

PUBLIC VERSION

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

**BETWEEN:**

**RESOLUTE FOREST PRODUCTS INC.**

**Claimant**

**AND:**

**GOVERNMENT OF CANADA**

**Respondent**

**PCA CASE No. 2016-13**

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**GOVERNMENT OF CANADA**

**COUNTER-MEMORIAL ON MERITS AND DAMAGES**

**April 17, 2019**

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Trade Law Bureau  
Government of Canada  
Lester B. Pearson Building  
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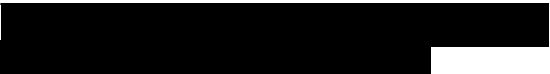
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**Table of Abbreviations**

Abbreviation	Definition
ATR	Advanced Tax Ruling
Basis Weight	The weight of a standard amount of paper cut to a standard size; measured in grams per square metre or pounds.
Biomass Plant	Cogeneration Power Plant around the Biomass-fired Boiler that burns renewable energy sources derived from bark, chips, etc.
Bowater Mersey	Bowater Mersey Paper Company Limited
CCAA	Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
CM paper	Coated mechanical paper, sometimes referred to as coated groundwood (CGW)
Court	Supreme Court of Nova Scotia
CPP	Commercial Paper Product
CRA	Canada Revenue Agency
DNR	Department of Natural Resources
DOC	United States Department of Commerce
DOE	Nova Scotia Department of Energy
EGSPA	Environmental Goals and Sustainable Prosperity Act, SNS 2007, c. 7
FTC	NAFTA Free Trade Commission
FULA	Forest Utilization License Agreement
GDP	Gross Domestic Product
GNS	Government of Nova Scotia
ICJ	International Court of Justice

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Improved Newsprint	Standard uncoated mechanical paper (not supercalendered including high bright and bulky book
ILC Articles	International Law Commission, Draft Articles on State Responsibility
IPP	Independent Power Producers
LRR	Load Retention Rate
LRT	Load Retention Tariff
Monitor	Ernst & Young Inc.
NAFTA Panel	Panel established under Chapter Nineteen of NAFTA
NewPage	NewPage Corporation
NPPH	NewPage Port Hawkesbury Corp.
NSPI	Nova Scotia Power Inc.
Outreach Agreement	Sustainable Forest Management and Outreach Program Agreement
Plan	Plan of Compromise and Arrangement for NPPH under the CCAA
Plan Sponsorship Agreement	PWCC and NPPH agreement, July 6, 2012
PHP	Port Hawkesbury Paper Inc.
PHPLP	Port Hawkesbury Paper Limited Partnership
PM	Paper machine
PPPC	Pulp and Paper Products Council
PWCC	Pacific West Commercial Corporation
	

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RES Regulations	<i>Renewable Electricity Regulations</i>
RES-2013	Renewable Electricity Standard – 2013
RES-2015	Renewable Electricity Standard – 2015
RES-2020	Renewable Electricity Standard – 2020
Resolute or Claimant	Resolute Forest Products Inc.
Sanabe	Sanabe & Associates LLC
SC paper	Supercalendered paper, which is made up of SNC, SCB, SCA, SCA+ and SCA++ grades
SCM Agreement	<i>WTO Agreement on Subsidies and Countervailing Measures</i>
Standard UM paper	Standard uncoated mechanical paper, sometimes called improved newsprint; it includes hi-bright and bulky book but not SC
Stora Act	<i>Stora Forest Industries Agreement Act</i>
TMP	Thermomechanical Pulping
UARB	Nova Scotia Utilities and Review Board
UM paper	Uncoated mechanical paper
VCLT	Vienna Convention on the Law of Treaties
WPT	Windfall Profit Tax Law
WTO	World Trade Organization
	
	



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**Timeline of Events**

<b>2007</b>	NewPage Corp. (NPC), an American investor, acquires the Port Hawkesbury mill and renames it NewPage Port Hawkesbury (NPPH)
<b>June 2009</b>	Resolute's Dolbeau mill stops producing paper
<b>October 2010</b>	GNS enacts Renewable Electricity Regulations, which require Nova Scotia Power Inc. (NSPI) to supply its customers with prescribed amounts of renewable electricity
<b>14 October 2010</b>	Nova Scotia Utility and Review Board (UARB) approves NSPI's \$208.6 million Port Hawkesbury Biomass Plant project
<b>June 2011</b>	Bowater Mersey (Resolute's mill in Nova Scotia) and NPPH make a joint application to the UARB seeking approval of amendments to NSPI's Load Retention Tariff (LRT)
<b>[REDACTED]</b>	<b>[REDACTED]</b>
<b>22 August 2011</b>	NPPH announces the idling of the Port Hawkesbury mill
<b>~26 August 2011</b>	Resolute informs the GNS about its intention to shut down the Bowater Mersey mill
<b>6 September 2011</b>	NPPH seeks creditor protection under the <i>Companies' Creditors Arrangement Act</i>
<b>9 September 2011</b>	Supreme Court of Nova Scotia grants NPPH's application for creditor protection, appoints Ernst & Young as the Monitor, and authorizes the Monitor and NPPH to solicit offers for the sale of the mill
<b>9-28 September 2011</b>	Sanabe provides new Confidential Information Memorandum to potential bidders in CCAA process
<b>28 September 2011</b>	Deadline for the receipt of non-binding letters of intent for the Port Hawkesbury mill; 21 interested parties apply
<b>24 October 2011</b>	Deadline for Qualified Bidders to file offers to purchase the Port Hawkesbury mill; 8 offers are filed
<b>28 October 2011</b>	Monitor advises four of the eight Qualified Bidders that they can continue to participate in the Sales Process; PWCC and Paper Excellence are the two going concern bids
<b>29 November 2011</b>	UARB issues a decision approving amendments to NSPI's LRT and an individual Load Retention Rate (LRR) for the Bowater Mersey mill, and deferring approval of a LRR for the Port Hawkesbury mill until a new owner is found
<b>1 December 2011</b>	GNS and Resolute sign an agreement for \$50 million in financial assistance to the Bowater Mersey mill (with an option for an additional

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	\$40 million)
<b>15 December 2011</b>	Bowater Mersey Pulp and Paper Investment (2011) Act (“Bowater Mersey Act”) enacted
<b>16 December 2011</b>	Four Qualified Bidders submit final offers for the Port Hawkesbury mill
<b>[REDACTED]</b>	<b>[REDACTED]</b>
<b>13 January 2012</b>	Monitor reports to the Court that it has recommended to NPPH’s board of directors to accept PWCC’s bid
<b>27 April 2012</b>	NSPI and PWCC apply to the UARB for approval of the LRR pricing mechanism
<b>15 June 2012</b>	Resolute announces the indefinite shut down of the Bowater Mersey mill
<b>6 July 2012</b>	NPPH and PWCC enter into the Plan Sponsorship Arrangement for the sale of the Port Hawkesbury mill (renamed Port Hawkesbury Paper Inc. or PHP) to PWCC
<b>16-18 July 2012</b>	UARB hearing concerning the LRR pricing mechanism for the Port Hawkesbury mill takes place
<b>17 July 2012</b>	Court approves the Plan Sponsorship Agreement
<b>[REDACTED]</b>	<b>[REDACTED]</b>
<b>15 August 2012</b>	Creditors of the Port Hawkesbury mill vote in support of sale of mill to PWCC
<b>20 August 2012</b>	UARB approves a LRR pricing mechanism, contingent upon a favourable Advance Tax Ruling (ATR) from the Canada Revenue Agency (CRA)
<b>24 August 2012</b>	Resolute announces reopening of the Dolbeau mill
<b>[REDACTED]</b>	<b>[REDACTED]</b>
<b>12 September 2012</b>	CRA advises NSPI and PWCC that it will not issue a favourable ATR
<b>21 September 2012</b>	GNS and PWCC announce no agreement on the Port Hawkesbury mill
<b>[REDACTED]</b>	<b>[REDACTED]</b>
<b>25 September 2012</b>	Court sanctions an amended version of the Plan of Compromise and Arrangement
<b>[REDACTED]</b>	<b>[REDACTED]</b>

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<b>27 September 2012</b>	UARB approves a LRR pricing mechanism for the Port Hawkesbury mill
<b>[REDACTED]</b>	<b>[REDACTED]</b>
<b>28 September 2012</b>	Sale of the Port Hawkesbury mill to PWCC becomes effective
<b>October 2012</b>	Resolute's Dolbeau mill reopens
<b>3 October 2012</b>	Port Hawkesbury mill reopens
<b>26 November 2012</b>	Resolute shuts down a SC paper machine (PM10) at the Laurentide mill
<b>10 December 2012</b>	Resolute and GNS enter into a share purchase agreement for Bowater Mersey
<b>15 October 2014</b>	Resolute shuts down the Laurentide mill

## I. INTRODUCTION AND SUMMARY OF CANADA'S DEFENCE

1. In late August 2011, two of Nova Scotia's three pulp and paper mills announced, almost simultaneously, that they were on the brink of permanent closure. Together, they directly employed almost 1500 workers and contributed substantially to the Province's annual gross domestic product ("GDP"). The Government of Nova Scotia ("GNS") realized that if both mills shut down there was a potential billion-dollar economic impact and dire consequences for the local population. As any responsible government would do, the GNS looked for ways to assist these two mills in light of their significance to Nova Scotia's forest industry and to the rural regions that relied so heavily on them for their economic sustainability.

2. Over the course of the next thirteen months, the GNS thought carefully about the economic and market challenges facing both mills, considered what, if anything, might be a reasonable investment of public funds, and studied the consequences of doing nothing versus offering some level of financial assistance. Both mills sold substantial amounts of land to the GNS for fair market value, and the mills used the proceeds as liquidity for their operations. Both mills were also successful in separately negotiating lower electricity rates with Nova Scotia Power Inc. ("NSPI"), a private electricity company. Additionally, both mills sought financial support from the government to remain viable and continue to contribute to the Nova Scotia economy. The GNS faced difficult choices in 2011 and 2012 given the market uncertainties for the paper products produced by the two mills. After careful deliberation, the GNS decided that it was in the public interest to provide financial assistance to both mills to help keep them running.

3. Those two mills were NewPage Port Hawkesbury ("NPPH") and Resolute-owned Bowater Mersey Paper Company ("Bowater Mersey").

4. At this stage, the Tribunal is already familiar with the NPPH story. On August 22, 2011, NPPH, owned by U.S.-based NewPage Corporation ("NewPage"), announced that it was indefinitely idling the Port Hawkesbury supercalendered ("SC") paper and newsprint machines. NPPH entered creditor protection under the *Companies' Creditors Arrangement Act* ("CCAA") on September 6, 2011, with the stated goal of finding a buyer that would continue to operate the mill. NPPH, as well as the independent court-appointed monitor ("Monitor"), Ernst & Young, overseeing the CCAA process, believed that selling the mill as a going concern offered greater value to creditors than simply selling off its assets for scrap. An open, fair, neutral, and court-

supervised bidding process was commenced and 21 companies submitted expressions of interest to purchase the Port Hawkesbury mill by the court-ordered deadline of September 28, 2011. Resolute Forest Products Inc. (“Resolute” or “Claimant”), despite having been encouraged to submit a bid (including by GNS officials), decided not to participate in the CCAA process.

[REDACTED]

[REDACTED]<sup>1</sup>

5. Although Resolute decided not to participate in the CCAA process, many other companies submitted bids, which the Monitor narrowed down before ultimately recommending Pacific West Commercial Corporation (“PWCC”) to NPPH’s board of directors in January 2012. In the Monitor’s opinion, PWCC was the company most likely to continue to operate the mill and provide the greatest value (and thus potential for recovery) to the creditors. PWCC planned to substantially streamline the mill’s operations by shutting down the newsprint line and operating the state-of-the-art SC paper machine more efficiently. The company received a financial assistance package from the GNS in September 2012 in the form of two forgivable loans and two grants for worker training and marketing. PWCC was also able to separately negotiate a lower and more flexible electricity arrangement with NSPI, which was subsequently approved by the quasi-judicial and independent Nova Scotia Utilities and Review Board (“UARB”) following an adversarial hearing.

6. As for Resolute’s Bowater Mersey newsprint mill in Liverpool, Nova Scotia, the Claimant has conspicuously avoided any mention of that story. On or around August 26, 2011, just a few days after NPPH idled the Port Hawkesbury mill, Resolute told the GNS that it was going to shut down Bowater Mersey. The GNS offered to help keep the mill open and Resolute accepted that offer. On December 1, 2011, Resolute received: a \$50 million rescue package from the GNS (with the potential for an additional \$40 million) consisting of a loan, a grant, cash for land and other benefits explicitly intended to make Bowater Mersey a low-cost mill and keep it open for at least five more years. Resolute publicly praised the leadership of the GNS for its financial support of the Bowater Mersey mill.

7. Resolute also secured a discounted electricity rate for the Bowater Mersey mill. In June

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<sup>1</sup> C-119, [REDACTED] p. 11; C-118, [REDACTED], p. 3.

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2011, Resolute applied jointly, with its competitor NPPH, to the UARB for a lower electricity rate for both mills given their situation of economic distress. On November 29, 2011, Resolute got what it asked for: the UARB approved its application for a lower electricity rate for Bowater Mersey (but deferred on Port Hawkesbury, until the CCAA proceedings were complete).

8. Ultimately, market factors led Resolute to decide in June 2012 to shut down Bowater Mersey and, in December 2012, the GNS agreed to take over all of the mill's assets and liabilities to wind up the company in an orderly fashion. There can be no doubt as to the genuine and legitimate motivations of the GNS: when the Bowater Mersey mill was in a dire economic state and Resolute needed money to help make it a low cost operation, the GNS listened in good faith and balanced those needs against market uncertainties while also taking into account the financial and employment benefits of keeping the mill open versus the consequences of its permanent closure. In the end, the GNS decided that helping to rescue Resolute's mill was, in light of all the circumstances and available information, a prudent and reasonable investment of public funds.

9. As the Tribunal will learn from the witness statements of four current and former Nova Scotia government officials, those same *bona fides* guided the GNS when it came to its decision that it was in the public interest to provide financial assistance to the Port Hawkesbury mill.

10. Resolute's notable omission of the Bowater Mersey storyline is not surprising since it undermines its protests of discrimination and unfairness. Alleging that Canada has "robbed Peter to save Paul"<sup>2</sup> rings hollow when Peter gratefully accepted tens of millions in financial assistance from the GNS to save his own mill. But Resolute's receipt of financial assistance from the GNS is only part of the story that Resolute has not presented to this Tribunal and only one of many reasons why its NAFTA claims are without factual and legal merit.

11. As a preliminary matter, Part III below explains that PWCC's electricity load retention rate ("LRR") – the most significant alleged "benefit" to Port Hawkesbury that Resolute complains of – is not a measure "adopted or maintained" by the GNS as required by NAFTA Article 1101(1) in order to engage the jurisdiction of the Tribunal.

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<sup>2</sup> *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant's Memorial, 28 December 2019 ("Claimant's Memorial"), ¶ 13.

12. Resolute fails to meet the high threshold required by customary international law, as reflected in Article 8 of the International Law Commission’s *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (“ILC Articles”), to attribute the actions of two private corporations (PWCC and NSPI) to the GNS. As Nova Scotia’s former Deputy Minister of Energy Murray Coolican affirms in his witness statement, the GNS did not and could not “instruct” NSPI or the UARB to set any specific electricity rate for the Port Hawkesbury mill. Resolute has not even attempted to demonstrate how the GNS had effective control over PWCC and NSPI and their negotiations, which is the requisite international legal test to engage State responsibility for private acts. Indeed, a panel established under Chapter Nineteen of NAFTA (“NAFTA Panel”) has already rejected the argument that, by engaging an electricity consultant (Mr. Todd Williams) to help facilitate discussions between two private parties, the GNS entrusted or directed NSPI to provide electricity to PHP.<sup>3</sup> A World Trade Organization (“WTO”) panel has similarly concluded that NSPI was not entrusted or directed to provide electricity to the Port Hawkesbury mill.<sup>4</sup> Resolute’s allegations that the GNS “waived” environmental requirements and legislated renewable electricity rules in order to appease PWCC are red herrings based on Resolute’s misunderstanding of pre-existing policies of the GNS. Resolute cites no relevant international legal sources to support its attribution analysis and fails in its burden of establishing that NSPI and PWCC were “in fact acting on the instructions of” the GNS.

13. But even if the Tribunal concludes that the electricity rate for Port Hawkesbury can be considered as a measure of the GNS, this does nothing to change the conclusion that none of the impugned measures, whether taken separately or collectively, can be considered to violate NAFTA Article 1102 or 1105.

14. With respect to Article 1102, the vast majority of the measures that Resolute complains of fall into the exclusions to national treatment set out in Article 1108(7)(a) and (b). As described in Part IV(A) below, under the plain text of NAFTA Chapter Eleven, the obligation to provide

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<sup>3</sup> **R-270**, NAFTA Article 1904 Binational Panel Review, Supercalendered Paper from Canada: Final Affirmative Duty Determination, Memorandum Opinion and Order (Apr. 13, 2017) (“NAFTA Panel Report”), April 13, 2017, p. 36.

<sup>4</sup> **R-238**, *United States – Countervailing Measures on Supercalendered Paper from Canada*, Report of the Panel (July 5, 2018) (“WTO Panel Report”), ¶ 7.68.

national treatment does not apply to “procurement by a Party” (Article 1108(7)(a)) and to “subsidies or grants provided by a Party [...], including government-supported loans, guarantees and insurance” (Article 1108(7)(b)). These provisions unambiguously apply to the GNS’ purchase (i.e., procurement) of land from NPPH/PWCC, the two forgivable loans from the GNS to PWCC, the training and marketing grants, the indemnity loan, the funding to prepare for the restart of the mill, and the Outreach Agreement.<sup>5</sup> Accordingly, Resolute’s Article 1102 claim that its three mills in Québec (Laurentide, Kénogami and Dolbeau) did not receive national treatment are precluded by the exclusions in Article 1108(7). Resolute’s argument that Canada cannot rely on the NAFTA Article 1108(7) exclusions because of alleged positions taken in other proceedings or the lack of a notification under the WTO *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”) is premised on a mischaracterization of Canada’s position in other proceedings and is also meritless.

15. But for the sake of providing a complete answer to Resolute’s claim, Part IV(C) below sets out detailed reasons why the Nova Scotia measures do not constitute a violation of Canada’s obligation to provide national treatment. Article 1102 prohibits nationality-based discrimination and there is no evidence that nationality was even a consideration for the GNS when it decided to provide support for the Port Hawkesbury mill. In addition, Resolute has not established the essential elements of a claim under Article 1102: the GNS did not accord “treatment” to Resolute or its investments in Québec, treatment was not accorded “in like circumstances,” and there is no “treatment less favorable.” As a result, Resolute’s claim under Article 1102 must be rejected.

16. Resolute’s claim that the collective actions of the GNS constitute a violation of the minimum standard of treatment of aliens under customary international law (NAFTA Article 1105(1)) must also fail. Government financial support to distressed industries is hardly unusual and Resolute has no legal or factual basis on which it can challenge the measures of the GNS as falling below the minimum standard of treatment that substantial State practice and *opinio juris* establish as the behaviour that all States must comply with when dealing with foreign investors.

17. As discussed in Part V below, the real story that emerges from contemporaneous

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<sup>5</sup> Canada disputes Resolute’s characterization of other “benefits” allegedly given to Port Hawkesbury, but if the Tribunal were to find that a financial benefit has been given to PWCC by the GNS, the Article 1108 exclusion for “subsidies” and “grants” must also apply to those measures.



documents and the witness statements of four senior GNS officials is one of a provincial government acting reasonably, in good faith and in the public interest to address a serious threat to Nova Scotia's economic well-being. Even putting aside the extraordinary lengths the GNS went to help Resolute when it asked for financial assistance to keep its Bowater Mersey mill open and the fact that Resolute took itself out of the Port Hawkesbury bidding process before engaging in discussions with the GNS on possible financial assistance, there is no rule of customary international law that prevents a government from providing financial assistance to a company even if it may have some adverse impacts on other market actors.<sup>6</sup> Nothing the GNS did remotely approaches the type of egregious, manifestly arbitrary or grossly unfair conduct so as to fall below the accepted international standards and violate NAFTA Article 1105.

## **II. FACTUAL BACKGROUND**

### **A. The Forest Sector in Nova Scotia**

18. Nova Scotia is Canada's second-smallest province with a population of less than a million people and a dense and diverse forest ecosystem covering 75% of its territory. It is therefore no surprise that historically Nova Scotia has relied heavily on the forest industry. Since the early 20<sup>th</sup> century, pulp and paper mills and sawmills have been the lifeline for entire rural communities, employing thousands of people directly and indirectly through harvesting, silviculture, trucking and road building.

19. Although Nova Scotia's forest sector has been hit hard by the decline in demand for paper products due to increasing digitalization, it continues to play a very significant economic role in the Province. In 2015, the forest sector was worth \$2.1 billion to the Province, with a contribution of \$800 million to the provincial GDP, and it accounted for the direct and indirect employment of 11,500 people.<sup>7</sup> In 2011, Resolute's Bowater Mersey newsprint mill, NewPage's newsprint and SC paper mill in Port Hawkesbury and Paper Excellence's kraft pulp mill in New Glasgow were critical sources of employment in rural Nova Scotia and major contributors to the local economy.

20. While the economic importance of the forest industry is clear, the GNS is also concerned

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<sup>6</sup> Canada's response to the Claimant's damages arguments are presented in Part VI below.

<sup>7</sup> **R-205**, Gardiner Pinfold "Nova Scotia Forest Industry Economic Impact (December 2016), p. 14.

with the preservation of its forests. In particular, the 2007 *Environmental Goals and Sustainable Prosperity Act* (“EGSPA”) explicitly sought to integrate environmental sustainability with economic prosperity in the Province.<sup>8</sup> After extensive public consultations and recommendations from experts, the GNS released *A Natural Resources Strategy for Nova Scotia 2011-2020* on August 16, 2011 (“Natural Resources Strategy”).<sup>9</sup>

21. As current Deputy Minister of Lands and Forestry Julie Towers explains in her witness statement, the Natural Resources Strategy was a 10-year plan to move Nova Scotia towards an ecosystem-based approach to forest management balancing the economic, social and ecological needs of a community in order to preserve biodiversity while also ensuring sustainable economic growth. Nova Scotia’s Department of Natural Resources (“DNR”) carefully considered the way forests had been managed in the past and identified what would need to change going forward in order to ensure environmental sustainability. Specific goals include revising the way that forest resources on provincial Crown land are managed and allocated, making changes to forest harvesting practices (in particular reducing clear-cutting to 50% of all harvests and establishing a harvest tracking system), establishing rules for whole-tree harvesting and establishing a Code of Forest Practice.<sup>10</sup>

22. A major hurdle to implementing these goals was that Nova Scotia had one of Canada’s lowest percentages of Crown land ownership. Since the vast majority of the land in the Province was privately owned, the GNS was limited in its ability to develop and implement policies with respect to forest management, as well as land, hunting and fishing rights of the Mi’kmaq First Nation. Furthermore, because private landowners controlled rights of access, the public was unable to access vast swaths of the Province for recreational purposes.

23. Accordingly, the Natural Resources Strategy set a goal of legally protecting 12% of the land mass of Nova Scotia.<sup>11</sup> Through two funding programs – the Large Land Acquisition Fund

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<sup>8</sup> **R-194**, *Environmental Goals and Sustainable Prosperity Act*, SNS 2007, c. 7 (“EGSPA”).

<sup>9</sup> **R-202**, Nova Scotia, “The Path We Share: A Natural Resources Strategy for Nova Scotia 2011-2020” (“Natural Resources Strategy”).

<sup>10</sup> **R-201**, Report of the Steering Panel Phase II, Natural Resource Strategy, “A Natural Balance: Working Toward Nova Scotia’s Natural Resources Strategy” (April 2010), pp. 22-23.

<sup>11</sup> **R-202**, Natural Resources Strategy, pp. 9, 22.

and the Forestry Transition Land Purchase Program<sup>12</sup>– the GNS was ready to purchase land at fair market value from private owners.

24. Nova Scotia’s substantial forest resources also presented an opportunity for the development of clean energy policies. The Province was shifting away from its traditional reliance on coal towards renewable energy, including biomass, particularly using wood chips harvested from Nova Scotia’s forests.

25. Each of these distinct but interconnected policy priorities and goals were central to the GNS’ decision-making when it came to the Bowater Mersey and Port Hawkesbury mill crisis of 2011-2012.

### **B. Bowater Mersey and Port Hawkesbury Mills on the Brink of Closure**

26. In June 2011, Port Hawkesbury and Bowater Mersey were facing serious financial challenges. Both mills had filed a joint application to the UARB on June 6, 2011 seeking a significantly discounted electricity rate to keep them in business.<sup>13</sup> While that application was pending, both mills took other steps to address their respective financial situations.

27. On August 22, 2011, NPPH idled the Port Hawkesbury mill and then filed for creditor protection on September 6.<sup>14</sup> NewPage invested \$25 million to keep the mill in hot idle to increase the chances that it would be sold as a going concern while the Monitor organized an open bidding process.<sup>15</sup>

28. On or around August 26, 2011, Resolute added to the Province’s challenges when it

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<sup>12</sup> **R-206**, Nova Scotia, March 2010 Land Purchase (March 2010); **R-207**, Nova Scotia Natural Resources, “Forestry Transition Land Acquisition Program: Guidelines of Applicants” (April 2008).

<sup>13</sup> **R-162**, *Re NewPage Port Hawkesbury Corporation*, Letter re: Proposed Amendments to Nova Scotia Power Inc.’s Load Retention Tariff, M04175 NPB-1 (June 6, 2011).

<sup>14</sup> **C-110**, “NewPage to Initiate Downtime at Port Hawkesbury” (Aug. 22, 2011); **R-024**, *Re NewPage Port Hawkesbury Corp.*, Affidavit of Tor E. Suther (S.C.N.S.) (Sept. 6, 2011) (“Suther Affidavit”), ¶¶ 7, 34; **R-026**, *Re NewPage Port Hawkesbury Corp.*, Notice of Application in Chambers (S.C.N.S.) (Sept. 6, 2011).

<sup>15</sup> **R-026**, *Re NewPage Port Hawkesbury Corp.*, Notice of Application in Chambers (S.C.N.S.) (Sept. 6, 2011). Nova Scotia later agreed to contribute up to \$10.8 million to help keep the mill in hot idle status once the money NewPage had set aside for hot idle had been used up. On January 4, 2012, the GNS announced that it had agreed to provide NPPH with up to \$5 million in “hot idle” funding, and on March 16, 2012, the GNS announced an additional \$5.8 million in “hot idle” funding. See **R-048**, Nova Scotia Department of Natural Resources, News Release, “Province Will Keep NewPage Mill in Point Tupper Re-Sale Ready” (Jan. 4, 2012); **R-042**, Nova Scotia Premier’s Office, News Release, “Province Protects Jobs, Keeps Mill Re-sale Ready” (Mar. 16, 2012); **R-043**, Province of Nova Scotia, Backgrounder, “Provincial Support to former NewPage Port Hawkesbury Paper Mill” (Mar. 16, 2012), p. 2.

informed the Premier that it was planning to announce the permanent closure of the Bowater Mersey mill.<sup>16</sup>

29. Mr. Duff Montgomerie, then Nova Scotia Deputy of Minister of Natural Resources, describes in his witness statement the situation that the GNS faced:<sup>17</sup>

With two of Nova Scotia's three pulp and paper mills in danger of simultaneous collapse, there was a threat to the economic well-being of the Province. 452 people were directly employed through Resolute's Bowater Mersey operations, while NewPage Port Hawkesbury's operations directly employed approximately 1000 people. Thousands more were economically dependent on both mills as they were located in rural parts of the Province with few other employment opportunities. It was estimated that the permanent closure of both mills could result in a loss of more than [REDACTED] to Nova Scotia's GDP within five years.<sup>18</sup>

30. While the financial situations of the two mills were similarly serious, there were some situational differences that called for different responses.

31. In the case of Port Hawkesbury, NPPH voluntarily entered creditor protection and the Monitor sought out purchasers for the mill with the goal of selling it as a going concern and secure the greatest return for the creditors. Accordingly, the GNS had little control over the outcome since it needed to wait for the CCAA process to unfold before it could consider engagement with a potential buyer.<sup>19</sup>

32. In the case of Bowater Mersey, on the other hand, it was not yet public that Resolute was planning to shut down the mill. Accordingly, Resolute and GNS officials met starting in September 2011 to discuss what, if any, financial assistance the Province could offer to help keep the mill operational.<sup>20</sup>

33. The situation facing the Province was serious. A worst-case scenario from the Nova Scotia

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<sup>16</sup> Witness Statement of Duff Montgomerie (April 17, 2019) ("Montgomerie Statement"), ¶ 9.

<sup>17</sup> Montgomerie Statement, ¶ 7.

<sup>18</sup> **R-145**, [REDACTED]

<sup>19</sup> In the meantime, the GNS released a seven-point plan and created the temporary Forest Infrastructure Fund on September 9, 2011 in order to keep the critical forestry supply chain workers temporarily employed while the CCAA process progressed. **C-116**, Nova Scotia Department of Natural Resources, "Seven Point Woodlands Plan Keeps Plant Resale Ready" (Sept. 9, 2011).

<sup>20</sup> Montgomerie Statement, ¶ 20.

Department of Finance indicated that if both the Bowater Mersey and Port Hawkesbury mills shut down, [REDACTED]

[REDACTED] <sup>21</sup> [REDACTED]

[REDACTED]

[REDACTED] <sup>22</sup> It was important for the GNS to respond in an appropriate way.

34. However, the possibility of using public funds to assist either mill required thorough consideration by the GNS. As part of that process, the GNS commissioned independent studies to examine the state of the market for newsprint and SC paper, the potential future for the forest industry in Nova Scotia, and the potential economic impact of the shutdown of Bowater Mersey and Port Hawkesbury.<sup>23</sup>

35. Mr. Montgomerie describes the measured response of the GNS in the face of this significant challenge:

While there was a sense of urgency, there was never a direction from the Premier or anyone else in the GNS that the Bowater Mersey or Port Hawkesbury mills needed to be saved at any cost. Instead, as the chair of the interdepartmental government committee, I was tasked with overseeing the gathering and analysis of information as to the economic impact of the mill closures, the state of the newsprint and SC paper industries, and the implications of the potential closures for the forest sector and Nova Scotia's electricity system. We had to assess whether, in light of all the circumstances,

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<sup>21</sup> R-271, [REDACTED]  
R-145, [REDACTED]

<sup>22</sup> C-105, Stora Enso Oyj News Release, "Stora Enso's Port Hawkesbury Mill to Restart," (Sept. 29, 2006); R-145,

[REDACTED]

R-309, p. 6

<sup>23</sup> R-146, [REDACTED]; R-147, [REDACTED]

there was anything prudent and reasonable the GNS could do for these mills and for the thousands of Nova Scotians who depended on their continued operation.<sup>24</sup>

36. The first challenge triaged by the GNS was the impending closure of Resolute’s Bowater Mersey newsprint mill.

### **C. Resolute Receives a Financial Assistance Package from the GNS for Bowater Mersey in December 2011**

#### **1. Resolute’s Bowater Mersey Paper Mill**

37. Since 1956, Resolute and its predecessors<sup>25</sup> owned a majority stake in the company that operated the Bowater Mersey paper mill.<sup>26</sup> Bowater Mersey was located on the southwest shore of Nova Scotia in the town of Liverpool and produced primarily newsprint, but after receiving \$2.5 million in financial support from the Nova Scotia Department of Economic and Rural Development in September 2009, it began producing book-grade paper as well.<sup>27</sup>

38. Resolute’s Bowater Mersey mill lost more than \$25 million in each of 2009 and 2010,<sup>28</sup> and needed to significantly reduce its labour and electricity costs to be economically viable.

39. Electricity accounted for more than one-third of Bowater Mersey’s manufacturing costs,

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<sup>24</sup> Montgomerie Statement, ¶ 8.

<sup>25</sup> Between 2007, when a new company was created following the merger of Montréal-based Abitibi-Consolidated and U.S.-based Bowater Inc., and November 2011, Resolute Forest Products Inc. (“Resolute”) was known as AbitibiBowater Inc. from 2007-2011. See **R-311**, Resolute Forest products, “Our History”; **R-312**, PR Newswire, “AbitibiBowater Changing Name to Resolute Forest Products” (Oct. 11, 2011).

<sup>26</sup> The Bowater Mersey Paper Company Limited was owned 51% by Resolute and 49% by The Daily Herald Company, a wholly-owned subsidiary of The Washington Post. Resolute controlled and managed the mill. The Brooklyn power plant was directly owned by Brooklyn Power Corporation, was acquired by Bowater Mersey in 2008. See **R-241**, AbitibiBowater Inc., Annual Report for the Fiscal Year Ended December 31, 2011 (Form 10-K)) (“AbitibiBowater Inc., Form 10-K (2011)”), pp. 4, 5 & Exhibit 21.1; **R-313**, AbitibiBowater Inc., Annual Report for the Fiscal Year Ended December 31, 2010 (Form 10-K) (“AbitibiBowater Inc., Form 10-K (2010)”), pp. 7-8; **R-166**, *Re NewPage Port Hawkesbury Corporation*, Pre-Filed Evidence of Bowater Mersey Paper Company Limited, M04175 NPB-5 (June 22, 2011) (“Pre-Filed Evidence of Bowater Mersey”), p. 1.

<sup>27</sup> **R-314**, Nova Scotia Department of Economic and Rural Development, “Province Invests in Innovation at Nova Scotia Paper Plant” (Sept. 22, 2009); **R-315**, CBC News, “Mill gets \$2.5M for upgrade from N.S. government” (Sept. 22, 2009). Bowater Mersey had two paper machines with total capacity of 258,000 and 230,000 metric tons in 2011 and 2012, respectively. The mill produced 195,000 tons of newsprint and 27,000 tons of book-grade paper in 2010, **R-313**, AbitibiBowater Inc., Form 10-K (2010), p. 7. The mill produced 216,000 tons of newsprint and 8,000 tons of book-grade paper in 2011. **R-241**, AbitibiBowater Inc., Form 10-K (2011), p. 4.

<sup>28</sup> **R-316**, The Chronicle Herald, “Resolute boss confident plan will keep Bowater mill running” (Dec. 6, 2011).

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and the mill used about 4-5% of all the electricity generated in Nova Scotia.<sup>29</sup> As a first step in making the mill a low-cost producer, on June 6, 2011, Bowater Mersey made a joint application for a reduced electricity rate to the UARB with NPPH, the owner of Resolute's competitor newsprint mill at Port Hawkesbury.<sup>30</sup> The application used "NPB" (i.e., "NewPage Bowater") to emphasize that both companies were jointly seeking a reduced electricity rate.

40. Resolute argued to the UARB that its mill needed "stable, competitive rates over the longer term in order for its current operations to remain sustainable" and this was not possible under the rate that Bowater Mersey was paying at the time.<sup>31</sup> Bowater Mersey's manager Brad Pelley stated that "if we are not able to get our electricity costs down to a more manageable level, we simply do not believe that we will have a cost base that will provide us the necessary opportunity to stay in business" and noted that Resolute's President and Chief Executive Officer, Mr. Richard Garneau, had made it clear that, unless Bowater Mersey found a way to reduce its electricity bills, "the operation is in jeopardy."<sup>32</sup>

41. With the electricity rate application filed in June 2011 and hearings before the UARB scheduled for September and October 2011, Resolute sought other means by which it could lower its costs for the Bowater Mersey mill.

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<sup>29</sup> **R-166**, Pre-Filed Evidence of Bowater Mersey, p. 2.

<sup>30</sup> **R-144**, Redacted Bowater Mersey Responses to Information Requests from the Avon Group, p. 3 ("Bowater Mersey considers NewPage a competitor in Atlantic Canada, for Newsprint grade."); **R-317**, *Re NewPage Port Hawkesbury Corporation*, Redacted NewPage Responses to Information Requests from the Avon Group, M04175 NPB-15 (Aug. 2, 2011), p. 2, ("NewPage understands that Bowater Mersey is a potential competitor in newsprint markets in Atlantic Canada and the north-eastern United States.")

<sup>31</sup> **R-166**, Pre-Filed Evidence of Bowater Mersey, p. 4; **R-318**, *Re NewPage Port Hawkesbury Corporation*, Redacted NPB Responses to Information Requests from the Liberty Consulting Group, M04175 NPB-12 (July 28, 2011), p. 11 ("Energy rates are now at a level that Bowater Mersey is not competitive on manufacturing cost. This critical element of cost, to a large degree, defines the probability of our chances for survival.")

<sup>32</sup> **R-318**, *Re NewPage Port Hawkesbury Corporation*, Opening Statement of Bowater Mersey Paper Company Ltd., M04175 NPB-53 (Oct. 24, 2011), pp. 2-4; **R-319**, *Re NewPage Port Hawkesbury Corporation*, Closing Submission of NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Company Limited, M04175 Document No 08308 (Nov. 9, 2011) ("NPB Closing Submission"), pp. 49-50, ("Mr. Pelley indicated that AbitibiBowater's current CEO, Mr. Richard Garneau, met with local senior management at the mill at the beginning of the year and had a very detailed cost review about every aspect of the mill's input cost, and at that meeting and a subsequent meeting with the provincial government, Mr. Garneau indicated that "...unless we can address the serious competitive disadvantage we have on electricity pricing that our operation is in jeopardy.")

## 2. Resolute Announces its Intention to Close Bowater Mersey and Seeks Financial Assistance from the Government of Nova Scotia

42. On or around August 26, 2011, Mr. Garneau met with Nova Scotia Premier Darrell Dexter and informed the Premier of his intention to shut down the mill by the end of the year.<sup>33</sup> Premier Dexter asked if Resolute would delay the announcement so the GNS could consider ways to help keep the mill open. Mr. Garneau agreed.<sup>34</sup>

43. Over the following three months, GNS officials held meetings with Resolute's management to see if there was a way to help Bowater Mersey.<sup>35</sup> The GNS knew that the shutdown of the mill would directly impact the Province's economy and the mill's 452 employees.<sup>36</sup> The Nova Scotia Department of Finance estimated that, [REDACTED]

[REDACTED]  
[REDACTED] <sup>37</sup> [REDACTED]  
[REDACTED],<sup>38</sup> the GNS tried to balance the risk of providing financial assistance to Resolute in the face of a deteriorating market against the economic and social consequences that would result from the mill shutting down permanently.

44. On November 1, 2011, Resolute announced that it would idle Bowater Mersey for one week starting on November 14, and said that it was considering idling for another two weeks in December 2011.<sup>39</sup> Resolute's spokesman Pierre Choquette stated that the company was "looking for the Nova Scotia mill to address various issues relating to cost, including power rates and

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<sup>33</sup> Montgomerie Statement, ¶ 9; **R-320**, The Chronicle Herald, "Bowater Mersey on brink of closure" (Nov. 1, 2011); **C-123**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-37 (Nov. 2, 2011) ("Hansard (Nov. 2, 2011)"), pp. 3008-3009; **R-212**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-64 (Dec. 12, 2011) ("Hansard (Dec. 12, 2011)"), pp. 5225, 5230.

<sup>34</sup> Montgomerie Statement, ¶ 9; **C-123**, Hansard (Nov. 2, 2011), pp. 3008-3009.

<sup>35</sup> Montgomerie Statement, ¶ 10; **C-123**, Hansard (Nov. 2, 2011), p. 3009; **R-212**, Hansard (Dec. 12, 2011), pp. 5217-5218 ("Following that initial meeting, we started to work with the mill owner to go through the process and to look at every facet of the process where there might be an opportunity to make the mill more efficient or cut its costs or find a new way to supply a service to the mill itself."); **R-211**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-62 (Dec. 8, 2011) ("Hansard (Dec. 8, 2011)"), p. 5065 per Vicki Conrad.

<sup>36</sup> **R-144**, Redacted Bowater Mersey Responses to Information Requests from the Avon Group, p. 17.

<sup>37</sup> **R-148**, [REDACTED]

<sup>38</sup> **R-146**, [REDACTED].

<sup>39</sup> **R-321**, CBC News, "Bowater mill to close for one week" (Nov. 1, 2011). **R-320**, The Chronicle Herald, "Bowater Mersey on brink of closure" (Nov. 1, 2011); *See also*, **R-322**, Global News, "Bowater Mersey paper mill in Nova Scotia to close for a week amid weak market" (Nov. 1, 2011).



labour costs going forward.”<sup>40</sup> Another Resolute official, Mr. Seth Kursman, stated that the company was looking to the GNS and Bowater Mersey’s employees to come up with plans to cut costs and become more competitive.<sup>41</sup>

45. In its Memorial, Resolute quotes statements made by Premier Dexter on November 2, 2011, which it mistakenly believes was referring to the problems facing Port Hawkesbury and the need for government support to make the mill economically viable.<sup>42</sup> In fact, Premier Dexter, who had just returned from Liverpool to meet Resolute’s local management and employees,<sup>43</sup> was talking about negotiations with Resolute and the GNS’ efforts to help the Bowater Mersey mill:

Over the last number of months we have worked with the Bowater management team, both local and international, and they have come to the conclusion now that there is a way forward for that mill. It will not be easy. It is not in the same position as the NewPage Port Hawkesbury mill. Obviously, that one [i.e., Port Hawkesbury mill] went through a bankruptcy which puts it in a different category - it has an asset that needs to be sold.

This one [i.e., Bowater Mersey mill] is about a company continuing to operate an asset in the face of a number of difficulties. One is that the world price per ton of pulp and paper is declining. The second is that the demand for pulp and paper is declining in almost every market around the world; there are some very limited exceptions to that. Because of the downturn in the U.S. market with respect to lumber, the access to fibre for the paper mill has actually gone up by something like 30 per cent since 2008. So they're dealing with the increased fibre costs, increased electricity costs, labour costs that are not consistent with what they're getting in other places. All of these things completely through the supply chain are creating a problem for the mill.

We have said and we have pledged our commitment to the mill but I think more importantly to the community, to the people who work in that mill, to the families who rely on it, to do everything in our power to try to ensure that we take costs out of the supply chain from one end to the other in order to ensure that that mill, in fact, has a future. They have now said they are willing to

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<sup>40</sup> **R-321**, CBC News, “Bowater mill to close for one week” (Nov. 1, 2011).

<sup>41</sup> **R-323**, CBC News, “Bowater mill owner delivers ultimatum” (Nov. 2, 2011).

<sup>42</sup> Claimant’s Memorial, ¶¶ 38, and 129, citing to Exhibit **C-123**, Hansard (Nov. 2, 2011).

<sup>43</sup> **C-123**, Hansard (Nov. 2, 2011), p. 3008 (“I have just returned from Liverpool, in Queens County, after meeting with the representatives of the union, local management, suppliers, sawmill operators, and local municipalities, and I felt it was necessary for me to be in a position to report to the House of Assembly at the earliest opportunity so that you would be as well informed as possible.”)

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consider that, but that if they are going to make another decision other than closure, that's going to have to be done soon.<sup>44</sup>

46. Premier Dexter noted that Resolute asked the GNS to help it reduce labour costs from \$97 to \$80/ton, and manufacturing costs from \$537 to \$480/ton “in order to be competitive.”<sup>45</sup>

47. By November 2011, Resolute was pursuing several strategies to make Bowater Mersey a low-cost newsprint producer.

48. The first measure to cut costs was undertaken on November 16, 2011, when the mill’s unionized workers narrowly voted (51.7%) to accept contract concessions that included cutting 80 full-time and 30 casual positions.<sup>46</sup> Resolute’s spokesman commented that the vote on jobs cuts “is a step and we will continue to work with government and other stakeholders to address the various challenges that have been identified,” but cautioned that “[w]e still have a long way to go in terms of meeting our cost-reduction targets.”<sup>47</sup>

49. The second step was taken on November 17, 2011, when the Region of Queens Municipality approved a 15% property tax reduction for the Bowater Mersey mill and Brooklyn energy plant for 10 years.<sup>48</sup>

50. The third element of Resolute’s cost-reduction plan fell into place when the UARB approved a reduced electricity rate for the Bowater Mersey mill on November 29, 2011, ensuring

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<sup>44</sup> **C-123**, Hansard (Nov. 2, 2011), p. 3009.

<sup>45</sup> **C-123**, Hansard (Nov. 2, 2011), p. 3010; **R-320**, The Chronicle Herald, “Bowater Mersey on brink of closure” (Nov. 1, 2011); **R-324**, Global News, “Bowater Mersey paper mill needs government help: Nova Scotia premier” (Nov. 2, 2011).

<sup>46</sup> **R-325**, Global News, “Bowater Mersey workers accept contract concessions in bid to save N.S. mill” (Nov. 16, 2011); **R-326**, Nova Scotia Premier's Office, “Premier Re-Affirms Commitment to Help Find Solution for Bowater Mersey” (Nov. 17, 2011); **R-327**, Global News, “Nova Scotia premier says job cuts one step on road to saving paper mill” (Nov. 17, 2011).

<sup>47</sup> **R-328**, The Chronicle Herald, “NSP’s rates for mills ‘irresponsible’” (Nov. 18, 2011).

<sup>48</sup> **R-151**, *Bowater Mersey Pulp and Paper Investment (2011) Act*, SNS 2011, c. 32 (“*Bowater Mersey Act*”), preamble, ss. 3, 9; **R-328**, The Chronicle Herald, “NSP’s rates for mills ‘irresponsible’” (Nov. 18, 2011); **R-329**, Global News, “Nova Scotia has support package for troubled paper mill, premier says” (Dec. 1, 2011); **R-330**, Global News, “Nova Scotia offers \$50-million package for Bowater Mersey paper mill” (Dec. 2, 2011); **R-331**, Global News, “Nova Scotia tables legislation to ratify \$50-million deal with Bowater mill” (Dec. 6, 2011). The agreement between the Municipality and Bowater Mersey required legislative approval to enter into force. **R-332**, *Municipal Government Act*, SNS 1998, c. 18, ss. 72, 75.

rate stability over the next three years.<sup>49</sup>

51. The final step for Resolute was to secure financial assistance from the GNS.

### 3. Resolute Gets a Financial Assistance Package from the GNS

52. On December 1, 2011, the GNS and Resolute agreed to a multimillion-dollar assistance package to keep the Bowater Mersey mill running for at least five years.<sup>50</sup> The deal was announced publicly the next day.<sup>51</sup> The agreement stated that the GNS' financial assistance was aimed at maintaining the Bowater Mersey mill [REDACTED]

[REDACTED]<sup>52</sup> The main components of the package consisted of: (i) a \$25 million forgivable capital loan; (ii) a \$23.75 million purchase of land; (iii) a \$40 million option for the GNS to purchase more land from the company; (iv) a \$1.5 million workforce training grant; and (v) a \$135,000 reduction in municipal property taxes. The agreement with Resolute was ratified and confirmed by the *Bowater Mersey Pulp and Paper Investment (2011) Act*.<sup>53</sup>

53. Resolute's Richard Garneau expressed his gratitude to the GNS, both privately to Deputy Minister Duff Montgomerie,<sup>54</sup> and publicly in a press release, for the decision to provide millions of dollars to Bowater Mersey in order to improve its competitive position:

We're pleased to move forward and improve the competitive position of our paper mill in Nova Scotia. Today's announcement would not have been possible without the hard work and determination of so many. In particular, I would like to recognize our employees for their willingness to bring important savings to the table, as well as the leadership of Premier Dexter and the quick response by his government. Today's developments demonstrate how much can be accomplished in a short period of time when parties are committed and

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<sup>49</sup> **C-138**, *In re an Application by NewPage-Port Hawkesbury and Bowater Mersey Paper Company*, Decision (Nov. 29, 2011) ("Bowater Mersey UARB Decision.")

<sup>50</sup> **R-149**, [REDACTED] pp. 1, 8.

<sup>51</sup> **R-150**, Nova Scotia Premier's Office, "Province Acts to Protect Rural Jobs" (Dec. 2, 2011).

<sup>52</sup> **R-149**, [REDACTED] p. 2.

<sup>53</sup> **R-151**, *Bowater Mersey Act*, s. 4(1).

<sup>54</sup> Montgomerie Statement, ¶ 13.

work in a spirit of collaboration.<sup>55</sup>

54. The financial assistance package was structured to help Resolute achieve its goal of becoming a low-cost newsprint producer.<sup>56</sup> However, recognizing that the market for newsprint was declining and there was little expectation that the prices would rebound,<sup>57</sup> the deal was also structured to give some security and return to the GNS for the risk of using public funds to help a struggling mill in a challenging market environment.

55. First, Bowater Mersey received a \$25 million interest-free capital loan through the Nova Scotia Jobs Fund.<sup>58</sup> The loan was forgivable at the rate of \$5 million per year, subject to the company operating two paper machines and providing the Province with annual estimates of pulp and paper amounts and payroll budgets, as well as giving the Province advance notice of any scheduled downtimes in newsprint production.<sup>59</sup> [REDACTED]

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<sup>55</sup> **R-150**, Nova Scotia Premier’s Office, “Province Acts to Protect Rural Jobs” (Dec. 2, 2011).

<sup>56</sup> **R-333**, Nova Scotia House of Assembly, “Standing Committee on Economic Development” (Dec. 6, 2011), p. 20 per Marvyn Robar (“The whole motive behind the company’s, and any commercial entity’s reason for doing things, is to try to be cost competitive and if you can’t be cost competitive then there’s no future for you. So the whole exercise was designed to reduce the operating costs of the mill to a cost-competitive level. So the union contributed to it. The province worked with the company and the company indicated that, you know, if we had \$25 million to invest, we could invest in energy-saving projects that would result in a significant reduction in our costs per ton for energy.”); **R-330**, Global News, “Nova Scotia offers \$50-million package for Bowater Mersey paper mill” (Dec. 2, 2011) (“These are investments that will continue to deliver efficiencies and continue to take costs out of the structure, year after year after year. In the end, I believe that in the newsprint industry it is the lowest-cost mills that are going to survive, and once the newsprint industry reaches an equilibrium, those companies will make money and they will be long-term businesses.”); **R-211**, Hansard (Dec. 8, 2011), p. 5015 per Darryl Dexter (“we went through every single part of the cost chain with Bowater and removed costs so that they would be a low-cost, highly competitive mill in the market that exists.”); **R-212**, Hansard (Dec. 12, 2011), p. 5219, (“So the question then was, how would we go about ensuring that we could have a low-cost, high-efficiency mill?”), p. 5220 (“What we wanted to do was put money in place that would allow that mill to actually operate in that low-cost, high-efficiency environment.”), and p. 5222 (“The question is, how will they survive? They will survive in a low-cost, high-efficiency, and very competitive market, and that’s the way that this mill is being positioned.”) **R-334**, Nova Scotia House of Assembly, “Standing Committee on Economic Development” (Jan. 10, 2012), p. 12 per Marvyn Robar (Vice President, Investment at DERDT) (“What’s happening, for example in Bowater, is there had to be a fundamental restructuring of all the variables of their production [...] the assistance the government provided was to preserve jobs and to assist the company in dropping their costs significantly.”)

<sup>57</sup> **R-146**, [REDACTED] **R-147**, [REDACTED]

<sup>58</sup> **R-149**, [REDACTED], p. 2; **R-151**, *Bowater Mersey Act*, s. 5; **R-335**, The Chronicle Herald, “N.S. makes \$50m deal to keep Bowater mill open” (Dec. 1, 2011); **R-150**, Nova Scotia Premier’s Office, “Province Acts to Protect Rural Jobs” (Dec. 2, 2011); **R-333**, Nova Scotia House of Assembly, Standing Committee on Economic Development (Dec. 6, 2011); **R-211**, Hansard (Dec. 8, 2011), pp. 5051-5052.

<sup>59</sup> **R-149**, [REDACTED] p. 3; **R-335**, The Chronicle Herald, “N.S. makes \$50m deal to keep Bowater mill open” (Dec. 1, 2011); **R-330**, Global News, “Nova Scotia offers \$50-million

[REDACTED]

[REDACTED]<sup>60</sup> The company planned to use \$18 million on long-fibre refining project and \$7 million to build a topping turbine at the Brooklyn power plant.<sup>61</sup> The company could accelerate the rate of forgiveness by undertaking other productivity improvements,<sup>62</sup> such as [REDACTED]

[REDACTED]

[REDACTED]<sup>63</sup>

56. Resolute’s spokesman Pierre Choquette said that “[t]hese are smart and strategic investments that are going to make it [the mill] more efficient, more productive, so it can be a long-term asset for the province” and “[t]hat’s what we hope in making those investments, to make the mill more competitive for the longer term.”<sup>64</sup> Premier Dexter explained that, once implemented, the two projects contemplated in the agreement would reduce Bowater Mersey’s costs,<sup>65</sup> and that the capital loan would thus help to “make it a more efficient, low-cost mill and therefore be able to survive in that exact environment.”<sup>66</sup> [REDACTED]

[REDACTED]

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package for Bowater Mersey paper mill” (Dec. 2, 2011); **R-333**, Nova Scotia House of Assembly, “Standing Committee on Economic Development” (Dec. 6, 2011); **R-336**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-61 (Dec. 7, 2011), p. 4932; **R-211**, Hansard (Dec. 8, 2011), p. 5052.

<sup>60</sup> **R-149**, [REDACTED] p. 2.

<sup>61</sup> **R-149**, [REDACTED] p. 2; **R-150**, Nova Scotia Premier’s Office, “Province Acts to Protect Rural Jobs” (Dec. 2, 2011); **R-335**, The Chronicle Herald, “N.S. makes \$50m deal to keep Bowater mill open” (Dec. 1, 2011); **R-330**, Global News, “Nova Scotia offers \$50-million package for Bowater Mersey paper mill” (Dec. 2, 2011); **R-210**, Nova Scotia Department of Natural Resources, “Legislation to Enact Pulp and Paper Mill Agreement Introduced” (Dec. 6, 2011); **R-211**, Hansard (Dec. 8, 2011), p. 5052; **R-212**, Hansard (Dec. 12, 2011), p. 5220.

<sup>62</sup> **R-335**, The Chronicle Herald, “N.S. makes \$50m deal to keep Bowater mill open” (Dec. 1, 2011); **R-211**, Hansard (Dec. 8, 2011), p. 5052; **R-212**, Hansard (Dec. 12, 2011), p. 5220.

<sup>63</sup> **R-149**, [REDACTED] p. 3.

<sup>64</sup> **R-335**, The Chronicle Herald, “N.S. makes \$50m deal to keep Bowater mill open” (Dec. 1, 2011).

<sup>65</sup> **R-212**, Hansard (Dec. 12, 2011), p. 5220 (The long-fibre refining project would “will give them a better and more efficient process and use less energy, and therefore bring down the cost to the mill,” and the topping turbine for the Brooklyn power plant would make it possible to sell more renewable electricity and receive additional revenues, “which will be offset against their other power costs and therefore reduce the overall cost to the mill.”)

<sup>66</sup> **R-212**, Hansard (Dec. 12, 2011), pp. 5219-5220.

██████████<sup>67</sup>

57. Second, the GNS agreed to purchase 25,000 acres of land from Bowater Mersey for \$23.75 million (\$950/acre).<sup>68</sup> The company had to use the land sale proceeds ██████████

██████████

██████████<sup>69</sup> The agreement also gave the GNS a five-year option to purchase an additional 50,000 acres of land at \$800/acre, worth another potential \$40 million for Resolute.<sup>70</sup>

58. Purchasing land from Bowater Mersey for fair market value served a dual purpose of achieving the GNS' goal of protecting land,<sup>71</sup> while providing some cash liquidity that the mill needed for its operations. The Nova Scotia Premier said:

Some of the highest conservation value land in the province is owned by Bowater Mersey, which means that what we were able to do with this is to put in place an arrangement where we could pick up a sum of that very valuable property in this process and benefit both the company, from a cash flow perspective, and the province, by getting some of the available high

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<sup>67</sup> **R-337**, ██████████

<sup>68</sup> **R-149**, ██████████ p. 4; **R-151**, *Bowater Mersey Act*, s. 6(1); **R-210**, Nova Scotia Department of Natural Resources, "Legislation to Enact Pulp and Paper Mill Agreement Introduced" (Dec. 6, 2011); **R-211**, Hansard (Dec. 8, 2011), p. 5052.

<sup>69</sup> **R-149**, ██████████ p. 4.

<sup>70</sup> **R-149**, ██████████ p. 5; **R-150**, Nova Scotia Premier's Office, "Province Acts to Protect Rural Jobs" (Dec. 2, 2011).

<sup>71</sup> Witness Statement of Julie Towers (April 17, 2019) ("Towers Statement"), ¶ 25. **R-194**, EGSPA, s. 4(2)(v); **R-152**, Nova Scotia House of Assembly, Committee on Public Accounts (Oct. 3, 2012); **R-213**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-60 (Dec. 6, 2011) ("Hansard (Dec. 6, 2011)"), p. 4877 (Premier Dexter: "We are purchasing from them some 25,000 acres of land. The reason why we're doing that is to fulfill our responsibility to reach the 12 per cent protected goal") and p. 4880 ("This province is engaged in a process where we will get to the 12 per cent of protected lands that was set out in legislation that was supported by both of the other Parties. The only way to get there is by the purchase of more land. That is necessary in order to get to the 12 per cent. What this does is it allows us an option to purchase what we know is high-quality, high-conservation-value land from Bowater."); **R-211**, Hansard (Dec. 8, 2011), p. 5052 (Minister Parker: "Since 2009, we've invested more than \$90 million to increase Crown land assets in our province. This land purchase will add to that and is consistent with government's goal to increase ownership of the total land mass for the province.") and p. 5066 (Vicki Conrad: "The province has secured lands with a \$23.5 million investment into the purchase of some prime lands owned by Bowater Mersey and some would say that those lands are some of the most ecological and conservation lands that will be part of our conservation package. As you know, [...] the province's goal is to protect 12 per cent of lands in the province by 2015, and the investment of \$23.5 million to purchase lands from Bowater Mersey certainly helps us reach that goal.")

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conservation value property.<sup>72</sup>

59. Mr. Brad Pelley, the manager of Resolute’s Bowater Mersey mill, said that the land purchase “was an absolutely essential element in the agreement [...] The proceeds from the sale will provide Bowater Mersey with liquidity cash flow that we need to sustain our operations.”<sup>73</sup>

60. Third, Bowater Mersey was authorized to receive up to \$1.5 million in 2012-2014 for workforce training.<sup>74</sup> Premier Dexter explained that, as a result of technology improvements made possible by the GNS financial assistance, “[t]here’s going to be new equipment for people to be trained on and this is an opportunity for the government to assist in that training so that they can very efficiently operate the mill itself, but also so they can do it safely.”<sup>75</sup>

61. Fourth, the Nova Scotia legislature authorized reduced municipal property tax rates for Bowater Mersey and Brooklyn Power Corporation in the Region of Queens Municipality.<sup>76</sup> The tax break would last 10 years, from April 1, 2012, and result in annual savings of about

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<sup>72</sup> **R-212**, Hansard (Dec. 12, 2011), p. 5221. *See also* **R-213**, Hansard (Dec. 6, 2011), p. 4878 (“First of all this agreement is put in place – it purchased 25,000 acres of high-conservation value for the Province of Nova Scotia. Secondly, it helped secure some 2,000 jobs on the South Shore of Nova Scotia.”); **R-338**, Nova Scotia Department of Natural Resources/Premier’s Office, “Land Purchase Helps 12 Per Cent Target, Protects Jobs” (Jan. 6, 2012) (“The province has reached an agreement with Bowater Mersey to purchase 25,000 acres of land that will help Nova Scotia meet its goal to protect 12 per cent of its land mass, provide more recreational opportunities and save thousands of jobs along the South Shore and in southwestern Nova Scotia.”); **R-339**, Nova Scotia Legislature, Subcommittee of the Whole House on Supply (Apr. 19, 2012), (“Over the past year the Department of Natural Resources has successfully negotiated the purchase of 35,000 total acres of land. Mr. Chairman, that’s a significant accomplishment that will help Nova Scotia meet its goal to protect 12 per cent of its land mass. Now, the largest purchase of the province was 25,000 acres from Bowater Mersey, which on top of providing more recreational opportunities, certainly that particular transaction helped to save thousands of jobs along the South Shore and in southwestern Nova Scotia.”)

<sup>73</sup> **R-340**, The Chronicle Herald, “Province purchases prime conservation land from Bowater” (Jan. 6, 2012). *See also* **R-211**, Hansard (Dec. 8, 2011), p. 5052 (Minister Parker: “the [land] sale proceeds must be used to ensure the long-term sustainability of the pulp and paper operations.”)

<sup>74</sup> **R-149**, [REDACTED] p. 5; **R-150**, Nova Scotia Premier’s Office, “Province Acts to Protect Rural Jobs” (Dec. 2, 2011); **R-335**, The Chronicle Herald, “N.S. makes \$50m deal to keep Bowater mill open” (Dec. 1, 2011); **R-330**, Global News, “Nova Scotia offers \$50-million package for Bowater Mersey paper mill” (Dec. 2, 2011); **R-333**, Nova Scotia House of Assembly, Standing Committee on Economic Development (Dec. 6, 2011); **R-210**, Nova Scotia Department of Natural Resources, “Legislation to Enact Pulp and Paper Mill Agreement Introduced” (Dec. 6, 2011); **R-211**, Hansard (Dec. 8, 2011), pp. 5052-5053.

<sup>75</sup> **R-212**, Hansard (Dec. 12, 2011), p. 5221.

<sup>76</sup> **R-151**, *Bowater Mersey Act*, preamble and ss. 9 to 16, which came into force on March 13, 2012. *See* **R-341**, Order-in-Council, No 2012-72 (Mar. 13, 2012).

\$135,000.<sup>77</sup>

62. Finally, the agreement noted that Bowater Mersey was receiving other cost-saving benefits from third parties, including [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 78 [REDACTED]

[REDACTED]

[REDACTED] 79 [REDACTED]

#### 4. Resolute Shuts Down Bowater Mersey and Negotiates a Soft-Landing Exit from Nova Scotia

63. When the financial support package was announced on December 1, 2011, Resolute’s President, and Chief Executive Officer, Richard Garneau emphasized that he did not “want to run the mill for a year” and explained that financial assistance that Resolute negotiated with the GNS was structured to “basically guarantee that the mill (survives) for five years. I hope that it’s going to run for longer than that. We’re going to do everything that is in our control to make it a success.”<sup>80</sup> Mr. Garneau stated that “[w]ith what we’ve got from the employees and the agreement with the government, I think that this mill has a potential to run more than five years.”<sup>81</sup>

64. Similarly, Resolute’s spokesman Pierre Choquette said that “[a]s for the future, it is certain [that] with the investments announced today, it will put the mill in a better position to compete in the longer term.”<sup>82</sup> He was “optimistic [that] those investments will provide a bit more leverage

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<sup>77</sup> **R-151**, *Bowater Mersey Act*, s. 9; **R-328**, The Chronicle Herald, “NSP’s rates for mills ‘irresponsible’” (Nov. 18, 2011); **R-329**, Global News, “Nova Scotia has support package for troubled paper mill, premier says” (Dec. 1, 2011); **R-330**, Global News, “Nova Scotia offers \$50-million package for Bowater Mersey paper mill” (Dec. 2, 2011).

<sup>78</sup> **R-149**, [REDACTED] p. 6.

<sup>79</sup> **R-149**, [REDACTED] p. 6.

<sup>80</sup> **R-316**, The Chronicle Herald, “Resolute boss confident plan will keep Bowater mill running” (Dec. 6, 2011).

<sup>81</sup> **R-316**, The Chronicle Herald, “Resolute boss confident plan will keep Bowater mill running” (Dec. 6, 2011).

<sup>82</sup> **R-342**, CBC News, “Bowater gets \$50M boost from N.S.” (Dec. 2, 2011).



to make the mill viable” for at least five years.<sup>83</sup> GNS officials shared Resolute’s view that the funding was to make the mill a viable economic operation for at least several more years.<sup>84</sup>

65. Unfortunately, on June 15, 2012, Resolute announced that the Bowater Mersey mill would be idled indefinitely starting on June 17, 2012.<sup>85</sup> Mr. Garneau acknowledged the financial support provided by the Province, saying “[w]e have worked diligently with the provincial government, our employees, union leadership and other stakeholders but simply could not overcome the inherent challenges.” He blamed the closure on the collapse in the value of the Euro.<sup>86</sup> The Nova Scotia Premier expressed no regret for the financial assistance package the GNS gave to Resolute: “I believe it was the province’s responsibility to do everything it could to protect jobs on the South Shore, and to help this mill survive.”<sup>87</sup>

66. After the mill’s permanent closure was announced, the GNS sought to negotiate a soft-landing for Resolute in order to mitigate the impact of its withdrawal from the Province, particularly on workers, pensioners and the communities, and to advance the Province’s forest policy goals.<sup>88</sup> On December 10, 2012, the GNS signed an agreement with Resolute to take over the Bowater Mersey mill’s assets and liabilities.<sup>89</sup> In exchange for nominal consideration (\$1) for Bowater Mersey’s shares, the Province assumed all of the mill’s liabilities, which at the time

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<sup>83</sup> **R-330**, Global News, “Nova Scotia offers \$50-million package for Bowater Mersey paper mill,” (Dec. 2, 2011).

<sup>84</sup> **R-330**, Global News, “Nova Scotia offers \$50-million package for Bowater Mersey paper mill” (Dec. 2, 2011) per Premier Dexter (“I said a few weeks ago that it would not be acceptable to anyone in Nova Scotia to just hand over taxpayers’ dollars to see the mill operate for another six or eight months. [...] The solution to keep the mill operating... had to ensure long-term sustainability of the mill. This agreement does that.”); **R-211**, Hansard (Dec. 8, 2011), p. 5051 per Minister Parker (“This bill sets out the legislative authority to ratify and confirm the recent agreement between the province and Bowater Mersey Paper Company Limited, which will see the pulp and paper mill near Liverpool continue to operate for years into the future. ... [W]hile there are no guarantees, we believe we have put in place a plan that we are confident will make the mill competitive and keep it operating for the next five years and, hopefully, well beyond.”)

<sup>85</sup> **R-153**, Resolute Forest Products, “Resolute to Indefinitely Idle Mersey Mill in Nova Scotia” (June 15, 2012).

<sup>86</sup> **R-153**, Resolute Forest Products, “Resolute to Indefinitely Idle Mersey Mill in Nova Scotia” (June 15, 2012); **R-343**, CBC News, “Bowater Mersey Mill shutting down” (June 15, 2012); **R-344**, CBC News, “Mill CEO blames closure on market conditions” (June 15, 2012).

<sup>87</sup> **R-345**, Nova Scotia Premier's Office, “Premier Responds to Indefinite Closure of Bowater Mill” (June 15, 2012).

<sup>88</sup> Montgomerie Statement, ¶ 16; **R-346**, Nova Scotia House of Assembly Debates and Proceedings, No. 12-48 (Nov. 14, 2012), pp. 3739-3741 per Vicky Conrad.

<sup>89</sup> **R-155**, Nova Scotia Premier's Office, “Province Takes Crucial Step to Build Forestry of Future” (Dec. 10, 2012); **R-214**, Nova Scotia Department of Lands and Forestry, “Bowater Land Purchase - Announced December 2012” (Dec. 10, 2012); **R-347**, Order-in-Council, No. 2012-375 (Dec. 7, 2012).

were estimated at \$136.4 million, including \$118.4 million in pension and severance payments, and \$18 million of intercompany debt that the GNS repaid directly to Resolute.<sup>90</sup> In addition, the GNS covered the cost of environmental clean-up of the mill site, estimated at \$8.75 million,<sup>91</sup> and it absorbed \$1.6 million in legal, appraisal, survey and other costs.<sup>92</sup> Bowater Mersey's assets included 555,000 acres of woodlands, which helped the GNS make towards its land acquisition and environmental goals,<sup>93</sup> and the Brooklyn Power Corporation, which was later sold to Emera to help cover the mill's substantial liabilities.<sup>94</sup>

67. As Duff Montgomerie notes in his witness statement when referring to the GNS' efforts to help Resolute with its Bowater Mersey mill:

While it was unfortunate that the original financial package given to Resolute did not work out, I believe that the GNS acted in good faith in considering what Resolute asked for and, balancing all the information and circumstances known at the time, acted reasonably in deciding what was an appropriate and prudent use of public funds.<sup>95</sup>

68. The GNS' willingness to provide financial support to Resolute's Bowater Mersey mill in December 2011, which Resolute has made no mention of in this arbitration, is essential context to understand how the GNS was similarly motivated with respect to the Port Hawkesbury mill.

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<sup>90</sup> **R-155**, Nova Scotia Premier's Office, "Province Takes Crucial Step to Build Forestry of Future" (Dec. 10, 2012); **R-214**, Nova Scotia Department of Lands and Forestry, "Bowater Land Purchase - Announced December 2012" (Dec. 10, 2012); **R-348**, Resolute Forest Products, "Resolute Announces Sale of Mersey Assets" (Dec. 10, 2012); **R-349**, The Chronicle Herald, "Province buys Bowater lands" (Dec. 10, 2012).

<sup>91</sup> **R-156**, "Summary of Notes – Site Visit – Bowater Mersey Paper Company – June 26th" (June 26, 2012), pp. 1, 5; **R-350**, Daily Commercial News, "Strategic demolition repurposes Bowater Mersey paper plant" (Apr. 25, 2014). See **R-351**, AMEC Earth and Infrastructure, Phase I Environmental Site Assessment, Executive Summary (August 2012), pp. 11-38.

<sup>92</sup> **R-352**, Order-in-Council, No. 2012-381 (Dec. 10, 2012).

<sup>93</sup> **R-353**, Cortex Consultants Inc., "Valuation of the Bowater Mersey Woodlands: Valuation Summary" (Nov. 18, 2012), pp. v-vi, 5-7; **R-352**, Order-in-Council, No. 2012-381 (Dec. 10, 2012). **R-155**, Nova Scotia Premier's Office, "Province Takes Crucial Step to Build Forestry of Future" (Dec. 10, 2012); **R-214**, Nova Scotia Department of Lands and Forestry, "Bowater Land Purchase - Announced December 2012" (Dec. 10, 2012) ("Gaining control of these lands and resources allows the province to put them into the hands of those in our forestry industry who will value them most and can best generate more jobs and wealth in the province [...].")

<sup>94</sup> The Oakhill sawmill, the largest operating sawmill in the province as of June 2011, was excluded from the sale. See **R-347**, Order-in-Council, No. 2012-375 (Dec. 7, 2012); **R-166**, Pre-Filed Evidence of Bowater Mersey, p. 1.

<sup>95</sup> Montgomerie Statement, ¶ 17.

**D. NPPH Files for Creditor Protection and Seeks a Buyer to Operate the Port Hawkesbury Mill as a Going Concern**

69. Opened in 1962 as a pulp mill, the Port Hawkesbury mill is located on the southwest coast of Cape Breton Island in Nova Scotia. A newsprint machine was added within the first decade of operation and the site was expanded in 1998 with a major investment in a state-of-the-art SC paper machine with an annual capacity of 360,000 metric tons.<sup>96</sup> The Port Hawkesbury SC paper machine set a world-record for production speed on July 6, 2003,<sup>97</sup> and was widely recognized in the industry as the best SC paper machine in North America.

70. In 2007, U.S. company NewPage acquired the Port Hawkesbury mill and operated it through its wholly-owned Canadian subsidiary NPPH, a company incorporated in Nova Scotia.<sup>98</sup> As of August 2011, it was operating both the newsprint and SC paper machines with a combined production capacity of 545,000 metric tonnes annually,<sup>99</sup> and with approximately 650 employees<sup>100</sup> and many indirect jobs.<sup>101</sup>

71. The mill was particularly important to the island of Cape Breton, which had an employed population of only 52,800 and the highest unemployment rate in the province at 15.9%.<sup>102</sup> Cape Breton had also experienced the Province's largest employment decline (4.0%) over the previous five years (2006-2011).<sup>103</sup>

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<sup>96</sup> **R-355**, Port Hawkesbury Paper LLC, "Port Hawkesbury Paper Mill Datasheet" (2018), pp. 1-2.

<sup>97</sup> **C-108**, Resolute "[REDACTED]" PowerPoint [REDACTED] p. 5.

<sup>98</sup> **R-165**, *Re NewPage Port Hawkesbury Corporation*, Pre-Filed Evidence of NewPage Port Hawkesbury, M04175 NPB-4 (June 22, 2011) ("Pre-Filed Evidence of NewPage Port Hawkesbury"), p. 1; **R-024**, Suther Affidavit, ¶¶ 14-15. See also **R-159**, *Re NewPage Port Hawkesbury Corp.*, Twelfth Report of the Monitor (S.C.N.S.) (Aug. 8, 2012), ("Twelfth report of the Monitor"), ¶ 24: NPPH is part of a large group of companies owned by NPC with activities in the forestry and paper products sectors.

<sup>99</sup> **R-165**, Pre-Filed Evidence of NewPage Port Hawkesbury, p. 1; **R-024**, Suther Affidavit, ¶ 24. PM1, the newsprint machine, had a production capacity of 185,000 metric tonnes annually and PM2, the SC paper machine, had a production capacity of 360,000 metric tonnes annually.

<sup>100</sup> **R-024**, Suther Affidavit, ¶ 45. The mill employed approximately 650 people at the mill and a further 350 people as employees of independent contractors in forestry operations.

<sup>101</sup> **R-423**, CBC News, "NewPage Port Hawkesbury to close indefinitely" (Aug. 22, 2011).

<sup>102</sup> **R-037**, Nova Scotia Department of Labour and Advanced Education, "2011 Nova Scotia Labour Market Review", p. 6.

<sup>103</sup> **R-037**, Nova Scotia Department of Labour and Advanced Education, "2011 Nova Scotia Labour Market Review", p. 6.

## 1. The Court-Appointed CCAA Monitor Seeks Out Potential Purchasers for the Port Hawkesbury Mill

72. On September 6, 2011, NPPH applied to the Supreme Court of Nova Scotia (the “Court”) for creditor protection under the CCAA.<sup>104</sup> The CCAA is a Canadian federal law that allows “insolvent corporations that owe their creditors in excess of \$5 million to restructure their business and financial affairs.”<sup>105</sup> The Ontario Court of Appeal described the purpose of the CCAA as “remedial in the purest sense in that it provides a means whereby the devastating social and economic consequences of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.”<sup>106</sup> In the context of the CCAA process, a court-appointed monitor oversees the process and works with the company, the creditors, potential purchasers and employees.<sup>107</sup> The company that files for creditor protection is responsible for developing a plan to put before its creditors. The creditors must then approve the plan and the process of restructuring. Ultimately, the creditors’ approval is subject to approval by the court.

73. NPPH chose to file under the CCAA (and not to liquidate the company under the *Bankruptcy and Insolvency Act*<sup>108</sup>) because it wanted “to stabilize its current situation in order to seek a ‘going concern’ solution for the business of NPPH to attempt to preserve the greatest benefit and value for its creditors, employees and other stakeholders and for the local community as a whole.”<sup>109</sup> These are the words of a NPPH company representative, not those of the GNS. Contrary to what Resolute insinuates,<sup>110</sup> the GNS did not control the CCAA proceedings and it

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<sup>104</sup> **R-025**, *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36. See **R-026**, *Re NewPage Port Hawkesbury Corp.*, Notice of Application in Chambers (S.C.N.S.) (Sept. 6, 2011).

<sup>105</sup> See **R-356**, Government of Canada website, Office of the Superintendent of Bankruptcy Canada, You are Owed Money - *The Companies’ Creditors Arrangement Act* (“You are Owed Money – CCAA”) NPPH met that threshold. See **R-024**, Suther Affidavit, ¶ 73.

<sup>106</sup> **RL-110**, *Elan Corp. v. Comiskey (C.A.)*, 1990 Canlii 6979 (ON CA), 2 November 1990; See also **R-356**, You are Owed Money – CCAA (the purpose of the Act “is to avoid, where possible, the social and economic consequences of bankruptcy, and to allow a company to carry on business.”)

<sup>107</sup> **R-025**, *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 11.7.

<sup>108</sup> **R-357**, *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

<sup>109</sup> **R-024**, Suther Affidavit, ¶¶ 8, 89-92 and 104.

<sup>110</sup> See, for example, Claimant’s Memorial, ¶ 24, “GNS recommended to NewPage that it place the mill into creditor protection to find a new owner to operate the mill as a going concern.”

was NPPH that decided to market the Port Hawkesbury mill as a going concern.<sup>111</sup>

74. On September 9, 2011, the Court granted NPPH’s application for creditor protection and appointed Ernst & Young Inc. as the Monitor to supervise the business and financial affairs of NPPH during the CCAA proceedings.<sup>112</sup> In addition, the Court authorized and directed NPPH and the Monitor to implement a process for soliciting offers for the sale of the assets of NPPH.<sup>113</sup> The Monitor and NPPH hired U.S.-based investment bankers Sanabe & Associates LLC (“Sanabe”) to assist with the sale of the Port Hawkesbury mill.<sup>114</sup>

75. The Monitor published a notice of the sale in regional and national newspapers and, in consultation with NPPH and Sanabe, developed a list of 110 strategic and financial parties (“Interested Parties”) that may be interested in purchasing NPPH’s assets.<sup>115</sup> The Monitor and Sanabe directly contacted them to determine if they had an interest in executing a confidentiality agreement and obtaining new information concerning the sale of the company and its assets.<sup>116</sup> Resolute acknowledges that it was one of those Interested Parties.<sup>117</sup>

76. Twenty-seven potential purchasers signed a confidentiality agreement, received a confidential information memorandum and were given access to an electronic data room.<sup>118</sup> The deadline for the receipt of non-binding letters of intent was September 28, 2011.<sup>119</sup> Twenty-one

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<sup>111</sup> See **R-159**, Twelfth report of the Monitor, ¶ 43, “As a result, a sales process was approved by this Court (the ‘Sales Process’) that was designed to market the mill assets on an expedited basis with the hopes that a going concern buyer offering the highest net return for the assets could be secured.”

<sup>112</sup> **R-028**, *Re NewPage Port Hawkesbury Corp.*, Initial Order (S.C.N.S.) (Sept. 9, 2011), ¶¶ 17-19 and 26-34. In CCAA proceedings, the monitor is a Licensed Insolvency Trustee appointed by the Court. He is considered an officer of the Court and monitors “the company’s business and financial affairs to ensure compliance with the law, the Court orders and the terms of the Plan [of Compromise or Arrangement].” Among other tasks, the monitor assists the company with the preparation of the Plan and prepares reports for the Court. The monitor’s reports, Court orders and a list of creditors are posted on the monitor’s website. See **R-356**, *You are Owed Money – CCAA*.

<sup>113</sup> **R-029**, *Re NewPage Port Hawkesbury Corp.*, Order: Approval of Settlement and Transition Agreement and Sales Process, (S.C.N.S.) (Sept. 9, 2011), ¶ 3 and Schedule A: Sales Process Terms.

<sup>114</sup> NPPH’s contract with Sanabe included a success fee if a going concern sale was achieved. See **R-159**, Twelfth report of the Monitor, ¶ 56 (a)(i) (referencing “the Sanabe Success Fee.”)

<sup>115</sup> **R-030**, *Re NewPage Port Hawkesbury Corp.*, Second Report of the Monitor (S.C.N.S.) (Oct. 3, 2011), (“Second Report of the Monitor”), ¶¶ 14-15.

<sup>116</sup> **R-030**, Second Report of the Monitor, ¶ 15.

<sup>117</sup> Claimant’s Memorial, ¶ 28.

<sup>118</sup> **R-030**, Second Report of the Monitor, ¶ 16.

<sup>119</sup> **R-030**, Second Report of the Monitor, ¶ 17.

Interested Parties filed expressions of interest by that date, some intending to operate the mill as a going concern while others were planning to liquidate the assets.<sup>120</sup> Resolute, by its own choice, was not one of those 21 companies.

**2. Resolute Decides to “ [REDACTED] ”**

77. Resolute acknowledges that it decided not to invest in the Port Hawkesbury mill [REDACTED]  
[REDACTED].<sup>121</sup>

78. [REDACTED] when Resolute was approached by the investment bank Sanabe, which was working with NewPage to market the sale of the Port Hawkesbury mill.<sup>122</sup>

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]<sup>123</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>124</sup> [REDACTED]

[REDACTED]

[REDACTED].<sup>125</sup>

79. Resolute complains that it “never was offered financial assistance to make a purchase more attractive.”<sup>126</sup> But no potential purchaser of Port Hawkesbury was offered financial assistance by the GNS at that time. In any event, [REDACTED]

[REDACTED]

[REDACTED]

<sup>120</sup> **R-030**, Second Report of the Monitor, ¶ 17.

<sup>121</sup> Claimant’s Memorial, ¶ 28.

<sup>122</sup> Claimant’s Memorial, ¶ 28; **R-024**, Suther Affidavit, ¶ 105.

<sup>123</sup> **C-107**, [REDACTED]  
[REDACTED] p. 5.

<sup>124</sup> **C-107**, [REDACTED], p. 50.

<sup>125</sup> **C-107**, [REDACTED], p. 50.

<sup>126</sup> *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant’s Notice of Arbitration and Statement of Claim, 30 December 2015 (“Statement of Claim”), ¶ 26. See Claimant’s Memorial, ¶ 220 (“Resolute’s SC paper operations were offered none of these benefits, nor was Resolute when invited to bid on the shuttered Port Hawkesbury mill.”)

[REDACTED]  
[REDACTED] 127 [REDACTED]  
[REDACTED].

80. [REDACTED] Resolute decided not to buy Port Hawkesbury was at the end of  
September [REDACTED] 128 [REDACTED]  
[REDACTED] 129

81. [REDACTED]  
[REDACTED]  
[REDACTED] 130 [REDACTED]  
[REDACTED] 131 [REDACTED]  
[REDACTED] 132 [REDACTED]  
[REDACTED] 133

82. [REDACTED]  
[REDACTED] 134 [REDACTED]  
[REDACTED]  
[REDACTED]

<sup>127</sup> C-107, [REDACTED], p. 50.

<sup>128</sup> Claimant’s Memorial, ¶ 28.

<sup>129</sup> R-358, [REDACTED] RFP0009563-9564. [REDACTED]

<sup>130</sup> R-359, [REDACTED] RFP0009569-9572.

<sup>131</sup> R-359, [REDACTED] RFP0009572.

<sup>132</sup> R-359, [REDACTED] RFP0009571-9572.

<sup>133</sup> R-359, [REDACTED] RFP0009571.

<sup>134</sup> R-359, [REDACTED] RFP0009570-9571.

[REDACTED] 135 [REDACTED]

[REDACTED] 136

83. [REDACTED]

[REDACTED]

[REDACTED] 137 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 138 [REDACTED]

[REDACTED] 139 [REDACTED]

[REDACTED]

[REDACTED] 140 [REDACTED] 41 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 42 [REDACTED]

84. [REDACTED]

[REDACTED]

[REDACTED]

<sup>135</sup> R-359, [REDACTED] RFP0009571-9572.

<sup>136</sup> R-359, [REDACTED]), RFP0009569-9570.

<sup>137</sup> C-119, Resolute [REDACTED] p. 4

<sup>138</sup> C-119, Resolute [REDACTED] p. 4.

<sup>139</sup> C-119, Resolute [REDACTED] pp. 5, 10.

<sup>140</sup> C-119, Resolute [REDACTED] pp. 3, 6.

<sup>141</sup> C-119, Resolute [REDACTED] pp. 8-9.

<sup>142</sup> C-119, Resolute [REDACTED] p. 11.



[REDACTED]

[REDACTED] 143 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 144

85. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 145

86. [REDACTED] 146

[REDACTED]

[REDACTED]

[REDACTED] 147

<sup>143</sup> C-118, Resolute [REDACTED] p. 2.

<sup>144</sup> C-118, Resolute [REDACTED] p. 3.

<sup>145</sup> R-360, [REDACTED]), RFP0009566-9567.

<sup>146</sup> Claimant’s Memorial, ¶¶ 2, 28.

<sup>147</sup> Montgomerie Statement, ¶ 20; R-360, [REDACTED]), RFP0009566-9567 and R-359, [REDACTED] RFP0009572.

87. [REDACTED]  
[REDACTED] 148 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] 149 [REDACTED]  
[REDACTED] 150

88. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] 151

89. In any event, Resolute had direct access to GNS senior officials and it could have inquired about financial assistance for the Port Hawkesbury mill. As Mr. Montgomerie notes in his witness statement, by the time the deadline came to submit an expression of interest for Port Hawkesbury, Resolute and the GNS were already in discussions as to how the government might provide financial support for the Bowater Mersey mill.<sup>152</sup> Mr. Montgomerie states that if Resolute had submitted a bid and if it had been selected by the Monitor, the GNS would have been ready to discuss reasonable requests for financial assistance from Resolute to keep the Port Hawkesbury mill operational.<sup>153</sup>

### 3. The CCAA Monitor Selects PWCC as the Preferred Bidder

90. After the September 28, 2011 deadline, the Monitor and Sanabe analyzed the 21 submissions received and designated 14 Interested Parties as “Qualified Bidders.” Here again,

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<sup>148</sup> **R-360**, [REDACTED] RFP0009566-9567.

<sup>149</sup> **R-361**, Sanabe Confidential Information Memorandum (Sept. 2011) (“September 2011 Sanabe Memorandum”), pp. 47, 49.

<sup>150</sup> **R-362**, *Re NewPage Port Hawkesbury Corp.*, Third Report of the Monitor (S.C.N.S.) (Oct. 26, 2011), (“Third Report of the Monitor”), ¶ 45(a)-(e).

<sup>151</sup> **C-107**, [REDACTED] p. 50; **R-361**, September 2011 Sanabe Memorandum, p. 50.

<sup>152</sup> Montgomerie Statement, ¶ 20.

<sup>153</sup> Montgomerie Statement, ¶¶ 24, 32.

that group included parties wanting to operate the mill as a going concern and others who wanted to liquidate the mill's assets.<sup>154</sup> A number of Qualified Bidders visited the mill, and the Monitor and Sanabe responded to numerous information requests and supported the bidders that were looking for information regarding the business.<sup>155</sup>

91. Qualified Bidders had until October 24, 2011 to file offers to purchase the mill and the Monitor received eight offers on that date.<sup>156</sup> On October 28, 2011, the Monitor advised four of the eight Qualified Bidders that they were invited to continue participating in the sales process.<sup>157</sup> The final group of four bidders was composed of two "going concern" bidders, including PWCC, and two "liquidation" bidders.<sup>158</sup> The Monitor advised the four Qualified Bidders to complete their due diligence and negotiations and submit their final revised offers no later than December 16, 2011.<sup>159</sup>

92. While the CCAA process was unfolding, the GNS was preparing for every eventuality. Shortly after Resolute told the GNS that it was going to shut down Bowater Mersey and NPPH went into creditor protection, the GNS commissioned studies on the potential future for newsprint and SC paper and the forest sector in Nova Scotia generally.<sup>160</sup> [REDACTED]

[REDACTED] 161 [REDACTED]  
[REDACTED] 62 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

<sup>154</sup> **R-362**, Third Report of the Monitor, ¶ 45(a).

<sup>155</sup> **R-362**, Third Report of the Monitor, ¶ 45(d).

<sup>156</sup> **R-362**, Third Report of the Monitor, ¶ 45(c)-(f).

<sup>157</sup> **R-362**, Third Report of the Monitor, ¶ 45(f), (g); **R-047**, *Re NewPage Port Hawkesbury Corp.*, Fifth Report of the Monitor (Nov. 24, 2011) (S.C.N.S.), ("Fifth Report of the Monitor"), ¶ 16(a).

<sup>158</sup> **R-031**, *Re NewPage Port Hawkesbury Corp.*, Sixth Report of the Monitor (Jan. 13, 2012) (S.C.N.S.), ("Sixth Report of the Monitor"), ¶¶ 17-18.

<sup>159</sup> **R-047**, Fifth Report of the Monitor, ¶ 16(f); **R-031**, Sixth Report of the Monitor, ¶¶ 17-18.

<sup>160</sup> Montgomerie Statement, ¶ 10.

<sup>161</sup> **R-146**, [REDACTED] pp. 6-8; **R-147**, [REDACTED] pp. 5-9.

<sup>162</sup> **R-146**, [REDACTED] pp. 9-11.

[REDACTED]

[REDACTED]<sup>163</sup> This assessment provided some comfort to the GNS that NPPH's efforts to sell the mill as a going concern were not wishful thinking and that the state-of-the-art SC paper machine could be of interest to the right buyer. Whether the GNS would agree to provide financial assistance to such a buyer remained to be determined.

93. Contrary to what Resolute alleges,<sup>164</sup> the GNS was not in a position to offer any support to the bidders before knowing who they were and it did not do so.<sup>165</sup> It was not until PWCC was identified as one of two finalists to purchase the mill as a going concern on October 28, 2011 that such discussions began.<sup>166</sup>

94. In November and December 2011, the GNS met with representatives from PWCC and the other bidder (Paper Excellence) that was also proposing to operate the mill as a going concern.<sup>167</sup> The GNS listened to both companies' plans for the mill and started to think about what, if anything, might be appropriate financial assistance.<sup>168</sup> In the meantime, the Monitor, NPPH and Sanabe also worked with the two bidders as they were completing their due diligence, which involved discussions with a number of stakeholders, including the union representing the mill's employees, suppliers and NSPI.<sup>169</sup>

95. It also bears mentioning that NPPH had continued to pursue its June 2011 application for a discounted electricity rate jointly with Resolute's Bowater Mersey mill even after filing for creditor protection in September 2011. NPPH, with Resolute's support as co-applicant, emphasized that a reduced electricity rate was a key part of its attempts to attract buyers to operate Port Hawkesbury as a going concern.<sup>170</sup> While the UARB granted a LRR for Bowater

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<sup>163</sup> **R-146**, [REDACTED] p. 9.

<sup>164</sup> Claimant's Memorial, ¶ 220 ("Resolute's SC paper operations were offered none of these benefits, nor was Resolute when invited to bid on the shuttered Port Hawkesbury mill.")

<sup>165</sup> Montgomerie Statement, ¶ 23.

<sup>166</sup> Montgomerie Statement, ¶ 23.

<sup>167</sup> Montgomerie Statement, ¶ 21.

<sup>168</sup> Montgomerie Statement, ¶ 22.

<sup>169</sup> **R-047**, Fifth Report of the Monitor, ¶ 16 (c).

<sup>170</sup> **R-363**, *Re NewPage Port Hawkesbury Corporation*, Opening Statement of NewPage Port Hawkesbury Corp., M04175 NPB-55 (Oct. 25, 2011), p. 3 ("the success of the Load Retention Rate Application, and the stabilization of electricity prices, are fundamental considerations for any potential purchaser who wishes to continue to carry on

Mersey on November 29, 2011,<sup>171</sup> it deferred a decision on Port Hawkesbury until a potential buyer for the mill was found and it would then consider any reapplication for a reduced electricity rate.<sup>172</sup>

96. The four Qualified Bidders submitted their formal and final offers by the deadline of December 16, 2011.<sup>173</sup> Despite what Resolute implies,<sup>174</sup> it is not unusual for a small number of parties to express interest in acquiring assets when contacted in the context of CCAA proceedings. In the present case, it was NPPH, the Monitor and Sanabe who identified parties who could be interested in acquiring the mill or its assets. The GNS did not select the companies that proceeded to the next stage of the bidding process.

97. The Monitor, NPPH and Sanabe evaluated the final four offers and recommended to NPPH's Board of Directors that the offer from PWCC be selected.<sup>175</sup>

98. It is important to note that, at this stage of the CCAA process, PWCC had no formal offer of financial support from the GNS and Resolute is mistaken to suggest otherwise. As Duff Montgomerie testifies, [REDACTED]

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pulp and papermaking in Port Hawkesbury.”); **R-319**, NPB Closing Submission, pp. 56 (“As Mr. Stewart indicated, there are various potential opportunities for the Port Hawkesbury mill under a new ownership structure, but these opportunities to attempt to enhance profitability can only come about if the mill’s largest input cost is at some level of competitiveness.”) and 58 (“Electricity pricing will remain the ‘elephant in the room’ and if a potential buyer does not have an opportunity to carry on business at a rate that is at a minimum near the upper end of competitiveness for electricity pricing, NPB [i.e., Bowater and NPPH] respectfully submits there simply will not be a buyer for the mill that will choose to operate it going forward. As Mr. Stewart made very clear, he has been engaged with all of the potential buyers, those that have dropped away and those that are still in play, and each has indicated the importance of electricity pricing in their considerations of whether there is an opportunity for the mill to be a going concern.”)

<sup>171</sup> **C-138**, Bowater Mersey UARB Decision, ¶ 223.

<sup>172</sup> **C-138**, Bowater Mersey UARB Decision, ¶ 224.

<sup>173</sup> **R-031**, Sixth Report of the Monitor, ¶ 18.

<sup>174</sup> Claimant’s Memorial, ¶ 34 (“Despite the large number of inquiries from the Monitor, only eight parties submitted offers, and only four were invited to continue bidding.”)

<sup>175</sup> **R-031**, Sixth Report of the Monitor, ¶ 19; **R-159**, Twelfth Report of the Monitor, ¶ 48.

[REDACTED] 176

**E. New Phase of the CCAA Proceedings: PWCC Negotiates the Purchase of Port Hawkesbury from NPPH and the GNS Agrees to Provide Financial Assistance**

**1. Discussions with the GNS Run Parallel to PWCC’s Negotiations with NSPI and Other Parties**

99. On January 13, 2012, the Monitor reported to the Court that it had recommended to NPPH’s board of directors that it accept PWCC's going concern bid.<sup>177</sup> In the Monitor's opinion, this offer “would facilitate a going concern sale of the mill and timberlands” while providing “the greatest potential recovery to the estate in terms of purchase price and the likelihood of having ongoing operations in Port Hawkesbury, which in turn [would] have beneficial ramifications to [NPPH] employees and the community.”<sup>178</sup> The Monitor also considered PWCC’s excellent track record and reputation in the industry, a view that the GNS shared,

[REDACTED]

[REDACTED] 179

100. Once PWCC was formally selected by the Monitor and NPPH as the company most likely to give the greatest return to creditors, negotiations to purchase the mill entered into a new phase.

101. First, PWCC started negotiations with Port Hawkesbury’s employees. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 180 [REDACTED]

[REDACTED] 181

102. Second, formal negotiations between PWCC and NSPI began, picking up from initial

<sup>176</sup> *Montgomerie Statement*, ¶ 25. *See C-139*, [REDACTED]), compared to *R-149*, [REDACTED]

<sup>177</sup> *R-031*, Sixth Report of the Monitor, ¶ 19.

<sup>178</sup> *R-031*, Sixth Report of the Monitor, ¶ 19.

<sup>179</sup> *C-158*, [REDACTED], pp. 4-5; *See Montgomerie Statement*, ¶ 26.

<sup>180</sup> *C-163*, [REDACTED], pp. 6, 30 and 44.

<sup>181</sup> *C-163*, [REDACTED], pp. 4, 44.

discussions commenced in November 2011.<sup>182</sup> As discussed in Murray Coolican’s witness statement, PWCC had creative ideas on a flexible electricity scheme that it had used at other mills in other jurisdictions, which could substantially reduce energy costs, but also provide NSPI with significant benefits. Negotiations between PWCC and NSPI lasted several months but both parties finally agreed to the terms of an electricity rate structure and applied to the UARB on April 27, 2012.<sup>183</sup>

103. Third, PWCC sought assistance from the GNS in the form of loans and grants to help with capital improvements and lowering its operation costs. While the GNS was open to the idea of some financial support, it was not willing to use public funds at any cost and would only do so upon scrutiny of PWCC’s business plan.<sup>184</sup> The GNS also had broader policy objectives to be concerned with: it was interested in purchasing NPPH’s land regardless of whether PWCC completed its purchase. Also, if PWCC did purchase the mill and re-opened it, the GNS wanted to replace the outdated forest license regime that the Port Hawkesbury mill had been operating under for almost fifty years.<sup>185</sup>

104. The GNS also had to consider PWCC’s business case before any financial assistance would be offered.<sup>186</sup> [REDACTED]

[REDACTED] 87 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] 188 [REDACTED]

<sup>182</sup> Witness Statement of Murray Coolican (April 17, 2019) (“Coolican Statement”), ¶ 14.

<sup>183</sup> **R-062**, *Re Pacific West Commercial Corporation*, 2012 NSUARB 126, Decision (Aug. 20, 2012) (“PWCC P”), ¶ 9.

<sup>184</sup> Montgomerie Statement, ¶ 22; Witness Statement of Jeannie Chow (April 17, 2019) (“Chow Statement”), ¶¶ 6, 9, 15.

<sup>185</sup> Towers Statement, ¶¶ 32-33.

<sup>186</sup> Chow Statement, ¶ 6.

<sup>187</sup> **C-163**, [REDACTED], pp. 4, 6 of 52.

<sup>188</sup> **R-359**, [REDACTED]), RFP0009566-9567. *See also* **R-361**, September 2011 Sanabe Memorandum, pp. 47-50.

[REDACTED] 189

[REDACTED]

[REDACTED] 190

**2. PWCC Concludes a Plan of Arrangement with NPPH to Purchase Port Hawkesbury and Agrees to Terms with the GNS on Financial Assistance and Other Agreements**

105. On July 6, 2012, PWCC and NPPH entered into an agreement (the “Plan Sponsorship Agreement”) whereby, subject to the fulfilment of certain conditions, PWCC would act as the sponsor of a Plan of Compromise and Arrangement for NPPH under the CCAA (the “Plan”).<sup>191</sup> The Plan and the Plan Sponsorship Agreement would result in NPPH being continued as a federal corporation and renamed Port Hawkesbury Paper Inc. (“PHP”), which PWCC would acquire for \$33 million.<sup>192</sup>

106. Amongst the conditions for the sale, which are a matter of public record,<sup>193</sup> were the various agreements with the GNS at issue in this dispute: (i) a Sustainable Forest Management and Outreach Program Agreement in respect of achieving sustainable harvest and forest land practices in woodlands in Nova Scotia, (ii) a Forest Utilization License Agreement in respect of

<sup>189</sup> **R-146**, [REDACTED] pp. 6-11.

<sup>190</sup> **C-109**, Resolute, [REDACTED] PowerPoint Presentation [REDACTED] p. 28

[REDACTED]  
; **C-119**, Resolute  
, p. 3

<sup>191</sup> **R-032**, Re NewPage Port Hawkesbury Corp., Affidavit of Peter Wedlake – Part 1 (S.C.N.S.) (July 6, 2012) (“Wedlake Affidavit – Part 1”), Exhibit A: Plan of Compromise and Arrangement of NewPage Port Hawkesbury Corp.; **R-033**, Re NewPage Port Hawkesbury Corp., Affidavit of Peter Wedlake – Part 2 (S.C.N.S.) (July 6, 2012) (“Wedlake Affidavit – Part 2”), Exhibit B: Plan Sponsorship Agreement.

<sup>192</sup> **R-033**, Wedlake Affidavit – Part 1, Exhibit B: Plan Sponsorship Agreement, s. 1 and Plan of Compromise and Arrangement of NewPage Port Hawkesbury Corp., Arts. 2.1, 6.2 and Schedule “A”; **C-220**, Port Hawkesbury Paper Limited Partnership Financial Statements for 2013 (Dec. 31, 2013), p. CAN000013\_0007. The Monitor concluded that the sale of the Port Hawkesbury mill to PWCC as contemplated by the Plan would produce a more favourable result to NPPH’s creditors than a further sale process or liquidation of the company’s assets. See **R-159**, Twelfth Report of the Monitor, ¶¶ 132-134.

<sup>193</sup> **R-033**, Wedlake Affidavit – Part 2, Exhibit B: Plan Sponsorship Agreement, s. 9(1) (see especially s. 9(1)(d), requiring that “all of the conditions set out in Section 9.2 of the Plan shall be satisfied or waived prior to the date specified therein.”); **R-035**, Re NewPage Port Hawkesbury Corp., Plan Sanction Order (S.C.N.S.) (Sept. 25, 2012) (“Plan Sanction Order”), Schedule A: Amended and Restated Plan of Compromise and Arrangement of NewPage Port Hawkesbury Corp. dated July 6, 2012, as amended and restated on September 5, 2012, s. 9.2 (“Conditions of Plan Implementation.”)



access to fibre on Crown lands, (iii) a Letter of Offer Agreement in connection with the provision of certain financial assistance by the GNS to PWCC, and (iv) a Land Purchase Agreement with respect to the purchase and sale of certain real property owned by NPPH.<sup>194</sup>

107. The purchase of Port Hawkesbury was also contingent on the UARB approving a LRR pricing mechanism governing the mill's electricity rates, which was the subject of an agreement between PWCC and NSPI.<sup>195</sup>

108. On July 17, 2012, NPPH obtained the Court's approval of the Plan Sponsorship Agreement<sup>196</sup> and on August 15, 2012, NPPH's creditors voted overwhelmingly in favour of PWCC's offer and the Plan.<sup>197</sup>

109. The sale came at a time when the market for SC paper had taken a turn for the worse, with demand and prices having dropped in the first half of 2012.<sup>198</sup>

[REDACTED]

[REDACTED]<sup>199</sup> [REDACTED]

[REDACTED]<sup>200</sup> [REDACTED]

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<sup>194</sup> **R-035**, Plan Sanction Order, Schedule A, ss. 1.1 (*see especially* the definitions of “Applicant,” “Forest Utilization License Agreement,” “Letter of Offer Agreement,” “Plan Sponsor,” “Province,” “Provincial Agreements,” “Real Property Agreement,” “Sustainable Forest Management and Outreach Program Agreement,”), s. 9.2(e) (requiring PWCC to have entered into these “Provincial Agreements” before the transaction closed), and s. 9.2(f) (requiring the agreements to remain in full force and effect as of the date of the transaction’s closing).

<sup>195</sup> **R-035**, Plan Sanction Order, s. 9.2(i). As discussed in Part III(B) below, PWCC and NSPI originally arranged for NSPI to become co-owner of the Port Hawkesbury mill. However, PWCC switched to a different structure in September 2012 after the Canada Revenue Agency declined the parties’ request for an advanced tax ruling necessary to implement the ownership structure contemplated by PWCC and NSPI.

<sup>196</sup> **R-034**, *Re NewPage Port Hawkesbury Corp.*, Meeting Order (S.C.N.S.) (July 17, 2012), ¶ 3.

<sup>197</sup> **R-035**, Plan Sanction Order, ¶¶ (b), (c), 3. *See also* **R-364**, *Re NewPage Port Hawkesbury Corp.*, Thirteenth Report of the Monitor (S.C.N.S.) (Aug. 4, 2012), ¶¶ 10, 22-35.

<sup>198</sup> See Expert Report of Peter Steger, Cohen Hamilton Steger (April 17, 2019) (“Steger Report”), ¶ 22; Expert Report of Pöyry (April 17, 2019) (“Pöyry Report”), ¶ 42.

<sup>199</sup> **R-161**, [REDACTED] Montgomerie Statement, ¶ 30.

<sup>200</sup> **R-161**, [REDACTED] pp. 8, 55-56.

[REDACTED]  
[REDACTED] 201 [REDACTED]  
[REDACTED] 202

110. As Duff Montgomerie explains in his witness statement, with all the information gathered, the GNS “faced a difficult decision that required balancing various interests and considerations. Consistent with our mandate, we considered all of the options before us based on the information we had, including the option of not offering any financial support to the mill.”<sup>203</sup> Mr. Montgomerie testifies that the GNS was not willing to help keep the mill open at any cost,<sup>204</sup> but on balance, it decided – just as it did when it provided a \$50 million financial assistance package to Resolute to help save its Bowater Mersey mill in December 2011 – that it was in the public interest to provide a reasonable financial assistance package to PWCC for its purchase of the Port Hawkesbury mill.

**a) Financial Assistance from the GNS to PWCC**

111. The GNS and PWCC agreed to the terms of a financial assistance package [REDACTED], which consisted of the following:

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

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<sup>201</sup> Pöyry Report, ¶ 46.

<sup>202</sup> **R-161**, [REDACTED], pp. 6, 36-40.

<sup>203</sup> Montgomerie Statement, ¶ 28.

<sup>204</sup> Montgomerie Statement, ¶ 22.

<sup>205</sup> [REDACTED]  
[REDACTED] **C-163**, [REDACTED], pp. 7, 9, 41-42.

[REDACTED]

[REDACTED]

112. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] 206

113. [REDACTED]  
[REDACTED] PWCC's application for an advanced tax ruling ("ATR") on its proposed partnership with NSPI was rejected by the Canada Revenue Agency ("CRA") on September 12, 2012.<sup>207</sup> While the new agreement provided greater security to the GNS, the total amount of the loans remained the same.

114. The witness statement of Ms. Jeannie Chow, Director at the Nova Scotia Department of Business, corrects several of Resolute's misstatements with respect to [REDACTED]. The factual details of the changes to the financing agreement are immaterial to the merits of this arbitration since the specific terms of the revised financing agreement do not change the assessment of whether there is a violation of NAFTA Articles 1102 or 1105. Nonetheless, the misrepresentations in Resolute's Memorial with respect to the terms of [REDACTED] merit clarification.

115. First, [REDACTED]  
[REDACTED] 208 [REDACTED]  
[REDACTED]

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<sup>206</sup> C-182, [REDACTED]  
pp. 3-4.

<sup>207</sup> C-195, [REDACTED]  
[REDACTED]

<sup>208</sup> Chow Statement, ¶ 214.

[REDACTED]

209

116. Second, [REDACTED]<sup>210</sup> Contrary to Resolute’s view, this was not a “benefit” given by the GNS to PWCC.<sup>211</sup> Generally, under Canadian tax law, within a related corporate group, losses of one corporation can be used against the income of another corporation.<sup>212</sup> [REDACTED]

[REDACTED]

213

[REDACTED]

214

[REDACTED]

[REDACTED]

117. Third, [REDACTED]<sup>215</sup>

[REDACTED]

216

There was, in effect, a trade-off between having PWCC repay the loan on the one hand, and NSPI paying tax revenues to the GNS on the other. From the GNS’ point of view, the additional tax revenues placed it in a roughly equivalent situation as it would have been by waiting for full reimbursement from PWCC.

<sup>209</sup> C-195, [REDACTED], p. 4.

<sup>210</sup> Chow Statement, ¶¶ 10, 16.

<sup>211</sup> Claimant’s Memorial, ¶¶ 219, 253.

<sup>212</sup> R-365, *Income Tax Act*, RSC 1985, c.1 (5<sup>th</sup> Supp.), s. 111.

<sup>213</sup> C-195, [REDACTED], p. 5.

<sup>214</sup> C-195, [REDACTED], p. 6.

<sup>215</sup> C-195, [REDACTED], pp. 2-4.

<sup>216</sup> Chow Statement, ¶ 9.

**b) Land Purchase Agreement**

118. Resolute suggests that [REDACTED] Land Purchase Agreement between PWCC and the GNS was a \$20 million gift to PWCC, which reduced PWCC's effective price for the mill to \$13 million.<sup>217</sup> Resolute's argument suffers from a fundamental misunderstanding.

119. As described in the witness statement of Ms. Julie Towers, the GNS had a long-standing goal of increasing its share of forest ownership in the Province. For example, the GNS purchased 25,000 acres of land from Resolute for \$23.75 million as part of the rescue package to save Bowater Mersey and it had the option to buy an additional \$40 million worth of land. This served the dual role of giving the GNS more land it could use for its conservation and environmental goals and providing Resolute with money that it was required to use [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>218</sup>

120. The same reasoning applies with respect to Port Hawkesbury. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>19</sup>  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>220</sup>

**c) Forest Utilization License Agreement**

121. Resolute also misstates the purpose and terms of the September 27, 2012 Forest Utilization

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<sup>217</sup> Claimant's Memorial, ¶ 115.

<sup>218</sup> **R-149**, [REDACTED] p. 4. Indeed, Bowater Mersey's land was the company's most valuable asset and was a reason why Nova Scotia agreed to take over close to \$140 million in liabilities in December 2012.

<sup>219</sup> **R-216**, [REDACTED] p. 1.

<sup>220</sup> **C-209**, [REDACTED]  
pp. CAN000016\_0004-0005.

License Agreement (“FULA”),<sup>221</sup> which the GNS (not PWCC) required as a means of adopting a modern forest licensing system in line with the Province’s Natural Resources Strategy.

122. As Ms. Julie Towers explains in her witness statement, the former owners of the Port Hawkesbury mill obtained the wood fibre they required for the mill’s operations from Crown land pursuant to the 1969 *Stora Forest Industries Agreement Act* (“*Stora Act*”).<sup>222</sup> This legislation had been put in place for the mill’s original owner back when it was a sulphite mill. The *Stora Act* was highly advantageous to the Port Hawkesbury mill operators, giving them largely unfettered control over Crown land.

123. The *Stora Act* had a 50-year term that was coming up for renewal in 2019 for another 50 years.<sup>223</sup> Accordingly, when NPPH went into creditor protection in September 2011, the GNS was concerned that a new owner may demand the continuation of the advantageous *Stora Act* regime as a condition of the purchase, which would deprive the GNS of the opportunity to modernize the regime applicable to that land, including implementing new forestry and conservation requirements. With the mill in creditor protection, there was an opportunity to negotiate a modern forest licensing arrangement with the new owner that was more advantageous to the Province.<sup>224</sup>

124. Resolute makes a number of misstatements with respect to the term, wood supply and economics of the FULA.

125. First, Resolute implies that the 20-year term was a benefit for PWCC,<sup>225</sup> when in fact that was sought by the Province to replace the 50-year term under the *Stora Act*. A 20-year term had the dual objective of providing reasonable certainty for the operator of the mill, while also preserving policy flexibility for the Province.<sup>226</sup>

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<sup>221</sup> **R-192**, Port Hawkesbury Paper, Forest Utilization License Agreement (September 27, 2012) (“FULA”). See Claimant’s Memorial, ¶¶ 44, 67.

<sup>222</sup> **R-219**, *Stora Forest Industries Limited Agreement Act*, RSNS 1989, c 446. See Towers Statement, ¶ 33.

<sup>223</sup> **R-024**, Suther Affidavit, ¶ 18; **R-219**, *Stora Forest Industries Limited Agreement Act*, RSNS 1989, c 446.

<sup>224</sup> Towers Statement, ¶ 33.

<sup>225</sup> Claimant’s Memorial, ¶¶ 67, 219, 253.

<sup>226</sup> Towers Statement, ¶ 33.

126. Second, Resolute portrays the FULA as a guarantee of wood fibre from provincial lands.<sup>227</sup> But as Ms. Towers explains, the point of the FULA was to place a cap on how much Crown timber can be used for PHP's operations and to encourage greater use of timber from private woodlots than the *Stora Act* did. This is consistent with the goals set out in the Natural Resources Strategy and GNS legislation.<sup>228</sup>

127. Third, Resolute incorrectly describes the terms of the FULA, confusing the stumpage fees and silviculture payments. According to Resolute, because PHP received more in silviculture payments in 2017 than it paid for stumpage, it received its Crown timber for free.<sup>229</sup> Resolute alleges that PHP's silviculture expenditures are not monitored.<sup>230</sup> Neither of these statements is true. In Nova Scotia, stumpage fees are related to harvesting standing timber, while silviculture fees are related to activities undertaken on that land. PHP pays for all Crown stumpage harvested at the rates prescribed in the FULA.<sup>231</sup> Those rates are set pursuant to an index referencing the average market price for uncoated groundwood paper delivered to the United States, as published by RISI for the preceding calendar year.<sup>232</sup> [REDACTED]

233

128. The FULA also requires PHP to conduct silviculture activities on Crown land using best practices for forest management.<sup>234</sup> This necessarily involves PHP incurring additional expenses to conduct silviculture activities that it would not undertake in the ordinary course of business under the *Forest Sustainability Regulations* since those regulations apply to timber harvested from private lands or industrial freeholds (i.e., not Crown land). PHP's expenditures for silviculture performed on Crown land are audited annually.<sup>235</sup> [REDACTED]

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<sup>227</sup> Claimant's Memorial, ¶ 67.

<sup>228</sup> **R-202**, Natural Resources Strategy, pp. 38-39; *see also* **R-366**, *Forests Act*, R.S.N.S. 1989, c. 179, s. 2(b) ("The intent and purpose of this Act is directed towards...(b) encouraging the development and management of private forest land as the primary source of forest products for industry in the Province.")

<sup>229</sup> Claimant's Memorial, ¶ 96.

<sup>230</sup> Claimant's Memorial, ¶ 96.

<sup>231</sup> **R-192**, FULA, s. 11 and Schedule "F".

<sup>232</sup> **R-192**, FULA, Schedule "F", ¶ 2.

<sup>233</sup> **R-192**, FULA, ss. 5.11-5.12.

<sup>234</sup> **R-192**, FULA, s. 15.1.

<sup>235</sup> **R-192**, FULA, ss. 15.8, 23.1.

[REDACTED]  
[REDACTED] 236

129. Furthermore, the FULA provides the GNS with greater authority to manage forests on Crown land while pursuing a number of objectives of the Natural Resources Strategy by providing for: limits on provincial wood supply; withdrawals from or adjustments to the lands covered under the FULA; limitations on the number of trees that can be harvested for biomass; commitments that PWCC/PHP undertook vis-à-vis the Mi'kmaq First Nation; Forest Stewardship Council requirements; silviculture activities, and access to lands.<sup>237</sup> All of these provisions impose new requirements on PHP.

130. In sum, the FULA was the modernization of a long-outdated forestry regime that would have otherwise continued. It was not executed at PWCC's request or for its benefit.

**d) Sustainable Forest Management and Outreach Agreement**

131. Under the [REDACTED] Outreach Agreement, the GNS provides PHP with up to \$3.8 million a year, [REDACTED] to carry out certain activities relating to forest management.<sup>238</sup> As Julie Towers explains, the GNS has used the Outreach Agreement to pursue its Natural Resources Strategy, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] 239 Contrary to what Resolute alleges,<sup>240</sup> [REDACTED]  
[REDACTED]  
[REDACTED] 241

132. Resolute states that the FULA "turned ultimately into" the Outreach Agreement, which

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<sup>236</sup> R-192, FULA, s. 15.3.

<sup>237</sup> R-192, FULA, ss. 3.2-3.3, 5.3-5.8, 5.13-5.15, 9.1, 9.2(b), 9.2(q), 10.1, 14.1, 15.1-15.8, 16.1-16.2, 16.5, 17.1-17.4; R-202, Natural Resources Strategy, pp. 34-44.

<sup>238</sup> C-206, [REDACTED] ss. 13.2-13.3.

<sup>239</sup> Towers Statement, ¶ 38.

<sup>240</sup> Claimant's Memorial, ¶ 94.

<sup>241</sup> C-206, [REDACTED], ss. 13.1, 13.4-13.5, 13.8, 13.11.



“provided PHP with payments [REDACTED]

[REDACTED]<sup>242</sup> This is not accurate. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**e) Other “Measures” Challenged by Resolute**

133. Resolute includes four other “measures” that it alleges were “benefits and concessions” from the GNS to PWCC: (i) reducing municipal property taxes from \$2.6 million to \$1.3 million annually,<sup>243</sup> (ii) “indemnification of costs were PWCC not to complete the purchase of the mill,”<sup>244</sup> (iii) [REDACTED],<sup>245</sup> and (iv) pension liability relief.<sup>246</sup> Again, Resolute misunderstands or misrepresents the nature of these “measures” and their relevance.

134. First, Resolute complains that Port Hawkesbury got a municipal property tax reduction from \$2.6 million down to \$1.3 million.<sup>247</sup> However, the new municipal property tax rate for Port Hawkesbury was a readjustment to account for reduced operations and asset use at the mill that conferred no benefit on PWCC.

135. Negotiating a different municipal property tax rate is not unusual: Resolute’s Bowater Mersey mill did so in December 2011 with the Region of Queens municipality as part of its efforts to reduce costs.<sup>248</sup> In the case of Port Hawkesbury, the municipal property tax paid by NPPH prior to the sale of the mill to PWCC was based on a property tax agreement made at the time when the mill was a much larger industrial operation, i.e., when it included both the newsprint and the SC paper machines.<sup>249</sup> PWCC and the municipality agreed on a new tax rate

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<sup>242</sup> Claimant’s Memorial, ¶ 69.

<sup>243</sup> Claimant’s Memorial, ¶¶ 115(4), 219.

<sup>244</sup> Claimant’s Memorial, ¶¶ 71(11), 115(7), 219, 253.

<sup>245</sup> Claimant’s Memorial, ¶¶ 99, 115(6), 219, 253.

<sup>246</sup> Claimant’s Memorial, ¶¶ 49, 71(10), 219, 253.

<sup>247</sup> Claimant’s Memorial, ¶¶ 115(4), 219.

<sup>248</sup> Supra, ¶ 61. **R-149**, [REDACTED] p. 6. This property tax reduction was approved by the GNS in the *Bowater Mersey Pulp and Paper Investment (2011) Act*. **R-151**, *Bowater Mersey Act*.

<sup>249</sup> **R-222**, [REDACTED] p. 1.

based on reduced operations but in an amount that was approximately twice what PWCC would have otherwise have been required to pay under provincial law.<sup>250</sup> Resolute has failed to explain how a property tax agreement with a municipality to pay more taxes than what would have otherwise been due is a “benefit” that the GNS gave to PWCC.

136. Second, Resolute complains about the November 28, 2011 Indemnity Agreement [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>251</sup> [REDACTED]  
[REDACTED]  
[REDACTED]<sup>252</sup> [REDACTED]

[REDACTED]<sup>253</sup> Resolute fails to explain how an indemnification that never actually occurred helps its case.

137. Third, Resolute complains about [REDACTED]

[REDACTED]<sup>254</sup> [REDACTED]  
[REDACTED]  
[REDACTED]<sup>255</sup>

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<sup>250</sup> See **R-368**, U.S. DOC, Supercalendered Paper from Canada, Issues and Decision Memorandum (Oct. 13, 2015), p. 54, (concluding “the property tax that Port Hawkesbury paid during the POI under the amended tax agreement exceeds the property tax otherwise due. As a result, we find that there is no revenue foregone...without foregone revenue, Port Hawkesbury did not receive a benefit...”)

<sup>251</sup> **C-136**, [REDACTED] ss. 1.1, 1.7. [REDACTED]  
[REDACTED] **C-136**, [REDACTED]  
p. CAN000020\_0012-13.

<sup>252</sup> **C-136**, [REDACTED] p. CAN000020\_0013 [REDACTED]  
[REDACTED]

<sup>253</sup> [REDACTED] See **C-238**, [REDACTED]  
[REDACTED], p. CAN000015\_0011.

<sup>254</sup> Claimant’s Memorial, ¶¶ 99, 115(6), 219, 253.

<sup>255</sup> [REDACTED]  
[REDACTED] **C-190**, [REDACTED]  
[REDACTED], p. CAN000120\_0013.

[REDACTED] 256 [REDACTED]

[REDACTED]

[REDACTED] 257 [REDACTED]

[REDACTED] 258 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 259 [REDACTED]

[REDACTED] 260 [REDACTED]

[REDACTED]

[REDACTED] 261 [REDACTED]

138. Finally, Resolute alleges that the GNS gave PWCC “relief from all pension liabilities”<sup>262</sup> but says nothing further on this other than citing to newspaper articles and alleging that PWCC “refused to assume the unfunded pension liability of over \$100 million.”<sup>263</sup> Resolute’s failure to plead with specificity is enough for the Tribunal to disregard this alleged “measure” by the GNS.

139. With the Plan of Arrangement and various agreements in place, the Court approved PWCC’s purchase of the mill from NewPage on September 25, 2012.<sup>264</sup> The sale became

<sup>256</sup> C-190, [REDACTED] s. 2(b).

<sup>257</sup> C-190, [REDACTED] p. CAN000120\_0013.

<sup>258</sup> C-190, [REDACTED] s. 2(c).

<sup>259</sup> C-190, [REDACTED] ss. 2(b), (c).

[REDACTED] See R-269, [REDACTED] CAN000012\_007.

<sup>260</sup> C-190, [REDACTED] pp. 1-2 [REDACTED]

[REDACTED] . See also C-190, [REDACTED] pp. CAN000120\_21, ¶¶ 6-7.

<sup>261</sup> Claimant’s Memorial, ¶ 219.

<sup>262</sup> Claimant’s Memorial, ¶¶ 71(10), 219.

<sup>263</sup> Claimant’s Memorial, ¶ 49; Expert Witness Report of Seth T. Kaplan, Ph.D. (December 28, 2018) (“Kaplan Report”), ¶ 26.

<sup>264</sup> R-035, Plan Sanction Order, ¶ 3.

effective September 28, 2012<sup>265</sup> and PHP resumed production and sale of SC paper in early October 2012.<sup>266</sup>

## **F. The Current State of the SC Paper Market**

### **1. The Paper Products Matrix**

140. SC paper is an uncoated mechanical paper, which is smoothed and compacted by calender rolls (i.e., supercalendered). On the paper matrix (see figure below), it is an intermediate grade of paper that offers better quality than newsprint and standard uncoated mechanical paper (“UM”), and it has traditionally offered lower quality than coated mechanical paper (“CM”). It is comprised of the following grades: soft nip calendered (SNC), SCB, SCA, SCA+ and SCA++.<sup>267</sup>

#### **Typical Grade-to-End-Use Matrix for Paper Grades<sup>268</sup>**

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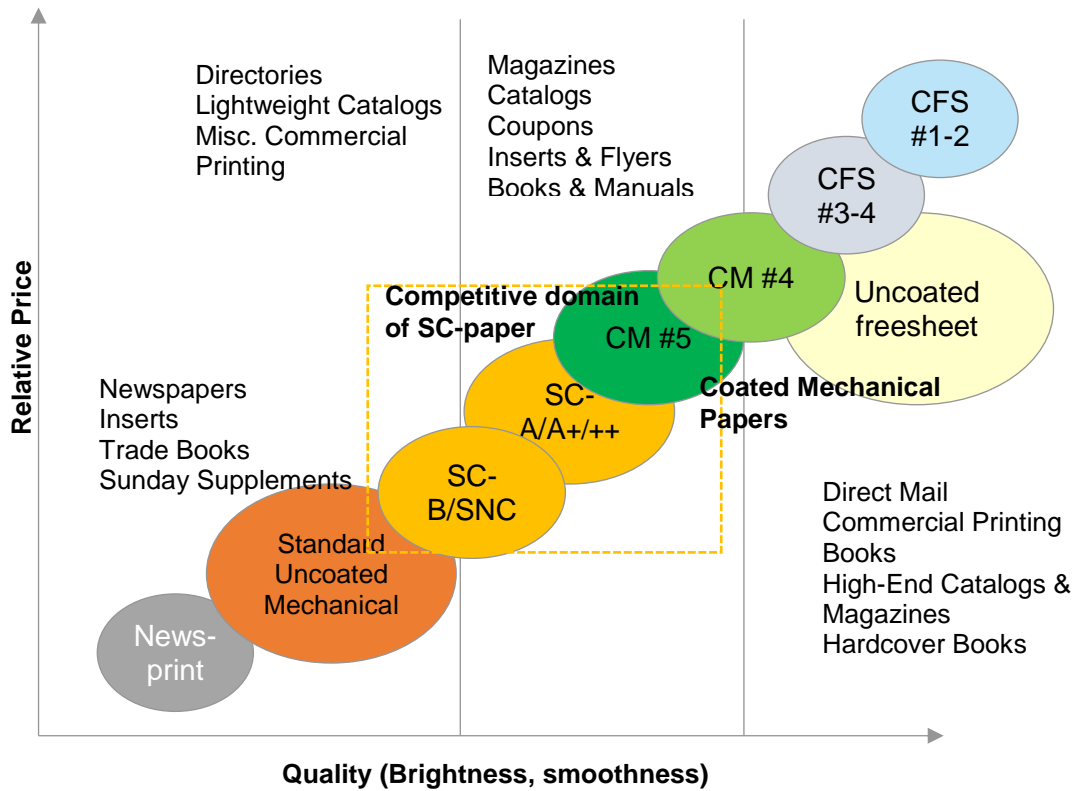
<sup>265</sup> The Plan defined the “Effective Date” as “the day on which the Monitor delivers the Monitor’s Certificate to the Applicant and the Plan Sponsor pursuant to Section 9.3”, which occurred on September 28, 2012. **R-035**, Plan Sanction Order, Schedule A: Amended and Restated Plan of Compromise and Arrangement, Art. 1.1; **R-036**, *Re NewPage Port Hawkesbury Corp.*, Monitor’s Certificate (Sep. 28, 2012) (S.C.N.S.).

<sup>266</sup> **R-098**, Truro Daily News, “Paper rolling off line at mill” (Oct. 4, 2012); **R-099**, Cape Breton Post, “Paper rolling off line at mill” (Oct. 3, 2012).

<sup>267</sup> Pöyry Report, ¶¶ 4, 5, 19; Pöyry refers to SCA+ and SCA++ and what some suppliers call SCA+++ as SCA+ grades.

<sup>268</sup> Pöyry Report, Figure 2-1, ¶ 22.

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141. The qualities of SC paper and the grades closest to it on the above matrix differ significantly, from the highest to the lowest grades, in terms of basis weight,<sup>269</sup> brightness, gloss, opacity and smoothness.<sup>270</sup>

142. Although SC paper has traditionally offered lower quality than CM paper, since 2012, SCA+ and CM grades have competed directly with one another because SCA+ grades offer comparable quality to coated mechanical paper at lower basis weight and cost.<sup>271</sup> On the lower end of the price and quality matrix, SCB and SNC paper also competes with “standard UM” that is not supercalendered. “Standard UM” paper, also referred to as improved newsprint, includes high bright, directory and bulky book to name a few. Downgrading from coated paper to SCA+ grades has been prevalent since 2013, [REDACTED]

<sup>269</sup> Basis weight is defined as the weight of a standard amount of paper cut to a standard size; measured in grams per square metre (also known as grammage) or pounds. **R-369**, Catalyst, Glossary “Basis Weight”.

<sup>270</sup> Pöyry Report, ¶ 21.

<sup>271</sup> Pöyry Report, ¶¶ 5, 19, 26.

[REDACTED] 272 [REDACTED]  
 [REDACTED]  
 [REDACTED] 273 [REDACTED]  
 [REDACTED] 274 [REDACTED]

143. At the same time, downgrading has occurred in flyers, inserts and coupons from SCB to standard uncoated mechanical paper.<sup>275</sup>

**2. Port Hawkesbury’s SC Paper Operations**

144. The SC paper machine at Port Hawkesbury had been installed only in 1998, making it North America’s newest and best SC paper machine. With an annual production capacity of 360,000 metric tonnes, that machine produces several different grades of SC paper, including SCA+ grades, SCA and SCB, used for catalogs, magazines, retail inserts and wrapping paper.<sup>276</sup> Since re-opening in 2012, [REDACTED]

[REDACTED] 277 [REDACTED]  
 [REDACTED]

145. [REDACTED]  
 [REDACTED] 278 However, there has

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<sup>272</sup> R-242, [REDACTED] RFP0009500-9501. [REDACTED]  
 [REDACTED] R-161, [REDACTED]  
 [REDACTED], pp. 23, 26.

<sup>273</sup> R-242, [REDACTED] RFP0009500-9501.

<sup>274</sup> R-259, [REDACTED]  
 [REDACTED] p. 15. See also R-235, [REDACTED]  
 [REDACTED]

R-370, [REDACTED] p. 5 (RFP0011800); R-229, [REDACTED] RFP0011700; R-371, [REDACTED] p. 10 (RFP0011638).

<sup>275</sup> Pöyry Report, ¶ 31.

<sup>276</sup> R-355, Port Hawkesbury Paper LLC, “Port Hawkesbury Paper Mill Datasheet” (2018), pp. 1-2.

<sup>277</sup> Steger Report, ¶ 116.

<sup>278</sup> Pöyry Report, ¶ 88; [REDACTED] R-242, [REDACTED] RFP0009500-9501.

always been room for SCA+ paper from Europe in North America, despite the high shipping costs.<sup>279</sup> Imports from Europe have constituted between 21-30% of North American SC-A/A+ paper supply in the 2010s, and could have filled the gap left in the North American market had PHP not restarted.<sup>280</sup> In fact, imports from Europe were increasing [REDACTED] [REDACTED]<sup>281</sup> but have declined since that time. The bulk of SC-A/A+ imports accounted for only 15% of the additional demand in 2013 but absorbed 93% of the demand decline in 2014.<sup>282</sup> This meant that the two main shock absorbers of PHP's re-entry into the market were the European SC paper suppliers and the CM suppliers.<sup>283</sup>

146. It was NPPH that marketed the Port Hawkesbury mill in September 2011 as a one machine operation that could produce high quality grades of SC paper (i.e., SCA+ and above) in order to compete with CM paper.<sup>284</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] <sup>285</sup> [REDACTED]

[REDACTED]

[REDACTED] <sup>286</sup> [REDACTED]

### 3. Resolute's SC Paper Operations

147. In contrast to Port Hawkesbury, Resolute's Dolbeau and Laurentide (before it closed) mills have concentrated on producing the lower grades of SC paper: SNC and SCB. [REDACTED]

[REDACTED]

[REDACTED] <sup>287</sup> [REDACTED]

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<sup>279</sup> Pöyry Report, ¶ 36.

<sup>280</sup> Pöyry Report, ¶ 36.

<sup>281</sup> **R-242**, [REDACTED] RFP0009500-9501.

<sup>282</sup> Pöyry Report, ¶¶ 8, 50.

<sup>283</sup> Pöyry Report, ¶¶ 8, 50.

<sup>284</sup> **R-361**, September 2011 Sanabe Memorandum, pp. 47, 49.

<sup>285</sup> **C-163**, [REDACTED], pp. 23-24. Pöyry Report, ¶ 33.

<sup>286</sup> Pöyry Report, ¶ 34; *see also* **R-372**, [REDACTED] [REDACTED] RFP009546.

<sup>287</sup> **R-272**, [REDACTED] RFP00009455.

148. Resolute had idled the Dolbeau mill in June 2009 and closed it in 2010.<sup>288</sup> But, after having negotiated a lucrative energy contract with Hydro-Québec that greatly reduced Dolbeau's cost structure,<sup>289</sup> Resolute announced the reopening of the mill on August 24, 2012.<sup>290</sup> Resolute's Dolbeau mill produces only SNC/SCB paper.<sup>291</sup>

149. [REDACTED]<sup>292</sup>  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>293</sup> Resolute shut down its Laurentide paper machine #10 in November 2012.<sup>294</sup> Laurentide's paper machine #11, which was regarded in the industry as old and inefficient,<sup>295</sup> continued to make SNC/SCB paper until Resolute shut it down in October 2014.<sup>296</sup> Resolute publicly cited the high costs of fibre, fuel and transportation as the reasons behind its decision to

<sup>288</sup> **C-023**, The Canadian Press, "AbitibiBowater may restart Dolbeau Mill after workers endorse changes" (Sep. 23, 2011).

<sup>289</sup> Resolute's Dolbeau mill sells electricity produced by its cogeneration plant to Hydro- Québec at the rate of \$106/MWh, adjustable for inflation. **R-310**, Contrat d'approvisionnement en électricité entre PF Resolu Canada Inc. et Hydro-Québec Distribution centrale de cogénération de Dolbeau (September 4, 2012), pp. 24-25. See **R-354**, [REDACTED], RFP0009386 [REDACTED] and RFP0009418 [REDACTED]

<sup>290</sup> **R-011**, Resolute Press Release "Resolute Forest Products Announces Restart of its Dolebau (Québec) Paper Mill," (Aug. 24, 2012).

<sup>291</sup> **R-373**, [REDACTED] p. 7.

<sup>292</sup> **R-373**, [REDACTED] p. 5; **R-087**, [REDACTED] p. 22.

<sup>293</sup> [REDACTED] **R-354**, [REDACTED] RFP0009426.

<sup>294</sup> On November 6, 2012, Resolute announced permanent closure of the PM#10 at the Laurentide mill effective on November 26, 2012. **R-014**, Resolute Forest Products, News Release, "Resolute Forest Products announces permanent shutdown of paper machine at its Laurentide mill" (Nov. 6, 2012). See **R-354**, [REDACTED] RFP0009418 [REDACTED]

[REDACTED] **R-258**, [REDACTED] RFP0011899, [REDACTED]; **C-025**, C'est terminé la 6 à Kénogami, Le Quotidien du jour (Dec. 13, 2011), p. 2 (Resolute's spokesman Pierre Choquette said "Analyses are being performed on Machine No. 10 in Laurentides where the same issue is being faced as in Kénogami – a low-yield machine and obsolete technology for which a major investment would not be a sound long-term investment.")

<sup>295</sup> Pöyry Report, ¶ 68.

<sup>296</sup> On September 2, 2014, Resolute announced permanent closure of the Laurentide mill effective on October 15, 2014. **R-016**, Resolute Forest Products, News Release, "Resolute Announces Permanent Closure of Laurentide Mill in Shawinigan, Québec" (Sep. 2, 2014).



close its Laurentide mill, as well as alleged competition with Port Hawkesbury.<sup>297</sup>

150. [REDACTED] 298 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] 299 [REDACTED]

151. Resolute’s focus on a different class of SC paper than what PHP produces has exposed it to two market challenges. First, [REDACTED]

[REDACTED]  
[REDACTED] 300 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] 301 Second, Resolute is not able to capture customers that switch to SCA+ grades

<sup>297</sup> **R-016**, Resolute Forest Products, News Release, “Resolute Announces Permanent Closure of Laurentide Mill in Shawinigan, Québec” (Sep. 2, 2014); **R-017**, Resolute Forest Products, “2014 Annual Report”, p. 8.

<sup>298</sup> **R-373**, [REDACTED] p. 8.

<sup>299</sup> **R-228**, [REDACTED] RFP0009515-9516, [REDACTED]; **R-230**, [REDACTED], RFP0011677 [REDACTED]

<sup>300</sup> **R-374**, [REDACTED] RFP0011561 [REDACTED]; **R-375**, [REDACTED] RFP0011816 and RFP0011817; **R-370**, [REDACTED] RFP0011799 and RFP0011800 [REDACTED]; **R-376**, [REDACTED] RFP0011726; **R-229**, [REDACTED] RFP0011700 and RFP0011702 [REDACTED]; **R-371**, [REDACTED] RFP0011637 and RFP0011638; **R-273**, [REDACTED] RFP0011593 [REDACTED] and RFP0011595 [REDACTED]; **R-377**, [REDACTED] RFP0011540 [REDACTED] and RFP0011543.

<sup>301</sup> **R-371**, [REDACTED] RFP0011638 [REDACTED]; **R-230**, [REDACTED] RFP0011677; *See also* **R-161**, [REDACTED]

because its Québec mills do not have the equipment to make that quality of high-grade SC paper. As a result, and as explained in the Pöyry report and Part VI below, there is actually little direct competition between Resolute and PHP.

#### **4. NAFTA Chapter Nineteen Panel and WTO Panel Reviews of the U.S. Department of Commerce’s SC Paper from Canada Investigation**

152. While the Claimant has dropped its claims against Canada in relation to the DOC investigation into SC paper imports from Canada,<sup>302</sup> the findings made by a NAFTA Panel and by a WTO Panel with respect to various aspects of the DOC’s investigation are of relevance to Resolute’s mischaracterizations of various measures at issue in this arbitration.<sup>303</sup>

153. In its Final Determination dated October 13, 2015, the DOC decided that the following Nova Scotia measures constituted countervailable subsidies to PHP: the \$40 million credit facility, the \$24 million capital loan, the \$1.5 million training grant, the \$1 million marketing contribution, the provision of stumpage under the FULA, the Outreach Agreement, the Indemnity Agreement, the provision of electricity<sup>304</sup> and the Land Purchase Agreement.<sup>305</sup>

154. Following the issuance of the DOC’s Final Determination, Canada initiated dispute settlement proceedings before a NAFTA Panel and a WTO Panel. The NAFTA Panel issued its

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<sup>302</sup> Claimant’s Memorial, ¶ 152. While Canada disagrees with the Claimant’s characterizations of the investigation, in light of its decision to drop its claims against Canada in connection with the DOC investigation, Canada will not spend time rebutting each of Resolute’s incorrect characterizations of the facts. In addition, none of facts that the Claimant refers to in the section of its Memorial entitled “Resolute’s Mitigation of Damages” amounts to actual mitigation of alleged damages.

<sup>303</sup> The DOC, the NAFTA Panel and the WTO Panel also made findings with respect to the hot idle funding and the FIF program. Canada does not address those findings here given that the Tribunal found these measures to be outside of its jurisdiction.

<sup>304</sup> **R-395**, United States Department of Commerce, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada (Oct. 13, 2015) (“Issues and Decision Memorandum”), pp. 13-16, 24-26, and 30-53.

<sup>305</sup> While the DOC found that the land purchase conferred a countervailable subsidy, the amount was less than 0.005% and it did not have an impact of PHP’s overall subsidy rate. Therefore, the DOC did not include this program in its subsidy rate calculations. *See R-395*, Issues and Decision Memorandum, pp. 55-57. With respect to the Richmond County property tax reduction, the DOC concluded that it did not provide a benefit to PHP because the property tax that it paid during the period of investigation under an amended tax agreement exceeded the property tax otherwise due. As for the retention of accumulated tax losses to carry forward, the DOC determined that PHP received no benefit during the period of investigation based on tax returns for the relevant period. *See R-395*, Issues and Decision Memorandum, pp. 54-55.

decision in April 2017 and remanded the DOC's Final Determination with respect to the conclusion that the GNS "entrusted" or "directed" NSPI to make a financial contribution by providing electricity to PHP, finding that the DOC had not identified substantial evidence on the record to support its conclusion on that point.<sup>306</sup> The NAFTA Panel also found that the DOC's determination that the payments under the Outreach Agreement were grants was supported by evidence.<sup>307</sup>

155. In its report issued in July 2018, the WTO Panel found that the DOC had acted inconsistently with the SCM Agreement by finding entrustment or direction with respect to the provision of electricity by NSPI, and it concluded that the DOC's determination that the provision of electricity conferred a benefit was inconsistent with the SCM Agreement.<sup>308</sup>

### **III. THE "ELECTRICITY DEAL" BETWEEN PWCC AND NSPI IS NOT ATTRIBUTABLE TO THE GNS UNDER INTERNATIONAL LAW AND IS NOT A MEASURE WITHIN THE TRIBUNAL'S JURISDICTION**

156. Resolute alleges that "the GNS instructed" the passage of PHP's "electricity deal," thereby making the electricity rate paid by the Port Hawkesbury mill a "measure adopted...by a Party" sufficient to be within the scope and coverage of NAFTA Chapter Eleven.<sup>309</sup> Resolute pins its attribution argument on Article 8 of the ILC Articles: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

157. Resolute has misapplied the applicable international legal test and distorted the facts

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<sup>306</sup> **R-270**, NAFTA Panel Report, pp. 31-36. The NAFTA Panel also denied the claim relating to the initiation of an investigation into whether purchases of stumpage were for less than adequate remuneration without a sufficient basis because it considered that PHP had not exhausted its administrative remedies, and it remanded certain issues relating to the benchmark used to determine if electricity was provided for less than adequate remuneration. *See also* pp. 15-18 and 37-44.

<sup>307</sup> **R-270**, NAFTA Panel Report, pp. 44-50.

<sup>308</sup> **R-238**, WTO Panel Report, ¶¶ 7.68 and 7.78. The WTO Panel also concluded that the DOC acted inconsistently with the SCM Agreement by failing in its obligation to evaluate the accuracy and the adequacy of the evidence in the petitioner's application with respect to the existence of a benefit in the provision of stumpage and biomass by the GNS to PHP. *See also*, ¶ 7.154.

<sup>309</sup> NAFTA Article 1101(1) states "This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party."

relating to Port Hawkesbury’s electricity rate. The “group of persons” allegedly “in fact acting on the instructions of” the GNS were PWCC and NSPI, two private companies over which the GNS had no control or ability to instruct to do anything. The witness statement of former Nova Scotia Deputy Minister of Energy Murray Coolican and the voluminous documentary evidence in the UARB record clearly establish that PWCC and NSPI negotiated their own electricity arrangement that served their respective economic interests. Their electricity deal was vetted by the independent UARB, which concluded that NSPI’s customers were better off with their negotiated electricity structure than if the mill shut down completely. Resolute’s allegation that the GNS “waived” environmental regulations and changed laws on biomass to authorize the agreement between PWCC and NSPI are premised on factual errors and misunderstandings of pre-existing government policies.

158. Resolute has failed to meet the high legal threshold that international law sets for attribution of PWCC and NSPI’s load retention rate to the GNS. Accordingly, the Tribunal has no jurisdiction under NAFTA Article 1101(1) to decide the Claimant’s claims concerning the provision of electricity to Port Hawkesbury.

#### **A. The Electricity System in Nova Scotia**

159. Each province of Canada governs its electricity system differently. Hydro-Québec is a government-owned utility that controls the generation, transmission and distribution of electricity in Québec.<sup>310</sup> In Nova Scotia, it is a private company – NSPI – that generates, transmits, and distributes electricity to ratepayers.<sup>311</sup>

160. NSPI’s electricity rates generally fall into two categories.<sup>312</sup> First, NSPI has “above-the-line” rates that are calculated using its rate design methodology, which divides NSPI’s total revenue requirements fairly among customer classes and includes a rate of return on equity. Second, NSPI maintains “below-the-line” rates for certain customer classes, which are set using

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<sup>310</sup> **R-378**, *Hydro-Québec Act*, CQLR, c. H-5, ss. 3.3 and 29.

<sup>311</sup> Coolican Statement, ¶ 3.

<sup>312</sup> **R-238**, WTO Panel Report, ¶¶ 7.11-7.12; **R-379**, Application by Nova Scotia Power Incorporated for Approval of Certain Revisions to its Rates, Charges and Regulations, M04972, Section 1 – Direct Evidence, Appendix A-Q, DE-01 – 04, (May 8, 2012) (NSUARB), pp. 138-144; **R-380**, Nova Scotia Utility and Review Board, “Preparing a Rate Case”; **R-381**, *Re Nova Scotia Power Inc.*, 2006 NSUARB 97, Decision (Sept. 28, 2006), ¶¶ 85-88; **R-382**, *Re Nova Scotia Power Inc.*, 2003 NSUARB 91, Decision (Aug. 1, 2003), ¶¶ 11-13.

a cost-based formula. For example, NSPI may offer lower rates, in exchange for the right to interrupt service to a large industrial customer at times of peak demand. Importantly, NSPI is not required to provide electricity to a customer if it does not make economic sense, and the UARB is not entitled to approve rates that would be uneconomical for NSPI.<sup>313</sup>

161. Since 2000, NSPI has maintained a Load Retention Tariff (“LRT”), which allows it to negotiate below-the-line LRRs with specific customers under certain conditions.<sup>314</sup> LRTs are not unusual or peculiar to Nova Scotia – many electric utilities across Canada and the United States offer LRTs.<sup>315</sup> NSPI’s LRT was originally available only to customers that had a feasible option to use a supply of power and energy other than NSPI’s and could demonstrate that, under the lower proposed rate, (i) retaining the customer’s load is better for NSPI’s other customers than losing the customer’s load in question; and (ii) the revenue from service to the customer is both greater than the applicable incremental cost to serve such customer and makes a significant positive contribution to fixed costs.<sup>316</sup> If NSPI determines that a customer meets these criteria, it will negotiate the terms and conditions of a specific LRR with that customer.<sup>317</sup>

162. However, it was the joint request by Resolute and NPPH to the UARB on June 22, 2011 for a new amendment to the LRT that gave NSPI the ability to negotiate individual LRRs not only with customers that had alternative electricity supply options, but also with its largest

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<sup>313</sup> **R-238**, WTO Panel Report, ¶ 7.63; **RL-111**, *Board of Commissioners of Public Utilities v. Nova Scotia Power Corp. et al.*, (1976) 75 D.L.R. (3d) 72 (N.S.C.A.), p. 77 (“The ‘justness’ of rates has two aspects – rates of a utility as a whole must be ‘reasonable’ and just for the public it serves and just and ‘sufficient’ for the utility itself – and the rates for the various customers and classes of customer of a utility must not as between each other be ‘unjustly discriminatory’ or ‘preferential.’”)

<sup>314</sup> **R-163**, *Re Nova Scotia Power Inc.*, 2000 NSUARB 72, Decision (May 24, 2000) (“NSUARB Decision (May 24, 2000)”), ¶ 52. NSPI proposed the LRT in 2000 to address the increasing availability of natural gas and the advances in gas-fired generation technology, which would have made it feasible for the existing large customers to leave NSPI’s system and generate their own electricity.

<sup>315</sup> **R-163**, NSUARB Decision (May 24, 2000), ¶¶ 9, 36; **C-138**, Bowater Mersey UARB Decision, ¶ 117. Dr. Alan Rosenberg, an expert jointly retained by Resolute’s Bowater Mersey and NPPH, explained that “[m]any North American jurisdictions have provisions for load retention tariffs.” **R-383**, *Re NewPage Port Hawkesbury Corporation*, Direct Evidence and Exhibits of Dr. Alan Rosenberg, M04175 NPB-3 (Jun. 22, 2011), p. 3; **C-168**, Evidence of Todd Williams, pp. 14-16.

<sup>316</sup> **R-163**, NSUARB Decision (May 24, 2000), Schedule “A”, s. “Availability”, ¶ 1; **R-164**, *Re NewPage Port Hawkesbury Corporation*, NSUARB Order, M04175 (Dec. 21, 2011) (“NSUARB Order (Dec. 21, 2011)”), Schedule “B”, Load Retention Tariff, s. “Availability”, ¶ 1; **R-238**, WTO Panel Report, ¶¶ 7.12-7.13, 7.63.

<sup>317</sup> **R-163**, *Re Nova Scotia Power Inc.*, 2000 NSUARB 72, Decision (May 24, 2000), Schedule “A”, s. “Special Conditions” and Attachment “A”; **R-164**, NSUARB Order (Dec. 21, 2011), Schedule “B”, “Load Retention Tariff”, s. “Special Conditions” and Attachment A.

customers in economic distress. As discussed above, on June 22, 2011, Resolute and NPPH argued that neither Bowater Mersey or Port Hawkesbury could absorb forthcoming electricity rate increases and that NSPI should be allowed to negotiate lower rates when its largest customers were threatening to leave the electricity system altogether for economic reasons.<sup>318</sup> The UARB approved Resolute and NPPH’s requested amendment to NSPI’s LRT on November 29, 2011.<sup>319</sup> This amendment later gave NSPI greater flexibility to negotiate a new electricity rate structure with PWCC for the Port Hawkesbury mill.

163. LRTs and other rate applications are reviewed by the UARB, an independent quasi-judicial tribunal established in 1992 with responsibility for the regulatory oversight of all public utilities in Nova Scotia.<sup>320</sup> It is comprised of eight members who hold the same powers, privileges and immunities as judges.<sup>321</sup> Rate applications are adversarial and subject to “a thorough and contested review process”<sup>322</sup> in transparent public proceedings. Anyone who has a real and substantial interest in the subject-matter of the UARB proceeding (e.g., a municipality or a large

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<sup>318</sup> On May 13, 2011, NSPI filed a general rate application to increase electricity rates in the province. At the time, NPPH paid NSPI about \$100 million for 1.5 million MWh of electricity annually, roughly 75% of which was used in the thermomechanical pulping (“TMP”) process at Port Hawkesbury. If approved, NSPI’s proposed electricity rate would have increased from \$64.20/MWh to \$71.09/MWh, raising NPPH’s annual electricity costs by about \$15 million. Both companies emphasized that while unfavourable exchange rates and low prices had negative effect on all paper producers, Nova Scotia’s particularly high electricity prices put both NPPH and Bowater at a disadvantage compared to their competitors from other parts of Canada and the United States. **R-165**, Pre-Filed Evidence of NewPage Port Hawkesbury, pp. 6-7; **R-166**, Pre-Filed Evidence of Bowater Mersey, pp. 4-5; **R-317**, *Re NewPage Port Hawkesbury Corporation*, Redacted NewPage Responses to Information Requests from the Avon Group, M04175 NPB-15 (Aug. 2, 2011), p. 14; **R-384**, *Re NewPage Port Hawkesbury Corporation*, Redacted NewPage Responses to Information Requests from Larkin & Associates, M04175 NPB-18 (Aug. 5, 2011), p. 28; **R-319**, NPB Closing Submission, pp. 1, 50; **R-385**, *Re NewPage Port Hawkesbury Corporation*, Reply Submission of NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Company Limited, M04175 Document No 08327 (Nov. 15, 2011) (“NPB Reply Submission”), pp. 34, 50; **R-167**, *Re Pacific West Commercial Corporation*, 2012 NSUARB 126, Evidence of Nova Scotia Power Inc., M04862 P-4 (Apr. 27, 2012), p. 8 (“NSPI Evidence”); **R-024**, Suther Affidavit, ¶¶ 36-41.

<sup>319</sup> **C-138**, Bowater Mersey UARB Decision, ¶¶ 281-288; **R-164**, NSUARB Order (Dec. 21, 2011), ¶ 4 and Schedule “B”, Load Retention Tariff, s. “Availability”, ¶ 1.

<sup>320</sup> **R-238**, WTO Panel Report, ¶ 7.10; **R-061**, *Public Utilities Act*, R.S.N.S. 1989, c. 380 (“*Public Utilities Act*”).

<sup>321</sup> **R-386**, *Utility and Review Board Act*, S.N.S. 1992, c. 11, ss. 5(1), 5(3), 16, 45; **R-387**, *Public Inquiries Act*, R.S.N.S. 1989, c. 372.

<sup>322</sup> **R-238**, WTO Panel Report, ¶ 7.63. See **R-061**, *Public Utilities Act*, ss. 86, 91, 92; **R-388**, *Board Regulatory Rules made under Section 12 of the Utility and Review Board Act*, N.S. Reg. 235/2005 (Dec. 23, 2005) (“*Board Regulatory Rules*”). Upon application by a party, the UARB can order in camera sessions in order to protect business confidential information and can also issue confidentiality orders to ensure such confidential information is protected from disclosure.

customer) can participate in the hearing as an intervenor.<sup>323</sup> A Consumer Advocate and a Small Business Advocate are regular intervenors in electricity matters and serve to challenge the rate applicant(s) to ensure that the UARB has full information on which to base its ruling. The Nova Scotia Department of Energy (“DOE”) may participate in the UARB proceedings, but has the same status as any other interested party and no ability to control the decisions of the UARB.<sup>324</sup>

### **B. PWCC and NSPI Negotiate a Load Retention Rate for the Port Hawkesbury Mill**

164. As former Nova Scotia Deputy Minister of Energy Murray Coolican writes in his witness statement, PWCC approached the DOE with its ideas concerning energy efficiency improvements and electricity cost reduction after the Monitor selected it as one of two going-concern bidders for Port Hawkesbury.<sup>325</sup> Because the GNS does not supply electricity and cannot assess whether a particular electricity structure or rate is technically and economically feasible, it referred PWCC to NSPI to discuss a potential LRR that would be commercially beneficial to both parties.<sup>326</sup>

165. PWCC had determined that its plan to operate only the SC paper machine would substantially lower Port Hawkesbury’s annual electricity needs by 450,000 MWh and would also double the thermomechanical pulping (“TMP”) capacity it needed to run the SC paper line.<sup>327</sup> PWCC also believed running only one paper machine would give it much greater flexibility as to timing the electricity-intensive pulping process: PWCC’s idea was that it could produce pulp

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<sup>323</sup> **R-061**, *Public Utilities Act*, R.S.N.S. 1989, c. 380, ss 91-93; **R-389**, *Utility and Review Board Regulations*, SNS 1992, c. 11, s. 6.

<sup>324</sup> **R-388**, *Board Regulatory Rules*; **R-390**, *Re Nova Scotia Power Incorporated*, 2014 NSUARB 189, Decision (Nov. 25, 2014), ¶ 28.

<sup>325</sup> Coolican Statement, ¶ 11.

<sup>326</sup> **R-062**, *PWCC I*, ¶¶ 36-41.

<sup>327</sup> Thermomechanical pulp is produced by processing wood chips using heat, whereby logs are first stripped of their bark and converted into small chips for mechanical refinement. See **C-125**, PWCC Discussion Memorandum (Nov. 9, 2011), p. 1; **R-391**, *Re Pacific West Commercial Corporation*, 2012 NSUARB 126, Application Pursuant to Nova Scotia Power Inc.’s Load Retention Tariff, M04862 P-1 (Mar. 13, 2012), p. 3; **C-028**, *Re Pacific West Commercial Corporation*, 2012 NSUARB 126, Pre-Filed Evidence of Pacific West Commercial Corporation, M04862 P-3 (Apr. 27, 2012), (“PWCC Evidence”), pp. 3-4; **R-062**, *PWCC I*, ¶ 7; **R-392**, *Re Pacific West Commercial Corporation*, Redacted Pacific West Commercial Corporation (“PWCC”) Responses to Information Requests from the Avon Group, M04862 P-16 (May 30, 2012), p. 19; **R-393**, *Re Pacific West Commercial Corporation*, Non-Confidential Pacific West Commercial Corporation (“PWCC”) Responses to Information Requests from the Consumer Advocate, M04862 P-17 (May 30, 2012), p. 1; **R-394**, *Re Pacific West Commercial Corporation*, Non-Confidential Pacific West Commercial Corporation (“PWCC”) Responses to Information Requests from Board Counsel Consultants – Synapse, M04862 P-19 (May 30, 2012), p. 2.

when electricity was in low demand and cheaper, and rely on its stored pulp when electricity was in high demand and more expensive.<sup>328</sup>

166. As discussed in Murray Coolican’s witness statement, the DOE engaged Mr. Todd Williams of Navigant Consulting as an independent consultant to help facilitate the discussions between PWCC and NSPI.<sup>329</sup>

167. After several months of negotiations, PWCC and NSPI filed applications with the UARB on April 27, 2012 seeking approval of a LRR pricing and dividend calculation mechanism.<sup>330</sup> NSPI and PWCC proposed to become limited partners in a newly created partnership that would own the Port Hawkesbury mill. NSPI would dedicate certain assets (electricity generating facilities and a 24% interest in the biomass boiler) to the use of the partnership and, in return, NSPI would receive dividends to recover the incremental cost of supplying the power to the mill and make a significant contribution to NSPI’s fixed costs.<sup>331</sup>

168. The UARB approved the LRR mechanism on August 20, 2012, stating that “customers are clearly better off with this contribution [to fixed costs] than if the mill does not operate over the course of the next five to seven and a half years”<sup>332</sup> and that the proposed LRR “will recover all the incremental costs without subsidization from the other ratepayers.”<sup>333</sup> However, after the CRA declined to provide an ATR confirming the proposed dividend tax structure,<sup>334</sup> PWCC and NSPI amended the rate application to remove NSPI’s ownership interest and right to dividends.<sup>335</sup>

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<sup>328</sup> **C-125**, PWCC Discussion Memorandum (Nov. 9, 2011), p. 1; **C-165**, PWCC Evidence, p. 4.

<sup>329</sup> Coolican Statement, ¶¶ 14-16.

<sup>330</sup> **R-062**, *PWCC I*, ¶ 9.

<sup>331</sup> **R-062**, *PWCC I*, ¶¶ 17-20, 34, 53; **C-165**, PWCC Evidence, pp. 5-8.

<sup>332</sup> **R-062**, *PWCC I*, ¶ 120.

<sup>333</sup> **R-062**, *PWCC I*, ¶¶ 226, and 144. Approval was contingent upon receipt of a favourable ATR from CRA. **R-063**, *Re Pacific West Commercial Corporation*, 2012 NSUARB 144, Decision (Sept. 27, 2012) (“*PWCC II*”), ¶ 2.

<sup>334</sup> This transaction would have allowed the partnership to self-supply electricity from NSPI’s dedicated facilities so that NSPI would receive inter-corporate dividends which, unlike revenue from the sale of electricity, would not be subject to income tax. **R-062**, *PWCC I*, ¶ 17; **R-063**, *PWCC II*, ¶ 1 (Sept. 27, 2012). See **C-165**, PWCC Evidence, p. 10.

<sup>335</sup> **R-063**, *PWCC II*, ¶¶ 9, 2 (“[NSPI] supports approval of the Load Retention Tariff Mechanism as it is [NSPI’s] view that the proposed Tariff will allow customers to obtain the benefit of fixed cost contributions that would otherwise not be available if the mill does not operate.”).



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169. On September 27, 2012, the UARB approved an amended LRR pricing mechanism whereby PHP pays the variable incremental costs of service, plus a significant positive contribution to NSPI's fixed costs.<sup>336</sup> PHP is also required to pay invoices for its electricity in advance, which gives NSPI access to funds immediately with no risk of non- or late payment.<sup>337</sup> NSPI also has the right to interrupt PHP's entire load on a ten-minute notice, with provision made for penalty payments in case of PHP's failure to comply.<sup>338</sup> Finally, PWCC agreed to assume all of NSPI's risk of fuel cost fluctuations in relation to electricity provided to the mill.<sup>339</sup>

170. It is notable that the electricity rate for the Port Hawkesbury mill is significantly higher than what PWCC originally sought from NSPI. When it first approached NSPI in November 2011, PWCC said it wanted to cut Port Hawkesbury's electricity rate in half from "prohibitively high @ current 60 per MWh level" down to \$30/MWh.<sup>340</sup> [REDACTED]

[REDACTED]<sup>41</sup> The reason for [REDACTED] is that PHP assumed all of NSPI's fuel risk. PHP's hourly electricity costs are calculated based on PHP consuming the electricity generated from the conventional fuel with the highest cost used by NSPI in any given hour.<sup>342</sup> This has resulted in higher electricity costs that have prevented the mill from operating at full capacity.<sup>343</sup>

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<sup>336</sup> The price of NSPI's provision of electricity to PHP is calculated according to the following formula, determined on an hourly basis: [Amount = (Hourly Incremental Cost/kWh + Variable Capital Cost + Contribution to Fixed Costs) \* kWh actual load]. **R-170**, *Re NewPage Port Hawkesbury Corporation*, NSUARB M04862, Order (Sept. 28, 2012), ("NSUARB Order (Sept. 28, 2012)"), Appendix A, pp. 1-2; **R-063**, *PWCC II*, ¶¶ 40-41.

<sup>337</sup> **R-170**, NSUARB Order (Sept. 28, 2012), Appendix A, pp. 5-6; **R-063**, *PWCC II*, ¶ 127 ("The Board finds that the prepayment arrangement materially reduces the credit risk to NSPI.")

<sup>338</sup> **R-170**, NSUARB Order (Sept. 28, 2012), Appendix A, p. 4; **R-238**, WTO Panel Report, ¶ 7.16.

<sup>339</sup> **R-170**, NSUARB Order (Sept. 28, 2012), Appendix A, p. 2; **C-165**, PWCC Evidence, p. 14; **R-239**, *Re Pacific West Commercial Corporation*, NSPI Responses to Avon Information Requests, M04862 P-11 IR-5 (May 30, 2012) ("NSPI Responses-Avon"), pp. 1-2; **R-240**, *Re Pacific West Commercial Corporation*, Non-Confidential NSPI Responses to Synapse Information Requests, M04862 P-15 IR-10 (May 30, 2012), p. 1.

<sup>340</sup> **C-125**, PWCC Discussion Memorandum (Nov. 9, 2011).

<sup>341</sup> **C-222**, [REDACTED] p. 3.

<sup>342</sup> **R-170**, NSUARB Order (Sept. 28, 2012), Appendix A, p. 2; **C-165**, PWCC Evidence, p. 14; **R-239**, NSPI Responses-Avon, pp. 1-2; **R-240**, *Re Pacific West Commercial Corporation*, Non-Confidential NSPI Responses to Synapse Information Requests, M04862 P-15 IR-10 (May 30, 2012), p. 1.

<sup>343</sup> **C-236**, Transcript of Proceedings before U.S. International Trade Commission in re Supercalendered Paper from Canada, Inv. No. 701-TA-530 (Oct. 22, 2015), pp. 163:19-164:2 ("Port Hawkesbury Paper gets its electricity rate from the privately-held company Nova Scotia Power Incorporated. Under our contract we are the last customer

**C. The Conduct of PWCC and NSPI in Negotiating an Electricity Rate for Port Hawkesbury does not Meet the Demanding Requirements for Attribution to the GNS under International Law**

171. Resolute alleges that the electricity rate agreed between PWCC and NSPI is “attributable to Canada” because the “GNS staffed the negotiations, ██████████ passed regulations specifically to consummate the deal, and had a direct financial interest in the outcome.”<sup>344</sup> Resolute distorts the facts, and fails to meet the high threshold for attribution under customary international law as reflected in Article 8 of the ILC Articles.

**1. State Responsibility under International Law Only Arises When a State has “Effective Control” and “Instructs a Private Person or Entity to do Something on its Behalf”**

172. In order for a measure to be within the scope and coverage of NAFTA Chapter Eleven, Article 1101(1) requires that the impugned measure be both “adopted or maintained by a Party” and “relating to” an investor or its investments.<sup>345</sup> A measure is “adopted or maintained by a Party” only if it is attributable to the respondent State.<sup>346</sup> Whether a measure that has been found attributable to a Party constitutes a violation of Chapter Eleven involves an analysis under international law, which is reflected in the ILC Articles.<sup>347</sup>

173. Resolute relies exclusively on Article 8 (Conduct directed or controlled by a State) of the ILC Articles, which provides:

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served. Meaning, we get the most expensive power available, but have the option not to use it. As a result, from the time Port Hawkesbury resumed operations in October 2012 until July 2015, Port Hawkesbury took 40 days of lost production because the electricity was uneconomical or unavailable.”).

<sup>344</sup> Claimant’s Memorial, ¶ 164.

<sup>345</sup> NAFTA Article 1101(1) (Scope and Coverage) states “This Chapter applies to measures adopted or maintained by a Party relating to (a) investors of another Party, (b) investments of investors of another party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.”

<sup>346</sup> **RL-032**, International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Act, with Commentaries (2001), pp. 34-35; **RL-069**, *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010 (“*Hamester – Award*”), ¶¶ 143, 147, 173; **RL-112**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India* (PCA Case No. 2013-09) Award on Jurisdiction and Merits, 25 July 2016 (“*CC/Devas – Award*”), ¶ 283; **RL-113**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, (“*Electrabel – Decision*”), ¶¶ 7.58, 7.61.

<sup>347</sup> **RL-032**, International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Act, with Commentaries (2001), pp. 34-35; **RL-069**, *Hamester – Award*, ¶¶ 143, 147, 173; **RL-112**, *CC/Devas – Award*, ¶ 283; **RL-113**, *Electrabel – Decision*, ¶¶ 7.58, 7.61.

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The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.<sup>348</sup>

174. The rationale underlying the customary rule articulated in ILC Article 8 is that by acting on the instructions of the State when carrying out the internationally wrongful conduct, private persons or entities “become the extended arm of the instructing State organ and therefore the attribution in the sense that the conduct is to be considered as State action is a matter of consequence.”<sup>349</sup> State responsibility thus arises “where a state instructs a private person or entity to do something *on its behalf*.”<sup>350</sup>

175. While Article 8 expresses the three terms ‘instructions’, ‘direction’ and ‘control’ disjunctively, “instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.”<sup>351</sup> An abstract argument that a State gave an “instruction” is insufficient.

176. As the International Court of Justice (“ICJ”) found in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, in order to satisfy the test of “effective control”<sup>352</sup> set out in its prior decisions and in ILC Article 8, instructions from the State must have been given “in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.”<sup>353</sup>

177. The international legal threshold to attribute actions of private parties to a State is very

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<sup>348</sup> **RL-032**, International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Act, with Commentaries (2001), pp. 47-49.

<sup>349</sup> **CL-111**, James Crawford, “State Responsibility: The General Part” (Cambridge University Press 2013), p. 141.

<sup>350</sup> **CL-111**, James Crawford, “State Responsibility: The General Part” (Cambridge University Press 2013), p. 144 (emphasis added).

<sup>351</sup> **RL-032**, International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Act, with Commentaries (2001), p. 48 (emphasis added).

<sup>352</sup> **RL-114**, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, (“*Nicaragua v. United States – Judgment*”), ¶ 115.

<sup>353</sup> **RL-115**, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ¶ 400.

demanding because it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is in question.<sup>354</sup> In the investor-State context, arbitral tribunals have applied this high threshold, requiring claimants to demonstrate a “close link” between the impugned act and the State<sup>355</sup> through “effective control,”<sup>356</sup> “direct command,”<sup>357</sup> “direct order”<sup>358</sup> or “direct control.”<sup>359</sup>

178. Resolute has failed to meet the high threshold of the “effective control” test. Instead, it argues that ILC Article 8 merely requires proof of “clearance and guidance” by the State to a person or private entity with respect to a particular act.<sup>360</sup> In *Bayindir v. Pakistan*, the only case cited by Resolute in support of this position, the tribunal stated that a finding of attribution may be made “if the specific facts of an investment dispute so warrant.”<sup>361</sup> While *Bayindir v. Pakistan* is a departure from the “effective control” test deeply entrenched in international jurisprudence, it is also a highly fact-specific finding of attribution in the circumstances where the Chairman of the government-controlled National Highway Authority<sup>362</sup> (himself a military general) received “express clearance”<sup>363</sup> from Pakistan’s military chief executive to terminate a contract, which

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<sup>354</sup> **CL-105**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award (“*Jan de Nul – Award*”), ¶ 173; **RL-069**, *Hamester – Award*, ¶ 179; **RL-116**, *White Industries Australia Limited v. The Republic of India* (UNCITRAL), Final Award, 30 November 2011 (“*White – Final Award*”), ¶ 8.1.18; **RL-113**, *Electrabel – Decision*, ¶ 7.69; **RL-117**, *Gavrilovic v. Croatia* (ICSID Case No. ARB/12/39) Award, 25 July 2018 (“*Gavrilovic – Award*”), ¶ 828.

<sup>355</sup> **CL-105**, *Jan de Nul – Award*, ¶ 157; **RL-069**, *Hamester – Award*, ¶ 172.

<sup>356</sup> **RL-069**, *Hamester – Award*, ¶ 172; **RL-118**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Award, 10 March 2014, (“*Tulip – Award*”), ¶ 304-305; **RL-120**, *Almas v. Poland*, (UNCITRAL) Award, 27 June 2016, ¶ 269; **RL-119**, *Teinver v. Argentina* (ICSID Case No. ARB/09/01) Award, 21 July 2017, ¶ 722-724; **RL-117**, *Gavrilovic – Award*, ¶¶ 828-829.

<sup>357</sup> **RL-069**, *Hamester – Award*, ¶¶ 198, 200, 203.

<sup>358</sup> **RL-121**, *Bernhard von Pezold and Others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15) Award, 28 July 2015 (“*Pezold – Award*”), ¶ 448.

<sup>359</sup> **CL-105**, *Jan de Nul – Award*, ¶ 157.

<sup>360</sup> Claimant’s Memorial, ¶¶ 177-178.

<sup>361</sup> **CL-112**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Award, 27 August 2009, (“*Bayindir – Award*”), ¶ 130.

<sup>362</sup> **CL-112**, *Bayindir – Award*, ¶ 9 (The NHA is a “public corporation” established by a statute and “controlled by the Government of Pakistan”).

<sup>363</sup> **CL-112**, *Bayindir – Award*, ¶¶ 9 and 125.

could not have happened without approval by the highest levels of the Pakistani government.<sup>364</sup>

179. On the other hand, numerous tribunals have endorsed the two-part effective control test where there is “both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake.”<sup>365</sup>

180. In *von Pezold v. Zimbabwe*, the tribunal held that the acts of the persons who settled on the claimants’ land were not attributable to the respondent State despite “ample evidence of Government involvement and encouragement.”<sup>366</sup> While the government “appears to have encouraged (and endorsed) the action once it had begun,” the tribunal was “not persuaded that the acts of the invaders were based on *a direct order or under the direct control* of the Government when they initially invaded the Claimants’ properties” and stated that “[e]ncouragement would not meet the test set out in Article 8.”<sup>367</sup>

181. International tribunals have also emphasized that there is a difference between an “instruction” and other actions taken by a State. In *Electrabel v. Hungary*, the tribunal held that “the fact that a State acts through a State-owned or State-controlled company over which it exercises some influence is by itself insufficient for the acts of such entities to be attributed to the State.”<sup>368</sup> In that case, the tribunal found that a letter sent by the Hungarian Energy Office (“HEO”) to MVM (a State-owned electricity supplier) could not be considered an “instruction” because “its purpose was to encourage Dunamenti [power plant owner and operator] and MVM to negotiate in the direction favoured by HEO, as opposed to instructing them to do so.”<sup>369</sup> The

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<sup>364</sup> Claimant’s Memorial, ¶¶ 34, 128, 206, 217, 236. See **R-404**, Dawn, “Islamabad: Progress on M-1, M-3 reviewed” (Oct. 29, 2011); **R-405**, Los Angeles Times, “Military Inc. Dominates Life in Pakistan” (October 7, 2002).

<sup>365</sup> **CL-105**, *Jan de Nul – Award*, ¶ 173. See also **RL-120**, *Almas v. Poland*, (UNCITRAL) Award, 27 June 2016, ¶¶ 268-269. Similarly, the *White Industries v. India* tribunal held that the claimant had to prove India had both “general control” over the State-entity “as well as specific control over the particular acts in question” in order for ILC Article 8 to apply. The Tribunal in *Almås v. Poland* endorsed the same. Similarly, the *White Industries v. India* tribunal held that the claimant had to prove India had both “general control” over the State-entity “as well as specific control over the particular acts in question” in order for ILC Article 8 to apply (**RL-116**, *White – Final Award*, ¶ 8.1.18). The Tribunal in *Almås v. Poland* endorsed the same.

<sup>366</sup> **RL-121**, *Pezold – Award*, ¶ 448.

<sup>367</sup> **RL-121**, *Pezold – Award*, ¶ 448 (emphasis added).

<sup>368</sup> **RL-113**, *Electrabel – Decision*, ¶ 7.95.

<sup>369</sup> **RL-113**, *Electrabel – Decision*, ¶ 7.107.

tribunal concluded that “an invitation to negotiate cannot be assimilated to an instruction”<sup>370</sup> and “just an invitation to negotiate is not an instruction, influence is also not an instruction.”<sup>371</sup>

182. Resolute’s exclusive reliance on the *Bayindir v. Pakistan* decision and failure to recognize that international law requires the effective control test to be met before acts of private parties may be attributable to a State evidences the weakness of its attribution argument.

## 2. The GNS Did Not Have Effective Control over PWCC and NSPI

183. The Claimant’s Memorial avoids specifically identifying “the person or group of persons” who were “in fact acting on the instructions of” the GNS and instead makes a vague statement that “GNS ‘instructed,’ as intended by the ILC Articles, the passage of the electricity deal.”<sup>372</sup> But the evidence clearly establishes that the terms and conditions of the LRR for the Port Hawkesbury mill were negotiated between two private parties, NSPI and PWCC, and the GNS had no control over either of them.

184. PWCC is a privately-held company. NSPI is wholly-owned by the publicly-traded corporation Emera Inc. The GNS does not own shares in either PWCC or NSPI nor does it appoint any members of their board of directors. There is no dispute as to the independent status of both corporations, which is a very different situation from other international cases dealing with State-owned entities that were alleged to have terminated contracts through the State’s voting shares or board of director appointees.<sup>373</sup>

185. Resolute attempts to inflate the role that the GNS played in the negotiations between NSPI and PWCC. It mentions that PWCC representatives visited Halifax in late November 2011 “to meet with NSPI and GNS personnel [...] to address electricity issues,”<sup>374</sup> that “GNS representatives [...] participated in numerous meetings and were involved in repeated

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<sup>370</sup> **RL-113**, *Electrabel – Decision*, ¶ 7.111.

<sup>371</sup> **RL-113**, *Electrabel – Decision*, ¶ 7.113.

<sup>372</sup> Claimant’s Memorial, ¶ 186.

<sup>373</sup> See e.g., Claimant’s Memorial ¶¶ 176-178 and footnotes 263-270 refer to **CL-112**, *Bayindir – Award* and **RL-118**, *Tulip – Award*. In *Tulip Real Estate v. Turkey*, even though the state-entity in question was subject to Turkey’s corporate and managerial control, the tribunal still did not find attribution “due to an absence of proof that the State used its control as a vehicle directed towards achieving a particular result in its sovereign interests.” See **RL-118**, *Tulip – Award*, ¶¶ 37, 63, 307, 326.

<sup>374</sup> Claimant’s Memorial, ¶ 42.

correspondence with PWCC and NSPI regarding the power rate,”<sup>375</sup> and that Premier Darrell Dexter “intervened personally in the rate negotiations” when he spoke with the CEO of NSPI.<sup>376</sup>

186. As Murray Coolican writes in his witness statement, GNS legal counsel occasionally attended meetings between NSPI and PWCC as an observer, as did Mr. Coolican on a couple of occasions.<sup>377</sup> But nothing in the thousands of pages of correspondence and notes from the PWCC-NSPI negotiations that have been published on the UARB website can be construed as evidence of effective control by the GNS over the parties or evidence that PWCC and NSPI were “in fact acting on the instructions of” the GNS “in carrying out” their LRR negotiations.<sup>378</sup> Those same documents establish that the GNS did not want to be a co-applicant to the UARB with PWCC and NSPI for the LRR rate application and that “due process” had to be followed before the UARB.<sup>379</sup> The role of GNS representatives in the meetings was to observe and report on progress, not to “instruct” the parties. Resolute’s reliance on isolated snippets from negotiation notes do not meet the high threshold for attribution.<sup>380</sup>

187. As for Resolute’s allegation of an intervention by the Premier of Nova Scotia in the negotiations between PWCC and NSPI, this is a highly inappropriate misrepresentation of the record. The full quote from the Premier’s statement in the Nova Scotia legislature that Resolute relies on was simply: “I have spoken with the CEO of Nova Scotia Power and I am confident

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<sup>375</sup> Claimant’s Memorial, ¶ 59.

<sup>376</sup> Claimant’s Memorial, ¶ 185.

<sup>377</sup> Coolican Statement, ¶ 17.

<sup>378</sup> **R-239**, NSPI Responses-Avon, p. 1; **C-147**, PWCC Meeting Notes, Redacted PWCC LRT Application NSPI (Avon) IR-1, Attachment 2 (May 30, 2011); **R-406**, PWCC Documents, Redacted PWCC LRT Application NSPI (Avon), Attachment 3, M04862, P-39(c). The UARB noted that the “record [was] as full and complete as seen by the Board.” **R-062**, *PWCCI*, ¶ 41.

<sup>379</sup> Coolican Statement, ¶ 17, citing to **C-147**, PWCC Meeting Notes, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 2, p. 108 of 165.

<sup>380</sup> In *Hamster v. Ghana*, the tribunal did not see “any compelling sign of such a strong control by the State, as would be required by [ILC] Article 8” because “being informed and discussing the case with the parties,” both the claimant and the Ghana Cocoa Board, did not mean that the government had “effective control” over it. **RL-069**, *Hamster – Award*, ¶ 199. In *Electrabel v. Hungary*, the claimant alleged that instructions given in a letter sent by the Hungarian Energy Office (“HEO”) to MVM (State-owned electricity supplier) in November 2005 were repeated in December 2005 in the meetings convened by Hungary’s Minister of Economy and Transport. **RL-113**, *Electrabel – Decision*, ¶¶ 7.4, 7.12, 7.13, 7.92. The tribunal found, however, that even if these meetings were related to the commercial agreement between the parties, “their minutes reveal a passive attitude by ministerial attendees and did not demonstrate not any ‘direction or control’ by the Ministry (by itself or through HEO), still less the provision of ‘instructions’ to MVM.” **RL-113**, *Electrabel – Decision*, ¶ 7.92.

that the utility and Pacific West are working together to build a plan in the best interests of Nova Scotians. Once that plan is finalized, it will go before the Nova Scotia Utility and Review Board for approval.”<sup>381</sup> It is apparent from this statement that the negotiations were in the hands of NSPI and PWCC and that whatever the outcome, the arrangement they agreed upon would need to withstand the scrutiny of the independent regulator, the UARB. Indeed, Premier Dexter stated unambiguously that the GNS does not get involved in the independent, evidence-based UARB process for political reasons:

Mr. Speaker, the Leader of the Official Opposition should know that there is the Utility and Review Board process. It is one that is designed to take into account the requirements that the utility has in order to be able to fulfill its mandate, in order to be able to supply electricity to the people of Nova Scotia. That is a job that is fulfilled by the board based on the evidence that comes before it. Surely, the Leader of the Official Opposition is not suggesting that for political reasons, the Premier of the province ought to be involved in that process.<sup>382</sup>

188. Finally, Resolute does not allege that the GNS instructed the UARB to approve the PWCC-NSPI agreement, nor could it. The Board is a quasi-judicial independent tribunal that considers rate applications in adversarial public hearings with written submissions, testimony and cross-examinations, and oral argument. The GNS has the same status as any interested party before the UARB and was one of seven intervenors during the PWCC-NSPI rate hearing.<sup>383</sup> Indeed, the UARB itself has stated: “[w]hile the Board always is, and must be, cognizant of Government energy policy, the Board has a role as independent regulator to adjudicate utility matters in the best interests of ratepayers. Unfortunately, that obligation and Government policy may not always be completely aligned.”<sup>384</sup>

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<sup>381</sup> **C-162**, Nova Legislature House of Assembly Debates and Proceedings, Fourth Session (Apr. 25, 2012), p. 1000 (emphasis added).

<sup>382</sup> **R-396**, Nova Scotia House of Assembly Debates and Proceedings, No. 12-29 (May 10, 2012), p. 1967.

<sup>383</sup> The Consumer Advocate, the Small Business Advocate, the Avon Group, the Province of Nova Scotia, the Municipal Electric Utilities of Nova Scotia Co-operative, and the Municipal Action Group were granted Intervenor status. **R-062**, *PWCC I*, ¶¶ 10-16.

<sup>384</sup> **R-390**, *Nova Scotia Power Incorporated (Re)*, 2014 NSUARB 189, Decision (Nov. 25, 2014), ¶ 28. More than 3000 pages of evidence was produced and made public, including meeting notes and communications exchanged among NSPI, PWCC, the Monitor and the GNS. **R-239**, NSPI Responses-Avon, p. 1; **C-147**, PWCC Meeting Notes, Redacted PWCC LRT Application NSPI (Avon) IR-1, Attachment 2 (May 30, 2011); **R-406**, PWCC Documents, Redacted PWCC LRT Application NSPI (Avon), Attachment 3, M04862, P-39(c). The hearing, including direct and cross-examination of fact and expert witnesses, is documented in 853 pages of transcripts freely available to the



**3. The GNS Did Not Issue Instructions Through an Independent Consultant and Had No Effective Control over NSPI or PWCC in their LRR Negotiations**

189. Resolute points to the fact that the GNS retained an independent electricity expert to facilitate the discussions between PWCC and NSPI as a basis for attribution.<sup>385</sup> This does not establish that NSPI or PWCC were “in fact acting on the instructions of” the GNS as required by the effective control test in international law for attribution of private acts to a State.

190. Murray Coolican and Duff Montgomerie testify that initial discussions between PWCC and NSPI were challenging because of their experiences in different jurisdictions and of PWCC’s desire for a more flexible electricity arrangement than what NSPI had until then used with other large customers.<sup>386</sup> The GNS retained Todd Williams of Navigant Consulting to facilitate the LRR discussions between NSPI and PWCC because of his breadth of experience in different jurisdictions with varying electricity regimes.<sup>387</sup> He was also already familiar with NSPI and the Port Hawkesbury mill (as well as Bowater Mersey) due to a previous retainer by NPPH and Resolute regarding a 2009 electricity rate application by NSPI to the UARB.<sup>388</sup>

191. Resolute describes Mr. Williams as “an emissary of GNS,”<sup>389</sup> but this is inaccurate. Mr. Williams’s contract, which is publicly available on the UARB website, specifically stated that he was “not the agent of the Province” and had “no authority under this Agreement to bind the Province by contract or otherwise.”<sup>390</sup> His contract sets out the limited scope of his mandate: (i) “help both [PWCC] and NSPI understand the opportunities there are to find value for the

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public on the UARB website. **R-397**, Transcript – Part A, (July 16, 2012); **R-398**, *Pacific West Commercial Corporation (Re)*, 2012 NSUARB 126, Transcript – Part B, M04862, T0245 (July 16, 2012); **R-399**, *Re Pacific West Commercial Corporation Re*, Transcript, M04862 T0247 (July 17, 2012), (“Transcript (July 17, 2012)”); **R-400**, *Pacific West Commercial Corporation (Re)*, 2012 NSUARB 126, Transcript – Part A, M04862, T0248 (July 18, 2012), (“Transcript – Part A (July 18, 2012)”); **R-401**, *Pacific West Commercial Corporation (Re)*, 2012 NSUARB 126, Transcript – Part B, M04862, T0250 (July 18, 2012), (“Transcript – Part B (July 18, 2012)”).

<sup>385</sup> Claimant’s Memorial, ¶ 164.

<sup>386</sup> Coolican Statement, ¶14; Montgomerie Statement, ¶ 36.

<sup>387</sup> Coolican Statement, ¶ 14; Montgomerie Statement, ¶ 36.

<sup>388</sup> Coolican Statement, ¶ 14; Montgomerie Statement, ¶ 36; *See C-168*, Evidence of Todd Williams, pp. 2, 4; **C-173**, *Pacific West Commercial Corporation (Re)*, 2012 NSUARB 126, Non-Confidential Government of Nova Scotia Responses to Information Requests from the Consumer Advocate, (June 29, 2012) (“GNS Responses-CA”), pp. 2-3; **R-407**, NSPI DSM Cost Allocation and Rate Recovery, NSUARB P-888 N-24, Aug. 7, 2008, p.1.

<sup>389</sup> Claimant’s Memorial, ¶ 181.

<sup>390</sup> **C-173**, GNS Responses-CA, Exhibit 1 (Agreement dated February 13, 2012), Schedule “A”, ¶ 9.

ancillary services proposed by [PWCC] and NSPI,” (ii) assist them “to quantify potential benefits and discuss implementation including rate design principles if required,” and (iii) maintain contact with the parties and consider whether the information each party relies on is accurate and reasonable.<sup>391</sup> Mr. Williams had no ability or mandate to instruct PWCC or NSPI and had no effective control over them as international law requires.

192. Mr. Williams testified before the UARB that his role was “provide advice and technical support to both parties on matters related to the design of the [LRR] mechanism”<sup>392</sup> and “to identify opportunities to operate the facility differently in order to generate savings for the mill and NSPI ratepayers.”<sup>393</sup> He described himself as an “honest broker” who “occasionally offered suggestions and proposals to help resolve differences and keep the discussions moving forward” but “did not advocate for any specific party or position.”<sup>394</sup> The GNS was not instructing PWCC and NSPI via Mr. Williams: he could not ensure that they would reach an agreement on a particular electricity rate or the specific terms and conditions.

193. Resolute also ignores the fact that both PWCC and NSPI were acting to advance their own commercial interests. When reviewing the decision of the DOC in the countervailing duty investigation, the WTO Panel noted the “vigour of the negotiations that took place between NSPI and PWCC.”<sup>395</sup> PWCC told the UARB that “to say that the negotiations were vigorous is an understatement” and that it had to significantly modify its original objectives, shorten the term of the proposed LRR, and accept higher risks.<sup>396</sup> Rob Bennett, NSPI’s President and Chief

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<sup>391</sup> **C-173**, GNS Responses-CA, Exhibit 1 (Agreement dated February 13, 2012), Schedule “A”, ¶ 26; **C-168**, Evidence of Todd Williams, p. 4; Coolican Statement, ¶ 16.

<sup>392</sup> **C-178**, *Pacific West Commercial Corporation (Re)*, The Government of Nova Scotia Opening Statement, (July 16, 2012), p. 1.

<sup>393</sup> **C-178**, *Pacific West Commercial Corporation (Re)*, The Government of Nova Scotia Opening Statement, (July 16, 2012), p. 1.

<sup>394</sup> **C-168**, Evidence of Todd Williams, p. 6. This is evident from what Resolute itself points to as examples what Mr. Williams did: “delivered comments regarding the variable Capex figure,” “worked with NSPI to develop a protocol for delivering energy to the mill,” “reviewed feedback from the NSPI Board of Directors,” “reviewed computer simulations used to calculate the power rate” and provided “expert advice to PHP with respect to fuel and electricity costs.” See Claimant’s Memorial, ¶ 181.

<sup>395</sup> **R-238**, WTO Panel Report, ¶ 7.77

<sup>396</sup> **R-397**, *Pacific West Commercial Corporation (Re)*, Transcript – Part A, M04862 T0244 (July 16, 2012), (“Transcript – Part A (July 16, 2012)”), Cross-Examination of Mr. Stern by Mr. Mahody, pp. 63-64 and Cross-Examination of Mr. Stern by Mr. Blackburn, p. 113 (“I think it’s -- for us, it’s not as good a deal as we had hoped for. It’s not as good a deal as we have in other jurisdictions where we buy power for, you know, double digit dollars

Executive Officer, also testified that it “negotiated aggressively” to extract a better deal from PWCC and “with the level of intensity that we would negotiate any other commercial arrangement in our business.”<sup>397</sup>

194. NSPI, had an economic incentive to see its largest customer remain operational. First, Port Hawkesbury’s closure would deprive NSPI of the mill’s contribution to its fixed costs and would lead to a substantial reduction in the load requirements of the system.<sup>398</sup> In contrast, if the mill re-started its operations under a reduced electricity rate negotiated with NSPI, it would be making a “significant positive contribution to fixed costs,” a *sine qua non* of any LRR.<sup>399</sup> Second, NSPI pointed out that “the mill provides continuing employment in the Strait area which will assist in maintaining local residential and commercial customer load”<sup>400</sup> and, correspondingly, preserve NSPI’s revenues from the sales of electricity to customers in the area. Third, the presence of the mill allows NSPI to operate its Port Hawkesbury Biomass Plant as a co-generation facility and “results in improved economics over time.”<sup>401</sup> In particular, NSPI recovers \$4.72 million per year for the steam used by the mill, and PHP bears all the fuel costs for producing the steam required for the mill’s operations.<sup>402</sup> Finally, NSPI acknowledged that “the existence of a large load, located between the Province’s generation centre in Cape Breton and load centre in Halifax, often running during lower load periods will, in general, produce

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per megawatt less. But it’s the best deal that is available in Nova Scotia, and part of the overall arrangements, it’s one that we’re prepared to commit ourselves to if we can -- you know, if this Board determines to approve it.”).

<sup>397</sup> **R-399**, Transcript (July 17, 2012), Cross-Examination of Mr. Bennett by Mr. Mahody, pp. 284-285, 288-289, 291-292; (“[NSPI] made a commitment to do everything that we could do to make contributions towards the lost fixed-cost recovery of the paper mills and in that process if we could have a mill up and operating in making some form of contribution, our thought was that that would be better than the mill not operating at all and we’re representing our customers, in our mind, but negotiating as if it was our own money. So with the level of intensity that we would negotiate any other commercial arrangement in our business, and recognize that that was at the beginning.”).

<sup>398</sup> **R-062**, *PWCCI*, ¶ 4.

<sup>399</sup> **R-163**, *Nova Scotia Power Inc. (Re)*, 2000 NSUARB 72, Decision (May 24, 2000), Schedule “A” Load Retention Rate, s. “Availability”, ¶ 1; **R-170**, NSUARB Order (Sep. 28, 2012), Appendix A, p. 1.

<sup>400</sup> **R-408**, *Re Pacific West Commercial Corporation*, NS Power Reply Evidence (July 9, 2012), M04862 P-41, p. 10.

<sup>401</sup> **C-165**, PWCC Evidence, p. 15; **R-167**, NSPI Evidence, p. 4.

<sup>402</sup> **R-408**, *Re Pacific West Commercial Corporation*, NS Power Reply Evidence (July 9, 2012), M04862 P-41, p. 10.

lower overall system losses.”<sup>403</sup>

195. As the WTO Panel pointed out, it is “entirely consistent with market principles for an electricity provider to seek to both manage its load and accommodate the needs of its largest customer, and for a company that consumes a large amount of electricity to make concessions and accept flexibilities that would result in a lower rate being payable.”<sup>404</sup> Accordingly, the WTO Panel found that the DOC acted inconsistently with the SCM Agreement by finding that NSPI was entrusted or directed to provide electricity.<sup>405</sup> The same argument on entrustment has also been rejected by a NAFTA Panel, which found that “hiring a consultant to facilitate discussions between PWCC and NSPI” did not constitute “substantial evidence that the GNS was engaged in the provision of electricity or rate-setting,” and that there was no “substantial evidence on the record to support [the] conclusion that the GNS entrusted or directed NSPI to make a financial contribution by providing electricity.”<sup>406</sup> For Resolute to argue that by merely retaining an independent consultant, the GNS transformed a commercial transaction between NSPI and PWCC into an act of State is legally incorrect.

**4. Resolute’s Incorrect Characterization of [REDACTED] in Fact Confirms that the GNS Had No Effective Control over NSPI and PWCC**

196. Resolute also argues that the GNS “instructed [...] the passage of the electricity deal” because [REDACTED]<sup>407</sup> Resolute refers to [REDACTED]

[REDACTED]

[REDACTED]<sup>408</sup>

197. This is a concocted argument by Resolute that actually proves the opposite of what it

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<sup>403</sup> **R-409**, *Re NewPage Port Hawkesbury Corporation*, PHP LRT Pricing Mechanism Re-Opener (NSUARB M08519) NSPI Responses to Synapse Information Requests, M08519 P-9 (May. 1, 2018), p. 1. *See R-410*, *Re NewPage Port Hawkesbury Corporation*, PHP Load Retention Tariff Pricing Mechanism: Re-Opener of Certain LRR Cost Components and Justification of the Continuance of the \$4/MWh Cap, M08519 P-2 (Mar. 14, 2018), p. 5.

<sup>404</sup> **R-238**, WTO Panel Report, ¶ 7.77.

<sup>405</sup> **R-238**, WTO Panel Report, ¶ 7.68

<sup>406</sup> **R-270**, NAFTA Panel Report, pp. 35-36.

<sup>407</sup> Claimant’s Memorial, ¶¶ 45, 164-165, 179, 186.

<sup>408</sup> **C-139**, [REDACTED] pp. 4-5.

alleges. As Jeannie Chow explains in her witness statement, [REDACTED]

[REDACTED]

[REDACTED] 409 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 410 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. By raising this argument, Resolute has further confirmed that the GNS did not control the outcome of the LRR negotiations.

**5. The Link of Financial Assistance to the “Electricity Deal” and the GNS’ “Financial Interest in the Outcome” Do Not Constitute an Instruction or Engage Attribution under International Law**

198. Resolute alleges that the GNS “instructed [...] the passage of the electricity deal” because it “expressly linked the electricity deal to the other GNS support”<sup>411</sup> and “had a direct financial interest in the outcome.”<sup>412</sup> In particular, Resolute asserts that, after the CRA denied the ATR requested by NSPI and PWCC, the “power deal [...] was expressly tied to the \$40 million forgivable credit facility, as PHP could earn forgiveness based upon additional tax revenue paid by NSPI to the province.” Resolute also cites a newspaper article to support its contention that the credit facility was made forgivable as “an alternative way to reduce power costs” for the mill.<sup>413</sup>

199. Again, Resolute has created an argument that does not assist it in attributing the “electricity deal” to the GNS. Jeannie Chow explains in her witness statement that [REDACTED]

[REDACTED]

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<sup>409</sup> Chow Statement, ¶ 17.

<sup>410</sup> Chow Statement, ¶ 17.

<sup>411</sup> Claimant’s Memorial, ¶ 179. *See also* Claimant’s Memorial, footnote 271 and ¶ 104.

<sup>412</sup> Claimant’s Memorial, ¶ 164.

<sup>413</sup> Claimant’s Memorial, ¶ 166; **C-198**, Mill deal revived: Still in game but not out of the woods, The Chronicle Herald (Sep. 23, 2012).

[REDACTED]

[REDACTED]

[REDACTED] <sup>414</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] <sup>415</sup> In other words, pegging repayment terms of a loan from the GNS to PWCC based on tax revenues from NSPI does not establish that the actions of PWCC and NSPI in negotiating the LRR are attributable to the GNS under international law.

200. In any event, Resolute has not attempted to explain how by making a revenue-neutral change to a loan agreement, the GNS could retroactively “instruct” NSPI and PWCC with respect to an electricity rate that had already been negotiated and approved by the UARB. It is also apparent that any “financial interest” the GNS allegedly had in the outcome of the negotiations between NSPI and PWCC does not amount to an “instruction” that would engage attribution under international law.

**D. Renewable Energy Regulations Do Not Make the Port Hawkesbury LRR Attributable to the GNS under International Law**

201. Resolute also attempts to attribute the LRR to the GNS under international law by alleging that it “passed legislation necessary to enable the electricity deal; [and] took specific steps to address RES and Biomass Plant concerns raised by the UARB.”<sup>416</sup> Resolute exaggerates the significance of a July 20, 2012 letter regarding the GNS renewable electricity policy and of the January 2013 amendments to the RES Regulations and entirely omits their context. Neither of these so-called “measures” have any impact on the conclusion that the LRR deal between NSPI and PWCC is not attributable to the GNS under international law.

**1. The GNS Policy of Encouraging Renewable Electricity Generation Predated the LRR Negotiations between PWCC and NSPI**

202. What Resolute describes as extraordinary measures on RES that constitute an “instruction”

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<sup>414</sup> Chow Statement, ¶ 9.

<sup>415</sup> Chow Statement, ¶ 10.

<sup>416</sup> Claimant’s Memorial, ¶ 179.

of PWCC and NSPI’s LRR are merely a continuation of long-standing GNS policies to transition the Province away from excessive reliance on fossil fuels to a diversified, localized and cleaner portfolio of energy sources.

203. In 2007, the *Environmental Goals and Sustainable Prosperity Act* mandated that, by the year 2013, 18.5% of the total electricity needs of Nova Scotia had to be obtained from renewable electricity sources.<sup>417</sup> Regulations were enacted the same year that required NSPI in 2010-2012 to supply its customers with renewable electricity in a proportion of not less than 5% of its total sales using only renewable electricity purchased by NSPI from independent power producers (“IPPs”).<sup>418</sup> Two years later, the GNS released the Climate Change Action Plan<sup>419</sup> and the Energy Strategy.<sup>420</sup> In April 2010, Nova Scotia’s Renewable Electricity Plan<sup>421</sup> was published. These documents set out the plans and policies to significantly reduce Nova Scotia’s dependence on coal.<sup>422</sup> Given the lack of significant hydroelectric resources in the Province, with solar and tidal energy in the nascent stages of development,<sup>423</sup> and with plans to link Nova Scotia’s electricity grid to other provinces still a few years away,<sup>424</sup> biomass and wind were seen as the most promising sources of renewable energy.

204. Generation of electricity from biomass was already a reality in Nova Scotia, with

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<sup>417</sup> **R-194**, EGSPA, S.N. S. 2007, c. 7, s. 4(1)(g).

<sup>418</sup> **R-171**, *Renewable Energy Standard Regulations*, N.S. Reg. 35/2007, ss 5(1), 5(3), 6(1), 6(3), 7(2)(d). This requirement was later increased to 10% (“RES-2013”) but allowed NSPI to acquire additional renewable electricity either from IPPs or from its own generation facilities.

<sup>419</sup> **R-424**, Nova Scotia Department of Energy, “Toward a Greener Future, Climate Change Action Plan” (January 2009) (“Climate Change Action Plan”).

<sup>420</sup> **R-180**, Nova Scotia Department of Energy, “Toward a Greener Future, Nova Scotia’s 2009 Energy Strategy” (January 2009) (“2009 Energy Strategy”), p. 3.

<sup>421</sup> **R-181**, Nova Scotia Department of Energy, *Renewable Electricity Plan: A path to good jobs, stable prices, and a cleaner environment* (April 2010) (“Renewable Electricity Plan”), p. 2.

<sup>422</sup> At the time, about 88% electricity in Nova Scotia came from fossil fuels (about 75% – from imported coal), **R-424**, *Climate Change Action Plan*, pp. 13, 17; **R-180**, *2009 Energy Strategy*, pp. 8, 14, 16; **R-181**, *Renewable Electricity Plan*, p. 2, 4, 17. This dependence on a single fuel source weakened Nova Scotia’s energy security, bound it to volatile and rising coal prices, drained wealth away from the province, and had a detrimental impact on the environment. **R-424**, *Climate Change Action Plan*, p. 7; **R-180**, *2009 Energy Strategy*, pp. 4, 7, 17.

<sup>423</sup> **R-180**, *2009 Energy Strategy*, pp. 4, 13; **R-181**, *Renewable Electricity Plan*, p. 23.

<sup>424</sup> **R-180**, *2009 Energy Strategy*, p. 19; **R-181**, *Renewable Electricity Plan*, p. 16. *See also* **R-180**, *Climate Change Action Plan*, pp. 8, 17-18; **R-180**, *2009 Energy Strategy*, pp. 5, 8, 13-14, 17; **R-181**, *Renewable Electricity Plan*, p.

Resolute’s Bowater Mersey operating a co-generation facility in Brooklyn, Nova Scotia.<sup>425</sup> Biomass was seen as a more reliable source of “firm” energy that would reduce reliance on coal and “help diversify [Nova Scotia’s] electricity supply, makes cost-effective use of existing infrastructure, and helps support the forest sector.”<sup>426</sup> Biomass plants are also more predictable and operate at a significantly higher capacity factor than wind power.<sup>427</sup>

205. For NSPI, biomass was an important hedge against overreliance on wind power that had presented costly operational challenges previously.<sup>428</sup> Moreover, wind power partners were not reliable enough for a stable electrical system.<sup>429</sup> Biomass was also important for NSPI to meet new targets for renewable energy: new Renewable Electricity Regulations adopted in 2010 (“RES Regulations”) set the renewable electricity targets at 5% for 2011-2012, 10% for 2013-2014 (“RES-2013”), and 25% starting in 2015 (“RES-2015”).<sup>430</sup> The RES Regulations also required NSPI to supply at least 5% of its total annual sales by purchasing renewable electricity from IPPs; and, starting in 2015, NSPI had to acquire additional 300 GWh from IPPs.<sup>431</sup>

206. NSPI accordingly sought to diversify its renewable energy portfolio by negotiating an agreement with NPPH to build a cogeneration power plant around the biomass-fired boiler at Port Hawkesbury (“Biomass Plant”).<sup>432</sup> In April 2010, NSPI sought approval from the UARB to purchase a boiler from NPPH and to install a steam turbine generator at a total cost of \$208.6 million.<sup>433</sup> The project contemplated that NSPI would own the Biomass Plant and all the

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<sup>425</sup> **R-181**, Renewable Electricity Plan, p. 13.

<sup>426</sup> **R-181**, Renewable Electricity Plan, p. 13.

<sup>427</sup> **R-182**, *Re Nova Scotia Power Inc.*, Redacted Application for Approval of Work Order CI# 39029, Port Hawkesbury Biomass Project (Apr. 9, 2010), M02961, N-2 (“Application for Work Order CI#39029”), p. 5.

<sup>428</sup> **R-182**, Application for Work Order CI#39029, p. 5.

<sup>429</sup> **R-411**, *Re Nova Scotia Power Incorporated*, 2009 NSUARB 111, Decision (July 22, 2009) (“NSPI Decision (July 22, 2009)”), ¶ 3.

<sup>430</sup> **R-179**, *Renewable Electricity Regulations*, N.S. Reg. 155/2010, ss 4-6.

<sup>431</sup> **R-179**, *Renewable Electricity Regulations*, N.S. Reg. 155/2010, ss 5(2)(a), 6(3)(a), 6(3)(b), 13(1)(c), 13(2).

<sup>432</sup> **R-182**, Application for Work Order CI#39029, pp. 3, 5; **R-184**, *Re Nova Scotia Power Incorporated*, 2010 NSUARB 196, Decision (Oct. 14, 2010) (“NSPI Decision (Oct. 14, 2010)”), ¶¶ 4, 112. In April 2009, NSPI and NPPH applied for approval for NPPH to supply NSPI with around 400 GWh of renewable energy per year over the next 25 years from the Port Hawkesbury biomass plant, **R-411**, NSPI Decision (July 22, 2009), ¶¶ 5, 10. The UARB sent the application back to the parties for further consideration and information, which culminated in the renewed April 2010 application.

<sup>433</sup> **R-184**, NSPI Decision (Oct. 14, 2010), ¶ 1.



renewable electricity it produced, while NPPH would use the steam from the Biomass Plant for the mill's operations.<sup>434</sup>

207. For NSPI, the cost of operating the Biomass Plant at Port Hawkesbury was less than the cost of wind generation<sup>435</sup> and also provided “a large scale co-generation opportunity with access to a long-term supply of biomass from an established leader in sustainable forestry.”<sup>436</sup> NSPI wanted the Biomass Plant because it would enable it “to meet its RES commitments in a planned and cost-effective manner which is in the interests of NSPI customers and our Province.”<sup>437</sup> The plan was approved on October 14, 2010 by the UARB.<sup>438</sup> By the time NPPH filed for creditor protection in September 2011, NSPI had already taken over construction and operation of the Biomass Plant.<sup>439</sup>

208. After the sale of the mill to PWCC, NSPI still wanted to operate the Biomass Plant and noted that its “ability to run it as a cogeneration facility results in improved economics over time for [NSPI's] customers when compared to having no mill in operation.”<sup>440</sup> Accordingly, NSPI and PWCC negotiated an arrangement whereby NSPI continues to own the Biomass Plant and delivers steam to PHP.<sup>441</sup> PHP also pays for the fuel that is necessary to generate the steam required for its paper operations.<sup>442</sup> The UARB approved their agreement, holding that the prices

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<sup>434</sup> **R-184**, NSPI Decision (Oct. 14, 2010), ¶ 9. NPPH would manage, operate and maintain the Biomass Plant, and NSPI would pay for fuel and NPPH's services. *See also* **R-184**, NSPI (Oct. 14, 2010), ¶¶ 10-11.

<sup>435</sup> **R-182**, Application for Work Order CI#39029, p. 6.

<sup>436</sup> **R-182**, Application for Work Order CI#39029, p. 35.

<sup>437</sup> **R-182**, Application for Work Order CI#39029, p. 35.

<sup>438</sup> **R-184**, NSPI (Oct. 14, 2010), ¶¶ 112, 164. In approving the capital cost expenditures, the UARB reiterated it did not need to approve whatever specific project agreements were to be negotiated between NSPI and NPPH. *See also* **R-184**, NSPI (Oct. 14, 2010), ¶¶ 30-33.

<sup>439</sup> **R-167**, NSPI Evidence, p. 8.

<sup>440</sup> **R-167**, NSPI Evidence, p. 4.

<sup>441</sup> **R-062**, *PWCC I*, ¶¶ 34(10), 156; **R-412**, *Re Pacific West Commercial Corporation*, Shared Services Agreement, M04862 P-8, Preamble (¶ B) & ¶ 5.2.2. Under the terms of the Shared Services Agreement, NSPI delivers up to 1.2 million GJ of steam per year while PHP pays NSPI \$393,333.33 per month in advance for the steam (for a total of \$4.72 million per year). The terms of Shared Services Agreement remained essentially the same even after PWCC and NSPI restructured their arrangements following receipt of an unfavorable ATR from the CRA. *See* **R-413**, *Re Pacific West Commercial Corporation*, Redacted Pacific West Commercial Corporation (“PWCC”) Responses to Information Requests from the Avon Group, M04862 P-71(Sept. 25, 2012) IR-30, p. 3; **R-063**, *PWCC II*, p. 10.

<sup>442</sup> **R-062**, *PWCC I*, ¶¶ 34(10), 156; **R-412**, *Re Pacific West Commercial Corporation*, Shared Services Agreement, M04862 P-8, ¶ 7.1 & Schedules 9 & 10. NSPI pays PHP \$62,500 per month for shared services. *See* **R-062**, *PWCC*

for the steam supply and shared services appeared reasonable and not subsidized by ratepayers.<sup>443</sup>

## 2. The Implementation of GNS Policy on a Minimum Supply of Firm Renewable Electricity Is Not an “Instruction” to NSPI and PWCC

209. Resolute argues that “[t]he Biomass Plant would need to run full-time to produce steam for PHP and would not run full-time for any other reason”<sup>444</sup> and that the GNS “moved to enable the deal after the evidentiary hearing”<sup>445</sup> by submitting a letter to the UARB and then “passed regulations specifically to consummate the deal”<sup>446</sup> or “passed legislation necessary to enable the electricity deal.”<sup>447</sup> Resolute alleges this was done to “satisfy PWCC.”<sup>448</sup>

210. This is a misrepresentation of reality. First, NSPI wanted to continue operating its new renewable electricity generation plant, not only because failing to do so would be a lost investment, but also because it would help it meet its RES obligation during shortfalls from wind and hydro power generation<sup>449</sup> and it represented a long-term investment in a facility that could produce firm renewable electricity for years, ensuring the stability and reliability of the electrical grid.<sup>450</sup> The GNS was supportive of NSPI’s efforts as early as 2010, long before PWCC appeared

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*I*, ¶¶ 34(10), 156; *See also* **R-412**, *Re Pacific West Commercial Corporation*, Shared Services Agreement, M04862 P-8, Schedule 5.

<sup>443</sup> **R-062**, *PWCC I*, ¶ 158.

<sup>444</sup> Claimant’s Memorial, ¶ 84.

<sup>445</sup> Claimant’s Memorial, ¶ 85.

<sup>446</sup> Claimant’s Memorial, ¶ 164.

<sup>447</sup> Claimant’s Memorial, ¶ 179.

<sup>448</sup> Claimant’s Memorial, ¶ 174

<sup>449</sup> **R-399**, Transcript (July 17, 2012), p. 439 (“MS. RUBIN: MS. RUBIN: [...] is it a fair conclusion that that Port Hawkesbury Biomass Project's not needed to meet the RES goals in 2013? MR. SIDEBOTTOM: No, you can't make that conclusion. As I say, we don't know what the exact wind production will be in that year and we don't know what the exact hydro production will be in that year.”), and pp. 440-441 (“MS. RUBIN: Okay. So can I suggest that without the Port Hawkesbury mill load, the Port Hawkesbury Biomass Project is not a must-run project, is it, not to meet RES compliance? MR. SIDEBOTTOM: Again, it really depends on what the production of the other facilities are, Ms. Rubin. If there's a shortfall in hydro, then you might very well find yourself in a must-run situation.”)

<sup>450</sup> **R-399**, Transcript (July 17, 2012), pp. 447-448 (“MR. SIDEBOTTOM: [...] I think you need to recognize that this biomass plant brings renewable energy that is both firm and for a long period of time. [...] There's only so much wind we can practically put on the system.”), and pp. 449-450 (“MS. RUBIN: [...] why would you run it [the Biomass Plant] when there are less costly plants to run? MR. SIDEBOTTOM: So when we look at economic dispatch, one of the things we have to do is look at all of the attributes of the energy. [...] I'm not trying to be difficult on this but it -- you know, economic dispatch is one of the attributes, and a very important one, but

on the scene, because it would help advance the development of renewable energy in Nova Scotia.<sup>451</sup>

211. Second, the amendments to RES Regulations were actually prepared and released for public consultation on June 27, 2011,<sup>452</sup> months before PWCC was even in the picture. As Murray Coolican explains in his witness statement, final approval of the regulations had to be temporarily delayed because the simultaneous developments in late August 2011 that the Bowater Mersey and Port Hawkesbury mills (both of which had biomass power plants) may shut down permanently because that would impact renewable energy policy more broadly.<sup>453</sup> But by the summer of 2012, the GNS knew that (i) Bowater Mersey was closing and no longer needed its biomass plant as a source of heat, and (ii) NSPI wanted to finish construction of its Port Hawkesbury Biomass Plant and take a stake in the Port Hawkesbury mill under new ownership. With these developments, the amendments to the RES Regulations were ready to move forward.<sup>454</sup>

212. On January 17, 2013, the GNS passed multiple amendments the RES Regulations. The first set of amendments was meant to add a 2020 renewable electricity standard (“RES-2020”), to enable the purchasing of power from Muskrat Falls, and to provide changes to the feed-in tariff program.<sup>455</sup> A second set of amendments added provisions respecting the generation of electricity using biomass.<sup>456</sup> In particular, NSPI was required to produce or acquire certain amounts of “firm” renewable electricity<sup>457</sup> and to operate its Port Hawkesbury Biomass Plant as a “base-load” unit (i.e., as close as practical to the Plant’s rated output on a continuous basis).<sup>458</sup> Furthermore, beginning in 2020, NSPI has to supply its customers with renewable electricity in

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reliability and spinning reserve and a number of other characteristics are also provided by that facility which are not provided by other renewable facilities. So we would make the judgment at that time as to all of those attributes, what the best overall cost is.”)

<sup>451</sup> **R-183**, Application by Nova Scotia Power Inc. for the Approval of a Capital Work Order in Respect of the Port Hawkesbury Biomass Project, Closing Submissions (Sept. 20, 2010), ¶¶ 24, 26, 30, 34.

<sup>452</sup> **R-185**, Proposed Amendments to Renewable Electricity Regulations Released (June 27, 2011).

<sup>453</sup> Coolican Statement, ¶ 38.

<sup>454</sup> Coolican Statement, ¶ 39.

<sup>455</sup> **R-186**, Order in Council, No. 2013-13 (Jan. 17, 2013).

<sup>456</sup> **R-225**, Order in Council, No. 2013-12 (Jan. 17, 2013).

<sup>457</sup> **R-225**, Order in Council, No. 2013-12 (Jan. 17, 2013), Schedule A, s. 4.

<sup>458</sup> **R-225**, Order in Council, No. 2013-12 (Jan. 17, 2013), Schedule A, s 3.

an amount not less than 40% of the total electricity supplied, and, to meet this requirement, NSPI has to acquire 20% of the electricity generated by the Muskrat Falls Generating Station.<sup>459</sup>

213. PHP does not benefit from any reduced or subsidized rate for the steam supplied by NSPI. Steam from the Biomass Plant costs PHP almost \$4 million annually and PHP covers the cost of fuel necessary to produce its share of steam. Even if NSPI decided not to operate the Biomass Plant, it would still be able to obtain the necessary steam from its own gas-fired boiler (PB4), which was not sold to NSPI.<sup>460</sup>

214. If Resolute's allegations were true, that would mean that NSPI, a private company, negotiated away the value of steam to PHP in exchange for less than adequate remuneration while it was under no obligation to do so and contrary to its own interests and those of its other customers. As explained above, this proposition is contradicted by NSPI's own statements that it and its customers are better off as a result of the electricity and steam supply agreements that NSPI negotiated. Even the DOC concluded that because "the GNS and the regulating entity, the UARB, are not involved in the provision of steam between NSPI and Port Hawkesbury," there was neither a "financial contribution by an authority" nor "the entrustment or direction of a private entity, NSPI, to make a financial contribution."<sup>461</sup>

### **3. Explaining the GNS Renewable Electricity Policy in a Comfort Letter Is Not a "Specific and Extraordinary" Measure or "Instruction"**

215. Resolute also alleges that "GNS took specific and extraordinary actions to ensure that PHP's electricity deal would be approved by the NSUARB" and, in particular, guaranteed that neither PWCC nor other ratepayers will be required to pay the incremental costs of additional renewable electricity triggered by PHP's return to the grid.<sup>462</sup>

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<sup>459</sup> **R-186**, Order in Council, No. 2013-13 (Jan. 17, 2013), Schedule A, s 6.

<sup>460</sup> **R-062**, *PWCC I*, ¶ 156; **R-417**, *Pacific West Commercial Corporation (Re)*, Redacted Pacific West Commercial Corporation ("PWCC") Responses To Information Requests from the Small Business Advocate (May 30, 2012), M04862 P-18 IR-24, p. 25 ("The Port Hawkesbury Mill has sufficient steam generation capacity to run the Mill from its wholly-owned PB4 boiler.").

<sup>461</sup> **R-395**, United States Department of Commerce, Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada (July 27, 2015), p. 47; **R-395**, United States Department of Commerce, Issue and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada (Oct. 13, 2015), p. 59.

<sup>462</sup> Claimant's Memorial, ¶ 168.

216. Again, Resolute misrepresents reality. The GNS did nothing more than confirm what it, NSPI and PWCC already knew in July 2012: Port Hawkesbury’s reopening would not result in incremental costs to meet RES requirements because there was sufficient sources of renewable energy elsewhere.

217. Resolute focuses on Murray Coolican’s July 20, 2012 letter to the UARB regarding the GNS’ policy and intentions on RES,<sup>463</sup> characterising it as a “waiver” of RES obligations to enable the “electricity deal” and for which the GNS indemnified. This is not true. As Mr. Coolican notes, “my letter is self-explanatory: the DOE was confident that, because there was enough RES supply coming on-line and the return of the mill-load would not otherwise increase the total system load from what had been planned for in prior years, the Port Hawkesbury mill returning to the grid would not trigger an incremental RES cost over the term of the proposed LRR pricing mechanism.”<sup>464</sup>

218. The DOE’s confidence in July 2012 that there was sufficient supply of renewable electricity was entirely reasonable, taking into account the fact that (i) by the time the Port Hawkesbury mill went into “hot idle” in September 2011, NSPI had already planned its compliance with the RES-2015 requirements; (ii) Resolute’s Bowater Mersey paper mill closed in June 2012, significantly decreasing the overall system load and the amount of renewable electricity needed for NSPI to comply with RES requirements; (iii) PWCC’s plan to close the newsprint line would reduce the mill’s load by about 450,000 MWh per year; and (iv) the GNS was in the process of finalizing the Lower Churchill – Maritime Link Project, which would result in NSPI importing renewable electricity from Newfoundland and Labrador to help it to satisfy the RES-2020 requirements.<sup>465</sup>

219. Mr. Coolican’s confidence was shared by NSPI and PWCC, who spent months negotiating the minutiae of the terms and conditions of an electricity rate for the Port Hawkesbury mill and were confident that the return of the mill onto the electrical grid would not cause NSPI to incur

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<sup>463</sup> **R-418**, *Pacific West Commercial Corporation (Re)*, Letter, M04862 P-69 (July 20, 2012), p. 2.

<sup>464</sup> Coolican Statement, ¶ 29.

<sup>465</sup> Coolican Statement, ¶ 26; **R-177**, *Pacific West Commercial Corporation (Re)*, Non-Confidential Government of Nova Scotia Amended Response to Consumer Advocate IR-41(a), M04862 P-66 (July 18, 2012), p. 8.

incremental costs to meet the RES requirements.<sup>466</sup>

220. This expectation proved to be reality: “[j]ust as the DOE assessed and expected, the Port Hawkesbury mill’s load has never triggered an additional RES obligation and has never resulted in additional incremental costs.”<sup>467</sup> In other words, the GNS has never paid anything to PWCC under the Agreement on Environmental Performance Commitments.<sup>468</sup> There was no change to GNS policy as a result of PWCC’s LRR application, and it certainly had no impact on the specific pricing terms and conditions for the supply of electricity negotiated privately between NSPI and PWCC.

221. In conclusion, the GNS did not “instruct” NSPI or PWCC to reach an agreement on the LRR pricing mechanism, and the measures undertaken by the GNS with respect to renewable electricity regulation in Nova Scotia are not part of an “electricity deal” between NSPI and PWCC. The electricity rate negotiated between NSPI and PWCC is not attributable to the GNS under international law. Therefore, the “electricity deal” is not a measure “adopted or maintained by a Party” as contemplated by Article 1101(1) and, as such, is not a measure that may form the basis of a claim under NAFTA Chapter Eleven.

#### **IV. CANADA HAS NOT VIOLATED ITS OBLIGATIONS UNDER NAFTA ARTICLE 1102 (NATIONAL TREATMENT)**

##### **A. The Nova Scotia Measures Are Excluded from the National Treatment Obligation under Article 1108(7)**

222. The Claimant alleges that the Nova Scotia measures have breached Canada’s obligations under NAFTA Article 1102 because they accorded less favourable treatment to Resolute and its investments (i.e., the Québec mills) than to PWCC and PHP, and that Resolute and its investments are “in like circumstances” with PWCC and PHP.<sup>469</sup>

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<sup>466</sup> **R-062**, *PWCC I*, ¶ 172; **R-408**, *Re Pacific West Commercial Corporation*, NS Power Reply Evidence (July 9, 2012), M04862 P-41, pp. 7-8; **C-174**, *Re Pacific West Commercial Corporation*, Redacted Rebuttal Evidence of Pacific West Commercial Corporation (July 9, 2012), p. 3; **R-178**, *Re Nova Scotia Power Incorporated*, General NSPI Responses to Nova Scotia Utility and Review Board Information Requests, M04972 P-893 N-35 (July 23, 2012), IR-51 Attachment 1.

<sup>467</sup> Coolican Statement, ¶ 31.

<sup>468</sup> **C-210**, Agreement on Environmental Performance Commitments to the Province of Nova Scotia (Sep. 28, 2012).

<sup>469</sup> Claimant’s Memorial, ¶ 193.

223. The NAFTA Parties specifically excluded measures covered by Article 1108(7)(a) (“procurement by a party or a state enterprise”) and (b) (“subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance”) from the scope of their national treatment obligation.<sup>470</sup> There is no dispute that Article 1108(7) applies with respect to measures adopted by a provincial or state government.<sup>471</sup>

224. With the exception of the electricity rate negotiated between NSPI and PWCC, which is not attributable to the GNS, all of the measures challenged by Resolute plainly fall within Article 1108(7)(a) or (b).<sup>472</sup> Accordingly, there is no need to assess whether national treatment was accorded to Resolute because Canada has no obligation to do so when it comes to procurement, grants or subsidies.

### 1. The Credit Facility and the Capital Loan are “Government Supported Loans”

225. The \$40 million credit facility and the \$24 capital loan [REDACTED] [REDACTED] fall within the Article 1108(7)(b) exclusion for “government supported loans.”<sup>473</sup> [REDACTED]

[REDACTED]<sup>474</sup> The Claimant itself refers to these two instruments as “loans.”<sup>475</sup> There is no controversy on this question. If any loaned amounts were

<sup>470</sup> NAFTA Article 1108(7) provides “Articles 1102, 1103 and 1107 do not apply to: (a) procurement by a Party or a state enterprise; or (b) subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance.”

<sup>471</sup> Just as the obligations of the NAFTA are applicable to provinces and states pursuant to NAFTA Article 105 (Extent of Obligations), so too are the exclusions. See **CL-130**, *ADF Group Inc. v United States of America* (ICSID Case No ARB(AF)/00/1) Award, 9 January 2003 (“*ADF – Award*”), ¶ 170: “the exclusionary effect of Article 1108(7)(a) and 8(b) operates on both federal and state governmental procurement.”

<sup>472</sup> Resolute has failed to explain how the revised municipality tax agreement negotiated between PWCC and Richmond County constitutes a “benefit”. Nevertheless, in the event that the Claimant maintains this argument or the Tribunal finds that the tax agreement provided a benefit to PWCC or PHP, Canada submits that the measure would fall within the scope of the exclusion for subsidies and grants set out in Article 1108(7)(b).

<sup>473</sup> The ordinary meaning of “loan” is “[a] thing lent; something the use of which is allowed for a time, on the understanding that it shall be returned or an equivalent given; *esp.* a sum of money lent on these conditions, and usually at interest.” **R-419**, Canadian Oxford Dictionary, (Oxford University Press, 2019), s.v. “loan.”

<sup>474</sup> [REDACTED]. See **R-269**, [REDACTED] CAN000012\_0015.

<sup>475</sup> See, for example, Claimant’s Memorial, ¶ 64.

to be forgiven by the GNS, they would be characterized as “grants”<sup>476</sup> and would still fall within the Article 1108(7)(b) exclusion. The credit facility and the capital loan are thus excluded from the scope of Article 1102.

226. In its Memorial, the Claimant lists the use of accumulated tax losses available through PHP to offset gains from PWCC’s investments outside of Nova Scotia as a distinct measure from the credit facility and the capital loan.<sup>477</sup> This is incorrect: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>478</sup> This is not a separate “measure,” it is an integral part of the credit facility and the capital loan. The Article 1108(7)(b) exclusion applies.

**2. The Workforce Training Incentive and the Marketing Contribution are “Grants”**

227. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>479</sup> Again, Resolute does not dispute that these measures are “grants.”<sup>481</sup> Therefore, the Article 1108(7)(b) exclusion applies.

**3. The Indemnity Agreement is a “Government Supported Loan”**

228. [REDACTED]

<sup>476</sup> The ordinary meaning of “grant” is “[a]n authoritative bestowal or conferment of a privilege, right, or possession; a gift or assignment of money, etc. by the act of an administrative body or of a person in control of a fund or the like.” **R-420**, Canadian Oxford Dictionary, (Oxford University Press, 2019), s.v. “grant.”

<sup>477</sup> Claimant’s Memorial, ¶ 219.

<sup>478</sup> **C-182**, [REDACTED], pp. 5-6; **C-195**, [REDACTED], pp. 5-6.

<sup>479</sup> **C-195**, [REDACTED], p. 6. In any event, NAFTA Article 2103 (Taxation) would apply.

<sup>480</sup> **C-182**, [REDACTED]

<sup>481</sup> See, for example, Claimant’s Memorial, ¶ 64.



[REDACTED]

82

[REDACTED]<sup>483</sup> [REDACTED]<sup>484</sup> Again, there can be no debate that the Article 1108(7)(b) exclusion for “government sponsored loans” applies and that Article 1102 does not.

**4. The Ramp-Up Agreement is a “Grant” or a “Government Supported Loan”**

229. [REDACTED]

[REDACTED] It squarely falls under the Article 1108(7)(b) exclusion irrespective of whether [REDACTED] as a whole or its constituent parts are characterized as “grants” or “government supported loans.”

**5. The \$20 Million Land Purchase Agreement is “Procurement”**

230. In September 2012, the GNS purchased 51,500 acres of land from PWCC for \$20 million.<sup>485</sup> This transaction falls within the scope of the Article 1108(7)(a) exclusion for “procurement”: the GNS paid money and received land in return.<sup>486</sup> Resolute cannot impugn this measure under Article 1102.

**6. The Outreach Agreement is “Procurement” or a “Grant”**

231. Under the Outreach Agreement, PHP is entitled to receive up to \$3.8 million per year for

<sup>482</sup> C-136, [REDACTED], p. 4.

<sup>483</sup> [REDACTED] C-136, [REDACTED] p. 13.

<sup>484</sup> [REDACTED] See R-269, [REDACTED], CAN000015, p. 11.

<sup>485</sup> C-155, [REDACTED] C-209, [REDACTED]

<sup>486</sup> See CL-130, *ADF- Award*, ¶ 161: “[i]n its ordinary or dictionary connotation, ‘procurement’ refers to the act of obtaining, ‘as by effort, labor or purchase.’ To procure means ‘to get; to gain; to come into possession of.’ In the world of commerce and industry, ‘procurement’ may be seen to refer ordinarily to the activity of obtaining by purchase goods, supplies, services and so forth.’ See also RL-122, *Mercer International Inc. v. Canada* (ICSID Case No. ARB(AF)/12/3) Award, 6 March 2018 (“*Mercer – Award*”), ¶ 6.35: ‘procurement by a Party or a state enterprise’, in its context and in the light of NAFTA’s object and purpose, signifies the buying of goods or services for or by a State or a state enterprise [...]”

10 years from the GNS for undertaking certain kinds of work on Crown land that it would not otherwise perform in the course of its operations.<sup>487</sup> The GNS will reimburse administrative expenses incurred in connection with projects that are eligible under the agreement for up to \$3.8 million a year.<sup>488</sup>

232. Payment by the GNS for the activities performed under the agreement constitutes a “procurement” of services. Consequently, the Outreach Agreement is covered by the exclusion in Article 1108(7)(a) and Article 1102 does not apply to it. Even if the Outreach Agreement is considered as a “grant” as Resolute describes it,<sup>489</sup> it would be subject to the exclusion in Article 1108(7)(b). In either case, the national treatment obligation in Article 1102 does not apply.

### **7. Resolute Has Not Pled with Specificity with Respect to the FULA**

233. Resolute qualifies two elements of the FULA as “benefits”: (1) the fact that PHP can harvest fiber for paper and biomass for fuel, and (2) the fact that PHP is reimbursed for silviculture payments.<sup>490</sup> As part of its confused allegations in relation to the FULA, Resolute apparently takes issue with the fact that PHP could allegedly “receive more in silviculture payments than it was paying for stumpage [...] essentially making the Crown timber free.”<sup>491</sup>

234. At this stage, it is impossible for Canada to fully respond to the Claimant’s assertions on the FULA given their lack of clarity and specificity, except to note that Resolute misrepresents the workings of the FULA. However, even if it were true that PHP got Crown timber “for free” as Resolute claims (and it is not true), the “subsidy” exception in Article 1108(7)(b) would apply. As for the payments made by the GNS for silviculture activities completed by PHP, they constitute “procurement” and thus fall within the exclusion in Article 1108(7)(a). While the relevance of Resolute’s argument regarding the FULA is unclear, what is clear is that the Article 1108(7) exception would apply to the extent Resolute alleges there are subsidies at play.

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<sup>487</sup> C-206, Outreach Agreement, ¶¶ 5.1, 5.4, 5.5 (environmental research), 6.1-6.6 (experimental silviculture) 7.1 (road planning and maintenance), 10.1 and 10.2 (forest planning). Towers Statement, ¶ 39.

<sup>488</sup> Towers Statement, ¶ 39; C-206, Outreach Agreement.

<sup>489</sup> Claimant’s Memorial, ¶ 219.

<sup>490</sup> Claimant’s Memorial, ¶ 219. Kaplan Report, ¶ 24.

<sup>491</sup> Claimant’s Memorial, ¶ 96.

**B. The Article 1108(7) Exclusions are Fully Available to Canada**

235. Resolute argues that Canada cannot rely on the Article 1108(7) exclusions to avoid the application of Article 1102. There are several reasons why this argument is incorrect.

236. First, Resolute’s own characterizations of the GNS measures confirm that all the measures described above are either “procurement by a Party” or “subsidies or grants provided by a Party [...], including government supported loans, guarantees and insurance.” There are no qualifications to the text of Article 1108(7)(a) and (b): if a measure falls within the ordinary meaning of its terms, the exclusion from the national treatment obligation in Article 1102 is decisive.

237. Second, Resolute cannot pretend this is a new or unexpected argument. Canada’s Statement of Defence included explicit references to the fact that it would rely on the exclusions set out in Article 1108(7)(a) and (b).<sup>492</sup> While it had no obligation to do so at such an early stage of the arbitration, Canada even identified some of the specific measures that would fall within the two exclusions,<sup>493</sup> which is more than sufficient to meet the requirements of Article 19(2) of the UNCITRAL Arbitration Rules.<sup>494</sup>

238. Third, Resolute misleads with a statement that Canada and the GNS “vigorously defended themselves and PHP against any and all subsidy allegations”<sup>495</sup> without any context or accuracy. In fact, in the context of the DOC proceedings, Canada and the GNS did not dispute certain elements of the subsidy findings with respect to the FULA, the credit facility, the capital loan, the workforce training incentive, the marketing contribution and the Indemnity Agreement.<sup>496</sup> Resolute is mischaracterizing Canada’s past arguments in other venues because it obviously does not want the NAFTA Article 1108(7) exclusions to apply. But even if Resolute’s portrayal were true (and it is not), Canada would still not be precluded from having recourse to an exclusion

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<sup>492</sup> See, for example, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Canada’s Statement of Defence, 1 September 2016 (“Statement of Defence”), ¶¶ 12 and 88-89.

<sup>493</sup> Statement of Defence, ¶¶ 88-89.

<sup>494</sup> *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Jurisdictional Hearing Transcript, 15-16 August 2017 (“Jurisdictional Hearing Transcript”), p. 27:7-20.

<sup>495</sup> Claimant’s Memorial, ¶ 229.

<sup>496</sup> Statement of Defence, ¶ 75. With respect to the electricity LRR negotiated between PWCC and NSPI, Canada and Nova Scotia’s position in previous proceedings are in full concordance with Canada’s position in this arbitration: the electricity rate is not attributable to the GNS, so the question of subsidy does not even arise.

under the NAFTA. The question as to whether a measure constitutes a “subsidy” or “grant” under Article 1108(7)(b) must be decided by the Tribunal, like any other issue in dispute, in accordance with the NAFTA and applicable rules of international law.<sup>497</sup>

239. Fourth, and contrary to what the Claimant alleges,<sup>498</sup> whether a measure has been notified as a subsidy through the mechanism of the WTO Committee on Subsidies and Countervailing Measures (“SCM Committee”) is not relevant to determining whether it will be captured by Article 1108(7)(b). Resolute does not even attempt to explain how an alleged lack of notification pursuant to a different treaty deprives a NAFTA Party of the right to rely on an explicit provision of the NAFTA. Moreover, Article 25.7 of the SCM Agreement provides that “Members recognize that notification of a measure does not prejudice either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.”<sup>499</sup> If the notification of a measure does not prejudice its nature, the lack of notification cannot have that effect either. In any event, the Government of Canada provided to the United States Trade Representative a comprehensive description of the financial package provided to Port Hawkesbury in response to questions the United States raised in the SCM Committee in October 2012.<sup>500</sup> That document was clear about the nature of the Nova Scotia measures. For instance, it referred to the workforce training incentive and the marketing contribution as “grants.”<sup>501</sup>

240. Finally, Resolute’s argument that Canada should be “estopped” from relying on the Article 1108(7) exclusions to national treatment is based on a misunderstanding of the applicable legal test. In international law, estoppel precludes a party from denying the “truth” of the representation that it had previously made to the other party and thereby caused that other party, in reliance on such statement or conduct, to detrimentally change its position or to suffer some

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<sup>497</sup> NAFTA Article 1131(1) (Governing Law) provides that: “A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”

<sup>498</sup> Claimant’s Memorial, ¶ 229.

<sup>499</sup> **RL-193**, WTO, *Agreement on Subsidies and Countervailing Measures*.

<sup>500</sup> **C-212**, Canada Response to USTR Questions of October 10, 2012 (Nov. 23, 2012); **RL-123**, WTO, Committee on Subsidies and Countervailing Measures, “Minutes of the Regular Meeting” (October 23, 2012), ¶¶ 61-63.

<sup>501</sup> **C-212**, Canada Response to USTR Questions of October 10, 2012 (Nov. 23, 2012), p. 2.

prejudice.<sup>502</sup> The essential elements of estoppel are: (a) a clear and unambiguous statement of fact; (b) which is made voluntarily, unconditionally, and is authorized; and (c) which is relied on in good faith either to the detriment of the party relying on the statement or to the advantage of the party making the statement.<sup>503</sup> This approach to the definition of estoppel has been applied by numerous arbitral tribunals in investor-state disputes,<sup>504</sup> as well as by the ICJ,<sup>505</sup> the International Tribunal on the Law of the Sea,<sup>506</sup> and State-to-State arbitral tribunals.<sup>507</sup>

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<sup>502</sup> **RL-124**, James Crawford, *Brownlie's Principles of International Law* (8th ed., 2012), pp. 420 (“There is a tendency to refer to any representation or conduct having legal significance as creating an estoppel, precluding the author from denying the ‘truth’ if the representation, express or implied. [...] The essence of estoppel is the element of conduct which causes the other party, in reliance on such conduct, detrimentally to change its position or to suffer some prejudice”), 422 (“An estoppel is precisely *not* a unilateral act; it is a representation the truth of which the entity on whose behalf it is made is precluded from denying in certain circumstances, notably reliance and detriment”); **RL-125**, D.W. Bowett, *The British Year Book Of International Law*, “Estoppel before International Tribunals and Its Relation to Acquiescence”, (1958) 33 *British Yearbook of International Law* 176, p. 201 (“The rule of estoppel operates so as to preclude a party from denying the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit”).

<sup>503</sup> **RL-124**, James Crawford, *Brownlie's Principles of International Law* (8th ed., 2012), p. 420; **RL-125**, D.W. Bowett, “Estoppel before International Tribunals and Its Relation to Acquiescence”, (1958) 33 *British Yearbook of International Law* 176, p. 202.

<sup>504</sup> **RL-126**, *Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge LLC* (ICSID Case No. ARB/09/18) Decision on Jurisdiction, 22 March 2011, ¶ 261; **CL-116**, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Interim Award, 26 June 2000, ¶ 111; **RL-127**, *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) Award, 14 October 2016, ¶ 8.47; **RL-128**, *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador* (UNCITRAL) (PCA Case No. 34877) Partial Award on the Merits, 30 March 2010, ¶ 353; **RL-129**, *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, Decision on Preliminary Objections, 27 July 2006 (ICSID Case no. ARB/03/13) ¶¶ 159-160; **RL-130**, *Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America*, (UNCITRAL) Order of the Consolidation Tribunal, 7 September 2005, ¶ 168; **RL-131**, *Philippe Gruslin v. Malaysia*, Award, 27 November 2000 (ICSID Case No. ARB/99/3) ¶ 20.2; **RL-132**, *Československa obchodní Banka, A.S. v. Slovak Republic* (ICSID Case No. ARB/97/4) Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ¶ 47.

<sup>505</sup> **RL-133**, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, 23 May 2008, ICJ Reports (2008) 12, ¶ 228; **RL-134**, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea intervening)*, Judgment, 11 June 1998, ICJ Reports (1998) 275, ¶ 57; **RL-135**, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras, Nicaragua intervening)*, Judgment, 13 September 1990, ICJ Reports (1990) 92, ¶ 63; **RL-136**, *North Sea Continental Shelf Cases (Germany v. Denmark and Germany v. the Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969) 3, ¶ 30; **RL-137**, *Payment of Various Serbian Loans Issued in France (France v. Serbia)*, 1929 PCIJ Series A, No. 20, 4, p. 39 ¶ 80.

<sup>506</sup> **RL-138**, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Case No. 16, Judgment, 14 March 2012, ¶ 124; **RL-139**, *The “ARA Libertad” Case (Argentina v. Ghana)*, ITLOS Case No. 20, Joint Separate Opinion of Judges Rüdiger Wolfrum and Jean-Pierre Cot, 15 December 2012, ¶¶ 60-69.

241. The international legal principle of estoppel is inapplicable in this case. First, Canada and the GNS have never “clearly” and “unambiguously” stated that all of the measures of the GNS were not “procurement” (Article 1108(7)(a)) or that they were not “subsidies or grants [...], including government supported loans, guarantees and insurance” (Article 1108(7)(b)). Second, Resolute cannot furnish any evidence that it relied in good faith on a statement made by Canada or the GNS to its detriment, or to the advantage of Canada or the GNS. In other words, Resolute’s estoppel argument does even not meet the most basic elements of the applicable test.

242. Resolute’s reliance in a footnote on a single phrase from the 1962 Separate Concurring Opinion of Vice-President Ricardo Alfaro in the *Temple of Preah Vihear* case evidences the weakness of its argument.<sup>508</sup> Resolute fails to mention that the underlying principle for Vice-President Alfaro was that “a State must not be permitted to benefit by its own inconsistency to the prejudice of another State” and that “the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it.”<sup>509</sup> The tribunal in *Amco Asia v. Indonesia* subsequently relied on Vice-President Alfaro’s opinion as an example of a definition that “combines the elements of prejudice to one party and advantage to the other in order for the substance of estoppel, whatever the term employed to describe the same, to be met.”<sup>510</sup> Another separate opinion in the *Temple of Preah Vihear* ICJ case stated that the essential element of estoppel “is that the party invoking the rule must have ‘relied upon’ the statements or conduct of the other party, either to its own detriment or to the other’s advantage”<sup>511</sup> Estoppel is, therefore,

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<sup>507</sup> **RL-140**, *Railway Land Arbitration (Malaysia/Singapore)* (PCA Case No. 2012-01) Award, 30 October 2014, ¶ 199; **RL-141**, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, (PCA Case No. 2011-03) Award, 18 March 2015, ¶ 438.

<sup>508</sup> Claimant’s Memorial, ¶ 230, fn. 325.

<sup>509</sup> **CL-136**, *Temple of Preah Vihear (Cambodia v. Thailand)*, Separate Opinion of Vice-President Alfaro, p. 40.

<sup>510</sup> **RL-142**, *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1) Decision on Jurisdiction, 25 September 1983, ¶ 47.5.

<sup>511</sup> **RL-143**, *Temple of Preah Vihear (Cambodia v. Thailand)*, Separate Opinion of Sir Gerald Fitzmaurice, p. 63. Judge Fitzmaurice continued: A frequent source of misapprehension in this connection is the assumption that change of position means that the party invoking preclusion or estoppel must have been led to change its own position, by action it has itself taken consequent on the statements or conduct of the other party. It certainly includes that: but what it really means is that these statements, or this conduct, must have brought about a change in the relative positions of the parties, worsening that of the one, or improving that of the other, or both. The same requirement, that a change or alteration in the relative positions of the parties should have been caused, covers also certain other notions usually closely associated with the principle of preclusion or estoppel, such as for instance that the one party must have ‘relied’ on the statements or conduct of the other; or that the latter must, by the same means, have ‘held

not a unilateral act; it requires reliance and detriment.<sup>512</sup>

243. The other two authorities cited by Resolute are similarly distinguishable: both the ICC Case No. 6474 and *ADC v. Hungary* address situations where one party attempted to deny the existence (or the legality) of a contract with the other party despite having benefited from the same contract.<sup>513</sup> In the ICC Case No. 6474, the respondent (“Republic of X”) unsuccessfully argued that its contract with the claimant (the supplier of agricultural products) was “unenforceable,” and that the claimant could not rely on the arbitration clause contained therein, because the respondent was not recognized as a state by the international community.<sup>514</sup> Further, in *ADC v. Hungary*, the tribunal found that, in a situation where the respondent “enters into and performs these agreements for years and takes the full benefit from them,” it could not now challenge the legality or enforceability of these agreements because it “entered into these agreements willingly, took advantage from them and led the Claimants over a long period of time, to assume that these Agreements were effective.”<sup>515</sup> The *ADC* tribunal thus confirmed that obtaining a benefit by the party making a representation (“took advantage”) and reliance on it by the other party (“led [the other party] to assume”) are necessary prerequisites to the application of estoppel.

244. The present case is plainly not one where the GOC or GNS has had a contract with Resolute, derived certain benefits from it, and now seeks to escape its obligations under the same contract by denying its very existence. Resolute’s estoppel argument is illogical and has no

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itself out’ as adopting a certain attitude; or must have made a ‘representation’ of some kind. These factors are no doubt normally present; but the essential question is and remains whether the statements or conduct of the party impugned produced a change in relative positions, to its advantage or the other’s detriment. If so, that party cannot be heard to deny what it said or did.”)

<sup>512</sup> **RL-124**, James Crawford, *Brownlie’s Principles of International Law* (8th ed., 2012), p. 422 (“An estoppel is precisely *not* a unilateral act; it is a representation the truth of which the entity on whose behalf it is made is precluded from denying in certain circumstances, notably reliance and detriment”).

<sup>513</sup> Claimant’s Memorial, ¶ 325. Fitzmaurice noted that in such cases, where “a party has, by conduct or otherwise, undertaken, or become bound by, an obligation, it is strictly not necessary or appropriate to invoke any rule of preclusion or estoppel.” While “it may be said that A, having accepted a certain obligation, or having become bound by a certain instrument, cannot now be heard to deny the fact, to ‘blow hot and cold,’” it simply means that “A is bound, and, being bound, cannot escape from the obligation merely by denying its existence.” **RL-143**, *Temple of Preah Vihear (Cambodia v. Thailand)*, Separate Opinion of Sir Gerald Fitzmaurice, p. 63.

<sup>514</sup> **CL-137**, *Supplier v Republic of X*, Partial Award on Jurisdiction and Admissibility, ICC Case No. 6474, 1992, ¶¶ 5, and 10.

<sup>515</sup> **CL-138**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16) Award, 2 October 2006, ¶ 475.

bearing on the applicability of Article 1108(7) to the measures at issue.

**C. Resolute has Failed to Meet its Burden to Prove a Breach of Article 1102**

245. Article 1102 sets out the NAFTA Parties' national treatment obligation in the following terms:

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

246. Accordingly, for the Claimant to make out a claim under Article 1102, it must demonstrate that: (1) the government accorded both the Claimant or its investments and the comparators "treatment [...] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments;"<sup>516</sup> (2) the government accorded the alleged treatment "in like circumstances;"<sup>517</sup> and (3) the treatment accorded to the Claimant or its investments was "less favourable" than the treatment accorded to comparator investor or investments.<sup>518</sup>

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<sup>516</sup> **RL-060**, *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL) Award (31 March 2010) ("Merrill & Ring – Award"), ¶¶ 79 and 81-82; **CL-113**, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits *UPS – Award*, 24 May 2007 ("UPS – Award"), ¶ 83(a); **RL-091**, *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/01) Decision on Responsibility, 15 January 2008 ("Corn Products – Decision on Responsibility"), ¶ 117.

<sup>517</sup> **CL-113**, *UPS – Award*, ¶ 83(b); **RL-057**, *The Loewen Group Inc. and Raymond L. Loewen v. The United States of America* (ICSID Case No. ARB/98/3) Award on Merits, 26 June 2003 ("Loewen – Award"), ¶¶ 139-140; **RL-092**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/05) Award, 21 November 2007 ("ADM – Award"), ¶ 205; **RL-059**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) First Partial Award, 13 November 2000 ("S.D. Myers – Partial Award"), ¶¶ 243 and 247; **RL-091**, *Corn Products – Decision on Responsibility*, ¶ 117.

<sup>518</sup> **CL-113**, *UPS – Award*, ¶ 83(c); **RL-091**, *Corn Products – Decision on Responsibility*, ¶ 117.



247. Even if the Tribunal were to conclude that some of the Nova Scotia measures are not exempted from national treatment pursuant to Article 1108(7), Resolute’s Article 1102 claim still fails because it has not established the essential elements of that provision: the GNS did not accord “treatment” to Resolute or its investments, and treatment was not accorded “in like circumstances.” As a result, there can be no “treatment less favorable” and, hence, no violation of the national treatment obligation.

248. As noted by the *UPS* tribunal, “failure by the investor to establish one of these three elements will be fatal to its case.”<sup>519</sup> This burden falls squarely on a claimant’s shoulders,<sup>520</sup> and the onus does not shift, as the Claimant suggests, to Canada to attempt to justify the discrimination.<sup>521</sup> But, there is no need for a debate on whether or not the burden of proof shifts to the Respondent given that Resolute has not made out the basic elements of its case.

249. Moreover, the Tribunal should reject the attempts made by Resolute to transform the national treatment obligation found in Article 1102 into something it is not by having recourse to the objectives set out in NAFTA Article 102.<sup>522</sup> The objectives of NAFTA do not impose obligations on Parties; its substantive provisions do, and, the Claimant has not met its burden to demonstrate that the Nova Scotia measures constitute a violation of Article 1102.

### 1. Resolute Has Not Provided any Evidence of Nationality-Based Discrimination

250. The national treatment obligation in Article 1102 is designed to protect against nationality-based discrimination. Canada,<sup>523</sup> the United States<sup>524</sup> and Mexico<sup>525</sup> have consistently agreed on

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<sup>519</sup> **CL-113**, *UPS – Award*, ¶ 84. For example, if a comparator is determined not to be in like circumstances, NAFTA tribunals have concluded that there can be no violation of Article 1102 or 1103. **CL-113**, *UPS – Award*, ¶ 119-120; **RL-057**, *Loewen – Award*, ¶ 140.

<sup>520</sup> **CL-113**, *UPS – Award*, ¶ 84.

<sup>521</sup> Claimant’s Memorial, ¶ 223.

<sup>522</sup> Claimant’s Memorial, ¶ 226.

<sup>523</sup> On behalf of Canada, *see RL-056, Pope & Talbot v. Government of Canada*, (UNCITRAL) Counter Memorial, 29 March 2000, ¶ 166 (“Article 1102(2) does not prevent a Party from implementing a measure that affects investments differently as long as the measure neither directly nor indirectly discriminates on the basis of nationality as between foreign and domestic investments.”); **RL-144**, *Methanex Corporation v. The United States of America* (UNCITRAL) Canada’s Fourth Submission pursuant to Article 1128, 30 January 2004, ¶ 5; **RL-145**, *United Parcel Service v. Canada* (UNCITRAL) Counter Memorial (Merits Phase), 22 June 2005, ¶ 585 and **RL-146**, *United Parcel Service v. Canada* (UNCITRAL) Rejoinder (Merits Phase), 6 October 2005, ¶¶ 41, 70, and 159; **RL-147**, *William Ralph Clayton and others v. Government of Canada* (UNCITRAL) (PCA Case No. 2009-04) Counter-

this point.<sup>526</sup> Commentators and scholars have expressed the same view.<sup>527</sup>

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Memorial, 9 December 2011, ¶ 401 and **RL-148**, *William Ralph Clayton and others v. Government of Canada* (UNCITRAL) (PCA Case No. 2009-04) Rejoinder, 21 March 2013, ¶¶ 169-170; **RL-149**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) (PCA Case No. 2012-17) Counter-Memorial and Reply on Jurisdiction, 28 February 2014, ¶ 354; **RL-150**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Counter-Memorial, 22 August 2014, ¶¶ 25, and 360; **RL-041**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Rejoinder Memorial, 31 March 2015, ¶ 241; **RL-151**, *Windstream Energy LLC v. Government of Canada* (UNCITRAL) (PCA Case No. 2013-22) Rejoinder Memorial, 6 November 2015, ¶ 67.

<sup>524</sup> On behalf of the United States, see **RL-152**, *Pope & Talbot v. Government of Canada*, (UNCITRAL) Submission of the United States of America, 7 April 2000, ¶ 3 (“The national treatment provision was designed to prohibit discrimination on the basis of nationality. ... Article 1102 paragraphs (1) and (2) were not intended to prohibit all differential treatment among investors or investments. Rather, they were intended only to ensure that Parties do not treat entities that are ‘in like circumstances’ differently based on their NAFTA Party nationality.”). See also **RL-153**, *Methanex Corporation v. The United States of America* (UNCITRAL) Amended Statement of Defense of Respondent United States of America, 5 December 2003 (“*Methanex – Amended Statement of Defence*”), ¶ 289; **RL-154**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Counter-Memorial on Merits and Objections to Jurisdiction of Respondent United States of America, 14 December 2012, ¶ 323; **RL-038**, *William Ralph Clayton and others v. Government of Canada* (UNCITRAL) (PCA Case No. 2009-04) Submission of the United States of America, 19 April 2013, ¶ 7; **RL-155**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) (PCA Case No. 2012-17) Submission of the United States of America, 25 July 2014, ¶ 11; **RL-040**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3), Submission of the United States of America, 8 May 2015, ¶¶ 10-11; **RL-156**, *Windstream Energy LLC v. Government of Canada* (UNCITRAL) (PCA Case No. 2013-22) Submission of the United States of America, 12 January 2016, ¶¶ 27-28. See also the submission made by the United States during the jurisdiction and admissibility phase of this arbitration, at para. 15 (“the obligation prohibits nationality-based discrimination between domestic and foreign investors (or investments of foreign and domestic investors) that are ‘in like circumstances.’”)

<sup>525</sup> On behalf of Mexico see **RL-157**, *Pope & Talbot v. Government of Canada*, (UNCITRAL) Submission of the United Mexican States, 3 April 2000, ¶¶ 67 (“The Tribunal could make a finding of breach only if it was satisfied that, when compared to Canadian investors *in like circumstances*, there was actual discrimination against Pope & Talbot, Inc. based on the nationality of its capital.”), and, 69 (“There is no indication from the pleadings that the Claimant can point to its investment being discriminated against by virtue of its foreign ownership. Without proof of this element, no claim of denial of national treatment can be made out”). See also **RL-158**, *GAMI Investments, Inc. v. Mexico* (UNCITRAL) Statement of Defense, 24 November 2003, ¶ 273; **RL-159**, *Methanex Corporation v. The United States of America* (UNCITRAL) Mexico Fourth Submission pursuant to Article 1128, 30 January 2004, ¶ 16; **RL-160**, *United Parcel Service v. Canada* (UNCITRAL) Submission of the United Mexican States, 20 October 2005, ¶ 7; **RL-161**, *Cargill, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/05), Rejoinder of the Respondent, 2 May 2007, ¶ 286; **RL-162**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Submission of Mexico, 8 May 2015, ¶¶ 11, and 15.

<sup>526</sup> **RL-086**, United Nations, *Vienna Convention on the Law of Treaties* (May 23, 1969), Art. 31(3)(b). The consistent and concordant views of the NAFTA Parties constitutes “subsequent practice” under Article 31(3)(b) of the *Vienna Convention on the Law of Treaties*.

<sup>527</sup> **RL-163**, Andrea K. Bjorklund, *NAFTA Chapter 11*, in Chester Brown, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013), p. 478 (“[t]he national treatment obligation extends to both *de jure* and *de facto* discrimination on the basis of nationality). **RL-164**, Meg. N. Kinnear, *Investment Disputes under NAFTA* (Kluwer Law International), p. 1102-10 (“[t]he principle of non-discrimination on the basis of nationality is at the core of the Parties’ NAFTA obligations.”). **CL-117**, Andrew Newcombe and Luís Paradell, *Law and Practise of Investment Treaties: Standards of Treatment* (Kluwer Law International), pp. 150-151 (“The purpose of the national treatment obligation in IIAs is to prohibit nationality-based discrimination by the host state between the host states’ investors and investments and those of another IIA party.”).

251. Likewise, the awards of NAFTA tribunals have emphasized that the central object of Article 1102 is to prevent nationality-based discrimination. The *Loewen* tribunal found that “Article 1102 is direct [sic] only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality.”<sup>528</sup> Similarly, the *ADM* tribunal found that “[t]he national treatment obligation under Article 1102 is an application of the general prohibition of discrimination based on nationality”<sup>529</sup> and “Article 1102 prohibits treatment which discriminates on the basis of the foreign investor’s nationality. Nationality-based discrimination is established by showing that a foreign investor has unreasonably been treated less favourably than domestic investors in like circumstances.”<sup>530</sup> More recently, the tribunal in *Mercer v. Canada* also agreed with the NAFTA Parties on this point.<sup>531</sup>

252. Consequently, in order to demonstrate a violation of Article 1102, the Claimant must establish that it was accorded less favourable treatment than PWCC (a Canadian company) because it is an investor of another NAFTA Party (i.e., the United States). Resolute provides no evidence that this was the case beyond vaguely playing the nationality card in its Memorial.<sup>532</sup> In fact, Resolute has already confirmed that it is not alleging that the GNS “had in mind to support Port Hawkesbury because it wanted to impact Resolute as a foreign investor only [...] We just happened to be the only foreign participant with an investment in Canada, so we qualified for protection under NAFTA.”<sup>533</sup> This admission puts an end to the national treatment analysis

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<sup>528</sup> **RL-057**, *Loewen – Award*, ¶ 139.

<sup>529</sup> **RL-092**, *ADM – Award*, ¶ 193.

<sup>530</sup> **RL-092**, *ADM – Award*, ¶ 205. *See also*, **RL-050**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009 (*Cargill – Award*), ¶¶ 217 (“Respondent ... argues that, in order to comply with Article 11 02, differential treatment has to be received on the basis of nationality. Respondent claims that this requirement is the consistent position taken by the three NAFTA State Parties and that the Tribunal should give this due weight in interpreting Article 1102.”) and, 220 (“the Tribunal also concludes that the discrimination was based on nationality both in intent and effect.”). For a non-NAFTA case, *see* **CL-009**, *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/01) Decision on Liability, 27 December 2010, ¶¶ 211 (“the national treatment obligation does not preclude all differential treatment that could affect a protected investment but is aimed at protecting foreign investors from *de jure* or *de facto* discrimination based on nationality.”) and, 213 (“different treatment between foreign and national investors who are similarly situated or in like circumstances must be nationality-driven.”)

<sup>531</sup> **RL-122**, *Mercer - Award*, ¶¶ 7.7-7.9.

<sup>532</sup> *See, for example*, Claimant’s Memorial, ¶¶ 13, 17, 127, 215, 227.

<sup>533</sup> Jurisdictional Hearing Transcript, pp. 350-351.

under Article 1102.

253. Resolute cannot evidence nationality-based discrimination because none exists. The Monitor and NPPH (not the GNS) chose the successful bidder based on the potential for obtaining maximum value for the mill’s creditors, not its Canadian nationality. As Duff Montgomerie explains, the GNS would have been ready to discuss financial assistance with Resolute had it been selected by the Monitor to buy Port Hawkesbury.<sup>534</sup> The fact that the GNS offered a similar financial package to Resolute for its Bowater Mersey mill demonstrates that the GNS was willing to engage with Resolute and that nationality-based discrimination was not a factor. In the absence of any thereof evidence, the Claimant’s Article 1102 claim must be dismissed.

**2. Resolute Does Not Meet the Elements of the Test to Determine Compliance with Article 1102**

**a) The GNS Did Not Provide “Treatment” to Resolute or its Investments**

254. The first step of the analysis under Article 1102 is to establish that the government accorded “treatment” to the investor or its investments. In particular, the alleged treatment must be “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”

255. The Claimant alleges that “Resolute and its investments were accorded treatment by GNS with respect to the expansion, conduct and operation of those investments” and that the “treatment of the competitors in SC paper” consists in the Nova Scotia measures.<sup>535</sup>

256. In its discussion of the issue of “treatment,” the Claimant relies on the four questions the Tribunal used to determine if the measures “related to” Resolute or its investments under Article 1101.<sup>536</sup> But as the *Methanex* tribunal pointed out, “[a]n affirmative finding of the requisite ‘relation’ under NAFTA Article 1101 [...] does not necessarily establish that there has been a

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<sup>534</sup> Montgomerie statement, ¶ 32.

<sup>535</sup> Claimant’s Memorial, ¶ 194.

<sup>536</sup> *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018 (“Decision on Jurisdiction and Admissibility”), ¶ 247.

corresponding violation of NAFTA Article 1102.”<sup>537</sup> In addition, Resolute does not acknowledge that the Tribunal emphasized in its Decision on Jurisdiction and Admissibility that it was not “necessary to discuss in further detail here the meaning of 'treatment' in Article 1102.”<sup>538</sup>

257. The facts of which the Claimant complains cannot be considered “treatment” under Article 1102. While that term is not expressly defined in the NAFTA, in light of Article 1101, any complained of “treatment” must be a “measure,”<sup>539</sup> i.e., a “law, regulation, procedure, requirement, or practice”<sup>540</sup> that is “adopted or maintained” by some person or entity for which Canada is responsible at international law. Consistent with these requirements and the ordinary meaning of the term<sup>541</sup>, treatment requires “behaviour in respect of an entity or a person.”<sup>542</sup>

258. In the present case, beyond referring to the “adverse effect” the Nova Scotia measures allegedly had on Resolute and its investments, the Claimant has not identified any “treatment” it received from Nova Scotia that would meet the definition set out above. In fact, Resolute does not complain about instances where it has received actual “treatment”: (1) the treatment that was granted to it by the GNS with respect to Bowater Mersey, its only mill located within the province’s jurisdiction, and (2) the treatment granted to it by the government of Québec.

259. The Claimant has not demonstrated that the GNS adopted or maintained a measure with respect to, or undertook conduct, behaviour or an action towards, Resolute and its mills in Québec. Resolute did not have, and was not seeking to make, any kind of SC paper investment in Nova Scotia. In fact, it explicitly decided not to do so when it declined on two occasions to buy the Port Hawkesbury mill. Therefore, Nova Scotia never had the opportunity to accord any treatment with respect to the expansion, conduct or operation of Resolute’s SC paper

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<sup>537</sup> **RL-054**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, (“*Methanex – Final Award*”), Part IV - Chapter B – Page 1, ¶ 1.

<sup>538</sup> Decision on Jurisdiction and Admissibility, ¶ 291. Canada also recalls that in its analysis of the “related to” requirement the Tribunal said that “it regard[ed] the case as close to the line”. See Decision on Jurisdiction and Admissibility, ¶ 248.

<sup>539</sup> NAFTA, Article 1101(1).

<sup>540</sup> NAFTA, Article 201.

<sup>541</sup> **R-421**, Canadian Oxford Dictionary, (Oxford University Press, 2019), s.v. “treatment.” The Oxford English Dictionary defines “treatment” as “[c]onduct, behavior; action or behavior towards a person, etc.; usage.”

<sup>542</sup> **RL-165**, *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8) Decision on Jurisdiction, 3 August 2004, ¶ 85.

investments. Similarly, NSPI could not accord treatment to mills located outside of the province, nor could Richmond County negotiate a tax rate with a company that was not operating on its territory.<sup>543</sup>

260. The Claimant argues that, in order to determine what “treatment” is, past NAFTA tribunals have looked beyond the measures at issue to assess their practical effect on competitors.<sup>544</sup> However, Resolute ignores a fundamental fact: the cases it cites involved “treatment” as this term is defined above. In *UPS*, the tribunal considered that the “conduct of Canada Customs in processing items to be delivered in Canada” by UPS and its investment and the “assignment of costs and obligations in connection with processing of items” constitute “treatment.”<sup>545</sup> In *S.D. Myers*, the claimant was subject to the jurisdictional authority of the Canadian federal government to impose PCB export restrictions at the border and there was no question of whether it had been “accorded treatment” within the meaning of Article 1102.<sup>546</sup> In *Suez*, the issue was the “treatment” of the claimants under the Argentina-Spain BIT, namely the fact that investors under that BIT had to bring a case before local courts in order to have recourse to international arbitration.<sup>547</sup> It is apparent that the tribunals in these cases were faced with either measures applying to an investor or a conduct toward a specific investor.

261. Resolute also cites the awards in *ADM, Corn Products* and *Cargill* in support of its approach to “treatment” but these awards are equally unhelpful to its argument. In those three arbitrations, the Claimants had made investments in Mexico, the jurisdiction that imposed the tax.<sup>548</sup> Resolute did not have, and was not seeking to make, any kind of SC paper investment in Nova Scotia. In addition, the three tribunals cited by the Claimant found that the discrimination

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<sup>543</sup> In 2013, the Claimant negotiated certain tax abatements with the municipality of Saguenay for its Kénogami mill. See Reply Memorial on Jurisdiction, ¶ 141; **R-140**, Radio-Canada, “Évaluation de l’usine Kénogami: Produits forestiers Résolu s’entend avec Saguenay” (Jan. 7, 2013).

<sup>544</sup> Claimant’s Memorial, ¶ 204.

<sup>545</sup> **CL-113**, *UPS – Award*, 24 May 2007, ¶ 85 (emphasis added).

<sup>546</sup> **RL-059**, *S.D. Myers – Partial Award*, ¶¶ 162-193, 241.

<sup>547</sup> **CL-144**, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Jurisdiction, ¶¶ 52 and 55.

<sup>548</sup> **RL-092**, *ADM – Award*, ¶ 100; **RL-091**, *Corn Products – Decision on Responsibility*, ¶ 2; **RL-050**, *Cargill – Award*, ¶ 1.

was based on nationality or that there was a protectionist intent by Mexico,<sup>549</sup> two elements that are not present in this case.

262. The Claimant has not cited a single case in which a national treatment claim was allowed when the investor or its investment was not in some way subject to the authority of the government “according treatment” or the investor did not have an investment in the relevant jurisdiction. No NAFTA tribunal has ever endorsed a notion of “treatment” that is as remote as the one suggested by the Claimant.

**b) The Treatment Allegedly Accorded to Resolute and its Investments Is Not “In Like Circumstances” to the Treatment Accorded to PWCC and PHP**

263. Even if the Tribunal were to accept the Claimant’s argument that Resolute and its investments were accorded “treatment” by the GNS, Resolute has not demonstrated that such treatment was accorded “in like circumstances” to the treatment accorded to PWCC and PHP. For this reason as well, its claim under Article 1102 must fail.

264. The Claimant alleges that Resolute and its investments are “in like circumstances” to PWCC and PHP because the GNS measures “were aimed directly at making PHP the national champion, the lowest-cost producer in North America” and Resolute’s investments were competitors that the “Nova Scotia Measures were designed to impair.”<sup>550</sup> Resolute claims that if a measure aims to discriminate in favour of a competitor in a given economic or business sector, the competitors are “in like circumstances” under Article 1102.<sup>551</sup>

265. The Claimant’s arguments with respect to the “in like circumstances,” analysis focuses on the circumstances in which the *investors and their investments* were<sup>552</sup> rather than on the circumstances in which the *treatment* was accorded. This is incorrect and contrary to the language of Article 1102.<sup>553</sup> This was recognized by the *Mercer* tribunal when asked to decide

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<sup>549</sup> **RL-092**, *ADM – Award*, ¶¶ 190, 208 and 212; **RL-091**, *Corn Products – Decision on Responsibility*, ¶¶ 137-138; **RL-050**, *Cargill – Award*, ¶ 220.

<sup>550</sup> Claimant’s Memorial, ¶ 210.

<sup>551</sup> Claimant’s Memorial, ¶ 210.

<sup>552</sup> Claimant’s Memorial, ¶ 209.

<sup>553</sup> Article 1102(1) provides that “Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” Given that language (and

whether it is the investors (or investments) or the treatment that must be “in like circumstances” and it found that it is the treatment that must be in like circumstances.<sup>554</sup> Consequently, Resolute must do more than prove that two investors (or their investments) are in like circumstances; it must prove that the treatment accorded to those investments was in like circumstances.

266. In applying the “in like circumstances” test like it does, the Claimant allows itself to focus on a single element, namely the fact that the two companies (and their investments) allegedly operate within the same economic or business sector<sup>555</sup> and it leaves important factors out of the equation. However, it is well established that this element alone is not a sufficient or determinative factor. Indeed, the *Pope & Talbot* tribunal acknowledged that being in a common business or economic sector was pertinent, but not determinative.<sup>556</sup>

267. Past NAFTA tribunals have recognized that the relevant circumstances in an Article 1102 analysis “are context-dependent.”<sup>557</sup> As such, an acceptable “like circumstances” analysis “will require consideration [...] of all the relevant circumstances in which the treatment was accorded.”<sup>558</sup> Tribunals have thus looked to a number of factors such as the circumstances that might justify government regulations that treat investors differently in order to protect the public interest,<sup>559</sup> and the regulatory framework applicable to the foreign and the domestic investor.<sup>560</sup>

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the one contained in Article 1102(1)), it is clear that it is the “treatment” that must be “in like circumstances” and not the investors (or the investments).

<sup>554</sup> **RL-122**, *Mercer - Award*, ¶¶ 7.18-7.21. In reaching this conclusion the *Mercer* tribunal cited the award in *Cargill v. Mexico* (“Thus, in both *GAMI* and *Pope & Talbot*, ‘like circumstances’ was determined by reference to the rationale for the measure that was being challenged. It was not a determination of ‘like circumstances’ in the abstract. The distinction between those affected by the measure and those who were not affected by the measure could be understood in light of the rationale for the measure and its policy objective. Indeed, it is possible that in respect of other, different measures, the mills in *GAMI* and the lumber producers in *Pope & Talbot* could have been found to be in ‘like circumstances’...”). **RL-050**, *Cargill – Award*, ¶ 206.

<sup>555</sup> As Canada explains in Part II(F), Resolute and PHP are both involved in the production of SC paper but they produce different grades.

<sup>556</sup> **RL-058**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001, (“*Pope & Talbot - Award on the Merits Phase 2*”), ¶ 78.

<sup>557</sup> **RL-058**, *Pope & Talbot - Award on the Merits Phase 2*, ¶ 75.

<sup>558</sup> **CL-113**, *UPS – Award*, ¶ 87. See also **RL-166**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia* (UNCITRAL), Award on Jurisdiction and Liability, 28 April 2011 (“*Paushok - Award*”), ¶ 475.

<sup>559</sup> **RL-059**, *S.D. Myers – Partial Award*, ¶ 250.

<sup>560</sup> **RL-019**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, 12 January 2011 (“*Grand River – Award*”), ¶ 166; **RL-054**, *Methanex – Final Award*, Part IV – Chapter B – Page 9, ¶¶



268. In particular, tribunals have repeatedly confirmed that treatment accorded under different legal and regulatory regimes cannot be compared. As noted by the tribunal in *Merrill & Ring*, “the proper comparison is between investors which are subject to the same regulatory measures under the same jurisdictional authority.”<sup>561</sup> The tribunal in *Grand River* reviewed the awards in *ADF*, *Pope & Talbot*, *Feldman*, *Methanex* and *UPS* and found that “[t]he reasoning of these cases shows the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of Article 1102.”<sup>562</sup>

269. Furthermore, the “like circumstances” element of the national treatment test requires an analysis of any public policy considerations that justify the differential treatment by showing that it bears a “reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments.”<sup>563</sup> As the tribunal in *GAMI v. Mexico* explained, even if the government is “misguided” in its perceptions or “clumsy in its analysis,” it was “a matter of policy and politics” and “ineffectiveness is not discrimination.”<sup>564</sup> Similarly, faced with respect to the arguments of the claimant in a case with respect to whether or not a Mongolian windfall profit tax law should have applied to different sectors, the *Paushok* tribunal held that it “may have been a poor instrument” but “it is not the role of the Tribunal to weigh the wisdom of

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18-19; **CL-113**, *UPS – Award*, ¶¶ 117-119; **CL-130**, *ADF- Award*, ¶ 156; **RL-058**, *Pope & Talbot - Award on the Merits Phase 2*, ¶¶ 84-88; **RL-021**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002 (“*Feldman – Award*”), ¶¶ 171-172; **RL-051**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014, ¶ 8.15, 8.42 and 8.54; **RL-092**, *ADM – Award*, ¶ 197.

<sup>561</sup> **RL-060**, *Merrill & Ring – Award*, ¶¶ 89-93.

<sup>562</sup> **RL-019**, *Grand River – Award*, ¶ 167.

<sup>563</sup> **RL-058**, *Pope & Talbot - Award on the Merits Phase 2*, ¶79. See also **RL-058**, *Pope & Talbot - Award on the Merits Phase 2*, ¶¶ 87-88; **RL-060**, *Merrill & Ring – Award*, ¶ 88; **RL-059**, *S.D. Myers – Partial Award*, ¶¶ 248, 250; **RL-167**, OECD Declaration, *National Treatment for Foreign-Controlled Enterprises*, OECD: 2005, p. 106 (“More general considerations, such as the policy objectives of adhering governments, could be taken into account to define the circumstances in which comparison between foreign-controlled and domestic enterprises is permissible inasmuch as those objectives are not contrary to the principle of National Treatment.”).

<sup>564</sup> **CL-017**, *GAMI Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004 (“*Gami – Award*”), ¶ 114 (emphasis added). See also **RL-050**, *Cargill – Award*, ¶ 206 (“Thus, in both *GAMI* and *Pope & Talbot*, ‘like circumstances’ was determined by reference to the rationale for the measure that was being challenged. It was not a determination of ‘like circumstances’ in the abstract. The distinction between those affected by the measure and those who were not affected by the measure could be understood in light of the rationale for the measure and its policy objective.”).

legislation.”<sup>565</sup>

270. In the present case, it is essential to consider the policy objectives that the GNS was pursuing in providing the financial assistance to PWCC and PHP in order to determine whether treatment was really accorded “in like circumstances.” As explained at length in the four witness statements of current and former GNS officials and discussed further in Part V below, Nova Scotia’s financial assistance to Port Hawkesbury helped achieve a number of legitimate public policy objectives that do not hide a protectionist agenda. If PWCC received financial support from the GNS, it is simply because it decided to purchase the Port Hawkesbury mill.

271. The other obvious consideration that must be taken into account when assessing if treatment was accorded “in like circumstances” is the fact that Resolute’s claim relates to its investments located outside of Nova Scotia. In contrast to how it could treat Resolute’s Bowater Mersey mill, the Claimant’s only mill that was located in Nova Scotia, the GNS could not extend the same type of treatment provided to Port Hawkesbury to Resolute’s mills in Québec.

272. Investment tribunals have found that measures resulting in a difference in treatment that is explained by non-discriminatory reasons, including underlying factual circumstances or a rational government objective – to which international law generally extends a “high measure of deference”<sup>566</sup> – will not amount to a breach of Article 1102.<sup>567</sup> In light of the fact that Resolute

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<sup>565</sup> **RL-166**, *Paushok – Award*, ¶ 316 (emphasis added). See also, **RL-166**, *Paushok – Award*, ¶ 366.

<sup>566</sup> See **RL-059**, *S.D. Myers – Partial Award*, ¶ 263 (“That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”) **RL-113**, *Electrabel – Decision*, ¶ 8.35 (“Further, the Tribunal’s task is not here to sit retrospectively in judgment upon Hungary’s discretionary exercise of a sovereign power, not made irrationally and not exercised in bad faith towards Dunamenti at the relevant time.”). **RL-122**, *Mercer – Award*, ¶ 7.42 (“The Tribunal also accepts as a general legal principle, in the absence of bad faith, that a measure of deference is owed to a State’s regulatory policies.”) **RL-058**, *Pope & Talbot – Award on the Merits Phase 2*, ¶ 79. See also **CL-017**, *GAMI – Award*, ¶ 114.

<sup>567</sup> **RL-058**, *Pope & Talbot - Award*, ¶¶ 78 (“Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.”); **CL-017**, *GAMI - Award*, ¶ 114 (“The arbitrators are satisfied that a reason exists for the measure which was not itself discriminatory. That measure was plausibly connected with a legitimate goal of policy (ensuring that the sugar industry was in the hands of solvent enterprises and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.”); **RL-050**, *Cargill - Award*, ¶ 206 (“Thus, in both *GAMI* and *Pope & Talbot*, ‘like circumstances’ was determined by reference to the rationale for the measure that was being challenged. It was not a determination of ‘like circumstances’ in the abstract.”). See also **RL-168**, *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8) Award, 11 September 2007, ¶ 371 (“The two investors must be treated differently. The difference of treatment must be due to a measure taken by the State. No policy or purpose behind the said measure must apply to the treatment that justifies the different treatments

had no SC paper mill in Nova Scotia, that the paper mill Resolute did have in that province was offered assistance to also make it a “low cost” producer,<sup>568</sup> and that the GNS was pursuing rational objectives, no breach of Article 1102 should be found.

c) **Resolute and its Investments Were Not Accorded Less Favourable Treatment**

273. In order to establish a breach of Article 1102, the Claimant is also required to show the treatment it was accorded was “less favourable” than that accorded in like circumstances to its comparators.

274. Resolute alleges that the more favourable treatment was granted through the Nova Scotia measures.<sup>569</sup> It says that none of these benefits were offered to (1) Resolute’s SC paper operations, and (2) Resolute when it was invited to bid on the Port Hawkesbury mill. It blames the fact that no other producer received equivalent treatment on the nature of the treatment accorded to PHP, namely “market intervention to make it the ‘most competitive’ producer of SC paper in North America.”<sup>570</sup>

275. The facts are far simpler: Resolute’s SC paper operations did not receive benefits from Nova Scotia because they are located outside the province. The Claimant does not even attempt to demonstrate that the treatment its SC paper operations receive from the jurisdiction where they are located is actually less favourable than the treatment the GNS accorded to PWCC and

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accorded. *A contrario*, a less favourable treatment is acceptable if a State’s legitimate objective justifies such a different treatment in relation to the specificity of the investment.”); **CL-113**, *UPS – Award*, ¶ 102 (listing the “principal factors [such as greater security, time-sensitivity, and the presence of contractual relationships] which demonstrate to the satisfaction of the Tribunal that Customs treatment of international mail is not ‘in like circumstances’ with the treatment accorded to UPS”). **RL-091**, *Corn Products – Decision on Responsibility*, ¶ 118 (the Tribunal “must be sensitive to the particular circumstances of each case [...] it is necessary to consider the entire factual and legal context”). See also **CL-117**, Andrew Newcombe and Luís Paradell, *Law and Practise of Investment Treaties: Standards of Treatment* (Kluwer Law International), pp. 151 (“Finally, national treatment obligations are not absolute. Legitimate, non-protectionist rationales may justify differential treatment.”) and p. 152 (“In contrast, in the NAFTA national treatment cases, the search for nationality-based discrimination appears as central elements of the analysis.”).

<sup>568</sup> **R-333**, Nova Scotia House of Assembly, “Standing Committee on Economic Development” (Dec. 6, 2011), p. 20; **R-330**, Global News, “Nova Scotia offers \$50-million package for Bowater Mersey paper mill” (Dec. 2, 2011); **R-211**, Hansard (Dec. 8, 2011), p. 5015; **R-212**, Hansard (Dec. 12, 2011), pp. 5219-5220 and 5222; **R-334**, Nova Scotia House of Assembly, “Standing Committee on Economic Development” (Jan. 10, 2012), p. 12.

<sup>569</sup> Claimant’s Memorial, ¶ 219.

<sup>570</sup> Claimant’s Memorial, ¶ 220.

PHP. For instance, the electricity rate that Resolute pays to Hydro-Québec<sup>571</sup> to operate its mills in Québec is lower than the rate PHP pays to NSPI.<sup>572</sup>

276. As for Resolute's complaint that it was not offered benefits when it was invited to bid for the Port Hawkesbury mill, the GNS did not offer financial assistance to any of the bidders in the CCAA process. It waited to know the identity of the bidder selected by the monitor before entering into discussions.<sup>573</sup> Therefore, PWCC and Resolute were exactly in the same situation in that regard, but PWCC decided to submit a bid [REDACTED]

[REDACTED]<sup>574</sup> Resolute was nevertheless aware of the possibility to obtain assistance from the GNS based on its experience relating to the Bowater Mersey mill [REDACTED]

[REDACTED]<sup>575</sup>

277. In its Decision on Jurisdiction and Admissibility, the Tribunal agreed with the finding of the *Merrill & Ring* tribunal to the effect "that Article 1102(3) only applies to 'the same regulatory measures under the same jurisdictional authority' and left the door open to the Claimant to establish on the merits a violation of Article 1102."<sup>576</sup> The Tribunal mentioned two instances that could constitute a breach of national treatment: (1) "protective measures taken for

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<sup>571</sup> Hydro-Québec is the government-owned public utility that manages the generation, transmission and distribution of electricity in Québec. See **R-422**, Hydro-Québec, Annual Report: Clean Energy to Power Us All (2018), pp. 68 ("Under the provisions of the *Hydro-Québec Act*, Hydro-Québec is mandated to supply power and to pursue endeavors in energy-related research and promotion, energy conversion and conservation, and any field connected with or related to power or energy. [...] As a government corporation, Hydro-Québec is exempt from paying income taxes in Canada.") and 72 ("In the normal course of business, Hydro-Québec sells electricity and enters into other business transactions with its sole shareholder, the Québec government, and its agencies, as well as with other government corporations.").

<sup>572</sup> The invoice that Hydro-Québec sent to the Dolbeau mill in May 2015 shows that the mill's effective electricity rate was merely \$46.67/MWh. See **R-367**, *Certain Softwood Lumber Products from Canada*, Case Brief of Resolute FP Canada Inc. (July 27, 2017) (Public Version), p. 46. The Rate L includes a fixed part ("demand charge", \$/MW) and a variable part ("energy price", \$/MWh). The total amount charged under the May 2015 bill was \$2.1 million (of which \$1.5 comprised the variable part), and the electricity consumption amounted to 45,000 MWh. In contrast, pursuant to the LRR pricing mechanism, the price of electricity that the Port Hawkesbury mill had to pay to the privately-owned NSPI [REDACTED]. See **C-222**, [REDACTED] at CAN000005\_0003 [REDACTED]

[REDACTED]. The Claimant conceded that PHP's electricity rate was even higher in the years 2014 and 2015 (approximately [REDACTED] and [REDACTED], respectively). Claimant's Memorial, ¶¶ 119-120.

<sup>573</sup> Montgomerie Statement, ¶ 21.

<sup>574</sup> **C-119**, Resolute [REDACTED] p. 11.

<sup>575</sup> **C-107**, [REDACTED] p. 50.

<sup>576</sup> Decision on Jurisdiction and Admissibility, para. 290. However, the Tribunal noted that whether there was a breach of Article 1102 "would depend on the circumstances, including the application of the 'like circumstances' requirement".

the benefit of local investors while effectively keeping NAFTA investors or their investments out”; and (2) “a *Methanex*-type scenario if the out-of province investor had been the specific target of a provincial campaign to cause it loss.”<sup>577</sup>

278. The Nova Scotia measures do not fall within either of these scenarios. They did not keep a NAFTA investor or its investment out. Resolute kept itself out by deciding not to bid for the Port Hawkesbury mill. There was no campaign by the GNS to target Resolute and cause loss to Resolute. The GNS actually encouraged Resolute to bid for the Port Hawkesbury mill and it provided Resolute with financial assistance so it would keep its Bowater Mersey mill in Nova Scotia open. The two situations described by the Tribunal in its Decision on Jurisdiction and Admissibility clearly does not apply here.

279. Given that this is not an instance of nationality-based discrimination and that the Claimant has not fulfilled its burden to show that it meets the three-part national treatment test, its Article 1102 claim must fail.

**V. CANADA HAS NOT VIOLATED ITS OBLIGATIONS UNDER NAFTA ARTICLE 1105 (MINIMUM STANDARD OF TREATMENT)**

**A. Article 1105(1) Requires That Canada Accord to the Investment of the Claimant the Customary International Law Minimum Standard of Treatment of Aliens**

280. NAFTA Article 1105(1) requires that:

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

281. The proper interpretation of Article 1105 was conclusively determined by the NAFTA Free Trade Commission in its 2001 Note of Interpretation (“FTC Note”).<sup>578</sup> The FTC Note provides:

(1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

(2) The concepts of “fair and equitable treatment” and “full protection and

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<sup>577</sup> Decision on Jurisdiction and Admissibility, ¶ 290.

<sup>578</sup> **RL-001**, NAFTA Free Trade Commission, “Notes of Interpretation of Certain Chapter Eleven Provisions” (July 31, 2001).

security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

(3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

282. Pursuant to NAFTA Article 1131(2), “[a]n interpretation by the [FTC] of a provision of this Agreement shall be binding on a Tribunal established under [Section B of Chapter Eleven].” NAFTA tribunals have invariably acknowledged the binding nature of the FTC Note.<sup>579</sup>

283. The FTC Note confirms that Article 1105(1) does not create an open-ended obligation but rather a minimum standard of treatment for investors as determined by the rules of customary international law.<sup>580</sup> Consistent and substantial state practice accompanied by an understanding that such practice is required by law (*opinio juris sive necessitates*) is required in order to establish a rule of customary international law.<sup>581</sup> The party alleging the existence of a rule of custom has the burden of proving it.<sup>582</sup>

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<sup>579</sup> See e.g., **CL-025**, *Glamis Gold Ltd. v. United States of America* (UNCITRAL) Award, 8 June 2009 (“*Glamis – Award*”), ¶ 599; **CL-131**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Award, 26 January 2006 (“*Thunderbird – Award*”), ¶ 192; **RL-054**, *Methanex – Final Award*, Part IV –Chapter C – pp.9-10, ¶ 20; **RL-029**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 (“*Mondev – Award*”), ¶¶ 100-101 and 120-122; **RL-057**, *Loewen – Award*, ¶ 126; **CL-016**, *Waste Management Inc. v Mexico* (ICSID Case No ARB(AF)/00/3) Award, 30 April 2004 (“*Waste Management – Award*”), ¶¶ 90-97; **RL-050**, *Cargill – Award*, ¶¶ 135, 267-268; **CL-130**, *ADF – Award*, ¶ 176; **RL-169**, *Eli Lilly and Company v. Canada* (UNCITRAL) Final Award, 16 March 2017 (“*Eli Lilly – Award*”), ¶¶ 105-106; **RL-052**, *Mesa Power Group v. Canada* (UNCITRAL) Award, 24 March 2016 (“*Mesa – Award*”), ¶¶ 478-480.

<sup>580</sup> **RL-029**, *Mondev – Award*, ¶ 120, (“The Tribunal has no difficulty in accepting that an arbitral tribunal may not apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105(1)”); **RL-050**, *Cargill– Award*, ¶ 268 (“Article 1105(1) requires no more, no less, than the minimum standard of treatment demanded by customary international law.”); **CL-026**, *Crompton (Chemtura) Corp. v. Government of Canada* (UNCITRAL) Award, 2 August 2010, ¶ 121 (“it is not disputed that the scope of Article 1105 [...] must be determined by reference to customary international law.”); **RL-170** *Mobil Investments Canada Inc. and Murphy Oil Company v. Canada*, ICSID Case No. ARB(AF)/07/04, Decision on Liability and Principles of Quantum, 22 May, 2012, ¶ 153 (“It is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law.”).

<sup>581</sup> **RL-114**, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, (“*Nicaragua v. United States*”), ¶ 207 (“For a new customary rule to be formed, not only must the acts concerned ‘amount to settled practice’, but they must be accompanied by *opinio juris sive necessitates*. Either the States taking such action or the other States in a position to react to it must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.’”).

<sup>582</sup> **RL-171**, *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, Judgment, 27 August 1952, ICJ Reports (1952) 176, p. 200, citing *Colombian-Peruvian Asylum Case*,

284. Resolute does not dispute that the FTC Note is binding on this Tribunal, nor does it dispute that Article 1105(1) requires no more than the minimum standard of treatment that exists in customary international law. However, it attempts to muddy the waters with inapposite references to the *Vienna Convention on the Law of Treaties* (“VCLT”)<sup>583</sup> and makes no reference at all in its Memorial to state practice and *opinio juris* as requisites to proving a rule of custom. Paying lip service to the legal rule in Article 1105(1) is insufficient: Resolute must establish that the measures of the GNS violate the norms of customary international law that have been created by a consistent practice of States.

### **B. The Threshold for a Violation of the Minimum Standard of Treatment Under Customary International Law is High**

285. The tribunal in *Glamis Gold* summarized the customary international law treatment under Article 1105(1) as follows:

[A] violation of customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105.<sup>584</sup>

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Judgment, 20 November 1950, ICJ Reports (1950) 266, p. 276 (“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”); **CL-130**, *ADF – Award*, ¶ 185: (“The investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that the current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.”); **RL-172**, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction, 22 November 2002 (“*UPS – Award on Jurisdiction*”), ¶ 84: (“the obligations imposed by customary international law may and do evolve. The law of state responsibility of the 1920s may well have been superseded by subsequent developments. It would be remarkable were that not so. But relevant practice and the related understandings must still be assembled in support of a claimed rule of customary international law.”)

<sup>583</sup> Claimant’s Memorial, ¶¶ 235-236. Interpreting “fair and equitable treatment” in Article 1105(1) as if it were an autonomous standard of treatment is not appropriate in the NAFTA context where the FTC firmly established that customary international law is the standard to be applied. This is now beyond debate in light of the position of the NAFTA Parties and NAFTA tribunal decisions. See e.g., **CL-025**, *Glamis – Award*, ¶ 608 (“arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom”); **RL-050**, *Cargill – Award*, ¶ 276 (“significant evidentiary weight should not be afforded to autonomous clauses as it could be assumed that such clauses were adopted precisely because they set a standard other than required by custom”).

<sup>584</sup> **CL-025**, *Glamis – Award*, ¶ 627. The tribunal in **RL-169**, *Eli Lilly – Award*, ¶ 222 endorsed this standard, as did the DR-CAFTA tribunal in **RL-028**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica* (UNCITRAL) Interim Award, 25 October 2016 (“*Spence – Award*”), ¶ 282. See also **CL-016**, *Waste*

286. As described by the *Cargill* tribunal (relied on extensively by Resolute), “[i]f the conduct of the government toward the investment amounts to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, bad faith or the willful neglect of duty, whatever the particular context the actions taken in regard to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment.”<sup>585</sup> Resolute accepts that a violation of Article 1105 requires conduct “that is egregious, arbitrary, [grossly] unfair, unjust or idiosyncratic, discriminatory or exposes a claimant to sectional prejudice.”<sup>586</sup>

287. International law also requires deference to States when they make policy decisions within their territory.<sup>587</sup> As the *Mercer* tribunal accepted, “as a general legal principle, in the absence of bad faith, that a measure of deference is owed to a State’s regulatory policies.”<sup>588</sup> Similarly, the *Mesa* tribunal remarked upon “the deference which NAFTA Chapter 11 tribunals owe a state

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*Management – Award*, ¶ 98; **RL-170** *Mobil Investments Canada Inc. and Murphy Oil Company v. Canada*, ICSID Case No. ARB(AF)/07/04, Decision on Liability and Principles of Quantum, 22 May 2012, ¶ 152; **CL-131**, *Thunderbird – Award*, ¶¶ 194 and 197.

<sup>585</sup> **RL-050**, *Cargill – Award*, ¶ 286.

<sup>586</sup> Claimant’s Memorial ¶ 241. Resolute omits the qualifier “grossly unfair” from its citation to **CL-016**, *Waste Management – Award*, ¶ 98. In light of Resolute no longer arguing that its “legitimate investment-backed expectations” were violated by the Nova Scotia measures, Canada need not address the question whether the minimum standard of treatment protects “legitimate expectations.” See Statement of Claim, ¶¶ 101-105. Resolute’s Memorial contains no submission with respect to its alleged “legitimate expectations” or any legal analysis in this regard.

<sup>587</sup> See for example, **RL-059**, *S.D. Myers – Partial Award*, ¶¶ 261-263 (explaining that “a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making” and that international law provides a “high measure of deference [...] to the right of domestic authorities to regulate matters within their own borders”); **CL-025**, *Glamis – Award*, ¶ 762 (holding that “it is not for an international tribunal to delve into the details of and justifications for domestic law.”); **CL-026**, *Crompton (Chemtura) Corp. v. Government of Canada* (UNCITRAL) Award, 2 August 2010, ¶ 123 (taking into account that “the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations.”); **RL-173**, *Gemplus, S.A., et al. v. Mexico* (ICSID Case No. ARB(AF)/04/3 and ARB(AF)/04/4) Award, 16 June 2010, ¶ 6-26: (“as to deference, the Tribunal accepts the Respondent’s submissions to the effect that this Tribunal should not exercise ‘an open ended mandate to second-guess government decision-making’, in the words of the arbitration tribunal in *S.D. Myers*. Accordingly, in assessing the Respondent’s conduct later in this Award, this Tribunal accords to the Respondent a generous measure of appreciation, applied without the benefit of hindsight.”); **RL-113**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19) Award, 25 November 2015, ¶ 181: (“It is all too easy, many years later with hindsight, to second-guess a State’s decision and its effect on one economic actor, when the State was required at the time to consider much wider interests in awkward circumstances, balancing different and competing factors.”).

<sup>588</sup> **RL-122**, *Mercer – Award*, ¶ 7.42. The tribunal further stated that “[u]nder NAFTA’s Chapter 11, this Tribunal cannot operate as a court of appeal from decisions made by BC Hydro or the BCUC, particularly on such extensive and complex technical matters calling for specialist judgment to be exercised by BC Hydro and the BCUC at the particular time.” **RL-122**, *Mercer – Award*, ¶ 7.33. See also **RL-174**, *Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) Award, 8 July 2016, ¶ 418 (“The fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal.”).



when it comes to assessing how to regulate and manage its affairs.”<sup>589</sup>

**C. Customary International Law Does Not Prohibit States from Treating Domestic Investors More Favorably than Foreign Investors with Respect to Procurement, Subsidies and Grants**

288. Customary international law does not preclude a State from treating its own investors more favorably than foreign investors. The *Grand River* tribunal noted that “neither Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments.”<sup>590</sup> The *Methanex* tribunal stated that Article 1105 “does not support the contention that the ‘minimum standard of treatment’ precludes government differentiations between nationals and aliens.”<sup>591</sup> The *Mercer* tribunal concluded that “the Claimant’s claims for ‘discriminatory treatment’ under NAFTA Article 1105(1) can add nothing to the Claimant’s claims under NAFTA Articles 1102 and 1103.”<sup>592</sup> The three NAFTA Parties have the concordant view that less favourable treatment between domestic and foreign investors is not prohibited by Article 1105(1).<sup>593</sup>

289. While the NAFTA Parties have by treaty precluded nationality-based discrimination under Article 1102, Article 1108(7)(a) and (b) specifically allows favoritism for domestic investors when it comes to procurement and “subsidies or grants [...], including government-supported loans, guarantees and insurance.”<sup>594</sup> As the *Mercer* tribunal explained, a claimant cannot avoid

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<sup>589</sup> **RL-052**, *Mesa – Award*, ¶ 553. The dissenting arbitrator, Judge Brower, seemed to agree that States are to be given a certain degree of deference in their regulatory decision making, in principle, but considered that the State was entitled to less deference than accorded by the majority on the facts of that case. See; **RL-175**, *Mesa Power Group, LLC v. Canada* (PCA Case No. 2012-17), Concurring and Dissenting Opinion of Judge Charles N. Brower, 24 March 2016, ¶ 17.

<sup>590</sup> **RL-019**, *Grand River – Award*, ¶ 209

<sup>591</sup> **RL-054**, *Methanex – Final Award*, Part IV – Chapter C – Page 7, ¶ 14 See also **CL-025**, *Glamis – Award*, fn. 1087.

<sup>592</sup> **RL-122**, *Mercer – Award*, ¶ 7.60.

<sup>593</sup> **RL-040**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3), Submission of the United States of America, 8 May 2015, ¶¶ 21-23; **RL-162**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Submission of Mexico, 8 May 2015, ¶ 20; **RL-176**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3), Government of Canada Reply to 1128 Submissions, 12 June 2015, ¶¶ 43-46.

<sup>594</sup> Similarly, the NAFTA Parties are permitted to favor domestic investors when it comes to procurement, subsidies and grants notwithstanding the obligations of most-favored nation treatment (Article 1103) and Senior Management and Boards of Directors (Article 1107). Pursuant to NAFTA Article 1108(7), “Articles 1102, 1103 and 1107 do not

these exceptions “simply by advancing the same discrimination claims as a breach of the minimum standard of treatment in NAFTA Article 1105(1).”<sup>595</sup> The *Mercer* tribunal confirmed that there is no basis to complain under Article 1105(1) that nationals were treated more favorably than a foreign investor when it comes to a procurement exercise.<sup>596</sup> The same reasoning applies with respect to subsidies and grants. Resolute has not explained how subsidies or grants provided to a domestic investor but not to a foreign investor is explicitly permitted under Article 1102 but somehow prohibited by customary international law and Article 1105(1).

290. Indeed, Resolute itself admits that subsidies and grants are commonplace in the United States and Canada.<sup>597</sup> It is axiomatic that government subsidies and grants to domestic companies are commonplace globally. Resolute has not demonstrated that substantial State practice and *opinio juris* have crystalized into a customary rule that requires equal treatment between domestic and foreign investors with respect to procurement, subsidies and grants. Resolute has not provided the Tribunal with any international legal precedent or other subsidiary source of international law that evidences such a rule exists in custom.<sup>598</sup> None of the awards Resolute points to provides support for this proposition, let alone bear any similarity to the facts of this case.

291. Instead, Resolute argues that the “customary practice among NAFTA Parties, and in market-oriented economies generally, is for companies that are not commercially viable to be allowed to fail.”<sup>599</sup> In support of this assertion, all Resolute has to rely on are photocopies of a bankruptcy yearbook with no probative value.<sup>600</sup> Resolute also claims to have “reviewed public

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apply to (a) procurement by a Party or a state enterprise; or (b) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance.”

<sup>595</sup> **RL-122**, *Mercer – Award*, ¶ 7.61.

<sup>596</sup> **RL-122**, *Mercer – Award*, ¶ 7.61.

<sup>597</sup> Claimant’s Memorial ¶ 156. Resolute itself has received the same type of financial support from the GNS for its Bowater Mersey mill in December 2011 (see **R-149**, [REDACTED] and has benefitted from government sponsored loans, grants and other subsidies from the governments of Québec and Ontario.

<sup>598</sup> As set out in Article 38(1)(d) of the Statute of the International Court of Justice, “judicial decisions and the teachings of the most highly qualified publicists of the various nations” are subsidiary means for the determination of the rules of international law. **RL-177**, Statute of the International Court of Justice.

<sup>599</sup> Claimant’s Memorial, ¶ 274.

<sup>600</sup> Even if Resolute’s assertion had any evidentiary support (it does not), its acceptance that “non-market oriented economies” (which are undefined and unspecified) do not always allow commercially unviable companies to fail

CCAA filings in search of instances where a government converted a dying business into a national champion”<sup>601</sup> according to its self-serving “criteria” and concludes that it “has not been able to find any example in public CCAA filings comparable to what was done for PHP.”<sup>602</sup> Again, there is no evidentiary value to this “analysis.”

292. In sum, in the absence of a rule in customary international law that requires equal treatment between foreign and domestic investors for procurement, subsidies and grants, the starting point for this Tribunal must be that it was perfectly consistent with Article 1105(1) for the GNS to provide subsidies and grants exclusively to PWCC for the Port Hawkesbury mill and not give anything to Resolute for its three SC paper mills in Québec. Resolute’s only hope to establish a violation of Article 1105(1) is to prove that financial assistance measures by the GNS were so “sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105.” As discussed below, nothing that the GNS did can be described as coming anywhere close to such behavior.

**D. The GNS’ Provision of Financial Assistance to Port Hawkesbury and Other Measures Are Well Within the Minimum Standard of Treatment under Customary International Law**

293. Resolute affixes various labels to the GNS’ actions, describing the financial support for Port Hawkesbury variously as “arbitrary,” “egregious,” “idiosyncratic”, “unfair”, “unjust” and “an act of sectional prejudice.”<sup>603</sup>

294. Resolute offers no explanation of how these terms are understood in international law and how they are relevant in light of the facts of this case. For example, as the International Court of Justice explained in the *ELSI* case, “[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. [...] It is a wilful disregard of due process of law,

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demonstrates there is insufficient State practice and *opinio juris* to form a rule of customary international law. C-241, Excerpts from the 2018 Bankruptcy Yearbook, Almanac & Directory (2018).

<sup>601</sup> Claimant’s Memorial ¶ 276.

<sup>602</sup> Claimant’s Memorial ¶ 277. Resolute does not provide any further details or submit any evidence with respect to its so-called “review of public CCAA filings.”

<sup>603</sup> Claimant’s Memorial, ¶¶ 249, 263, 265, 270, 272.

an act which shocks, or at least surprises, a sense of juridical propriety.”<sup>604</sup> Similarly, Resolute’s description of the “sectional prejudice” comes from the *Loewen* case in which the tribunal, faced with a denial of justice claim by a Canadian investor with respect to a Mississippi jury trial allegedly tainted by anti-foreigner and racial prejudice, observed that the courts of a State are responsible for providing a fair trial and to “ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice.”<sup>605</sup> Neither arbitrariness nor “sectional prejudice” as understood in international law are at play here.

295. Furthermore, no comparison can be made between the facts of the *Cargill* case and the actions of the GNS. In *Cargill*, the tribunal found that the import permit in that case was “put into effect by Mexico with the *express intention* of damaging Claimant’s HFCS investment to the greatest extent possible.”<sup>606</sup> The tribunal found that “the import permit was one of a series of measures expressly intended to injure United States HFCS producers and suppliers in Mexico in an effort to persuade the United States government to change its policy on sugar imports from Mexico.”<sup>607</sup> There is no evidence to suggest that the GNS acted with the express intention to damage Resolute’s investment. Indeed, Resolute conceded at the jurisdictional hearing that it was “not saying necessarily that Nova Scotia had in mind to support Port Hawkesbury because it wanted to impact Resolute as a foreign investor only. [...] We just happened to be the only foreign participant with an investment in Canada, so we qualified for protection under NAFTA.”<sup>608</sup> This admission eliminates any possibility that the minimum standard of treatment in international law was breached.

296. The crux of Resolute’s complaint is really about the alleged size of the financial assistance

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<sup>604</sup> **RL-178**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, ICJ Reports (1980) 15, Judgment, 20 July 1989, ¶ 128.

<sup>605</sup> **RL-057**, *Loewen – Award*, ¶ 123. The *Loewen* tribunal went on to say “In the United States and in other jurisdictions, advocacy which tends to create an atmosphere of hostility to a party because it appeals to sectional or local prejudice, has been consistently condemned and is a ground for holding that there has been a mistrial, at least where the conduct amounts to an irreparable injustice.” *Ibid.* The *Waste Management* tribunal, in assessing various NAFTA awards which dealt with the minimum standard of treatment under Article 1105(1), acknowledged the “sectional and racial prejudice” reference from *Loewen*. See **CL-016**, *Waste Management – Award*, ¶ 98.

<sup>606</sup> **RL-050**, *Cargill – Award*, ¶ 298.

<sup>607</sup> **RL-050**, *Cargill – Award*, ¶ 299.

<sup>608</sup> Jurisdictional Hearing Transcript (15 August 2017), pp. 350-351.

package offered to Port Hawkesbury and its “principle” that failing companies should be left to fail with no economic intervention by the government. There is no basis to this argument in international law.

**1. Resolute Cannot Complain of Unfairness When It Was Invited and Encouraged to Bid on Port Hawkesbury but Decided Not to Do So**

297. Resolute complains of the discrimination and unfairness of not having been offered any benefits and financial assistance when it was invited to bid on the Port Hawkesbury mill.<sup>609</sup> Resolute’s complaint is warranted.

298. No company was offered benefits when invited by the Monitor and Sanabe in September 2011 to bid on the mill.<sup>610</sup> But Resolute and all the others were certainly aware of the openness of the GNS to discuss possible financial support [REDACTED].<sup>611</sup> As Duff Montgomerie noted, if Resolute had decided to participate in the CCAA process, the GNS would have engaged with it in discussions about possible financial assistance.<sup>612</sup>

299. [REDACTED]<sup>613</sup>  
Resolute chose not to while 21 other companies did. [REDACTED]

[REDACTED]<sup>614</sup> [REDACTED]<sup>615</sup> [REDACTED]<sup>16</sup> [REDACTED]

<sup>609</sup> Statement of Claim, ¶ 26. *See* Claimant’s Memorial, ¶ 220 (“Resolute’s SC paper operations were offered none of these benefits, nor was Resolute when invited to bid on the shuttered Port Hawkesbury mill.”).

<sup>610</sup> Montgomerie Statement, ¶ 23.

<sup>611</sup> **C-107**, [REDACTED], p. 50; **R-361**, September 2011 Sanabe Memorandum, p. 50 [REDACTED]

<sup>612</sup> Montgomerie Statement, ¶ 24.

<sup>613</sup> Montgomerie Statement, ¶ 20; **R-360**, [REDACTED] [REDACTED], RFP0009566-9567

<sup>614</sup> **R-360**, [REDACTED]), RFP0009566.

<sup>615</sup> **C-118**, Resolute [REDACTED] p. 3.

<sup>616</sup> **C-119**, Resolute [REDACTED] p. 11.

[REDACTED] 617 [REDACTED]  
[REDACTED] 618 [REDACTED]  
[REDACTED] 619 [REDACTED]  
[REDACTED]  
[REDACTED] 620 [REDACTED]  
[REDACTED]

300. The minimum standard of treatment in customary international law does not protect foreign investors from the consequences of their own business decisions. In this case, Resolute removed itself from the CCAA sales process of its own volition and before initiating a conversation with the GNS on possible assistance. Resolute cannot complain about not having the opportunity to bid on the mill or the fairness of the CCAA process. There is no evidence of discrimination or prejudice by the GNS against Resolute, whether on the basis of its U.S. nationality or otherwise. The fact that the GNS actually encouraged Resolute to consider bidding on Port Hawkesbury and gave Bowater Mersey a substantial financial assistance package demonstrates that there was no animus against Resolute, nationality-based or otherwise, that would suggest a breach of Article 1105(1).

**2. Resolute Cannot Allege a Breach of Customary International Law When It Accepted a Financial Assistance Package from the GNS for its Bowater Mersey Mill**

301. At the heart of Resolute’s complaint is that by helping Port Hawkesbury lower its costs and operate profitably, the GNS “disregarded the rules of market competition” for reasons “not founded in competitive market principles respected by free market economies in NAFTA and the rest of the world.”<sup>621</sup>

302. Even if the underlying premise were accepted as true (and it is not), Resolute has not

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<sup>617</sup> C-118, Resolute [REDACTED], p. 3.

<sup>618</sup> C-119, Resolute [REDACTED] p. 11.

<sup>619</sup> C-119, Resolute [REDACTED] p. 11.

<sup>620</sup> R-359, [REDACTED] RFP0009571; C-118, Resolute [REDACTED], pp. 2-3; C-119, Resolute [REDACTED], pp. 5, 10.

<sup>621</sup> Claimant’s Memorial, ¶¶ 271 and 278.

explained how “disregarding the rules of market competition” is a violation of the minimum standard of treatment in customary international law. But in any event, it is disingenuous for Resolute to accuse the GNS of acting in a fashion “that is egregious, arbitrary, [grossly] unfair, unjust or idiosyncratic, discriminatory or exposes a claimant to sectional prejudice”<sup>622</sup> when it contemporaneously accepted a \$50 million financial package from the GNS (plus the potential for an additional \$40million) under similar circumstances.<sup>623</sup> Resolute’s motivations for accepting financial assistance from the GNS were no different than those of PWCC: to lower its costs and remain an economically profitable paper producer. The GNS’ motivations for offering financial assistance to Resolute were no different than they were with respect to Port Hawkesbury: to help, within reasonable limits, maintain a major employer in a rural part of the Province, which in turn would sustain the forest sector supply chain, leave electricity ratepayers better off and help promote land conservation and renewable energy goals.<sup>624</sup>

303. While Resolute ultimately decided to shut down Bowater Mersey in June 2012, that does nothing to change what motivated Resolute to accept a financial package from the GNS in the first place. Resolute’s own actions confirm that the GNS’ assistance to Port Hawkesbury was not a breach of Article 1105(1).

### **3. Nova Scotia Acted Reasonably and on the Basis of Rational and Legitimate Policy Goals**

304. Resolute argues that by helping to keep the mill open, the “GNS conduct was egregious, far beyond what might be necessary or advisable to meet domestic policy goals.”<sup>625</sup> Contrary to Resolute’s assertion, there is no doubt the GNS was acting on a rational basis and in good faith in order to fulfill genuine policy goals in the public interest.

305. It is important to recall that it was NPPH, not the GNS, that initiated CCAA proceedings in order to try and sell the Port Hawkesbury mill as a going concern to “preserve the greatest benefit and value for its creditors, employees, and other stakeholders and for the local

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<sup>622</sup> Claimant’s Memorial, ¶ 241.

<sup>623</sup> Montgomerie Statement, ¶¶ 9-12.

<sup>624</sup> Montgomerie Statement, ¶¶ 4-8, 14, 17, 22 and 29.

<sup>625</sup> Claimant’s Memorial, ¶ 279.

community as a whole.”<sup>626</sup> The bidding process was open, fair and designed to find the best owner for the mill. While there was no guarantee that a viable bid for the mill would be forthcoming and there was no guarantee that the GNS would decide to provide any financial assistance to help keep the mill open,<sup>627</sup> it was known to all potential purchasers that the GNS was willing to be [REDACTED] in providing support for the mill.<sup>628</sup> There are several reasons why the GNS did ultimately decide to provide financial assistance to PHP, all of which are reasonable and rationally connected to legitimate policy goals.

306. First, the permanent closure of the Port Hawkesbury mill would have had a serious impact on the Nova Scotia economy. Approximately 1000 people were directly employed through the mill’s operations at the time it went into creditor protection,<sup>629</sup> and given its location in a rural part of the province, if the mill closed completely, many would likely have to leave the area to find alternative employment. While PWCC’s plan to run only the SC paper machine with a smaller workforce still resulted in job losses, the alternative would have been much worse. A total shutdown of the mill would have had an immediate impact on Nova Scotia’s GDP and could have reduced Nova Scotia’s nominal GDP by [REDACTED] by [REDACTED].<sup>630</sup> Given the mill’s integral role to the supply chain, there would have been negative spin-off effects for the entire forest sector.<sup>631</sup>

307. Second, the liquidation of NPPH could have jeopardized GNS’ environmental objectives if it had resulted in the sale of the land and the transfer of its pre-existing Crown land license to a third party with no interest in conservation and responsible forest practices. Securing the purchase of land from NPPH helped to ensure the GNS would be able to meet its conservation

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<sup>626</sup> R-024, Suther Affidavit, ¶¶ 8, 89-92 and 104.

<sup>627</sup> Montgomerie Statement ¶¶ 8 and, 22 (“there was never a direction from the Premier or anyone else in the GNS that the Port Hawkesbury mill needed to be saved at any cost.”)

<sup>628</sup> C-107, [REDACTED], p. 50; R-361, September 2011 Sanabe Memorandum, p. 50.

<sup>629</sup> R-024, Suther Affidavit, ¶ 45.

<sup>630</sup> R-160, [REDACTED] p. 3. See also R-157, [REDACTED] pp. 1-4; R-148, [REDACTED]; C-158, [REDACTED]

p. 2

<sup>631</sup> Towers Statement, ¶ 18.



targets, implement its natural resources strategy and engage with the Mi'kmaq First Nations on land issues.<sup>632</sup> The FULA gave the GNS much greater control over Crown land and imposed new requirements on PHP for sustainable forestry practices, which served the GNS' natural resources strategy and renewable energy targets.<sup>633</sup> The Outreach Agreement enabled the GNS to have PHP undertake work on its behalf (e.g., environmental research, road maintenance) and sivilculture practices that furthered the Province's natural resources strategy.<sup>634</sup>

308. Third, [REDACTED]

[REDACTED]<sup>635</sup> Port Hawkesbury's SC paper machine was a unique asset in North America given its efficiency and the fact that it was relatively new,<sup>636</sup> so it is understandable that the GNS would be open to supporting its continued operation if the right owner could be found.

309. Finally, Port Hawkesbury's permanent closure would have left the Province's electricity ratepayers without the benefit of NSPI's largest customer contributing to its fixed costs. Electricity rates in Nova Scotia were already amongst the highest in Canada and the Port Hawkesbury mill going offline would have worsened the situation. While the GNS had no ability to control the outcome of the negotiations between NSPI and PWCC or direct the UARB's decision on the proposed LRR, the fact that their deal did meet the legal requirements to qualify for a LRT was a net positive outcome.

310. Nevertheless, as Duff Montgomerie states, there was never a direction from any one in the GNS that the mill must be kept open at all costs and the decision to provide financial assistance was not a foregone conclusion.<sup>637</sup> The GNS sought out expert advice and weighed all relevant

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<sup>632</sup> Towers Statement, ¶¶ 22-30; R-216, [REDACTED]

[REDACTED]; C-209, [REDACTED].

<sup>633</sup> Towers Statement, ¶¶ 31-34.

<sup>634</sup> Towers Statement, ¶¶ 38-39.

<sup>635</sup> C-163, [REDACTED], pp. 4 and 7-10; Steger Report, p. 109.

<sup>636</sup> Pöyry Report, p. 57.

<sup>637</sup> Montgomerie Statement, ¶¶ 8 and 22.

circumstances before deciding on an appropriate and reasonable level of financial support.<sup>638</sup> There is no doubt that the decision was taken in good faith and in the public interest.

**4. Resolute Exaggerates the Quantum and Nature of the Financial Assistance Provided by the GNS**

311. Resolute says that the GNS’ actions “appear to be unique in the annals of the thousands of recent bankruptcies in North America” and that “the GNS’ intervention to resurrect a company from the dead and elevate it above the living appears to be so extraordinary as to be unique.”<sup>639</sup>

312. This is hyperbole. Resolute has exaggerated both the quantum and the nature of the financial assistance in order to portray the GNS’ actions as egregious enough to breach its own interpretation of what is fair and equitable treatment.

313. Resolute has a long bullet point list of “benefits” allegedly provided by the GNS to Port Hawkesbury<sup>640</sup> that amount to approximately \$1.164 billion (or \$1.127 billion if the hot idle and FIF funding are excluded).<sup>641</sup> This is obviously not reflective of reality. In truth, [REDACTED]

[REDACTED]

[REDACTED]<sup>642</sup>

314. Under the Outreach Agreement, PHP is eligible to receive \$3.8 million per year until 2022

[REDACTED]

<sup>638</sup> Montgomerie Statement, ¶¶ 7, 10 19, 21-22, 28-30 and 33-34.

<sup>639</sup> Claimant’s Memorial, ¶¶ 275, 277.

<sup>640</sup> Claimant’s Memorial, ¶¶ 219, 253.

<sup>641</sup> Decision on Jurisdiction and Admissibility, ¶¶ 243-244, 330; Steger Report, ¶ 24(a).

<sup>642</sup> **C-182**, [REDACTED] pp. 1-4; **C-195**, [REDACTED] pp. 1-4.

<sup>643</sup> **C-190**, [REDACTED] See Part II(E)(2)(e) above.

<sup>644</sup> **C-206**, [REDACTED], p. 1 and ¶¶ 5-10 and 13-14.

[REDACTED],<sup>645</sup> [REDACTED]  
[REDACTED]  
[REDACTED]<sup>646</sup> [REDACTED]  
[REDACTED]

315. Accordingly, since 2012, and excluding funds received under the Outreach Agreement, financial assistance from the GNS to Port Hawkesbury has totalled \$64 million.<sup>647</sup> If the Outreach Agreement is included (i.e., money received since 2012 and expected until 2022) plus other minor amounts, the entire amount of GNS support for the decade 2012-2022 will be \$104.4 million (i.e., just over \$10 million per year).<sup>648</sup> This does not even take into account the various monetary and other commitments that PHP had to make to the GNS and others in return, including profit sharing, workforce training and minimum levels of pulpwood purchases from private suppliers.<sup>649</sup> Given the alternative potential [REDACTED] impact of Port Hawkesbury's permanent closure,<sup>650</sup> and taking into account all of the other forest, energy and other policy goals furthered by the GNS' financial support for the mill, Resolute's vociferous condemnations that the GNS has acted in a way that is "so extraordinary as to be unique" are clearly exaggerated.<sup>651</sup>

316. With respect to electricity, it is certainly not unusual in North America for electric utilities to offer LRTs to their largest customers, so Resolute cannot complain that this was something extraordinary.<sup>652</sup> Indeed, it was thanks to Resolute's own efforts that NSPI was granted the

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<sup>645</sup> C-206, [REDACTED] p. 1 and ¶ 10.

<sup>646</sup> R-222, [REDACTED]

<sup>647</sup> Steger Report, ¶ 106.

<sup>648</sup> Steger Report, ¶ 24.

<sup>649</sup> Steger Report, ¶¶ 24(c), 114(e).

<sup>650</sup> See e.g., R-157, [REDACTED]

R-160, [REDACTED]

<sup>651</sup> Claimant's Memorial, ¶ 277.

<sup>652</sup> R-163, NSUAR Decision (May 24, 2000), ¶¶ 9 and 36; C-138, Bowater Mersey UARB Decision, ¶ 117; C-168, Evidence of Todd Williams, pp. 14-16. Dr. Alan Rosenberg, an expert jointly retained by Resolute's Bowater Mersey and NPPH, explained that "[m]any North American jurisdictions have provisions for load retention tariffs. They are a mechanism available to the utility and to the regulator to retain load on the system that could otherwise be lost. Of course, this Board has itself already approved a Load Retention tariff." R-163, *Re NewPage Port*

ability to negotiate a reduced electricity rate with its largest customers in times of economic distress.<sup>653</sup> Furthermore, the actual savings PWCC has accrued from the LRR are far lower than what Resolute claims it had originally “demanded.”<sup>654</sup> There was no “benefit” conveyed by the GNS to PHP with respect to electricity, but even if there was, it is not close to what Resolute suggests.

317. Resolute also alleges “benefits” arising from “statutory rights to run the Biomass Plant 24/7” and “regulatory protection from environmental standards.”<sup>655</sup> Again, Resolute is incorrect. As explained in Part III(D) above and by Murray Coolican,<sup>656</sup> NSPI had economic and technical reasons to operate the biomass plant it owned and to meet the pre-existing renewable energy targets. PHP pays to NSPI almost \$4 million annually and covers the cost of fuel necessary to produce steam for the mill, so it cannot be considered a “benefit” from the GNS that was “demanded and received” by PWCC. As for the alleged “regulatory protection from environmental standards,” this is much ado about nothing. NSPI and PWCC were not exempted from environmental regulations and PWCC has never received any money from the GNS under the Agreement on Environmental Performance Commitments.<sup>657</sup>

318. As for the other points on Resolute’s list, they are of a very different character and are not “benefits” conferred by the GNS to PHP:

- The \$20 million land purchase was a fair market value transaction between the GNS and PHP. There was no “benefit” bestowed on PHP when it had to give up a valuable tangible asset in consideration for money;
- [REDACTED]

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*Hawkesbury Corporation*, Direct Evidence and Exhibits of Dr. Alan Rosenberg, M04175 NPB-3 (Jun. 22, 2011), p. 3.

<sup>653</sup> Coolican Statement, ¶¶ 7-10.

<sup>654</sup> Steger Report, ¶ 100.

<sup>655</sup> Claimant’s Memorial, ¶ 253.

<sup>656</sup> Coolican Statement, ¶¶ 32-45.

<sup>657</sup> **C-210**, Agreement on Environmental Performance Commitments to the Province of Nova Scotia (Sep. 28, 2012); Coolican Statement, ¶¶ 25-31.

[REDACTED] .<sup>658</sup>

Accordingly, there was no “benefit” bestowed by the GNS on PHP. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] .<sup>659</sup>

- The FULA was not a benefit “demanded and received” by PWCC but was something the GNS wanted in order to rebalance the rights in favour of the Province compared to the outdated license under the *Stora Act*.<sup>660</sup> There is no “benefit” bestowed on PWCC – by a forest use license designed to accomplish Nova Scotia’s forest conservation policy goals and put reasonable restrictions on how PHP can harvest timber on Crown land. Silviculture payments are the same as they would be for timber harvested on Crown land by any licensee for GNS-approved silviculture conducted by that licensee on the Crown land, with the exception that silviculture reimbursement to PHP was otherwise capped pursuant to the terms of the FULA;
- [REDACTED]  
[REDACTED] .<sup>661</sup> and
- Resolute has not pled with specificity in relation to “pension liability relief” from the GNS, so this alleged “benefit” can be disregarded.<sup>662</sup>

319. The reasonableness of the financial assistance for Port Hawkesbury can also be viewed in light of what Resolute itself accepted from the GNS. Even though the market prospects were bleaker for newsprint than for SC paper, and even though Bowater Mersey was a smaller

<sup>658</sup> **R-365**, *Income Tax Act*, RSC 1985, c.1 (5<sup>th</sup> Supp.), s. 111; Chow Statement ¶ 16.

<sup>659</sup> **C-195**, [REDACTED], pp. 5-6.

<sup>660</sup> Towers Statement ¶¶ 32-34; **R-192**, FULA, ss. 3.1(a), 4.1, 5.1, 9.1, 10.1, 14.1 and 15.1.

<sup>661</sup> [REDACTED] See **C-136**, [REDACTED] **C-238**, p. CAN000015\_0011.

<sup>662</sup> At ¶ 49 of its Memorial, Resolute inappropriately characterizes the statement of Natural Resources Minister Charlie Parker in a newspaper article as evidence that the “GNS would provide the [pension liability] assistance PWCC requested.” This is an inaccurate reflection of what the article is reporting. See **C-148** “Pacific West now lone bidder for idled NewPage paper mill in Cape Breton” (Jan. 4, 2012).

operation than Port Hawkesbury,<sup>663</sup> the GNS still agreed to give Resolute a \$50 million financial assistance package intended to make it a low-cost operation and keep the mill open for at least five years.<sup>664</sup> Resolute's agreement with the GNS also had the potential for an additional \$40 million<sup>665</sup> that Resolute could have used for its mill operations. Resolute cannot allege that the GNS acted extraordinarily vis-à-vis Port Hawkesbury when it accepted comparable financial assistance to accomplish the same thing as PWCC: lower its cost structure and remain a viable economic enterprise.

320. In sum, the quantum and nature of the financial assistance provided by the GNS to the Port Hawkesbury mill is not extraordinary or out of proportion to what was a legitimate and reasonable policy interest the GNS had in having the mill continue to operate.

### **5. Resolute Exaggerates the Impact of Port Hawkesbury's Reopening on its Québec Mills**

321. To amplify its claim of unfair behaviour by the GNS, Resolute exaggerates the impact Port Hawkesbury's reopening on its Québec mills by saying it has suffered US\$163 million in damages. Canada refutes the specifics of this inflated damages claim in Part VI below, but it is important to note that in reality, the actual impact of Port Hawkesbury's reopening was not nearly as dramatic as Resolute alleges.

322. As explained by Peter Steger and Pöyry in their expert reports, there may have been a short-term price impact (which the Claimant has yet to prove, but which Canada has never denied)<sup>666</sup> due to perceptions of Port Hawkesbury coming back online after one year. However, it did not take long for the market to adjust and absorb Port Hawkesbury's production, which was composed of paper grades that Resolute did not, and still cannot, produce.

323. Having dropped its original argument that PHP engaged in "predatory pricing" enabled by

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<sup>663</sup> 452 people were directly employed through Resolute's Bowater Mersey operation (**R-144**, *NewPage Port Hawkesbury Corporation (Re)*, Redacted Bowater Mersey Responses to Information Requests from the Avon Group, M04175 NPB-14 (August 2, 2011), p. 17) while NPPH's operations directly employed approximately 1,000 people. **R-024**, Suther Affidavit, ¶ 45.

<sup>664</sup> **R-149**, [REDACTED] pp. 1-2.

<sup>665</sup> **R-149**, [REDACTED] p. 5 (option for GNS to purchase an additional 50,000 acres of land at \$800 per acre).

<sup>666</sup> *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Memorial on Jurisdiction, 22 December 2016, ¶¶ 62-66.

the GNS against Resolute,<sup>667</sup> the Claimant also conceded that the closure of its paper machine #10 at the Laurentide mill was unrelated to Port Hawkesbury’s reopening but was actually as a result of Resolute reopening its Dolbeau mill in October 2012.<sup>668</sup> Resolute claims damages for the time it was operating paper machine #11 at Laurentide until November 2014, but makes no mention of the fact that by reopening Dolbeau, Resolute cannibalized its own SCB/SNC paper production from Laurentide.<sup>669</sup> Resolute also omits to mention that its costs at the Laurentide and Kénogami mills were high for reasons entirely out of the control of the GNS (and PHP).<sup>670</sup>

324. In other words, Resolute cannot argue that the impact on its investment was disproportionate given its own limitations and business decisions which were unrelated to the GNS. But in any event, if governments refrained from acting in the public interest for legitimate and reasonable policy objectives every time there was a financial impact on investors in the market, they would never be able to act at all. There may be reasonable differences of opinion on what are preferable policy strategies and outcomes, but unless a State breaches its obligation to accord fair and equitable treatment by acting in a fashion that is “sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, a complete lack of due process, evident discrimination, or a manifest lack of reasons,” then there is no violation of the minimum standard of treatment under customary international law.<sup>671</sup> Nothing in the actions of the GNS or the outcomes implicate NAFTA Article 1105(1).

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<sup>667</sup> Statement of Claim, ¶¶ 55 and 96.

<sup>668</sup> *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Counter-Memorial on Jurisdiction, 22 February 2017 (“Counter-Memorial on Jurisdiction”), ¶¶ 42-51; *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Reply Memorial on Jurisdiction, 3 May 2017 (“Rejoinder Memorial on Jurisdiction”), ¶¶ 64, 66-83.

<sup>669</sup> Pöyry Report, ¶ 15.

<sup>670</sup> Steger Report, ¶ 19, Schedule 12K, 12L.

<sup>671</sup> **CL-025**, *Glamis – Award*, ¶ 627. The tribunal in **RL-169**, *Eli Lilly – Award*, ¶ 222 endorsed this standard, as did the DR-CAFTA tribunal in **RL-028**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica* (UNCITRAL) Interim Award, 25 October 2016 (“*Spence – Award*”), ¶ 282. See also **CL-016**, *Waste Management – Award*, ¶ 98; **RL-170** *Mobil Investments Canada Inc. and Murphy Oil Company v. Canada*, ICSID Case No. ARB(AF)/07/04, Decision on Liability and Principles of Quantum, May 22, 2012, ¶ 152; **CL-131**, *Thunderbird – Award*, ¶ 194 and 197.

**VI. THE CLAIMANT IS NOT ENTITLED TO THE DAMAGES IT SEEKS FOR THE ALLEGED VIOLATIONS OF NAFTA CHAPTER ELEVEN**

**A. Overview**

325. For Resolute to be entitled to damages pursuant to NAFTA Articles 1116 and 1117, it must prove three things: (1) that a measure of Canada breached an obligation in Part A of NAFTA Chapter Eleven, (2) that the breach was the proximate cause of the Claimant's losses, and (3) that the Claimant's means of quantifying those losses is reasonable, rational and not speculative. Proof of proximate cause requires persuasive evidence that the breach caused the damage, and that the damage did not arise from other causes and is not too remote. A rational method of quantification is one that sets out to measure the right amount and is reliable in doing so. It cannot be speculative or influenced by causes other than the breach. Canada maintains that Resolute has failed to prove a breach of Article 1102 and 1105, but even if the Tribunal finds in favour of the Claimant on the merits, Resolute has failed to prove that it is entitled to the damages it seeks.

326. Despite having abandoned two of its original claims from its Notice of Arbitration,<sup>672</sup> Resolute's demand for damages has increased from US\$70 to US\$163,695,000 million.<sup>673</sup> This amount includes a 5-year past losses period, during which Resolute actually posted its largest annual profits in the past decade (in contrast to the C\$4.4 million in net losses that it incurred in 2012 when PHP was not operating),<sup>674</sup> plus 11 years of future reduced profits (i.e., until 2028) due to continuing price erosion allegedly caused by Port Hawkesbury's reopening in October 2012. The Claimant submits that "but for all the Measures taken together, PHP never would have re-entered the market and Resolute would not have been damaged."<sup>675</sup>

327. Resolute's proof of causation rests on Dr. Kaplan's application of overly simplistic economic principles. He argues from the basis of theory, that the "addition of [360,000 MT of SC paper] supply [by PHP] was not due to, or met with, a significant increase in demand,"<sup>676</sup>

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<sup>672</sup> Claimant's Memorial, ¶¶ 14, 152

<sup>673</sup> Claimant's Memorial, ¶ 310.

<sup>674</sup> Steger Report, ¶ 17.

<sup>675</sup> Claimant's Memorial, ¶ 308.

<sup>676</sup> Kaplan Report, ¶ 50.



thus there was a “substantial price decrease” in January 2013.<sup>677</sup> As explained by Pöyry and described further below, both of Dr. Kaplan’s premises are factually misplaced. PHP’s actual supply has not been 360,000 MT but something closer to 300,000 MT,<sup>678</sup> and in 2013, it coincided with a massive spike in demand for SC paper of between 14-17.9%.<sup>679</sup> Dr. Kaplan does not just overlook this unexpected anomaly within the normal path of secular decline in SC paper demand, he states that there was no increase in demand. Furthermore, the “substantial” January 2013 price decrease that Dr. Kaplan cites reversed itself in July 2013 with just as substantial an increase, providing compelling evidence of a strong market.<sup>680</sup> As Pöyry points out in its expert report, Dr. Kaplan and Dr. Hausman are not following the assumption in economics of *ceteris paribus* (all other things being equal) to make sure that all of the market shocks unrelated to PHP’s re-entry are held constant and do not interfere with the market effect that they profess to assess and quantify.<sup>681</sup> In the face of the market events mentioned above and other actual market influences (i.e., GDP, foreign exchange rates, other supply changes, imports, grade substitution), Resolute’s theory that 100 percent of the blame for price erosion between 2013 and 2028 was and will continue to be caused by PHP’s re-opening is not credible.

328. Disregarding what it argued previously about the hazards of relying on speculative “market prognostications,” Resolute now asks the Tribunal to rely on an October 2011 RISI 5-year price forecast as the basis of its lost profits damages claim. Resolute’s method of quantification is unreliable and provides none of the reasonable certainty necessary for the Tribunal to award the damages claimed.

**B. The Claimant Bears the Burden of Showing that the Identified NAFTA Breach Factually and Legally Caused its Injury**

**1. The Standard of Compensation under NAFTA Chapter Eleven (“by Reason of or Arising out of the Breach”) in Articles 1116 and 1117 Requires Proof of Proximate Causation**

329. Articles 1116(1) and 1117(1) require that Resolute establish that it “has incurred loss or

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<sup>677</sup> Kaplan Report, ¶ 48.

<sup>678</sup> Steger Report, ¶ 116.

<sup>679</sup> Steger Report, ¶ 46.

<sup>680</sup> Steger Report, ¶ 47.

<sup>681</sup> Pöyry Report, ¶¶ 102, 112.

damage, by reason of, or arising out of” a breach of NAFTA.<sup>682</sup> Applying the general rule of treaty interpretation,<sup>683</sup> the ordinary meaning of these terms in their context requires a “sufficient causal link”<sup>684</sup> or an “adequate[] connect[ion]”<sup>685</sup> between the alleged breach of NAFTA and the loss sustained by the investor. This reflects the recognized idea of a close and direct causal link: the customary international law standard of proximate causation.<sup>686</sup>

330. The burden of proof is on the Claimant to prove the existence of such a causal link or connection.<sup>687</sup> As the *S.D. Myers* tribunal explained, “compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached; the economic losses claimed by [the investor] must be proved to be those that have arisen from a breach of the NAFTA, and not from other causes.”<sup>688</sup> In *UPS*, the tribunal explained that “a claimant must show...that it has persuasive evidence of damage from the

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<sup>682</sup> NAFTA Article 1116(1) (emphasis added).

<sup>683</sup> **RL-086**, United Nations, *Vienna Convention on the Law of Treaties* (May 23, 1969) (“Vienna Convention”), Art. 31(1).

<sup>684</sup> **RL-179**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Second Partial Award, 21 October 2002, (“*S.D. Myers – Second Partial Award*”), ¶ 140. See also, **RL-180**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008 (“*Biwater Gauff – Award*”), ¶ 779: (“Compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by [the Enterprise].”)

<sup>685</sup> **RL-021**, *Feldman – Award*, ¶ 194.

<sup>686</sup> **CL-145**, Draft articles on State Responsibility, 2001, Article 31, Commentary 10; The terms of Articles 1116(1) and 1117(1) are similar to those used in other treaties that have been interpreted to require proximate causation. See **RL-153**, *Methanex – Amended Statement of Defence*, ¶ 219.

<sup>687</sup> UNCITRAL Arbitration Rules (2010), Article 27(1). See also **RL-181**, M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer Law International, 1996), p. 222: (“As a general principle, however, it is necessary for the party who alleges a fact to prove the truth of its claim, if not accepted by the other party, before the authority which is charged with the duty to adjudicate the dispute. This rule is so well-founded in municipal law that it could easily be concluded to be a generally accepted principle of municipal law which, in accordance with Article 38 of the Statute of the International Court of Justice, is a source of international law.”); **RL-182**, M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International, 2008), pp. 105-106: (“The injured claimant, therefore, has the burden of demonstrating that the claimed quantum flowed from that conduct. Shelves of books and papers contain discussions of the fundamental role the principle of ‘causation’ plays in determining both liability and compensation. While this volume is not the place to repeat those detailed analyses, we cannot overemphasize the crucial role causation performs in valuation issues. The claimant must satisfy the tribunal that the causal relationship is sufficiently close (i.e., not ‘too remote’) to satisfy the applicable standard of causation.”)

<sup>688</sup> **RL-059**, *S.D. Myers – Partial Award*, ¶ 316; see also *Pope & Talbot*, in which the tribunal held that an investor bringing a claim under Article 1116 bears the burden to “prove that loss or damage was caused to its interest, and that it was causally connected to the breach complained of.” **CL-135**, *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL) Award in Respect of Damages, 31 May 2002, ¶ 80.

actions alleged to constitute breaches of NAFTA obligations.”<sup>689</sup>

## 2. The Injury Must Be Directly Caused by the Measure that Breaches NAFTA

331. The interpretation of Articles 1116 and 1117 set out above is consistent with the general rule of international law that requires a claimant to prove not only that a breach has occurred, but that the specific breach caused its damage. As the Permanent Court of International Justice explained in the *Factory at Chorzów* case, “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>690</sup> This customary rule is reflected and explained in ILC Article 31 in that a State that has committed a wrongful act must make “full reparation,” but only for “any damage...caused by the internationally wrongful act.”<sup>691</sup>

332. The Commentary to ILC Article 31, explains that “[i]t is only ‘[i]njury ... caused by the internationally wrongful act of a State’ for which full reparation must be made.” In other words, “the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.”<sup>692</sup> As the tribunal in *Pey Casado* explained, the operation of the rule “depends on injury, and that injury in turn depends on causation. [...] The injury in question must be caused by that specific breach. Causation is of the essence.”<sup>693</sup>

333. The *Bewater* tribunal similarly explained that “‘causing injury’ must mean more than simply the wrongful act itself (e.g., an expropriation, or unfair or inequitable treatment), otherwise the element of causation would have to be taken as present in every case, rather than

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<sup>689</sup> **CL-113**, *UPS – Award*, ¶ 38.

<sup>690</sup> **RL-183**, *Case Concerning the Factory at Chorzów (Germany v. Poland)* Judgment, 1928 P.C.I.J. (ser. A) No. 17, 13 September 1928, p. 47, ¶ 125.

<sup>691</sup> **RL-032**, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, Text adopted by the International Law Commission at its fifty-third session, in 2001, (A/56/10), United Nations, New York 2001 (“Commentary on the ILC Articles”), Art. 31. See **RL-184**, T.W. Walde & B. Sabahi, *Compensation, Damages, and Valuation in The Oxford Handbook of International Investment Law* (OUP 2008), p. 1057: (The commission of an internationally wrongful act entails the obligation to put the victim back into the position it would “have – in theory – [been in] had the unlawful act not occurred.”)

<sup>692</sup> **RL-032**, Commentary on the ILC Articles, Article 31, Commentary (9).

<sup>693</sup> **RL-185**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No ARB/98/2), (*Casado – Award*), ¶¶ 204, 218; See also **RL-179**, *S.D. Myers – Second Partial Award*, ¶ 173, which provided that with respect to the injury caused by the breach, what must be proven is both the existence of an injury to the claimant and that that particular injury is the sufficiently proximate consequence of the specific breach

being a separate enquiry.”<sup>694</sup> In the words of that tribunal, “[w]hether or not each wrongful act by [the Respondent] ‘caused injury’ such as to ground a claim for compensation must be analysed in terms of each specific ‘injury’ for which [the claimant] has in fact claimed damages.”<sup>695</sup>

334. In sum, causation in international law “comprises a number of different elements, including (inter alia) (a) a sufficient link between the wrongful act and the damage in question, and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote.”<sup>696</sup> The Commentary to ILC Article 31 similarly explains that “causality in fact is a necessary but not a sufficient condition of reparation. [...] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in Article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.”<sup>697</sup>

335. Thus, even where it can be established that an identified breach was a “but for” cause in the chain of causation, recovery of the damages sought is not permitted unless the claimant can prove that “the wrongful conduct was a sufficient, proximate, adequate, foreseeable, or direct cause of the injury.”<sup>698</sup>

### 3. Quantification of the Injury Must Be Appropriate and Rational

336. Once a claimant has identified the breach, and shown that the injury was a proximate cause of the breach, the third step is to determine the appropriate compensation for that injury.<sup>699</sup> According to the *Rompetrol* tribunal, “[t]he test is: what does the method set out to measure, and

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<sup>694</sup> **RL-180**, *Biwater Gauff – Award*, ¶ 803.

<sup>695</sup> **RL-180**, *Biwater Gauff – Award*, ¶ 804; See also **RL-186**, *Nordzucker AG v. The Republic of Poland* (UNCITRAL) Third Partial and Final Award, 23 November 2009, ¶ 47 (“*Nordzucker – Final Award*”).

<sup>696</sup> **RL-180**, *Biwater Gauff - Award*, ¶ 785; **RL-187**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award, 18 August 2008, ¶ 468; **RL-179**, *S.D. Myers – Second Partial Award*, ¶ 140 (“the harm must not be too remote, or [...] the breach of the specific NAFTA provision must be the proximate cause of the harm.”)

<sup>697</sup> **RL-032**, Commentary on the ILC Articles, Article 31, Commentary (10) (emphasis added) (citations omitted).

<sup>698</sup> **RL-188**, RS. Ripinsky, *Damages in International Investment Law* (London, British Institute of International and Comparative Law: 2008) (“*Ripinsky*”) (emphasis in original), p. 135. See also **RL-189**, T. Weiler & L.M. Diaz, *Causation and Damages in NAFTA Investor-State Arbitration in NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*, (T. Weiler, ed.) (Transnational Publisher: 2004), pp. 194-195.

<sup>699</sup> **RL-185**, *Casado – Award*, ¶ 217.

does it do so with sufficient accuracy and reliability?”<sup>700</sup>

337. Any future lost profits claim, including a claim for price erosion like the one put forward by Resolute, can present special challenges.<sup>701</sup> Tribunals have naturally shown an unwillingness to allow damages with respect to prospective gains that are highly conjectural or, “too remote or speculative,”<sup>702</sup> or to “provide compensation for claims with inherently speculative elements.”<sup>703</sup> As the tribunal in *S.D. Myers* noted, a claimant must establish that the sums in question are “neither speculative nor too remote” and a tribunal should approach the task “both realistically and rationally.”<sup>704</sup>

338. As with the proof of a breach and legal causation, the burden of proof rests on the Claimant to prove the quantum of its lost profits or future damages.

### **C. The Claimant Has Failed to Meet its Burden of Proving that the Identified Breach Caused its Alleged Loss of Profits**

#### **1. A Market Impact of PHP’s Re-Entry does not Establish Causation of Resolute’s Alleged Damage**

339. The Claimant alleges that “but for all the Measures taken together, PHP never would have re-entered the market and Resolute would not have been damaged.”<sup>705</sup> The Claimant goes on to argue that the re-entry of PHP was “designed” to flood the market with additional volume of SC paper causing prices to fall within the market in which it was competing.<sup>706</sup> It relies on Dr. Kaplan’s alleged application of economic theory to “prove” that it would have expected higher prices and on Dr. Hausman to quantify that alleged harm based on forecasted prices by RISI.

340. Dr. Kaplan submits that the re-entry of the PH mill introduced 360,000 MT of SCP

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<sup>700</sup> **RL-190**, *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award, 6 May 2013 (“*Rompetrol – Award*”), ¶ 287.

<sup>701</sup> **RL-191**, Patrick W. Persall and J. Benton Heath, *Causation and Injury in Investor-State Arbitration*, in Christina L. Beharry, *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*, 2018.

<sup>702</sup> **RL-192**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Award, 25 July 2007, ¶ 51.

<sup>703</sup> **RL-032**, Commentary on the ILC Articles, Art 36(27), pp. 259-260.

<sup>704</sup> **RL-179**, *S.D. Myers – Second Partial Award*, ¶ 173.

<sup>705</sup> Claimant’s Memorial, ¶ 308.

<sup>706</sup> Claimant’s Memorial, ¶ 308.

capacity to a declining market with moderately elastic demand [which was] “not due to, or met with, a significant increase in demand, thus, prices for SCP fell.”<sup>707</sup> He opines that the GNS “benefits package” caused PHP to re-enter the market and that the “increase in SCP supply from PHP depressed SCP prices below the levels that would have otherwise occurred.”<sup>708</sup> Dr. Kaplan then concludes that “‘but for’ the increased SC paper supply from PHP, Resolute’s operations would have experienced higher prices, and enjoyed a concomitant increase in profits.”<sup>709</sup>

341. Dr. Hausman calculates the profits the Claimant’s investments would have expected to receive without PHP in the market and subtracts the profits they actually received.<sup>710</sup> He describes his damages calculations as “conservative” because his analysis “only includes the price effects” and “does not include PHP’s negative effects on Resolute’s quantities via lowered shipments and market related downtime at its three mills.”<sup>711</sup>

342. Resolute submits that the line between the measures in breach of NAFTA and the damage they caused is straight,<sup>712</sup> but in reality, that line is imaginary. Rather than demonstrating that the injury results from, and is ascribable to, a wrongful act,<sup>713</sup> the Claimant simply alleges a market impact of PHP’s re-entry and asks the Tribunal to assume that this single market impact caused all of Resolute’s reduced profits through to 2028. As Pöyry explains, “Dr. Kaplan’s expert witness report does not attempt to assess whether three of Resolute’s Canadian mills were damaged by the re-start of the Port Hawkesbury PM2 starting in 2013. Instead, it assumes they were damaged based on a purely theoretical framework of basic economics and a shallow understanding of the paper market.”<sup>714</sup> Resolute’s case on causation ignores all other market shocks that could have affected prices, including the actual supply and demand in the market as well as actual competition.<sup>715</sup> It points to the market impact of the re-entry of PHP and uses

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<sup>707</sup> Kaplan Report, ¶ 50.

<sup>708</sup> Kaplan Report, ¶ 17.

<sup>709</sup> Kaplan Report, ¶¶ 50-51.

<sup>710</sup> Expert Witness Report of Jerry Hausman, Ph.D. (December 28, 2018) (“Hausman Report II”), ¶ 44.

<sup>711</sup> Hausman Report II, ¶ 22.

<sup>712</sup> Claimant’s Memorial, ¶ 308.

<sup>713</sup> **RL-032**, Commentary on the ILC Articles, Art. 31, Commentary (9).

<sup>714</sup> Pöyry Report, ¶ 86; Kaplan Report, Figure 3, ¶ 47.

<sup>715</sup> Pöyry Report, ¶ 119.

theory to assess what might normally happen rather than real evidence to assess the impact that actually occurred.<sup>716</sup> Yet, as the Claimant itself argued during the jurisdictional phase, “[a]n impact on the market does not guarantee that Resolute will ever incur losses or damages.”<sup>717</sup>

343. Although Resolute has persistently alleged that it lost customers and market share to PHP<sup>718</sup> and suffered from PHP’s “predatory pricing,”<sup>719</sup> it does not provide any evidence to this effect. Instead, its damages case is based exclusively on alleged lost profits due to price erosion, and accordingly this is where its burden to show causation lies. However, the measuring stick Resolute uses to assess what Dr. Kaplan terms “the SCP prices... that would have otherwise occurred”<sup>720</sup> is an October 2011 RISI 5-year price forecast. In other words, despite the Tribunal having found in its Decision on Jurisdiction and Admissibility that “market predictions are no substitute for evidence of sales volumes and prices,”<sup>721</sup> and despite Resolute’s own critique of “soothsayers” and “gurus” who try to predict market prices,<sup>722</sup> the Claimant now bases its entire damages model on just such a market prognostication.

344. Without the RISI price forecast, Dr. Kaplan has no proof of price erosion beyond a theoretical explanation of what would normally occur in the market and a price graph showing that a \$45 drop in prices did occur in January 2013.<sup>723</sup> However, as Pöyry submits, “[s]imple graphical examination of supply and price interrelationships leads to erroneous interpretation of causal relationships” since a multitude of factors affect prices.”<sup>724</sup> For instance, Peter Steger in his report points to Dr. Kaplan’s failure to consider secular reductions in SC demand, grade

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<sup>716</sup> Pöyry Report, ¶¶ 51, 67 and 83.

<sup>717</sup> *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Rejoinder Memorial on Jurisdiction, 3 May 2017 (“Rejoinder Memorial on Jurisdiction”), ¶ 83.

<sup>718</sup> Statement of Claim, ¶ 48; Counter-Memorial on Jurisdiction, ¶ 152; *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Bifurcation Hearing Transcript, 7 November 2016 (“Bifurcation Hearing Transcript”), p.59:4-25; Claimant’s Memorial, ¶¶ 10, 134; Hausman Report II, ¶ 22.

<sup>719</sup> Counter-Memorial on Jurisdiction, ¶ 155; *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Rejoinder Memorial on Jurisdiction, 3 May 2017 (“Rejoinder Memorial on Jurisdiction”), ¶ 123; Jurisdictional Hearing Transcript, p. 4:23-25, p. 18:6-21, p. 19:1-4, p. 19:23-25 p. 25:7-12, p. 27:23-25, p. 103:4-7, and p. 104:14-25.

<sup>720</sup> Kaplan Report, ¶ 17; **R-257**, [REDACTED] p. 10.

<sup>721</sup> Decision on Jurisdiction and Admissibility, ¶173.

<sup>722</sup> Jurisdictional Hearing Transcript, p. 269:13-14.

<sup>723</sup> Kaplan Report, ¶ 48.

<sup>724</sup> Pöyry Report, ¶ 100.

substitution between CM and SCA+ grades and between SNC and improved newsprint, as well as Resolute's re-opening of paper machine 5 at the Dolbeau Mill in October 2012, its decision to close the Laurentide mill and its decision to sell its Catawba mill in the United States.<sup>725</sup> Pöyry also points to the weakening business cycle and economy, the exchange rate, the cost of wood and power, the rapid expansion in demand for SC paper in 2013 and future pricing, all of which point to the conclusion that it "is highly likely that there were other intervening factors both on the demand and supply side that have contributed to the changes in SC paper price."<sup>726</sup>

345. Furthermore, the January 2013 price drop was followed by a \$44 price increase in July 2013. The reason why prices took six months to spring back up is explained by the 6-month contracts that sellers typically conclude: when prices were negotiated (likely in mid-November 2012), sellers dropped their prices in expectation of what would happen with a Port Hawkesbury restart.<sup>727</sup> But sellers did not predict the surge in demand and other market developments that would affect both supply and demand after PHP's re-entry, so their expectations based on simple economic principles proved incorrect. Dr. Kaplan's attempt to prove causation fails for the same reason.

#### **D. Dr. Kaplan Ignores Market Developments in Demand for SC Paper**

346. Resolute's causation arguments rest on the assertion that the "addition of [360,000 MT of SC paper] supply [by PHP] was not due to, or met with, a significant increase in demand, thus, prices for SCP fell."<sup>728</sup> Dr. Kaplan's approach assumes 100 percent of the blame for price erosion rests on 360,000 MT of supply brought by the re-entry of PHP, but Pöyry uses an evidentiary-based approach that takes into account the high likelihood that many intervening factors, both on the demand and supply sides, contributed to the changes in SC paper price.<sup>729</sup>

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<sup>725</sup> Steger Report, ¶ 26.

<sup>726</sup> Pöyry Report, ¶¶ 100, 103.

<sup>727</sup> Pöyry Report, ¶ 83.

<sup>728</sup> Kaplan Report, ¶ 17.

<sup>729</sup> Kaplan Report, ¶ 50; Pöyry Report ¶¶ 69-80.



**1. Resolute Relies on Indirect Price Erosion Because its Lower Quality Paper Competes with Producers other than PHP**

347. The Claimant’s case for causation rests on two key assumptions with respect to paper substitutability, one stated and one not: (1) SC paper products (SNC, SCB, SCA and SCA+ grades) are “highly substitutable and sold primarily on the basis of price,”<sup>730</sup> and (2) there is no substitutability between SC paper and non-SC paper. Resolute asserts that “any increase in the supply of [Port Hawkesbury’s] SC paper will negatively affect the price of all SC paper sold in the North American market.”<sup>731</sup> But this ignores the reality that PHP and Resolute compete much less with one another than they do with other paper producers. While PHP’s high quality SCA+ grades compete with coated mechanical paper producers, Resolute’s comparatively low-quality SCB/SNC paper competes with standard grades of uncoated mechanical paper such as high bright news.

348. In Pöyry’s expert opinion, Dr. Kaplan’s first premise is problematic because “quality is very important, and the quality gap between Resolute’s and PHP SC-paper grades is evident.”<sup>732</sup> Dr. Kaplan lumps all SC grades together and, in doing so, discounts the importance of quality differentiation as a competitive attribute. As Pöyry explains, it is not realistic to say that one grade would be substituted for the other “on the basis of price” alone, and much more realistic to conclude that “the lower priced product seldom gains the order if the customer prefers better quality.”<sup>733</sup> Resolute has [REDACTED]

[REDACTED] <sup>734</sup>

349. Dr. Kaplan’s second premise is equally problematic because it fails to recognize that Port Hawkesbury’s main product (SC-A+ grades) competes primarily with Irving paper, European imports and producers of coated mechanical #5 and #4 paper.<sup>735</sup> [REDACTED]

<sup>730</sup> Kaplan Report, ¶ 37; Hausman Report II, ¶ 24.

<sup>731</sup> Claimant’s Memorial, ¶ 202; Kaplan Report, ¶ 37.

<sup>732</sup> Pöyry Report, ¶ 87.

<sup>733</sup> Pöyry Report, ¶ 87.

<sup>734</sup> R-237, [REDACTED] RFP009490.

<sup>735</sup> See Part II(F)(1)-(2); Pöyry Report, ¶ 22, Figure 2-1.

[REDACTED] 736 [REDACTED]  
[REDACTED]  
[REDACTED] 737

350. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] 739 [REDACTED]  
[REDACTED]  
[REDACTED] 740 [REDACTED]  
[REDACTED] 41 [REDACTED]  
[REDACTED]  
[REDACTED] 742 [REDACTED]  
[REDACTED] 743

351. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] 744 [REDACTED]

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<sup>736</sup> R-272, [REDACTED] RFP009455.  
<sup>737</sup> R-377, [REDACTED] RFP0011540.  
<sup>738</sup> R-272, [REDACTED], RFP009455.  
<sup>739</sup> R-161, [REDACTED] p 23.  
<sup>740</sup> Pöyry Report, ¶ 34; *see also* R-372, [REDACTED] RFP009546, [REDACTED]  
<sup>741</sup> Pöyry Report, ¶¶ 22 and 31, Figure 2-1.  
<sup>742</sup> R-230, [REDACTED]  
RFP0011677; *See also* R-161, Pöyry [REDACTED]  
[REDACTED] p 29 [REDACTED]  
<sup>743</sup> R-371, [REDACTED]  
RFP0011638.  
<sup>744</sup> R-228, [REDACTED]  
RFP0009515-16.

[REDACTED] 745 [REDACTED] 746

352. [REDACTED]  
[REDACTED]  
[REDACTED] The price erosion Resolute experienced, if any, was indirect. It was not caused directly by PHP, but was part of a general market trend.<sup>747</sup> Prior to 2012, demand for SCA paper was declining three times faster than demand for SCB/SNC, whereas after 2012, that trend has reversed, and SCB demand has been dropping precipitously compared to SCA demand.<sup>748</sup> [REDACTED]  
[REDACTED]

[REDACTED]<sup>749</sup> For the Claimant's but-for theory of causation to succeed, it would have to prove that PHP [REDACTED] was the cause of price decline for Resolute's SCB and SCA paper, rather than its own lower quality or any other factors. The Claimant has not attempted to do so.

## 2. Resolute Did Not Benefit when NPPH Exited the Market in 2011-2012

353. Immediately following the temporary shutdown of the Port Hawkesbury mill in 2011, [REDACTED]  
[REDACTED] 750 [REDACTED]  
[REDACTED] 751 [REDACTED]  
[REDACTED]  
[REDACTED] 752 [REDACTED] 753

354. This significant drop in SC paper demand removed any benefit that might have otherwise

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<sup>745</sup> R-230, [REDACTED] RFP0011677.

<sup>746</sup> R-230, [REDACTED] RFP0011677.

<sup>747</sup> Pöyry Report, ¶¶ 41-46.

<sup>748</sup> Pöyry Report, ¶ 39.

<sup>749</sup> R-377, [REDACTED] p. 10. RFP0011543.

<sup>750</sup> Pöyry Report, ¶ 51.

<sup>751</sup> R-235, [REDACTED], p. 66.

<sup>752</sup> R-235, [REDACTED] p. 66.

<sup>753</sup> Pöyry Report, ¶ 48.

accrued from Port Hawkesbury's closure to its SC paper-producing competitors.<sup>754</sup> Even if Resolute would have been able to pick up PHP's customers, plummeting demand meant that it did not. In fact, Resolute's orders dropped over 100 MT that year.<sup>755</sup> Rather than the expected shortage of SC paper supply, and higher prices, demand fell so much in 2012 that there was excess supply and prices weakened.<sup>756</sup>

355. Dr. Kaplan's casual treatment of this market event is curious. He describes prices as "stable" following the closure of the Port Hawkesbury mill, but adds that despite multiple mill closures, "the decrease in supply was offset by declining demand."<sup>757</sup> In other words, although Dr. Kaplan concludes with confidence that the re-entry of PHP in October 2012 caused a substantial price decrease, he does not explain why the closure of PHP in September 2011 did not lead to a contrary result. After all, as Pöyry states, this would have been a logical consequence of tightening supply based on basic economic principles.<sup>758</sup>

356. Dr. Kaplan's theory of what prices would do in a market free of PHP's supply is based on a theoretical model designed to ignore the reality of how the market actually responded to the closure of Port Hawkesbury in 2011. The reality is that prices dropped rather than rose in correlation to PHP's temporary shutdown. Given that circumstance, for the Claimant to simply assert that prices would have risen starting in October 2011 if PHP had stayed out of the market lacks credibility.

### **3. SC Paper Benefitted from Surge in Demand and a Price Hike in 2013**

357. The Claimant's case for causation also rests on Dr. Kaplan's proposition that the addition of supply by the re-entry of PHP "was not due to, or met with, a significant increase in demand, thus, prices for SCP fell."<sup>759</sup> This is not correct.

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<sup>754</sup> Pöyry Report, ¶ 42.

<sup>755</sup> **R-246**, Resolute Forest Products Inc., Annual Report for the Fiscal Year Ended December 31, 2011 (Form 10-K); **R-247**, Resolute Forest Products Inc., Annual Report for the Fiscal Year Ended December 31, 2012 (Form 10-K); Steger Report, Schedule 10.

<sup>756</sup> Pöyry Report, ¶ 42.

<sup>757</sup> Kaplan Report, ¶ 49.

<sup>758</sup> Pöyry Report, ¶ 101.

<sup>759</sup> Kaplan Report, Uncoated Mechanical Demand rt, ¶ 50.

358. As Pöyry points out, the actual data, as reported by the Pulp and Paper Products Council (“PPPC”),<sup>760</sup> shows that the overall demand for SC paper increase by 238,000 metric tons (or 14%) in 2013, and after factoring in the drop in basis weight, was closer to 17.9%.<sup>761</sup> Pöyry explains, “[r]ather than the market weakness that PHP’s re-entry was expected to cause, with excess supply and an accompanying downward price cycle beginning, there was a shortage of SC-paper supply in 2013.”<sup>762</sup>

359. [REDACTED]  
[REDACTED]<sup>763</sup> As one market expert observed, [REDACTED]  
[REDACTED]<sup>764</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>765</sup>

360. Although SC paper producers dropped their prices in January 2013 in anticipation of PHP’s re-entry, by early March 2013, SC paper buyers and sellers began to accept that the supply and demand balance favoured producers so much, that customers had no effective resistance to a July price increase.<sup>766</sup> Contrary to Dr. Kaplan’s theory, the July price increase is clear proof of a strong market in 2013.<sup>767</sup>

361. The way Resolute and PHP dealt with the rumoured price hike was also telling. [REDACTED]  
[REDACTED]<sup>768</sup> [REDACTED]

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<sup>760</sup> The Pulp and Paper Product Council (PPPC) is recognized as the industry reference and principal source of information on the global pulp and graphic paper markets.

<sup>761</sup> Pöyry Report, ¶ 46.

<sup>762</sup> Pöyry Report, ¶ 47.

<sup>763</sup> See Part II(F).

<sup>764</sup> R-416, [REDACTED]  
[REDACTED] p. 3

<sup>765</sup> R-415, [REDACTED] p. 7.

<sup>766</sup> Pöyry Report, ¶ 49.

<sup>767</sup> Pöyry Report, ¶ 47

<sup>768</sup> R-262, [REDACTED]  
[REDACTED] p. 22.

[REDACTED]

[REDACTED]<sup>769</sup> Then, on May 28, 2013, Resolute announced a \$40/ton increase on both SCA and SCB, which prompted the following reaction from one commentator:

[REDACTED]

[REDACTED]<sup>770</sup>

362. In other words, despite the Claimant's prior allegations that PHP engaged in predatory pricing,<sup>771</sup> the evidence shows that in fact Resolute was the supplier resisting higher prices in 2013.

#### **E. Dr. Kaplan Ignores Market Developments in Supply for SC Paper**

##### **1. The Claimant Misstates the Quantity of Paper Supplied by PHP**

363. Throughout its pleadings, the Claimant maintains that PHP produced to its full capacity of 360,000 MT.<sup>772</sup> But the available evidence suggests this is not true: data and testimony during the U.S. International Trade Commission hearings on SC paper suggest that PHP's actual yearly production has in fact been [REDACTED]<sup>773</sup> The Claimant has not conducted an assessment of the price impact of [REDACTED] nor does it consider the many other supply changes that have occurred in the North American and European SC paper markets since 2013, or in the uncoated mechanical market more generally.<sup>774</sup>

364. At the low end of the SC paper matrix, where the bulk of Resolute's production lies, the company faced competition from standard uncoated mechanical grades of paper like high bright

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<sup>769</sup> R-415, [REDACTED] p. 7.

<sup>770</sup> R-415, [REDACTED] p. 7.

<sup>771</sup> Counter-Memorial on Jurisdiction, ¶ 155; Rejoinder Memorial on Jurisdiction, ¶ 123; Jurisdictional Hearing Transcript, p. 9:23-25, p. 18:6-21, p. 19:1-4, p. 19:23-25 p. 25:7-12, p. 27:23-25, p. 103:4-7, and p. 104:14-25.

<sup>772</sup> Claimant's Memorial, ¶¶ 133,284; Kaplan Report, ¶¶ 44, 50; Hausman Report II, ¶15.

<sup>773</sup> Steger Report, ¶¶ 115-116.

<sup>774</sup> Pöyry Report, ¶ 101.

news.<sup>775</sup> This part of the market underwent many capacity changes during the relevant period, which Dr. Kaplan does not address. Capacity of standard uncoated mechanical papers increased in 2012 by 535,000 tons, and in 2013, capacity continued to increase by 75,000 tons per annum.<sup>776</sup> Pöyry's conclusion is that PHP's re-entry constitutes only part of the industry's capacity development during the period from 2012 to 2014 and therefore cannot account for all of the market's reaction at the time.

## **2. If Not for PHP's Re-Entry, SC Paper Imports from Europe Would Have Increased**

365. Dr. Kaplan refers to the conditions of competition in the "North American market"<sup>777</sup> without ever referring to the important role played by SC paper imports, which come principally from Europe. This is another market factor Dr. Kaplan does not take into account.

366. As Pöyry explains, SC paper is a globally-traded product, and North America buys more than it produces, and is therefore dependent on imports from Europe.<sup>778</sup> SC paper capacity in Europe has always exceeded local demand, and there has always been room in North America for the significant and steady supply of excess tonnage, particularly in SCA+ grades, despite their high shipping costs.<sup>779</sup> Imports from Europe have constituted between 20-30 percent of the North American SCA/A+ paper supply in the 2010s, with negligible imports of SCB and SNC.<sup>780</sup>

367. Dr. Kaplan does not mention that, when PHP re-entered the market, imports of SC paper actually went up, from 302,000 MT to 336,000 MT.<sup>781</sup> Market commentators [REDACTED]

[REDACTED]<sup>782</sup> In RISI's view:

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<sup>775</sup> See ¶ 154.

<sup>776</sup> Pöyry Report, ¶ 100.

<sup>777</sup> Kaplan Report, ¶ 17, 35.

<sup>778</sup> Pöyry Report, ¶ 35.

<sup>779</sup> Pöyry Report, ¶ 36.

<sup>780</sup> Pöyry Report, ¶ 8.

<sup>781</sup> Pöyry Report, Figure 3-5.

<sup>782</sup> R-414, [REDACTED], p. 73.

[REDACTED]

368. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

369. [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]. But since Resolute does not produce SCA+ grades, it could not target that new business.

370. The events of 2013 demonstrate that additional supply from Europe was required in the North American Market even with PHP's re-entry, and that this was coupled with a price hike, not price erosion. This demonstrates that the Claimant's but-for cause theory is too speculative and remote to be relied upon.

371. In 2014, imports of SCA returned to their steady decline rate of -2.6% on average, but that

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<sup>783</sup> **R-414**, [REDACTED], p. 73.

<sup>784</sup> **R-403**, [REDACTED]

<sup>785</sup> **R-236**, [REDACTED] p. 77 (emphasis added).

<sup>786</sup> **R-402**, [REDACTED]

<sup>787</sup> See Part II(F).

<sup>788</sup> **R-261**, [REDACTED], p. 24, [REDACTED]



year also saw the biggest drop in imports.<sup>789</sup> According to Pöyry, this means that although SC paper imports accounted for only 15% of the incremental demand in 2013, they absorbed 93% of the demand decline in 2014.<sup>790</sup> In other words, Pöyry sees this as strong evidence that, if Port Hawkesbury had not restarted, European supply of SCA+ grades would have continued to take market share from North American producers. Indeed, [REDACTED]

[REDACTED]

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372. In sum, the alleged price erosion that Resolute complains of was not the but-for result of PHP's added supply, rather, it was the result of a market shift to SCA+ grades of paper that was filled by Irving, PHP and European imports. Resolute was unable to compete in that market because, on its own admission, it makes an average SCA and weak SCA+ paper.

**F. If any of the GNS Measures Are NAFTA-Consistent, the Claimant's Theory of Causation Fails Entirely**

373. The Claimant has emphasized that it is the measures taken as a whole upon which the Tribunal must find a breach of NAFTA and award damages. The Claimant's Memorial contends that the alleged measures "should be taken together, as all were indispensable."<sup>792</sup>

374. The "entire benefits package" that Dr. Kaplan identifies as the cause of PHP's re-entry amounts, in his view, to "over CAD \$124.5 million in aid."<sup>793</sup> But if all 13 bulletpoints of purported aid Resolute alleges was given to PHP, it would amount to about \$1.164 billion (or \$1.127.2 not including hot idle and FIF).<sup>794</sup> The Claimant does not acknowledge that the amount that PHP actually received for the GNS up to 2015 was only \$79.3 million.<sup>795</sup>

375. While the Claimant's theory of causation fails to even properly identify and quantify actual financial assistance to Pork Hawkesbury, it also fails because it does not attempt to value the

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<sup>789</sup> Pöyry Report, Figure 3-3.

<sup>790</sup> Pöyry Report, ¶ 50.

<sup>791</sup> C-180, [REDACTED] p. 13.

<sup>792</sup> Claimant's Memorial, Part III(A).

<sup>793</sup> Kaplan Report, ¶¶ 18, 24.

<sup>794</sup> Kaplan Report, ¶ 24; Steger Report, ¶ 24(a).

<sup>795</sup> Steger Report, ¶ 24(b).

Claimant's damages if any of the Nova Scotia measures is held to be compliant with NAFTA. For example, if the purchase of land by GNS from PHP for fair market value is determined not to constitute a NAFTA breach, but it was allegedly still a necessary element to PHP's re-entry into the market, the Claimant's theory of causation requires an award of damages on the basis of a non-breach, which the Tribunal cannot do. Similarly, if the LRR negotiated by PWCC and NSPI is not attributable under international law to the GNS, then the Claimant's damages model has no way to account for this.

376. In other words, if any one of the impugned measures are compliant with NAFTA, the only option for the Tribunal would be to award no damages at all. Indeed, from the perspective of legal causation, this appears to be recognized by the Claimant when it states that "but for all the Measures taken together, PHP never would have re-entered the market and Resolute would not have been damaged."<sup>796</sup>

### **G. The Claimant's Quantification of its Damages is Speculative and Flawed**

377. In the event that the Tribunal disagrees with Canada and finds that the Claimant has established legal causation, it must nonetheless dismiss the Claimant's quantification of its alleged damages as speculative and unrealistic, and for the other reasons why Resolute's damages model is flawed that are fully set out in the Pöyry and Cohen Hamilton Steger reports.<sup>797</sup>

#### **1. Past Losses Period**

378. The quantum that the Claimant requests for the past period (2013-2017) is based on a price erosion analysis by Dr. Hausman, which uses an October 2011 5-year price forecast by RISI to measure prices that would allegedly have occurred absent PHP's re-entry.<sup>798</sup> He relies on the October 2011 RISI forecast because it supposedly "it represents the industry's price expectations"

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<sup>796</sup> Claimant's Memorial, ¶ 308, *see also* Claimant's Memorial, ¶¶ 257, ("PWCC believed that the Port Hawkesbury mill would be shut down permanently if it did not receive the bailout package, and would not have purchased the mill absent each and every one of these benefits" (emphasis added)), Counter-Memorial on Jurisdiction, and ¶10, ("a galaxy of measures that, collectively, have harmed Resolute").

<sup>797</sup> Pöyry Report, ¶¶ 107-126.

<sup>798</sup> Hausman Report II, ¶ 23.

and 2011 “was the last year without price effects from PHP’s re-opening.”<sup>799</sup> Ironically, the Claimant relies on a means of quantifying its damages that it had previously rejected for the purposes of demonstrating loss or damage.<sup>800</sup>

379. Indeed, during the jurisdictional phase, the Claimant was highly critical of Canada’s reliance on market forecasts to show a loss of market share or price decline. In the words of the Claimant, “the forecast does not present data showing actual losses of SC paper sales, profit, or revenue.”<sup>801</sup> The Claimant accused Canada of looking to the “gurus and soothsayers”<sup>802</sup> and argued that predictions and analyses of potential market impacts on price and competition are speculative at best and provide little insight as to actual commercial effects.<sup>803</sup>

380. The Claimant urged the Tribunal to reject the dangers of forecasts and to see hindsight as the right approach: “[w]hatever 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.”<sup>804</sup> The Claimant specifically acknowledged that “market prognostications are speculative, sometimes even requiring the “forecasters” to admit they badly missed the mark.”<sup>805</sup>

381. Now, at the merits and damages phase, the Claimant asks the Tribunal to ignore hindsight in favour of the hazards of “industry forecasting data”<sup>806</sup> to calculate price erosion. It does so without any evidence that PHP’s re-entry in 2012 had a lasting and increasingly detrimental effect on SC paper prices.<sup>807</sup>

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<sup>799</sup> Hausman Report II, ¶¶ 23, 26.

<sup>800</sup> See Part VI(C)(1) above “Canada and Resolute have already sparred over whether, and more importantly when, damage to Resolute occurred. That disagreement came to an end with the Tribunal’s finding that “market predictions are no substitute for evidence of sales volumes and prices, or a clear acknowledgement of present loss”

<sup>801</sup> Counter-Memorial on Jurisdiction, ¶ 90.

<sup>802</sup> Jurisdictional Hearing Transcript, p. 269:13-14.

<sup>803</sup> Counter-Memorial on Jurisdiction, ¶¶ 88-91; see also Counter-Memorial on Jurisdiction, ¶ 83 in which the Claimant states that “[a]n impact on the market does not guarantee that Resolute will ever incur losses or damages, including losses or damages that trigger a ripe claim under NAFTA.”

<sup>804</sup> Jurisdictional Hearing Transcript, p. 470:14-19.

<sup>805</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 87.

<sup>806</sup> Claimant’s Memorial, ¶¶ 293-300.

<sup>807</sup> Steger Report, ¶ 34.

382. Dr. Hausman’s use of the RISI forecast ex ante to predict prices that would have occurred also requires the Tribunal to accept all of RISI’s underlying assumptions without the ability to test them. The inability to test RISI’s assumptions against what actually occurred in the market renders the Claimant’s model dubious, at best.

383. But even without looking at the underlying assumptions of the RISI forecast, it is evident that RISI “missed the mark” by not predicting the plummeting demand for SC paper in 2012 and the \$4 price drop that accompanied it resulted in a \$50 price difference between the RISI 2012 price prediction and the actual price.<sup>808</sup> In other words, when PHP exited the market, [REDACTED] [REDACTED]<sup>809</sup> but in fact, demand plummeted and prices dropped slightly.<sup>810</sup> This took place prior to the adoption of the Nova Scotia measures and therefore prior to the alleged breach. [REDACTED]

384. RISI’s previous forecasts from February and June 2011, each with Port Hawkesbury in the market, also demonstrates price predictions that were too high, similar to the prices RISI predicted in October 2011.<sup>812</sup> The same is true for the three forecasts it conducted in 2013, again with PHP in the market.<sup>813</sup> This is precisely why the Claimant’s model does not meet the standard of reasonable certainty: it is too speculative.

385. The RISI forecast is also flawed because, unsurprisingly, it failed to predict many market events. For example, it forecasted volumes of SC paper supply without PHP’s re-entry that exceeded actual volumes with PHP’s re-entry by up to 227,000 MT.<sup>814</sup> It also did not predict the significant downgrading that took place from coated mechanical paper to SCA+ grades, and

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<sup>808</sup> Pöyry Report, ¶ 120; Steger Report, ¶¶ 35, 37.

<sup>809</sup> R-257, [REDACTED], pp. 61, 64, 68

<sup>810</sup> Pöyry Report, ¶ 120; Steger Report, ¶¶ 35, 37b.

<sup>811</sup> R-257, [REDACTED] pp. 64, 69.

<sup>812</sup> Steger Report, ¶ 37(d).

<sup>813</sup> Steger Report, ¶ 37(e).

<sup>814</sup> Steger Report, ¶ 39.

from SNC/SCB to high bright and other standard uncoated mechanical paper.<sup>815</sup> RISI also assumed a GDP growth of 2.8% while the actual growth was only 2.33%, and it forecasted stable foreign exchange, whereas the CAD weakened by 24% between 2012-2016.<sup>816</sup>

386. In sum, the Claimant's price erosion claim is solely based in "industry forecasting data" provided by RISI, which itself has had to revise its speculative forecasts. Since the Claimant's alleged damages rely upon the "hazards of forecasting" rather than the benefit of hindsight, they must be rejected.

## 2. Future Losses Period

387. The Claimant's calculation for its future losses is based on Dr. Hausman's application of a ■ year-on-year decrement to his 2017 estimated profit levels by mill (as calculated in his past loss period) and continuing for 11 years, until 2028. In other words, the Claimant's alleged damages for 2017 and for the 2018-2028 period is based on Dr. Hausman's forecast of expected profits.<sup>817</sup>

388. Since Dr. Hausman's calculation of the Claimant's alleged future losses starts from the basis point of the past losses he calculated, it suffers from the same level of speculation based an unproven premise that the re-entry of PHP would have a lasting and permanent decremental effect on SC paper prices.<sup>818</sup> This premise is refuted by Pöyry.<sup>819</sup>

389. In addition, Dr. Hausman presents no support other than his personal view for his assumption that the SC paper industry "will exist in its present state in 10 years."<sup>820</sup> Similarly, he offers no support in the form of witness testimony or documentary evidence that Resolute is indeed expecting a ■ year-on-year profit decrement,<sup>821</sup> which presumes a rate of decline in selling prices or in volumes neither of which is supported by historical results or current

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<sup>815</sup> Pöyry Report, ¶ 120.

<sup>816</sup> Pöyry Report, ¶ 112.

<sup>817</sup> Hausman Report II, ¶ 42.

<sup>818</sup> Steger Report, ¶ 74.

<sup>819</sup> Pöyry Report, ¶ 12.

<sup>820</sup> Hausman Report II, ¶ 43; Pöyry Report, ¶ 117; Steger Report, ¶ 73.

<sup>821</sup> Hausman Report II, ¶ 42.

forecasts.<sup>822</sup> Further, Dr. Hausman improperly applies a 10% discount rate,<sup>823</sup> which appears to be based on the weighted average cost of capital (WACC) of Resolute's more diversified U.S. parent company rather than on the WACC of the mills themselves.<sup>824</sup>

390. In conclusion, the Claimant has chosen to quantify its alleged damages through price erosion allegedly caused by PHP's re-entry, but it has presented a speculative forecast that is totally unreliable given that it is based on erroneous assumptions. Accordingly, the quantum it has proposed is speculative and must be rejected.

## **H. A Proper Price Erosion Analysis Would Consider Real World Events**

### **1. A Market without PHP in 2011 and 2012 Resulted in Lower SC Paper Prices**

391. In the event that the Tribunal disagrees with Canada and decides to award damages based on the Claimant's price erosion claim, it should look to what actually took place in a market without PHP in 2011 and 2012. As Pöyry explains, the expected shortage of SC paper supply and higher prices did not materialize, and prices weakened.<sup>825</sup> Given the evidence of how the market reacted to the absence of PHP, the Tribunal should reject Resolute's theory of necessarily rising prices. Without an increase in SC paper prices, there can be no price erosion and the request for damages actually results in a negative amount.

### **2. Alternatively, any Price Erosion Claim Must Be Limited to Six Months**

392. In the alternative, if the Tribunal accepts that prices would have gone up absent PHP, it must limit the amount to the observable 6-month "price bucket" that followed PHP's re-entry. The "price bucket" consists of a decline in SC paper prices in January 2013 of CAD \$ 44,<sup>826</sup> which increased back up by \$ 43 by July 2013. Market commentators agree that PHP's SC paper supply had been absorbed into the market by July 2013 since the market was strong, operation rates high and prices back to 2012 levels.<sup>827</sup> Accordingly, as Peter Steger calculates, damages for

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<sup>822</sup> Steger Report, ¶ 72.

<sup>823</sup> Hausman Report II, ¶ 44

<sup>824</sup> Steger Report, ¶¶ 77-78.

<sup>825</sup> Pöyry Report, ¶¶ 46, 84.

<sup>826</sup> Kaplan Report, ¶ 48 and Figure 4; Steger Report, ¶ 88.

<sup>827</sup> Steger Report, ¶ 86.

price erosion losses should be limited to C\$9.419 million.<sup>828</sup>

### 3. The Claimant is not Entitled to Pre-Award Interest

393. The Claimant requests pre-award compound interest. Dr. Hausman calculates it on the understanding that Canada agreed to the Canadian prime rate for pre-judgment interest in *Windstream v. Canada* and that the tribunal awarded the Canadian prime rate plus one percent in *S.D. Myers v. Canada*.<sup>829</sup>

394. Under Article 1135(1) of NAFTA, a tribunal has discretion to award “any applicable interest.” However, with the exception of Article 1110 claims, both NAFTA and the UNCITRAL Arbitration Rules are silent on the terms of such interest awards, as are both of the tribunals that Dr. Hausman relies on. In *S.D. Myers*, the tribunal awarded post-award interest but not pre-award interest,<sup>830</sup> and in *Windstream*, the tribunal had no reason to decide the matter, which the parties disputed.<sup>831</sup>

395. The guiding principle under international law is that interest should only be awarded where it is necessary to ensure full reparation, but that there is no automatic right to it.<sup>832</sup> As a result, the Claimant bears the burden of proving that the circumstances of this case justify an award of interest to ensure full reparation, and it has not done so. The Claimant admits to knowing since 2013 that it was incurring damages,<sup>833</sup> but waited almost three years to bring a claim. In these circumstances, awarding interest, and particularly compound interest, would be unjust.

## VII. CONCLUSION

396. In this Counter-Memorial, Canada has provided detailed arguments to rebut Resolute’s exaggerated allegations and meritless claims. Even if the electricity rate negotiated between PWCC and NSPI was attributable to the GNS under international law (it is not), and even if the exclusions to national treatment in NAFTA Article 1108(7) applied (they do), there would still

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<sup>828</sup> Steger Report, ¶¶ 90, 93.

<sup>829</sup> Hausman Report II, ¶ 47; Appendix A, p. 24.

<sup>830</sup> **RL-179**, *S.D. Myers – Second Partial Award*, p.303.

<sup>831</sup> **CL-123**, *Windstream – Award*, ¶ 486.

<sup>832</sup> **RL-032**, Commentary on the ILC Articles, Art. 38, Commentary (1), p. 235.

<sup>833</sup> Hausman Report ¶¶ 25-28.

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be no violation of Articles 1102 and 1105. None of the legal or factual elements necessary to support of a national treatment or minimum standard of treatment claim are present. There was no discrimination against Resolute, nationality-based or otherwise. There was no treatment “in like circumstances” and there was no “treatment less favourable” – this is simply not a case where Article 1102 is implicated. There was no arbitrariness, no bad faith, no prejudice, no targeting – nothing the GNS did vis-à-vis Resolute can be impugned under the minimum standard of treatment in customary international law. The GNS acted reasonably, in the public interest and in good faith. Resolute’s claim of unfairness is unwarranted given that it took similar financial assistance from the GNS for the same reasons as PWCC and because it had its chance to bid on Port Hawkesbury, but decided to walk away from the sale and wait to see what happened. The Claimant may have had its reasons for this strategy, but the consequences of its own decisions cannot be the basis of a claim against Canada under NAFTA Chapter Eleven.



**VIII. ORDER REQUESTED**

397. For the foregoing reasons, Canada respectfully requests that this Tribunal issue an award:

- i. dismissing the Claimant's claims that Canada has violated its obligations under Articles 1102 and 1105 of NAFTA in their entirety;
- ii. dismissing the Claimant's claim that it incurred damages as the result of Canada violating its obligations under Chapter 11 of NAFTA;
- iii. ordering the Claimant to bear the costs of this arbitration in full and to indemnify Canada for its legal fees and costs in this arbitration; and
- iv. granting any further relief it deems just and appropriate under the circumstances.

April 17, 2019

Respectfully submitted  
On behalf of the Government of Canada,



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