Public Version

IN THE ARBITRATION
UNDER CHAPTER ELEVEN OF THE NAFTA
AND THE ICSID CONVENTION

BETWEEN:

MOBIL INVESTMENTS CANADA INC.

Claimant

AND

GOVERNMENT OF CANADA

Respondent

ICSID Case No. ARB/15/6

CLAIMANT'S MEMORIAL

ARBITRAL TRIBUNAL:

Sir Christopher Greenwood QC
Mr. J. William Rowley QC
Dr. Gavan Griffith QC

March 11, 2016

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I.

INTRODUCTION

1. At its heart, this case is about the damages that Mobil Investments Canada Inc. ("Mobil") has suffered since a competent tribunal (the "Mobil I Tribunal") constituted under the North American Free Trade Agreement ("NAFTA") ruled in Mobil's favor by determining that Canada's regulatory regime was a "continuing breach" of the NAFTA.[1] The Mobil I Tribunal, by a majority, awarded Mobil damages up to January 1, 2012 in relation to its investment in the Terra Nova Project, and May 1, 2012, in relation to the Hibernia Project. In this arbitration, Mobil seeks to recover damages caused by the continuing breach from those dates through the end of 2015. This arbitration, therefore, is effectively a second quantum phase of a prior arbitration, required because of Canada's ongoing breach of the NAFTA, as well as the manner in which the earlier tribunal approached the question of the losses suffered by Mobil. The question of liability can and should be resolved summarily by this tribunal by reliance upon the awards issued by the competent first tribunal.

2. By way of background, Mobil has been part of a consortium of working interest holders developing petroleum reserves in the Hibernia and Terra Nova fields offshore Newfoundland for over 25 years. When Canada entered into the NAFTA, its treaty partners allowed it to retain a limited local content requirement that was contrary to the NAFTA's

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[1] **C-1**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4 (the "Mobil I Arbitration" or "Mobil I"), Decision on Liability and on Principles of Quantum dated May 22, 2012 (the "Decision"); and **C-2**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Award dated February 20, 2015 (the "Award").

prohibition on performance requirements. This non-conforming measure existed in certain provisions of the Federal Accord Act, which applied to petroleum development projects off the coasts of the Province of Newfoundland and Labrador.[2]

3. Well after the ratification and entry into force of the NAFTA, the Canada-Newfoundland & Labrador Offshore Petroleum Board (the "Board" or "CNLOPB") adopted certain Guidelines for Research and Development Expenditures (the "Guidelines") in 2004.[3] These mandatory Guidelines require Mobil and other investors in offshore petroleum projects to pay millions of dollars each year for unneeded research and development and education and training in the Province of Newfoundland and Labrador.[4]

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[2] **CL-1**, Canada-Newfoundland and Labrador Atlantic Accord Implementation Act, S.C., 1987, c. 3 (the "Federal Accord Act").

[3] **C-3**, CNLOPB, Guidelines for Research and Development Expenditures (Oct. 2004). *See also* **CW-1**, First Witness Statement of Paul Phelan ("Phelan Statement I"), ¶¶ 22-23; **CW-2,** First Witness Statement of Ted O'Keefe ("O'Keefe Statement I"), ¶¶ 21-23.

[4] **C-3**, Guidelines. *See also* **CW-1**, Phelan Statement I, ¶ 51 ("at both Hibernia and Terra Nova, during the periods at issue in this arbitration, the amount of R&D and E&T spending made in the ordinary course of business would have been insufficient to satisfy the spending required by the Guidelines"); **CW-3**, First Witness Statement of Krishnaswamy Sampath ("Sampath Statement I"), ¶ 22 ("the R&D needs of those projects, which were well into their production phases when enforcement of the Guidelines began, did not generate enough project-necessary spending to satisfy the expenditure requirements fixed under the Guidelines"); **CW-4**, First Witness Statement of Andrew Ringvee ("Ringvee Statement I"), ¶ 13 ("the level of R&D expenditure required under the Guidelines was expected to significantly exceed the level of R&D which would otherwise be needed for Hibernia and Terra Nova in the production stage").

4. Since 2012, in excess of [redacted] has been spent at the Hibernia and Terra Nova projects (the "Projects") in order to comply with the Guidelines.[5]

5. Mobil commenced the first arbitration under the NAFTA against Canada with respect to the Guidelines in 2007.[6] After a lengthy proceeding before distinguished arbitrators, the Mobil I Tribunal concluded unanimously that the Guidelines were subject to, and caught by, Article 1106 of the NAFTA. By a majority, the Tribunal ruled that the Guidelines were not covered by Canada's reservation to the NAFTA under Article 1108 and based on the Federal Accord Act.

6. Having concluded that the Guidelines were a "continuing breach" of the NAFTA, the majority (the "Mobil I Majority") awarded Mobil damages for the losses it had incurred. The Mobil I Majority concluded that it was premature to award damages for the losses Mobil suffered on or after January 1, 2012 (in relation to Terra Nova) and May 1, 2012 (in relation to Hibernia) reasoning that, under the NAFTA, they were only able to compensate an injured party where that party had suffered "actual" damages, i.e., where a call for payment under the Guidelines had been made or where damages had otherwise been incurred.

7. The Board continues to impose the Guidelines in breach of Canada's obligations under the NAFTA. Mobil has therefore brought this second arbitration to recover the substantial losses it has incurred since 2012 due to the ongoing application of the Guidelines.

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[5] **CW-1**, Phelan Statement I, ¶¶ 67-68 & Annex A Table "Summary of Mobil Investments' Claim for Incremental Expenditures (2012-2015)", Reference G.

[6] The prior arbitration included, as a co-claimant, Murphy Oil Corporation, which indirectly owns a participation interest in the Projects. Murphy Oil Corporation is not a party to this second arbitration against Canada.

8. This Memorial is accompanied by an appendix, as well as a number of exhibits, witness statements and legal authorities. Exhibits have been given the designation “C-”, witness statements have been given the designation “CW-” and legal authorities have been given the designation “CL-” in accordance with Procedural Order No. 1. A number of these documents were previously submitted in the Mobil I Arbitration. When exhibited in this Memorial, these documents have been re-designated to comply with the numbering system provided by Procedural Order No. 1. To assist the tribunal, a table of equivalency is included in order to allow the tribunal to cross reference documents used in both arbitrations, where necessary.

9. All references to dollars in this Memorial are in Canadian currency.

II.

FACTUAL BACKGROUND

A. Parties

1. Claimant and its Enterprises

10. Mobil is a corporation organized under the laws of the State of Delaware, United States of America.[7] It indirectly controls the interests in the Hibernia and Terra Nova oil development projects at issue in this case.

11. Mobil is an indirect subsidiary of Exxon Mobil Corporation, a corporation organized under the laws of the State of New Jersey, United States of America. Exxon Mobil Corporation is an energy company, and its common shares are

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[7] **C-4**, Delaware Certificate of Good Standing for Mobil Investments Canada Inc. (Jan. 5, 2015).

publicly traded on the New York Stock Exchange and other stock exchanges in the U.S. and abroad.

12. As detailed below, Mobil indirectly controls a 33.125% share in the Hibernia oil development project by way of its ownership and control of companies organized under Canadian law.[8] It likewise controls a 19% share in the Terra Nova oil development project.[9]

13. Mobil owns and controls all outstanding shares of ExxonMobil Canada Investments Company, a company organized under the laws of the Province of Nova Scotia, Canada.[10] ExxonMobil Canada Investments Company in turn owns and controls all outstanding shares of ExxonMobil Canada Finance Company, which is also organized under the laws of the Province of Nova Scotia.[11] ExxonMobil Canada Finance Company in turn owns all outstanding shares of ExxonMobil Canada Ltd., a corporation organized under Canadian federal law, namely the Canada Business Corporations Act.[12] ExxonMobil Canada Ltd. directly owns a 28.125% share in the primary production license for the Hibernia oil field and associated rights and interests, and it also directly owns a 19%

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8 **CW-1**, Phelan Statement I, ¶ 74.

9 *Id.*

10 **C-5**, Share Certificate and Accompanying Secretary's Certification, Certificate of Incorporation, and Certificate of Registration of ExxonMobil Canada Investments Company.

11 **C-6**, Share Certificate and Accompanying Secretary's Certification, Certificate of Incorporation, and Certificate of Registration of ExxonMobil Canada Finance Company.

12 **C-7**, Share Certificate and Accompanying Secretary's Certification of ExxonMobil Canada Ltd., Articles of Amendment of Mobil Oil Canada Ltd., and Certificate of Amendment of ExxonMobil Canada Ltd. ExxonMobil Canada Ltd. was formerly known as Mobil Oil Canada Ltd. *Id.*

share in the production licenses that comprise the Terra Nova oil field and associated rights and interests.[13]

14. ExxonMobil Canada Ltd. is also the sole shareholder in ExxonMobil Canada Resources Company, a company organized under the laws of the Province of Nova Scotia.[14] As the successor to ExxonMobil Resources Ltd., ExxonMobil Canada Resources Company owns all outstanding shares of ExxonMobil Canada Hibernia Company Ltd., a company organized under the federal laws of Canada.[15] ExxonMobil Hibernia Company Ltd. directly owns a 5% participation interest in the Hibernia project, and, with other energy companies, pursues the exploration, production, transportation, and sale of hydrocarbons from the Hibernia

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[13] **C-8**, CNLOPB Registry Entry 93003, Transfer of an Undivided Share in a Production License No. 1001 (Hibernia) (Mar. 25, 1993) (following transfer, Mobil Oil Canada Ltd. held a 28.125% share in primary production license for Hibernia); **C-9**, CNLOPB Registry Entry 01026, Production License No. 1002 (Terra Nova) (Aug. 21, 2001); **C-10**, CNLOPB Registry Entry 01025, Production License No. 1003 (Terra Nova) (Aug. 21, 2001); and **C-11**, CNLOPB Registry Entry 01027, Production License No. 1004 (Terra Nova) (Aug. 21, 2001). *See also* **C-12**, CNLOPB Registry Docket for Production License 1001 (Hibernia) (May 22, 2001) (acknowledging change in name of Mobil Oil Canada Ltd. to ExxonMobil Canada Ltd.).

[14] **C-13**, Share Certificate and Accompanying Secretary's Certification of ExxonMobil Canada Resources Company.

[15] **C-14**, Certificate of Amalgamation of ExxonMobil Canada Resources Company and Accompanying Certificate of Continuance (the "Amalgamation Certificate") (showing ExxonMobil Resources Ltd. was amalgamated into ExxonMobil Canada Resources Company); **C-15**, Share Certificate and Accompanying Secretary's Certification of Mobil Canada Hibernia Company Ltd., Certificate of Amendment of ExxonMobil Canada Hibernia Company Ltd., and Articles of Amendment of Mobil Canada Hibernia Company Ltd. (showing change in name of Mobil Canada Hibernia Company Ltd. to ExxonMobil Canada Hibernia Company Ltd.).

field.[16] ExxonMobil Hibernia Company Ltd. also owns a 5% share in the production license for the Hibernia oil field and associated rights and interests.[17]

15. ExxonMobil Canada Ltd. and ExxonMobil Canada Resources Company are the only partners in ExxonMobil Canada Properties, a partnership organized under the laws of the Province of Alberta, Canada.[18] ExxonMobil Canada Properties directly owns a 28.125% participation interest in the Hibernia project.[19] ExxonMobil Canada Properties also owns a 19% participation interest in the Terra Nova project, which is an unincorporated joint venture with other energies companies to pursue the exploration, production, transportation, and sale of hydrocarbons from the Terra Nova field.[20]

16. ExxonMobil Canada Hibernia Company Ltd. and ExxonMobil Canada Properties are enterprises owned or controlled by Claimant Mobil Investments Canada Inc. within the meaning of Article 1117 of the NAFTA.

17. The operator of the Hibernia project is the Hibernia Management and Development Company Ltd. ("HMDC"), a

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16 **C-16**, Hibernia Field Operating Agreement, Amending Agreement (March 24, 1993); *see also infra* note 19.

17 **C-8**, CNLOPB Registry Entry 93003 (following transfer, Mobil Canada Hibernia Company Ltd. held a 5% share in production license for Hibernia); *see also* **C-12**, CNLOPB Registry Docket for Hibernia (May 22, 2001) (acknowledging change in name of Mobil Canada Hibernia Company Ltd. to ExxonMobil Canada Hibernia Company Ltd.).

18 **C-17**, Proof of Filing of Amended Partnership (ExxonMobil Canada Properties); **C-14**, Amalgamation Certificate (showing that ExxonMobil Resources Ltd. was amalgamated into ExxonMobil Canada Resources Company).

19 **C-18**, Hibernia Field Operating Agreement.

20 **C-19**, Amended and Restated Terra Nova Development and Operating Agreement (July 18, 2003) (the "Terra Nova Development and Operating Agreement").

company organized under the federal laws of Canada for the purpose of operating Hibernia.[21] HMDC is owned by the Hibernia project owners with shareholding in proportion to their working interest share in the primary production license for the Hibernia field.[22] ExxonMobil Canada Ltd. and ExxonMobil Canada Hibernia Company Ltd. respectively own 28.125% and 5% of the outstanding shares of HMDC.[23]

2. Respondent

18. Respondent Canada is a State and a Party to the NAFTA. It is a constitutional monarchy with a parliamentary government and federal system. Its ten provinces have a certain amount of autonomy from the Canadian federal government, and one of those provinces is the Province of Newfoundland and Labrador (the "Province").

19. Pursuant to Article 105 of the NAFTA, Canada agreed to "ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments."

B. The Hibernia and Terra Nova Oil Fields

20. The Hibernia and Terra Nova oil fields rank among the largest oil fields off Canada's Atlantic Coast, one of the most technically demanding locations in the world.

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[21] **C-20**, Certificate and Articles of Incorporation of Hibernia Management and Development Company Ltd. (Dec. 21, 1988) ("HMDC Certificate and Articles of Incorporation").

[22] **C-21**, CNLOPB, *Abstract PL 1001*, http://www.cnlopb.ca/abstract/pl1001.php (last visited Mar. 6, 2016).

[23] **C-22**, Share Certificates and Accompanying Secretary's Certification of Hibernia Management and Development Company Ltd.

1. Hibernia

21. The Hibernia field was discovered in 1979 and is currently in the production phase. It is the fifth largest field ever discovered in Canada and it was the first offshore oil project in the Province. At present, it remains the Province's largest petroleum development project.[24] It is located in the North Atlantic Ocean, 315 kilometers east-southeast of St. John's, Newfoundland.

22. The Hibernia platform stands 224 meters high, has a storage capacity of 1.3 million barrels of crude oil, and can accommodate production of approximately 230,000 barrels per day.[25] The platform was constructed from 1990 to 1997 at a cost of nearly $5.8 billion.[26]

23. The Hibernia platform includes a gravity base structure ("GBS"), which is the first of its kind in the Arctic environment and specifically designed to withstand the impact of sea ice and icebergs, thereby permitting year-round production.[27] Other technological innovation was necessary to overcome other environmental challenges, including violent winter storms with heavy snowfalls, significant wave heights, extremely wet weather conditions, and dense fog.[28] Cutting-edge drilling

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[24] Portions of the field known as the AA Block and the Hibernia Southern Extension are not subject to this arbitration. **CW-1**, Phelan Statement I, ¶¶ 65, 71.

[25] **C-23**, Hibernia, *About Hibernia*, http://www.hibernia.ca/about.html, "Hibernia Shareholder Companies" (last visited Mar. 3, 2016) (the "Hibernia Website").

[26] *Id.*; **C-24**, Hibernia, 1998 Canada/Newfoundland Benefits Update, § 1.0 (undated) ("Hibernia 1998 Benefits Report").

[27] **CW-5**, First Witness Statement of Ryan Noseworthy ("Noseworthy Statement I"), ¶ 11.

[28] *Id.*; **C-25**, HMDC, The Hibernia Development Project: An Evaluation of Canada-Newfoundland Benefits Achievements as of June 30, 1995, at 26.

technology had to be developed and employed to reach petroleum reservoirs located as deep as 3,700 meters beneath the seabed and well locations as far as 8.5 kilometers from the platform.[29]

24. Research and development ("R&D") expenditures on the project were substantial in the exploration and development phases, mostly due to the severe environmental conditions in the area and the distance between and depth of the drilling locations.[30] Oil production at Hibernia began in November 1997, and, as of December 31, 2015, the facility had produced over 952 million barrels.[31] In 2005, during peak production, the facility produced approximately 72 million barrels of oil.[32] However, production has since declined and in 2015, the facility produced approximately 33 million barrels of oil.[33] The life of the Hibernia field is estimated to be 2040.[34]

25. The Hibernia project is owned by a consortium of working interest holders. Mobil indirectly controls the largest

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[29] *E.g.*, **C-23**, Hibernia Website, "The Hibernia Platform" ("The platform stands 224 metres high, which is half the height of New York's Empire State Building (449 metres) and 33 metres taller than the Calgary Tower (191 metres)."); **C-26**, Hibernia Project Overview Slide (undated); **C-27**, Worldwide Horizontal Displacement and Extended-Reach Drilling Charts (undated).

[30] Noseworthy Statement I, ¶¶ 10-11, ¶ 13; **C-27**, Worldwide Horizontal Displacement and Extended-Reach Drilling Charts (undated).

[31] **C-23**, Hibernia Website, "The Hibernia Platform" ("The completed platform was towed to the Hibernia oil field and positioned on the ocean floor in June of 1997 and began producing oil on November 17, 1997."); **C-28**, CNLOPB Cumulative Production Chart (Jan. 21, 2016).

[32] **C-28**, CNLOPB Cumulative Production Chart (Jan. 21, 2016).

[33] *Id.*

[34] **C-343,** CNLOPB Staff Analysis: Hibernia Development Plan Amendment, at 30-31 (Sept. 2, 2010).

interest at 33.125%.[35] Other interest holders include Chevron Canada Resources at 26.875%, Suncor Energy Inc. ("Suncor") at 20%, Canada Hibernia Holding Corporation at 8.5%, Murphy Oil at 6.5%, and Statoil Canada Ltd. at 5%.[36] At the beginning of the project, Mobil Oil Canada, Ltd. ("Mobil Oil Canada"), a predecessor in interest to ExxonMobil Canada, was the lead proponent and acted on the consortium's behalf in obtaining the necessary regulatory approvals.[37]

26. In 1988, HMDC was created to manage and operate the project on behalf of the interest owners.[38] As an agent for the consortium, HMDC does not realize any revenues.[39] The owners contribute to a joint account in proportion to their respective ownership interests and collect their share of the oil produced at the wellhead.[40] Since 2002, ExxonMobil Canada Ltd. and Exxon Mobil Canada Properties have provided significant management support to the project, including seconding personnel to HMDC.[41]

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[35] **C-23**, Hibernia Website, "Hibernia Shareholder companies"; **CW-1**, Phelan Statement I, ¶ 74.

[36] **C-23**, Hibernia Website, "Hibernia Shareholder companies."

[37] *E.g.*, **C-29**, Mobil Oil Canada, Hibernia Canada/Newfoundland Benefits Plan (Sept. 15, 1985) (the "Hibernia Benefits Plan"); **CW-1**, Phelan Statement I, ¶ 10.

[38] **CW-1**, Phelan Statement I, ¶ 10; **C-20**, HMDC Certificate and Articles of Incorporation.

[39] **CW-1**, Phelan Statement I, ¶ 11.

[40] *Id.* ¶ 11; **C-18**, Hibernia Field Operating Agreement, Articles 3, 7.

[41] **CW-1**, Phelan Statement I, ¶ 13.

2. Terra Nova

27. The Terra Nova field was discovered in 1984 and is located in the North Atlantic Ocean, 350 kilometers southeast of St. John's, Newfoundland.[42]

28. The floating production, storage and offloading system ("FPSO") used in this location is among the largest ever built. The FPSO measures 292.2 meters long and 45.5 meters wide, approximately the size of three football fields laid end to end, with a storage capacity of 960,000 barrels of oil.[43] It was constructed from 1999 to 2001 at a cost of nearly $2.985 billion.[44]

29. Production from the Terra Nova field began in January 2002, and, as of December 31, 2015, approximately 379 million barrels of oil had been produced. In 2007, during peak production, the facility produced approximately 42 million barrels of oil.[45] However, production has since declined and in 2015, the facility produced approximately 13 million barrels of oil.[46] The life of the Terra Nova field is estimated to be 2026.[47]

30. Although the initial need for R&D at Terra Nova was not as extensive as it was at Hibernia, the interest owners nonetheless made substantial investments in technology designed to protect the FPSO from environmental hazards. For

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[42] **C-30**, Suncor, *Terra Nova*, http://www.suncor.com/en/about/4001.aspx, at 1 (last visited Mar. 3, 2016) (the "Terra Nova Website").

[43] *Id.*

[44] **C-31**, Terra Nova Facilities Overview Presentation (Jan. 21, 2009); **C-32**, Letter from G. Vokey, Petro-Canada, to F. Smyth, CNLOPB (May 7, 2009).

[45] **C-28**, CNLOPB Cumulative Production Chart (Jan. 21, 2016).

[46] *Id.*

[47] **C-32**, Speaking Notes for Scott Tessier, Chair and CEO, CNLOPB (Sept. 25, 2014).

example, the mechanism through which the facility connects to subsea flowlines was designed to include a quick-disconnect feature, which allows the FPSO to evacuate the area in an emergency, such as during the accumulation of pack ice or the approach of an iceberg.[48]

31. The Terra Nova project is organized as an unincorporated joint venture.[49] Suncor holds the largest working interest (37.675%), and it manages and operates the project for a consortium of working interest owners.[50] ExxonMobil indirectly owns a 19% interest, Statoil Canada Ltd. a 15% interest, Husky Oil Operations Limited a 13% interest, Murphy Oil Company Ltd. a 10.475% interest, Mosbacher Operating Ltd. a 3.85% interest, and Chevron Canada Ltd. a 1% interest.[51] As HMDC does for Hibernia, Suncor invoices the Terra Nova interest owners for their share of operating costs, and the owners have a right to claim their *pro rata* share of crude produced at the wellhead.[52]

C. R&D in the Upstream Petroleum Industry

1. In General

32. Upstream petroleum projects have three phases: exploration, development, and production.[53] During the exploration phase, companies attempt to determine whether

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48 **C-30**, Terra Nova Website, at 1; **CW-5**, Noseworthy Statement I, ¶ 12.

49 **CW-1**, Phelan Statement I, ¶ 14.

50 *Id.* ¶ 15; **C-30**, Terra Nova Website, at 1 (“Terra Nova owners and their working interests”). Suncor’s predecessor in this role was Petro-Canada.

51 **C-30**, Terra Nova Website, at 1 (“Terra Nova owners and their working interests”).

52 **CW-1**, Phelan Statement I, ¶ 15; **C-19**, Terra Nova Development and Operating Agreement, Articles 7, 15.

53 **CW-5**, Noseworthy Statement I, ¶¶ 10, 13.

hydrocarbons are present in a particular area. Should hydrocarbons be discovered in commercially viable quantities, then the project proceeds to the development phase, in which design, engineering, and construction occur. The production phase then begins when the first hydrocarbons are produced after the project infrastructure is completed. The downstream end of the production phase involves refining and distributing the extracted oil.

33. The primary techniques for developing offshore petroleum reserves were developed decades ago. Since then, companies engaging in offshore oil production regularly devote substantial resources to developing improved technologies and other applied research.[54] However, because the basic production process is so well known, these companies tend to undertake research only on an "as needed" basis when existing technology is inadequate to meet the specific challenges of particular projects. Whenever possible, existing technologies are adapted for use in new circumstances. As a result, operators rarely undertake general R&D just for the sake of innovation, in contrast to, for example, a pharmaceutical company that may invest substantial sums in searching for the next miracle drug.[55]

2. R&D and E&T Specific to Hibernia and Terra Nova

34. Before the imposition of the Guidelines, R&D and education and training ("E&T") in the Projects was on an "as

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[54] *Id.* ¶ 10. *See also* **CW-6**, Witness Statement of Rod Hutchings ("Hutchings Statement I"), ¶ 43.

[55] **CW-5**, Noseworthy Statement I, ¶ 14 ("The interest holders expect the operator to manage the budget in a way that enhances the value of the project itself, which means finding specific cost-appropriate solutions to specific problems, rather than funding general R&D that might yield value for projects elsewhere."), ¶ 15 ("R&D spending . . . was driven by one overriding consideration: how do we safely produce more oil in a way that also maximizes net revenues?").

needed" basis. Because the Projects are controlled by a consortium of interest owners who are often competitors outside of the Projects, their collective R&D objectives are limited to the specific needs of each project.[56]

35. The development of the Hibernia project shows how upstream oil producers, and joint ventures, in particular, approach R&D in practice. The basic technologies used at Hibernia predated the project, but the location of the reserves deep beneath the seabed, in the unforgiving North Atlantic environment, presented design and engineering challenges that necessitated further innovation.[57] To that end, the interest owners spent tens of millions of dollars on R&D in Canada during the early years of the project to develop an iceberg-resistant platform and other new technologies.[58] This R&D was a business expense like any other incurred in the regular course of project construction and operations, and therefore was not a separate budget item for the Hibernia operator.[59] Once the technology was proven and the project entered the production phase, R&D expenditures declined significantly.[60]

36. The companies participating in the Projects do not always approach R&D on a project-level basis. Larger

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[56] *Id.* ¶ 14; **CW-1**, Phelan Statement I, ¶ 39 ("After the project is decommissioned, HMDC presumably will cease to exist…. There is therefore limited benefit to the organization or the interest-holders of conducting R&D that does not meet a specific project need.").

[57] **CW-5**, Noseworthy Statement I, ¶ 11.

[58] *Id.*; *also note* **C-33**, Hibernia SR&ED Profile (GBS Design & Construction) and **C-34**, Hibernia SR&ED Acceptance Chart.

[59] **CW-1**, Phelan Statement I, ¶ 15; **CW-6**, Hutchings Statement I, ¶ 21; **CW-2**, O'Keefe Statement I, ¶ 15.

[60] **CW-5**, Noseworthy Statement I, ¶ 13 ("as an upstream asset transitions from the exploration and development phases into the production phase much less R&D is needed").

companies with global assets and with future projects in mind may embrace a broader research agenda because such companies can leverage the outputs across a multitude of investments. For example, ExxonMobil's Upstream Research Company ("URC") carries out basic research, applied research, and technology development on behalf of ExxonMobil affiliate companies that have entered into cost sharing agreements with URC, under which the affiliates share in both the risks and rewards of the research work.[61] Each affiliate identifies and shares its technological needs and priorities with the URC, which then develops research programs designed to meet the needs of the affiliate parties as a group.

37. The level of R&D activity undertaken before the Guidelines were implemented was significant for both Hibernia and Terra Nova, and in particular for Hibernia during the early years of the project because of its technological challenges.[62] From 1990, when the development phase commenced for Hibernia, through 2008, the year before Guidelines enforcement began, HMDC reported R&D expenditures of over $226 million.[63] From 1997, when the development phase began for Terra Nova, through 2008, Petro-Canada reported R&D expenditures of over $24 million.[64]

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61 *Id.* ¶ 23; **CW-3**, Sampath Statement I, ¶ 51.

62 *Supra* ¶¶ 23-24.

63 **C-33**, Hibernia SR&ED Profile (July 2009). Of this amount, over [redacted] was accepted as SR&ED by CRA. **C-34**, Hibernia SR&ED Acceptance Chart (July 2009).

64 **C-35**, Terra Nova 2007 Benefits Report, § 2.3.2 (reporting actual R&D spending from 1997 through 2007 and estimated spending in 2008).

D. Regulatory Framework Applicable to Hibernia and Terra Nova

1. Before the Enforcement of the Guidelines

(a) The Accord Acts

38. After the discovery of petroleum reserves off the coast of the Province, the federal and provincial governments coordinated to establish a legal regime to govern the corresponding fields. In 1985, the Governments of Canada and the Province entered into a Memorandum of Agreement regarding offshore oil and gas resource management and revenue sharing, known as the Atlantic Accord.[65] The Governments of Canada and the Province, respectively, then enacted parallel legislation implementing the Atlantic Accord, known respectively as the "Federal Accord Act" and the "Provincial Accord Act" (collectively, the "Accord Acts").[66]

39. The Accord Acts govern the conduct of petroleum development projects in the Newfoundland and Labrador offshore area. The Accord Acts also established the Board to regulate the projects.[67] The Board's mandate is "[t]o interpret and apply the provisions of the Atlantic Accord and the [Accord Acts] to all activities of operators in the Newfoundland and Labrador Offshore Area; and to oversee operator compliance

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65 **CL-2**, The Atlantic Accord: Memorandum of Agreement Between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing (Feb. 11, 1985).

66 **CL-1**, Federal Accord Act; **CL-3**, Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act, R.S.N.L. 1990, c. C-2 (the "Provincial Accord Act").

67 **CL-1**, Federal Accord Act, s. 9; **CL-3**, Provincial Accord Act, s. 9.

with those statutory provisions."[68] The Board has seven members: three appointed by the Canadian federal government; three appointed by the provincial government; and a Chair, who is jointly appointed by the federal and provincial governments.[69]

40. To develop a field in the area, the Accord Acts require a project operator to prepare and obtain approval from the Board of a "development plan" that sets out the operator's general approach for developing the oil field,[70] as well as a "benefits plan" that describes how the operator will provide Canadians with a full and fair opportunity to participate on a competitive basis in the supply of goods and services.[71] Benefits plans must also contain provisions intended to ensure that first

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[68] **C-36**, CNLOPB, *About CNLOPB: Mandate and Objectives*, http://www.cnlopb.ca/about/mandate.php (last visited Mar. 3, 2016).

[69] **CL-1**, Federal Accord Act, s. 10; **CL-3**, Provincial Accord Act, s. 10.

[70] A development plan is "a plan submitted . . . for the purpose of obtaining approval of the general approach of developing a pool or field as proposed in the plan." **CL-1**, Federal Accord Act, s. 2; **CL-3**, Provincial Accord Act, s. 2(e). Because approval by the Board of a development plan is considered a "fundamental decision" under the Accord Acts, approval must also be obtained from the federal and provincial Ministers of Natural Resources. **CL-1**, Federal Accord Act, ss. 2, 31, 139; **CL-3**, Provincial Accord Act, ss. 2(k), 31.

[71] The Accord Acts define a benefits plan as "a plan for the employment of Canadians and, in particular, of the labour force of the Province and . . . for providing manufacturers, consultants, contractors and service companies in the Province and other parts of Canada with a full and fair opportunity to participate on a competitive basis in the supply of goods and services used in any proposed work or activity referred to in the benefits plan." **CL-1**, Federal Accord Act, s. 45(1); **CL-3**, Provincial Accord Act, s. 45(1).

consideration is given to goods and services available in the Province.[72]

41. Under the Accord Acts, a benefits plan must also "contain provisions intended to ensure that . . . expenditures shall be made for research and development to be carried out in the Province . . . ."[73] However, the Accord Acts do not specify any fixed amount or percentage of revenue that must be spent on R&D, nor do they specify whether the R&D should be carried out in any particular phase of the project—exploration, development, or production. The Accord Acts also do not require pre-approval of individual expenditures by the Board or any other entity, but instead only specify that the project proponents make some allocation of expenditures for R&D, to be approved by the Board as part of the benefits plan review process, and that Canadians, and Newfoundlanders in particular, be given a full and fair opportunity to participate on a competitive basis.[74]

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72 **CL-1**, Federal Accord Act, s. 45(3)(d); **CL-3**, Provincial Accord Act, s. 45(3)(d). The Acts also require benefits plans to contain provisions to ensure that "individuals resident in the Province shall be given first consideration for training and employment in the work program for which the plan was submitted." **CL-1**, Federal Accord Act, s. 45(3)(b); **CL-3**, Provincial Accord Act, s. 45(3)(b).

73 **CL-1**, Federal Accord Act, s. 45(c)(3); **CL-3**, Provincial Accord Act, s. 45(3)(c). This is derived from Section 55 of the Atlantic Accord, which provides that "Benefits plans . . . shall provide for expenditures to be made on research and development, and education and training, to be conducted within the province. Expenditures made by companies active in the offshore pursuant to this requirement shall be approved by the Board." **CL-2**, Atlantic Accord.

74 **CL-1**, Federal Accord Act, s. 45; **CL-3**, Provincial Accord Act, s. 45; *see also* **C-37**, CNLOPB, Hibernia Decision 86.01, § 2.2.1 (June 18, 1986) ("Hibernia Decision 86.01") ("Full and fair opportunity for Canadians, with first consideration for Newfoundlanders, to participate in the provision of goods, services, and

42. Under the Accord Acts, project operators must also hold a valid Operations Authorization ("OA") from the Board in order to operate and to extract oil.[75] OAs ordinarily cover a period of three to five years, at the end of which operators must obtain a new OA to continue production.[76] The Board may impose conditions upon issuing an OA, and it can suspend or revoke an OA if an operator fails to comply with any condition on which the authorization has been granted.[77]

(b) 1986 and 1987 Exploration Phase Guidelines

43. In April 1986, the Board issued its first set of guidelines governing the approval of benefits plans (the "1986 Guidelines").[78] The 1986 Guidelines also had provisions intended to streamline pre-existing benefits-related monitoring and reporting requirements. They were applicable only to the exploration phase, and did not contain any requirement applicable to either the production or development phases. The 1986 Guidelines were in place when the Hibernia Benefits Plan was approved by the Board in June 1986.

44. Under the 1986 Guidelines, a project operator was required to endorse and record in its benefits plan a commitment to comply with certain reporting requirements, including a

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employment is a fundamental provision of the Atlantic Accord and its implementing legislation.").

[75] **CL-1**, Federal Accord Act, s. 138; **CL-3**, Provincial Accord Act, s. 134. Prior to December 15, 2009, OAs were known as Production Operations Authorizations, or "POAs."

[76] For a list of Hibernia and Terra Nova's POAs/OAs, please see *infra* ¶¶ 114-120.

[77] **CL-1**, Federal Accord Act, s. 138(5); **CL-3**, Provincial Accord Act, s. 134(5).

[78] **C-38**, Guidelines for Benefits Plan Approval and Reporting Requirements for Exploration Activities in Newfoundland Offshore Area, *attached to* Letter from T. O'Keefe, CNLOPB, to W. Abel, Mobil Oil Canada (Apr. 14, 1986).

requirement to file annual reports summarizing the past year's expenditures on R&D.[79] Moreover, as part of the 1986 Guidelines' prescribed format for benefits plans, a project proponent was "required to outline its proposed expenditures and activities on research and development to be carried out within the Province."[80] Crucially, as with the Accord Acts, the 1986 Guidelines did not specify a mandatory minimum level of spending on R&D or otherwise require the operator to spend a particular amount on R&D, nor did the 1986 Guidelines require the operator to seek the Board's approval of individual R&D expenditures in advance.[81]

45. Therefore, the expectation was that, as is customary, operators would undertake R&D on an "as needed" basis in the regular course of business, but, if and when a legitimate need arose for technological innovation or design support, local providers would be prioritized in the procurement process.[82] This approach was consistent with the nature of R&D in the upstream oil and gas industry.[83]

46. Although the instructions for composing benefits plans stated that "[g]uidelines for expenditure amounts, etc. [would] be developed by the Board,"[84] this notion was abandoned by the time the Board issued revised exploration phase guidelines in April 1987 after consultation with industry

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[79] *Id.* §§ 4.0, 4.2.3 ("The report should provide a summary of the past year's activities to include . . . R&D expenditures and activities (guidelines to be established by the Board) . . . .").

[80] *Id.* § 3.5. The likely areas of R&D expenditure outlined in the Hibernia Benefits Plan reflect anticipated technological needs.

[81] *Id.*

[82] **CW-1**, Phelan Statement I, ¶ 17.

[83] *Supra* ¶¶ 32-33.

[84] **C-38**, 1986 Guidelines, § 3.5.

(the "1987 Guidelines").[85] With respect to R&D, the 1987 Guidelines provided only that:

> Section 45(3)(c) of the [Accord Acts] requires that a Benefits Plan contain provisions intended to ensure expenditures are made for research and development and education and training in the Province. The company is expected to outline its plans in this regard by describing its program and identifying the expenditure amounts.[86]

47. A company engaged in exploration activities was also required to submit an annual benefits report with "a description of Research and Development activities, including associated expenditures, undertaken by the company in the province[.]"[87]

48. Like the 1986 Guidelines, the 1987 Guidelines did not specify a target amount or percentage of revenue to be spent on R&D. Rather, the project proponent was left to identify potential areas of R&D activity and associated expenditures as part of the benefits plan approval process. But these general requirements did not oblige a proponent to set out (or meet) a target level of R&D activity or to seek the Board's prior approval of individual expenditures. Neither the 1986 nor the 1987 Guidelines anticipated that the Board would evaluate—or provide any criteria by which it might evaluate—whether activities undertaken by the operator constitute R&D.[88]

49. In a letter forwarding the revised 1987 Guidelines to Mobil Oil Canada, the Board stated: "We now feel that the guidelines provide an effective framework for dealing with the

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85 **C-39**, Exploration Benefits Plan Guidelines: Newfoundland Offshore Area, *attached to* Letter from T. O'Keefe, CNLOPB, to W. Abel, Mobil Oil Canada (Apr. 21, 1987).

86 *Id.* § 3.5.

87 *Id.* § 4.4; *see also id.*, Appendix C; **C-40**, Letter from K. Whittle, CNLOPB, to E. Martin, Mobil Oil Canada (Jan. 5, 1989).

88 **C-39**, 1987 Exploration Phase Guidelines, § 3.5.

Canada-Newfoundland benefits aspect of offshore exploration activities in the Newfoundland offshore area."[89]

50. As noted above, the 1986 and 1987 Guidelines applied only to the exploration phase (as opposed to the development or production phases). Additionally, because the Board did not promulgate guidelines applicable to the development and production phases until the 2004 Guidelines, any requirements applicable to the development and production phases prior to 2004 were, therefore, established in the Accord Acts themselves or in the Board's decisions approving the benefits plans.[90]

51. The 1987 Guidelines remained in effect until they were revised in 2006,[91] and therefore were in place when the NAFTA was enacted in 1994 and when the Terra Nova Benefits Plan was approved by the Board in 1997.[92]

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[89] *Id.*, Cover Letter to 1987 Exploration Phase Guidelines.

[90] **C-37**, Hibernia Decision 86.01, § 2.5 (Hibernia benefits reporting to be on a basis determined by the project participants and the Board) (discussed at ¶ 52 *et seq.*); **C-41**, CNLOPB, Terra Nova Decision 97.02, § 3.5.3 (Dec. 1997) ("Terra Nova Decision 97.02") (discussed at ¶ 68 *et seq.*) (per Condition 7, beginning in 1998, Terra Nova project proponent required to submit annual benefits reports addressing past and planned R&D and E&T activities). *Also note* **C-352**, CNLOPB, Development Application Guidelines: Newfoundland Offshore Area (1988). In 1988, the Board issued certain "Development Application Guidelines." As the Mobil I Tribunal observed, "[d]espite the title, these [1988] guidelines did not specifically address the development and production phases of a project. They did, however, provide guidance with respect to the preparation of a Benefits Plan." **C-1**, Decision ¶ 44. The 1988 guidelines' terms related to R&D were substantively indistinguishable from the terms of the 1987 Guidelines.

[91] **C-42**, Exploration Benefits Plan Guidance, attached as Appendix I to Canada-Newfoundland and Labrador Benefits Plan Guidelines (Feb. 2006) (the "2006 Exploration Phase Guidelines").

[92] *Infra* ¶ 68.

(c) Hibernia and Terra Nova Benefits Plans

(i) *Hibernia*

52. The Hibernia Development Plan and Hibernia Benefits Plan were submitted to the Board on September 15, 1985.[93] The Board held a series of discussions with the Hibernia project proponents as part of the review process, during which the Benefits Plan (the "Hibernia Benefits Plan") was clarified and refined.[94] At the Board's request, the proponents also submitted a Supplementary Benefits Plan on May 28, 1986 (the "Supplementary Benefits Plan") that elaborated on certain commitments.[95]

53. Consistent with the language of the Atlantic Accord,[96] the Hibernia Benefits Plan set forth Mobil Oil Canada's "overall objectives for the development of the Hibernia Field and the operation of the production facilities," which included, *inter alia*, providing industry in the Province and in

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[93] **C-29**, Hibernia Benefits Plan. *See also* **CW-2**, O'Keefe Statement I, ¶ 7.

[94] **C-37**, Hibernia Decision 86.01, § 2.1.

[95] **C-43**, Mobil Oil Canada, Supplementary Canada/Newfoundland Benefits Plan: Hibernia Development Project (May 28, 1986); *see also* **C-37**, Hibernia Decision 86.01, § 2.2.1 (explaining, with citation to the Supplementary Plan, that the Board sought and received from the project Proponent confirmation of its commitment to the "entire principle of full and fair opportunity and first consideration"). Unless otherwise specified in this submission, the term "Benefits Plan" in the context of the Hibernia project includes both the initial Benefits Plan submitted on September 15, 1985 and the Supplementary Plan submitted on May 28, 1986.

[96] Neither the Federal Accord Act nor the Provincial Accord Act were enacted by the time the Hibernia Benefits Plan was submitted. In the interim, the Board exercised authority pursuant to the Atlantic Accord itself, which described the Board's duties and powers in substantial detail. **CL-2**, Atlantic Accord, §§ 3-20.

Canada generally with "a full and fair opportunity to participate on a worldwide competitive basis in the supply of goods and services to the project."[97]

54. With respect to R&D, the Hibernia Benefits Plan pledged "to promote research and development in Canada for problems unique to the Canadian offshore environment[.]"[98] It noted that "Mobil [Oil Canada] promotes local and Canadian research and development by entrepreneurs and institutions who are aware of our technical problems and who have the interest and resources to develop commercial applications."[99]

55. The Hibernia Benefits Plan did not dedicate any specific or fixed amount or percentage of revenue to R&D, nor did it call for the Board to scrutinize and pre-approve individual expenditures.[100]

56. On April 18, 1986, in response to a request by the Board, the Hibernia project participants issued a Memorandum of Understanding that described "the benefits related principles and practices [they would] be utilizing in the Hibernia Project."[101] With respect to R&D, the participants reiterated the commitment made in the Hibernia Benefits Plan—that is, to "[c]ontinue to support local research institutions and promote further research and development in Canada to solve problems unique to the Canadian offshore environment."[102]

57. The Supplementary Benefits Plan submitted to the Board the following month was primarily a statement of

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[97] **C-29**, Hibernia Benefits Plan, § 2.1.

[98] *Id.* § 2.2.

[99] *Id.* § 3.5.4.

[100] *Id.*

[101] **C-44**, Letter from J.A. Kelly, Mobil Oil Canada, to J.E. Baugh, CNLOPB (Apr. 18, 1986), *attaching* Memorandum of Understanding: Canada/Newfoundland Benefits – Hibernia Development Project (the "Hibernia MOU").

[102] *Id.* at 4.

principles with no prescribed target for R&D spending and no obligation to obtain the Board's pre-approval of individual expenditures. The Supplementary Benefits Plan reiterated the commitment to give local industry a full and fair opportunity, and went further, committing to "[u]tilize, *to the extent practical and cost effective*, the principle of first consideration to Newfoundland and Canada in procurement, contracting and employment policies for the project including the construction, development and operating phases."[103]

58. The Supplementary Benefits Plan addressed R&D by pledging to "[c]ontinue to support local research institutions and promote further research and development in Canada to solve problems unique to the Canadian offshore environment."[104] Like the Hibernia Benefits Plan, the Supplementary Benefits Plan did not make any commitment to undertake R&D activity except as needed in the regular course of business.[105] The Supplementary Benefits Plan only committed to give local providers priority consideration on a competitive basis.[106]

59. The Board approved the Hibernia Benefits Plan in its Decision 86.01 issued on June 18, 1986.[107] The Decision emphasized that the primary purpose of its review was to ensure that the Benefits Plan met the requirements of the Accord Act, including that it contain provisions intended to provide a full and fair opportunity for employment of Canadians, and Newfoundlanders in particular, and that first consideration be given to local goods and services on a competitive basis.[108]

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[103] **C-43**, Supplementary Benefits Plan, at 1 (emphasis added); **CL-2**, Atlantic Accord, § 2.

[104] **C-43**, Supplementary Benefits Plan, at 7.

[105] *Id.*

[106] *Id.*

[107] **CW-2**, O'Keefe Statement I, ¶ 8.

[108] **C-37**, Hibernia Decision 86.01, § 2.1.

60. The Board found that the Hibernia Benefits Plan satisfied the Accord Act requirements. The Board wrote: "[a]ny benefits plan is, in large measure, a commitment to principles . . . . In a general sense the Board feels that the Proponent's benefits strategy *does meet statutory requirements*."[109] Although the Board imposed specific conditions on its approval of the Benefits Plan where it deemed them necessary to meet the requirements of the Accord Acts, it imposed no such condition with regard to R&D.[110]

61. Instead, the Board stated that "the Proponent's strategy represents an excellent plan for significant participation by Canadian industry and labour in the Project."[111] The "strategy" was set out verbatim in the Supplementary Benefits Plan.[112] As already noted, the only R&D commitment in the Supplementary Benefits Plan was to "[c]ontinue to support local research institutions and promote further research and development in Canada to solve problems unique to the Canadian offshore environment."[113]

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109 *Id.* § 2.0 ("Decision Summary") (emphasis added).

110 *Id.* §§ 2.0-2.6. For example, Condition 2 stipulated that "[i]t is a condition of the approval of the Hibernia Benefits Plan that, prior to the start of production, the Proponent submit a training and staffing plan reflecting the maximum reasonable employment and training of residents of Newfoundland." *Id.* § 2.2.1.7. To comply with this condition, HMDC submitted a plan in June 1996 outlining the staffing and training protocol to be applied by HMDC and its alliance organizations through the production phase. **C-45**, Hibernia Staffing and Training Plan, § 1.0 (June 1996). The condition was deemed satisfied when the Board approved the Plan in March 1997. **C-46**, CNLOPB, Hibernia Decision 97.01, at 36-37 (1997) ("Hibernia Decision 97.01").

111 **C-37**, Hibernia Decision 86.01, § 2.6.

112 *Id.*; **C-43**, Supplementary Benefits Plan, at 6-8.

113 **C-43**, Supplementary Benefits Plan, at 7.

62. In addressing the range of regulatory options available to ensure the greatest possible benefit to Canada and the Province, the Board stated in its Decision:

> [T]he most effective approach would be to encourage the commitment of the Proponent to a series of basic principles. The implementation of these basic principles would, in the Board's opinion, be more effective than attempting to negotiate specific requirements for the multitude of elements of which the project will consist.[114]

Elsewhere in its Decision, the Board rejected imposing specific R&D expenditure targets as a means of ensuring compliance with the Accord Acts.[115] The Hibernia Development Plan and Benefits Plan were, at the time, "considered 'cradle to grave' in that all project activities including engineering, construction, development drilling, producing operations, and ultimately field abandonment would be covered by the approved plans."[116]

63. Since issuing Decision 86.01, the Board has approved amendments to the Hibernia Development Plan, but the Benefits Plan was never modified before the promulgation of the Guidelines.[117] Rather, each time the Board approved a

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[114] **C-37**, Hibernia Decision 86.01, § 2.1.

[115] Specifically, with respect to the principle of full and fair opportunity to participate in the provision of goods, services and employment, the Board wrote: "While the Board's mandate is to ensure that full employment opportunity is given to Canadians and especially to Newfoundlanders, *the Board does not support the establishment of specific employment goals, expressed in either absolute or percentage terms, for this project.*" *Id.* § 2.2.1 (emphasis added).

[116] **CW-2**, O'Keefe Statement I, ¶ 8.

[117] **C-47**, Hibernia Decision 90.01, § 1.2 (Aug. 1990) ("the commitments made by the Proponent in its 1985 Benefits Plan submission to the principles of full and fair opportunity and first consideration will be maintained despite the proposed changes in the project"); **C-46**, Hibernia Decision 97.01, § 1.0 (1997) ("Since the amendments now being proposed deal with changes in the production

Development Plan amendment, it found the Benefits Plan was unaffected and the Board did not impose any additional requirement or condition.[118] And the Board did not impose any condition with respect to R&D expenditures when it issued POAs for Hibernia in 1997 and 2000.[119]

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schedule and with aspects of the project located below the seafloor, they do not affect the approved Hibernia Benefits Plan . . . ."); **C-48**, Hibernia Decision 2000.01, § 1.0 (2000) ("Because the Application involves only a change to the average daily oil production rate approved in Decision 97.01, and does not involve any major modifications to the facilities themselves, the Board has determined that it does not affect the approved Hibernia Benefits Plan . . . ."); **C-49**, Hibernia Decision 2003.01, § 1 (Mar. 2003) ("Because the Application involves only a change to the annual oil production rate approved in Decision 2000.01, and does not involve any major modification to the facilities themselves, it does not affect the approved Hibernia Benefits Plan."); **C-50**, CNLOPB, Decision 2003.02: Respecting the Extension of the Ben Nevis/Avalon Appraisal Period, § 1.0 (Oct. 2003) (proposed amendment "does not introduce any new safety, environmental or benefits issues that are not already addressed by current approvals issued by the Board"); **C-51**, Hibernia Decision 2006.01: Respecting the Amendment to the Hibernia Development Plan, § 4.4 (Jan. 2006) ("The Board has determined that the proposed Ben Nevis-Avalon development plan does not introduce any safety, environmental or benefits issues that are not already addressed by current approvals issued by the Board."); **C-52**, Hibernia Decision 2009.10 (2009); **C-53**, Staff Analysis of the Hibernia Development Plan Amendment Application 2009-08-07, at 10 ("[S]taff recommends that a Benefits Plan Amendment at this time is not required."). The Board later determined that a Benefits Plan Amendment was required prior to the development of the Hibernia Southern Extension. **C-54**, Hibernia Decision 2010.02 (2010) (approving "Amendment to the Hibernia Benefits Plan, Hibernia Southern Extension Project, January 2010" and "Hibernia Development Plan Amendment Part II, January 2010").

[118] *Id.*

[119] **C-55**, CNLOPB, Hibernia POA, June 5, 1997 – June 1, 2000; **C-56**, Letter from H. Pike, CNLOPB, to D. Willis, HMDC (June

64. The federal and provincial governments similarly declined to impose additional R&D requirements when they entered into a series of agreements with the interest owners in 1988 and 1990. At that time, the two governments provided financial support for the project after the price of oil unexpectedly declined. As a result, the project owners negotiated a series of agreements with the governments in which the owners exchanged additional commitments, some benefits-related, for guaranteed loans and subsidies, among other things, from the governments.[120]

65. In July 1988, the Hibernia project owners[121] (the "Hibernia Project Owners") and the governments entered into a Statement of Principles to guide their efforts toward a definitive agreement. The Hibernia Project Owners exchanged various benefits commitments for financial and regulatory guarantees made by the governments, but none of these commitments were related to R&D. On the topic of procurement, the Hibernia Project Owners merely restated their pledge to give priority to Canadians, and Newfoundlanders in particular, consistent with the Accord Acts and the Board's Decision 86.01 approving the Hibernia Benefits Plan.[122]

66. After further negotiations, the governments and the Hibernia Project Owners entered into a set of binding

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1, 2000) (transmitting Hibernia POA, June 1, 2000 – November 1, 2005). The Board only began to impose such conditions in POAs/OAs after the Guidelines were promulgated. *Infra* ¶¶ 114-120.

[120] **CW-2**, O'Keefe Statement I, ¶ 9; **CW-1**, Phelan Statement I, ¶ 22.

[121] The Hibernia project owners were those holding interests in Hibernia at that time, and included Chevron Canada Resources, Columbia Gas Development of Canada Ltd., Gulf Canada Resources Limited, Mobil Oil Canada, and Petro-Canada Inc. **C-57**, Statement of Principles, Hibernia Development Project, § I (July 1988).

[122] **C-57**, Statement of Principles: Hibernia Development Project, § VI(2)(a)(i) (July 1988).

agreements, including a Framework Agreement dated November 10, 1990 (the "Hibernia Framework Agreement").[123] A special act of Parliament established the federal government's authority to enter into the Hibernia Framework Agreement.[124] While the Hibernia Project Owners agreed to various benefits commitments beyond those set forth in the Hibernia Benefits Plan and the Board's Decision 86.01 approving that Plan, the governments did not impose any further obligations with respect to R&D. The Hibernia Project Owners simply reiterated their commitment to give a full and fair opportunity to Canadians and first consideration to Newfoundlanders to participate, on a competitive basis, in the procurement process.[125]

67. In summary, at the time the NAFTA came into effect, the R&D obligations of the Hibernia project, pursuant to the requirements of the Accord Acts and the agreements of the Hibernia interest owners with the Board and with the federal and provincial governments, were as follows:

- R&D spending in excess of technical project needs was not required;
- no minimum or fixed amount or percentage of money or revenue was required to be spent on R&D;
- the Hibernia project was not required to obtain pre-approval by the Board or any other government agency before making R&D expenditures; and
- in conducting the necessary research and development in Canada to solve problems "unique to the Canadian offshore

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[123] **C-58**, Hibernia Development Project: Framework Agreement (Nov. 10, 1990).

[124] **CL-4**, Hibernia Development Project Act, 1990, c.41, s.3. This Act was referenced in a separate reservation to Article 1106 in Canada's Schedule to Annex I.

[125] **C-58**, Hibernia Framework Agreement, § 7.4(a).

environment,"[126] the Hibernia project was expected to support local research institutions by giving priority to them and others when possible.

(ii) *Terra Nova*

68. On behalf of the Terra Nova proponents, Suncor's predecessor, Petro-Canada, submitted the Terra Nova Development Plan and the Terra Nova Benefits Plan to the Board on August 5, 1996.[127] The Board approved them in December 1997.[128] The Terra Nova Benefits Plan was also considered to be a "cradle to grave" plan.[129]

69. The Terra Nova Benefits Plan made certain commitments and set forth general principles on which those commitments were based. First among those principles was a pledge to develop the project in keeping with the Accord Acts.[130] Other principles reflected a commitment to enhance opportunities for Canadians and, in particular, Newfoundlanders. However, the Terra Nova Benefits Plan cautioned that "the actual level of benefits flowing to domestic businesses will depend to a large degree on their ability to capture these opportunities in an internationally competitive framework."[131]

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[126] **C-44**, Hibernia MOU, at 4.

[127] **C-59**, Development Application: Terra Nova Development (Aug. 5, 1996). The Benefits Plan (the "Terra Nova Benefits Plan") appears as Section 3 therein.

[128] **C-41**, Terra Nova Decision 97.02.

[129] **CW-2**, O'Keefe Statement I, ¶ 18.

[130] **C-59**, Terra Nova Benefits Plan, § 3.1 ("The proponents are committed to developing Terra Nova in Accordance with the Atlantic Accord legislation. The policies and procedures that will be developed to guide the development will embody the commitment of the Proponents to carry out the development in the spirit of the *Canada-Newfoundland Atlantic Accord Implementation Acts.*") (emphasis added).

[131] *Id.*

The Terra Nova Benefits Plan did not contain any specific commitment with respect to R&D activities nor require pre-approval of individual expenditures. Additionally, it did not anticipate that the Board would pass judgment on the eligibility of particular activities as R&D.[132]

70. Before submitting the Terra Nova Benefits Plan, Petro-Canada, as the project proponent, met with the Board to discuss its plans and the Board's expectations with respect to the benefits provisions of the Accord Acts. The meeting minutes prepared by the Board show Petro-Canada specifically asked how the Board planned to apply the R&D provisions of the Accord Acts. In response, the Board directed Petro-Canada to simply describe its policies and procedures with respect to expenditures on R&D in the Province.[133] The Board also encouraged—but did not require—Petro-Canada "to describe, in the Benefits Plan, the nature and current level of support to R&D in the Province (e.g. C-CORE) and, to the extent possible, its future plans in this regard."[134] According to the Board's minutes, "Petro-Canada indicated that should there be any benefits undertakings agreed to with the Governments beyond the statutory requirements, they would be contained, if possible, in their Benefits Plans."[135] As noted, the Terra Nova Benefits Plan set forth general principles to guide the project's R&D activity, but it did not embrace any specific plans.[136]

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[132] *Id.* § 3.

[133] **C-60**, Meeting Minutes, CNLOPB/Petro-Canada (Feb. 13, 1995).

[134] *Id.* C-CORE is the Center for Cold Ocean Research, an engineering services firm based on St. John's, Newfoundland. **C-61**, C-CORE, *About C-CORE*, https://www.c-core.ca/aboutus (last visited Mar. 3, 2016).

[135] **C-60**, Meeting Minutes, CNLOPB/Petro-Canada, at 2 (Feb. 13, 1995).

[136] *Supra* ¶ 69.

71. Summarizing the meeting, the Board documented in its minutes that "the Petro-Canada officials seemed to be well informed of the requirements of the Atlantic Accord Acts and the [1987 Exploration Phase] Guidelines. *To a large extent, they see the benefits requirements to be 'process' oriented rather than related to prescribed targets and outcomes.* Nevertheless, the need for an assessment of outcomes in terms of the *potential* level and nature of benefits to Canada and, in particular, to Newfoundland seemed to be understood."[137]

72. In its Decision 97.02, the Board approved the Terra Nova Benefits Plan.[138] The Board reiterated the statement made in the decision approving the Hibernia Benefits Plan, namely that "[a]ny benefits plan is, in large measure, a commitment to principles."[139] It then cited the two fundamental principles embodied in the Accord Acts—full and fair opportunity to Canadians, and first consideration to Newfoundlanders—and found that the Benefits Plan as presented sufficiently addressed those principles.[140]

73. The Board further acknowledged that "*the relevant provisions of the Accord Acts do not prescribe levels of*

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137 **C-60**, Meeting Minutes, CNLOPB/Petro-Canada, at 2 (Feb. 13, 1995) (emphasis added). As noted, the meeting addressed the full scope of benefits covered by the Accord Acts, including but not limited to R&D. As with Hibernia, the Board was especially concerned about the employment of local residents, and therefore, it imposed a specific condition to its approval of the Benefits Plan. Condition 3 stipulated that "[w]ithin six (6) months of Project Sanction, the Proponent submit to the Board a comprehensive human resources plan, acceptable to the Board . . . [t]he plan should provide for the maximum practicable level of participation of residents of the Province . . . ." **C-41**, Terra Nova Decision 97.02, § 3.3.2; *see also supra* note 110 (discussing Condition 2 to the approval of the Hibernia Benefits Plan). The Board did not impose a similar condition with respect to R&D.

138 **C-41**, Terra Nova Decision 97.02.

139 *Id.* § 1.2.

140 *Id.*

expenditure[.]”[141] Instead, the Acts simply “require that the Benefits Plan contain provisions intended to ensure that expenditures are made on research and development in the Province.”[142]

74. The Board recognized that the Terra Nova project would involve significant R&D and training expenditures, even if it expressed concerns in its Decision 97.02 that such planned expenditures were not articulated in the Benefits Plan itself.[143] Petro-Canada had apparently identified three potential areas for R&D activity—iceberg detection, tracking and management; ice-vessel interactions; and ice-seafloor interaction—in communications with the Board related to the Benefits Plans.[144] Petro-Canada had also advised the Board that the needs of the project could be met “with existing products and services and the extension of existing technologies through appropriate R&D programs.”[145] However, these expectations are not articulated in the Terra Nova Benefits Plan.[146]

75. Nevertheless, the Board did not impose an R&D expenditure requirement as a condition to its approval of the Benefits Plan. Rather, it simply imposed a reporting requirement.[147] Condition 7 to the Board’s approval of the Terra Nova Benefits Plan required that “[t]he Proponent report to the Board by March 31 of each year, commencing in 1998, its plans for the conduct of research and development and education and training in the Province, including its expenditure estimates, for

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141 *Id.* § 3.5.1 (emphasis added).

142 *Id.*

143 *Id.* §§ 1.2, 3.5.1.

144 *Id.* § 3.5.1.

145 *Id.*

146 **C-59**, Terra Nova Benefits Plan, § 3.

147 **CW-2**, O’Keefe Statement I, ¶ 19 (“As with the Hibernia Benefits Plan, if the Board found the Terra Nova Plan as submitted unsatisfactory in terms of R&D, it could have imposed a condition to its approval of the Plan.”).

a three-year period and on its actual expenditures for the preceding year."[148]

76. The Terra Nova Development Plan has been amended twice since the Board issued Decision 97.02. In both instances, the Board concluded an amendment to the Benefits Plan was unnecessary.[149] As with Hibernia, the Board did not impose any condition with respect to R&D expenditures when it issued a POA for Terra Nova in 2001.[150]

77. Thus, the R&D expenditure obligations for the Terra Nova project were essentially the same as those of the Hibernia project.

(iii) *R&D Expenditures and Reporting to the Board*

78. Because no Board guidelines applied to the development and production phases, any reporting obligations effective during those phases of the Projects were established in the Board's decisions approving individual benefits plans.[151]

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[148] **C-41**, Terra Nova Decision 97.02, § 3.5.3.

[149] **C-62**, CNLOPB, Terra Nova Decision 2002.01, at 2 (2002) ("Because the Application involves only a change to the annual oil production rate approved in Decision 97.02, and does not involve any major modification to the facilities themselves, the Board has determined that it does not affect the approved Terra Nova Benefits Plan nor raise any new environmental issues."); **C-63**, CNLOPB, Terra Nova Decision 2005.03, at 11 (2005) ("no amendment to the approved Benefits Plan will be required").

[150] **C-64**, Letter from H. Pike, CNLOPB, to G. Lever, Petro-Canada (July 26, 2001) (transmitting Terra Nova POA, July 26, 2001 – August 31, 2004). The Board only began to impose such conditions in POAs/OAs after the 2004 Guidelines were promulgated. *Infra* ¶¶ 114-120.

[151] *Supra* Section II.D.1.c.

79. After the Board approved the Hibernia and Terra Nova Benefits Plans and the Projects moved into the development phase, the project operators had two ongoing obligations with respect to R&D: *first*, to prioritize Canadians, and Newfoundlanders in particular, in the R&D procurement process if and when R&D was needed and if competitive; and *second*, to submit regular benefits reports to the Board with information on R&D expenditures.[152] No obligation to meet a target amount or to obtain pre-approval of planned R&D expenditures was established in the Accord Acts, the Hibernia or Terra Nova Benefits Plans, or the Hibernia Framework Agreement (nor even the exploration phase 1987 Guidelines that were no longer applicable).[153]

80. With respect to Hibernia, Board Decision 86.01 approved the Hibernia Benefits Plan, and benefits reporting began when construction commenced in 1990.[154] During the

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[152] **C-37**, Hibernia Decision 86.01, §§ 2.2.1, 2.5; **C-41**, Terra Nova Decision 97.02, § 3.5.

[153] *Id.*; **CL-1**, Federal Accord Act, s. 45; **CL-3**, Provincial Accord Act, s. 45; **C-58**, Hibernia Framework Agreement, Article 7; **C-39**, 1987 Exploration Phase Guidelines, §§ 3.5, 4.4; **CW-2**, O'Keefe Statement I, ¶¶ 10, 14, 19.

[154] **C-65**, Hibernia Website, at 1 (construction commenced in October 1990). Before 1990, HMDC submitted annual benefits reports to the Board pursuant to the 1986 and 1987 Exploration Phase Guidelines. **CW-2**, O'Keefe Statement I, ¶ 10; **C-66**, Letter from T. O'Keefe, CNLOPB to W. Abel, Mobil Oil Canada (Jan. 7, 1987) ("[T]he Board requires that operators engaged in exploration activities in the Newfoundland offshore area submit an annual report. This report should cover post-discovery/pre-development activities in addition to exploration activities."). Consistent with the exploration phase 1986 and 1987 Guidelines, the reports during this period contained information on R&D expenditures in the Province. **C-67**, Hibernia 1986 Benefits Report, § d, schedule A; **C-68**, Hibernia 1987 Benefits Report, § d, schedule A; **C-69**, Hibernia 1988 Benefits Report, § D, attachment II; **C-70**, Hibernia 1989 Benefits Report, § D, attachment II.

development phase, HMDC submitted monthly reports on various benefits commitments.[155] However, the monthly reports did not contain information about R&D expenditures, as HMDC historically did not track R&D spending except on an annual basis.[156] Beginning in 1998, after the Hibernia project had transitioned into the production phase, quarterly reports replaced the monthly reports.[157] HMDC also began submitting annual benefits reports summarizing benefits expenditures in the prior year, including R&D.[158] With respect to R&D, the annual reports usually have quantified total expenditures in the Province in the prior year and provided a breakdown by research area of cumulative expenditures since 1990. The reports have also included an estimate of R&D expenditures likely to be incurred in the year at issue.[159]

81. With respect to Terra Nova, benefits reporting pursuant to Decision 97.02 (which approved the Terra Nova Benefits Plan) began in 1999. At the outset of each calendar year, Petro-Canada, and then Suncor, submitted a report

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155 **CW-2**, O'Keefe Statement I, ¶ 11; *also note, e.g.*, **C-71**, Hibernia December 1996 Staffing and Training Report.

156 **CW-2**, O'Keefe Statement I, ¶ 11; **CW-1**, Phelan Statement I, ¶ 20.

157 **CW-2**, O'Keefe Statement I, ¶ 12. The quarterly reporting did not address R&D expenditures. **CW-1**, Phelan Statement I, ¶ 20.

158 **CW-2**, O'Keefe Statement I, ¶¶ 13-14; **CW-1**, Phelan Statement I, ¶ 20.

159 **C-24**, Hibernia 1998 Benefits Report, § 5; **C-72**, Hibernia 1999 Benefits Report, § 5; **C-73**, Hibernia 2000 Benefits Report, § 5; **C-74**, Hibernia 2001 Benefits Report, § 5; **C-75**, Hibernia 2002 Benefits Report, § 5; **C-76**, Hibernia 2003 Benefits Report, § 5; **C-77**, Hibernia 2004 Benefits Report, § 5; **C-78**, Hibernia 2005 Benefits Report, § 5; **C-79**, Hibernia 2006 Benefits Report, § 5; **C-80**, Hibernia 2007 Benefits Report, § 5; **C-81**, Hibernia 2008 Benefits Report, § 5.

summarizing benefits expenditures in the prior year.[160] With regard to R&D, the reports have quantified total expenditures in the prior year and provided an estimate of R&D expenditures likely to be incurred in the next three-year period.[161]

82. As already described, before the Guidelines' implementation, R&D was typically undertaken in the usual course of business if there was technological need, and funded through general operating and capital budgets pre-approved each year by the project owners.[162] Technical managers made the decision to undertake particular R&D projects, and they did so

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[160] **C-82**, Terra Nova 1998 R&D Report; **C-83**, Terra Nova 1998 E&T Report; **C-84**, Terra Nova 1998 Benefits Report; **C-85** Terra Nova 1999 R&D Report; **C-86**, Terra Nova 1999 E&T Report; **C-87**, Terra Nova 1999 Benefits Report; **C-88**, Terra Nova 2000 R&D Report; **C-89**, Terra Nova 2000 E&T Report; **C-90**, Terra Nova 2000 Benefits Report; **C-91**, Terra Nova 2001 Benefits Report, § 2.3; **C-92**, Terra Nova 2002 Benefits Report, § 2.3; **C-93**, Terra Nova 2003 Benefits Report, § 2.3; **C-94**, Terra Nova 2004 Benefits Report, § 2.3; **C-95**, Terra Nova 2005 Benefits Report, § 2.3; **C-96**, Terra Nova 2006 Benefits Report, § 2.3; **C-35**, Terra Nova 2007 Benefits Report, § 2.3; **C-97**, Terra Nova 2008 Benefits Report. For the reports covering 1998 through 2000, Petro-Canada submitted three separate reports each year, one covering R&D expenditures, one covering E&T expenditures, and a third covering other benefits commitments. Beginning with the report covering 2001, information on R&D expenditures has been included in the Terra Nova annual benefits reports.

[161] *Id.*; **C-41**, Terra Nova Decision 97.02, § 3.5.3, Condition 7 ("The Proponent report to the Board by March 31 of each year, commencing in 1998, its plans for the conduct of research and development and education and training in the Province, including its expenditure estimates, for a three-year period and on its actual expenditures for the preceding year.").

[162] *Supra* ¶¶ 33-34; **CW-1**, Phelan Statement I, ¶ 12; **CW-5**, Noseworthy Statement I, ¶ 14; **C-18**, Hibernia Field Operating Agreement, § 4.12.1.1.

with a view to operating safely and efficiently, and to maintaining the integrity of the project infrastructure.[163]

83. Within HMDC, there was historically no individual or group responsible or dedicated to planning R&D activity, no system for tracking R&D activity as it was undertaken, nor any dedicated R&D budget.[164] As a result, in order to determine for benefits reporting purposes what R&D activities were undertaken and the amounts spent, HMDC had to rely on data collected in connection with Canada's Scientific Research and Experimental Development ("SR&ED") tax incentive program.[165] Pursuant to the SR&ED program, businesses subject to taxation in Canada may earn tax credits for R&D undertaken within Canada that will lead to new, improved, or technologically advanced products or processes.[166] To qualify for SR&ED credit, work must advance the understanding of scientific relations or technologies, address scientific or technological uncertainty, and incorporate a systematic investigation by qualified personnel.[167]

84. To identify tax expenditures that may qualify for SR&ED credit, HMDC's internal tax advisors send a communication at the beginning of every tax planning cycle soliciting information from the technical and operations managers under whose supervision R&D work may have been undertaken in the prior year.[168] Of the activities reported, the tax

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163 **CW-5**, Noseworthy Statement I, ¶ 14.

164 **CW-2**, O'Keefe Statement ¶ 15; **CW-1**, Phelan Statement I, ¶ 20; **CW-6**, Hutchings Statement I, ¶¶ 21-24; **CW-4**, Ringvee Statement I, ¶ 9.

165 **CW-1**, Phelan Statement I, ¶ 20.

166 **CW-6**, Hutchings Statement I, ¶ 12.

167 **C-98**, Canada Revenue Agency, *Claiming SR&ED tax incentives*, http://www.cra-arc.gc.ca/txcrdt/sred-rsde/clmng/clmngsrd-eng.html (last visited Mar. 3, 2016).

168 *E.g.*, **C-99**, E-mail from S. Coombs, ExxonMobil, to Distribution List (Mar. 15, 2004); **C-100**, Letter from R. Hutchings,

advisor makes a first cut, eliminating from further consideration those that do not plausibly meet the requirements of the SR&ED program.[169] KPMG, which advises HMDC in connection with the SR&ED program, reviews the remaining expenditures to determine which are viable candidates for SR&ED credit.[170] At the conclusion of its review, KPMG compiles a portfolio of SR&ED-eligible expenditures for use by the project shareholders in preparing their tax returns.[171] Ultimately, the individual owners are responsible for claiming their respective shares of the eligible expenditure total from the Canada Revenue Agency ("CRA").[172] For the purposes of benefits reporting before the Guidelines were implemented, HMDC had always reported to the Board the total value of SR&ED-eligible expenditures included in the portfolio prepared for the Hibernia interest owners.[173]

85. Before the introduction of the 2004 Guidelines, discussed below, the Board never expressed dissatisfaction with the R&D expenditures reported by either project, nor did it judge the appropriateness of reporting particular activities as R&D.[174] Rather, the Board accepted the R&D expenditure levels without apparent comment.[175] Indeed, in the very early years of the Hibernia project, the Board issued letters acknowledging receipt of annual benefits reports and confirming that they "fully [met]

ExxonMobil, to Distribution List (Feb. 29, 2008); **CW-6**, Hutchings Statement I, ¶ 22.

169 **CW-6**, Hutchings Statement I, ¶ 22.

170 **CW-6**, Hutchings Statement I, ¶¶ 22-24.

171 *Id.*

172 Mobil has regularly claimed its *pro rata* share of the expenditures endorsed by KPMG. **CW-6**, Hutchings Statement I, ¶ 20.

173 **CW-6**, Hutchings Statement I, ¶ 29; **CW-2**, O'Keefe Statement I, ¶ 15; **CW-1**, Phelan Statement I, ¶¶ 20-21.

174 **CW-1**, Phelan Statement I, ¶ 21; **CW-2**, O'Keefe Statement I, ¶ 22.

175 **CW-1**, Phelan Statement I, ¶ 21.

the requirements outlined in the Board's Exploration Benefits Plan Guidelines."[176] Over time, the Board stopped issuing such letters and simply accepted the benefits reports without comment.

86. Before implementation of the Guidelines, HMDC had never sought to report R&D expenditures greater than those claimed for SR&ED credit and viewed by the Board as eligible activity under the Accord Acts.[177] There simply was no incentive to capture every last credit-worthy dollar because there had been, prior to 2004, no spending target under the Benefits Plan.[178]

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176 **C-101**, Letter from T. O'Keefe, CNLOPB, to W. Abel, Mobil Oil Canada (May 5, 1988); **C-102**, Letter from T. O'Keefe, CNLOPB, to W. Abel, Mobil Oil Canada (May 8, 1989); *see also* **C-103**, Letter from T. O'Keefe, CNLOPB, to W. Abel, Mobil Oil Canada (June 25, 1986).

177 Before the issuance of the 2004 Guidelines, the Board did not define R&D. The 2004 Guidelines reflect a concept of R&D that is much broader than the SR&ED definition. **C-3**, Guidelines, § 3.3 ("The definition of research and development, as referenced in Section 45 of the [Accord Acts], includes, but is not limited to Section 248(1) of the Income Tax Act, which defines Scientific Research and Experimental Development . . . . In addition to the elements included in the [SR&ED] definition, eligible R&D expenditures may extend beyond science and technology to include research in such areas as fiscal regimes, business models and socioeconomic and environmental matters."). For example, because E&T is not captured in the SR&ED program, the Board has necessarily applied its own definition to give credit for such expenditures. HMDC and Suncor typically report on E&T expenditures in their annual reports to the Board. *E.g.*, **C-81**, Hibernia 2008 Benefits Report, § 4; **C-35**, Terra Nova 2007 Benefits Report, § 2.2.

178 **CW-6**, Hutchings Statement I, ¶ 29; **CW-1**, Phelan Statement I, ¶ 20.

(d) The NAFTA

87. The NAFTA went into effect on January 1, 1994, after which the Parties were prohibited from imposing performance requirements like those set out in the Accord Acts. Article 1106(1) of the NAFTA provided:

> No party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-party in its territory:
>
> * * *
>
> (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory[.][179]

88. The NAFTA allowed Parties to make reservations with respect to non-conforming existing measures, as long as such measures were specifically identified. Article 1108(1) provided that Article 1106, among other provisions, did not apply to:

> (a) any existing non-conforming measure that is maintained by
>
> > (i) a Party at the federal level, as set out in its Schedule to Annex I or III, [or]
> >
> > (ii) a state or province, for two years after the date of entry into force of this Agreement, and thereafter as set out by a Party in its Schedule to Annex I in accordance with paragraph 2 . . . .[180]

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[179] **CL-5**, NAFTA, Article 1106(1); **CL-5**, NAFTA, Article 2203.

[180] **CL-5**, Article 1108(2) further provides that: "Each Party may set out in its Schedule to Annex I, within two years of the date of entry into force of this Agreement, any existing nonconforming measure maintained by a state or province, not including a local government."

* * *

> (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1102, 1103, 1106 and 1107.[181]

89. Each reservation taken under Article 1108(1) must identify the laws, regulations or other measures to be reserved. A measure identified as such "means the measure as amended, continued or renewed as of the date of entry into force of [the treaty], and . . . includes any subordinate measure adopted or maintained under the authority of and consistent with the measure[.]" [182]

90. Recognizing the conflict between the Federal Accord Act and its new treaty commitments, Canada included a reservation to Article 1106 for the requirement to have a benefits plan with provisions for expenditures on R&D. Canada's Schedule to Annex I, dated December 17, 1992, provided:

> 1. Under the *Canada Oil and Gas Operations Act*, the approval of the Minister of Energy, Mines and Resources of a "benefits plan" is required to receive authorization to proceed with any oil and gas development project.
>
> 2. A "benefits plan" is a plan for the employment of Canadians and for providing Canadian manufacturers, consultants, contractors and service companies with a full and fair opportunity to participate on a competitive basis in the supply of goods and services used in any proposed work or activity referred to in the benefits plan . . .
>
> 3. The *Canada – Nova Scotia Offshore Petroleum Resources Accord Implementation Act* and the *Canada – Newfoundland Atlantic Accord Implementation Act* have the same requirement

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[181] **CL-5**, NAFTA, Article 1108(1).

[182] **CL-5**, NAFTA, Annex I, Interpretative Note, para. 2(f). Canada's reservation identifies the Federal Accord Act. **CL-5**, NAFTA, Annex I, Schedule of Canada.

> of a benefits plan but also require that the benefits plan ensure that:
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> * * *
>
> (b) expenditures be made for research and development to be carried out in the province, and for education and training to be provided in the province[.][183]

91. Significantly, the entire Federal Accord Act was not reserved. As the interpretative note to Annex I makes clear, the "Measures" element of Canada's reservation "identifies the laws, regulations or other measures, *as qualified, where indicated, by the Description element*, for which the reservation is taken."[184] The "Description" element of the reservation focuses on the "requirement for a benefits plan" in the Federal Accord Act as well as the "require[ment] that the benefits plan ensure that … expenditures be made for research and development to be carried out in the province, and for education and training to be provided in the province[.]"[185] For this reason, only those provisions of the Federal Accord Act specifically addressing such requirements are exempted.

2. After the Enforcement of the Guidelines

(a) The Board Considers Imposing a New R&D Expenditure Requirement

92. Prior to the imposition of the Guidelines in 2004, the Projects were not required to meet prescribed R&D expenditure levels or to subject their R&D spending to pre-approval by the Board. Rather, as agreed with the Board in the Benefits Plans, and with Canada and the Province in the Hibernia Framework Agreement, among others, the Projects

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183 **CL-5**, NAFTA, Annex I, Schedule of Canada.

184 **CL-5**, NAFTA, Annex I, Interpretative Note, para. 2(f) (emphasis added).

185 **CL-5**, NAFTA, Annex I, Schedule of Canada.

were expected to undertake R&D only as necessary, and they had to make provisions for Canadians, and Newfoundland residents in particular, to be able to compete for such work. Canada's obligations under the NAFTA precluded any measure that would make these requirements more onerous than those covered by Canada's express reservations.[186]

93. In late 2001, with the NAFTA already in effect, however, the Board began to consider imposing a new R&D spending requirement. The idea appears to have originated during consideration of a benefits plan for the White Rose project, in which Mobil was not and is not a participant. In its November 2001 decision approving the White Rose benefits plan, the Board released what it described as "a definitive statement as to how it interprets and applies the provision of the Atlantic Accord and the [Accord Acts]."[187]

94. In its statement, the Board specifically acknowledged that, while the Atlantic Accord and the Accord Acts contemplated opportunities being provided to Canadians and Newfoundlanders on a competitive basis, they do not require that benefits actually be delivered:

> Both require that Benefits Plans be designed to ensure that, for goods and services, opportunities are made available to Newfoundland & Labrador and Canadian participants. *There is no requirement in the Accord or the Legislation that Benefits Plans be designed to ensure that economic Benefits are delivered to Newfoundland & Labrador and Canada. This is particularly the case for goods and services, which are subject to an overriding qualification relating to market competition.*[188]

95. The Board also acknowledged that the Accord Acts did not impose fixed spending levels for R&D or require pre-

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[186] *Supra* ¶ 88.

[187] **C-104**, CNLOPB, White Rose Decision 2001.01, § 3.2 (2001) (the "White Rose Decision 2001.01").

[188] *Id.* § 3.2.1 (emphasis added).

approval of such spending, noting that "*the Legislation simply requires that expenditures be made for these purposes in the Province*[.]"[189] It observed that "[t]his statutory requirement is intended to ensure *that the Proponent describes* its plans and financial commitments to research & development and education & training in the Province."[190] Of course, the proponent would describe such plans in the benefits plan, as was in fact the case for the Hibernia and Terra Nova Benefits Plans.[191] Although the Accord Acts themselves did not establish criteria or parameters for evaluating the adequacy of the proponent's R&D activity, the Board decided it had latitude to establish target expenditure levels.[192]

96. The Board conceded that its purpose was to create demand for R&D services in the Province:

> Expenditures for research & development and education & training are viewed by the Board to be strategically important contributions to the growth and development of the research and development and education and training capacity in the Province.[193]

97. An early draft of the new expenditure guidelines was framed as providing guidance exclusively with respect to Condition 3 to approval of the White Rose benefits plan, which required the proponent to "submit a plan to address the obligation in the [Accord Acts] that expenditures shall be made" for R&D and E&T in the Province.[194] The Board recognized that the White Rose proponent's submission substantially addressed expenditures for R&D and E&T in its Benefits Plan,

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[189] *Id.* § 3.2.2.3 (emphasis added).

[190] *Id.* (emphasis added).

[191] Section II.D.1.c, *supra*.

[192] **C-104**, White Rose Decision 2001.01, §§ 3.2.2, 3.3.3.3.

[193] *Id.* § 3.2.2.3.

[194] *Id.* § 3.3.3.3; **C-105**, CNLOPB, Guidelines for Research and Development / Education and Training Expenditures: White Rose Project, § 1.0 (July 2002) (the "July 2002 Draft Guidelines").

but it believed establishing quantifiable expenditure requirements was appropriate. Notably, the Board did not suggest at this stage that it expected to establish expenditure targets applicable to projects with earlier-approved benefits plans, such as Hibernia and Terra Nova.[195] Indeed, the Board's discussion of expenditure requirements was limited to the White Rose proponent and its contractors.[196]

98. The draft guidelines soon evolved, however, into a measure applicable to *all* operators engaged in petroleum development activities in the Province.[197] The Board acknowledged that the guidelines would impose new requirements: *"These guidelines are a first effort by the C-NOPB in this area."*[198]

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195 **C-104**, White Rose Decision 2001.01, § 3.3.3.3.

196 *Id.*

197 **C-106**, CNLOPB, Draft Guidelines for Research and Development/Education and Training Expenditures, § 1.0 (Aug. 2002) (the "August 2002 Draft Guidelines"). A June 2003 document of unknown origin that was provided to Mobil by Canada in the Mobil I Arbitration indicates that "[t]he writing of the White Rose Decision Report provided an opportunity for the Board to focus on the application of Section 45(3)(c) of the legislation and the need for an R&D guideline." **C-107**, R&D Expenditures by Canadian Petroleum Companies – Draft, § I (June 2003). Early drafts of the guidelines indicate uncertainty as to whether they should also apply to the exploration phase. *E.g.*, **C-106**, August 2002 Draft Guidelines, § 1.0 (reference to exploration phase in bracketed text); **C-108**, CNLOPB, Draft Guidelines for Research and Development / Education and Training Expenditures, § 1.0 (Jan. 2003) (reference to exploration phase in bracketed text). However, the June 2003 document indicates that the Board ultimately decided to make R&D voluntary during the exploration phase, in part to encourage exploration activity. **C-107**, R&D Expenditures by Canadian Petroleum Companies – Draft, § I (June 2003).

198 **C-106**, August 2002 Draft Guidelines, § 2.0 (emphasis added).

99. In July 2003, the Board issued a consultation draft of the guidelines and made presentations to the operators of existing projects in the Province, including Hibernia and Terra Nova.[199] It conducted additional consultations with the operators and the Canadian Association of Petroleum Producers ("CAPP"), an industry association, in 2004.[200] Industry representatives and CAPP objected to the proposal on a number of grounds, including that the expenditure requirement was being imposed "after the fact" and amounted to an additional, substantial financial burden that upset the premise upon which decisions to proceed with the project had been based.[201] They also advised the Board on numerous occasions that the draft guidelines were out of step with business reality. For example, they observed that:

- "Industry undertakes R&D activities to address areas where understanding and improvement are needed[,] not because of arbitrarily set targets."[202]

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[199] **C-109**, CNLOPB, Draft Guidelines for Research and Development Expenditures (July 2003) (the "Consultation Draft"); *e.g.*, **C-110**, Presentation by CNLOPB to HMDC (July 24, 2003); **C-111**, Meeting Minutes, CNLOPB/HMDC (July 24, 2003).

[200] **C-112**, Meeting Minutes, CNLOPB/Industry Representatives (Oct. 28, 2003); **C-113**, Meeting Minutes, CNLOPB/Industry Representatives (May 11, 2004); **C-114**, Meeting Minutes, CNLOPB/ExxonMobil (May 26, 2004).

[201] **C-112**, Meeting Minutes, CNLOPB/Industry Representatives (Oct. 28, 2003) ("This takes away the stability of the fiscal regime. This is a (negative) message to new entrants. It is a penalty after the fact.").

[202] **C-115**, Letter from P. Alvarez, CAPP, to H. Stanley, CNLOPB (Nov. 14, 2003). The observation was also made that operators active in the Province, when left to their own devices, have already shown good corporate citizenship by living up to and often exceeding their commitments. "Industry has been instrumental in creating an important legacy for NL through our support of the service and supply industry's research and development, improving and

- R&D investments are leveraged by coordinating R&D activities around the world and by directing work to institutes most capable of solving particular problems.[203]
- "R&D should be needs driven rather than dollars driven."[204]

100. In explaining the propriety of a needs-based approach rather than prescriptive guidelines, Mobil and HMDC noted *inter alia* that the bulk of R&D activity required in connection with the Hibernia project had already been undertaken,[205] that there was no foreseeable benefit to the project from the increasing spending obligations that the Board was contemplating,[206] that the approved Benefits Plan did not contain any R&D spending commitment,[207] and that imposition of a

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expanding the local research and development, improving and expanding the local research infrastructure and supporting the education and training of local residents. We are providing opportunities for the local R&D capability to increase." *Id.*

203 *Id.*

204 **C-113**, Meeting Minutes, CNLOPB/Industry Representatives (May 11, 2004); *see also* **C-116**, Summary of telephone conversation between G. Carrick, Petro-Canada, and F. Way, CNLOPB (June 30, 2004) ("The operators feel that R&D expenditures should be based on industry needs.").

205 **C-113**, Meeting Minutes, CNLOPB/Industry Representatives (May 11, 2004) ("Hibernia spent $100 million on SR&ED in development phase . . . not much R&D left to spend in Hibernia.").

206 **C-114**, Meeting Minutes, CNLOPB/ExxonMobil (May 26, 2004) ("Where would HMDC get the benefit from spending $150 million on R&D?").

207 **C-117**, Letter from T. Cutt, HMDC, to H. Stanley, CNLOPB (Sept. 22, 2003) ("Our primary concern relates to the Board's authority . . . to impose explicit expenditure levels for [R&D] and to apply them to a project for which an approved Canada-Newfoundland benefits plan is already in-place."); *see also* **C-118**, Letter from G. Carrick, Petro-Canada, to H. Stanley, CNLOPB (Sept.

spending target would thus constitute a change in the regulatory regime applicable to the project.[208] As Ted O'Keefe, HMDC's Regulatory and Environment Lead at the time, observes:

> In a May 11, 2004 meeting with the Board, I commented that the legislative commitments already had been satisfied for Hibernia by virtue of its having an approved Benefits Plan. In a May 26, 2004 meeting with the Board, I further noted that the Hibernia Benefits Plan does not contain any commitment as to R&D spending, that HMDC had no business need for the level of R&D expenditures contemplated by the draft Guidelines, and that we were not prepared to accept the Guidelines as applicable to Hibernia.[209]

101. The Board was not prepared to continue the regime lacking quantifiable targets.[210] However, the Board's position to require a set level of R&D spending was unacceptable to the industry, and no agreement on an alternative was reached.[211]

19, 2003) ("[W]e do not believe the C-NOPB has authority to retrospectively require commitments of R&D expenditures . . . where an Operator is proceeding pursuant to a previously approved Benefits Plan.").

[208] **C-114**, Meeting Minutes, CNLOPB/ExxonMobil (May 26, 2004) (". . . the rules have changed . . ."); *see also* **C-118**, Letter from G. Carrick, Petro-Canada, to H. Stanley, CNLOPB (Sept. 19, 2003) ("[W]e do not believe the C-NOPB has authority to retrospectively require commitments of R&D expenditures . . . where an Operator is proceeding pursuant to [a] previously approved Benefits Plan.").

[209] **CW-2**, O'Keefe Statement I, ¶ 23.

[210] **C-119**, Meeting Minutes, CNLOPB/Industry Representatives (June 3, 2004) ("[O]perators should understand we are not prepared to go back to a solution which has no measure or quantifiable commitment associated with it.").

[211] *E.g.*, **C-120**, Letter from F. Way, CNLOPB, to J. Taylor, HMDC (Nov. 5, 2004) ("On October 18, 2004, industry advised that it has not been able to reach a consensus on an alternative approach.").

102. Finally, at the time the Board was considering implementing the Guidelines in 2000–2003, there existed no contemporaneous documentation taking the position that the operators were not fulfilling their obligations. Indeed, as Mr. O'Keefe recalls, "the Board to my knowledge never once suggested that HMDC was not meeting the approved Hibernia Benefits Plan requirements with respect to R&D or that its level of R&D activity was disappointing. To my knowledge the Board also never suggested that Terra Nova was not meeting any R&D requirements in its approved Benefits Plan."[212] Mr. Frederick Way, one of Canada's fact witnesses in Mobil I who was employed by the Board at the time, testified in those proceedings that he could "not recall any specific correspondence, internal memoranda, minutes of meetings or other specific documents related to R&D and E&T expenditures prior to the Board focusing its attention on the need for guidance for such expenditures."[213] And the Board did not provide any response to the benefits reports submitted by the operators during the time period leading up to the promulgation of the Guidelines—much less a response that expressed any concern regarding the operators' historical level of R&D and E&T expenditures.

(b) Promulgation of the Guidelines

103. On November 5, 2004, the Board sent the now-finalized Guidelines to the Hibernia and Terra Nova project operators. Although the Guidelines were dated October 2004, the Board's letters indicated that they were effective retroactively to April 1, 2004.[214]

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[212] **CW-2**, O'Keefe Statement I, ¶ 22.

[213] **C-121**, Second Witness Statement of Frederick Way (Mobil I), ¶ 3.

[214] **C-120**, Letter from F. Way, CNLOPB, to J. Taylor, HMDC; **C-122**, Letter from F. Way, CNLOPB, to G. Carrick, Petro-

104. The Guidelines materially changed the existing regime governing the Projects. In effect, the Guidelines introduced expenditure requirements, reporting requirements, and financial administrative changes that amount to a set of additional obligations with respect to Hibernia and Terra Nova that are different in nature and degree than those previously applied to those projects. These additional requirements are quantitatively and qualitatively different from, and more burdensome than, what existed before. They imposed a set of mandatory requirements above and beyond those established in the Accord Acts or the Board's Decision approving the Hibernia and Terra Nova Benefits Plans.[215] Additionally, they imposed a new, formula-based R&D spending requirement during the development and production phases of all offshore petroleum projects undertaken in the Province.[216] For individual expenditures to count toward the spending target, project operators were required to obtain pre-approval from the Board.[217] The expenditure amounts dictated by the Guidelines

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Canada (Nov. 5, 2004). The Guidelines were later attached as Appendix II to new Canada-Newfoundland and Labrador Benefits Plan Guidelines dated February 2006. **C-42**, Canada-Newfoundland and Labrador Benefits Plan Guidelines. Appendix I to the Benefits Plan Guidelines was a revised version of the Canada-Newfoundland and Labrador Exploration Benefits Plan Guidance already in place. *Id.*, Appendix I; **C-39**, 1987 Exploration Phase Guidelines.

[215] **C-3**, Guidelines, § 2.4. The Guidelines use the term "requirement" repeatedly and clearly operate as such. *Infra* ¶¶ 245-252.

[216] Except where otherwise indicated, the term "R&D" in the context of the Guidelines encompasses E&T, or Education and Training. According to the Guidelines, qualifying E&T expenditures count toward an operator's R&D expenditure target. **C-3**, Guidelines, § 3.4.

[217] **C-3**, Guidelines, § 4.1 ("The operator shall file an R&D and E&T Expenditure Application Form … for each R&D and E&T activity it plans to undertake. The form shall be submitted to and reviewed by the Board for approval, prior to commencement of the

are not based on business reality or actual need, but rather a flawed and arbitrary formula developed by the Board as an ostensible proxy for common industry practice.[218]

105. The Guidelines do not require R&D expenditures during the exploration phase.[219] During the development phase, however, operators are required to spend 0.5% of total project capital cost on R&D in the Province. Operators are then provided a development phase credit in that amount to be applied against expenditure obligations in the production phase.[220] The Guidelines do not indicate whether spending in excess of the development phase requirement will be credited in the production phase.[221]

106. During the production phase, operators are required to spend a given percentage of annual revenues in the Province,

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activity.”). **CW-3**, Sampath Statement I, ¶ 13 (“As HMDC’s R&D Manager, I was responsible for preparing and submitting these Work Expenditure Application forms. From our viewpoint, it was required and necessary to obtain the Board’s pre-approval before funding R&D or E&T activities that HMDC would not otherwise pay for, since we wanted to ensure that the expenditures would count toward the spending requirements set for Hibernia under the Guidelines.”).

[218] **C-3**, Guidelines, § 2.2; *see also infra* ¶ 111.

[219] Regarding the exploration phase, the Guidelines state: “From 2003 on, during the exploration phase, R&D expenditures up to a maximum of 5 percent of the expenditure bid will be allowed.” **C-3**, Guidelines, § 2.1. The Guidelines do not explain what this “allowance” might count toward. Unlike the development phase credit, it does not appear as a credit toward the production phase expenditure requirement. *Id.* § 2.2.

[220] According to the Guidelines, R&D expenditures during the development phase ordinarily amount to approximately 0.5% of total project capital cost (C). On that premise, the development phase R&D expenditure requirement (DPr&d) is calculated as follows: DPr&d = 0.005 x C. **C-3**, Guidelines, § 2.2.1.

[221] R&D expenditures at Hibernia during the development phase exceeded 0.5% of capital cost.

in accordance with a benchmark calculated by the Board for average R&D spending, as a percentage of revenues, by oil and gas companies in Canada.[222] The Board calculates the benchmark using the most recent five-year average of R&D expenditure data published by Statistics Canada. If, for example, the average of the industry benchmark data published over the most recent five-year period is 0.4% of revenues, every operator of a project in the production phase will be required to spend on R&D 0.4% of revenues generated that year. Although the Board calculates the benchmark for each single year, operators are not necessarily expected to make the required expenditures on an annual basis. Rather, near the end of each OA period, the Board calculates retrospectively the expenditure obligations in each prior year of the same OA period.[223]

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[222] The Total R&D expenditure (TRr&d) required during the development and production phase is determined by the benchmark (B), multiplied by the product of a project's total recoverable oil (RO), as defined by the approved Development Plan, and the long-term oil price (LTOP): TRr&d = B x (RO x LTOP). **C-3**, Guidelines, § 2.2. The Board uses the price of Brent Crude less 10% for both Hibernia and Terra Nova. **C-123**, Letter from F. Smyth, CNLOPB, to P. Sacuta, HMDC (Feb. 26, 2009); **C-124**, Letter from F. Smyth, CNLOPB, to G. Vokey, Petro-Canada (Mar. 3, 2009). The production phase R&D expenditure requirement (PPr&d) constitutes the difference between the Total Requirement (TRr&d) and the development phase requirement (DPr&d): PPr&d = TRr&d – DPr&d. **C-3**, Guidelines, § 2.2.2.

[223] *E.g.*, **C-125**, Letter from S. Tessier, CNLOPB, to J. Walck, HMDC (September 30, 2015) (calculating annual R&D and E&T spending obligations at Hibernia from May 1, 2012 through April 30, 2015); **C-126**, Letter from M. Baker, CNLOPB, to D. Zeller, Suncor Energy Inc. (June 11, 2014) (calculating annual R&D and E&T spending obligations at Terra Nova from April 2, 2011 through March 31, 2014). The total expenditure commitment for the production phase is distributed in proportion to anticipated production per period covered by each OA issued by the Board. At the end of each OA period, the

107. Under the Guidelines, project operators must spend these amounts in the Province regardless of whether the project requires that level of R&D activity. For any OA period without sufficient projects to absorb the mandated level of expenditures, according to the Guidelines "the *balance* may be placed in a R&D fund … managed by the Board in conjunction with the operator consistent with these guidelines."[224] The Guidelines reference the possibility of allowing payment into a "fund" for any remaining "balance," indicating on their face that operators must attempt to make all feasible expenditures directly to meet their Guidelines' spending obligations. There is no evidence that this fund was ever set up by the Board, so, in practice, all expenditures were made directly.[225] "One way or another, the amount required by the Guidelines must be spent."[226]

108. Under the Guidelines, in an OA period where the operator exceeds its R&D requirement, that excess amount may be applied against its requirement for the subsequent OA period. However, the carryover only applies to the subsequent OA period and not to any OA period thereafter. As a result, operators forfeit credit for amounts spent in excess of the Guidelines' target amount in a given OA period if those amounts also exceed the expenditure requirement applicable in the next OA period.[227]

109. The Guidelines also require operators to obtain pre-approval of individual expenditures by making an application to

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Board recalculates projected spending commitments based on actual production levels and prices. **C-3**, Guidelines, § 2.2.2.

[224] *Id*. § 4.2 (emphasis added).

[225] **C-127**, CNLOPB Agenda for Board Meeting (Mar. 25, 2014) ("C-NLOPB does not manage a 'R&D Fund'."); **C-128**, C-NLOPB, Research and Development – Education and Training – Guidelines Overview (Feb. 5, 2015) ("C-NLOPB does not manage a 'R&D Fund'[.]").

[226] **CW-1**, Phelan Statement I, ¶ 23.

[227] **C-3**, Guidelines, § 4.2.

the Board before beginning each R&D activity that they plan to undertake.[228]

110. The Guidelines acknowledge the Board's lack of experience regulating R&D expenditure levels and suggest that that inexperience justifies the Board's reliance on the Statistics Canada data to base a benchmark.[229] Requiring operators to match their own R&D expenditures to the Statistics Canada-driven benchmark constituted an entirely new, artificial spending obligation unrelated to the commercial reality that drove R&D spending prior to the Guidelines. According to their approved Benefits Plans, the Hibernia and Terra Nova project owners were only required to accord priority consideration to local service providers, on a competitive basis, after they decided to undertake R&D in the usual course of business.[230]

111. Under the Guidelines, by contrast, operators have been required to meet an externally-imposed expenditure requirement divorced from the actual needs of the projects. Indeed, the benchmark is based on an inherently flawed and unreliable metric for the average spending behavior of a range of upstream and downstream companies operating projects in Canada at different phases of their lifespan, on shore and off.[231] More troubling than the arbitrariness of the benchmark is the spending feedback loop that it creates: "[S]pending made for Guidelines' credit serves to increase [the Projects'] obligations under the Guidelines in future years because of its inclusion in

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[228] *Id.* § 4.1. An R&D Work Expenditure Application Form is attached to the Guidelines. *See also* **CW-3**, Sampath Statement I, ¶¶ 12-13.

[229] **C-3**, Guidelines, § 2.2 ("In the absence of experience on which to base a benchmark for such expenditures, the C-NOPB examined the level of such expenditures by petroleum companies in Canada").

[230] *Supra* Section II.D.1.c.

[231] **CW-6**, Hutchings Statement I, ¶¶ 38-52, and **CW-1**, Phelan Statement I, ¶¶ 29-32.

the benchmark, thereby ratcheting upward [the Projects'] obligation as time goes on."[232]

(c) Issuance of the POAs/OAs Was, and Is, Conditional On Compliance with the Guidelines

112. Despite their title, compliance with the Guidelines is incontrovertibly required. The Guidelines on their face purport to establish a series of "requirements."[233] As Krishnaswamy Sampath, HMDC's R&D Manager for much of the period at issue in this arbitration, explains, "[t]he Board regards the Guidelines as mandatory and, therefore, the project operators are bound to follow them as a matter of Canadian law and as a condition of the respective projects' Operations Authorization[.]"[234]

113. The Board has repeatedly and regularly demanded operators make commitments to and abide by the Guidelines, in addition to demanding an accounting of past R&D expenditures ostensibly for the purpose of enforcing compliance retroactively to the effective date of April 1, 2004.[235] This was most evident in the Board's approach to POAs/OAs, without which operators may not operate or produce.

114. As Ted O'Keefe, then HMDC's Regulatory and Environment Lead, observes, "[t]he Board has used the POA application process as a lever to enforce compliance with the

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[232] **CW-1**, Phelan Statement I, ¶ 32. *See also* **CW-6**, Hutchings Statement I, ¶ 51 (explaining how the Projects' "inflated R&D data is then factored into the benchmark set under the Guidelines, thereby increasing even further the R&D spending obligations of the projects, and the cycle begins anew").

[233] *Infra* ¶¶ 245-252.

[234] **CW-3**, Sampath Statement I, ¶ 11.

[235] *E.g.*, **C-123**, Letter from F. Smyth, CNLOPB, to P. Sacuta, HMDC (Feb. 26, 2009); **C-124**, Letter from F. Smyth, CNLOPB, to G. Vokey, Petro-Canada (Mar. 3, 2009).

Guidelines."[236] Shortly after the Guidelines were promulgated, the POA for Terra Nova was up for renewal. Petro-Canada, as project operator, had submitted an application for a new POA on July 14, 2004, i.e., before issuance of the Guidelines. The Board did not respond until January 27, 2005,[237] at which time it granted the application subject to a set of appended conditions.[238] Condition 15 read: "The Operator *shall* comply with the *Guidelines for Research and Development Expenditures* as issued by the Board November 5, 2004 and with effect from April 1, 2004."[239] A project operator has no choice but to accept the Board's unilaterally imposed conditions in a POA/OA, and cannot continue production without a valid POA/OA.[240]

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[236] **CW-2**, O'Keefe Statement I, ¶ 24.

[237] The Board extended the renewal deadline for the POA to January 29, 2005. **C-129**, Letter from F. Way, CNLOPB, to G. Carrick, Petro-Canada (Aug. 18, 2004) (extending Terra Nova POA until November 30, 2004); **C-130**, Letter from F. Way, CNLOPB, to G. Carrick, Petro-Canada (Nov. 30, 2004) (extending Terra Nova POA until January 29, 2005).

[238] **C-131**, CNLOPB, Terra Nova POA, January 27, 2005 – March 31, 2008.

[239] *Id.* (emphasis added). This POA was extended three times, until September 30, 2008. **C-129**, Letter from F. Way, CNLOPB, to G. Carrick, Petro-Canada (Aug. 18, 2004) (extending Terra Nova POA until November 30, 2004); **C-130**, Letter from F. Way, CNLOPB, to G. Carrick, Petro-Canada (Nov. 30, 2004) (extending Terra Nova POA until January 29, 2005); **C-132**, Letter from M. Ruelokke, CNLOPB, to A. Brown, Petro-Canada (Feb. 15, 2008) (extending Terra Nova POA from March 31, 2008 to September 30, 2008).

[240] **CW-1**, Phelan Statement I, ¶ 34; **CW-2**, O'Keefe Statement I, ¶¶ 24-25; **C-133**, Memorandum from F. Way, CNLOPB, to Board Members, CNLOPB, at 3 (Jan. 28, 2004) ("The POA for Terra Nova is up for 5-year renewal on August 31, 2004, and for Hibernia the 5-year renewal date is November 1, 2005. Production cannot continue until a new POA is issued."). Had the Terra Nova interest owners refused to accept the Board's condition and abandoned

115. On February 18, 2005, the Board wrote to HMDC (regarding Hibernia) and Petro-Canada (regarding Terra Nova) as operators of the projects advising them of their obligations under the Guidelines from the effective date of April 1, 2004 through the end of 2004. The Board assessed HMDC's financial commitments for those nine months at $9.16 million, and Petro-Canada's at $5.31 million.[241] In a separate letter from the Board's counsel, the Board indicated that it would not seek to enforce compliance with the Guidelines during the pendency of a court proceeding by the operators challenging the legality of the Guidelines under Canadian law.[242] However, the Board made it clear that the amounts it calculated were mandatory and would be enforced if the Guidelines were ultimately upheld under Canadian law.[243]

116. The Hibernia POA was set to expire on November 1, 2005. As operator, HMDC submitted an application for a new POA on October 25, 2005. At the Board's request, the application included the same condition appended to the Terra Nova POA: "The Operator shall comply with the *Guidelines for Research and Development Expenditures* as issued by the Board November 5, 2004 and with effect from April 1, 2004[.]"[244] Ted

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the project, they would have effectively surrendered 136 million barrels of oil slated for production. **C-28**, CNLOPB Cumulative Production Chart (Jan. 21, 2016).

[241] **C-134**, Letter from F. Way, CNLOPB, to J. Taylor, HMDC (Feb. 18, 2005); **C-135**, Letter from F. Way, CNLOPB, to G. Carrick, Petro-Canada (Feb. 18, 2005). In its letter to Petro-Canada, the Board assessed Terra Nova's expenditure obligation through January 26, 2005, whereas it assessed Hibernia's obligation through December 31, 2004. It is unclear why the January date was used.

[242] **C-136**, Letter from I. Kelly, Curtis Dawe Barristers, Solicitors & Notaries, to J. Thistle, McInnes Cooper Barristers & Solicitors (Mar. 3, 2005).

[243] *Id.*

[244] **C-137**, Letter from J. Taylor, HMDC, to F. Way, CNLOPB, transmitting Hibernia POA Application, Condition 7 (Oct.

O'Keefe, then HMDC's Regulatory and Environment Lead, recalls that, "HMDC had no choice but to submit the application in the form prescribed by the Board. If we did not agree to the condition, the Board could have denied the POA and we would have had to cease production operations."[245] HMDC therefore submitted a protest letter with the application, in which it stated that it was signing and submitting the Application prescribed by the Board, subject to certain objections, including HMDC's position that the Board lacked authority to impose the Guidelines.[246] HMDC also provided annotations in its application form to make it clear the application was subject to both the Board's condition and the objections stated in the protest letter.[247]

117. On October 28, 2005, the Board responded by indicating it would not accept the application subject to HMDC's objections and directed HMDC to resubmit the application without those provisions.[248] The Board also reiterated that it did not intend to enforce compliance with the Guidelines while the court action was pending but nonetheless noted that "HMDC assumes any risk of noncompliance while the legal proceeding is outstanding."[249] The Board further stated that "the Guidelines are effective from April 1, 2004 and the expenditure requirements will be determined on that basis, subject to any Order which the Court may make."[250]

25, 2005) (emphasis added) (the letter is mistakenly dated October 25, 2004).

[245] **CW-2**, O'Keefe Statement I, ¶ 24.

[246] **C-137**, Letter from J. Taylor, HMDC, to F. Way, CNLOPB, transmitting Hibernia POA Application.

[247] *Id.*

[248] **C-138**, Letter from F. Way, CNLOPB, to J. Taylor, HMDC (Oct. 28, 2005).

[249] *Id.*

[250] *Id.*

118. In accordance with the Board's directive, and cognizant of the "enormous loss and costs associated with [potentially] ceasing operations altogether," HMDC resubmitted its POA without qualification on October 31, 2005.[251] Instead of asserting its objections in the application, HMDC requested that a copy of its October 25, 2005 letter and a copy of the Board's October 28, 2005 letter be filed and attached to the POA to record the respective positions of HMDC and the Board.[252] On November 1, 2005, the Board issued a new POA for Hibernia, effective until October 29, 2008, and attached the letters as requested.[253] The POA was extended three times, until December 15, 2009.[254]

119. The subsequent OAs for Hibernia included equivalent requirements that the project abide by the Guidelines:

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[251] **CW-2**, O'Keefe Statement I, ¶ 25. Had the Projects' owners refused to accept the Board's condition and abandon their activities, they would have foregone the extraction of hundreds of millions of barrels of oil slated for production. **CW-1**, Phelan Statement I, 34; *see also* **C-139**, CNLOPB, 2014-2015 Annual Report (June 26, 2015), at p. 26 (stating that CNLOPB has estimated that Hibernia field's oil reserves amount to 1.644 billion barrels and Terra Nova field's oil reserves amount to 528 million barrels).

[252] **C-140**, Letter from J. Taylor, HMDC, to F. Way, CNLOPB (transmitting Hibernia POA Application) (Oct. 31, 2005).

[253] **C-141**, Letter from H. Pike, CNLOPB, to T. O'Keefe, HMDC (transmitting Hibernia POA, Nov. 2, 2005 – Oct. 29, 2008) (Nov. 1, 2005). The Board's letter explicitly provided that the POA was subject only to the conditions imposed by the Board in the application form, not the objections asserted by HMDC.

[254] **C-142**, Letter from M. Ruelokke, CNLOPB, to P. Sacuta, HMDC (Feb. 15, 2008) (extending Hibernia POA until April 30, 2009); **C-143**, Letter from M. Ruelokke, CNLOPB, to P. Sacuta, HMDC (Oct. 6, 2008) (extending Hibernia POA until October 30, 2009); **C-144**, Letter from M. Ruelokke, CNLOPB, to P. Sacuta, HMDC (Oct. 30, 2009) (extending Hibernia POA until December 15, 2009).

Hibernia	
Dates of OA Validity	Guidelines Compliance Requirement
December 16, 2009 – October 31, 2012	"The Operator shall comply with the *Guidelines for Research and Development Expenditures* as issued by the Board November 5, 2004 and with effect from April 1, 2004[.]"[255]
November 1, 2012 – January 28, 2016	"The Operator shall comply with the *Guidelines for Research and Development Expenditures* as issued by the Board November 5, 2004 and with effect from April 1, 2004[.]"[256]
January 27, 2016 – October 30, 2018	"The Operator shall comply with the *Guidelines for Research and Development Expenditures* as issued by the Board November 5, 2004 and with effect from April 1, 2004[.]"[257]

[255] **C-145**, Letter from F. Smyth and H. Pike, CNLOPB, to P. Sacuta, HMDC, attaching HMDC's Operations Authorization, Condition 7.

[256] **C-146**, Hibernia Operations Authorization Form (Nov. 1, 2012), Condition 8; *also note* **C-147**, Letter from S. Tessier, CNLOPB, to J. Walck, HMDC (Oct. 28, 2015) (extending Hibernia OA until January 28, 2016).

[257] **C-148**, Hibernia Operations Authorization Form (Jan. 27, 2016), Condition 6.

120. Similarly, subsequent Terra Nova POAs/OAs were conditioned on compliance with the Guidelines:

Terra Nova	
Dates of OA Validity	Guidelines Compliance Requirement
October 1, 2008 – September 30, 2011	"The Operator shall comply with the *Guidelines for Research and Development Expenditures* as issued by the Board November 5, 2004 and with effect from April 1, 2004[.]"[258]
October 1, 2011 – October 1, 2014	"The Operator shall comply with the *Guidelines for Research and Development Expenditures* as issued by the Board November 5, 2004 and with effect from April 1, 2004[.]"[259]
December 31, 2014 – October 4, 2017	"The Operator shall comply with the *Guidelines for Research and Development Expenditures* as issued by the Board November 5,

[258] **C-149**, Letter from M. Ruelokke & H. Pike, CNLOPB, to A. Brown, Petro-Canada, (Sept. 30, 2008) (transmitting Terra Nova POA, October 1, 2008 – September 30, 2011), Condition 7. *Also note* **C-150**, Letter from D. Hawkins & H. Pike, CNLOPB, to A. Brown, Petro-Canada (May 29, 2009) (transmitting amended Terra Nova POA, May 29, 2009 – September 30, 2011).

[259] **C-151**, Letter from M. Ruelokke, CNLOPB to S. Martin, Suncor Energy Inc. (transmitting Terra Nova OA, Oct. 1, 2011 to Oct. 1, 2014), Condition 8.

Terra Nova	
Dates of OA Validity	Guidelines Compliance Requirement
	2004 and with effect from April 1, 2004[.]"[260]

121. In its most recent statement on Hibernia's spending requirement under the Guidelines, the Board has calculated Hibernia's requirement over the period from May 1, 2012 to April 30, 2015 amounted to [redacted].[261] For Terra Nova, the Board has calculated the spending requirement over the period from April 1, 2011 to March 31, 2014 amounted to [redacted].[262]

E. The Projects' Efforts to Devise Spending Opportunities to Comply with the Guidelines Without Prejudice to NAFTA Claims

122. In September 2008, the Supreme Court of Newfoundland and Labrador Court of Appeal rejected a domestic court challenge to the Guidelines brought by HMDC

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[260] **C-152**, Terra Nova Operations Authorization Form (December 31, 2014 – October 4, 2017), Condition 6.

[261] **C-125**, Letter from S. Tessier, CNLOPB, to J. Walck, HMDC (September 30, 2015) (calculating annual R&D and E&T spending obligations at Hibernia from May 1, 2012 through April 30, 2015).

[262] **C-126**, Letter from M. Baker, CNLOPB, to D. Zeller, Suncor Energy Inc. (June 11, 2014) (calculating annual R&D and E&T spending obligations at Terra Nova from April 2, 2011 through March 31, 2014).

and Petro-Canada,[263] and, after the Supreme Court of Canada dismissed the application for leave to appeal on February 19, 2009,[264] the Projects increased their overall expenditures on local R&D and E&T in order to fulfil their obligations under the Guidelines.[265]

1. Industry Developed and Executed Focused Plans to Increase R&D and E&T Spending to Comply with the Guidelines

123. Compliance with the Guidelines posed a real challenge for mature projects, as R&D and E&T expenditures were, by that point, no longer generally required on a large scale. In 2009, Hibernia and Terra Nova were already well past their development phases and into their production phases, which meant there was little need for R&D in the ordinary course of business.[266] Compounding the challenges, there was a lack of human resource and infrastructure capacity in the Province to absorb the additional spending arising from the Guidelines.[267] These and other practical difficulties prompted an extraordinary level of coordination among industry, the Board, and public and

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[263] **C-153**, *Hibernia and Petro-Canada v. C-NOPB*, Supreme Court of Newfoundland and Labrador Court of Appeal, 2008 NLCA 46 (Sept. 4, 2008).

[264] **C-154**, Judgment No. 32866 of the Supreme Court of Canada, http://scc-csc.lexum.com/scc-csc/scc-l-csc-a/en/11150/1/document.do (last visited Mar. 3, 2016) (dismissing applications for leave to appeal).

[265] **CW-1**, Phelan Statement I, ¶ 44 ("the Hibernia and Terra Nova projects ramped up Guidelines-eligible expenditures in order to 'spend down' the Board-assessed shortfalls"). These compliance efforts were done without prejudice to the NAFTA claims of Mobil and its affiliates.

[266] **CW-1**, Phelan Statement I, ¶ 27; **CW-5**, Noseworthy Statement I, ¶ 13; **CW-4**, Ringvee Statement I, ¶ 13.

[267] **CW-4**, Ringvee Statement I, ¶ 14.

private institutions to help industry meet the spending obligations imposed by the Guidelines.[268]

124. The Board encouraged the industry to work together to find ways to increase R&D spending in compliance with the Guidelines.[269] In September 2008, the Board convened a meeting of senior management representatives from the operators of the projects located in the Province to discuss how to close the gap between actual spending and the Guidelines' requirements.[270] That same month, CAPP[271] coordinated the formation of an industry-wide R&D Task Force among the project operators subject to the Guidelines.[272] The Task Force's purpose was to foster dialogue concerning challenges posed by the Guidelines and to devise a coordinated strategy at the industry level for meeting the expenditure obligations.[273]

125. In early 2009, the Board sent letters to HMDC and Petro-Canada, as respective operators of the Hibernia and Terra Nova Projects, to advise them of their unsatisfied expenditure requirements under the Guidelines from April 1, 2004 through December 31, 2008 and to require an accounting of such spending during that period.[274] Around that time, the Task Force participants met again with the Board to present the industry's response to the questions raised at the September 2008

268 *Id.* ¶¶ 16-26.

269 *Id.* ¶ 10.

270 *Id.*

271 As defined in ¶ 99, CAPP refers to the Canadian Association of Petroleum Producers.

272 **CW-4**, Ringvee Statement I, ¶ 11.

273 *Id.*

274 **C-123**, Letter from F. Smyth, CNLOPB, to P. Sacuta, HMDC (Feb. 26, 2009); **C-124**, Letter from F. Smyth, CNLOPB, to G. Vokey, Petro-Canada (Mar. 3, 2009). *See also* **CW-1**, Phelan Statement I, ¶ 40.

meeting.[275] Andrew Ringvee, who attended that meeting as part of the Task Force, recalls that industry "told the Board about the practical challenges and uncertainties [it was] facing in order to comply with the Guidelines."[276] Among the noted challenges was the lack of in-Province R&D capacity to handle the additional R&D spending required by the Guidelines.[277] Despite the serious challenges, the industry conveyed that they preferred to meet the Guidelines' spending obligation through a combination of additional project-specific R&D projects, joint industry R&D projects, and owner specific initiatives.[278]

126. As a next step, the industry assessed larger joint industry projects, spread over several years, in an effort to meet the spending minimums set under the Guidelines.[279] It was important that the Projects "find big-dollar R&D projects because such projects would maximize [their] R&D expenditures while diverting a minimal amount of personnel and overhead resources from our usual business (and therefore minimize the operational and administrative costs that we incurred by complying with the Guidelines)."[280]

127. By December 2009, while industry was actively devising ways to increase R&D spending, the Board had calculated that Hibernia's shortfall (*i.e.*, the difference between the spending *required* under the Guidelines over a particular period and the total spending *undertaken* by the Projects over that particular period, as determined by the Board[281]) between the effective date of the Guidelines and the end of 2008

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[275] **C-155**, CAPP, CNLOPB R&D Guidelines, Administration of Unspent R&D Obligations, Industry Feedback to CNLOPB (February 26, 2009).

[276] **CW-4**, Ringvee Statement I, ¶ 14.

[277] *Id.*

[278] *Id.* ¶ 15.

[279] *Id.* ¶¶ 17, 19; **CW-1**, Phelan Statement I, ¶ 38.

[280] **CW-5**, Noseworthy Statement I, ¶ 17.

[281] *Also note* **C-2**, Award ¶ 157 (definition of shortfall).

amounted to [redacted].[282] The Board had calculated that Terra Nova's shortfall over the corresponding period amounted to [redacted].[283]

128. The Board required the Hibernia and Terra Nova operators to submit work plans to address the significant spending shortfalls.[284] It also required the Projects' owners to make financial guarantees for the full amount of the shortfalls by letters of credit.[285] The Board indicated that it would condition renewal of the Projects' POAs/OAs upon satisfaction of these requirements.[286]

129. As required by the Board, on March 31, 2010, HMDC and Suncor submitted work plans outlining their multi-faceted approaches for closing the spending gaps.[287] The work

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[282] **C-156**, CNLOPB, Staff Analysis of the Research and Development Education and Training Report Hibernia Project (April 2004 to December 2008) (Dec. 1, 2009).

[283] **C-157**, CNLOPB, Staff Analysis of the Research and Development Education and Training Report Terra Nova Project (April 2004 to December 2008) (Dec. 1, 2009).

[284] **CW-4**, Ringvee Statement I, ¶ 23; **C-158**, Letter from J. Bugden, CNLOPB, to P. Sacuta, HMDC (Dec. 10, 2009); **C-159**, Letter from J. Bugden, CNLOPB, to G. Vokey, Suncor Energy Inc. (Dec. 15, 2009); **C-160**, Letter from M. Ruelokke, CNLOPB, to A. Brown, Suncor Energy, Inc. (Mar. 24, 2010).

[285] **CW-1**, Phelan Statement I, ¶¶ 42, 44-45, 90-91. *See also* **C-158**, Letter from J. Bugden, CNLOPB, to P. Sacuta, HMDC (Dec. 10, 2009); **C-161**, Letter from M. Ruelokke, CNLOPB, to P. Sacuta, HMDC (Mar. 24, 2010); **C-159**, Letter from J. Bugden, CNLOPB, to G. Vokey, Suncor Energy Inc. (Dec. 15, 2009); **C-160**, Letter from M. Ruelokke, CNLOPB, to A. Brown, Suncor Energy, Inc. (Mar. 24, 2010).

[286] **C-158**, Letter from J. Bugden, CNLOPB, to P. Sacuta, HMDC (Dec. 10, 2009); **C-159**, Letter from J. Bugden, CNLOPB, to G. Vokey, Suncor Energy Inc. (Dec. 15, 2009).

[287] **CW-4**, Ringvee Statement I, ¶¶ 24-25; **C-162**, HMDC, Hibernia R&D Work Plan to Meet C-NLOPB R&D Guidelines (March

plans contemplated spending on project-level R&D projects, funding a number of joint-industry projects, and R&D capacity-building initiatives.[288] After reviewing the Projects' work plans, the Board acknowledged that they met the conditions it had imposed on their respective OAs, as described above at paragraphs 114 to 120.[289]

130. In May 2010, the Hibernia and Terra Nova project owners submitted the financial instruments required by the Board to secure the shortfall amounts.[290] The Board then confirmed to the Projects' operators that these instruments satisfied the corresponding conditions in the OAs.[291]

2. R&D and E&T Spending Between 2009 and Early 2012

131. Consistent with their respective work plans, both Projects made aggressive plans and took concrete steps to increase R&D and E&T spending so as to comply with the Guidelines. They relied on a combination of approaches, including funding project-level R&D and participating in joint-industry projects.[292]

31, 2010); **C-163**, Suncor Energy Inc., Terra Nova R&D and E&T Workplan: CNLOPB Submission (March 31, 2010).

[288] **CW-4**, Ringvee Statement I, ¶ 24.

[289] *Id.* ¶ 26; **C-164**, Letter from M. Ruelokke, CNLOPB, to P. Sacuta, HMDC (Apr. 1, 2010); **C-165**, Letter from M. Ruelokke, CNLOPB, to A. Brown, Suncor Energy Inc. (Apr. 1, 2010).

[290] **C-166**, ExxonMobil Canada Properties, Letter of Credit for 2004-2008 Hibernia R&D Obligation (May 19, 2010); **C-167**, ExxonMobil Canada Properties, Letter of Credit for 2004-2008 Terra Nova R&D Obligation (May 19, 2010).

[291] **C-168**, Letter from M. Ruelokke, CNLOPB, to P. Sacuta, HMDC (June 1, 2010); **C-169**, Letter from M. Ruelokke, CNLOPB, to A. Brown, Suncor Energy Inc. (June 1, 2010).

[292] **CW-1**, Phelan Statement I, ¶¶ 36-38.

132. With their OAs on the line, the Projects had no choice but to continue making significant R&D and E&T expenditures above and beyond actual project needs in order to meet the spending minimums set by the Board under the Guidelines.[293]

133. In the Mobil I Arbitration, the majority granted the vast majority of expenditures Mobil claimed as incremental (*i.e.*, expenditures that would not have been made in the absence of the Guidelines), awarding all but three of the incremental items.[294] The Mobil I Arbitration only dealt with incremental expenditures through December 31, 2011 (Terra Nova) and April 30, 2012 (Hibernia).[295]

3. From 2012 onwards, Mobil Has Continued to Suffer Losses as a Result of the Guidelines

134. The Mobil I Majority determined that the Guidelines constituted a "continuing breach" of the NAFTA.[296] As anticipated, Mobil's losses due to the Board's continuing

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[293] **CW-1**, Phelan Statement I, ¶¶ 34, 51; **CW-2**, O'Keefe Statement I, ¶¶ 24-25.

[294] **C-2**, Mobil I Award ¶ 129 (table).

[295] *Id.* The two different dates were used because, in light of the fact that Hibernia's POA was renewed at the end of 2012, the Board had already issued its decisions with regard to Hibernia's Guidelines obligation and eligible expenditures for the period between January 1 and April 30, 2012. **C-170**, Letter from J. Bugden, CNLOPB, to J. Long, HMDC (July 16, 2012). This circumstance allowed the Mobil I Claimants to calculate their actual damages through the end of that period. Conversely, when the Mobil I Claimants made their damages submission, the most recent Board decisions with regard to Terra Nova related to the 2011 calendar year. **C-171**, Letter from J. Bugden, CNLOPB, to D. Zeller, Suncor Energy Inc. (June 7, 2012). *See also* **CW-1**, Phelan Statement I, ¶ 49 (explaining why two different end dates were referred to in the Mobil I Claimants' damages submission).

[296] **C-1**, Decision ¶ 429.

enforcement of the Guidelines did not come to an end on December 31, 2011 (at Terra Nova) or April 30, 2012 (at Hibernia).[297] The Board has continued to enforce the Guidelines after the Decision was rendered on May 22, 2012 and after the Award was rendered on February 20, 2015. The Projects in which Mobil has invested have continued to comply with the Guidelines, causing Mobil to incur significant sums in incremental R&D and E&T expenditures as a result.

135. HMDC's R&D Manager for much of this period, Krishnaswamy Sampath, explains: "the projects' respective operators and owners have undertaken extraordinary and novel measures so that they can meet their respective spending obligations. … The Hibernia and Terra Nova projects funded a number of R&D activities between 2012 and 2015 that were not required for the safety or success of the projects themselves."[298] These included, *inter alia*, a large number of joint industry projects and individual studies investigating matters as diverse as [redacted],[299] the effects of large scale iceberg impacts, [redacted],[301] the impact of seismic activities on shrimp, and three-dimensional

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[297] *Id.* ¶ 478.

[298] **CW-3**, Sampath Statement I, ¶¶ 22, 25. *See also* **CW-7**, First Witness Statement of Paul Durdle ("Durdle Statement I"), ¶ 15 ("Because our expenditure obligations are so high, and there is so much money that must be spent by the Hibernia and Terra Nova projects to meet them, we have begun to spend money on safety R&D and E&T in circumstances where we are getting very little value added in return."); **CW-1**, Phelan Statement I, ¶ 51 ("at both Hibernia and Terra Nova, during the periods at issue in this arbitration, the amount of R&D and E&T spending made in the ordinary course of business would have been insufficient to satisfy the spending required by the Guidelines").

[299] **CW-3**, Sampath Statement I, ¶¶ 40-41.

[300] *Id.* ¶¶ 70-71.

[301] *Id.* ¶¶ 60-61.

[302] **CW-8**, First Witness Statement of Robert Dunphy ("Dunphy Statement I"), ¶¶ 15-16.

profiling of icebergs.[303] These and many other R&D and E&T projects would not have been funded in the absence of the Guidelines.

136. From May 1, 2012 to December 31, 2015, the Hibernia project made [redacted] in "incremental expenditures"—that is, expenditures that would not have been made in the absence of the Guidelines.[304] The Terra Nova project spent [redacted] from January 1, 2012 to December 31, 2015 on incremental expenditures.[305] "Mobil, as an investor in the projects, ultimately bears its share of spending made through the projects' respective joint accounts according to its *pro rata* ownership interests. … In this way, the increased spending caused by the implementation of the Guidelines represents a loss to Mobil."[306]

III.

A COMPETENT NAFTA TRIBUNAL HELD THAT APPLICATION OF THE GUIDELINES CONSTITUTED A "CONTINUING BREACH" OF THE NAFTA

A. The Mobil I Arbitration

137. In November 2007, Mobil and Murphy Oil Corporation ("Murphy" and, with Mobil, "Claimants" in the Mobil I Arbitration) filed a Request for Arbitration against Canada pursuant to the ICSID Additional Facility Rules and Chapter 11 of the NAFTA. Claimants requested relief for Canada's violation of NAFTA Article 1105 (minimum standard

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303 **CW-3**, Sampath Statement I, ¶¶ 113-114.

304 **CW-1**, Phelan Statement I, Annex A Table "Summary of Mobil Investments' Claim for Incremental Expenditures (2012-2015)", Reference G.

305 *Id.*

306 *Id.* ¶ 52.

of treatment) and Article 1106 (prohibition on performance requirements), while disputing Canada's defense that the Guidelines were covered by its reservation under the NAFTA for certain parts of the Federal Accord Act.[307]

138. As detailed below, the Mobil I Majority concluded that Canada is committing a continuing violation of the NAFTA prohibition on performance requirements and also found that the Guidelines were not within the scope of Canada's reservation under the NAFTA.

B. The Mobil I Decision on Liability and on Principles of Quantum (2012)

(a) Article 1106

139. The Mobil I Tribunal issued its Decision on Liability and on Principles of Quantum on May 22, 2012. After extensive written submissions and a four-day oral hearing on the merits,[308] the Mobil I Majority found that the Guidelines violate Article 1106(1) of the NAFTA.[309] Article 1106(1) prohibits the Parties, including Canada, from imposing or enforcing a requirement, in connection with the operation or conduct of an investment, "to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory."[310]

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307 **C-1**, Decision ¶¶ 100-101.

308 **C-1**, Decision ¶ 27.

309 **C-1**, Decision ¶ 490; *also note* ¶¶ 211-225, 233-242, and 246. Additionally, the Mobil I Tribunal concluded that the adoption and application of the Guidelines do not violate Article 1105 of the NAFTA. *Id.* ¶ 490(1). Mobil is not asserting a claim under Article 1105 in this arbitration.

310 Importantly, the prohibition on performance requirements applies to *all* investments in Canada, not just those of U.S. and Mexican Investors. **CL-5,** NAFTA, Article 1101(1) ("This Chapter

140. In assessing whether the Guidelines breached Article 1106, the Mobil I Tribunal viewed the question before it as follows:

> [W]hether those 2004 Guidelines impose requirements "to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory" within the meaning of Article 1106(1)(c), and whether R&D and E&T constitute 'services' within the meaning of Article 1106(1)(c).[311]

141. The Mobil I Tribunal first concluded that the term "services" includes R&D and E&T.[312] Next, it rejected Canada's argument that the Guidelines did not breach Article 1106 because they were not mandatory, instead finding "ample evidence of the requisite degree of compulsion for the purposes of Article 1106."[313] In reaching that conclusion, it determined that the "2004 Guidelines introduce a new and different approach, and it is obviously not the case that an operator may choose for itself whether to follow the requirements or not."[314]

142. The Mobil I Tribunal concluded with respect to Article 1106:

- R&D and E&T requirements imposed by the 2004 Guidelines are "services" within the meaning of Article 1106;
- the 2004 Guidelines and their implementation impose legal requirements on operators to undertake R&D and E&T expenditures in the Province; and

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applies to measures adopted or maintained by a party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party").

311 **C-1**, Decision ¶ 212.

312 *Id.* ¶ 216.

313 *Id.* ¶ 234.

314 *Id.* ¶ 235.

- subject to the requirements of Article 1108, the R&D and E&T requirements of the Guidelines, and the implementation thereof, constitute a prohibited performance requirement under Article 1106 of the NAFTA.[315]

(b) Article 1108

143. The Decision went on to address Article 1108 ("Reservations and Exceptions"). The Mobil I Majority held that the Guidelines are not exempted by Article 1108 and Annex I, which excuses from the application of Article 1106 any "existing non-conforming measure" that is included in Canada's Schedule to Annex I to the NAFTA, and any "subordinate measure adopted . . . under the authority of and consistent with the measure."[316] As noted above, Canada listed certain specific provisions of the Federal Accord Act in its Schedule to Annex I.[317]

144. In reaching its Article 1108 conclusion, the Mobil I Majority first noted that "[c]onsideration of Article 1108 and the NAFTA reservations is largely a matter of first impression."[318] A reservation extends to and encompasses both the "non-conforming measure" set out in Annex I and "any subordinate measure" that has been "adopted or maintained under the authority of and consistent with the measure."[319]

145. In other words, for the Guidelines to be encompassed by the Annex I reservation, they needed to be consistent with the reserved portions of the Federal Accord Act

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315 *Id.* ¶ 246.

316 **CL-5**, NAFTA, Art. 1108(1); *id.* at Annex I, ¶ 2(f)(ii).

317 *Supra* ¶ 91.

318 **C-1**, Decision ¶ 249.

319 **CL-**5, NAFTA, Annex I ¶ 2(f)(ii).

as well as any prior qualifying subordinate measures.[320] The Mobil I Majority determined, therefore, that the Guidelines' consistency needed to be assessed against the Hibernia and Terra Nova Benefits Plans and the related Board Decisions.[321]

146. The meaning of "consistent with" was determined by analyzing "whether and how the scope of the reservation has been impacted" and, in this connection, the Majority observed that the "amendment standard in Article 1108 and the consistency standard in paragraph 2(f) … are substantively reinforcing and tug in the same direction, namely, to ensure that the reservations are not expanded or altered to such a degree so as to enlarge the non-conformity of the reservation vis-a-vis the obligation against which the measure is reserved."[322]

147. The Mobil I Majority found:

> The particular approach contained in the 2004 Guidelines has introduced expenditure requirements, reporting requirements, and financial administrative adjustments that result in a set of additional obligations with respect to the Hibernia and Terra Nova projects that are different in nature and degree than those previously applied to those projects. Examining all of these attributes together, the Majority is of the view that the changes that have been introduced and applied to Hibernia and Terra Nova amount to more than mere changes in methodology, but in fact reflect a fundamentally different approach to compliance, compared to the Federal Accord Act and the Hibernia and Terra Nova Benefits Plans.[323]

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[320] **C-1**, Decision ¶ 325 ("In our view, under a proper interpretation of paragraph 2(f) of the interpretative note, the new subordinate measure, the 2004 Guidelines, is to be textually and logically evaluated with respect to the reserved measure and the existing subordinate measures that meet the criteria of paragraph 2(f).").

[321] *Id.* ¶ 343.

[322] *Id.* ¶ 341.

[323] *Id.* ¶ 398.

148. And based on the foregoing, the Mobil I Majority concluded:

> [T]he 2004 Guidelines introduce additional and different expenditure, reporting, oversight and administrative requirements that are quantitatively and qualitatively different, and more burdensome from that which existed prior to the introduction of the 2004 Guidelines. In so doing, the 2004 Guidelines render the local content regime that arises, more non-conforming with Article 1106 than was the case when the measures that applied to the Hibernia and Terra Nova investment projects were defined by the Federal Accord Act, the Hibernia and Terra Nova Benefits Plans, and related Board Decisions.[324]

149. Thus, the Mobil I Majority concluded that the Guidelines are "inconsistent" with the Federal Accord Act, the Hibernia and Terra Nova Benefits Plans, and related Board Decisions. As a result, they are not encompassed by Canada's Annex I reservation.[325] It thus followed that Article 1106 was breached.

(c) Principles of Quantum

150. Having found Canada to be in breach of Chapter 11, the Mobil I Majority determined that the Claimants should recover their compensable losses. First, the Mobil I Majority noted that Article 1116(1) requires *inter alia* "that the investor must have incurred 'loss or damage by reason of, or arising out of, that breach' of Chapter XI of the NAFTA."[326] According to the Mobil I Majority, Article 1116(1) does not limit damages to those incurred in the past and thereby preclude damages for a breach that began in the past and continues, resulting in quantifiable losses that must be paid in the future.[327] Thus, the

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324 *Id.* ¶ 409.

325 *Id.* ¶ 413.

326 *Id.* ¶ 427.

327 *Id.*

Guidelines triggered an obligation to make expenditures that would continue over the life of the projects, i.e., a "continuing breach," causing ongoing damage to the Claimants' interests in their investments.[328]

151. However, the Mobil I Majority considered there to be a distinction between deciding whether damages are *incurred* so as to allow the Tribunal to exercise jurisdiction under Article 1116(1) and grant compensation, and deciding whether damages can be established in order to be compensated.[329] In determining the quantum of damages, the Mobil I Majority took the approach that they would consider any actual loss incurred as of the date of the Decision. To be "actual," there must have been "a firm obligation to make a payment" and "a call for payment or expenditure, or the occurrence of payment or expenditure has transpired."[330] Anticipating losses that would become actual in the future, the Mobil I Majority instructed that, "[g]iven that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings."[331]

C. The Mobil I Award (2015)

152. The Mobil I Tribunal issued the Award on February 20, 2015. In the Award, Canada was ordered to pay Mobil $10,310,605 as compensation for incremental expenditures and $3,582,408 as compensation for shortfall.[332] In

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328 *Id.* ¶ 429.

329 *Id.* ¶ 431.

330 *Id.* ¶ 440.

331 *Id.* ¶ 478.

332 **C-2**, Award ¶ 178 (Feb. 20, 2015). Murphy Oil was awarded $2,273,635 as compensation for incremental expenditures and $1,127,612 as compensation for shortfall. *Id.* The amounts awarded include interest at the 12-month Canadian Dollar LIBOR rate +4%, compounded monthly, from July 23, 2012 to February 20, 2015. *Id.*

assessing incremental expenditures, the Mobil I Majority noted that "[i]t is logical that if the Claimants were under an expenditure requirement, they would seek to make the necessary expenditures of some utility," and "[a]ny sensible investor would not choose to make an expenditure that was wholly superfluous to the investment."[333] After analyzing the testimony and documentary evidence, the Mobil I Majority determined that the following expenditures were incremental:[334]

Mobil I Arbitration	
Expenditure	***Amount Incurred by Mobil***
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

The Tribunal also ordered each party to bear their own legal costs and share the arbitration costs. *Id.*

333 *Id.* ¶ 51.

334 *Id.* ¶¶ 52, 129.

Mobil I Arbitration	
Expenditure	***Amount Incurred by Mobil***
[redacted]	
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

D. The Status of the Decision and the Award

153. In the Mobil I Arbitration, the tribunal was properly constituted in accordance with Article 13 of the Additional Facility Rules, without challenge by Canada.[335] The Mobil I Tribunal had jurisdiction to issue the Decision and the Award and was composed of three highly qualified arbitrators, properly selected in accordance with the applicable rules. The 204 pages of careful reasoning contained in the Decision and the 57 pages of detailed reasoning in the Award show the care taken by the Mobil I Tribunal to address and resolve each issue raised by the parties. Throughout the course of the Mobil I Arbitration

[335] Details as to the constitution of the Mobil I Tribunal and the procedural history of the Mobil I Arbitration are set out in the Decision, ¶¶ 7-33, and are not repeated here.

Canada did not challenge the Mobil I Tribunal's jurisdiction to address the issues before it.[336]

154. After the Award in Mobil I was issued, Canada filed a "Notice of Application" in its domestic courts seeking an order setting aside the Award.[337] Canada, for the first time, argued that the Mobil I Tribunal "exceeded its jurisdiction by using the wrong criteria to conclude that the Guidelines were not a reserved subordinate measure."[338]

155. On February 16, 2016, the Court dismissed Canada's challenge to the Award.[339] The Court began by recognizing that Canada did not challenge key aspects of the Mobil I Arbitration. Namely, Canada had "acknowledge[d] that the Tribunal had the jurisdiction to determine whether the Guidelines constituted a breach of Article 1106(1)(c) and whether they were reserved pursuant to Article 1108."[340] The Court further observed that:

> The Tribunal also unanimously decided that the Guidelines violated the prohibition on performance requirements in Article

[336] Canada did lodge a discrete objection to the jurisdiction of the Mobil I Tribunal to consider awarding future damages, which is not material in this arbitration.

[337] **C-172**, Notice of Application, *Attorney General of Canada v. Mobil Investments Canada, Inc. and Murphy Oil Corporation*, No. CV-15-11079-00CL (Ontario Sup. Ct. J.) The Set Aside Notice was filed in the Ontario Superior Court of Justice and issued under the Commercial Arbitration Act, R.S.C. 1985, c.17 (2nd Supp.), Article 34 of the Commercial Arbitration Code, and Rule 14.05 of the Rules of Civil Procedure. *Id.*; *also note* **CL-6**, Commercial Arbitration Act, R.S.C. 1985, c.17 (2nd Supp.), which includes at Schedule 1 the Commercial Arbitration Code.

[338] Canada's position was summarized in the subsequent decision dismissing the application (the "Set Aside Decision"). **C-173**, Set Aside Decision ¶ 43.

[339] *Id.* ¶ 51.

[340] *Id.* ¶ 28.

> 1106(1)(c). *Canada does not challenge that part of the decision.*[341]

156. In the Court's view, Canada's purported jurisdictional challenge was no more than an inadmissible attempt "to re-litigate the merits of the case," *i.e.*, "the determination of the NAFTA breach and the 'scope of the reservation' issues."[342] For the Court, the questions of "did the Guidelines breach Article 1106(1)(c) and, if so, did they fall within the scope of Canada's reservation pursuant to Article 1108?" were squarely "merits issues":

> These were merits issues that the parties argued in their written and oral submissions. These were the very issues that the Tribunal did decide. These were issues clearly within the terms of the submission to the Tribunal.[343]

157. Ultimately, the Court "d[id] not regard this as one of the 'rare circumstances' where there is a true question of jurisdiction," and dismissed Canada's set aside application.[344]

158. Mobil and Murphy had also defended Canada's set aside application on independent grounds, raising arguments that (i) Canada "failed to raise this [allegedly] jurisdictional issue before the Tribunal and is precluded from raising it for the first time on this application" and (ii) "even if this is a true jurisdiction issue, the majority made no error in its analysis that would warrant setting aside the Award."[345] Having decided on the aforementioned ground, the Court did not need to address these other arguments put forward by Mobil and Murphy.[346]

159. As described in Section V, Mobil relies on the Decision and Award for their *res judicata* effect in this

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[341] *Id.* ¶ 18 (emphasis added).
[342] *Id.* ¶ 45.
[343] *Id.* ¶ 46.
[344] *Id.* ¶ 51.
[345] *Id.* ¶ 30.
[346] *Id.* ¶ 40.

arbitration, in relation to which any continuation of the rejected set aside action is of no relevance.

E. Despite the Decision and the Award, the Board Continues to Enforce the Guidelines at Hibernia and Terra Nova

160. In light of the Decision, Mobil and Murphy wrote to the Board in July 2012 to request a waiver of past amounts in proportion to their ownership interests at Hibernia and Terra Nova, and to seek assurances that the Board would not apply the Guidelines to the Claimants for any future period.[347]

161. The Board responded by letter stating it had "no intention to 'waive' in whole or in part any of the Operator's obligations respecting research and development or education and training for any of the projects that fall under the Board's jurisdiction."[348] Consequently, the project operators at Hibernia and Terra Nova had no choice but to continue to comply with the Guidelines.[349]

162. In response to the issuance of the Award in February 2015, the Board unilaterally suspended the pre-approval process required by the Guidelines for determining the eligibility of proposed R&D and E&T expenditures at Hibernia and Terra Nova.[350] This freeze made it difficult for the Projects

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[347] **C-174**, Letter from P. Sacuta, ExxonMobil Canada Ltd., to J. Bugden, CNLOPB (July 5, 2012); **C-175**, Letter from C. Buchanan, Murphy Oil Company Ltd., to J. Bugden, CNLOPB (July 9, 2012).

[348] **C-176**, Letter from J. Bugden, CNLOPB, to P. Sacuta, ExxonMobil Canada Ltd. (July 9, 2012); **C-177**, Letter from J. Bugden, CNLOPB, to C. Buchanan, Murphy Oil Company Ltd. (July 12, 2012).

[349] **CW-1**, Phelan Statement I, ¶ 47.

[350] **C-178**, Email from M. Baker, CNLOPB, to K. Sampath, HMDC (April 13, 2015). *See also* **CW-3**, Sampath Statement I, ¶¶ 18-20.

to plan and to make expenditures in compliance with the Guidelines. The difficulties were expressed in repeated correspondence to the Board.[351] Without explanation, and despite repeated attempts to express its concerns about meeting the Guidelines' obligations, the Board maintained the freeze until January 12, 2016, when it began issuing pre-approvals again.[352]

IV.

THIS TRIBUNAL HAS JURISDICTION

163. The Chapter 11 jurisdictional requirements *rationae personae, materiae*, and *temporis* are satisfied in this case.

164. As an initial matter, the Mobil I Tribunal accepted jurisdiction over Mobil's claims against Canada under Chapter 11 of the NAFTA with respect to the imposition and enforcement of the Guidelines. When faced with the same investor, investments, and Article 1106 claim in the Mobil I Arbitration, Canada did not raise any jurisdictional objections under Articles 1116 and 1117 of the NAFTA.[353] Of course, the present arbitration once again involves Mobil and Canada and

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[351] **C-179**, Letter from J. Long, HMDC, to M. Baker, CNLOPB (June 23, 2015); **C-180**, Letter from J. Long, HMDC, to S. Tessier, CNLOPB (July 29, 2015); **C-181**, Letter from J. Walck, HMDC, to M. Baker, CNLOPB (September 3, 2015).

[352] **CW-3**, Sampath Statement I, ¶ 20: "On January 12, 2016, approximately nine months after the initial suspension of the pre-approval process, the Board emailed me to notify that it had 're-started' the pre-approval of HMDC's applications. The Board never explained to me why it decided to resume the pre-approval process."

[353] **C-1**, Decision, ¶¶ 94, 415-416. Canada's only jurisdictional objection in the Mobil I Arbitration concerned "the Tribunal awarding future or prospective damages." Mobil does not seek "future or prospective damages" in this arbitration.

relates to the "continuing breach" of the NAFTA impacting the same projects.

A. The Tribunal Has Jurisdiction Over the Parties

165. Under Article 1116 of the NAFTA, an Investor of a Party may make a claim on its own behalf for loss or damage arising out of a breach of Section A of Chapter 11 by the other Party. Under Article 1117, that Investor may make such a claim on behalf of an "enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly[.]"

166. Article 1139, in turn, defines an investor of a Party to include a national or enterprise of a NAFTA Party that seeks to make, is making, or has made an investment. Article 201 defines enterprise as any "entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association," and an enterprise of a Party as "an enterprise constituted or organized under the law of a Party."

167. Mobil is an enterprise organized under the laws of the State of Delaware in the United States,[354] and therefore is an investor of the United States as defined by the NAFTA. Through intermediary holding companies, Mobil controls interests in the Hibernia and Terra Nova projects in Newfoundland, Canada. Those interests are directly or indirectly held by entities organized under the laws of Canada, *i.e.*, ExxonMobil Canada Properties and ExxonMobil Canada Hibernia Company Ltd. Each of these entities qualifies as an enterprise owned or controlled, directly or indirectly, by Mobil within the meaning of Article 1117(1).

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354 **C-4**, Certificate of good standing of Mobil Investments Canada Inc. (Jan. 5, 2015).

168. Mobil therefore falls within the tribunal's jurisdiction *rationae personae* under Articles 1116 and 1117. The conditions precedent to submission of a claim to arbitration under these provisions recognized in Article 1121 have been satisfied by Mobil,[355] ExxonMobil Canada Properties,[356] and ExxonMobil Canada Hibernia Company Ltd.[357]

169. As a Party to the NAFTA, Canada is also subject to the jurisdiction of the tribunal under Articles 1116 and 1117. The tribunal therefore has jurisdiction over each of the parties to this arbitration.

170. The instrument of consent—here, the NAFTA—governs the interpretation and scope of application, if any, of the ICSID Convention's jurisdictional requirements.[358] Based on the foregoing, the ICSID Convention's Article 25 is, to the extent applicable, also satisfied.[359]

B. The Tribunal Has Jurisdiction Over the Subject Matter of the Dispute

171. As noted above, Articles 1116 and 1117 of the NAFTA permit investor claims pertaining to loss or damage arising out of a breach of Section A of Chapter 11. Under

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[355] **C-182**, Certification of Mobil Investments Canada Inc. dated October 30, 2015.

[356] **C-183**, Resolution of the Management Board and Certification of ExxonMobil Canada Properties dated November 2, 2015.

[357] **C-184**, Resolution of the Directors and Certification of ExxonMobil Canada Hibernia Company Ltd. dated November 2, 2015.

[358] **CL-7**, Meg N. Kinnear et al., *Article 1117*, in *Investment Disputes Under NAFTA*: *An Annotated Guide to NAFTA Chapter 11* (Kluwer 2006) at 4.

[359] *E.g.*, Mobil is a "national of another Contracting State," namely, the U.S., and Canada is a "Contracting State." *Also note supra* ¶¶ 165-169.

Article 1101, Chapter 11 applies to measures adopted or maintained by a Party relating to investors of another Party and to their investments in the territory of the Party adopting or maintaining the measure. Where, as here, Article 1106 is implicated, the Chapter also applies in relation to all investments in the territory of the Party.[360]

172. Article 1139 defines "investment" to include, *inter alia*, an enterprise, interest in an enterprise that entitles the owner to share in income or profits of the enterprise, interest in an enterprise that entitles the owner to share in the assets of that enterprise, or interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory. Annex 201.1 of the NAFTA defines "territory" with respect to Canada as "the territory to which its customs laws apply, including any areas beyond the territorial seas of Canada within which, in accordance with international law and its domestic law, Canada may exercise rights with respect to the seabed and subsoil and their natural resources." As noted, Mobil controls interests in the Hibernia and Terra Nova projects in Newfoundland, Canada. Through those interests, Mobil is entitled to share in the income, profits, and assets of the projects as well as any interests arising from their commitment of capital or other resources to the projects.[361] Mobil's interests in the Hibernia and Terra Nova projects therefore constitute investments within the meaning of Article 1139.

173. Article 201 defines a measure to include "any law, regulation, procedure, requirement or practice[.]" The Guidelines, promulgated by the Board in 2004, set out the requirements, procedures, and practices to be used by the Board in regulating the investments. Decisions by the Board conditioning the issuance of regulatory authorizations, including POAs/OAs for the Hibernia and Terra Nova oil fields, on compliance with the Guidelines are requirements imposed by the

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360 **CL-5**, NAFTA, Article 1101(1)(c).

361 *Supra* ¶¶ 10-17.

Board. The Guidelines and the Board's decisions constitute measures within the meaning of Article 201.

174. The claims made in this arbitration concern losses and damages incurred by Mobil and its affiliates in relation to Canada's breach of Article 1106(1) of the NAFTA. This provision falls within Section A of Chapter 11, as contemplated by Articles 1116 and 1117. Pursuant to Article 1122(2) of the NAFTA, Canada's consent in Article 1122(1), coupled with Mobil's "submission … of a claim to arbitration," constitute the written consent of the parties. Moreover, for the reasons discussed above at paragraph 172, Mobil's interests in the Hibernia and Terra Nova projects constitute "investment[s]" within the meaning of Chapter 11 of the NAFTA. Consequently, Article 25 of the ICSID Convention, as applicable, is satisfied.[362]

175. Accordingly, the tribunal has jurisdiction *rationae materiae* over this dispute.

C. The Tribunal Has Temporal Jurisdiction

176. Under Article 2203 of the NAFTA, the treaty has been in force for both the United States and Canada since January 1, 1994. The measures at issue—namely the Guidelines, were implemented well after the NAFTA entered into force.

177. In Chapter 11 of the NAFTA, Canada agreed to submit to arbitration disputes pertaining to the substantive obligations undertaken therein. Mobil accepted this offer in its Request for Arbitration, which was received by the ICSID Secretary-General on January 16, 2015.[363] The tribunal therefore has jurisdiction *rationae temporis*.

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[362] Article 25 provides as follows in relevant part: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment…"

[363] **CL-5**, NAFTA, Article 1122(2); *see also id.*, Article 1137(1).

178. On November 1, 2013, Canada ratified the ICSID Convention and it came into force for Canada on December 1, 2013.[364] It has been in force for the U.S. since 1966. As such, Mobil is entitled, pursuant to Article 1120(1) of the NAFTA, to bring this claim in this forum.

V.

THE DECISION AND AWARD ARE *RES JUDICATA* BETWEEN THE PARTIES TO THIS DISPUTE

179. These proceedings are, effectively, the second quantum phase of the Mobil I Arbitration, required due to the way in which the Mobil I Majority approached the question of awarding damages to the Claimants. Namely, the Mobil I Majority recognized that, "[g]iven that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings."[365]

180. Canada's liability to Mobil in relation to the imposition of the Guidelines was properly determined in the Decision. The losses Mobil suffered up to December 31, 2011 for Terra Nova and April 30, 2012 for Hibernia were quantified in the Award. These issues cannot be re-argued in these proceedings. In this arbitration, where the issues and parties are

[364] **C-185**, ICSID, Database of ICSID Member States, https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx (last visited Mar. 7, 2016).

[365] **C-1**, Decision ¶ 478. The Arbitration Rules governing this arbitration mandated the constitution of a new tribunal for this case. *See* Rule 1(4).

identical, *res judicata* must be applied to avert "the potential of divergent decisions in identical cases."[366]

181. Mobil commenced the first arbitration against Canada in relation to the Guidelines nine years ago. After eight years of arbitration, Canada was ultimately ordered to pay $13,893,013 to Mobil. To date, Mobil has not yet been able to recover the damages it was awarded because of Canada's challenge to the Award. This challenge notwithstanding, Canada has repeatedly relied on the Decision to support positions it has taken in other NAFTA arbitrations, urging these other NAFTA tribunals to adopt the Mobil I Tribunal's holdings on a number of issues.[367]

182. Although Canada's challenge was recently dismissed at first instance, it is presently unclear whether Canada

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[366] **CL-8**, Schreuer and Reinisch, Legal Opinion dated June 20, 2002 in *CME Czech Republic BV (the Netherlands) -v- the Czech Republic* ("Schreuer and Reinisch").

[367] **CL-9**, *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Canada's Rejoinder on the Merits with Exhibits, 2 July 2014 at, e.g., ¶ 47 (Canada urged the adoption of Mobil I Tribunal's holdings on approach to interpretation of Article 1108) and ¶ 146 ("Canada relies on the articulations of the customary international law minimum standard of treatment in … *Mobil*"); and **CL-10**, *Eli Lilly and Company v. The Government of Canada*, ICSID Case No. UNCT/14/2, Canada's Counter Memorial, 27 January 2015 at, e.g., note 415 (Canada recognized that "[t]he Tribunal [in the Mobil I Arbitration] unanimously rejected the claim that Canada had acted in violation of Article 1105(1) even though it determined that the measure in question was inconsistent with Article 1106(1)(c) (Performance Requirements) and, by majority, decided that the measure was not covered by Canada's NAFTA Annex I reservation") and ¶ 270 (describing Mobil I Tribunal's holding on Article 1105 and urging "[t]his Tribunal [to] do the same"). *Also note* **CL-11**, *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Canada's Counter Memorial, 24 July 2015; and **CL-12**, *Windstream Energy LLC v. The Government of Canada*, PCA Case No. 2013-22, Canada's Rejoinder Memorial, 6 November 2015.

will appeal. Regardless of the outcome of the set aside proceedings, Canada should not be permitted to resile from the findings of the Mobil I Tribunal that the Guidelines breach the NAFTA, in this situation where all elements of the *res judicata* doctrine are present.

183. As the Permanent Court of International Justice held in the *Société Commerciale de Belgique Case*, "recognition of an award as *res judicata* means nothing else than recognition of the fact that the terms of that award are definitive and obligatory."[368] The terms of the Decision and Award are both definitive and obligatory. The tribunal should apply the principle of *res judicata* in this arbitration because (i) this arbitration is governed by the general principles of international law, (ii) *res judicata* is undisputedly recognized as a general principle of international law, and (iii) the requirements for the application of the *res judicata* doctrine are satisfied.

A. *Res Judicata* Is a General Principle of International Law Applicable in this Arbitration

184. *Res judicata* developed as a broad rule of public policy to engender finality in litigation and arbitration. *Res judicata* is based on principles of estoppel. It is generally thought to have two types of effect: a conclusive effect (*i.e.*, ending litigation or arbitration by ensuring that a judgment or award is final and binding); and a preclusive effect (preventing the re-litigation of the subject-matter of the judgment or award). *Res judicata* must be applied by this tribunal to ensure that the parties are not "twice vexed in the same matter."[369]

185. Article 1131 of the NAFTA states in relevant part: a "[t]ribunal established under this Section shall decide the

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[368] **CL-13**, *Société Commerciale de Belgique Case,* 1939 P.C.I.J. (ser. A/B) No. 78, Judgment at 175 (June 15, 1939).

[369] **CL-14**, *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31 (Lord Bingham of Cornhill).

issues in dispute in accordance with this Agreement and applicable rules of international law." *Res judicata* is a "widely accepted" and well-established principle of international law.[370] Numerous decisions by international tribunals, including the International Court of Justice ("ICJ") and its predecessor, the Permanent Court of International Justice, recognize that *res judicata* is a general principle of international law.[371] In its Advisory Opinion of 13 July 1954, the ICJ affirmed that "[a]ccording to a well-established and generally recognized principle of law, a judgment rendered by . . . a judicial body is *res judicata* and has binding force between the parties to the dispute."[372]

186. Investor-state tribunals, including those constituted under the ICSID Convention, have also confirmed the existence of the doctrine of *res judicata* under international law, leaving no doubt as to its availability in this arbitration.[373]

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370 **CL-8**, Schreuer and Reinisch.

371 *See*, *inter alia*, **CL-15**, *Case Concerning the Factory at Chorzów*, 1928 P.C.I.J. (ser. A) No. 13, Interpretation of Judgments Nos. 7 and 8, Dissenting Opinion of Judge Anzilotti at 371; **CL-16**, *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Advisory Opinion of 13 July 1954.

372 **CL-16**, *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Advisory Opinion of 13 July 1954. Per Professor Bin Cheng, "there seems little, if indeed any question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings." **CL-17**, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, at 336 (2006).

373 *E.g.*, **CL-18**, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada*, ICSID Case No. ARB/10/6, Award ("[D]octrine of collateral estoppel is now well established as a general principle of law applicable in the international courts and tribunals such as this one."), **CL-19**, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (explaining that *res judicata* requires identical

187. NAFTA awards have confirmed both that *res judicata* is a general principle of international law and that it is applicable under NAFTA Chapter 11 by way of Article 1131. The tribunal in *Apotex Holdings Inc. and Apotex Inc.* ("*Apotex III*") recognized *res judicata* as a "general principle of law," with the result that it was "an applicable rule of international law within the meaning of NAFTA Article 1131."[374] Similarly, the *Waste Management II* tribunal held that "[t]here is no doubt that *res judicata* is a principle of international law[.]"[375]

B. The Mobil I Decision and Award Satisfy the Requirements of the *Res Judicata* Doctrine

188. Under the *res judicata* doctrine, an arbitral award can have both conclusive and preclusive effect. The *Apotex III* tribunal stated that "the doctrine of *res judicata* is often described as operating in international proceedings where three conditions establish the congruence of the matters previously determined and those currently at issue." The tribunal then quoted the so-called "triple identity test" formulated by Judge

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parties and claims); **CL-20**, *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award ("The authority as *res judicata* of a decision given by another competent jurisdiction between the same parties, concerning the same claims and based on the same factual and legal bases, prohibits a party from reintroducing a new action that is similar on all points."); and **CL-21**, *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award (recognizing *res judicata* as principle of international law).

[374] **CL-22**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award at ¶¶ 7.4-.11, 7.18-.36, 7.40, 7.42, 7.50-.52.

[375] **CL-23**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings at ¶¶ 38-47. *See also* **CL-17,** Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, at 336 (2006).

Anzilotti in his dissent in the *Chorzow Factory* case. Judge Anzilotti referred to "the three traditional elements for identification, *persona, petitum, causes petendi*, for it is clear that 'that particular case' (*le cas qui a été décidé*) covers both the object and the grounds of the claim." In their influential legal opinion in *CME Czech Republic BV (the Netherlands) v. the Czech Republic*, Professors Schreuer and Reinisch identified a similar set of conditions for the applicability of the doctrine: the "proceedings must have been conducted 1. before international courts or arbitral tribunals, 2. between the same parties, 3. concerning the same issues."[376]

189. As the *Apotex III* tribunal noted, many tribunals have used a simpler approach than Judge Anzilotti and have applied the test described by Professors Schreuer and Reinisch, variously described by tribunals as: "identity of the parties and of the question at issue"[377] and "same parties to the suit, but also the same subject-matter that was judged."[378]

190. In the present case, the requirements for *res judicata* under international law and the NAFTA are met whichever test is used. The Mobil I Arbitration unquestionably qualifies as an international arbitration proceeding. It is similarly indisputable that there is identity of the parties between the Mobil I Arbitration and the present case. Mobil has been required to bring this second arbitration as a result of the approach the Mobil I Majority took to the quantification of its

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[376] **CL-8**, Schreuer and Reinisch.

[377] **CL-24**, *China Navigation Co., Ltd. (Great Britain) v. United States (Newchwang case)*, Arbitral Tribunal (Great Britain-United States) constituted under the Special Agreement of August 18, 1910 (18 June 1913 - 22 January 1926), *in* Reports of International Arbitral Awards, vol. 6 (2006) at 64 *et seq.*, cited in **CL-22**, *Apotex III*, at ¶ 7.15.

[378] **CL-25**, *The United States of America v. The United Mexican States (The Pious Fund of the Californias)*, PCA, Award, cited in **CL-22**, *Apotex III*, at ¶ 7.15.

losses incurred as a result of the imposition of the Guidelines upon it. It is seeking precisely the same relief in this arbitration as it sought in the Mobil I Arbitration—namely, compensation for the losses it has incurred in complying with the Guidelines. In this second arbitration, Mobil is asserting the same legal arguments (with the addition, of course, of the *res judicata* argument) to contend that the Guidelines are a breach of Article 1106 and are not reserved through Article 1108.

191. In order to have *res judicata* effect under international law, the prior award must be "definitive and obligatory," *i.e.*, the award must be final and binding upon the parties.[379] The Decision and Award meet that standard under both the Additional Facility Rules and the NAFTA. The Additional Facility Rules, which applied in the Mobil I Arbitration, expressly state that an award rendered by a tribunal shall be final and binding upon the parties.[380] The award is deemed to have been rendered on the date on which certified copies were dispatched to the parties under Article 53(2) thereof. In the Mobil I Arbitration, the Decision was transmitted to the parties on May 22, 2012; the Award was transmitted to the parties on February 20, 2015. Both awards were properly rendered on those respective dates in accordance with the Additional Facility Rules. The Decision and Award therefore became final and binding in accordance with the Additional Facility Rules on May 22, 2012, and February 20, 2015, respectively.

192. The NAFTA, for its part, likewise expressly confirms that an award rendered under Chapter 11 binds the parties in respect of the particular dispute.[381] Chapter 11 draws a

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[379] **CL-17**, Cheng, at 339.

[380] **CL-26**, Article 52(4) of the Additional Facility Rules provides: "The award shall be final and binding on the parties."

[381] **CL-5**, Article 1136(1) of the NAFTA states that an award shall have "no binding force *except between the disputing parties and in respect of the particular case*" (emphasis added). This provision

clear distinction between the "render[ing]" of the award, which makes it final and binding between the parties, and the expiry of the time limits in Article 1136(3), which then entitle a party to enforce a final and binding award previously "rendered." This distinction was addressed in *Bilcon*, another Chapter 11 dispute against Canada, in which Canada sought to stay the tribunal's quantum proceedings pending Canada's challenge to the antecedent liability award. The *Bilcon* tribunal opined as follows:

> [T]he text of Article 1136(3) embodies a clear distinction between: the 'rendering' of a final award by a tribunal; [and] the seeking of 'enforcement' of a final award by a disputing party. … The Tribunal concludes that by proceeding with this case [to the quantum phase] … it would simply be continuing with its own process as an international tribunal constituted under NAFTA, rather than engaging in any kind of 'enforcement' measure contemplated by Article 1136(3).[382]

193. The title of Article 1136 of the NAFTA confirms this crucial distinction between the "Finality and Enforcement of an Award." That article confirms the finality of an award by requiring that a "disputing party shall abide by and comply with an award without delay" but also prohibits a disputing party from seeking *enforcement* of a final award until (in relation to Additional Facility awards), a court has "dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal…."

"makes clear that no rule of stare decisis applies in Chapter 11 proceedings." **CL-7**, Meg N. Kinnear et al., *Article 1136*, in *Investment Disputes Under NAFTA*: *An Annotated Guide to NAFTA Chapter 11* (Kluwer 2006) at 3.

[382] **CL-27**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Procedural Order No. 19 at ¶¶ 11–13.

194. As noted, Article 1136(2) of the NAFTA requires a disputing party to "abide by and comply with an award without delay." The only exception to that requirement is the possibility of a stay on "enforcement of a final award." Mobil is not presently seeking to enforce the awards against Canada, either before this tribunal or in any national courts. Rather, Mobil is seeking to rely on the Decision and the Award as being *res judicata* under international law to avoid the vexation, expense, and duplicative effort (by counsel and this tribunal) of having to re-litigate its case on liability and to avoid the potential of "divergent" decisions.[383] Nothing in Article 1136(3) precludes this.

195. Further, as noted in paragraph 181 above, Canada has selectively chosen to rely on the Decision in support of its position in other NAFTA arbitrations, clearly showing that it considers itself bound by the Mobil I rulings.[384] In light of the foregoing, it is incontrovertible that the Decision and the Award satisfy the requirements of the *res judicata* doctrine under international law.

C. The Decision and Award Still Have *Res Judicata* Effect in this Arbitration Regardless of Whether Canada Appeals the Dismissal of its Challenge to the Award

196. Canada's unsuccessful set-aside application did not, and, if pursued on appeal, will not challenge key aspects of the Decision, in particular, the finding that the Guidelines breached Article 1106.[385]

197. Mobil relies upon the Decision and Award to eliminate the risk of a conflicting decision by this tribunal on identical causes of action. It is not seeking to enforce the Decision or Award; it is simply seeking to rely on them. The set

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[383] **CL-8**, Schreuer and Reinisch.

[384] *Supra* note 367.

[385] **C-1**, Decision ¶ 490.

aside action is therefore irrelevant to the question of the proper application of the *res judicata* doctrine because international arbitral awards maintain a legal existence even if they are annulled. It is for this tribunal to determine to its satisfaction under international law whether or not the Decision and the Award met the requirements for this tribunal to find that those awards are *res judicata* between the parties. No deference can or should be given to the decisions of national courts in this situation, which are applying different, municipal criteria for different ends.

198. Even were it to be eventually set aside by the Canadian courts, the Award would still exist and would be capable of recognition and enforcement by national courts.[386] In fact, U.S. federal courts, including the federal courts in Washington, D.C. (the place of the proceedings), have recognized and enforced awards that have been set aside at the seat.[387] Significantly, one recent case involved enforcement of

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[386] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards gives a court the discretion to enforce an award notwithstanding the fact that it has been "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." **CL-28**, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[387] The District Court for the District of Columbia refused to recognize a decision of Egyptian Court of Appeal suspending an arbitral award. **CL-29**, *In re Chromalloy Aeroservices*, 939 F. Supp. 907 (D.D.C. 1996). Similarly, the District Court for the Southern District of New York held that, under similar provisions of the Inter-American Convention on International Commercial Arbitration, deference to a Mexican court's decree nullifying an arbitration award was not required because the Mexican court decision violated basic notions of justice. **CL-30**, *Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Produccion*, 962 F. Supp. 2d 642 (S.D.N.Y. 2013).

an award annulled by a NAFTA Party's courts.[388]

199. The set-aside proceedings do not detract from the binding nature of the Decision. In this arbitration, Mobil should not ever be required to re-litigate matters that were finally determined by a competent prior tribunal, regardless of the outcome of Canada's challenge to the Award.

D. The Mobil I Dispositifs and Related Reasoning Bind Canada

200. In terms of the scope of the application of the *res judicata* doctrine, both the *dispositifs* of the Decision and the Award and the reasoning required to reach such decisions should be considered binding.

201. As noted by Professors Schreuer and Reinisch, "practice follows a wide concept, not restricting the preclusive effect to the *dispositif*."[389] Rather, numerous tribunals have recognized that the second tribunal must take into account the reasoning of the first tribunal in order to define the scope of the *dispositif* and its binding effect in the subsequent proceedings.[390]

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[388] **CL-30**, *Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Produccion*, 962 F. Supp. 2d 642 (S.D.N.Y. 2013).

[389] **CL-8**, Schreuer and Reinisch.

[390] *E.g.*, **CL-31**, *Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, in* Reports of International Arbitral Awards, vol. 28 (2006) at 295 ("having regard to the close links that exist between the reasoning of a decision and the provisions of its *dispositif*, recourse may … be had to the reasoning in order to elucidate the meaning and scope of the *dispositif*"); **CL-22**, *Apotex III*, ¶¶ 7.18–32 ("international courts and tribunals have regularly examined under international law a prior tribunal's reasoning, and the arguments it considered, in determining the scope, and thus the preclusive effect, of the prior award's operative part. The first

202. In order to fully define the scope and preclusive effect of the *dispositifs*, this tribunal should therefore refer to certain key parts of the Decision and Award's reasoning that elucidate the scope of the *dispositifs*. In this case, the tribunal will be assisted in its approach to the issue at the heart of this arbitration, namely the quantification of the losses Mobil has suffered since January 1, 2012 in relation to Terra Nova and May 1, 2012 in relation to Hibernia, if it takes into account the reasoning of the Mobil I Majority. The Mobil I Majority determined that Mobil's recoverable damages are those expenditures that "would not have been made in the ordinary course of business in the absence of the Guidelines[.]"[391] In effect, the Mobil I Majority adopted a "but for" test for incremental expenditures, asking itself, but for the Guidelines, would the given expenditure have been made in the amount it was actually made?[392] The fact that Mobil obtained some benefit from such an expenditure did not preclude a claim.[393]

203. Several categories of expenditures that the Mobil I Majority found to be incremental have continued through the 2012–2015 period at issue in this second arbitration. As to these categories, the Mobil I findings that they constitute incremental expenditures should be taken into account by this tribunal. For instance, the Gas Utilization Study (also known as the WAG Project), Ice Management Joint Industry Projects, and

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international tribunal's analysis and reasoning thus often play a significant role before the second international tribunal in determining the *res judicata* effect of the earlier award"); and **CL-25**, *The Pious Fund of the Californias* at 2–3 ("[c]onsidering that all the parts of a judgment or a decree concerning the points debated in the dispute enlighten and mutually supplement each other, and that they all serve to render precise the meaning and the bearing of the *dispositif*… to determine the points upon which there is *res judicata* and which therefore cannot be put in question.").

391 **C-2**, Award, ¶ 52.

392 *Id.* ¶ 68.

393 *Id.* ¶ 51.

contributions to the Center for Arctic Resources Development were all found to be incremental expenditures by the Mobil I Majority.[394] These expenditures, and the Mobil I Majority's holding in this regard, are set out in the part of the Award's *dispositif* granting "compensation for incremental expenditures."[395]

204. In light of the above, Mobil respectfully requests that this tribunal find that the Decision and the Award are *res judicata* between the parties.

205. In Section VI below, Mobil submits its position on the liability issues that were determined in the Mobil I Arbitration.[396] Only in the event that the tribunal finds that it is not able to treat the Decision and Award as *res judicata* between the parties, does the tribunal need to consider the issue of liability in this arbitration *de novo*.

VI.

THE CONTINUING APPLICATION OF THE GUIDELINES BREACHES THE NAFTA

206. The Guidelines are subject to and caught by Article 1106 of the NAFTA ("Performance Requirements"). They are not covered by Canada's reservation under Article 1108(1) of the NAFTA.

A. The Guidelines Are Subject to, and Caught by, Article 1106

207. Article 1106(1) of the NAFTA provides that:

> No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in

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394 *Id.* ¶¶ 58-63, 101-105, 116-121.

395 *Id.* ¶ 178.

396 Procedural Order No. 1, § 14.1.

> connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
>
> * * *
>
> (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory[.]

208. By requiring project operators to undertake R&D and E&T activity that they otherwise would not, the Board substitutes its own development objectives for the business judgment of investors and, in so doing, distorts investment flows in favor of the Province. As such, its conduct goes to the heart of Article 1106(1)(c)'s prohibition on performance requirements.

1. Holdings and Reasoning of the Mobil I Tribunal

209. The Mobil I Tribunal "had little difficulty in reaching a clear consensus that the 2004 Guidelines and their application to the Hibernia and Terra Nova … are caught by the Article 1106 rules relating to performance requirements."[397]

210. In reaching this conclusion, the Mobil I Tribunal reasoned as follows:

- *First*, applying the Vienna Convention on the Law of Treaties ("VCLT"), it "interpret[ed] the requirements of Article 1106 in accordance with their ordinary meaning, in their context, and in light of their object and purpose."[398]
- *Second*, the "ordinary meaning of the term 'services' is broad enough to encompass R&D and E&T."[399] Furthermore, "[i]nterpreting 'services' to include R&D and

[397] **C-186**, Partial Dissenting Opinion of Professor Philippe Sands Q.C., ¶ 1.
[398] **C-1**, Decision ¶ 210.
[399] *Id.* ¶ 216.

E&T is consistent with how services are to be treated within the treaty text of the NAFTA more broadly."[400]

- *Third*, "a degree of legal obligation is necessary for the 2004 Guidelines and their implementation, to be caught by Article 1106."[401]
- *Fourth*, in light of the fact that "the requirements of the 2004 Guidelines are to be implemented by means of a legal mechanism in the form of a Benefits Plan that will achieve compliance with the expenditure requirement," "[w]e see ample evidence of the requisite degree of compulsion for the purposes of Article 1106."[402]

211. In the unsuccessful set-aside proceedings, Canada expressly accepted the Mobil I Tribunal's reasoning and holdings with respect to Article 1106:

> The Tribunal unanimously found that the Guidelines were a breach of NAFTA Article 1106(1)(c). Canada does not challenge before this Court these aspects of the Award.[403]

2. Nature of the NAFTA's Prohibition on Performance Requirements

212. Performance requirements are measures imposed on investors by the host State "as conditions for allowing the investment or for granting [the investor] certain privileges."[404]

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[400] *Id.* ¶ 219.

[401] *Id.* ¶ 233.

[402] *Id.* ¶¶ 234, 236.

[403] **C-187**, Memorandum of Fact and Law of the Attorney General of Canada dated September 25, 2015, *Attorney General of Canada v. Mobil Investments Canada Inc. and Murphy Oil Corporation*, ¶¶ 37–38; *also note* **C-173**, Set Aside Decision, ¶ 18.

[404] **CL-7**, Meg N. Kinnear et al., *Article 1106*, in *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer 2006) at 4.

They are used to achieve policy objectives which are "usually economic, including trade-balancing, creation of employment opportunities, and regional development."[405] They commonly compel investors to accord a preference to local goods or services or to make expenditures in the territory of the host State. As the United Nations Conference on Trade and Development ("UNCTAD") has explained:

> Performance requirements are stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country. They are and have been used by developed and developing countries … to enhance various development objectives.[406]

213. Performance requirements are prohibited by the NAFTA because they subjugate the business judgment of foreign investors to the development goals of the host State and, in so doing, create investment and trade distortions. Indeed, one of the American negotiators of the NAFTA investment chapter identified the goals of Article 1106 as follows:

> The prohibition on performance requirements serves two goals. First, it eliminates trade distortions that arise from the imposition of performance requirements. Hence a Party is prohibited from imposing such requirement even on its own investors. Second, it ensures a degree of entrepreneurial autonomy: sourcing and sales decisions are based on the

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405 *Id.*

406 **CL-32**, UNCTAD, Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries, UNCTAD/ITE/IIA/2003/7, at 2 (2003); *see also* **CL-33**, Barton Legum, *Understanding Performance Requirement Prohibitions in Investment Treaties, in Contemporary Issues in International Arbitration and Mediation*, at 53 (June 2007) (performance requirements "require foreign investments to perform in a certain manner to meet host State investment policy objectives").

> investor's judgment, not by the dictates of the host government.[407]

214. The Guidelines violate this prohibition by design. The Board admitted on the face of the Guidelines its intent to compel artificial investor demand for R&D and E&T in order to grow that sector of the provincial economy:

> Expenditures for research & development and education & training are viewed by the Board to be strategically important contributions to the growth and development of the research and development and education and training capacity in the Province.[408]

215. By requiring project operators to undertake R&D and E&T activity that they otherwise would not, the Board substitutes its own development objectives for the business judgment of investors. In so doing, it deliberately distorts investment flows in favor of the Province. As demonstrated in the following paragraphs, this type of regulation is precisely what Article 1106 of the NAFTA prohibits.

3. Interpretive Methodology

216. The starting point for the tribunal's analysis of Article 1106 should be Article 31(1) of the VCLT, which requires interpretation of a treaty "in good faith in accordance

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[407] **CL-34**, Daniel Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW 727, 729 (1993) (cited as authority in **CL-7**, Meg N. Kinnear et al., *Article 1106*, in *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11*, at 9-10 (Kluwer 2006)). *See also* Kinnear, *id.* at 6 ("The main rationale for prohibiting performance requirements in trade and investment agreements is that their use distorts trade and investment flows.").

[408] **C-104**, White Rose Decision 2001.01, §§ 3.2.2.3.

with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[409]

217. On its face, Article 1106(1) prohibits NAFTA Parties from imposing or enforcing a requirement to purchase R&D/E&T services or goods in the territory, or according a preference to R&D/E&T services or goods provided in the territory.

218. The objectives of the NAFTA are set forth in Article 102(1). They include "eliminat[ing] barriers to trade in, and facilitat[ing] the cross-border movement of, goods and services between the territories of the Parties," as well as "promot[ing] conditions of fair competition in the free trade area[.]"

4. R&D and E&T Constitute "Services"

219. The R&D and E&T requirements imposed by the Guidelines are "services" within the meaning of Article 1106(1)(c).

(a) The Ordinary Meaning of "Services" Encompasses R&D and E&T

220. Article 1106(1)(c) applies, without qualification, to requirements "to purchase, use or accord a preference to goods

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[409] **CL-35**, Vienna Convention on the Law of Treaties, May 23, 1969, 1115 U.N.T.S. 31 (entered into force January 27, 1980), Article 31(1); *see also* **CL-36**, *Archer Daniels Midland Co. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award of November 21, 2007, ¶ 220 ("[T]he starting point for interpreting article 1106[] is Article 31(1) of the Vienna Convention on the Law of Treaties."); **CL-37**, *S.D. Myers Inc. v. Government of Canada*, (UNCITRAL) Partial Award of November 13, 2000, ¶ 202 ("In interpreting the NAFTA the tribunal must start by identifying the plain and ordinary meaning of the words in the context in which they appear and also must take due account of the object and purpose of the treaty.").

produced or services provided in its territory, or to purchase goods or services from persons in its territory." It addresses "services" without limitation or exclusion.

221. The ordinary meaning of the term "services" is as follows:

> useful labor that does not produce a tangible commodity - usu. used in pl. (railroads, telephone companies, and physicians perform services although they produce no goods).[410]

222. Canadian dictionaries provide a similar definition of "services."[411] Industry definitions for the term are equally broad.[412]

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[410] **CL-38**, Webster's Third New International Dictionary, 2075 (1993); *see also* **CL-38**, Webster's Eleventh New Collegiate Dictionary, p. 1137 (2007) ("useful labor that does not produce a tangible commodity – usu. used in pl. <charge for professional ~s>"); **CL-38**, Oxford English Dictionary, definition of "service" ("The section of the economy that supplies needs of the consumer but produces no tangible goods."); **CL-38**, Shorter Oxford English Dictionary, 2767 (2002) ("The sector of the economy that supplies the needs of the consumer but produces no tangible goods, as banking or tourism.").

[411] *E.g.*, **CL-38**, David Crane, The Canadian Dictionary of Business and Economics, 572 (1993) ("Examples of services include … education."); **CL-38**, The Canadian Oxford Dictionary, 1322 (2004) ("the sector of the economy that supplies the needs of the consumer but produces no tangible goods, as banking or tourism … a business which provides a specified service to the public (*runs a water taxi service*).").

[412] **CL-38**, InvestorWords.com, definition of "service" ("A type of economic activity that is intangible, is not stored and does not result in ownership. A service is consumed at the point of sale."); **CL-38**, Encyclopedia of Business and Finance, entry for "economics" ("Services are provided in numerous ways and are an intangible activity …. It is important to understand that because goods and services utilize resources that are limited, goods and services are also scarce …. If individuals cannot have everything they want, they must

223. The Oxford English Dictionary defines "research and development" as "work directed on a large scale towards the innovation, introduction, and improvement of products and processes."[413]

224. Research and development, and education and training services are clearly "services" within the ordinary meaning of that term. Each consists of "useful labor that does not produce a tangible commodity." There can be no doubt that the Guidelines, in regulating R&D expenditures, view eligible R&D activities as services. The R&D Work Expenditure Application Form reproduced as the last page of the Guidelines provides a concrete idea of the R&D services that the Guidelines cover. The form provides check-boxes for "Engineering," "Design," "Computer Programming," "Mathematical Analysis" and "Testing or Psychological Research," among other classifications.[414] Each of these falls well within the ordinary meaning of "services"; each provides a classic example of useful labor that does not result in the production of a good.

(b) The Context to Article 1106 Confirms that the Term "Services" Encompasses R&D and E&T

225. The NAFTA Parties have repeatedly recognized the foregoing interpretation of "services" in other provisions of the NAFTA. These other provisions form the treaty's "context," to which this tribunal should refer in interpreting Article 1106.

226. Like Article 1106(1)(c), the scope-and-coverage provision of the NAFTA's chapter on government procurement

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decide which of the goods and services are most important and which they can do without.").

[413] **CL-39**, Oxford English Dictionary, definition of "research and development."

[414] **C-3**, Guidelines.

referred to "goods" and "services."[415] That provision allowed the Parties to except specific categories of goods and services from their procurement chapter obligations by listing them in annexes.[416] With respect to services, the Parties agreed on a common classification system to use for reporting purposes.[417] This classification system explicitly included R&D services, as it established a series of detailed codes for such services introduced by the following definition:

> Procurement of research and development services include the acquisition of specialized expertise for the purposes of increasing knowledge in science; applying increased scientific knowledge or exploiting the potential of scientific discoveries and improvements in technology to advance the state of art; and systematically using increases in scientific knowledge and advances in state of art to design, develop, test, or evaluate new products or services.[418]

227. The NAFTA Parties' common classification system also included a group entitled "Educational and Training Services," which included subclasses such as "Lectures for Training," "Tuition, Registration, and Membership Fees,"

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[415] **CL-5**, NAFTA, Article 1001(1). As in other chapters of the NAFTA dealing at some length with services (such as **CL-5**, Chapter 12 (Cross-Border Trade in Services) and **CL-5**, Chapter 14 (Financial Services)), the term "services" is nowhere defined. Nothing in the NAFTA suggests that the Parties intended a content for the term "services" different in one chapter from that in another. In any event, Article 1112 of NAFTA's investment chapter provides that "[i]n the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency." **CL-5**, NAFTA, Article 1112.

[416] **CL-5**, NAFTA, Article 1001(1).

[417] **CL-5**, NAFTA, Annex 1001.1b-2, sec. A, ¶ 2.

[418] **CL-5**, NAFTA, Appendix 1001.1b-2-B, sec. A (emphasis added).

"Faculty Salaries for Schools Overseas" and "Other Education and Training Services."[419]

228. This classification system illustrates that the types of activities recognized by the NAFTA Parties as comprising R&D and E&T parallel the types of activities for which expenditures are required under the Guidelines.[420] Moreover, these types of services can be "purchase[d], use[d] or accord[ed] a preference" in the manner addressed by Article 1106(1)(c).

229. Illustrating that Canada understood at the time that the term "services" included R&D and E&T unless otherwise specified, it listed in its procurement-chapter schedule of "Service Exclusions by Major Service Category" the following exclusions:

> **A. Research and Development**
>
> All classes
>
> …
>
> **U. Education and Training Services**
>
> U010 Certifications and Accreditations for Educational Institutions[421]

230. Canada's other Annex reservations similarly evidenced its, and the other NAFTA Parties', understanding that R&D and E&T services are "services."[422] Canada's January

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419 **CL-5**, NAFTA, Appendix 1001.1b-2-B, sec. U.

420 **C-1**, Decision ¶ 221.

421 **CL-5**, NAFTA, Appendix 1001.1b-2-B, sec. B, Schedule of Canada.

422 *E.g.*, **CL-5**, NAFTA, Annex II, Schedule of Canada, exception for social services sector ("Canada reserves the right to adopt or maintain any measure with respect to … the following services to the extent that they are social services established or maintained for a public purpose: . . . public education, public training …"); **CL-5**, NAFTA, Annex I, Schedule of Canada, exception for Accord Acts; *see*

1994 Statement of Implementation of the NAFTA underscored this point with reference to the SR&ED tax incentive program mentioned in the Guidelines:

> As the provisions of paragraph 4(a) [of NAFTA Article 2103 on taxation] are not to be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage relating to the purchase or consumption of particular services on a requirement to provide the service in its territory, a Party may condition the receipt of income tax benefits in connection with the purchase of *research and development services* on the requirement that the service be provided in its territory.[423]

231. Articles 1106(3) and (4) of the NAFTA, which do not apply in this arbitration, confirm this understanding of "services" in Chapter 11. Those provisions provide as follows:

> 3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

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also **CL-5**, NAFTA, Article 1210(5) & Annex 1210.5, sec. C (addressing engineers as "professional service providers").

[423] **CL-40**, Department of Foreign Affairs and International Trade Canada, Statement on Implementation, Canada Gazette 216 (Jan. 1, 1994); *see also* **C-3**, Guidelines, § 3.3 (Oct. 2004). Likewise, a paper presented at a multi-stakeholder roundtable hosted by the Canadian Department of Foreign Affairs and International Trade to coincide with the annual meeting of the NAFTA Free Trade Commission clearly noted that "services" in the context of the NAFTA include R&D and E&T. **CL-41**, Pierre Paul Proulx, *Canada-U.S. Trade and Investment Relations within NAFTA: A few chosen general facts and hypotheses*, 5 (Oct. 6, 2003), https://www.collectionscanada.gc.ca/webarchives/20061107104839/http://international.gc.ca/nafta-alena/proulx-en.asp (last visited Mar. 3, 2016) (noting that "US shares of [Canada's] commercial services trade are highest among services trade" and that "R&D services are the fastest growing component"); *id.* (referring to "educational … services").

> (a) to achieve a given level or percentage of domestic content;
>
> (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
>
> (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
>
> (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
>
> 4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

232. The prohibition in Article 1106(3) applies to the conditioning of the receipt or continued receipt of an advantage on compliance with any of the four categories of requirements specified in subparagraphs (a) through (d) of that paragraph. By contrast, the prohibition in Article 1106(1) applies to the imposition or enforcement of any of the seven categories of requirements specified in subparagraphs (a) through (g) of that paragraph, including "services" as specified in subparagraph (c). In particular, Article 1106(3)(b) differs in important respects from the comparable requirement stated by Article 1106(1)(c), as the former refers only to "goods" and not to "services."

233. Article 1106(4) expressly allows the NAFTA Parties to condition the receipt or continued receipt of investment incentive(s) or advantage(s) on "compliance with a requirement to … train or employ workers … or carry out research and development[] in its territory." In other words,

such a condition or requirement with respect to R&D would not violate Article 1106(3).

234. With this background, the import of Article 1106(4) is clear: because "carry[ing] out research and development" and "train[ing] … workers" are services, "[n]othing in paragraph 3" prohibits conditioning an advantage on a requirement that such services take place in Canadian territory. This is because Article 1106(3) does not apply to services, only to goods. As such, it cannot be construed to prevent a Party from adopting measures with respect to R&D or E&T services.

235. The reference in Article 1106(4) only to Article 1106(3) was deliberate. As Article 1106(5) demonstrates, the NAFTA Parties clearly understood how to refer to both prohibitions in Article 1106 when they thought it desirable.[424] The NAFTA Parties intentionally decided not to extend Article 1106(4) to Article 1106(1), which explicitly does refer to "services," making clear their intent not to permit R&D or E&T local content requirements.

236. The clear inference from Article 1106(4) is that Article 1106(1) does prohibit such requirements. This element of the context of Article 1106(1)(c) thus reinforces the ordinary meaning of the provision: Article 1106(1)(c) prohibits all measures imposing or enforcing local content requirements for services, including those involving R&D and E&T services.

237. Indeed, the Mobil I Tribunal, in reviewing the "necessary context" for Article 1106, held that "[i]nterpreting 'services' to include R&D and E&T is consistent with how

[424] **CL-5**, NAFTA, Article 1106(5) ("Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.").

services are to be treated within the treaty text of the NAFTA more broadly."[425]

(c) The Object and Purpose of the NAFTA Confirm that the Term "Services" Encompasses R&D and E&T

238. Interpreting Article 1106(1)(c) to mean what it says—a prohibition of measures imposing or enforcing local content requirements for goods and services, including R&D and E&T services—fully accords with the object and purpose of the NAFTA. Article 102 of the NAFTA provides in pertinent part:

> 1. The objectives of this Agreement … are to:
>
> > a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; …
> >
> > c) increase substantially investment opportunities in the territories of the Parties; …
>
> 2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

239. In another context Canada has described the purpose of Article 1106(1) in the following terms:

> Article 1106 derives from a prohibition on performance requirements in U.S. BITs dating back to the 1980s. This prohibition was a response to the practice by some host countries of conditioning the establishment or continued operation of a U.S. investment on increasing the revenue brought by those investments to the host country. … As noted by Jon Johnson, "the objective of prohibiting performance

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[425] **C-1**, Decision ¶ 219.

> requirements is to prevent NAFTA countries from distorting investment decisions in their favour."[426]

240. Interpreting Article 1106(1)(c)'s prohibition to apply to all goods and services accords with the NAFTA's objective of "eliminat[ing] barriers to trade in, and facilitat[ing] the cross-border movement of, goods and services between the territories of the Parties." It more effectively "create[s] an expanded and secure market" for R&D and E&T services in the territory of the NAFTA Parties, "reduce[s] distortions to trade" and substantially "increase[s] … investment opportunities" by allowing investors and investments to make decisions based on commercial need rather than government-imposed local content requirements.[427] Reading Article 1106(1)(c) to address R&D and E&T services would, consistent with Canada's description of the purpose of Article 1106(1), prohibit a requirement that "condition[s] the establishment or continued operation of a U.S. investment on increasing the revenue brought by those investments to the host country" and would serve to "prevent NAFTA countries from distorting investment decisions in their favour."

(d) The NAFTA's Negotiating History Confirms that Article 1106(1)(c) Encompasses R&D and E&T Services

241. Under Article 32 of the VCLT, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the

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[426] **CL-42**, *Merrill & Ring Forestry L.P. v. Government of Canada*, Counter-Memorial of the Government of Canada, ¶¶ 695-696 (May 13, 2008) (footnotes omitted) (quoting **CL-43,** Jon Johnson, *The North American Free Trade Agreement: A Comprehensive Guide*, 288 (Ontario: Canada Law Book Inc., 1994)).

[427] **CL-5**, NAFTA, Preamble (emphasis omitted); **CL-5**, NAFTA, Article 102(1)(c).

application of article 31 ….” The preparatory work of the NAFTA confirms that Article 1106(1)(c) includes R&D and E&T services.

242. First, in the July 10, 1992 negotiating draft of the investment chapter, Canada proposed an exception for R&D and E&T to the main prohibition now reflected in Article 1106(1), in addition to the predecessor of the text now reflected in Article 1106(4).[428] By the August 4, 1992 negotiating draft, Canada's proposal and that predecessor read as follows:

> [CDA][2. *Notwithstanding paragraph 1*, a Party may *nonetheless* condition the establishment or acquisition of an investment, and its subsequent conduct or operation, on commitments to locate production, *carry out research and development*, *train* or employ workers, construct or expand particular facilities in its territory.]
>
> …
>
> 4. For greater clarity, the provisions of paragraph 3 do not apply to conditions related to the receipt of an advantage that an investor or investment locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.[429]

243. Canada's proposed text was bracketed to indicate that it was not accepted by the other two negotiating parties.[430]

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[428] **CL-44**, NAFTA, Chapter 11, Trilateral Negotiating Draft Text, Doc. No. INVEST.710, 10-11 (July 10, 1992).

[429] **CL-45**, NAFTA Chapter 11, Trilateral Negotiating Draft Text, Doc. No. INVEST.810, 9 (Aug. 4, 1992) (emphasis added) (the performance requirements article appears as Article 2109 in this draft).

[430] **CL-7**, Meg N. Kinnear et al., *Article 1101*, in *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer 2006) at note 13 ("The use of square brackets signified that the enclosed text was not agreed upon by all three negotiating states. The State or States that proposed or accepted the enclosed language would

In fact, it was dropped from the text in the subsequent draft of the chapter dated August 11, 1992.[431]

244. This preparatory work of the NAFTA is important for several reasons. *First*, it demonstrates that, at the time of the negotiation of the NAFTA, Canada's negotiators were acutely aware of the fact that Article 1106(1)(c)'s reference to "services" included R&D and E&T services. *Second*, it shows that the NAFTA Parties together considered the argument that Canada is expected to advance here—that Article 1106(1) should not cover R&D or E&T services—and that the three Parties definitively rejected that argument. *Third*, it shows that by August 4, 1992, the Parties understood Canada's proposal to be an exception, while Article 1106(4) was a provision "[f]or greater clarity"—confirming that Article 1106(1) otherwise applied to the matters addressed in Canada's proposed exception.

5. The Guidelines Constitute "requirement[s] to purchase, use or accord a preference to goods produced or services provided"

245. There also can be no question that the Guidelines constitute a requirement within the meaning of Article 1106(1). Although their title—"Guidelines"—may have voluntary connotations, the tribunal's task in applying Article 1106(1) is to consider the substance of the measure, not only its label.[432] Every available indicator, including their text, functionality and purpose, makes clear that the Guidelines are compulsory.

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generally be reflected in the superscript immediately preceding the opening bracket.").

[431] **CL-46**, NAFTA Chapter 11, Trilateral Negotiating Draft Text, Doc. No. INVEST.811, 8 (Aug. 11, 1992).

[432] **CL-37**, *S.D. Myers Inc. v. Government of Canada*, (UNCITRAL), Partial Award (November 13, 2000), ¶ 273 ("[I]n applying Article 1106 the Tribunal must look at substance, not only form.").

246. The Accord Acts, under whose authority the Benefits Plans and Guidelines were ostensibly made, provide that "expenditures shall be made for research and development to be carried out in the Province and for education and training to be provided in the Province."[433]

247. The word "requirement" appears numerous times throughout the Guidelines. Section 2.0 is captioned "Required Expenditure Commitments." Section 2.2.2, concerning expenditure targets in the production phase, uses the word "requirement" five times, including three times in the phrase "production phase R&D expenditure requirement."[434]

248. Under the Guidelines, "[t]he operator shall file an R&D and E&T Expenditure Application Form … for each R&D and E&T activity it plans to undertake."[435] This form "shall be submitted to and reviewed by the Board for approval, prior to commencement of the activity."[436]

249. The Guidelines reflect the principle that a "successful R&D program should not fluctuate widely."[437] For this reason, Section 4.2 on Expenditure Management provides for deposit of unspent expenditure commitments into an R&D fund in the event that there are not sufficient projects to absorb "the required level of expenditure" in a given OA period. When an operator "overspends its R&D requirement, the excess may be applied against its requirement in the subsequent []OA period." The obligation to transfer unspent amounts to an R&D fund to be managed by the Board consistent with the Guidelines further establishes that the expenditure levels set forth in the Guidelines

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433 **CL-1**, Federal Accord Act, s. 45(3)(c); **CL-3**, Provincial Accord Act, s. 45(3)(c).

434 The word also appears once in the slightly abbreviated phrase "production phase expenditure requirement."

435 **C-3**, Guidelines § 4.1 (Oct. 2004).

436 *Id.* § 4.1.

437 *Id.* § 4.2.

are in fact mandatory. If they were not, there would be no need or use for such a fund.

250. The Board's actions to enforce the terms of the Guidelines confirm that they operate as a requirement. As Ted O'Keefe, then HMDC's Regulatory and Environment Lead, recalls, "[t]he Board has used the POA application process as a lever to enforce compliance with the Guidelines." [438] As discussed above in paragraphs 114 to 120, the Board has required each project operator to commit to compliance with the Guidelines as a condition to issuance of each POA/OA, beginning immediately after the Guidelines' promulgation. In the case of Terra Nova, the Board unilaterally appended such a condition to the application for a POA; no signature by the operator submitting the application was requested.[439] In the case of Hibernia, the operator lodged a protest to the imposition of the condition in question, and the Board refused to act on the application until it was resubmitted without the objection noted.[440] The requirement that the Guidelines be satisfied was included in every subsequent POA or OA for the Projects.[441]

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[438] **CW-2**, O'Keefe Statement I, ¶ 24. *See also* **CW-1**, Phelan Statement I, ¶ 25 ("the Board took steps to condition Hibernia and Terra Nova's Operations Authorizations … on compliance with the Guidelines").

[439] **C-131**, CNLOPB, Terra Nova Production Operations Authorization (January 27, 2005 – March 31, 2008), Condition 15. The Appended Conditions are not countersigned by Petro-Canada. In any event, a project operator has no choice but to accept conditions imposed unilaterally by the Board in a POA, and cannot continue production without a valid POA. **C-133**, Memorandum from F. Way, CNLOPB, to Board Members, CNLOPB, at 3 (Jan. 28, 2004) ("The POA for Terra Nova is up for 5-year renewal on August 31, 2004, and for Hibernia the 5-year renewal date is November 1, 2005. Production cannot continue until a new POA is issued.").

[440] *Supra* ¶¶ 116-118, summarizing the Hibernia POA Application and related correspondence (**C-137**, Letter from J. Taylor, HMDC, to F. Way, CNLOPB, transmitting Hibernia POA Application

251. Had either operator refused to abide by the Board's condition, it would have risked denial of an OA and termination of production operations.[442] The Board's demand that the operators agree to comply with the Guidelines as a condition for issuance of an OA constitutes the clearest evidence of the imposition of a requirement and enforcement of a commitment or undertaking in connection with the investments in the Hibernia and Terra Nova projects.

252. Additionally, when informed of the Decision and its holding that the Guidelines breached Article 1106, the Board claimed instead that "the validity of the Board's guidelines have been affirmed by the Courts and we will continue to verify an Operator's *obligation to ensure that research and development and education and training projects, initiatives and expenditures are aligned with the eligibility criteria and benchmarks established by these guidelines*."[443] It clarified that it would not "'waive' in whole or in part any of the Operator's *obligations respecting research and development or education and training* for any of the projects that fall under the Board's jurisdiction."[444]

(Oct. 25, 2005); **C-138**, Letter from F. Way, CNLOPB, to J. Taylor, HMDC (Oct. 28, 2005); **C-140**, Letter from J. Taylor, HMDC, to F. Way, CNLOPB (transmitting Hibernia POA Application) (Oct. 31, 2005); and **C-141**, Letter from H. Pike, CNLOPB, to T. O'Keefe, HMDC (transmitting Hibernia POA, Nov. 2, 2005 – Oct. 29, 2008) (Nov. 1, 2005).

[441] *Supra* ¶¶ 119-120.

[442] *Supra* ¶¶ 119-120.

[443] **C-176**, Letter from J. Bugden, CNLOPB, to P. Sacuta, ExxonMobil Canada Ltd. (July 9, 2012) (emphasis added).

[444] *Id.*

6. The Guidelines' R&D Expenditure Requirement is "in connection with the … management, conduct or operation" of the Investments at Issue

253. The R&D expenditure requirement imposed by the Guidelines is unquestionably "in connection with the … management, conduct or operation" of the investments at issue in this arbitration.[445] As described above, the Board conditioned the right to operate the Hibernia and Terra Nova projects on compliance with the Guidelines. The project operators therefore have no choice but to comply. To do so, they must spend and have spent considerably more in the "management, conduct or operation" of the projects, make fundamental adjustments to their business practices, including adoption of a new spending protocol, and obtain pre-approval of individual R&D expenditures by the Board.[446]

7. Canada's Annex I Reservation for Certain Parts of the Federal Accord Act Confirm that the Guidelines Violate Article 1106(1)(c)

254. Canada recognized that a requirement to provide for expenditures on R&D in the Province constituted a prohibited performance requirement within the meaning of the NAFTA when it took an Annex I reservation to its Article 1106 obligations for certain parts of the Federal Accord Act. In an interpretative note at the beginning of Annex I, the NAFTA sets out how the text of the reservations included in the Parties' Schedules are to be interpreted. That note provides as follows: "The Schedule of a Party sets out … the reservations taken by that Party with respect to existing measures that *do not conform*

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[445] **CL-5**, NAFTA, Article 1106(1).

[446] **CW-1**, Phelan Statement I, ¶¶ 28, 33; **CW-3**, Sampath Statement I, ¶ 13. HMDC and Suncor created new positions to administer the respective Projects' compliance activities under the Guidelines. **CW-1**, Phelan Statement I, ¶ 35.

with obligations imposed by … Article 1106 (Performance Requirements)[.]"[447] There can be no other explanation for the fact or form of Canada's reservation.

255. The interpretative note to Annex I further provides that a Party must describe the "*non-conforming aspects* of the existing measures for which the reservation is taken[.]"[448] In describing the aspects of the Federal Accord Act that do not conform with Article 1106, Canada referred to the R&D expenditure requirement separately from the basic requirement to have a benefits plan. Comparing the Federal Accord Act to another statute covered by the same reservation, Canada emphasized that:

> [T]he Canada - Newfoundland Atlantic Accord Implementation Act [has] the same requirement for a benefits plan but also require[s] that the benefits plan ensure that … expenditures be made for research and development to be carried out in the province, and for education and training to be provided in the province[.][449]

256. Indeed, section 45(3) of the Federal Accord Act requires that "benefits plan[s] … ensure that … (c) expenditures shall be made for research and development to be carried out in

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[447] **CL-5**, NAFTA, Annex I, Interpretative Note, para. 1 (emphasis added).

[448] **CL-5**, NAFTA, Annex I, Interpretative Note, para. 2(g) (emphasis added); *see also id*. § 1 ("The Schedule of a Party sets out, pursuant to Articles 1108(1)…, the reservations taken by that Party with respect to existing measures that *do not conform* with obligations imposed by … (d) Article 1106 (Performance Requirements)….") (emphasis added); **CL-5**, NAFTA, Article 1108(1) ("Articles 1102, 1103, 1106 and 1107 do not apply to: (a) any existing *non-conforming measure* that is maintained by (i) a Party at the federal level, as set out in its Schedule to Annex I or III…") (emphasis added).

[449] **CL-5**, NAFTA, Annex I, Schedule of Canada (emphasis added).

the Province and for education and training to be provided in the Province."[450]

257. By highlighting the R&D component of the legislation in this manner, Canada acknowledged that a requirement to provide for R&D expenditures is itself inconsistent with Article 1106.

B. The Guidelines Are not Exempted by Article 1108

258. As described above, the Guidelines clearly breach Article 1106(1) of the NAFTA. In the Mobil I Arbitration, however, Canada argued that the reservation in Annex I of the NAFTA excused this breach.[451] Anticipating that Canada will again invoke its Annex I reservation to avoid liability for its Article 1106 breach, Mobil will address Canada's expected defense. In doing so, Mobil does not assume the burden of proof or persuasion of this defense, which rests with Canada.[452]

259. Article 1108(1) provides as follows:

> 1. Articles 1102, 1103, 1106 and 1107 do not apply to:
>
> (a) any existing non-conforming measure that is maintained by
>
> (i) a Party at the federal level, as set out in its Schedule to Annex I or III,
>
> (ii) a state or province, for two years after the date of entry into force of this Agreement, and thereafter as set out by a Party in its Schedule to Annex I in accordance with paragraph 2, or
>
> (iii) a local government;
>
> (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

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450 **CL-1**, Federal Accord Act, s. 45(3).

451 **C-1**, Decision ¶¶ 247-249.

452 *Infra* ¶ 260.

> (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1102, 1103, 1106 and 1107.

1. How the Tribunal Should Approach Article 1108

260. Canada bears the burden of proof in establishing the applicability and scope of any Annex I reservation. A NAFTA panel interpreting another Annex I reservation observed that a "Party asserting that a measure is subject to an exception under the [NAFTA] shall have the burden of establishing that the exception applies."[453] Model rules of procedure promulgated pursuant to NAFTA Article 2012(1) to govern Chapter 20 arbitrations locate the burden of proof with a Party that asserts the applicability of an exception to the treaty for a non-conforming measure.[454] There is no reason why the burden of proof should be any different in an investor-State case than in a State-State case.

261. In interpreting the scope and effect of Canada's Article 1108 reservations, the tribunal should be guided by the VCLT. The NAFTA's object and purpose require a restrictive interpretation of treaty reservations that seek to narrow or eliminate an investor's rights under Chapter 11.

262. This principle was endorsed by a NAFTA panel interpreting other Annex I reservations, which found that "reservations to treaty obligations are to be construed

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453 *E.g.*, **CL-47**, *In the Matter of Cross-Border Trucking Services*, Final Report of the NAFTA Arbitral Panel Established Pursuant to Chapter Twenty of February 6, 2001, ¶ 285.

454 **CL-48**, Model Rules of Procedure for Chapter Twenty of the North American Free Trade Agreement, ¶ 34 ("A Party asserting that a measure is subject to an exception under the Agreement shall have the burden of establishing that the exception applies.").

restrictively."[455] The panel grounded its approach in the fact that "the reservations in Land Transportation included in Annex I are contrary to the principal objective of NAFTA as established in its Preamble, and are also obstacles to achieving the concrete objectives agreed upon in Article 102(1)."[456]

263. This interpretive principle has been recognized in other contexts in which States seek to rely on reservations to treaties that grant rights to private parties. In the *Case of Boyce et al. v. Barbados*, the Inter-American Court of Human Rights recognized that reservations to the American Convention had to be interpreted restrictively because, *inter alia*, "the object and purpose of the relevant treaty … involves the 'protection of the basic rights of individual human beings.'"[457]

264. Article 102 of the NAFTA requires this tribunal to "interpret and apply the provisions of this Agreement in the light of its objectives," which include "eliminat[ing] barriers to trade in, and facilitat[ing] the cross-border movement of, goods and services between the territories of the Parties," as well as "promot[ing] conditions of fair competition in the free trade area[.]" Canada's Article 1108 reservation deliberately detracts from the NAFTA's furtherance of these objectives, and derogates from international rights vested in Mobil under Chapter 11. As such, they must be interpreted restrictively.

2. The Guidelines Are Not Expressly Reserved by Canada's Annex I Reservation

265. According to the interpretative note to Annex I, each reservation taken pursuant to Article 1108(1) must "identif[y] the laws, regulations or other measures … for which

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[455] **CL-47**, *In the Matter of Cross-Border Trucking Services*, ¶ 237.

[456] *Id.*

[457] **CL-49**, *Case of Boyce et al. v. Barbados*, Inter-American Court of Human Rights, Judgment of November 20, 2007, ¶¶ 13-17.

the reservation is taken."[458] A description of the measure must set out the "non-conforming aspects of the existing measures for which the reservation is taken[.]"[459] These requirements show the NAFTA Parties' intent that Article 1108(1) reservations be interpreted narrowly.

266. Canada made a reservation in Annex I for the Federal Accord Act.[460] The law set out under the "Measures" element is the "Canada – Newfoundland Atlantic Accord Implementation Act, S.C. 1987, c. 3," *i.e.*, the Federal Accord Act. The entire Federal Accord Act, however, is not reserved. As the interpretative note to Annex I makes clear, the "Measures" element "identifies the laws, regulations or other measures, *as qualified, where indicated, by the Description element*, for which the reservation is taken."[461] The tribunal must therefore refer to the "Description" element of the reservation, which focuses on the "requirement for a benefits plan" in the Federal Accord Act as well as the "require[ment] that the benefits plan ensure that … expenditures be made for research and development to be carried out in the province, and for education and training to be provided in the province[.]"[462] For this reason, only those provisions of the Federal Accord Act specifically addressing such requirements are exempted.

267. Needless to say, the Guidelines, which were adopted by the Board in November 2004, did not exist when this reservation was included in Annex I or when the NAFTA came into effect in 1994.

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458 **CL-5**, NAFTA, Annex I, Interpretative Note, para. 2(f).

459 **CL-5**, NAFTA, Annex I, Interpretative Note, para. 2(g).

460 **CL-5**, NAFTA, Annex I, Schedule of Canada.

461 **CL-5**, NAFTA, Annex I, Interpretative Note, para. 2(f) (emphasis added).

462 **CL-5**, NAFTA, Annex I, Schedule of Canada.

3. The Guidelines Are Not a Subordinate Measure Encompassed by Canada's Annex I Reservation

268. In order to establish that the Guidelines are exempted under Article 1108, Canada must establish that the criteria in Annex I are met. Paragraph 2(f) of Annex I's interpretative note states as follows:

> **Measures** identifies the laws, regulations or other measures, as qualified, where indicated, by the **Description** element, for which the reservation is taken. A measure cited in the **Measures** element (i) means the measure as amended, continued or renewed as of the date of entry into force of this Agreement, and (ii) includes any subordinate measure adopted or maintained under the authority of and consistent with the measure.

269. The Guidelines are not the Federal Accord Act "as amended, continued or renewed," and, in any event, significantly post-date the NAFTA's entry into force. Nor, as the following sections explain, do the Guidelines, as a "subordinate measure," fall within the scope of Canada's Annex I reservation.

270. To be covered by the reservation, a new subordinate measure, like the Guidelines, must be consistent with the reserved measure and any prior subordinate measure that is itself adopted or maintained under the authority of and consistent with the measure listed in the Schedule to Annex I.

271. In other words, once a subordinate measure passes the test in paragraph 2(f)(ii) of Annex I's Interpretative Note, it is 'included' within the expressly listed measure. Thereafter, the expressly listed "parent" measure and the subordinate measures adopted thereunder are treated as one composite whole for the purposes of Annex I.[463] This interpretation is confirmed by the NAFTA Drafting Conventions, which state that "[t]he singular is

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[463] **CL-5**, NAFTA, Annex I, Interpretative Note, para. 2(f)(ii).

preferred over the plural form of a word"[464]—suggesting that no special meaning should be inferred from the use of the singular in this instance.

272. Thus, once the Board approved the Hibernia Benefits Plan in 1986 in Decision 86.01, that Decision became part of the specifically listed measure, the Accord Act, for the purposes of Canada's Schedule to Annex I.[465] Decision 86.01 undisputedly was adopted under the authority of and consistent with the Accord Act. When the NAFTA came into force in 1994, the Hibernia Benefits Plan and Decision 86.01 were already "included" within the Accord Acts for the purposes of Annex I, a fact on which investors would rely going forward. It would make no sense for Decision 86.01 to be excluded subsequently from the listed measure for the purposes of applying the test laid down in paragraph 2(f)(ii) to a later subordinate measure. Therefore, the measure against which the Guidelines must be assessed is the Accord Act including the Benefits Plans and the Board decisions adopting them.

273. Indeed, Canada has adopted the same interpretation on numerous occasions. For example, during opening oral submissions at the liability hearing in the Mobil I Arbitration, Canada's representative stated that:

> To determine whether or not the Guidelines are subordinate and therefore whether they're reserved, the Tribunal has to determine whether the Guidelines are authorized by the Accord Implementation Act and whether they are consistent with that Act as well as the Hibernia and the Terra Nova Benefits

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[464] **CL-50**, Conventions to be used in the NAFTA Texts, at 4 (July 9, 1992), attached as Exhibit A to Submission of the United States of America (July 8, 2010).

[465] **C-41**, Terra Nova Decision 97.02, which approved the Terra Nova Benefits Plan, was also adopted "under the authority of and consistent with" the Accord Acts. As such, the Guidelines must also be assessed for consistency against the Terra Nova Benefits Plan and Decision 97.02.

> Decisions. That's the test the Tribunal has to apply to determine whether the Guidelines are subordinate and whether they are reserved.[466]

274. Canada's position, as it then was, could not be clearer: paragraph 2(f)(ii) requires a Tribunal to determine whether the new subordinate measure is consistent with the listed measure including any prior subordinate measures that have been adopted thereunder.

275. In defining consistency under Annex I, the Decision recognized that:

> While the amendment standard in Article 1108 [*i.e.*, the 'ratchet test' in Article 1108(1)(c)] and the consistency standard in paragraph 2(f) [of Annex I] are not identical provisions, they are substantively reinforcing and tug in the same direction, namely, to ensure that the reservations are not expanded or altered to such a degree so as to enlarge the non-conformity of the reservation *vis-a-vis* the obligation against which the measure is reserved. An evaluation of "consistency" and that of an amendment both consider whether and how the scope of the reservation has been impacted. Here, an evaluation of "consistency" under the NAFTA must consider the consistency with the reserved and subordinate measures in the

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[466] **C-188**, Mobil I Tr. 240:17-241:4. *See also id.*, Tr. 1241:3-17 (Counsel for Canada: "So, in the Interpretive Note to Annex I in Article 2(f)(ii) it says that: 'A measure cited in the Measures element includes any subordinate measure adopted or maintained under the authority of and consistent with the measure.' So, this is the test that we have to apply to determine whether the Guidelines are subordinate to the Accord Implementation Act. In this sentence, then, the measures cited in the Measures element is the Accord Implementation Act, the alleged subordinate measure is the Guidelines, and therefore the issue [sic] are: One, whether the Guidelines are adopted under the authority of the Act; and, two, are the Guidelines consistent with the Act in the previous Benefits Decisions?"); *and id.*, Tr. 239:18-240:16, 270:15-271:6, 1263:13-19.

context of the recognized and limited exception to Article 1106.[467]

276. This context and purpose must inform the tribunal's application of the "consistency" standard in Annex I's Interpretative Note.

277. The Guidelines impose far more restrictive local content requirements on investments than had been the case under the preexisting regime. As discussed in detail above in Section II.D.2, the significant changes required by the imposition of the Guidelines are summarized below:

	Pre-Guidelines	**Post-Guidelines**
Substantive Commitment	Project operator will undertake some unspecified amount of R&D/E&T to address the commercial and technical needs of the project unique to operating in the Canadian offshore environment, and must give priority consideration to local providers on a competitive basis in the procurement of those services.	Project operator must achieve a prescribed level of expenditures on R&D/E&T irrespective of the commercial and technical needs of the project, amounting, in practice, to millions more dollars per year than would otherwise be spent. The mandated amounts are not tied to the commercial or technical needs of the project, nor are they tied to the technical needs of the offshore

[467] **C-1**, Decision ¶ 341.

	Pre-Guidelines	Post-Guidelines
		Newfoundland environment.
Board Monitoring Function	Project operator must periodically provide high-level report to the Board on R&D/E&T activity. These periodic reports allow the Board to monitor the operators' undertakings, as contained in their benefits plans.	At the end of each OA period, project operator must provide detailed accounting of R&D/E&T expenditures during that OA period. Board assesses each claimed expenditure and determines whether it counts toward the Guidelines' expenditure requirement. In the event of a shortfall in spending, the project owners must provide a plan to spend down the gap, a financial instrument to guarantee the shortfall, and an agreement with sufficient triggers for the Board to realize upon the instrument.
Pre-Approval Requirement	No Board preapproval; the Board does not pass judgment on individual R&D/E&T expenditures.	Project operator must seek Board preapproval of each R&D/E&T expenditure that it plans to undertake.

	Pre-Guidelines	**Post-Guidelines**
Relationship Between R&D/E&T Activity and OA	None.	OA conditioned on compliance with the Guidelines.
Retroactive Effect of the Board's Determinations	Operators spent the amount required by the commercial and technical needs of the project on R&D and E&T.	Board calculates expenditure requirements at the end of each OA period. Thus, an operator does not know how much it was required to expend during an OA period until that period is over. Because the expenditure amount applicable to a given period is calculated after the fact, operators cannot effectively plan their R&D/E&T activity to avoid a deficit or a surplus in spending.

278. The conclusion is inescapable: the changes introduced by the Guidelines as applied to Hibernia and Terra Nova amount to a fundamentally different approach to R&D and E&T expenditures than that previously set forth and implemented under the Federal Accord Act, the Benefits Plans, and related Board Decision. Thus, the Guidelines, as applied to Hibernia and Terra Nova, are not reserved and therefore violate Article 1106 of the NAFTA.

VII.

MOBIL HAS SUFFERED, AND CONTINUES TO SUFFER, LOSS AS A RESULT OF THE GUIDELINES

279. Canada has thus breached its NAFTA obligations through the enforcement of the Guidelines, as the Mobil I Majority held. Mobil is entitled under international law to be made whole for the harm inflicted upon it by this wrongful conduct.

280. The Mobil I Majority awarded damages through April 30, 2012 for Hibernia and December 31, 2011 for Terra Nova.[468] In this arbitration, Mobil seeks compensation for the damages that were actually incurred from these dates through the end of 2015.

A. Mobil Is Entitled to Full Reparation for the Losses it Has Suffered as a Result of the Guidelines

281. Under Article 1135 of the NAFTA, a tribunal that makes a final award against a Party may award, separately or in combination, (a) monetary damages and any applicable interest or (b) restitution of property. In this case, because the harm inflicted by the Guidelines is pecuniary in nature, the appropriate remedy is monetary damages. Given that the NAFTA does not set out how monetary damages are to be calculated, the tribunal should calculate Mobil's damages in accordance with general principles of international law.

282. The Permanent Court of International Justice formulated the relevant customary international law standard almost nine decades ago in its judgment in the *Chorzów Factory* case:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by

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468 **C-2**, Award ¶¶ 157, 178.

> international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.[469]

Today, the full reparation principle recognized by *Chorzów Factory* enjoys universal recognition.[470] Accordingly, the principle of full reparation established in international law should guide this tribunal's assessment of damages.

283. The Mobil I Majority adopted an approach to damages that is consistent with the applicable principles of international law, including the principle of full reparation.

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[469] **CL-51**, *Case Concerning the Factory at Chorzów*, 1928 P.C.I.J. (ser. A) No. 17, Judgment No. 13 at 47.

[470] *E.g.*, **CL-52**, *ADC Affiliate Ltd. v. Republic of Hungary*, Award of September 27, 2006, ¶ 493 (reviewing numerous decisions and concluding that "there can be no doubt about the present vitality of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice."); **CL-37**, *S.D. Myers v. Canada*, UNCITRAL, Partial Award of November 13, 2000, ¶ 311 (recognizing that *Chorzów Factory* "is still recognized as authoritative on the matter of general principle" of damages); **CL-53**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of August 20, 2007, ¶ 8.2.4-8.2.5 (adopting *Chorzów Factory* as setting out the general principle of international law pertaining to compensation for unlawful state acts); **CL-54**, *Siemens v. Argentine Republic*, ICSID Case No. ARB/02/8, Award of February 6, 2007, ¶ 351 (same); **CL-55**, *AMOCO International Finance Corporation v. Iran*, Award of July 14, 1987, ¶ 191 (recognizing *Chorzów Factory* as "the most authoritative exposition of the principles applicable" to calculation of damages). *See also* **CL-56**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Award of July 25, 2007, ¶ 29 ("It is well established in international law that the most important consequence of the committing of a wrongful act is the obligation for the State to make reparation for the injury caused by that act.").

Mobil initiated this proceeding in accordance with the Mobil I Majority's guidance that, as losses became "actual," the Claimants could claim compensation in future NAFTA arbitration proceedings.[471] The majority understood that a loss becomes actual when either "a payment or expenditure related to the implementation of the 2004 Guidelines has been made"[472] or "when there is a firm obligation to make a payment and there is a call for payment or expenditure" under the Guidelines.[473]

284. The Mobil I Majority awarded damages for actual losses in respect of "incremental expenditures," meaning, those expenditures that would not have been made in the ordinary course of business in the absence of the Guidelines.[474] It determined which expenditures were incremental in nature based on "the particular facts and characteristics of each of the identified and challenged expenditures, together with the related testimony and evidence" before it.[475] The Mobil I Majority understood that "the mere fact that an expenditure may be beneficial to the Claimants or Projects does not definitively answer whether it was undertaken as a result of the Guidelines or not" since it was logical that the Projects "would seek to make the necessary expenditures of some utility."[476] Rather, the central inquiry is whether "the incremental expenditures would not have been made in the ordinary course of business in the absence of the Guidelines[.]"[477]

285. Some expenditures presented "inherent difficulties of retrospectively applying the definition of 'ordinary course' to R&D and E&T spending which was not conceived with this

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471 **C-1**, Decision ¶ 478.

472 *Id.* ¶ 469.

473 *Id.*

474 **C-2**, Award ¶ 52.

475 *Id.* ¶ 51.

476 *Id.* ¶ 51.

477 *Id.* ¶ 52.

definition in mind."[478] In view of this, the Mobil I Majority recognized that "the Claimants do not have to prove the quantum of damages with absolute certainty."[479]

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478 *Id.* ¶ 53.

479 **C-1**, Decision, ¶ 437. In the Mobil I Decision, the Majority considered and discussed the standard of reasonable certainty in connection with the claims for future damages. *Id.* ¶¶ 432-39, 473-77. Later, in the Award, the Mobil I Majority applied the reasonable certainty standard to assess the claims for past damages. **C-2**, Award ¶¶ 52-53 (noting that the standard of "reasonable certainty" was applied). In international law, the prevalent standard of proof is preponderance of the evidence. **CL-57**, S. Ripinsky and K. Williams, Damages in International Investment Law (BIICL 2008), p. 163 ("Commentators tend to support 'preponderance of evidence' as the prevalent standard in international arbitration."); **CL-58**, Nigel Blackaby et al., Redfern and Hunter on International Arbitration (6th ed. 2015) ¶ 6.85 ("The degree of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition, but it may be safely assumed that it is close to the test of the 'balance of probability' (that is, 'more likely than not')."). The reasonable certainty standard is invoked typically in the context of forward-looking damages, such as lost profits. *E.g.*, **CL-59**, M. Kantor, Valuation for Arbitration (2008), p. 49 ("A commonly accepted standard for awarding forward-looking compensation (the expectancy interest) is that damages must be proved with reasonable certainty."); **CL-60**, *Karaha Bodas Co., LLC v. Pertamina & Others*, (UNCITRAL) Award of 18 December 2000, ¶ 124 ("the issue confronting the Arbitral Tribunal in the present case is that it is requested to assess with a reasonable degree of confidence the level of profits which the Claimant might have legitimately expected to earn"). In any event, there appears to be little practical difference between the two standards in terms of the degree of proof required. **CL-57**, S. Ripinsky and K. Williams, Damages in International Investment Law (BIICL 2008), p. 164 ("[I]nternational law has followed the lead of most legal systems, which relax the standards of proof [for lost future gains] and are satisfied if the profits would have been *probable* in light of the circumstances.") (emphasis in original, internal quotation marks and footnote omitted); *see also* **C-1**, Decision ¶ 477 ("[I]t does not, on

B. The Process of Quantifying Mobil's Compensable Losses Due to Incremental Expenditures

286. Guided by the approach taken in the Mobil I Arbitration, Mobil has relied on the assistance of Paul Phelan to quantify its compensable losses due to incremental expenditures at Hibernia (since May 1, 2012) and at Terra Nova (since January 1, 2012) through the end of 2015.[480] The quantification of these losses, while conservative and accurate, includes a number of adjustments that are necessary to arrive at the net claim amount. Mr. Phelan describes in detail the methodology employed to calculate Mobil's incremental expenditure losses.[481] This methodology may be summarized in six steps, as follows.

1. Step One: Identification of All Post-Mobil I R&D and E&T Expenditures Made on the Hibernia and Terra Nova Joint Accounts

287. The starting point for quantifying Mobil's losses is identifying all of the R&D and E&T expenditures made at Hibernia and Terra Nova on the project joint accounts.

288. The Guidelines require the project operators to submit annual reports to the Board regarding their Guidelines-eligible expenditures.[482] In addition, as part of its "squaring-up process" of determining compliance with the Guidelines' spending minimums, the Board has historically required the operators to submit partial-year reports approximately six

balance, seem to us that the estimates [of future damages] are *more probable than not*.") (emphasis added). Thus, whichever recognized standard of proof this Tribunal uses, the proof submitted by Mobil will suffice to establish the existence and quantum of its damages claim, which pertains entirely to past time periods.

480 **CW-1**, Phelan Statement I, ¶ 54.

481 *Id.* ¶¶ 56-85.

482 **C-3**, Guidelines, § 4.1; *also note* **CW-3**, Sampath Statement I, ¶ 15.

months before the expiry of a project's current POA/OA.[483] Within a few months after receiving an annual or "squaring-up" report, the Board issues its decision on which of the reported expenditures meet the eligibility criteria under the Guidelines.[484]

289. The periodic R&D and E&T reports include spending by the operator that is charged to the respective project joint account.[485] Mobil incurs a *pro rata* portion of these expenditures according to its percentage interests in the Hibernia and Terra Nova projects.[486] The reports additionally include R&D and E&T spending by the project's contractors and owners, which can count toward the respective project's overall spending requirement.[487] However, except for spending made by Mobil as an owner in the Hibernia and Terra Nova projects, such contractor and owner spending is not incurred by Mobil and therefore does not form part of its claim for damages.[488]

290. Thus, the first step in quantifying Mobil's compensable losses due to incremental expenditures is to segregate out expenditures made by the projects' contractors and owners. The remainder is all of the R&D and E&T spending made on the Hibernia and Terra Nova projects' respective joint

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[483] *E.g.*, **C-189**, Letter from J. Bugden, CNLOPB, to W. Swett, HMDC (June 7, 2012); **C-190**, Letter from J. Bugden, CNLOPB, to G. Vokey, Suncor Energy Inc. (July 18, 2011). *See also* **CW-3**, Sampath Statement I, ¶ 15; **CW-1**, Phelan Statement I, ¶ 56.

[484] **CW-3**, Sampath Statement I, ¶ 16.

[485] **CW-1**, Phelan Statement I, ¶ 56; **CW-3**, Sampath Statement I, ¶ 15.

[486] **CW-1**, Phelan Statement I, ¶ 74. See discussion of "Step Four" at ¶ 310, *infra*.

[487] **CW-1**, Phelan Statement I, ¶¶ 59-60.

[488] None of the R&D and E&T spending by Mobil as a project owner during the periods at issue in this arbitration was incremental, and therefore no claim is made in respect of this spending. **CW-1**, Phelan Statement I, ¶ 60.

accounts.[489] As the joint account expenditures include incremental and ordinary course spending, further adjustments are required to arrive at Mobil's damages.

2. Step Two: Determination of Which R&D and E&T Expenditures Would not Have Been Made But for the Guidelines

291. After identifying all of the R&D and E&T joint account expenditures made during the relevant periods, the next step is determining which of these are incremental in nature—that is, those expenses which would not have been made in the absence of the Guidelines.

292. Some of the overall expenditures would have been made by the Projects even in the absence of the Guidelines, because they relate to R&D and E&T that is necessary for the Projects or that would in any event have been undertaken in the ordinary course of business.[490] However, the amount of such ordinary course spending could not come close to meeting the Projects' respective Guidelines obligations.[491] As a result, to satisfy their expenditure obligations, the Projects had to devise and to undertake expenditures that were contrived in order to meet the Guidelines' spending requirement, and that would not have been undertaken in the ordinary course of business.[492]

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[489] **CW-1**, Phelan Statement I, ¶ 62.

[490] **CW-1**, Phelan Statement I, ¶ 63.

[491] **CW-1**, Phelan Statement I, ¶ 51. *See also* **CW-4**, Ringvee Statement I, ¶ 13, ¶ 17; **C-191**, Email from T. Cutt, ExxonMobil, to P. Phelan et al, ExxonMobil (Aug. 1, 2003) ("The expectation of this type of R&D expenditure on mature assets seems completely unrealistic . . . . We could never require even a small percentage of the R&D for the project.").

[492] **CW-1**, Phelan Statement I, ¶ 64. *See also* **CW-4**, Ringvee Statement I, ¶ 13 ("the level of R&D expenditure required under the Guidelines was expected to significantly exceed the level of

293. For many incremental expenditures, this Tribunal can and should rely on, and be guided by, findings in the Award. For instance, several expenditures incurred after the periods at issue in the Mobil I Arbitration relate to continued expenditures for the same projects that the Mobil I Majority found to be incremental in nature.[493] With respect to such continuing expenditures, Mobil requests that this tribunal find their incremental nature to be *res judicata* by virtue of the Award.[494]

294. In addition, many expenditures are similar in origin, nature, or purpose to one or more expenditures found to be incremental in the Award.[495] For the recent incremental

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R&D which would otherwise be needed for Hibernia and Terra Nova in the production stage, and we would have to look for R&D opportunities to spend beyond actual project needs"); **CW-7**, Durdle Statement I, ¶ 15 ("when enforcement of the Guidelines began in 2009, HMDC's management encouraged various teams, including mine, to come up with R&D projects on which to spend money to help the Hibernia project satisfy its spending requirements"); **CW-3**, Sampath Statement I, ¶ 22 ("the projects' respective operators and owners have undertaken extraordinary and novel measures so that they can meet their respective spending obligations").

[493] *E.g.*, **CW-3**, Sampath Statement I, ¶ 42 (Ice Gouge Study), ¶ 85 (Industrial Chair in Petroleum Geosciences), ¶ 89 (Enhanced Field School Program), ¶ 92 (Girl Quest Camp Fund), ¶ 120 (CARD Annual Contributions), ¶ 137 (Young Innovators Award), ¶ 138 (Johnson GEO Centre Programming), ¶ 144 (Rovers Search and Rescue Infrastructure Contribution), ¶ 146 (Red Cross Centre), ¶ 150 (Women in Science and Engineering Program), ¶ 152 (WRDC Contributions); **CW-5**, Noseworthy Statement I, ¶ 19 (Gas Utilization Study or WAG Pilot), ¶ 31 (SARA & Metal Analysis).

[494] Section V.A, *supra*.

[495] *E.g.*, **CW-5**, Noseworthy Statement I, ¶ 28 (Ice Management JIPs); **CW-3**, Sampath Statement I, ¶¶ 26-45 (various ice- and arctic-related JIPs and projects), ¶¶ 87-88 (Geophysics Support), ¶ 94-96 (Shad Valley Program), ¶ 122 (CARD Subject Matter Expert Support), ¶¶ 123-124 [redacted], ¶¶ 125-126 ("Drift and Divergence of Ice Floes Project), ¶¶ 127-

expenditures bearing such similarities to predecessor expenditures, Mobil requests that this tribunal give appropriate consideration to the relevant reasoning in the Award.

295. Mobil submits supporting documents and testimony in support of each incremental expenditure to be claimed, including those that are identical or similar to those addressed by the Mobil I Majority.[496] Thus, if this tribunal must decide any of the claimed incremental expenditures *de novo*, the documents and testimony submitted by Mobil fully establish their incremental nature.

296. Each expenditure made as a result of the Guidelines since May 1, 2012 for Hibernia and January 1, 2012 for Terra Nova and claimed as incremental is separately identified in the table at Appendix A to this Memorial, which reflects:

(i) a brief description of the expenditure,

(ii) the gross amount of the expenditure, in Canadian dollars, for the periods at issue in this proceeding,

(iii) which project(s) (Hibernia, Terra Nova, or both) is (or are) associated with the expenditure,

(iv) the year (or years) in which the expenditure was made,

(v) a citation to the relevant evidence provided in one or more witness statements as to each specific incremental expenditure,

(vi) a citation to the relevant documentary evidence as to each specific incremental expenditure, and

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128 (Arctic Offshore and Pipeline Engineering Course), ¶¶ 130-131 (Development of Ice Ridge Keel Strengths Enhancement Project), ¶¶ 140-141 (Manuels River Education Centre), ¶¶ 142-143 (Fortune Head Interpretation Centre Improvements), ¶¶ 148-149 (Choices for Youth – Train for Trades Program), ¶¶ 154-155 (ESTEEM Girls).

[496] Appendix A.

(vii) a citation to a relevant passage or passages of the Mobil I Award, as appropriate.

As shown in the table, [redacted] of gross incremental expenditures have been made due to the continued imposition of the Guidelines upon the Projects since the periods at issue in the Mobil I Arbitration up to the end of 2015.[497]

297. The strategies employed by Hibernia and Terra Nova to meet their Guidelines spending obligations were multifaceted. To illustrate these strategies, a number of common threads merit attention.[498]

Joint-Industry Projects

298. When the Board began implementing the Guidelines in 2009, the industry coordinated to devise jointly funded projects as a strategy for achieving the levels of spending required by the Guidelines.[499] A number of Guidelines-driven joint-industry projects (or "JIPs") were in progress during the Mobil I Arbitration, and the Mobil I Majority decided that expenditures in support of such JIPs were incremental.[500] As it observed with respect to one such JIP, "[t]he fact that this expenditure was conducted jointly by [redacted] supports the Claimants' assertion that

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[497] Mobil may receive additional information regarding R&D and E&T expenditures over the course of this proceeding. Consequently, based on new information learned, this table will be updated as it becomes appropriate.

[498] The types of R&D and E&T spending discussed below are illustrative and not necessarily exhaustive.

[499] **CW-4**, Ringvee Statement I, ¶¶ 17-22; **CW-5**, Noseworthy Statement I, ¶ 26; **CW-7**, Durdle Statement I, ¶ 17; **CW-8**, Dunphy Statement I, ¶¶ 13-14.

[500] **C-2**, Award ¶¶ 67-70 [redacted], ¶¶ 77-78 [redacted], ¶¶ 104-105 [redacted], ¶¶ 113-115 [redacted].

the project was not specifically needed at Hibernia, and rather, that it was Guidelines-motivated."[501]

299. Hibernia and Terra Nova have continued to participate in JIPs for the purpose of meeting their obligations under the Guidelines.[502] As the Mobil I Majority recognized, Mobil is entitled to damages in respect of expenditures made to support JIPs that would not have been funded in the absence of the Guidelines.

Project-Level R&D and E&T

300. The Hibernia and Terra Nova operators funded a number of project-level R&D and E&T initiatives to meet the spending minimums set under the Guidelines. These R&D and E&T expenditures were made in a variety of areas, including production operations,[503] arctic design,[504] safety,[505] and environment.[506]

301. Conceivably, some project-level incremental expenditures could yield a utility or benefit to the respective projects.[507] However, as the Mobil I Majority recognized, the

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[501] *Id.* ¶ 67. *Also note id.* ¶ 105: "Further, additional factors such as . . . that this project was conceived at a joint industry workshop[] lead the Majority to believe that this expenditure is properly characterized as incremental."

[502] **CW-3**, Sampath Statement I, ¶ 23.

[503] *E.g.*, **CW-5**, Noseworthy Statement I, ¶¶ 19-25 (Gas Utilization Study or WAG Pilot).

[504] *E.g.*, **CW-3**, Sampath Statement I, ¶¶ 44-45 (Alternative Subsea Protection Systems for Ice Scour Regions).

[505] *E.g.*, **CW-7**, Durdle Statement I, ¶ 35 (Personal Locator Beacon).

[506] *E.g.*, **CW-8**, Dunphy Statement I, ¶¶ 15-16 (Environmental Impact of Seismic Activity on Shrimp Behavior).

[507] **CW-3**, Sampath Statement I, ¶ 23 ("[G]iven that the Guidelines mandated R&D spending, we preferred to fund R&D work that held a possibility of generating some value for the Hibernia

fact that an expenditure may have entailed some utility or benefit does not mean that it would have been undertaken in the absence of the Guidelines.[508] Mobil is entitled to compensation for its losses in respect of project-level incremental expenditures, regardless of whether there was any possible benefit to making them.

Community Contributions

302. Hibernia and, to some extent, Terra Nova made a number of contributions to not-for-profit community organizations that they would not have made but for the Guidelines.[509] In the Mobil I Arbitration, Canada did not challenge the vast majority of such expenditures.[510]

303. Elevated levels of contributions continued after the periods at issue in the Mobil I Arbitration. In many cases, the sizes of the contributions at issue were simply unprecedented, reaching the millions of dollars.[511] Also, any nexus between community-based spending and the projects' tangible priorities was usually tenuous, if not wholly absent. Whatever social value may have been created through the Projects' charitable giving, very little (if any) commercial value was created for the Projects.[512]

Costs of R&D Management

304. The surge in R&D and E&T spending after the imposition of the Guidelines necessitated the creation of full-

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project, the project's owners or the industry in general, even if the potential value was incommensurate with the amount spent.").

[508] **C-2**, Award, ¶ 51.

[509] **CW-3**, Sampath Statement I, ¶¶ 132-135.

[510] **C-2**, Award, ¶ 128.

[511] *E.g.*, **CW-3**, Sampath Statement I, ¶¶ 140-141 ($2.84 million to the Manuels River Education Centre in 2012-2013).

[512] ***Id.*** ¶ 136.

time positions to manage the respective projects' activities.[513] The Board has recognized the costs associated with R&D management at Hibernia as eligible expenditures under the Guidelines.[514]

305. As with spending on actual R&D and E&T projects at Hibernia, the costs of R&D management would not have been incurred but for the imposition of the Guidelines. Indeed, in the Mobil I Arbitration, the Claimants were awarded these costs as incremental expenditures.[515]

306. Before the implementation of the Guidelines, there was no employee at HMDC whose full-time responsibility was to manage R&D and E&T activities.[516] After implementation, the administrative burdens of managing such activities grew considerably, so much so that HMDC created and filled a formal R&D Manager position.[517] As with the incremental R&D and E&T activities themselves, the costs associated with HMDC's employment of an R&D Manager would not have been incurred in the absence of the Guidelines. Therefore, Mobil seeks compensation for these losses.

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513 **CW-1**, Phelan Statement I, ¶ 35; **CW-4**, Ringvee Statement I, ¶ 4, ¶ 18.

514 **C-192**, Letter from M. Baker, CNLOPB, to J. Long, HMDC (June 1, 2015), *attaching* Hibernia 2014 Annual R&D/E&T Expenditure Review, [redacted].

515 **C-2**, Award, ¶ 128 (awarding incremental expenditures not challenged by Canada).

516 **CW-4**, Ringvee Statement I, ¶ 9.

517 **CW-1**, Phelan Statement I, ¶ 35. Suncor also created a position to manage Terra Nova's R&D activities in response to the imposition of the Guidelines. *Id.* However, Suncor has not claimed these costs as eligible expenditures under the Guidelines. In accordance with Mobil's conservative approach to damages, Mobil does not claim the costs of Suncor's R&D management.

307. For purposes of quantifying Mobil's compensable losses, expenditures that Mobil's witnesses have not identified as incremental are deducted from total joint account expenditures.[518] In this way, expenditures that would have been made in the ordinary course of business in the absence of the Guidelines are excluded from Mobil's claim for damages, leaving only incremental expenditures.

3. Step Three: Accounting Adjustments to the Incremental Expenditures at Hibernia

308. The Hibernia project consists of not only Hibernia (which is subject to this arbitration), but also the Hibernia Southern Extension ("HSE") and the AA Block.[519] Although the latter two areas are outside the scope of this arbitration, they form part of the Hibernia project and the Board has calculated a single figure for Hibernia's obligations under the Guidelines.[520]

309. Thus, an adjustment to most of Hibernia's incremental expenditures should be made to exclude that portion that relates to the volume of oil produced by the AA Block (which came online at the end of 2009) and HSE (which came online in June 2011).[521] Also, a number of R&D projects were charged entirely to the HSE owners.[522] As Mobil does not claim compensation for the HSE legacy projects in this arbitration, it has omitted these expenditures in full from its claim.[523]

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518 **CW-1**, Phelan Statement I, ¶¶ 63-64.

519 *Id.* ¶¶ 65, 69, 71.

520 *Id.* ¶¶ 66, 71.

521 *Id.* ¶¶ 66, 70, 72. Corresponding adjustments to Terra Nova's incremental expenditures are unnecessary. *Id.*

522 *Id.* ¶ 65.

523 *Id.* ¶ 66.

4. Step Four: Accounting for Mobil's Working Interests

310. At Hibernia, Mobil has a 33.125% indirect ownership interest, and at Terra Nova, Mobil has a 19% indirect ownership interest.[524] Mobil, as an indirect interest-holder in the Hibernia and Terra Nova projects, incurs spending made by the operators through the respective Projects' joint accounts in proportion to its *pro rata* ownership interests. Thus, an adjustment is made based on the ownership interest Mobil holds in the respective project to arrive at the portion of incremental expenditures that Mobil incurs.[525]

5. Step Five: Adjustment for the Net Tax Benefit of SR&ED Tax Credits

311. The Mobil I Majority determined that "it [was] appropriate to deduct from the compensation granted to the Claimants under this Award an amount that reflects the benefits that they … have received as a result of the SR&ED program."[526] Following this guidance, Mobil has deducted from its claim for compensation the net tax benefit of the SR&ED credits that it has claimed through 2014.[527]

312. At this time, SR&ED claims for R&D expenditures at Hibernia and Terra Nova made in tax year 2015 remain in progress. Thus, Mobil has made a SR&ED adjustment to R&D expenditures in 2015 that are continuations of expenditures claimed for SR&ED in prior tax years, as these 2015 expenditures are likely to be claimed for the SR&ED credit

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[524] *Id.* ¶ 74.

[525] *Id.*

[526] **C-2**, Award ¶ 138.

[527] **CW-1**, Phelan Statement I, ¶¶ 76-80. *See also* **CW-6**, Hutchings Statement I, ¶¶ 33-36.

again.[528] As the SR&ED claim process advances over the following months, additional SR&ED-eligible expenditures may be identified. In this event, Mobil will update the quantification of its claim accordingly.

6. Step Six: Adjustment for the Award of Shortfall Damages in Mobil I

313. When the Mobil I Claimants made their damages submission in July 2012, the Board had recently assessed an outstanding shortfall amount of [redacted] at Hibernia.[529] Mobil was awarded compensation of $3,582,408 for future incremental expenditures that the Mobil I Majority expected to be made to eliminate Hibernia's shortfall.[530] In this arbitration, and upon payment of the Mobil I Award by Canada, a deduction should be made from Mobil's total losses that stem from Hibernia incremental expenditures after April 30, 2012, because the Mobil I Award has already awarded a portion of the losses to Mobil.[531]

314. The Mobil I Majority did not award shortfall damages with respect to the Terra Nova project.[532] Accordingly, no corresponding deduction should be made to Terra Nova incremental expenditures after January 1, 2012. In this arbitration Mobil does not claim for shortfall damages with respect to the periods at issue.

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528 **CW-6**, Hutchings Statement I, ¶ 37; **CW-1**, Phelan Statement I, ¶ 80.

529 **C-170**, Letter from J. Bugden, CNLOPB, to J. Long, HMDC, at 1 (July 16, 2012); **C-2,** Award ¶¶ 165-168.

530 **C-2**, Award ¶¶ 165-169.

531 **CW-1**, Phelan Statement I, ¶¶ 82-84.

532 **C-2**, Award ¶ 164.

7. No Adjustment for Provincial Royalties or Federal Net Profits Interest

315. The Mobil I Majority considered whether to reduce the damages award on account of the provincial royalty regime, but ultimately declined to make any such deduction. Under the Hibernia Royalty Agreement applicable to the Hibernia project[533] and the provincial royalty regulations applicable to the Terra Nova project,[534] Mobil is entitled to self-assess which incurred R&D expenditures may qualify as eligible deductions from the royalties on the Projects' revenues that are paid to the Province.[535] The majority ultimately found that "there should be no deduction to the Claimants' compensation to reflect deductions made under the royalty regime applicable to the Projects."[536] Mobil therefore does not make any reductions in its claims for potential royalty deductibility.[537]

316. For the sake of completeness, Mobil notes that the Canadian federal government owns a net profits interest ("NPI") in the Hibernia project. The deductibility criteria for federal NPI obligations are similar to those for the provincial royalty regime.[538] Therefore, Mobil likewise makes no reduction in its claims for potential NPI deductibility.[539]

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533 **C-193**, Hibernia Royalty Agreement.

534 **CL-61**, Newfoundland and Labrador Regulation 71/03 (the "Royalty Regulations, 2003").

535 **C-2**, Award ¶ 141 (providing overview of provincial royalty regime).

536 *Id.* ¶ 147. *See also* **CW-1**, Phelan Statement I, ¶ 88 (observing that the Mobil I Majority's reasons for declining to reduce the awarded compensation based on royalty deductibility remain valid).

537 **CW-1**, Phelan Statement I, ¶¶ 86-88.

538 *Id.* ¶ 89.

539 *Id.*

C. Costs of Letters of Credit to Secure Shortfall Liabilities

317. Since it began imposing the Guidelines, the Board has required letters of credit from the owners of Hibernia and Terra Nova to secure shortfall amounts.[540] Of course, without mandatory spending minimums, the Board would not have demanded these letters of credit.

318. Since 2012, Mobil has put in place or maintained letters of credit required by the Board to secure the assessed R&D shortfalls for each of the Projects. During the time periods at issue in this arbitration, the costs of the letters of credit to secure Hibernia shortfall amounted to [redacted].[541] Meanwhile, to secure Terra Nova shortfall amounts, the costs of the letters of credit amounted to [redacted].[542] Mobil seeks compensation for these losses, as they would not have been incurred in the absence of the Guidelines.

D. Pre- and Post-Award Interest

319. Under NAFTA Article 1135, this Tribunal has the power to award interest. Interest is "'an integral part of the compensation itself, and should run consequently from the date when the State's international responsibility became engaged.'"[543] The award of appropriate interest should include compounding "as one of the elements of compensation."[544]

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540 *Id.* ¶¶ 90-92.

541 *Id.* ¶¶ 92-93; **C-194**, ExxonMobil Canada Properties, "C-NLOPB Security – LC Fees" Q1 2010 through Q4 2015.

542 *Id.*

543 **CL-62**, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 128 (quoting *Asian Agricultural Products v. Sri Lanka*, 4 ICSID Reports 245, ¶ 114). *See also* **CL-56**, *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award of July 25, 2007, ¶ 55

320. Mobil requests a commercially reasonable rate of pre-award and post-award interest based on Canadian Dollar Offered Rate plus four percentage points, averaged on a calendar year basis and compounded monthly on all sums awarded as damages by this tribunal.[545]

E. Costs

321. Article 1135 of the NAFTA provides that the Tribunal may award costs in accordance with the applicable arbitration rules. Rule 28 of the ICSID Arbitration Rules, which govern this proceeding, authorizes this Tribunal to award costs,[546] including attorneys' fees.[547] Accordingly, Mobil requests an award of costs.[548]

("In the Tribunal's view, interest is part of the 'full' reparation to which the Claimants are entitled to assure that they are made whole.").

[544] **CL-63**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002, ¶ 89 (citing **CL-64,** *Award in the Matter of an Arbitration between Kuwait and the American Independent Oil Co.* (1982) 21 ILM 976, ¶ 163; **CL-65**, *Asian Agricultural Products v. Republic of Sri Lanka* (1991) 6 ICSID Rev. – FILJ 526 at ¶ 114). *See also* **CL-66**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of July 14, 2006, ¶ 440 ("The Tribunal considers that compound interest reflects the reality of financial transactions, and best approximates the value lost by an investor.").

[545] **CW-1**, Phelan Statement I, ¶¶ 94-96. *See also* **CL-67**, John Y. Gotanda and Thierry J. Senechal, Interest as Damages, 47 Columbia Journal of Transnational Law 491 (2009) (arguing that full compensation requires an award of interest at a rate in line with market realities, compounded on a yearly basis).

[546] *Also note* Procedural Order No. 1, § 1.1 (designating the ICSID Arbitration Rules as the applicable rules), § 9.1 (reflecting that the parties' upfront payments of direct costs of the proceeding are "without prejudice to the final decision of the Tribunal as to the allocation of costs"); § 22.1 (authorizing the Tribunal to determine a schedule for the parties' statements of costs).

F. Summary of Damages Claimed

322. Mobil claims $20,845,708 as compensation for the losses it has incurred due to incremental expenditures made at Hibernia between May 1, 2012 and December 31, 2015 and at Terra Nova between January 1, 2012 and December 31, 2015.[549] Mobil additionally seeks [redacted] for the costs of the letters of credit that were placed or maintained during the time periods at issue. Finally, Mobil requests an award of pre-award and post-award interest on all compensation to be awarded, and of its costs, including attorneys' fees, in connection with this proceeding.

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[547] **CL-68**, Lucy Reed, Jan Paulsson, et al., Guide to ICSID Arbitration (Kluwer Law International 2010) at 153: "Parties to ICSID arbitrations are exposed to three main categories of costs: (a) the administrative costs of the Centre; (b) the fees and expenses of the arbitrators; and (c) the attorneys' fees and other expenses incurred by the parties themselves. The tribunal allocates responsibility for these costs as between the parties in the award[.]"

[548] Section VIII, *infra*.

[549] **CW-1**, Phelan Statement I, Annex A Table "Summary of Mobil Investments' Claim for Incremental Expenditures (2012-2015)", Reference P. Mobil may receive over the course of this proceeding emerging information pertaining to the quantum of its damages, particularly for losses incurred in 2015 for Hibernia and Terra Nova, and if so, it will update this Tribunal accordingly.

VIII.

RELIEF REQUESTED

323. For the foregoing reasons, Mobil respectfully requests an award in its favor:

A. Finding or otherwise affirming that the enforcement of the Guidelines constitute a performance requirement within the meaning of Article 1106(1) of the NAFTA, and that Canada has breached its obligations under the Article as a result;

B. Finding or otherwise affirming that the Guidelines are not covered by Article 1108(1) of the NAFTA or Canada's Annex I reservation to the treaty for the Federal Accord Act;

C. Directing Canada to pay damages to Mobil, or alternatively, to its indirectly controlled enterprises, in an amount to be proven at the hearing;

D. Directing Canada to pay pre- and post-award interest on all sums awarded;

E. Directing Canada to pay all of Mobil's costs associated with these proceedings, including attorneys' fees, ICSID fees and costs, the fees and costs of the arbitral tribunal, fees and costs associated with fact and expert witnesses, and any other fees and costs incurred in connection with Mobil's claims in this arbitration, in an amount to be determined at the conclusion of the proceedings;

F. Ordering such other and further relief as the tribunal deems available and appropriate.

Respectfully submitted,

[signed]

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Appendix A:
Claimant's Table of Incremental Expenditures

Expenditure Description	Gross Expenditures[1]	Project	Year(s)	Witness Testimony (¶¶)	Claimant's Exhibit(s)	Mobil I Award (¶¶)
Alternative Subsea Protection Systems for Ice Scour Regions	[redacted]	Hibernia	2014	Sampath 21-25, 44-45; Noseworthy 26-28; Durdle 17	C-246	67, 101-105
Arctic Offshore and Pipeline Engineering Course	[redacted]	Both	2012, 2014	Sampath 117-119, 127-129	C-292, C-293	116-121
[redacted]	[redacted]	Hibernia	2014	Sampath 21-25, 48-50	C-248	
Bioindicators	[redacted]	Both	2012-2015	Durdle 17; Dunphy 12-14, 19-20	C-316, C-322	67
CAE Helicopter Training Facility	$7,500,000	Hibernia	2014	Sampath 21-25, 67-69	C-257	
Canadian Access to Centrifuge Centre	[redacted]	Hibernia	2014	Sampath 108-112	C-282	

[1] This column reflects the total amount spent or incurred by the Hibernia project, the Terra Nova project, or both projects during the time periods at issue in this arbitration. *See* Claimant's Memorial, ¶ 296. The quantification of Claimant's incremental expenditure damages based on these gross amounts and other factors is included in Section VII.B of the Memorial. *See id.* at ¶¶ 286-316.

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Expenditure Description	Gross Expenditures[1]	Project	Year(s)	Witness Testimony (¶¶)	Claimant's Exhibit(s)	Mobil I Award (¶¶)
CARD Annual Contributions	[redacted]	Both	2012, 2013	Sampath 117-121	C-286	116-121
CARD Subject Matter Expert Support	[redacted]	Hibernia	2012-2015	Sampath 117-119, 122	C-206, C-212, C-192, C-251, C-216	116-121
Choices for Youth - Train for Trades Program	$2,100,000	Hibernia	2012	Sampath 132-136, 148-149	C-311	128
Cold Climate Oil Spill Response Research Facility	[redacted]	Both	2012	Sampath 21-25, 75-76; Durdle 17	C-262, C-263	67
Development of Ice Ridge Keel Strengths Enhancement Project	$586,000	Hibernia	2013	Sampath 117-119, 130-131	C-294, C-295	116-121
Drift and Divergence of Ice Floes Project	$763,518	Hibernia	2015	Sampath 117-119, 125-126	C-234, C-291	116-121
Dual Polarized Radar	[redacted]	Both	2012-2013	Sampath 21-27; Noseworthy 26-28; Durdle 17	C-234, C-229	67, 101-105

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Expenditure Description	Gross Expenditures[1]	Project	Year(s)	Witness Testimony (¶¶)	Claimant's Exhibit(s)	Mobil I Award (¶¶)
Dynamic Monitoring of Shallow-Water Wells Project	[redacted]	Hibernia	2015	Sampath 21-25, 77-78	C-264	
Dynamic Positioning in Ice	[redacted]	Both	2014, 2015	Sampath 21-25, 38-39; Noseworthy 26-28; Durdle 17	C-239	67, 101-105
[redacted]	[redacted]	Hibernia	2014	Durdle 16-17, 36-38	C-221	75-78
Enhanced Field School Program	$420,000	Hibernia	2012	Sampath 81-84, 89-90	C-268	
Enhanced Iceberg and Sea Ice Drift Forecasting	[redacted]	Both	2012	Sampath 21-25, 32-33; Noseworthy 26-28; Durdle 17	C-233, C-234	67, 101-105
Enhanced Satellite Radar	[redacted]	Both	2012-2014	Sampath 21-25, 30-31; Noseworthy 26-28; Durdle 17	C-234, C-232	67, 101-105

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Expenditure Description	Gross Expenditures[1]	Project	Year(s)	Witness Testimony (¶¶)	Claimant's Exhibit(s)	Mobil I Award (¶¶)
Enhancing the Operability of Offshore Personnel Transfer	[redacted]	Both	2012	Durdle 16-19	C-208	
Environmental Genomics	[redacted]	Hibernia	2015	Sampath 21-25, 79-80	C-265	
Environmental Impact of Seismic Activity on Shrimp Behavior	[redacted]	Both	2013-2015	Durdle 17; Dunphy 12-16	C-316, C-319	67
Escape-Evacuation-Rescue (EER) in Ice JIP	[redacted]	Both	2012, 2014	Durdle 16-17, 20-22	C-209, C-210	79-84
ESTEEM Girls	$100,000	Hibernia	2014	Sampath 132-136, 154-155	C-314	128
Fortune Head Interpretation Centre Improvements	$852,000	Hibernia	2013	Sampath 132-136, 142-143	C-309	128
Gas Utilization Study (WAG Pilot)	[redacted]	Hibernia	2012-2015	Noseworthy 19-25	C-162, C-330, C-343	58-63
Geophysics Support	$1,980,000	Hibernia	2013	Sampath 81-84, 87-88; Durdle 17	C-267	

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Claimant's Table of Incremental Expenditures

Expenditure Description	Gross Expenditures[1]	Project	Year(s)	Witness Testimony (¶¶)	Claimant's Exhibit(s)	Mobil I Award (¶¶)
Girl Quest Camp Fund	[redacted]	Hibernia	2012, 2014, 2015	Sampath 81-84, 92-93	C-270	
[redacted]	[redacted]	Hibernia	2015	Sampath 21-25, 72-74; Durdle 17	C-259	
H_2S Corrosion and Materials Laboratory and Basic Research on H_2S Souring	$3,667,889	Terra Nova	2013	Sampath 81-84, 99-104	C-273, C-274, C-275, C-276, C-277	97-100, 164
[redacted]	[redacted]	Hibernia	2014	Phelan 35	C-192	128
Ice Gouge Study	[redacted]	Both	2013-2015	Sampath 21-25, 42-43; Noseworthy 26-28; Durdle 17	C-243, CE-279	67, 110-115
Ice Loads on Floating Structures	[redacted]	Both	2012	Sampath 21-25, 34-35; Noseworthy 26-28; Durdle 17	C-234, C-235	67, 110-115

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Claimant's Table of Incremental Expenditures

Expenditure Description	Gross Expenditures[1]	Project	Year(s)	Witness Testimony (¶¶)	Claimant's Exhibit(s)	Mobil I Award (¶¶)
[redacted]	[redacted]	Hibernia	2014, 2015	Sampath 21-25, 58-59; Noseworthy 26-28; Durdle 17	C-234, C-253	67, 110-115
Ice Management JIP	[redacted]	Hibernia	2014, 2015	Noseworthy 26-28; Durdle 17	C-162, C-234	67, 110-115
Ice Ocean Sentinel System	$300,000	Terra Nova	2015	Sampath 81-84, 105-107	C-278, C-279, C-280	
Ice Radar Enhancement Project	[redacted]	Hibernia	2015	Sampath 21-25, 28-29; Noseworthy 26-28	C-231, C-234	
[redacted]	[redacted]	Hibernia	2014, 2015	Sampath 21-25, 40-41; Noseworthy 26-28; Durdle 17	C-242	67, 110-115
Improved Metocean Support for Offshore Operations	[redacted]	Hibernia	2014, 2015	Sampath 21-25, 54-55; Noseworthy 26-28	C-234, C-250	
Improving Stability of Helicopters Following Ditching	[redacted]	Hibernia	2013	Durdle 16-17, 26-30	C-213, C-214, C-215	

Appendix A:
Claimant's Table of Incremental Expenditures

Expenditure Description	Gross Expenditures[1]	Project	Year(s)	Witness Testimony (¶¶)	Claimant's Exhibit(s)	Mobil I Award (¶¶)
Industrial Chair in Petroleum Geosciences	$500,000	Hibernia	2012	Sampath 81-86	C-266	122-127
Johnson GEO Centre Programming	$660,000	Hibernia	2012	Sampath 132-136, 138-139	C-306, C-307	128
Large Scale Iceberg Impact Experiment	[redacted]	Both	2014	Sampath 21-25, 70-71; Noseworthy 26-28; Durdle 17	C-243	67, 110-115
Manuels River Education Centre	$2,840,000	Hibernia	2012, 2013	Sampath 132-136, 140-141	C-189, C-308	128
Marine Dredge Disposal	[redacted]	Both	2012-2015	Durdle 17; Dunphy 12-14, 17-18	C-316, C-320, C-321	67
Nuclear Magnetic Resonance to Detect Oil in and Under Ice	[redacted]	Hibernia	2014, 2015	Sampath 21-25, 62-64	C-255	
Offshore Operations Simulation Centre	$4,400,000	Hibernia	2014	Sampath 81-84, 97-98	C-272	71-74
[redacted]	[redacted]	Hibernia	2014, 2015	Sampath 108-109, 115-116	C-284	

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Expenditure Description	Gross Expenditures[1]	Project	Year(s)	Witness Testimony (¶¶)	Claimant's Exhibit(s)	Mobil I Award (¶¶)
Personal Locator Beacon	[redacted]	Hibernia	2014, 2015	Durdle 16, 35-36	C-220	
R&D Applications of Iceberg Profiling	[redacted]	Hibernia	2014	Sampath 108-109, 113-114	C-283	
Red Cross Centre	$100,000	Hibernia	2014	Sampath 132-136, 146-147	C-310	128
Remote Underdeck Inspection System	[redacted]	Hibernia	2012	Sampath 81-84, 91	C-206	
Rovers Search and Rescue Infrastructure Contribution	$109,000	Hibernia	2012	Sampath 132-136, 144-145	C-189, C-206	128
Safety Oversight Management System	[redacted]	Hibernia	2014	Durdle 16, 33-34	C-218, C-219	
SARA & Metal Analysis	[redacted]	Hibernia	2012	Noseworthy 29-31	C-331	97-100
Seabird Activity and Aviation Operations Study (Nocturnal Migratory Bird Behavior)	[redacted]	Hibernia	2013, 2015	Durdle 16, 31-32	C-213, C-214, C-217	

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Expenditure Description	Gross Expenditures[1]	Project	Year(s)	Witness Testimony (¶¶)	Claimant's Exhibit(s)	Mobil I Award (¶¶)
[redacted]	[redacted]	Hibernia	2014	Sampath 117-119, 123-124	C-290	116-121
Shad Valley Program	$2,850,000	Hibernia	2013	Sampath 81-84, 94-96	C-271	
Subsea Leak Detection	[redacted]	Hibernia	2013, 2015	Sampath 21-25, 46-47; Durdle 17	C-247	67
Subsea Sentry System	[redacted]	Hibernia	2014, 2015	Sampath 21-25, 51-53	C-249	
Synthetic Aperture Radar	[redacted]	Hibernia	2014, 2015	Sampath 21-25, 65-66	C-234, C-256	
[redacted]	[redacted]	Hibernia	2014, 2015	Sampath 21-25, 60-61; Noseworthy 26-28	C-254	101-105
Towing Icebergs	[redacted]	Hibernia	2014, 2015	Noseworthy 26-28; Durdle 17	C-234, C-236	67, 101-105
Towing, Sheltering and Recovery of TEMPSC Lifeboats/Life Rafts	[redacted]	Hibernia	2012, 2014	Durdle 16-17, 23-25	C-211	
Wave Impact Study	[redacted]	Hibernia	2014, 2015	Sampath 21-25, 56-57	C-252	

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Claimant's Table of Incremental Expenditures

Expenditure Description	Gross Expenditures[1]	Project	Year(s)	Witness Testimony (¶¶)	Claimant's Exhibit(s)	Mobil I Award (¶¶)
Women in Science and Engineering Program	[redacted]	Hibernia	2013-2015	Sampath 132-136, 150-151	C-312	128
WRDC Contributions	$261,750	Hibernia	2014, 2015	Sampath 132-136, 152-153	C-313	128
Young Innovators Award	[redacted]	Terra Nova	2012-2015	Sampath 132-137	C-207, C-230, C-240, C-241	89-93