IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT ("NAFTA") AND THE 1979 UNCITRAL ARBITRATION RULES

BETWEEN:

RESOLUTE FOREST PRODUCTS INC.

Claimant

- and -

GOVERNMENT OF CANADA

Respondent

(PCA CASE NO. 2016-13)

TRANSCRIPT OF PROCEEDINGS

HEARD BEFORE JAMES R. CRAWFORD, RONALD A. CASS & CELINE LEVESQUE

Held at the offices of Arbitration Place
333 Bay Street, Suite 900, Toronto, Ontario
on, Wednesday, August 16, 2017, at 9:32 a.m.

APPEARANCES:

Mr. Mark Luz
Ms. Jenna Wates
Ms. Shawna Lesaux — for the Government of Canada

Ms. Shamali Gupta — for Global Affairs Canada

Mr. Daniel Hill — for Natural Resources Canada

Mr. Andrew Weatherbee — for the Department of Justice of Government of Nova Scotia
Mr. Elliot Feldman
Mr. Martin Valasek
Mr. Jacques Vachon
Mr. Paul Levine
Mr. Jean-Christophe Martel
Mr. Mike Snarr
Ms. Jenna Anne de Jong — for Resolute Forest Products

Also Present:

Mr. Matthew Olmsted — United States of America
Ms. Judith Levine — Permanent Court of Arbitration

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Toronto, Ontario

--- Upon resuming on Wednesday, August 16, 2017,
at 9:32 a.m.

PRESIDENT: Well, we'll start this morning's session. I have forgot to mention yesterday that we have with us Mr. Matthew Olmsted from the United States Department of State exercising the rights of the audience in relation to these proceedings, and he is welcome.

There are a few administrative matters. We will deal with them at the end of this morning's proceeding, and we will start with the Respondent. As I said yesterday, approximately half an hour, but there's a bit of flexibility.

REBUTTAL SUBMISSIONS BY MR. LUZ:

MR. LUZ: Thank you, Judge Crawford and members of the tribunal.

This morning, Canada will focus on -- in a real rebuttal style, I will endeavour not to repeat too much of what was said yesterday except to re-emphasize those points that are important enough to bring up in a rebuttal. And one of those things that I want to start off which applies holistically in this preliminary

phase is the Claimant's caution with respect to trying to stray into the merits of this case. And Canada recognizes that. That is one of those things that one should not prejudge the merits in a preliminary phase, but Canada is not asking the Tribunal to make any determinations of fact that don't go to the tribunal's jurisdiction, and that is the key difference between what Canada is presenting and what the Claimants are presenting, and we actually addressed this at paragraph 12 our reply memorial.

It is well established in international law that if jurisdiction rests on the existence of certain facts, then they have to be proven at the jurisdictional phase. So we can't simply just assume that the facts are as the Claimants say they are and that, in and of itself, establishes jurisdiction. To the contrary, the Claimant does have to prove the facts upon which the jurisdiction of this Tribunal depends. So that applies as much to Article 1101(1) as it does with respect to the limitations period.

So, for example, the tribunal only has jurisdiction with respect to measures that have a legally significant connection to the

investment, as we know from Article 1101(1). So the Claimant must establish the facts that establish that jurisdiction and that it must go through all of the measures and establish that each of the measures have a legally significant connection to its investment in order to establish jurisdiction. So that's not a merits question. That's a jurisdictional issue that must be proven at this stage, and similarly with the limitations period.

If the existence of this tribunal's jurisdiction over the claim ratione temporis depends on proving certain facts, well, those are facts that don't go to the merits. They go to jurisdiction.

Now --

PRESIDENT: Some of the facts, arguably, have a connection to the Claimant, and others of them don't of the various facts they rely on. I'm talking about 1101.

MR. LUZ: Sometimes it is difficult to tease apart merits issues from jurisdictional issues, but Canada submits, in this case, it's not actually difficult to tease them apart, especially when one considers -- if you

look at the measures themselves, I mean, it's still speaking to 1101(1) -- whether or not the measures relate to them.

The factual issues that are required to establish that there is a legally significant connection between the measure and the investment don't require an intricate involvement into the merits of the claim. It simply is something that needs to be established that there has been, as we've discussed and as I will discuss actually right now, a legally significant connection between the measures, as we've all listed, the forestry infrastructure fund, the hot idle funding, the forestry coordinator, and so on and so forth, and the Claimant's investment.

So, with respect to 1101(1), on that particular issue, I have already said that that is the test that needs to be applied by the tribunal, because Chapter 11 applies to measures, not sort of an amorphous group of things that all meld into one. And the Claimant has sought to avoid addressing each of the measures in a context of 1101(1), but that is something that it can't avoid, because that's how the NAFTA works. You have to impugn measures that are taken by a

government and establish, first, that they fall within the scope and coverage of NAFTA Chapter 11 and then, in this case, that the claims against those measures are timely.

So, to take, for example, the hot idle funding, the Claimant has really described that as a precondition to the precondition that, after a lot of uncertainty, it would eventually allow PHP to gradually, down the line, expropriate the mill at Laurentide. So that is one of those issues that is not a merits question. It's a jurisdictional question as to whether there is a legally significant connection between the investment and the measure.

PRESIDENT: The point of my question was: Assuming we take hot idle funding as an example, and this is without prejudice of course. Let's assume we say that the hot idle funding didn't have any relationship to the Claimant. Let's assume we say that some of the funding agreement aspects of the Nova Scotia measures did. What do we do?

MR. LUZ: The measures that do not meet that test are outside the tribunal's jurisdiction.

PRESIDENT: The tribunal has jurisdiction, but it's a truncated jurisdiction?

MR. LUZ: Exactly. Yes.

Now, with respect to the expropriation claim, there's a separate issue. Not only is the problem of relating to and whether you pass through that, but the language of 1101(1) requires that these be measures adopted and maintained by a party.

Now, the Claimant says that that's an artificial way of looking at it, to question whether or not the actions of PHP, with respect to its alleged predatory pricing in 2014, are attributable to the Government of Canada or Nova Scotia. But it's not an artificial way of looking at it. It's the only way to look at it, because that's the only way that a NAFTA claim can be brought under 1101(1). It has to be a measure adopted or maintained by a party.

Now, the Claimant's own language actually suggests the problem that Canada has identified. I think it was a couple of times yesterday that the Claimant referred to PHP as a state-owned enterprise or a state entity. That means something, and that's a significant -- that

means something in international law and in the NAFTA, and that's not something that falls -- I mean, first of all, it's not true. But they're trying to use this as a proxy to get around the problem that what they are complaining about are actions taken by a non-state party years after the relevant government measures have come into play. So the Claimant has not even tried to fit this into the ILC Articles and state responsibility. They haven't even tried to say that Article 8 applies or, in another way, because they cannot, and that's why, with respect to the expropriation claim, there can be no attribution. There can be no claim, and it can be dismissed at this phase.

PRESIDENT: You say that's a point which you can make independently of the legally significant connection test in 1101?

MR. LUZ: It is. It is. It's another problem that's embedded within Article 1101(1).

Now, since we talked about the legally significant connection test, I want to get back to the tribunal's Question No. 7 where we had the three scenarios, and my colleague Mr. Neufeld had addressed them, but I think I want to come

back to them a little bit, because my colleagues from the Claimant spent a long time about talking about the different interpretations and the options.

Numbers 2 and 3, really, were where the question arose, and the Claimant agreed that No. 2, the interpretive proposition that the tribunal put forward, that the term only requires the action by a party to have a significant impact on an investor or investment. The Claimant acknowledged that's too low of a standard, and Canada agrees. I mean, we're all in agreement that it's not enough to have that.

Then we look at the third proposition: The term requires the action of the party to have been undertaken with an understanding or purpose that it have a significant impact on an investment or investor.

And you can see that it's very easy for two to bleed into three or three to bleed into two, because, really, it's just the understanding or purpose, which really talks about the intent of the measure, because if you don't have that, if you don't have that in No. 3, then you have No. 2, which both parties agree is not

good enough.

So, really, the third scenario focuses on: What is the intent or the purpose or the understanding of having to do it?

Dean Cass?

MR. CASS: Yes. I will let the Claimant say whether they do or don't agree on that, but my understanding of what they were saying yesterday was that that's a possible standard. They might think that's the right standard. But certainly, at some margin, it could become too low of a bar --

MR. LUZ: Right.

MR. CASS: -- not that effects alone wouldn't be sufficient.

MR. LUZ: Right. And I think that's the crux of where we're coming to. And the Claimant spent a long time talking about Cargill, and I think there's -- that's the perfect case between Cargill and Methanex to show where the wall between two and three falls apart if you don't have something more than just the significant impact or even acknowledgement that there will be a significant impact on an investor.

I mean, my colleague

Mr. Neufeld did focus on this, but, again, it bears repeating, because the Claimant is trying to put forward Cargill as a case that helps this tribunal make a decision on the legally significant connection test. But it bears repeating that the tribunal specifically noted and found that the rationale for the measure adopted by Mexico was, and I quote:

> "Just to bring pressure on the United States government to live up to its NAFTA obligations."

Now, I know I don't need to remind the tribunal of the very complicated background of what this was. It essentially was the outcome of a trade dispute with respect to imports of sugar into the United States. Mexico felt that United States was not living up to its commitments. This was a trade war. There's a very complicated background between this.

And the Claimant, in its pleadings, specifically alleged that the behavior of Mexico was, and I quote:

> "A systematic anti-high fructose corn syrup

campaign engaged in by Mexico."

So there was this intentional targeting of a particular industry to get a particular result.

The other thing that the tribunal noted was that the import permit requirement had this immediate and direct impact on the business of the subsidiary and also constituted a legal impediment.

So there were three factors in Cargill that made the tribunal think that this was something that was relating to and fulfilled the legally significant connection test of Methanex: One, the motivation was driven by the desire to influence and retaliate against the United States, and the producers, like Cargill; two, there was an immediate and direct effect on the investment. The goal was to hit the industry hard and hit it fast; and, third, there was a legal impediment.

So none of those conditions are present here.

MR. CASS: There wasn't really a legal impediment to Cargill operating its business; right?

MR. LUZ: There was a legal impediment to its subsidiary from importing the product, and so the tribunal specifically identified the legal impediment as one of the factors in its analysis.

PRESIDENT: The tax was on the Mexican producer of drinks.

MR. LUZ: That was, but the import requirement wasn't.

PRESIDENT: Yes, I understand. But the test was fulfilled with respect to both.

MR. LUZ: It was. And, again, the other factors were present in both cases, the intention of what it was and the impact.

Now, again, to distinguish what we have here, the Claimant has acknowledged that there was no motivation with respect to nationality. There was no intention to be able to favour a domestic producer over a foreign one, and that was conceded by the Claimant. In fact, it's a pure coincidence that the ultimate purchaser of the mill happened to be Canadian. The former owner was American. The PWCC was selected by the Court-appointed Monitor in conjunction with the board of directors of the former owner in order to

maximize the value.

So there were many bidders, and it could have been Resolute. They were originally approached. They decided not to.

So there's no nationality motivation that was behind this.

MR. CASS: I just want to make sure. Are we talking now about 1101 or 1102? Which point are you arguing here?

MR. LUZ: It is specifically now with 1101, but it does apply with respect to 1102 in the sense that there's a factual predicate that's missing, but what I'm saying now is primarily for 1101. I don't want to get into the nationality-based discrimination requirement of national treatment, which is a merits issue, we concede. If the national treatment claim gets forward to the merits, the concession that there was no nationality discrimination intention here will be a problem for the merits, but I will leave that aside. Hopefully we won't have to cross that bridge.

So the key variable that was present in the Cargill case was not here. And, similarly, the Claimant has said, "Well, the

impact was uncertain, and it was gradual, and it sort of took its place eventually, and the government support may not have actually resulted in the success of the mill." So, again, that was missing as compared to Cargill and, again, no legal impediment.

So what we end up having is a scenario that's actually much closer to Methanex than in this case. And I agree. It's true that the Claimant rightly pointed out that Methanex was the only case NAFTA tribunal to have dismissed a claim on the basis of no legally significant connection. Canada submits that this should be the second tribunal to do so, because the facts are much more similar to the original Methanex claim than it is to the subsequent Methanex claim and the Cargill scenario.

So, again, there's not much distance between what we have here and what the tribunal in Methanex originally faced, which was a measure that was taken in the public interest, and, in that case, it was environmental, and here it's certainly, I think, common ground and understood that the goal of Nova Scotia was to keep people working and to help an otherwise

economically-stressed region. So there was a public interest element to this as well. So, again, there's a similarity between this case and the original Methanex claim.

It was described yesterday as Methanex is not sort of being aimed at a particular industry or product, but that's not the case. I mean, this was a measure aimed at a particular product in a particular industry. So, again, there's common ground between what the Methanex tribunal saw the first time and what we see here. It was something that had a direct impact on a particular industry and a particular product that affected the Claimant. But, again, that wasn't good enough for the tribunal to pass 1101(1).

So just to conclude on this, that's why the wall between two and three in the tribunal's scenarios really have to be distinguished between that motivation and that intention. Certainly, if there was that motivation and intention to discriminate or for some other nefarious reasons, as was alleged in Methanex after they amended their claim; it was never proven, then that is the kind of

distinguishing factor that might end up passing the legally significant connection test. All Canada is saying is that it's just not present here, and, hence, this should be the second NAFTA tribunal to find on the basis with respect to the measures that the Claimant hasn't established don't go through.

Just one last point with respect to the measures, and I hope it's just a redundant point, but it was something that the Claimant had mentioned yesterday about measures continuing. And it just seemed to be very cryptic in what they were saying, because the measures that have been identified and are before this tribunal are very clear. And so we just want to make sure that there's no other measures that the Claimant, if it gets through to the merits, are suddenly going to throw into the basket that have been never mentioned before.

Now, I don't believe that's the case, but, again, we brought it up with respect to the limitations period yesterday, which doesn't seem to be at issue at all here. But the point is the measures that are at issue are starting in September 2011 with the Forestry

Infrastructure Fund, the last one being the biomass facility in January 2013, and those are the issues that are before this tribunal.

MS. LEVESQUE: Could you just address their argument that the impact is continuing. So if you have a loan for 10 years or you have other measures that continue to have an effect, does that change anything? They argue yes. You seem to say no, but...

MR. LUZ: Well, if they were trying to argue that that somehow converts PHP into a state-owned enterprise and, hence, there is attribution for an expropriation claim, well, that has never been pled. It's not true. There's no evidence to be able to say it. And so I'm not sure if that's what -- that's why I said it was sort of cryptic. We don't really understand what that means, but the fact is there's no evidence on that, and it hasn't been pled that way, so I'm assuming that, again, we're just noting that now just in case it comes up as an issue later.

On the limitations period, I don't have much to add to this, but it is actually something that I'm actually very grateful to Dean Cass for bringing up the question that, posed to

the Claimant yesterday, is: Can the tribunal decide now and then move on to the merits phase and then change its mind or make a different decision? And Judge Crawford picked up on this, and it was something that immediately hit into my mind is that that's not something that is possible for the tribunal to do without seriously prejudicing Canada and procedural fairness.

If the tribunal makes a decision now that Canada -- excuse me. I will back up.

If the burden of proof is on Canada, to prove the time bar, and we've not been given the opportunity to prove it because we have not had the opportunity for document production and cross-examination, and the tribunal makes a decision on that basis, then that decision is res judicata, and we can't come back and revisit it. So that would bar Canada unfairly from being able to present its case. Now, I know that's not the intention of what the tribunal has at all, but it is an important factor in the tribunal's considerations. I will talk about it in a minute. Canada's position is the evidence is plentiful, and a decision can be made now that the claims are

time barred. But that's why Canada presented the second option as being document production from the Claimant now.

The third option would be to join to the merits, because then, as unfortunate as that circumstance would be, because it would end up defeating the purpose of having a preliminary phase, it wouldn't result in a decision that is res judicata and can't be revisited by Canada. So that was the one thing that we wanted to say on that.

But, again, the Claimant seems to say that the only issue really here is on the burden of proof, and, again, the burden of proof is on the Claimant. And that burden of proof has not been met by the Claimant, as we have seen from the evidence.

And one of those things that is important to keep in mind is with respect, for example, to the statements by Resolute's corporate spokesperson in November and December 2012. That is the evidence, the most direct and clear evidence on the record and uncontradicted, saying that the Claimant had already adjusted itself in preparation for new competition from Port

Hawkesbury.

Now, it's all well and good to speculate as to what might have been in Mr. Choquette's mind and what might have been in Mr. Garneau's mind and why you make statements like that to the newspaper that may or may not be consistent with other things. That would be a different story if the witness was here and it was corroborated by internal documentation. But the fact is there is evidence that is uncontroverted, direct, and the evidence that the Claimants have put forward doesn't diminish anything of what we have with respect to what Mr. Choquette said in November and December 2012. So, on that basis alone, the tribunal can dismiss on the limitations period, because that's the most probative evidence.

PRESIDENT: We have had some discussion about the meaning of the word "knowledge" in 1116(2), and the purpose of 1116(2) is to fix a time period within which the claim must be brought. If a Claimant believes that it has suffered injury and if there is material on which it could believe that, it seems to me that there's some difficulty in the Claimant later on

saying, "We didn't, in fact, suffer injury. We were mistaken as to that fact." That's an observation without prejudice.

MR. LUZ: And it is one of those circumstances that -- again, because it's the Claimant's burden to put this forward and there's obviously a lot more evidence that is entirely in the hands of the Claimant -- Canada doesn't have access to any of this -- which, again, shows the illogic of putting the burden on Canada to prove the Claimant's knowledge when we don't have access to that knowledge without intrusive discovery.

But I think the ultimate point is: Canada's point is the multiple ways that we have presented the evidence fulfil both the actual or constructive knowledge test. Even though the tribunal only needs one or the other, it can make a decision on the basis of either actual or constructive knowledge for the limitations period. Canada submits that both cases are fulfilled.

And I will just say very quickly, because I think my colleague Ms. Wates covered Professor Hausman's report, but, again, standing on its own, it really has little, if any,

probative value. If it had been corroborated with internal documents and witness testimony, perhaps it might say something. But it doesn't say anything about, for example, the observation that there would have been a price increase in Q4 2012. Resolute doesn't deny that it was going to do it. It just says, "Oh, there's no evidence to do it." Well, we don't have the evidence of what Resolute was or was not planning, but the market expected that there would have been a price increase. Its competitors said it had expected a price increase. Resolute doesn't deny that it wasn't going to do it. Professor Hausman's report doesn't say anything about that.

And, similarly, it's really that 1,000-foot view down that Professor Hausman's report takes it. But, again, there was no interviews or speaking with anyone at Resolute's management or sales, and it doesn't talk about anything that the Claimant actually knew on the ground with respect to its prices, its marketing, its competition from Port Hawkesbury. It doesn't explain any of that. So the probative value of what was said is just, as we said yesterday, not very much, if anything.

I will just move on very briefly to the national treatment claim because I think, Dean Cass, you did ask about it with respect to my comments on the absence of a nationality-based discrimination intention here.

Again, certainly that is a necessary prerequisite to an Article 1102 claim, but it is a merits question, and, again, the now undisputed fact that that was not present here poses yet another barrier on the merits, but, again, we're not talking about that on merits, because we agree it's not something to deal with now, nor is the question of in like circumstances, nor is the question of whether or not the exceptions in 1108(7) apply.

But it does go in the sense, again, to Canada's argument that there's a key missing factual predicate for the admissibility of an 1102 claim. And let me use this. Let me use the Property Tax Agreement as an example.

If that measure gets through 1101 and it gets through the time bar, we know that it can't be part of an 1105 or an 1110 claim. So how does this kind of a measure fall into the ordinary meaning of 1102(3)? Because we know

that, and it's undisputed that Nova Scotia could not have offered equivalent tax treatment to Resolute. Resolute's in Quebec. It couldn't have even done it if it had wanted to.

But the Claimant says, "Well, that falls into the ordinary meaning of 1102(3) because Nova Scotia could just have not offered PHP treatment." But that's the impossibility of the claim, because what they're trying to do is do indirectly what they can't do directly, because everyone agrees that 1102(3) -- what they're trying to do is get around what 1102(3) would not allow them to do. We all agree that they can't complain about the treatment that they got from Quebec vis-à-vis the treatment that Nova Scotia gave to Port Hawkesbury. That's not what 1102(3) allows, and I think now that is common ground.

But what the Claimant is trying to do is get around that by saying that there was treatment accorded to them even though Nova Scotia could never have offered them the same treatment. It's a back door to get around the ordinary meaning of 1102(3), and that's not something that the tribunal should allow. It's just simply a factual predicate to bringing a

claim that makes it inadmissible.

And I will just conclude with this because Judge Crawford asked about Judge Higgins' opinion in the Oil Platforms case, and I think that is a good way to end, because that talked about how you have to consider as to whether or not, on the facts as pled, it's capable of constituting a breach. And, again, with respect to the expropriation claim, our view is that it's not capable of doing it because the alleged expropriation was not done by the state. It was done by a private actor. Similarly, here, it's not capable of constituting a breach because the language of 1102(3), the factual predicate that a province accord treatment to the investor is not here, and it couldn't be here because they're in a different province.

So Canada will just rest on that, that the tribunal should not allow the Claimant to do indirectly what it can't do directly through 1102(3), and that is something that can be dealt with at this phase of the arbitration. It's not a like circumstances issue. It's not a subsidies or procurement issue. It's not a nationality-based discrimination question.

It's simply: Is it capable of being a claim? And, in this case, it's not.

PRESIDENT: Could you address Mr. Valasek's argument based on the travaux of 1102(3).

MR. LUZ: Actually I think we addressed this in -- it was addressed in our reply memorial at paragraph -- it was addressed. I will get the citation.

We did address it. The point was that the language that was between the two don't contradict each other. They mean the same thing in the sense that the ultimate language that was chosen was not intended to broaden the scope of 1102(3). It was just language that said, in essence, the same thing as the previous version.

Again, I addressed this during my pleadings yesterday. The one thing with respect to territory and jurisdiction that's important is, because the -- and I addressed this yesterday. The tribunal need not be concerned with reading the provision in a way that would prevent application with respect to market access.

So, again, an investor that seeks entry into the province, they're not in the

province, so it's not a territorial issue, but they're trying to get into the province, and they are barred from entering for illegal reasons or inappropriate reasons or are given worse treatment. That's one of those scenarios where, really, it's not about territory. It is about jurisdiction. And, again, that is just not present here. It's not like Nova Scotia would have ever been able to give that same kind of treatment to Nova Scotia, because it's not within its jurisdiction.

MR. CASS: Can I ask one question.

MR. LUZ: I saw the end of my presentation coming and thought that I should end very quickly, so I didn't pay attention to my last sentence. I apologize. And thank you for bringing it up.

MR. CASS: I don't know if you have seen any of the Fast and Furious movies. It all involved car races of some sort and ways of making cars go faster. But if you assume for a moment you have a car race with two cars starting in different provinces and ending up at an equidistant point. And Province A buys a

particularly fast car and also gives a form of nitrous oxide that boosts the performance of that car and gives it to the driver who is starting in that province. Obviously it will have an impact on the race. Obviously it's understood and intended to have an impact on the race.

Is Province A giving treatment to both drivers or only to one driver?

MR. LUZ: Not within the meaning of 1102(3), and I think the idea --

MR. CASS: Was that it's not giving treatment?

MR. LUZ: It's not giving treatment, right. It's not giving treatment, because, again, there's a difference -- 1102(3) isn't -- again, the wording is not "effects." It's not a provision that is intended to cover everything. It has a specific application, and the parties brought it down to the provincial level for a reason: They didn't want to have the kinds of issues that might arise with respect to -- that apply nationally.

So, in that sense, there was an intention to be able to limit the scope of what could be complained of in a national treatment

context with respect to states and provinces, and our view is that this is not one of those scenarios that was covered or considered. It doesn't fall under the ordinary meaning, and, again, there's a whole bunch of other issues to get into if we ever got to the merits, but Canada's position is that we don't even get there, because it's not something that is capable of constituting a violation of the treaty.

MR. CASS: Just to go back to the scope question --

MR. LUZ: Sure.

MR. CASS: -- on the Methanex test, which you embrace, the legally significant effect, what work does the word "legally" do there? I mean, I understand what an effect is. I understand what significant is.

MR. LUZ: Sure.

MR. CASS: But if it doesn't have to be -- obviously, in Cargill, not everything else is a legal impediment to Cargill's business. We have one that is and one measure that isn't.

What does the word "legally" contribute to this test? How should we think of

it?

MR. LUZ: Right. I think I would say that the "legally" part of it could engage legal obligations that a treaty party -- well, maybe I can give an example of the idea that, if there was an intention to discriminate on the basis of nationality or some other ultra vires, unacceptable intention that would otherwise be prohibited by the treaty, that's a legally significant connection because, within the context of 1102, for example, nationality-based discrimination is a legal obligation on the part of the NAFTA parties not to engage in. So I think that, if it's not a legal impediment, there might be a legal link between the obligation and the measure as identified by the intention.

And I think that might be a way of thinking about it when the right circumstances are connected. I think there needs to be -- it's not just market effects, even if it's significant. There needs to be something more to push it past a simple effects test.

MR. CASS: So just to be clear, so that no matter what the intended effect is, no matter how great it is, no matter how few

the parties involved are, your point is that there has to be something in addition to that in order to bring it within 1101?

MR. LUZ: Yes. I think that has to be the case, because then, otherwise, you run into the problem that the Methanex tribunal worried about is that you end up having a much broader scope and coverage for NAFTA Chapter 11 that was never intended.

PRESIDENT: Any questions?

MS. LEVESQUE: Back to 1102(3).

MR. LUZ: Mm-hmm.

MS. LEVESQUE: As highlighted by the Claimant, at some point Canada argued that it was impossible for a province to be in breach outside of its jurisdiction. I'm not formulating this quite well. I know that's not what they're arguing, but just as a matter of standard, if there was evidence, like alleged in Methanex, as you gave the example of nationality-based discrimination. So there's a smoking gun. It is in a letter somewhere that this was meant to hurt Resolute, not the others, just Resolute.

Then would you agree that

it is possible under 1102(3) to compare even outside of the jurisdiction if there's that link, that legally significant link?

MR. LUZ: I think it might be possible --

MS. LEVESQUE: Okay.

MR. LUZ: -- because, again, in the Methanex scenario, when that allegation was made, the idea was that they were doing something in order to target someone. I think it might be possible in that case.

MS. LEVESQUE: All right.

MR. LUZ: Obviously without prejudice to the fact that it's not here, but --

MS. LEVESQUE: No, no. That's agreed.

Do you think that might explain the formulation of the U.S. 1128 submissions? They rely more on like circumstances then jurisdiction.

MR. LUZ: I think that's probably it. I mean, I think that was what the U.S. 1128 was getting at, because it was really that -- their point was that there was a nationality-based discrimination kind of issue,

and if you were being targeted for that purpose, well, then that's something that gets taken into account at the merits phase. And we said this in our pleadings. I mean, we don't disagree with that in principle. It's just that here we're talking about the ordinary meaning of the language and whether or not a claim can even be brought within that ordinary meaning, setting aside all those other factors.

Again, the Claimant sort of suggests that it was Canada that has changed its arguments. We didn't change our arguments. We were just reacting to a very unclear argument to begin with. It wasn't clear at first as to whether or not whose treatment they were complaining about, and, if I may say in Canada's defence, we assumed that they would be complaining about the treatment that they did or didn't get from Quebec, because that is the only really logical claim, notwithstanding the fact that you can't do that under 1102(3). To Canada, the position that it has evolved to now is equally inadmissible as the original version.

MS. LEVESQUE: I would have one final point, if I may.

MR. LUZ: Please.

MS. LEVESQUE: Going back to time bar and knowledge and incur, we heard a lot about what "incur" means and referring to Grand River. In Grand River, as was noted yesterday, there was already a legal obligation to put money in an escrow account, although the money would have been put later in the account.

In the case here, there's no legal obligation. It's a different matter. So could you clarify a bit how we should treat it the same although it's not?

MR. LUZ: Well, it is in the sense that the legal obligation to sell paper at a lower price in January was incurred in November and December when the contracts were negotiated. So, in that sense, there was an incurred loss or damage. The Claimants have accepted that. If they knew that their prices were lower in December, that's when the legal obligation was incurred. That's one way of looking at it.

The second way of looking at it is, again, just to look at the pleadings of what they were pleading. The damage was to their competitive position, and that damage to the

competitive position happened as soon as the mill reopened and started re-entering the market, because then all of a sudden, as opposed to four competitors, it now suddenly had five competitors, and that's the damage that they were alleging and the fact that they didn't get the equivalent benefits that PHP got.

When did they not get the equivalent benefits? Well, when it was given to them and suddenly they, starting in 2012, had to start operating in the absence of that similar benefit. And, as we've seen, the result, at least in part, was their decision to shut down one machine permanently in November 2012 and shut down one machine temporarily in December 2012.

So that's why Canada had sort of said there are multiple ways to get at this, and when you put them all together, then we think that the claim is just filed too late.

PRESIDENT: I think we now have finished.

MR. LUZ: Thank you very much.

PRESIDENT: Thank you very much.

MR. LUZ: Thank you.

PRESIDENT: Mr. Feldman.

MR. FELDMAN: Thank you. Mr. Valasek is going to precede me.

PRESIDENT: Do you wish a break?

MR. VALASEK: I would, certainly, a comfort break. And five minutes should do it. Thanks.

MR. FELDMAN: Thank you.

--- Recess at 10:18 a.m.

--- Upon resuming at 10:27 a.m.

PRESIDENT: Mr. Valasek.

REBUTTAL SUBMISSIONS BY MR. VALASEK:

MR. VALASEK: Good morning.

I will present some rebuttal arguments in respect of 1101 and 1102 and answer some of the questions that were posed.

Taking first Article 1101, Canada says this morning that the Claimant has to prove the jurisdictional facts that are relevant to that inquiry. Just a couple of observations on that: First, I will take you through some of the exhibits that we have put into the record that we believe prove the jurisdictional facts for purposes of the "related to" question. But let's

recall that the bifurcation application was made on the basis that Canada claimed that we were alleging mere effect, and, therefore, this was purely a question of applying the Methanex test and that they were prepared to accept Claimant's factual allegations pro tem.

So we started this bifurcation proceeding, and this was accepted by the tribunal in paragraph 4.14 of its bifurcation order that this would not be a factual inquiry even on the jurisdictional facts. Canada said "the jurisdictional facts have been pled; we accept them, and we don't think they meet the Methanex test". And we've been debating what the test means, and, as we've gone through the pleadings and the proceedings, it now seems that Canada accepts, notwithstanding Mr. Neufeld's presentation yesterday, that we're not really looking at Test No. 1 that the tribunal articulated in its Question 7, but we are looking at the third formulation.

So, in our view, we've come through the bifurcation proceeding, and we've accomplished what the tribunal asked us to do, which is make submissions to the tribunal on the proper

interpretation of the Article 1101 test, and let's apply it to the facts that were alleged by the Claimant that don't need to go through a factual inquiry.

So this morning we hear that, to some extent, Canada accepts that there is -- that the Methanex test is, in fact, not as strict as they originally said it should be, but now they've turned to us and said, "Well, you have to prove your facts." So we've reversed what the bifurcation proceeding on 1101 was meant to do.

In our view, that should be sufficient to get us through the hurdle or, at a minimum, get us through the hurdle and have the tribunal say, "Well, we're not going to decide the issue," because what Canada has essentially conceded this morning is that this is a factual inquiry, which they insisted it wasn't at the bifurcation application stage. And, if it is, then it should be joined to the merits, and that's exactly what all other tribunals have done. It's perhaps not surprising that, as I mentioned yesterday, that all of the cases, including Cargill, Mesa Power, Apotex, all of them considered Article 1101 in conjunction with the

merits.

So we feel there's been a change in position. We feel we've satisfied what we needed to show at this stage. If the tribunal decides that there's a factual inquiry that needs to take place, well, then it's inextricably linked to the merits, and we need to proceed to the merits.

MS. LEVESQUE: Quick question on this: Would you argue the same for 1116 and 1117? And, by that, I mean to state for a minute -- let's say it's a jurisdictional issue. Then the tribunal has to ascertain the facts. When did the Claimant know or should have known? So that's clearly a factual issue. And if we just took what the Claimant alleged pro tem, there wouldn't be a decision to be made.

MR. VALASEK: Well, the decision on bifurcation, I will let Mr. Feldman address that question specifically, but your decision on bifurcation was different on Article 1116. There, you said there is a factual question of when the Claimant knew or should have known that injury first occurred. And so that's before the tribunal. We have put in evidence, and that's

a fairly different situation.

So focusing on 1101, this bifurcation proceeding was not meant to be a factual inquiry. Focusing on 1116, it was meant to be a factual inquiry. There's a question of who has the burden, and Mr. Feldman will address our closing rebuttal argument on that, but I wouldn't say that we're in the same circumstances at this point with respect to these two objections.

MS. LEVESQUE: Okay.

MR. VALASEK: So I feel that Resolute can stand on my submission that I just made, but I will go further and go beyond and establish that we have proven the jurisdictional facts with respect to 1101, especially in respect of the measures which appear to be of concern to the Tribunal and which Canada, again, referred to this morning, and those are the hot idle funding and the Forestry Infrastructure Fund, which were the presale measures, and there's also a reference this morning to the example of the forestry coordinator.

If I can take five or ten minutes to just go through some of the exhibits to

show the inextricable connection between those measures and the sale to Pacific West and making Pacific West the lowest cost producer in North America and thereby creating the connection in this commodity market that we claim exists with respect to all of our claims.

I don't have the exhibit up, but we saw yesterday that Canada put up a nice PowerPoint with respect to their measures, and their presale measures, they said, covered the period September 2011 to September 2012. So the 12-month period preceding the announcement of the agreement by Nova Scotia to support the sale to Pacific West.

And there is an exhibit from September 2011. It's Exhibit C-5. I unfortunately don't have slides prepared for these, but I will take you through that exhibit.

This is an exhibit that we cited in our Statement of Claim, and it's a CBC news report which reports on statements that were made by various individuals, including the Premier of Nova Scotia, in connection with the mill at Port Hawkesbury and what its situation was and what they anticipated would take place.

So, first, the CBC news report mentions that the current owner at the time, NewPage, is looking for a buyer, and it has applied for creditor protection because it's in dire financial circumstances, and it says that it filed an application with the Nova Scotia Supreme Court for creditor protection. It says that:

"The Cape Breton mill is in dire financial straits and needs immediate protection from creditors. Suther --"

And I believe that was the mill manager, Tor Suther.

"-- said the Point Tupper mill had been --"

And the Point Tupper mill is Port Hawkesbury.

"-- had been 'suffering significant operating losses,' most recently about $4 million per month on average."

And, in our Statement of Claim, in paragraph 28, we do say that it suffered

$50 million in operating losses in the previous 12 months, $50 million in operating losses.

And Mr. Feldman mentioned yesterday that this is a fantastic mill. It's a beautiful mill with great equipment, but it's not near the market. There's a cost structure that's simply impossible to sustain without something more.

So let's see what everyone is talking about. It says that:

> "NewPage Port Hawkesbury is looking to sell the mill as a 'going concern.'"

NewPage is looking to sell the mill as a going concern. Well, you're trying to sell a mill that has just lost $50 million as a going concern. There's not too many people that are going to line up to say, "I would like to buy something that's going to lose me $50 million."

Everyone was clear at this point that they didn't want to sell this for scrap. This was a mill that the politicians wanted to sell so that it could be sustained. That would be a big win for them. So we continue

reading on.

The province will look for a buyer.

> "Premier Darrell Dexter said that despite the mill's financial problems, it doesn't mean another company can't find a way to bring the mill back to profitability."

It goes on:

> "'The province has already reached out to potential buyers and will now aggressively work with our partners to attract a new buyer as quickly as possible.'"

Now, if you consider this in light of all the other circumstances that we've alleged, what that means is that the province is now focused on finding a buyer that will be partnering with the government and that clearly will receive assistance from the government in

order to make this a going concern.

"'Now that efforts will need to be focused on identifying a new buyer for the mill --"

So that's the focus.

"'-- it is more important than ever to keep the woodland infrastructure in place and contractors working.'"

So Canada says this isn't about the sale to Pacific West. The intention here was to put together a woodland infrastructure program and taking these things as separate and unrelated.

Well, the Forestry Infrastructure Fund, which is one of the presale measures, here, according to the Premier himself, is necessary because they need to find a new buyer to make this losing mill a winner.

PRESIDENT: You decided you didn't want to, and one can understand it, but it might have been you. The treatment of Nova Scotia at that point was either treatment of no one or

treatment of everyone.

MR. VALASEK: Right. And that's why the chronology is important, because within a few months, it's clear that Pacific West enters the picture and immediately starts demanding favourable treatment that it starts getting accorded.

So just to finish this exhibit, Dean Cass mentioned the Fast and Furious franchise. Well, there is a reference to cars here. It says that this is the Cadillac:

> "It's the best mill there is in North America in the production of supercalendered paper. It produces the best quality. We have a Cadillac here."

So the other important thing to point out is that, at this point, it is operating at a loss, at a $50 million loss, even though it's the Cadillac. So it has all this great equipment. So any buyer coming in, including Resolute, would understand that, notwithstanding it being a Cadillac, it can't make

money.

So the province, at this point, identifies that it wants to find a buyer, and, as alleged in our Statement of Claim at paragraph 31, Pacific West comes into the picture on January 4, 2012, so within a few months. Vancouver-based Pacific West was chosen by the Monitor over another pulp and paper producer and two scrap dealers as a suitable purchaser for the Port Hawkesbury mill. And it's at this point that the negotiation between Pacific West and the province begins. And, in the Monitor's report of July 2012, we see the connection with the hot idle funding.

At this point, the Monitor announces the planned sponsorship agreement that has been entered into between Pacific West and the existing owner, and it sets out the various conditions that Pacific West insisted on, and it includes, among other things, maintaining the mill in hot idle status. Of course, the hot idle status was absolutely necessary for any of this to take place.

At the end of that 12-month period, you have essentially an exhibit which

shows you how the province looked at this at the end of the process. This is Exhibit C-35, and this is a press release by the province. This was a press release issued the day before -- well, right during the day where Pacific West actually was playing hard ball with the province and said, "Well, in the end, we're not going to go through with this. We don't have enough on the table for us to proceed with the sale." And Premier Dexter noted that:

> "Everyone had a role to play if this mill was going to reopen and be successful. The province took every reasonable step to keep this mill resale ready and facilitate the reopening."

So the Premier there is characterizing what's happened in the previous 12 months. And he says that the province had a role to play to make this a success. The province took every reasonable step to keep this mill resale ready and facilitate the reopening.

And, really, this language is contained in the very exhibits that Canada itself put on the screen yesterday attempting to show that these measures have nothing to do with our case. So if you look at their presentation on the presale measures, of course, they're focusing, for example, on the Forestry Infrastructure Fund, and they're saying: What does this have to do with the competitors in the supercalendered paper market? This is a forestry initiative.

Well, looking at page 17 of their presentation -- and this is the presentation that Mr. Neufeld was going through -- they highlight a list from Exhibit R-39, which says:

> "The Forestry Infrastructure Fund will allow for new silviculture work, harvesting, road maintenance on Crown land, forestry trading program, establishing a woodlands core team."

But what they also highlighted but didn't focus on yesterday was the top quote:

> "The province's seven-point plan to provide job-specialized training and to keep the New Page mill in Point Tupper resale ready."

That's exactly what the Premier says in September 2012, saying, "We've taken all the reasonable steps to make this plant resale ready because we want to make it a success."

Same thing for the hot idle funding on page 18 of the presentation, the two citations that are highlighted. This is from the Monitor's report:

> "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."

So technically that's what hot idle funding is meant to do. And I think that's

Exhibit R-46.

Then, in Exhibit R-48:

> "After discussions with the Court-appointed Monitor, the province will keep the mill resale ready through February and March. This will cost $5 million."

So, again, the idea is to keep it resale ready, and I'm connecting it to the statement by the Premier in September 2012, saying, "These were steps we took to make sure this was a success."

On that day, in September 2012, ultimately the province did accede to Pacific West's demands for further support, and it ultimately put together the full range of measures, which I don't think we have to go through. I don't think there's any real debate that the financial support, the electricity specialized rate for the highest cost of the plant, and that all of those relate directly to making this the lowest-cost producer in North America.

And the one other measure that Canada mentioned this morning, which was the forestry coordinator, I mean, again, we suggest that this actually shows that Canada's sort of picking apart these measures in an artificial way.

If you do look at Exhibit C-9 which is the Premier's press release at the time when they announced the actual financial package, this is mentioned simply as part of the support for making this the national champion.

So Exhibit 9 is the announcement that the province will invest in jobs training and renewing the forestry sector. And the province, it is announced, is providing a financial package to Pacific West. That's a $24 million loan, a $40 million repayable loan, $1.5 million to train workers, $1 million to implement the marketing plan.

And then it says:

> "The province, through the Department of Natural Resources, has also agreed to invest:
>
> "-- $20 million to buy 51,500 acres of land...

$3.8 million annually, for 10 years, from the forestry restructuring fund to support sustainable harvesting, forest land management, and fund programs that will allow more woodlot owners and pulpwood suppliers to become more active in the management of their woodlands."

And finally:

"Funding for the development of a Mi'kmaq Forestry Strategy and a Mi'kmaq Forestry Co-ordinator.

"These investments --"

The Premier said.

"-- will support the most modern paper machine in the industry and the development of a new and innovative sector."

And, finally, it concludes:

"These investments will support to make the mill the lowest cost, most efficient operation in North America and take advantage of today's market."

Now, before the province did all of these things, this mill was losing $50 million a year. So the idea that Canada has put forward that somehow this mill that was purchased by a private operator, we're seeking to attribute the measures or we're seeking to complain about the conduct of a private party. It's not at all our case.

We're saying that, in some ways, for purposes of this case, the private buyer is the hammer in the government's hand. And to claim that we shouldn't complain about the government; we should complain about the hammer is highly artificial. It is the province that has decided to take steps, because it wants to, probably for good political reasons. It has decided to take these measures to put Pacific West

in the position to do the harm that it did. And we are complaining about the entity that is wielding the hammer, not the hammer itself.

Turning quickly to Article --

PRESIDENT: As a matter of international law of expropriation, if I put to you, a private party, in a position where you can exercise economic power to destroy another entity, I may well have acted unfairly. There might be circumstances in which I may have acted in a discriminatory way, but I haven't expropriated you. Whatever my motivations, I haven't acquired anything. It's not even tantamount to acquiring anything. I may have behaved improperly, but expropriation is a rather specific delict.

MR. VALASEK: Well, expropriation is taking -- there are several types of expropriation. I agree it's not a direct expropriation. But an expropriation is a measure that causes the substantial deprivation of my property. And if you, as a government, take measures, knowing that you will be supporting an entity in a way that will harm a limited number of other competitors in a shrinking market, I think that there is a very good basis to claim that that

measure may cause the expropriation, indirect, constructive expropriation, of one of the other market players. It results in the substantial deprivation of my asset, which is what we will argue on the merits.

Now, we're clearly getting into the merits, but, as a matter of theory, I don't see any reason why an entity that's wielding the hammer can't do so in circumstances where the hammer doesn't just harm me a little bit, but actually kills me. And that's a question for the merits.

So turning to Article 1102, let me just get my notes. Sorry, I have seen that I need to make an additional point on 1101.

Mr. Luz mentioned that the Cargill case doesn't support our position, but, really, the first point to make is that Cargill decided 1101 on the merits. So the tribunal had the luxury of going through all the allegations and really delving into the case before having to make the decision.

But Mr. Luz mentioned three factors: motivation, immediate and direct effect, and legal impediment. Well, he conceded that not

all of the measures had a legal impediment. So that's actually not one of the three factors.

And, interestingly, Canada when it's analyzing Cargill, seems to be happy to lump all the measures together, but now accuses us of doing something similar when we've pled our case. But putting that aside, No. 3, the legal impediment, is clearly not part of the 1101 test.

Motivation, we have alleged motivation here. We have alleged that the clear motivation from the beginning was for the province to make this the lowest-cost producer, but it was losing $50 million a year. So it could only do so by adopting these measures. And by making it the lowest-cost producer in a commodity market, it necessarily had to be harming the other producers outside the province. So we have alleged, and we believe there is motivation of the kind that exists in Cargill.

And in terms of immediate and direct effect, Professor Hausman said that he believes that the effect would have been apparent to Resolute within about six months. He says that, by the end of the first quarter or second quarter of 2013, the effect would have been

knowable to Resolute. Now, that's pretty immediate from the point of view of economic impact. With respect to the debate over whether it should have been known prior to December 2012, Mr. Feldman will go over that. So we believe that the Cargill test is met here.

And, finally, the ongoing measures, there was a question from, I think, Dean Levesque. Our point with respect to ongoing measures is, again, to demonstrate that there's an artificiality in Canada's position that, once these measures were adopted, it was all the private company. The private company decided to price other producers into a very difficult position.

But, at that point, the private company is getting this sustained support from the government, and it continues to get the sustained support. So, at that point, it's not even that the government has grabbed the hammer in September 2012 and has thrown it and then somehow you can claim that that hammer somehow takes on an independent status. It's just continuing to wield the hammer, because the government continues to be linked with what that operation is doing through

continued financial support. And, frankly, we don't know whether more support will be provided. Potentially, yes. They may throw more money at it, because once you have politically made such an investment in it, there is a risk, of course, that they will just continue to do that.

So 1102, I can be very brief, because Mr. Luz has conceded, in our view, the point that this proceeding was meant to address, which is: Is it possible for an investor that doesn't have an investment in a province to bring an 1102(3) claim? And Mr. Luz said, yes, it is possible. That was the only debate that this proceeding, this bifurcated proceeding, was meant to address. And all of the other questions that are before the tribunal here are merits-related questions on 1102(3).

When Mr. Luz characterizes it as, essentially, an Oil Platforms type objection now, that the claim is inadmissible because there's a lack of a factual predicate, but that's just a different way of saying that we're not in like circumstances, because if you think about treatment, treatment absolutely is a comparative concept.

If Canada's argument on treatment is correct, then even a legal impediment, a negative treatment that's directly imposed on a foreign investor can't be subject to 1102(3), because where is the treatment of the domestic investor? There's no treatment. There's only treatment of the other side. It's always comparative.

And what 1102(3) provides is that the foreign investor is entitled to demonstrate that it has not received the most favourable treatment. If I receive no treatment, in Canada's term, that's still not receiving the most favourable treatment. That's the point.

The point of 1102(3) is to say: If you are in like circumstances and you haven't received the most favourable treatment, is there a breach? The defence can't be you haven't received treatment. I mean, that might be the very concession that establishes that we've made our case. The whole debate will be on whether we're in like circumstances, and everyone agrees that that is a debate for the merits.

MS. LEVESQUE: Sorry for interrupting. You were saying yesterday, if the

treatment is giving you equal support, then that's not possible in the sense that Nova Scotia will not subsidize companies outside of Nova Scotia.

MR. VALASEK: Yes.

MS. LEVESQUE: So isn't it a catch-22?

MR. VALASEK: As a matter of political reality, it won't, but as a matter of law, it's not. It has the spending power. The spending power is not limited by territorial jurisdiction. If it chooses -- so these are all good questions for the merits, but as a matter of theory, the claim is good because the province has done something that it could do in respect of other competitors. It could spend the money outside the province. There's no question about it. The spending power is not limited by territorial jurisdiction.

Politically, of course, it probably wouldn't do so, but we're not debating political questions. We're debating the legal interpretation of 1102(3).

MS. LEVESQUE: It's not just political; right? If you have a city negotiating a tax rate or -- so I'm trying to remember the

individual measures. Some are linked to the territory.

So taxation, forest, management, it's linked to the territory. So if you're not in that territory, those benefits, subsidies, whatever you want to call them at this point, are not possible. You would agree with that; right?

MR. VALASEK: Yes. But we would say that that's the wrong level of analysis, because that's simply the way that the benefit was accorded as a matter of mechanics, because when the province first announced this, they said, "We're going to take aggressive measures to support this producer." And then the buyer said, "We want this, this, this, this, and that." And the total financial package, which is often mentioned in the various reports, is what's important. It's not important that the benefits came in different ways.

Let me give you an example. One of the things that Pacific West wanted was a tax credit from the federal government. So that was one thing that they wanted in order to make it work. And the federal government said no, so they

went back to the province, and the province said, "Well, we will find another way."

The point is the individual mechanics of what was done isn't important. What was important was the economics, of course. I mean, the shareholders of Pacific West don't care how the province achieves the support. What they care about is that, at the end of the day, the plant can make a profit.

And I will close there. I have already taken more time than I should have.

On the Oil Platforms case, I would simply say that I think this morning I heard Canada say that they would be applying it in the context of 1102(3). I have responded to that. But I believe yesterday the chairman's question to Mr. Neufeld and whether the argument on 1101 was sort of being made in the same sort of way, I would say that, while the Oil Platforms case does provide a basis for arguing inadmissibility, that is not the purpose of 1101.

1101 is not a claim-related procedure. 1101 is very clear. It just requires Claimant to establish that the measures are related to the investment. It doesn't say that

you can use that to short-circuit an analysis of the claims. Thank you.

PRESIDENT: Thank you, Mr. Valasek.

REBUTTAL SUBMISSIONS BY MR. FELDMAN:

MR. FELDMAN: Thank you very much, and thank you for your patience as we get toward the end, I guess.

Judge Crawford recommended yesterday that we think overnight about what we might want to say this morning, and I confess that initially I didn't take his advice. I composed some thoughts last night, and this morning I changed my mind. So what I will present might not be quite as complete or tidy as I might have hoped, because I ran out of time this morning.

I concentrated this morning on something else Judge Crawford said yesterday. He drew our attention to the word "knowledge." To begin the clock on the Chapter 11 time bar, a Claimant must have incurred loss and/or damage and acquired knowledge of loss or damage.

Did a public relations officer besieged by unhappy local politicians have knowledge of the corporate decision to close

Machine 10 at Laurentide? We've heard that opening and closing a paper mill doesn't involve simply throwing a switch. Machine 10 was not turned off when and because Port Hawkesbury was turned on.

To the contrary, the decision was taken to close the Laurentide machine at least a full year earlier, and we have indeed provided evidence on the record to that effect contrary to what our friends in Canada have suggested, that there's no contrary evidence.

Resolute president and CEO, Richard Garneau, forecast the likely closure of that machine when he explained Resolute's careful and deliberate plan to reduce costs, increase efficiency, and thereby improve profits.

So I did manage to cobble together some slides. Here is a statement from October 2011 from Mr. Garneau:

> "Well, I think that the intent here at Gatineau and Dolbeau...so if those two mills were to restart, I think that capacity will have to be

closed elsewhere. So it's not going to be a net increase in terms of production."

And we know, of course, that he proceeded to open those two mills. And, later, in 2012, a full month before the opening of Port Hawkesbury, he said:

"We spared no effort to relaunch the Dolbeau mill because it is a good investment. With today's announcement Resolute will be more competitive than ever."

And then looking back later, in April of 2013, he says:

"We benefited from more cost efficient operations on the restarted Dolbeau machine, which replaced permanently closed machines at Kenogami and Laurentide."

A full month before Port

Hawkesbury opened, he announced the reopening of Dolbeau, which, 10 months earlier, he said would require closing something else, which, because of its age and inefficiency, inevitably was Laurentide Machine 10.

Now, M. Choquette may have even believed what he was saying, but he obviously didn't know, because the decision had been taken long before. There is, indeed, as Judge Crawford noted, a critical difference between belief and knowledge. And to test belief against knowledge, we turned to science, analogous perhaps to Judge Crawford's hypothetical cancer treatments. Whatever anyone might have believed or forecast or prognosticated about the impact of Port Hawkesbury, Professor Hausman, with the benefits of hindsight not the hazards of forecasting, was able to report with confidence what, in fact, happened.

In fact, Resolute had not incurred loss or damage in 2012. When Resolute now reports that it had not acquired knowledge in 2012 of loss or damage, that report is unassailable because, as Professor Hausman demonstrated with the most powerful tools of

social science, there had been no loss or damage in 2012. The Chapter 11 requirement is for knowledge, not belief.

And Professor Hausman elaborated yesterday about the Resolute prices, sales, profits in 2012. They all speak for themselves. We've been told that these data are not probative. But what else could be probative? We were suggested, even again today, that there was some drop in price, but we understand that there was no significant drop in price in 2012.

And, indeed, we have heard again about a drop in price in January, but Christmas comes but once a year, and the prices in paper that's used for advertising in newspapers go down after Christmas. They also come back up, in this case, in February.

So in the midst of a secular decline in this industry and the seasonality that's attached to the particular paper being produced, the evidence is ample, just evidence that our friends seem to want to avoid.

Canada focused yesterday on a statement of Resolute's CEO a full month before Port Hawkesbury reopened. You will recall, I'm

sure, that, up until the very day when Port Hawkesbury reopened, there was considerable uncertainty as to whether it would. M. Garneau acknowledged that, if it did and if it succeeded, there would be an impact on its competitors. But Canada didn't show us yesterday the full statement. So I would like to put it back up, the pieces that they didn't talk about of this same statement.

Mr. Garneau says, quoting again the passage that Canada quoted to you yesterday:

> "So obviously the restart of Port Hawkesbury would certainly have an impact on the market. Yes, it would. So we're going to monitor the situation, because, after all, we don't know if it's opening, and we don't know when it's going to restart, but we are certainly going to continue to compete head

on and continue to work on our costs and make sure that we're going to certainly, I believe, be able to serve our customers with the same dedication than, let's say, before the restart."

This is hardly a statement that says, "I know there's going to be this negative impact when they restart, and, therefore, because I know that that's going to happen, I've admitted that I had knowledge of a loss or damage," which was essentially what Canada was arguing yesterday.

Whatever anyone believed during or about autumn 2012, Professor Hausman has provided us unrefuted evidence of fact. Canada has insisted that Resolute didn't call the patient to be examined by Canada's lawyers. We called the doctor and welcomed Canada's lawyers to question him. Better, we think, the doctor than the patient.

I also reflected this morning from the remarks yesterday on good faith.

After all, as I alluded yesterday, as a casual inside remark that may not even be on the record, we're allied with Canada in trying to save NAFTA. We joined hands in Geneva before the WTO in challenging new American protectionism, but when Richard Garneau asked Federal Minister Ed Fast to take him seriously, to recognize the gravity of what had been done in Nova Scotia for fair competition, he was rewarded by a Canadian presumption of bad faith. Yesterday Canada called his letter to Minister Fast a threat.

We thought it might be useful to pause a moment and look at that letter a little bit more carefully to see whether it's a threat. So I have provided this slide as well. And M. Garneau says:

> "I anticipated that you would consider carefully our draft Notice of Intent to arbitrate and, in due course, would initiate a conversation that might lead to compensation for Resolute because of the

discriminatory and damaging character of these subsidies to three Resolute mills in Canada."

We have sought to avoid subjecting your government --"

Now, this was an election year, and there was an election coming.

"We have sought to avoid subjecting your government to a potentially costly and embarrassing NAFTA proceeding in which the government's best defence likely would be an admission that Nova Scotia had indeed provided the Port Hawkesbury mill with substantial countervailable subsidies."

For some time, Resolute had been warning Canada that there may be a case being brought by the American victims of the Nova Scotia subsidies and was concerned especially about that and was desperately trying to get Canada to participate in recognizing that that was going to happen and that that was a risk, not just for Resolute, but for the other producers of supercalendered paper in Canada.

There had been an exchange between the United States and Canada on this subject through the auspices of the WTO and the subsidies and countervailing measures committee. The United States provided Resolute with the questions it asked, but Canada forbade the release of Canada's answers. And, currently, notwithstanding a request that Resolute has made to Canada under Canada's Freedom of Information Act, Canada has invoked national security in refusing to release what it told the United States about the Nova Scotia measures. So that is meant to explain this last paragraph in the letter.

MS. LEVESQUE: Maybe a quick question on the paragraph that's not on this slide. It's the fourth paragraph. It starts

with:

"As you will understand from our meeting..."

MR. FELDMAN: I don't have it in front of me, but go ahead.

MS. LEVESQUE: "As you will understand from our meeting, Resolute agrees with the essentials of the American SC paper petition. We must now decide whether to support it rather than attempt a defence against it. Our decision will depend in significant part on the disposition of the Government of Canada toward our potential NAFTA proceeding."

Could this have a relation to what you are explaining now?

MR. FELDMAN: Yes, it does. And the timing is very important because the draft Notice of Intent was presented to the Minister

before there was an American petition. But with the intelligence that Resolute was able to gather in Washington, it anticipated there would be one.

And so the draft Notice of Intent was delivered in a conversation, in a meeting, saying, "We need to anticipate this and be concerned about it." Then the petition came, and the awkwardness of the Resolute position was it agreed that there was harm being caused by the activity at Port Hawkesbury, and that agreement meant that Resolute, in effect, was in between. It was on the Canadian side, defending against the allegations of countervailable subsidies, delivered entirely to Port Hawkesbury.

So it was cast in the role of respondent and defender. It also agreed with the petition; that it was true; that what had happened at Port Hawkesbury was damaging to the whole industry.

So, in this last paragraph that I have put on the slide, M. Garneau says:

> "As gestures of good faith, we hope you will release to us immediately the Canada-U.S. exchange

of documents to the WTO on the subject of Port Hawkesbury that you have told us are public, but that we have been unable to locate. And we'll agree to meet again no later than March 15 in order to discuss more intensively our NAFTA-based concerns."

This is not a threat. This is a letter that says, "We've got a problem", and it's a problem that is, if I dare expand the metaphor, metastasizing.

So M. Garneau was sincerely looking for help. He delivered the letter as a final effort to persuade the government that there likely was about to be even greater fallout from Port Hawkesbury and its resurrection, an American trade remedy action that would ensnare all of the producers of SC paper operating in Canada.

I will give you one last slide on this subject. This comes from our Statement of Claim, so I'm not introducing you to anything new:

"Resolute CEO, Richard Garneau, met with Minister Fast late on February 24, 2015 to discuss Resolute's concerns. Within a week of that meeting --"

This goes directly to your question, Dean Levesque.

"-- the U.S. government initiated its investigation of SC paper from Canada."

Just as Resolute had predicted and warned for nearly eight months. And we have put on the record and in our Statement of Claim that whole sequence of events.

"Canada began working on a defence of the U.S. allegations for the three Canadian companies, Port Hawkesbury, Irving Paper and Catalyst Paper --"

Now we come to something that will be entertained, we hope, in the merits.

"-- and entered into a joint defence agreement with those companies for that purpose. Canada informed Resolute in March 2015 that it would not enter into a joint defence agreement with Resolute in the U.S. investigation."

We don't doubt that Nova Scotia was sincere in seeking to protect jobs and seeking to do the best it could for its own public. It's not the issue. The issue is that it was a "beggar thy neighbour" policy because those jobs, in an industry in secular decline, couldn't be in both places. Someone was going to lose jobs if those jobs were going to Nova Scotia.

But all of this discussion is really for the merits. I raise it here because of the odd way in which Canada wanted to impugn this particular letter that M. Garneau wrote to Minister Fast.

The timing of the draft notice, they also raised. It was driven by the

fear of the American case compounding the damages and losses. It was otherwise early, after all, for the statute of limitations. It was not that the actual notice, therefore, was late, but that this was early.

It is often better to think, we think -- and we draw this out from yesterday's discussion as well -- and expect the best of the other side. Regrettably, Canada has never looked at this situation that way.

In the end, Resolute executed a deliberate plan to reduce costs, maximize efficiency, and increase profits. Were Resolute not obliged to compete with the Government of Nova Scotia, the plan likely would have succeeded, or the Government of Canada might have responded more sympathetically to Resolute's plight, first in being forced to compete directly with Port Hawkesbury, and then with dealing with the countervailing duty case brought by the United States. More responsible and responsive Canadian governments might have avoided this arbitration, which plainly was Resolute's preference, as you can tell in the communications with the Minister.

It would appear that Canada

has agreed that there is no 1116 bar to the expropriation claim with respect to Machine 11 at Laurentide. There are questions such as the one that Judge Crawford is raising about what constitutes an expropriation and whether you can have a constructive expropriation of this kind. And we welcome that discussion in the merits phase, but it appears to us that there is no 1116 bar to that claim regardless of what other arguments are still before the Tribunal.

And we think that we've proved that the date of breach is not the standard. This bifurcation began with an 1116 inquiry whose fact was when the breaches occurred. It now is apparent that the key facts are about loss or damage and not about the timing of the breach.

So, as best we can tell, we've put a great deal of evidence into the record, meeting the requirements that are upon us, leaving open still the dispute as to who really has a burden of proof, whether we have a semantic debate over jurisdiction and admissibility.

But what evidence has Canada brought to us, in fact? It has no answer at all for the fact that the prices didn't do what they

said they would do in the autumn of 2012. It has provided us no answer of any kind about the prices going up in February of 2013, and for all of that, it's made no linkage of cause to Port Hawkesbury. It's not shown that any of the activity it claimed was happening in those prices at that time, had anything to do with Port Hawkesbury.

So we're left with a Clintonesque interpretation of the word "from," picking on a public relations official who contradicted his own CEO and the decision-making to close a machine. We have selective quotations from the president and CEO of the company all because a provincial government thought it could, indeed, beggar its neighbour even if it was acting sincerely in the interests of its own public, take jobs back by creating, whatever you choose to call it. I've referred to it as a commercial ward of the state.

It is, in many appearances, a state-owned enterprise. I have represented a Chinese state-owned enterprise. I know what it is. This is not very far from being that. And the expectation that it would benefit from the indulgence of a federal government apparently

prepared to hide behind federalism to hold harmless investments that constructively have expropriated a competitor's business while exposing it to trade remedy actions from the United States.

Resolute certainly wishes, as is evident in the letter that Canada characterized as a threat, that it would not have come to this.

MS. LEVESQUE: Do you mind getting back to the state-owned enterprise issue?

MR. FELDMAN: Sure.

MS. LEVESQUE: So, just to clarify, are you arguing in law that it is a state-owned enterprise, that we have to apply Chapter 15 of NAFTA?

MR. FELDMAN: No. No.

MS. LEVESQUE: That's not what you're saying?

MR. FELDMAN: Not what we're saying at all.

MS. LEVESQUE: So could you elaborate a little more.

MR. FELDMAN: Well, that's why I've used the language of "a ward of state." That's why we emphasized the continuing support

and help.

In effect, we have no reason to believe -- and I believe Mr. Valasek laid out this evidence very adroitly just before me. We have no reason to believe that Port Hawkesbury could prosper in the competitive market, given its geographic situation, without continuing help, without special electricity rates in particular because of the cost, but without all of the other arrangements and the sustained forgivable loans, the annual payments, and so on.

There were several companies that assessed whether it could make a go of that mill, including Resolute, which examined it very carefully and concluded that financially it was impossible. The only way it has been possible was, not only through the original infusion, not only from the hot idle and the capital that went into starting the mill, but it continues to depend on that. If the government were to withdraw some of that support, the mill would fail.

MS. LEVESQUE: I do have two scenarios, hypothetical, I would like to put forward, but on 1101, so I don't know if Mr. Valasek wants to take them or...

MR. FELDMAN: I don't even know what they are, and I would rather he did.

MS. LEVESQUE: I will let you fight it out. Maybe I will ask first.

MR. FELDMAN: Thank you very much.

MS. LEVESQUE: All right. So relating to, 1101.

MR. VALASEK: Yes, yes.

MS. LEVESQUE: So Hypothetical No. 1: The Quebec government decides it's going to promote video gaming industries.

MR. VALASEK: Yes.

MS. LEVESQUE: In Montréal. Okay? So it puts in a lot of money, all sorts of subsidies, tax advantages. So the Quebec government puts in tax advantages. The city matches with other things that benefit the development of the video gaming industry. Ontario doesn't think it's as interesting for its industrial policy. It has some advantage, but not as many, while British Columbia doesn't have any.

Okay? So you have an American company in B.C. getting in this video gaming industry, and they are not happy, right, because,

in Montréal, it's much better. Do these measures relate to that B.C. company?

MR. VALASEK: So the scenario is -- I mean, one reason there's a difference -- I could say yes, because that would serve an easy answer. But one reason we say that here the connection is that much clearer is that it's a commodity industry, which is quite different. The effect or the connection between government support and impact on the other producers in the industry is much more direct.

So I think it would be more difficult to make out. I don't want to say there wouldn't be a "relating to," but I think the hypothetical highlights an important difference. The gaming industry is not a commodity industry.

MS. LEVESQUE: No.

MR. VALASEK: It depends on marketing. It depends on reaching a particular segment. Are you going after my kids, preteens, or are you going after the adult segment? Are they violent games, or are they other games? So, in some respects, the industries are completely different, and I think that that might be enough to cause all sorts of differences.

In terms of --

MS. LEVESQUE: Okay.

MR. VALASEK: I don't know if that's sufficient.

MS. LEVESQUE: So it's not just the number of competitors?

MR. VALASEK: No.

MS. LEVESQUE: It's about the commodity and those markets?

MR. VALASEK: It's the prima facie causal connection. Our argument is that this industry competes on price.

MS. LEVESQUE: Okay.

MR. VALASEK: And there was a question about the elasticity between the different grades. And so, as soon as a competitor like Port Hawkesbury with a significant capacity comes on the market, the connection between the additional capacity, the lower price on the other limited number of participants is much more direct than a more complex industry like gaming.

MS. LEVESQUE: Yes.

Scenario No. 2 or Hypothetical No. 2.

MR. VALASEK: Okay.

MS. LEVESQUE: Back to this industry, so the SC paper industry. I have one exhibit in front of me that's relevant, but not the other one, but you will probably recall. So in one of the exhibits I believe you submitted, there was a description of how to reopen Dolbeau. There were negotiations with Hydro-Québec. And it was only feasible to reopen Dolbeau if a certain rate could be negotiated with the biomass, and so a similar fact pattern, but in Quebec.

And also in another exhibit, C-58, this one I have in front of me was from Radio Canada. (French spoken)'Usine Laurentide à Shawinigan: retour au travail'. I will do a rough translation. The Laurentide mill in Shawinigan back to work. And, in there, there's a reference to a new forestry management regime. And the article states: Resolute has asked the Quebec government to be exempted from this regime. And then Pierre Choquette is cited: "We want to see if something can be done for us to ensure that Laurentide can continue its operations".

So, in Quebec, the industry also benefits from some support. So if the shoe was on the other foot and Resolute was Canadian

owned and Verso still owned Port Hawkesbury, would the Quebec measures relate to Port Hawkesbury?

MR. VALASEK: I think they would, because it's the same industry, and there's the impact. And I don't have the capacity numbers in front of me, but, again, the distinction between our case and your hypothetical is the capacity of Port Hawkesbury and the unviability of Port Hawkesbury without the government measure.

And I'm not sure in your hypothetical -- and, again, I'm not an expert in the industry, but I think -- and Mr. Feldman may have more reasons to distinguish the situation, but I think that, again, the reason that we believe that the prima facie connection, which we have suggested is the probative standard under "relating to" -- is there a prima facie causal nexus -- is clearer where you have an entity that has just failed. So it's not a question of an entity that isn't failing but simply is asking for something additional or some variation in the support it is receiving.

Where you have an entity that has failed, that's lost $50 million and is in a position to be a price-maker in the industry,

because it's the lowest cost, most efficient equipment. If that is brought on with a great deal of capacity, the impact on the rest of the industry is much, much clearer.

So those are the distinctions I would make, but it may be that, in that particular case, the "relating to" standard would be met, but the merits would be much more difficult to establish, because, on actual causation, which is a merits test, not the 1101 test, the Claimant would have a more difficult time against those saying, "Well, there are other factors that were involved that affected the price, or the capacity wasn't sufficient." That would all depend on expert evidence. So I think there are important distinctions between our case and the two hypotheticals that you have made that make this a much clearer case for the "relating to" standard.

MS. LEVESQUE: Okay.

MR. FELDMAN: I wish I had let you ask me, because I agree with this answer completely, but I also agree with the beginning of the answer, which is yes. The role of the provincial government in impacting competing

enterprises in other provinces would apply in the same way. It's just that the facts here are so different. And you can test them a little bit in seeing what happened in the countervailing duty case that the United States brought, because all of the issues are focused on Nova Scotia.

That's where the problem is in the industry, and that's the problem that expanded from this kind of assistance under these circumstances.

But you are quite right. There is a new forestry regime in Quebec, and everybody wants to be relieved from it, and nobody is getting relieved from it, and there is no surprise about any of that.

We won't argue softwood lumber here, but the highest cost of harvested softwood lumber in the continent now is in Quebec because of that new regime. And so, yes, everybody would like out from it. Nobody is getting out from it. The provinces own the natural resources, as you know better than I.

Because they own the natural resources, they decide how to dispose of them, and that involves electricity and hydroelectricity and

so on. And so those are provincial matters. And this is a great dilemma of Canadian federalism, and I hope one day we can have this discussion.

But, for this case, what we're seeing -- and it is of great consequence, I think. In this case, what we're seeing is that, when a province steps in to salvage something that's dead, in a commodity market with a finite number of competitors, it goes beyond what is possible when a foreign enterprise has a reasonable expectation that it's competing with private enterprises and not with the government.

MS. LEVESQUE: Thank you.

PRESIDENT: I think that concludes the discussion.

MR. LUZ: Excuse me, Judge Crawford.

PRESIDENT: Yes.

MR. LUZ: Could we have just a couple of minutes, very brief, to make one surrebuttal point in direct response to something that Mr. Feldman said?

PRESIDENT: Can I know what it is?

MR. LUZ: It's with respect to

the price drop in Q4 of 2012 and then the price increase in Q1 2014. It's just a point that my colleague Ms. Wates wants to make. If the tribunal doesn't think we should go there, then we can...

MR. FELDMAN: I think the record is very complete on this question.

MS. WATES: I would just like to clarify, if I may, Judge Crawford, one --

PRESIDENT: I will give the Claimant the opportunity to respond. Very briefly, please.

SURREBUTTAL SUBMISSIONS BY MS. WATES:

MS. WATES: Certainly. This was just with respect to Mr. Feldman's statement that we hadn't spoken to the increase of prices that happened in February 2012, but that is actually not true. And I would encourage the -- sorry, 2013.

I would encourage the tribunal to look at Attachment 4 of Professor Hausman's report in their deliberations, and you will actually see that prices went down [ ], January over December. They did go back up in February, but it was only [ ]. So you will see they're still

down by [ ].

PRESIDENT: Yes, we knew that.

MS. WATES: I just wanted to make sure. Thank you.

PRESIDENT: I think that's a matter of record, and the Tribunal will draw whatever conclusions seem appropriate from it.

A number of procedural questions: The first is post-hearing briefs. The tribunal's tentative position is that we don't see a need for post-hearing briefs on the basis of the very full material we've got before us. But I will ask the parties to express their view, and we will have some deliberation today of a preliminary sort. But maybe we'll change our mind and identify some particular points, in which case we would notify you, but it would be helpful to know what your position is in relation to post-hearing briefs starting with the Applicant.

MR. FELDMAN: We would be happy to address questions you may have in any form you would like, but we don't perceive that this record is missing anything that would require a post-hearing brief on our own initiative.

PRESIDENT: Thank you.

Respondent.

MR. LUZ: Canada concurs. We will be in the tribunal's hands.

PRESIDENT: If, indeed, we decide there are some points, we will address them to you by the end of the week, but I think, on balance, it's unlikely.

Procedural Order 1, paragraph 23.5 provides for correction of transcripts. We're very grateful to the technical staff for producing the transcripts with such speed. And could we say Monday week for the correction of transcripts? I'm not sure what date it is, but you will get a letter from the PCA confirming that. So we can have your corrections by Monday week, and a correct transcript will be issued. You will be getting sound recordings of the proceeding for what that's worth.

The case has been very well argued. It's quite difficult, but the tribunal will do its best to produce a decision by the end of the year, but it can't be expected to be much more than before the end of the year, given other commitments, but we will certainly do our best to do it as promptly as possible.

I thank all the participants and the technical staff and the PCA, Judith Levine, for her customary efficiency. Thank you for your courtesy and professionalism. Thank you to my colleagues. The hearing is closed.

--- Whereupon hearing concludes at 11:36 a.m.

I HEREBY CERTIFY THAT I have, to the best of my skill and ability accurately transcribed the foregoing proceeding.

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Teresa A. Forbes, RMR, CRR, CSR