PUBLIC VERSION

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE 1976 UNCITRAL ARBITRATION RULES

BETWEEN:

RESOLUTE FOREST PRODUCTS INC.

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

PCA CASE No. 2016-13

GOVERNMENT OF CANADA

STATEMENT OF DEFENCE

September 1, 2016

Government of Canada
Trade Law Bureau
Lester B. Pearson Building
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I. PRELIMINARY STATEMENT

1. Canada files this Statement of Defence in response to the Notice of Arbitration and Statement of Claim ("NOA") filed by Resolute Forest Products Inc. (the "Claimant" or "Resolute") against Canada on December 30, 2015. The Claimant brings this claim under NAFTA Chapter Eleven on behalf of itself and its subsidiary, Resolute FP Canada Inc. ("Resolute Canada") in connection with its investment in a paper mill located in the province of Québec. The mill produces a grade of paper called supercalendered ("SC") paper, which is used in retail inserts, magazines and catalogues. The Claimant demands at least $70 million (USD) for alleged violations of NAFTA Articles 1110 (Expropriation), 1105 (Minimum Standard of Treatment) and 1102 (National Treatment).

2. The claim is a spurious attempt to pin financial liability on the federal Government of Canada and the provincial Government of Nova Scotia (the "Province") for the Claimant's own strategic business decisions and for actions taken by the United States Government. The Claimant wants to blame Nova Scotia for its own closure of a mill in Québec and its decision to consolidate its operations in response to the economic pressures facing the entire SC paper industry in North America. The Claimant also wants compensation because it gripes that Canada treated it badly during a countervailing duty ("CVD") investigation by the United States Department of Commerce ("U.S. DOC") into SC paper from Canada, which ultimately led the United States to impose such duties on the Claimant and its three Canadian competitors. Neither of these claims has any foundation in NAFTA Chapter Eleven. The Claimant is merely using this arbitration as a pressure tactic to extract any benefit it can from Canada.

3. The Claimant's principal allegation is that it was forced to close its SC paper mill located in Shawinigan, Québec (the "Laurentide mill") in October 2014 because of support, allegedly including "grants, loans, cash to purchase land, reduced electricity rates and property taxes, [and] other financial contributions and measures",[1] that Nova Scotia allegedly provided more than two

[1] *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant's Notice of Arbitration and Statement of Claim, 30 December 2015, ("Notice of Arbitration" or "NOA"), ¶ 41.

years earlier to another SC paper mill located in Nova Scotia, near Port Hawkesbury on Cape Breton Island (the "Nova Scotia Measures").

4. In September 2011, the former owner of the Port Hawkesbury mill had filed for protection from its creditors, throwing 1,000 people out of work and the local community into crisis. As part of the creditor protection proceedings, the Nova Scotia courts ordered that the Port Hawkesbury mill be sold through a court-supervised sale process. In an effort to maintain the employment opportunities and economic activities provided by the mill, the Government of Nova Scotia decided to adopt measures aimed at facilitating the mill's sale to a new buyer as a going concern rather than it being dismantled for scrap. This included purchasing forestry services from the mill's independent contractors and providing funding to keep the mill in "hot idle" (i.e., operable so as to avoid very costly mechanical shut-down and restart procedures). Nova Scotia also facilitated the sale process after a suitable buyer had been identified by agreeing to provide the buyer with certain loans and grants, acquire certain mill lands and establish a sustainable forest management program. These efforts proved successful, as the Port Hawkesbury mill was bought by its new owner effective September 28, 2012, and immediately resumed its production of SC paper.

5. Contrary to the Claimant's mischaracterizations, the closure of its 126-year-old Laurentide mill more than two years after the Port Hawkesbury mill reopened was, in reality, a strategic business decision made as part of the Claimant's long-standing efforts to rationalize its operations to survive in a competitive industry facing an inevitably shrinking market. The Claimant told its shareholders that its decision to close its mill in Québec was based on multiple business realities – including declining demand, high freight and fuel costs, and the high cost of fibre in Québec – none of which had anything to do with the entirely separate and bona fide measures of the Government of Nova Scotia. Indeed, years prior to closing it completely in October 2014, the Claimant had already substantially reduced operations at its high-cost Laurentide mill in favour of its two other SC paper mills located in Jonquière, Québec (the "Kénogami mill") and Dolbeau-Mistassini, Québec (the "Dolbeau mill").

6. Whatever the wisdom behind the Claimant's consolidation strategy, there is no legal basis to demand compensation from Canada because of measures taken by the Government of Nova Scotia, a province where the Claimant has no investment in the SC paper industry and whose government has no control over the Claimant's production and operating costs in Québec. The Claimant cannot use NAFTA Chapter Eleven as a blanket insurance policy to protect against its own business decision to optimize its asset base by closing down higher-cost assets and focusing its production in its more cost-effective mills.

7. The flaws in the Claimant's allegations with respect to the Nova Scotia Measures are fatal. Even if the Claimant's factual allegations are accepted at face value, its claims are outside the Tribunal's jurisdiction for two reasons. First, the Nova Scotia Measures fall outside the scope and coverage of NAFTA Chapter Eleven as defined by Article 1101(1), the jurisdictional gateway to arbitration. They are plainly not "relating to" the Claimant or its investment within the meaning of NAFTA Article 1101(1), which precludes claims against government measures which may have mere incidental effects on investments, but which have no legally significant connection thereto. There is no legal nexus between measures adopted by Nova Scotia and the Claimant's investment in the entirely different jurisdiction of Québec. Furthermore, one of the impugned measures – the electricity rate paid by the Port Hawkesbury mill – is also not a measure "adopted or maintained by a Party" as required by Article 1101(1). The rate is set by an agreement between two private entities, the mill's current owner and Nova Scotia Power Inc. ("NSPI"), and is therefore not attributable to Canada.

8. Second, even if the Tribunal determines that the claims against the Nova Scotia Measures fall within the scope of NAFTA Chapter Eleven, which it should not, the Tribunal has no jurisdiction *ratione temporis*. As a condition of Canada's consent to arbitrate under NAFTA Article 1122(1), Articles 1116(2) and 1117(2) set a strict three-year time limit within which an investor must file a claim once it has knowledge of the alleged NAFTA breach and that it has suffered some cognizable loss or damage. There is no factual dispute here: all of the impugned Nova Scotia Measures were adopted more than three years prior to the Claimant filing its NOA on December 30, 2015. The Claimant cannot deny that it had knowledge of the alleged NAFTA

breach and loss at the time Nova Scotia publicly adopted the measures in question during the Port Hawkesbury mill's court-supervised sale process between September 2011 and September 2012. If the Claimant believed that it had a NAFTA claim against these measures, it should have initiated this arbitration earlier. Its failure to do so puts consideration of the merits beyond this Tribunal's jurisdiction.

9. Canada's jurisdictional objections described above are sufficient to entirely preclude consideration of whether any of the Nova Scotia Measures violated NAFTA Chapter Eleven. But the Claimant's allegations that they constitute a breach of NAFTA Articles 1110, 1105 and 1102 are meritless in any event.

10. The Nova Scotia Measures cannot be construed as an indirect expropriation by government action under Article 1110. Not only are sales and market share not investments capable of being expropriated, as the Claimant alleges, but the Nova Scotia Measures are not the proximate cause of the damages the Claimant seeks. Nova Scotia's treatment of the Port Hawkesbury mill did not substantially deprive the Claimant of its investments in the Laurentide mill. Indeed, the Claimant continued to operate the Laurentide mill for two years after the Nova Scotia Measures were adopted, and then decided to close it for other reasons. Far from being an expropriation, this was a business decision the Claimant made voluntarily based on its own financial circumstances and economic conditions unrelated to the Nova Scotia Measures. Moreover, the Claimant remained in control of its mill at all times and, according to media reports, recently elected to sell the Laurentide mill for millions of dollars.

11. Nor has there been anything close to a violation of Article 1105. Nothing Nova Scotia did to facilitate the sale of the Port Hawkesbury mill can be construed as having violated the customary international law minimum standard of treatment of aliens vis-à-vis the Claimant. Its Article 1105 claim is a specious complaint with no legal merit.

12. Turning to Article 1102, there are at least three reasons why the Tribunal need not assess the merits of the Claimant's national treatment claims at all. First, Article 1102(3) plainly limits the national treatment obligation with respect to provincial measures to treatment accorded, in

like circumstances, by a province to other Canadian investors within that province. The Claimant's investment is located in Québec, not Nova Scotia. It is therefore not possible for Nova Scotia to accord the Claimant "treatment no less favorable" as contemplated by Article 1102(3). Hence, the Article 1102 claim is not even admissible. Second, even if the Article 1102 claim was not defective *ab initio*, to the extent that any or all of the Nova Scotia Measures are subsidies or grants within the meaning of Article 1108(7)(b), they would be excluded from the national treatment obligation. Third, to the extent that any of the Nova Scotia Measures include purchases of forestry services from independent contractors, they can be considered procurement and therefore are unchallengeable pursuant to Article 1108(7)(a).

13. Finally, even if any of the measures can be challenged, there is plainly no violation of Article 1102. Nova Scotia did not discriminate against the Claimant or Resolute Canada on the basis of nationality, nor are there "like circumstances" in which national treatment could have been accorded. Both are necessary elements of an Article 1102 claim and both are absent in this case. Of the many distinctions between the Claimant's investment and the circumstances surrounding the Port Hawkesbury mill, the most straightforward reason why the Claimant's Article 1102 claim fails is because Nova Scotia could not have provided similar financial support for the Laurentide mill because that mill is located in Québec, not Nova Scotia.

14. It is unnecessary to engage in a lengthy and expensive arbitration to establish that the Claimant's allegations are entirely without merit. Canada's jurisdictional objections pursuant to Articles 1101(1), 1116(2) and 1117(2) would dispose of the entirety of the claims against the Nova Scotia Measures. Furthermore, the correct legal interpretation of Article 1102(3) as advanced by Canada eliminates entirely the need for legal and factual submissions regarding the exceptions to national treatment under Articles 1108(7)(a) and (b) and whether the Claimant and Port Hawkesbury were accorded treatment "in like circumstances." The Tribunal should therefore address its jurisdiction over the Nova Scotia claims, as well as the admissibility of the Claimant's Article 1102 claim against the same, in a preliminary phase of the arbitration.

15. The secondary claim described in the NOA is that Canada, through its officials and legal counsel, allegedly treated the Claimant poorly during the U.S. DOC's CVD investigation into SC paper from Canada (the "Federal Measures"). The Claimant's NOA is vague as to how any of its allegations could possibly constitute a violation of Articles 1110, 1105 or 1102, and has not even attempted to identify the damage it allegedly suffered as a direct result of Canada's supposed conduct. Indeed, it can show neither breach nor damage. Canada has made every reasonable effort to cooperate with the Claimant and Resolute Canada while defending itself and all of the Canadian SC paper industry in the CVD investigation to the best of its ability. To this day, Canada continues to offer its good faith collaboration with the Claimant in the context of legal challenges that Canada has filed under NAFTA Chapter Nineteen and at the World Trade Organization ("WTO") with respect to the U.S. DOC's CVD investigation. Nothing in Canada's behaviour even remotely offends NAFTA Chapter Eleven. The Claimant's allegations are fatuous.

16. In this Statement of Defence, Canada will provide: (1) an overview of the relevant facts; (2) a summary of Canada's objections to the Tribunal's jurisdiction and the admissibility of the Claimant's claims; (3) a summary of Canada's defences on the merits; (4) a summary of the shortcomings in the claimant's damages claim; and (5) a brief explanation of Canada's proposal to bifurcate these proceedings.

II. FACTUAL BACKGROUND

A. The North American Supercalendered Paper Market

17. The Claimant is one of four producers of SC paper in Canada, the others being Port Hawkesbury Paper Inc. ("PHP"), Catalyst Paper Corporation ("Catalyst") and Irving Paper Limited ("Irving"). SC paper is also produced in the United States by the Claimant, Verso Corporation, and, until recently,[2] Madison Paper Industries.

[2] **R-001**, UPM, News Release, "UPM closes Madison Paper Industries and plans to sell related hydro power assets in the U.S." (Mar. 14, 2016), available at: http://www.upm.com/About-us/Newsroom/Releases/Pages/UPM-closes-Madison-Paper-Industries-and-plans-to-sell-related-hydro-power-assets-001-Mon-14-Mar-2016-16-03.aspx.

18. Each of these firms has faced the declining global demand for printing paper in recent years. Media reports have estimated reductions in demand as great as 21 per cent from 2002 to 2012,[3] and 25 per cent from 2009 to 2014.[4] As the Claimant described in its NOA, e-commerce and internet news delivery have largely contributed to this trend.[5]

19. SC paper producers across North America have modified their operations in various ways to alleviate the impacts of decreasing demand. For example, in Canada, the Claimant and PHP idled machines and went through creditor protection and restructuring processes, as described below. Catalyst also idled one of its paper machines in 2014, recently shutting it down completely.[6] In the United States, one of the three SC paper producers, Madison Paper Industries, recently shut down its operations.[7]

B. The Claimant's Emergence from Creditor Protection and Implementation of an Asset Optimization Strategy

20. Formerly known as AbitibiBowater Inc., the Claimant was established in 2007 as the result of a merger between Abitibi-Consolidated Inc., a Canadian enterprise, and Bowater Inc., an American enterprise.[8] The Claimant's investment in Canada was approved under the *Investment*

[3] **R-002**, Adam Belz, Star Tribune, "As society sheds paper, an industry shrinks" (Oct. 31, 2013), available at: http://www.startribune.com/business/179601951.html.

[4] **R-003**, Ross Marowits, Globe and Mail, "Resolute Forest closing Laurentide paper mill in Quebec" (Sep. 2, 2014), available at: http://www.theglobeandmail.com/report-on-business/resolute-forest-closing-laurentide-paper-mill-in-quebec/article20316684/.

[5] Notice of Arbitration, ¶ 3.

[6] **R-004**, Catalyst Paper Corporation, News Release, "Catalyst permanently shuts down paper machine No. 9" (Jul. 29, 2016), available at: http://www.catalystpaper.com/media/news/general/catalyst-permanently-shuts-down-paper-machine-no-9.

[7] **R-001**, UPM, News Release, "UPM closes Madison Paper Industries and plans to sell related hydro power assets in the U.S." (Mar. 14, 2016).

[8] **R-005**, Resolute Forest Products, News Release, "Abitibi-Consolidated and Bowater complete combination to form AbitibiBowater" (Oct. 29, 2007), available at: http://resolutefp.mediaroom.com/news-releases?item=135445. This merger triggered a review process under the *Investment Canada Act*, which required Canada's Minister of Industry to determine whether the Claimant's investment was likely to be of net benefit to Canada. **R-006**, *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.), s. 16, available at: http://laws-lois.justice.gc.ca/eng/acts/I-21.8/20030702/P1TT3xt3.html. Note that Canada has provided the version of the Act that was in force at the time of the Claimant's merger in 2007.

Canada Act in July 2007 and the Claimant completed its merger in October 2007.[9] However, by mid-April 2010, the Claimant had filed for protection from its creditors in the United States and Canada.[10]

21. The Claimant emerged from these creditor protection proceedings and a corporate restructuring on December 9, 2010.[11] As part of this restructuring, the Claimant implemented a strategy of "streamlin[ing] [its] operational profile" and "streamlin[ing] [its] asset profile to encompass only better-performing facilities," which included "closing or idling 3.4 million metric tons of paper capacity."[12] In the Claimant's 2010 annual report, its President and CEO Richard Garneau claimed that this strategy allowed the Claimant to create a "flexible operating base better able to deal with market fluctuations and changing trends in market demand."[13]

22. Mr. Garneau later stated in the Claimant's 2011 annual report that the Claimant was continuing to take steps to "optimize [its] asset base", and that it would "continue to assess profitability at each paper […] operation, focusing production and investments at [its] most competitive and modern facilities, and closing or restructuring higher cost operations."[14] As a result of this strategy, Mr. Garneau explained, the Claimant had already made the decision to permanently close three paper machines, including a machine at its Kénogami mill in Québec.[15] Mr. Garneau also set out the Claimant's business priorities for 2012, including "[c]ontinuing to manage [its] production and inventory levels in line with lower demand", "[p]ursuing a strategy

[9] *See* **R-007**, Industry Canada, Website Excerpt, "Archived – July 2007 – Decisions" (May 12, 2010), available at: https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk-30707.html; **R-005**, Resolute Forest Products, News Release, "Abitibi-Consolidated and Bowater complete combination to form AbitibiBowater" (Oct. 29, 2007).

[10] *See* **R-008**, Resolute Forest Products, News Release, "AbitibiBowater receives court orders in the United States and Canada" (Apr. 18, 2009), available at: http://resolutefp.mediaroom.com/news-releases?item=135373.

[11] **R-009**, Resolute Forest Products, "2010 Annual Report", p. 2, available at: http://www.resoluteforestproducts.com/uploadedFiles/Investors/Financial_Reports/AbitibiBowater-2010_Annual_Report.pdf.

[12] **R-009**, Resolute Forest Products, "2010 Annual Report", p. 2.

[13] **R-009**, Resolute Forest Products, "2010 Annual Report", p. 2.

[14] **R-010**, Resolute Forest Products, "2011 Annual Report", p. 2, available at: http://www.resoluteforestproducts.com/uploadedFiles/Investors/Financial_Reports/Resolute-Forest-Products---2011-Annual-Report.pdf.

[15] **R-010**, Resolute Forest Products, "2011 Annual Report", p. 2.

of only bringing profitable tonnes to market", and "[m]aking capital investments at [its] most competitive facilities."[16]

C. The Claimant's Rationalization of its SC Paper Operations in Québec from 2012-2014

23. The Claimant continued its asset optimization strategy and began to rationalize its SC paper operations in Québec in August 2012, before the sale of the Port Hawkesbury paper mill closed. Over the next two years, the Claimant reduced its overall production capacity of SC paper and shifted its remaining capacity out of the aged, inefficient and high-cost Laurentide mill and into its other assets, including the more competitive Dolbeau mill.

1. The Claimant's Strategic Business Decision to Shift Production Capacity From the Laurentide Mill to the Dolbeau Mill

24. On August 24, 2012, the Claimant announced that it was restarting its Dolbeau mill.[17] The Dolbeau mill, which currently has a capacity of 143,000 metric tonnes,[18] had been idle since July 2009.[19] The Claimant stated in a news release that it had decided to reopen the Dolbeau mill "follow[ing] the receipt of a notice of acceptance of the tender regarding the sale of electricity to be produced at the Company's Mistassini cogeneration facility to Hydro-Québec."[20] In this news release, Mr. Garneau stated that Resolute had "spared no effort to relaunch the Dolbeau mill because it [was] a good investment" that would make Resolute "more competitive than ever."[21]

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[16] **R-010**, Resolute Forest Products, "2011 Annual Report", p. 3.

[17] **R-011**, Resolute Forest Products, News Release, "Resolute Forest Products Announces Restart of its Dolbeau (Québec) Paper Mill" (Aug. 24, 2012), ("Resolute News Release of August 24, 2012"), available at: http://resolutefp.mediaroom.com/index.php?s=28238&item=135310.

[18] **R-012**, Resolute Forest Products, website excerpt, "Dolbeau" (2016), available at: http://www.resolutefp.com/installation_site.aspx?siteid=159&langtype=4105.

[19] **R-013**, AbitibiBowater Inc., Form 10–Q, "Notes to Unaudited Interim Consolidated Financial Statements" (Aug. 11, 2009), p. 11, available at: http://www.resolutefp.com/uploadedFiles/AbitibiBowater-Q2-2009_Financial_Report.pdf.

[20] **R-011**, Resolute News Release of August 24, 2012.

[21] **R-011**, Resolute News Release of August 24, 2012.

However, the news release also stated that the Claimant was still "assessing its network of paper mills to ensure that production continue[d] to be balanced."[22]

25. On November 6, 2012, the Claimant announced that it had decided to permanently shut down one of the two paper machines at the Laurentide mill, reducing the mill's capacity by 125,000 metric tonnes, from over 350,000 to 225,000 metric tonnes annually.[23] In a news release, Mr. Garneau stated that "market demand and capacity, the strong Canadian dollar, rising freight and fuel costs, and the continuing high cost of fiber […] factored into management's decision" to shut down the Laurentide paper machine.[24] Mr. Garneau further stated that "Resolute must prove that it is profitable with mills that perform well, which forces us to improve our competitive edge by focusing on our best assets and cutting costs."[25]

26. In the Claimant's 2012 annual report, Mr. Garneau cited the August 2012 restart of the Dolbeau mill and the November 2012 closure of the paper machine at the Laurentide mill among the highlights of the Claimant's efforts towards "optimizing [its] asset base and investing in [its] future," stating that the Claimant had "made significant progress toward optimizing [its] paper and pulp mill network."[26] Mr. Garneau further explained that "[t]he [Dolbeau] machine was newly built in 1999, and [he] believe[d] that together with the power cogeneration unit, the mill [would] be a highly competitive operation."[27] In contrast, Mr. Garneau stated the Claimant had

[22] **R-011**, Resolute News Release of August 24, 2012.

[23] **R-014**, Resolute Forest Products, News Release, "Resolute Forest Products announces permanent shutdown of paper machine at its Laurentide mill" (Nov. 6, 2012), available at: http://resolutefp.mediaroom.com/index.php?s=28238&item=135177.

[24] **R-014**, Resolute Forest Products, News Release, "Resolute Forest Products announces permanent shutdown of paper machine at its Laurentide mill" (Nov. 6, 2012).

[25] **R-014**, Resolute Forest Products, News Release, "Resolute Forest Products announces permanent shutdown of paper machine at its Laurentide mill" (Nov. 6, 2012).

[26] **R-015**, Resolute Forest Products, "2012 Annual Report", p. 8, available at: http://www.resolutefp.com/uploadedFiles/Investors/Financial_Reports/Resolute_Forest_Products-2012_Annual_Report.pdf.

[27] **R-015**, Resolute Forest Products, "2012 Annual Report", p. 8.

"rationalized higher cost capacity by closing [the] supercalendered paper machine in Laurentide."[28]

2. The Claimant's Strategic Decision to Permanently Shut Down the Laurentide Mill

27. On September 2, 2014, the Claimant announced that it would permanently close the Laurentide mill, effective on or about October 15, 2014.[29] In a news release, the Claimant quoted Mr. Garneau as stating that the Claimant had "made every effort to find a way to improve the Laurentide mill's performance," but that "due to its cost structure and challenging market conditions, there [was] no economically viable option for the mill."[30] At that time, the mill was 126 years old and had an annual production capacity of 191,000 metric tonnes.[31]

28. In the Claimant's 2014 annual report, Mr. Garneau described the closure of the Laurentide mill as one of the company's "difficult decisions to ensure ongoing success."[32] Mr. Garneau reported to the Claimant's shareholders that "[t]he cost positions of these operations as well as ongoing market challenges, including the global weakness in newsprint, the high cost of fiber in Quebec, and higher transportation and fuel costs, made them vulnerable."[33]

3. The Claimant's Sale of the Laurentide Mill to the City of Shawinigan

29. On September 8, 2015, the City of Shawinigan issued a news release announcing that the city's municipal economic development corporation, Société de développement de Shawinigan

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[28] **R-015**, Resolute Forest Products, "2012 Annual Report", p. 8.

[29] **R-016**, Resolute Forest Products, News Release, "Resolute Announces Permanent Closure of Laurentide Mill in Shawinigan, Quebec" (Sep. 2, 2014), available at: http://resolutefp.mediaroom.com/index.php?s=28238&item=135267.

[30] **R-016**, Resolute Forest Products, News Release, "Resolute Announces Permanent Closure of Laurentide Mill in Shawinigan, Quebec" (Sep. 2, 2014).

[31] **R-016**, Resolute Forest Products, News Release, "Resolute Announces Permanent Closure of Laurentide Mill in Shawinigan, Quebec" (Sep. 2, 2014).

[32] **R-017**, Resolute Forest Products, "2014 Annual Report", p. 8, available at: http://www.pfresolu.com/uploadedFiles/Investors/Financial_Reports/Resolute_Forest_Products-2014_Annual_Report.pdf.

[33] **R-017**, Resolute Forest Products, "2014 Annual Report", p. 8.

("SDS"), had reached an agreement to acquire the site of the former Laurentide mill from the Claimant.[34] The City stated that it had been working to ensure continued industrial operations at the mill site since Resolute announced the mill closure in September 2014, and in August 2015 had reached an agreement in principle with Nemaska Lithium Inc., which proposed to develop a hydrometallurgical plant there for the production of high purity lithium hydroxide and lithium carbonate.[35] According to news reports, the City acquired the property from the Claimant for between two and three million dollars,[36] while Nemaska acquired the property from the SDS on May 10, 2016, for two million dollars.[37]

D. The Court-Supervised Sale of the Port Hawkesbury Mill in September 2012

30. Over 1,200 kilometres away from Shawinigan, Québec, the Port Hawkesbury mill is located on the southwest coast of Cape Breton Island in Nova Scotia. The Port Hawkesbury mill produces SC paper used in retail inserts, magazines and catalogues.[38] The mill currently consists of one SC paper machine with a production capacity of 360,000 metric tonnes and three thermomechanical pulp lines with a production capacity of 650,000 metric tonnes.[39] Although its

[34] **R-018**, City of Shawinigan, News Release, "Suite à l'acquisition des actifs de Résolu par la SDS; La Ville de Shawinigan est heureuse d'accueillir Nemaska Lithium sur le site de l'ex-usine Laurentide" (Sep. 8, 2015), ("City of Shawinigan News Release"), available at: http://www.shawinigan.ca/Citoyens/Communiques/la-ville-de-shawinigan-est-heureuse-d-accueillir-nemaska-lithium_1438.html.

[35] **R-018**, City of Shawinigan News Release; **R-019**, Nemaska Lithium, News Release, "Nemaska Lithium to Build Hydromet Plant in Shawinigan, Quebec", available at: http://www.nemaskalithium.com/en/investors/press-releases/2015/327aaebd-14ce-47eb-b84f-d62c7fa2369b/.

[36] **R-020**, Louis Cloutier, TVA Nouvelles, "Une fabrique de lithium dans l'ancienne usine Laurentide" (Aug. 31, 2015), available at: http://tvanouvelles.ca/lcn/economie/archives/2015/08/20150831-173311.html; **R-021**, Patrick Vaillancourt, L'hebdo du St-Maurice, "L'usine Laurentide devrait revivre" (Sep. 1, 2015), available at: http://www.lhebdodustmaurice.com/Actualites/Economie/2015-09-01/article-4263892/Lusine-Laurentide-devrait-revivre/1.

[37] **R-022**, Nemaska Lithium, News Release, "Nemaska Lithium Completes Acquisition of Shawinigan Facilities, Quebec" (May 10, 2016), available at: http://www.nemaskalithium.com/en/investors/press-releases/2016/d8d2bf6e-38d7-40bb-b259-5bd42fb9932e/.

[38] **R-023**, Port Hawkesbury Paper LLC, "Port Hawkesbury Mill Datasheet" (2016), p. 1, available at: http://www.wlinpco.com/PH_Mill_Datasheet_v4.2016.pdf.

[39] **R-023**, Port Hawkesbury Paper LLC, "Port Hawkesbury Mill Datasheet" (2016), p. 2.

SC paper machine only began operating in 1998, the site of the Port Hawkesbury paper mill has been used for various pulp and paper mill operations since 1962.[40]

31. As of August 2011, the Port Hawkesbury mill was operated by NewPage Port Hawkesbury Corp. ("NPPH"), a company incorporated in Nova Scotia that was a wholly-owned subsidiary of United States-based NewPage Corporation ("NPC").[41] As described below, the mill was sold by NPPH to the Pacific West Commercial Corporation ("PWCC"), a Canadian enterprise, through a court-supervised sales process completed in September 2012.

1. The Creditor Protection Proceedings that Led to the Sale of the Port Hawkesbury Mill

32. On August 22, 2011, NPC announced that, due to market and economic conditions facing NPPH, it would initiate downtime of the Port Hawkesbury mill's operations starting in mid-September 2011.[42] Approximately two weeks later, on September 6, 2011, NPPH applied to the Supreme Court of Nova Scotia (the "Court") for creditor protection under Canada's *Companies' Creditors Arrangement Act*[43] ("CCAA").[44]

33. The manager of the Port Hawkesbury mill explained in a sworn affidavit that "NPPH [was] in dire financial straits" and had been suffering significant operating losses totalling approximately $50 million over the previous year alone.[45] While NPPH's United States parent company NPC had funded those losses until then, its own financial difficulties prevented it from continuing to do so.[46]

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[40] **R-023**, Port Hawkesbury Paper LLC, "Port Hawkesbury Mill Datasheet" (2016), p. 1.

[41] **R-024**, *Re NewPage Port Hawkesbury Corp.*, Affidavit of Tor E. Suther (Sep. 6, 2011) (S.C.N.S.), ("Suther Affidavit"), ¶¶ 14-15.

[42] **R-024**, Suther Affidavit, ¶ 7.

[43] **R-025**, *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, available at: http://laws-lois.justice.gc.ca/eng/acts/C-36/FullText.html.

[44] **R-026**, *Re NewPage Port Hawkesbury Corp.*, Notice of Application in Chambers (Sep. 6, 2011) (S.C.N.S.)

[45] **R-024**, Suther Affidavit, ¶ 6.

[46] **R-024**, Suther Affidavit, ¶ 6. Indeed, NPC filed for Chapter 11 bankruptcy protection under the U.S. Bankruptcy Code the next day, on September 7, 2011. 11 U.S.C. §§ 101-1532. *See* **R-027**, Voluntary Petition, *In re NewPage*

34. On September 9, 2011, the Court granted the application for creditor protection and appointed Ernst & Young Inc. (the "Monitor") to monitor the business and financial affairs of NPPH during the proceedings under the CCAA.[47] The Court also authorized and directed NPPH and the Monitor to implement a process for soliciting offers for the sale of the assets of NPPH, to be facilitated and overseen by the Monitor (the "Sales Process").[48]

35. The Monitor published a notice of the Sales Process in regional and national newspapers and directly contacted 110 strategic and financial parties potentially interested in acquiring the assets of NPPH.[49] Ultimately, four bidders, including PWCC, submitted final offers by the deadline of December 16, 2011.[50] On January 12, 2012, the Monitor reported to the Court that it had recommended that NPPH accept PWCC's bid.[51] In the Monitor's opinion, "[t]he PWCC offer provide[d] the greatest potential recovery to the estate in terms of purchase price and the likelihood of having ongoing operations in Port Hawkesbury, which in turn [would] have beneficial ramifications to NPPH employees and the community."[52]

36. On July 6, 2012, PWCC and NPPH entered into an agreement (the "Plan Sponsorship Agreement") whereby, subject to the fulfillment of certain conditions, PWCC would act as the sponsor of a plan of compromise and arrangement for NPPH under the CCAA (the "Plan").[53] The Plan and Plan Sponsorship Agreement further contemplated a restructuring transaction

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Corp., Case No. 11-12804 (KG) (Sep. 7, 2011) (Bankr. D. Del.), available at: http://www.kccllc.net/newpage/document/881840011090700000000001.

[47] **R-028**, *Re NewPage Port Hawkesbury Corp.*, Initial Order (Sep. 9, 2011) (S.C.N.S.), ¶¶ 17-19 and 26-34.

[48] **R-029**, *Re NewPage Port Hawkesbury Corp.*, Order (Approval of Settlement and Transition Agreement and Sales Process) (Sep. 9, 2011) (S.C.N.S.), ¶ 3 and Schedule A: Sales Process Terms.

[49] **R-030**, *Re NewPage Port Hawkesbury Corp.*, Second Report of the Monitor (Oct. 3, 2011) (S.C.N.S.), ¶¶ 14-15.

[50] **R-031**, *Re NewPage Port Hawkesbury Corp.*, Sixth Report of the Monitor (Jan. 13, 2012) (S.C.N.S.), ("Sixth Report of the Monitor"), ¶¶ 19-20.

[51] **R-031**, Sixth Report of the Monitor, ¶ 19.

[52] **R-031**, Sixth Report of the Monitor, ¶ 19.

[53] **R-032**, *Re NewPage Port Hawkesbury Corp.*, Affidavit of Peter Wedlake – Part 1 (July 6, 2012) (S.C.N.S.), Exhibit A: Plan of Compromise and Arrangement of NewPage Port Hawkesbury Corp.; **R-033**, *Re NewPage Port Hawkesbury Corp.*, Affidavit of Peter Wedlake – Part 2 (July 6, 2012) (S.C.N.S.), ("Wedlake Affidavit – Part 2"), Exhibit B: Plan Sponsorship Agreement.

through which NPPH would be continued as PHP, a successor corporation which PWCC would acquire for $33 million.[54]

37. On July 17, 2012, NPPH obtained the Court's approval of the Plan Sponsorship Agreement and authorization to present the Plan for the consideration of its creditors.[55] A majority of the creditors gave approval, the Court sanctioned an amended and restated version of the Plan on September 25, 2012, and the sale transaction between NPPH and PWCC closed on September 28, 2012.[56]

2. Nova Scotia's Funding to Maintain the Mill in Hot Idle and Purchase of Services from the Mill's Supply Chain During the Sales Process

38. When NPPH applied for creditor protection, its operations directly employed approximately 1,000 people: 650 as employees at the Port Hawkesbury mill and 350 as independent contractors in forestry operations that provided timber harvesting and other forestry services.[57] In a province with a working-age population of only 778,500,[58] the mill represented a major source of employment. It was particularly important to the Cape Breton Region, which had total employment of only 52,800, and the highest unemployment rate in the province, at 15.9 per cent.[59] Cape Breton had also experienced the province's largest employment decline of 4.0 per cent over the previous five years.[60]

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[54] **R-033**, Wedlake Affidavit – Part 2, Exhibit B: Plan Sponsorship Agreement, art. 1.

[55] **R-034**, *Re NewPage Port Hawkesbury Corp.*, Meeting Order (July 17, 2012) (S.C.N.S.), ¶¶ 3(a) and (b).

[56] Article 1.1 of the Plan defined the "Effective Date" as "the day on which the Monitor delivers the Monitor's Certificate to the Applicant and the Plan Sponsor pursuant to Section 9.3", which occurred on September 28, 2012. **R-035**, *Re NewPage Port Hawkesbury Corp.*, Plan Sanction Order (Sep. 25, 2012) (S.C.N.S.), ("Plan Sanction Order"), Schedule A: Amended and Restated Plan of Compromise and Arrangement, art. 1.1; **R-036**, *Re NewPage Port Hawkesbury Corp.*, Monitor's Certificate (Sep. 28, 2012) (S.C.N.S.)

[57] **R-024**, Suther Affidavit, ¶ 45.

[58] **R-037**, Nova Scotia Department of Labour and Advanced Education, "2011 Nova Scotia Labour Market Review" (2012), p. 11, available at: https://careers.novascotia.ca/sites/all/files/EN_2011_LMR.pdf.

[59] **R-037**, Nova Scotia Department of Labour and Advanced Education, "2011 Nova Scotia Labour Market Review" (2012), p. 6.

[60] **R-037**, Nova Scotia Department of Labour and Advanced Education, "2011 Nova Scotia Labour Market Review" (2012), p. 6.

39. In this context, the Government of Nova Scotia decided to support the sale of the Port Hawkesbury mill in a way that would improve the chances it would be purchased as a going concern, which would result in continued employment for workers in the Cape Breton region, rather than the mill being dismantled for scrap. As described below, Nova Scotia provided support at various points during the creditor-protection proceedings between September 2011 and September 2012.

(a) The Forestry Infrastructure Fund

40. On September 9, 2011, the day that NPPH entered creditor protection, the Nova Scotia Premier's Office announced that the Province would create an "action plan [… to] employ hundreds of woods workers, provide specialized training programs and keep the NewPage mill in Port Hawkesbury ready for a quick re-sale."[61] The Premier's Office explained that "[t]he plan will…keep harvesters and truckers working [and] ensure Crown forest roads are maintained in the NewPage Port Hawkesbury harvest area."[62]

41. The Department of Natural Resources announced further details on the Province's support for the Nova Scotia woods workers on September 20, 2011, stating that an agreement had been reached with NewPage Port Hawkesbury to create a $14-million Forestry Infrastructure Fund ("FIF").[63] The FIF would facilitate forest management activities that the Department of Natural Resources had to continue, including new silviculture work, harvesting, road maintenance on Crown land, a forestry training program, and a woodlands core team. The agreement establishing the FIF (the "FIF Agreement") contemplated that NPPH would serve as an intermediary between the Province and the approximately 350 independent contractors who would provide forestry services to the Province. The Province considered these services necessary to its forestry strategy regardless of the ultimate disposition of the mill. The Monitor filed a copy of the FIF Agreement

[61] **R-038**, Nova Scotia Premier's Office, News Release, "Seven-point Woodlands Plan Keeps Plant Resale Ready" (Sep. 9, 2011), available at: http://novascotia.ca/news/release/?id=20110909004.

[62] **R-038**, Nova Scotia Premier's Office, News Release, "Seven-point Woodlands Plan Keeps Plant Resale Ready" (Sep. 9, 2011).

[63] **R-039**, Nova Scotia Department of Natural Resources, News Release, "Province Presents Forestry Infrastructure Plan" (Sep. 20, 2011), available at: http://novascotia.ca/news/release/?id=20110920006.

with the Court,[64] which approved it on September 23, 2011, on the basis that NPPH would incur no net cost in serving as the Province's intermediary.[65]

42. On March 16, 2012, the Premier's Office announced that the Province would provide an additional $12 million in funding to the FIF, $3 million of which it expected to recover through logging sales made possible by the FIF Agreement and ongoing independent contractor harvesting of timber on Crown land.[66] The Premier's Office also publicly disclosed the amount of total spending to date under the Province's previous funding commitment, stating that $12.3 million of the $14 million originally allocated to the FIF had been spent, with $3 million recovered through logging sales, for a net of $9.3 million spent as of March 16, 2012.

43. Following this announcement, as publicly reported by the Monitor, the Province and NPPH implemented the additional FIF funding by executing an amendment to the FIF Agreement.[67]

(b) The Hot Idle Funding

44. When NPPH entered into creditor protection proceedings in September 2011, it also entered into a settlement and transition agreement with its parent company NPC whereby NPC paid NPPH $25 million to acquire its raw materials, work-in-process, and finished goods inventories.[68] Because NPPH had no cash reserves apart from the settlement and transition

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[64] **R-040**, *Re NewPage Port Hawkesbury Corp.*, First Report of the Monitor (Sep. 20, 2011) (S.C.N.S.), Appendix B.

[65] **R-041**, *Re NewPage Port Hawkesbury Corp.*, Woodmen's Reserve Fund Claims Process Order (Sep. 23, 2011) (S.C.N.S.)

[66] **R-042**, Nova Scotia Premier's Office, News Release, "Province Protects Jobs, Keeps Mill Re-sale Ready" (Mar. 16, 2012), available at: http://novascotia.ca/news/release/?id=20120316002; **R-043**, Province of Nova Scotia, Backgrounder, "Provincial Support to former NewPage Port Hawkesbury Paper Mill" (Mar. 16, 2012), p. 1, available at: http://www.novascotia.ca/news/docs/2012/Mar/factsheet.pdf.

[67] **R-044**, *Re NewPage Port Hawkesbury Corp.*, Eighth Report of the Monitor (Mar. 26, 2012) (S.C.N.S.), ¶¶ 56-57; **R-045**, *Re NewPage Port Hawkesbury Corp.*, Ninth Report of the Monitor (May 28, 2012) (S.C.N.S.), ¶ 46.

[68] **R-046**, *Re NewPage Port Hawkesbury Corp.*, Report of the Proposed Monitor (Sep. 7, 2011) (S.C.N.S.) ("Report of the Proposed Monitor"), ¶ 63.

agreement funds, NPC made the $25 million available to NPPH to maintain the mill in "hot idle," enabling a sale of the mill as a going concern rather than for scrap.[69]

45. As explained by the Monitor, "Hot Idle Status indicates that the plant has been taken out of active production in such a way as to permit a smooth resumption of production when circumstances permit."[70] This stands in contrast with "'cold idle' [which] is a more complex shut-down operation involving draining of potentially hazardous chemicals and preparation of the machinery either for decommissioning or potentially a long-term shut down."[71]

46. On November 25, 2011, before the final bids for the purchase of the Port Hawkesbury mill were made, the Monitor notified the Court and all parties concerned that NPPH would no longer have sufficient cash on hand to continue operating in hot idle after January 20, 2012.[72] Therefore, on January 4, 2012, the Nova Scotia Department of Natural Resources announced that "the province [would] continue to keep the mill re-sale ready through February and March during negotiations with successful bidder Pacific West Commercial Corporation."[73] The news release stated that this was "expected to cost up to $5 million."[74] The Monitor provided further details on this hot idle funding in the report it filed with the Court on February 27, 2012, stating that "the Province [had] confirmed that it will provide funding to [NPPH] as required to a maximum of $5 million", subject to "partial recourse to the assets of NPPH in certain limited circumstances and

[69] **R-046**, Report of the Proposed Monitor, ¶ 79.

[70] **R-046**, Report of the Proposed Monitor, ¶ 32.

[71] **R-046**, Report of the Proposed Monitor, ¶ 32.

[72] **R-047**, *Re NewPage Port Hawkesbury Corp.*, Fifth Report of the Monitor (Nov. 24, 2011) (S.C.N.S.), ¶ 71.

[73] **R-048**, Nova Scotia Department of Natural Resources, News Release, "Province Will Keep NewPage Mill in Point Tupper Re-Sale Ready" (Jan. 4, 2012), available at: http://novascotia.ca/news/release/?id=20120104002.

[74] **R-048**, Nova Scotia Department of Natural Resources, News Release, "Province Will Keep NewPage Mill in Point Tupper Re-Sale Ready" (Jan. 4, 2012).

only if no going concern outcome is achieved."[75] NPPH sought and obtained a Court order memorializing this arrangement.[76]

47. When it announced $12 million in additional funding for the FIF on March 16, 2012, the Premier's Office also announced that the Province would provide an additional $5.8 million in hot idle funding to support the process leading to the Port Hawkesbury mill's sale as a going concern until the end of September 2012.[77] The Province and NPPH concluded an agreement granting the additional hot idle funding on March 27, 2012, which the Monitor filed with the Court on the same date.[78]

3. The Agreements Negotiated between the Province and PWCC

48. Aside from the FIF and hot idle funding it provided during the Sales Process, the Province also negotiated a series of agreements with PWCC to facilitate its acquisition of the Port Hawkesbury mill. For example, the Province concluded a Forest Utilization License Agreement ("FULA") with PWCC on September 27, 2012.[79] The FULA governs the mill's access to fibre on certain Crown lands, obliging PHP to purchase a minimum of 200,000 green metric tonnes

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[75] **R-049**, *Re NewPage Port Hawkesbury Corp.*, Seventh Report of the Monitor (Feb. 27, 2012) (S.C.N.S.), ("Seventh Report of the Monitor"), ¶¶ 32-45.

[76] *See* **R-050**, *Re NewPage Port Hawkesbury Corp.*, Reimbursement Order (Mar. 1, 2012) (S.C.N.S.)

[77] **R-042**, Nova Scotia Premier's Office, News Release, "Province Protects Jobs, Keeps Mill Re-sale Ready" (Mar. 16, 2012); **R-043**, Province of Nova Scotia, Backgrounder, "Provincial Support to former NewPage Port Hawkesbury Paper Mill" (Mar. 16, 2012), p. 2.

[78] **R-051**, *Re NewPage Port Hawkesbury Corp.*, Supplement to the Eighth Report of the Monitor (Mar. 27, 2012) (S.C.N.S.), Appendix A.

[79] The agreement was made public in its entirety on November 9, 2012. *See* **R-052**, Forest Utilization Agreement between Her Majesty the Queen in Right of the Province of Nova Scotia and Port Hawkesbury Paper LP, "Forest Utilization License Agreement (Redacted)" (Sep. 27, 2012), ("FULA"), available at: https://www.novascotia.ca/natr/library/forestry/reports/FULA-Nov9-2012.pdf; **R-053**, CBC News, "NDP releases forest agreement with Port Hawkesbury mill" (Nov. 9, 2012), available at: http://www.cbc.ca/news/canada/nova-scotia/ndp-releases-forest-agreement-with-port-hawkesbury-mill-1.1177525; **R-054**, Ryan Van Horne, Cape Breton Post article, "Province releases agreement with Port Hawkesbury Paper" (Nov. 9, 2012), available at: http://www.capebretonpost.com/News/Local/2012-11-09/article-3117919/Province-releases-agreement-with-Port-Hawkesbury-Paper/1.

("GMT") per year of pulpwood from private suppliers, while allowing it to harvest 400,000 GMT per year of pulpwood from Crown land.[80]

49. Nova Scotia and PWCC also concluded a Sustainable Forest Management and Outreach Program Agreement, a Letter of Offer Agreement for certain financial assistance including certain loans and grants, and a Real Property Agreement. Nova Scotia announced the conclusion of these agreements and released details of their main features.[81]

50. For example, on August 20, 2012, the Premier's Office issued a news release announcing that the Province, through the Nova Scotia Jobs Fund, would provide "a financial commitment to support the sale of the former NewPage mill" to PWCC.[82] The news release stated that this financial commitment included a $24 million loan for improved productivity and efficiency, a $40 million repayable loan for working capital, $1.5 million for worker training, and $1 million for a marketing plan.[83]

51. The news release also stated that the Department of Natural Resources would "invest $20 million to buy 51,500 acres of land" as part of its commitment to increase Crown land share, and provide $3.8 million annually for 10 years "to support sustainable harvesting, forest land management, and fund programs to allow more woodlot owners and pulpwood suppliers to become more active in the management of their woodlands [.]"[84]

52. The Premier's Office announced a revised agreement with PWCC on September 22, 2012, stating that "the province's previously announced support remain[ed] the same," subject to

[80] **R-052**, FULA, arts. 4.1, 4.2, 11.1 and Schedule F.

[81] **R-035**, Plan Sanction Order, Schedule A: Amended and Restated Plan of Compromise and Arrangement, arts. 1.1 and 9.2(e).

[82] **R-055**, Nova Scotia Premier's Office, News Release, "Province Invests in Jobs, Training and Renewing the Forestry Sector" (Aug. 20, 2012), available at: http://novascotia.ca/news/release/?id=20120820001.

[83] **R-055**, Nova Scotia Premier's Office, News Release, "Province Invests in Jobs, Training and Renewing the Forestry Sector" (Aug. 20, 2012).

[84] **R-055**, Nova Scotia Premier's Office, News Release, "Province Invests in Jobs, Training and Renewing the Forestry Sector" (Aug. 20, 2012).

certain exceptions, in particular that the $40-million working capital loan would be earnable instead of repayable.[85]

4. The Property Tax Agreement Negotiated between Richmond County and PWCC and the *Richmond-NewPage Port Hawkesbury Tax Agreement Act*

53. As part of the sale, PWCC also concluded an agreement with NPPH and Richmond County, the municipal jurisdiction where the Port Hawkesbury mill is located, concerning the municipal real property taxes payable on the mill lands for the balance of the 2012 taxation year through to March 31, 2016 (the "Property Tax Agreement").[86] The Property Tax Agreement set the mill's annual property taxes at approximately $1.3 million.[87] The Nova Scotia Legislature authorized this agreement as required on December 6, 2012, by enacting the *Richmond-NewPage Port Hawkesbury Tax Agreement Act*.[88]

5. The Load Retention Tariff Negotiated Between PWCC and NSPI

54. Another condition of PWCC's acquisition of the Port Hawkesbury mill was the successful negotiation of an energy supply agreement between PWCC and NSPI for the NPPH operations.[89] A wholly-owned subsidiary of the publicly-traded company Emera Incorporated,[90] NSPI is Nova Scotia's primary electricity provider and the supplier of electricity to the Port Hawkesbury mill. PWCC and NSPI negotiated a Load Retention Tariff ("LRT"), which set the rate payable for

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[85] **R-056**, Nova Scotia Premier's Office, News Release, "Province Negotiates New, Better Deal to Reopen Mill, Support the Strait" (Sep. 22, 2012), available at: http://novascotia.ca/news/release/?id=20120922001.

[86] *Amendment to Tax Agreement*, being Schedule B to **R-057**, *Richmond Port Hawkesbury Paper GP Ltd. Taxation Act*, S.N.S. 2006, c. 51, as amended by S.N.S. 2012, c. 49 ("*Richmond Port Hawkesbury Paper GP Ltd. Taxation Act*"), available at: http://nslegislature.ca/legc/statutes/richmond%20port%20hawkesbury%20paper.pdf.

[87] **R-057**, *Richmond Port Hawkesbury Paper GP Ltd. Taxation Act.*, Schedule A, 1(a)-1(c).

[88] **R-058**, *Richmond–NewPage Port Hawkesbury Tax Agreement Act*, S.N.S. 2012, c. 49, s. 7, available at: http://nslegislature.ca/legc/PDFs/annual%20statutes/2012%20Fall/c049.pdf. *See also* **R-057**, *Richmond Port Hawkesbury Paper GP Ltd. Taxation Act*, s. 5.

[89] **R-049**, Seventh Report of the Monitor, ¶ 17; **R-035**, Plan Sanction Order, Schedule A: Amended and Restated Plan of Compromise and Arrangement, art. 9.2(i).

[90] *See* **R-059**, Emera, "2015 Annual Report" (2015), pp. 6 and 22, available at: http://investors.emera.com/Cache/1500083715.PDF?Y=&O=PDF&D=&fid=1500083715&T=&iid=4072693; *See also* **R-060**, Emera, "Investor Presentation" (May 18, 2016), p.5, available at: http://investors.emera.com/Cache/1500085794.PDF?Y=&O=PDF&D=&FID=1500085794&T=&IID=4072693.

electricity supplied to the Port Hawkesbury mill by the privately-owned utility company. The LRT was approved by the Nova Scotia Utility and Review Board pursuant to Nova Scotia's *Public Utilities Act*[91] on September 27, 2012.[92]

E. The United States' Investigation into Alleged Subsidization of SC Paper from Canada

55. Nova Scotia's support for PWCC's acquisition of the Port Hawkesbury mill received extensive media coverage in Canada,[93] and was also reported by United States. media outlets.[94] These news reports fuelled allegations of subsidization of Canadian exports of SC paper to the United States, raising the spectre of an investigation by the United States authorities. While the

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[91] **R-061**, *Public Utilities Act*, R.S.N.S. 1989, c. 380, available at: http://nslegislature.ca/legc/statutes/public%20utilities.pdf.

[92] **R-062**, *Re Pacific West Commercial Corporation*, 2012 NSUARB 126, available at: http://www.canlii.org/en/ns/nsuarb/doc/2012/2012nsuarb126/2012nsuarb126.html?resultIndex=1, as amended by **R-063**, *Re Pacific West Commercial Corporation*, 2012 NSUARB 144, available at: http://www.canlii.org/en/ns/nsuarb/doc/2012/2012nsuarb144/2012nsuarb144.html?resultIndex=1.

[93] *See, e.g.*, the numerous examples filed as exhibits to the Claimant's Notice of Arbitration (**R-064**, The Chronicle Herald, "Paper mill sale finalized" (Sep. 28, 2012), available at: http://thechronicleherald.ca/business/141140-paper-mill-sale-finalized; **R-065**, Nancy King, Cape Breton Post, "UARB approves paper mill power deal" (Aug. 20, 2012), available at: http://www.capebretonpost.com/News/Local/2012-08-20/article-3056733/UARB-approves-paper-mill-power-deal/1; **R-066**, Pulp & Paper Canada, "Nova Scotia mill restarts as Port Hawkesbury Paper" (Dec. 1, 2012), available at: http://www.pulpandpapercanada.com/news/nova-scotia-mill-restarts-as-port-hawkesbury-paper-1001952406; **R-067**, Cumberland News Now, "Former NewPage Port Hawkesbury paper mill in Nova Scotia sold to Vancouver firm" (Sep. 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; **R-068**, Brett Bundale, Chronicle Herald, "Mill gets millions in N.S. Cash" (Aug. 21, 2012), available at: http://thechronicleherald.ca/novascotia/128302-mill-gets-millions-in-ns-cash; **R-069**, Cassie Williams, CBC News, "Nova Scotia paper mill revived in 11th-hour twist" (Sep. 22, 2012), available at: http://www.cbc.ca/news/canada/nova-scotia/nova-scotia-paper-mill-revived-in-11th-hour-twist-1.1148136; **R-070**, Brett Bundale, The Chronicle Herald,"Plant restart could topple competitors" (Aug. 21, 2012), available at: http://thechronicleherald.ca/business/128645-plant-restart-could-topple-competitors; **R-071**, Marc Dubé, The Chronicle Herald, "Full steam ahead for paper mill" (Dec. 6, 2012), available at: http://thechronicleherald.ca/opinion/222523-full-steam-ahead-for-paper-mill).

[94] *See, e.g.*, **R-072**, Whit Richardson, Bangor Daily News, "Nova Scotia mill startup could harm Maine's paper industry, trigger pursuit of tariffs" (Aug. 27, 2012), available at: http://bangordailynews.com/2012/08/27/business/nova-scotia-mill-startup-could-harm-maines-paper-industry-trigger-pursuit-of-tariffs/; **R-073**, Whit Richardson, Bangor Daily News, "Nova Scotia paper mill calls back employees, reaches deal to reopen this week" (Sep. 24, 2012), available at: http://bangordailynews.com/2012/09/24/business/nova-scotia-paper-mill-calls-back-employees-reaches-deal-to-reopen-this-week/; **R-074**, Adam Belz, Star Tribune, "Paper industry subsidies strike home in Nova Scotia and Minnesota" (Sep. 19, 2012), available at: http://www.startribune.com/paper-industry-subsidies-strike-home-in-nova-scotia-and-minnesota/170367846/.

Claimant criticizes Canada for allegedly failing to act in response to warnings by the Claimant that such an investigation could be on the horizon, Canada had no control over the U.S. DOC's decision to initiate the investigation. Nonetheless, Canada responded to the investigation and worked assiduously to defend its interests and those of the SC paper producers in Canada, including the Claimant.

1. The United States Trade Representative's Questions and Canada's Responses

56. On September 26, 2012, the day after the Court approved the sale of the Port Hawkesbury mill to PWCC, United States Congressman Mike Michaud of Maine issued a news release calling for a "U.S. response to Canadian paper mill subsidies."[95] The news release included the text of a letter to the United States Trade Representative ("USTR") alleging that Nova Scotia's supposed "rescue package" for the Port Hawkesbury mill was "likely to lead to a decreased market share for [Maine's SC paper] mills."[96] Mr. Michaud asked that USTR obtain information about the Nova Scotia Measures from Canada and determine whether they were consistent with Canada's WTO and NAFTA commitments. The media reported on the issue, including USTR's response that the alleged support for the Port Hawkesbury Paper mill "raised 'troubling questions' about potential injury to U.S. businesses" and that the United States planned to raise the matter with Canada at the WTO.[97]

57. USTR sent questions about Nova Scotia's support for the Port Hawkesbury mill to the Government of Canada on October 10, 2012. The United States also raised the issue during a

[95] **R-075**, Congressman Mike Michaud, News Release, "Michaud Pushes for U.S. Response to Canadian Paper Mill Subsidies" (Sep. 26, 2012), available at: http://web.archive.org/web/20120928023659/http://michaud.house.gov/press-release/michaud-pushes-us-response-canadian-paper-mill-subsidies. Mr. Michaud represented a congressional district in the state of Maine where the Claimant's and PHP's competitor Madison Paper Industries produced SC paper.

[96] **R-075**, Congressman Mike Michaud, News Release, "Michaud Pushes for U.S. Response to Canadian Paper Mill Subsidies" (Sep. 26, 2012).

[97] **R-076**, Canadian Press, Financial Post, "U.S. trade rep Kirk probes possible subsidies to Port Hawkesbury mill" (Oct. 4, 2012), available at: http://business.financialpost.com/news/u-s-trade-official-launches-probe-into-possible-subsidies-to-n-s-mill; **R-077**, Michael MacDonald, Globe and Mail, "U.S. launches trade inquiry into aid for Cape Breton paper mill" (Oct. 4, 2012), available at: http://www.theglobeandmail.com/report-on-business/economy/us-launches-trade-inquiry-into-aid-for-cape-breton-paper-mill/article4589642/.

meeting of the WTO Committee on Subsidies and Countervailing Measures ("SCM Committee") on October 23, 2012. As reported in the publicly available minutes for that meeting,[98] the United States expressed its view that many of Nova Scotia's measures in support of the Port Hawkesbury mill might constitute actionable subsidies, and invited Canada to provide details regarding these measures. The publicly available minutes also report Canada's response that "it was working with the provincial government on replies to the questions that the US had sent regarding this issue and expected to provide such replies in November 2012."[99] Canada ultimately provided responses to USTR's questions on November 23, 2012.

58. USTR wrote to Canada's Minister of International Trade reiterating its concern about Nova Scotia's support for the Port Hawkesbury mill on January 17, 2013. On February 27, 2013, the Minister of International Trade responded to USTR that the Government of Canada had already offered a full disclosure of the information it possessed while respecting business confidentiality, and referred USTR to the responses provided in November 2012.

59. The issue was discussed at another WTO SCM Committee meeting on April 22, 2013. The publicly available meeting minutes reflect Canada's response, specifically that "the Federal Government and the Government of Nova Scotia had worked with the US and the EU to resolve this issue and had already provided responses to the US government's first set of questions in November, and to a second set of questions in February. It had provided as much information as possible while respecting the business confidentiality of the information."[100]

2. Canada's Cooperation with the Claimant in the U.S. DOC's CVD Investigation

60. On February 26, 2015, two producers of SC paper in the United States, Madison Paper Industries and Verso Corporation, submitted a CVD petition to the U.S. DOC and the United

[98] **R-078**, WTO, Committee on Subsidies and Countervailing Measures, "Minutes of the Regular Meeting held on 23 October 2012" (Jan. 10, 2013), WTO Doc. G/SCM/M/83, ("Minutes of the Regular Meeting held on 23 October 2012"), ¶ 61), available at: https://docs.wto.org/.

[99] **R-078**, Minutes of the Regular Meeting held on 23 October 2012, ¶ 63.

[100] **R-079**, WTO, Committee on Subsidies and Countervailing Measures, "Minutes of the Regular Meeting held on 22 April 2013" (Aug. 5, 2013), WTO Doc. G/SCM/M/85, ¶¶ 128-132, available at: https://docs.wto.org/.

States International Trade Commission requesting the initiation of an investigation into SC paper imports from Canada.[101] The petition alleged that the Government of Canada and certain Canadian provinces, including Nova Scotia, were providing countervailable subsidies to such imports, which was causing or threatening to cause material injury to the United States' SC paper industry. The U.S. DOC formally initiated an investigation into these allegations on March 18, 2015.

61. The Claimant had previously expressed concern to Canadian officials about the potential for such an investigation and Canada accordingly engaged with the Claimant, the United States Government and other Canadian SC paper producers in anticipation of that eventuality. Since the ultimate decision to initiate the CVD investigation was the United States Government's, not Canada's, the Claimant's dissatisfaction with Canada's efforts to head off the dispute is both a distortion of reality and irrelevant.

62. In responding to the U.S. DOC's investigation, Canada cooperated and consulted closely with all four producers of SC paper in Canada, including the Claimant. Canada made the effort to work with the Claimant despite the fact that the Claimant had, during a meeting with Canada's Minister of International Trade on February 24, 2015, given notice of its intention to sue Canada under NAFTA Chapter Eleven for the same Nova Scotia Measures that were the subject of the U.S. DOC's investigation.[102] The Claimant even went so far as to threaten to take positions adverse to Canada and the other Canadian SC paper producers in the U.S. DOC investigation "depend[ing] in significant part on the disposition of the Government of Canada toward [Resolute's] potential NAFTA proceeding."[103]

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[101] **R-080**, Department of Commerce, "Supercalendered Paper From Canada: Initiation of Countervailing Duty Investigation" (Mar. 26, 2015) ("Supercalendered Paper From Canada: Initiation of Countervailing Duty Investigation"), 80 Fed. Reg. 15981-15983, available at: http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2015/SC%20Paper%20from%20Canada/Preliminary/fr_commerce_initiation_sc_paper_prelim.pdf.

[102] **R-081**, Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement (Feb. 24, 2015). The Claimant formally filed its Notice of Intent ("NOI") on September 30, 2015.

[103] **R-082**, Letter from Richard Garneau, President and CEO of Resolute Forest Products Inc., to Ed Fast, Minister of International Trade (Mar. 2, 2015).

63. The Claimant in fact did take positions contrary to Canada's position in the SC paper investigation only a few weeks after it told Canada of its plan to launch this NAFTA Chapter Eleven arbitration. Specifically, at a United States International Trade Commission hearing on March 19, 2015, the Claimant stated on the record that "the reopening of the Port Hawkesbury mill […] had an extremely serious impact on Resolute's operations" and was "the proximate cause for the closure of the Laurentide mill," and that the Claimant saw it as "lowering [its] prices and disrupting [its] competitive position."[104] This statement directly contradicted Canada's interests and the interests of all the other Canadian parties in the U.S. DOC's investigation, since a finding of injury is a necessary prerequisite to any imposition of countervailing duties.

64. But despite the Claimant's tactics, Canada continued to consult with it in good faith. Canada held meetings with the Claimant regularly, for example, to discuss responses to questionnaires issued by the U.S. DOC. Canada provided the Claimant with drafts of various submissions to seek its input, and invited the Claimant to participate in meetings and calls with Canada and relevant provincial governments in order to discuss and consult on the parties' positions on various issues implicating the Claimant. The Claimant's allegation that Canada "proceeded to develop defensive strategies in the U.S. case, meeting with counsel for all producers in Canada except Resolute"[105] is patently false.

65. There were, however, limits on how far Canada could reasonably accommodate the Claimant's demands without jeopardizing its own legal position and the legal position of the other SC paper producers under investigation. For example, Canada could not share a draft of a consultations paper it filed with the U.S. DOC in advance of consultations held on March 12, 2015, given that the Claimant was threatening to launch these NAFTA Chapter Eleven

[104] **R-083**, United States International Trade Commission, Investigation No. 701-TA-530, "Transcript of Staff Conference" (Mar. 19, 2015), p. 150 (lines 9-16), available at: http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2015/SC%20Paper%20from%20Canada/Preliminary/supercalenderd_paper_from_canada_conference_03-19-2015.pdf.

[105] Notice of Arbitration, ¶ 71.

proceedings.[106] But Canada still made the effort to accommodate the Claimant, for example, by incorporating the Claimant's views into the consultations paper.

66. Furthermore, the Claimant could not be included in a Joint Defence and Confidentiality Agreement ("JDCA") established between Catalyst, Irving, PHP, the Government of Canada and relevant provincial governments, including the Government of Nova Scotia, for very good reasons. The JDCA was established to enable the sharing of privileged and confidential information in relation to the measures at issue in the U.S. DOC's investigation, including the Nova Scotia Measures. Making the Claimant part of the JDCA would have granted it access to confidential documents and legal strategy which it could then use against Canada in this NAFTA Chapter Eleven arbitration. Despite the Claimant not being included in the JDCA, Canada continued to cooperate and consult with it on a bilateral basis to ensure its interests were taken into account.

3. Canada's Advocacy for the Claimant and for Other SC Paper Producers

67. On April 3, 2015, the U.S. DOC selected Resolute Canada and PHP as mandatory respondents in the CVD investigation, a decision over which Canada had no control. Catalyst and Irving also asked the U.S. DOC to examine them individually as either mandatory or voluntary respondents, but were refused. Under United States law, this meant that at the conclusion of the investigation, Catalyst and Irving would be subject to an "all others" CVD rate representing the weighted average of the rates assigned to Resolute Canada and PHP, even if Catalyst and Irving did not actually receive any countervailable subsidies or even if they received countervailable subsidies that were in the *de minimis* range, such that they should not be subject to countervailing duties.

68. Canada considered that the U.S. DOC had erred in excluding Catalyst and Irving as individual respondents, and made representations to the U.S. DOC to that effect. The Claimant objected to Canada's efforts on behalf of Catalyst and Irving even though the addition of

[106] The Claimant appears to allege that it was wrongful under NAFTA Chapter Eleven to not share the consultations paper. *See* Notice of Arbitration, ¶ 72.

individual respondents could have no impact on the calculation of its own CVD rate. It took the position that Canada's advocacy for the Claimant's competitors Catalyst and Irving would aggravate the U.S. DOC, but in reality this had no impact on the U.S. DOC's deliberations whatsoever. Indeed, the U.S. DOC ultimately rejected Canada's submissions and refused to examine Catalyst and Irving individually.[107]

69. To support its allegation that "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 Canadian companies to Resolute's detriment," the Claimant relies exclusively on a letter sent by Canada's Ambassador to the United States' Secretary of Commerce on August 18, 2015.[108] However, this letter merely expresses Canada's disappointment at the U.S. DOC's decision not to calculate an individual duty rate for all respondents and reiterates the importance that Canada attached to the issue.[109] It is impossible to read this letter as damaging to Resolute's position in the CVD investigation. Indeed, Canada never made any representation to the United States authorities that negatively affected the Claimant's position in the U.S. DOC's investigation. Canada acted reasonably with respect to the Claimant during the CVD investigation and continues to do so in the context of Canada's NAFTA Chapter Nineteen and WTO challenges to the U.S. DOC's final determination.

4. The Claimant's Request for Confidential Documents

70. The Claimant alleges that in April 2015 it submitted a request under Canada's *Access to Information Act* ("ATIA")[110] for the disclosure of Canada's submissions to its WTO partners

[107] The U.S. DOC ultimately imposed CVDs of 20.18 per cent for PHP, 18.85 per cent for Catalyst and Irving and 17.87 per cent for the Claimant. This decision is currently being challenged by Canada under NAFTA Chapter Nineteen and at the WTO.

[108] Notice of Arbitration, ¶ 79.

[109] **R-084**, Letter from Gary Doer, Ambassador of Canada to the U.S., to the Hon. Penny Pritzker, Secretary of Commerce (Aug. 18, 2015), available at: https://assets.documentcloud.org/documents/2461026/canadian-ambassador-letter.pdf.

[110] **R-085**, *Access to Information Act*, R.S.C. 1985, c. A-1, available at: http://laws-lois.justice.gc.ca/eng/acts/a-1/FullText.html.

about Port Hawkesbury.[111] In September 2015, Canada released certain records in response to such an ATIA request and withheld others pursuant to statutory exceptions which allow the Government of Canada to refuse to disclose any record that, among other exceptions, "was obtained in confidence from […] the government of a foreign state or an institution thereof" or "contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs."[112] Anyone refused access to a record under the ATIA can initiate a formal complaints procedure through Canada's Information Commissioner.

71. The Claimant also complains that USTR would not release Canada's responses to questions in the context of the CVD investigation, allegedly because of objections by Canadian officials.[113] While it would have been perfectly reasonable for Canada to make such an objection given the confidential nature of the communications, Canada has no control over whether the United States Government releases documents in its possession in accordance with its own legal requirements. The relevance of any of the Claimant's allegations on this issue is entirely unclear.

III. THE TRIBUNAL HAS NO JURISDICTION OVER CLAIMS RELATING TO THE NOVA SCOTIA MEASURES

72. The Claimant cannot establish the Tribunal's jurisdiction over its claims in relation to the Nova Scotia Measures because (i) they do not fall within the scope and coverage of NAFTA Chapter Eleven as required by Article 1101(1), and (ii) the Claimant failed to file its NOA challenging the Nova Scotia Measures within the three-year time limit required by NAFTA Articles 1116(2) and 1117(2).

73. In order for a measure to be within the scope and coverage of NAFTA Chapter Eleven, Article 1101(1) requires that the impugned measure be both "adopted or maintained by a Party"

[111] Notice of Arbitration ¶¶ 73-75. Under the ATIA, the identity of requestors is kept confidential by officials responsible for processing such requests. Accordingly, based on the Claimant's Notice of Arbitration, Canada assumes that the ATIA request to which it produced and withheld certain documents in September 2015 was that of the Claimant.

[112] **R-085**, *Access to Information Act*, R.S.C. 1985, c. A-1, ss. 13(1)(a) and 15(1).

[113] Notice of Arbitration, ¶ 74.

and "relating to" an investor or its investments.[114] The fact that a measure has some indirect economic effect on an investor is not a sufficient legal nexus to ground a claim under Chapter Eleven. More is needed. The Claimant must establish a legally significant connection between the impugned measure and it or its investment. It must also establish that the measures were adopted or maintained by a Party. The Claimant has not, and cannot establish either of these requirements.

74. First, the Nova Scotia Measures at issue, collectively or individually, do not "relat[e] to" the Claimant and its investments in Québec. The Claimant and its investments are subject to the provincial laws, regulations and policies of Québec, not those of Nova Scotia. The Claimant's investment is entirely outside of Nova Scotia's jurisdiction – the Nova Scotia government could not have adopted measures relating to the Claimant's investment in Québec even if it had wanted to. The only alleged connection between the Nova Scotia Measures and the Claimant's investment in Québec is the assertion that Resolute Canada's overall market share in the SC paper industry was reduced and allegedly resulted in the closure of the Laurentide mill more than two years later. Even if it were true that the Port Hawkesbury mill's reopening resulted in increased competition within the SC paper market, this indirect effect is too remote and lacks sufficient legal significance to ground a NAFTA Chapter Eleven claim.

75. Second, one of the measures challenged by the Claimant – the electricity rate negotiated between PWCC and NSPI – is not a measure "adopted or maintained by a Party" as contemplated by Article 1101(1). NSPI is not a State organ or a State enterprise exercising delegated governmental authority. Nor is its conduct in the negotiation of load retention tariffs directed or controlled by the State. The LRT between PWCC and NSPI is a commercial agreement negotiated between private parties. As such, it is not attributable to Canada, and is thus a measure that may not form the basis of any claim under NAFTA Chapter Eleven.

[114] Article 1101(1) (Scope and Coverage) states "This Chapter applies to measures adopted or maintained by a Party relating to (a) investors of another Party, (b) investments of investors of another party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party."

76. Even if the Claimant can get through the Article 1101(1) gateway to NAFTA Chapter Eleven, this Tribunal would still have no jurisdiction *ratione temporis* because the Claimant waited too long to file its claim. NAFTA Article 1116(2) provides that "[a]n investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."[115] The Claimant submitted its claim to arbitration when it filed its NOA on December 30, 2015, which means the critical date for assessing the limitations period is December 30, 2012.

77. There is no debate on the facts: all of the Nova Scotia Measures that the Claimant alleges violate NAFTA were adopted months before December 30, 2012. Specifically, the alleged "grants, loans, cash to purchase land, reduced electricity rates and property taxes" the Claimant challenges as violations of NAFTA Chapter Eleven were all in place when the sale of the Port Hawkesbury mill closed on September 28, 2012. Even the legislation authorizing the Property Tax Agreement was adopted before December 30, 2012. As the adoption of the Nova Scotia Measures was a matter of public record, including through court filings, public announcements, press coverage and the enactment of legislation, the Claimant cannot deny that it had knowledge of the measures and that it would suffer cognizable loss as soon as Port Hawkesbury re-entered the market in September 2012 after emerging from creditor protection proceedings. Accordingly, any allegation that the Nova Scotia Measures violate NAFTA Chapter Eleven is outside the Tribunal's jurisdiction *ratione temporis*.

78. Finally, the Claimant's allegations that the Property Tax Agreement and the *Richmond-NewPage Port Hawkesbury Tax Agreement Act* breach Articles 1110 and 1105 are also outside the Tribunal's jurisdiction.[116] NAFTA Article 2103(1) makes clear that NAFTA shall not apply to taxation measures except as set out in that Article. Article 1105 claims against taxation

[115] Article 1117(2) applies with respect to the investment of an investor and provides: "[a]n investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage."

[116] *See* Notice of Arbitration, ¶¶ 88-98 and 106.

measures are not permitted. Furthermore, Article 2103(6) stipulates that an investor may not bring an expropriation claim under Chapter Eleven with respect to a taxation measure if it has not sought a determination that the measure is an expropriation from the NAFTA Parties tax authorities at the time it filed its Notice of Intent to Submit a Claim to Arbitration.[117] The Claimant failed to fulfil this prerequisite. The taxation agreement between PHP and Richmond County, which was approved by Nova Scotia legislation, cannot form part of the Claimant's Article 1105 or 1110 claims.

IV. THE ARTICLE 1102 CLAIM RELATING TO THE NOVA SCOTIA MEASURES IS INADMISSIBLE

79. The Claimant's Article 1102 argument that "Nova Scotia provided Port Hawkesbury Paper preferential treatment over that received by Resolute"[118] is inadmissible under Article 1102(3). Article 1102(3) requires a comparison of the treatment accorded by a state or province to investors and investments within that state or province's jurisdiction.[119] It does not allow a comparison of the treatment accorded by different states or provinces to investors and investments of investors within their respective jurisdictions.

80. Article 1102(3) is specifically intended to preclude a claim like the Claimant's against the Nova Scotia Measures. The Government of Nova Scotia can only accord treatment with respect to investors and investments of investors within its own jurisdiction. As it is undisputed that the

[117] Article 2103(6) states: "Article 1110 (Expropriation and Compensation) shall apply to taxation measures except that no investor may invoke that Article as the basis for a claim under Article 1116 (Claim by an Investor of a Party on its Own Behalf) or 1117 (Claim by an Investor of a Party on Behalf of an Enterprise), where it has been determined pursuant to this paragraph that the measure is not an expropriation. The investor shall refer the issue of whether the measure is not an expropriation for a determination to the appropriate competent authorities set out in Annex 2103.6 at the time that it gives notice under Article 1119 (Notice of Intent to Submit a Claim to Arbitration). If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article 1120 (Submission of a Claim to Arbitration)."

[118] Notice of Arbitration, ¶ 114.

[119] Article 1102(3) reads as follows: "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."

Claimant's investment at issue is in Québec, not in Nova Scotia, it is impossible for the Claimant to assert a claim under Article 1102 resulting from the Nova Scotia Measures.

V. CANADA HAS NOT BREACHED ANY OBLIGATION IN NAFTA CHAPTER ELEVEN THROUGH THE NOVA SCOTIA MEASURES

81. The Claimant argues that the Nova Scotia Measures violate Articles 1110, 1105 and 1102 of NAFTA Chapter Eleven. These allegations are unfounded in both fact and law.

A. The Nova Scotia Measures Did Not Breach Article 1110

82. The Claimant alleges that Nova Scotia's support for the Port Hawkesbury mill has taken sales and market share from the Claimant and Resolute Canada, which constitutes an indirect expropriation of the Claimant's Laurentide mill in breach of Canada's obligations under NAFTA Article 1110.[120] The argument fails on multiple fronts.

83. As an initial matter, sales and market share are not investments capable of being expropriated. But even if sales and market share could be expropriated, the Nova Scotia Measures were not the proximate cause of the Claimant's alleged loss of sales or market share or the closure of the Laurentide mill; indeed, the Claimant has publicly reported to its shareholders the causes of its alleged loss of sales or market share as being "[t]he cost positions of these operations as well as ongoing market challenges, including the global weakness in newsprint, the high cost of fiber in Quebec, and higher transportation and fuel costs."[121] The Claimant was already in the process of consolidating operations away from its Laurentide mill and prevailing economic conditions would likely have prompted its closure regardless of Nova Scotia's support for the Port Hawkesbury mill. Nova Scotia's treatment of the Port Hawkesbury mill and its owners thus did not substantially deprive the Claimant of any of its investments, including Resolute Canada or the Laurentide mill.

[120] Article 1110 (Expropriation and Compensation) states: "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."

[121] **R-017**, Resolute Forest Products, "2014 Annual Report", p. 8.

84. That there has been no expropriation is confirmed by the fact that the Claimant has maintained control and direction of Resolute Canada and the Laurentide mill at all times. Neither the Province nor the Government of Canada has interfered with the Claimant's full ownership and control of those investments. The fact that the Claimant recently sold the Laurentide mill for millions of dollars underscores this point.[122]

B. The Nova Scotia Measures Did Not Breach Article 1105

85. The Claimant has no credible basis to argue that the Nova Scotia Measures violated the customary international law minimum standard of treatment of aliens, which was reaffirmed long ago through the NAFTA Free Trade Commission's binding note of interpretation as the only applicable standard under Article 1105.[123] A breach of customary international law requires evidence of egregious conduct, such as serious malfeasance, gross unfairness, manifestly arbitrary behaviour or denial of justice. It is impossible to describe what happened here in such terms. Faced with the potential of 1,000 people losing jobs because of the challenges facing the largest employer in the region, Nova Scotia provided support during the Port Hawkesbury creditor protection proceedings to improve the chances that the mill would be sold to a buyer who would continue to operate it rather than the entire mill being dismantled for scrap. To allege that such measures breach a rule of customary international law is absurd.

86. The Claimant's argument that Article 1105 protects investors from being deprived of their legitimate investment-backed expectations through the "unexpected detrimental conduct" of the host government has no basis in customary international law. Similarly, the Claimant's allegation that it received specific assurances and developed expectations based on "substantial conditions" allegedly imposed by the Government of Canada under the *Investment Canada Act* when the Claimant's corporate predecessors, Abitibi-Consolidated Inc. and Bowater Incorporated, merged

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[122] *See* **R-020**, Louis Cloutier, TVA Nouvelles, "Une fabrique de lithium dans l'ancienne usine Laurentide" (Aug. 31, 2015); **R-021**, Patrick Vaillancourt, L'hebdo du St-Maurice, "L'usine Laurentide devrait revivre" (Sep. 1, 2015).

[123] **RL-001**, NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter Eleven Provisions" (July 31, 2001), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng.

in 2007,[124] is a complete mischaracterization of reality. What the Claimant describes as "conditions" were merely factors that Canada's Minister of Industry could take into account, amongst others, when deciding whether or not to approve the Claimant's investment as being of a net benefit to Canada.[125] Nothing Canada said or did in the context of approving the Claimant's merger has any relevance whatsoever to the Claimant's claim against the Nova Scotia Measures or establishes a breach of the customary international law minimum standard of treatment of aliens.

C. The Nova Scotia Measures Did Not Breach Article 1102

87. As Canada has set out in Section IV, Article 1102(3) precludes the Claimant from arguing it was denied national treatment. However, there are multiple other reasons why there is no violation of Articles 1102(1) and (2).[126]

88. First, NAFTA Article 1108(7)(b) stipulates that Article 1102 does not apply to "subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance." Any of the Nova Scotia Measures which fall within this exception (for example, the loans for working capital and productivity improvement, and the grants for worker training and marketing) are unimpeachable under Article 1102. Contrary to the Claimant's argument,[127] whether a State has notified the measures as subsidies through the mechanism of the WTO SCM Committee does not determine whether measures constitute

[124] Notice of Arbitration, ¶¶ 102-103.

[125] The Act sets out a number of factors "to be taken into account, where relevant" by the Minister in determining whether an investment subject to review under the Act is likely to be of net benefit to Canada, including the effect of the investment on the level and nature of economic activity in Canada, the degree and significance of participation by Canadians in the business, the effect of the investment on competition, the compatibility of the investment with national industrial, economic and cultural policies, and the contribution of the investment to Canada's ability to compete in world markets. *See* **R-006**, *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.), ss. 20-21.

[126] NAFTA Article 1102 states: "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. 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."

[127] Notice of Arbitration, ¶¶ 117-119.

subsidies for the purpose of NAFTA Article 1108(7)(b). This Tribunal must undertake that analysis in accordance with the principles of treaty interpretation in the context of the specific measures at issue.

89. Second, any of the measures which can be considered procurement by the Government of Nova Scotia (for example, the purchasing of forestry services from independent contractors through the FIF) would be similarly unchallengeable pursuant to Article 1108(7)(a). This provision states that Article 1102 does not apply to "procurement by a Party or a state enterprise."

90. Third, if any measures even remain for consideration on the merits after the application of Articles 1108(7)(a) and (b), there has been no nationality-based discrimination in violation of Article 1102. Not only did the Claimant's United States nationality have nothing to do with Nova Scotia's provision of financial support to the Port Hawkesbury mill, the Claimant cannot establish that it was entitled to treatment "in like circumstances." Indeed, of the many distinctions between the Port Hawkesbury mill and the Claimant's mill in Shawinigan, the Nova Scotia government had no ability to accord any treatment, let alone "treatment no less favourable," to the Claimant's Laurentide mill because it is located in Québec.

VI. CANADA HAS NOT BREACHED ANY OBLIGATION IN NAFTA CHAPTER ELEVEN THROUGH THE FEDERAL MEASURES

91. While the Claimant describes a litany of complaints about how Canada represented the companies that were subject to the U.S. DOC's CVD investigation into SC paper imports from Canada, it is vague as to what specific measures it challenges and how these actions constitute a violation of any NAFTA provision. There are no documents attached to the Statement of Claim nor is there any indication as to how the Claimant intends to support its allegations, either by documentary evidence or witness testimony. Based on what the Claimant has written in its NOA, most, if not all, the impugned behaviour cannot even constitute "measures adopted or maintained" by Canada as required by Article 1101(1) since much of what the Claimant is complaining about appears to be irrelevant or tangential interactions between Canada's and

Resolute's legal counsel. Indeed, the complaint against the Federal Measures, which did not appear in the "draft" Notice of Intent to file this NAFTA claim which the Claimant presented to Canada's Minister of International Trade in February 2015,[128] appears to be an afterthought as it plainly has no legal foundation. Hence, Canada can only provide a summary response at this time and will provide a more comprehensive rebuttal at such time as the Claimant elaborates the specific nature of its claim. [129]

92. As a preliminary matter, it is illogical to allege that Canada has violated NAFTA Chapter Eleven because the U.S. DOC initiated a CVD investigation against SC paper producers in Canada and imposed countervailing duties. Obviously, this is not a measure adopted or maintained by Canada and could never form the basis of a NAFTA claim given that Canada has no control over the actions of a foreign sovereign government. Thus, while the Claimant's NOA is drafted as if to suggest that is the case,[130] Canada assumes that the Claimant's description of its treatment by Canadian officials internally during the course of the CVD investigation forms the actual basis of its claim. Its allegations, as made, distort reality and in any event cannot constitute a violation of NAFTA Chapter Eleven.

93. To the extent the Claimant alleges a breach of Article 1102, Canada did not subject the Claimant to any nationality-based discrimination. For example, the Claimant could not be included in the JDCA Canada entered into with the other producers in the context of the U.S. DOC's CVD investigation for the obvious reason that the Claimant put itself into an adverse posture against certain signatories of the JDCA in relation to the Nova Scotia Measures. As described above, Resolute had threatened this NAFTA Chapter Eleven claim against Canada at the same time that it was demanding to be part of a joint defence group which would share confidential information and litigation strategy with respect to the exact same measures. This

[128] **R-081**, Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement (Feb. 24, 2015).

[129] Canada reserves its right to raise other objections and defenses, including any relating to jurisdiction and admissibility, at such time the Claimant provides further particulars on the specific nature of this aspect of its claim.

[130] For example, the heading "U.S. Countervailing Duty Investigation – Canada Adding Injury To Injury" is nonsensical since it suggests Canada was the country that caused injury by imposing CVDs on the Claimant. *See* Notice of Arbitration, p. 15.

reasonable distinction (among many others given that each company under investigation has separate interests and distinct concerns) demonstrates that the Claimant was not "in like circumstances" with the other JDCA members – clearly, no responsible party would agree to share confidential information and litigation strategy with a party that was simultaneously threatening a lawsuit involving exactly the same measures and which had threatened to (and in fact did) take adverse positions against the other parties to the JDCA. The Claimant's nationality was completely irrelevant to its exclusion from the JDCA.

94. To the extent the Claimant alleges a breach of Article 1105, Canada's treatment of the Claimant in the context of the CVD investigation by the U.S. DOC and Canada's responses to the Claimant's requests for documents did not fall below the customary international law minimum standard of treatment of aliens. Even in the face of the untenable position Resolute forced upon Canada, Canada still collaborated with the Claimant throughout the U.S. DOC's investigation. Canada continues to cooperate with the Claimant in the context of its NAFTA Chapter Nineteen and WTO challenges of the U.S. DOC's determination, and has shown good faith to the Claimant at all times, even after the Claimant made submissions to the United States Government that were contrary to Canada's interests. In contrast, Canada never made any submission to the U.S. DOC that could cause detriment to the Claimant.

95. Finally, Article 1105 does not require Canada to acquiesce to the Claimant's unreasonable demands that Canada only represent the Claimant's interests and not make submissions to the U.S. DOC on behalf of other SC paper producers in Canada. Nor does it require Canada to enter a JDCA with the Claimant when the Claimant demonstrably did not share Canada's interests and could obtain information about the Nova Scotia Measures to use against Canada in the context of this NAFTA Chapter Eleven arbitration. Nor does Article 1105 require Canada to disclose to the Claimant Canada's responses to USTR's questions regarding the Nova Scotia Measures. Nothing in Canada's behaviour falls short of the customary international law minimum standard of treatment.

VII. THE CLAIMANT'S DAMAGES CLAIM IS WITHOUT FOUNDATION OR MERIT

96. The Claimant cannot establish that it is entitled to the $70 million (USD) that it claims in damages. As discussed above, it cannot show that the Nova Scotia Measures were the proximate cause of any damage or loss it has suffered. Nor can it show that the treatment accorded to the Claimant and its investments by the Government of Canada during the U.S. DOC's CVD investigation caused it any damage at all. Tellingly, the Claimant failed to identify either the harm or damages it claims as a result of this treatment, resorting instead to vague and highly general assertions of "detriment."[131] In fact, Canada has caused no damage to the Claimant in the context of the CVD investigation by the U.S. DOC, nor could it. The U.S. DOC's decision to initiate that investigation and impose duties on the Claimant was a measure of the United States Government, not a measure of the Government of Canada.

97. Nor has the Claimant provided any explanation as to how it arrived at its quantum of damages at $70 million (USD). It has not identified what this amount represents, what valuation methodology it used, whether this amount is related only to the Nova Scotia Measures or includes the Federal Measures, and whether it accounts for the weak SC paper market or the actions of the United States Government. The figure of $70 million (USD) has no apparent factual or legal foundation.

VIII. CANADA'S PROPOSAL TO BIFURCATE THE PROCEEDINGS

98. Pursuant to Procedural Order No. 1,[132] Canada proposes that the Tribunal bifurcate the proceedings into two phases. The first phase would address preliminary questions of jurisdiction and admissibility relating to the Nova Scotia Measures. If the Tribunal rules that it does have jurisdiction over this claim, merits and damages would be heard together in the second phase of the arbitration.

[131] *See, e.g.*, Notice of Arbitration, ¶¶ 76-77, 109 and 120.

[132] Procedural Order No. 1 (June 29, 2016) , ¶ 13.1.

99. Canada proposes that the following objections to jurisdiction be addressed in the preliminary phase of the arbitration:

- Canada's objection to the Tribunal's jurisdiction over the claims relating to all of the Nova Scotia Measures, on the basis that they are outside the scope and coverage of NAFTA Chapter Eleven because they do not "relat[e] to" the Claimant or its investments, as required by Article 1101(1);

- Canada's objection to the Tribunal's jurisdiction over the claims relating to all of the Nova Scotia Measures, on the basis that these claims are time-barred under NAFTA Articles 1116(2) and 1117(2); and

- Canada's objection to the Tribunal's jurisdiction over the Claimant's Article 1110 and 1105 claims relating to the Property Tax Agreement and the *Richmond-NewPage Port Hawkesbury Tax Agreement Act*, on the basis that Article 1105 is not included in Article 2103 and the Claimant has failed to comply with Article 2103(6) in order to bring an Article 1110 claim.

100. Addressing these issues in a preliminary phase of the arbitration is consistent with Article 21(4) of the 1976 UNCITRAL Arbitration Rules ("UNCITRAL Rules"), which apply in this arbitration pursuant to paragraph 5.2 of Procedural Order No. 1. Article 21(4) specifically stipulates that "[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question." Furthermore, the factual issues underlying these jurisdictional objections are not in dispute and will not require witness or expert testimony, nor is it likely that any document discovery will be necessary at all. Indeed, these jurisdictional objections are based on publicly-available information and can be efficiently dispensed with in a preliminary phase without treading upon disputed facts or the merits of the Claimant's allegations.

101. Canada also proposes that its objection to the admissibility of the Claimant's NAFTA Article 1102 claims in relation to the Nova Scotia Measures be resolved by the Tribunal as a preliminary question of law. Specifically, Canada proposes that the Tribunal issue a ruling on

Canada's objection that the claims in relation to the Nova Scotia Measures under NAFTA Article 1102 are precluded by Article 1102(3), which defines national treatment on an intra-state and intra-provincial basis when dealing with measures adopted or maintained by states and provinces.

102. Article 15(1) of the UNCITRAL Rules provides that the Tribunal "may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case." In this case, a ruling on Canada's objection to the admissibility of the Claimant's claim under Article 1102(3) in the preliminary phase of the arbitration is in the interests of both parties.

103. An early ruling on the Article 1102(3) interpretation advanced by Canada would save the disputing parties the significant time and cost of presenting extensive factual arguments and evidence in support or defence of the national treatment claim on the merits. It will be a straightforward question for the Tribunal to decide whether a claimant with investments in one state or province can base a national treatment claim on the treatment accorded by another state or province to investors and investments of investors in that other state or province. In answering this question, the Tribunal would not be required to consider any contested or complicated factual issues, and no witness or expert testimony or document discovery will be required. The only facts relevant to this objection are agreed and simple: the challenged measures were adopted by the Government of Nova Scotia, while the Claimant's investments were all located in Québec. These are the very same facts the Tribunal will need to consider in determining whether the measures at issue are "relating to" the Claimant and its investments as required by Article 1101(1) and whether the Nova Scotia measures are time-barred under Articles 1116(2) and 1117(2). As these objections are linked, they should be heard together in the preliminary phase proposed by Canada. If the Tribunal accepts Canada's interpretation of Article 1102(3), then everything else relating to national treatment – including Canada's defences under Article 1108(7) relating to subsidies, grants and procurement – become moot and unnecessary to address.

104. Canada has raised another jurisdictional objection with respect to the Nova Scotia Measures, specifically, that the electricity rate paid by the Port Hawkesbury mill is not a measure attributable to Canada and thus not a measure "adopted or maintained by a Party" as required by Article 1101(1). However, Canada does not propose that this objection be addressed in the preliminary phase because it would not make the proceeding more efficient given the factual issues involved in establishing that NPSI's actions are not attributable to Canada.[133] Indeed, the question of attribution will not need not be considered at all if the Tribunal agrees with Canada that none of the Nova Scotia Measures are within the scope of Article 1101(1) or are time-barred under Articles 1116(2) and 1117(2). If this arbitration proceeds to a merits phase, unless the Claimant concedes the point now (which it should), Canada will maintain this objection.

105. The Claimant has agreed to consider Canada's bifurcation proposal and to advise the Tribunal by September 15, 2016, whether it will consent to bifurcation with respect to Canada's objections described above. Should the Claimant not consent to bifurcation, the Disputing Parties have agreed that Canada will submit a Request for Bifurcation setting out the rationale supporting bifurcation in greater detail by September 29, 2016.

[133] Canada considers it to be self-evident that the electricity deal between NPSI and PWCC is not attributable to Canada given that NPSI is a private corporation wholly-owned by the publicly traded corporation Emera Inc.

IX. REQUEST FOR RELIEF

106. For the reasons outlined above, Canada respectfully requests that the Tribunal:

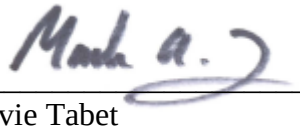
(a) dismiss the Claimant's claims in their entirety;

(b) require the Claimant to bear all costs of the arbitration, including Canada's costs of legal assistance and representation, pursuant to NAFTA Article 1135(1) and Article 40 of the UNCITRAL Rules; and

(c) grant any other relief it deems appropriate.

September 1, 2016

Respectfully submitted
on behalf of the Government of Canada,



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