INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mobil Investments Canada Inc.

v.

Canada

(ICSID Case No. ARB/15/6)

PROCEDURAL ORDER NO. 5

Members of the Tribunal
Sir Christopher Greenwood QC, President of the Tribunal
Dr. Gavan Griffith QC, Arbitrator
Mr. J. William Rowley QC, Arbitrator

Secretary of the Tribunal
Ms. Martina Polasek

Assistant Secretary of the Tribunal
Ms. Kendra Magraw

August 19, 2016

Order: Production of Documents

1. The Tribunal has received and considered the following submissions of the parties:

   - The Claimant's requests for the production of documents of July 15, 2016;
   - The Respondent's objections of August 1, 2016 to Mobil's July 15, 2016 requests for the production of documents;
   - The Claimant's responses of August 8, 2016 to Canada's August 1, 2016 objections;
   - The Claimant's email of August 17, 2016 containing the parties' agreements on certain outstanding document requests.

2. The Tribunal's decisions on the Claimant's requests for the production of documents are set forth in the last column of the Redfern Schedule incorporated as Annex A to this Order.

3. In accordance with the timetable established in Annex A to Procedural Order No. 1, the Respondent shall produce the documents ordered by the Tribunal by September 2, 2016.

On behalf of the Tribunal:

[signed]

Sir Christopher Greenwood QC
President of the Tribunal
Date: August 19, 2016

ANNEX A – PROCEDURAL ORDER NO. 5

Mobil Investments Canada Inc. v. Canada
ICSID Case No. ARB/15/6

MOBIL'S REQUESTS FOR DOCUMENT PRODUCTION
July 15, 2016

CANADA'S OBJECTIONS TO MOBIL'S JULY 15, 2016 REQUESTS FOR DOCUMENT PRODUCTION
August 1, 2016

MOBIL'S RESPONSES TO CANADA'S AUGUST 1, 2016 OBJECTIONS
August 8, 2016

1. Pursuant to and in compliance with Procedural Order No. 1 of the Arbitral Tribunal dated November 24, 2015, and in conformity with Article 3(3) of the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules"), Claimant Mobil Investments Canada Inc. ("Mobil") hereby requests that Respondent Canada produce for examination, inspection and copying the documents described below on or before August 12, 2016.

2. Mobil uses certain terms and abbreviations in its requests for documents, which have the following meanings:

   a) "and" means "and/or";

   b) "Board" means Canada-Newfoundland and Labrador Offshore Petroleum Board and Canada-Newfoundland Offshore Petroleum Board, including the Board's past and present members, officers, employees, directors, or other representatives, to the extent they presently possess or control responsive material;

   c) "concerning" means addressing, relating to, referring to, describing, discussing, identifying, evidencing, constituting, and recording;

   d) "Documents" is used in the broadest sense possible and includes, without limitation, all originals, non-identical copies (whether different from the original because of underlining, editing marks, notes made on or attached to such copy, or otherwise), and drafts, whether printed or recorded (through a sound, video or other electronic, magnetic or digital recording system) or reproduced by hand, including but not limited to writings, recordings, and photographs, letters, correspondence, purchase orders, invoices, telegrams, telexes, memoranda, records, summaries of personal conversations or interviews, minutes or records or notes of meetings or conferences, note pads, notebooks, postcards, "Post-It" notes, stenographic or other notes, opinions or reports of consultants, opinions or reports of experts, projections, financial or statistical statements or compilations, checks (front and back), contracts, agreements, appraisals, analyses, confirmations, publications, articles, books, pamphlets,

circulars, microfilm, microfiche, reports, studies, logs, surveys, diaries, calendars, appointment books, maps, charts, graphs, bulletins, photostats, speeches, data sheets, pictures, illustrations, blueprints, films, drawings, plans, tape recordings, videotapes, disks, diskettes, data tapes or readable computer-produced interpretations or transcriptions thereof, electronically transmitted messages ("e-mail"), voice mail messages, inter-office communications, advertising, packaging and promotional materials, and any other writings, papers and tangible things of whatever description whatsoever, including but not limited to all information contained in any computer or electronic data processing system, or on any tape, whether or not already printed out or transcribed;

e) "E&T" means education and training;

f) "Guidelines" means the 2004 Canada-Newfoundland and Labrador Offshore Petroleum Board Guidelines for Research and Development Expenditures;

g) "Hibernia" means the Hibernia oil field located in the North Atlantic Ocean, 315 kilometers east-southeast of St. John's, Newfoundland;

h) "Mobil I Arbitration" means that prior proceeding under NAFTA Chapter 11 known as *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4);

i) "Mobil I Majority" means the majority of arbitrators in the Mobil I Arbitration who in all respects joined in the Decision on Liability and on Principles of Quantum of May 22, 2012 and the Award of February 20, 2015 (that is, Professor Hans van Houtte and Professor Merit E. Janow);

j) "NAFTA" means the North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America;

k) "NAFTA Parties" means the signatory parties of the NAFTA, that is, the Government of Canada, the Government of the United Mexican States and the Government of the United States of America;

l) "including" means "including, but not limited to";

m) "or" means "and/or";

n) "Province" means the Province of Newfoundland and Labrador;

o) "R&D" means research and development; and

p) "Terra Nova" means the Terra Nova oil field located in the North Atlantic Ocean, 350 kilometers east-southeast of St. John's, Newfoundland.

3. Any term appearing in a quotation of another document has the meaning that is ascribed to that term by the document in which it appears.

4. The use of the singular form of any word includes the plural and vice versa.

5. With regard to some of the requests, none of the documents requested are in the possession, custody or control of Mobil. With regard to other categories, although Mobil may already possess some of the documents described by those categories, without knowing the full universe of documents that exist, it is impossible to state whether Mobil possesses all such documents, or whether some are in the exclusive possession, custody or control of Canada. Accordingly, Mobil believes it has a good faith basis for requesting all of the documents described below. Moreover, Mobil has a reasonable and good faith belief that the documents requested exist and are in the possession, custody and control of Canada, as the Canadian government or the government of the Province of Newfoundland and Labrador and/or the Canada-Newfoundland and Labrador Offshore Petroleum Board was involved in the creation or maintenance of many of these documents. Canada is instructed to search for documents in whichever units of the federal and provincial governments (including the Board) that are reasonably likely to have responsive documents.

6. As set forth in Procedural Order No. 1, Mobil requests Canada to produce documents based upon the contents of Canada's Counter Memorial.

7. Additionally, as set forth in Procedural Order No. 2, all documents produced in the Mobil I Arbitration may be used by the disputing parties in this arbitration. For that reason, the following requests do not seek documents produced by Canada to Mobil in the course of the Mobil I Arbitration, except to the extent that these documents were subsequently modified or supplemented.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
1.	Documents concerning the Province's assessment and consideration of R&D and E&T expenditures for deduction from royalty obligations pertaining to year 2009 which are owed to the Province by law or agreement with respect to Hibernia and Terra Nova.	Following the Mobil I Majority, Mobil has not reduced its damages claims based on provincial royalty deductions taken in respect of incremental R&D and E&T spending.[1] Despite the Mobil I Majority's conclusion, Canada argues that Mobil's claim for damages should be reduced in proportion to certain deductions that Mobil has taken against royalty obligations owed to the Province relating to the Hibernia and Terra Nova projects.[2] Canada cites the completed 2004-2008 royalty assessments.[3] The 2004-2008 royalty assessments are not, in fact,	Canada objects to the production of the requested documents on the following grounds: First, the Claimant fails to explain why "preliminary assessments or analyses predating any final audit outcome" are relevant or material within the meaning of IBA Rule 9(2)(a). The Province's practices relating to deductions from royalty obligations for R&D and E&T expenditures for the year 2009 is not in dispute. Claimant has never alleged, and does not say it will allege, that the Province's internal deliberations are tainted nor is the integrity of the Province's internal deliberations at issue. The disclosure of documents that evidence ongoing	**Relevance and Materiality** Documents concerning the Province's assessment and consideration of R&D and E&T expenditures for deduction from royalty obligations are relevant and material. Canada misconstrues the purpose of this request, which is not to show that the Province's internal deliberations are "tainted." Rather, this request is justified because Canada asks this Tribunal to reduce Mobil's compensation by at least 30% in respect of certain deductions taken against provincial royalty obligations relating to the Hibernia and Terra Nova projects.[7] Mobil is opposed to	1. The Tribunal notes Canada's understanding that "the final audit for Terra Nova for the year 2009 is complete and was already provided by the Province to the Terra Nova project operator in April 2016". That being the case, the documents related to that audit should be produced at once in accordance with Procedural Order No. 3, ruling on Request 19. 2. The Tribunal does not consider it necessary, at the present stage, to vary the decision made in Procedural Order No. 3, ruling on

[1] Mobil's Memorial dated March 11, 2016, para. 315.

[2] Canada's Counter Memorial dated June 30, 2016, para. 234 ("if any R&D and E&T expenditures remain which are determined by the Tribunal to be compensable, then the Claimant's savings on its royalty payments to the Province as a result of such expenditures must be deducted from the final assessment of damages."); **RE-1**, Report of Richard E. Walck, para. 83.

[3] Canada's Counter Memorial, para. 238.

[7] Canada's Counter Memorial, para. 234; **RE-1**, Report of Richard E. Walck, para. 83.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
		reliable historical data for predicting whether the Province will ultimately permit the deductions for incremental R&D and E&T expenditures that were taken during the 2012-2015 period at issue in this arbitration. Importantly, the 2004-2008 time period predates the Board's enforcement of the Guidelines against the Hibernia and Terra Nova projects, which commenced in 2009.[4] Thus, Mobil still does not know how the Province will treat deductions for *incremental* R&D and E&T spending that began in and after 2009, and Canada has not produced any evidence that might elucidate this question. Canada and the Province have custody and control over responsive material, including	and incomplete internal deliberations concerning decisions that have not yet been taken and which are not at issue or challenged in the arbitration will chill those deliberations and prejudice the Province's ability to properly exercise its audit rights under applicable royalty agreements. The highly speculative nature of the Claimant's request is highlighted by the Claimant's own words that the requested documents only "may be relevant". Decisions on royalties are made by the Province on the basis of law or agreement, neither of which provide for differential treatment on the basis of the treatment of R&D and E&T expenditures by a NAFTA panel or the characterization of R&D and E&T expenditures as incremental versus ordinary course. As the Claimant is unable to offer any argument or authority in support	such a reduction in part because Canada has not yet proffered reliable information regarding how the Province will treat deductions taken in respect of incremental R&D and E&T expenditures. The requested documents may shed light on the Province's intended treatment of such deductions and thereby assist this Tribunal in deciding on Canada's request for a reduction in compensation. It is surprising that Canada persists in disputing the relevance and materiality of these documents in view of the Tribunal's prior order that they be produced.[8] Indeed, Canada previously requested documents from Mobil concerning provincial royalty deductions, explaining that they were	Request 19, with regard to the other documents sought. Those documents should be produced as soon as the Province has finished its assessment in respect of deductions claimed for 2009 in respect of Hibernia.

[4] Mobil's Memorial, para. 115 (recounting that the Board indicated by letter 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); **CW-1**, Phelan Statement I, para. 40 ("Almost immediately after the Supreme Court of Canada refused the application for appeal by HMDC and Petro-Canada, the Board notified Hibernia and Terra Nova of their Guidelines obligations for the period from April 2004 through the end of 2008.").

[8] Procedural Order No. 3, Redfern Schedule at p. 32 (Decision of the Tribunal on request no. 19).

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		any preliminary assessments or analyses predating any final audit outcome, by virtue of the fact that the Province is conducting audits. This request was conditionally granted by the Tribunal in Procedural Order No. 3, request no. 19, in which the Tribunal ordered production "as soon as the Province has finished its assessment."[5] Mobil respectfully requests that Canada's production obligation not be deferred until such time. Canada argues that Mobil's claim should be reduced by at least 30% based on deductions to royalty obligations taken during the 2012-2015 period.[6]	of its speculation that the Province may treat incremental R&D expenditures differently for the purpose of royalty deduction, or disallow any of the claimed royalty deductions, the conclusion must be that this request is an improper fishing expedition from which it hopes to make an argument depending on the content of produced documents. Second, the Tribunal already made a decision with respect to this request in Procedural Order No. 3 (PO No. 3, Request #19). The Tribunal already ordered Canada to produce the Province's final assessment and consideration of R&D expenditures for deductions for the years 2009-2015 as soon as those assessments	"relevant and material to the quantification of the Claimant's alleged loss in the arbitration."[9] There is more than "speculation" that the Province may treat incremental R&D and E&T expenditures differently than those made in the ordinary course of business. The Province issued an information request to ExxonMobil specifically seeking a compilation of incremental expenditures in connection with its audit of 2009 royalty obligations, which demonstrates that it is evaluating the deductibility of incremental expenditures *as a possible distinct class of expenditure* that	

5 To date, Canada has not produced any materials in response to this request.

6 Canada's Counter Memorial, para. 234; **RE-1**, Report of Richard E. Walck, para. 83.

9 Procedural Order No. 4, Redfern Schedule at p. 13 (Canada's Statement of Relevance and Materiality for request no. 7).

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		Whether Mobil's claim should be reduced on the basis of provincial royalty deductions is thus a material issue in dispute, and the requested documents may be relevant to the Tribunal's determination. Fundamental fairness beckons Canada to produce the requested documents available at this juncture, not some time in the future within Canada's control, and to supplement its production as additional documents become available.	are complete. There is no reason to revisit the Tribunal's decision and order Canada to produce preliminary materials and documents from ongoing and incomplete assessments given that they would not represent any final decision by the Province and could never be relied on as an accurate representation of any audit. Canada understands that the Province has not completed its assessment and consideration of royalty obligations owed to the Province arising from the Hibernia project for the years 2009-2015 and the Terra Nova project for the years 2010-2015. Consistent with the Tribunal's previous decision, Canada will not produce documents relating to thereto. Canada understands that the final audit for Terra Nova for the year	may not be deductible from royalty obligations.[10] Also, the risk that the Province may draw a distinction between incremental and non-incremental expenditures for royalty deductibility purposes was one of the bases of the Mobil I Majority's decision not to reduce Mobil's compensation in respect of royalty deductions, dispelling Canada's unwarranted allegation that such outcomes are speculative.[11] Ultimately, the requested documents may, even if preliminary, bear on the likelihood of this outcome and thereby allow this Tribunal to make an informed award based on all available evidence. **Province's Deliberations** It is Canada's burden to substantiate its objection, yet Canada offers no logical reason	

[10] Province of Newfoundland and Labrador, IR # ExxonMobil-TN-HIB-NAFTA-01, "ExxonMobil Incremental Spending on R&D and E&T" (Confidential). Upon the Tribunal's request, Mobil can provide this document.

[11] **C-2**, Mobil I Award, paras. 149-150.

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			2009 is complete and was already provided by the Province to the Terra Nova project operator in April 2016. As such, any relevant and material documents pertaining to the 2009 audit of Terra Nova are either already in the possession of the Claimant or its affiliates or can be obtained directly from Suncor. The Claimant is thus no correct when it states that it does not know how the Province will treat deductions for spending that began in and after 2009 – the completed audit for the Terra Nova project confirms that the Province does not treat incremental R&D and E&T spending any differently from other R&D and E&T spending for the purpose of royalty deductions.	for why production of the requested documents will alter, much less "chill," the Province's assessment of royalty deductions at Hibernia and Terra Nova. Moreover, Canada's objection is inconsistent with the Board's own avowed commitment to, and "ongoing focus on[,] improved openness and transparency."[12] Canada is a great proponent of transparency, but unfortunately does not appear to apply this principle when it may require disclosure of documents that are unhelpful to its litigation positions. In addition, assuming that Canada properly designates the documents as confidential, Mobil will handle them in accordance with the protections conferred by Procedural Order No. 2 on Confidentiality. **<u>Immediate Need for Documents</u>**	

[12] See, e.g., C-NLOPB new releases 2011, available at http://www.cnlopb.ca/news/nr20110420.php.

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				Mobil repeats its request that Canada's production of the requested documents not be deferred until after the Province has finished its assessment. When this Tribunal issued Procedural Order No. 3, ruling on Mobil's related request, it had not yet been established whether Canada would seek to re-open the Mobil I Majority's conclusion that compensation should not be reduced in respect of royalty deductions. Now that Canada has staked out its positon in the Counter Memorial that, notwithstanding this holding, Mobil should have its compensation reduced, the urgency of the requested documents has only increased. Deferring Canada's obligation to produce these documents is tantamount to not requiring their production at all. By way of background, the Province delays seven years following the royalty year in question before communicating the results of its audits. As Canada confirms	

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				herein, the 2009 audit for Terra Nova royalties was only completed and communicated in April 2016. Similarly, the Province is expected to deliver in [redacted] the results of its audit of Hibernia's royalty deductions for year 2009. The results of the Province's other audits for years 2010 and onward are expected to follow in subsequent years hence. In short, if Canada is not required to make this production before the royalty audits are concluded, then it is highly unlikely that the documents will be available to Mobil and the Tribunal in time for the hearing. **<u>Terra Nova 2009 Audit</u>** Mobil notes that Canada's objection confirms that it has not complied with the Tribunal's standing order to produce responsive documents concerning the 2009 Terra Nova audit "as soon as the Province has finished its assessment."[13]	

[13] Procedural Order No. 3, at p. 32 (Decision of the Tribunal on Request no. 19).

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				While Canada's objection suggests that the audit was complete at the very latest in April 2016, Mobil has yet to receive any documents in this arbitration from Canada's counsel. This standing request encompasses all documents in the Province's and Canada's possession, not just the official results of the audit delivered to the project operators. Accordingly, Mobil requests that Canada be specifically ordered to produce responsive documents concerning the 2009 Terra Nova audit in accordance with the Tribunal's standing order in Procedural Order No. 3.	
2.	Documents concerning the Province's assessment and consideration of R&D and E&T expenditures for deduction from royalty obligations pertaining to year 2010 which are owed to the Province by law or agreement with respect to Hibernia and Terra Nova.	Mobil repeats its statement of relevance and materiality for request no. 1, above, *mutatis mutandis*.	Canada objects to the production of the requested documents on the same grounds set out in its response to Request #1 above.	Mobil repeats its response for request no. 1, above, *mutatis mutandis*.	The Tribunal does not consider it necessary, at the present stage, to vary the decision made in Procedural Order No. 3, ruling on Request 19. The documents sought in the present request should be produced as soon as the Province has finished its assessment in respect of deductions claimed for 2010.
3.	Documents concerning the	Mobil repeats its statement of	Canada objects to the production of	Mobil repeats its response for	The Tribunal does not consider

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	Province's assessment and consideration of R&D and E&T expenditures for deduction from royalty obligations pertaining to year 2011 which are owed to the Province by law or agreement with respect to Hibernia and Terra Nova.	relevance and materiality for request no. 1, above, *mutatis mutandis*.	the requested documents on the same grounds set out in its response to Request #1 above. Further, Canada understands that the Province has not commenced its assessment and consideration of royalty obligations owed to the Province by law or agreement arising from the Hibernia and Terra Nova projects for the years 2011-2015, so no documents could be produced in any event.	request no. 1, above, *mutatis mutandis*. It is not clear from Canada's representation in response to this request no. 3 whether Canada has in fact verified that no responsive documents exist or Canada merely speculates that they do not. Either way, Mobil requests that Canada be ordered to produce the requested documents as soon as they come into existence or are modified.	it necessary, at the present stage, to vary the decision made in Procedural Order No. 3, ruling on Request 19. The documents sought in the present request should be produced as soon as the Province has finished its assessment in respect of deductions claimed for 2011.
4.	Documents concerning the Province's assessment and consideration of R&D and E&T expenditures for deduction from royalty obligations pertaining to year 2012 which are owed to the Province by law or agreement with respect to Hibernia and Terra Nova.	Mobil repeats its statement of relevance and materiality for request no. 1, above, *mutatis mutandis*.	Canada objects to the production of the requested documents on the same grounds set out in its response to Request #3 above.	Mobil repeats its response for request no. 3, above, *mutatis mutandis*.	The Tribunal does not consider it necessary, at the present stage, to vary the decision made in Procedural Order No. 3, ruling on Request 19. The documents sought in the present request should be produced as soon as the Province has finished its assessment in respect of deductions claimed for 2012.
5.	Documents concerning the Province's assessment and consideration of R&D and E&T expenditures for deduction from royalty obligations pertaining to year 2013 which are owed to the	Mobil repeats its statement of relevance and materiality for request no. 1, above, *mutatis mutandis*.	Canada objects to the production of the requested documents on the same grounds set out in its response to Request #3 above.	Mobil repeats its response for request no. 3, above, *mutatis mutandis*.	The Tribunal does not consider it necessary, at the present stage, to vary the decision made in Procedural Order No. 3, ruling on Request 19. The documents sought in the present request

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	Province by law or agreement with respect to Hibernia and Terra Nova.				should be produced as soon as the Province has finished its assessment in respect of deductions claimed for 2013.
6.	Documents concerning the Province's assessment and consideration of R&D and E&T expenditures for deduction from royalty obligations pertaining to year 2014 which are owed to the Province by law or agreement with respect to Hibernia and Terra Nova.	Mobil repeats its statement of relevance and materiality for request no. 1, above, *mutatis mutandis*.	Canada objects to the production of the requested documents on the same grounds set out in its response to Request #3 above.	Mobil repeats its response for request no. 3, above, *mutatis mutandis*.	The Tribunal does not consider it necessary, at the present stage, to vary the decision made in Procedural Order No. 3, ruling on Request 19. The documents sought in the present request should be produced as soon as the Province has finished its assessment in respect of deductions claimed for 2014.
7.	Documents concerning the Province's assessment and consideration of R&D and E&T expenditures for deduction from royalty obligations pertaining to year 2015 which are owed to the Province by law or agreement with respect to Hibernia and Terra Nova.	Mobil repeats its statement of relevance and materiality for request no. 1, above, *mutatis mutandis*.	Canada objects to the production of the requested documents on the same grounds set out in its response to Request #3 above.	Mobil repeats its response for request no. 3, above, *mutatis mutandis*.	The Tribunal does not consider it necessary, at the present stage, to vary the decision made in Procedural Order No. 3, ruling on Request 19. The documents sought in the present request should be produced as soon as the Province has finished its assessment in respect of deductions claimed for 2015.
8.	To the extent not also responsive to one or more of document requests 1 through 7 above, documents created or modified on or after May 22, 2012 concerning the Province's actual, proposed, considered, or	Mobil repeats its statement of relevance and materiality for request no. 1, above, *mutatis mutandis*. For the purposes of this request, "incremental R&D and E&T expenditures" means "expenditures that would not	Canada objects to the production of the requested documents on the same grounds set out in its response to Request #3 above. In addition, the lack of relevance and materiality of this request is	Mobil repeats its responses for requests nos. 1 and 3, above, *mutatis mutandis*. **Relevance and Materiality** Canada has misconstrued the relevance and materiality of this	To the extent that "the Province has not yet taken a firm position on the deductibility of incremental expenditures", the Tribunal considers that this request is already covered by the ruling on Request 19 in

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	intended treatment of R&D and E&T expenditures (including incremental R&D and E&T expenditures) for deduction from royalty obligations which are owed to the Province by law or agreement with respect to Hibernia and Terra Nova.	have been made in the absence of the Guidelines."[14] Additionally, there is a high likelihood that Canada and the Province have materials responsive to this request. After the Award in the Mobil I Arbitration was issued in February 2015, the Province issued an information request to ExxonMobil in connection with its audit of 2009 royalty obligations. The information request sought, among other things, a "summary, by project and month, of the 2009 incremental expenditures of [redacted] related to the Award from the Arbitration under Chapter Eleven of the North American Free Trade Agreement ICSID Case No. ARB(AF/07/4)," *i.e.*, the Mobil I Arbitration.[15] This information	plainly demonstrated by the Claimant's own acknowledgement that "the Province has not yet taken a firm position on the deductibility of the deductibility of incremental expenditures." The requested documents could never be relied upon as an accurate representation of the Province's position and would be extremely prejudicial to the Province's internal deliberations if prematurely disclosed prior to any final decision. Furthermore, the reference to "'preliminary Board assessments or position papers" is clearly erroneous since the Board plays no role in the calculation of royalty obligations.	request: the Province's present failure to reveal any firm position on the deductibility of incremental expenditures is precisely why the requested documents are relevant and material and, furthermore, why they should be produced at this juncture. In its Counter Memorial, Canada asks this Tribunal to reduce Mobil's compensation by at least 30% in respect of certain deductions taken against provincial royalty obligations relating to the Hibernia and Terra Nova projects.[16] The Province's decision to allow, or disallow, such deductions is patently relevant to Canada's attempted 30% reduction. If Canada has documents supporting its position, it should produce them now and allow Mobil to test their probative value.	Procedural Order No. 3. It has already stated that it does not consider it necessary to vary that decision at the present stage. However, as soon as the Province has taken a decision, the relevant documents should be produced.

[14] See Mobil's Memorial at, *e.g.*, paras. 133 and 136 (defining incremental expenditures).

[15] Province of Newfoundland and Labrador, IR # ExxonMobil-TN-HIB-NAFTA-01, "ExxonMobil Incremental Spending on R&D and E&T" (Confidential). Upon the Tribunal's request, Mobil can provide this document.

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		request demonstrates that the Province was evaluating the deductibility of incremental expenditures from royalty obligations. While, to Mobil's knowledge, the Province has not yet taken a firm position on the deductibility of incremental expenditures, any responsive materials—including preliminary Board assessments or position papers—are clearly relevant to Canada's quantum arguments in these proceedings.		In addition, without reviewing these documents, Mobil and the Tribunal cannot evaluate Canada's unsupported contention that they cannot be relied upon "as an accurate representation of the Province's positon" on the deductibility of incremental R&D and E&T expenditures. The documents sought by this request are at least as important as those sought by requests nos. 1 through 7, *supra*, if not more so. Documents concerning the Province's actual, proposed, considered, or intended treatment of deductions for incremental R&D and E&T expenditures go to the heart of whether Mobil's compensation must be reduced in respect of such deductions, which is a highly relevant and material matter in dispute.	

[16] Canada's Counter Memorial, para. 234; **RE-1**, Report of Richard E. Walck, para. 83.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
				Clarification In the statement of relevance and materiality, the reference to "preliminary Board assessments or position papers" should instead read "preliminary Provincial assessments or position papers." Having itself acknowledged this discrepancy, Canada was not prejudiced by this clarification.	
9.	Documents concerning the drafting and negotiating history of NAFTA Articles 1116 and 1117, including any materials addressing continuing or ongoing breaches of Chapter 11.	In its Counter Memorial, Canada invokes these provisions for the first time to allege a time bar to Mobil's claims.[17] Depending on the contents and existence of the requested materials, they could be relevant to determining the intent, scope, and significance of these provisions as well as the correct interpretation and application of these provisions in disputes involving continuing or ongoing breaches of Chapter 11. Such	Canada objects to the production of the requested documents on the following grounds: First, this request is overly speculative because it seeks documents which, in Claimant's own words, only "could be relevant" and fails to establish how they are relevant and material to its claim within the meaning of IBA Rules 9(2)(a). The Vienna Convention on the Law of Treaties places priority on the ordinary meaning of the treaty, taken in its context, and states	**Relevance and Materiality** The requested documents are clearly relevant. Canada's defenses in this arbitration rely on Articles 1116(2) and 1117(2).[20] In Canada's view, the operation of these provisions would preclude Mobil's claims—and thus they are clearly material to the outcome of Mobil's claims. Canada's objection, moreover, ignores *Grand River Enterprises Six Nations, Ltd. v. United*	This request is rejected.

17 Canada's Counter Memorial, Section III.

20 Canada's Counter Memorial, Section III (alleging that "this Tribunal has no jurisdiction *rationae temporis*" on the basis of "NAFTA Articles 1116 and 1117").

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		documents could be, moreover, material to the dispute. Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT") provide that "recourse … to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" may be appropriate, e.g., "in order to confirm the meaning resulting from the application of article 31[.]" Another NAFTA tribunal has granted similar requests for *travaux préparatoires* of the treaty, such as requests for "communications, explication notes, position papers or memoranda which, to the extent they exist, were shared among the three NAFTA Parties with respect to the relevant portions of the NAFTA" at dispute in that case.[18]	that recourse to supplementary means of interpretation is made only when a term is ambiguous, obscure or manifestly absurd or unreasonable if interpreted in accordance with ordinary treaty interpretation principles. This was relied upon by the Mobil/Murphy Tribunal when it rejected the Claimants' requests for drafting and negotiating history (Mobil I Decision ¶ 231-232). Other NAFTA tribunals have also rejected such requests (e.g., Methanex v. United States; Bilcon v. Canada; Merrill & Ring v. Canada; Mesa v. Canada). Canada further notes that the draft negotiating texts of Chapter Eleven produced between 1991 and 1993 by the NAFTA investment negotiating group are available online at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/trilateral_neg.aspx?lang=eng. The Claimant has not established why any documents beyond those	*States of America*—despite the fact that Canada's time bar arguments rely on that dispute's jurisdictional award.[21] In that award, the NAFTA tribunal acknowledged that "negotiating history constitutes a supplementary guide to interpretation under Article 32 of the Vienna Convention" and, on that basis, "requested the Parties to inform it of any potentially relevant negotiating history" for "Articles 1116(2) and 1117(2)."[22] *Grand River* demonstrates that recourse to the negotiating materials for these provisions may be justified when the respondent state invokes a limitations defense. *Grand River*, as well as Canada's objection that it "would have to search for and organize a large quantity of documents," moreover confirm that responsive materials exist *beyond* the public negotiating	

[18] See *Canfor Corporation v. United States of America*, UNCITRAL, Procedural Order No. 5, 28 May 2004 at paras. 16 and 21, available at http://www.state.gov/documents/organization/33109.pdf.

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		For the avoidance of doubt, Mobil does not seek any documents already in the public domain, such as the NAFTA Trilateral Negotiating Draft Texts posted online by, among others, the Office of the United States Trade Representative and Global Affairs Canada.[19]	which are already publicly available are relevant and material to its claim. Second, the production of the requested documents would be unreasonably burdensome under IBA Rule 9(2)(c). Canada would have to search for and organize a large quantity of documents involving treaty negotiations with the United States and Mexico from more than 20 years ago. The time required and cost involved is unduly burdensome in light of the lack of relevance and materiality of the requested documents.	drafts referenced by Mobil and Canada, and that they are in the possession and custody of Canada.[23] In its objection, Canada points out that the Mobil I Tribunal denied a request for the *travaux préparatoires* relative to other provisions of the NAFTA. Canada has failed to reveal, however, that it undertook not to rely on any such *travaux préparatoires*, and that the Mobil I Tribunal relied on Canada's undertaking when it decided not to allow the request for these documents.[24] Given	

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21 Canada's Counter Memorial at, *e.g.*, paras. 142 and 163.

22 *Grand River Enterprises Six Nations, Ltd. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 at para. 35, available at http://www.state.gov/documents/organization/69499.pdf.

19 See, *e.g.*, Global Affairs Canada website at http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/trilateral_neg.aspx?lang=eng.

23 *Grand River*, *supra* note 22 at para. 35 (the United States "advised that the provisions that became Articles 1116(2) and 1117(2) were based upon a Canadian draft text originally providing for a two-year limitations period triggered by the breach of a NAFTA obligation").

24 See Procedural Order No. 3 at p. 5 (Footnote 1 to Canada's Reply in opposition to request no. 1).

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			Third, any documents responsive to this request are solicitor-client and/or attorney work product privileged, within the meaning of IBA Rule 9(2)(b), or fall within political or institutional sensitivity within the meaning of IBA Rule 9(2)(f).	that Canada has not made a similar undertaking in response to Mobil's request for *travaux préparatoires* in this proceeding, the decision of the Mobil I Tribunal is inapposite. **Proportionality** As all documentary searches involve some degree of burden, Canada must show that the alleged burden is disproportionate to the probative value of any responsive materials. Given that Canada's defenses rely extensively on Articles 1116(2) and 1117(2) and that, in Canada's view, its arguments on those provisions are material to the case, Canada's nebulous and speculative "burden" is unwarranted. Moreover, the *Grand River* arbitration illustrates that the United States was able to overcome any alleged difficulty in "search[ing] for and organiz[ing]" such materials. Canada offers no reason for why	

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				its burden would be comparatively more burdensome. **Privilege** Before Canada has undertaken a search for and review of the documents responsive to this request, it is premature for Canada to assert that "any" such documents are privileged or otherwise protected from disclosure under the IBA Rules. After conducting this search and review, Canada should provide a privilege log for responsive documents withheld on the basis of an alleged privilege or other protection.	
10.	To the extent not privileged by virtue of the solicitor-client relationship, internal Board documents, or correspondence by or to the Board, concerning the interpretation, scope, and	Canada made two requests for a similar type and range of documents from Mobil, which this Tribunal allowed.[25] Mobil previously made this document request, and the Tribunal ruled	Canada objects to the production of the requested documents on the following grounds: First, Canada's two requests for documents concerning	**Relevance and Materiality** Canada's objection to this request is surprising, given that it made a similar request to Mobil concerning "the interpretation, scope and	1. Claimant's email of August 17, 2016 explains that the Respondent has agreed to produce the requested documents within two weeks of the present Order. Accordingly,

[25] Procedural Order No. 4, requests nos. 1 and 2 ("Documents since May 2012, including, but not limited to, correspondence between Claimant and other investors at Hibernia [and Terra Nova], concerning the interpretation, scope and effects of the Decision or Award on actual or projected incremental and ordinary course R&D and E&T expenditures at" Hibernia and Terra Nova.).

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	effects of the Decision on Liability and on Principles of Quantum ("Mobil I Decision") and the Award ("Mobil I Award") issued in the Mobil I Arbitration, including the impact thereof on the Board's application of the Guidelines.	that Mobil would be free to renew this request based on the Counter Memorial.[26] Mobil incorporates its statement of relevance and materiality and response from Procedural Order No. 3, request no. 14. In addition, in its Counter Memorial, Canada alleges a time bar to Mobil's claims, and also contests Mobil's damages claims for many expenditures that are identical or similar to those addressed by the Mobil I Majority.[27] Moreover, the requested documents are relevant and material to how the Mobil I Decision and Award have influenced the Board's consideration, evaluation, and approval of expenditures	correspondence between the Claimant and its affiliates regarding the Decision and Award (that the Tribunal allowed) were based on reasons wholly inapplicable to the Claimant's requests. Canada's two requests were relevant and material pursuant to IBA Rule 9(2)(a) because of the "nature of how the Claimant defines what is ordinary course and what is "incremental spending"" in this arbitration (PO No. 4, Canada's response, request #1). The documents were necessary to "explore whether the Claimant's decision-making on expenditures has been unduly influenced by the Award and the prospect of recovery of its self- defined "incremental" expenditures against Canada" (PO No. 4, Canada's response, request #1). The requested documents were therefore highly relevant to how the Claimant self-defines "incremental	effects" of the Mobil I Decision and Award.[35] In accordance with the Tribunal's direction, Mobil in fact produced to Canada documents responsive to that request. Procedural fairness requires that Canada make a reciprocal production. The adoption and application of the Guidelines to Mobil were established to be a continuing breach of international law in the Mobil I Arbitration. In the four years since its liability was conclusively established in the Mobil I Decision, Canada has made no efforts to bring itself into compliance with its Article 1106 obligations. The requested documents are relevant to understanding the Board's rationale for wilfully maintaining this breach of	no decision on this request is necessary. 2. Any claim that documents subject to paragraph (1), above, are privileged must be accompanied by a privilege log.

[26] Procedural Order No. 3, request no. 14.

[27] Canada's Counter Memorial, Sections III and V.

[35] Procedural Order No. 4, request no. 1.

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		proposed by the project operators for eligibility under the Guidelines. In its Counter Memorial, Canada alleges that the Claimants in the Mobil I Arbitration understated their projected "ordinary course" expenditures.[28] But Canada ignores that the amount of "ordinary course" expenditures is dependent on, among other factors, the Board's regulatory decisions on Guidelines eligibility, which can be unpredictable.[29] Thus, whether and how the Board altered its expenditure-approval criteria in response to the Mobil I Decision and Award is relevant and material to addressing Canada's allegations in this regard. Mobil and Murphy Oil Company wrote to the Board shortly after the Mobil I	expenditures" and whether or not its decision to claim for certain expenditures was unduly influenced by its belief in the chances of recovery against Canada based on the Decision and Award. The purpose for which the Claimant seeks these documents is, however, very different. The Claimant seeks these documents to assess the Board's views on the legal effects of the Decision and the Award. Documents concerning the Board's "interpretation, scope and effects" of the first NAFTA tribunal's Decision and Award are not relevant or material within the meaning of IBA Rule 9(2)(a). The "scope and effects" of the Decision and Award in this arbitration is a legal question for this Tribunal to determine pursuant to the NAFTA and international law. The Board's understanding is not relevant to any	international law and for perpetuating the failure in recent draft revisions to the Guidelines (which may be at issue in this or future arbitrations between the parties). Moreover, the characterization of expenditures under the Guidelines from 2012-2015 are clearly at issue in this arbitration. Canada is wrong when it suggests that Mobil is unilaterally and exclusively responsible for "self-defin[ing] 'incremental expenditures'." As the Mobil I Majority held, incremental expenditures are those "expenditures that would not have been made in the absence of the Guidelines."[36] The Board plays an active role in the making of expenditures, from inception (pre-approval) to eligibility evaluation (assessing	

[28] Canada's Counter Memorial, paras. 74-77.

[29] See **C-1**, Mobil I Decision, para. 474 (observing that "the results of the Board's regulatory decisions" comprise part of the variables that impact the quantum of incremental R&D and E&T spending).

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		Decision requesting that the Board cease and desist its ongoing breach of international law, *i.e.*, the implementation of the Guidelines against them.[30] The Board refused these demands, though it failed to communicate why it believed it could evade the Mobil I Decision.[31] Thus, the requested documents are relevant and material to testing the accuracy of Canada's concession that the Mobil I Decision and Award are binding on Canada.[32] Moreover, after the Mobil I Award was issued in February 2015, the Board suspended the pre-approval process to	claim the Claimant advances or any response put forward by Canada. Second, the Claimant is not challenging the Board's implementation of the Guidelines as a NAFTA breach and is rather challenging the Guidelines themselves. The Claimant has never alleged, and does not say it will allege, that the Board's implementation of the Guidelines, and in particular, its decision-making on Guidelines applicability and pre-approval processes, are tainted. The issue of "why the Board re-instituted the pre-approval process" is not relevant or material to any of the Claimant's claims or Canada's response to them,	the Projects' outstanding liability, if any, vis-à-vis completed projects). **Canada's Second Objection** The Confidentiality Order (Procedural Order No. 2) adequately addresses Canada's concerns about protecting any internal deliberations of the Board. Additionally, Canada's objection is inconsistent with the Board's own avowed commitment to, and "ongoing focus on[,] improved openness and transparency."[37] Canada is a great proponent of transparency, but unfortunately does not appear to apply this principle when it may require	

36 See Mobil's Memorial at, *e.g.*, paras. 133 and 136 (defining incremental expenditures).

30 **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).

31 **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).

32 Canada's Counter Memorial, paras. 8 and 110.

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		determine "whether the award has any implications for [its] management of the R&D Guidelines."[33] Thus, the requested documents are relevant and material to why the Board re-instituted the pre-approval process, which Canada alleges in the Counter Memorial was meant as a "benefit" for the project operators.[34] There is a high likelihood that Canada and the Province have materials responsive to this request. In all of the above circumstances, the Board must have considered whether to maintain the Guidelines in	particularly in light of the fact that both the Claimant and Canada have accepted the res judicata effect of the Mobil/Murphy Decision and the Claimant has confirmed that it is not pursuing any damages related to the pre-approvals process (PO No. 3, Mobil's objections, Request #3). Further, Sections 3.0-3.4 of the 2004 Guidelines already clarify how expenditures are evaluated to determine eligibility pursuant to the 2004 Guidelines. The Claimant has not suggested that the Board has not abided by the criteria in the 2004 Guidelines. Whether the Claimant believes and expenditure is "ordinary course" or "incremental" is entirely irrelevant to the Board's	disclosure of documents that are unhelpful to its litigation positions. With respect to any "chill[ing]" effect on the Board's activities and deliberations, a NAFTA tribunal has remarked that such concerns by Canada are outweighed when the responsive documents concern the regulator's own misconduct in breach of the NAFTA.[38] The Board's approach to, analysis of, and decisions on Mobil's R&D and E&T expenditures are directly implicated as breaches of the NAFTA. The Tribunal should not accept Canada's invitation to deny production of	

[37] See, e.g., C-NLOPB new releases 2011, available at http://www.cnlopb.ca/news/nr20110420.php.

[33] **C-226**, Email from M. Baker, CNLOPB, to K. Sampath, HMDC (April 13, 2015).

[34] Canada's Counter Memorial, para. 85.

[38] See *Bilcon v. Canada*, Procedural Order No. 13, 11 July 2012 at para. 42, available at http://www.italaw.com/sites/default/files/case-documents/italaw1164.pdf ("Should the available evidence indicate that the JRP proceedings were tarnished by bias or misconduct, the value of preserving its deliberational secrecy diminishes, considering that the protection of its internal deliberations is intended to ensure the very soundness of its proceedings. Put differently, any argument to protect certain elements of institutional proceedings in the interest of preserving the sound administration of justice loses value where the proceedings have been shown to be tainted").

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		contravention of the NAFTA and to create further liability for Canada to Mobil. As such, the existence of responsive documents is highly probable.	decisions regarding expenditure eligibility under the Guidelines. Canada should not be required to undertake a general search for documents which may not even exist or be relevant or material. The Claimant has not explained where gaps remain in relation to the matters actually at issue in this arbitration. Canada is left to conclude that the Claimant's unspecific request constitutes an improper fishing expedition from which it hopes to make an argument depending on the content of produced documents. If the Claimant has specific questions about the Board's evaluation of expenditures or its administration of the 2004 Guidelines, then it should pursue those questions through the normal administrative channels. Circumventing these channels through sweeping document production in a NAFTA arbitration would subvert the regulatory process. If regulators must disclose documents that evidence their internal deliberations concerning decisions which are not at issue or	documents for conduct that was already determined in the Mobil I Arbitration to be a "continuing breach" of the NAFTA.	

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			challenged in the arbitration, those deliberations will be chilled and the Board's ability to properly exercise its jurisdiction will be undermined.		
11.	Documents concerning the actual or potential administration, existence, operation, or management of any "R&D fund," deposit, or account established, or to be established, by or on behalf of the Board to receive monies from the operators or owners of any project subject to the Board's regulatory oversight (including Hibernia and Terra Nova), including, if any, documents concerning the discussion, consideration, rationale or circumstances for the Board's failure to set up and manage such a fund, deposit, or account.	The Guidelines establish that, "for any POA period in which there are not sufficient projects to absorb the required level of expenditure, the balance may be placed in a R&D fund. The fund will be managed by the Board[.]"[39] In its Counter Memorial, Canada contends that, as an alternative to spending on eligible R&D and E&T, the Projects could have deposited shortfall funds into such a R&D fund and this would impact the calculation of Mobil's damages.[40] Canada's expert makes the same allegation.[41] These positions	Canada objects to the production of the requested documents on the following grounds: First, the Claimant has failed to prove that documents "concerning the actual or potential administration, existence, operation, or management of any "R&D fund"" are relevant and material pursuant to IBA Rule 9(2)(a). It is undisputed that there is no R&D fund in existence, so a document request to prove its non-existence is redundant and unnecessary. Second, the Claimant has not alleged, and does not say it will allege, that it has ever requested that	**Relevance and Materiality** Canada misunderstands the purpose of this request. Mobil does not only seek to prove the non-existence of a Board-managed R&D fund; as Canada acknowledges herein, no such fund has ever existed. Rather, it is Mobil's understanding that the Board faced impediments to establishing and administering an R&D fund, such that this so-called "option" was never made available to the projects' owners and operators. Thus, the requested documents may be relevant and material to ascertaining the Board's reasons for not establishing or	1. This request is granted. 2. Any claim that documents subject to paragraph (1), above, are privileged must be accompanied by a privilege log.

39 **C-3**, 2004 Guidelines, s. 4.2.

40 Canada's Counter Memorial, para. 219, footnote 329.

41 **RE-1**, Report of Richard E. Walck, para. 41

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		are, however, contrary to internal Board documents stating that the "C-NLOPB does not manage a 'R&D Fund'."[42] The requested documents are relevant and material to determining the existence of a Board-managed R&D fund and whether the Hibernia and Terra Nova projects had, in fact, recourse to such a fund.	such a fund be established. There is no suggestion by the Claimant that it pursued the option but was unable to rely on this alternative because of lack of cooperation from the Board. If there ever has been communications between the Claimant and the Board regarding the establishment of a fund, those documents would already be in the Claimant's possession. The Claimant has provided no reason or justification as to why documents already in its possession regarding its discussions with the Board as to the R&D fund are insufficient for whatever arguments it intends to make.	administering such a fund, including the Board's assessment of the viability or non-viability of establishing and administering such a fund. Canada and its expert contend in the Counter Memorial, contrary to Mobil's understanding and, indeed, to Canada's present affirmation that "no R&D fund [is] in existence," that Mobil had the option of depositing money into a Board-managed R&D fund as an alternative method of complying with the Guidelines.[43] If Canada or Mr. Walck has reviewed or relied upon any documents to support their contention in this regard, then these should be produced, as well. Contrary to Canada's suggestion, Mobil does not have	

[42] Mobil's Memorial, para. 107 (citing **C-127**, CNLOPB Agenda for Board Meeting (Mar. 25, 2014)). Also note **C-128**, CNLOPB, Research and Development – Education and Training – Guidelines Overview (Feb. 5, 2015) ("C-NLOPB does not manage a 'R&D Fund'[.]").

[43] Canada's Counter Memorial, para. 219, footnote 329; **RE-1**, Report of Richard E. Walck, para. 41.

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				the burden to show that the documents already in its possession, custody, or control are "insufficient" to support Mobil's position on these questions before the obligation falls to Canada to produce additional responsive documents. *See* IBA Rules, Article 3(3) (omitting any such requirement). Rather, it is sufficient to show that the requested documents are relevant and material, as Mobil has.	
12.	Documents, including forward-looking forecasts, estimates, or predictions by or on behalf of the Board, concerning the amount of R&D and E&T expenditures that the Hibernia project's operator and owners would be expected or anticipated to make under the Guidelines between 2012 and 2015.	Canada alleges that the Hibernia project made greater expenditures on R&D and E&T than the Guidelines required during the period at issue in this arbitration, thus attempting to call into question whether these damages were caused by the Guidelines.[44] The precise expenditure requirements under the Guidelines are not precisely known in advance, but rather must be calculated	Canada agrees to produce non-privileged documents responsive to this request.	Mobil notes Canada's agreement to produce documents in response to this request. A privilege log should be provided for any responsive document(s) withheld on the basis of an alleged privilege or other alleged protection.	1. No order is required in light of the Respondent's agreement. 2. Any claim that documents subject to paragraph (1), above, are privileged must be accompanied by a privilege log.

[44] Canada's Counter Memorial, Section V-B.

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		retrospectively and are based on several variables.[45] As such, the requested forecasts, estimates, predictions, and other forward-looking documents are relevant and material to the variability in the amounts and predictability of the spending requirements under the Guidelines.			
13.	Documents, including forward-looking forecasts, estimates, or predictions by or on behalf of the Board, concerning the amount of R&D and E&T expenditures that the Terra Nova project's operator and owners would be expected or anticipated to make under the Guidelines between 2012 and 2015.	Mobil repeats its statement of relevance and materiality for request no. 12, above, *mutatis mutandis*.	Canada agrees to produce non-privileged documents responsive to this request.	Mobil notes Canada's agreement to produce documents in response to this request. A privilege log should be provided for any responsive document(s) withheld on the basis of an alleged privilege or other alleged protection.	1. No order is required in light of the Respondent's agreement. 2. Any claim that documents subject to paragraph (1), above, are privileged must be accompanied by a privilege log.
14.	Documents concerning the Board's preference, encouragement, or suggestions that R&D or E&T expenditures at Hibernia or Terra Nova be	Contrary to Canada's allegations in its Counter Memorial, the Board provided input regarding R&D or E&T expenditures that are at issue in this arbitration	Canada objects to the production of the requested documents on the following grounds: First, any "preference,	**Relevance and Materiality** In its Counter Memorial, Canada has failed to mention the Board's influence in directing R&D and E&T expenditures	The request is rejected.

[45] See, *e.g.*, Mobil's Memorial, para. 106.

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	made to or for the benefit of any particular recipient, vendor, or area of research, including documents in which the Board identifies or discusses possible recipients, vendors, or areas of research.	with respect to certain vendors and/or expenditure types.[46] The requested documents are relevant and material to correcting Canada's allegation that some of these expenditures were made at the direction of and/or for Mobil and its affiliates.[47] Documents reflecting the Board's input into the projects' R&D and E&T expenditures in favor of recipients, vendors, or areas of research preferred by it are relevant and material in addressing Canada's allegations in its Counter Memorial in this regard.	encouragement, or suggestions" or "input", if any, would have to have been communicated to HMDC, Suncor and/or Mobil to be relevant and material to the question of what entity any direction regarding expenditures originated from. As such, any relevant and material documents are either already in the possession of the Claimant or its affiliates. Any documents containing information that was not communicated are not relevant or material within the meaning of IBA Rule 9(2)(a). Second, the Claimant is not challenging any aspect of the Board's practices relating to selection or directing of R&D and E&T expenditures. The Claimant has never alleged, and does not say it will allege, that the Board's internal deliberations are tainted. The Claimant raises an issue in this	toward its preferred recipients, vendors, and areas of research. The requested documents will be helpful to correcting Canada's contention that the R&D and E&T expenditures at issue in this arbitration were made primarily for the benefit of Mobil and its affiliates, on their initiative. Moreover, as Canada acknowledges, Mobil's request was made in part to demonstrate the Board's influence in the planning and making of incremental expenditures at issue in this arbitration. These materials, as Canada concedes, go to the characterization of such expenditures as incremental: incremental expenditures are those incurred in order to comply with the Guidelines, and any preference, encouragement, or suggestion by the Board, in its capacity as	

[46] See, *e.g.*, **CW-7**, Durdle Statement I, para. 34 ([redacted]).

[47] Canada's Counter Memorial, Appendix A (alleging that Mobil derived "added value" or "benefit" from various R&D and E&T expenditures claimed).

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			arbitration only for the limited purpose of clarifying the motivations underlying expenditures in order to correctly classify expenditures as ordinary course or incremental expenditures. If regulators must disclose documents that evidence their internal deliberations concerning decisions which are not at issue or challenged in the arbitration, those deliberations will be chilled and the Board's ability to properly exercise its jurisdiction will be undermined. Third, the request is overbroad, without a relevant date range and unduly burdensome because the Claimant has not identified which expenditures were allegedly encouraged or suggested by the Board. Canada is thus left to conclude that the Claimant's unspecific request constitutes an improper fishing expedition from which it hopes to make an argument depending on the content of produced documents. Canada should not be required to undertake a general search for documents which may not even exist or be relevant or	regulator of the Guidelines, as to recipients of Guidelines-eligible expenditures inform this characterization. Canada is wrong to assert that "any relevant and material documents" are already in the possession of Mobil and its affiliates, particularly given that it does not claim to have undertaken any search to verify the universe of responsive materials. Indeed, for those expenditures that the Board encouraged, it is likely that the Board has additional documents memorializing or reflecting its preferences that were not provided to the projects' operators or owners. Canada's unfounded speculation otherwise does not support its contention that Mobil already has access to all responsive documents. **Board Deliberations** It is Canada's burden to substantiate its objection. Yet Canada offers no logical reason	

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			material.	for why production of the requested documents will alter, much less "chill," the Board's exercise of its functions. In addition, assuming that Canada properly designates the produced documents as confidential, Mobil will handle them in accordance with the protections conferred by Procedural Order No. 2 on Confidentiality. Moreover, Canada's objection is inconsistent with the Board's own avowed commitment to, and "ongoing focus on[,] improved openness and transparency."[48] Canada is a great proponent of transparency, but unfortunately does not appear to apply this principle when it may require disclosure of documents that are unhelpful to its litigation positions. **<u>Breadth</u>** Canada's objection to the	

[48] See, e.g., C-NLOPB new releases 2011, available at http://www.cnlopb.ca/news/nr20110420.php.

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				breadth of this request is unfounded, as Mobil has identified precisely the incremental expenditures at issue in this arbitration (as evidenced by Appendix A to Canada's Counter Memorial, which identifies the same). It is appropriate for Canada to produce responsive documents insofar as they concern the incremental expenditures claimed in this arbitration. In this connection, Mobil notes that it agreed to Canada's requests to search for and produce documents concerning the "rationale or justification" for each of the expenditures in this arbitration.[49] Mobil's present request is, if anything, more targeted and less burdensome upon Canada.	
15.	Documents concerning the Board's consideration, evaluation, and approval of the R&D Work Expenditure Application by Suncor Energy	Canada contends in its Counter Memorial that the program to control H2S souring at Terra Nova is a relatively large expenditure at that project which	Canada objects to the production of the requested documents on the following grounds: First, Claimant fails to explain why	**Relevance and Materiality** Canada misunderstands the purpose of this request, which is not to demonstrate that the Board "improperly applied"	1. The Claimant's email of August 17, 2016 explains that the Respondent has agreed to produce the requested documents within two weeks of

[49] Procedural Order No. 4, Redfern Schedule at pp. 36-117 (Canada's Requests for Production nos. 22-104).

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	Inc. as operator for the Terra Nova project for the program to control H2S souring (**R-71**).	has resulted in an increased level of "ordinary course" spending.[50] Canada argues that this expenditure demonstrates that the level of ordinary course spending at Terra Nova is higher than what was anticipated in the Mobil I Arbitration.[51] The requested documents concerning the Board's consideration and approval of this expenditure may illuminate the criteria applied by the Board when deciding whether a proposed expenditure is eligible for credit under the Guidelines and allow the Tribunal to assess Canada's contentions concerning ordinary course spending in connection with this project.	"documents concerning the Board's consideration, evaluation and approval of the R&D Work Expenditure Application … for the program to contain H2S souring" are relevant or material within the meaning of IBA Rule 9(2)(a). The Claimant is not challenging any aspect of the Board's practices relating to approval of R&D and E&T expenditures. The Claimant has never alleged, and does not say it will allege, that the Board's internal deliberations are tainted. The integrity of the Board's internal deliberations relating to the approval of the H2S souring expenditures are not at issue. The Claimant has not identified any issue with the Board's decision to approve the H2S souring project as an eligible R&D expenditure. The Board only decides whether R&D and E&T	Guidelines-eligibility criteria or to address "specific concerns" about the Board's approval of the H2S souring-control program for eligibility under the Guidelines. In Canada's Counter Memorial, Canada takes the position that Mobil is not entitled to compensation in respect of Terra Nova expenditures because the ordinary course expenditures at that project nearly met the spending minimum set under the Guidelines during the period at issue in this arbitration.[52] However, as Canada acknowledges, ordinary course expenditures at Terra Nova were significantly greater than anticipated because of the Board's regulatory decision to approve the eligibility of Terra	the present Order. Accordingly, no decision on this request is necessary. 2. Any claim that documents subject to paragraph (1), above, are privileged must be accompanied by a privilege log.

[50] Canada's Counter Memorial, para. 76. As Mr. Sampath explained, while the field-oriented aspects of the H2S expenditure are "ordinary course," certain contributions to Memorial University of Newfoundland associated with the program are not. **CW-3**, Sampath Statement I, paras. 99-104.

[51] Canada's Counter Memorial, paras. 75-77.

[52] Canada's Counter Memorial, para. 212.

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			expenditures are eligible pursuant to the Guidelines. Whether or not an an expenditure is "incremental" or "ordinary course" is entirely a characterization created by the Claimant and it is the Claimant's burden to prove. The Claimant's statement of relevance and materiality does not explain why any illumination of the "criteria applied by the Board when deciding whether a proposed expenditure is eligible for credit" is necessary when such criteria is entirely irrelevant as to whether the Claimant considers the expenditure to be incremental or not. Second, Sections 3.0-3.4 of the 2004 Guidelines already clarify how expenditures are evaluated to determine eligibility pursuant to the 2004 Guidelines. Claimant simply speculates that additional documents "may illuminate the criteria applied by the Board" without explaining what gaps exist to be filled. Third, if the Claimant has specific	Nova's H2S souring-control program for Guidelines credit.[53] If not for this regulatory decision, the quantum of incremental spending required to meet the Guidelines minimum would clearly have been much higher. Thus, documents concerning the Board's consideration, evaluation, and approval of this multi-million-dollar expenditure are relevant and material to the context in which the Suncor planned and made *other* expenditures for the Terra Nova project, including Terra Nova's incremental expenditures at issue in this proceeding. **Board Deliberations** It is Canada's burden to substantiate its objection. Yet Canada offers no logical reason for why production of the requested documents will alter, much less "chill," the Board's	

[53] Canada's Counter Memorial, para. 76.

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			concerns about the Board's evaluation of expenditures or is of the view that the criteria were improperly applied, then it should pursue those matters through the normal administrative channels. Circumventing these channels through sweeping document production in a NAFTA arbitration would subvert the regulatory process. If regulators must disclose documents that evidence their internal deliberations concerning decisions which are not at issue or challenged in the arbitration, those deliberations will be chilled and the Board's ability to properly exercise its jurisdiction will be undermined.	evaluation of R&D and E&T for eligibility under the Guidelines. Canada's concern is particularly implausible given the Board has already issued its pre-approval for this expenditure. In addition, assuming that Canada properly designates the produced documents as confidential, Mobil will handle them in accordance with the protections conferred by Procedural Order No. 2 on Confidentiality. Moreover, Canada's objection is inconsistent with the Board's own avowed commitment to, and "ongoing focus on[,] improved openness and transparency."[54] Canada is a great proponent of transparency, but unfortunately does not appear to apply this principle when it may require disclosure of documents that are unhelpful to its litigation positions.	
16.	Native files (including, if any,	The requested documents are	Canada agrees to produce non-	Mobil notes Canada's agreement	1. No order is required in

[54] See, e.g., C-NLOPB new releases 2011, available at http://www.cnlopb.ca/news/nr20110420.php.

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	workbooks and spreadsheets) concerning or supporting the computation of Mobil's alleged damages (including, but not limited to, Tables 1 through 12) in the Expert Report of Richard E. Walck (**RE-1**).	relevant and material to assessing Canada's quantification of Mobil's damages claim. The Tribunal previously granted a similar request by Canada to Mobil for the native files of the annexes to Paul Phelan's First Witness Statement.[55]	privileged documents responsive to this request.	to produce documents in response to this request. A privilege log should be provided for any responsive document(s) withheld on the basis of an alleged privilege or other alleged protection.	light of the Respondent's agreement. 2. Any claim that documents subject to paragraph (1), above, are privileged must be accompanied by a privilege log.

[55] Procedural Order No. 4, request no. 11.