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**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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**PROCEDURAL ORDER NO. 13**

**ON THE DESIGNATION OF CERTAIN EXHIBITS AS RESTRICTED ACCESS INFORMATION**

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**ARBITRAL TRIBUNAL:**

Judge James R. Crawford, AC (President)

Dean Ronald A. Cass

Professor Céline Lévesque

**February 17, 2020**

*Resolute Forest Products Inc. v. Government of Canada*  
(PCA Case No. 2016-13)

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Procedural Order No. 13 – On the Designation of Certain Exhibits as Restricted Access Information

1. **PROCEDURAL HISTORY**

- 1.1 On October 14, 2016, the Presiding Arbitrator (on behalf of the Tribunal) and the Parties signed the Confidentiality Order. The Confidentiality Order establishes the procedure for the designation of Restricted Access Information and Confidential Information by the Parties for the Documents Exchanged in Document Production, Written Submissions, Transcripts, Orders, and Awards.
- 1.2 By letter dated December 6, 2019, Resolute objected to Canada’s “over-zealous” assertion of Restricted Access Information, which it argued was preventing Resolute’s counsel from sharing vital information with Resolute and, in turn, from receiving advice from Resolute regarding the presentation of arguments to the Tribunal.
- 1.3 By letter dated January 17, 2020, Resolute requested the Tribunal to instruct Canada “to re-designate C-182,<sup>1</sup> C-195,<sup>2</sup> R-146,<sup>3</sup> and R-161<sup>4</sup> [(the “**Four Exhibits**”), all designated by Canada as Restricted Access] as Confidential, or alternatively, allow M. Vachon to view these documents, subject to an undertaking not to disseminate the documents further.” (“**Resolute’s Application**”)
- 1.4 By e-mail of January 18, 2020, Resolute’s counsel informed the Tribunal that they “inadvertently copied Mr. Vachon” on the letter dated January 17, 2020. By an e-mail of the same date, Mr. Vachon confirmed destruction of the e-mail from Resolute’s counsel containing the letter dated January 17, 2020.
- 1.5 By letter dated January 23, 2020, Canada provided comments on Resolute’s letter of January 17, 2020.
- 1.6 On January 28, 2020, the Tribunal informed the Parties that it would consider their positions and issue a Procedural Order in due course.

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<sup>1</sup> [REDACTED]

<sup>2</sup> [REDACTED]

<sup>3</sup> A report prepared by [REDACTED]

<sup>4</sup> A report prepared by [REDACTED]

*Resolute Forest Products Inc. v. Government of Canada*  
(PCA Case No. 2016-13)

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Procedural Order No. 13 – On the Designation of Certain Exhibits as Restricted Access Information

- 1.7 On January 28, 2020, acknowledging receipt of the Tribunal’s message of the same date, Resolute submitted a letter in response to Canada’s letter of January 23, 2020 (the “**Additional Submission**”).
- 1.8 On January 28, 2020, Canada objected to Resolute’s “unauthorized” letter of the same date and requested the Tribunal to “disregard [Resolute’s] letter and its contents.”

**2. CONSIDERATION OF RESOLUTE’S ADDITIONAL SUBMISSION BY THE TRIBUNAL**

**Resolute’s Position**

- 2.1 Resolute has requested the Tribunal to take into account the Additional Submission because it responds to arguments raised by Canada in its letter of January 24, 2020.

**Canada’s Position**

- 2.2 Canada argues that the Tribunal should disregard Resolute’s Additional Submission. Canada submits that Resolute had sufficient opportunity to present its case in its letter of January 17, 2020. Canada notes that the Tribunal did not request any further submissions from the Parties and had indicated that it possessed sufficient information to make a determination.

**3. RE-DESIGNATION OF THE FOUR EXHIBITS**

**Resolute’s Position**

- 3.1 Resolute argues that the Four Exhibits are not entitled to Restricted Access protection because they do not contain any information that would cause serious material gain or loss, which could prejudice the competitive position of anyone, nor any information that would constitute highly sensitive Business Confidential Information belonging to anyone.
- 3.2 Resolute argues that the Four Exhibits are central to the arguments made in its Memorial and to be made at the Hearing on the Merits and Damages. Resolute’s counsel submit that they have been unable to obtain “Resolute’s understanding, advice and authorization of the argument presented to the Tribunal,” on account of the designation of the Four Exhibits as Restricted Access Information by Canada.

*Resolute Forest Products Inc. v. Government of Canada*  
(PCA Case No. 2016-13)

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Procedural Order No. 13 – On the Designation of Certain Exhibits as Restricted Access Information

Timeliness of Resolute’s Application

- 3.3 Resolute does not consider its Application to be time barred.
- 3.4 Resolute notes that it previously objected on July 27, 2018 and August 31, 2018 to Canada’s “overly-broad Restricted Access designations.”
- 3.5 Resolute notes that Canada failed to produce R-146 and R-161 in response to Resolute’s first document production request, as a result of which Resolute was left with a too-brief period of 7 days after receiving R-146 and R-161 with Canada’s Counter-Memorial to determine whether these exhibits were entitled to Restricted Access protection.
- 3.6 Resolute notes that Paragraph 26 of the Confidentiality Order allows the Tribunal to modify the time period for Parties to bring objections to designations of Restricted Access Information in appropriate cases such as this one. Resolute recalls that Canada lifted its Restricted Access Information designation of C-190 after the period for challenging the designation of Restricted Access Information had expired, when Resolute pointed to a public version of the same document on the record (C-340). Therefore, Resolute submits, Canada has accepted belated challenges to its designations of Restricted Access Information.
- 3.7 Resolute argues that Canada’s arguments on timeliness ignore Paragraph 26 of the Confidentiality Order, which governs the amendment of time limits established by the Confidentiality Order, in favour of Paragraph 41 of the Confidentiality Order.

Whether the Four Exhibits can benefit from Restricted Access protection in their entirety

- 3.8 Resolute submits that the Four Exhibits are not entitled to Restricted Access protection. Resolute argues that Canada has not attempted to provide limited designations within the Four Exhibits of Restricted Access Information despite being required to do so by the Confidentiality Order and being specifically requested to do so by Resolute.<sup>5</sup>
- 3.9 According to Resolute, neither R-146 nor R-161 contains any information provided by Pacific West Commercial Corporation (“**PWCC**”), Port Hawkesbury Paper (“**PHP**”), or the Government of Nova Scotia (“**GNS**”). Resolute contends that R-146 and R-161 rely on

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<sup>5</sup> Letter from Resolute to Canada, dated December 18, 2019.

*Resolute Forest Products Inc. v. Government of Canada*  
(PCA Case No. 2016-13)

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Procedural Order No. 13 – On the Designation of Certain Exhibits as Restricted Access Information

[REDACTED] Resolute points out that R-161 was [REDACTED] which suggests that [REDACTED] could not have considered the information in R-161 to be too sensitive to disclose to third parties.

- 3.10 Resolute argues that Canada’s Restricted Access designation of R-161 is predicated on one piece of information, [REDACTED] which Resolute does not rely upon in its Reply. Moreover, Resolute argues that the burden of proof is upon Canada to show that R-146 and R-161 contain Restricted Access Information; Canada cannot argue that it should not be required to “reverse engineer” R-146 and R-161 to identify Restricted Access Information. Resolute points out that Canada has not demonstrated that the information from R-146 and R-161 relied upon in Resolute’s Reply is entitled to Restricted Access protection.<sup>6</sup>
- 3.11 According to Resolute, all the material in C-182 and C-195 was disclosed in press releases of GNS.<sup>7</sup> Resolute argues that Canada has not identified which, if any, provisions of C-185 or C-195 contain highly sensitive Business Confidential Information or what information contained in C-185 or C-195 could cause serious material gain or loss to the prejudice of GNS or PWCC/PHP.
- 3.12 Resolute clarifies that the non-public information in C-182 and C-195 does not constitute highly sensitive Business Confidential Information as claimed by Canada.

Prejudice caused by the current designation and the re-designation of the Four Exhibits

- 3.13 Resolute acknowledges that the designation of the Four Exhibits as Restricted Access Information did not hamper preparations for its Reply. However, Resolute notes that the ability of its counsel to use the Four Exhibits in a filing is separate from whether Resolute can instruct its own counsel effectively ahead of a hearing.
- 3.14 Resolute submits that the re-designation of the Four Exhibits as Confidential would not prejudice Canada. First, Resolute argues that after the re-designation, the Four Exhibits will continue to be confidential from the public. Resolute clarifies that no one at Resolute other

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<sup>6</sup> Resolute refers to quotations of R-164 and R-161 in the following paragraphs of Resolute’s Reply: Paragraphs 3, 103, 131, 144-147, 249, 257, 261, 321, 323, 371, 374, 384, 385, 388.

<sup>7</sup> C-187; C-196; R-090.

*Resolute Forest Products Inc. v. Government of Canada*  
(PCA Case No. 2016-13)

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Procedural Order No. 13 – On the Designation of Certain Exhibits as Restricted Access Information

than Mr. Vachon would have access to the Four Exhibits. Resolute further submits that the information in the Four Exhibits is seven or more years old, does not contain any “highly sensitive information of the government” nor any “highly sensitive business confidential information of other non-parties to the arbitration.”

- 3.15 Resolute points out that, on account of Paragraph 28(b) of the Confidentiality Order, Resolute’s personnel have limited ability to evaluate arguments that rely on Restricted Access Information in comparison to the information available to Canada’s personnel. This “handicap”, according to Resolute, is made more acute by Canada’s “blanket Restricted Access designations.”

**Canada’s Position**

- 3.16 Canada submits that the Restricted Access designation of the Four Exhibits must be maintained.
- 3.17 Canada opposes Resolute’s Application on the basis that (i) it is untimely; (ii) the Four Exhibits contain “highly sensitive Business Confidential Information”, which is entitled to Restricted Access protection; and (iii) the Business Confidential Information in the Four Exhibits belongs to [REDACTED], who could suffer prejudice if the information is disclosed to Resolute.

Timeliness of Resolute’s Application

- 3.18 Canada notes that Resolute has known of the Restricted Access designation of R-146 and R-161 for at least eight months, but only objected to such designation on December 18, 2019. Should Resolute not have had sufficient time to review the Restricted Access designations, it could have, Canada submits, sought an extension of the relevant deadlines. Canada notes that Resolute did not object to the Restricted Access designation of R-146 and R-161 despite having several opportunities to do so, including: (i) when Canada relied on these documents in its Counter-Memorial and the Parties agreed to maintain the Restricted Access designations of R-146 and R-161; (ii) while the second document production process was underway; and (iii) while Resolute was preparing its Reply.

*Resolute Forest Products Inc. v. Government of Canada*  
(PCA Case No. 2016-13)

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Procedural Order No. 13 – On the Designation of Certain Exhibits as Restricted Access Information

3.19 Canada submits that Resolute’s challenge to the Restricted Access designation of C-182 and C-195 is 17 months too late. Canada points out that Resolute first challenged the Restricted Access designation of C-182 and C-195 only after the submission of its Reply on December 6, 2019. Canada recalls that C-182 and C-195 were designated as Restricted Access when they were produced by Canada and that Resolute failed to challenge the Restricted Access designation within the timelines of the Confidentiality Order. Canada notes that Resolute confirmed the Restricted Access designations of C-182 and C-195 when it exhibited these documents with its Memorial on December 28, 2018 and when the Parties submitted to the Tribunal on January 21, 2019 the final versions of the Memorial and accompanying reports. Canada notes that Resolute further confirmed the Restricted Access designation of C-182 and C-195 upon the submission of Canada’s Counter-Memorial on April 17, 2019 and when Canada submitted the final versions of the Counter-Memorial and its accompanying reports to the Tribunal on May 13, 2019.

Whether the Four Exhibits can benefit from Restricted Access protection in their entirety

3.20 In any event, Canada submits that C-182 and C-195 clearly meet the criteria for a Restricted Access designation. Canada notes that although C-182 and C-195 [REDACTED] they contain highly sensitive Business Confidential Information [REDACTED]

This information [REDACTED]

Allowing Resolute’s representatives to have access to this information, in Canada’s view, would [REDACTED] Canada notes that knowledge [REDACTED]

3.21 Canada denies that C-182 and C-195 are public documents. Canada clarifies that some “high-level elements” of these documents are publicly known, but their details have been consistently treated as confidential by [REDACTED]

3.22 According to Canada, R-161 was prepared using Business Confidential Information [REDACTED]. Canada points out that R-161 [REDACTED] which information constitutes [REDACTED] (defined as Business Confidential [REDACTED])

*Resolute Forest Products Inc. v. Government of Canada*  
(PCA Case No. 2016-13)

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Procedural Order No. 13 – On the Designation of Certain Exhibits as Restricted Access Information

Information in the Confidentiality Order) that is highly sensitive (as covered by Paragraph 1(d)(ii) of the Confidentiality Order). Canada argues that it should not be made to “reverse engineer” the text of R-161 to determine which portions are predicated on Business Confidential Information and then apply appropriate redactions. Canada notes that it is irrelevant whether R-161 [REDACTED]; what is relevant is the disclosure of [REDACTED] Business Confidential Information that formed the basis of R-161.

- 3.23 Canada explains that R-146 [REDACTED] Canada argues that it should not be required to “reverse engineer” R-146 to determine which portions of R-146 rely on Business Confidential Information [REDACTED]. Canada clarifies that R-146 was intended to be confidential [REDACTED]

Prejudice by the current designation and the re-designation of the Four Exhibits

- 3.24 Canada denies that it has been over-zealous in its Restricted Access designations. Canada notes that it must be “particularly vigilant” to ensure that the Business Confidential Information [REDACTED], who are not parties to this arbitration, is not disclosed to [REDACTED]
- 3.25 Canada recalls that the Tribunal, in Paragraph 28(b) the Confidentiality Order, ensured that no employee of Resolute would have access to Restricted Access documents. Canada submits that there are no compelling circumstances that justify the departure from the terms of the Confidentiality Order to allow Resolute’s Application. Canada points out that any adverse impact on hearing preparation and consultations with clients and witnesses of the designation of certain information as Restricted Access, would equally apply to Canada. In Canada’s view, if Resolute was able to present written submissions with the Four Exhibits designated as Restricted Access, then it should not face any obstacles preparing for the upcoming hearing in the same circumstances. Canada notes that any purported inconvenience that Resolute may face on account of the designation of the Four Exhibits as Restricted Access is outweighed by [REDACTED] that may ensue from the disclosure of the Four Exhibits to Resolute’s officers, particularly since the Tribunal and Canada have no power to ensure that the Four Exhibits are not used [REDACTED] in the future.



*Resolute Forest Products Inc. v. Government of Canada*  
(PCA Case No. 2016-13)

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Procedural Order No. 13 – On the Designation of Certain Exhibits as Restricted Access Information

3.26 Canada submits that the timelines in the Confidentiality Order were established to prevent disputes from arising at prejudicial times (such as now, during the preparations for Canada's Rejoinder).

**4. TRIBUNAL'S ANALYSIS**

4.1 Paragraph 7 of the Confidentiality Order provides that:

7. A Disputing Party may object to a proposed designation of Restricted Access Information in a document that it obtains through the other Disputing Party's Document Production. If such an objection is made, the Disputing Parties shall attempt to agree on the final designations of Restricted Access Information in the document. If the Disputing Parties do not agree on the final designations of Restricted Access Information, a Disputing Party may submit the objection to the Tribunal for resolution. The Tribunal may invite further submissions on proposed designations of Restricted Access Information.

4.2 The Confidentiality Order further states that:

8. A Disputing Party shall provide, at the time that it files a Written Submission, a preliminary Restricted Access Version of the Written Submission containing its proposed designations of Restricted Access Information, if any, of the Disputing Party making the filing. A Disputing Party shall provide, at the time it files the exhibits to a Written Submission, a preliminary Restricted Access Version of those exhibits containing the proposed designations of Restricted Access Information, if any, of the Disputing Party making the filing. Double brackets ([[ ]]) or highlighting shall be used to surround designated Restricted Information.

9. A Disputing Party shall have fourteen (14) calendar days from the date of receiving a Written Submission from the other Disputing Party (and therefore, seven (7) calendar days of the date that exhibits forming part of its Written Submission are filed under paragraph 8.2 of Procedural Order No. 1), to object to any proposed designations of Restricted Access Information and to provide its own further proposed designations of Restricted Access Information, if any, in the Written Submission and its accompanying exhibits.

*Resolute Forest Products Inc. v. Government of Canada*  
(PCA Case No. 2016-13)

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Procedural Order No. 13 – On the Designation of Certain Exhibits as Restricted Access Information

10. If such objections or further proposed designations are provided, the Disputing Parties shall attempt to agree on the final designations of Restricted Access Information in the Written Submission. If the Disputing Parties do not agree on the final designations of Restricted Access Information, a Disputing Party may submit any outstanding objections to the Tribunal for resolution. The Tribunal may invite further submissions on proposed designations of Restricted Access Information.

4.3 The Confidentiality Order stipulates that:

26. The time periods set out in this Confidentiality Order may be amended by agreement of the Disputing Parties, or by order of the Tribunal after hearing the Disputing Parties and taking into account all relevant circumstances.

[...]

41. A Disputing Party may apply for an amendment to, or a derogation from, this order if compelling circumstances so require.

**Consideration of Resolute’s Additional Submission**

4.4 The Parties are divided about whether the Tribunal should consider Resolute’s Additional Submission while making its determination regarding the classification of the Four Exhibits.

4.5 Resolute was not requested by the Tribunal to provide comments on Canada’s letter of January 24, 2020. In fact, prior to the circulation of the Additional Submission, the Tribunal had informed the Parties that it had sufficient material to issue a procedural order in due course.

4.6 The arguments contained in Resolute’s Additional Submission are adequately presented in Resolute’s Application. The former does not contain any substantially new arguments. In the circumstances, the Tribunal has taken Resolute’s Additional Submission into consideration while preparing this procedural order.

4.7 Going forward, the Parties are requested to adhere to the submissions schedule established by the Tribunal and to seek the Tribunal’s leave before supplying a submission that is not in line with the Tribunal’s schedule.

Procedural Order No. 13 – On the Designation of Certain Exhibits as Restricted Access Information

**Re-Designation of the Four Exhibits**

- 4.8 Paragraph 7 of the Confidentiality Order (extracted above) establishes the process to be followed by a Party to object to a proposed designation of Restricted Access Information in a document that it obtains through the other Party's Document Production. Paragraphs 8-10 of the Confidentiality Order (extracted above) describe the process to challenge the proposed designation of Restricted Access Information in exhibits forming part of the other Party's Written Submission.
- 4.9 It is agreed by the Parties that Resolute's Application is belated. The Tribunal takes note of Canada's argument that eight months had passed since Canada designated R-146 and R-161 as Restricted Access Information and that seventeen months had passed since Canada designated C-182 and C-195 as Restricted Access Information, when Resolute formally challenged the Restricted Access designation of the Four Exhibits. Resolute had several opportunities during the above periods, within the framework of the Confidentiality Order, to challenge the classification of the Four Exhibits, but did not do so.
- 4.10 It is true that Paragraph 26 of the Confidentiality Order (extracted above) stipulates that the time periods for the challenge of a designation of Restricted Access Information by a Party may be amended "by order of the Tribunal after hearing the Disputing Parties and taking into account all relevant circumstances." More generally, Paragraph 41 of the Confidentiality Order (extracted above) allows amendment or derogation to the Confidentiality Order "if compelling circumstances so require." However, Paragraphs 26 and 41 of the Confidentiality Order suggest that a departure from the Confidentiality Order's timelines for the challenge of a Restricted Access Information designation is only permissible in exceptional circumstances. Therefore, Resolute now bears a high burden to establish that there are compelling reasons to vary the designation of the Four Exhibits.
- 4.11 Resolute's counsel argue that they are presently unable to obtain proper instructions from Resolute ahead of the Hearing on the Merits and Damages on account of the Restricted Access Information designation of the Four Exhibits.
- 4.12 The Tribunal notes that Resolute's Reply provides sufficient indication of what Resolute's core arguments are in relation to the Four Exhibits, particularly R-146 and R-161. For example, the Reply makes note of the delayed production by Canada of Exhibits R-146 and

*Resolute Forest Products Inc. v. Government of Canada*  
(PCA Case No. 2016-13)

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Procedural Order No. 13 – On the Designation of Certain Exhibits as Restricted Access Information

R-161

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- 4.13 Further, the record demonstrates that Resolute's expert (Dr. Kaplan) was aware of the content of the Four Exhibits. In his expert report dated December 6, 2019, Dr. Kaplan refers to R-146 and R-161 extensively in his analysis.<sup>9</sup> This analysis is in turn relied upon in Resolute's Reply.<sup>10</sup>
- 4.14 Accordingly, the record demonstrates that Resolute has been able to present its case to the Tribunal with the current designations of the Four Exhibits. The Tribunal is not convinced that the disadvantages described by Resolute are so compelling that they satisfy the high burden to be met for a late variation in the designations of the Four Exhibits. Resolute has not established the existence of compelling circumstances that would justify a derogation from the timelines set by the Confidentiality Order.

**5. ORDER**

- 5.1 For the above reasons, the Tribunal rejects Resolute's Application.

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<sup>8</sup> See Resolute's Reply, paras 2, 148, 249, 254, 257.

<sup>9</sup> See Reply of Seth T. Kaplan, December 6, 2019, paras 6, 23-27.

<sup>10</sup> Resolute's Reply, paras 146, 148-49, 261, 384, 385.

*Resolute Forest Products Inc. v. Government of Canada*  
(PCA Case No. 2016-13)

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Procedural Order No. 13 – On the Designation of Certain Exhibits as Restricted Access  
Information

Date: February 17, 2020

For the Arbitral Tribunal



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Judge James R. Crawford, AC