

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

WITNESS STATEMENT OF JEANNIE CHOW

April 17, 2019

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I, Jeannie Chow, of 1660 Hollis Street, the City of Halifax, in the Province of Nova Scotia, hereby AFFIRM as follows:

1. I have been a Director at the Nova Scotia Department of Business since April 2015. Between January 2012 and April 2015, I was a Senior Investment Manager, Investment and Trade, at the Nova Scotia Department of Economic, Rural Development and Tourism (“ERDT”). While I was at ERDT (which was wound-up in 2015), one of my roles was to assess and process complex financial transactions, including evaluating company business plans and conducting due diligence for the Government of Nova Scotia (“GNS”) to support transactions relating to program financing.

2. This witness statement responds to certain statements that Resolute Forest Products Inc. (“Resolute”) made in its December 28, 2018 Memorial regarding the financial assistance that the GNS provided to Pacific West Commercial Corporation (“PWCC” or the “Company”) in its bid to purchase the Port Hawkesbury paper mill. I do not respond to every statement made in Resolute’s Memorial, but that should not be taken to mean that I agree with its characterizations or statements.

NOVA SCOTIA DEPARTMENT OF ECONOMIC AND RURAL DEVELOPMENT AND TOURISM

3. ERDT’s mandate was to develop and implement plans, programs and policies that encourage entrepreneurship, help attract venture capital investment, and grow sectors of the Nova Scotia economy, particularly in rural areas of the province.¹ The Department of Business now plays a similar role.

4. A key mechanism through which the ERDT achieved its mandate was through the Nova Scotia Jobs Fund (“Jobs Fund”).² The Jobs Fund was an initiative to provide investment support

¹ The Nova Scotia *Public Service Act* describes the mandate of ERDT, which includes: developing, coordinating, and implementing policies, planning, and programming relating to economic and rural development and economic growth strategy; coordinating and implementing special projects with communities in economic transition; and cooperating with and supporting the work and efforts of other departments and the Government of Canada and its departments respecting matters relating to economic and rural development in the Province. **R-188**, *Public Service Act*, RSNS 1989, c 376, s 33(2)(a),(b),(f).

² **R-189**, *Nova Scotia Jobs Fund Act*, SNS 2011, c. 40, s 3, proclaimed into force on December 21, 2011, was the successor legislation to **R-220**, *Industrial Development Act*, RSNS 1989, c. 222, s. 4, which established the

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for economic development, such as attracting businesses, sustaining or increasing employment, promoting growth, renewal and restructuring in regions or sectors and pursuing regional or strategic initiatives. Investments were made to support activities such as productivity, capital expansion, and working capital. The Jobs Fund also acted as a lender to support industries in Nova Scotia.³ The Jobs Fund (and its predecessor the Industrial Expansion Fund) has been used to provide over \$850 million in support to dozens of companies in all parts of Nova Scotia.⁴

5. Between 2009 and 2011, three pulp and paper mills in the province – Bowater Mersey Paper Company Limited (owned by Resolute and The Washington Post), NewPage Port Hawkesbury (“NPPH”), and Northern Pulp Nova Scotia Corporation (“Northern Pulp”) – had financial difficulties. The Nova Scotia Jobs Fund (and its predecessor the Industrial Expansion Fund) was identified as a means through which the GNS might be able to provide financial assistance to these mills. Given that ERDT was mandated with overseeing the Jobs Fund, and given my experience with account management, I was asked to join the interdepartmental government committee in January 2012 as ERDT’s representative with respect to the Port Hawkesbury mill.

PORT HAWKESBURY FINANCING

6. When I joined EDRT in January 2012, I was tasked with assessing and implementing the terms of any financing that the GNS may negotiate with PWCC. I had recent experience in this respect because I had previously negotiated and implemented financing arrangements for companies in a variety of industries. With respect to the Port Hawkesbury transaction, my role was to carry out due diligence, communicate my analyses to senior management, and implement the contractual documents necessary to authorize any potential financial assistance to the Company and monitor the company’s progress.

Industrial Expansion Fund. The Jobs Fund was closed to new transactions in April 2014. However, it continues to exist in order to monitor and administer multi-year transactions that were agreed prior to April 2014. See **R-190**, *Invest Nova Scotia Board Act*, SNS 2014, c 9, s. 34, which added s. 5A to **R-189**, *Nova Scotia Jobs Fund Act*. Both funds had similar purposes of supporting economic development in Nova Scotia. Each could propose investments in various forms to organization, and both required Executive Council approval to do so.

³ **R-191**, Job Fund Annual Report 2018, “Nova Scotia Jobs Fund Annual Report (2017-2018)”, p. 2.

⁴ **R-191**, Job Fund Annual Report 2018, “Nova Scotia Jobs Fund Annual Report (2017-2018)”, p. 2.

7. The August 14, 2012 Letter of Offer [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] I summarize each of these elements below.

8. \$40 Million Credit Facility: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] on September 12, 2012 the Company was unable to obtain a positive advance tax ruling (“ATR”) from the Canada Revenue Agency (“CRA”) on its proposed organizational structure with Nova Scotia Power Inc. (“NSPI”), the loan was changed to be potentially forgivable [REDACTED].⁸

9. Resolute states that the change in the loan term from [REDACTED] repayable to potentially forgivable was an attempt to “sweeten the deal” for PWCC.⁹ I disagree with this characterization because it ignores the conditions under which forgiveness could be granted. The CRA rejection of PWCC’s application for an ATR on September 12, 2012 constituted a changed circumstance on which the GNS’ financial assumptions had been based, which then changed the business case for deciding whether to provide financial assistance. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁵ C-182, [REDACTED] pp. 1-4.

⁶ C-195, [REDACTED]

⁷ C-182, [REDACTED], pp. 2-3.

⁸ C-195, [REDACTED], pp. 2-4.

⁹ Claimant’s Memorial on Merits and Damages (December 28, 2019) (“Claimant’s Memorial”), ¶ 256.

[REDACTED]

[REDACTED] loan forgiveness was linked to the taxes paid by NSPI:

[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]¹⁰

10. In other words, the GNS is only required to forgive as much of the loan as it receives from corresponding tax revenue from NSPI, [REDACTED]

[REDACTED].¹¹ From the GNS' perspective, the forgiveness provision effectively offsets the loan because the amount forgiven will correspond with the amount received in additional tax revenue.

11. **\$24 Million Capital Loan**: This loan was to encourage productivity and efficiency improvements at the mill [REDACTED]

[REDACTED].¹² [REDACTED]
[REDACTED]
[REDACTED]

¹⁰ C-195, [REDACTED] p. 3.

¹¹ C-195, [REDACTED], p. 3, ¶ 3(b).

¹² C-182, [REDACTED], pp. 2-3.

[REDACTED]

12. **Profit Share Contribution**: This is an important aspect of the GNS financial assistance package because it provided some level of security for Nova Scotia’s financing. Given the forgivable loans and incentives for the Company in the early years of its operation discussed above, a profit share contribution was included in the financing package [REDACTED]

[REDACTED]

[REDACTED] There is a cap on this, such that the totality of the profit share contribution would not exceed \$24 million – the same amount that GNS provided as a capital loan.¹⁴

13. **\$1 Million Marketing Contribution**: Due to the prolonged shutdown of the Port Hawkesbury mill between August 2011 and September 2012, and because new PWCC management had additional start-up costs associated with its takeover of operations, the GNS provided up to [REDACTED] to support the Company in marketing its products produced at the mill. [REDACTED]

[REDACTED]¹⁵ [REDACTED]

14. **\$1.5 Million Workforce Training Grant**: This incentive was structured to support the Company’s employees with training due to the mill’s restart following a prolonged shutdown, and to train workers on the new capital upgrades to the mill. The GNS provided up to \$1.5 million [REDACTED]

[REDACTED]¹⁶

¹³ C-182, [REDACTED], pp. 2-3.

¹⁴ C-195, [REDACTED], pp. 4-5.

¹⁵ C-182, [REDACTED], p. 4.

¹⁶ C-182, [REDACTED], p. 4.

MISCHARACTERIZATIONS IN RESOLUTE’S MEMORIAL

15. I disagree with how Resolute characterizes the financial assistance measures. As a preliminary matter, the GNS did not [REDACTED]”¹⁷ or otherwise do “whatever it took to reopen the mill”.¹⁸ Like with any other government financing transaction using the GNS’ investment support programs like the Jobs Fund, we did due diligence and considered potential risks and benefits in order to assess, as best we could, whether the investment of public money under these circumstances and on these terms was reasonable.

16. Further, Resolute appears to characterize the tax losses that had previously been generated by NPPH, [REDACTED].¹⁹ These tax losses are not an asset recorded on the balance sheet of NPPH or PWCC, but may be an advantage to PWCC, as acquirer of NPPH, if restructuring occurs to include taxable income from a similar line of business to be applied against the tax losses. There is also a finite period in which the tax losses can be carried back or forward. [REDACTED]

[REDACTED]. If Stern Partners wishes to use, and is able to use, those tax losses, [REDACTED] [REDACTED] 32 cents of every dollar had to be paid to Nova Scotia, and a further 18 cents reinvested into the mill.²⁰ This was a requirement on Nova Scotia’s part that the province would be able to obtain a financial benefit if Stern Partners restructured in order to be able to apply these losses to other taxable income from other similar business activity.

17. Finally, [REDACTED]
[REDACTED]
[REDACTED]²¹ [REDACTED]”²² [REDACTED]
[REDACTED]

¹⁷ Claimant’s Memorial, ¶ 65.

¹⁸ Claimant’s Memorial, ¶ 37.

¹⁹ Claimant’s Memorial, ¶ 97.

²⁰ C-195, [REDACTED], pp. 5-6.

²¹ C-182, [REDACTED], p. 4.

²² Claimant’s Memorial, ¶¶ 45, 164, 179.

MAY CONTAIN RESTRICTED ACCESS AND CONFIDENTIAL INFORMATION

[REDACTED]

I affirm that the foregoing is true and correct.

Dated: April 17, 2019

Jeannie Chow

