitute a waiver of the designation of the information as confidential.
24. All persons receiving Confidential Information and Protected Seismic Data shall be bound by this Confidentiality Order. Each Disputing Party shall have the obligation to notify all persons receiving Confidential Information and Protected Seismic Data of the obligations under this Confidentiality Order and to ensure that such persons receiving Confidential Information and Protected Seismic Data pursuant to paragraphs 20 (c) (d) or (e) execute a Confidentiality Undertaking in the form attached as Appendix A, before gaining access to any such information. Each Disputing Party shall maintain copies of Confidentiality Undertakings under Appendix A and shall make such copies available to the other Disputing Party upon order of the Tribunal or upon the termination of this arbitration.
25. Where Confidential Information or Protected Seismic Data is used or discussed at any hearing in this arbitration, the following rules shall apply:
 - a. the Tribunal shall restrict access to that portion of the hearing only to: (i) authorized persons in accordance with the terms of this Order; and (ii) originators of the Confidential Information or Protected Seismic Data; and
 - b. transcripts of those portions of the hearing in which Confidential Information or Protected Seismic Data is used or discussed shall not be made public.
26. In the light of the Note of Interpretation of the NAFTA Free Trade Commission issued July 31, 2001, which is binding upon the Tribunal pursuant to Article 1131(2) of the NAFTA, a Disputing Party shall be free to publicly disclose the Public Documents and the redacted, Public Versions of Written Submissions of the Disputing Parties, including the Notice of Arbitration, and decisions of the Tribunal, correspondence to or from the Tribunal, transcripts of hearings, procedural rulings and orders and awards.
27. Notwithstanding any other provision in this Confidentiality Order, a recipient Disputing Party may disclose documents or information produced in this arbitration to the extent required by applicable law. In circumstances where any document designated as Confidential Information or Protected Seismic Data is subject to disclosure required by applicable law, the Disputing Party subject to that disclosure requirement shall, as soon as possible in the circumstances, notify the disclosing Disputing Party of the requirement, including the nature and extent of the disclosure and the applicable provision or provisions of law pursuant to which the disclosure is required. Upon receiving the notification, the disclosing Disputing Party may take any reasonable action to challenge the disclosure or the disclosure requirement.
28. In accordance with Articles 1127, 1128 and 1129 of the NAFTA, non-disputing NAFTA Parties may attend oral hearings and have access to transcripts, orders, awards and Written Submissions.

29. Nothing in this Confidentiality Order shall be construed to abrogate or support a claim or entitlement with respect to a refusal to disclose any information on the basis of the grounds set out in Article 9.2 of the IBA Rules on the Taking of Evidence in International Arbitration, including legal impediment, privilege or special political or institutional sensitivity.
30. One (1) unredacted copy of transcripts, orders, awards and Written Submissions, including those designated as Confidential Information and Protected Seismic Data under this Order, may be retained by the Disputing Parties' legal counsel identified in paragraph 20(b). Any other documentation which has not been designated as a Public Document or Public Version must be returned to the respective Disputing Party or otherwise destroyed within 30 calendar days following the later of: the conclusion of any set aside proceedings, the time to request set aside proceedings under Article 1136 of the NAFTA has expired or the full compliance of a Disputing Party with the Tribunal's Final Award. When a Disputing Party destroys documentation, the Disputing Party shall provide a written certification of destruction of the documents to the other Disputing Party.
31. The obligations created by this Order shall survive the termination of these proceedings.
32. This Confidentiality Order shall be effective and binding upon a Disputing Party upon the signature of the Confidentiality Order by the Tribunal.
33. A Disputing Party may apply to the Tribunal for an amendment to, or a derogation from, this Confidentiality Order if compelling circumstances so require.

[Signed]

On behalf of the Tribunal
Carita Wallgren-Lindholm
(Presiding Arbitrator)

Date: 13 June 2022

- Signatory page
- Appendix A (Confidentiality Undertaking)
- Schedule 1 (Timetable for Confidential Designations of Written Submissions and Exhibits)
- Schedule 2 (Timetable for Confidential Designations of Transcripts, Orders and Awards)

**Signed by all Disputing Parties in acknowledgement of the obligation to abide by this
Confidentiality Order:**

[Signed]

On behalf of the Government of Canada

June 16, 2022

Date

Mr. Mark Luz, General Counsel
Ms. Sylvie Tabet, General Counsel
Ms. Susanna Kam, Counsel
Mr. Mark Klaver, Counsel
Mr. Dmytro Galagan, Counsel
Ms. Camille Berube-Lepage, Counsel
Ms. Ana Poienaru, Counsel
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[Signed]

On behalf of Theodore David Einarsson, Harold Paul
Einarsson, Russell John Einarsson, and Geophysical
Service Incorporated

June 13, 2022

Date

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APPENDIX A

CONFIDENTIALITY UNDERTAKING

TO: The Government of Canada (and its legal counsel) and Theodore David Einarsson, Harold Paul Einarsson, Russell John Einarsson, and Geophysical Service Incorporated (and their legal counsel).

FROM:

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1. IN CONSIDERATION of being provided with materials in connection with the arbitration between Theodore David Einarsson, Harold Paul Einarsson, Russell John Einarsson, and Geophysical Service Incorporated and the Government of Canada, over which claims of confidentiality ("Confidential Information") and "Protected Seismic Data" have been advanced, I hereby agree to maintain the confidentiality of such material. It shall not be copied or disclosed to any other person who has not signed a Confidentiality Undertaking nor shall the material so obtained be used by me for any purposes other than in connection with this proceeding.
 2. I acknowledge that I am aware of the Confidentiality Order that has been agreed to by the Disputing Parties, a copy of which is attached to this Undertaking, and agree to be bound by it.
 3. I will promptly return or otherwise destroy any Confidential Information and Protected Seismic Data received by me to the Disputing Party that provided me with such materials or the information recorded in those materials, at the conclusion of my involvement in these proceedings.
 4. I acknowledge and agree that either of the Disputing Parties to this arbitration is entitled to relief to restrain breaches of this Confidentiality Order, to enforce the terms and provisions hereof in addition to any other remedy to which any Disputing Party to this arbitration may be entitled at law or in equity.
 5. I agree to submit to the jurisdiction of the courts:
 - a. For residents of Canada in the Province of Alberta; or
 - b. For residents of the United States of America in the District of Columbia; or
 - c. For residents of another jurisdiction, at their choice:
 - In the Province of Alberta
 - In the District of Columbia

[Please check one box]

SIGNED, SEALED AND DELIVERED before a witness this day of _____, 20 .

(Print Name)

(Print Witness Name)

(Signature)

(Witness Signature)

SCHEDULE 1

Timetable For Confidential Designations of Written Submissions and Exhibits

<u>Action</u>	<u>Reference</u>	<u>Day</u>
Disputing Party “A” files Confidential Version of Written Submission and Exhibits containing Confidential Information and Protected Seismic Data designation	¶ 6	Within 14 days from the date a Written Submission is filed
Disputing Party “B” provides Confidential Information objections and its own additional proposed Confidential Information and Protected Seismic Data designation	¶ 7	28
Any disputes about Confidential designations are resolved by the Disputing Parties or may be submitted by a Disputing Party to the Tribunal for resolution	¶ 8	42
Disputing Parties consolidate final designations and file with the Tribunal Confidential Version and Public Version, of Written Submission and Exhibits as a appropriate	¶ 9	Within 10 days after resolution of designations by Disputing Parties or Tribunal

SCHEDULE 2

Timetable For Confidential Designations of Transcripts, Orders and Awards

<u>Action</u>	<u>Reference</u>	<u>Day</u>
Transcript, order or award is issued	¶¶ 13,14	0
Disputing Parties make designations of Confidential Information and Protected Seismic Data in transcript or order and exchange designation	¶ 13	14
Disputing Parties may raise objections to the other Disputing Party's designations in transcript or order	¶ 13	28
Disputing Parties make designations of Confidential Information and Protected Seismic Data in award	¶ 15	30
Disputing Parties may submit disagreement over designations for transcript or order to the Tribunal for resolution	¶ 13	42
Disputing Parties may raise objections to the other Disputing Party' designation in award	¶ 15	44
Disputing Parties may submit disagreement over designations for award to Tribunal for resolution	¶ 15	58
Disputing Parties consolidate final designations and file with the Tribunal Confidential Version and Public Version of transcript, order or award as appropriate	¶ 16	Within 10 days after resolution of designations by Disputing Parties or Tribunal