

**AN ARBITRATION UNDER CHAPTER 11 OF THE NAFTA  
AND THE UNCITRAL ARBITRATION RULES, 1976**

between

**ELI LILLY AND COMPANY**

Claimant

and

**GOVERNMENT OF CANADA**

Respondent

**(CASE NO. UNCT/14/2)**

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**CONFIDENTIALITY ORDER**

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**ARBITRAL TRIBUNAL:**

Professor Albert Jan van den Berg (President)

Sir Daniel Bethlehem

Mr. Gary Born

26 May 2014

1. For the purposes of this Confidentiality Order:
  - a. “Disputing Party” means either Eli Lilly and Company or the Government of Canada;
  - b. “Confidential Information” means information designated by a Disputing Party as confidential on the grounds that it is:
    - i. Business Confidential Information of a Disputing Party;
    - 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*, and Canada’s *Privacy Act*; or
    - iv. confidential 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 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 or third party to which it relates;
    - iv. information the disclosure of which could interfere with contractual or other negotiations of the Disputing Party or third party to which it relates; or
    - v. other communications treated as confidential in furtherance of settlement between the Disputing Parties.
  - d. “Restricted Access Information” means Confidential Information within the meaning of paragraph 1(b) that is designated by a Disputing Party as restricted access on the grounds that the wider disclosure of the information in question to those otherwise permitted to see Confidential Information would give rise to a real risk of material prejudice to the Disputing Party to whom that information relates.
2. In order to designate information in a written submission or exhibit as Confidential Information, a Disputing Party must clearly label the cover page of the submission or exhibit “**Confidential Information, Unauthorized Disclosure Prohibited**” or some variation thereof. The top of each particular page of the submission or exhibit that the Disputing Party contends contains Confidential Information should be labeled “**Confidential**”, or some variation thereof. The alleged Confidential Information should then be enclosed in a single set of brackets (“[ ]”), unless the exhibit in its entirety is confidential in which instance it is sufficient to label the exhibit “**Confidential**”. Equivalent measures should be used with respect to Confidential Information contained in a written submission or exhibit produced in electronic and similar media. Two weeks after the filing of this confidential version of the written submission or exhibit, a

Disputing Party must also file a version of the written submission or exhibit with the Confidential Information identified and redacted, unless the exhibit in its entirety is confidential in which instance it is sufficient to label the exhibit "**Confidential**".

3. In order to designate Confidential Information in a written submission or exhibit as Restricted Access Information, a Disputing Party must clearly label the cover page of the submission "**Restricted Access Information, Dissemination Prohibited**", or some variation thereof. The top of each particular page of the submission that the Disputing Party contends contains Restricted Access Information should be labeled "**Restricted Access**", or some variation thereof. The alleged Restricted Access Information should then be enclosed in a double set of brackets ("[[ ]]"). Equivalent measures should be used with respect to Restricted Access Information contained in a written submission or exhibit produced in electronic or similar media. Where information is designated as Restricted Access Information, the Disputing Party must also file a version of the written submission or exhibit with the Restricted Access Information identified and redacted within one business day.
4. The designation Restricted Access Information shall only be used in exceptional circumstances in which the wider disclosure of the information in question to those otherwise permitted to see Confidential Information would give rise to a real risk of material prejudice to the Disputing Party to whom the information relates.
5. The Disputing Party designating information as Confidential Information or Restricted Access Information shall, contemporaneously with the filing of the submission or exhibit containing the information in question, submit an explanation justifying the designation proposed. On receipt of the explanation justifying the proposed designation, the Tribunal may, if it considers this to be necessary or appropriate, require of the submitting Disputing Party a more detailed explanation of the use of the proposed designation, including, if appropriate, an explanation of the perceived real risk of material prejudice to that Disputing Party. The explanation justifying the use of the proposed designation shall be **Confidential** and should itself be designated as appropriate in accordance with paragraph 2 above.
6. If upon receipt of a written submission or exhibit, the receiving Disputing Party contends that it contains additional Confidential Information that has not been appropriately identified and redacted by the submitting Disputing Party, it shall so inform the submitting Disputing Party and the Tribunal within ten days, and within twenty days shall provide an electronic copy of the written submission or exhibit with the additional information which it contends is Confidential Information appropriately identified and redacted. The twenty day period may be extended by the Tribunal if necessary. For greater clarity, the submitting Disputing Party shall not disclose the written submission or exhibit to any person not authorized to receive Confidential Information under the terms of this Confidentiality Order until the elapse of the ten day period for the receiving party to identify additional Confidential Information.
7. In order to designate information as Confidential Information in a transcript, order or award, a Disputing Party must, within ten days from its receipt of the transcript, order or award, notify the other Disputing Party and the Tribunal of its intent to do so, and within twenty days, provide the other Disputing Party and the Tribunal with an electronic copy of the transcript, order or award, with the information that it contends is confidential appropriately identified and redacted. The twenty day period may be extended by the Tribunal if necessary. For greater clarity, the Disputing Party and the Tribunal shall not disclose the transcript, order or award to any person not authorized to receive Confidential Information under the terms of this Confidentiality Order until the elapse of

the ten day period for a Disputing Party to notify of its intent to designate information as Confidential Information.

8. 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 thirty days of the execution of this Confidentiality Order. A redacted version of the materials shall also be provided to the other Disputing Party at that time.
9. Where a Disputing Party does not agree that information designated as Confidential Information or Restricted Access information by the other Disputing Party is Confidential Information or Restricted Access information under the terms of this Order, it shall submit the issue for resolution by the Tribunal. Following submission by the challenging Disputing Party, the Tribunal shall determine the procedure to be followed to address the issue. In the case of a dispute concerning the appropriateness of a designation of information as Confidential or Restricted Access information, the information in question shall not be disclosed to any person not authorized to receive Confidential Information or Restricted Access information under the terms of this Confidentiality Order until the dispute is resolved by the Tribunal.
10. 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 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 administrative authority 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), whose involvement in the preparation or conduct of these proceedings is reasonably considered by the Disputing Party to be necessary in connection with preparation of the Disputing Party's case;
  - c) officials or employees of the Disputing Parties 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, in connection with these proceedings;
  - e) witnesses, who in good faith are reasonably expected by a Disputing Party to offer evidence in these proceedings and only to the extent that the information is relevant to their expected testimony; or
  - f) court reporters and other hearing support staff.
11. Except as otherwise provided in this Order, information and materials containing Restricted Access 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 administrative authority to whom disclosure is reasonably considered by one or more members of the Tribunal to be necessary;

- b) counsel and legal support staff of the Disputing Parties whose involvement in the preparation or conduct of these proceedings is reasonably considered by a Disputing Party to be necessary;
  - c) a single official or employee from each instructing department or agency to whom disclosure is necessary to obtain instructions to prepare the Disputing Party's case;
  - d) independent experts or consultants retained or consulted by the Disputing Parties in connection with these proceedings; or
  - e) court reporters and other hearing support staff.
12. No Disputing 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 Disputing Party shall notify the other Disputing Party and any affected parties prior to requesting such direction from the Court.
13. 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.
14. All persons receiving Confidential Information shall be bound by this Confidentiality Order. Each Disputing Party shall have the obligation of notifying all persons receiving Confidential Information of the obligations under this Confidentiality Order.
15. It shall be the responsibility of the Disputing Party wishing to disclose Confidential Information and/or Restricted Access information to any person described in paragraphs 9(d) to (e) or paragraph 10(d) to ensure that such person executes a Confidentiality Undertaking in the form attached as Appendix A. Each Disputing Party shall maintain copies of such Confidentiality Undertakings and shall make such copies available to the other Disputing Party upon order of the Tribunal or upon the termination of this arbitration.
16. Amicus curiae briefs shall not be designated confidential in whole or in part.
17. 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 Information; and
  - b) transcripts of those portions of the hearing in which Confidential Information is used or discussed shall not be made public.
18. If the Tribunal's award discloses Confidential Information, the Tribunal shall issue two versions of the award:
- a) A private, confidential version of the award; and
  - b) A public, non-confidential version of the award, with Confidential Information redacted.

Prior to disclosure of the award to any person not authorized to receive Confidential Information in accordance with this Confidentiality Order, the Disputing Parties may designate information as Confidential Information in accordance with paragraph 2.

19. 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 disclose to the public the redacted, public versions of pleadings and written submissions of the Disputing Parties and decisions of the Tribunal, including the Notice of Arbitration, Memorials, witness statements, correspondence to or from the Tribunal, transcripts of hearings, procedural rulings and Orders and Awards.
20. The Respondent's representatives in this arbitration shall make their best efforts to be promptly advised of any request filed under Canada's Access to Information Act in connection with information covered by this Confidentiality Order. Upon being advised, they shall give prompt notice of the request to the Claimant.
21. Pursuant to Articles 1127, 1128 and 1129 of the NAFTA, non-disputing NAFTA Parties may attend oral hearings, and have access to confidential versions of transcripts, written submissions and exhibits, including witness statements and expert reports. Non-disputing NAFTA Parties shall be made aware of this Confidentiality Order and pursuant to Article 1129 of the NAFTA, shall treat all information received from the Respondent as if they were a Disputing Party, notably in respect of protection of Confidential Information.
22. 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 a legal impediment or privilege, or special political or institutional sensitivity.
23. The Disputing Parties may each retain one complete copy of the record, including information designated as confidential under this Order. All other documentation relating to this matter must be returned to the respective Disputing Party or otherwise destroyed within one month 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; the full compliance of a Disputing Party with the Tribunal's Final Award.
24. The obligations created by this Order shall survive the termination of these proceedings.
25. This Confidentiality Order shall be effective and binding upon a Disputing Party upon the signature of the Confidentiality Order by the Tribunal.
26. Each Disputing Party may apply for an amendment to, or a derogation from, this order if compelling circumstances so require.

[Signed]

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On behalf of the Tribunal  
Professor Albert Jan van den Berg

26 May 2014

\_\_\_\_\_  
Date

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

[Signed]

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On behalf of the Government of Canada

Ms. Sylvie Tabet  
Mr. Christophe Douaire de Bondy  
Trade Law Bureau (JLTB)  
Lester B. Pearson Building  
Tower C, Fifth Floor  
125 Sussex Drive  
Ottawa, Ontario K1A 0G2  
Canada

\_\_\_\_\_  
Date

[Signed]

\_\_\_\_\_

On behalf of Eli Lilly and Company

Mr. Richard Dearden  
Ms. Wendy Wagner  
Gowling Lafleur Henderson LLP  
160 Elgin Street, Suite 2600  
Ottawa, Ontario K1P 1C3  
Canada

\_\_\_\_\_  
Date

Ms. Marney Cheek  
Mr. John K. Veroneau  
Mr. James M. Smith  
Mr. Alexander A. Berengaut  
Covington & Burling, LLP  
1201 Pennsylvania Avenue, NW  
Washington, D.C. 20004-2401  
United States

**APPENDIX A**

**CONFIDENTIALITY UNDERTAKING**

TO: The Government of Canada (and its legal counsel) and Eli Lilly Company (and its legal counsel).

FROM: \_\_\_\_\_

1. IN CONSIDERATION of being provided with materials in connection with the arbitration between Eli Lilly and Company and the Government of Canada, over which claims for confidentiality have been advanced ("Confidential Information"), 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 any Confidential Information 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 Ontario; 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 Ontario
- 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)