



PCA (PERMANENT COURT OF ARBITRATION)

PCA Case No. 2018-54

TENNANT ENERGY, LLC V. GOVERNMENT OF CANADA

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CONFIDENTIALITY ORDER

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24 June 2019

Tribunal:

[Cavinder Bull](#) (President)

[Doak Bishop](#) (Appointed by the investor)

[Daniel Bethlehem KCMG QC](#) (Appointed by the State)

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# Confidentiality Order

## I. DEFINITIONS

1. For this Confidentiality Order:

a) "Business Confidential Information" includes:

i) trade secrets;

ii) financial, commercial, scientific or technical information that is treated consistently in a confidential manner by the 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 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 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 Parties.

b) "Confidential Information" means information that is not publicly available and is designated by a Party as confidential on the grounds that it is:

i) Business Confidential Information of a Party or 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*, and Ontario's *Freedom of Information and Protection of Privacy Act*;

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; or

v) information subject to a confidentiality order issued by a court or tribunal in proceedings unrelated to the present proceedings.

c) "Confidential Version" means the version of a Written Submission, transcript, correspondence from the Tribunal to the Parties, order or award that contains Confidential Information that has not been redacted and contains no Restricted Access Information or has been redacted to remove all Restricted Access Information.

- d) "Party" means either Tennant Energy LLC or the Government of Canada.
- e) "Public Document" means a Written Submission, transcript, correspondence from the Tribunal to the Parties, order or award that contains no Restricted Access Information or Confidential Information and no redactions of such information.
- f) "Public Version" means the version of a Written Submission, transcript, correspondence from the Tribunal to the Parties, order or award that has been redacted to remove all Restricted Access Information and Confidential Information.
- g) "Restricted Access Information" means Confidential Information within the meaning of paragraph 1(b) that is designated by a Party as restricted access on the grounds that:
- i) the disclosure of this information to the other Party could result in a serious material gain or loss which could potentially prejudice the competitive position of the Party, provincial, territorial or municipal government or a third party to whom that information relates; or
  - ii) the information is highly sensitive Business Confidential Information that belongs or relates to a Party, provincial, territorial or municipal government or third party.
- h) "Restricted Access Version" means the version of a Written Submission, transcript, correspondence from the Tribunal to the Parties, order or award that contains Restricted Access Information and Confidential Information that has not been redacted.
- i) "Tribunal" refers to the members of the Tribunal, whether acting collectively or individually.
- j) "Written Submission" includes substantive written submission made by way of letter or email, all Memorials, (Memorial, Counter-Memorial, Reply Memorial and Rejoinder Memorial) and accompanying documents filed with the Memorial, including, but not limited to: expert reports, witness statements, and exhibits.

## **II. GUIDING PRINCIPLES, OBJECTIVE AND PURPOSE**

2. The Tribunal (and their assistants, if any), the Parties and the Permanent Court of Arbitration (the "Registry") agree to respect and maintain the confidentiality of information exchanged in this arbitration in accordance with the terms of this Confidentiality Order and, for this purpose, to adopt and maintain appropriate communications modalities and secure data storage systems.
3. A Party may designate Confidential or Restricted Access Information contained in any document that the Party produces to the other Party, and in any Written Submission, transcript, correspondence from the Tribunal to the Parties, order or award. These designations shall be made in accordance with the procedures set out in this Confidentiality Order.
4. A Party shall not designate as Restricted Access Information any information belonging to the other Party which that Party has not also designated as Restricted Access Information.

5. The Tribunal may, either *proprio motu* or on application of a Party, after affording the Parties an opportunity to be heard, designate Confidential or Restricted Access Information contained in any document produced to or generated by it. Such designations shall be made in accordance with the procedures set out in this Confidentiality Order.
6. No document, communication or information submitted in or arising in the course of these proceedings may be made public by the Tribunal (and their assistants, if any), the Registry or the Parties other than by direction of the Tribunal.

### **III. DOCUMENTS EXCHANGED IN DOCUMENT PRODUCTION**

7. A document produced by a Party to the other Party shall be protected from disclosure as though it contained Confidential Information in its entirety, unless the document is filed by one of the Parties as part of a Written Submission, in which case the Parties must follow the process for designating Confidential Information as set out in this Confidentiality Order.
8. If a Party contends that a document that it produces to the other Party contains Restricted Access Information, the Party shall provide its proposed designations of Restricted Access Information by clearly labeling each page of the document as "Restricted Access" at the time that it produces the document. A document produced by a Party to the other Party containing such proposed designations shall be deemed to constitute Restricted Access Information in its entirety unless an objection is filed under paragraph 9, or the document is filed by one of the Parties as part of a Written Submission, in which case the Parties shall follow the process for designating Restricted Access Information as set out in this Confidentiality Order.
9. A Party may object to a proposed designation of Restricted Access Information in a document that it obtains through the other Party's Document Production. If such an objection is made, the Parties shall attempt to agree on the final designations of Restricted Access Information in the document. If the Parties do not agree on the final designations of Restricted Access Information, a Party may submit the objection to the Tribunal for resolution. The Tribunal may invite further submissions on proposed designations of Restricted Access Information.

### **IV. WRITTEN SUBMISSIONS**

10. For the purposes of this section, the term "Written Submission" applies to substantive written submission made by way of letter or email, all Memorials, (Memorial, Counter-Memorial, Reply Memorial and Rejoinder Memorial) and accompanying documents filed with the Memorial, including, but not limited to: expert reports, witness statements, and exhibits.

### ***RESTRICTED ACCESS INFORMATION FILINGS***

11. Upon filing a Written Submission which a Party contends contains Restricted Access information, a

Party shall provide, at the time that it files a Written Submission, a preliminary Restricted Access Version of the Written Submission containing its proposed designations of Restricted Access Information, if any, and the proposed designations of Restricted Access information provided by the other Party in its document production. Yellow highlighting shall be used to surround designated Restricted Information, and the pages containing such Restricted Access information should indicate so in the heading of that page. A preliminary Confidential Version shall also be provided on the date the filing is due, with the Restricted Access information redacted.

12. A Party shall have twenty-one (21) calendar days from the date of receiving the other Party's proposed designations of Restricted Access Information in a Written Submission to object to those proposed designations and to provide its own further proposed designations of Restricted Access Information, if any, in the Written Submission. The Parties shall use the attached Disputed Designations Schedule (Annex 'A') for filing these objections.
13. Within fourteen (14) calendar days, the filing Party shall file its responses to the objecting Party's objections. The parties shall then attempt to reach an agreement on the objected designations. If no such agreement is made, the Parties shall submit the Disputed Designations Schedule to the Tribunal for resolution. The Tribunal may invite further submissions on proposed designations of Restricted Access information.
14. Materials designated as containing confidential information are generally assumed to contain confidential information only in part, and, thus, to be capable of redaction.

## ***CONFIDENTIAL INFORMATION FILINGS***

15. Upon filing a Written Submission which a Party contends contains confidential information, a Party must clearly label the cover page of the submission "Confidential Information - Unauthorized Disclosure Prohibited" upon filing of the Written Submission.
16. Within twenty-one (21) calendar days from the date of filing of its Written Submission, the Party must file a preliminary Confidential Version of the Written Submission which should include grey highlighting surrounding the confidential information as well as a heading on each particular page of the submission that the Party contends contains confidential information which should be labeled "Confidential", or some variation thereof. Equivalent measures should be used with respect to confidential information contained in the material produced in electronic and similar media. A Party shall have twenty-one (21) calendar days from the date of receiving the other Party's proposed designations of Confidential Information in a Written Submission to object to those proposed designations and to provide its own further proposed designations of Confidential Information, if any, in the Written Submission. The Parties shall use the attached Disputed Designations Schedule (Annex 'A') for filing these objections.
17. Within fourteen (14) calendar days, the filing Party shall file its responses to the objecting Party's objections. The Parties shall then attempt to reach an agreement on the objected designations. If no such agreement is made, the Parties shall submit the Disputed Designations Schedule to the Tribunal for resolution. The Tribunal may invite further submissions on proposed designations of

Confidential Information.

18. Materials designated as containing confidential information are generally assumed to contain confidential information only in part, and, thus, to be capable of redaction.

## **V. ALL FILINGS**

19. Within thirty (30) calendar days from the date on which the final designations of Confidential and Restricted Access Information have been confirmed by the agreement of the Parties or by order of the Tribunal, the Party that originally filed the Written Submission shall file:
  - a) a final Restricted Access Version of the Written Submission reflecting the final designations of Restricted Access and Confidential Information;
  - b) a final Confidential Version of the Written Submission reflecting the final designations of Confidential Information but with all Restricted Access Information redacted; and
  - c) a final Public Version of the Written Submission, with all Confidential and Restricted Access Information, redacted.
20. Once the Public Version of the Written Submission has been received, the Registry shall post it on the PCA website as soon as possible.
21. Each page of a Restricted Access Version must be labeled "Restricted Access, Unauthorized Disclosure Prohibited." 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." Public Documents shall be labeled "Public Document" on the first page of the document.
22. A procedural timetable for Restricted Access and Confidential Information designations in Written Submissions is provided in Schedule 1 of this Confidentiality Order.

## **VI. TRANSCRIPTS, CORRESPONDENCE, ORDERS, AWARDS**

23. The Parties shall have twenty (20) calendar days from the receipt of an order or correspondence from the Tribunal to designate information as Confidential or Restricted Access Information in the order and to exchange such designations. The Parties shall have thirty (30) calendar days from the date of the hearing to designate information as Confidential or Restricted Access Information in the transcript and to exchange such designations. The Parties shall have an additional twenty-one (21) calendar days from the receipt of such designations to raise any objections to the other Party's designations. After that period, if the Parties are unable within twenty-one (21) calendar days to agree on any designations of Confidential or Restricted Access Information, a Party may submit the issues to the Tribunal for resolution.

24. If the Tribunal's award discloses Confidential or Restricted Access Information, the Tribunal shall issue the following versions of the award, as applicable:
  - a) A Restricted Access Version of the award;
  - b) A Confidential Version of the award with all Restricted Access Information redacted; and
  - c) A Public Version of the award, with all Confidential and Restricted Access Information, redacted.
25. The Parties shall have thirty (30) calendar days from the receipt of an award to designate information as Confidential or Restricted Access Information in the award and to exchange such designations. The Parties shall have an additional twenty-one (21) calendar days from the receipt of such designations to raise any objections to the other Party's designations. After that period, if the Parties are unable within twenty-one (21) calendar days to agree on any designations of Confidential or Restricted Access Information, a Party may submit the issues to the Tribunal for resolution.
26. Within twenty-one (21) calendar days from the date on which the final designations of Confidential or Restricted Access Information have been confirmed by agreement of the Parties or by order of the Tribunal, the Parties shall consolidate their final designations and file with the Tribunal, as appropriate, a final Restricted Access Version, Confidential Version, and Public Version of the transcript, correspondence from the Tribunal to the Parties, order or award.
27. A procedural timetable for Restricted Access and Confidential Information designations in transcripts, correspondence from the Tribunal to the Parties, orders, and awards is provided in Schedule 2 of this Confidentiality Order.

## **VII. TREATMENT OF RESTRICTED ACCESS AND CONFIDENTIAL INFORMATION**

28. Until the final designations of Restricted Access Information have been confirmed by the agreement of the Parties or by order of the Tribunal, each Party's proposed designations of Restricted Access Information shall be presumed valid. For greater certainty, the Parties and the Tribunal shall not disclose the preliminary Restricted Access Version of a Written Submission, transcript, correspondence from the Tribunal to the Parties, order or award to any person not authorized to receive Restricted Access Information under the terms of this Confidentiality Order until the final designations of Restricted Access Information have been confirmed in accordance with the terms of this Confidentiality Order.
29. Until the elapse of any period for a Party to provide the other Party with its proposed designations of Confidential Information therein, or such earlier time should the Parties communicate in writing that they have no proposed designations or requests for changes of highlighted information, a Written Submission, transcript, correspondence from the Tribunal to the Parties, order or award shall be deemed to be designated as Confidential. After that, until the final designations of Confidential Information have been confirmed by the agreement of the Parties or by order of the Tribunal, each Party's proposed designations of Confidential Information shall be presumed valid.



For greater certainty, the Parties and the Tribunal shall not disclose the Written Submission, transcript, correspondence from the Tribunal to the Parties, order or award to any person not authorized to receive Confidential Information under the terms of this Confidentiality Order until the final designations of Confidential Information have been confirmed in accordance with the terms of this Confidentiality Order.

30. Materials already exchanged by the Parties before the execution of this Confidentiality Order can be designated as confidential by notifying the other Party of such designation within twenty-one (21) calendar days from the execution of this Confidentiality Order. Restricted Access, Confidential, and Public Versions of the materials shall also be provided to the other Party, as appropriate.
31. The time periods set out in this Confidentiality Order may be amended by agreement of the Parties, or by order of the Tribunal after hearing the Parties and taking into account all relevant circumstances.
32. Except with the prior written consent of the 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, Confidential Information 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 Registry to whom disclosure is reasonably considered by one or more Members of the Tribunal to be necessary;
  - b) counsel to a 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 Party to be necessary in connection with the preparation of the Party's case;
  - c) officials or employees of the Parties or of provincial, territorial, or municipal governments to whom disclosure is reasonably considered by the Party to be necessary in connection with the preparation of the Party's case;
  - d) Representatives of Non-Disputing Parties;
  - e) independent experts or consultants retained or consulted by the Parties or by provincial, territorial, or municipal governments in connection with these proceedings;
  - f) witnesses, who in good faith are reasonably expected by a Party to offer evidence in these proceedings but only to the extent material to their expected testimony; or
  - g) court reporters and other hearing support staff.
33. Except with the prior written consent of the 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 Restricted Access Information, Restricted Access Information may be used only in these proceedings and may be disclosed only to and among the following people, where their access to the information is necessary for the preparation of the conduct of the case:
  - a) Members of the Tribunal (and their assistants, if any) and officials of the Registry to whom disclosure is reasonably considered by one or more Members of the Tribunal to be necessary;

- b) counsel to a 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 Party to be necessary in connection with preparation of the Party's case, excluding counsel to the Claimant who are also officials or employees of the Claimant;
  - c) independent experts or consultants retained or consulted by the Parties or by provincial, territorial, or municipal governments in connection with these proceedings; or
  - d) court reporters and other hearing support staff.
34. No Party shall file any confidential material 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 Party shall notify the other Party and any affected parties or persons prior to requesting such direction from the Court.
35. Inadvertent or improper disclosure of Confidential Information, as set forth in the present Order, does not constitute a waiver of the designation of the information as confidential.
36. All persons receiving Confidential Information or Restricted Access Information shall be bound by this Confidentiality Order. Each Party shall have the obligation of notifying all persons receiving Confidential Information or Restricted Access Information of the obligations under this Confidentiality Order and to ensure that such persons execute a Confidentiality Undertaking in the form attached as Appendix A, or a Restricted Access Information Confidentiality Undertaking in the form attached as Appendix B, as appropriate, before gaining access to any such information. Each Party shall maintain copies of Confidentiality or Restricted Access Undertakings under Appendix A and B and shall make such copies available to the other Party upon order of the Tribunal or upon the termination of this arbitration.
37. Where Confidential Information is used or discussed at any hearing, 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 or Restricted Access Information; and
  - b. transcripts of those portions of the hearing in which Confidential Information and Restricted Access Information is used or discussed shall not be made public.
38. Notwithstanding any other provision in this Confidentiality Order, any request for documents, or for the production of documents under the applicable domestic law of the disputing State, including documents produced to Canada in these proceedings, shall be wholly governed by the relevant law.
39. A Party shall be free to disclose to the public Public Documents and the redacted, Public Versions of Written Submissions of the Parties, including the Notice of Arbitration, and decisions of the Tribunal, transcripts of hearings, correspondence from the Tribunal to the Parties, procedural rulings and orders and awards.

40. Notwithstanding any other provision in this Confidentiality Order, the Parties may make such disclosure of documents or information as is required by law.
41. Nothing in this Confidentiality Order shall be construed to abrogate or support a claim or entitlement concerning a refusal to disclose any information based on a privilege, ground for an exemption or non-disclosure or a public interest immunity arising at common law, or under national or provincial legislation.
42. The obligations created by this Order shall survive the termination of these proceedings.
43. This Confidentiality Order shall be effective and binding upon a Party, the Tribunal (and their assistants, if any) and the Registry upon the signature of the Confidentiality Order by the Tribunal.
44. A Party may apply to the Tribunal for an amendment to, or a derogation from, this Order if circumstances so require.