

**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**

**SUBMISSION ON COSTS**

**February 2, 2021**

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Trade Law Bureau  
Government of Canada  
Lester B. Pearson Building  
125 Sussex Drive  
Ottawa, Ontario  
K1A 0G2  
CANADA

1. As directed by the Tribunal requesting submissions on costs,<sup>1</sup> and pursuant to Article 1135(1) of the North American Free Trade Agreement (“NAFTA”) and Article 40 of the 1976 UNCITRAL Arbitration Rules (“UNCITRAL Arbitration Rules”), Canada requests the Tribunal to direct the Claimant, Resolute Forest Products Inc. (“Resolute”), to bear all of Canada’s costs in this arbitration. In no circumstances should Canada be required to bear any of the Claimant’s costs, even if a breach of the NAFTA is found.

2. Resolute’s claims are wholly without merit. Its complaints regarding the financial assistance provided by the Government of Nova Scotia (the “GNS”) to Port Hawkesbury Paper (“PHP”) seek to bend the provisions of NAFTA Chapter Eleven beyond recognition and apply them to mischaracterized facts. Not only did Canada show this in its written and oral pleadings, but Canada also gave the Claimant an opportunity to drop its meritless claim without bearing any of Canada’s costs after the Decision on Jurisdiction and Admissibility.<sup>2</sup>

3. The Claimant nevertheless persisted with new and ever-changing allegations, forcing Canada to mount a very substantial and costly defence on merits and damages. Canada’s total costs in this arbitration are **CAN \$6,565,981.03**, which includes the fees and expenses of the Tribunal and the Permanent Court of Arbitration (“PCA”) (**CAN \$722,113.00**),<sup>3</sup> Canada’s disbursements for experts and other expenses (**CAN \$1,597,898.75**, as itemized in **Annex-I**) and Canada’s legal representation costs which have been reasonably incurred in the defence of this claim (**CAN \$4,245,969.28**, as itemized in **Annex-II**).<sup>4</sup>As explained in **Part I** below, the Tribunal has the

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<sup>1</sup> Letter from Ms. Ashwita Ambast, Permanent Court of Arbitration, to the Disputing Parties (22 November 2020). The Tribunal approved the agreement of the disputing parties that cost submissions would be limited to ten pages, not including supporting annexes. Email from Ms. Ashwita Ambast, Permanent Court of Arbitration, to the Disputing Parties (26 November 2020).

<sup>2</sup> Letter from Mark A. Luz to Elliot J. Feldman and Martin J. Valasek (17 April 2018), **Annex-III**, p. 2. Canada noted in the letter that “[i]f Resolute decides not to accept this offer and to continue with its NAFTA Chapter Eleven claim, Canada will request that the Tribunal award Canada the full costs of its defence of this arbitration and will present a copy of this letter in support of such costs demand.”

<sup>3</sup> Email from Ms. Ashwita Ambast, Permanent Court of Arbitration, to the Disputing Parties (28 January 2021) attaching Statement of Account indicating deposit payment by Canada of USD \$550,000. Fees and expenses of the Tribunal and the Permanent Court of Arbitration have been converted from USD funds to CAN funds. The Tribunal should direct the Claimant to pay any further fees and expenses incurred by the Tribunal and PCA.

<sup>4</sup> Article 38 of the UNCITRAL Arbitration Rules defines “costs” as “(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39; (b) The travel and other expenses incurred by the arbitrators; (c) The costs of expert advice and of other assistance required by the arbitral tribunal; (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral

discretion to determine the apportionment of costs and should order the Claimant to bear these costs entirely.

4. Even if the Claimant were successful in establishing a breach of NAFTA Chapter Eleven, the Tribunal should not award any costs to Resolute because it presented a damages claim that was incoherent and unsubstantiated. Resolute failed to prove causation and requested multiple wide ranges of quantum based on flawed economic theories. As explained in **Part II** below, in light of the Claimant's extraordinary failure to articulate a coherent damages model supported by evidence, the Claimant should be awarded none of its costs even if it prevails on the merits.

## **I. THE TRIBUNAL HAS THE DISCRETION TO DETERMINE THE APPORTIONMENT OF COSTS AND SHOULD AWARD CANADA ALL OF ITS COSTS**

5. NAFTA Article 1135(1) provides discretion to the Tribunal to award costs in accordance with the applicable arbitration rules. In this case, Article 40 of the UNCITRAL Arbitration Rules stipulates that the costs of arbitration shall in principle be borne by the unsuccessful party, and that the Tribunal has discretion to award costs of legal representation and assistance taking into account the circumstances of the case.<sup>5</sup> Relevant factors that the Tribunal may take into account include (i) the relative success of the parties, (ii) the quality of the claims, (iii) the complexity of the issues, and (iv) the reasonableness of the parties' incurred expenses.<sup>6</sup>

6. The hearing in November 2020 confirmed what Canada has argued since its September 1, 2016 Statement of Defence: Resolute had no credible legal or factual basis to sustain a claim of a

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tribunal; (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at the Hague."

<sup>5</sup> UNCITRAL Arbitration Rules, Articles 40(1) ("Except as provided in paragraph 2, the costs of the arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.") and 40(2) ("With respect to the costs of legal representation and assistance referred to in article 38(e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.").

<sup>6</sup> **RL-169**, *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017 ("*Eli Lilly – Final Award*"), ¶¶ 454-455.

breach of NAFTA Chapter Eleven. This should have been evident to the Claimant from the outset, and the fact that it nevertheless pursued its claim justifies an order that Resolute pay the full amount of the arbitration costs and Canada's legal representation costs.

7. Resolute's national treatment claim is inherently futile because Article 1102 is plainly not applicable in light of Article 1108(7). However, Resolute persisted in pursuing its moot national treatment claim based on the frivolous premise that the Tribunal has the authority to ignore the explicit text of NAFTA Chapter Eleven. Even without Article 1108(7) acting as a bar to the applicability of Article 1102, Resolute cannot prevail on the Article 1102(3) treatment "in like circumstances" test and should not have pursued such an unprecedented argument that the GNS accorded treatment to its investments in Québec, and that such treatment was "in like circumstances" to that accorded to PHP in Nova Scotia.

8. Similarly, the Claimant's argument that financial assistance provided by the GNS to PHP was a violation of customary international law's minimum standard of treatment of aliens was based on hyperbole and misrepresentation of the facts. The Claimant persistently relied on legal standards, such as proportionality, that it conceded were not part of the minimum standard of treatment in customary international law.<sup>7</sup> The Claimant also made sweeping and unsupported allegations about the unprecedented nature of Nova Scotia's financial support in State practice,<sup>8</sup> and even sought to belatedly buttress its exaggerations with an expert report that was ultimately exposed as having been written without independent analysis or review of relevant documents.<sup>9</sup>

9. It was the Claimant's own decision not to participate in the bidding process for the Port Hawkesbury mill despite having been encouraged to do so by the GNS, and it is improper for the

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<sup>7</sup> Claimant's Reply Memorial on Merits and Damages, ¶¶ 191-208; Hearing Transcript, Day 6 (14 November 2020), p. 1127:9-13 per Michael Snarr: "So I think there is some evidence, maybe an emerging body of evidence, of proportionality playing a role in customary international law. There's probably not enough yet to preclude us having this discussion."

<sup>8</sup> Claimant's Memorial on Merits and Damages, ¶¶ 274-276 ("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. [...] the Port Hawkesbury story – appears to be unique in the annals of the thousands of recent bankruptcies in North America.").

<sup>9</sup> Canada's Rejoinder Memorial on Merits and Damages, ¶¶ 187-200; Hearing Transcript, Day 3 (11 November 2020), p. 564:3-9, pp. 567:8 through 569:4, pp. 569:25 through 572:22, pp. 574:11 through 580:2, pp. 581:18 through 585:2 and pp. 587:7 through 590:14.

Claimant to now use NAFTA Chapter Eleven as a cost-free insurance for the outcome of its own freely-made decisions. The fact that the Claimant intentionally omitted from its pleadings the \$50 million financial assistance package that its own paper mill in Nova Scotia was provided by the GNS demonstrates the Claimant's lack of transparency with facts relevant to its Article 1105 claim.

10. The fact that Canada did not prevail on all of its jurisdictional objections should not bear on the Tribunal's decision to award the full amount of Canada's costs. It was the Claimant's own written statement (as well as public statements made by its own corporate spokesperson<sup>10</sup>) which suggested that it started to incur damage in 2012 arising from PHP's reopening, which would have been outside the three-year limitation period and was one of the good reasons to bifurcate the proceedings.<sup>11</sup> Furthermore, the Tribunal regarded the Claimant's case as being "close to the line" on whether it even fulfilled the "legally significant connection" test necessary to establish jurisdiction under NAFTA Article 1101(1).<sup>12</sup> The fact that the Claimant persisted to include measures that had been ruled outside of the Tribunal's jurisdiction in its merits claim is further reason to order the Claimant to bear all of Canada's costs.<sup>13</sup>

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<sup>10</sup> See Canada's Memorial on Jurisdiction, ¶ 60, citing **R-101**, Radio-Canada, "Shawinigan: 111 emplois perdus a l'usine Laurentide" (6 November 2012). See also Notice of Arbitration and Statement of Claim (30 September 2015), ¶ 48, citing **C-017**, "Plant restart could topple competitors", The Chronicle Herald (21 August 2012); Canada's Memorial on Jurisdiction, ¶¶ 51 and 56, citing **R-096**, CQ Transcriptions, transcript, "Q3 2012 Resolute Forest Products Inc. Earnings Conference Call – Final" (2 November 2012), p. 9, and **R-097**, Resolute Forest Products Inc., Form 8-K (1 August 2012), Exhibit 99.2: Transcript of Earnings Call Held on August 1, 2012, p. 10.

<sup>11</sup> Procedural Order No. 4, Decision on Bifurcation (18 November 2016), ¶¶ 4.8-4.11. The Tribunal acknowledged that the Claimant alleging that it lost market share in 2012 was "significant" even though ultimately found it was not until 2013 that the Claimant knew it had suffered some cognizable loss or damage. See Decision on Jurisdiction and Admissibility, ¶ 169 ("The draft notice of intent presented to the Minister on February 24, 2015 referred to market share having declined 'from 2012 to 2014'. The Tribunal does not accept Claimant's argument that this was merely a draft for the purposes of negotiation. It was a document transmitted to the Respondent with a view to the settlement of the dispute and was correspondingly significant.").

<sup>12</sup> Decision on Jurisdiction and Admissibility, ¶ 248.

<sup>13</sup> The Tribunal agreed with Canada that the claims concerning the Forest Infrastructure Fund ("FIF"), "hot idle" funding and taxation measures were outside of the Tribunal's jurisdiction (Decision on Jurisdiction and Admissibility, ¶¶ 243-244, 327-330) but the Claimant continued to include them as part of its claim. See Claimant's Memorial on Merits and Damages, ¶¶ 71, 91, 115, 219, Expert Witness Report of Seth T. Kaplan (28 December 2018), ¶¶ 18, 24; Canada's Counter-Memorial on Merits and Damages, ¶¶ 313, 374; Expert Report of Peter Steger, Cohen Hamilton Steger (17 April 2019) ("Steger-1"), ¶ 24; Expert Witness Statement of Ernest and Young Inc. (6 December 2019), ¶¶ 18-21, 61-63; Reply of Seth T. Kaplan, Ph.D. (6 December 2019), ¶ 56; Claimant's Reply Memorial, ¶¶ 9-10, 176-180; and Canada's Rejoinder Memorial on Merits and Damages, ¶¶ 183, 189, 199.

11. Indeed, while the Claimant dropped its Article 1110 claim after the Tribunal noted that it “face[d] considerable difficulties, even assuming the facts as pleaded,”<sup>14</sup> many of the same evident flaws infected its Article 1105 claim. The Claimant paid no heed to the Tribunal’s observation that Resolute’s decision to close the Laurentide mill “was allegedly made because of the low paper prices offered by PHP, and did not involve state action of any kind.”<sup>15</sup> Resolute ignored the inherent attribution and other flaws in its claim and persisted even after Canada made the offer that, in consideration for withdrawing its claim entirely, Canada and Resolute would share the costs and expenses of the Tribunal and PCA equally and each disputing party would bear their own legal costs.<sup>16</sup> Resolute chose to pursue its claim and, having reserved its right to present a copy of its letter to the Tribunal in support of its demand for full costs incurred in this arbitration,<sup>17</sup> Canada requests the Tribunal take into account that the Claimant could have withdrawn its claim and saved Canada the significant expense of defending against it.

12. Finally, the Claimant’s approach to damages justifies an order of costs in Canada’s favour. Not only did Resolute make it extraordinarily difficult to assess the basis upon which its damages claim was premised,<sup>18</sup> the Claimant and its experts produced multiple and significantly fluctuating numbers with every written and oral submission. On cross-examination, Dr. Hausman himself declared that he had “no idea under creation” where the Claimant’s stated quantum amount came from.<sup>19</sup> He also admitted that “there is a lot of uncertainty” and that it is very difficult to predict

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<sup>14</sup> Decision on Jurisdiction and Admissibility, ¶ 312.

<sup>15</sup> Decision on Jurisdiction and Admissibility, ¶ 312.

<sup>16</sup> Letter from Mark A. Luz to Elliot J. Feldman and Martin J. Valasek (17 April 2018), **Annex-III**, p. 2.

<sup>17</sup> Letter from Mark A. Luz to Elliot J. Feldman and Martin J. Valasek (17 April 2018), **Annex-III**, p. 3.

<sup>18</sup> To support its original damages valuation, the Claimant relied on a single page, p. 94 of the RISI October 2011 price forecast and Dr. Hausman’s calculations based on it, provided in pdf format only (see Expert Witness Report of Prof. Jerry Hausman (28 December 2018), Exhibit 2). Canada was obliged to purchase this and other RISI price forecasts in the preparation of its defense against Resolute’s damages claim at a cost of CAN \$24,062.83, including **R-470**, RISI North American Graphic Paper Forecast, 5-Year Forecast, “Printing and Writing Papers” (Oct. 2011), and have its experts reproduce the spreadsheets that Resolute did not provide in native format. Other RISI price forecasts which Canada had to purchase and submitted as evidence include Exhibits **R-235**, RISI, North American Graphic Paper Forecast, “Printing and Writing Papers” (November 2013); **R-236**, RISI, North American Graphic Paper Forecast, “Printing and Writing Papers” (June 2013); **R-402**, RISI North American Uncoated Mechanical Demand Summary(24 June 2013); **R-403**, RISI, North American Uncoated Mechanical Demand Summary (13 February 2013); and **R-426**, RISI Prices - UM Grades - 2018-19 (2018-2019).

<sup>19</sup> Hearing Transcript, Day 3 (11 November 2020), p. 734:18.

the future,<sup>20</sup> which is why he preferred a quantum of \$90 million.<sup>21</sup> Despite this, the Claimant requested in its opening argument that the Tribunal “award Resolute damages in the amount of the losses Professor Hausman has calculated up to approximately \$216 million”,<sup>22</sup> before dropping it in its closing argument to \$124.4 million.<sup>23</sup> With all of this confusion only one thing is clear: Dr. Hausman asserts he “always tries to be conservative in these matters”,<sup>24</sup> but the Claimant does not.

13. The lack of foundation for the claims goes beyond a typical unsuccessful claim: the Claimant should never have brought them before a NAFTA Chapter Eleven tribunal. This, in addition to the reasonableness of Canada's incurred expenses (described in **Part III** below), fully justifies an order that the Claimant bear all the costs in this arbitration.

## **II. EVEN IF THE CLAIMANT IS SUCCESSFUL ON THE MERITS, IT SHOULD BE REQUIRED TO BEAR ITS OWN COSTS**

14. Even if the Tribunal were to find a breach of NAFTA Chapter Eleven, the Tribunal should exercise its discretion under Article 40 of the UNCITRAL Arbitration Rules and order the Claimant bear its own costs given its failure to articulate a coherent theory and quantum of damages.

15. While not conceding that the Claimant is entitled to any compensation, it was Canada, not Resolute, which put forward a reasonable and coherent approach to quantification of damages: if a breach of NAFTA is found, then the re-entry of PHP into the market caused, at most, a slight decline in prices before it was fully reabsorbed and further damages became unquantifiable and not attributable to Canada.<sup>25</sup> While Canada demonstrated why the Claimant has failed to meet the

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<sup>20</sup> Hearing Transcript, Day 3 (11 November 2020), pp. 731:20, 735:17-19.

<sup>21</sup> Hearing Transcript, Day 3 (11 November 2020), p. 731:18-21.

<sup>22</sup> Hearing Transcript, Day 1 (9 November 2020) pp. 164:24-165:1.

<sup>23</sup> Hearing Transcript, Day 6 (14 November 2020), p. 1102:9.

<sup>24</sup> Hearing Transcript, Day 3 (11 November 2020), p. 731:16-17.

<sup>25</sup> Steger-1, ¶¶ 33-50, 84-94.

legal threshold to be compensated even that amount and should not be awarded any damages even if a breach was found, Canada's approach to damages has always been principled and reasonable.

16. The Claimant, on the other hand, adopted a manifestly untenable and confused approach to damages. As described above and canvassed in Canada's pleadings and at the oral hearing, the Claimant did not even follow its own expert's advice, ultimately abandoning the damages request made in its Reply Memorial and the entire foundation upon which it lay.<sup>26</sup> In essence, the Claimant has asked the Tribunal to pick a random amount of damages with no legal or factual basis to back up that quantification.

17. For this reason, even if the Claimant is successful in establishing a breach of NAFTA, its incoherent approach to damages justifies the Tribunal exercising its discretion to order the Claimant to bear all of its own costs.

### **III. CANADA'S COSTS ARE REASONABLE**

18. In light of the substantial pleadings, expert reports and witness statements Canada had to obtain, two rounds of document production and two oral hearings, the costs incurred by Canada in its defence are entirely reasonable. Significant resources were necessary to defend this case, owing to the Claimant's baseless allegations regarding the motivations and actions of the GNS, as well as its unnecessarily complicated and unreasonable damages valuations, which added complexity and significant expense to Canada's defence against the claim. The following is a brief overview of the specific cost claims in Annexes I and II.

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

19. Article 38(a), (b) and (c) of the UNCITRAL Arbitration Rules includes the fees of arbitral tribunal, the travel and other expenses incurred by the arbitrators, and the cost of other assistance required by the arbitral tribunal, as allowable costs that a successful party may seek to recover. To

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<sup>26</sup> Claimant's Reply Memorial, ¶397(e) requests USD \$103,967,000 which is Dr. Hausman's "conservative" amount derived from his forecasting model.



date, the disputing parties have shared the costs of the arbitration equally. So far, Canada has paid **CAN \$722,113.00**.<sup>27</sup>

## B. Legal Representation Costs

20. Article 38(e) of the UNCITRAL Arbitration Rules includes the costs of legal representation and assistance, such as expert costs and disbursements, incurred in relation to the arbitration, as allowable costs that a successful party may seek to recover.

### 1. Lawyers and Paralegals

21. Regarding its legal fees, Canada was represented in this arbitration by lawyers and paralegals at the Trade Law Bureau of the Government of Canada whose rates are determined by the Department of Justice based on a seniority scale. The total time that they spent on Canada's defence since the filing of the Notice of Intent on September 30, 2015 to current day is indicated in **Annex-II**. The total billings for legal representation of the Trade Law Bureau since the filing of the Claimant's Notice of Intent are **CAN \$4,245,969.28**.

22. This amount is entirely reasonable in light of the circumstances of this case and typical of the legal costs incurred by Canada and recently awarded to Canada by past NAFTA tribunals.<sup>28</sup>

### 2. Experts and Consultants

23. Canada was required to retain experts and consultants to respond to the Claimant's claims. Cohen Hamilton Steger and AFRY/Pöyry submitted expert reports to identify, clarify and correct the errors and inaccuracies in the Claimant's assessment of the SC paper market and its damages claim. In addition, Canada retained technical experts at Core Legal to assist with trial technology and graphics at two oral hearings. The fees for each of these experts and consultants are listed as "Disbursements" in **Annex-I** and total **CAN \$1,519,180.23**.

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<sup>27</sup> Email from Ms. Ashwita Ambast, Permanent Court of Arbitration, to the Disputing Parties (28 January 2021), attaching Statement of Account indicating deposit payment by Canada of USD \$550,000. Fees and expenses of the Tribunal and the Permanent Court of Arbitration have been converted from USD funds to CAN funds. The Tribunal should direct the Claimant to pay any further fees and expenses incurred by the Tribunal and PCA.

<sup>28</sup> See e.g., **RL-169**, *Eli Lilly – Final Award*, ¶ 480(4) (awarding \$4.45 million in legal representation and assistance costs); **RL-122**, *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, Part X ¶ 10.7 (awarding \$9 million in legal representation and assistance costs).

### 3. Additional Disbursements

24. Canada had to make additional disbursements of **CAN \$78,718.52**. In particular, Canada incurred travel costs in the amount of **CAN \$22,704.64** for various meetings with expert witnesses and the arbitral hearing. Canada incurred an additional **CAN \$31,951.05** for administrative services and supplies necessary to defend this case, including printing, photocopying, and courier services. Canada also had to incur an expense of **CAN \$24,062.83** to purchase a collection of RISI price forecasts (for which Canada has no use other than for the purposes of this arbitration) that formed the basis of Resolute's damages claim in order to demonstrate that its damages model was flawed and unreasonable.<sup>29</sup>

### IV. ORDER REQUESTED

25. The Tribunal should award Canada all of its arbitration and legal costs.

February 2, 2021

Respectfully submitted on behalf of the  
Government of Canada,



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Mark A. Luz  
Rodney Neufeld  
Annie Ouellet  
Stefan Kuuskne  
Azeem Manghat  
Dmytro Galagan

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<sup>29</sup> See ¶ 12 and footnote 18 above.