

IN THE ARBITRATION
UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN
MOBIL INVESTMENTS CANADA INC. & MURPHY OIL CORPORATION

(Claimants)

AND

CANADA

(Respondent)

ICSID Case No. ARB(AF)/07/4

AWARD

Tribunal

Professor Hans van Houtte, President
Professor Merit E. Janow
Professor Philippe Sands QC

Secretary of the Tribunal

Ms. Martina Polasek

Date of Dispatch to the Parties: February 20, 2015

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TABLE OF ABBREVIATIONS

2004 Guidelines	Guidelines for Research and Development Expenditures adopted by the Canada-Newfoundland Offshore Petroleum Board in November 2004
Arbitration Rules	Arbitration (Additional Facility) Rules of 2006
BNA	Ben Nevis Avalon
Board	Canada-Newfoundland Offshore Petroleum Board
C-CORE	Center for Cold Ocean Research
CA	Claimants' Authorities
CE	Claimants' Exhibits
Claimants	Mobil Canada and Murphy Oil
CNLOPB or the "Board"	Canada-Newfoundland and Labrador Offshore Petroleum Board
Counter-Memorial on Damages	Respondent's Counter-Memorial on Damages of October 19, 2012
CRA	Canada Revenue Agency
Cl. Mem.	Claimants' Memorial of August 3, 2009
Cl. Mem. on Damages	Claimants' Memorial on Damages of July 23, 2012
Cl. Reply	Claimants' Reply Memorial of April 8, 2010
Cl. Reply on Damages	Claimants' Reply on Damages of November 30, 2012
Cl. P. Brief	Claimants' Post-Hearing Brief (Redacted) of January 7, 2011
Cl. Reply P. Brief	Claimants' Reply Post-Hearing Brief of January 31, 2011
Damages Hearing	Hearing on damages of April 23, 2013
E&T	Education and Training
HMDC	Hibernia Management and Development Company Ltd.
Mobil Canada	Mobil Investments Canada Inc.
MUN	Memorial University of Newfoundland
Murphy Oil	Murphy Oil Corporation

NAFTA	North American Free Trade Agreement
NL	Province of Newfoundland and Labrador
Parties	Claimants and Respondent
POA	Production Operations Authorization
Projects	Hibernia and Terra Nova
R&D	Research and Development
RA	Respondent's Authorities
RE	Respondent's Exhibits
Rejoinder on Damages	Respondent's Rejoinder on Damages of January 25, 2013
Respondent	Government of Canada
SR&ED	Scientific Research and Experimental Development

I. INTRODUCTION

1. On May 22, 2012, the Tribunal issued a Decision on Liability and on Principles of Quantum (“Decision”). By a majority, the Tribunal decided that the Guidelines for Research and Development Expenditures adopted by the Canada-Newfoundland Offshore Petroleum Board in November 2004 (“2004 Guidelines”), as applied to the investment projects Hibernia and Terra Nova (“Projects”), are not covered by Canada’s reservation under Article 1108(1) of the North American Free Trade Agreement (“NAFTA”) and therefore violate Article 1106 of the NAFTA. The majority of the Tribunal also concluded that the Claimants are entitled to recover damages incurred as a result of the breach, provided that the Claimants submit evidence of any such damages no later than 60 days of receipt of the Decision and that the Tribunal finds such evidence persuasive.
2. Professor Philippe Sands Q.C. issued a Partial Dissenting Opinion (“Dissent”) concluding that there was no breach of Article 1106 of the NAFTA and that, therefore, the question of damages does not arise. The Decision and Dissent are incorporated into this Award as Annex 1.

II. PROCEDURAL HISTORY

3. The procedural history of this case leading up to the issuance of the Decision is contained in its paragraphs 7-33. This section provides the procedural history from the date of the Decision until the date of this Award.
4. In accordance with the Tribunal's Decision, on July 23, 2012, the Claimants filed a Damages Submission ("Cl. Mem. on Damages"), accompanied by the Fourth Witness Statement of Paul Phelan and exhibits CE-249 to CE-337, as well as legal authority CA-267.
5. On September 7, 2012, pursuant to Article 41(2) of ICSID Arbitration (Additional Facility) Rules ("Arbitration Rules"), the Respondent requested that the Tribunal order the Claimants to produce certain documents. By letter of September 17, 2013, the Claimants objected to the production. On October 3, 2012, the Tribunal decided to grant the Respondent's requests and ordered the Claimants to produce the relevant documents and information within one week from receipt of the Tribunal's decision. As a result, the Respondent was granted an extension to file its response to the Cl. Mem. on Damages. The Tribunal further invited the Parties to file a second round of written pleadings on damages.
6. On October 10, 2012, the Claimants informed the Tribunal that they had no documents responsive to the Respondent's requests, as granted by the Tribunal. The Claimants therefore proposed that the Respondent file its response on damages within one week. On October 11, 2012, the Respondent countered that, in view of the fact that the Claimants had produced no documents, there be no Reply and Rejoinder. On October 16, 2012, the Tribunal directed the Respondent to file its response by October 24, 2012 and confirmed its previous directions concerning a Reply and Rejoinder.
7. On October 19, 2012, the Respondent filed its Reply to the Claimants' Submission on Damages ("Counter-Memorial on Damages"). The submission was accompanied by a Fourth Expert Report of Richard E. Walck (including Annexes 1 and 2) and exhibits RE-65 to RE-72.

8. Following a request for an extension granted by the Tribunal, the Claimants filed their Reply on Damages on November 30, 2012 (“Cl. Reply on Damages”), including a Fifth Witness Statement of Paul Phelan, Witness Statements of Paul Durdle and Ryan Noseworthy, exhibits CE-338 to CE-359 and legal authorities CA-268 to CA-271.
9. Due to the extension of time for the filing of the Reply and Rejoinder, the Tribunal consulted the Parties and postponed the date for a potential hearing on damages (initially scheduled to January 15 and 16, 2013) to April 23, 2013.
10. On January 25, 2013, the Respondent filed its Rejoinder on Damages (“Rejoinder on Damages”), accompanied by a Fifth Expert Report of Richard E. Walck, exhibits RE-73 to RE-96 and legal authorities RA-171 to RA-173.
11. On March 27, 2013, following requests by the Parties concerning the conduct of the hearing on damages and admissibility of new documents, the Tribunal issued its Procedural Order No. 3 addressing these matters. In addition, the Order invited the Parties to comment on a number of questions posed by the Tribunal. The Parties subsequently responded to the Tribunal’s queries by letters of April 9, 2013.
12. On April 5, 2013, in accordance with Procedural Order No. 3, the Claimants sought to introduce ten new documents into the record. By letter of April 10, 2013, the Respondent objected to the admissibility of eight of the new documents.
13. On April 12, 2013, the Tribunal issued Procedural Order No. 4 on the admissibility of the Claimants’ new documents. It admitted exhibits CE-360 and CE-361 on certain conditions, reserved its position as to two other exhibits and declined to admit the remaining documents.
14. On April 17, 2013, pursuant to the conditions in Procedural Order No. 4, the Claimants submitted exhibits CE-362 to CE-367 and CE-370 to CE-372.
15. The Tribunal held the hearing on damages in Washington D.C. on April 23, 2013 (“Damages Hearing”). Pursuant to the Parties’ agreement, the hearing was not open to

the public. In addition to the Tribunal and the Secretary, the following persons were present:

On behalf of the Claimants:

Mr. David W. Rivkin, Debevoise & Plimpton LLP

Ms. Samantha Rowe, Debevoise & Plimpton LLP

Ms. Mary Grace McEvoy, Debevoise & Plimpton LLP

Mr. Tomasz J. Sikora, Exxon Mobil Corporation

Mr. Nathan Baines, ExxonMobil Canada

Mr. Roger Landes, Murphy Oil Corporation

Mr. Paul Phelan, Witness

Mr. Paul Durdle, Witness

Mr. Ryan Noseworthy, Witness

On behalf of the Respondent:

Mr. Nick Gallus, Counsel, Trade Law Bureau

Mr. Mark Luz, Counsel, Trade Law Bureau

Mr. Adam Douglas, Counsel, Trade Law Bureau

Ms. Heather Squires, Counsel, Trade Law Bureau

Ms. Melissa Perrault, Paralegal, Trade Law Bureau

Ms. Annette Tobin, Senior Policy Advisor, Natural Resources

Mr. Matthew Tone, Senior Trade Policy Analyst, Department of Foreign Affairs and International Trade

Mr. Jeff O'Keefe, Manager Resource Management, Chief Conservation Officer, Canada-Newfoundland and Labrador Offshore Petroleum Board

Mr. Richard (Rory) E. Walck, Expert

16. The hearing was recorded and a verbatim transcript was made.
17. On May 14, 2013, the Tribunal requested that the Parties provide information on certain matters that arose at the Damages Hearing. The Parties subsequently responded to the Tribunal's queries by letters of May 28, 2013. The Respondent requested an

opportunity to respond to certain points raised in the Claimants' letter of May 28, 2013 and this request was granted by the Tribunal on May 30, 2013. The Respondent submitted a further response by letter of June 12, 2013.

18. On August 1, 2013, the Tribunal notified the Parties that it expected the Respondent to indicate its final position on a proposal made by the Claimants in relation to an aspect of their claim by August 16, 2013 (the "Proposal").
19. The Parties each filed a statement of costs on August 14, 2013. The Claimants subsequently objected to the format of the Respondent's statement of costs.
20. On September 12, 2013, the Tribunal directed the Respondent to file a statement of costs which was similar to that filed by the Claimants on August 14, 2013. Following an enquiry from the Respondent, on September 17, 2013, the Tribunal clarified that it did not wish to receive the Parties' arguments on the allocation of costs at that stage.
21. On August 28, 2013, the Respondent wrote to the Claimants seeking further information to assist them in considering the Proposal. By letter of September 12, 2013, the Tribunal informed the Parties that it could not consider any further information that was provided in the letter from the Respondent or that might be provided in response to that letter.
22. On September 17, 2013, the Respondent indicated that it could not accept the Proposal.
23. On November 27, 2013 the Claimants were invited by the Tribunal to file observations on specific aspects of the Respondent's statement of costs filed on August 14, 2013. The Tribunal also indicated that the Respondent would be permitted to file a response to any submission the Claimants made. The Claimants subsequently requested, and were granted, an extension, filing their submission on costs on December 27, 2013. The Respondent filed a further response on January 17, 2014.
24. The proceeding was closed on January 21, 2014.
25. On January 22, 2014, the Parties informed the Tribunal that they had agreed on a standstill of the arbitral proceedings to pursue settlement discussions. They requested

that the Award be released only in the event that the standstill were terminated. The Parties specified that the standstill could be terminated by either Party on providing notice to the other Parties and the Tribunal, and that the Tribunal may subsequently issue the Award after two weeks. By letter of January 22, 2014, the Tribunal took note of the Parties' agreement and confirmed that it would continue drafting its Award, which would be rendered after two weeks from the date of a notification by either Party that the standstill was terminated.

26. On February 4, 2015, counsel for the Claimants notified the Tribunal of the termination of the standstill of the proceeding and requested that the Tribunal issue its Award as soon as possible after February 18, 2015. Accordingly, by letter of February 18, 2015, the Tribunal confirmed that it would proceed accordingly.

III. THE MAJORITY'S ANALYSIS

A. INTRODUCTION

27. By a majority (the “Majority”), the Tribunal has found that the 2004 Guidelines, as applied to the Projects, breach Article 1106 of the NAFTA and this “gives rise to a right to claim compensation.”¹
28. The Majority emphasized in the Decision that the Claimants must prove “that a call for payment has been made or that damages have otherwise occurred (i.e. that they are “actual”).”² The Decision indicated that money need not have been expended for compensation to be due, but there must, at minimum, be a “firm obligation to make a payment.”³
29. The Claimants claim losses in two distinct categories. First, claimed losses for “incremental spending” represent amounts that the Claimants have already spent on R&D or E&T⁴ as a result of the Guidelines. Such spending, according to the Claimants, would not have been undertaken in the ordinary course of business in the absence of the Guidelines. Second, the Claimants advance “shortfall” losses, being the difference between spending undertaken pursuant to the Guidelines and the spending required by the Guidelines.⁵ For the Claimants, the fact that they have been informed of the shortfall for Hibernia through to April 2012, and for Terra Nova through to December 2011,

¹ Decision, ¶ 487.

² Decision, ¶ 488.

³ Decision, ¶ 440.

⁴ The Guidelines regime, and the regime that preceded it, require spending on research and development and education and training (“R&D” and “E&T”). These terms are used, as appropriate, herein. The Claimants’ claim for incremental spending pertains primarily to projects which are classified by the Claimants as R&D, with the exception of [REDACTED] (see ¶¶ 94-96) and the [REDACTED] (see ¶¶ 89-93 below)). A great deal of the Claimants’ spending on E&T was accepted by the Respondent as incremental (see ¶ 128 below and the Annexes to Phelan Statement IV).

⁵ Based on the practice of the Board and the terms of the Guidelines, this shortfall can be met in several ways: via spending (either incremental or ordinary course), via payment into an R&D fund, or via the drawing down of a letter of credit (the drawn down monies are apparently then to be paid to a “recognized research or education agency” according to the terms of the letters of credit (see, e.g. CE-315, EMM0004860, clause 2B)). Historically, the Claimants have also applied spending from subsequent periods to the shortfall relating to earlier periods to neutralize the shortfall (see CE-252).

means that compensation is required as an actual call for payment has occurred. Thus, they should be compensated for both their incremental expenditures and the identified shortfall.

30. The Respondent asserts that a significant portion of the Claimants' incremental spending is in fact spending which occurred in the ordinary course of business. The Claimants dispute this. Additionally, the Respondent argues that if any incremental spending is compensable, it should be reduced to reflect certain benefits that the Claimants have received as a result of such spending. These alleged benefits result from the Scientific Research & Experimental Development program ("SR&ED"), under which the Claimants receive tax credits for eligible R&D spending, and a Provincial program whereby R&D and E&T spending reduces the royalties payable to the Province on Project revenue.
31. The Majority deals first with the Claimants' incremental spending claim, followed by the impact of the SR&ED and royalty deduction programs, and then turns to the claim resulting from the shortfall.
32. By way of general remarks, the Majority notes that it has faced various difficulties in assessing the Claimants' losses. As the Claimants themselves have noted, the situation in these proceedings is a novel one. The regulatory regime from which the Claimants' alleged losses flow continues to operate. Thus, the situation involves a continuing or ongoing breach as applied to these Claimants, and (to the Majority's knowledge) has not been litigated before a NAFTA arbitral tribunal previously.⁶ The Decision dealt with some of the peculiarities that arise from this with regard to future damages, but other difficulties resulting from this fluid situation remain to complicate the Majority's task.⁷ The Tribunal has been asked in several instances to take into account events

⁶ "[N]o NAFTA tribunal has yet been faced with a continuing treaty violation or investment impairment scenario" (Cl. P. Brief, ¶ 55). More specifically, NAFTA tribunals have been confronted with continuing breaches (see, e.g., *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL Award, March 31, 2010; and *Marvin Roy Feldman v United Mexican States*, ICSID ARB (AF)/99/1, Award, December 16, 2002), but, so far as the majority is aware, there have been no decisions by NAFTA tribunals which dealt with the question of *damages* resulting from such breaches.

⁷ For example, Mr. Phelan said in a witness statement submitted November 30, 2012 that "Hibernia will have spent down its current shortfall by the end of 2013" (Phelan Statement V, ¶ 43) but the Tribunal has

which have not yet occurred, which therefore by nature require a degree of conjecture, as a future event can never be supported completely by evidence or information.⁸ Conscious of this conjecture, the Majority has had to consider carefully the evidence that *relates* to or indicates the *likelihood* of a future event, and whether that evidence can meet the standards set forth in the Decision.⁹

33. The Majority also notes that whilst it has not influenced its decision herein, some of the uncertainty surrounding this claim¹⁰ would not have arisen if the Claimants had opted to pay the amount of spending required under the Guidelines into a fund administered by the Board. Business imperatives apparently dictated otherwise.¹¹ The consequence, however, of not having taken that approach has required an extensive examination of the rationale behind previous and ongoing expenditures without a clear baseline.
34. The Majority's task at this stage in the proceeding has largely been an evidence-based one. Few purely legal matters remain between the Parties¹² as the Decision sought to lay out principles which would apply to the determination of compensation and because the Parties were invited by the Tribunal in the Decision to submit evidence, rather than further legal argument.¹³

not seen any firm evidence of this and instead the Claimants maintain their claim for a shortfall amount for the relevant period (i.e. as opposed to incremental spending). This illustrates the fluidity of the "continuing breach" situation that the Parties and the Tribunal find themselves in.

⁸ A few examples may be illustrative: the Claimants argue against a reduction to their compensation for SR&ED and royalty deductions on the basis of an audit that may take place in the future and that may deny them these benefits; the Respondent argues for a deduction to the Claimants' compensation on the basis of ordinary course spending which might take place to neutralize the shortfall in spending required under the Guidelines; and the Claimants argue against reduction of their compensation on the basis that future proceedings will allow for any necessary reconciliation.

⁹ I.e. "reasonable certainty" (Decision, ¶ 439).

¹⁰ With respect to both incremental spending-based compensation and shortfall-based compensation.

¹¹ Cl. Reply on Damages, ¶ 17; Phelan Statement I, ¶ 29.

¹² With the exception of, *inter alia*, certain principles alleged by the Claimants to be applicable, such as that doubts as to quantum or evidence of damages should be resolved against the party in breach (Cl. Reply on Damages, ¶ 7); issues relating to the burden of proof (see, e.g. Rejoinder on Damages, ¶¶ 8-16) and the appropriate weight to be given to witness statements (Rejoinder on Damages, ¶¶ 17-28).

¹³ Decision, ¶ 490.

B. INCREMENTAL SPENDING

35. The Claimants claim [REDACTED]¹⁴ in compensation for their incremental spending.¹⁵

(a) Parties' Positions

36. The Claimants have sought to fulfill their obligations under the Guidelines in part via spending on R&D and E&T projects in the Province.¹⁶
37. The fundamental disagreement between the Parties therefore, is whether expenditures claimed as incremental, can be said to be solely motivated by the Guidelines, and whether the Claimants would have abstained from such spending “but for” the Guidelines.¹⁷
38. The Respondent says that in fact, a large part of the Claimants’ spending would have taken place in the ordinary course of business in the absence of the Guidelines, or was motivated by other imperatives, and is thus not compensable. For the Respondent, there is therefore no causal link between the Guidelines and much of the spending for which the Claimants seek compensation.
39. The Claimants accept that “ordinary course”¹⁸ spending is not compensable and claim compensation only for expenditures that they submit “would *not have* been made in the

¹⁴ See Annex A to Phelan Statement V. Mobil Canada claims [REDACTED] and Murphy Oil [REDACTED].

¹⁵ With claimed interest, this figure is [REDACTED] according to the Respondent’s expert Mr. Walck (see Annex 1 to Walck Statement V) or [REDACTED] according to the Claimants’ witness Mr. Phelan (see Annex A to Phelan Statement V). The difference in these two figures appears to be attributable to rounding (see Walck Statement V, Annex 1, ¶ 2). For the purposes of the Majority’s determination at ¶ 129 below, the figure [REDACTED] has been used as it is the slightly more conservative number and as the breakdown of figures utilized by Mr. Walck was found to be more user-friendly.

¹⁶ Cl. Mem. on Damages, ¶ 18.

¹⁷ “In our view, the additional spending requirement, even taking the Respondent’s numbers as a base line, involves expenditures of millions of dollars beyond that which would have likely been spent but for the 2004 Guidelines” (Decision, ¶ 401).

¹⁸ In Procedural Order No.3, the Parties were requested to provide a definition of “ordinary course”. In the Majority’s view, the responses from the Parties did not materially add to the submissions they had already

ordinary course of business in the absence of the Guidelines.”¹⁹ Thus, the Claimants confirm that whatever spending they considered to be in the “ordinary course” has already been deducted from their claim.²⁰ The Respondent holds that the Claimants have made insufficient deductions on this basis and “ordinary course” spending improperly remains part of the Claimants’ damages claim.²¹

40. The following categories are the different bases on which the Respondent says the Claimants spending is not incremental.²²

(i) “Consistent with the Needs”

41. The Respondent argues that any spending which is “consistent with the needs” of the Projects or directly relates to the “specific needs” of the Projects (such as, *inter alia*, expenditure to increase oil production or to improve safety) should be classified as “ordinary course” and is therefore not compensable.
42. The Respondent says that the fact that spending is related to the needs of the Projects is evidenced in several ways, including: that it was “previously budgeted” in the Claimants’ records;²³ that it may benefit the Projects;²⁴ that it was subject to an economic incentive,²⁵ or that it was in line with a previously stated research aim or area

made on this matter. The Claimants indicated that they had sought the agreement of the Respondent on a definition but no agreement was forthcoming.

¹⁹ Cl. Mem. on Damages, ¶ 6.

²⁰ Phelan Statement IV, ¶ 30.

²¹ *Inter alia*, the Respondent says that the Claimants’ assessment and deduction of what spending is in the “ordinary course” and what is properly incremental is unsound because it has been performed by Mr. Phelan, who is an employee of Mobil Canada (and thus lacking the requisite independence) (Counter-Memorial on Damages, ¶ 10).

²² Or as otherwise not attributable to the Guidelines.

²³ Rejoinder on Damages, ¶ 37.

²⁴ E.g. through the production of more oil, see Rejoinder on Damages, ¶ 44.

²⁵ Rejoinder on Damages, ¶ 33.

of R&D.²⁶ Moreover, the Respondent submits that safety-related spending was clearly ordinary course spending, *inter alia* because such spending was necessary.²⁷

43. The Claimants argue that “consistent with the needs of” the Projects is not necessarily synonymous with “ordinary course” and that by focusing on criteria such as this, the Respondent has “re-characterized” the relevant test.²⁸ Claimants admit “that they have sought, in the first instance, to comply with their Guidelines obligations by undertaking incremental expenditures that would *relate to the needs* of the Projects” (emphasis added).²⁹ Indeed, as their witness Mr. Phelan indicated “[s]ince the money must be spent in any event, we are actively looking for opportunities to undertake work that could at least be of some benefit to the project, even if it is unnecessary.”³⁰ For the Claimants, the relevant criterion is not whether spending is related to or benefits the Projects, but rather whether it was motivated by the Guidelines.
44. The Claimants reject the Respondent’s argument that R&D and E&T directed at enhancing oil production or the safety of the Projects is all ordinary course spending. Relying on the evidence of Mr. Noseworthy, they posit that the “idea that Claimants are in the business of undertaking R&D simply because it *might* ‘enhance oil recovery’” goes against common sense and the evidence.³¹ Similarly, while safety is a key concern for Exxon Mobil generally, there is a limit to spending on safety in the ordinary course.³² The Claimants also point to Exxon Mobil’s strong safety record in the oil industry (which means that less R&D and E&T spending on safety is necessary). They

²⁶ Rejoinder on Damages, ¶ 45.

²⁷ See, e.g., Rejoinder on Damages, ¶ 70.

²⁸ Cl. Reply on Damages, ¶ 5.

²⁹ Cl. Reply on Damages, ¶ 17.

³⁰ Cl. Reply on Damages, ¶ 17; Phelan Statement I, ¶ 29.

³¹ Cl. Reply on Damages, ¶ 19; Noseworthy Statement I, ¶ 6.

³² The Claimants analogize using car safety, stating that “[i]f Canada’s argument were to be followed to its logical conclusion, every car on the road would be equipped with all the newest safety features no matter the cost, which is not the case” (Cl. Reply on Damages, ¶ 20).

allege they have in fact not sought compensation for the “vast majority of their safety-related expenditures.”³³

(ii) Spending Which Pre-dates the Guidelines

45. The Respondent asserts that spending that was already ongoing or was conceived of prior to the Guidelines has not, by its very nature, been motivated by the Guidelines.³⁴
46. The Claimants argue that the Guidelines have precipitated a change in the character of the relevant spending or that the expenditure was entirely different to begin with. For the Claimants this is evidenced in several ways: that the spending was restructured, for example where it was transferred from the Project operator to the joint account of the Project owners (so it could be applied against the Guidelines), and/or the amount of spending was increased;³⁵ or, that, despite a similar or the same description for pre-Guidelines *versus* post-Guidelines expenditures, it is in fact different in substance.

(iii) Spending Which Pre-dates 2009

47. The Claimants’ witness, Mr. Phelan, stated that “neither Hibernia nor Terra Nova *made any incremental expenditures* during the 2004-2008 period”³⁶ (emphasis added). The Respondent thus concludes that R&D and E&T expenditure on projects which began before 2009 cannot be incremental.
48. The Claimants argue that the expenditure that falls under this argument by the Respondent is either a) not the same expenditure that began prior to 2009;³⁷ or b) if it is expenditure that began prior to 2009, only a portion of the costs involved in the

³³ Cl. Reply on Damages, ¶ 22.

³⁴ Rejoinder on Damages, ¶¶ 89-99.

³⁵ [REDACTED] Phelan Statement V, ¶ 21 and [REDACTED] Phelan Statement V, ¶ 22.

³⁶ Phelan Statement IV, ¶ 32.

³⁷ Cl. Reply on Damages, ¶ 34.

overall expenditure (specifically costs related to transferring the expenditure to the Province) are claimed.³⁸

(iv) Spending in Line with the Accord Acts and Benefit Decisions

49. The Respondent argues that the Claimants were already obligated to spend on R&D and E&T prior to the implementation of the Guidelines.³⁹ Therefore, any spending compatible with the Accords Acts and Benefits Decisions fails the “but for” test and must be deducted from the damages claimed.

⁵⁰ The Claimants, however, highlight that the Accord Acts and Benefit Plans set no ceiling or floor for spending, and argue (relying upon the language of the Decision) that the 2004 Guidelines, by contrast, require the Claimants to spend “millions of dollars beyond that which would have likely been spent but for the 2004 Guidelines.”⁴⁰ The Claimants’ spending in 2000 and 2001, ranging between C [REDACTED] [REDACTED]⁴¹ was deemed consistent with the Benefits Plans by the Board.⁴² This spending level has, since the introduction of the Guidelines, been far exceeded; the Claimants say the timing of this increase indicates a causal link to the Guidelines. The Claimants further hold that even if the Accord Acts and Benefits Plans *required* R&D and E&T spending, the Respondent’s argument would still fail, as “[e]xpenditures on specific R&D projects were never required by the Board before, or even since, the Guidelines, and Canada has not introduced any evidence that suggests otherwise.”⁴³

³⁸ Noseworthy Statement I, ¶ 46.

³⁹ Counter-Memorial on Damages, ¶¶ 37-43; Rejoinder on Damages, ¶¶ 108-113.

⁴⁰ Cl. Reply on Damages, ¶ 37 (citing Decision, ¶ 401).

⁴¹ Cl. Reply on Damages, ¶ 38.

⁴² As the Claimants point out, POAs would not otherwise have been issued (Cl. Reply on Damages, ¶ 38).

⁴³ Cl. Reply on Damages, ¶ 42.

(b) The Individual Expenditures and the Majority's Findings

51. The Majority starts by observing that the categories outlined above by the Respondent as the basis for construing whether spending is incremental or ordinary can be useful, but are not entirely dispositive. For example, the mere fact that an expenditure may be beneficial to the Claimants or Projects does not definitively answer whether it was undertaken as a result of the Guidelines or not. It is logical that if the Claimants were under an expenditure requirement, they would seek to make the necessary expenditures of some utility. Any sensible investor would not choose to make an expenditure that was wholly superfluous to the investment. If an expenditure was wholly superfluous, or contrived, it would indicate that it is incremental. But as with benefit, this also might not be determinative; the mere identification as superfluous would not necessarily capture the totality of the expenditures that are properly deemed incremental. Similarly, expenditure that predates the Guidelines may properly be seen as ordinary. However, even if an expenditure is related to a Project that predates the Guidelines, this may not in itself definitively answer the question of whether the continued expenditure is ordinary course or incremental. The absence of a clear baseline of pre-Guidelines expenditure has added considerable complexity to the Majority's task. The Majority finds itself thus obliged to consider the particular facts and characteristics of each of the identified and challenged expenditures, together with the related testimony and evidence before us, separately.
52. Accordingly, the Majority now turns to the individual incremental expenditures and projects. The Majority notes at the outset that the burden of proof to show that each of the incremental expenditures would not have been made in the ordinary course of business in the absence of the Guidelines lies with the Claimants. The Majority has already noted in the Decision that the relevant standard of proof is "reasonable certainty," not "absolute certainty," and that damages must not be too speculative or remote.⁴⁴

⁴⁴ Decision, ¶¶ 437-438.

53. The Majority faces the inherent difficulties of retrospectively applying the definition of “ordinary course” to R&D and E&T spending which was not conceived with this definition in mind. The Majority appreciates that the Claimants have had to conduct their assessment as to what spending was ordinary course subsequent to its occurrence or conception, and have sought to be conservative in doing so.⁴⁵ Nonetheless, there are difficulties inherent in the kind of retro-fitting which the Claimants, and now the Majority, have to engage in to assess what spending may have been in the ordinary course. These difficulties however, do not relieve the Claimants of their burden of proof.⁴⁶ The Majority is similarly not convinced by the Claimants’ argument that uncertainty is to be construed against the wrongdoer.⁴⁷ The Majority does not find this to be an applicable principle of international law as the Claimants allege.⁴⁸ The Majority has relied upon the evidence it found to be the clearest indicator of spending being either ordinary course or incremental and has applied the “reasonable certainty” standard.⁴⁹

(i) [REDACTED]

54. The [REDACTED] was carried out by HMDC in 2010 and 2011 at the [REDACTED] which is “highly

⁴⁵ Phelan Statement IV, ¶ 42.

⁴⁶ The Tribunal notes the submission to this effect by the Claimants’ counsel at the Damages Hearing: “to the extent there is any uncertainty because documents were not created at the time that says this is incremental spending because what they were trying to do was meet the Guidelines, and until 2012, we didn’t have the standard from the Tribunal that it was going to apply, rather we were trying to look at the-- trying to do a life-of-field analysis of what would be ordinary, that can’t be held against us” (Damages Hearing Transcript, p.419). The Tribunal does not find that the Claimants’ burden is alleviated on this basis and notes that the Claimants themselves introduced the “ordinary course” concept (see, e.g. Cl. Mem, ¶ 218; Rosen Statement I, ¶ 28 Cl. Mem. on Damages, ¶ 6).

⁴⁷ Cl. Reply on Damages, ¶ 7. The Tribunal notes that the situation is further complicated by the fact that the Claimants themselves have created uncertainty by not simply paying the amount of required spending into a fund, as is permissible under the Guidelines.

⁴⁸ The references relied upon by the Claimants: Mark Kantor, *Valuation for Arbitration*, at 72 (Wolters Kluwer Law 2008); *Sapphire International v. National Iranian Oil Companies*, Award of March 15, 1963, at 187-188) are an insufficient basis to establish a rule of international law.

⁴⁹ Decision, ¶ 438. The Tribunal notes that the Claimants submitted at the Damages Hearing that the relevant standard of proof is a “preponderance of the evidence” standard (Damages Hearing Transcript, p.419). The Tribunal finds it more useful to focus on the reasonable certainty standard, which was clearly adopted in the Decision.

faulted,”⁵⁰ “slot constrained” and “technologically challenged.”⁵¹ The Claimants submitted that the ██████ sought to understand “possible connectivity, or communication, across faults dividing reservoir blocks.”⁵²

55. The Respondent argues that the ██████ addresses the needs of Hibernia and that the Claimants themselves recognized the need for the study in Benefit and Development Plan Applications, which were subsequently approved by the Board with the ██████ included as a condition.⁵³ The Claimants say that they were required to ██████ but that the ██████ as such does not fall within that obligation.
56. The Respondent also asserts that the Claimants’ own witness (Mr. Graham) has stated that this expenditure was made in the ordinary course of business and that the Claimants’ evidence indicates that the ██████ was “previously budgeted” and therefore was made in the ordinary course.⁵⁴ The Claimants object that the evidence relied upon to make these assertions has been misconstrued and taken out of context. Specifically, they say that Mr. Graham is not referring to the ██████ as the Respondent alleges (he was instead referring to the broader obligation ██████⁵⁵) and the label “previously budgeted” refers to a point in time that was part of the post-Guidelines timeframe, rather than pre-Guidelines.⁵⁶
57. The Majority accepts the Claimants’ explanation of how the ██████ inclusion in an internal accounting document as “previously budgeted” did not necessarily refer to a period pre-dating the Guidelines. The Majority also accepts that the Claimants’ witness, Mr. Graham, in stating that the ██████ was “ordinary course,” referred

⁵⁰ Noseworthy, Statement I, ¶ 10.

⁵¹ Merits Hearing Transcript, Day 2, p. 468, testimony of Mr. Ringvee.

⁵² Noseworthy, Statement I, ¶ 16.

⁵³ Counter-Memorial on Damages, ¶ 20.

⁵⁴ Counter-Memorial on Damages, ¶ 22. I.e., that the spending pre-dates the Guidelines, as evidenced by the descriptor “previously budgeted,” and therefore could not have been motivated by the Guidelines.

⁵⁵ Cl. Reply on Damages, ¶ 32.

⁵⁶ Phelan Statement V, ¶ 10.

instead to [REDACTED].⁵⁷ The Majority finds, however, that the Claimants have not proven that the [REDACTED] is an incremental expenditure. Lack of clear evidence as to the differentiation between the [REDACTED] (which the Claimants accept was in the ordinary course of business), and the allegedly narrower [REDACTED] prevents the Majority from determining with requisite certainty that the [REDACTED] was not in the ordinary course of business.⁵⁸

(ii) [REDACTED]

58. The costs claimed in relation to this project are for the establishment, by HMDC, of a [REDACTED] which will carry out studies of enhanced oil recovery by [REDACTED],⁵⁹ culminating in a pilot program referred to as the [REDACTED].⁶⁰ The Claimants are under an obligation to “maximize recovery” at Hibernia pursuant to the Newfoundland Offshore Petroleum Drilling and Production Regulations.⁶¹ The [REDACTED] itself will not take place until 2014, and is the second component of the project.⁶²
59. The Respondent argues that [REDACTED] has long been an R&D focus at Hibernia and this project is thus ordinary course spending. The Respondent also asserts, as it did

⁵⁷ The Tribunal notes that whilst it has been able to discern that Mr. Graham was referring to the broader [REDACTED] it has not followed that Mr. Graham’s evidence has assisted in clarifying the scope of the narrower [REDACTED] (see Graham Statement I, ¶ 18 and the discussion below).

⁵⁸ The Tribunal notes, for example, that Mr. Noseworthy, when he is describing the [REDACTED] in his witness statement, referred to Claimants’ Exhibit CE-212 (Noseworthy Statement I, ¶ 16). At the Damages Hearing however, Mr. Noseworthy indicated that parts of this exhibit *do not* relate to the [REDACTED]. These two conflicting parts of CE-212 contain similar phraseology, which creates confusion as to what in exhibit CE-212 can be relied upon as a clear description of the [REDACTED].

⁵⁹ Noseworthy Statement I, ¶ 23.

⁶⁰ Noseworthy Statement I, ¶ 21.

⁶¹ Rejoinder on Damages, ¶ 46. The Claimants also concede that Hibernia is obligated to [REDACTED] [REDACTED] (Noseworthy Statement I, ¶ 22) but distinguish this from the [REDACTED]

⁶² Noseworthy Statement I, Damages Hearing Transcript, p. 262.

with respect to the [REDACTED]⁶³ that the [REDACTED] was “previously budgeted” and therefore was made in the ordinary course.

60. The Claimants argue that Canada is conflating the [REDACTED] with earlier, unrelated work that was undertaken at Hibernia.⁶⁴ They say that the evidence relied upon to conclude that the study was “previously budgeted” has been misconstrued and taken out of context. The Claimants’ witness Mr. Noseworthy asserted that but for the Guidelines, [REDACTED] would not have been established,

[REDACTED]⁶⁵

61. The Respondent also argues that the fact that some of the work relating to this project was carried out at [REDACTED] indicates that it is ordinary course expenditure, *inter alia*, because such expenditure cannot defray the Claimants’ Guidelines obligations. The Respondent also points to a discrepancy in Mr. Noseworthy’s statement regarding when [REDACTED] which was aimed at identifying whether [REDACTED]⁶⁶ Mr. Noseworthy says that this [REDACTED] was post-Guidelines, the Respondent says that it was in fact done before the Guidelines.⁶⁷ The Claimants concede that work relating to this project has been carried out [REDACTED], but say that this does not indicate that the project is ordinary course. Rather, this can be explained by capacity limitations in the Province and an occasional need to carry out initial R&D elsewhere to get a project “off the ground.”⁶⁸

62. The Majority finds that the Claimants have proven that this expenditure is incremental. As with the [REDACTED], the fact that the [REDACTED] was included in an

⁶³ See ¶ 56 above.

⁶⁴ Noseworthy Statement I, ¶ 20.

⁶⁵ Noseworthy Statement I, ¶ 27. [REDACTED]

⁶⁶ Rejoinder on Damages, ¶ 49; Noseworthy Statement I, ¶ 33.

⁶⁷ Rejoinder on Damages, ¶ 49.

⁶⁸ Noseworthy Statement I, ¶ 20.

internal accounting document⁶⁹ as “previously budgeted” does not mean that this expenditure pre-dated the Guidelines.⁷⁰

63. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁷² This duplication is persuasive evidence that [REDACTED] represents an expenditure that was motivated by the Guidelines. It is also significant that initially the Claimants did not apply for pre-approval [REDACTED] this aspect was added later to the [REDACTED] [REDACTED] which in turn was hoped would increase the likelihood that this expenditure met the Guidelines and would be pre-approved.⁷³ These factors in combination demonstrate that this expenditure would not have been made in the ordinary course of business in the absence of the Guidelines. The Majority does not consider the fact that some work related to this project may have been carried out [REDACTED] [REDACTED] to support that the project is ordinary course. Mr. Noseworthy’s explanations of why this was so are reasonable.⁷⁴ Nor does the Majority find it significant (for determining whether or not this spending was incremental) that some of the preparatory work for this project may have been carried out in 2008.⁷⁵ Costs relating to this work are not claimed by the Claimants and therefore this work and its timing and location are not relevant. [REDACTED]

⁶⁹ This document was compiled in August 2010 (Phelan Statement V, ¶ 11).

⁷⁰ The Respondent and Claimants’ arguments regarding the “previously budgeted” label in the [REDACTED] context (see ¶ 56 above) apply here also as the same document where the “previously budgeted” descriptor appears is at issue (CE-233).

⁷¹ Noseworthy Statement I, ¶ 27.

⁷² At the Damages Hearing, in the course of a line of questioning by Arbitrator Sands, the Claimants’ witness Mr. Noseworthy confirmed that [REDACTED] [REDACTED] (Damages Hearing Transcript, p.317).

⁷³ Noseworthy Statement I, ¶ 25.

⁷⁴ See Noseworthy Statement I, ¶¶ 20, 33.

⁷⁵ Rejoinder on Damages, ¶ 49.

[REDACTED]

[REDACTED]

(iii) [REDACTED]

64. The Joint Industry [REDACTED] project aims to “develop and test new technologies” which might lead to [REDACTED] the Grand Banks region.⁷⁶
65. The Claimants argue that the cost and risks involved are such that it is apparent that this expenditure would not have been undertaken in the ordinary course of business.⁷⁷
66. The Respondent argues that this project aims to enhance oil recovery and therefore directly relates to the needs of Hibernia and Terra Nova and is thus in the ordinary course of business.⁷⁸
67. The fact that this expenditure was conducted jointly by [REDACTED] [REDACTED] supports the Claimants’ assertion that the project was not specifically needed at Hibernia, and rather, that it was Guidelines-motivated. The Claimants have convincingly explained that this type of joint approach is unusual and was a novel initiative that was a response to the Guidelines.⁷⁹ The Majority notes however that the novel nature of this approach stems not only from the fact that it was a joint industry initiative, (this alone might be unsound given that the evidence indicates that the Claimants have been involved in joint projects before the Guidelines came into effect)⁸⁰ but also because, *inter alia*, workshops were held to “devise both potential problems and their R&D solutions”.⁸¹ The documents relating to these workshops clearly indicate that the R&D under discussion at the workshops were being discussed in the context

⁷⁶ Noseworthy Statement I, ¶ 37.

⁷⁷ Noseworthy Statement I, 37.

⁷⁸ Rejoinder on Damages, ¶ 55.

⁷⁹ Noseworthy Statement I, ¶ 7.

⁸⁰ See, e.g. CE-84, EMM0001616.

⁸¹ Noseworthy Statement I, ¶ 7.

of Guidelines compliance.⁸² Thus, the discussion of a project in these documents is a strong indicator (in combination with other factors) that it involved incremental spending.

68. Further, it appears that this project was considered to be high risk and indeed has not been pursued vigorously. These characteristics of the project support the finding that it would not have been made in the ordinary course of business but for the Guidelines.
69. The Respondent, for its part, has not convincingly rebutted the Claimants' assertion that this project was undertaken as an incremental expenditure and did not discuss this expenditure at the Damages Hearing.
70. The Majority therefore finds that the Claimants *have* proven that this expenditure is incremental.

(iv)

71. The Claimants argue that they should be compensated pro-rata for a donation made by HMDC [REDACTED] [REDACTED] [REDACTED].⁸⁴ For the Claimants, this [REDACTED] is not required for basic safety training and in the ordinary course of business HMDC would not have made this donation.⁸⁵
72. Spending on safety, the Respondent argues, however, is necessary for the Projects and therefore is in the ordinary course.⁸⁶ Moreover, this donation is based on a

⁸² See, e.g., CE-202, EMM0003359; CE-203, EMM0003366.

⁸³ [REDACTED]

⁸⁴ Durdle Statement I, ¶ 16; CE-283.

⁸⁵ Durdle Statement I, ¶¶ 14-21.

⁸⁶ Counter-Memorial on Damages, ¶¶ 30-31.

_____ and would have been made in the absence of the Guidelines.⁸⁸

73. The Claimants reply that [REDACTED] was not, however, released until *after* the donation was made and did not recommend Hibernia's donation.⁸⁹
74. The Majority finds that the Claimants have established that this expenditure was incremental. The [REDACTED] that was funded went above and beyond what could be reasonably construed as "ordinary course" safety spending. Mr. Durdle's testimony refuted effectively that this expenditure [REDACTED] [REDACTED]. He pointed out that the timing of the expenditure did not correspond with [REDACTED], nor did the object of the expenditure.⁹⁰ [REDACTED] [REDACTED] which further confirms that the funding would not be part of the Claimants' "ordinary course" spending on safety.⁹¹ The Respondent has failed to show that this expenditure was necessary for safety at Hibernia or Terra Nova and thus would have been made in the ordinary course of business in the absence of the Guidelines.

⁸⁷ The Offshore Helicopter Safety Inquiry was conducted in response to a helicopter crash in March 2009 (see Counter-Memorial on Damages, ¶ 31; RE-69; RE-80).

⁸⁸ Counter-Memorial on Damages, ¶ 31.

⁸⁹ Durdle Statement I, ¶ 22.

⁹⁰ Damages Hearing Transcript, p. 366. See also Durdle Statement I, ¶ 22 (footnotes omitted) “The donation was made and approved in July 2011, [REDACTED]”

⁹¹ Damages Hearing Transcript, p. 362.

(v)

75. The [REDACTED] which is a joint industry project conducted by [REDACTED]⁹² trains “workers to respond to emergencies.”⁹³ The relevant [REDACTED] are still under development.⁹⁴
76. The Claimants argue that any safety procedures or measures that follow from this project will not replace any of the current (ordinary course) training in place at Hibernia, and that this demonstrates that this project was instead precipitated by the Guidelines.⁹⁵ The Claimants’ witness, Mr. Durdle, was convincing in his explanation of how the more basic, “ordinary course” procedures [REDACTED] differ from this safety measure, demonstrating that the latter goes beyond ordinary course spending.
77. The Respondent’s arguments largely consist of questioning the statements of the Claimants’ witness, rather than offering tangible evidence to refute them. The Respondent argues that spending on safety is necessary for the Projects and therefore would have been undertaken even in the absence of the Guidelines.⁹⁷ However, it has failed to show that this particular expenditure was in any way specifically necessary for safety at Hibernia and it has not offered convincing rebuttal of the Claimants’ assertion that this is incremental spending.⁹⁸
78. For the foregoing reasons, the Majority finds that the Claimants have proven that this expenditure is incremental.

⁹² CE-288.

⁹³ Durdle Statement I, ¶ 23.

⁹⁴ Durdle Statement I, ¶ 23.

⁹⁵ Durdle Statement I, ¶¶ 23-27.

⁹⁶ Durdle Statement I, ¶ 25.

⁹⁷ Counter-Memorial on Damages, ¶¶ 30-31.

⁹⁸ This project was not discussed at the Damages Hearing.

(vi) [REDACTED]

79. The [REDACTED] project is a joint industry project with the ultimate objective of developing [REDACTED]
[REDACTED]⁹⁹
80. The Respondent repeats that spending on safety is necessary for the Projects and therefore this spending would have been undertaken in the absence of the Guidelines.¹⁰⁰ For the Respondent, the fact that part of the expenditure on this project was classified as ordinary course is indicative of the fact that the whole project was ordinary course.¹⁰¹
81. The Claimants admit that certain expenditures in relation to the “exploratory” part of this project, which took place in 2009, are appropriately classified as ordinary course.¹⁰² However, as this was in line with the operator’s desire to be a “good corporate citizen,”¹⁰³ it does not mean that the remainder of the spending on this project was likewise in the ordinary course. The project in its final form, the Claimants say, is not necessary for the Projects and would not have been conducted absent the Guidelines.¹⁰⁴
82. The Claimants’ witness, Mr. Durdle, convincingly describes how various aspects of this project are above and beyond standard requirements. For example, part of the project is aimed at the development of [REDACTED]¹⁰⁵ At Hibernia, at the same time as the development of these [REDACTED] is proceeding, the regular [REDACTED] are being replaced with the same type of regular [REDACTED]. This seems highly suggestive of the exceptional nature of the spending on [REDACTED]. Mr. Durdle also convincingly described how the [REDACTED] equipment may not even

⁹⁹ Durdle Statement I, ¶ 30. [REDACTED]
[REDACTED] (CE-279, EMM0004420).

¹⁰⁰ Counter-Memorial on Damages, ¶¶ 30-31.

¹⁰¹ Counter-Memorial on Damages, ¶ 31.

¹⁰² Durdle Statement I, ¶ 33.

¹⁰³ Durdle Statement I, ¶ 33.

¹⁰⁴ Durdle Statement I, ¶¶ 30-35.

¹⁰⁵ [REDACTED] (Durdle Statement I, ¶ 30).

ultimately be appropriate for use at either Hibernia or Terra Nova, which further supports the non-ordinary course nature of this project.¹⁰⁶

83. By contrast, the Respondent merely challenges statements by the Claimants and their witness, rather than offering any evidential basis to refute the Claimants' assertion.¹⁰⁷ The Respondent has failed to show that this project was necessary for safety and/or in the ordinary course.
84. For the foregoing reasons, the Majority finds that the Claimants have proven that this expenditure is incremental.

(vii)

85. The Claimants claim expenditure for a scoping study commissioned by Terra Nova, which was intended to "investigate/evaluate existing technologies for [REDACTED] [REDACTED] propose potential new/enhanced technologies, and develop a plan (roadmap) for future research and development."¹⁰⁸
86. The Claimants point out that this vague project is merely a study to develop future studies, with no specific parameters or specifications, and that such a vague project is not something that would be undertaken in the ordinary course of business.¹⁰⁹
87. The Respondent says that spending on safety is necessary for the Projects and therefore would have been undertaken in the absence of the Guidelines.¹¹⁰ The Claimants' witness Mr. Durdle is unable to point to any specific features of this spending which distinguish it from ordinary course spending, other than that it is vague, and that to "come up with new studies without any defined parameters or specifications" is not a common approach.¹¹¹ Mr. Durdle is moreover primarily engaged with the Hibernia

¹⁰⁶ Durdle Statement I, ¶ 32.

¹⁰⁷ Rejoinder on Damages, ¶¶ 80-85.

¹⁰⁸ CE-311, EMM0004809; Durdle Statement I, ¶¶ 36-37.

¹⁰⁹ Durdle Statement I, ¶¶ 36-38.

¹¹⁰ Counter-Memorial on Damages, ¶¶ 30-31.

¹¹¹ Durdle Statement I, ¶ 38.

Project and he appears relatively unfamiliar with this project, which was centered on Terra Nova. Mr. Durdle merely claims to have been “aware of its content”.¹¹²

88. The Majority therefore finds that the Claimants have not proven that this is an incremental expenditure.

(viii) [REDACTED]

89. The [REDACTED]
[REDACTED]¹¹³
It was first created in 1998 and was initially funded by Petro Canada,¹¹⁴ in the amount of [REDACTED] per annum. In 2009 the funding for [REDACTED] was doubled and transferred to Terra Nova’s joint account.¹¹⁵

90. The Respondent says that the Claimants have been funding [REDACTED] since 1998.¹¹⁶

91. The Claimants dispute this, arguing that they did not fund [REDACTED] prior to 2009.¹¹⁷

92. The Majority finds that the Claimants have proven that this expenditure was incremental.

93. The Majority is persuaded that the Claimants did not contribute to the funding of [REDACTED]
[REDACTED] until the Guidelines came into effect.¹¹⁸ This is significant and probative of a causal link to the Guidelines. Whilst the funding of [REDACTED] was occurring pre-Guidelines, it was borne by a different entity and was of a lesser amount. This

¹¹² [REDACTED]
[REDACTED] (Durdle Statement I, ¶ 38); Durdle Statement I, ¶ 36.

¹¹³ CE-227, EMM0003852.

¹¹⁴ The Terra Nova project is organized as an unincorporated joint venture. The largest shareholder, Petro-Canada, which owned a 33.99% interest, managed and operated the project for a consortium of working interest owners, including the Claimants. In 2009, Petro-Canada merged with Suncor, which is now the operator.

¹¹⁵ Phelan Statement V, ¶ 21.

¹¹⁶ Counter-Memorial on Damages, ¶ 33.

¹¹⁷ Phelan Statement V, ¶¶ 20-21.

¹¹⁸ Phelan Statement V, ¶ 21.

expenditure was not spending the Claimants themselves were undertaking until the Guidelines came into effect.

(ix)

94. The Claimants claim compensation for their donation [REDACTED]
[REDACTED]¹¹⁹
95. The Respondent says that the “Claimants” have been donating [REDACTED] since 2003 and that this is therefore an expenditure that “pre-dates” the Guidelines and should thus not be compensable.¹²⁰ The Claimants accept that “Petro-Canada has provided relatively minor funding for [REDACTED] since 2003”¹²¹ but highlight that the Claimants themselves never contributed to this donation program.
96. The Majority finds that the Claimants have proven that this expenditure was incremental. Similar to the [REDACTED], it is significant that this donation was not spending that the Claimants were willing to undertake until the Guidelines came into effect.

(x)

97. The Claimants request compensation for the costs of [REDACTED]
[REDACTED]¹²² In order for this [REDACTED] to occur in Newfoundland, it was necessary to [REDACTED]
[REDACTED].¹²³

¹¹⁹ Phelan Statement V, ¶ 22. At the hearing, Claimants clarified that Mobil makes its own contributions to [REDACTED] the amount claimed in these proceedings is the Terra Nova “joint account” spend only (Damages Hearing Transcript, p.252).

¹²⁰ Counter-Memorial on Damages, ¶ 33.

¹²¹ Phelan Statement V, ¶ 22.

¹²² Noseworthy Statement I, ¶ 45.

¹²³ Noseworthy Statement I, ¶ 47.

98. The Claimants are only claiming the costs of relocating the [REDACTED] to the Province as incremental spending (as opposed to the cost of the [REDACTED] itself).¹²⁴ This part of the spending, the Claimants argue, is clearly linked to the Guidelines. The transfer of this [REDACTED] to Newfoundland, they say, is “an excellent example of the distorted business practices Claimants have been forced to adopt as a result of the Guidelines.”¹²⁵
99. The Respondent argues that this expenditure relates to an [REDACTED] that “has long been conducted outside of the Province”¹²⁶ and that this [REDACTED] “pre-dates” the Claimants’ attempts to comply with the Guidelines via incremental spending and thus cannot now be construed as incremental.¹²⁷
100. The Majority finds that the Claimants have proven that these expenditures are incremental. The evidence offered by the Claimants that this project was moved to Newfoundland so that it would be Guidelines-compliant (combined with the timing of this move) indicates a clear causal link with the Guidelines.¹²⁸ The fact that the [REDACTED] has been conducted for some time elsewhere is irrelevant in light of the fact that the Claimants claim only the cost of transferring the expenditure to the Province.

(xi) [REDACTED]

101. The Claimants claim compensation for costs related to improving the [REDACTED] [REDACTED] to improve safety, operational efficiency and capability in existing and Arctic frontier regions.”¹²⁹

¹²⁴ Noseworthy Statement I, ¶¶ 45-48.

¹²⁵ Noseworthy Statement I, ¶ 45.

¹²⁶ Counter-Memorial on Damages, ¶ 36.

¹²⁷ Counter-Memorial on Damages, ¶ 35.

¹²⁸ Noseworthy Statement I, ¶¶ 46-7. See also clause 3.1 of the Guidelines (“In order to be eligible, any R&D expenditure must occur in the Province of Newfoundland & Labrador”).

¹²⁹ CE-313, EMM0004838.

102. The Respondent says that the Claimants have participated in this type of project since 1999 and that this is therefore an ongoing expenditure, conceived of before the Guidelines, and is therefore not incremental.¹³⁰
103. The Claimants argue that the Respondent confuses this incremental expenditure with pre-Guidelines work (also focused on [REDACTED]) undertaken by Petro-Canada/Suncor as an individual owner company.¹³¹
104. The Majority finds that the Claimants have proven that this expenditure was incremental.
105. The [REDACTED] at issue in these proceedings appears to be far more extensive than previous work focused on [REDACTED], both in terms of scope and costs.¹³² Further, additional factors such as that Hibernia's fundamental structure is not susceptible to [REDACTED],¹³³ and that this project was conceived at a joint industry workshop,¹³⁴ lead the Majority to believe that this expenditure is properly characterized as incremental.

¹³⁰ Counter-Memorial on Damages, ¶ 33; Rejoinder on Damages, ¶¶ 96-99.

¹³¹ Noseworthy Statement I, ¶¶ 41-44.

¹³² Historical Benefit Plan reports for both Projects put the cost of previous [REDACTED] work at much lower amounts than the [REDACTED] total project cost estimated for this [REDACTED] (see, e.g. CE-84, EMM0001616; CE-93, EMM0001871; and CE-92, EMM0001824 for historical Benefit Plans, and CE-313, EMM0004838 for the estimated cost of this [REDACTED]).

¹³³ Noseworthy Statement I, ¶ 43.

¹³⁴ Noseworthy Statement I, ¶ 44, see the discussion above at ¶ 67.

(xii) [REDACTED]
[REDACTED]

106. The [REDACTED] aims to develop new [REDACTED] specifically via the “development of a [REDACTED] [REDACTED] for application of [REDACTED].”¹³⁶
107. The Respondent refers to the Claimants’ witness’ testimony to argue that the project began in 2007 and “pre-dates” the Claimants’ attempts to comply with the Guidelines via incremental spending and should thus not be compensable.¹³⁷ Moreover, this project is consistent with ExxonMobil’s R&D priorities, which for the Respondent indicates that it is ordinary course spending.¹³⁸
108. For the Claimants, the 2007 project was completed that same year and the [REDACTED] [REDACTED] that was proposed in 2010, i.e. well after the implementation of the Guidelines, and the commencement of their attempts to comply with them began in earnest, is a separate expenditure.¹³⁹ However, the Claimants’ evidence clearly describes this 2010 project as “Phase II” in several instances.¹⁴⁰ The Claimants further argue that ExxonMobil’s concomitant R&D priorities elsewhere in the world are irrelevant to assessing whether this Terra Nova expenditure constitutes an incremental expenditure.¹⁴¹
109. The Majority finds that the Claimants have not proven that this is an incremental expenditure. They have not effectively refuted the Respondent’s argument that this project is a phased project that was conceptualized prior to the introduction of the

¹³⁵ [REDACTED]
[REDACTED]
[REDACTED]

¹³⁶ CE-310, EMM0004801.

¹³⁷ Counter-Memorial on Damages, ¶ 35.

¹³⁸ Rejoinder on Damages, ¶ 102.

¹³⁹ Cl. Reply on Damages, ¶ 34.

¹⁴⁰ CE-310, EMM0004801.

¹⁴¹ Cl. Reply on Damages, ¶ 34.

Guidelines. The Claimants have not offered an adequate explanation of this descriptive feature, which suggests that this project originated prior to the time at which the Claimants indicate they began carrying out incremental spending.

(xiii)

110. [REDACTED] focused R&D¹⁴² is aimed at advancing, *inter alia*, “the state of [REDACTED]”¹⁴³ and the [REDACTED]¹⁴⁴

111. The Respondent argues that the expenditures related to these projects fit within the Claimants’ pre-Guidelines commitments and therefore cannot be incremental.¹⁴⁵ It further asserts that this type of R&D is directed towards the specific needs of the Projects.¹⁴⁶

112. The Claimants say that pre-Guidelines compatibility is irrelevant to the question of whether or not the expenditure was incremental. The Guidelines imposed a threshold for R&D spending.¹⁴⁷ This means that even if an expenditure is compliant with the pre-Guidelines regime, it does not necessary follow that it was not motivated by the Guidelines.

113. The Majority finds that the Claimants have proven that these expenditures were incremental.

¹⁴² The relevant projects are joint industry projects with [REDACTED] (Noseworthy Statement I, ¶ 53).

¹⁴³ CE- 291, EMM0004603. Two projects fall within this description, they are dealt with together partly as this was the approach taken by the Claimants’ witness Mr. Noseworthy (Noseworthy Statement I, ¶¶ 52-54).

¹⁴⁴ Noseworthy Statement I, 53.

¹⁴⁵ Counter-Memorial on Damages, ¶ 42.

¹⁴⁶ Counter-Memorial on Damages, ¶ 42.

¹⁴⁷ Cl. Reply on Damages, ¶¶ 36-40.

114. The Majority notes that the R&D spending commitments under the Benefits Plans (the pre-Guidelines regime) were nonspecific.¹⁴⁸ It is difficult, and inappropriate, for the Majority to now seek to translate these nonspecific commitments into pre-Guidelines spending requirements which would function as a baseline. The Respondent's arguments that rely on pre-Guidelines regime spending compliance are thus ineffective.
115. The Majority also finds several aspects of the Claimants' evidence persuasive. Foremost, the projects at issue were conceived of at a joint industry workshop. Such a workshop, as the Claimants' witness Mr. Noseworthy has explained, is not how the Claimants would conduct and plan R&D in the ordinary course.¹⁴⁹ Further, the serious nature of [REDACTED] in this context¹⁵⁰ aligns with Mr. Noseworthy's statements that this research would have been undertaken earlier were it important, and that the Projects already have systems to address [REDACTED]. These various aspects support the Claimants' assertion that this spending was Guidelines-motivated.

(xiv) [REDACTED]
[REDACTED]

116. The Claimants seek compensation for [REDACTED] that will operate under the auspices of the [REDACTED] and will conduct [REDACTED]
[REDACTED]
[REDACTED].¹⁵¹

¹⁴⁸ See, e.g., the examples given in the Counter-Memorial on Damages (¶¶ 37-38): "fund basic research", "promote further research and development in Canada to solve problems unique to the Canadian offshore environment", etc.

¹⁴⁹ Noseworthy Statement I, ¶ 7.

¹⁵⁰ See CE-291, EMM0004609: [REDACTED] presents a significant hazard to [REDACTED] in environments [REDACTED] such as for example, the Grand Banks...".

¹⁵¹ CE-286, EMM0004540.

117. The Respondent submits that this project fits within the Claimants' pre-Guidelines commitments and therefore cannot be incremental.¹⁵²
118. The Claimants posit that pre-Guidelines compatibility is irrelevant to the question of whether or not the expenditure was incremental.¹⁵³
119. The Majority finds that the Claimants have proven that [REDACTED] entails incremental expenditure.
120. [REDACTED] functions as an [REDACTED], which, as the Claimants point out, is accessible to all and can be used by their competitors.¹⁵⁴ The Majority finds particularly convincing the Claimants' observation that this type of sharing arrangement is not representative of the manner in which Projects normally carry out "ordinary course" R&D spending. The finding that this expenditure is incremental is also supported by the timing of its inception (which was in 2010),¹⁵⁵ which is clearly in line with the time period when the Claimants began to comply with the Guidelines in earnest.¹⁵⁶
121. Further, the Majority again notes that the R&D spending commitments under the Benefits Plans (the pre-Guidelines regime) were general and unspecified. It is inappropriate for the Majority to now seek to translate these pre-Guidelines spending requirements into a particular baseline. The Respondent's arguments are thus unconvincing in this regard.

¹⁵² Counter-Memorial on Damages, ¶ 42.

¹⁵³ Cl. Reply on Damages, ¶¶ 36-40; Noseworthy Statement I, ¶¶ 49-51.

¹⁵⁴ Noseworthy Statement I, ¶ 51.

¹⁵⁵ See CE-212.

¹⁵⁶ Phelan Statement IV, ¶ 9.

(xv)

122. The Claimants' spending on this [REDACTED] in 2011 entails funding which will initially provide for the [REDACTED] that it is hoped will [REDACTED] [REDACTED] Ultimately direct funding for the [REDACTED] will be provided.¹⁵⁷
123. For the Respondent, this expenditure is consistent with pre-Guidelines commitments.¹⁵⁸ Indeed, the Respondent says, the Projects have funded [REDACTED] since 1986.¹⁵⁹
124. The Claimants hold that the fact that Projects have funded [REDACTED] in the past is irrelevant. The current incremental [REDACTED] (of [REDACTED]) furthermore far exceeds pre-Guidelines funding by Hibernia and is for a different purpose, according to the Claimants.¹⁶⁰ Thus, even if the Claimants accepted that pre-Guidelines compatibility rendered certain expenses non-compensable (which they do not), this expenditure would be distinguishable.
125. The Majority finds that the Claimants have proven that this is an incremental expenditure.
126. Regarding the Respondent's argument that this spending is in accordance with the pre-Guidelines regime, the Majority has already outlined its view that the mere fact that an expenditure is consistent with the pre-Guidelines regime does not resolve whether it is introduced as a result of the Guidelines or not.¹⁶¹
127. The Majority finds the timing of this funding to be probative of a causal link to the Guidelines; the previous funding for [REDACTED] began in 1986 and continued until 1991. This amounts to a 20 year break in funding for or related to [REDACTED] The

¹⁵⁷ Phelan Statement V, ¶¶ 17 and 18.

¹⁵⁸ Counter-Memorial on Damages, ¶ 42.

¹⁵⁹ Counter-Memorial on Damages, ¶ 42.

¹⁶⁰ Phelan Statement V, ¶¶ 17-18; Cl. Reply on Damages, ¶ 41.

¹⁶¹ See ¶ 121 above.

reinstitution of this type of funding is convincingly explained by the inception of the Guidelines.

(xvi)

128. The Respondent accepts that the Claimants have spent [REDACTED] [REDACTED] related to E&T and R&D that are incremental.¹⁶² The Majority therefore does not need to engage in discussion as to whether these expenses are incremental.

(c) Total Spending Determined to be Incremental by the Majority

129. The Majority finds that the Claimants have proven that [REDACTED] worth of their expenditure was incremental and is compensable (subject to the adjustment discussed below¹⁶³), as indicated above and set forth in the table below:

Expenditure / Project	Ordinary Course	Incremental Expenditures ¹⁶⁴	Share Mobil Canada	Share Murphy Oil
[REDACTED] [REDACTED]	[REDACTED]			[REDACTED]
[REDACTED] [REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED] [REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED] [REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]

¹⁶² See footnote 267 to the Rejoinder on Damages and Counter-Memorial on Damages, ¶ 44; Walck Statement V, Annex 1. The Respondent accepts these expenditures but still asserts that deductions should be made for the tax and royalty-based benefits schemes (see discussion below at ¶¶ 130-150).

¹⁶³ See ¶ 138 below.

¹⁶⁴ See e.g. R. Walck, Report in Response to Claimant's Damage Submission, dated 21 September 2012, Annex 1, p. 2-7.

[REDACTED] [REDACTED] [REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED] [REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED] [REDACTED]	[REDACTED]			[REDACTED]
[REDACTED] [REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED] [REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED] [REDACTED] [REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED] [REDACTED] [REDACTED]	[REDACTED]			
[REDACTED] [REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED] [REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED] [REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]

Total				

C. SR&ED (TAX) CREDITS

130. The SR&ED tax program is self-assessing. The Claimants assess and identify the portion of R&D expenditures that are eligible for credit under the program and reduce their tax liability in their annual returns accordingly.¹⁶⁵ The applicable deduction rate is 32% (i.e. the Claimants deduct from their tax payable 32% of the value of R&D expenditures self-assessed to be eligible). The self-assessed amounts can be audited by the Canadian Revenue Authority (“CRA”) for up to four years after the CRA issues a Notice of Assessment, which is issued “with all due dispatch” after the Claimants file their tax returns (reflecting the credits claimed).¹⁶⁶
131. Prior to the Damages Hearing, the Claimants offered to deduct from the compensation they claim the SR&ED “credits” that they have self assessed and included in their tax returns to date.¹⁶⁷ If however, at a later date, the CRA denies any of the credits that Claimants have deducted from their damages, Claimants will have to pay the CRA the amount of that credit. Under the terms of the offer, the Canadian government will then have to reimburse the Claimants the amount of that credit, which they had to pay to the CRA.
132. At the Damages Hearing, the Claimants also indicated that they could (alternatively) withdraw their claims for tax credits so that if the Majority compensated them for incremental expenditures there would be no danger of overcompensation.¹⁶⁸ The

¹⁶⁵ Claimants’ letter to the Tribunal of April 9, 2013; Respondent’s letter to the Tribunal of April 9, 2013; Counter-Memorial on Damages, ¶ 49; Rejoinder on Damages.

¹⁶⁶ Claimants’ letter to the Tribunal of April 9, 2013, p.3; Respondent’s letter to the Tribunal of April 9, 2013, p. 2.

¹⁶⁷ Claimants’ letter to the Tribunal of April 9, 2013, p.2.

¹⁶⁸ Damages Hearing Transcript, p.215.

Claimants have since indicated that this is not a possible course of action for [REDACTED] (a necessary step in fulfilling this offer).¹⁶⁹

133. The Respondent ultimately rejected the offer made by the Claimants to settle the question of SR&ED credits.¹⁷⁰

(a) *Parties' Positions*

134. The Respondent argues that the Claimants are receiving the benefit that these credits result in *now* and that if they are not deducted from the Claimants' damages the Claimants will enjoy a windfall.¹⁷¹ Thus, for any incremental spending the Majority finds to be compensable, a 32% deduction should be applied.¹⁷²
135. For the Claimants, the SR&ED credits (nor the deductions from their tax payable) are not "final," or enjoyed in any "relevant sense"¹⁷³ because they have not yet been made subject to an audit by the Canadian government authorities and can therefore still be denied.
136. The Claimants argue that it is far from certain that the CRA will in fact confirm the entirety of the credits that the Claimants have claimed. The Respondent disputes this. To these ends, the Parties differ on the historic and overall acceptance rate of self-assessed SR&ED credits by CRA, using Hibernia as an example. The Claimants put the acceptance rate at [REDACTED] through 2009,¹⁷⁴ whereas the Respondent points to the

¹⁶⁹ Claimants' letter to the Tribunal of May 28, 2013, p.2. [REDACTED]

¹⁷⁰ Respondent's letter to the Tribunal of September 17, 2013.

¹⁷¹ Rejoinder on Damages, ¶ 115.

¹⁷² The Respondent argues that as the Claimants have not clarified which expenditures they have claimed credits in relation to, the Tribunal should assume they have claimed credits for all of its expenditure (Damages Hearing Transcript, p.79).

¹⁷³ Cl. Reply on Damages, ¶ 45.

¹⁷⁴ Cl. Reply on Damages, ¶ 47.

high rate of acceptance from 2007 to 2009 (either [REDACTED] or [REDACTED])¹⁷⁵ and argues that the Claimants have in fact conceded that the overall acceptance rate for Hibernia is [REDACTED].¹⁷⁶

137. Further, the Respondent says that the Claimants’ “offers” demonstrate that they themselves agree there should be a deduction to their damages to reflect the SR&ED credits they enjoy. The Claimants dispute this, explaining that whilst they have never sought to “double dip,” this does not mean that they agree that the Majority should make deductions from their compensation now. Rather, this simply demonstrates that the Claimants are willing to work with the Respondent to achieve other solutions to this issue that ensure that they are not left out of pocket.

(b) Majority’s Finding

138. The Majority finds that it is appropriate to deduct from the compensation granted to the Claimants under this Award an amount that reflects the benefits that they, by their own account, have received as a result of the SR&ED program. This will result in a 32% deduction to the amount the Majority has determined to be incremental spending where the expenditure appears to be eligible under the SR&ED program. So far as the Majority is aware, the Claimants have not indicated exactly which of their incremental expenditures they consider eligible and/or have used as a basis for claiming credits under the SR&ED program.¹⁷⁷ The Majority therefore is necessarily guided by the indications of the Respondent’s expert in in this regard.¹⁷⁸ Accordingly, applying the 32% discount to the relevant incremental expenditures leaves a compensable amount of CDN\$ [REDACTED] due to Mobil Canada and CDN\$ [REDACTED] due to Murphy Oil.¹⁷⁹

¹⁷⁵ Respondent’s letter to the Tribunal of April 9, 2013, p.2.

¹⁷⁶ Rejoinder on Damages, ¶ 116.

¹⁷⁷ See Damages Hearing Transcript, p.78. See also the Respondent’s letter to the Claimants of August 28, 2013. The Claimants have given only an approximate figure to indicate the total amount of their SR&ED claim.

¹⁷⁸ See Walck Statement V, Annex 1.

¹⁷⁹ The following table represents the Majority’s calculations to this end:

Expenditure / Project	Incremental Spending Amount	SR&ED eligible? (Walck	Total with deduction for SR&ED credit
-----------------------	-----------------------------	------------------------	---------------------------------------

	Mobil	Murphy	Statement V, Annex 1)	Mobil	Murphy
██████████ ██████████ ██████████	██████████	██████████	yes	██████████	██████████
██████████ ██████████ ██████████	██████████	██████████	yes	██████████	██████████
██████████ ██████████ ██████████ ██████████	██████████	██████████	no	██████████	██████████
██████████ ██████████ ██████████ ██████████ ██████████ ██████████ ██████████	██████████	██████████	yes	██████████	██████████
██████████ ██████████ ██████████ ██████████	██████████	██████████	yes	██████████	██████████
██████████ ██████████ ██████████ ██████████	██████████	██████████	no	██████████	██████████
██████████ ██████████ ██████████	██████████	██████████	no	██████████	██████████
██████████ ██████████ ██████████ ██████████	██████████	██████████	no	██████████	██████████
██████████ ██████████ ██████████ ██████████	██████████	██████████	yes	██████████	██████████
██████████ ██████████ ██████████ ██████████	██████████	██████████	yes	██████████	██████████
██████████ ██████████ ██████████ ██████████ ██████████ ██████████ ██████████	██████████	██████████	yes	██████████	██████████
██████████ ██████████ ██████████ ██████████	██████████	██████████	no	██████████	██████████
██████████ ██████████ ██████████	██████████	809,000	some not all*	██████████	██████████
Total	12,701,000	2,856,000		10,310,605	2,273,635

*Only 5 entries in the “spending not challenged” section of Annex 1 to Walck V are marked as SR&ED eligible (H-3, H-4, H-16, TN-16 and H-49). The total amount of these entries is ██████████ To arrive at the amount in the far right

139. The Majority arrives at this finding by virtue of several aspects of the evidence and arguments that were put before it. Foremost, there is a significant likelihood that the Claimants will have the benefit they have already received confirmed. There is a clear record of a high acceptance rate for self-assessed credits under this program, at times reaching █████ even on the Claimants' own evidence.¹⁸⁰ No evidence has been presented to indicate that the CRA would change its practice with respect to SR&ED credit regime.
140. The Majority also finds it significant that the (potential) audit process for the SR&ED program is relatively short, and does not entail any punitive claw-back provisions.¹⁸¹

D. ROYALTY DEDUCTIONS

141. Similar to the SR&ED program, the royalty deduction program allows the Claimants to self-assess deductions from the royalties on revenue that they pay to the Province,¹⁸² based on their R&D expenditure.¹⁸³ Royalties are paid to the Province on a monthly basis and deductions to royalties for R&D are made monthly as well.¹⁸⁴ The deduction rates are █████ of the relevant expenditure for Hibernia and █████ of the relevant expenditure for Terra Nova.¹⁸⁵ The royalty deduction program is governed by Provincial regulations and royalty agreements pertaining to each of the Projects.¹⁸⁶ The deductions that the Claimants make are subject to review and audit. The audit process

columns, on respectively █████ and █████ (pro rata of █████, i.e. amount eligible for deduction) the 32 % deduction was applied.

¹⁸⁰ CE-354.

¹⁸¹ In contrast to the royalties regime (see ¶¶ 130-150).

¹⁸² See, e.g. the Hibernia Royalty Agreement (CE-355). The Tribunal notes the distinction between this type of royalty and royalties which might be payable in relation to know how or patents (see the letter from the Tribunal of October 3, 2012).

¹⁸³ Claimants' letter to the Tribunal of April 9, 2013, p. 4; Respondent's letter to the Tribunal of April 9, 2013, p. 3.

¹⁸⁴ Claimants' letter to the Tribunal of April 9, 2013, p. 4.

¹⁸⁵ Rejoinder on Damages, ¶ 120.

¹⁸⁶ Phelan Statement V, 32.

for each of the Projects differs, but can take from five to seven years to resolve.¹⁸⁷ If the Province ultimately determines, via the audit process, that certain deductions were invalid, these must be repaid to the Province with interest. The applicable interest rate for Terra Nova is prime + 2% and for Hibernia [REDACTED] (in both cases dating back to the month in which the relevant R&D expenditure was made).

(a) *Parties' Positions*

142. For the Claimants, it is “simply too speculative” to determine at this time whether or not they will ultimately enjoy these royalty deduction benefits, such that there should be a deduction to the compensation granted to them by this Majority.¹⁸⁸ The Claimants also object that this uncertainty is of the Respondent’s making, for the Respondent could simply guarantee that the deductions will be confirmed. If the Respondent did so, the Claimants would be happy to have a deduction applied to the compensation awarded by this Tribunal. They point to the fact that the Province is yet to audit any royalty payments from 2006 onwards, saying it is therefore unclear how R&D spending under the Guidelines will be treated in the royalty deduction program.¹⁸⁹
143. The Claimants argue that it is significant that the royalty regulations which apply to both Projects¹⁹⁰ provide that if a cost which is eligible (here R&D expenditure) is offset in some way (i.e. by an award of damages in these proceedings), that cost becomes ineligible as the basis for a royalty deduction.¹⁹¹ Thus, any deductions that the Claimants have made on the basis of R&D may ultimately be deemed ineligible for royalty deductions if they are also compensated as incremental expenditure by this Tribunal. At the Damages Hearing, the Respondent argued that it is not clear that the

¹⁸⁷ Claimants’ letter to the Tribunal of April 9, 2013; Respondent’s letter to the Tribunal of April 9, 2013. The Claimants assert that the dispute resolution process that follows the audit process can take much longer (Claimants’ letter to the Tribunal of April 9, 2013, p. 5).

¹⁸⁸ Phelan Statement V, ¶ 33.

¹⁸⁹ Cl. Reply on Damages, ¶¶ 48-49.

¹⁹⁰ And in the case of Hibernia, additionally the Royalty Agreement (Phelan Statement V, ¶ 32; CE-355; CE-356).

¹⁹¹ Phelan Statement V, ¶ 32.

provisions of the royalty regulations and Hibernia Royalty Agreement would lead to such a claw back.¹⁹²

144. As with the SR&ED credits, the Claimants have emphasized that they do not seek to “double dip” and that if they ultimately receive confirmation of the deductions they have made to their royalty payments, they will return any amount of overcompensation to Canada.¹⁹³ Indeed, the Claimants have expressed that they are willing to have this Award direct them to do so.¹⁹⁴
145. The Respondent argues that the Claimants are enjoying the benefits of the royalty deduction program *now* (a fact which it asserts the Claimants have themselves accepted).¹⁹⁵ To avoid overcompensation to the Claimants, these savings should therefore be deducted from any compensation awarded. The Respondent relies upon the fact that the Claimants have offered to deduct these savings from their damages under certain conditions to argue that indeed, the Claimants agree that there should be a deduction.¹⁹⁶ The Respondent asserts that it is impermissible for the Tribunal to rely upon or include in this Award any kind of enforceable order or direction that the Claimants repay any amount of overcompensation at a later date. This would be outside the boundaries of the Tribunal’s powers pursuant to Article 1135 of NAFTA.¹⁹⁷ The only option for the Tribunal is to deduct the royalty-based benefits at the present time.

¹⁹² Damages Hearing Transcript, p.218.

¹⁹³ See, e.g. Phelan Statement V, ¶ 34; Damages Hearing Transcript, p.56.

¹⁹⁴ Damages Hearing Transcript, p.102.

¹⁹⁵ Rejoinder on Damages, ¶ 115. The Claimants respond that earlier comments by their Expert in this regard (which the Respondent relies upon) are irrelevant because there is “no guarantee that [they] will *actually enjoy* these benefits” (Phelan Statement V, ¶ 25, emphasis added). The Respondent asserts, and the Claimants appear to accept, that the amount they have deducted is in the order of CDN [REDACTED] (Respondent’s letter to the Tribunal of April 9, 2013, p.4; Respondent’s letter to the Tribunal of June 12, 2013, p.3; Damages Hearing Transcript, pp. 204-205).

¹⁹⁶ Respondent’s letter to the Tribunal of April 9, 2013, p.3.

¹⁹⁷ Article 1135(1) of NAFTA provides (emphasis added):

“1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, **only**:

(a) **monetary damages and any applicable interest;**

146. Regarding the Claimants' assertion that Respondent could rectify the uncertainty (which is of the Respondent's making) surrounding royalty deductions, the Respondent says that it has "no authority to 'guarantee' a result" in this way (i.e. that it ensure the royalty deductions are ultimately confirmed).¹⁹⁸

(b) Majority's Finding

147. For several different reasons, the Majority finds that there should be no deduction to the Claimants' compensation to reflect deductions made under the royalty regime applicable to the Projects.¹⁹⁹

148. First, it appears far from certain that the deductions the Claimants have applied to royalties will ultimately be confirmed. [REDACTED]

[REDACTED]²⁰⁰ Unlike for the SR&ED tax credits regime, the Majority was not presented with reliable historical data showing acceptance rates for royalty deductions.

149. The Majority observes that the audit process, which applies to the royalty deductions, is very lengthy²⁰¹ and the interest rate that is applied to any amount the Claimants must repay for Hibernia is very high, bordering on the punitive. Thus, were the Majority to reduce the Claimants' compensation as requested, the Claimants may well be left in a

(b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs in accordance with the applicable arbitration rules."

¹⁹⁸ Rejoinder on Damages, ¶ 117.

¹⁹⁹ The Tribunal notes that in its letter of October 3, 2012, it indicated that "a proper assessment of damages rests upon the Tribunal's determination of any loss that has actually occurred. In this context, the *possibility* that the amount of actual damages *may* have to take into account any tax benefits that have been received has been recognized by the Claimants in their own pleadings." (emphasis added). Having taken into account all of the evidence, the Tribunal has ultimately found that there is not yet sufficient certainty regarding the royalty deductions for any deduction to compensation to be warranted.

²⁰⁰ Damages Hearing Transcript, pp.208-209.

²⁰¹ The Claimants' witness Mr. Phelan testified that this process has been known to last up to 16 years (Damages Hearing Transcript, p.209, see also the Claimants' letter to the Tribunal of April 9, 2013, p. 5).

situation (many years hence²⁰²) where they are not only out of pocket but, for Hibernia, faced with a substantial penalty to pay in addition.

150. Secondly, it is a possibility that the royalty deductions will be clawed back. The Province may, relying on provisions in the regulations and royalty agreement for Hibernia,²⁰³ seek repayment of the deductions related to R&D expenditures for which the Majority granted compensation. This in turn creates a possibility that if the Majority reduced the Claimants' compensation to reflect royalty deductions, the Claimants may later be left undercompensated. Whilst the Majority recognizes that this is not an absolute certainty, the relevant provisions of the regulations and royalty agreement indicate it is a possibility that warrants refusing the Respondent's request for deduction.

E. SHORTFALL

151. The Claimants claim CDN\$ [REDACTED] in shortfall-related losses, being the pro-rated amounts for which Murphy Oil and Mobil Canada are responsible (CDN\$ [REDACTED] and CDN\$ [REDACTED] for Hibernia and Terra Nova respectively).²⁰⁴ The Board has requested that a promissory note secured by a letter of credit be provided as security for the Hibernia shortfall amount²⁰⁵ and letters of credit have been put in place to secure the Terra Nova shortfall amount.²⁰⁶

²⁰² This appears to be to an extent under the Province's control, which, for the Tribunal, is further reason to deny the reduction requested by the Respondent.

²⁰³ See Phelan Statement V, ¶ 32. The Hibernia Royalty Agreement for example states that [REDACTED]

²⁰⁴ Phelan Statement IV, ¶ 58; Phelan Statement V, Annex A

²⁰⁵ Phelan Statement IV, ¶ 18. The operators are responsible for providing and maintaining letters of credit for only their share of the shortfall for each Project.

²⁰⁶ CE-324 and CE-325.

(a) *Parties' Positions*

152. The Claimants posit that the notifications of shortfalls that they have received constitute a “call for payment” within the terms of the Decision.²⁰⁷ Additionally, the fact that the notification has been followed by a requirement that the Projects provide letters of credit to underwrite the shortfalls, and the accompanying risk that if the letters of credit are not provided, the Projects’ POAs may not be renewed, is further evidence of a call for payment.²⁰⁸
153. The Respondent says that it is likely that a great deal of the Claimants’ shortfall will be met with spending on R&D that is “ordinary course” spending.²⁰⁹ Such ordinary course spending is not compensable and the Claimants are therefore not entitled to the full shortfall amount. The Respondent argues that a reduction should also be made to reflect the fact that the Claimants will likely meet some of the shortfall with spending that is consistent with their obligations under the Accord Acts and Benefits Decisions.²¹⁰
154. The Terra Nova shortfall, the Respondent says, is in fact already slated to be eliminated via a large R&D project²¹¹ [REDACTED] which the Claimants have recently had pre-approved by the Board.²¹² Similarly, the Respondent points to the fact that the Claimants’ witness Mr. Phelan has made statements that indicate that their Hibernia shortfall will be “spent down.”²¹³ The Respondent argues that this too, may be ordinary course spending.

²⁰⁷ Cl. Mem. on Damages, ¶ 15.

²⁰⁸ Cl. Mem. on Damages, ¶ 16.

²⁰⁹ Based on historical spending, [REDACTED] for Terra Nova and [REDACTED] for Hibernia (Rejoinder on Damages, ¶ 126).

²¹⁰ Rejoinder on Damages, ¶ 125.

²¹¹ This project seems to in fact be better characterized as a series or collection of projects, all targeted at the same issue (CE-362).

²¹² Rejoinder on Damages, ¶ 128.

²¹³ Phelan Statement IV, ¶ 43.

155. The Claimants allege that the Respondent accepts that they are entitled to the shortfall as compensation “as a matter of law.”²¹⁴ For the Claimants, the Respondent’s arguments regarding “ordinary course” spending and compatibility with the Accord Acts and Benefits Decisions are an unwarranted attempt to chip away at the Claimants’ losses.²¹⁵ It is far from clear, argue the Claimants, that they will spend money on R&D to meet their shortfall. They may instead simply allow the Board to draw down the letters of credit that are held by the Board.²¹⁶ In the event that the Claimants do spend on R&D to meet the shortfall, and if that spending is “ordinary course,” the Claimants will not claim these amounts in future proceedings and this will allow for any necessary reconciliation.²¹⁷ The Respondent rejoins that the Claimants’ evidence demonstrates that it is in fact likely that they will spend down the shortfall on R&D, and that it is inappropriate for this Tribunal to rely on the possibility of future proceedings to ameliorate the danger of overcompensation that is therefore present.²¹⁸

(b) Majority’s Finding

156. The Majority finds that the shortfall is only partially compensable.
157. The Majority observes that the shortfall is comprised of the difference between the spending *required* under the Guidelines over a particular POA period and the total spending *undertaken* by the Projects over that particular POA period. The shortfalls for both Projects over the first POA period after implementation of the 2004 Guidelines (2004 to 2008) were “spent down” fully by the Claimants.²¹⁹ However, the shortfalls in

²¹⁴ Cl. Reply on Damages, ¶ 52.

²¹⁵ Cl. Reply on Damages, ¶ 53.

²¹⁶ Cl. Reply on Damages, ¶ 56; Phelan Statement V, ¶ 40. The Board would then pay the drawn down money a “recognized research or education agency” (see e.g. the terms of Hibernia’s letter of credit issued May 19, 2010, clause 2(B) (CE-315) and Terra Nova’s letter of credit issued August 24, 2011 (CE-324)).

²¹⁷ Cl. Reply on Damages, ¶ 60; Phelan Statement V, ¶ 41.

²¹⁸ Rejoinder on Damages, ¶¶ 135-137.

²¹⁹ Phelan Statement IV, ¶¶ 45 and 48.

the subsequent POA period, 2009 to 2011 (April 2012 for Hibernia), have, to the best of our knowledge, not yet been eliminated.²²⁰

158. The Decision has indicated that in principle, shortfall amounts may be compensable, if their quantum is ascertainable with sufficient certainty and if there has been a call for payment. However, at this time, the Majority finds itself confronted by two key challenges: first, whether the Claimants have in fact received a “call for payment.” Second, the possibility that the current shortfalls will be mitigated by future ordinary course expenditures.
159. Regarding the first issue, the Majority notes that the notification by the Board of the shortfall and the attendant actions associated therewith are not a conventional call for immediate payment. Rather, they amount to a call for the Claimants to fulfill their obligations, with a request for a guarantee. The practice has been that the Board’s notification and attendant actions are merely the first steps in a process whereby the Claimants may ultimately take several different courses of action to fulfill their obligation: via spending on R&D (either incremental or ordinary course); or via payment into an R&D fund.²²¹ The letters of credit that are in place are best considered an interim measure; they may be amended and adapted to whatever course of action the Claimants take in meeting the shortfall.²²²
160. More crucially, regarding the second issue, the Majority is concerned that compensating the entirety of the shortfall, as the Claimants request, may result in pre-financing of ordinary course expenditures. The Majority is not comforted in this regard by the Claimants’ assurance that any future ordinary course expenditures financed by this compensation will be off-set in any future claim or reconciliation proceedings.²²³

²²⁰ Phelan Statement IV, ¶¶ 46 and 49.

²²¹ See Article 4.2 of the 2004 Guidelines. As noted above (see footnote 5 above), the Board has also permitted the Claimants to apply spending from subsequent periods to shortfalls from previous periods. The Guidelines also permit the opposite of this (excess spending in one POA period to be applied against a shortfall in a subsequent period) (Article 4.2 of the 2004 Guidelines).

²²² See, e.g. CE-315, clause 6.

²²³ Damages Hearing Transcript, p.123.

161. The Majority also finds parts of the Respondent's approach to shortfall problematic. In particular, Respondent's argument that the Accord Acts and Benefit Decisions dictated a quantifiable minimal obligation of spending and that some of the Claimants' projected shortfall expenditures should be deemed to be in conformity with such obligation [REDACTED] for Hibernia, and [REDACTED] for Terra Nova)²²⁴ has been found unconvincing and inapplicable elsewhere herein.²²⁵
162. The Majority feels obligated to develop an understanding of possible spending by the Claimants in the immediately foreseeable future that may mitigate the shortfall in the specific POA period being examined herein. The Majority notes that the situation with respect to shortfall differs between the Projects. As discussed below, there are reasonably certain, large future expenditures at Terra Nova that are likely to eliminate its existing shortfall completely. The same is not true for Hibernia, and the Projects' shortfalls are therefore dealt with separately below where relevant.
163. Whereas the previous shortfall was fully met through the Claimants' spending, the present shortfall has not been extinguished and its final composition is thus currently undetermined (whether it will be met by incremental or ordinary course spending, or otherwise). As previously mentioned, the Claimants could have extinguished the shortfall by placing the full amount into a Board-administered R&D Fund, or insisting the Board draw down the letters of credit. The Claimants did not do so.
164. For Terra Nova, as noted above, the Majority finds it reasonably certain that the shortfall will cease to exist via projected expenditures on the [REDACTED] which targets [REDACTED]. It is also reasonably certain that, as they have done in the past by arrangement with the Board, the Claimants will use the expenditure on this project to eliminate the existing shortfall for Terra Nova. The fact that the Claimants have sought Board approval for this project is clear indication thereof. Given this reasonable certainty that the shortfall for Terra Nova will cease to exist in the foreseeable future, it is not appropriate, in the Majority's view, that this Tribunal

²²⁴ Counter-Memorial on Damages, ¶ 70.

²²⁵ See ¶ 121 above.

compensate the Claimants at this time for the existing Terra Nova shortfall. The Majority notes that as they have done so in these proceedings, the Claimants may claim whatever portion of the █████ spending they believe is incremental, in later proceedings.

165. By contrast, for Hibernia, the Majority accepts that the shortfall is partially compensable at present. Both the Claimants and Respondent agree on the initial compensability of the shortfall at Hibernia,²²⁶ but differ as to the possible future ordinary course spending that should be accounted for in the present compensation assessment. Whereas the Claimants demand full compensation upfront, but offer not to claim resulting pre-financed ordinary course spending in possible future proceedings, Respondent suggests applying a historic ratio (based on spending in the 2009-2011 period) to differentiate the Claimants' future ordinary from incremental spending.²²⁷
166. The Majority was, in the Decision, reluctant to engage in speculative predictions of the future.²²⁸ The Majority does not have the same concerns in using the historical incremental spending ratio over this specific POA period (as against some far distant past or future period) to estimate what proportion of the current Hibernia shortfall may be reduced or extinguished with ordinary course spending. The Majority is acutely aware that it cannot predict ordinary course spending well into the future – and neither would it be appropriate for it to attempt to do so. However, it is comfortable with the projection (based on historical data and practice) it is carrying out for a very narrow future time period. The projection allows the Majority to make a reasonable approximation of what portion of the shortfall may be met with incremental spending and is therefore compensable. This current assessment necessarily leaves unprejudiced the compensability of shortfall damages over future POA periods, or indeed the

²²⁶ See, e.g., Counter-Memorial on Damages, ¶ 73.

²²⁷ Counter-Memorial on Damages, ¶ 62; Rejoinder on Damages, ¶ 133; Walck IV, ¶ 38. Application of the historic spending ratio is only one of three categories the Respondent identifies as necessary deductions to the Claimants' shortfall. However, the Respondent agrees that "the Tribunal can select individual categories to be deducted if it does not accept that all deductions should be made." (Rejoinder on Damages, ¶ 144).

²²⁸ Decision, ¶ 473.

compensability of spending not accounted for here, that the Claimants ultimately believe is incremental.

167. The Majority therefore accepts, in principle, the application of the historic ratio between incremental and ordinary course spending, as suggested by the Respondent. However, whilst the Majority accepts this, it believes that the percentage of [REDACTED] posited by the Respondent requires adjustment. The [REDACTED] figure was derived from information regarding the ratio of ordinary course versus incremental spending provided by the Claimants. The Respondent's expert Mr. Walck arrived at the [REDACTED] figure by examining the 2009 to 2011 spending that was applied (by agreement with the Board) to the 2004 to 2008 shortfall. The Majority has adjusted the calculations to reflect our findings on historical incremental and ordinary course spending discussed above and to include the spending which it has determined was not incremental spending.²²⁹
168. The Majority has also made some other minor adjustments in calculating the historical ratio of incremental spending. These adjustments include:
- a. calculating the ratio across *all* spending that was undertaken in that POA period, not just across the spending from 2009 to 2011 that was applied to the 2004 to 2008 shortfall. The Tribunal believes this provides a more accurate and complete picture, and thus a more accurate historical ratio for present purposes;
 - b. calculating the ratio over the period 2009 to April 2012, rather than across 2009 and 2011, as this is the current Hibernia POA period; and
 - c. calculating the ratio based on Mobil and Murphy's proportion of the Hibernia project spend.

²²⁹ Specifically, an amount of CDN\$ [REDACTED] representing the spending on the [REDACTED] has been added to the Claimants' incremental spending to calculate the correct ratio.

169. In light of the foregoing, the Majority finds that the applicable historical ratio is [REDACTED] incremental spending / [REDACTED] ordinary course spending.²³⁰ The Claimants are therefore granted [REDACTED] of the claimed shortfall amount for Hibernia of respectively CDN\$ [REDACTED] for Mobil and CDN\$ [REDACTED] for Murphy.²³¹ Consequently, Mobil Canada is entitled to CDN\$ [REDACTED] and Murphy Oil is entitled to CDN\$ [REDACTED] as compensation for the relevant shortfall.²³²

²³⁰ The Majority's calculations (references to "lines" are to Phelan Statement IV, Annex A, Table 2B) were:

Total Hibernia Approved Expenditures 2009- April 2012 (line A): [REDACTED]

Pro rata total Hibernia expenditures:

Mobil (33.125%) = [REDACTED]

Murphy (6.5%) = [REDACTED]

Total pro rata Mobil + Murphy = [REDACTED]

Incremental expenditures:

Mobil : [REDACTED]

Murphy: [REDACTED]

Correction for [REDACTED] to be deducted from total incremental expenditures amount

Pro rata deduction:

Mobil (33.125 %): [REDACTED]

Murphy (6.5 %): [REDACTED]

∴ Incremental expenditures:

Mobil : [REDACTED]

Murphy [REDACTED]

∴ Total incremental expenditures Mobil and Murphy 2009-April 2012: [REDACTED]

∴ Percentage of incremental expenditures Mobil and Murphy of their total expenditures:

[REDACTED]

²³¹ See e.g. Walck, Second Report in Response to Claimant's Damage Submission, Annex 2 page 3.

²³² The Tribunal has noted that Messrs. Phelan and Walck, the experts of the Parties, have considered that the shortfall should be subject to discounts and interest. In the Tribunal's view, the shortfall remains a nominal amount, which is carried over into the future and either will result in incremental expenditures in the future or payment into the Fund. Until such actual expenditure or payment is made, no interest is due.

IV. OTHER MATTERS

A. INTEREST

170. The Claimants seek compound prejudgment interest on their incremental spending compensation from the time of spending to the date of this Award.²³³ The Claimants' entitlement to prejudgment interest does not appear to be disputed by the Respondent.²³⁴ The Claimants have calculated their prejudgment interest at the rate of 12 month Canadian dollar LIBOR rate +4, on a calendar year basis.²³⁵ The Majority grants interest on this basis through to the date of this Award. Such interest is already incorporated into the amounts discussed herein in section III.B.²³⁶ However, this interest appears to have been calculated and included by the Claimants (calculations that were followed by the Respondent) only to the date of their first damages submission (July 23, 2012).²³⁷ Thus, interest at the rate of Canadian dollar LIBOR +4, compounded monthly, must be added to the amount of incremental expenditure that the Majority has deemed compensable above,²³⁸ in accordance with the methodology applied by the Claimants up to July 23, 2012.²³⁹

B. COSTS

171. The Claimants' legal fees and expenses incurred in the arbitration amount to US\$ 8,204,365.40 (up until the Decision the legal fees and expenses amounted to US\$ 7,103,207.50 and the remaining US\$ 1,101,157.80 pertained to the damages phase of

²³³ Cl. Mem. on Damages, ¶ 23; Phelan Statement IV, ¶ 31.

²³⁴ Walck Statement V, ¶ 6; Walck Statement IV, ¶¶ 33-34.

²³⁵ Cl. Mem. on Damages, ¶ 23; Phelan Statement IV, ¶ 31 ("This calculation was performed on a calendar year basis; in other words, I assumed that each of the expenditures made in a given calendar year was made on December 31 of that year. In the case of Hibernia's 2012 expenditures, I have assumed that they were all made in April 2012"). The Majority notes that it is apparent from Mr. Phelan's calculations (see Phelan Statement IV, Annex A, p.7) that interest has been compounded monthly. As already noted, these calculations do not appear to be disputed by the Respondent.

²³⁶ See also ¶ 138 above.

²³⁷ Phelan Statement IV, ¶ 31, Annex A (pp. 7-9).

²³⁸ CDN\$ [REDACTED] due to Mobil Canada and CDN\$ [REDACTED] due to Murphy Oil., see ¶ 138 above.

²³⁹ See Phelan Statement IV, Annex A, pp. 7-9.

the proceeding).²⁴⁰ They have advanced US\$ 525,000 on account of the fees and expenses of the Members of the Tribunal and the ICSID administrative fees and expenses (the “Arbitration Costs”), and a lodging fee of US\$ 25,000. The Claimants seek an award of the entirety of these costs.

172. The Respondent’s legal fees and expenses amount to CND\$ 5,363,229.70 (CND\$ 4,507,481.19 of which related to the proceeding on merits and on principles of quantum). It has advanced US\$ 525,000 to ICSID.²⁴¹
173. The Respondent initially requested that the Claimants be ordered to pay the costs and legal fees of Canada.²⁴² In its Statement of Costs of August 14, 2013, it requested the Tribunal to decide that the Parties should bear their own legal costs and share equally the Arbitration Costs. The Respondent argued that (i) ICSID and other tribunals have refused to award costs when the claimant failed to establish all alleged treaty breaches or recovered significantly less damages than claimed, meaning that there was no “unsuccessful party” in those cases; (ii) tribunals have consistently not awarded costs against parties that raised legitimate arguments, even if those arguments did not ultimately prevail, or where the dispute raised novel issues as in this case; (iii) the proceeding involved unnecessary costs due to unscheduled submissions filed by the Claimants and the Damages Hearing requested by the Claimants.²⁴³
174. In their observations on the Respondent’s Statement of Costs, the Claimants maintained their position that the Respondent should bear the Claimants’ legal fees and expenses and the Arbitration Costs, arguing that the Tribunal should apply the “Costs Follow the Event” rule.²⁴⁴ The Respondent counter-argued that the “Costs Follow the Event Rule”

²⁴⁰ Claimants’ Schedules of Costs of November 7, 2011 and August 13, 2014 and Claimants’ submission on costs of December 27, 2013.

²⁴¹ Respondent’s Summary of Costs Incurred by Canada of October 28, 2011, Respondent’s Statement of Costs of August 14, 2013.

²⁴² Respondent’s Counter-Memorial of December 1, 2009, ¶ 387.

²⁴³ Respondent’s Statement of Costs of August 14, 2013, ¶¶ 3-6.

²⁴⁴ Claimants’ Observations of December 27, 2013, ¶¶ 1-6.

is not a prevailing principle in investment treaty arbitration and that both the NAFTA and the ICSID Additional Facility give full discretion to the Tribunal to award costs.²⁴⁵

175. Although the Parties disagree on the allocation of costs, they agree that the Tribunal has broad discretion to decide how and by whom the Arbitration Costs and the legal costs and expenses incurred by the Parties in connection with the proceeding shall be borne, pursuant to Article 58 of the Arbitration Rules and the NAFTA.
176. This case involved novel and complex issues concerning the interpretation of the NAFTA and the quantification of damages. The Tribunal asked and addressed many questions in this respect, some of which were also addressed to the other NAFTA parties. Both Parties raised meritorious arguments, and presented their respective cases fairly and professionally, which ultimately lead to a majority opinion and a dissent. The need for a second phase of the arbitration on the quantification of the damages shows in itself the difficulties faced by the Tribunal. Ultimately, while the Claimants prevailed on the merits and were awarded damages on aspects of their claims, they were only partially successful in regard to these claims.
177. Having considered all the circumstances of this arbitration, in the exercise of its discretion, the Tribunal has concluded that it is fair and appropriate that both sides bear the Arbitration Costs in equal share and that each side bears its own legal and other costs.²⁴⁶

²⁴⁵ Respondent's Response to the Claimants' Observations of December 27, 2013, ¶¶ 2-3.

²⁴⁶ The Parties will in due course receive a statement of the account from the ICSID Secretariat. Any remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

V. AWARD

178. On the basis of the foregoing, the Tribunal decides:

- a. That Canada shall pay Mobil Canada and Murphy Oil respectively CDN\$ 10,310,605 and CDN\$ 2,273,635 as compensation for incremental expenditures. These amounts shall bear interest at the 12-month Canadian Dollar LIBOR rate + 4%, compounded monthly, from July 23, 2012 to the date of this Award.
- b. That Canada shall pay Mobil Canada and Murphy Oil respectively CDN\$ 3,582,408 and CDN\$ 1,127,612 as compensation for shortfall.
- c. That the Parties shall bear their own legal and other costs in relation to this proceeding, and shall bear the Arbitration Costs in equal share.

[Signed]

Professor Hans van Houtte
President

Date: 11 February 2015

[Signed]

Professor Merit E. Janow

Date: 02.17.15

[Signed]

Professor Philippe Sands

Date: 13 February 2015