

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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CLAIMANT'S SUBMISSION ON COSTS

FEBRUARY 2, 2021

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## **I. INTRODUCTION**

1. The Governments of Nova Scotia and Canada, when committing to and defending special treatment for the Port Hawkesbury mill, did not consider any obligations they owed, pursuant to the North American Free Trade Agreement, to American-owned investors and investments. The U.S. Government repeatedly warned Canada of international trade repercussions when the Port Hawkesbury intervention was still in the planning stages, and the Claimant, Resolute Forest Products Inc. (“Resolute”), unsuccessfully warned the Government of Canada and then sought relief from the consequences. This arbitration has been the reluctant result of the failures of those governments to respect their international obligations.

2. Resolute requests, should it be successful in this arbitration, that the Tribunal order the Government of Canada to bear Resolute’s costs of arbitration as defined by Article 38(a)-(d) and (f) of the UNCITRAL Arbitration Rules (1976), and Resolute’s costs for expert witnesses and for legal representation and assistance under Article 38(e) (referred to herein as “Resolute’s Legal Costs”). Resolute’s costs total US\$6,478,988.46 and C\$2,686,052.67 and are detailed in the attached Appendix.

## **II. THE APPLICABLE LEGAL STANDARDS FOR ALLOCATING COSTS**

3. NAFTA Article 1135(1) permits the Tribunal to “award costs in accordance with the applicable arbitration rules.” Article 38 of the UNCITRAL Rules (1976) provides that the Tribunal “shall fix the costs of arbitration in its award” and that the costs include, as reasonable and appropriate, (a) “the fees of the arbitral tribunal”; (b) “travel and other expenses incurred by the arbitrators”; (c) “the costs of expert advice” engaged by the Tribunal; (d) “travel and expenses of witnesses”; (e) “costs for legal representation and assistance,” including experts engaged by a disputing party; and (f) “fees and expenses

of the appointing authority” (PCA).

4. The Tribunal has discretion to determine the reasonableness of any costs claimed and to apportion the costs of the arbitration and the costs of legal representation considering the circumstances of the case.

5. Article 40(1) of the UNCITRAL Rules provides that “the costs of arbitration {except costs for legal representation and assistance} shall in principle be borne by the unsuccessful party,” but such costs may be apportioned between the parties as the Tribunal deems appropriate under the circumstances. The “costs of arbitration” under Article 40(1) include the categories set out in Articles 38(a)-(d) and (f).

6. Under Article 40(2), the Tribunal may determine who bears Article 38(e) “costs of legal representation and assistance,” including experts engaged by the disputing parties, or may apportion such costs between the parties.

7. Factors relevant to determining a reasonable allocation of costs include (i) the relative success of the parties, (ii) whether the claims were of a serious nature, were compelled by an underlying unfairness, or presented novel issues; and (iii) whether unnecessary delays or costs were attributable to a party. Costs also must be reasonable in amount for recovery.

### **III. COSTS SHOULD BE AWARDED FOR RESOLUTE AND LIMITED FOR CANADA**

8. Should Resolute be wholly successful in the arbitration, the Tribunal should order Canada to pay all Resolute’s costs of arbitration and legal costs. Should Resolute be partially successful, the Tribunal should order Canada to pay an appropriate portion of Resolute’s costs. Were Resolute not to be successful, the Tribunal should not award costs in Canada’s favor for the reasons provided below.

**A. Relative Success: Resolute Prevailed In The Jurisdictional Phase**

9. Resolute prevailed in opposition to Canada’s preliminary motions on jurisdiction and admissibility. Canada’s time-bar objection, Article 1101 scope objection, and 1102 provincial treatment objection, all were denied; the case proceeded to memorials and a hearing on the merits.<sup>1</sup> The Tribunal should award Resolute its costs incurred in opposition to Canada’s motions on jurisdiction and admissibility.<sup>2</sup>

**B. Resolute’s Claims Were Serious, Presented Novel Issues, And Were Compelled By An Underlying Unfairness**

1. Resolute’s Claims Were Of A Serious Nature

10. The serious nature of Resolute’s claims is a factor favoring an award of Resolute’s costs.<sup>3</sup> Notwithstanding Canada’s aspersions that Resolute’s claim was “a spurious attempt to pin financial liability on” Canada and Nova Scotia, “merely...a pressure tactic,” and “unnecessary to engage in a lengthy and expensive arbitration to establish that the Claimant’s allegations are entirely without merit,”<sup>4</sup> the fact that Resolute overcame Canada’s objections of jurisdiction and admissibility is evidence of the serious nature of Resolute’s claims.

11. Resolute demonstrated that Nova Scotia’s enrichment of Port Hawkesbury enabled it to produce supercalendered paper (“SC paper”) at a lower cost than its

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<sup>1</sup> See Decision on Jurisdiction and Admissibility ¶¶ 178-179, 248, 290-292, 330 (Jan. 30, 2018). The Tribunal, while expressing reservations, also decided not to dismiss Resolute’s expropriation claim and left it to the merits. *Id.* ¶ 314. Resolute’s memorials on the merits focused only on the Article 1102 and 1105 claims as recovery under either 1102 or 1105 would provide Resolute a full remedy. None of Canada’s jurisdictional arguments focused exclusively on Article 1110.

<sup>2</sup> See CL-017, *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award ¶ 135 (“Mexico raised an unsuccessful jurisdictional objection which became a major feature of the proceedings. Mexico insisted against GAMI’s wishes that its objections be heard separately. The costs associated with that special hearing were significant.”).

<sup>3</sup> See *id.* (denying Mexico its costs because “GAMI’s grievance must be considered as serious. It raised disquieting questions with respect to regulatory acts and omissions.”).

<sup>4</sup> See, e.g., Canada’s Statement of Defense ¶¶ 2, 14.

competitors in the North American market for a product in secular decline, causing significant losses to Resolute. Resolute presented evidence that this outcome was not only foreseeable to Nova Scotia but foreseen.<sup>5</sup> Resolute's legitimate concerns were shared by U.S. producers and the U.S. Government, prompting a countervailing duty investigation and subsequent U.S. and WTO litigation, culminating in a settlement in which Port Hawkesbury paid tens of millions of dollars to dismiss the case.<sup>6</sup>

12. The U.S. International Trade Commission found that U.S. producers were injured by the Nova Scotia measures' benefits to Port Hawkesbury.<sup>7</sup> Canada's own expert in this case acknowledged Resolute incurred a substantial loss as a result of Nova Scotia's measures. Peter Steger disputed Resolute's expert calculation of damages yet conceded that Resolute lost C\$9.4 million from January to June 2013 alone—a loss that would not have occurred but for the Nova Scotia measures.<sup>8</sup> The lowest end of the most conservative damages estimate offered by Resolute's expert, Professor Jerry Hausman, amounted to C\$90 million.<sup>9</sup>

2. Resolute Was Compelled To Bring The Claims By The Unfairness Of Actions By Canada and Nova Scotia

13. Resolute was compelled to bring this arbitration due to losses it incurred from Nova Scotia's unfair measures and Canada's indifference. Tribunals have denied cost awards, even to prevailing respondents, when the claimant has been compelled to

<sup>5</sup> See, e.g., Resolute's Counter-Memorial ¶¶ 148-150.

<sup>6</sup> See Resolute's Memorial ¶ 151; C-242, Verso-PHP Settlement Agreement; Merits Hr'g. Tr. 1108:20-24.

<sup>7</sup> See generally C-237, *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination Commission Opinion (U.S.I.T.C.) (Dec. 2015).

<sup>8</sup> See Steger April 17, 2019 Expert Report ¶ 90 ("Based on the foregoing, I calculated the lost profits from price erosions at C\$9.419 million."); Merits Hr'g Tr. at 967:23-968:3 [

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<sup>9</sup> See Merits Hr'g Tr. 619:15.

bring the arbitration in an attempt to obtain justice,<sup>10</sup> or the claimant had been treated unfairly, even when the unfairness did not warrant an award on the merits.<sup>11</sup>

14. Resolute was injured by Nova Scotia's measures to resuscitate and make Port Hawkesbury the lowest-cost producer in the North American market. Nova Scotia foresaw the probable harm to Resolute which, at a minimum, evidences reckless disregard for Resolute's Canadian investments, a fact that should be considered in allocating costs.

15. Resolute went to significant lengths seeking an amicable resolution to avoid arbitration. Canada, however, made no substantive effort to engage, sending Resolute to chase Canada's correspondence with the WTO and the United States about the Nova Scotia measures until Canada finally produced the documents here.

16. Counsel for Resolute sought out Canadian Embassy officials in July, August and October of 2014, but Ottawa's promises to follow up went unfulfilled.<sup>12</sup>

17. Resolute wrote to Canada's Minister of Foreign Affairs in October 2014 and met with Canada's outside counsel to discuss its concerns that Nova Scotia's measures bestowed an unfair competitive advantage; infringed Resolute's rights under NAFTA; and risked provoking a trade remedy action with the United States.<sup>13</sup> Resolute's meetings and communications, culminating in a meeting between Resolute CEO Richard Garneau and Minister Ed Fast, yielded Resolute no relief.<sup>14</sup>

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<sup>10</sup> See CL-249, *PSEG Global Inc. et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award ¶ 355 (Jan. 19, 2007) (awarding claimant costs despite not prevailing as to the majority of its claims); CL-212, *Azinian, Davitian & Baca v. United Mexican States*, ICSID Case No. ARB(AF)97/2, Award ¶ 126 (Nov. 1, 1999) (denying respondent costs where municipality, to some extent, invited litigation).

<sup>11</sup> CL-122, *Mondev International v. United States*, ICSID Case No. ARB (AF)/99/2, Award ¶ 159 (Oct. 11, 2002) (declining to award successful respondent an award of costs).

<sup>12</sup> See Resolute Notice of Intent to Arbitrate ¶¶ 43-48.

<sup>13</sup> *Id.* ¶¶ 49-50.

<sup>14</sup> *Id.* ¶¶ 51-53.

18. Minister Fast referred M. Garneau to Canada's official responses to U.S. inquiries about Port Hawkesbury, yet subsequently denied those same documents existed; refused to release them in an Access to Information request; and produced them to Resolute only under the pressure of document requests in this proceeding.<sup>15</sup>

19. Furthermore, Canada invited litigation under NAFTA by declaring before the WTO that the Nova Scotia Measures were not subsidies and by denying in this proceeding any relevance of this self-contradiction with respect to Article 1108(7).<sup>16</sup>

### 3. Resolute's Claims Presented Novel And Complex Issues

20. The important, novel and complex issues raised by Resolute's claim favor an award of Resolute's costs.<sup>17</sup> The Tribunal has been asked to resolve several important and untested aspects of NAFTA's foreign investment protections, including:

- Whether, to be actionable under NAFTA Article 1102, the conduct complained of (a) must be intended to harm a foreign national or its investment, (b) must be taken with knowledge that it will harm or is very likely to harm, or (c) is sufficient as an action that harms a foreign national;
- What is the correct interpretation of Article 1102(3) as it relates to treatment accorded to an investor or investment by a province or state, particularly where the investor or investment is outside that province or state;
- What is the effect of the principle forbidding a State's self-contradiction in international fora as applied to Canada in its invocation of Article 1108(7);

<sup>15</sup> Resolute's Memorial ¶ 144, n.230.

<sup>16</sup> See Merits Hr'g Transcript 1246:23-1247:15 (PROF. LEVESQUE: "So are you saying the 'nil' didn't mean nil..." MR. LUZ: "... The honest answer is I don't know, I can't speculate, and it's not relevant for the context of this."); see also CL-212, *Azinian, Davitian & Baca v. United Mexican States*, ICSID Case No. ARB(AF)97/2, Award ¶ 126 (Nov. 1, 1999) (The underlying behavior of the respondent was found "to some extent to have invited litigation.").

<sup>17</sup> See CL-250, *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award on Costs ¶¶ 7-9 (Nov. 26, 2002) (noting that the arbitration had "raised a number of important and novel issues relating to NAFTA Chapter 11"); CL-025, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award ¶ 833 (June 8, 2009) ("Claimant raised difficult and complicated claims based in at least one area of unsettled law, and both Parties well-argued their positions with considerable legal talent and respect for one another"); CL-130, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award ¶ 200 (Jan. 4, 2003) (noting the nature and complexity of the questions raised); CL-251, *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award ¶¶ 220-221 (July 17, 2006) (the "Preliminary Question was a close one" and the investor had "respectable claims on the merits").

- Whether it is a complete defense for a State to claim measures were taken in the public interest;
- What is the appropriate methodology for determining damages arising from a State's measures impacting the price of the foreign investment's product sales.

21. These questions are particularly important in light of the NAFTA Article 102 objectives to “a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; b) promote conditions of fair competition in the free trade area; {and} c) increase substantially investment opportunities in the territories of the Parties.”

22. The arbitration also involved detailed facts about Nova Scotia's efforts to resuscitate the Port Hawkesbury SC paper mill; complex damages analyses regarding the impact of Port Hawkesbury on the market; analyses of the electricity rate benefits and regulations enacted for Port Hawkesbury; and Canada's introduction of the (tangential, in Resolute's view) negotiations between Nova Scotia and Resolute over the closing of the Bowater Mersey newspaper mill.

**C. Costs Should Be Allocated For Canadian Delays**

23. The Government of Nova Scotia, or Canada, delayed production of the most important documents until late in the arbitration. Document production was due in the summer of 2018, but the most important document in this arbitration, Exhibit R-161, was within Nova Scotia's possession and was not produced until March 14, 2019, ten weeks after Canada had received Resolute's Memorial on the Merits of its claims, even though it was responsive to Resolute's initial document requests.<sup>18</sup> Resolute did not

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<sup>18</sup> See C-369, Letter from Mark A. Luz to Elliot J. Feldman, March 14, 2019 (“In the context of the preparation of its Counter-Memorial, Canada located certain documents responsive to Resolute's Document Request No. 28.”). Only then was R-161 provided to Resolute's counsel.



have this document when it prepared and filed its Memorial.

24. This document was the primary focus of the case and Resolute's claims at the hearing.<sup>19</sup> Canada brought two experts to the hearing to defend it. It also was the primary reason for Restricted Access designations in the pleadings and the hearing transcript. The vast majority of time, cost and efforts required to mark pleadings and transcripts for Restricted Access information is attributable to this document.

#### **IV. THE COSTS INCURRED BY RESOLUTE AND PRESENTED IN THIS SUBMISSION ARE REASONABLE**

25. The costs of the legal and expert witness assistance provided to Resolute, both as a function of their quantity and rate, were reasonable and appropriate given the novelty, seriousness and complexity of the claims.

##### **A. Arbitration Costs**

26. The "costs of arbitration" include "fees of the arbitral tribunal" (Article 38(a)); "travel and other expenses incurred by the arbitrators" (Article 38(b)); and costs for administration by the PCA (Article 38(f)). Resolute has deposited US\$550,000 to date in advances toward such costs which the parties have borne equally.

27. Under Article 40(1), the "costs of arbitration" also include "travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal." Article 38(d). Resolute incurred travel and lodging expenses for witnesses required to travel to Toronto for the bifurcated jurisdictional hearing.

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<sup>19</sup> This document, referenced constantly throughout the merits hearing, was not known to Claimant nor the Tribunal during the jurisdictional phase when Canada insisted that the Nova Scotia measures did not relate to and lacked a legally significant connection to Resolute. The Tribunal still held that the measures were sufficiently proximate to Resolute for the case to proceed, but had the contents of the document been known during the jurisdictional arguments, the Tribunal might not have found Canada's objection to be as "close to the line" as it previously thought. See Decision on Jurisdiction and Admissibility ¶ 248.

**B. Claimant's Legal Representation And Assistance Costs**

28. Under Article 40(2), the Tribunal is “free to determine” that the unsuccessful party should also bear the costs of “legal representation and assistance” under Article 38(e), so long as such apportionment is reasonable, “taking into account the circumstances.”

29. The fees and expenses for Claimant's legal counsel, BakerHostetler and NortonRoseFulbright, were reasonable and are provided in the attached Appendix. The legal fees were actually paid by Resolute based on BakerHostetler's and NortonRoseFulbright's standard rates with all applicable courtesy discounts and write-offs included.<sup>20</sup> Resolute also incurred fees for the assistance of KPMG, who provided support for the review and production of documents, and GLM Services, who provided research and analysis with respect to government assistance programs.

**C. Claimant's Expert Witness Fees**

30. The costs Resolute incurred for expert witnesses and their assistants in the arbitration are reasonable. Claimant retained Dr. Jerry Hausman, who provided expert witness testimony on the calculation and measurement of damages to Resolute resulting from Nova Scotia's reintroduction of Port Hawkesbury into the SC paper market. Dr. Hausman testified at both the jurisdictional and final hearing on the merits.

31. Dr. Seth Kaplan provided expert witness testimony on Canada's liability for the economic impact of Port Hawkesbury's re-entry into the SC paper market. Dr. Kaplan testified at the hearing on the merits and provided advice for the jurisdictional hearing. Drs. Kaplan and Hausman were assisted by professional staff of Capital Trade

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<sup>20</sup> Costs for travel of counsel are included in the costs of “legal representation and assistance,” but those costs are minimal as they primarily involve initial consultations with the Government of Canada in Ottawa and travel for the two-day jurisdictional hearing in Toronto.

Inc. Their fees and expenses are provided under “Capital Trade” in the Appendix.

32. Alex Morrison of Ernst & Young provided expert witness testimony on the history and nature of government assistance packages for companies that have entered into CCCA proceedings and the uniqueness of the Port Hawkesbury case. Fees for Mr. Morrison and his staff are provided in the Appendix.

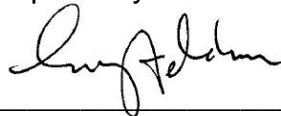
**V. THE TRIBUNAL SHOULD ENSURE CANADA’S CLAIMS FOR COSTS ARE REASONABLE**

33. Notwithstanding that the parties have agreed to a single, simultaneous exchange of cost submissions, any claims for costs by Canada should be reviewed for its reasonableness. Tribunals in other NAFTA Chapter 11 arbitrations have reviewed Canada’s cost requests and found in some cases that reasonableness required reduced awards in relation to the amounts Canada claimed.<sup>21</sup>

**VI. CONCLUSION**

34. This arbitration raised novel and complex issues of both a factual and legal nature. To the extent Resolute substantially prevails on its claims, the Tribunal should award it costs of the arbitration and legal representation. Alternatively, should Resolute not be successful on its claims, the Tribunal should allocate costs in accordance with the considerations described above.

Respectfully submitted,




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Counsel for Claimant, Resolute Forest Products Inc.

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<sup>21</sup> See, e.g., CL-252, *Detroit Int’l Bridge Co. v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25, Award on Costs, ¶ 53 (Aug. 17, 2015) (denying Canada costs for 1/3 of the hours billed as unreasonable); CL-253, *Melvin J. Howard*, *Centurion Health Corp. & Howard Family Trust v. Government of Canada*, UNCITRAL, PCA Case No. 2009-21, Award on Costs, ¶¶ 80-81 (Aug. 2, 2020) (denying Canada legal fees despite prevailing at an early stage).