

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES

Mobil Investments Canada Inc.

v.

Canada

(ICSID Case No. ARB/15/6)

PROCEDURAL ORDER NO. 6

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

October 4, 2016

Order: Redactions in the Counter-Memorial

1. The Tribunal has received and considered the submissions of the parties regarding those passages in the Respondent's Counter-Memorial in respect of which the Claimant's requests for redactions on the basis of claimed business confidentiality were opposed by the Respondent.
2. The Tribunal's decisions on the Claimant's requests are set forth in the last column of the Redfern Schedule incorporated as Annex A to this Order.
3. The Tribunal notes that the parties were able to agree on the redaction of certain other passages in the Counter-Memorial.
4. The Tribunal also takes note of the agreement of the parties regarding redactions to the Tribunal's Procedural Order No. 4.

On behalf of the Tribunal:

[signed]

Sir Christopher Greenwood QC
President of the Tribunal
Date: October 4, 2016

ANNEX A – PROCEDURAL ORDER NO. 6

No.	Ref. to Designation	Information Designated by the Claimant	Type of Designation	Objections to Designation		Reply to Objections	Tribunal's Decision
				Reasons	Designation Requested		
1.	para. 13	Claimant	Confidential	The total amount obligated to be spent under the Guidelines (i.e. \$5.541 million) and damages claimed for each project (i.e. \$1.770 million and \$18.723 million) are designated in this paragraph. The information does not meet the definition of confidential information under paragraph 1(c) of the Confidentiality Order. The total amount claimed in damages for each project in this arbitration does not convey any information about the Claimant's business practices and simply apportions the Claimant's overall damages claim because the claim happens to cover two separate investments. Similarly, the Claimant's expenditure obligation represents the extent of a legislated requirement and does not convey any information about the Claimant's business practices. No detailed or specific information about the Claimant can be derived from these amounts.	Canada requests that the information be treated as public information. The remainder of the amounts designated in the paragraph can remain redacted.	<p><u>Business Confidentiality</u> The figure of \$5.541 million is Canada's estimate of how much Mobil, as an investor in the Terra Nova project, was required to spend on Guidelines-eligible R&D and E&T between 2012 and 2015. This figure is confidential financial information which is consistently treated as confidential as it is not in the public domain. Furthermore, its disclosure could negatively impact contractual relationships with co-venturers of the Terra Nova project, as it can be used to derive the amounts that they respectively are required to spend pursuant to the Guidelines. Mobil does not have the consent of the Terra Nova co-venturers to publicly disclose this information.</p> <p>The figure of \$1.770 million is Mobil's claim amount in this</p>	The Respondent's objection is upheld. The information relating to the total amount which was required to be spent under the Guidelines and the damages claimed in respect of each project shall remain unredacted; for clarity, this does not include the parties' agreed-upon redaction in line 6 of para. 13 (the Claimant's estimate of its "ordinary course" R&D and E&T spending from 2012-2015).

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				<p>Further, corresponding information was not designated in the Mobil/Murphy arbitration (see, for example, Mobil/Murphy, Decision, ¶ 103 in relation to damages claimed and Mobil/Murphy, Decision, ¶¶ 82, 88, 448 in relation to expenditure obligations).</p> <p>Finally, Mobil’s proposed redaction of its claimed damages raises public policy concerns as Canadian taxpayers who in the end would be liable to pay should have access to this information.</p>		<p>arbitration with respect to the Terra Nova project, and the figure of \$18.723 million is Mobil’s claim amount with respect to the Hibernia project. These claim amounts may be subject to revision in the course of this proceeding.¹ Moreover, Canada uses these figures to allege that Mobil (and, by extension, Mobil’s co-venturers) have overspent on R&D and E&T in excess of their obligations under the Guidelines. The public disclosure of these figures in connection with Canada’s allegation could negatively impact Mobil. For the foregoing reasons, the above figures (i.e., \$5.541 million, \$1.770 million, and \$18.723 million) constitute business confidential information relating to the Claimant, to a third party, or both within the meaning of</p>	

¹ See Claimant’s Memorial, para. 322 n. 549.

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						<p>paragraphs 1(c) and 1(d) of Procedural Order No. 2 on Confidentiality (the “Confidentiality Order”).</p> <p><u>Mobil I Redactions</u> Confidential information concerning the breakdown of Mobil’s claim amount based on incremental expenditures was redacted in the Mobil I Arbitration. See, for example, Mobil I Award ¶ 35 & n. 14, ¶ 129, ¶ 151.²</p> <p><u>Public Policy</u> Mobil does not propose redacting the total amount of its claim in this arbitration. Canada does not explain why “Canadian taxpayers” and other non-parties would have any interest or right in obtaining this granular information, which raises</p>	

² The redacted public version of the Mobil I Award is available at http://www.italaw.com/sites/default/files/case-documents/italaw4399_0.pdf.

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						legitimate concerns of business confidentiality and negative impact on Mobil’s in releasing confidential information pertaining to Mobil as well as the co-venturers.	
2.	para. 41	Claimant	Confidential	The extent of revenues generated by the Hibernia project between 2004 and 2015 is designated in this paragraph. The designated information does not meet the definition of confidential information under paragraph 1(c) of the Confidentiality Order. Past cumulative project-wide revenue information is generally known and/or can be readily derived for both the Hibernia and Terra Nova projects from various public data, including information about barrels of oil produced annually at each project and revenues generated for affiliates of the project by the project. Such information can be identified in public reports produced by affiliates of the projects such as Canada Development Investment Corporation and Suncor.	Canada requests that the information be treated as public information. The remainder of the amounts designated in the paragraph can remain redacted.	<u>Business Confidentiality</u> Canada alleges that the gross revenues in respect of the Hibernia project was \$47.867 billion between 2004 and 2015. The amount of revenues generated by this project is confidential financial information and it is not in the public domain. Furthermore, its disclosure could negatively impact Mobil’s contractual obligations relating to the Hibernia project, in releasing confidential information that also pertains to co-venturers who have not consented to the public disclosure of this confidential information.	The Respondent’s objection is upheld. The reference to revenues from Hibernia between 2004 and 2015 shall remain unredacted.

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				Further, corresponding information was not designated in the Mobil/Murphy arbitration (see, for example, <i>Mobil/Murphy</i> , Canada’s Counter-Memorial, ¶ 79).		<p>Canada claims that it is “generally known” that the Hibernia project raised \$47.867 billion in revenues. This is not correct. The figure of \$47.867 is an approximate figure calculated by the Board for purposes of calculating the Hibernia project’s expenditure obligation under the Guidelines.³ It is not a statement of or based on the project’s actual revenues. The public disclosure of this approximate figure will cause misinformation and confusion, and could thereby negatively impact Mobil and the Hibernia project.</p> <p>For the foregoing reasons, the figure (i.e., \$47.867 billion) constitutes business confidential information relating to the Claimant, to a third party, or both within the meaning of paragraphs</p>	

³ See references at footnote 48 of Canada’s Counter Memorial.

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						1(c) and 1(d) of the Confidentiality Order. <u>Mobil I Redactions</u> The revenue-related information disclosed in the Mobil I arbitration was not based on actual revenues. For instance, in the reference to paragraph 79 of Canada's Counter Memorial, the figures there do not represent actual revenues.	
3.	para. 50	Claimant	Confidential	The extent of revenues generated by the Terra Nova project between 2004 and 2015 is designated in this paragraph. Canada repeats its statement of objection for designation no. 2, above, <i>mutatis mutandis</i> .	Canada requests that the information be treated as public information. The remainder of the amounts designated in the paragraph can remain redacted.	Mobil repeats in its replies to objection no. 3, above, <i>mutatis mutandis</i> .	The Respondent's objection is upheld. The reference to revenues from Terra Nova between 2004 and 2015 shall remain unredacted.
4.	para. 134	Claimant	Confidential	The extent of damages awarded for Terra Nova in the Mobil/Murphy arbitration (i.e. \$726,080 or \$90,750/year) and the project's revenues over that time period	Canada requests that the information be treated as public information.	<u>Business Confidentiality</u> The extent of damages awarded in the Mobil I Arbitration in respect of the Terra Nova project is	The Respondent's objection is upheld. The amounts of damages awarded in

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				<p>(i.e. \$15.75 billion) are designated in this paragraph. The designated information does not meet the definition of confidential information under paragraph 1(c) of the Confidentiality Order.</p> <p>The extent of damages awarded does not convey any information about the business practices of the Claimant. No detailed or specific information about the Claimant can be derived from these amounts. The specific information relating to how the amount was derived containing the extent of ordinary course and incremental expenditures for various time periods will remain designated.</p> <p>Further, the total amount awarded to Mobil in the arbitration was not designated (see, for example, <i>Mobil/Murphy</i>, Award, para. 178), and there is no reasonable basis on which the amount awarded per project can be distinguished and treated differently.</p>		<p>confidential financial information that is not in the public domain. This figure was not disclosed as such in the Mobil I Award. Furthermore, its disclosure could negatively impact Mobil’s contractual relationships with co-venturers of the Terra Nova project, as it can be used to derive the amounts that they respectively were required to spend pursuant to the Guidelines in excess of the project’s needs. Mobil does not have the consent of the co-venturers to publicly disclose this information</p> <p>Moreover, Canada’s alleged amount of revenues at the Terra Nova project (i.e., \$15.75 million) is an approximate figure calculated by the Board for purposes of calculating the Hibernia project’s expenditure obligation under the Guidelines. It constitutes business confidential</p>	<p>the <i>Mobil I</i> arbitration for Terra Nova’s additional spending on R&D and E&T from 2004-2011, as well as the amount of spending per year and the amount of Terra Nova’s revenues from 2004-2011 shall remain unredacted.</p>

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				<p>Finally, Mobil’s investment in the Terra Nova project is separate and distinct from its investment in the Hibernia project. Mobil’s proposed redaction of the damages it was awarded at its investment in the Terra Nova project raises public policy concerns as Canadian taxpayers who in the end are liable to pay should have access to this information.</p> <p>With respect to the project’s revenues, past cumulative project-wide revenue information is generally known and/or can be derived for the Terra Nova project from various public data, including information about barrels of oil produced annually at each project and revenues generated for affiliates of the project by the project. Such information can be identified in public reports produced by affiliates of the projects such as Suncor.</p> <p>Further, similar information was not designated in the Mobil/Murphy arbitration (see, for example,</p>		<p>information, for the reasons stated in Mobil’s replies to objection no. 3, above, <i>mutatis mutandis</i>.</p> <p><u>Mobil I Redactions</u> The amount of Mobil’s recovery in respect of incremental expenditures at the Terra Nova project was not disclosed in the Mobil I Award. Moreover, the revenue-related information disclosed in the Mobil I arbitration was not based on actual revenues. For instance, in the reference to paragraph 79 of Canada’s Counter Memorial, the disclosed information does not represent actual revenues.</p> <p><u>Public Policy</u> Mobil does not propose redacting the total amount of its claim in this arbitration. Canada does not explain why “Canadian taxpayers” and other non-parties would have any interest or right in</p>	

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				Mobil/Murphy, Canada’s Counter-Memorial, para. 79).		obtaining this granular information, which raises legitimate concerns of business confidentiality and negative impact on Mobil’s relationships with the co-venturers.	
5.	para. 184	Claimant	Confidential	<p>The designated information (damages claimed for each project in this arbitration) does not meet the definition of confidential information under paragraph 1(c) of the Confidentiality Order. The total amount claimed in damages for each project in this arbitration does not convey any information about the Claimant’s business practices and simply apportions the Claimant’s overall damages claim because the claim happens to cover 2 separate unrelated projects. No detailed or specific information about the Claimant can be derived from these amounts.</p> <p>Further, corresponding information was not designated in the Mobil/Murphy</p>	Canada requests that the information be treated as public information.	Mobil repeats is replies to objection no. 2, above, <i>mutatis mutandis</i> .	The Respondent’s objection is upheld. The information in para. 184 and footnote 275 relating to the damages claimed in respect of each project shall remain unredacted.

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				arbitration (see, for example, Mobil/Murphy, Decision, ¶ 103). Finally, Mobil's proposed redaction of its claimed damages raises public policy concerns as Canadian taxpayers who in the end would be liable to pay should have access to this information.			
6.	para. 202	Claimant	Confidential	The amount obligated to be spent under the Guidelines (i.e. \$29.364 million) and damages claimed for the Hibernia project (i.e. \$18.723 million) are designated in this paragraph. Canada repeats its statement of objection for designation no. 1, above, <i>mutatis mutandis</i> .	Canada requests that the information be treated as public information. The remainder of the amounts designated in the paragraph can remain redacted.	Mobil repeats is replies to objection no. 2, above, <i>mutatis mutandis</i> .	The Respondent's objection is upheld. The information relating to the total amount which was required to be spent under the Guidelines and the damages claimed in respect of the Hibernia project shall remain unredacted.
7.	para. 210	Claimant	Confidential	The amount of spending obligated under the Guidelines for each project (i.e., \$29,364,248 and \$5,540,998) is designated in this paragraph.	Canada requests that the information be treated as public information. The	Mobil repeats is replies to objection no. 2, above, <i>mutatis mutandis</i> .	The Respondent's objection is upheld. The information relating to the total

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				Canada repeats its statement of objection for designation no. 1, above, <i>mutatis mutandis</i> .	remainder of the amounts designated in the paragraph can remain redacted.		amount which was required to be spent under the Guidelines in respect of each project shall remain unredacted.
8.	para. 212	Claimant	Confidential	The amount (i.e., \$5.541 million) required to be spent by the Terra Nova project under the Guidelines is designated in this paragraph. Canada repeats its statement of objection for designation no. 1, above, <i>mutatis mutandis</i> .	Canada requests that the information be treated as public information. The remainder of the amounts designated in the paragraph can remain redacted.	<i>Mobil repeats is replies to objection no. 2, above, mutatis mutandis.</i>	The Respondent’s objection is upheld. The information relating to the total amount which was required to be spent under the Guidelines in respect of Terra Nova shall remain unredacted.
9.	para. 213	Claimant	Confidential	The amount (i.e., \$29.364 million) required to be spent by the Hibernia project under the Guidelines is designated in this paragraph. Canada repeats its statement of objection for designation no. 1, above, <i>mutatis mutandis</i> .	Canada requests that the information be treated as public information. The remainder of the amounts designated in the paragraph can remain redacted.	<i>Mobil repeats is replies to objection no. 2, above, mutatis mutandis.</i>	The Respondent’s objection is upheld. The information relating to the total amount which was estimated to be required to be spent under the Guidelines

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							in respect of Hibernia shall remain unredacted.
10.	para. 220	Claimant	Confidential	<p>The amount claimed in damages for the Terra Nova project in this arbitration is designated.</p> <p>Canada repeats its statement of objection for designation no. 5, above, <i>mutatis mutandis</i>.</p>	Canada requests that the information be treated as public information.	Mobil repeats its replies to objection no. 2, above, <i>mutatis mutandis</i> .	The Respondent’s objection is upheld. The information relating to damages claimed in respect of Terra Nova shall remain unredacted.
11.	para. 237	Claimant	Confidential	<p>The amount of royalty deductions that the Claimant will accrue according to Canada from the Mobil/Murphy damages award has been designated. The amount that has been redacted (i.e., [REDACTED]) is simply [REDACTED] \$13.893 million in damages awarded to the Claimant in the Mobil/Murphy arbitration. As both [REDACTED] [REDACTED] [REDACTED] and “\$13.893” (see, for example, Mobil, Canada’s Counter-Memorial, para. 237) are not designated (which is correct, as neither</p>	Canada requests that the information be treated as public information.	<p>Business Confidentiality Canada alleges that Mobil has benefited from [REDACTED] in royalty deductions corresponding to amounts awarded in the Mobil I Arbitration. The amount of royalty deductions actually taken by Mobil and allowed by the Province is confidential financial information and it is not in the public domain.</p> <p>Furthermore, the figure of [REDACTED] [REDACTED] is merely Canada’s</p>	The Respondent’s objection is dismissed. The royalty payment savings figure in respect of which business confidentiality is claimed shall be redacted.

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				<p>of those amounts meet the definition of confidential information under paragraph 1(c) of the Confidentiality Order), it is inconsistent to designate the [REDACTED] amount.</p> <p>Further, no specific or detailed information about the Claimant can be derived from it. The amount does not convey any information about the Claimant’s business practices. As such, it does not meet the definition of confidential information under paragraph 1(c) of the Confidentiality Order.</p>		<p>allegation. The actual figure depends on a number of variables, including the results of the Province’s audits of the expenditures claimed against the projects’ royalty obligations, which are still ongoing. Thus, Canada’s alleged figure is not a statement of, nor based on, actual royalty deductions. The public disclosure of this alleged figure will cause misinformation and confusion, and could thereby negatively impact Mobil in relationships with others, including the Province.</p> <p>For the foregoing reasons, the figure (i.e., [REDACTED]) constitutes business confidential information relating to the Claimant, to a third party, or both within the meaning of paragraphs 1(c) and 1(d) of the Confidentiality Order.</p>	