

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 DUFF MONTGOMERIE
April 17, 2019

I, Duff Montgomerie, of 1505 Barrington Street, the City of Halifax, in the Province of Nova Scotia, hereby AFFIRM as follows:

1. I am the Deputy Minister of the Nova Scotia Department of Labour and Advanced Education. I was appointed to my current position on April 28, 2014. I make this statement from my personal knowledge and from my review of contemporaneous documents.

2. From January 2011 to April 2014, I was the Deputy Minister of Natural Resources in the Government of Nova Scotia (“GNS”). I also chaired an interdepartmental government committee established to contend with the cross-cutting challenges facing Nova Scotia’s forestry sector at that time, including the financial difficulties faced by the Northern Pulp kraft mill in New Glasgow, the closure of Resolute’s¹ Bowater Mersey newsprint mill in Liverpool, the idling of NewPage’s newsprint and supercalendered (“SC”) paper mill in Port Hawkesbury and the re-emergence of that mill from *Companies’ Creditors Arrangement Act* (“CCAA”) proceedings under the new ownership of Pacific West Commercial Corporation (“PWCC”).

3. I provide this witness statement to respond to certain allegations made in Resolute’s December 28, 2018 Memorial relating to Nova Scotia’s role in the reopening of the Port Hawkesbury mill in September 2012. The fact that I have not addressed Resolute’s characterizations of facts and events other than those I discuss in this witness statement must not be taken to mean that I agree with them.

THE NOVA SCOTIA GOVERNMENT’S APPROACH TO THE FORESTRY SECTOR

4. Management of Nova Scotia’s forestry sector requires an integrated approach by the government to ensure that the Province will benefit from the economic vitality of the largest players (i.e., pulp and paper mills and saw mills) and the myriad of small companies and independent contractors, but also from the pursuit of environmental objectives and First Nations

¹ For part of the time the events discussed in this witness statement occurred, Resolute was called AbitibiBowater. For the sake of consistency and clarity, I use the company’s current name in this witness statement.

prosperity and reconciliation. Our policy goals are aimed at ensuring a viable integrated forest industry and include increasing Crown land acreage for conservation purposes, reducing clear-cutting, modernizing silviculture practices and revising long outdated harvesting agreements. I was responsible for balancing these various considerations and trying to reconcile competing interests, especially in the challenging economic landscape which saw a steep decline in Nova Scotia's forest industry in the past decade.

5. To properly address the challenges faced by the forestry sector in Nova Scotia, an interdepartmental government committee was created under my supervision to deal not only with long-term planning and policy considerations, but also to contend with urgent situations facing the industry's biggest players and largest employers in rural Nova Scotia. The GNS had been providing financial support to the Northern Pulp kraft mill since 2009, but the events in August 2011 involving Resolute's Bowater Mersey newsprint mill and NewPage's newsprint and SC paper mill required a particularly coordinated response.

NOVA SCOTIA'S REACTION TO THE POTENTIAL CLOSURE OF RESOLUTE'S BOWATER MERSEY MILL AND NEWPAGE'S PORT HAWKESBURY MILL IN AUGUST 2011

6. On August 22, 2011, NewPage announced that it was idling its Port Hawkesbury mill.² Four days later, Resolute informed the GNS that it would announce imminently that it would permanently shut down its Bowater Mersey mill. Less than two weeks after that (September 6, 2011), Port Hawkesbury's owner NewPage sought court protection from its creditors by entering into CCAA proceedings.

7. 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,³ while NewPage Port Hawkesbury's operations directly employed approximately 1000 people.⁴ Thousands more were economically dependent on both mills as they were located in rural parts of the Province with few other

² **C-110**, "NewPage to Initiate Downtime at Port Hawkesbury" (August 22, 2011); **R-024**, Re NewPage Port Hawkesbury Corp., Affidavit of Tor E. Suther (September 6, 2011) (SCNS) ("Suther Affidavit"), ¶¶ 7, 34.

³ **R-144**, *New Page Port Hawkesbury Corporation (Re)*, Redacted Bowater Mersey Responses to Information Requests from the Avon Group, M04175 NPB-14 (August 2, 2011), p. 17.

⁴ **R-024**, Suther Affidavit, ¶ 45.

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.⁵

8. 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 forestry sector and Nova Scotia's electricity system. We had to assess whether, in light of all the circumstances, 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.

NOVA SCOTIA'S FINANCIAL SUPPORT FOR RESOLUTE'S BOWATER MERSEY MILL (AUGUST 2011-DECEMBER 2012)

9. On or around August 26, 2011, Nova Scotia Premier Darrell Dexter had a meeting with Resolute's President Mr. Richard Garneau. I was not at that meeting but was briefed on the details very shortly thereafter. I was told that Mr. Garneau informed the Premier that the company was going to permanently shut down the Bowater Mersey mill. I was informed that Resolute considered the mill's production costs to be too high and that it would shortly make a public announcement that it was closing. I was told that the Premier asked Mr. Garneau if he would delay the closure decision in order to give the GNS an opportunity to consider how it might help Resolute keep the mill open. I was informed that Mr. Garneau agreed to delay the mill closure and would consider what it wanted from the Province.

10. We were aware from [REDACTED] and [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁵ R-145, [REDACTED] pp. 1-2.

⁶ R-146, [REDACTED] pp. 6-8; R-147, [REDACTED] pp. 5-9.

[REDACTED]. Nevertheless, our responsibility was to listen to what Resolute's management thought was necessary to keep its mill viable for the foreseeable future and to balance that against the financial and employment consequences of the Bowater Mersey mill shutting down entirely.⁷ We held several meetings with Resolute between September and November 2011.

11. We were aware that Resolute had filed a joint application with NewPage to the Nova Scotia Utility and Review Board ("UARB" or "Board") in June 2011 seeking a change to the load retention tariff ("LRT") to allow for a specific load retention rate ("LRR") that would reduce the electricity rates charged by Nova Scotia Power Inc. ("NSPI") for both the Bowater Mersey and Port Hawkesbury mills. Resolute's application for a reduced electricity rate for its mill was approved by the UARB on November 29, 2011.⁸ We were also aware that Resolute was in negotiations with its workforce to extract concessions on workforce size, wages, pensions and other labour issues.

12. Resolute told us that it also wanted around \$50 million from the GNS in order for the company to meet its cost reduction goals and continue operating the Bowater Mersey mill. Negotiations with Resolute culminated on December 1, 2011 with a financial assistance package that had the stated goal of [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁹ The financial support from the Province was a combination of a \$25 million [REDACTED] capital loan, a \$23.75 million land purchase agreement, a \$1.5 million non-repayable workforce training grant, a property tax reduction and other financial benefits.¹⁰ Nova Scotia also had the option of purchasing an additional 50,000 acres of land from Resolute for \$40 million.¹¹ Nova Scotia passed legislation in December 2011 – the

⁷ See R-148, [REDACTED].

⁸ See C-138, *Nova Scotia Power Incorporated (Re)*, 2011 NSUARB 184 (November 29, 2011).

⁹ R-149, [REDACTED] p. 2.

¹⁰ R-149, [REDACTED], pp. 1-7; R-150, Premier's Office, "Province Acts to Protect Rural Jobs" (December 2, 2011).

¹¹ R-149, [REDACTED], p. 5 [REDACTED]

Bowater Mersey Pulp and Paper Investment (2011) Act – to cement the agreement reached with Resolute.¹²

13. Mr. Garneau expressed to me personally what he also stated publicly¹³: that Resolute was appreciative for the financial assistance the GNS had provided to Bowater Mersey to help keep the mill open for at least five years. I felt that we had worked in good faith with Resolute to help it achieve its significant cost reduction goals and make the mill competitive for the foreseeable future.

14. I previously described the assistance the GNS provided to Resolute as follows:

In dealing with Resolute, as we looked at the future and potential of Liverpool and the mill in Bowater, part of the dynamic that we arrived at, recognizing some of the challenges they had over the short term to keep the mill operating - we looked at a way that would benefit the province and at the same time give support to Resolute, to keep the mill going in an appropriate manner.

[...]

I think again part of the dynamic and the relationship with Resolute - and I'm not an apologist for companies by any means - they had been frank and forthright with our government about the things they were facing and some of the challenges. When it was determined - both from our perspective and theirs - that it was worth a risk to try to reopen the mill, part of the dynamic of those negotiations were around up front how we could assist the company and at the same time protect the interests of taxpayers. We felt the land purchase really was a good go-forward on behalf of Nova Scotians because they then moved to reopen the plant and move forward.¹⁴

15. Unfortunately, Resolute decided in June 2012 that it would close its Bowater Mersey mill permanently.¹⁵ While the financing provided by the GNS helped Resolute lower its production

¹² **R-151**, *Bowater Mersey Pulp and Paper Investment (2011) Act*, SNS 2011, c. 32.

¹³ For example, see **R-150**, Nova Scotia Premier's Office, "Province Acts to Protect Rural Jobs" (December 2, 2011), which quotes Mr. Garneau as saying "We are 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 work in a spirit of collaboration."

¹⁴ **R-152**, Nova Scotia House of Assembly, Committee on Public Accounts (October 3, 2012).

¹⁵ **R-153**, Resolute Forest Products, "Resolute to Indefinitely Idle Mersey Mill in Nova Scotia" (June 15, 2012).

costs, Resolute explained that the drop in the value of the Euro had hurt its competitive position for exports and that as a consequence, there was no way to keep the mill in business despite the GNS' financial assistance.

16. At that point, we engaged with Resolute to see how the GNS could help to minimize the impact of the mill closure. We also met with the local community and other stakeholders to try and work out a transition plan for Liverpool and the affected surrounding area. In December 2012, we reached an agreement with Resolute whereby the GNS purchased all the shares in the Bowater Mersey company for nominal consideration (\$1). In exchange, the GNS paid Resolute \$18 million for inter-company debt and assumed all of the Bowater Mersey company's pension, severance and environmental liabilities, which were estimated at \$127.15 million, and absorbed all the costs involved in the general winding up of the company.¹⁶ The assets included 224,601 hectares of forest that were transferred to the Province, which was in keeping with Nova Scotia's goal of increasing its share of Crown land and protecting forest diversity.

17. While it was unfortunate that the original financial package given to Resolute did not lead to the mill staying open, I believe that the GNS acted in good faith in considering what Resolute asked for and, balancing all of the information and circumstances known at the time, acted reasonably in deciding what was an appropriate and prudent use of public funds.

NOVA SCOTIA'S ROLE WITH RESPECT TO THE PORT HAWKESBURY MILL DURING THE CCAA PROCEEDINGS (SEPTEMBER 2011 - DECEMBER 2011)

18. After announcing the indefinite idling of the Port Hawkesbury mill on August 22, 2011, NewPage Port Hawkesbury ("NPPH") filed for creditor protection under the CCAA on September 6, 2011. The company stated that its goal was 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."¹⁷

¹⁶ **R-154**, Resolute Forest Product Inc., Current Report for December 10, 2012 (Form 8-K), p. 2. Resolute's pension and severance liabilities amounted to \$118.4 million, and environmental cleanup costs were estimated at \$8.75 million. See **R-155**, Nova Scotia Premier's Office, "Province Takes Crucial Step to Build Forestry of Future" (December 10, 2012); **R-156**, "Summary of Notes – Site Visit – Bowater Mersey Paper Company – June 26th" (June 26, 2012), pp. 1, 5.

¹⁷ **R-024**, Suther Affidavit, ¶ 8.

19. We knew from past experience that even a temporary shutdown of the Port Hawkesbury mill would have serious economic consequences for the Province's economy.¹⁸ We were also aware that the future prospects for the newsprint and SC paper industries were challenging. As I noted above, [REDACTED]

[REDACTED]. However, [REDACTED]
[REDACTED]¹⁹ While I was aware that Port Hawkesbury's newsprint line was considered inefficient, it was also widely known in the industry that the Port Hawkesbury's SC paper machine was the newest, most efficient and highest quality machine in North America. I understood from NewPage and the Monitor appointed in the context of the CCAA proceedings that the SC paper machine would have the highest value to a potential buyer.

20. As discussed above, at the time NPPH entered CCAA creditor protection in early September 2011, we were already engaged in discussions with Resolute regarding financial support for its Bowater Mersey mill. During meetings with Resolute in September 2011, I encouraged Resolute to consider submitting a bid for the Port Hawkesbury mill. Mr. Garneau was non-committal. I am not aware of whether Resolute ultimately decided to submit a bid by the deadlines set by the Monitor.

21. I was not aware of PWCC's bid for Port Hawkesbury until October 28, 2011 when the Monitor decided that its offer to purchase the mill had qualified it to proceed to the next phase of the CCAA process.²⁰ Once the Monitor put PWCC in contact with me, I met with its owner Mr. Ron Stern in November and December 2011 in order to become familiar with the company and its other paper mill operations, as well as to [REDACTED]
[REDACTED]
[REDACTED]

¹⁸ See R-157, [REDACTED] pp. 1, 4-6 [REDACTED]. See also C-105, "Stora Enso's Port Hawkesbury Mill to Restart" (September 29, 2006).

¹⁹ R-146, [REDACTED] pp. 9-11.

²⁰ R-047, *Re NewPage Port Hawkesbury Corp.*, Fifth Report of the Monitor (November 24, 2011) (S.C.N.S.), ¶ 16(a).

[REDACTED]

NOVA SCOTIA’S NEGOTIATIONS WITH PWCC AFTER ITS SELECTION BY THE MONITOR AS THE SUCCESSFUL BIDDER (JANUARY 2012-SEPTEMBER 2012)

26. On January 13, 2012, the Monitor announced that PWCC’s offer provided “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 have beneficial ramifications for NPPH and the community.”²² While PWCC and NPPH negotiated a plan of arrangement and PWCC and NSPI engaged in lengthy negotiations regarding electricity (which I discuss below), we engaged with PWCC on a potential financial assistance package, as well as on a land purchase agreement and a new forestry licensing regime. Similar to the GNS’ December 2011 deal with Resolute for the Bowater Mersey mill, we discussed a combination of government loans, grants and a land purchase but tailored to the particular needs of the Port Hawkesbury mill and on PWCC’s business plan.

27. The arrangement reached in the CCAA proceedings between NewPage and PWCC was signed on July 6, 2012, and approved by the Court on July 17, 2012. There was a deadline of August 31, 2012 for the arrangement to close;²³ otherwise, liquidation was the likely alternative. PWCC and NSPI completed their negotiations for a LRR and oral hearings at the UARB took place in July 2012.

²¹ **R-149**, [REDACTED]

²² **R-031**, *Re NewPage Port Hawkesbury Corp.*, Sixth Report of the Monitor (January 13, 2012) (S.C.N.S.), ¶ 19.

²³ **C-175**, *Re NewPage Port Hawkesbury Corp.*, Tenth Report of the Monitor (July 12, 2012) (S.C.N.S.), ¶¶ 31, 33; **R-159**, *Re NewPage Port Hawkesbury Corp.*, Twelfth Report of the Monitor (August 8, 2012) (S.C.N.S.), ¶¶ 51, 56, 139-141.

28. To finalize the financial assistance package from the GNS in August 2012, we 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. We were aware that NPPH had sought creditor protection under the CCAA in order to try and sell the Port Hawkesbury mill as a going concern because its high-quality SC paper machine had the potential to be successful with the right owner. We were also aware that PWCC had been selected fairly through an open and competitive bidding process by a neutral Monitor under judicial supervision and that the company had demonstrated it had a viable business plan to operate only Port Hawkesbury's SC paper machine.

29. While we understood there would still be significant job losses given PWCC's plan to close the newsprint line, we saw this outcome as less damaging to the economy and to the thousands of people who depended on the mill for employment than the total shut-down of the mill.²⁴ We also understood that if the agreement PWCC reached with NSPI on electricity was ultimately approved by the UARB, it would be because the Board agreed that Nova Scotia electricity ratepayers would be better off overall than if Port Hawkesbury (NSPI's largest customer) shut down permanently. Finally, we also considered all of the other policy aspects implicated by the potential closure of Port Hawkesbury, including the GNS' goal of increasing Crown land holdings for conservation purposes, modernizing silviculture practices, the implementation of modern forestry license usages and renewable energy policies.

30. However, we did recognize that there were uncertainties in the SC paper market. Market conditions had deteriorated in the first half of 2012, so [REDACTED]

[REDACTED].²⁵ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁴ R-145, [REDACTED]
[REDACTED] R-157, [REDACTED]
[REDACTED]; R-160, [REDACTED]
[REDACTED]

²⁵ R-161, [REDACTED].

█. These were all factors we took into account in trying to come up with a reasonable and prudent decision.

31. █
█²⁶ However, after PWCC's application for an advanced tax ruling was denied by the Canada Revenue Agency, PWCC informed the Monitor and the GNS that it was re-evaluating whether it would proceed with its purchase of the mill. The GNS took the position that it had offered as much as was reasonable and prudent and I conveyed that message to PWCC. On September 21, 2012, the GNS announced there would be no agreement with PWCC on financing for its purchase of the Port Hawkesbury mill.²⁷ Shortly after that announcement, however, PWCC reached out to me to say that it still wanted to proceed with the purchase. On █, we negotiated amendments to █ that gave the GNS greater security on its investment.²⁸ While certain terms of the loan agreements were changed to address the GNS' requests for certainty in the amount of taxes paid before forgiveness would be granted, the net outlay remained the same.

32. Resolute also alleges that the GNS intended to create a "national champion" at its expense.²⁹ I do not know where the expression "national champion" originates from, but it is not accurate. NewPage had itself decided to enter CCAA proceedings in order to sell Port Hawkesbury as a going concern. The GNS had no role in selecting PWCC as a qualified bidder for the mill and, as I stated above, we would have been ready to consider providing financial assistance to Resolute had it been selected by the Monitor as a qualified bidder.

33. PWCC came forward with a credible and reasonable business plan to operate what was well-known in the industry to be a high quality and efficient SC paper machine. It had also negotiated an agreement with NSPI to address its electricity cost concerns.

²⁶ C-182. █

²⁷ C-192, "Province Standing with the Strait after Announcement Mill Will Not Reopen," Nova Scotia Premier's Office Press Release (September 21, 2012).

²⁸ █
█ R-090, Statement – Premier Darrell Dexter (September 22, 2012).

²⁹ Claimant's Memorial, ¶¶ 1, 192, 210, 221, 249, 253, 258, 267, 269, 272, 276, 278, and 306.

34. Nevertheless, the decision to provide financial assistance to PWCC in order for it to purchase the mill as a going concern was a difficult one because it required balancing many different factors and competing interests. In the end, I believe that the GNS acted in good faith and as reasonably as it could have under all the circumstances.

NOVA SCOTIA'S ROLE IN THE NEGOTIATIONS BETWEEN PWCC AND NSPI REGARDING AN ELECTRICITY RATE

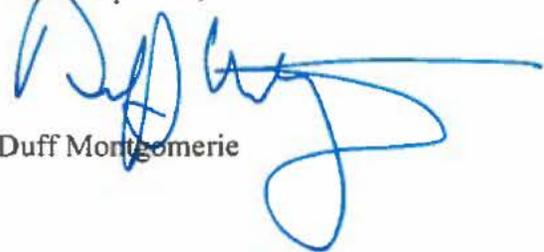
35. My former colleague Murray Coolican, then Deputy Minister of Energy, had principal senior responsibility for following the discussions between PWCC and NSPI. However, as former chair of the intergovernmental government committee, I can make general comments in response to certain statements relating to electricity made by Resolute in its Memorial.

36. I understood that in early November 2011, PWCC had presented some of its ideas to NSPI on how it could substantially reduce the mill's electricity costs while benefitting NSPI's load management. I was informed that PWCC and NSPI's initial discussions were challenging, so I agreed with Murray Coolican's idea that it could be helpful for the GNS to retain Todd Williams of Navigant Consulting as an independent consultant given his significant expertise and experience with different electricity regulatory regimes throughout North America. Mr. Williams's role was to be in contact with both parties, help them understand each other's position, and help generate ideas.

37. We knew that NSPI, a private corporation operating in Nova Scotia for two decades, would not agree to a deal that was not in accord with its commercial interests. We also knew that whatever deal was reached between PWCC and NSPI, it would be carefully scrutinized by the UARB in an adversarial proceeding. The GNS' position was that whatever load retention rate they negotiated, PWCC and NSPI would have to demonstrate to the Board's satisfaction that it fulfilled the necessary legal requirements. In the end, PWCC and NSPI did reach an agreement and had their LRR applications approved by the independent Board.

I affirm that the foregoing is true and correct.

Dated: April 17, 2019

A handwritten signature in blue ink, appearing to read 'Duff Montgomery', written over the printed name below it.

Duff Montgomery