

NOTICE OF ARBITRATION AND STATEMENT OF CLAIM
UNDER THE RULES OF ARBITRATION OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT

RESOLUTE FOREST PRODUCTS INC.,

Claimant/Investor,

v.

GOVERNMENT OF CANADA,

Respondent/Party

December 30, 2015

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I. INTRODUCTION

1. Resolute Forest Products Inc. (“Resolute”), a U.S. corporation, respectfully submits this Notice of Arbitration and Statement of Claim on behalf of itself and its Canadian subsidiary, Resolute FP Canada Inc., as to the following legal dispute with the Government of Canada (“Canada,” “GOC” or “Respondent”) in accordance with Chapter Eleven of the North American Free Trade Agreement (“NAFTA”).

2. Resolute elects to proceed with this arbitration pursuant to Article 3 of the United Nations Commission on International Trade Law (“UNCITRAL”) Rules, as provided under Article 1120(1)(c) of NAFTA.

II. SUMMARY OF THE CLAIM

3. E-commerce and news delivery via the Internet have imposed tremendous economic pressures on the pulp and paper industry, reducing the global demand for printing paper, including “supercalendered paper” (“SC paper”) used primarily for newspaper advertisements and catalogs. Heightened competition for a reduced paper product demand has forced companies in the paper industry to shed inefficient assets and restructure themselves, often through bankruptcy proceedings. In 2011, an SC paper mill located in Port Hawkesbury, Nova Scotia and owned by NewPage Corporation went idle and sought creditor protection to deal with costs it could not control.

4. The Government of Nova Scotia undertook to preserve the mill while it sought investors to resuscitate it as a going concern. The leading candidate, however, recognizing the heightened competition in the industry and the high costs associated

with the mill, would invest only on the condition that the government could ensure the Port Hawkesbury mill would be the “lowest cost and most competitive producer” of SC paper in North America. Nova Scotia agreed and undertook a series of measures late in 2012 to ensure that the Port Hawkesbury paper mill would have competitive advantages above any other SC paper producer, including Resolute, the claimant in this arbitration.

5. The provincial government, having preserved the mill from being sold for scrap and having rejected scrap buyers’ proposals, kept the mill in a “hot idle” condition so it could be sold as a going concern. The provincial government enabled the investors to obtain preferential electricity rates from the local utility, and endowed the mill with a package of more than C\$124 million of assistance in order to rise above all other producers in the highly competitive industry. By 2013, the Government of Nova Scotia had elevated the moribund Port Hawkesbury paper mill and placed it as a national champion at the top of the North American SC paper industry.

6. Nova Scotia assumed the role of a national industry kingmaker through measures designed to ensure that its own company could seize and hold a dominant position in the market.

7. Nova Scotia’s actions had severe consequences for Resolute and other producers in the North American industry. The job losses that once had loomed over Port Hawkesbury were thrust onto Resolute’s Laurentide SC paper mill in Shawinigan, Québec, which Resolute was forced to close in October 2014, unable to compete with both Port Hawkesbury Paper and the provincial government backing it. Resolute has suffered a total deprivation of its Laurentide mill, and its two remaining SC paper mills,

Dolbeau and Kénogami, both located in Québec, have suffered and continue to suffer harm from the Nova Scotia measures.

8. Nova Scotia's measures were tantamount to expropriation of Resolute's Laurentide SC paper mill, provided discriminatory advantages to the Port Hawkesbury Paper mill, and have harmed and destroyed Resolute's Canadian SC paper investments in a manifestly unjust and inequitable manner in violation of Canada's obligations toward foreign investors under NAFTA.

9. As the Port Hawkesbury resurrection began to impact the market, Resolute sought a dialogue with Canadian officials on multiple occasions, beginning in 2014, to address the discriminatory, inequitable and harmful conduct of Nova Scotia. Canada initially was indifferent, but then became increasingly adversarial in response to Resolute's concerns, denying the existence of documents confirmed to have been provided to the United States about Port Hawkesbury, and excluding Resolute from a joint defense against SC paper subsidy allegations in the United States. Consequently, Resolute is compelled to submit this claim to arbitration under NAFTA Chapter Eleven.

10. Resolute respectfully serves this Notice of Arbitration for breach by the Government of Canada ("Canada"), especially (but not exclusively) through the actions of the provincial Government of Nova Scotia ("Nova Scotia"), of its obligations under NAFTA, Chapter Eleven.

III. PROCEDURAL REQUIREMENTS

11. The disputing investor, Resolute, is incorporated in the State of Delaware, United States of America and, thus, is an investor of a NAFTA Party pursuant to NAFTA Article 1139. Its registered address is as follows:

Resolute Forest Products Inc.
1209 Orange Street
Wilmington, Delaware 19801
United States of America
Phone: 302-658-7581
Fax: 302-655-2480

12. Resolute wholly owns and controls Resolute FP Canada Inc., a Canadian incorporated enterprise whose rights have been affected directly by acts for which Canada is responsible under NAFTA. Resolute FP Canada Inc.'s registered address is:

Resolute FP Canada Inc.
111 Duke Street, Suite 5000
Montréal, Québec H3C 2M1 Canada
Phone: 514 875-2160 or 1 800 361-2888

13. Resolute served its Notice of Intent to Arbitrate on Canada on September 30, 2015 in accordance with Article 1119. The ninety-day period required by NAFTA Article 1119 expired on December 29, 2015.

14. Resolute met with Government of Canada officials on November 30, 2015 for consultations regarding this arbitration claim in accordance with NAFTA Article 1118, but have yet to reach an agreed resolution.

15. Resolute has consented to arbitration under Article 1121. Resolute submits this Notice of Arbitration and Statement of Claim under both NAFTA Article 1116 as an investor on its own behalf, and under NAFTA 1117 on behalf of its wholly-owned subsidiary, Resolute FP Canada Inc.

16. Resolute and Resolute FP Canada Inc. have executed waivers in accordance with NAFTA Article 1121, copies of which are appended to this Notice of Arbitration as Exhibit 1.

17. Canada has consented to arbitration pursuant to NAFTA Article 1122.

18. The following are duly empowered to act on behalf of Resolute in this matter, and correspondence should be served upon them at the addresses listed below:

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19. Resolute proposes that the fees and expenses of the tribunal appointed to decide this matter be governed by the International Centre for Settlement of Investment Disputes' July 6, 2005 "Memorandum on the Fees and Expenses" and regulations cited therein.

IV. FACTUAL BASIS FOR THE CLAIM

20. This claim arises out of measures taken by Nova Scotia that have damaged Resolute and its investments in Canada, including the complete deprivation of Resolute's Laurentide paper mill in Shawinigan, Québec, in violation of the investment protections extended to foreign investors under NAFTA Articles 1102, 1105 and 1110. Canada is responsible for Nova Scotia's actions under NAFTA and applicable principles of international law.

A. Resolute's Background In SC Paper

21. Resolute is incorporated under the laws of the State of Delaware, U.S.A., and was created in 2007 through the merging of two forest products companies, one a Canadian company (Abitibi-Consolidated Inc.), the other a U.S. company (Bowater Inc.).

22. Resolute is an integrated forest products company that manufactures and markets a diverse range of wood and paper products, including a product known as supercalendered paper, or "SC paper." SC paper is made thin and smooth from being pressed between rollers, or "calenders," and is sold for commercial printing in magazines, catalogs, directories, and newspaper inserts.

23. Resolute owns subsidiary enterprises and plant facilities in Canada that produce SC paper. Resolute owns Resolute FP Canada, which owns three Canadian SC paper mills:

- the Dolbeau mill located in Dolbeau-Mistassini, Québec;
- the Kénogami mill located in Jonquièrre, Québec; and
- the now-defunct Laurentide mill, which was located in Shawinigan, Québec.

24. The Laurentide SC paper mill was shut down in October 2014 as a consequence of the Nova Scotia measures at issue here.

B. Nova Scotia's Intervention In The SC Paper Market

25. In 2007, NewPage Corporation, a U.S. paper company, acquired the Port Hawkesbury paper mill, which produced newsprint and SC paper. Over time, NewPage Corporation found that the Port Hawkesbury paper mill was unable to operate as a

viable business due to high operating and transportation costs. The mill was losing over C\$4 million per month by August 2011¹ when NewPage announced that it would be shutting down the mill indefinitely.²

26. Resolute was approached in June 2011 by an investment bank, on behalf of NewPage, to consider purchasing the Port Hawkesbury operations. Resolute concluded that operating and transportation costs would make it economically impossible. Resolute never was offered financial assistance to make a purchase more attractive.

27. On September 6, 2011, NewPage Port Hawkesbury (“NPPH”), the wholly-owned subsidiary of NewPage Corporation that operated the mill, commenced proceedings seeking creditor protection under the Companies’ Creditor Arrangement Act of Canada (“CCAA Proceedings”) with the objective of securing a going concern sale of NPPH. The Supreme Court of Nova Scotia appointed Ernst & Young as the Monitor to oversee the sale.

28. NPPH had incurred over \$50 million in operating losses for the twelve months preceding the mill’s closure. In a sworn affidavit filed in the CCAA Proceedings, NPPH mill manager Tor Suther explained that the mill was “losing money at an alarming rate”³, adding that:

¹ Ex. 2, “Paper Plant Turns Profit Page,” Aaron Beswick, The Chronicle Herald, Aug. 26, 2013, available at <http://thechronicleherald.ca/business/1150074-paper-plant-turns-profit-page> (last visited Dec. 28, 2015).

² Ex. 3, “Paper Mill Sale Finalized,” Canadian Press, The Chronicle Herald, Sep. 28, 2012, available at <http://thechronicleherald.ca/business/141140-paper-mill-sale-finalized> (last visited Dec. 28, 2015).

³ See Ex. 4, Affidavit of Tor Suther, Mill Manager of New Page Port Hawkesbury (“NPPH”), Sept. 5, 2011, filed in support of NPPH’s application pursuant to the Companies’ Creditors Arrangement Act of Canada (CCAA) (Suther Affidavit), at ¶ 89.

NPPH is in dire financial straits. NPPH has been suffering significant operating losses which currently approximate \$4,000,000 per month on average. NPPH's operating losses have, to date, been funded by its US parent company, NewPage Corporation ("NPC"), and these totalled approximately US\$50,000,000 over the past twelve months alone. NPC is however currently experiencing its own financial difficulties and is unable to continue to fund the operating losses of NPPH.⁴

29. Nova Scotia was determined to find a new buyer to operate the Port Hawkesbury mill despite the fact that the operation plainly was not viable. The Premier of Nova Scotia, Darrell Dexter, said, "The province has already reached out to potential buyers and will now aggressively work with our partners to attract a new buyer as quickly as possible."⁵

30. The court-appointed Monitor contacted one hundred ten interested parties about the acquisition of the Port Hawkesbury mill and received eight offers to purchase the company's assets. Four of the eight offerors were invited to continue with the bidding. Bids were submitted in December 2011. Two companies offered to continue Port Hawkesbury as a going concern, while the other two companies proposed liquidation.

31. Vancouver-based Pacific West Commercial Corporation ("PWCC") was chosen on January 4, 2012 by the Monitor over another pulp and paper producer and two scrap dealers as a suitable purchaser for the Port Hawkesbury mill.⁶ Nova Scotia negotiated with PWCC to offer various financial incentives for the company to acquire, revive and operate the mill's SC paper line.

⁴ Ex. 4, Suther Affidavit, at ¶ 6.

⁵ Ex. 5, "NewPage Port Hawkesbury Mill To Be Sold," CBC News, Sept. 7, 2011, available at <http://www.cbc.ca/news/canada/nova-scotia/newpage-port-hawkesbury-mill-to-be-sold-1.1004828> (last visited Dec. 28, 2015).

⁶ See Ex. 6, Sixth Report of the Monitor, Jan. 13, 2012, at ¶ 19.

32. PWCC made the implementation of the sale contingent upon conditions designed to provide the Port Hawkesbury mill with ongoing competitive advantages in the SC paper market. Negotiations between Nova Scotia and PWCC pertaining to the financial incentives that PWCC demanded to acquire, revive and operate the mill's SC paper line carried on for more than six months.

33. Nova Scotia decided to pay for maintaining the Port Hawkesbury mill in a "hot idle" condition during CCAA proceedings in order to make it attractive as an ongoing, viable concern. The high costs of operating the Port Hawkesbury mill, however, meant that it would take more than the government's baseline maintenance to render the mill viable for purchase. The Monitor observed that Nova Scotia's "hot idle" measures were exceptional and would enable the completion of a going concern sale to PWCC "on inexpensive commercial terms,"⁷ stated that it was "unaware of any other lender" that would provide similar financing; and that it could not anticipate that "any more favorable terms could be achieved with any other lender."⁸

34. PWCC required Nova Scotia to assure, among other things, that the Port Hawkesbury mill would "be the lowest cost operator in North America."⁹ PWCC threatened that "if the 7.5-year load-retention {electricity} rate was not approved it would abandon its \$33-million purchase of the shuttered {Port Hawkesbury} paper mill."¹⁰

⁷ Ex. 7, Seventh Report of the Monitor dated Feb. 27, 2012 at ¶ 43.

⁸ Ex. 7, Seventh Report of the Monitor dated Feb. 27, 2012 at ¶¶ 36, 43.

⁹ Ex. 8, "UARB Approves Paper Mill Power Deal," Nancy King, Cape Breton Post, Aug. 20, 2012, available at <http://www.capebretonpost.com/News/Local/2012-08-20/article-3056733/UARB-approves-paper-mill-power-deal/1> (last visited Dec. 28, 2015).

¹⁰ Ex. 8, "UARB Approves Paper Mill Power Deal," *supra*, note 9.

35. Nova Scotia embraced PWCC's goal of making the Port Hawkesbury paper mill "the most efficient paper producer in the world," and "the lowest cost and most competitive producer" of SC paper, and announced a series of measures on August 20, 2012 to assist.¹¹

36. By September 2012, Nova Scotia had finalized agreement on various requests made by PWCC in the negotiations and provided no less than \$124.5 million in government measures, including cash to purchase land, reduced electricity rates, and property tax.¹²

37. News reports captured the extent of Nova Scotia's aid package:

The Nova Scotia government poured \$36.8 million into keeping the mill in a hot idle state and supporting the local forest products sector while NewPage Port Hawkesbury was closed. It also promised a financial aid package to the new owners that included: a \$24-million loan to improve productivity and efficiency, a \$40-million repayable loan for working capital, \$1.5 million to train workers, \$20 million to buy 51,500 acres of land, and \$3.8 million annually, for 10 years, from the forestry restructuring fund to support sustainable harvesting and forest land management.¹³

38. The loans for working capital and to improve productivity were eligible to be forgiven by the province.

39. Nova Scotia told the Nova Scotia Utility and Review Board ("NSUARB") responsible for regulating electricity rates that "the Government has been working closely with both {Nova Scotia Power} and PWCC to address the issue of high

¹¹ Ex. 9, "Province Invests in Jobs, Training and Renewing the Forestry Sector," Nova Scotia Premier's Office Press Release, Aug. 20, 2012, available at <http://novascotia.ca/news/release/?id=20120820001> (last visited Dec. 28, 2015).

¹² Ex. 2, "Paper Plant Turns Profit Page," *supra* note 1.

¹³ Ex. 10, "Nova Scotia Mill Restarts As Port Hawkesbury Paper," Pulp & Paper Canada, Dec. 1, 2012, available at <http://www.pulpandpapercanada.com/news/nova-scotia-mill-restarts-as-port-hawkesbury-paper/1001952406/> (last visited Dec. 28, 2015). The figures reported were in Canadian dollars.

electricity costs to serve the mill. {...} As part of the Government's involvement in negotiations relating to the re-opening of the mill, the province engaged the services of Todd Williams from Navigant Consulting to help facilitate the discussions between PWCC, represented by Stern Partners and {Nova Scotia Power}.”¹⁴

40. In the NSUARB proceedings, Nova Scotia Power stated that it began discussions with PWCC “[a]t the request of the government of Nova Scotia and the Monitor” as soon as PWCC was selected for exclusive negotiations to buy the Port Hawkesbury mill, and it recognized that “a new and innovative approach is necessary” since “PWCC’s objective is to be the lowest cost operator in North America...”¹⁵

41. PWCC made so many requests for assistance that the Monitor noted “its concern regarding the ongoing conditionality of the {sale}.”¹⁶ Nova Scotia accommodated most of them, providing grants, loans, cash to purchase land, reduced electricity rates and property taxes, among other financial contributions and measures, and thus lowered the production costs for Port Hawkesbury relative to those of Resolute’s SC paper mills.

42. These measures were designed to vault Port Hawkesbury Paper to the front of the SC paper industry, competing directly with Resolute for sales of SC paper in the same markets: Canada, the United States, and elsewhere.

43. Having secured the measures that it had demanded, PWCC closed the transaction. By way of a Plan of Arrangement concluded under the CCAA Proceedings,

¹⁴ Ex. 11, Opening Statement of the Government of Nova Scotia filed in the NSUARB proceedings on July 13, 2012, Exhibit P-48.

¹⁵ See Ex. 12, Evidence of Nova Scotia Power Inc. filed in the NSUARB proceedings on April 27, 2012, Exhibit P-4 at 9.

¹⁶ Ex. 13, Tenth Report of the Monitor dated Jul. 12, 2012 at ¶ 56.

the purchase of NPPH by investors of PWCC became effective on September 28, 2012. PWCC paid C\$33 million, less than the C\$36.8 million that Nova Scotia spent in its effort to keep the mill in a “hot idle” state and support the local forest products sector for nearly a year, and far less than the \$124.5 million that the government committed going forward.¹⁷ NPPH became a subsidiary of PWCC and was renamed Port Hawkesbury Paper, LP (“Port Hawkesbury Paper”).

44. Nova Scotia committed to applying its resources to resurrect the Port Hawkesbury mill and endowing it with a premium, competitive advantage over Resolute and the other producers in the SC paper market. Nova Scotia Premier Darrell Dexter stated: “Pacific West is well-positioned to be the most competitive and best supercalendered paper mill in the world.” He added that “{t}he mill has the most modern machine in North America and we’re helping position it to take advantage of this and become a leader.”¹⁸

45. PWCC CEO Ron Stern stated, “We’re hoping that there is going to be a bottom in the declining use of paper and that we will be, hopefully, the most competitive mill. We will certainly be the highest quality. Our goal is to be the lowest cost mill.”¹⁹

¹⁷ Ex. 14, “Former NewPage Port Hawkesbury paper mill in Nova Scotia sold to Vancouver firm,” *Cumberland News Now*, Sept. 28, 2012, available at <http://www.cumberlandnewsnow.com/Canada-World/News/2012-09-28/article-3086046/Former-NewPage-Port-Hawkesbury-paper-mill-in-Nova-Scotia-sold-to-Vancouver-firm/1> (last visited Dec. 28, 2015).

¹⁸ Ex. 15, “Mill Gets Millions in N.S. Cash,” Brett Bundale Business Reporter, *The Chronicle Herald*, August 20, 2012, <http://thechronicleherald.ca/novascotia/128302-mill-gets-millions-in-ns-cash> (last visited Dec. 28, 2015).

¹⁹ Ex. 16, “Nova Scotia Paper Mill Revived in 11th-Hour Twist,” Cassie Williams, *CBC News*, Sept. 22, 2012, available at <http://www.cbc.ca/news/canada/nova-scotia/nova-scotia-paper-mill-revived-in-11th-hour-twist-1.1148136> (last visited Dec. 29, 2015).

C. Harm To Resolute From The Nova Scotia Measures

46. Resolute competes directly with Port Hawkesbury Paper as one of only four producers in Canada (and one of only six in Canada and the United States combined) for sales in a highly competitive market that is shrinking as a consequence of the shift to electronic and new media.

47. The unforeseen and unforeseeable introduction into the Canadian market of an SC paper mill bankrolled by public funds to become “the lowest cost operator in North America” has had a devastating impact on the viability and competitiveness of Resolute’s three SC paper mills in Canada. Nova Scotia’s measures accomplished their express objective, to lower the production costs for the Port Hawkesbury mill relative to Resolute’s SC paper mills.

48. Nova Scotia’s measures openly threatened Resolute and other SC paper producers because Port Hawkesbury Paper would take their customers, create a downward pressure on prices, and “push higher-cost operators out of business.”²⁰

49. The substantial production capacity added to a market of declining demand did create downward pressure on the pricing of Resolute’s SC paper and has led to losses of sales orders for Resolute. Nova Scotia provided the means for Port Hawkesbury’s SC paper to take Resolute’s business unfairly.

50. The Port Hawkesbury Paper mill restarted in the fourth quarter of 2012. Port Hawkesbury Paper began to sell its high-quality SC paper at prices that undercut

²⁰ Ex. 17, “Plant Restart Could Topple Competitors,” Brett Bundale Business Reporter, The Chronicle Herald, Aug. 21, 2012, available at <http://thechronicleherald.ca/business/128645-plant-restart-could-topple-competitors> (last visited Dec. 28, 2015).

its competitors. Port Hawkesbury Paper began to take market share from Resolute and Resolute FP Canada in 2013.

51. The artificially revitalized Port Hawkesbury Paper mill has a production capacity of 360,000 tonnes of paper—nearly double the 190,000 tonne capacity of Resolute’s now defunct Laurentide mill.

52. Port Hawkesbury Paper spokesman Marc Dubé wrote that, “The support Nova Scotia and the Strait area have shown for the mill and its employees is unparalleled. From the start, we’ve said that to be successful, competitive, and in this for the long term, we need to make sure all our costs are the lowest, and we are on the path to achieving this.”²¹

53. The measures taken by Nova Scotia have inflicted damages on Resolute FP Canada’s SC paper mills. Resolute was forced to close its Laurentide mill permanently in October 2014 due principally to the added production capacity of Port Hawkesbury, which has driven prices down while producing at lower costs because of the measures taken by Nova Scotia. The closure of Resolute’s Laurentide mill cost 275 people their jobs in Shawinigan, Québec, and hundreds more jobs indirectly supported by that mill. Nova Scotia’s targeted support of Port Hawkesbury Paper has distorted the SC paper market and destroyed Resolute FP Canada’s investment in the Laurentide mill.

54. Following the closure of Resolute’s Laurentide mill, and the removal of its production capacity from the SC paper market in October 2014, Port Hawkesbury raised

²¹ Ex. 18, “Full Steam Ahead for Paper Mill,” Marc Dubé, *The Chronicle Herald*, Dec. 6, 2012, available at <http://thechronicleherald.ca/opinion/222523-full-steam-ahead-for-paper-mill> (last visited Dec. 28, 2015).

its prices. Mr. Dubé “confirmed that the closure of these other mills had allowed Port Hawkesbury Paper to raise its prices and relieve some cost pressure.”²²

55. Notwithstanding Port Hawkesbury’s predatory pricing in 2014, the elevated October prices did not hold. The volumes of SC paper from Port Hawkesbury promptly resumed downward pressure on Resolute’s SC paper prices.

56. In addition to Resolute’s loss of its Laurentide mill, Resolute’s investments in its Kénogami and Dolbeau mills have been harmed and are at risk of suffering the same fate as Laurentide. Resolute has lost thousands of tonnes of SC paper sales orders from catalog producers and major retailers, or has been forced to renegotiate purchase orders at discounted prices, all as consequences of the government-funded and fueled resurrection of the Port Hawkesbury mill.

D. U.S. Countervailing Duty Investigation – Canada Adding Injury To Injury

57. U.S. SC paper producers Verso Paper Corporation and New Page Corporation—the same company that failed to make the Port Hawkesbury paper mill profitable—similarly experiencing downward pricing pressure and unfair competition from Nova Scotia’s market intervention, prepared to submit a petition to the United States Government seeking the imposition of countervailing duties to offset the unfair Port Hawkesbury advantages.

58. These U.S. companies, producing SC paper in the United States, began raising objections in 2013 to their representatives in Congress and in the U.S.

²² Ex. 19, “Brighton: Mill Should Shoulder Power Costs,” Rachel Brighton, The Chronicle Herald, Oct. 17, 2014, available at <http://thechronicleherald.ca/business/1244574-brighton-mill-should-shoulder-power-costs> (last visited Dec. 28, 2015).

Government executive branch about Port Hawkesbury's unfair competitive advantage provided by Nova Scotia's assistance. Resolute warned officials in the Canadian Embassy in Washington, D.C. as early as July 2014 that a United States-led countervailing duty investigation into Canadian exports of SC paper was on the horizon.

59. U.S. countervailing duty law requires that an investigation be brought against all of a product from a country, in this case all SC paper producers in Canada. Hence, notwithstanding that Resolute's SC paper mills had not received assistance from any government authorities, Resolute was compelled to participate in the expensive and burdensome U.S. countervailing duty investigation to defend itself against the allegations aimed at Port Hawkesbury Paper. The same was true for the other Canadian SC paper producers, Irving Paper in New Brunswick and Catalyst Paper in British Columbia.

60. The countervailing duty investigation posed a risk that Resolute, notwithstanding its innocence, might be subjected to duties that would further harm Resolute's SC paper business.

61. Officials in the Canadian Embassy in Washington D.C. did not respond to warnings from Resolute in July 2014 with any proposals to spare Resolute from the harmful consequences of the Nova Scotia measures.

62. Resolute warned Canadian Embassy officials again in August 2014 and asked for copies of Canada's written submissions to the WTO Subsidies and Countervailing Measures Committee on Port Hawkesbury in order to prepare for a probable investigation and understand Canada's position on the Nova Scotia

assistance. Canada declined to provide these documents in response to Resolute's request.

63. Resolute again raised warnings of the probable U.S. Government investigation to the same Canadian Embassy officials in October 2014. They apologized for their delay in responding and promised to "follow up with Ottawa." Despite the apology and promise, Canadian officials continually ignored Resolute's requests.

64. Resolute wrote to Canadian Minister of International Trade Ed Fast in October 2014 raising concerns about the effects of Port Hawkesbury's unfair advantages on Resolute's investments in the SC paper industry and the additional problem of the probable U.S. investigation. Resolute also met with outside U.S. counsel for Canada to discuss the threat of a U.S. trade remedy case and to request again documents pertaining to Canada's representations to the United States and European Union through the WTO regarding Nova Scotia's assistance to Port Hawkesbury Paper.

65. Throughout these and subsequent meetings in December 2014, January 2015 and February 2015, Resolute expressed its concern about (1) Nova Scotia's bestowal of an unfair competitive advantage on Port Hawkesbury Paper that harmed and continued to harm Resolute; (2) Nova Scotia's actions contravening Canada's commitments and protections to foreign investors under NAFTA Chapter Eleven; and (3) the risk of an imminent U.S. trade remedy action were Canada to remain passive about the Port Hawkesbury Paper problem. Resolute asked to know the position that Canada had communicated to the WTO and the United States on Nova Scotia's

assistance to Port Hawkesbury Paper. In all of these communications, Canadian officials were only superficially responsive.

66. Minister Fast wrote to Resolute on February 6, 2015, claiming “limited scope to intervene” because the measures “are wholly under the purview of the Government of Nova Scotia.” He added that Canada, in coordination with Nova Scotia, “has responded to questions from the U.S. Government concerning the Port Hawkesbury paper mill during meetings of the World Trade Organization (WTO) Committee on Subsidies and Countervailing Measures in 2013” and added that “{t}he minutes for this meeting are publicly available on the WTO website.”

67. The minutes for the WTO meeting, however, did not include Canada’s responses to the U.S. Government’s questions and Minister Fast did not provide copies of Canada’s official response then, nor in reply to subsequent requests.

68. Resolute’s CEO, Richard Garneau, met with Minister Fast late on February 24, 2015 to discuss Resolute’s concerns. During the meeting, Mr. Garneau informed Minister Fast that he believed the Nova Scotia measures to constitute a breach of Canada’s obligations under NAFTA Chapter Eleven, and requested that Canada take steps to rectify the problem before the United States might decide to initiate a countervailing duty investigation. Minister Fast did not agree with Resolute’s assessment, nor did he agree to take any remedial action. Within a week of that meeting, the U.S. Government initiated its investigation of SC paper from Canada, just as Resolute had predicted and warned for nearly eight months.

69. Canada began working on a defense of the U.S. allegations for the three Canadian companies — Port Hawkesbury, Irving Paper and Catalyst Paper — and entered into a Joint Defense agreement with those companies for that purpose.

70. Canada informed Resolute in March 2015 that it would not enter into a Joint Defense agreement with Resolute in the U.S. investigation because Resolute had advised, privately, of a possible intention to file a NAFTA Chapter Eleven claim against Canada over the Nova Scotia support for Port Hawkesbury.

71. Hence, Canada proceeded to develop defensive strategies in the U.S. case, meeting with counsel for all producers in Canada except Resolute, the sole U.S.-based SC paper producer in Canada, as a consequence of Resolute privately and discreetly raising concerns about Canada's respect for Resolute's foreign investment under NAFTA Chapter Eleven.

72. Canada had prepared an initial consultations paper for submission to the U.S. Government providing reasons why the companies producing SC paper in Canada should not be subjected to the investigation, but Canada would not share its draft of this paper with Resolute for comment on the arguments and structure, treating Resolute as an adversary due to the potential that Resolute would submit these issues to arbitration under NAFTA Chapter Eleven.

73. Resolute submitted an Access to Information request to Canada in April 2015 for Canada's submissions to its WTO partners about Port Hawkesbury. After several months passed, Canadian officials reported that the documents did not exist, notwithstanding Minister Fast's representations, statements by the Office of the U.S.

Trade Representative (“USTR”), and the WTO Committee’s documentation in its minutes of the existence of the answers.

74. Resolute requested copies of the Canadian responses to the United States on Port Hawkesbury from USTR. USTR provided Resolute with copies of its questions to Canada in April 2015 and would have provided the Canadian responses but reported that Canadian officials had objected to providing that information to Resolute.

75. Canadian officials responsible for answering Resolute’s Access to Information Request have stalled and refused to acknowledge the existence of Canada’s WTO submission, notwithstanding the contrary acknowledgements of Minister Fast, USTR, and the WTO.

76. Meanwhile, in the United States’ SC paper investigation, Catalyst and Irving Paper, with whom Canada was cooperating in presenting a joint defense, met with multiple U.S. and Canadian government officials and sought their assistance to make special pleadings to the U.S. Department of Commerce on their behalf, always to Resolute’s detriment. Prominent among these communications was a May 2015 letter that the two Canadian companies, in defense privity with Canada, procured from the Governor of Maine to the U.S. Secretary of Commerce, alleging that countervailing duties likely should be imposed on Resolute at the rate of 5%, and that Catalyst and Irving Paper should receive their own special rates so they would not need to be subject to the countervailing duty rates that they hypothesized for Resolute and Port Hawkesbury in the U.S. investigation.

77. Repeatedly, throughout the U.S. investigation, Canadian officials, including the Ambassador and Cabinet Ministers, contacted, communicated with, and met with U.S. officials, including the Secretary of Commerce, pleading on behalf of the Canadian companies to Resolute's detriment.

78. Resolute complained to Canada's counsel repeatedly about these interventions, to no avail. The interventions continued, never on behalf of Resolute.

79. On August 18, 2015, Canada's Ambassador to the United States wrote personally to the U.S. Secretary of Commerce. He made special pleadings with respect to the outcome of the United States' SC paper investigation on behalf of each of the Canadian companies, to the exclusion of Resolute.

80. The Ambassador particularly defended Port Hawkesbury Paper, arguing that Nova Scotia did not provide the company preferential treatment for its electricity rates, and that other benefits from the province were extinguished through the Canadian bankruptcy proceedings.

81. Canada gave Resolute no advance notice of the Ambassador's letter, nor did it make any attempt to include Resolute in any of the Ambassador's arguments against the unfair trade claims.

82. Canada's treatment of Resolute in the U.S. SC paper investigation has been discriminatory and retaliatory as a consequence of Resolute indicating it might exercise its rights and protect its Canadian investments under Chapter Eleven.

83. The U.S. Department of Commerce, at the conclusion of the investigation, imposed countervailing duty rates on all Canadian producers of SC paper. Port

Hawkesbury Paper received the highest rate at 20.18%, while Resolute was subjected to a rate of 17.87%, and other SC paper producers received a rate of 18.85%.

84. Resolute's 17.87% rate was derived almost entirely (17.10%) from the U.S. Department of Commerce's decision to assign an "adverse facts available" rate for purported programs that had nothing to do with SC paper production and never were part of the allegations in NewPage's and Verso's original petition. The Department of Commerce's factual findings of subsidies to Resolute were *de minimis*.

85. Even in preparing to appeal the Department of Commerce Final Determination, Canada reconvened its Joint Defense group with provincial governments and Canadian private companies, excluding Resolute.

V. ISSUES PRESENTING VIOLATIONS OF NAFTA CHAPTER ELEVEN

86. Canada, through the actions of its constituent political subdivision, Nova Scotia, for which it is responsible under NAFTA, has breached its obligations to Resolute under Section A of Chapter Eleven of NAFTA, including but not limited to Article 1102 (National Treatment); Article 1105 (Minimum Standard of Treatment); and Article 1110 (Expropriation and Compensation).

87. Resolute is an investor of a Party as defined in NAFTA Chapter Eleven and has incurred damage to its investments in the SC paper industry in Canada by reason of Canada's breaches. Resolute must be compensated for Canada's failure to comply with its NAFTA Chapter Eleven obligations, as described below.

A. Breach Of Article 1110 – Expropriation And Compensation.

88. NAFTA Article 1110 prohibits Canada from directly or indirectly expropriating the investments of a U.S. company in its territory, except (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and the minimum standard of treatment under international law; and (d) on payment of compensation:

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”) except:
 - (a) for a public purpose;
 - (b) on a non-discriminatory basis;
 - (c) in accordance with due process of law and Article 1105(1); and
 - (d) on payment of compensation in accordance with paragraphs 2 through 6.

89. Canada has violated its obligations under NAFTA Article 1110. Nova Scotia selected the Port Hawkesbury Paper Mill as a national champion, chosen by a government, to establish it as the “lowest cost and most competitive producer” in the SC paper market, displacing all other producers, including Resolute. Nova Scotia’s measures to resuscitate the Port Hawkesbury Paper mill and enable the taking of sales and market share from Resolute constituted actions tantamount to an unlawful expropriation of Resolute’s Laurentide SC paper mill. Nova Scotia has disrupted the market to such an extent that it has neutralized permanently Resolute’s investment in the Laurentide mill for the benefit of its champion, Port Hawkesbury Paper.

90. Nova Scotia adopted the measures described above even though it knew or should have known that the resurrection of the Port Hawkesbury mill on special

competitive terms was likely to push some of Resolute's SC paper mills out of business. By these measures, Nova Scotia destroyed the value of Resolute's investment in the Laurentide mill.

91. Port Hawkesbury Paper's continuing state-sponsored competitive advantages threaten to force the closure of Resolute's Dolbeau and Kénogami SC paper mills.

92. Nova Scotia has reallocated the value and market share of the Laurentide mill to its chosen national champion, Port Hawkesbury Paper, and continues to take market share and value from the Dolbeau and Kénogami mills. Resolute reserves the right to claim compensation from Canada for the fair market value losses of these mills and any consequential damages.

93. Nova Scotia's conduct does not comply with the conditions for lawful expropriation provided under NAFTA Article 1110.

94. First, there is no valid public purpose for the expropriation. Provincial protectionism is not a legitimate public purpose. Any jobs that may have been provided to Port Hawkesbury residents were indirectly expropriated from the residents of Shawinigan, Québec who worked at Resolute's Laurentide mill. Nor can the federal or provincial governments claim as a valid public purpose the government-determined establishment of industry champions through financial assistance, designed to make a foreign-owned company in one province compete on grossly unfair terms with a domestically-owned company in another, thereby destroying the investment of an investor of a NAFTA Party.

95. Second, the expropriation was discriminatory in that Nova Scotia favored a domestically-owned, in-province mill over foreign-owned out-of-province mills, without any regard to principles of fair market competition. For reasons of provincial preference, Nova Scotia decided that the Port Hawkesbury Paper mill should be kept alive despite its inability to remain cost competitive in the SC paper industry. With tens of millions of dollars of assistance from the government and ongoing preferential operational arrangements, Port Hawkesbury Paper was empowered to drive Resolute's SC paper mills in Québec out of business. Resolute's investments in the SC paper sector are casualties of Nova Scotia's transfer of market value to its own SC paper champion, Port Hawkesbury Paper.

96. Third, the expropriation has been taken without regard for international standards of due process. Nova Scotia unilaterally decided that the Port Hawkesbury mill in its province should be empowered to undertake predatory pricing measures with respect to Resolute, its competitor in the SC paper industry. Neither Canada nor Nova Scotia has initiated any process to protect Resolute's SC paper investments in Canada.

97. Fourth, Resolute has received no compensation from Canada, nor from Nova Scotia, for the losses of its SC paper investments.

98. Resolute is entitled to full reparation for its losses, including restitution of the assets expropriated or compensation at their fair market value, as well as payment for any consequential damages suffered as a result of Canada's breach of Article 1110.

B. Breach Of Article 1105 – Minimum Standard Of Treatment.

99. NAFTA Article 1105 requires that a NAFTA Party provide investors of another Party the minimum standard of treatment under customary international law.

Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

100. The minimum standard of treatment under NAFTA Article 1105 protects investors of a Party from government treatment constituting conduct that infringes a sense of fairness, equity and reasonableness, including conduct that is egregious, arbitrary, unfair, unjust or idiosyncratic, discriminatory, or exposes a claimant to sectional prejudice.

101. The minimum standard of treatment also protects investors of a Party from being deprived of their legitimate investment-backed expectations through the unexpected detrimental conduct of the host government.

102. Resolute is the result of a merger of Abitibi-Consolidated Inc., a Canadian company, and Bowater Incorporated, an American company. The Government of Canada approved this combination in July 2007 after the two companies met substantial conditions set under the Investment Canada Act. Conditions included an obligation for the foreign investment in Canada to be compatible “with national industrial, economic, and cultural policies,” and to be a “contribution” “to Canada’s ability to compete in world markets.”

103. Resolute, the product of the approved combination, understood Canada’s industrial and economic policies to include the protections of NAFTA, including *inter alia* Chapter Eleven’s guarantee of a “minimum standard of treatment” and “national treatment,” such that Resolute would be assured it could, as the Investment Canada Act expected, “compete in world markets.”

104. Resolute invested in Resolute FP Canada and its SC paper mills with the reasonable expectation, pursuant to Canada's industrial and economic policies that Resolute had promised to uphold, of competing with other SC paper mills in Canada on fair terms, driven by the competitive conditions of the private SC paper market. Nova Scotia changed the terms of competition among SC paper mills in Canada when it preserved the bankrupt Port Hawkesbury mill in hot idle, committed more than \$124.5 million to its revival, and helped cap operating expenses.

105. No reasonable investor would invest in a country expecting that a government of that country subsequently would establish a national champion in competition with the investor and undertake measures to destroy the investor's foreign investment.

106. Nova Scotia has rearranged the SC paper market in Canada by presenting Resolute with a direct competitor that is bankrolled by Nova Scotia's public purse, conduct that clearly infringes a sense of fairness, equity and reasonableness. Resolute is being forced to compete not only with the Port Hawkesbury mill, but with a constituent province of Canada and its taxpayers. It is unfair and discriminatory that Nova Scotia has used its public funds to rearrange the SC paper market so severely as to put Resolute's Laurentide mill out of business and to threaten its other SC paper mills with a similar fate.

107. Nova Scotia has picked its own provincial mill as a champion in the SC paper industry, and propped it up with benefits and operational advantages to ensure that its costs are lower than those of Resolute and other competitors in the Canadian,

U.S. and other markets, thereby creating grossly unfair conditions in an SC paper market in Canada that has very few producers.

108. Resolute and its investments in the SC paper industry have experienced damages as a result of Nova Scotia's grossly unfair, prejudicial conduct, including the closure of Resolute's Laurentide mill, the loss of hundreds of jobs for its employees, the loss of market share and continuing damages to its other SC paper mills.

109. Canada has defended vigorously the measures of its constituent province to Resolute's detriment, potentially forcing Resolute out of its Canadian SC paper investments entirely. Canada apparently has defended these measures before the WTO, and openly before agencies of the United States. Canada has not provided Resolute with any compensation for this inequitable treatment.

C. Breach Of Article 1102 – National Treatment.

110. NAFTA Article 1102 requires a NAFTA Party to provide national treatment to investors of another Party:

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state

or province to investors, and to investments of investors, of the Party of which it forms a part.

111. Canadian-owned Port Hawkesbury Paper and U.S.-owned Resolute are both investors in a narrow market for SC paper in Canada, a sector that has only four producers in Canada.

112. Port Hawkesbury Paper and Resolute are not treated equally by Canada in Canada's SC paper market and sector. Nova Scotia has implemented an array of measures with effect beyond its provincial borders to give Port Hawkesbury Paper significant competitive advantages over other SC paper mills. By intervening in the market, Nova Scotia has distorted Resolute's competitive position grossly vis-à-vis Port Hawkesbury Paper. These competitive advantages provided to Port Hawkesbury in the SC paper market were, and remain, unavailable to Resolute. They include the injection of a reported \$124.5 million in government funds through various means, reduced electricity rates and discounted property taxes.

113. These measures predominantly were aimed not at the regulation of economic or other conditions within the province's own geographic territory, but rather at disrupting and displacing producers in Canadian and continental markets.

114. Nova Scotia provided Port Hawkesbury Paper preferential treatment over that received by Resolute to do business in the SC paper industry in Canada, expressly for the purpose of making Port Hawkesbury Paper "the most competitive {...} supercalendered paper mill in the world"²³ and "the lowest cost operator in North America."

²³ Ex. 15, "Mill Gets Millions in N.S. Cash," *supra* note 18.

115. Nova Scotia's actions were designed specifically to give Port Hawkesbury Paper an unfair competitive advantage over Resolute in the SC paper market in Canada. The measures were implemented precisely to discriminate in favor of Canadian-owned Port Hawkesbury Paper.

116. Resolute's SC paper mills have been harmed by this preferential treatment. The Laurentide mill was closed permanently in October 2014. Resolute's other investments likewise have experienced and continue to experience damages that threaten the viability of all of Resolute's SC paper investments in Canada.

117. Not all government measures resuscitating Port Hawkesbury were financial, but to the extent that predominantly they were, Article 1108.7(b) cannot apply.

118. According to the World Trade Organization:

Article 25.1 of the {Subsidies and Countervailing Measures} Agreement requires that all Members submit a new and full notification of all specific subsidies every three years, with updating notifications due in the intervening years. It should be noted that the notification obligation extends to all specific subsidies related to goods, in any sector (including agriculture), and provided by any level of government (e.g., national, regional, state or provincial, local). Members that consider that they provide no specific subsidies should so notify. Article 25.7 clearly states that the notification of a measure does not prejudice the measure's legal status under GATT 1994 and the SCM Agreement, its effects under the SCM Agreement, or the nature of the measure itself; Accordingly, Members are encouraged to err on the side of notification in the interests of transparency.²⁴

119. Canada reported to the World Trade Organization that Nova Scotia provided no subsidies ("nil") for the period between July 14, 2011 and July 19, 2013 during which Nova Scotia undertook measures to resuscitate the Port Hawkesbury

²⁴ See Ex. 20, "Notifications under the Agreement on Subsidies and Countervailing Measures," available at http://www.wto.org/english/tratop_e/scm_e/notif_e.htm (last visited Dec. 28, 2015).

Paper mill and ensure that it would be the lowest cost producer of SC paper in North America.²⁵

120. Canada has defended Nova Scotia's and Port Hawkesbury Paper's conduct vigorously in the United States Government's countervailing duty investigation of SC paper from Canada, denying that Port Hawkesbury Paper received countervailable subsidies. Canadian officials have advanced Port Hawkesbury's interests, and the interests of other Canadian companies, to Resolute's detriment, before U.S. authorities.

VI. RELIEF SOUGHT AND APPROXIMATE DAMAGES CLAIMED

121. In the event that these issues cannot be resolved through consultations, Resolute claims relief for the following:

- damages exceeding US\$70 million or such other amount to be proven in these proceedings in compensation for the direct losses caused by the measures of Canada and Nova Scotia that are inconsistent with Canada's obligations under Section A of NAFTA Chapter Eleven;
- additional consequential damages arising as a result of the illegal measures, in an amount to be proven in these proceedings;
- the full costs associated with these proceedings, including all professional fees and disbursements, as well as the fees of the arbitral tribunal and any administering institution;
- pre- and post-award interest at a rate to be fixed by the Tribunal;

²⁵ *To Article XVI:1 Of The GATT 1994 And Article 25 Of The Agreement On Subsidies And Countervailing Measures -- Canada, G/SCM/N/253/CAN 19 July 2013.*

- such further relief as counsel may advise and the Tribunal may deem just and appropriate.

Dated this 30th day of December, 2015

Respectfully submitted,



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