Court File No. T-XXX-XX

**FEDERAL COURT**

City, Province, this \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20XX

PRESENT:

BETWEEN:

**[INSERT NAME(S)]**

Plaintiff(s)

AND:

**[INSERT NAME(S)]**

Defendant(s)

**PROTECTIVE ORDER**

**UPON** a proposed draft order, submitted by [insert party/parties] to the Court protecting and maintaining the confidentiality of certain documents, information and transcripts to be produced during the course of this proceeding;

**AND UPON** considering that this Order does not authorize any party to file material into the Court Record under seal without obtaining a specific confidentiality order;

**AND UPON** the parties consenting to the order sought, and reading the submissions filed by counsel for [insert party/parties];

**THIS COURT ORDERS that:**

I. DEFINITIONS

1. In this Order:
2. ”Proceeding” means this action and any appeals;
3. “Plaintiff(s)” means the [insert party/parties];
4. “Counsel for Plaintiff(s)” means:
   1. the law firm of XXXX, solicitors of record for [insert party/parties] in this Proceeding, and their members and regular employees; and
   2. the law firm of XXXX, outside US counsel for Plaintiff(s), and their members and regular employees;
5. “Defendant(s)” means [insert party/parties];
6. “Counsel for Defendant(s)” means:
   1. the law firm of XXXX, solicitors of record for Defendant(s) in this Proceeding, and their members and regular employees;
   2. the law firm of XXXX, outside US counsel for Defendant(s) and their members and regular employees;
7. “Confidential Information” means the Information referred to in paragraph 4(a) hereof;
8. “Court” means the Federal Court;
9. “Discovery Information” means any document that is referred to in any Party’s affidavit of documents or disclosed during this Proceeding, any transcript or exhibit from an examination for discovery in this Proceeding, any answer given or document produced in response to a discovery question or in response to the Court ordering a discovery question answered or document produced, and the contents of any such documents, transcripts, exhibits or answers;
10. “Document” shall have the same meaning as in the *Federal Courts Rules* including Rule 222(1) thereof;
11. “Examination” refers to an examination as defined in Rule 87 of the *Federal Courts Rules*;
12. “Information” shall mean the information, including Discovery Information, contained in any Document produced by any Party to this Proceeding or by a non-party, the information in any affidavit, transcript, answer, submission, testimony or reasons for decision, and the information disclosed by any test sample;
13. “Parties” shall mean [insert party/parties] and [insert party/parties], collectively;
14. “Party” shall mean each of [insert party] and [insert party];
15. “Producing Party” means a Party, or a person other than a Party, including non-party witnesses, which or who produces Confidential Information in testimony, documents or other tangible or intangible forms in relation to this Proceeding;
16. “Receiving Party” means a Party receiving or requesting production of Confidential Information in testimony, documents or other tangible or intangible forms in relation to this Proceeding; and
17. “Solicitor’s Eyes Only Information” means the Information referred to in sub-paragraph 4(b) hereof.

II. CONFIDENTIALITY DESIGNATIONS

1. This Order shall apply to any Confidential Information and Solicitor’s Eyes Only Information produced or disclosed by or on behalf of any Producing Party in relation to this Proceeding, which is designated as such by that Producing Party in accordance with the procedures described herein.
2. A Producing Party, when it reasonably believes it will be disclosing or has disclosed Confidential Information or Solicitor’s Eyes Only Information, as referred to in paragraph 4 hereof, shall have the right, through its counsel, to designate such information as “Confidential Information” or “Solicitor’s Eyes Only Information” in accordance with the procedures set out herein. Confidential Information and Solicitor’s Eyes Only Information shall thereafter be governed by the terms of this Order, subject to the right of a Receiving Party to challenge the designation. However, the Parties shall make their best efforts to limit designations of information as Solicitor’s Eyes Only Information, and where any document or information is designated as Solicitor’s Eyes Only Information, the Producing Party shall also provide to the Receiving Party a copy of the document or information with appropriate redactions such that the redacted document or information may be treated as Confidential Information in accordance with this Order.
3. Information may be designated as:

(a) Confidential Information under this Order where the Producing Party in good faith believes that the Information is maintained by the Producing Party as confidential and that the Producing Party could be harmed if the Information were made available to the public, and the Information is or contains confidential technical, sales, marketing, financial, business strategy or other commercially sensitive information or proprietary information not otherwise known or available to the public, whether embodied in physical objects, documents, or the factual knowledge of persons; and

(b) Solicitor’s Eyes Only Information under this Order where the Producing Party in good faith believes that the Information is maintained by the Producing Party as confidential and that the Producing Party could be harmed if the Information were made available to the Receiving Party or the information is of commercial value to the Receiving Party, and the Information is or contains technical, sales, marketing, financial, business strategy or other commercially sensitive information or proprietary information not otherwise known or available to the public, whether embodied in physical objects, documents, or the factual knowledge of persons.

If Information has more than one designation by the Producing Party, it shall be treated as Solicitor’s Eyes Only Information.

1. The designation of any Information as Confidential Information or Solicitor’s Eyes Only Information shall not be an admission by a Producing Party as to the relevance of such Information in this Proceeding.
2. A non-party producing Information or material voluntarily or pursuant to a *subpoena* or a Court Order may designate such material or Information in the same manner and shall receive the same level of protection under this Order as any Party to this lawsuit, provided that such non-party complies with the provisions of this Order. A non-party’s use of this Order to protect its Confidential Information or Solicitor’s Eyes Only Information does not entitle that non-party access to Confidential Information or Solicitor’s Eyes Only Information produced by any Party in this Proceeding.

III. MANNER OF MAKING CONFIDENTIALITY DESIGNATIONS

1. Information shall be designated as Confidential Information or Solicitor’s Eyes Only Information by marking the document, affidavit, exhibit, transcript or answer containing the Information as “Confidential Information” or “Solicitor’s Eyes Only Information”. The document, affidavit, exhibit, transcript or answer may be marked on each page or prominent visible surface thereof, before or promptly after the Information has been produced with the following legend or other suitable means of marking:

(a) in terms of Confidential Information:

“**CONFIDENTIAL INFORMATION**

SUBJECT TO PROTECTIVE ORDER dated \_\_\_\_ \_\_\_\_\_\_\_\_,

IN COURT FILE T-XXX-XX”

(b) in terms of Solicitor’s Eyes Only Information:

“**SOLICITOR’S EYES ONLY INFORMATION**

SUBJECT TO PROTECTIVE ORDER dated \_\_\_\_ \_\_\_\_\_\_\_\_,

IN COURT FILE T-XXX-XX”

1. Any Receiving Party shall ensure that all copies made by the Receiving Party of received Confidential Information or Solicitor’s Eyes Only Information are marked in accordance with paragraph 7 hereof. Where it is not reasonably possible to so mark the Information, the Receiving Party will use other means to clearly indicate to recipients that the information is Confidential Information or Solicitor’s Eyes Only Information.
2. At or following any Examination and before a court reporter in this Proceeding, where evidence is given or documents are produced which are designated by a Producing Party to be Confidential Information or Solicitor’s Eyes Only Information:
   1. a copy of this Order shall be presented to the court reporter, and the reporter shall omit such evidence and documents from the non-confidential transcript and transcribe them separately as a “Confidential Transcript – Confidential Information” or “Confidential Transcript – Solicitor’s Eyes Only Information”, as the case may be, and shall mark the transcripts in accordance with paragraph 7 hereof. The reporter shall in the normal course send copies of the “Confidential Transcript – Confidential Information” and “Confidential Transcript – Solicitor’s Eyes Only Information” only to Counsel for all Parties in this Proceeding, and such copies shall thereafter be treated as Confidential Information or Solicitor’s Eyes Only Information subject to this Order; and
   2. the Producing Party may, within thirty (30) calendar days of receiving a copy of any transcript of any Examination or other Proceeding from a court reporter, designate all or any part of the transcript as Confidential Information or Solicitor’s Eyes Only Information, as the case may be, subject to this Order, by writing to counsel for any Receiving Party and advising which part of the transcript is to be treated as Confidential Information or Solicitor’s Eyes Only Information, as the case may be.
3. Where a Producing Party permits a Receiving Party to inspect any document that has not yet been produced, whether by agreement, order or otherwise, and indicates that the document comprises or contains Confidential Information or Solicitor’s Eyes Only Information, the Receiving Party shall treat the document as such until a copy is produced under the procedures set forth in this Order to the Receiving Party for use in this Proceeding.
4. The inadvertent or unintentional disclosure by a Producing Party of Confidential Information or Solicitor’s Eyes Only Information, either by way of document production or otherwise, regardless of whether the Information was so designated at the time of disclosure, shall not be deemed a waiver in whole or in part of the Producing Party’s claim of confidentiality, either as to the specific Information disclosed, or as to other Information relating thereto, or on the same or related subject matter.
5. Any Producing Party who inadvertently fails to designate Confidential Information or Solicitor’s Eyes Only Information shall, upon discovery of the inadvertent failure, promptly notify in writing all Receiving Parties known to have received the Information in question, and provide them with appropriately marked substitute copies of the Information. Until a Receiving Party receives such notification, any good faith disclosure made by that Receiving Party of the Confidential Information or Solicitor’s Eyes Only Information to any person not permitted by this Order to have access to the Confidential Information or Solicitor’s Eyes Only Information shall not constitute a violation of this Order. Any Receiving Party receiving any such notification shall promptly request all persons to whom the Confidential Information or Solicitor’s Eyes Only Information was disclosed by the Receiving Party to return the Confidential Information or Solicitor’s Eyes Only Information to the Producing Party or to destroy it. The Receiving Party may provide all persons entitled to receive the Confidential Information or Solicitor’s Eyes Only Information with the substitute copies provided by the Producing Party.

IV. DISCLOSURE AND USE OF INFORMATION AND DOCUMENTS

1. All Confidential Information or Solicitor’s Eyes Only Information shall be kept confidential, shall be used solely for the purposes of the Proceeding and shall not be disclosed to anyone except in accordance with the terms of this Order.
2. Subject to the limitations in paragraph 17 hereof, in the absence of prior written permission from the Producing Party who designated the Information as Confidential Information, Confidential Information shall not be disclosed to anyone except the following firms and individuals:
   1. Counsel for the Plaintiff(s) and Counsel for the Defendant(s);
   2. up to \_\_\_\_\_ in-house legal counsel, and \_\_\_\_\_ employees or corporate officers of the Receiving Party to whom disclosure is reasonably necessary for this Proceeding and who are disclosed in writing to the Producing Party prior to the disclosure of any Confidential Information to said persons;
   3. any outside service contractor (*e.g.*, court reporting, photocopying, videotaping, translating, preparing of exhibits, graphics, demonstratives or demonstrations, organizing, storing or retrieving data in any form or medium) retained by Counsel for the Plaintiff(s) or Counsel for the Defendant(s) to whom disclosure of the Confidential Information is reasonably necessary for the purpose of assisting with this Proceeding;
   4. Independent consultants or experts and their necessary assistants and secretarial and clerical personnel retained by a Party for the purpose of assisting with this Proceeding;
   5. any Judge, Prothonotary or personnel of the Court as may be necessary for the conduct of this Proceeding; and
   6. such other persons as the Parties may agree in writing or as the Court may order.
3. Any Solicitor’s Eyes Only Information designated under this Order shall be treated the same as Confidential Information, except that Solicitor’s Eyes Only Information shall not be disclosed to anyone except stenographic and video reporters engaged in the within Proceeding and those persons specified in subparagraphs 14(a), (c), (d), (e) and (f) hereof.
4. Prior to the disclosure of designated Confidential Information or Solicitor’s Eyes Only Information to the persons listed in subparagraph 14 (b) as applicable, (c), (d) and (f) hereof, the solicitor responsible for making such disclosure shall furnish the intended recipient with a copy of this Orderand shall obtain from the intended recipient an acknowledgment in writing in the form annexed hereto as Appendix I that the intended recipient has read this Order, understands it, agrees to be bound by it and consents to the jurisdiction of the Court in connection therewith. Outside counsel shall retain a copy of the written acknowledgment, but need not provide a copy of same to other outside counsel except upon order of this Court.
5. In the event that Confidential Information or Solicitor’s Eyes Only Information is disclosed to anyone other than in the manner authorized by this Order, the Receiving Party responsible for such disclosure shall immediately bring all pertinent facts relating to the disclosure to the attention of the Producing Party who designated the Information as Confidential Information or Solicitor’s Eyes Only Information and shall make every effort to prevent further disclosure of the Information.
6. The termination of this Proceeding shall not relieve any person to whom Confidential Information or Solicitor’s Eyes Only Information was disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such Information in accordance with the provisions of this Order.
7. Upon final termination of this Proceeding (including appeals), all copies of designated Confidential Information and Solicitor’s Eyes Only Information in the possession of any Receiving Party shall be destroyed within 90 days, except:
8. any witness and any Party may retain a copy of any transcript of evidence of that witness or that Party given in any examination or any hearing; and
9. archive copies may be retained by each of Counsel for the Plaintiff(s) and Counsel for the Defendant(s).
10. Any Party who inadvertently discloses Confidential Information or Solicitor’s Eyes Only Information shall, upon discovery of the disclosure, promptly notify in writing all inadvertent recipients of the Information in question. The recipients of the document shall then promptly request all persons to whom the Information was disclosed to refrain from reading or viewing the Information and return it and all copies thereof to the Party who disclosed it, or destroy the Information and all copies thereof. No such inadvertently disclosed document or information contained therein may be used or disclosed by the recipient(s) without leave of the Court.

V. EXCLUSIONS, LIMITATIONS AND CHALLENGE PROCEDURES

1. The restrictions set forward in this Order shall not apply to Information that:

(a) was lawfully and without legal restriction in the possession of an individual or Party other than through disclosure in this Proceeding pursuant to this Order;

(b) was or is derived independently of disclosure hereunder;

(c) any individual or a Party or its counsel lawfully and without legal restriction obtained from a person having the right to disclose such Information; or

(d) is or becomes part of the public domain not as a result of any unauthorized act or omission on the part of a recipient of Confidential Information pursuant to this Order.

1. Nothing in this Order shall foreclose or limit a Party:
2. from asserting that any designated Confidential Information is, in fact, not confidential or that any designated Solicitor’s Eyes Only Information is either not confidential or does not meet the criteria to be designated as Solicitor’s Eyes Only Information (“Challenged Information”);
3. from seeking an adjudication of the confidential character of the Challenged Information;
4. from opposing the production of any documents or the answering of any questions on any proper grounds whatsoever (including relevance and privilege); or
5. from use or disclosure of its ownConfidential Information or Solicitor’s Eyes Only Information for any purpose.
6. In the event of a challenge to the confidentiality of designated Confidential Information or Solicitor’s Eyes Only Information, such a challenge shall be written, shall be served on counsel for the Producing Party and shall particularly identify the Information that the challenging Party contends should be designated differently. The Parties will engage in a good faith effort to try to resolve the dispute on an informal basis. If the Parties are unable to resolve such a dispute informally within fourteen (14) business days, the challenging Party may apply to the Court for relief at any time. Any such disputed items shall be treated as originally designated by the Producing Party and subject to the protections of this Order unless and until the Court determines otherwise. On any challenge before the Court, the Party or non-party asserting confidentiality shall have the burden on a balance of probabilities of establishing that the information is, in fact, Confidential Information or Solicitor’s Eyes Only Information, as the case may be. No Party shall be obligated to challenge the propriety of any designation, and failure to do so shall not constitute an admission that any item or Information is in fact confidential.
7. If any party challenges the designation of any information pursuant to this Order, such information shall nevertheless be treated as Confidential Information or Solicitor’s Eyes Only Information, as the case may be, in accordance with the provisions of this Protective Order until such designation is removed by order of the Court or by written consent of the Producing Party.
8. A Producing Party may waive in writing all or any part of its rights over its designated Confidential Information or Solicitor’s Eyes Only Information under this Order.
9. Nothing in this Order shall preclude or impede Counsel for the respective Parties’ ability to communicate with or advise their client of general or high-level conclusions based on their review and evaluation of Confidential Information or Solicitor’s Eyes Only Information produced by any Producing Party, provided that such communications or advice shall not disclose or reveal the specific contents of any Confidential Information or Solicitor’s Eyes Only Information in violation of this Order.

VII. MISCELLANEOUS PROVISIONS

1. This Order shall not aggregate or diminish any contractual, statutory or other legal obligation or right of any Party or person with respect to any Confidential Information or Solicitor’s Eyes Only Information.
2. This Order shall bewithoutprejudice to the right of any Party to apply to the Court atany time to vary or terminate the effect of this Order or for a direction on any specific issue concerning production of a specific Document, including on the basis that the designation of information as Solicitor’s Eyes Only Information is unreasonably prejudicing the ability of a Receiving Party to assert any claim or defence in the Proceeding.
3. Unless otherwise specifically indicated, nothing in this Order is intended to vary or modify the implied undertaking rule.
4. There shall be no costs of this motion.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Case Management Judge

**Appendix I to the Protective Order of Case Management Judge [insert name] dated \_\_\_\_\_\_\_\_\_\_, 20XX in Federal Court file No. T-XXX-XX**

**UNDERTAKING**

I, the undersigned, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (name), domiciled and residing at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (address), hereby affirm the following:

1. I am \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (specify occupation and relation to) \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (indicate the Party)).
2. I acknowledge that I am about to receive Confidential Information and/or Solicitor’s Eyes Only Information as defined in the Protective Order dated \_\_\_\_\_\_\_\_\_\_\_\_\_ (date).
3. I certify my understanding that this Confidential Information and/or Solicitor’s Eyes Only Information is being provided to me pursuant to the terms and restrictions of the Protective Order referred to above in this Proceeding, and that I have received a copy of that order and have read and understand my obligations under that order.
4. I hereby agree and undertake to be bound by the terms of the Protective Order. I clearly understand that the Confidential Information and/or Solicitor’s Eyes Only Information and my copies or notes relating thereto shall not be disclosed to anyone not similarly bound by the Protective Order.
5. On request from counsel for the Producing Party who provided me with the Confidential Information and/or Solicitor’s Eyes Only Information, I will destroy all materials containing the Confidential Information and/or Solicitor’s Eyes Only Information, copies thereof and notes that I have prepared relating thereto which are in my possession.
6. I hereby submit to the jurisdiction of the Federal Court for the purpose of enforcement of this Protective Order.

|  |  |  |
| --- | --- | --- |
| Date |  | Signature |

|  |  |
| --- | --- |
|  | Court File No. T-XXX-XX  FEDERAL COURT |
|  | BETWEEN:  **[INSERT NAME(S)]**  Plaintiff(s)  - and -  **[INSERT NAME(S)]**  Defendant(s) |
|  | PROTECTIVE ORDER |
|  |  |
|  | **[INSERT FIRM AND COUNSEL INFORMATION]** |