



School of International Arbitration

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International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London  
International Arbitration Case Law**

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**Award Name and Date:** Resolute Forest Products Inc. v the Government of Canada (PCA Case No. 2016-13) – Decision on Jurisdiction and Admissibility – 30 January 2018.

**Case Report by:** Giacomo Gasparotti\*\*, Editor Ignacio Torterola\*\*\*

**Summary:** Resolute Forest Products Inc. ('Claimant' or 'Resolute') commenced arbitral proceedings against the Government of Canada ('Respondent') pursuant to Chapter Eleven of the North American Free Trade Agreement ('NAFTA') alleging the violation of NAFTA Articles 1110 (Expropriation and Compensation), 1105 (Minimum Standard of Treatment) and 1102 (National Treatment). The dispute arose over the closure of a paper mill operated by Claimant in Québec following certain measures adopted by the Governments of Nova Scotia and Canada. According to Claimant, such measures granted competitive advantages to another paper mill (located in Nova Scotia) and discriminated against Claimant. By decision of 30 January 2018, the Tribunal partially rejected the objections on jurisdiction and admissibility raised by Respondent.

**Main Issues:** whether the burden of proof with respect to Articles 1116(2) and 1117(2) of NAFTA falls on claimant or respondent; conditions for triggering the time limits under Articles 1116(2) and 1117(2) of NAFTA (in particular, on the actual or constructive knowledge of the investor's loss or damage); interpretation of the 'relating to' requirement under Article 1101 of NAFTA; scope of the national treatment obligation under Article 1102(3) of NAFTA (in particular, whether it is applicable to out-of-province investors); jurisdiction under the *Oil Platforms* test in the context of NAFTA Chapter Eleven Proceedings; scope of the exception for taxation measures under Article 2103(1) of NAFTA.

**Tribunal:** Judge James R. Crawford AC (President), Dean Ronald A. Cass (Arbitrator), Dean Céline Lévesque (Arbitrator).

**Claimant's Counsel:** Mr. Elliot J. Feldman, Mr. Michael S. Snarr and Mr. Paul M. Levine of Baker Hostetler LLP; and Mr. Martin J. Valasek and Ms. Jenna Anne de Jong and Mr. Jean-Christophe Martel of Norton Rose Fulbright Canada LLP.

**Repondent's Counsel:** Mr. Mark Luz, Mr. Rodney Neufeld, Ms. Jenna Wates and Ms. Michelle Hoffmann of the Trade Law Bureau (JLT), Global Affairs.

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## Digest:

### 1. Relevant Facts:

Claimant is a corporation incorporated in Delaware, USA, acting on its own behalf and on behalf of its Canadian subsidiary Resolute FP Canada Inc (¶ 1). Claimant brought an arbitration claim under Chapter Eleven of the NAFTA against the Government of Canada. The underlying dispute can be summarized as follows.

Resolute FP Canada owned three supercalendered paper ('SC paper') mills located in Québec, Canada, including the Laurentide mill. Another SC paper mill, the Port Hawkesbury mill, was located in Nova Scotia and competed with Resolute in the North American SC paper market. Following financial losses, in 2011, the company owning the Port Hawkesbury mill sought creditor protection to sell the mill as part of a supervised sale process (¶¶ 51-53). The sale of the mill was completed in September 2012 (¶ 60).

In 2012, in connection with the sale of the Port Hawkesbury mill, the Government of Nova Scotia implemented a series of measures that, according to the Claimant, granted the Port Hawkesbury mill competitive advantages above the other SC paper producers (the 'Nova Scotia Measures'). In particular, Nova Scotia preserved the Port Hawkesbury mill so that it could be sold as a going concern. Thereafter, it provided electricity to the Port Hawkesbury mill at a discounted rate and provided the Port Hawkesbury mill with more than C\$124 million in assistance to ensure its competitiveness (¶ 4). As a result, Claimant was (allegedly) forced to close the Laurentide mill since the latter was no longer able to compete with the Port Hawkesbury mill.

According to Claimant, the Nova Scotia measures were tantamount to the expropriation of the Laurentide mill in breach of NAFTA Article 1110 and amounted to a violation of the minimum standard of treatment and national treatment standards provided for by Articles 1105 and 1102 of NAFTA (¶ 4). Claimant also pleaded some violations attributable to measures adopted by the Federal Government of Canada (¶ 5).

As relief, Claimant sought damages exceeding US\$70 million plus additional consequential damages, the full costs of the proceedings, pre-award and post-award interest and such other relief as deemed appropriate (¶ 63).

Respondent raised the following preliminary objections to the Claimant's claims related to the Nova Scotia Measures, namely that: (i) the claims were time-barred under Articles 1116(2) and 1117(2) of NAFTA (the 'Time-Bar Objection'); (ii) the claims fell outside the scope of application of NAFTA under Article 1101(1) of NAFTA (the 'Scope Objection'); (iii) the Claimant's national treatment claims were inadmissible under Article 1102(3) of NAFTA (the 'Provincial Treatment Objection'); (iv) the Nova Scotia Measures were not tantamount to the expropriation of the Laurentide mill (the 'Expropriation Objection'); (v) the Tribunal lacked jurisdiction in respect of the Nova Scotia claims insofar as they related to taxation measures implemented by Nova Scotia (the 'Taxation Measures Objection') (¶ 7).

The Tribunal examined Respondent's objections and partially dismissed them (as discussed below at ¶ 4). The Tribunal reserved the decision on Respondent's objections related to the federal measures to a subsequent stage of the proceedings.

## **2. Procedural History**

On 30 September 2015, Claimant served its Notice of Intent to Submit a Claim to Arbitration under NAFTA Article 1119 (¶ 11); on 30 December 2015, Claimant served its Notice of Arbitration and Statement of Claim (¶ 12); on 9 February 2016, Claimant appointed Dean Ronald A Cass as arbitrator (¶ 13); on 18 March 2016, Respondent appointed Dean Céline Lévesque as arbitrator (¶ 14); on 25 May 2016, the parties appointed H.E. Judge James R Crawford, AC as the presiding arbitrator (¶ 15); by Procedural Order No. 1 of 29 June 2016, the Tribunal, *inter alia*, acknowledged its due constitution and the parties' agreement on the 1976 UNCITRAL Arbitration Rules as the applicable arbitration rules, Toronto as the place of arbitration, English and French as the languages of the proceedings and that the Permanent Court of Arbitration would act as registry (¶ 18); on 1 September 2016, Claimant filed its Statement of Defense (¶ 20); by Procedural Order No. 4 of 18 November 2016, the Tribunal decided to bifurcate the proceedings to deal with the above-mentioned objections by Respondent as preliminary questions (¶ 29); on 22 December 2016, Respondent filed its Memorial on Jurisdiction (¶ 31); on 22 February 2017, Claimant filed its Counter-Memorial on Jurisdiction (¶ 33); on 29 March 2017, Respondent filed its Reply Memorial on Jurisdiction (¶ 37); on 3 May 2017, Claimant filed its Rejoinder Memorial on Jurisdiction; on 14 June 2017, the USA and Mexico submitted Non-Disputing Parties submissions pursuant to Article 1128 (¶ 41); on 15 and 16 August 2017, a hearing on Jurisdiction and Admissibility was held (¶ 47).

## **3. Positions of the Parties**

### *3.1. Respondent's Position*

#### *3.1.1. Burden of Proof*

The parties had opposing views as to which party was to bear the burden of proof especially with respect to the Time-Bar Objection. According to Respondent, compliance by a claimant with the three-year time limit set out in Articles 1116(2) and 1117(2) of NAFTA is a jurisdictional requirement and it is for the claimant to prove that the tribunal has jurisdiction over the dispute (¶¶ 68-72).

### 3.1.2. The Time-Bar Objection

Since the dispute was submitted to arbitration on 30 December 2015, the ‘critical date’ for the purposes of Articles 1116(2) and 1117(2) of NAFTA was 30 December 2012. Respondent maintained that Claimant knew or could not be unaware of the enactment of the Nova Scotia Measures and of its loss or damage prior to the critical date. Therefore, according to Respondent, the three-year time limits set out in NAFTA Articles 1116(2), 1117(2) had elapsed, and Claimant’s claims were time-barred. (¶¶ 103-105)

Respondent argued that the Nova Scotia Measures had been adopted prior to the critical date. Specifically, Respondent pointed out that, when the last Nova Scotia Measure had been adopted and the Port Hawkesbury mill had restarted on 3 October 2012, Claimant could not be unaware of the effects that the reopening of the mill would have had on market share and prices (¶¶ 103-118).

Respondent also rejected Claimant’s argument that the Nova Scotia Measures constituted continuing violations of NAFTA (¶¶ 121-123). Finally, Respondent rejected Claimant’s reliance on a January 2013 electricity regulation allegedly granting benefits to Port Hawkesbury (¶¶ 124-125) and Claimant’s contention that the expropriation claim was not time barred since the Laurentide mill had closed down in 2014 (¶¶ 126-128).

### 3.1.3. The Scope Objection

Respondent submitted that, pursuant to Article 1101(1) of NAFTA, for a measure to be covered by NAFTA Chapter Eleven, a ‘legally significant connection’ must exist between that measure and the investor or its investment. The words ‘relating to’ in Article 1101(1) clarify this point (¶¶ 180-181). According to Respondent, ‘[...] the ‘legally significant connection test’ requires more than the measure ‘merely affect’ the claimant or its investment [...]’ (¶ 188), as confirmed, *inter alia*, by NAFTA tribunals case law (including the *Methanex* case) (¶¶ 185-188).

In the light of the above, Respondent alleged that the Nova Scotia Measures had no significant legal connection with Resolute’s investment. In fact, Claimant’s investment was located in Québec. As admitted by Claimant itself, Claimant did not become aware of the economic impact of the Nova Scotia Measures until 2013. The Claimant’s mill closed only on 2014 and, in the Respondent’s view, in no way were the Nova Scotia Measures aimed at harming Claimant (¶¶ 190-203).

### 3.1.4. The Provincial Treatment Objection

Article 1102(3) of NAFTA deals with treatment accorded by a component state or province of a federal government. With respect to Claimant’s national treatment claim, Respondent submitted that the scope of Article 1102(3) is limited to treatment accorded to investors within the jurisdiction of that state or province. Thus, since Claimant had no investment in Nova Scotia, Nova Scotia could not have breached Article 1102(3), nor did Claimant receive any ‘treatment’ by Nova Scotia (¶¶ 250, 254).

### *3.1.5. The Taxation Measures Objection*

With its last objection, Respondent submitted that the Tribunal lacked jurisdiction in respect of the Nova Scotia claims insofar as they related to taxation measures implemented by Nova Scotia. Specifically, Respondent referred to a 'Property Tax Agreement' entered into between the buyer, the seller of the Port Hawkesbury mill and Richmond County (¶ 317). It argued that Claimant's claims relating to taxation measures should first have been submitted by Claimant to the appropriate tax authorities under Article 2103(6) of NAFTA (¶ 316).

## *3.2. Claimant's Position*

### *3.2.1. Burden of Proof*

Claimant submitted, *inter alia*, that, as confirmed by the *Pope & Talbot* decision, Canada's time-bar objection is an 'affirmative' objection. It also alleged that such an objection pertains to admissibility, not jurisdiction, being unrelated to the Respondent's consent to arbitration (¶ 74). Accordingly, in the Claimant's view, the relevant burden of proof falls on the respondent.

### *3.2.2. The Time-Bar Objection*

Claimant submitted that knowledge of the probability or likelihood of damages being incurred was not sufficient to trigger the time limits sets out in Articles 1116(2) and 1117(2) of NAFTA (¶ 129). According to Claimant, at the time the Port Hawkesbury mill reopened there was deep uncertainty about its effects on market and prices. Hence, Claimant could not be aware of the loss or damage incurred until the first quarter of 2013, as confirmed by evidence (¶¶ 132-141).

Claimant further submitted that two breaches arose only after 30 December 2012, i.e. the expropriation of the Laurentide mill and the enactment of a January 2013 Nova Scotia Measure relating to a biomass facility providing Port Hawkesbury with a C\$6 to 8 million benefit (¶ 142).

### *3.2.3. The Scope Objection*

Claimant submitted that Article 1101(1) only requires 'some connection' between the impugned measure and the investor or its investment, not the 'legally significant connection' test adopted by the *Methanex* tribunal and relied on by Respondent. In Claimant's opinion, such a test sets too high a threshold (¶¶ 204-205). Specifically, Claimant argued that for the purposes of Article 1101(1) it is sufficient that a measure be adopted '[...] with the understanding or purpose that a significant impact on the investor will result' (¶ 212). Claimant went on to show that such requirement was met by the Nova Scotia Measures (¶¶ 213-217).

### *3.2.4. The Provincial Treatment Objection*

Claimant rejected Respondent's interpretation of NAFTA Article 1102(3). According to Claimant, Article 1102(3) cannot be interpreted in the sense that a province is allowed to accord its local investors benefits that placed them in a favorable position over investors from outside that province (¶ 261). Such a measure would definitely constitute a 'treatment' under Article 1102(3) and have an impact even outside the territory of that region. Hence, Claimant argued that, by granting competitive advantages to Port Hawkesbury mill and harming other

companies operating in the same narrow market, Nova Scotia violated Article 1102(3) of NAFTA.

### 3.2.5. *The Taxation Measures Objection*

Claimant rejected Respondent's Taxation Measures Objection arguing that the property tax discount granted by Nova Scotia did not constitute *per se* an expropriation covered by Article 2103(6) of NAFTA. Rather it was part of a set of measures that jointly contributed to the expropriation of the Laurentide mill (¶ 321).

## 4. The Tribunal Analysis

### 4.1. *Burden of Proof*

The Tribunal found that it follows from Article 1122(1) of NAFTA that where a claim is not submitted to arbitration in accordance with the 'procedures' provided for by NAFTA, there is no consent to arbitration and the tribunal lacks jurisdiction (¶¶ 82-83). Compliance with the time limit referenced in Articles 1116(2) and 1117(2) is a 'procedure' under Article 1122(1). Accordingly, it pertains to jurisdiction and the relevant burden of proof falls on claimant. Furthermore, in the Tribunal's opinion, '[...] the facts necessary to establish that a claim has been brought in accordance with Section B of Chapter Eleven are '[...] facts relied on in support of the claim'. Therefore, the relevant burden of proof falls on the claimant also pursuant to Article 24(1) of the UNCITRAL Rules (¶ 84). According to the Tribunal, the scope of such provision is not limited to substantial matters (¶ 84). Also, contrary to the findings in *Pope & Talbot*, time-bar objections under Articles 1116(2) and 1117(2) do not constitute an 'affirmative defence' (¶ 85).

### 4.2. *The Time-Bar Objection*

The three-year time limit provided for by Articles 1116(1) and 1117(2) of NAFTA runs from the date on which the investor first acquired knowledge: (i) that an alleged breach had occurred; and (ii) that loss or damage has been incurred as a result. According to the Tribunal, such time limit is strict, not flexible (¶ 153).

The Tribunal clarified that knowledge of a breach can only be acquired once the facts constituting that breach have actually occurred. Knowledge that a breach 'is likely to occur' is not enough to trigger such time limits (¶ 154). Breaches of Articles 1102(3) (national treatment) and 1105(1) (unfair and inequitable treatment) occur when the relevant governmental conduct occurs. Conversely, an expropriation only occurs when the affected investor loses its property as a result of a governmental taking (direct or indirect) (¶ 154).

As for the alleged breaches of NAFTA Articles 1102(3) and 1105(1), the Tribunal observed that the governmental measures giving rise to such breaches had been completed by September 2012 – i.e. three months before the critical date – and that Claimant knew of the enactment of such measures (¶ 155). The Tribunal rejected Claimant's argument that the alleged breaches of NAFTA Articles 1102(3) and 1105(1) were continuing breaches. In the Tribunal's view, there is a difference between '[...] a continuing breach and a perfected breach with continuing effects [...]'. The breaches at stake could only fall into the latter category (¶¶ 156-157). Furthermore, NAFTA Articles 1116(2) and 1117(2) refer to the time when the breach 'first' occurred (¶ 158). As for the January 2013 electricity regulation that granted further benefits to Port Hawkesbury,

the Tribunal found that it was not pleaded as a new claim. Furthermore, the Tribunal held that it was only a continuation of the previous conduct of Nova Scotia (¶ 160).

As for Claimant's expropriation claim, instead, the Tribunal found that the expropriation did not occur until 2014. Therefore, the claim was not time-barred under Articles 1116(2) and 1117(2) of NAFTA (and the Tribunal found no need to ascertain the time when Claimant first had knowledge of the relevant loss or damage) (¶ 163).

In relation to the alleged breaches of Articles 1102(3) and 1105(1), the Tribunal went on to ascertain when Claimant first became aware (or should have become aware) of losses incurred as a result thereof. On a point of law, the Tribunal, relying on the *Mondev* award, acknowledged that it is not necessary that the full extent of losses be known by the claimant to tackle the time limit of Articles 1116(2) and 1117(2) of NAFTA (¶ 165). On a point of fact, the Tribunal, after considering the evidence presented by the parties (*see* ¶¶ 168-176), reached the conclusion that, by December 2012, Claimant did not know and could not reasonably have known of the losses deriving from the Nova Scotia Measures (¶ 178).

In conclusion, in the Tribunal's opinion, Claimant's claims were not time-barred under Articles 1116(2) and 1117(2) (¶ 179).

#### 4.3. *The Scope Objection*

The Tribunal extensively discussed past NAFTA tribunals decisions on Article 1101(1)'s 'relating to' requirement, focusing in particular on the *Methanex*, *Cargill* and *Apotex II* cases (¶ 233-241). In agreement with the *Apotex II* case, the Tribunal concluded that the 'relating to' requirement, which is set for jurisdictional purposes, cannot be understood as a legal test of causation, which shall be dealt with when deciding on the merits of the claim (¶ 242). The Tribunal considered that, at the jurisdictional stage, it should only assess '[...] whether there was a relationship of apparent proximity between the challenged measure and the claimant or its investment'. It added that a measure adversely affecting the claimant 'in a tangential or merely consequential way' does not satisfy the 'relating to' requirement (*ibid.*).

With this view in mind, in the case at stake the Tribunal drew a distinction between the impugned measures (¶ 243). It considered that the Nova Scotia Measures aimed at maintaining the Port Hawkesbury mill in 'hot idle' in order for it to be sold as a going concern did not satisfy the requirement laid out by NAFTA Article 1101(1). In contrast, it found that the Nova Scotia Measures affecting the actual transaction of the sale and reopening on favorable terms of the mill did satisfy the 'relating to' requirement. That is because they were (allegedly) intended to place the (purchaser of the) Port Hawkesbury mill in a favorable position. Such a conclusion was mainly based on the consideration that the SC Paper market was a narrow market (with only five companies in the business) (¶ 248).

#### 4.4. *The Provincial Treatment Objection*

The Tribunal dismissed Respondent's Provincial Treatment Objection. The Tribunal discussed the interpretation of NAFTA 1102(3) and relevant past NAFTA cases (including the *SD Myers*, *Pope & Talbot* and *Merrill & Ring* cases) in depth (¶¶ 275-289). In conclusion, the Tribunal determined that Respondent's argument limiting the scope of NAFTA Article 1102(3) to foreign investments located in the territory of a particular province could not be accepted (¶ 290). According to the Tribunal, provincial measures aimed at protecting local investors to the

detriment of foreign investors or specifically at damaging foreign investors (such as in the *Methanex* case) may result in a violation of the national treatment standard (ibid.). Therefore, the Tribunal found that Claimant's national treatment claim was admissible. (¶ 292).

#### 4.5. Jurisdiction over the Expropriation Claim under the Oil Platforms Test

The Tribunal deemed it necessary to assess its jurisdiction over Claimant's expropriation claim also under the so-called 'Oil Platforms test', devised by Judge Higgins in its separate opinion to the *Oil Platforms* case and followed by several investment tribunals (¶¶ 298-310). According to the *Oil Platforms* test, a tribunal should determine, at the preliminary stage, if the facts pleaded by the claimant, accepted as true *pro tem*, may give rise to finding a breach of the obligations laid out by NAFTA Chapter Eleven (¶ 311). In the Tribunal's opinion, the *Oil Platforms* test goes to jurisdiction, not admissibility, so the application thereof finds no obstacles in Article 21 if the UNCITRAL Rules (¶ 311).

In the light of the *Oil Platforms* test, the Tribunal considered that Claimant's expropriation claim faced 'considerable difficulties.' In fact, according to the timing and circumstances that brought the Laurentide mill to closure, such an event could hardly be regarded as directly attributable to the actions of Canada or Nova Scotia (¶ 312). However, in the end, the Tribunal decided to allow the expropriation claim to proceed to the merits stage, considering that the *Oil Platforms* argument was put forward by Respondent only in its oral pleadings (¶ 314).

#### 4.6. The Taxation Measures Objection

Under NAFTA Article 2103(1) and (6), NAFTA only applies to tax measures that constitute an expropriation contrary to Article 1110 and provided the claimant first submitted its claim to the competent authorities set out in Annex 2103.6. The Tribunal considered that it should be established whether the measures relied on by Claimant were 'taxation measures' for the purposes of Article 2103(1) of NAFTA and whether Claimant could invoke them in support of its expropriation claim (¶ 325). The Tribunal relied on the broad definition of 'taxation measures' given in *El Cana v Ecuador* and found that there was no reason to limit the coverage of the general exception provided for by NAFTA Article 2103(1) to taxation measure imposed on the claimant or its investment (¶¶ 326-327). Furthermore, the Tribunal considered that 'taxation measures are simply not covered by NAFTA except as provided in Article 2103 [...]'. The fact that a taxation measure was invoked by Claimant in support of its expropriation claim not in itself, but as one among several measures, according to the Tribunal, was irrelevant. Therefore, the Tribunal denied its jurisdiction over Claimant's claims related to taxation measures.

### 5. Decision

The Tribunal found that it had jurisdiction to address Claimant's claims concerning the Nova Scotia Measures, with the exception of the interim measures taken to keep the Port Hawkesbury mill in operation prior to its resale in September 2012 and the claims concerning taxation measures, and that the claims were admissible (¶ 330). The Tribunal left the decision on costs to the final decision on the merits (¶ 331).