

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.**

IN THE ARBITRATION PROCEEDING  
UNDER CHAPTER ELEVEN OF THE NAFTA  
AND THE ICSID ARBITRATION RULES  
BETWEEN:

**MOBIL INVESTMENTS CANADA INC.**  
(CLAIMANT)

AND

**CANADA**  
(RESPONDENT)

**(ICSID CASE No. ARB/15/6)**

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**PROCEDURAL ORDER No. 2 ON CONFIDENTIALITY**

November 24, 2015

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***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

1. For the purposes of this Confidentiality Order (“Order”):
  - (a) “disputing party” means, in the case of the Claimant, Mobil Investments Canada Inc., ExxonMobil Canada Properties, ExxonMobil Canada Hibernia Company Ltd., and their heirs, successors, and assigns, and in the case of the Respondent, the Government of Canada;
  - (b) “Centre” means the International Centre for the Settlement of Investment Disputes;
  - (c) “confidential information” means any information designated by a disputing party as confidential. A disputing party may designate as confidential, and protect from disclosure, any information that may otherwise be released under the terms of this Order, on any of the following grounds:
    - (i) business confidentiality relating to the Claimant;
    - (ii) business confidentiality relating to a third party; and
    - (iii) information that could otherwise be protected from disclosure by legislation, including, as amended, the *Access to Information Act*, R.S. 1985, c. A-1, the *Canada Evidence Act*, R.S., 1985, c. C-5, the *Privacy Act*, R.S. 1985, c. P-21, and the Newfoundland and Labrador *Access to Information and Protection of Privacy Act*;
  - (d) the designation of information on the grounds of “business confidentiality” in subparagraph (c) includes information that:
    - (i) describes trade secrets, or financial, commercial, scientific or technical information that is confidential business information and is treated consistently in a confidential manner by the party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or accounting or financial records not otherwise disclosed in the public domain; and
    - (ii) if disclosed, could result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, the disputing party to which it relates, or could interfere with contractual or other negotiations of the disputing party to which it relates.
2. A disputing party may designate information as confidential by clearly identifying on each page of the document containing such information the notation “Confidential Information, Unauthorized Disclosure Prohibited” or some variation thereof, and shall take equivalent measures with respect to information contained in material produced in electronic and similar media. The disputing parties shall regard and treat information produced or submitted in the course of this arbitration as confidential information under this terms of this Order (i) pending a

designation as confidential as set forth herein, (ii) unless the designation has been expressly withdrawn by the disputing party who made the designation, or (iii) unless the Tribunal determines under paragraph 6 of this Order that the information designated as confidential is not confidential information under the terms of this Order.

3. If upon receipt of a written submission, witness statement, expert report, correspondence or exhibit the receiving disputing party contends that it contains additional confidential information that has not been appropriately identified and redacted by the submitting disputing party, it shall so inform the submitting disputing party and the Tribunal within ten (10) days of such receipt, and within twenty (20) days of such receipt it shall also provide an electronic copy of the written submission, witness statement, expert report, correspondence, or exhibit in question with the additional information which it contends is confidential information appropriately identified and redacted. The written submission, witness statement, expert report, correspondence or exhibit in question shall not be disclosed to any person not authorized to receive confidential information under the terms of this Order until the ten-day period for the receiving party to identify additional confidential information has come to an end. The submitting disputing party shall provide to the receiving disputing party and the Tribunal a version of the written submission, witness statement, expert report, correspondence or exhibit in question with all confidential information redacted either (i) within thirty (30) days of the date of the initial submission of the document to the Tribunal or, if a disagreement between the disputing parties over the designation of any information as confidential information has been submitted to the Tribunal for resolution under paragraph 6 of this Order, (ii) within ten (10) days of when such disagreement has been resolved by the Tribunal. The twenty- and thirty-day periods described in this paragraph may be extended by the Tribunal in its discretion.
4. In order to designate information as confidential information in a transcript, order, decision, correspondence or award, a disputing party must, within ten (10) days from its receipt of the transcript, order, decision, correspondence or award, notify the other disputing party and the Tribunal of its intent to do so, and within twenty (20) days, provide the other disputing party and the Tribunal with an electronic copy of the transcript, order, decision, correspondence or award in question with the information that it contends is confidential information appropriately identified and redacted. The transcript, order, decision, correspondence or award in question shall not be disclosed to any person not authorized to receive confidential information under the terms of this Order until the ten-day period for a disputing party to notify of its intent to designate information as confidential information has come to an end. The twenty-day period described in this paragraph may be extended by the Tribunal in its discretion.
5. If a disputing party produces documents reflecting confidential information to another disputing party or receives documents containing confidential information yet inadvertently fails to designate such information as confidential as set forth herein, then within a prompt time after discovery, the disputing party may make such designation by notice to the other disputing party who shall thereafter regard and treat the information identified in the notice as confidential information under the terms of this Order unless and until the earlier of either of the following events: (i) the designation has been expressly withdrawn by the disputing party who made the designation, or (ii) the Tribunal determines under paragraph 6 of this Order that the information

designated as confidential is not confidential information under the terms of this Order.

6. Where a disputing party does not agree that information designated as confidential information by the other disputing party is confidential information under the terms of this Order, it shall submit the issue for resolution to the Tribunal. Following submission by the challenging disputing party, the Tribunal shall determine the procedure to be followed to address the issue and shall resolve the issue in accordance with the terms of this Order. In the case of a dispute concerning the appropriateness of a designation of information as confidential information, the information in question shall not be disclosed to any person not authorized to receive confidential information under the terms of this Order until the dispute is resolved by the Tribunal.
7. Confidential information shall not be disclosed to any person, except in accordance with this Order or with the prior written consent of the disputing party that claimed confidentiality with respect to the information and, in the case of materials from third parties, the owner of such confidential information.
8. All documents produced in the *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) (“*Mobil I Arbitration*”) may be used by the disputing parties in this arbitration, subject to the terms of this Order. Information that was designated as confidential in the *Mobil I Arbitration* shall be regarded as confidential information under the terms of this Order.
9. Except as otherwise provided in this Order, information and materials containing confidential information may be used only in these proceedings and may be disclosed only for such purposes, to and among the following:
  - (a) Members of the Tribunal and their assistants, if any, to whom disclosure is reasonably considered by one or more Members of the Tribunal to be necessary;
  - (b) the Centre’s Secretariat and persons employed by the Centre’s Secretariat, including counsel, secretaries, paralegals, transcribers, translators, and any clerical or administrative personnel;
  - (c) counsel to a disputing party whose involvement in the preparation or conduct of these proceedings is reasonably considered by the disputing party to be necessary;
  - (d) officials or employees of the disputing parties and the Province of Newfoundland and Labrador, including any officials elected or appointed to public office, to whom disclosure is reasonably considered by a disputing party to be necessary;
  - (e) independent experts or consultants retained or consulted by the disputing parties in connection with these proceedings;
  - (f) witnesses who in good faith are reasonably expected by a disputing party to offer evidence in these proceedings and only to the extent that the information is relevant to

their expected testimony; or

- (g) authorized representatives of non-disputing Parties to the North American Free Trade Agreement (“NAFTA”) participating in the proceeding under NAFTA Article 1128. In accordance with NAFTA Article 1129, such non-disputing NAFTA Parties shall treat such information as if they were a disputing Party and shall therefore have the same obligations of confidentiality, as set out in this Order, as the Respondent.
10. All persons receiving material in this proceeding containing confidential information, including a non-disputing Party that is a Party to the NAFTA that may receive in the course of this arbitration any evidence, written argument, or other material pursuant to Article 1129 of the NAFTA, shall be bound by this Order. Each disputing party shall have the obligation of notifying all persons receiving such material of the obligations under this Order.
  11. It shall be the responsibility of the disputing party wishing to disclose material containing confidential information to any person pursuant to paragraphs 9(c), (d), (e) or (f) to ensure that such person executes a Confidentiality Agreement in the form attached as Appendix “A” before gaining access to any such material. Each disputing party shall maintain copies of such Confidentiality Agreements and shall make such copies available to the other disputing party upon order of the Arbitral Tribunal or upon the termination of this arbitration.
  12. Any request to the Government of Canada or the Government of Newfoundland and Labrador for documents, or the production of documents in other proceedings, under the *Access to Information Act*, the *Privacy Act*, the Newfoundland and Labrador *Access to Information and Protection of Privacy Act* or any other applicable federal or provincial legislation, including documents produced to Canada in these proceedings, shall be wholly governed by the relevant legislation.
  13. Nothing in this Order shall be construed to abrogate or support a claim or entitlement with respect to a refusal to disclose any information on the basis of a privilege, ground for exemption or non-disclosure or public interest immunity arising at common law, or Act of the Parliament of Canada or the Legislature of Newfoundland and Labrador.
  14. No party shall file any confidential material covered by the terms of this Order in any Court without first bringing this Order to the attention of the Court and seeking directions concerning the filing of such material in a manner that protects its confidentiality.
  15. All hearings shall be public. However, attendance at any public hearing by any individual(s) not identified in paragraph 9 of this Order shall be through closed-circuit video link. At the request of one of the parties, the Arbitral Tribunal shall hold *in camera* sessions to protect confidential information as defined in this Order.
  16. Where sessions are held *in camera*, the Arbitral Tribunal shall make appropriate orders respecting the closed-circuit video link and witness exclusion from the hearings.

17. In the event that a decision, correspondence or award of the Tribunal contains or refers to information designated as confidential in accordance with this Order, the Tribunal shall prepare, or direct the disputing party or parties who designated the information in question as confidential to prepare for its approval upon consultation with the other parties, if any, a redacted copy of the decision, correspondence or award. Unless otherwise directed by the Tribunal, such redacted version shall be furnished to the Tribunal for approval within thirty (30) days.
18. The obligations created by this Order shall survive the termination of these proceedings and shall be enforceable in a court of competent jurisdiction. For the avoidance of doubt, this Order does not constitute a waiver of the immunities accorded to the Centre, members of the Secretariat or members of the Tribunal by Articles 19-21 of the ICSID Convention or by any other applicable law.
19. Upon consultation with the parties and for good cause, the Arbitral Tribunal may at any time amend this Confidentiality Order.

[Signed]

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Sir Christopher Greenwood QC,  
President of the Tribunal

[Signed]

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Dr. Gavan Griffith QC, Arbitrator

[Signed]

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Mr. J. William Rowley QC,  
Arbitrator

**APPENDIX “A”**

**CONFIDENTIALITY AGREEMENT**

1. IN CONSIDERATION of being provided with materials in connection with the arbitration between Mobil Investments Canada Inc. and the Government of Canada (ICSID Case No. ARB/15/6) over which claims for confidentiality have been advanced (“confidential information”), I hereby agree to maintain the confidentiality of such material. It shall not be copied or disclosed to any other person nor shall the material so obtained be used by me for any purposes other than in connection with this proceeding.
  
2. I acknowledge that I am aware of the Confidentiality Order that has been agreed to by the disputing parties, a copy of which is attached to this Agreement, and agree to be bound by it.

EXECUTED before a witness this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
*(Print Name)*

\_\_\_\_\_  
*(Print Witness Name)*

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Witness Signature)*