

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
			<p>Canada bears the burden of proof.¹² Before it raised this defense in its Counter Memorial, Canada had the opportunity to seek from Mobil any documents it might need to satisfy its evidentiary burden, including documents concerning the knowledge elements of NAFTA Articles 1116(2) and 1117(2). Because Canada already had its first bite at the apple, it should be barred from making this late request now.¹³</p> <p style="text-align: center;"><u>Canada's Possession</u></p> <p>Canada already has documents responsive to this request. For instance, the proponent of the Hibernia Southern Extension project, HMDC, submitted an application for an amendment to the Hibernia Benefits Plan.¹⁴ Canada has not alleged that this application, among other responsive documents in its possession, fails to reveal the "knowledge</p>	<p>2004.¹⁵ Canada is not seeking documents at this time in support of that assertion.</p> <p>Second, Canada is seeking a limited range of documents relating specifically to the argument that the Claimant has raised in response to Canada's limitations defense for the first time in its Reply Memorial. The Claimant has argued as an alternative argument in its Reply Memorial that what is relevant is not the date when the 2004 Guidelines were adopted, and rather when the Claimant "first acquired" knowledge of the fact that the 2004 Guidelines would apply throughout the lifetimes of the Hibernia and Terra Nova projects. In furtherance of this argument, the Claimant has raised one interaction between the Board and the Claimant, namely the July 9, 2012 letter, as triggering such knowledge. In response, Canada is seeking documents with respect to another transaction between the</p>	

¹² Mobil's Reply Memorial, ¶ 35, ¶ 42. See also CL-70, *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award in Relation to Harmac Motion of February 24, 2000, ¶ 11 ("Canada has the burden of proof of showing factual predicate to [the Article 1116(2)] defense").

¹³ Procedural Order No. 1, § 15.2. Mobil notes that Canada specifically requested that this provision be included in the Procedural Order. See Letter from Mark Luz (Canada) to Martina Polasek (ICSID) of October 2, 2015. This circumstance makes it especially inappropriate to relieve Canada of the effects of this provision.

¹⁴ C-NLOPB, Staff Analysis: Hibernia Benefits Plan Amendment Hibernia Southern Extension Project (September 2, 2010), p. 4, available at <http://www.cnlopb.ca/news/pdfs/hibsaben.pdf?lbisphpreq=1>.

¹⁵ Canada's Counter-Memorial, ¶ 167.

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			<p>and understanding of the obligations HMDRC undertook in 2010 when the Hibernia benefits plan was amended and the context surrounding that amendment[.]”</p>	<p>Board and the Claimant, namely the amendment of the Hibernia Benefits Plan, to evaluate the impact of that transaction on the Claimant's knowledge. This is relevant and material to test the veracity of a counter-argument that was presented for the first time in the Claimant's Reply Memorial.</p> <p>Third, it is the Claimant's position that it is Canada's burden to prove when the Claimant “first acquired” knowledge. Even if the Claimant were right, which it is not, then Canada's alleged burden can only be discharged if the Claimant produces the requested documents to evidence its actual knowledge.</p> <p><u>Canada's possession:</u></p> <p>Canada confirms that it is not seeking from the Claimant any documents that are already in its possession. As the matter at issue is when the Claimant “first acquired” knowledge, a number of documents, including internal communications, forecasts, and notes, that would not be in Canada's possession may be responsive to the request.</p>	
2.	Documents confirming payment	The requested documents are relevant and material for the following reasons:	<u>Canada's Possession</u>	<u>Canada's possession:</u>	This request is granted.

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	by the Claimant of royalties in May 2016 and which evidence the amount of such payment specifically arising from "the incremental expenditures awarded in the Mobil I arbitration", including how such amounts were calculated in accordance with applicable royalty agreements and/or regulations.	The Claimant has argued that it will repay to the Province any benefit arising from R&D and E&T royalty deductions it receives as compensation in this arbitration. The Claimant has argued that for this reason this Tribunal ought not to deduct the benefits accruing to it in the form of royalty deductions from any Award made to it. In support of these arguments, the Claimant has alleged for the first time in its Reply Memorial that it repaid the Province in May 2016 for the royalty deductions it took with respect to R&D and E&T expenditures at issue in the Mobil/Murphy arbitration by paying royalties on the compensation (award) it received in the Mobil/Murphy arbitration (Phelan 2, ¶ 27). However, the Claimant has not disclosed the financial savings it realized from the deductions on royalties it took during the years 2004-2012, nor has it disclosed the actual amount of royalties it allegedly paid in May 2016 to the	Canada already possesses the documents confirming Mr. Phelan's testimony that the Province received an increased payment of royalties to compensate for the incremental expenditures awarded in the Mobil I Arbitration. ¹⁶ Canada fails to explain why obtaining the corroborating documents from Provincial authorities would be "impossible," as Canada puts it, particularly given that it represented repeatedly (including recently) that the Province purportedly cooperated with it in searching for documents. ¹⁷ Because the requested documents are already in Canada's possession, custody, or control, and it would not be unreasonably burdensome for Canada to produce such documents, this request should be denied. ¹⁸ <u>Relevance and Materiality</u>	First, the Claimant is incorrect in stating that Canada already possesses documents confirming Mr. Phelan's testimony. Mr. Phelan discusses the alleged repayment in only one paragraph in his witness statement and no exhibits are cited by Mr. Phelan in support of any assertion in that paragraph. Second, Mr. Phelan's witness statement simply states that an "increased payment of royalties in effect compensated the Provincial government for the incremental expenditures awarded in the Mobil[/Murphy] Arbitration" and "Mobil was not left "overcompensated" as a result of the Mobil[/Murphy] Majority's decision not to reduce the award based on provincial royalty deductions." ²⁴ This leaves Canada with a number of questions, including for example, the precise amount of royalty payment savings that were enjoyed by the Claimant and the amount that was allegedly repaid to the Province, and whether any	

¹⁶ CW-9, Second Witness Statement of Paul Phelan ("Phelan Statement II"), ¶ 27.

¹⁷ C-371, Letter from Meaghan McConnell (Province of Newfoundland and Labrador) to Mark Luz (Government of Canada), dated September 16, 2016 (responding to Canada's request to perform a search for documents responsive to one of Mobil's requests for production concerning Provincial royalties).

¹⁸ IBA Rule of Evidence, Art. 3.3(c). See also Procedural Order No. 1, § 28.1(a) (IBA Rules shall be followed as guidelines on the exchange of documents).

²⁴ CW-9, Second Witness Statement of Paul Phelan, ¶ 27.

