

1 IN THE MATTER OF AN ARBITRATION UNDER CHAPTER
2 ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT
3 ("NAFTA") AND THE 1979 UNCITRAL ARBITRATION RULES

4 BETWEEN:

5 RESOLUTE FOREST PRODUCTS INC. Claimant

6 - and -
7 GOVERNMENT OF CANADA Respondent

8 (PCA CASE NO. 2016-13)

9 TRANSCRIPT OF PROCEEDINGS
10 HEARD BEFORE JAMES R. CRAWFORD, RONALD A. CASS & CELINE LEVESQUE
11 Held at the offices of Arbitration Place
12 333 Bay Street, Suite 900, Toronto, Ontario
13 on Tuesday, August 15, 2017 at 8:33 a.m.

14 APPEARANCES:

15 Mr. Mark Luz

16 Mr. Rodney Neufeld

17 Ms. Jenna Wates

18 Ms. Michelle Hoffmann

19 Ms. Shawna Lesaux for the Government of Canada

20 Ms. Shamali Gupta for Global Affairs Canada

21 Mr. Daniel Hill for Natural Resources Canada

22 Mr. Andrew Weatherbee for the Department of
23 Justice of Government of Nova Scotia

24 Mr. Elliot Feldman

25 Mr. Martin Valasek

Mr. Jacques Vachon

Mr. Paul Levine

Mr. Jean-Christophe Martel

Mr. Mike Snarr

Ms. Jenna Anne de Jong for Resolute Forest Products

Also Present:

Mr. Matthew Olmsted for United States of America

Ms. Judith Levine for Permanent Court of Arbitration

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Toronto, Ontario

--- Upon commencing on Tuesday, August 15, 2017

at 8:33 a.m. 08:33:36AM

PRESIDENT: Well, ladies and 08:33:36AM

gentlemen, I think we're ready to start. My name 08:33:39AM

is James Crawford, and my colleagues are Dean 08:33:42AM

Celine Levesque and Dean Emeritus Ronald Cass. 08:33:50AM

I'm really a dean non-emeritus, ex-dean, so deans 08:33:57AM

in various gradations. 08:33:58AM

We have representatives of the 08:34:03AM

Claimant and Respondent here, and when you are 08:34:06AM

speaking, please push the button so that the light 08:34:09AM

comes on. And when you stop speaking, turn it 08:34:12AM

off, because it affects the transcript and 08:34:15AM

Internet recording. 08:34:20AM

In terms of administrative 08:34:26AM

matters, the tribunal only has one point, which is 08:34:27AM

that we will see how the hearing goes today, but I 08:34:32AM

think it's not unlikely that we may want to leave 08:34:34AM

the final statements to tomorrow morning, because 08:34:38AM

there will be questions which may raise issues 08:34:43AM

which either you haven't thought of or you have 08:34:47AM

thought of, may not think they arise, and there 08:34:49AM

may be some questions of looking at things 08:34:54AM

overnight. 08:34:56AM

1 So what's down as Respondent's 08:34:57AM
2 rebuttal and Claimant's surrebuttal, 15 minutes, 08:35:03AM
3 if we go over to tomorrow morning, the timing of 08:35:05AM
4 that will be flexible. I don't know this is a 08:35:07AM
5 very long session, but I think it may be 08:35:10AM
6 thoughtful. It may be helpful. This is a quite 08:35:13AM
7 difficult case, which has been very well argued on 08:35:16AM
8 both sides, and it may be necessary for us to ask 08:35:19AM
9 questions which will cause some reflection. 08:35:21AM
10 And when we had the prehearing 08:35:26AM
11 conference, I raised this possibility, and you 08:35:27AM
12 both agreed that you would be available for that, 08:35:30AM
13 and I'm just giving further warning that this may 08:35:32AM
14 happen. 08:35:35AM
15 Other than that, the tribunal 08:35:36AM
16 has no preliminary matters. Do either of the 08:35:38AM
17 parties have any preliminary matters? Claimant? 08:35:42AM
18 MR. FELDMAN: I don't think 08:35:44AM
19 so. I don't think so. Thank you. 08:35:47AM
20 PRESIDENT: Thank you. 08:35:50AM
21 Respondent? 08:35:51AM
22 MR. LUZ: None from Canada, 08:35:52AM
23 Judge Crawford. 08:35:54AM
24 PRESIDENT: Thank you. 08:35:57AM
25 So the first item of business, 08:35:58AM

1 which we're now taking early, is the Respondent's 08:36:00AM
2 opening statement, and I will call on the 08:36:03AM
3 Respondent. 08:36:05AM

4 MR. LUZ: Would the tribunal 08:36:07AM
5 like an introduction of Canada's party at this 08:36:08AM
6 time, or should I just launch right in? 08:36:10AM

7 PRESIDENT: Yes, please. 08:36:13AM
8 Please introduce them. 08:36:13AM

9 MR. LUZ: I'll do that sitting 08:36:14AM
10 down so that I don't have to bring up the piece of 08:36:15AM
11 paper reminding me of everyone's name. 08:36:19AM

12 PRESIDENT: Sorry, I should 08:36:19AM
13 have done that. 08:36:19AM

14 MR. LUZ: No, that's fine. 08:36:19AM

15 My name is Mark Luz. I'm 08:36:21AM
16 joined by my colleagues Rodney Neufeld, Jenna 08:36:23AM
17 Wates, Michelle Hoffmann. Shawna Lesaux is our 08:36:27AM
18 paralegal. We are also joined by Ms. Shamali 08:36:32AM
19 Gupta, from Global Affairs Canada, and Daniel 08:36:34AM
20 Hill, from Natural Resources Canada, and, from the 08:36:38AM
21 Department of Justice of Government of Nova 08:36:41AM
22 Scotia, Andrew Weatherbee. And we have our two 08:36:44AM
23 members of our technical team to assist us with 08:36:47AM
24 things that lawyers are unable to do, like 08:36:49AM
25 PowerPoint and so on, Chris Reynolds and Alex 08:36:51AM

1 Miller. 08:36:57AM

2 PRESIDENT: Thank you very 08:36:57AM

3 much. I should have done that earlier. 08:36:58AM

4 Mr. Feldman. 08:36:59AM

5 MR. FELDMAN: I was going to 08:37:00AM

6 introduce everybody when it was our turn, but I 08:37:01AM

7 will be happy to do it now. Martin Valasek is to 08:37:04AM

8 my left, from Norton Rose Fulbright; Jacques 08:37:07AM

9 Vachon, who is the general counsel of Resolute 08:37:11AM

10 Forest Products, is at the end seat; Paul Levine, 08:37:14AM

11 my partner at Baker Hostetler in Washington; and 08:37:17AM

12 Jean-Christophe Martel, who is a partner -- he is 08:37:22AM

13 at Norton Rose; Mike Snarr, my partner from 08:37:28AM

14 Washington; Jenna Anne de Jong, who is at Norton 08:37:30AM

15 Rose Fulbright; and Professor Jerry Hausman, who 08:37:36AM

16 will testify as our expert witness from MIT. 08:37:39AM

17 PRESIDENT: Thank you very 08:37:43AM

18 much. 08:37:45AM

19 Mr. Luz. 08:37:45AM

20 PRESIDENT: I should say that 08:37:53AM

21 there probably won't be very many interventions 08:37:55AM

22 from the Panel in this opening, but expect some 08:37:57AM

23 later on. 08:37:59AM

24 MR. LUZ: Expected and 08:38:01AM

25 welcomed. 08:38:01AM

1 MR. NEUFELD: Excuse me, Mark. 08:38:05AM
2 I don't mean to interrupt, but we're on the PCA 08:38:06AM
3 website looking at where the live-stream link 08:38:08AM
4 should be, and we don't see that the live-stream 08:38:12AM
5 is working, so just a question to Judith of the 08:38:14AM
6 PCA whether everything is in order with 08:38:18AM
7 live-stream. Maybe we're missing something. 08:38:21AM
8 MS. LEVINE: I'm having our IT 08:38:23AM
9 person check it. It is working on the French 08:38:24AM
10 version of the website, and we're checking as soon 08:38:26AM
11 as possible what is going on with the English 08:38:30AM
12 version. It might require refreshing a page. 08:38:32AM
13 OPENING STATEMENT BY MR. LUZ: 08:37:51AM
14 MR. LUZ: Mr. President, 08:38:40AM
15 members of the tribunal, it's an honour to appear 08:38:41AM
16 before you in this NAFTA arbitration representing 08:38:44AM
17 the Government of Canada. For the next 30 08:38:46AM
18 minutes, I will provide the tribunal with a short 08:38:48AM
19 overview of Canada's arguments as to why 08:38:50AM
20 Resolute's claims against the Nova Scotia measures 08:38:53AM
21 should be dismissed as outside this tribunal's 08:38:55AM
22 jurisdiction and inadmissible. 08:38:57AM
23 Later on this afternoon, I and 08:38:59AM
24 my colleagues Mr. Neufeld and Jenna Wates will go 08:39:02AM
25 into detail into Canada's arguments, and we will 08:39:05AM

1 also answer the questions that the tribunal posed 08:39:10AM
2 in its letter to the parties on July 21st. And, 08:39:12AM
3 of course, as I said earlier, we would welcome any 08:39:15AM
4 other questions that the tribunal can think of 08:39:18AM
5 over the course of the day. 08:39:20AM

6 Now, as the tribunal knows, 08:39:22AM
7 the Claimant has alleged that Canada has breached 08:39:22AM
8 NAFTA Chapter 11 because of various measures 08:39:25AM
9 adopted by the Government of Nova Scotia between 08:39:28AM
10 September 2011 and January 2013 with respect to 08:39:30AM
11 the supercalendered paper mill at Port Hawkesbury 08:39:34AM
12 on Cape Breton Island in Nova Scotia. 08:39:37AM
13 Specifically, Resolute says that Nova Scotia's 08:39:41AM
14 support for the Port Hawkesbury mill during the 08:39:43AM
15 creditor protection proceedings and for the 08:39:46AM
16 company that ultimately purchased the mill, 08:39:49AM
17 Pacific West Commercial Corporation, or PWCC, 08:39:52AM
18 violates the national treatment obligation in 08:39:56AM
19 Article 1102, the minimum standard of treatment in 08:39:58AM
20 Article 1105 and, contrary to Article 1110 of 08:40:02AM
21 Chapter 11, constitutes an expropriation of 08:40:05AM
22 Resolute's Laurentide mill in Shawinigan, Quebec, 08:40:08AM
23 in October 2014. 08:40:11AM

24 Now, Canada's Statement of 08:40:14AM
25 Defence demonstrated that the legal and factual 08:40:16AM

1 bases of these claims are so weak that pursuing 08:40:18AM
2 them on the merits is futile, but this tribunal 08:40:22AM
3 need not and cannot even get to the merits of the 08:40:25AM
4 dispute because of the jurisdictional and 08:40:28AM
5 admissibility problems and flaws that stand in the 08:40:30AM
6 way of Resolute's claim. 08:40:33AM

7 There are two primary 08:40:36AM
8 jurisdictional objections that Canada has put 08:40:37AM
9 forth for this preliminary phase of the 08:40:39AM
10 arbitration. The first is that the Claimant's 08:40:41AM
11 allegations against the Nova Scotia measures are 08:40:44AM
12 not within the scope and coverage of NAFTA Chapter 08:40:46AM
13 11. There is no legally significant connection 08:40:49AM
14 between the Nova Scotia measures and Resolute's 08:40:52AM
15 investment, as is required by NAFTA Article 08:40:56AM
16 1101(1). Investors cannot simply bring a claim 08:41:01AM
17 because a government measure has an economic 08:41:03AM
18 impact on their investments. Otherwise, virtually 08:41:05AM
19 everything a government does will be subject to 08:41:07AM
20 suit. Furthermore, the actions of a private 08:41:09AM
21 company, in this case PHP, are not attributable to 08:41:13AM
22 the government under international law. Now, the 08:41:17AM
23 Claimant alleges that it was PHP's alleged 08:41:20AM
24 predatory pricing that caused the shutdown of its 08:41:23AM
25 Laurentide mill in October 2014. That cannot 08:41:27AM

1 ground a claim in NAFTA Chapter 11 because 1101(1) 08:41:30AM
2 only covers measures adopted or maintained by a 08:41:35AM
3 party. 08:41:37AM
4 Now, Canada's second 08:41:39AM
5 jurisdictional objection in this preliminary phase 08:41:41AM
6 is that, even if the tribunal finds that there's a 08:41:43AM
7 legally significant connection between the Nova 08:41:46AM
8 Scotia measures and the Claimant's investments, 08:41:47AM
9 the claims are still outside the tribunal's 08:41:51AM
10 jurisdiction *ratione temporis* because of the 08:41:54AM
11 strict limitations period set out in Articles 1116(2) 08:41:58AM
12 and 1117(2). 08:42:02AM
13 Now, the Claimant can only 08:42:03AM
14 blame itself for its procrastination in bringing 08:42:05AM
15 its Notice of Arbitration. It could have and 08:42:07AM
16 should have filed its claim within the requisite 08:42:10AM
17 three years of when the Port Hawkesbury mill 08:42:13AM
18 reopened and re-entered the SC paper market in 08:42:17AM
19 September 2012. Now, as Canada's argued in its 08:42:20AM
20 pleadings and will set out furthermore today, it 08:42:23AM
21 was at that moment that the Claimant first knew or 08:42:26AM
22 should have first known of the alleged NAFTA 08:42:28AM
23 breach and that it had incurred some of the loss 08:42:31AM
24 or damage that it alleges in its pleadings. 08:42:34AM
25 Now, today Canada is going to 08:42:38AM

1 present its arguments in that order. First, 08:42:40AM
2 there's no legally significant connection between 08:42:41AM
3 the measures and the investment, and, second, the 08:42:44AM
4 claim was filed too late. We're going to present 08:42:48AM
5 our arguments in that order because, in the 08:42:51AM
6 Claimant's scramble to explain why its claim is 08:42:53AM
7 not time-barred, its own pleadings ended up 08:42:57AM
8 proving exactly Canada's point that there is no 08:43:00AM
9 legally significant connection between the 08:43:03AM
10 measures and Resolute's investment. 08:43:05AM

11 Now, there are also two other 08:43:08AM
12 objections to address in this preliminary phase, 08:43:10AM
13 that the national treatment claim is prima facie 08:43:13AM
14 inadmissible, and if the Article 1105 and 1110 08:43:16AM
15 claims are allowed to proceed, they can only 08:43:21AM
16 proceed with the Richmond County tax agreement 08:43:23AM
17 severed from those claims because of NAFTA Article 08:43:28AM
18 2103. Now, Canada's view is that there's no real 08:43:32AM
19 need to even address those two separate issues 08:43:35AM
20 because the claim can't even progress through the 08:43:38AM
21 first two, but I will address them briefly now, 08:43:40AM
22 and also briefly this afternoon. 08:43:43AM

23 So let me start with Article 08:43:46AM
24 1101 and give the tribunal a preview of what my 08:43:48AM
25 colleague Mr. Neufeld will argue in more detail 08:43:51AM

1 this afternoon. 08:43:54AM

2 The Nova Scotia measures can 08:43:56AM

3 be divided into two broad categories, those which 08:43:57AM

4 were adopted during the creditor protection 08:44:04AM

5 proceeding starting in September 2011 and then 08:44:05AM

6 those that were adopted during the closing of the 08:44:08AM

7 transaction of the mill to PWCC in September 2012. 08:44:10AM

8 Now, the first category of measures includes two 08:44:15AM

9 spending measures, money from Nova Scotia's 08:44:18AM

10 Forestry Infrastructure Fund, or FIF, and the 08:44:21AM

11 second is hot idle funding. Now, those were put 08:44:25AM

12 in place starting in September 2011 when the Port 08:44:29AM

13 Hawkesbury Mill went into creditor protection 08:44:33AM

14 proceedings, and the court appointed Monitor was 08:44:35AM

15 seeking out potential buyers for the mill. 08:44:37AM

16 These measures plainly do not-- 08:44:40AM

17 PRESIDENT: Mr. Luz, can I 08:44:42AM

18 ask, will we get a copy of these PowerPoints in 08:44:44AM

19 due course? 08:44:46AM

20 MR. LUZ: We will. This is 08:44:47AM

21 the only slide in my presentation. It will be 08:44:48AM

22 repeated again, and we have the copies for this 08:44:51AM

23 afternoon's. 08:44:55AM

24 PRESIDENT: Thank you very 08:44:56AM

25 much. 08:44:57AM

1 MR. LUZ: It's unfortunately, 08:44:57AM
2 or fortunately, depending on the tribunal's 08:44:59AM
3 preference, it's just me speaking, so this is the 08:45:02AM
4 only one that suddenly appeared on the screen, but 08:45:04AM
5 you will have copies of this. 08:45:06AM

6 As I said, the forestry 08:45:10AM
7 infrastructure funding was put into place 08:45:12AM
8 originally starting in September 2011 when the 08:45:15AM
9 mill went into creditor protection proceedings. 08:45:20AM

10 Now, these first two measures 08:45:23AM
11 don't pass the legally significant connection 08:45:25AM
12 test. 08:45:27AM

13 The FIF, the Forestry 08:45:28AM
14 Infrastructure Fund, was aimed at keeping forestry 08:45:31AM
15 workers working while a buyer for the mill was 08:45:34AM
16 being sought out. The funds were being used to 08:45:36AM
17 help train and sustain lumberjacks and truck 08:45:40AM
18 drivers and others that were involved in the 08:45:43AM
19 forestry industry who were impacted by the closure 08:45:44AM
20 of the mill. The FIF had no legally significant 08:45:49AM
21 connection to the Claimant's investments. 08:45:52AM

22 And the same can be said about 08:45:55AM
23 the hot idle funding. That was put into place 08:45:56AM
24 early on in the creditor protection proceedings to 08:46:00AM
25 help prevent the SC paper machine at the mill from 08:46:02AM

1 mechanically deteriorating during the time a buyer 08:46:07AM
2 was being sought. So, again, that had no impact 08:46:10AM
3 on the market nor on the Claimant's investment. 08:46:13AM
4 In fact, the money would have gone to waste 08:46:16AM
5 entirely if the ultimate purchaser of the mill had 08:46:18AM
6 just purchased it for scrap. 08:46:21AM

7 Now, the Claimant has not 08:46:24AM
8 demonstrated how either of these measures have any 08:46:25AM
9 connection at all to its investment, and they 08:46:28AM
10 can't make such a demonstration because they were 08:46:30AM
11 temporary stopgap measures with neutral intent and 08:46:34AM
12 limited scope. So these are the first of the 08:46:36AM
13 measures that should just be severed from the 08:46:38AM
14 claim as failing the Article 1101 legally 08:46:40AM
15 significant connection test. 08:46:45AM

16 The second set of measures 08:46:49AM
17 were adopted later, primarily in September 2012 08:46:50AM
18 when PWCC wanted to close its bid to purchase the 08:46:53AM
19 mill. Now, Mr. Neufeld will break down all of 08:46:56AM
20 these measures in detail later, but, again, it's 08:46:59AM
21 important to recall that several of these measures 08:47:03AM
22 were not actually aimed at supporting the 08:47:05AM
23 purchaser of the mill, but rather aimed at third 08:47:07AM
24 parties, including indigenous peoples. So, again, 08:47:10AM
25 the Claimant has made no effort to explain how 08:47:14AM

1 measures like a forestry coordinator for the 08:47:16AM
2 Mi'kmaq First Nations community or Nova Scotia's 08:47:22AM
3 purchase of forestry land -- how does that have 08:47:23AM
4 any kind of legally significant connection at all 08:47:25AM
5 to the Claimant's investment? 08:47:29AM
6 The Claimant's strategy is 08:47:33AM
7 obfuscation. It presents the Nova Scotia measures 08:47:35AM
8 in a single, ill-defined basket as if they were 08:47:37AM
9 all equally relating to the Laurentide mill in 08:47:41AM
10 Quebec, but without explaining how they are. But 08:47:44AM
11 in order for the tribunal to have jurisdiction 08:47:48AM
12 with respect to the Nova Scotia measures, the 08:47:49AM
13 Claimant has to demonstrate how each of them has a 08:47:52AM
14 legally significant connection to its investment. 08:47:55AM
15 And if the tribunal is not satisfied that the 08:47:59AM
16 Claimant has carried its burden, the measure has 08:48:01AM
17 to be declared outside the scope and coverage of 08:48:03AM
18 NAFTA Chapter 11. 08:48:08AM
19 So let's for a moment just 08:48:11AM
20 consider the loans and grants that were provided 08:48:12AM
21 to PWCC in September 2012 to help close the 08:48:16AM
22 transaction and put hundreds of people back to 08:48:20AM
23 work. Now, there can be no doubt that trying to 08:48:24AM
24 save the primary source of employment in an 08:48:26AM
25 otherwise economically stressed region is why Nova 08:48:29AM

1 Scotia took the actions that it did. 08:48:32AM

2 Now, the rhetoric that the 08:48:34AM

3 Claimant used in its pleadings alleging that Nova 08:48:36AM

4 Scotia wanted to destroy Resolute's business has 08:48:38AM

5 no basis in fact. Now, while the Claimant appears 08:48:41AM

6 to have dialled back its conspiratorial 08:48:45AM

7 accusations, it still says that Nova Scotia wanted 08:48:51AM

8 to create a national champion at the expense of 08:48:53AM

9 Resolute, but that term, "national champion," is 08:48:56AM

10 something that the Claimant invented and seems to 08:48:59AM

11 be attributing to the government. That is 08:49:01AM

12 not something the government has ever said or 08:49:03AM

13 intended to do. 08:49:04AM

14 But the fragility of the 08:49:06AM

15 Claimant's case is more than just that, because 08:49:08AM

16 the Claimant has now argued that the market impact 08:49:11AM

17 of Port Hawkesbury's reopening was -- and I quote 08:49:14AM

18 -- "unknown and unknowable." The Claimant has 08:49:16AM

19 also said in its pleadings that it was confident 08:49:20AM

20 that it was going to be able to compete and be 08:49:22AM

21 profitable regardless of PHP's re-entry into the 08:49:24AM

22 market. In fact, the Claimant affirms that its 08:49:27AM

23 Laurentide mill was profitable during 2013 even 08:49:31AM

24 though Port Hawkesbury was back in the market. 08:49:33AM

25 But this undermines the 08:49:36AM

1 Claimant's own case. How can it accuse Nova 08:49:38AM
2 Scotia of adopting measures that it supposedly 08:49:40AM
3 knew would destroy Resolute's business when it, 08:49:44AM
4 itself, was confident that it could compete and be 08:49:46AM
5 profitable, which apparently it was until sometime 08:49:49AM
6 in 2014? 08:49:52AM

7 So, on the one hand, it 08:49:54AM
8 accuses Nova Scotia of seeking to harm Resolute, 08:49:55AM
9 but, on the other hand, it says it was unknown and 08:49:58AM
10 unknowable what the market impact of Port 08:50:01AM
11 Hawkesbury's reopening would be. On the one hand, 08:50:04AM
12 Claimant says it was confident that it could 08:50:08AM
13 compete and be profitable and says that Laurentide 08:50:10AM
14 was profitable for a long time after PHP reopened. 08:50:12AM
15 But, on the other hand, it says that Nova Scotia 08:50:20AM
16 must have known that helping PHP reopen would 08:50:23AM
17 force Resolute to close Laurentide. This is just 08:50:26AM
18 double-speak. And it is indicative as to why the 08:50:30AM
19 tribunal should follow the approach of the 08:50:33AM
20 tribunal in Methanex arbitration and dismiss the 08:50:34AM
21 claim as not having a legally significant 08:50:37AM
22 connection to its investment as required by 08:50:39AM
23 1101(1). 08:50:42AM

24 A final point that I'm going 08:50:44AM
25 to move on to that Mr. Neufeld will address in 08:50:46AM

1 detail: The true nature of Resolute's complaint 08:50:48AM
2 is not so much in what the Government of Nova 08:50:53AM
3 Scotia did, but rather what PHP allegedly did as a 08:50:55AM
4 private actor long after the government was out of 08:50:59AM
5 the picture. 08:51:01AM
6 The Claimant argues that it 08:51:03AM
7 was predatory pricing by PHP in 2014 that led to 08:51:05AM
8 the shutdown of its Laurentide mill. Now, even if 08:51:09AM
9 we assume this accusation is true -- and there's 08:51:13AM
10 no evidence on the record to suggest that it is -- 08:51:15AM
11 this argument is fatal to the claim. The 08:51:18AM
12 Government of Nova Scotia did not engage in 08:51:21AM
13 allegedly predatory pricing of SC paper; PHP did. 08:51:24AM
14 Whatever happened in the market in 2014 which 08:51:29AM
15 allegedly caused Resolute to shut its Laurentide 08:51:31AM
16 mill cannot be attributed to Nova Scotia under 08:51:34AM
17 international law. If it was PHP's supposedly 08:51:37AM
18 predatory pricing that caused the expropriation of 08:51:41AM
19 the mill in October 2014, well, then that's not a 08:51:45AM
20 measure adopted or maintained by a party, which is 08:51:48AM
21 a fundamental jurisdictional prerequisite. 08:51:51AM
22 Now, the Claimant's sole 08:51:55AM
23 response to this is buried at Footnote 194 on page 08:51:56AM
24 52 of its rejoinder. It says: 08:52:00AM
25 "But the Nova Scotia 08:52:03AM

1 measures provided the 08:52:04AM
2 financial backing to PHP 08:52:05AM
3 so that it could enact 08:52:06AM
4 predatory pricing. The 08:52:08AM
5 Nova Scotia government, 08:52:10AM
6 as evidenced by its 08:52:11AM
7 public statements, knew 08:52:13AM
8 the potential 08:52:13AM
9 implications of enacting 08:52:14AM
10 the measures. Canada, 08:52:16AM
11 therefore, should not be 08:52:18AM
12 permitted to evade 08:52:18AM
13 responsibility by 08:52:20AM
14 supplying the 08:52:20AM
15 preconditions that 08:52:21AM
16 ultimately permitted PHP 08:52:22AM
17 to harm Resolute." 08:52:24AM
18 Now, this argument is 08:52:26AM
19 defective on multiple levels, and I will leave its 08:52:28AM
20 dissection to Mr. Neufeld this afternoon, but 08:52:31AM
21 suffice it to say that Article 1101(1) and 08:52:33AM
22 international law, in particular the ILC articles 08:52:36AM
23 on state responsibility, are clear: Alleged 08:52:40AM
24 predatory pricing by PHP in 2014 is not 08:52:42AM
25 attributable to the Government of Nova Scotia or 08:52:47AM

1 to Canada. 08:52:49AM

2 Canada's second jurisdictional 08:52:54AM

3 objection is the time limitations period. So if 08:52:56AM

4 any of the Nova Scotia measures individually 08:52:59AM

5 survive an Article 1101 assessment, there's a 08:53:03AM

6 second jurisdictional barrier, and this is one 08:53:07AM

7 that Resolute created for itself. The claim was 08:53:10AM

8 filed too late. 08:53:12AM

9 I will return to the podium 08:53:16AM

10 this afternoon to discuss Articles 1116(2) and 08:53:17AM

11 1117(2) and why they were drafted as a 08:53:24AM

12 hard-and-fast limitations period that must be 08:53:27AM

13 complied with in order to perfect the consent of a 08:53:29AM

14 NAFTA party to arbitrate. My colleague Jenna 08:53:31AM

15 Wates, she will speak to the factual evidence that 08:53:35AM

16 is before the tribunal that demonstrates very 08:53:36AM

17 clearly that the limitations period was not 08:53:40AM

18 complied with because the measures and the alleged 08:53:42AM

19 loss or damage were all first known or ought to 08:53:47AM

20 have been known prior to the cutoff date of 08:53:49AM

21 December 30, 2012. 08:53:51AM

22 But, just briefly, one would 08:53:56AM

23 assume that a Claimant who really had no knowledge 08:53:57AM

24 of the alleged loss or damage from a government 08:54:01AM

25 measure during a certain period would have the 08:54:04AM

1 confidence to put forward a witness and 08:54:05AM
2 corroborate its pleadings with internal 08:54:10AM
3 documentation. It would have been very easy for 08:54:13AM
4 the Claimant to have Mr. Richard Garneau, 08:54:15AM
5 Resolute's CEO, or someone else from Resolute's 08:54:18AM
6 management to put forward a witness statement and 08:54:20AM
7 to tell the tribunal what it knew and when, and it 08:54:22AM
8 would have been very easy to produce 08:54:26AM
9 contemporaneous internal documentation that 08:54:29AM
10 corroborates that testimony and the pleadings that 08:54:30AM
11 are right now uncorroborated. But that witness 08:54:32AM
12 would have had to explain away the public 08:54:38AM
13 statement by Resolute's own corporate 08:54:41AM
14 spokesperson, Pierre Choquette, who was quoted in 08:54:44AM
15 the newspapers in November 2012 saying that 08:54:47AM
16 competition from Port Hawkesbury was one of the 08:54:49AM
17 reasons why Resolute decided to shut down its 08:54:51AM
18 Machine No. 10 at Laurentide. 08:54:55AM
19 That witness would have also 08:54:58AM
20 have had to try and explain away Mr. Choquette's 08:54:59AM
21 public statements in December 2012, where he told 08:55:03AM
22 the newspapers that the temporary shutdown of Machine 08:55:05AM
23 No. 11 at Laurentide was also due to the reopening 08:55:09AM
24 of Port Hawkesbury. 08:55:12AM
25 And that witness would have 08:55:15AM

1 also have had to explained away that, despite 08:55:16AM
2 having negotiated its lower-priced January 2013 08:55:19AM
3 contracts the month before, in December 2012, it 08:55:24AM
4 still didn't know in 2012 that its paper prices 08:55:28AM
5 had been impacted by the opening of Port 08:55:32AM
6 Hawkesbury. 08:55:33AM

7 The Claimant didn't try to do 08:55:35AM
8 any of this. Instead, it cobbled together media 08:55:37AM
9 reports that don't actually refute anything that 08:55:40AM
10 Canada has put forward in terms of evidence, and 08:55:43AM
11 it hired an economist to use a market index 08:55:45AM
12 statistics as a proxy for what Resolute actually 08:55:48AM
13 knew or should have known. 08:55:52AM

14 Now, the tribunal is going to 08:55:54AM
15 learn later today that Professor Hausman's report 08:55:56AM
16 has no probative value in this case. But, really, 08:55:58AM
17 that's beside the point, because the Claimant 08:56:01AM
18 didn't even try and put forward the best evidence 08:56:03AM
19 with respect to its actual knowledge. And, 08:56:06AM
20 Mr. President, members of the tribunal, that ought 08:56:09AM
21 to send alarm bells ringing because, instead of 08:56:12AM
22 establishing this tribunal's jurisdiction *ratione* 08:56:15AM
23 *temporis*, which at least seven NAFTA tribunals 08:56:19AM
24 have affirmed is the requirement and the NAFTA 08:56:22AM
25 parties are all in agreement must be done by the 08:56:24AM

1 Claimant, the Claimant just absolves itself of 08:56:29AM
2 having to prove anything with respect to its 08:56:32AM
3 knowledge and the date thereof. In essence, the 08:56:34AM
4 Claimant is hiding behind Procedural Order No. 5, 08:56:38AM
5 where the tribunal ruled that document production 08:56:41AM
6 wouldn't be necessary in this preliminary phase. 08:56:43AM
7 Now, I'll say a little bit 08:56:46AM
8 more about that later this afternoon with respect 08:56:47AM
9 to the tribunal's Question No. 4 and with respect 08:56:49AM
10 to Canada's request that the schedule actually 08:56:56AM
11 account for the possibility of having document 08:56:58AM
12 production, but that's not a bridge that we have 08:57:00AM
13 to cross. The evidence that Canada has already 08:57:03AM
14 put forward in this case is determinative. The 08:57:06AM
15 first acquired knowledge necessary to engage the 08:57:09AM
16 limitations period was acquired before December 08:57:12AM
17 30, 2012. 08:57:16AM
18 Now, what about the claim with 08:57:20AM
19 respect to Claimant's arguments that the 08:57:22AM
20 expropriation claim cannot be time-barred? Well, 08:57:27AM
21 I will give you a little preview of what my 08:57:29AM
22 colleague Jenna Wates will bring up this afternoon 08:57:31AM
23 by explaining a little bit about how the 08:57:34AM
24 Claimant's arguments with respect to expropriation 08:57:36AM
25 have evolved since the beginning of this case. 08:57:38AM

1 In Resolute's Statement of 08:57:42AM
2 Claim, they argued that the Nova Scotia measures 08:57:44AM
3 constituted an expropriation of its market share 08:57:46AM
4 and SC paper sales. In response, Canada said, 08:57:49AM
5 "Well, sales and market share cannot be the 08:57:54AM
6 subject of an expropriation claim, but even if it 08:57:56AM
7 could, the limitations period would have started 08:57:58AM
8 in 2012, making the claim untimely." 08:57:59AM
9 But then Resolute changed its 08:58:03AM
10 approach. They're not claiming expropriation of 08:58:05AM
11 market share and sales, but, rather, the entire 08:58:08AM
12 Laurentide mill in October 2012. But the 08:58:11AM
13 consequence of the Claimant having shifted the 08:58:15AM
14 ground on which its house stands is to topple the 08:58:17AM
15 entire house. 08:58:22AM
16 Let's put aside a moment the 08:58:23AM
17 illogic of arguing under international law an 08:58:26AM
18 expropriation of a mill located in a different 08:58:29AM
19 province two years after the last government 08:58:32AM
20 measure. But if we take Resolute's arguments at 08:58:34AM
21 face value, that Nova Scotia knew or ought to have 08:58:38AM
22 known at the time it enacted its measures that 08:58:41AM
23 those measures would result in the expropriation 08:58:44AM
24 of its mill, well, then Resolute must have known 08:58:46AM
25 the same thing at the same time, which would make 08:58:49AM

1 its claim untimely. 08:58:52AM

2 But if it is unknown and 08:58:54AM

3 unknowable, which is now the Claimant's position 08:58:57AM

4 with respect to Port Hawkesbury's impact on the 08:58:59AM

5 market, then the expropriation claim must be 08:59:01AM

6 premised on something different, and it is 08:59:05AM

7 premised on something different. It is premised 08:59:07AM

8 on the argument that Resolute shut down its mill 08:59:10AM

9 in October 2014, which was apparently profitable 08:59:13AM

10 and competitive for the entire year previously, 08:59:16AM

11 because of predatory pricing enacted by PHP in 08:59:19AM

12 2014. That, as we have said earlier and we will 08:59:23AM

13 explain more, creates a jurisdictional catch-22 08:59:27AM

14 for the Claimant. There can be no attribution 08:59:29AM

15 under international law for actions taken by a 08:59:32AM

16 private company, so the expropriation claim fails 08:59:34AM

17 whichever analysis is applied. 08:59:40AM

18 Finally, the national 08:59:47AM

19 treatment claim, as I said, it's really only 08:59:49AM

20 necessary to get to this point if any one of the 08:59:51AM

21 measures of the Nova Scotia measures pass through 08:59:55AM

22 the first two jurisdictional objections. But if 08:59:57AM

23 the tribunal does have to rule on the issue, the 09:00:00AM

24 only question really in this preliminary phase is 09:00:03AM

25 to determine whether a fundamental factual 09:00:07AM

1 predicate is present for the purpose of making a 09:00:10AM
2 national treatment claim. Has there been 09:00:13AM
3 treatment accorded by a state or province of the 09:00:16AM
4 investor in its investment within the ordinary 09:00:21AM
5 meaning of Article 1102(3)? And, in this case, 09:00:22AM
6 the answer has to be no. 09:00:26AM

7 Starting in September 2011, 09:00:29AM
8 Nova Scotia accorded treatment to the Port 09:00:32AM
9 Hawkesbury mill and to third-party forestry 09:00:35AM
10 workers while the mill was in creditor protection 09:00:38AM
11 proceedings and while it was still uncertain 09:00:41AM
12 whether the mill would even reopen ever again. 09:00:43AM
13 That cannot be considered as falling into the 09:00:46AM
14 ordinary meaning of 1102(3). 09:00:48AM

15 Similarly, in September 2012, 09:00:52AM
16 Nova Scotia accorded treatment to the purchaser of 09:00:55AM
17 the mill and, again, third-party forestry workers 09:00:57AM
18 and First Nation groups, but that cannot, 09:01:00AM
19 similarly, fall into the ordinary meaning of 09:01:03AM
20 1102(3). Nova Scotia could not have accorded 09:01:07AM
21 treatment to Resolute with respect to taxes or 09:01:11AM
22 power rates, because it has no jurisdiction to 09:01:15AM
23 provide that kind of treatment. Resolute's 09:01:17AM
24 investments are located in a completely different 09:01:21AM
25 province. Nova Scotia could not have, even if it 09:01:23AM

1 had wanted to, accorded such treatment. 09:01:25AM

2 Now, Canada's argument is 09:01:28AM

3 based on the text of the treaty, and when a 09:01:30AM

4 critical factual predicate for bringing a national 09:01:32AM

5 treatment claim is missing, it can be dismissed as 09:01:36AM

6 a preliminary matter of admissibility. 09:01:39AM

7 This will spare the parties 09:01:43AM

8 and the tribunal of a huge expense and time and 09:01:44AM

9 money of a merits phase of having to even get into 09:01:47AM

10 the 'in like circumstances' test and whether or not 09:01:51AM

11 the subsidies and procurement exception at 1108(7) 09:01:53AM

12 applies. 09:01:57AM

13 Now, just on that last point, 09:01:59AM

14 I will address it a little bit later, but just to 09:02:00AM

15 note that the application of 1108(7) has never 09:02:03AM

16 been waived by Canada, so the tribunal can just 09:02:09AM

17 safely ignore the Claimant's suggestion that, if 09:02:11AM

18 this case ever got to the merits phase with 09:02:13AM

19 respect to national treatment, those defences 09:02:15AM

20 could not be raised. That's not the case. 09:02:19AM

21 Finally, the last of the 09:02:22AM

22 objections, jurisdictional objections, has to do 09:02:25AM

23 with NAFTA Article 2103. That applies to all 09:02:28AM

24 taxation measures. There's one specific measure 09:02:32AM

25 in this case that is a taxation measure, no 09:02:35AM

1 matter how the Claimant tries to characterize it, 09:02:38AM
2 the Richmond County Property Tax Agreement. That 09:02:41AM
3 cannot form any part of the Claimant's 1105 or 09:02:44AM
4 1110 claim. 09:02:48AM

5 It makes no difference to 09:02:50AM
6 Article 2103 whether the tax measure was intended 09:02:53AM
7 to directly expropriate the investment or if it 09:02:56AM
8 was intended to confer a benefit on a competitor 09:02:58AM
9 in order to result in an expropriation of an 09:03:01AM
10 investment. Whatever the scenario, the Claimant 09:03:04AM
11 did not follow the procedures that are required in 09:03:07AM
12 2103(6) to bring an expropriation claim with 09:03:10AM
13 respect to this taxation measure. So if this case 09:03:13AM
14 goes to the merits with respect to those claims, 09:03:17AM
15 the Property Tax Agreement must be severed from 09:03:20AM
16 it. 09:03:23AM

17 Unless the tribunal has any 09:03:24AM
18 questions at this time, that will conclude 09:03:26AM
19 Canada's opening statement, and I look forward, 09:03:30AM
20 along with my colleagues, to returning later this 09:03:32AM
21 morning. 09:03:36AM

22 PRESIDENT: Thank you. 09:03:36AM
23 MR. LUZ: Thank you. 09:03:37AM
24 PRESIDENT: Mr. Feldman. 09:03:42AM
25 OPENING STATEMENT BY MR. FELDMAN: 09:03:45AM

1 MR. FELDMAN: Thank you. 09:03:45AM

2 May it please the tribunal. 09:03:56AM

3 I'm Elliot Feldman, again, from Baker Hostetler in 09:03:58AM

4 Washington, and, again, my partners here are Mike 09:04:01AM

5 Snarr and Paul Levine, Martin Valasek. Jenna Anne 09:04:04AM

6 de Jong and Jean-Christophe Martel are here from 09:04:09AM

7 Norton Rose Fulbright in Canada and the general 09:04:12AM

8 counsel of Resolute Forest Products, Mr. Jacques 09:04:15AM

9 Vachon, all on behalf of Resolute. 09:04:17AM

10 And I thought Canadians were 09:04:19AM

11 nice: "defective", "deceptive", "toppling houses", 09:04:20AM

12 "cobbling things together", "double-speak", 09:04:25AM

13 "conspiratorial", "obfuscation", all the terms just 09:04:27AM

14 used with regard to us, and we're not the nice 09:04:31AM

15 Americans. 09:04:34AM

16 Seven years ago, the 09:04:36AM

17 Government of Nova Scotia decided to resurrect a 09:04:38AM

18 failed and bankrupt paper mill in order to rescue 09:04:40AM

19 jobs in Nova Scotia. The mill was highly 09:04:44AM

20 specialized, equipped with the latest machinery 09:04:47AM

21 to make supercalendered paper. 09:04:50AM

22 Unfortunately, there were a 09:04:52AM

23 lot of reasons why the mill had been closed. 09:04:53AM

24 There was no significant market for this specialty 09:04:56AM

25 paper in Nova Scotia. Even as the Port Hawkesbury 09:04:59AM

1 mill would be the only supercalendered paper mill 09:05:02AM
2 in the province, it could not be producing just 09:05:06AM
3 for the province or even chiefly or significantly 09:05:09AM
4 for the province. For the mill to operate, it 09:05:12AM
5 would have to compete primarily outside the 09:05:15AM
6 province. Paper is heavy. Transportation costs 09:05:17AM
7 are significant and so is timing for paper that 09:05:21AM
8 may come into demand on short notice or 09:05:25AM
9 seasonally. 09:05:28AM

10 The American company that had 09:05:29AM
11 owned the mill learned that, located on the 09:05:30AM
12 western edge of Cape Breton Island, 600 kilometres 09:05:34AM
13 to the nearest border with the United States in 09:05:37AM
14 Maine, or 1,900 kilometres from Brampton, Ontario, 09:05:40AM
15 where transfer to Detroit would require another 09:05:45AM
16 350 kilometres by truck, it was simply too far 09:05:48AM
17 from the market. It also learned that the 09:05:51AM
18 production costs in what was effectively a remote 09:05:54AM
19 location were too great, especially for 09:05:58AM
20 electricity, the single largest cost for operating 09:06:01AM
21 a pulp mill, or a paper mill. 09:06:03AM

22 The newsprint machine at Port 09:06:07AM
23 Hawkesbury was never to be resurrected. As the 09:06:09AM
24 government understood, no amount of investment 09:06:13AM
25 could ever make it profitable again. But 09:06:15AM

1 believing it could gain a significant portion of 09:06:19AM
2 the North American market for supercalendered 09:06:21AM
3 paper, the Nova Scotia government proceeded 09:06:23AM
4 despite the formidable obstacles. The odds on 09:06:26AM
5 success were not great. As much as competitors 09:06:30AM
6 worried about introducing into the continent's 09:06:33AM
7 supercalendered market new and large-scale 09:06:36AM
8 production, there were no confident predictions 09:06:39AM
9 that Port Hawkesbury would find customers, would 09:06:41AM
10 operate efficiently, would be able to control 09:06:43AM
11 costs, at least no such confident predictions 09:06:46AM
12 outside of the Government of Nova Scotia. 09:06:49AM
13 And there were very few 09:06:52AM
14 competitors. Only five in all of North America, 09:06:54AM
15 two operating in the United States, one of whom 09:06:58AM
16 had owned the portion of the mill that had gone 09:07:01AM
17 bankrupt, and three in Canada. All of them knew 09:07:05AM
18 each other well. They knew that the supercalendered 09:07:07AM
19 paper market probably could not absorb additional 09:07:10AM
20 large-scale production, but Resolute, at least, 09:07:14AM
21 believed it would continue to be competitive and 09:07:16AM
22 doubted that Port Hawkesbury, despite the initial 09:07:19AM
23 government support, would succeed. 09:07:21AM
24 The North American competitors 09:07:24AM
25 underestimated the tenacity and generosity of the 09:07:26AM

1 Nova Scotia government, which, in its 09:07:30AM
2 determination to resurrect the mill, was prepared 09:07:33AM
3 to devote extraordinary resources and make 09:07:35AM
4 extravagant promises that it was prepared to pay 09:07:39AM
5 to keep. For all that it spent and committed, the 09:07:42AM
6 Nova Scotia government effectively launched a 09:07:46AM
7 state-owned enterprise to compete with the handful 09:07:49AM
8 of other supercalendered producers in North 09:07:51AM
9 America promising to outcompete them by making a 09:07:55AM
10 superior product cheaper than they could make, 09:07:58AM
11 transporting it to customers, despite the 09:08:01AM
12 distance, to sell at a competitive price. 09:08:03AM
13 Resolute, an American company 09:08:07AM
14 incorporated in Delaware, had long-standing 09:08:09AM
15 investments in the production of supercalendered 09:08:12AM
16 paper in Canada. Resolute always expected private 09:08:14AM
17 sector competitors, but never expected to have to 09:08:17AM
18 compete against the full weight and resources of a 09:08:21AM
19 government. That, in essence, is what this case 09:08:24AM
20 is about. A private foreign investor, competing 09:08:28AM
21 in the North American market, one day learns that 09:08:31AM
22 it must compete against a government. 09:08:33AM
23 The Government of Canada has 09:08:36AM
24 brought the motion before the tribunal today, and, 09:08:39AM
25 since it brought the motion, we are responding in 09:08:41AM

1 the order in which it has brought its motion and 09:08:44AM
2 its argument, so notwithstanding the reversal of 09:08:47AM
3 presentation now introduced by Mr. Luz, we will 09:08:50AM
4 continue to present our case first with respect to 09:08:53AM
5 the time-bar objection and then with respect to 09:08:56AM
6 the other objections. 09:08:59AM

7 And, in this case, the 09:09:01AM
8 Government of Canada has brought four objections. 09:09:03AM
9 In the course of briefing these objections, two 09:09:06AM
10 more issues have arisen, one involving the 09:09:08AM
11 importance to be accorded to Article 1128 09:09:11AM
12 submissions, the other whether the Statement of 09:09:14AM
13 Claim ought to be amended to account for ongoing 09:09:18AM
14 Canadian measures introduced to sustain support 09:09:20AM
15 for Port Hawkesbury beginning in 2013. 09:09:24AM

16 First, Canada has proffered an 09:09:28AM
17 affirmative defence that Resolute's claims are 09:09:30AM
18 time-barred because Resolute must have incurred 09:09:33AM
19 loss or damage before December 30, 2012 and that 09:09:35AM
20 Resolute, moreover, knew it had incurred loss or 09:09:40AM
21 damage before that date or must have known. 09:09:43AM
22 Canada argues that this affirmative defence 09:09:47AM
23 involves jurisdiction with a burden of proof 09:09:49AM
24 falling on Resolute. 09:09:51AM

25 Resolute says Canada's 09:09:55AM

1 affirmative defence goes to admissibility and that 09:09:57AM
2 the burden of proof is Canada's. But Resolute 09:09:59AM
3 also says that the resolution of this issue, the 09:10:03AM
4 burden of proof, is not important in light of the 09:10:06AM
5 facts and evidence in this case. They show that 09:10:10AM
6 Resolute did not incur loss or damage before 09:10:14AM
7 December 30, 2012. I'm going to present 09:10:17AM
8 Resolute's case on this question, but we're going 09:10:21AM
9 to rely predominantly on the testimony of 09:10:24AM
10 Professor Jerry Hausman. 09:10:27AM

11 Second, Canada claims that the 09:10:29AM
12 Nova Scotia measures do not relate to Resolute 09:10:32AM
13 because they do not name Resolute. And, third, 09:10:35AM
14 Canada asserts that Resolute has no viable 09:10:39AM
15 national treatment claim because the investments 09:10:41AM
16 Resolute claims were damaged by the Nova Scotia 09:10:43AM
17 measures were not in Nova Scotia and, therefore, 09:10:46AM
18 were not susceptible to national treatment. 09:10:49AM
19 Mr. Valasek is going to present Resolute's case on 09:10:53AM
20 these two Canadian objections. 09:10:55AM

21 Canada has objected that 09:10:58AM
22 Resolute's complaint about local tax breaks 09:11:00AM
23 favouring Port Hawkesbury cannot be considered by 09:11:02AM
24 the tribunal because Resolute didn't follow 09:11:05AM
25 certain procedures to make this claim. The 09:11:07AM

1 tribunal hasn't asked the parties any questions 09:11:11AM
2 about this issue. Resolute's position has been 09:11:13AM
3 presented in the written pleadings. The tax 09:11:15AM
4 provision upon which Canada relies for its 09:11:18AM
5 argument was intended to insulate governments from 09:11:20AM
6 claims that they taxed a foreign investment out of 09:11:23AM
7 business. It wasn't intended to insulate 09:11:26AM
8 governments from challenge when they manipulate 09:11:29AM
9 the tax code to favour a domestic over a foreign 09:11:31AM
10 investment. 09:11:34AM

11 Resolute has demonstrated that 09:11:36AM
12 the Government of Nova Scotia continued to 09:11:37AM
13 introduce breaching measures even after Resolute 09:11:40AM
14 recognized it had incurred loss or damage, 09:11:43AM
15 sustaining the Port Hawkesbury enterprise to 09:11:46AM
16 Resolute's detriment so that the government role 09:11:49AM
17 didn't just end with the end of the measures as 09:11:52AM
18 Mr. Luz has suggested. The tribunal has asked 09:11:55AM
19 whether Resolute ought to seek to amend its 09:11:59AM
20 Statement of Claim to take account of these new 09:12:01AM
21 measures. I will address this question at the end 09:12:04AM
22 of Resolute's presentation this afternoon. 09:12:07AM

23 Professor Hausman will testify 09:12:10AM
24 that Resolute could not have known it was injured 09:12:12AM
25 by the reopening of Port Hawkesbury until it was 09:12:15AM

1 injured and that Resolute was not injured in 09:12:17AM
2 calendar year 2012. Resolute filed its Statement 09:12:21AM
3 of Claim just before the end of 2015, and, 09:12:25AM
4 therefore, the filing was timely. 09:12:27AM

5 Professor Hausman will also 09:12:30AM
6 testify that the Nova Scotia measures necessarily 09:12:31AM
7 related to Resolute because Resolute was one of a 09:12:35AM
8 small number of North American competitors, and 09:12:39AM
9 Port Hawkesbury was resurrected to compete in 09:12:42AM
10 North America. 09:12:44AM

11 The principal damages claimed 09:12:47AM
12 by Resolute are the consequence of a constructive 09:12:48AM
13 expropriation of the supercalendered paper machine 09:12:51AM
14 at Laurentide that became effective in 2014 and 09:12:54AM
15 required closing the mill and displacing hundreds 09:12:58AM
16 of jobs. In effect, Nova Scotia's aggressive 09:13:01AM
17 entry into the market transferred paper mill jobs 09:13:05AM
18 from Quebec to Nova Scotia while terminating an 09:13:08AM
19 important piece of Resolute's business. 09:13:11AM

20 An expropriation involves the 09:13:15AM
21 total loss of a property, and expropriation can't 09:13:17AM
22 be claimed until it has happened, until the 09:13:21AM
23 property is totally lost. Obviously, the 09:13:24AM
24 expropriation claim here has been made well within 09:13:28AM
25 the three-year limitation period. 09:13:31AM

1 The tribunal has asked, 09:13:34AM
2 however, whether the loss now of Laurentide, 09:13:36AM
3 indeed, is total or whether the mill could one day 09:13:38AM
4 be reopened. More precisely, the tribunal has 09:13:42AM
5 observed: 09:13:45AM
6 "The Laurentide mill has 09:13:46AM
7 been described as defunct 09:13:48AM
8 and shutdown." 09:13:50AM
9 And then has asked: 09:13:52AM
10 "Could the Claimant 09:13:54AM
11 specify whether the mill 09:13:55AM
12 could be restarted, such 09:13:56AM
13 as Dolbeau, after a 09:13:57AM
14 closure of two years, or 09:13:58AM
15 have the assets been 09:13:59AM
16 disposed of?" 09:14:01AM
17 Resolute determined, when 09:14:03AM
18 shuttering Laurentide in 2014, that the apparent 09:14:05AM
19 success of the Nova Scotia measures for the long 09:14:08AM
20 term meant there would be no room in the North 09:14:12AM
21 American market for additional supercalendered 09:14:15AM
22 paper given the secular declines in demand for the 09:14:17AM
23 specialty paper. Resolute completed the sale of 09:14:20AM
24 its entire property and operations in Shawinigan 09:14:22AM
25 in January 2016. 09:14:25AM

1 Resolute anticipated 09:14:27AM
2 presenting detail about this transaction in the 09:14:28AM
3 merits phase of this arbitration, but can provide 09:14:30AM
4 more information to the tribunal following this 09:14:33AM
5 hearing if the tribunal would prefer to have this 09:14:35AM
6 information now. Bottom line is the property is 09:14:37AM
7 gone. It's no longer owned at all by Resolute. 09:14:41AM
8 It's in other hands, and, therefore, the mill 09:14:45AM
9 could not possibly be restored or reopened. 09:14:47AM
10 Before we proceed to Canada's 09:14:51AM
11 examination of Professor Hausman, Mr. Valasek will 09:14:53AM
12 add a few remarks about the second and third 09:14:56AM
13 issues, the relationship between the measures and 09:14:59AM
14 Resolute and Resolute's investments. Thank you. 09:15:02AM
15 PRESIDENT: Thank you, 09:15:09AM
16 Mr. Feldman. 09:15:10AM
17 Mr. Valasek. 09:15:11AM
18 OPENING STATEMENT BY MR. VALASEK: 09:15:14AM
19 MR. VALASEK: Judge Crawford, 09:15:19AM
20 Dean Levesque, Dean Emeritus Cass, it's a pleasure 09:15:19AM
21 and an honour to appear before you this morning. 09:15:23AM
22 As Mr. Feldman explained, I 09:15:26AM
23 will be presenting Resolute's case on whether the 09:15:28AM
24 Nova Scotia measures relate to Resolute's 09:15:32AM
25 investments, as required by Article 1101(1) of 09:15:36AM

1 NAFTA, and whether Resolute's claim for breach of 09:15:41AM
2 Article 1102(3), the claim for violation of the 09:15:45AM
3 national treatment guarantee, is precluded on the 09:15:50AM
4 grounds that Resolute's investments were not in 09:15:53AM
5 Nova Scotia. 09:15:56AM

6 In order to sustain its 09:15:59AM
7 argument in support of each of these two 09:16:01AM
8 objections, Canada has misrepresented the factual 09:16:03AM
9 basis for Resolute's claim. Canada studiously 09:16:08AM
10 avoids the central complaint in Resolute's case, 09:16:16AM
11 which is that Nova Scotia resuscitated the mill at 09:16:18AM
12 Port Hawkesbury with the specific and express 09:16:22AM
13 intention of making it a national champion in the 09:16:25AM
14 supercalendered paper market and that it did so 09:16:29AM
15 through a variety of measures, including sustained 09:16:36AM
16 financial support, that was intended to enable the 09:16:38AM
17 private buyer of the mill to operate as the 09:16:41AM
18 lowest-cost producer in North America. Canada 09:16:44AM
19 asserts, instead, that the measures were adopted 09:16:50AM
20 merely to support the restructuring and sale of 09:16:54AM
21 Port Hawkesbury mill so that it would not be sold 09:16:56AM
22 for scrap and could continue to operate as a going 09:16:59AM
23 concern. 09:17:03AM

24 Canada has, therefore, pushed 09:17:06AM
25 Resolute to defend the merits of its case, even 09:17:07AM

1 in secular decline and had a small number of 09:18:47AM
2 participants competing for business. 09:18:51AM
3 Canada has conceded that there 09:18:56AM
4 was no question that the Methanex test was 09:18:58AM
5 satisfied in the Cargill case. It is, therefore, 09:19:02AM
6 incoherent for Canada to argue that Resolute has 09:19:04AM
7 failed to meet the Methanex test here. Canada can 09:19:06AM
8 make the argument only by contesting the merits of 09:19:10AM
9 Resolute's claim, which it cannot yet do at this 09:19:14AM
10 stage of the proceedings. Similarly, Canada 09:19:17AM
11 avoids the core of Resolute's claim in its attempt 09:19:22AM
12 to show that the claim under Article 1102(3) is 09:19:26AM
13 inadmissible. 09:19:31AM
14 Canada originally asserted 09:19:34AM
15 that Resolute's national treatment claim was 09:19:38AM
16 impossible -- Canada's word -- impossible as a 09:19:41AM
17 matter of law because it argued that the provision 09:19:46AM
18 allows only intraprovincial comparison among 09:19:47AM
19 investors even though the provision actually 09:19:51AM
20 doesn't say that and, Canada said, does not allow 09:19:55AM
21 comparison of treatment accorded by two different 09:20:00AM
22 provinces. 09:20:03AM
23 But Canada was arguing against 09:20:05AM
24 a straw man. Resolute's case was never about 09:20:07AM
25 comparing the treatment of Nova Scotia against the 09:20:12AM

1 treatment of any other province or level of 09:20:15AM
2 government. As is clear from Resolute's 09:20:17AM
3 allegations and was clear from the beginning, 09:20:20AM
4 Resolute's case is about Nova Scotia's direct 09:20:24AM
5 intervention in the supercalendered paper market. 09:20:28AM
6 Nova Scotia's intervention was expressly intended 09:20:32AM
7 to have effects outside the province, notably on 09:20:35AM
8 the finite number of Port Hawkesbury's 09:20:39AM
9 competitors, and eventually did have such effects. 09:20:42AM
10 In the circumstances of this case, Resolute 09:20:47AM
11 alleges, the provincial measures did result in 09:20:49AM
12 treatment of Resolute's investment outside of the 09:20:54AM
13 province and were intended, from the first, to do 09:20:56AM
14 so. 09:20:59AM
15 Canada has, therefore, 09:21:02AM
16 abandoned its earlier arguments based on 09:21:03AM
17 impossibility and legal interpretation of Article 09:21:05AM
18 1102(3) and must now make arguments that stray 09:21:09AM
19 impermissibly into the merits. Canada now argues 09:21:13AM
20 that Nova Scotia cannot accord treatment to an 09:21:17AM
21 investor over which it has no jurisdiction. But 09:21:21AM
22 that is at the very heart of Resolute's claim on 09:21:24AM
23 the merits, namely, that this is not a regulatory 09:21:27AM
24 case, but a case where a province has used its 09:21:31AM
25 powers to intervene directly in a market to 09:21:34AM

1 support a local enterprise, making it a national 09:21:37AM
2 champion to the detriment of all the other market 09:21:41AM
3 participants, a finite number, all of which were 09:21:45AM
4 outside of Nova Scotia. Whether Nova Scotia did 09:21:48AM
5 so and whether Resolute and Port Hawkesbury are in 09:21:52AM
6 like circumstances for purposes of Article 1102(3) 09:21:57AM
7 are questions to be addressed during the merits 09:22:03AM
8 phase, not now. What is clear at this stage is 09:22:05AM
9 that nothing in the text of Article 1102(3) 09:22:11AM
10 prohibits such a claim as a matter of law. 09:22:14AM
11 The tribunal has asked a 09:22:19AM
12 number of questions relevant to the objections 09:22:21AM
13 under Articles 1101 and 1102(3). I will respond 09:22:23AM
14 to these questions in detail during the main 09:22:28AM
15 presentation on these objections later in the day. 09:22:30AM
16 Thank you very much. 09:22:34AM
17 PRESIDENT: Thank you, 09:22:37AM
18 Mr. Valasek. So we are now going to hear the 09:22:37AM
19 expert, Professor Hausman. 09:22:43AM
20 MR. CASS: Did you want to 09:22:53AM
21 break before the expert? 09:22:54AM
22 PRESIDENT: It says we will 09:23:02AM
23 have a break. We will have a break. I think it's 09:23:03AM
24 probably best if we go continuously through 09:23:07AM
25 Professor Hausman's direct examination and 09:23:10AM

1 cross-examination and redirect. So we will break 09:23:12AM
2 for 15 minutes and have a early cup of coffee. 09:23:14AM
3 MR. LUZ: That's fine. We 09:23:20AM
4 will use the break, as well, just to adjust the 09:23:21AM
5 podium for the cross-examinations. So that will 09:23:23AM
6 be a good opportunity as well. 09:23:26AM
7 PRESIDENT: Good. Thank you. 09:23:32AM
8 --- Recess at 9:23 a.m. 09:23:34AM
9 --- Upon resuming at 9:41 a.m. 09:37:40AM
10 PRESIDENT: Take a seat. You 09:41:57AM
11 have a statement in front of you. If you could 09:42:02AM
12 please read it. 09:42:04AM
13 THE WITNESS: Yes. I solemnly 09:42:06AM
14 declare upon my honour and conscience that my 09:42:08AM
15 statement will be in accordance with my sincere 09:42:10AM
16 belief. 09:42:13AM
17 PRESIDENT: Thank you. 09:42:14AM
18 AFFIRMED: JERRY HAUSMAN 09:42:18AM
19 PRESIDENT: Mr. Hausman, you 09:42:18AM
20 will be introduced briefly. 09:42:21AM
21 MR. FELDMAN: Thank you, 09:42:21AM
22 Mr. Chairman. 09:42:21AM
23 EXAMINATION-IN-CHIEF BY MR. FELDMAN: 09:42:21AM
24 Q. Professor Hausman, our 09:42:30AM
25 tribunal is comprised of three distinguished 09:42:33AM

1 scholars. They will all recognize the stature of 09:42:34AM
2 your chair in economics at MIT, one of the world's 09:42:36AM
3 most respected and prestigious economics 09:42:39AM
4 departments. They may be less familiar with the 09:42:42AM
5 significance of the awards you have won. At the 09:42:44AM
6 risk of immodesty, recognizing that you are being 09:42:46AM
7 asked, could you please for a moment describe the 09:42:49AM
8 John Bates Clark award and perhaps reference some 09:42:52AM
9 of the other winners of this award. 09:42:54AM

10 A. Best economist in the 09:42:57AM
11 U.S. under the age of 40. Other people who have 09:42:59AM
12 won: Paul Samuelson, Bob Solow, Kenneth Arrow. 09:43:03AM

13 Q. Also the Frisch Medal of 09:43:10AM
14 the -- 09:43:13AM

15 PRESIDENT: You have a theorem 09:43:13AM
16 as well too. 09:43:14AM

17 THE WITNESS: I do. There's a 09:43:15AM
18 Hausman Theorem and a Hausman Specification Test. 09:43:16AM

19 PRESIDENT: Can you tell us 09:43:19AM
20 the Hausman Theorem? I don't guarantee to 09:43:20AM
21 understand it. 09:43:23AM

22 THE WITNESS: Oh, it's in 09:43:24AM
23 econometrics. It's, if you want to compare two 09:43:24AM
24 estimators, one of which is efficient, like 09:43:27AM
25 maximum likelihood, and the other is consistent, 09:43:30AM

1 since they're based on the same data, you might 09:43:35AM
2 think that to calculate the variance of the 09:43:37AM
3 difference is very complicated, but it turns out 09:43:40AM
4 that the Hausman Theorem is that the variance of 09:43:42AM
5 the difference is the difference of the variance. 09:43:45AM
6 So all you have to do is subtract. So that was 09:43:47AM
7 quite surprising to a lot of people. And then 09:43:50AM
8 that leads to something called the Hausman 09:43:52AM
9 Specification Test. 09:43:55AM
10 PRESIDENT: My belief is that 09:43:57AM
11 I wouldn't understand the theory. 09:43:59AM
12 THE WITNESS: I need a 09:44:02AM
13 blackboard. That's my only defence. 09:44:04AM
14 BY MR. FELDMAN: 09:44:06AM
15 Q. Also the Frisch Medal of 09:44:06AM
16 the Econometric Society? 09:44:08AM
17 A. Yeah. That's for the 09:44:09AM
18 best paper in Econometrica, which is the leading 09:44:10AM
19 econometrics journal in the previous five years. 09:44:13AM
20 Q. You won these awards many 09:44:15AM
21 years ago. You are no longer under 40. 09:44:17AM
22 A. Alas. 09:44:21AM
23 Q. Can you indicate, in the 09:44:22AM
24 category of what have you done for us lately, more 09:44:24AM
25 recent recognition? 09:44:27AM

1 A. I have two more recent 09:44:28AM
2 things: I received the gold medal from the 09:44:29AM
3 Australia New Zealand Modelling Society, and I was 09:44:34AM
4 made an honorary fellow of the American Economic 09:44:35AM
5 Association. 09:44:40AM

6 Q. We've asked you to 09:44:40AM
7 address two questions. When, in your expert 09:44:45AM
8 opinion, should Resolute first have known that it 09:44:47AM
9 had incurred damage or loss from the resurrection 09:44:49AM
10 of the Port Hawkesbury supercalendered paper mill, 09:44:51AM
11 or at least when it could not have incurred loss 09:44:55AM
12 or damage? And could the resurrection of the mill 09:44:59AM
13 ever have been intended or expected to limit its 09:45:02AM
14 impact and reach to the province of Nova Scotia? 09:45:04AM

15 Could you literally, in two 09:45:09AM
16 minutes, summarize your answers to those 09:45:11AM
17 questions? Bear in mind that we're on a live 09:45:12AM
18 public stream, so there is some confidential 09:45:15AM
19 information, I believe, in your report, perhaps, 09:45:18AM
20 so if you could also be conscious of that. 09:45:21AM

21 I will sit down, let you try 09:45:23AM
22 to answer those questions in two minutes, and then 09:45:25AM
23 leave you to cross-examination. Thank you very 09:45:29AM
24 much. 09:45:31AM

25 PRESIDENT: I should say, if 09:45:33AM

1 either party wishes to ask questions in 09:45:34AM
2 confidence, it would be helpful if they would 09:45:38AM
3 indicate or if you intend or wish to refer to 09:45:39AM
4 details in confidence, indicate so the appropriate 09:45:48AM
5 adjustment can be made to the video. 09:45:52AM

6 THE WITNESS: Sure. May I ask 09:45:53AM
7 for a bottle of water? I have a sore throat, and 09:45:54AM
8 I forgot to bring one up. That would be great. 09:45:58AM

9 Okay. So the answer to the 09:46:01AM
10 first question is, in my view -- well, since I'm 09:46:01AM
11 an economist, it has to be more complicated than 09:46:11AM
12 you might think. The question in my mind is: 09:46:13AM
13 When would they have a high enough degree of 09:46:16AM
14 certainty that they had been injured? In other 09:46:19AM
15 words, you can always look at the data and say, "I 09:46:22AM
16 might have been injured, but how big -- how much 09:46:24AM
17 does the change have to be?" So based on that -- 09:46:28AM
18 and I will be glad to explain it more -- it seems 09:46:31AM
19 to me that it is probably not until the second 09:46:34AM
20 quarter of 2013 that Resolute knew it was injured, 09:46:37AM
21 you know, in the way of thinking about it that I 09:46:45AM
22 do. 09:46:47AM

23 And the answer to the second 09:46:47AM
24 question is I think any economist and any 09:46:49AM
25 competition lawyer and any Department of Justice 09:46:52AM

1 or competition commission employed in either the 09:46:56AM
2 U.S. or Canada would all agree that the market for 09:47:00AM
3 supercalendered paper is at least North American 09:47:05AM
4 in scope. It could be worldwide, but, at a 09:47:08AM
5 minimum, it's North America. So that if something 09:47:13AM
6 happens in Nova Scotia, to make a bad joke, it 09:47:16AM
7 doesn't stay in Nova Scotia. It's going to have 09:47:18AM
8 ramifications throughout North America, and it 09:47:21AM
9 will affect plants both in Canada and in the 09:47:24AM
10 United States. 09:47:27AM

11 PRESIDENT: No further 09:47:33AM
12 questions, I take it? 09:47:33AM

13 MR. FELDMAN: We only had five 09:47:35AM
14 minutes, and I think maybe we used them. 09:47:38AM

15 PRESIDENT: Ms. Wates, I think 09:47:46AM
16 you are doing the cross. 09:47:48AM

17 MS. WATES: Yes. My colleague 09:47:51AM
18 Ms. Lesaux is just passing out some binders with 09:48:18AM
19 documents that we may refer to in our questioning 09:48:21AM
20 of Professor Hausman. 09:48:23AM

21 PRESIDENT: Thank you. 09:48:29AM

22 CROSS-EXAMINATION BY MS. WATES: 09:48:00AM

23 Q. Good morning, Professor 09:48:00AM
24 Hausman. 09:48:42AM

25 A. Good morning. 09:48:42AM

1 Q. My name is Jenna Wates, 09:48:42AM
2 and, as you know, I'm counsel for Canada, and I'm 09:48:44AM
3 going to ask you some questions about the report 09:48:47AM
4 that you filed on behalf of the Claimant in this 09:48:49AM
5 arbitration. 09:48:51AM
6 You have a copy of the report 09:48:53AM
7 at Tab 1 of the binder that we just gave to you. 09:48:54AM
8 A. Okay. 09:48:58AM
9 Q. And the binder also 09:48:58AM
10 includes some other documents that I may refer to 09:48:59AM
11 in the questions. 09:49:02AM
12 A. Sure. 09:49:03AM
13 Q. And I would ask that you 09:49:04AM
14 provide a clear yes or no answer to my questions 09:49:05AM
15 for the record, as appropriate, before providing 09:49:09AM
16 any additional context that is necessary. And I 09:49:12AM
17 also ask that we remain focused and on point given 09:49:15AM
18 that we have a limited amount of time today. 09:49:18AM
19 So I'd like to start with some 09:49:21AM
20 background information. My friend, Mr. Feldman, 09:49:23AM
21 went over your illustrious achievements. I would 09:49:27AM
22 like to focus more on the substantive issues. 09:49:32AM
23 So you have already 09:49:36AM
24 acknowledged you're a professor at Massachusetts 09:49:37AM
25 Institute of Technology; correct? 09:49:39AM

1 A. Yes. 09:49:40AM

2 Q. And your academic 09:49:40AM

3 specialties are in econometrics and applied 09:49:43AM

4 microeconomics? 09:49:46AM

5 A. Yes. 09:49:47AM

6 Q. And you've been at MIT 09:49:48AM

7 since 1973? 09:49:50AM

8 A. Yes. 09:49:51AM

9 Q. So you've spent your 09:49:51AM

10 whole career in academia? 09:49:55AM

11 A. Apart from two years in 09:49:57AM

12 the army before going to graduate school. 09:49:59AM

13 Q. I did notice that, and 09:50:01AM

14 I'm sure everyone thanks you for your service. 09:50:03AM

15 That was prior to -- 09:50:08AM

16 A. I've even been to the 09:50:08AM

17 Yukon before. 09:50:09AM

18 Q. Pardon me? 09:50:10AM

19 A. I've even been to the 09:50:12AM

20 Yukon before. 09:50:13AM

21 Q. Excellent. And, you 09:50:13AM

22 know, I haven't, and I'm ashamed to say so, 09:50:14AM

23 because Canadians should see more of their 09:50:18AM

24 country, so hopefully I will make it there one day 09:50:19AM

25 as well. 09:50:22AM

1 So your report also mentions 09:50:23AM
2 that you've acted as a consultant in the paper 09:50:26AM
3 industry; correct? 09:50:29AM
4 A. Yes. 09:50:30AM
5 Q. And that one of your 09:50:31AM
6 consulting clients in the paper industry was 09:50:33AM
7 Abitibi? 09:50:35AM
8 A. Yes. 09:50:35AM
9 Q. And that was one of the 09:50:36AM
10 two companies that merged to create Resolute? 09:50:37AM
11 A. Yes. 09:50:40AM
12 Q. But your consulting work 09:50:41AM
13 for Abitibi related to its corporate acquisitions. 09:50:45AM
14 Is that correct? 09:50:49AM
15 A. Also mergers. Yeah, 09:50:49AM
16 that's correct. 09:50:49AM
17 Q. Mergers and acquisitions? 09:50:49AM
18 A. Yes. 09:50:51AM
19 Q. And you didn't do any 09:50:52AM
20 consulting work for Abitibi related to selling or 09:50:53AM
21 marketing supercalendered paper? 09:50:57AM
22 A. Correct. 09:50:58AM
23 Q. And other than your role 09:50:59AM
24 in this arbitration, you haven't done any other 09:51:01AM
25 consulting work for Resolute; correct? 09:51:04AM

1 A. That is correct. 09:51:06AM

2 Q. And you've never been 09:51:07AM

3 employed by Resolute? 09:51:09AM

4 A. Correct. 09:51:10AM

5 Q. And it's also my 09:51:11AM

6 understanding that you've never worked for Port 09:51:12AM

7 Hawkesbury Paper? 09:51:14AM

8 A. That's correct. 09:51:14AM

9 Q. And you've never been 09:51:15AM

10 employed by any other supercalendered paper 09:51:16AM

11 producer? 09:51:20AM

12 A. That's incorrect. In my 09:51:20AM

13 witness statement, I mentioned -- oh, no. That is 09:51:22AM

14 -- I think I mentioned International Paper, and 09:51:27AM

15 I'm pretty sure at the time they -- and Georgia 09:51:28AM

16 Pacific. I think, at the time, one or two of them 09:51:31AM

17 may have been making supercalendered paper. I 09:51:33AM

18 think International Paper might have been, but I'm 09:51:36AM

19 not sure. 09:51:39AM

20 Q. And your consulting work 09:51:39AM

21 for them, it was also in the field of mergers and 09:51:41AM

22 acquisitions? 09:51:43AM

23 A. Yes. 09:51:44AM

24 Q. Thank you. So based on 09:51:45AM

25 all of this, it is my understanding that you have no 09:51:49AM

1 direct experience in marketing or selling 09:51:51AM
2 supercalendered paper? 09:51:53AM
3 A. That's correct. 09:51:54AM
4 Q. And you have no direct 09:51:55AM
5 experience in negotiating sale contracts for 09:51:56AM
6 supercalendered paper? 09:51:58AM
7 A. Correct. 09:51:59AM
8 Q. Now I would like to talk 09:51:59AM
9 about the data analyzed in your report. You 09:52:03AM
10 analysed internal data from Resolute's 09:52:06AM
11 supercalendered paper mills in Quebec; correct? 09:52:09AM
12 A. Yes. So that's 09:52:11AM
13 discussed, and that's in Attachment 3 and 4, yes. 09:52:19AM
14 Q. And, in Attachments 3 and 09:52:22AM
15 4, you are looking specifically at net sales 09:52:24AM
16 price, net mill price, cost of goods sold, and 09:52:27AM
17 contribution margin; correct? 09:52:29AM
18 A. That's in three, and 09:52:32AM
19 then, in four, I'm looking at quantities sold and 09:52:33AM
20 net sales price, yes. 09:52:36AM
21 Q. And the Attachments 3 and 09:52:37AM
22 4, they're reporting Resolute's data for all three 09:52:43AM
23 mills combined on aggregate? 09:52:45AM
24 A. Yes. 09:52:46AM
25 Q. And you developed these 09:52:47AM

1 attachments using Excel spreadsheets, Microsoft 09:52:50AM
2 Excel spreadsheets, that Resolute provided to you? 09:52:54AM
3 A. Correct. 09:52:56AM
4 Q. And they provided you 09:52:57AM
5 with three spreadsheets of data, one for each 09:52:58AM
6 mill; correct? 09:53:01AM
7 A. That's my memory, yes. 09:53:01AM
8 Q. So you had one 09:53:03AM
9 spreadsheet for Laurentide, one spreadsheet for 09:53:04AM
10 Dolbeau, and one for Kenogami? 09:53:06AM
11 A. Yes. 09:53:08AM
12 MS. WATES: I would like to go 09:53:12AM
13 into confidential session so that we can have a 09:53:13AM
14 look at those spreadsheets, so if the technician 09:53:15AM
15 could cut the public feed. 09:53:17AM
16 --- Whereupon public session ends at 9:53 a.m. 09:53:17AM
17 --- Upon commencing in-camera session at 9:53 a.m. 09:53:17AM
18 MS. WATES: Thank you. 09:53:17AM
19 BY MS. WATES: 09:53:22AM
20 Q. Now, if you turn to Tab 2 09:53:22AM
21 of your binder, we have included the three 09:53:25AM
22 spreadsheets of data that Resolute produced to 09:53:29AM
23 Canada. These are the three spreadsheets of data 09:53:33AM
24 that Resolute provided to you for its mills; 09:53:35AM
25 correct? 09:53:39AM

1 A. Yes. 09:53:39AM

2 Q. And I apologize that 09:53:40AM

3 they're so small and difficult to read. I think 09:53:42AM

4 we have the ability to pull it up on the screen. 09:53:46AM

5 It's still equally small, but at least we have a 09:53:54AM

6 vague idea of the data as it was produced to 09:53:57AM

7 Canada. 09:54:01AM

8 So these spreadsheets, they 09:54:03AM

9 indicate each mill's sales tonnage, net sales, 09:54:05AM

10 mill net sales, cash cost of sales, and net sales 09:54:09AM

11 price; correct? 09:54:12AM

12 A. Yes. 09:54:13AM

13 Q. And you used the data in 09:54:13AM

14 these spreadsheets to calculate Resolute's 09:54:15AM

15 aggregated net sales price, net mill price, cost 09:54:19AM

16 of goods sold, and contribution margin for all 09:54:22AM

17 three mills combined? 09:54:24AM

18 A. Yes. 09:54:25AM

19 Q. That's the data that's in 09:54:26AM

20 Attachments 3 and 4, as you said? 09:54:28AM

21 A. Yes. 09:54:30AM

22 Q. Now, these individual 09:54:30AM

23 mill spreadsheets, they only show data for 2012 09:54:33AM

24 and 2013; correct? 09:54:35AM

25 A. Yes. 09:54:38AM

1 Q. 2010, 2011, and 2014 are 09:54:38AM
2 redacted? 09:54:41AM
3 A. Yes. 09:54:42AM
4 Q. Were these spreadsheets 09:54:42AM
5 redacted when Resolute provided them to you? 09:54:44AM
6 A. Yes. 09:54:46AM
7 Q. So you never saw 09:54:47AM
8 Resolute's internal data from 2010, 2011, and 09:54:49AM
9 2014? 09:54:52AM
10 A. That's correct. 09:54:52AM
11 Q. Now, if you please turn 09:54:53AM
12 to Tab 3 of your book, it contains Exhibit R-129. 09:55:02AM
13 This is the spreadsheet that you prepared based on 09:55:11AM
14 the three individual mill spreadsheets provided to 09:55:14AM
15 you by Resolute; correct? 09:55:16AM
16 A. Well, it was done under 09:55:17AM
17 my supervision, but yes. 09:55:19AM
18 Q. So done under your 09:55:20AM
19 supervision, but this spreadsheet takes the data 09:55:24AM
20 that Resolute provided to you in the individual 09:55:27AM
21 spreadsheets and aggregates it for the three mills 09:55:30AM
22 together? 09:55:34AM
23 A. Yes. 09:55:34AM
24 Q. So aside from the data in 09:55:35AM
25 these spreadsheets that we have looked at, 09:55:37AM

1 Resolute didn't provide you with any other 09:55:39AM
2 internal documentation or information related to 09:55:41AM
3 its mills? 09:55:43AM
4 A. That's correct. 09:55:44AM
5 Q. Thank you. We can end 09:55:45AM
6 the confidential session for now, after the 09:55:47AM
7 material has gone from the screen. 09:55:50AM
8 --- Whereupon in-camera session ends at 9:55 a.m. 09:55:50AM
9 --- Upon resuming the public session at 9:55 a.m. 09:55:50AM
10 MS. WATES: Thank you. 09:55:50AM
11 BY MS. WATES: 09:55:59AM
12 Q. So I would like to 09:55:59AM
13 continue exploring the source of the information 09:56:03AM
14 in your report. For the purposes of your report, 09:56:05AM
15 you didn't interview anyone from Resolute's 09:56:09AM
16 management team, did you? 09:56:11AM
17 A. That's correct. 09:56:12AM
18 Q. And you also didn't 09:56:12AM
19 interview any Resolute employees? 09:56:14AM
20 A. That's correct. 09:56:15AM
21 Q. So you never interviewed 09:56:16AM
22 anyone in Resolute's sales department, for 09:56:18AM
23 example? 09:56:21AM
24 A. That's correct. 09:56:21AM
25 Q. And no one in Resolute's 09:56:21AM

1 finance department? 09:56:23AM

2 A. Correct. I may have had 09:56:23AM

3 a discussion with someone in finance, perhaps, 09:56:26AM

4 about a question of the data. I think there was a 09:56:30AM

5 phone call, and someone from finance was on, but 09:56:32AM

6 it was just resolving questions about the data 09:56:35AM

7 they provided. 09:56:38AM

8 Q. So it was to clarify 09:56:39AM

9 something in the data that they had provided to 09:56:41AM

10 you in the spreadsheets? 09:56:43AM

11 A. Yes. 09:56:44AM

12 Q. You didn't ask them any 09:56:45AM

13 questions about what they knew or ought to have 09:56:48AM

14 known in 2012? 09:56:50AM

15 A. No, I did not. 09:56:52AM

16 Q. I would like to talk 09:56:53AM

17 about your analysis on the effect that Port 09:57:04AM

18 Hawkesbury Paper's reopening had on the price of 09:57:08AM

19 supercalendered paper. 09:57:11AM

20 A. Okay. 09:57:12AM

21 Q. Now, you performed an 09:57:12AM

22 econometric analysis to determine whether an 09:57:15AM

23 effect of PHP's reopening exists in observed 09:57:16AM

24 prices; correct? 09:57:19AM

25 A. That was one of things I 09:57:20AM

1 did, yes. 09:57:21AM

2 Q. Right. And this 09:57:22AM

3 econometric analysis, it used a technique called 09:57:24AM

4 regression analysis? 09:57:26AM

5 A. Yes. 09:57:28AM

6 Q. And, according to your 09:57:30AM

7 report, the results that you analyze, the 09:57:31AM

8 regression analysis showed that the reopening of 09:57:33AM

9 Port Hawkesbury had a statistically significant 09:57:35AM

10 effect on prices in 2013? 09:57:37AM

11 A. Yes. 09:57:39AM

12 Q. But, also according to 09:57:40AM

13 your report, the regression analysis did not show 09:57:43AM

14 a statistically significant effect on prices in Q4 09:57:45AM

15 2012? 09:57:48AM

16 A. Correct. But it also -- 09:57:49AM

17 the estimated coefficient was very small. It was 09:57:50AM

18 only 89 cents for 2012. That's explained in 09:57:53AM

19 paragraph 22. 09:57:58AM

20 Q. Now, this regression 09:57:59AM

21 analysis that you did, you performed it on a 09:58:02AM

22 market price index; correct? 09:58:04AM

23 A. Yes. From RISI. 09:58:06AM

24 Q. And RISI is a company 09:58:08AM

25 that provides market data on the forest products 09:58:10AM

1 industry? 09:58:13AM

2 A. Yes. 09:58:13AM

3 Q. You used RISI's price 09:58:14AM

4 index for a grade of paper called SCA? 09:58:17AM

5 A. Yes. 09:58:22AM

6 Q. And that's one of the 09:58:22AM

7 grades of supercalendered paper, obviously? 09:58:23AM

8 A. Yes. That's the grade 09:58:25AM

9 that Port Hawkesbury specializes in, as I 09:58:27AM

10 understand it. 09:58:31AM

11 PRESIDENT: How do you 09:58:33AM

12 determine the different grades of supercalendered 09:58:35AM

13 paper? 09:58:37AM

14 THE WITNESS: There is data 09:58:38AM

15 that was put in by the Government of Canada, and 09:58:40AM

16 if we pull that up, it will show it. It's not 09:58:43AM

17 particularly large. The main difference between 09:58:46AM

18 SCA and SCB is brightness and the pulp that goes 09:58:49AM

19 into it. They move together, but there is a 09:58:53AM

20 difference. I don't want to guess at the amount, 09:58:55AM

21 but if they put the data up on the screen, we 09:58:58AM

22 could see, because they did it separately for 09:59:00AM

23 Supercalender A and Supercalender B. 09:59:03AM

24 BY MS. WATES: 09:59:06AM

25 Q. Professor Hausman, sorry, 09:59:06AM

1 which data is it that you are referring to? 09:59:08AM

2 A. You put -- you, the 09:59:10AM

3 Government of Canada, submitted a price series 09:59:11AM

4 from Reel Time for Supercalender A and 09:59:14AM

5 Supercalender B. 09:59:17AM

6 Q. Right. So the exhibit 09:59:18AM

7 numbers are R-108 and 109 for Reel Time prices. 09:59:27AM

8 A. Okay. Why don't we just 09:59:35AM

9 look in some date, and we can answer the 09:59:36AM

10 commission's question, then. 09:59:38AM

11 Q. Which one is it that you 09:59:40AM

12 would like to see? SCB? 09:59:42AM

13 A. Both of them. 09:59:42AM

14 Q. Both of them? 09:59:42AM

15 A. Yes. The question is: 09:59:43AM

16 What is the price difference between A and B? So 09:59:44AM

17 if you show me both of them, I can explain it. 09:59:46AM

18 Q. Sure. 09:59:49AM

19 A. It is not confidential or 09:59:51AM

20 anything. 09:59:52AM

21 Q. No. Actually, just move 09:59:52AM

22 on. 09:59:57AM

23 All right. Does the tribunal 10:00:02AM

24 want to see this price data, or, if not, I will 10:00:05AM

25 move on and give my colleagues the chance to 10:00:07AM

1 address it in redirect. 10:00:10AM

2 PRESIDENT: Well, it was just 10:00:12AM

3 a question I just wanted for information. I don't 10:00:13AM

4 attach much significance to it, so I will leave it 10:00:16AM

5 to you -- 10:00:19AM

6 MS. WATES: I think we will 10:00:20AM

7 just move on, then. 10:00:22AM

8 THE WITNESS: Just so I 10:00:25AM

9 remember, that was exhibit what? 10:00:25AM

10 BY MS. WATES: 10:00:27AM

11 Q. R-108 and 109 is the Reel 10:00:27AM

12 Time price series. 10:00:30AM

13 A. Okay. Thank you. 10:00:31AM

14 Q. For SCA and SCB. 10:00:33AM

15 A. Okay. Thank you. 10:00:39AM

16 Q. So just to go back to 10:00:40AM

17 where we were, you conducted the econometric 10:00:44AM

18 analysis on RISI's market price index for SCA 10:00:47AM

19 paper? 10:00:52AM

20 A. Correct. 10:00:52AM

21 Q. But the Laurentide mill 10:00:53AM

22 doesn't produce SCA paper, does it? 10:00:55AM

23 A. No. But, as I said, the 10:00:58AM

24 majority of the output, as I remember, of Port 10:01:01AM

25 Hawkesbury is SCA. 10:01:03AM

1 Q. Sorry, the Laurentide 10:01:04AM
2 mill, Resolute's Laurentide mill? 10:01:06AM

3 A. I agree. The Laurentide 10:01:07AM
4 mill does not do it. But I was looking at the 10:01:09AM
5 effect of Port Hawkesbury, and I expected, if 10:01:12AM
6 there was an effect, they will find it in SCA, 10:01:14AM
7 because that's what Port Hawkesbury makes the most 10:01:17AM
8 production of, the majority of its production. 10:01:20AM

9 Q. So you didn't do a 10:01:23AM
10 regression analysis on the market price index for 10:01:24AM
11 the grade of paper produced by Laurentide? 10:01:29AM

12 A. That one mill? No. 10:01:30AM

13 Q. And that was the SCB? 10:01:32AM

14 A. Yes. 10:01:35AM

15 Q. And you didn't do a 10:01:36AM
16 regression analysis for Resolute's prices, did 10:01:48AM
17 you? 10:01:50AM

18 A. That's correct. I was 10:01:51AM
19 worried there would be a measurement error or 10:01:52AM
20 sometimes called errors in variables problem for 10:01:57AM
21 Resolute's data if I did a regression because 10:01:59AM
22 they're relatively small. You know, they have 10:02:02AM
23 about 20 percent of the market, so I thought it 10:02:03AM
24 was better to use industry data. There's less of 10:02:06AM
25 a measurement error, errors in variables problem 10:02:08AM

1 in that data. 10:02:11AM

2 Q. So, just to be clear, you 10:02:12AM

3 didn't do a regression analysis to test whether 10:02:13AM

4 the reopening of Port Hawkesbury had a 10:02:16AM

5 statistically significant effect on Resolute's 10:02:18AM

6 prices? 10:02:20AM

7 A. That's correct. 10:02:21AM

8 Q. Now, I would like to talk 10:02:21AM

9 about the sale of SC paper. Your report indicates 10:02:30AM

10 that SC paper is made to order; correct? 10:02:35AM

11 A. Yes. The inventories are 10:02:37AM

12 small. 10:02:38AM

13 Q. And your report also 10:02:40AM

14 indicates that lead times for supercalendered 10:02:42AM

15 paper range from 28 to 45 days, for U.S. 10:02:44AM

16 importers, and 35 to 45 days, for U.S. producers? 10:02:49AM

17 A. Yes. 10:02:52AM

18 Q. Your report doesn't say 10:02:52AM

19 what Resolute's lead times are, though? 10:02:56AM

20 A. That's correct. 10:02:59AM

21 Q. But, based on the 10:03:00AM

22 industry lead times that you indicated, most 10:03:03AM

23 supercalendered paper orders would be placed a 10:03:07AM

24 month to a month and a half in advance of 10:03:09AM

25 delivery; correct? 10:03:12AM

1 A. Yes. 10:03:13AM

2 Q. So orders delivered in 10:03:14AM

3 January 2013 would have been placed by November or 10:03:16AM

4 December 2012 at the latest? 10:03:19AM

5 A. Yes. Some -- I mean, 10:03:22AM

6 some -- well, we want to be careful. Some SCB is 10:03:25AM

7 sold spot, but the orders in advance would have 10:03:28AM

8 been, yes. 10:03:31AM

9 Q. Right. So just to 10:03:32AM

10 clarify, even spot sales are subject to this 28- 10:03:33AM

11 to 45-day lead time? 10:03:36AM

12 A. Sometimes, yes; 10:03:38AM

13 sometimes, no. 10:03:39AM

14 Q. But, as you said, little 10:03:39AM

15 product is held in inventory? 10:03:42AM

16 A. Yes. 10:03:43AM

17 Q. So most of it is made to 10:03:44AM

18 order? 10:03:45AM

19 A. The majority, yes. 10:03:46AM

20 Q. So your conclusion is 10:03:47AM

21 that Resolute could not have known the effects of 10:03:54AM

22 PHP's reopening in 2012 because prices were stable 10:03:56AM

23 in Q4 2012. Do I understand that correctly? 10:03:59AM

24 A. Yes. Among other things. 10:04:03AM

25 I looked at many things that are discussed in my 10:04:05AM

1 report. 10:04:07AM

2 Q. Right. But, on the price 10:04:07AM

3 effects specifically, that was your conclusion? 10:04:08AM

4 A. Yes. 10:04:10AM

5 Q. If we can move on to 10:04:11AM

6 discuss Port Hawkesbury's production after it 10:04:25AM

7 reopened in early October 2012. 10:04:27AM

8 A. Okay. 10:04:29AM

9 Q. If you would turn to 10:04:29AM

10 paragraph 9 of your report at Tab 1, please. Now, 10:04:34AM

11 you have paragraph 9 in front of you? 10:04:46AM

12 A. Yes, I do. Thank you. 10:04:48AM

13 Q. So here you say that PHP 10:04:49AM

14 reopened on October 4, 2012 and shipped a very 10:04:51AM

15 small quantity, approximately 18,000 metric 10:04:55AM

16 tonnes, of supercalendered paper in its first 10:04:58AM

17 month of operation. Do you see that there? 10:05:00AM

18 A. Yes. 10:05:03AM

19 Q. So I would like to 10:05:04AM

20 compare that with sales at Resolute's mill. So we 10:05:05AM

21 will need to go into confidential session again. 10:05:08AM

22 --- Whereupon public session ends at 10:05 a.m. 10:05:08AM

23 --- Upon resuming in-camera session at 10:05 a.m. 10:05:08AM

24 MS. WATES: Thank you. 10:05:08AM

25 BY MS. WATES: 10:05:15AM

1 Q. So, just to repeat, you 10:05:15AM
2 said that Port Hawkesbury shipped approximately 10:05:22AM
3 18,000 metric tonnes in October 2012, but that's 10:05:24AM
4 more than Resolute sold that month at its Kenogami 10:05:27AM
5 mill or Dolbeau mill, for example. 10:05:30AM
6 A. So if we look at October 10:05:38AM
7 -- and I'm looking at Attachment 4 -- October of 10:05:43AM
8 2012, I have Resolute selling [] metric 10:05:50AM
9 tonnes. 10:05:57AM
10 Q. Right. And that's across 10:05:57AM
11 all three of its mills? 10:05:59AM
12 A. Yes. 10:06:00AM
13 Q. But just looking at 10:06:00AM
14 individual mills, PHP's shipments in October 2012 10:06:02AM
15 were greater than both Kenogami and Dolbeau. 10:06:07AM
16 A. Well, that might be of 10:06:10AM
17 interest to a lawyer, but with all due respect, 10:06:11AM
18 that's not of much interest to an economist. 10:06:13AM
19 We're looking at what the company is selling. 10:06:16AM
20 Port Hawkesbury is a much bigger plant than the 10:06:18AM
21 individual Resolute plant, so why would we want to 10:06:20AM
22 look at individual Resolute plants? That's like 10:06:25AM
23 comparing Berkeley to MIT, because Berkeley is 10:06:27AM
24 much bigger. So what? 10:06:33AM
25 Q. I appreciate that it may 10:06:34AM

1 not be interesting to you, Professor Hausman, but, 10:06:35AM
2 from a lawyer's perspective and just trying to 10:06:37AM
3 understand your report and do a relative 10:06:40AM
4 comparison, we would just like to confirm that it 10:06:44AM
5 is correct that -- 10:06:48AM
6 A. Okay. Well, to use a 10:06:49AM
7 lawyer's phrase, you're comparing apples to 10:06:50AM
8 oranges. 10:06:52AM
9 Q. But it's true, isn't it, 10:06:53AM
10 that -- 10:06:54AM
11 A. Yes, it's true. 10:06:54AM
12 Q. So just to reiterate, if 10:06:55AM
13 I could finish, PHP sold more paper in October 10:06:57AM
14 2012 than Kenogami or Dolbeau? 10:07:01AM
15 A. Okay. I'm not going to 10:07:03AM
16 disagree. 10:07:05AM
17 Q. Thanks. 10:07:05AM
18 Now, your report only 10:07:12AM
19 mentioned Port Hawkesbury's sales in October of 10:07:14AM
20 2012. It didn't refer to the remaining months in 10:07:16AM
21 2012, November and December; correct? 10:07:20AM
22 A. I think that's correct. 10:07:23AM
23 Q. So, in considering 10:07:26AM
24 whether or not Port Hawkesbury fully re-entered 10:07:28AM
25 the market in 2012, you looked at its sales in 10:07:30AM

1 October, but not in November or December? 10:07:33AM

2 A. Yes. 10:07:35AM

3 Q. So I would like to look 10:07:36AM

4 at those numbers. If you could turn to Tab 4 of 10:07:41AM

5 your binder, which is Exhibit C-046. 10:07:45AM

6 A. I'm there. 10:07:54AM

7 Q. You will see it's an 10:07:55AM

8 excerpt from a questionnaire response filed by 10:07:56AM

9 Port Hawkesbury with the U.S. Department of 10:07:58AM

10 Commerce, which is cited in your report. Now, if 10:08:01AM

11 you would turn to page 13 of this excerpt. 10:08:05AM

12 A. Okay. I'm there. 10:08:11AM

13 Q. And if you can please 10:08:14AM

14 tell me, according to this document filed by Port 10:08:15AM

15 Hawkesbury with the U.S. Department of Commerce, 10:08:19AM

16 how many tonnes of SC paper it says that they sold 10:08:22AM

17 in 2012. 10:08:24AM

18 A. 330,000. 10:08:26AM

19 Q. I think that's... 10:08:28AM

20 A. Am I in the right place? 10:08:31AM

21 Q. Just on page 13. 10:08:32AM

22 A. Yes. 10:08:34AM

23 Q. There's a table that 10:08:34AM

24 indicates Port Hawkesbury Paper Limited 10:08:36AM

25 Partnership's total sales. 10:08:39AM

1 A. Yes. 10:08:40AM

2 Q. And I would just like to 10:08:40AM

3 confirm the quantity in 2012. 10:08:42AM

4 A. Oh, 2012, 72,000. I'm 10:08:44AM

5 sorry. 10:08:46AM

6 Q. And the value of those 10:08:47AM

7 sales in Canadian dollars? 10:08:50AM

8 A. 45 million. 10:08:51AM

9 Q. Now, the annual capacity 10:08:54AM

10 of Port Hawkesbury is 360,000 metric tonnes; 10:08:55AM

11 correct? 10:08:59AM

12 A. I don't remember. 10:09:00AM

13 Q. If you would like to 10:09:02AM

14 check, I think it's stated at paragraph 6 of your 10:09:03AM

15 report. 10:09:06AM

16 A. Okay. That's what it 10:09:30AM

17 says. 10:09:31AM

18 Q. So Port Hawkesbury's 10:09:32AM

19 average quarterly production capacity would be 10:09:34AM

20 90,000 metric tonnes? 10:09:37AM

21 A. Yes. 10:09:39AM

22 Q. So Port Hawkesbury sold 10:09:40AM

23 80 percent of its average quarterly production 10:09:42AM

24 capacity in the fourth quarter of 2012? 10:09:45AM

25 A. Okay. You know, I'm 10:09:47AM

1 taking your word for it. I'm not dividing 72 by 10:09:53AM
2 90,000, but that's approximately right. 10:09:58AM

3 Q. I have a calculator if 10:09:59AM
4 you would like to? 10:10:01AM

5 A. No. It's -- nine goes 10:10:02AM
6 into 72 eight times. 10:10:06AM

7 Q. Right. 10:10:06AM

8 A. So I think you have it 10:10:08AM
9 right. I'm always distrustful of lawyers' 10:10:09AM
10 arithmetic, but, you know. 10:10:15AM

11 Q. Well, certainly we will 10:10:16AM
12 defer to you on all issues of mathematics. 10:10:17AM

13 A. But you can see that, if 10:10:24AM
14 I might finish, there's something wrong either in 10:10:26AM
15 this response or in the data, because you just had 10:10:29AM
16 me agree that the capacity -- maybe I'm 10:10:32AM
17 misinterpreting this -- the capacity was 360,000, 10:10:36AM
18 and, in 2013, they're claiming they produced 10:10:39AM
19 330,000. Oh, no, I guess that could be. Never 10:10:42AM
20 mind. I take that back. 10:10:47AM

21 Q. So I would like to go 10:10:48AM
22 back to the issue of how the reopening of Port 10:10:52AM
23 Hawkesbury affected the price of SC paper. 10:10:54AM

24 A. Okay. 10:10:56AM

25 Q. Now, your report 10:10:57AM

1 concludes that Resolute could not have known the 10:10:58AM
2 effects of Port Hawkesbury's reopening in 2012 10:11:01AM
3 because its prices were stable in the fourth 10:11:04AM
4 quarter of 2012; correct? 10:11:06AM
5 A. Now, I'm also -- that's 10:11:08AM
6 one of the factors, but I'm also looking at the 10:11:10AM
7 quantities sold and the profitability as well. 10:11:12AM
8 Q. Right. But one of the 10:11:15AM
9 reasons why you concluded that Resolute couldn't 10:11:17AM
10 have known of the effect of Port Hawkesbury's 10:11:19AM
11 reopening in 2012 was because its prices were 10:11:23AM
12 steady? 10:11:26AM
13 A. And, although they went 10:11:27AM
14 down in January, they went back up in February of 10:11:28AM
15 2013, and they would have known that before 10:11:31AM
16 December 30th. You know, given the 30- to 45-day 10:11:34AM
17 lead time before December 30th, they would have 10:11:37AM
18 known, or had a pretty good idea, I think, that 10:11:39AM
19 prices were coming back up in February. 10:11:42AM
20 Q. That price increase in 10:11:44AM
21 February, that was only []; right? 10:11:46AM
22 A. Well, they didn't know 10:11:48AM
23 exactly how much it was going to be, but, 10:11:49AM
24 remember, there's been a secular decline in this 10:11:51AM
25 industry where prices have been falling for five 10:11:54AM

1 years. So knowing the prices are going to go back 10:11:56AM
2 up in February, at least, would lead me and my MBA 10:11:59AM
3 students to say maybe there's not much of an 10:12:03AM
4 effect or something else is going on, because 10:12:05AM
5 prices are going back up. 10:12:07AM

6 But I do agree. It was 10:12:09AM
7 smaller than the price went down in January, but, 10:12:11AM
8 as you can see in Attachment 4, it does go back up 10:12:14AM
9 in February, and they would have known that before 10:12:19AM
10 the end of the year. 10:12:21AM

11 Q. Just for the tribunal's 10:12:22AM
12 benefit, at Attachment 4, you will see the price 10:12:23AM
13 decrease from December 2012 to January 2013 [] 10:12:27AM
14 per metric tonne to [] per metric tonne. 10:12:34AM

15 So you're saying that Port 10:12:39AM
16 Hawkesbury knew that its price would go down, 10:12:41AM
17 maybe not by that much, but that it had an idea? 10:12:43AM

18 A. Yes. 10:12:47AM

19 Q. But then it also -- 10:12:48AM
20 sorry. 10:12:49AM

21 MR. FELDMAN: Excuse me. This 10:12:50AM
22 is confidential data. 10:12:50AM

23 THE WITNESS: Oh, this is 10:12:52AM
24 historic. I can't believe it matters, but... 10:12:53AM

25 MS. WATES: My understanding 10:12:57AM

1 is that we're still in confidential session. 10:12:58AM

2 MR. FELDMAN: Excuse me. 10:12:59AM

3 MS. WATES: We're good? Thank 10:13:02AM

4 you. 10:13:02AM

5 BY MS. WATES: 10:13:07AM

6 Q. Just to reiterate, we see 10:13:07AM

7 a []price drop between December and January, and 10:13:09AM

8 then we see the prices go back up by []? 10:13:14AM

9 A. Right. And, of course, 10:13:18AM

10 there was a historic pattern, and the regression 10:13:20AM

11 was -- I'll share this as well, that January 10:13:23AM

12 prices typically are lower than the rest of the 10:13:25AM

13 year. And then your -- Government of Canada 10:13:27AM

14 Exhibits R-108 and 109, if one looks at the data, 10:13:31AM

15 in six of the eight cases, prices fell between 10:13:34AM

16 December and January. So that doesn't happen all 10:13:38AM

17 the time, but it's a pretty common -- pretty 10:13:41AM

18 typical occurrence. 10:13:44AM

19 Q. And in the data filed by 10:13:45AM

20 Resolute, RISI price series, it only goes down 10:13:47AM

21 half the time; correct? 10:13:51AM

22 A. Yes, that's right. 10:13:52AM

23 Q. It stays the same one 10:13:53AM

24 other time? 10:13:54AM

25 A. Right. 10:13:55AM

1 Q. And increases the other? 10:13:56AM

2 A. Right. 10:13:57AM

3 Q. And just so that I can 10:13:59AM

4 confirm we understand this correctly, Resolute 10:14:02AM

5 knew that its prices were going down in December 10:14:04AM

6 by []. It would up by [] in February. So, 10:14:09AM

7 therefore, they didn't know about a price 10:14:13AM

8 decrease. I'm not sure I understand. 10:14:14AM

9 A. No. The question is: 10:14:16AM

10 Did the opening of Port Hawkesbury have a 10:14:18AM

11 permanent effect that injured Resolute, and did 10:14:21AM

12 they know that by the end of the year? 10:14:27AM

13 If you look at these data, for 10:14:32AM

14 instance, you -- you know, we're still on Exhibit 10:14:34AM

15 4. You will see that, between February and March 10:14:36AM

16 of the previous year, prices went down by []. So 10:14:40AM

17 prices bounced up and down. 10:14:45AM

18 So the question is: If I know 10:14:47AM

19 there is going to be a [] price decrease in 10:14:49AM

20 January, but I know prices are going to go back 10:14:52AM

21 up, is that sufficient for me to conclude that 10:14:55AM

22 there's been a permanent change? I would say not. 10:14:57AM

23 And if you look, actually, at how much prices 10:15:00AM

24 bounce around, take the standard deviation,[] is 10:15:03AM

25 nowhere near statistically significant. 10:15:06AM

1 So, you know, if I'm working 10:15:09AM
2 for Resolute, I'm some -- different people have 10:15:11AM
3 different views, but if I were working for 10:15:14AM
4 Resolute, I would say, "Look, you know, you've had 10:15:16AM
5 larger price decreases within the previous year, 10:15:18AM
6 and if I look at how much prices bounce around, 10:15:22AM
7 [] is nothing out of the ordinary. And I know 10:15:25AM
8 prices are going up in February, and I know I'm 10:15:28AM
9 going to sell more quantity in January and 10:15:31AM
10 February than I did the previous year." 10:15:35AM
11 So, you know, life is 10:15:37AM
12 uncertain. Nobody knows things for sure, but it 10:15:39AM
13 seems to me that it would be a reasonable 10:15:42AM
14 conclusion to say Port Hawkesbury has not had a 10:15:45AM
15 permanent effect as of the end of the year. 10:15:48AM
16 Q. Professor Hausman, in 10:15:51AM
17 terms of looking at the data and the trends and 10:15:55AM
18 whether or not the price in the new year is often 10:15:58AM
19 or always lower than in the fourth quarter, as 10:16:04AM
20 Resolute asserts, we don't actually know if that's 10:16:08AM
21 true for Resolute because we only have two years 10:16:11AM
22 of their data. Isn't that true? 10:16:13AM
23 A. Yeah, for Resolute. I 10:16:14AM
24 was speaking of the Reel Time data that the 10:16:16AM
25 Government of Canada put in. Yeah. For Resolute, 10:16:18AM

1 we don't know. 10:16:20AM

2 Q. And so we saw that [] 10:16:21AM

3 price drop from the end of the fourth quarter of 10:16:32AM

4 2012 over the first quarter of 2013 at all three 10:16:37AM

5 mills of Resolute's combined. But isn't it true 10:16:44AM

6 that prices at Kenogami actually dropped 10:16:47AM

7 significantly between November and December 2012? 10:16:49AM

8 A. I didn't check that. I'm 10:16:52AM

9 sorry. I'm not going to disagree but... 10:16:54AM

10 Q. Well, why don't we look 10:16:58AM

11 at the Kenogami spreadsheet that Resolute provided 10:16:59AM

12 to you. 10:17:01AM

13 A. Okay. 10:17:01AM

14 Q. That's at Tab 2. It's 10:17:02AM

15 the second spreadsheet. And I think we can bring 10:17:03AM

16 it up on the screen as well. 10:17:07AM

17 A. Why don't you just read 10:17:09AM

18 the numbers. I'm not going to disagree with you. 10:17:10AM

19 I can't see them. My eyes aren't good enough. 10:17:13AM

20 I'm sorry. 10:17:19AM

21 Q. Sure. 10:17:19AM

22 A. I need Sherlock Holmes' 10:17:19AM

23 magnifying glass, actually. 10:17:22AM

24 Q. So the price at Kenogami 10:17:24AM

25 in November 2012 was [] Canadian per metric 10:17:25AM

1 tonne. 10:17:30AM

2 A. Okay. 10:17:32AM

3 Q. And, in December 2012, it 10:17:33AM

4 dropped to [] Canadian per metric tonne. 10:17:36AM

5 A. Okay. 10:17:42AM

6 Q. So there was actually a 10:17:43AM

7 price drop of [] Canadian per metric tonne at the 10:17:44AM

8 Kenogami mill between November and December 2012. 10:17:48AM

9 A. Okay. I will take your 10:17:51AM

10 word for it. But, if we look at Attachment 4, we 10:17:52AM

11 can see that -- I just want to make sure I'm 10:17:56AM

12 reading this in the right place. We can see, 10:18:02AM

13 between November and December, for all three mills 10:18:04AM

14 combined, there's only a [] drop. So that means 10:18:07AM

15 that prices probably went up at some -- one of the 10:18:10AM

16 other mills, or at least they didn't go down 10:18:12AM

17 nearly as much. You know, they wouldn't have gone 10:18:15AM

18 down at all. 10:18:17AM

19 So, you know, I know lawyers 10:18:18AM

20 like to pick their favourite examples, but 10:18:19AM

21 economists like to look at the data. 10:18:22AM

22 Q. Right. So we're looking 10:18:23AM

23 at this example specifically of Kenogami. 10:18:24AM

24 A. Yes, that's fine. I'm 10:18:25AM

25 not disagreeing. 10:18:26AM

1 Q. I'm not accusing you of 10:18:27AM
2 disagreeing. I'm sorry, Professor Hausman. I'm 10:18:29AM
3 just trying to confirm data that's in your 10:18:31AM
4 report -- 10:18:33AM
5 A. Right. 10:18:34AM
6 Q. -- and that you relied 10:18:34AM
7 on. 10:18:35AM
8 A. I'm just saying I think 10:18:36AM
9 it's better to look at all three mills combined, 10:18:37AM
10 because, if you look at the other mills, the price 10:18:40AM
11 is not going to go down nearly as much, and it may 10:18:44AM
12 actually go up if I can see the data on the other 10:18:45AM
13 two mills. 10:18:48AM
14 Q. Now, Professor Hausman, 10:18:48AM
15 there is something significant about the Kenogami 10:18:50AM
16 mill, isn't there, in that it's the one that 10:18:53AM
17 produces the same grade of paper as Port 10:18:55AM
18 Hawkesbury? 10:18:58AM
19 A. Yes, I think so. 10:18:58AM
20 Q. That's SCA paper? 10:19:00AM
21 A. Yes. 10:19:02AM
22 Q. Now, if you would please 10:19:02AM
23 turn to Tab 6 of your binder. 10:19:07AM
24 A. Okay. 10:19:09AM
25 Q. This is Exhibit R-097. 10:19:10AM

1 A. Okay. 10:19:13AM

2 Q. It contains a transcript 10:19:14AM

3 of Resolute's second quarter 2012 earnings call, 10:19:18AM

4 which I have tabbed for you. Do you see that? 10:19:21AM

5 A. Yes, thanks. It's the 10:19:23AM

6 AK; right? 10:19:29AM

7 Q. Yes. So if you please 10:19:29AM

8 turn to page 10 of the transcript, and you will 10:19:29AM

9 see about -- 10:19:34AM

10 A. Sorry, you are going a 10:19:35AM

11 bit too fast for me. 10:19:36AM

12 Q. Sorry. If you would just 10:19:37AM

13 turn to page 10 of the transcript. 10:19:39AM

14 A. Yes. I just had to find 10:19:40AM

15 that. I'm sorry. 10:19:43AM

16 Q. Take your time. 10:19:44AM

17 A. Okay. I think I'm there 10:19:49AM

18 now. 10:19:50AM

19 Q. You will see, about a 10:19:50AM

20 third of the page down, there's a question from 10:19:52AM

21 someone called Sean Stewart at TD Securities? 10:19:55AM

22 A. Yes, I see that. 10:19:57AM

23 Q. Would you please read 10:19:58AM

24 Mr. Stewart's question into the record? 10:19:59AM

25 A. "Thanks. Good morning, 10:20:02AM

1 everyone. A few 10:20:04AM
2 questions: Richard, I'm 10:20:05AM
3 wondering if you could 10:20:06AM
4 speak to North American 10:20:09AM
5 uncoated ground wood 10:20:10AM
6 markets, and I guess my 10:20:12AM
7 question is: Assuming 10:20:13AM
8 Port Hawkesbury restarts, 10:20:14AM
9 I guess either later this 10:20:15AM
10 quarter or early in 10:20:16AM
11 Quarter 4, I know you 10:20:18AM
12 don't have machines that 10:20:19AM
13 compete in the SC grade 10:20:21AM
14 specifically, but can you 10:20:23AM
15 speak of expectations of 10:20:24AM
16 substitution across the 10:20:26AM
17 grade spectrum and how 10:20:27AM
18 that might impact markets 10:20:28AM
19 for some of the other 10:20:29AM
20 uncoated grades you 10:20:30AM
21 produce?" 10:20:33AM
22 Q. Thank you. And if you 10:20:35AM
23 would also please read for the record the first 10:20:35AM
24 sentence of Mr. Garneau's response. 10:20:38AM
25 A. "Well, I think that -- 10:20:39AM

1 let's start first. We 10:20:41AM
2 have --" 10:20:44AM
3 I think you want me to read 10:20:44AM
4 more. 10:20:46AM
5 Q. Yes. Sorry, I should 10:20:46AM
6 have said the first two sentences. 10:20:48AM
7 A. I was just following 10:20:49AM
8 orders. 10:20:50AM
9 Q. That's true. Thank you. 10:20:51AM
10 A. Okay. 10:20:52AM
11 "We have -- our machines 10:20:53AM
12 at Kenogami --" 10:21:06AM
13 I think he meant to say. 10:21:10AM
14 "-- produce the same 10:21:12AM
15 grade, that is, SCA, and 10:21:13AM
16 we are also producing as 10:21:15AM
17 well SCB plus, and I 10:21:16AM
18 would say SCA minus at 10:21:17AM
19 Laurentide. So obviously 10:21:19AM
20 the restart of Port 10:21:20AM
21 Hawkesbury would 10:21:21AM
22 certainly have an impact 10:21:22AM
23 on the market." 10:21:23AM
24 Q. And just to clarify, 10:21:24AM
25 Mr. Garneau is Resolute's president and CEO; 10:21:27AM

1 correct? 10:21:29AM

2 A. Yes. 10:21:30AM

3 Q. So here Mr. Garneau was 10:21:31AM

4 asked a question about the restart of Port 10:21:33AM

5 Hawkesbury, and he's acknowledging that they 10:21:35AM

6 produce the same grade of paper at Kenogami? 10:21:37AM

7 A. Yes. 10:21:39AM

8 Q. And he's acknowledging 10:21:40AM

9 that it would obviously have an impact on their 10:21:42AM

10 market for SCA paper? 10:21:44AM

11 A. That's what he's saying. 10:21:46AM

12 It hadn't happened yet, but that's what he's 10:21:50AM

13 saying. 10:21:52AM

14 MS. WATES: Thank you, 10:21:53AM

15 Professor Hausman. 10:21:54AM

16 MR. CASS: Could I just ask 10:22:00AM

17 one question? 10:22:01AM

18 PRESIDENT: Have you finished? 10:22:01AM

19 MS. WATES: Yes. 10:22:03AM

20 MR. CASS: Did you perform a 10:22:06AM

21 cross-price elasticity estimate for SCA, SCB? 10:22:07AM

22 THE WITNESS: Not in this 10:22:12AM

23 proceeding, but I have done it numerous times 10:22:14AM

24 before, and it's very high. So they're definitely 10:22:15AM

25 in the same market. 10:22:18AM

1 MR. CASS: Thank you. 10:22:19AM

2 THE WITNESS: You're welcome. 10:22:20AM

3 I have done it in merger cases, of course. 10:22:21AM

4 MS. WATES: I don't think I 10:22:26AM

5 left the confidential mode, so unless Professor 10:22:27AM

6 Hausman or Claimant is going to refer to any 10:22:29AM

7 confidential information, we can go back into 10:22:32AM

8 public session. 10:22:34AM

9 --- Whereupon in-camera session ends at 10:22 a.m. 10:22:34AM

10 --- Upon resuming the public session at 10:22 a.m. 10:22:45AM

11 PRESIDENT: I have some 10:22:45AM

12 questions, but I think that it may be best if you 10:22:45AM

13 ask your questions first. 10:22:48AM

14 THE WITNESS: It's never a 10:23:01AM

15 burden to come to Toronto in my view, so... 10:23:02AM

16 RE-EXAMINATION BY MR. FELDMAN: 10:23:06AM

17 Q. I would like to just ask 10:23:06AM

18 a few questions -- 10:23:08AM

19 A. Sure. 10:23:08AM

20 Q. -- that follow from the 10:23:09AM

21 questions you just heard where the answers seem to 10:23:10AM

22 be somewhat open-ended. 10:23:13AM

23 Do you have any idea why 10:23:17AM

24 Resolute didn't give you more data or data for 10:23:18AM

25 other years or why you didn't consider other years 10:23:20AM

1 of data from Resolute? 10:23:23AM

2 A. Yeah. I asked for the 10:23:25AM

3 data, and that's what they gave me. I thought 10:23:26AM

4 that the year before, or the year of the opening 10:23:29AM

5 and the following year were the two best years to 10:23:31AM

6 look at. 10:23:35AM

7 Q. And you have been asked 10:23:37AM

8 why you didn't do a regression for Laurentide. 10:23:38AM

9 Why not? 10:23:42AM

10 A. Okay. Well -- oh, 10:23:43AM

11 Laurentide? Oh, well, I answered the question why 10:23:47AM

12 I didn't do it for Resolute, but Laurentide would 10:23:49AM

13 create even more of a problem. 10:23:55AM

14 So if I could ask everyone to 10:23:57AM

15 turn to page 10 of my witness statement, which is 10:23:59AM

16 Exhibit 1. I don't know who on the Panel has done 10:24:03AM

17 a course in regression and remembers it, but I 10:24:13AM

18 will make the statement anyway with the hope that 10:24:16AM

19 someone -- 10:24:20AM

20 PRESIDENT: Assume ignorance. 10:24:21AM

21 THE WITNESS: -- will 10:24:23AM

22 understand it. Okay. 10:24:24AM

23 So there has been a problem in 10:24:25AM

24 statistics known since the 1870s, and it's called 10:24:26AM

25 the measurement error or errors in variables 10:24:29AM

1 problem. And if you have a variable that is 10:24:33AM
2 subject to error, it affects every coefficient in 10:24:35AM
3 the regression and typically makes the 10:24:40AM
4 coefficients too small. 10:24:45AM

5 And so if you look at the 10:24:47AM
6 second variable, for instance, in Table 2, but 10:24:48AM
7 it's also in Table 3, you will see that it's U.S. 10:24:51AM
8 dollars minus one. So that means that what I did 10:24:57AM
9 was I put the left-hand side variable, which is 10:25:02AM
10 the price, as the right-hand side variable lagged 10:25:05AM
11 one value. And if there's a measurement error 10:25:08AM
12 problem, it will ruin the whole regression. I 10:25:12AM
13 mean, it will affect the whole regression by Solow 10:25:17AM
14 regression. 10:25:22AM

15 And the problem with looking 10:25:22AM
16 only at one mill or even at one company is that 10:25:23AM
17 prices tend to bounce around. A contract may end. 10:25:27AM
18 You may get a new customer. And so, month to 10:25:31AM
19 month -- this is monthly data -- you know, there's 10:25:35AM
20 a fair amount of variation, as you can see in 10:25:37AM
21 Exhibit 4. That's going to create problems for 10:25:40AM
22 the regression. 10:25:43AM

23 If you look at the market data 10:25:44AM
24 where you have all 100 percent of the market, that 10:25:45AM
25 errors in variables or measurement error problem 10:25:49AM

1 is minimized. So that's why I did what I did. 10:25:52AM

2 And, to answer the Chairman's 10:25:56AM

3 question, the Hausman test looks at this as well, 10:25:58AM

4 and if you do a Hausman test here, I'm quite sure 10:26:02AM

5 you would find there's a measurement error problem 10:26:05AM

6 if you look at a single mill. I haven't done it, 10:26:08AM

7 but I'm quite confident, because you are using a 10:26:10AM

8 lagged variable, so... 10:26:13AM

9 BY MR. FELDMAN: 10:26:15AM

10 Q. So you have answered 10:26:15AM

11 actually my next question as well, which was why 10:26:16AM

12 you did no regression for Resolute -- 10:26:18AM

13 A. Right. 10:26:20AM

14 Q. -- as opposed to just the 10:26:20AM

15 one mill. 10:26:22AM

16 You were asked about a 10:26:22AM

17 comparison between Port Hawkesbury's production 10:26:25AM

18 sales in October of 2012 and Dolbeau, but do you 10:26:29AM

19 recall when Dolbeau reopened? 10:26:34AM

20 A. It was October, as I 10:26:36AM

21 remember. 10:26:37AM

22 Q. It was October? 10:26:37AM

23 A. Yes. 10:26:38AM

24 Q. And you were also asked 10:26:38AM

25 why you didn't look at Port Hawkesbury's sales in 10:26:41AM

1 November and December. Why didn't you look at 10:26:44AM
2 those sales? 10:26:47AM

3 A. Well, I was looking at 10:26:48AM
4 the effect of possible knowledge of Resolute 10:26:51AM
5 whether they were injured. And they had no way to 10:26:57AM
6 know what the sales had been. That wasn't public 10:27:00AM
7 information. And, in fact, this information 10:27:02AM
8 didn't come out until about two years later in an 10:27:05AM
9 ITC, International Trade Commission, proceeding in 10:27:09AM
10 the U.S. So they had better not know what Port 10:27:12AM
11 Hawkesbury is producing, or the Canadian 10:27:15AM
12 Competition Bureau is not going to like it. So I 10:27:17AM
13 was looking at the knowledge that Resolute had at 10:27:20AM
14 the time. 10:27:24AM

15 Q. You were also asked -- 10:27:26AM
16 and I think perhaps Dean Cass' question has 10:27:27AM
17 resolved this matter, but you were asked about the 10:27:31AM
18 price drop in Kenogami, the mill that made the, in 10:27:37AM
19 theory, competitive SCA grade of supercalendered 10:27:40AM
20 paper and why you didn't look at Kenogami in 10:27:44AM
21 isolation for SCA paper with respect to Port 10:27:49AM
22 Hawkesbury. 10:27:52AM

23 So if you could elaborate, 10:27:54AM
24 again, just for a moment, on the relationship 10:27:56AM
25 between SCA and SCB in your analysis. 10:28:00AM

1 A. Yes. I have found, and 10:28:04AM
2 it continues to exist -- the last time I looked at 10:28:07AM
3 it was about two years ago -- and it's been true 10:28:10AM
4 for 30 years that there's an extremely high amount 10:28:12AM
5 of substitution between SCA and SCB. That's why 10:28:15AM
6 the prices, if you were to look at R-108 and 109, 10:28:22AM
7 just move together, because if the prices get out 10:28:27AM
8 of line, people are going to shift. 10:28:29AM
9 So Donnelley is the largest 10:28:31AM
10 U.S. printer, at least last I knew, and they use 10:28:33AM
11 exactly the same machinery to produce catalogues, 10:28:35AM
12 for instance, with SCA and SCB paper. All they do 10:28:39AM
13 is turn a few dials or now input a few things into 10:28:42AM
14 a computer and away you go. 10:28:46AM
15 And so SCA, you know, to some 10:28:48AM
16 extent, is brighter and more pleasing to the eye, 10:28:52AM
17 but that only goes so far, and so I thought it was 10:28:54AM
18 better to look at SCA, at least for the RISI data, 10:28:57AM
19 which is where I would have expected Port 10:29:02AM
20 Hawkesbury to have the biggest effect since that's 10:29:05AM
21 mainly what they produce. 10:29:07AM
22 But there is no doubt in my 10:29:09AM
23 mind that it's also -- if there's an effect -- and 10:29:11AM
24 it does have an effect later on in 2013 and 2014 10:29:14AM
25 -- it's going to affect SCB as well. 10:29:18AM

1 Q. My new friend Ms. Wates 10:29:23AM
2 asked you to read into the record the 'impact-on 10:29:28AM
3 -the-market' phrase from Mr. Garneau. Could you 10:29:30AM
4 state again what the significance to you is of 10:29:38AM
5 that remark. 10:29:42AM

6 A. Yeah. If I understand 10:29:44AM
7 this, this is a form filed with the SEC, and he's 10:29:46AM
8 not talking about what actually had happened. 10:29:51AM
9 He's talking about what he thinks might happen. 10:29:56AM
10 So I leave it to the Panel, of course, and you 10:30:00AM
11 lawyers to decide exactly what the state of 10:30:03AM
12 knowledge is necessary here, but he couldn't have 10:30:08AM
13 known what was going to happen, and there seemed 10:30:10AM
14 to be a lot of uncertainty. 10:30:12AM

15 This -- Port Hawkesbury was a 10:30:14AM
16 plant that had failed once before. I have 10:30:15AM
17 actually been to all the Canadian provinces, 10:30:18AM
18 including Nova Scotia. It's pretty far away from 10:30:20AM
19 the places where people have printing plants in 10:30:23AM
20 the U.S., so it has a very large transportation 10:30:27AM
21 cost disadvantage. It had failed once before 10:30:31AM
22 economically, and then, of course, the Nova Scotia 10:30:34AM
23 government stepped in. But it was not at all 10:30:37AM
24 clear, to me, or to the market -- I mean, there's 10:30:40AM
25 a lot of commentary -- that it was going to 10:30:42AM

1 succeed this time around. 10:30:46AM

2 MR. FELDMAN: I have no more 10:30:53AM

3 questions. Thank you very much. 10:30:54AM

4 QUESTIONS FROM THE PANEL: 10:31:00AM

5 PRESIDENT: Do either of my 10:31:00AM

6 colleagues have questions? 10:31:04AM

7 MS. LEVESQUE: Just one, just 10:31:11AM

8 one quick question. 10:31:15AM

9 THE WITNESS: Sure. 10:31:16AM

10 MS. LEVESQUE: You started 10:31:17AM

11 your testimony, and I can't go back to the exact 10:31:17AM

12 wording, but you referred to a high enough degree 10:31:22AM

13 of certainty for you to reach certain conclusions. 10:31:25AM

14 Could you elaborate a little bit, from your point 10:31:29AM

15 of view, what that means. 10:31:32AM

16 THE WITNESS: So this is what 10:31:34AM

17 I teach my MBA students, but if you're running a 10:31:35AM

18 business, this month turns out to be bad for 10:31:38AM

19 whatever reason. Okay. So is it a trend in the 10:31:42AM

20 industry that you know you're producing -- well, 10:31:46AM

21 we always like widgets, which you have heard 10:31:49AM

22 before. 10:31:52AM

23 So you are producing widgets 10:31:52AM

24 in competition with a lot of widget producers. 10:31:54AM

25 Are people moving away from widgets and starting 10:31:56AM

1 to buy quidgets? And so there's a secular decline 10:31:59AM
2 in the industry. 10:32:03AM
3 Has one of your competitors 10:32:04AM
4 come in and undercut the price and stolen some of 10:32:06AM
5 your customers? Or I can come into other things. 10:32:10AM
6 So you always face this 10:32:17AM
7 problem, you know, with a very small amount of 10:32:18AM
8 data. Am I going to change my business strategy 10:32:20AM
9 and say, "Got to rethink"? And usually, based on 10:32:23AM
10 a month or two, you don't. 10:32:28AM
11 So what I mean is prices fell 10:32:30AM
12 by [], you know, as we were discussing, between 10:32:33AM
13 December and January. Even putting aside the fact 10:32:39AM
14 that you knew they were going to go back up in 10:32:41AM
15 February -- let's put that totally aside -- but 10:32:43AM
16 you look and you see that they have gone down even 10:32:46AM
17 more in a given month in the prior year. So, on 10:32:48AM
18 one month data, are you going to say, "Well, Port 10:32:51AM
19 Hawkesbury is going to succeed, and this is a 10:32:54AM
20 permanent change"? Well, that has to be put 10:32:56AM
21 against the background of what had happened 10:32:59AM
22 previously, and their prices had been falling in 10:33:00AM
23 this business for the last five years. 10:33:03AM
24 So if -- when they go down by 10:33:05AM
25 a lot in one month, a real lot, or if they go down 10:33:08AM

1 and stay down for a number of months, then, if you 10:33:12AM
2 do some analysis, you will come to a high enough 10:33:15AM
3 degree of certainty to say, "Yes. Something has 10:33:18AM
4 changed." Otherwise, it may just be a transitory 10:33:20AM
5 fluctuation. That is what I meant. 10:33:24AM
6 And if you can determine that, 10:33:26AM
7 well, you will be typically very successful in 10:33:27AM
8 business, but it's very difficult to do. That's 10:33:31AM
9 why they hire me as a consultant. 10:33:33AM
10 MS. LEVESQUE: Thank you. 10:33:36AM
11 THE WITNESS: Sure. 10:33:37AM
12 PRESIDENT: And you tell them 10:33:38AM
13 you can't do it. 10:33:39AM
14 THE WITNESS: Exactly. No. I 10:33:40AM
15 tell them how difficult it is. 10:33:42AM
16 PRESIDENT: What we have to 10:33:45AM
17 apply as a tribunal is the test in NAFTA of ought 10:33:58AM
18 to have been aware of damage or injury, obviously 10:34:06AM
19 it's difficult to do that in relation to any given 10:34:12AM
20 month or short period of time. But Mr. Garneau 10:34:15AM
21 said that obviously the restart of Port Hawkesbury 10:34:20AM
22 will certainly have an impact on the market if we 10:34:23AM
23 focus not on month-to-month results but on the 10:34:26AM
24 consequence of having a competitor with a big 10:34:31AM
25 capacity to produce. 10:34:33AM

1 Can't you say fairly quickly 10:34:34AM
2 that this will have an impact, or you don't know 10:34:42AM
3 how much of an impact it will have or how long it 10:34:45AM
4 will take, but it will have an impact? I'm not 10:34:47AM
5 making that as a suggestion. I'm asking it as a 10:34:50AM
6 question. 10:34:52AM

7 THE WITNESS: Well, my view on 10:34:53AM
8 that is the big unknown is whether Port Hawkesbury 10:34:54AM
9 is going to succeed. So, in other words, they 10:34:58AM
10 were uneconomic before and shut down. If my 10:35:02AM
11 memory is correct, they were put up for private 10:35:06AM
12 auction, and -- since we're close to the ball park-- 10:35:10AM
13 no one stepped up the plate to buy them. So, in 10:35:14AM
14 other words, no private bidder thought that they 10:35:17AM
15 could make an economic go of the company. 10:35:20AM

16 The provincial government 10:35:25AM
17 stepped in, and, if you look at the reports, there 10:35:26AM
18 seems to be a lot of uncertainty. You know, one 10:35:29AM
19 of the gurus says, "Nothing has happened yet." 10:35:31AM
20 This is in December. "Nothing much has happened 10:35:35AM
21 yet." And a lot of customers have doubts about 10:35:37AM
22 whether Port Hawkesbury will stay in business. 10:35:40AM

23 So if you think that Port 10:35:43AM
24 Hawkesbury is going to succeed, yes. But Port 10:35:46AM
25 Hawkesbury could well have not made money. You 10:35:51AM

1 know, given what the secular decline in the 10:35:54AM
2 industry was, prices could have continued to fall. 10:35:57AM
3 In fact, they didn't very much in 2013, but they 10:36:01AM
4 could have. 10:36:04AM

5 And let's say that, in a 10:36:06AM
6 hypothetical, that Port Hawkesbury was losing 10:36:07AM
7 money. Then they would have had to go back to the 10:36:09AM
8 provincial government and say, "We need more if 10:36:12AM
9 we're going to stay in business." 10:36:16AM

10 I'm not an expert in politics 10:36:18AM
11 certainly in Canadian provincial governments' 10:36:21AM
12 actions, but it would seem to me that there would 10:36:24AM
13 be a considerable doubt whether the provincial 10:36:26AM
14 government would, as it were, throw good money 10:36:28AM
15 after bad. 10:36:31AM

16 So, you know, U.S. government 10:36:33AM
17 has supported all sort of enterprises in the last 10:36:34AM
18 administration -- battery plants, solar plants -- 10:36:38AM
19 and, you know, the Republicans like to say those 10:36:41AM
20 all went bust. They just couldn't make a profit. 10:36:44AM

21 So government support is not 10:36:47AM
22 sufficient to make a company successful. And, you 10:36:51AM
23 know, I can't speak for Mr. Garneau, but when I 10:36:54AM
24 look at things, given its previous history of 10:36:57AM
25 shutting down, I would say there should have been 10:37:00AM

1 significant doubt about whether Port Hawkesbury 10:37:04AM
2 was going to succeed. 10:37:06AM
3 PRESIDENT: The Claimant's -- 10:37:17AM
4 THE WITNESS: Excuse me. 10:37:24AM
5 Could I elaborate on that just a bit? I probably 10:37:26AM
6 have already overelaborated. 10:37:28AM
7 PRESIDENT: Of course. 10:37:30AM
8 THE WITNESS: You know, again 10:37:31AM
9 when you look at this, there's all this 10:37:31AM
10 uncertainty. So there are a lot of paper plants 10:37:33AM
11 in Quebec, and so who is to say that those paper 10:37:36AM
12 plants couldn't have gone to the Quebec government 10:37:38AM
13 or the Hydro-Québec and say, "We're amongst your 10:37:40AM
14 best customers. We need a special tariff from you 10:37:44AM
15 or we're going to go out of business, and you're 10:37:49AM
16 not going to sell us electricity." 10:37:50AM
17 So all I'm trying to say is 10:37:52AM
18 there's always a lot of uncertainty going forward. 10:37:54AM
19 The Nova Scotia government gave a special 10:37:57AM
20 electricity rate to Port Hawkesbury. 10:38:00AM
21 Could we go on the 10:38:09AM
22 confidential record just for a second, please? I 10:38:10AM
23 want to say something. 10:38:12AM
24 --- Whereupon public session ends at 10:38 a.m. 10:38:12AM
25 --- Upon resuming in-camera session at 10:38 a.m. 10:38:17AM

1 THE WITNESS: But over the 10:38:17AM
2 years -- are we on confidential now? 10:38:18AM
3 [10:38:21AM
4 10:38:23AM
5] 10:38:25AM
6 Okay. We can go off the 10:38:29AM
7 confidential record. 10:38:29AM
8 --- Whereupon in-camera session ends at 10:38 a.m. 10:38:29AM
9 --- Upon resuming public session at 10:38 a.m. 10:38:33AM
10 THE WITNESS: I think that's 10:38:33AM
11 public knowledge, but I don't want to get in 10:38:34AM
12 trouble. So, you know, looking forward, there 10:38:36AM
13 could well have been a reaction of the other 10:38:39AM
14 governments. 10:38:42AM
15 Port Hawkesbury has this 10:38:43AM
16 significant transportation disadvantage, you know, 10:38:46AM
17 that they're out there in Nova Scotia. And so 10:38:49AM
18 going forward, again, when I look at it, it wasn't 10:38:51AM
19 at all certain that Port Hawkesbury was going to 10:38:54AM
20 succeed this time around. 10:38:57AM
21 PRESIDENT: The Claimant's 10:38:59AM
22 case, as I understand it -- and they will correct 10:39:12AM
23 me if I'm wrong -- is that the assistance given by 10:39:16AM
24 Nova Scotia to Port Hawkesbury in 2012 didn't have 10:39:21AM
25 any immediate effect, but eventually it had a 10:39:29AM

1 catastrophic effect. That took a long time to 10:39:32AM
2 happen. 10:39:34AM

3 Does that raise questions 10:39:37AM
4 about causality to your mind? 10:39:39AM

5 THE WITNESS: Causality is a 10:39:42AM
6 very difficult concept in economics, and we're now 10:39:44AM
7 sort of venturing into legal terrain, which makes 10:39:48AM
8 me doubly cautious to answer. 10:39:51AM

9 The way that I would look at 10:39:55AM
10 it -- but this may be of no help to the Panel, and 10:39:56AM
11 if so, I apologize -- if Port Hawkesbury hadn't 10:39:59AM
12 restarted, which it was very unlikely to have 10:40:03AM
13 restarted given that no private person wanted -- 10:40:06AM
14 or private company wanted to buy it, if Port 10:40:10AM
15 Hawkesbury hadn't restarted it, I think it's very 10:40:13AM
16 unlikely that that plant would have closed. 10:40:15AM

17 And so, to me, as an 10:40:18AM
18 economist, that's causation. I leave it to you 10:40:19AM
19 lawyers to decide. 10:40:23AM

20 PRESIDENT: I think, in light 10:40:35AM
21 of the last question and answer, if either of the 10:40:36AM
22 parties wanted to follow up on that, they should 10:40:38AM
23 feel free to do so. That's an invitation. It's 10:40:42AM
24 not a demand. 10:40:47AM

25 MS. WATES: Thank you, Judge 10:40:51AM

1 Crawford. The Respondent has no further questions 10:40:52AM
2 for Professor Hausman. 10:40:54AM
3 FURTHER EXAMINATION BY MR. FELDMAN: 10:40:54AM
4 Q. I would just like to 10:40:56AM
5 clarify. Professor Hausman, when you referred to 10:40:57AM
6 the plant closing, you were referring to 10:41:00AM
7 Laurentide in 2014? 10:41:03AM
8 A. Yes. That's the basis of 10:41:05AM
9 your claim, as I understand it. 10:41:06AM
10 Q. Okay. 10:41:09AM
11 MR. FELDMAN: They have lots 10:42:07AM
12 of ideas, but I don't like any of them, so I think 10:42:07AM
13 we're fine. 10:42:11AM
14 PRESIDENT: I think the Panel 10:42:15AM
15 has no further questions probably on the same 10:42:20AM
16 ground. 10:42:23AM
17 Professor Hausman, thank you 10:42:32AM
18 very much for your evidence. 10:42:33AM
19 THE WITNESS: You're welcome. 10:42:35AM
20 PRESIDENT: I'm grateful to 10:42:36AM
21 you for coming. We will now have another 10:42:38AM
22 15-minute break. 10:42:40AM
23 --- Recess at 10:42 a.m. 10:42:43AM
24 --- Upon resuming at 11:01 a.m. 11:01:40AM
25 PRESIDENT: We will now move 11:02:06AM

1 to the legal argument with a certain sense of 11:02:08AM
2 relief on some of our parts. And the Respondent 11:02:11AM
3 goes first and has an hour and a half, and if you 11:02:15AM
4 would like to choose the point to break, it 11:02:19AM
5 doesn't have to be an hour. It could be an hour 11:02:21AM
6 and a quarter or whatever it is convenient before 11:02:24AM
7 lunch. I leave that to you, Mr. Luz. 11:02:26AM
8 MR. LUZ: Thank you, Judge 11:02:29AM
9 Crawford. Yes. We were thinking that my 11:02:30AM
10 colleague Mr. Neufeld will present Canada's 11:02:33AM
11 arguments with respect to 1101(1), and then I'll 11:02:35AM
12 come to the podium to talk about the legal 11:02:39AM
13 interpretation of the limitations period, and, 11:02:44AM
14 assuming the tribunal has questions, that will 11:02:44AM
15 take up a bit of time as well. That might be the 11:02:46AM
16 natural place for a break for lunch, and then, 11:02:49AM
17 after which, Ms. Wates will come back and address 11:02:54AM
18 the evidence, and then I'll conclude with the 11:02:57AM
19 remainder of Canada's arguments. 11:02:59AM
20 PRESIDENT: Fine. 11:03:02AM
21 Mr. Neufeld. 11:03:04AM
22 SUBMISSIONS BY MR. NEUFELD: 11:03:14AM
23 MR. NEUFELD: Well, good 11:03:14AM
24 morning, Judge Crawford, Dean Cass, and Dean 11:03:17AM
25 Levesque. It's a real honour for me to be here 11:03:20AM

1 today. 11:03:22AM

2 This morning you heard from 11:03:24AM

3 Mr. Luz that the Claimant's case fails for a 11:03:26AM

4 number of reasons, not least of which is because 11:03:28AM

5 the Nova Scotia measures have no legally 11:03:32AM

6 significant connection to the investment. The 11:03:33AM

7 clearest indication of this fact is that the 11:03:39AM

8 Claimant complains of the actions of PHP, not of 11:03:41AM

9 Nova Scotia. 11:03:45AM

10 Consider once again the 11:03:47AM

11 reasons it provides for their connection. I will 11:03:48AM

12 be turning to some slides. And have these been 11:03:52AM

13 handed out? I should pause here for a second. I 11:03:56AM

14 should have done that before we started. 11:04:00AM

15 --- (Reporter's Note: Binders passed out to 11:04:51AM

16 parties.) 11:04:52AM

17 MR. NEUFELD: So, yes, we're 11:04:54AM

18 at the fourth slide of the presentation of that 11:04:56AM

19 one there, Judge Crawford, which provides the 11:04:59AM

20 reasons that the Claimant has given for the 11:05:05AM

21 connection between the measures and its 11:05:10AM

22 investment. 11:05:13AM

23 First, it says PHP engaged in 11:05:14AM

24 predatory pricing in 2013. Second, it argues that 11:05:16AM

25 the measures were intended to make PHP's 11:05:21AM

1 competitors less competitive to PHP. And, third, 11:05:23AM
2 it argues that it was PHP that would eventually 11:05:28AM
3 push higher-cost producers out of business. 11:05:32AM
4 Now, these are no small 11:05:35AM
5 accusations, predatory pricing and pushing people 11:05:36AM
6 out of business, and they haven't been backed up 11:05:39AM
7 by a shred of evidence. But there's no need to be 11:05:41AM
8 distracted by that because the flaw in the 11:05:45AM
9 Claimant's position is apparent on the face of its 11:05:47AM
10 arguments. It asks you to find a breach of NAFTA 11:05:50AM
11 based on the actions of PHP, not of the 11:05:53AM
12 government. 11:05:57AM
13 Of course, Canada is not 11:05:59AM
14 responsible for the actions of PHP, because PHP is 11:06:01AM
15 not a state organ, and it doesn't exercise 11:06:03AM
16 governmental authority. 11:06:07AM
17 PRESIDENT: The Claimant 11:06:10AM
18 doesn't suggest that PHP is a state organ. It 11:06:11AM
19 suggests that it was the Nova Scotia measures that 11:06:13AM
20 put PHP in the position to be able to do these 11:06:15AM
21 things. I take it you make the point that it's 11:06:18AM
22 not proved that it did those things, but, as a 11:06:22AM
23 matter of theory, leaving aside questions of 11:06:25AM
24 evidence, it often happens in state responsibility 11:06:29AM
25 cases that the state is responsible for allowing 11:06:32AM

1 something to happen which it should have 11:06:34AM
2 prevented, for example. The fact that there is an 11:06:37AM
3 intermediate action by a private actor doesn't 11:06:41AM
4 necessarily amount to a Nova Scotia entity. 11:06:44AM

5 MR. NEUFELD: Right. I would 11:06:51AM
6 like to respond in two ways: First is to point to 11:06:52AM
7 Mr. Feldman's statement this morning that Nova 11:06:55AM
8 Scotia effectively made a state-owned enterprise, 11:06:57AM
9 which needs to be addressed head on. And there's 11:07:00AM
10 absolutely no evidence whatsoever that Nova Scotia 11:07:05AM
11 created an entity that it directed or controlled 11:07:09AM
12 or -- the pleadings go nowhere near this topic, of 11:07:12AM
13 course. 11:07:16AM

14 But, secondly, to the main 11:07:17AM
15 thrust of your question, Judge Crawford, the Nova 11:07:19AM
16 Scotia measures, according to the Claimant -- 11:07:24AM
17 you're correct -- provided the financial backing, 11:07:28AM
18 which they then say PHP used to engage in 11:07:31AM
19 predatory pricing. So if you go to that Footnote 11:07:35AM
20 194, the only explanation that they have provided 11:07:38AM
21 so far as to the link between the measures and the 11:07:42AM
22 investor or investment, it's that the Nova Scotia 11:07:48AM
23 measures, again, provided the preconditions. PHP 11:07:52AM
24 enacted or did the harm, enacted the predatory 11:07:56AM
25 pricing. Its explanation contains the same flaw 11:08:00AM

1 as its original argument, namely, that PHP is the 11:08:03AM
2 one doing the harm. PHP's the one acting, not 11:08:06AM
3 Nova Scotia. 11:08:11AM

4 And it further submits that 11:08:12AM
5 Canada shouldn't be able to evade responsibility 11:08:14AM
6 in the second highlighted section of this slide, 11:08:17AM
7 because Nova Scotia supplied the preconditions 11:08:23AM
8 that ultimately permitted PHP to harm Resolute. 11:08:27AM

9 Well, we submit that the 11:08:32AM
10 Claimant couldn't be clearer in this regard. If 11:08:34AM
11 it's preconditions that we're talking about, if 11:08:36AM
12 those were the Nova Scotia measures, then let's 11:08:38AM
13 address the preconditions and only the 11:08:40AM
14 preconditions. If it's the harm caused by PHP, 11:08:43AM
15 this is squarely outside of the jurisdiction of 11:08:48AM
16 this tribunal. 11:08:50AM

17 MR. CASS: I think that the 11:08:52AM
18 point that the chairman made is that the argument 11:08:55AM
19 that the Claimant is advancing is that the Nova 11:09:01AM
20 Scotia measures themselves provided support 11:09:07AM
21 without which the harms would not have occurred. 11:09:12AM
22 So I think it kind of mischaracterizes their 11:09:16AM
23 argument to say they are complaining about the PHP 11:09:19AM
24 actions as if those were freestanding occurrences. 11:09:24AM
25 They're complaining about what the impact of the 11:09:30AM

1 Nova Scotia measures was. 11:09:35AM

2 Now, you may, at some point, 11:09:37AM

3 want to get into a debate about exactly what the 11:09:40AM

4 impact was, what could follow from it, but I just 11:09:43AM

5 think the characterization is a little different 11:09:47AM

6 than the argument they're making. 11:09:50AM

7 MR. NEUFELD: Okay. But I'm 11:09:52AM

8 not sure where -- 11:09:53AM

9 PRESIDENT: Can I just make a 11:09:54AM

10 cautionary remark which applies to all questions 11:09:55AM

11 the tribunal will ask today and tomorrow, if we go 11:09:59AM

12 into tomorrow. These questions are questions, and 11:10:02AM

13 they don't assume that the tribunal has made up 11:10:06AM

14 its mind on any of these issues. They don't 11:10:09AM

15 express opinions. They are asking for 11:10:12AM

16 information. 11:10:14AM

17 MR. NEUFELD: I appreciate 11:10:15AM

18 that. 11:10:16AM

19 And turning back to Dean Cass' 11:10:16AM

20 question or rephrasing of Judge Crawford's 11:10:19AM

21 question, I'm not sure we are mischaracterizing 11:10:21AM

22 what the Claimant has argued here. As I think it 11:10:25AM

23 became abundantly clear with Professor Hausman's 11:10:28AM

24 evidence, there's a time lag here. We can all 11:10:33AM

25 recognize there's a time lag between when the 11:10:36AM

1 measures were adopted in 2012 and the effect or 11:10:38AM
2 the harm or the problems caused. Whether they're 11:10:42AM
3 caused by the measures is a separate issue. We 11:10:48AM
4 will leave that aside for the time being. But if 11:10:51AM
5 we just focus on the preconditions, this is their 11:10:53AM
6 explanation in Footnote 194, the only explanation 11:10:56AM
7 they've provided. It is the preconditions that 11:10:59AM
8 have been caused by the Nova Scotia measures. 11:11:01AM
9 Well, when did those 11:11:03AM
10 preconditions occur? Of course, they were in 11:11:04AM
11 2012. They weren't months later or years later. 11:11:09AM
12 The measures were adopted all at that point in 11:11:13AM
13 time. 11:11:15AM
14 And according to the Claimant 11:11:18AM
15 -- this is Slide 5, Chris -- Resolute did not know 11:11:21AM
16 in December 2012 and could not have known that a 11:11:25AM
17 cause for the decline in price was PHP. 11:11:28AM
18 Similarly, Resolute couldn't have known and, 11:11:32AM
19 therefore, shouldn't have known of the losses 11:11:35AM
20 caused by Port Hawkesbury in 2012. In other 11:11:37AM
21 words, the Claimant didn't know at the time that 11:11:41AM
22 Nova Scotia adopted the measures whether they 11:11:44AM
23 would affect them or not since, as the Claimant 11:11:47AM
24 explains, no thoughtful or responsible observer 11:11:50AM
25 was certain what the effect of PHP's return to the 11:11:55AM

1 market might be. 11:11:57AM

2 I mean, the Claimant's 11:12:00AM

3 argument says it all, and this is in and of itself 11:12:01AM

4 sufficient to prove that the measures didn't 11:12:05AM

5 relate to Resolute. Taking the Claimant at its 11:12:06AM

6 word, if it truly didn't know at the time of their 11:12:11AM

7 adoption that the Nova Scotia measures would 11:12:14AM

8 affect it -- and this could only be determined 11:12:17AM

9 based on the actions of PHP -- how can it 11:12:20AM

10 plausibly argue that the Nova Scotia measures 11:12:24AM

11 related to it? 11:12:26AM

12 That's why we say there's no 11:12:33AM

13 need to proceed to the merits on the case, the 11:12:35AM

14 Nova Scotia measures. There's no need to undergo 11:12:37AM

15 expensive or time-consuming document discovery on 11:12:39AM

16 this matter. There's no need to hear arguments on 11:12:42AM

17 1102 or 1105 or 1110 since the complaint is about 11:12:44AM

18 the actions of a private entity. And there's also 11:12:48AM

19 no need for you to rule on the measures as being 11:12:50AM

20 time-barred or on whether they're inadmissible 11:12:53AM

21 under 1102, because these actions can't constitute 11:12:56AM

22 measures relating to a foreign investor or its 11:13:00AM

23 investment for the purposes of Article 1101. 11:13:02AM

24 In fact, the only other 11:13:06AM

25 provision that you need to concern yourselves with 11:13:07AM

1 is Article 2103 in the context of 1105 and 1110 11:13:10AM
2 and the Property Tax Agreement, because there you 11:13:14AM
3 don't have jurisdiction to even look at whether 11:13:18AM
4 there's a relationship until we have satisfied the 11:13:20AM
5 requirements of 2103. 11:13:24AM

6 PRESIDENT: Surely, as a 11:13:30AM
7 matter of analysis, we have to look at the 11:13:31AM
8 'relating to' question first in relation to all 11:13:35AM
9 claims of Resolute, because we don't enter into 11:13:36AM
10 Chapter 11 at all unless the 'relating to' 11:13:42AM
11 requirement is satisfied. 11:13:44AM

12 MR. NEUFELD: That's right. 11:13:46AM
13 So we see this as the primary argument with the 11:13:48AM
14 exception only of 2103, which is a procedure that 11:13:51AM
15 must be followed before you even get to whether 11:13:58AM
16 there is a relationship through 1101. 11:14:01AM

17 PRESIDENT: I see. 11:14:04AM

18 MR. NEUFELD: So, otherwise, I 11:14:06AM
19 think you're absolutely right. Every other 11:14:06AM
20 provision, there's no sense in looking at them, 11:14:09AM
21 but 2103 is a systemic, chapter-wide provision 11:14:11AM
22 that must be respected. 11:14:15AM

23 So the brief overview of the 11:14:21AM
24 remainder of my talk today, I will cover the law 11:14:23AM
25 and, second, turn to the Nova Scotia measures. 11:14:28AM

1 And that's where we can get, I think, into a 11:14:31AM
2 little bit more detail about the relationship 11:14:33AM
3 itself and the relationship between this -- what I 11:14:35AM
4 will continue to call the preconditions. You 11:14:38AM
5 know, the measures, if they are the preconditions, 11:14:40AM
6 let's refer to those very specifically, not to 11:14:42AM
7 what occurred later on through actions of a 11:14:45AM
8 private entity. 11:14:49AM

9 So, for a measure to be 11:14:55AM
10 challenged by a Claimant, Article 1101 11:14:57AM
11 stipulates that it must relate to its investment. 11:15:01AM
12 It reads: 11:15:04AM

13 "This Chapter applies to 11:15:04AM
14 measures adopted or 11:15:05AM
15 maintained by relating to 11:15:07AM
16 investors of another 11:15:10AM
17 party or investments of 11:15:10AM
18 investors of another 11:15:12AM
19 party." 11:15:13AM

20 Of course, we and the Claimant 11:15:14AM
21 disagree on the meaning of this phrase. The 11:15:17AM
22 Claimant argues based on a decision of the Ontario 11:15:19AM
23 Superior Court in a set-aside proceeding that this 11:15:24AM
24 implies some connection or, as we heard this morning 11:15:27AM
25 from Mr. Valasek, a causal nexus. 11:15:30AM

1 And, to be clear here, we have 11:15:33AM
2 recognized the similarities between the words 11:15:35AM
3 "causal nexus" and "legally significant 11:15:38AM
4 connection," but we are by no means asking you to 11:15:40AM
5 apply a causal nexus test here. The test is well 11:15:42AM
6 established, as we will get into, and that is of a 11:15:45AM
7 legally significant connection. 11:15:48AM
8 Canada, of course, in 11:15:51AM
9 agreement with the other NAFTA parties and a 11:15:52AM
10 consistent line of arbitral decisions, calls on 11:15:56AM
11 the tribunal to apply that test, legally 11:15:59AM
12 significant connection. As you know, Mexico and 11:16:02AM
13 the U.S. raise in their 1128 submissions this very 11:16:06AM
14 point, and we're all in agreement. 11:16:09AM
15 Already back -- 11:16:11AM
16 PRESIDENT: Let me put this 11:16:16AM
17 neutrally. Are you suggesting, when the three 11:16:17AM
18 NAFTA governments take the same position in 11:16:22AM
19 interventions, in Amicus briefs and things like 11:16:24AM
20 that, that the tribunal is, in effect, bound by 11:16:28AM
21 any common position they have taken? 11:16:32AM
22 MR. NEUFELD: "Bound" is a 11:16:35AM
23 strong word. 11:16:37AM
24 PRESIDENT: Yes. It is a 11:16:38AM
25 strong word, which is why I asked the question. 11:16:38AM

1 There's a method by which the three states can bind 11:16:43AM
2 Chapter 11 commissions, Chapter 11 tribunals. 11:16:48AM

3 MR. NEUFELD: Right. But a 11:16:52AM
4 concordant consistent practice among the states 11:16:52AM
5 for the purposes of Article 31(3), as you heard 11:16:55AM
6 from Mr. Luz this morning, is a tell-tale sign of 11:16:58AM
7 how the NAFTA should be interpreted is the way I 11:17:05AM
8 will describe it. 11:17:08AM

9 I would prefer to leave this 11:17:10AM
10 one to my colleague Mr. Luz who addressed it this 11:17:11AM
11 morning in his talk already, and maybe we can 11:17:15AM
12 revert to it in terms of the questions that you 11:17:18AM
13 posed with respect to 1128 submissions and their 11:17:23AM
14 weight. 11:17:27AM

15 PRESIDENT: Under the Vienna 11:17:32AM
16 Convention, concordant practice of the parties is 11:17:33AM
17 a matter for the tribunal to take into account, 11:17:37AM
18 but it's not in itself determinative. That's the 11:17:40AM
19 question. 11:17:46AM

20 MR. NEUFELD: And that is 11:17:47AM
21 certainly our view, that this is -- what did I 11:17:48AM
22 say? A tell-tale sign? This is a consistent 11:17:51AM
23 approach that you should take note of in your 11:17:57AM
24 application of this interpretation of this phrase. 11:17:59AM

25 MR. CASS: If I can just 11:18:05AM

1 follow up on that. And if you are leaving this to 11:18:06AM
2 Mr. Luz, I will talk with him later about it. 11:18:10AM
3 Are you saying something 11:18:16AM
4 different than was said in one of the submissions 11:18:17AM
5 about this constituting a subsequent agreement 11:18:21AM
6 among the parties that should be viewed as if it 11:18:25AM
7 were part of the formal NAFTA agreement itself? 11:18:29AM
8 MR. NEUFELD: No, we aren't 11:18:35AM
9 saying anything different. We remain of the view. 11:18:37AM
10 This is something we have pled, and we stick by 11:18:41AM
11 it. But in terms of the effect of that agreement 11:18:43AM
12 between the parties, whether it is something that 11:18:50AM
13 binds you or whether it is something that you 11:18:53AM
14 should take note of as the proper interpretation 11:18:55AM
15 of NAFTA, I think is a line that we can draw. 11:18:58AM
16 MR. CASS: I'm trying to 11:19:04AM
17 understand just, first, whether you are treating 11:19:05AM
18 this as the equivalent of a formal statement by 11:19:09AM
19 the Free Trade Commission on the interpretation of 11:19:14AM
20 NAFTA or whether you are suggesting that it's not 11:19:17AM
21 equivalent, but we should treat it with similar 11:19:20AM
22 seriousness. 11:19:25AM
23 MR. NEUFELD: I think that's a 11:19:26AM
24 good way of putting it. The binding 11:19:28AM
25 interpretation, of course, is a specific tool that 11:19:32AM

1 NAFTA provides through Article 1131. This 11:19:35AM
2 concordant view of three parties, as stated 11:19:38AM
3 officially through pleadings, clearly doesn't 11:19:42AM
4 follow that same process. But that doesn't take 11:19:47AM
5 away its seriousness or prevent it from being seen 11:19:50AM
6 as the right approach to interpretation, as the 11:19:55AM
7 consistently-held view among all three NAFTA 11:20:01AM
8 parties. 11:20:03AM

9 MR. CASS: And you view the 11:20:04AM
10 three parties as taking the same position with 11:20:06AM
11 respect to interpretation of what "relating to" 11:20:10AM
12 means? 11:20:15AM

13 MR. NEUFELD: Yes. Yes. All 11:20:16AM
14 three parties have said clearly that "relating to" 11:20:17AM
15 means a legally significant connection; that that 11:20:20AM
16 means more than mere effects on a measure. And 11:20:23AM
17 ripple effects through the economy, through the 11:20:31AM
18 market of a measure is not sufficient to satisfy 11:20:33AM
19 the "relating to" threshold. 11:20:35AM

20 That's the NAFTA parties' 11:20:44AM
21 views. Let's turn to what the cases have said, 11:20:52AM
22 what the arbitral tribunals have said on the 11:20:55AM
23 matter. 11:20:58AM

24 Already back in 2005, the 11:20:59AM
25 Methanex tribunal had accepted the concordant 11:21:01AM

1 views of the three NAFTA parties, when they 11:21:03AM
2 decided that the phrase "relating to" in 1101(1) 11:21:07AM
3 of NAFTA signifies something more than mere effect 11:21:12AM
4 of a measure on an investor or an investment and 11:21:16AM
5 that it requires a legally significant connection 11:21:20AM
6 between them. 11:21:22AM

7 Since that decision, the three 11:21:25AM
8 NAFTA parties have consistently argued that a 11:21:27AM
9 legally significant connection is the correct 11:21:29AM
10 threshold, and tribunals have consistently agreed. 11:21:31AM
11 In Bayview, for example: 11:21:36AM

12 "It's the legally 11:21:37AM
13 significant connection 11:21:39AM
14 with the state taking 11:21:40AM
15 those measures that 11:21:42AM
16 establishes the right to 11:21:42AM
17 protection, not the bare 11:21:44AM
18 fact that the enterprise 11:21:46AM
19 is affected by the 11:21:47AM
20 measures." 11:21:48AM

21 That's what the Bayview 11:21:49AM
22 tribunal says. 11:21:50AM

23 PRESIDENT: I think anyone 11:21:51AM
24 would agree that mere economic effect of 11:21:53AM
25 government measures -- I mean, governments take 11:21:57AM

1 actions all the time which have economic effects 11:21:59AM
2 in the markets. And if any of those things were 11:22:02AM
3 capable of being brought to NAFTA for 11:22:07AM
4 adjudication, then 1105 would be a criterion for a 11:22:10AM
5 constitutional review, in effect. 11:22:17AM
6 MR. NEUFELD: Absolutely. 11:22:21AM
7 PRESIDENT: But the problem is 11:22:21AM
8 the phrase "legally significant connection" 11:22:22AM
9 replaces another phrase, perhaps even vaguer, but 11:22:24AM
10 it's still vague. I mean, what more do you need? 11:22:29AM
11 I know that you will come to 11:22:34AM
12 that, but I think that's where the focus has to 11:22:35AM
13 be. We can accept the phrase because it has come 11:22:38AM
14 to be used. 11:22:40AM
15 MR. NEUFELD: Right. 11:22:42AM
16 PRESIDENT: The question is 11:22:42AM
17 how you apply it. 11:22:43AM
18 MR. NEUFELD: Let's turn to 11:22:44AM
19 that immediately, because you've asked that 11:22:46AM
20 question specifically to us, because, as you say, 11:22:47AM
21 there's no doubt that "relating to" means legally 11:22:49AM
22 significant connection. The question remains: 11:22:53AM
23 How does the legally significant connection 11:22:55AM
24 threshold itself apply? 11:22:57AM
25 And we have argued already in 11:22:59AM

1 our pleadings, you have seen, that, of course, the 11:23:01AM
2 mere fact isn't enough. But we have also said 11:23:04AM
3 very clearly that the need for a measure to be 11:23:06AM
4 intended to deliberately harm the investor isn't a 11:23:09AM
5 necessary criteria, and it might be something 11:23:14AM
6 that's interesting, or it might be something that 11:23:17AM
7 gets you over the threshold, but it's not a 11:23:18AM
8 necessary criterion. 11:23:21AM

9 There's also no need for the 11:23:22AM
10 measure to create a legal impediment, as we've 11:23:24AM
11 clearly said in our pleadings, in the sense at 11:23:27AM
12 least of a block or a prohibition, although, 11:23:29AM
13 again, such a measure will undoubtedly meet the 11:23:32AM
14 threshold. 11:23:34AM

15 But it's not enough for that 11:23:38AM
16 measure to merely effect. It must have a direct 11:23:39AM
17 application to the investor or its investment. 11:23:42AM
18 The measure must create a connection that is 11:23:46AM
19 direct and that is significant. And that's where 11:23:49AM
20 the words are helpful to us and explain a little 11:23:52AM
21 bit more than the other words, "relating to." 11:23:54AM

22 So, in your question, you have 11:24:00AM
23 given us three constructions; right? The first 11:24:03AM
24 construction is that the term requires the action 11:24:05AM
25 of the party constitute a legal direction to, 11:24:08AM

1 imposition on or a limitation respecting the 11:24:11AM
2 investor and its investment. 11:24:13AM

3 The second one says the term 11:24:14AM
4 only requires the action by the party to have a 11:24:16AM
5 significant impact on the investor or its 11:24:18AM
6 investment. 11:24:21AM

7 And then, third, the third 11:24:21AM
8 construction is that the term requires the action 11:24:22AM
9 of the party to have been undertaken with an 11:24:24AM
10 understanding or purpose that it have a significant 11:24:26AM
11 impact on the investor or its investment. 11:24:29AM

12 Again, we made clear in our 11:24:33AM
13 pleadings, since the measure need not 11:24:34AM
14 intentionally target a foreign investor to be 11:24:37AM
15 related to it, we can safely do away with the third 11:24:39AM
16 construction as sort of the construction. Again, 11:24:43AM
17 it might be interesting. That intent may very 11:24:47AM
18 well show that you have met the threshold, but 11:24:50AM
19 we're not saying that it has to be shown in every 11:24:52AM
20 instance. 11:24:55AM

21 The second construction, 11:24:57AM
22 significant impact, it lacks certain conditions or 11:24:59AM
23 criteria that form part of a legally significant 11:25:02AM
24 connection. One of these is directness. The 11:25:05AM
25 measure must apply to the investor or its 11:25:09AM

1 investment for there to be a proper connection. 11:25:12AM
2 It's not about naming the investor, like my 11:25:15AM
3 friends have said this morning. It's about 11:25:19AM
4 whether it applies to them somehow. 11:25:20AM
5 While the word "impact" 11:25:23AM
6 denotes some kind of connection in this 11:25:25AM
7 construction, it's just not enough. It doesn't 11:25:27AM
8 imply that close connection that's required. A 11:25:29AM
9 legally significant connection is much closer than 11:25:31AM
10 impact. After all, it's not the impact of the 11:25:34AM
11 measure that needs to be significant, but it's the 11:25:37AM
12 connection itself that needs to be significant, 11:25:39AM
13 the connection to the investor or its investment. 11:25:42AM
14 Otherwise, the threshold would, again, have no 11:25:45AM
15 limits; right? Untold numbers would come forward, 11:25:48AM
16 as the U.S. has argued in its 1128 submission. 11:25:50AM
17 MS. LEVESQUE: Sorry to 11:25:58AM
18 interrupt. 11:25:59AM
19 MR. NEUFELD: Please. 11:25:59AM
20 MS. LEVESQUE: When I look at 11:25:59AM
21 these three and I consider the definition of 11:26:01AM
22 "measure," because it's a measure that has to 11:26:04AM
23 relate to, so Article 201 of NAFTA defines 11:26:07AM
24 measures: 11:26:11AM
25 "Includes law, 11:26:12AM

1 regulation, procedure, 11:26:13AM
2 requirement, or 11:26:14AM
3 practice." 11:26:15AM

4 And I think, even in some of 11:26:15AM
5 the cases you have mentioned, it's not always a 11:26:17AM
6 direct action. It could be, like the Claimant has 11:26:22AM
7 alleged "negative treatment", something you give to 11:26:24AM
8 an investor that you don't give to another. 11:26:27AM

9 So, if it's a case of 11:26:29AM
10 negative treatment, then how do you ascertain the 11:26:31AM
11 directness? I can try to reformulate if it's not 11:26:34AM
12 clear. 11:26:42AM

13 PRESIDENT: See if he can 11:26:44AM
14 answer that first. 11:26:45AM

15 MR. NEUFELD: I'm wondering 11:26:46AM
16 whether you are looking for more information on 11:26:49AM
17 how to show directness or whether you are looking 11:26:52AM
18 for the difference between a measure that has 11:26:54AM
19 indirect application and yet still would meet such 11:27:02AM
20 a threshold. 11:27:08AM

21 MS. LEVESQUE: It's more about 11:27:10AM
22 relating to. And if we talk about direction, 11:27:11AM
23 imposition, or a limitation, they all imply a 11:27:17AM
24 positive link, like a lot of the definition of 11:27:21AM
25 measure. The law applies or the regulation does. 11:27:25AM

1 But sometimes the problem is not the application. 11:27:28AM
2 It's the non-application or you are treating 11:27:31AM
3 differently by not doing something. 11:27:34AM
4 MR. NEUFELD: Right. Right. 11:27:36AM
5 MS. LEVESQUE: So if that's 11:27:37AM
6 the case, then how do you ascertain the relation 11:27:38AM
7 if it's something that's not there? 11:27:42AM
8 MR. NEUFELD: Thank you. 11:27:44AM
9 MS. LEVESQUE: Does that help? 11:27:46AM
10 MR. NEUFELD: That does make a 11:27:47AM
11 lot of sense. Thank you. 11:27:48AM
12 And I think we're right here 11:27:49AM
13 to be focusing on the word "measure," because 11:27:51AM
14 "measure" does imply not just law or regulation, 11:27:54AM
15 but practice and policy, something broader. And, 11:27:57AM
16 unfortunately, the words "legally significant 11:28:00AM
17 connection," if you look at the word "legally" too 11:28:02AM
18 strictly and you use it to mean only regulation, 11:28:04AM
19 only law, then I don't think we're capturing the 11:28:08AM
20 right threshold here either. 11:28:13AM
21 A legally significant 11:28:16AM
22 threshold may be one that considers a relationship 11:28:17AM
23 that is, in fact, practically significant, one 11:28:23AM
24 where the measure itself has application to the 11:28:29AM
25 investor, not through a law or a regulation, but 11:28:32AM

1 through its intended application. 11:28:35AM

2 And the Cargill case is sort 11:28:41AM

3 of interesting this way because here you've got, 11:28:42AM

4 as the Claimant likes to point out, a taxation on 11:28:45AM

5 bottling companies, not directed at high fructose 11:28:51AM

6 corn syrup, but there can be no doubt, after years 11:28:57AM

7 of a raging war on sugar, that this was absolutely 11:28:59AM

8 targeting high fructose corn syrup. There was no 11:29:04AM

9 doubt in the tribunal's minds here that the 11:29:09AM

10 measure, even if it was a tax applied to bottlers, 11:29:12AM

11 was really intended to get at high fructose 11:29:17AM

12 corn syrup importers, manufacturers, that 11:29:22AM

13 industry. 11:29:24AM

14 So the legally significant 11:29:24AM

15 connection isn't the relationship between the 11:29:27AM

16 regulation that says, "Thou shall do the following 11:29:29AM

17 or," but rather a clear direct application of a 11:29:33AM

18 tax, which, as is seen in those facts, ran that 11:29:39AM

19 industry into the ground in three years. 11:29:45AM

20 PRESIDENT: It was clear, but 11:29:49AM

21 it wasn't direct. It was on someone else, the 11:29:51AM

22 tax. The tax itself was on bottlers. The impact 11:29:55AM

23 on the importers or the manufacturers was indirect 11:29:59AM

24 but, nonetheless, sufficient according to the 11:30:04AM

25 tribunal. 11:30:06AM

1 MR. NEUFELD: Right. So 11:30:07AM
2 the -- 11:30:08AM
3 PRESIDENT: So you're using 11:30:08AM
4 the word "direct" as another icon, if I can, an 11:30:09AM
5 emoji, something which is a substitute for the 11:30:17AM
6 term "relating to," but it seems to be a 11:30:23AM
7 substitute for analysis as well. 11:30:25AM
8 MR. NEUFELD: Sure. Going 11:30:28AM
9 back to Dean Cass' question, what was direct in 11:30:29AM
10 that case was the intention to harm the HFCS 11:30:31AM
11 industry. The intention was what got you over the 11:30:35AM
12 threshold without a doubt. 11:30:39AM
13 I mean, the government has 11:30:41AM
14 this ability to apply a tax on the end user or 11:30:45AM
15 anywhere along the supply chain, so it may not be 11:30:49AM
16 directly applied in the sense of the law not 11:30:52AM
17 saying that you shall pay the tax because you are 11:30:55AM
18 the industry we're trying to harm, but that 11:30:58AM
19 doesn't mean that the effects of the measure 11:31:01AM
20 aren't direct. 11:31:03AM
21 That's very, very different 11:31:04AM
22 from the situation where the re-entrant of a 11:31:04AM
23 market player then causes effects, ripple effects, 11:31:08AM
24 down the line which affects the entire industry. 11:31:13AM
25 This is night and day here, the two examples. And 11:31:17AM

1 it's not fair to apply the word "indirect" in the 11:31:21AM
2 sense of the Cargill case when that measure, that 11:31:28AM
3 measure was very much intended to get at the 11:31:32AM
4 industry. And from what we have heard here -- and 11:31:38AM
5 we're waiting for the clarifications because I 11:31:40AM
6 think your Questions 6 and 8 go to this very 11:31:42AM
7 issue. We're waiting for the clarification. 11:31:48AM
8 But, again, from what I heard 11:31:50AM
9 in the opening this morning, the Claimant is 11:31:51AM
10 complaining about measures that have a general 11:31:54AM
11 application to the entire industry and are not 11:31:56AM
12 intended to drive Resolute out of the market, are 11:32:00AM
13 not intended to have the same types of effect that 11:32:03AM
14 the very measure, the very tax that was at issue 11:32:06AM
15 in Cargill did. 11:32:09AM
16 PRESIDENT: What if Resolute 11:32:11AM
17 had been the only other Canadian manufacturer of 11:32:12AM
18 supercalendered paper? Would that have made a 11:32:15AM
19 difference? Would that have been direct? The 11:32:18AM
20 Claimant keeps saying -- and I will ask them in 11:32:25AM
21 due course -- there are very few producers. What 11:32:27AM
22 if there was only one producer? 11:32:32AM
23 MR. NEUFELD: Right. Look, 11:32:35AM
24 the facts are what they are in this case, and a 11:32:36AM
25 small group of five industry players is not two 11:32:42AM

1 industry players. That's the first point to make 11:32:45AM
2 clear. 11:32:47AM
3 But in a situation where a 11:32:48AM
4 government is adopting a measure which has 11:32:52AM
5 application on its favoured industry player in a 11:32:56AM
6 situation where that competition is so close and 11:33:03AM
7 so tight and you know from the beginning what the 11:33:05AM
8 effects are going to be, then maybe we are pushing 11:33:10AM
9 it. 11:33:15AM
10 In a situation like that, I 11:33:15AM
11 think what moves you into the world of directness 11:33:20AM
12 is the intent of the measure. Is the intent to 11:33:22AM
13 bring back 330 jobs and to help stabilize logging 11:33:26AM
14 in Cape Breton a measure, in a situation like you 11:33:33AM
15 have just raised now, or is the intent really to 11:33:37AM
16 make sure that we have one market player here and 11:33:40AM
17 that there isn't another one to compete with? And 11:33:43AM
18 that would certainly move you into the realm of 11:33:46AM
19 Cargill or into the realm of -- you have no issue 11:33:51AM
20 meeting the threshold. 11:33:55AM
21 So, of course, these tests 11:33:56AM
22 exist because they are going to apply differently 11:33:59AM
23 on different facts. But let's not lose sight of 11:34:01AM
24 the facts that we have before us today. And let's 11:34:04AM
25 not lose sight of the fact that this threshold 11:34:08AM

1 that the Claimant advances would produce untold 11:34:12AM
2 numbers of -- it's a threshold they would like to 11:34:15AM
3 apply in this case because they say there's only a 11:34:19AM
4 few market players, but, of course, it has 11:34:22AM
5 systemic applications across the board. Once you 11:34:24AM
6 start applying a threshold of no limits, then this 11:34:27AM
7 will be abused in other situations. But on top of 11:34:30AM
8 that, even in this situation here, sure, you only 11:34:32AM
9 have five industry players, but if we're just 11:34:36AM
10 looking at effects, as that second construction 11:34:40AM
11 does, if you are just looking at effects on the 11:34:43AM
12 market, why is it that other suppliers or, in this 11:34:45AM
13 case, tree planting companies, woodlot companies, 11:34:49AM
14 logging companies, why aren't they so affected? 11:34:54AM
15 Why isn't the company that lost the contract for 11:34:57AM
16 sweeping the floor at the mill that just got shut 11:34:59AM
17 down not just as negatively impacted as the mill 11:35:02AM
18 itself, as that industry player itself? 11:35:06AM
19 I mean, the threshold that 11:35:08AM
20 they propose has no limits that way. And, even in 11:35:09AM
21 this case, it's problematic. Its application is 11:35:12AM
22 problematic. 11:35:15AM
23 MR. CASS: Let me ask: You 11:35:16AM
24 were dealing with the Cargill case. Would it 11:35:19AM
25 matter to you, in terms of the way you're applying 11:35:21AM

1 your test, whether the purpose was to harm those 11:35:24AM
2 who are using high fructose corn syrup or to help 11:35:32AM
3 those who are using other sweeteners, sugar in 11:35:36AM
4 particular? Does that make a difference in the 11:35:40AM
5 way you apply the test? 11:35:42AM
6 MR. NEUFELD: Of course, the 11:35:45AM
7 objective of the measure does make a difference. 11:35:46AM
8 These are the facts that we have to look to, to 11:35:47AM
9 determine whether -- 11:35:49AM
10 MR. CASS: And how would you 11:35:52AM
11 distinguish between trying to help the sugar 11:35:53AM
12 producers and harm the high fructose corn 11:35:56AM
13 producers? 11:36:01AM
14 MR. NEUFELD: So I think I 11:36:02AM
15 will refer to some of the exchange that we had 11:36:03AM
16 with Professor Hausman earlier, which was 11:36:07AM
17 interesting, referring to government support, we 11:36:09AM
18 know, isn't enough. It isn't enough for a company 11:36:13AM
19 to succeed. 11:36:16AM
20 And the fact that the support 11:36:17AM
21 takes place all the time throughout the U.S. or in 11:36:19AM
22 Canada, this is what governments do. If, in every 11:36:22AM
23 situation like that where a government steps in to 11:36:26AM
24 save those 330 jobs or to revive employment in an 11:36:29AM
25 area that is downtrodden and desperately in need, 11:36:38AM

1 if every situation like that where you are helping 11:36:41AM
2 a company turns into a -- meets this threshold and 11:36:43AM
3 allows you to challenge based on 1105 or 1110 or 11:36:49AM
4 1102, I think we're transforming NAFTA Chapter 11. 11:36:52AM
5 We're taking it from what was intended, how it was 11:36:57AM
6 intended to apply into a brave new world of sort 11:37:00AM
7 of antitrust law. 11:37:03AM
8 So the difference between 11:37:05AM
9 helping a company or hurting another, of course, 11:37:07AM
10 is going to turn on the very facts that you are 11:37:10AM
11 faced with. Of course, it's going to turn on the 11:37:12AM
12 evidence that is mustered to show what the 11:37:19AM
13 intention of the government is. 11:37:23AM
14 The Claimant has, time and 11:37:25AM
15 time again, used the words "national champion," 11:37:27AM
16 its words, its words. You're not going to find 11:37:30AM
17 them. I mean, you're going to find, "We're 11:37:32AM
18 bringing back 330 jobs. This is through a jobs 11:37:37AM
19 fund. We're helping a part of Nova Scotia that 11:37:41AM
20 needs help." But those words are crucial in a 11:37:44AM
21 situation like that. 11:37:48AM
22 So I don't think you can draw 11:37:48AM
23 a clear line between a measure that is intended to 11:37:50AM
24 help versus a measure that is intended to hurt, 11:37:53AM
25 although a measure that is intended to hurt will 11:37:55AM

1 very clearly get you through the threshold 11:37:58AM
2 quickly. But in terms of that first instance 11:38:00AM
3 where you have a measure intended to help, surely 11:38:02AM
4 you need some sort of evidence that it has a 11:38:05AM
5 direct application relationship to that foreign 11:38:13AM
6 competitor in the market for it to get you through 11:38:18AM
7 the "relating to" threshold. 11:38:22AM
8 PRESIDENT: But what if we're 11:38:24AM
9 in a situation hypothetically where blind Freddy 11:38:25AM
10 could see that substantial subsidies to an 11:38:30AM
11 enterprise which would otherwise not exist, which is 11:38:33AM
12 a very large enterprise in a declining market? It's 11:38:36AM
13 absolutely clear that you're going to have 11:38:39AM
14 impacts -- maybe not immediate impacts, but in due 11:38:42AM
15 course -- on the competitors. The government 11:38:46AM
16 might deny it, but it would be ingenuous to deny 11:38:48AM
17 it. Take that hypothesis. 11:38:54AM
18 MR. NEUFELD: Of subsidies 11:38:56AM
19 provided... 11:38:58AM
20 PRESIDENT: Subsidies provided 11:38:58AM
21 to local Enterprise A in a declining market where 11:39:00AM
22 Enterprise A wouldn't exist but for the subsidies. 11:39:07AM
23 MR. NEUFELD: Right. 11:39:11AM
24 PRESIDENT: And the effect of 11:39:11AM
25 the retention of Enterprise A in the market is 11:39:14AM

1 absolutely bound to have impacts on the few other 11:39:18AM
2 participants. 11:39:22AM

3 MR. NEUFELD: So in terms of 11:39:23AM
4 the unproven hypothesis, if we're going to assume 11:39:25AM
5 it to be true for the sake of this exchange now, 11:39:31AM
6 it still requires an element of attaching those 11:39:42AM
7 measures to the -- if it's just a bag of money, 11:39:45AM
8 it's just, "Here you go. Here is a pile of money. 11:39:49AM
9 Do with it as you wish," you're going to have to 11:39:52AM
10 draw a huge distinction between that type of 11:39:55AM
11 measure, that type of subsidy and a subsidy that 11:39:58AM
12 is meant to -- or assistance that is meant to 11:40:02AM
13 ensure that there is a Mi'kmaq forestry 11:40:06AM
14 coordinator put in place; that woodlot owners are 11:40:11AM
15 acting sustainably; that silviculture is taking 11:40:17AM
16 place according to the way the province wants it 11:40:22AM
17 to take place. 11:40:24AM

18 I mean, we do have to look at 11:40:25AM
19 each measure individually. I think part of the 11:40:26AM
20 issue with the Claimant's case here is that 11:40:30AM
21 they're having you believe that it is just one 11:40:33AM
22 large big pile of money. But until we start to 11:40:35AM
23 break these measures down and look at them 11:40:38AM
24 individually, it's deceptively easy to fall into 11:40:40AM
25 their line of thinking. 11:40:44AM

1 PRESIDENT: Isn't the problem, 11:40:46AM
2 if 1101 has this significant threshold effect, 11:40:48AM
3 that you are, in practice, getting into the detail 11:40:54AM
4 of the dispute at a preliminary level? Isn't that 11:40:58AM
5 difficult? 11:41:02AM

6 MR. NEUFELD: I'm not sure it 11:41:02AM
7 is. And I heard that, as well, from Mr. Valasek 11:41:04AM
8 this morning, that we're leading into the merits 11:41:06AM
9 of the case here. But that's not correct. 11:41:08AM

10 Whether the measure has a 11:41:12AM
11 relationship to Resolute, to the investor or its 11:41:14AM
12 investment, is a matter of jurisdiction and is a 11:41:17AM
13 matter that we must decide now, and it's a matter 11:41:20AM
14 that they had the burden of showing. They have 11:41:23AM
15 the burden of tying that measure to their 11:41:26AM
16 investment or to themselves somehow. 11:41:29AM

17 Will some of these things bleed 11:41:35AM
18 into the merits? Inevitably, if we ever get there, 11:41:37AM
19 but they still have a burden of showing that there's 11:41:41AM
20 relationship between them and the measure in the 11:41:44AM
21 first place, and it's certainly not good enough to 11:41:45AM
22 say that, "Nova Scotia did something to help 11:41:48AM
23 somebody, and, therefore, we're affected." That's 11:41:52AM
24 certainly not good enough. 11:41:54AM

25 PRESIDENT: There's a ground 11:41:55AM

1 of inadmissibility in general international law 11:41:56AM
2 associated with Judge Higgins' separate opinion in 11:42:00AM
3 the Oil Platforms case, and it says, in effect, 11:42:05AM
4 that, accepting the claim put forward by the, 11:42:08AM
5 Claimant this can't possibly give rise to liability. 11:42:12AM
6 It simply can't do so because there's a fundamental 11:42:18AM
7 problem. 11:42:21AM

8 Is this the same as what we're 11:42:25AM
9 talking about, or is it different? I wasn't 11:42:26AM
10 clear. You don't cite Oil Platforms, so it wasn't 11:42:29AM
11 clear from what you said on some points whether 11:42:33AM
12 this was a point you took. This is one of the 11:42:36AM
13 questions I'm asking which might come up again 11:42:39AM
14 tomorrow morning, because I'm asking it of both 11:42:42AM
15 parties. 11:42:44AM

16 MR. NEUFELD: Right. In terms 11:42:45AM
17 of the state attribution point -- 11:42:47AM

18 PRESIDENT: It's not a 11:42:50AM
19 question of attribution. 11:42:51AM

20 MR. NEUFELD: No. But its 11:42:53AM
21 application in this situation, if we just take 11:42:55AM
22 that perspective, there strikes me as some 11:42:57AM
23 immediate similarity to the point that Judge 11:43:04AM
24 Higgins was advancing in Oil Platforms. 11:43:06AM
25 If we can rest assured based 11:43:11AM

1 on the case that has been pled that the harm was 11:43:15AM
2 not caused by Nova Scotia -- those were just 11:43:19AM
3 preconditions -- but the harm was caused by a 11:43:24AM
4 private actor, then we're certainly in the realm 11:43:26AM
5 of there's no way that you can have liability. 11:43:29AM
6 But maybe that's something we can come back to in 11:43:33AM
7 due course. 11:43:36AM

8 And I'm conscious of time, and 11:43:36AM
9 I would like to -- I think the key here today is 11:43:38AM
10 really for us to start to crack open those 11:43:41AM
11 measures so you have a better sense of what -- 11:43:43AM
12 because you're not going to find it in their 11:43:46AM
13 pleadings. They haven't set out what the measures 11:43:48AM
14 do and how they affect people. So I think it 11:43:50AM
15 would do some good for us to be able to describe 11:43:53AM
16 those measures in a little bit more detail so you 11:43:58AM
17 have a better sense of how they actually apply. 11:44:00AM

18 MR. CASS: Just before we 11:44:04AM
19 leave this, I just want to make sure I understand 11:44:05AM
20 the argument you are advancing. 11:44:07AM

21 First, on the difference 11:44:10AM
22 between intending to harm and intending to help 11:44:12AM
23 someone else with the knowledge that it will harm 11:44:17AM
24 other competitors, if I understand, what you are 11:44:21AM
25 saying is that the intent to harm may be 11:44:25AM

1 sufficient evidence of a direct effect to pass the 11:44:29AM
2 test that you see as appropriate, whereas the 11:44:34AM
3 intent to help with the knowledge that it will 11:44:38AM
4 harm could be enough, but it doesn't get you there 11:44:40AM
5 as fast. Is that right? 11:44:43AM

6 MR. NEUFELD: I wouldn't say 11:44:45AM
7 it doesn't get there as fast. I would agree with 11:44:46AM
8 most of what you said. On the tail end, Dean Cass 11:44:50AM
9 the one nit I would pick is with it doesn't get 11:44:54AM
10 you there fast enough, because I think you're 11:44:58AM
11 going to have to show some evidence of 11:45:01AM
12 relationship in order to get you there at all. 11:45:03AM

13 MR. CASS: So, in Cargill, if the 11:45:06AM
14 knowledge that helping sugar producers in one way 11:45:10AM
15 will harm the high fructose corn syrup producers, 11:45:13AM
16 you know it. You don't care about that harm. 11:45:19AM
17 That isn't your goal. Your goal is to help the 11:45:22AM
18 people who are your constituents. Would that 11:45:25AM
19 satisfy the connection that you think is embodied 11:45:28AM
20 in NAFTA? 11:45:34AM

21 MR. NEUFELD: Of course, the 11:45:35AM
22 devil is in the detail there. I would say, in 11:45:36AM
23 theory, it may get you to that stage, but you are 11:45:40AM
24 going to require evidence of a relationship, 11:45:44AM
25 nonetheless. 11:45:46AM

1 It's not sufficient to say 11:45:48AM
2 that you have knowledge that it is going to affect 11:45:54AM
3 the market. That can't be sufficient to meet a 11:45:57AM
4 "relating to" test. 11:46:02AM
5 MR. CASS: So your test, then, 11:46:03AM
6 would require intention to harm in order to 11:46:05AM
7 satisfy the legally significant connection? 11:46:13AM
8 MR. NEUFELD: If you have a 11:46:19AM
9 measure that applies directly to a company, 11:46:20AM
10 whether you want to harm them or not, and it has a 11:46:23AM
11 relationship to them, it doesn't have to intend to 11:46:25AM
12 harm them. 11:46:29AM
13 If you have an indirect 11:46:29AM
14 measure that is helping somebody else, one of the 11:46:30AM
15 ways of showing the relationship to the Claimant 11:46:34AM
16 in a situation like that would be to show an 11:46:40AM
17 intention. Might there be other evidence to show 11:46:43AM
18 a relationship? Sure. But my simple point is 11:46:46AM
19 that you have to show a relationship. You have to 11:46:50AM
20 show a legally significant connection. And the 11:46:52AM
21 fact that you want to help one company is not a 11:46:56AM
22 legally significant connection to the rest of the 11:46:59AM
23 industry or the ripple effects that that might 11:47:02AM
24 cause. 11:47:04AM
25 MR. CASS: And just one last 11:47:05AM

1 thing: I understood you to say that the other 11:47:07AM
2 cases all accept the legally significant 11:47:13AM
3 connection as the test, and you would include 11:47:18AM
4 Cargill and Mesa Power -- 11:47:22AM

5 MR. NEUFELD: Absolutely. So 11:47:25AM
6 Cargill, as you know from Apotex, Cargill, which 11:47:26AM
7 we agree with, Cargill was not applying a 11:47:31AM
8 different standard. They may have used the words 11:47:34AM
9 "causal nexus." They also acknowledged the 11:47:36AM
10 legally significant connection, and this was not 11:47:38AM
11 -- there's no indication that they're applying a 11:47:43AM
12 different standard than the legally significant 11:47:45AM
13 connection test. 11:47:47AM

14 Actually, Chris, maybe you can 11:47:49AM
15 go back to that slide, which is Slide 13. 11:47:51AM

16 So here you have Apotex noting 11:48:10AM
17 that, in Cargill, the tribunal was not applying a 11:48:20AM
18 different threshold from the Bayview tribunal or 11:48:23AM
19 the Methanex tribunal. And the Apotex tribunal 11:48:26AM
20 itself recognizes a legally significant connection 11:48:29AM
21 requires something more than mere effect. 11:48:31AM

22 In the Mesa category, this 11:48:35AM
23 wasn't an issue that was briefed by the parties. 11:48:38AM
24 It was never in issue, because the Mesa Power 11:48:41AM
25 companies were companies operating in Ontario 11:48:44AM

1 within the FIT program. The measures of Ontario 11:48:47AM
2 applied directly to them. Canada never took issue 11:48:51AM
3 with that. We never mounted an Article 1101 or 11:48:54AM
4 never alleged that they didn't meet the threshold 11:48:58AM
5 through Article 1101, because the measures so 11:49:03AM
6 squarely applied to the investor in that case and 11:49:07AM
7 to the investor's investments rather in that case. 11:49:14AM
8 So the tribunal, in its 11:49:16AM
9 decision, again, used different wording there, but 11:49:22AM
10 this wasn't a matter that was at issue in the 11:49:26AM
11 case, and the fact that those measures in Mesa had 11:49:28AM
12 a legally significant connection to the Mesa Power 11:49:35AM
13 companies was not an issue, and Canada didn't 11:49:39AM
14 dispute it. 11:49:43AM
15 Let's turn to the measures now 11:49:47AM
16 at Slide 15, the two broad categories of measures 11:49:48AM
17 that Mr. Luz identified this morning already. In 11:49:53AM
18 the first category, we have the FIF, the Forestry 11:49:56AM
19 Infrastructure Fund, and the hot idle funding. 11:50:01AM
20 These are the presale measures. And then during 11:50:04AM
21 the creditor protection proceedings, there are a 11:50:05AM
22 series of measures, including the financial 11:50:08AM
23 package to Pacific West, the investments in the 11:50:11AM
24 Nova Scotia forestry industry, the load retention 11:50:14AM
25 tariff, LRT, and the Property Tax Agreement. 11:50:18AM

1 These are the measures that the Claimant has 11:50:21AM
2 pointed to. 11:50:23AM

3 So turning first to the first 11:50:27AM
4 set of measures, the forestry infrastructure fund 11:50:30AM
5 was established pursuant to a forestry 11:50:34AM
6 infrastructure agreement. That agreement existed 11:50:38AM
7 between NewPage Port Hawkesbury, the predecessor 11:50:41AM
8 of the province, not Port Hawkesbury Paper, but 11:50:44AM
9 the predecessor to Port Hawkesbury Paper, NewPage. 11:50:48AM
10 It provided funding of \$14 million -- 11:50:51AM
11 court-approved funding, that is -- and an additional 11:50:54AM
12 12 million in funding implemented through this 11:50:56AM
13 amendment to the agreement later. 11:51:00AM

14 The FIF agreement reached 11:51:02AM
15 between NewPage and the Government of Nova Scotia 11:51:04AM
16 involved a set of obligations and undertakings by 11:51:07AM
17 both parties, both NewPage and the Government of 11:51:10AM
18 Nova Scotia. Nova Scotia provided the funding, 11:51:13AM
19 which NewPage then managed. It didn't receive this 11:51:18AM
20 money and put it into its pockets and do with it 11:51:21AM
21 what it wanted. It managed the money for the sake 11:51:23AM
22 of tree planters, woodlot owners, road crews to 11:51:26AM
23 undertake pre-approved work including 11:51:29AM
24 silviculture, harvesting, and road maintenance, 11:51:33AM
25 which you can see from the press release, which is 11:51:35AM

1 on the next slide. The intention was to provide 11:51:36AM
2 jobs, specialized training, and to keep the 11:51:40AM
3 NewPage mill in Point Tupper resale ready. It 11:51:43AM
4 allowed for new silviculture work, 11:51:49AM
5 harvesting, road maintenance, forestry training, 11:51:53AM
6 and establishing a woodlands core team. 11:51:53AM

7 What is clear from the FIF 11:51:55AM
8 funding is that it wasn't intended to force 11:51:58AM
9 Resolute to close its mill. It wasn't intended to 11:52:00AM
10 drive it out of business. It had nothing to do 11:52:03AM
11 with Resolute. It was provided not to Port 11:52:05AM
12 Hawkesbury Paper, but to its predecessor, NewPage, 11:52:09AM
13 in the context of creditor proceedings. And, at 11:52:12AM
14 the time, Pacific West Corporation didn't own Port 11:52:14AM
15 Hawkesbury. It wasn't producing paper, and it 11:52:20AM
16 couldn't have been competing with Resolute. It's 11:52:22AM
17 safe to say that this measure couldn't have had 11:52:27AM
18 even a mere effect on the Claimant. 11:52:30AM

19 The same can be said of the 11:52:33AM
20 second measure, the hot idle funding. Hot idle 11:52:34AM
21 status indicates that the plant has been taken out 11:52:40AM
22 of active production. In contrast to cold idle, 11:52:41AM
23 which is a more complex shutdown process, taking 11:52:47AM
24 out hazardous material or hazardous chemicals for 11:52:50AM
25 the machinery to be able to shut down safely and 11:52:53AM

1 probably be decommissioned or at least shut down 11:52:56AM
2 long-term, placing the mill in cold idle, it would 11:53:00AM
3 effectively have made it impossible to sell the 11:53:02AM
4 mill later. 11:53:05AM

5 So NewPage had been providing 11:53:08AM
6 this hot idle funding for a period, and ultimately 11:53:09AM
7 NewPage ran out of cash. The court-approved 11:53:13AM
8 Monitor in the creditor proceedings proposed that 11:53:16AM
9 the mill be kept in hot idle, and the province 11:53:17AM
10 agreed, as it would improve its chances of resale 11:53:20AM
11 later. 11:53:25AM

12 PRESIDENT: Presumably, it 11:53:26AM
13 would increase the cost of the plant. 11:53:28AM

14 MR. NEUFELD: Right. 11:53:31AM

15 PRESIDENT: Because it would 11:53:31AM
16 have increased the value of the plant or 11:53:32AM
17 prevented its reduction? 11:53:34AM

18 MR. NEUFELD: Absolutely. 11:53:36AM
19 That's correct. 11:53:37AM

20 This FIF funding was provided 11:53:38AM
21 to the purchase of the mill prior to it producing 11:53:42AM
22 paper; right? Prior to it coming back on stream, 11:53:45AM
23 prior to it having a buyer, obviously prior to it 11:53:48AM
24 competing with the Claimant. So not only did the 11:53:52AM
25 measure not directly apply to the Claimant, it, 11:53:55AM

1 again, couldn't even have an effect on the 11:53:58AM
2 Claimant. 11:54:01AM

3 Let's turn to the second set 11:54:05AM
4 of measures, first the financial package. The 11:54:07AM
5 province announced that, through its jobs fund, it 11:54:10AM
6 would provide two loans and two grants to Pacific 11:54:12AM
7 West, a loan to support productivity and 11:54:15AM
8 efficiency, a loan for working capital, a grant to 11:54:17AM
9 train workers, and a grant to implement a 11:54:21AM
10 marketing plan. These monies were provided to 11:54:23AM
11 Pacific West on the condition that they buy the 11:54:28AM
12 mill and operate the mill. 11:54:30AM

13 The only explanation that the 11:54:33AM
14 Claimant has provided to show that this measure is 11:54:35AM
15 connected to its investment in another province is 11:54:37AM
16 that it was designed to alter competition. It was 11:54:41AM
17 intended to make PHP's competitors less 11:54:44AM
18 competitive, so it argues. 11:54:46AM

19 But these are the Claimant's 11:54:49AM
20 words. These aren't Nova Scotia's words. The 11:54:50AM
21 Premier never drew a link between the measures and 11:54:54AM
22 in Resolute. He certainly didn't say that the 11:54:57AM
23 intention was to drive Resolute out of business or 11:54:58AM
24 to otherwise harm it or any other industry player. 11:55:01AM
25 Rather, the stated objective of the measure, 11:55:04AM

1 according to the Premier, was to protect the 11:55:06AM
2 existing forestry jobs and revive the mill. Doing 11:55:08AM
3 so, as he said, would bring 330 people back to 11:55:12AM
4 work, protect 600 indirect jobs in the woodlands, 11:55:15AM
5 sawmills, and power generation industries and 11:55:19AM
6 provide 500 more jobs for local communities. This 11:55:21AM
7 was the true intent of the financial package that 11:55:25AM
8 went to Pacific West. 11:55:28AM

9 And even if the result of the 11:55:29AM
10 measure was to alter competition, this is not 11:55:30AM
11 sufficient to satisfy the Article 1101 threshold. 11:55:34AM
12 After all, the threshold isn't met by showing that 11:55:37AM
13 a measure has ripple effects through the economy 11:55:40AM
14 or through the market. For it to qualify, a 11:55:42AM
15 measure must have a significant legal connection 11:55:45AM
16 to the investment. 11:55:47AM

17 What's the legal connection 11:55:49AM
18 here between the Claimant and the assistance that 11:55:51AM
19 Nova Scotia provided to PHP? Well, there is none. 11:55:54AM
20 What's the direct impact of the measures on 11:55:59AM
21 Resolute? Again, there is none. 11:56:01AM

22 Just take the Claimant at its 11:56:05AM
23 own words: 11:56:07AM

24 "It is argued that the 11:56:08AM
25 market impact of the 11:56:09AM

1 revival of Port 11:56:11AM
2 Hawkesbury mill was 11:56:12AM
3 unknown and unknowable in 11:56:13AM
4 2012." 11:56:15AM

5 It also argues that PHP, as 11:56:17AM
6 the low-cost producer, would, if successful, 11:56:19AM
7 eventually be able to price its paper lower than 11:56:22AM
8 the competitors and cause some damage. 11:56:26AM

9 Therefore, according to the 11:56:28AM
10 Claimant, when the financial package was provided 11:56:30AM
11 to PHP, it didn't have a measurable effect on the 11:56:32AM
12 market. In other words, it didn't even have a 11:56:36AM
13 mere effect on the Claimant let alone a legally 11:56:40AM
14 significant one or a legally significant 11:56:44AM
15 connection. 11:56:46AM

16 The second measure to support 11:56:49AM
17 the acquisition of the mill by Pacific West are 11:56:51AM
18 the investments in Nova Scotia's forestry sector. 11:56:54AM
19 As the press release summarized: 11:56:57AM

20 "The province, through 11:56:59AM
21 the Department of Natural 11:57:00AM
22 Resources, agreed to 11:57:01AM
23 invest \$20 million to buy 11:57:02AM
24 land from PHP, 3.8 11:57:04AM
25 million annually over 10 11:57:06AM

1 years, for forestry 11:57:08AM
2 restructuring funds to 11:57:09AM
3 support harvesting, 11:57:11AM
4 forest land management, 11:57:12AM
5 funds programs, and allow 11:57:14AM
6 woodlot owners and 11:57:15AM
7 pulpwood suppliers to 11:57:17AM
8 become more active in the 11:57:18AM
9 management of their 11:57:19AM
10 woodlands and funding for 11:57:20AM
11 a Mi'kmaq forestry 11:57:21AM
12 strategy." 11:57:23AM
13 Again, the Claimant has made 11:57:24AM
14 no effort whatsoever to explain the connection 11:57:26AM
15 between this measure, the funding of the Mi'kmaq, 11:57:30AM
16 an indigenous group in Cape Breton, and its 11:57:33AM
17 investment. That's because there's no connection. 11:57:36AM
18 Similarly, its investment has no connection to the 11:57:40AM
19 funding that the Government of Nova Scotia 11:57:44AM
20 provided to woodlot owners, pulpwood suppliers in 11:57:45AM
21 Nova Scotia, or to the purchase of the land by 11:57:49AM
22 Nova Scotia, the purchase by Nova Scotia of the 11:57:53AM
23 land that PHP held. These measures, they relate 11:57:55AM
24 to the Mi'kmaq. They relate to woodlot owners. 11:57:58AM
25 They relate, in the case of the land purchase, to 11:58:02AM

1 PHP at least. But they couldn't have possibly 11:58:04AM
2 have a relationship to the Laurentide mill. 11:58:09AM
3 This brings us to the third 11:58:15AM
4 measure raised by the Claimants, the load 11:58:16AM
5 retention tariff. 11:58:18AM
6 Skip one more there, Chris. 11:58:20AM
7 It was negotiated by Pacific 11:58:21AM
8 West and Nova Scotia Power, a privately-owned, 11:58:31AM
9 commercially-run corporation. NSPI, Nova 11:58:33AM
10 Scotia Power, agreed to set a rate of electricity 11:58:39AM
11 sold to Pacific West that was lower than market 11:58:41AM
12 rates because it was in Nova Scotia Power's 11:58:43AM
13 interest to do so. It was in their interest to 11:58:49AM
14 prevent the mill's closure and preserve it as a 11:58:52AM
15 customer rather than losing its business 11:58:55AM
16 altogether, which would have led to a 11:58:56AM
17 corresponding hike in electricity rates for all 11:58:58AM
18 other customers on account of the loss of this 11:59:00AM
19 extra-large customer. It was in the public 11:59:02AM
20 interest since it benefitted all of the customers 11:59:07AM
21 on the grid. 11:59:09AM
22 Now, whether this measure is 11:59:11AM
23 even attributable to Canada -- and we submit that 11:59:13AM
24 it's not -- that jurisdictional question, we have 11:59:16AM
25 left. If we ever get to the merits, we will deal 11:59:18AM

1 with it there, because it's terribly fact 11:59:21AM
2 intensive. But there's absolutely no reason to 11:59:23AM
3 get that far because, yet again, the Claimants 11:59:27AM
4 made no effort to draw the relationship between 11:59:29AM
5 that measure and itself or its investment. 11:59:32AM
6 All it offers is that it 11:59:35AM
7 amounts to an electricity benefit or a 11:59:37AM
8 preferential rate, suggesting that it provides 11:59:40AM
9 some sort of benefit to PHP, but it doesn't 11:59:45AM
10 explain why that benefit -- and, to be clear here 11:59:49AM
11 we dispute that it's a benefit in the first place, 11:59:54AM
12 but it never explains why that benefit that it 11:59:58AM
13 gets from a commercially-run company, how that 12:00:00PM
14 relates to its investment in another province 12:00:03PM
15 entirely where it has its own electricity provider 12:00:05PM
16 and negotiates its own rates. 12:00:08PM
17 Finally, the Property Tax 12:00:11PM
18 Agreement -- so go back, one up. The last measure 12:00:15PM
19 that they cite is the Property Tax Agreement, 12:00:24PM
20 which equally has no direct connection to the 12:00:26PM
21 Claimant. It's an agreement, originally, between 12:00:30PM
22 the Richmond County and Stora Enso Port 12:00:35PM
23 Hawkesbury, which is a predecessor to NewPage, 12:00:38PM
24 which, of course, was a predecessor to Port 12:00:42PM
25 Hawkesbury. 12:00:45PM

1 The agreement sets the 12:00:45PM
2 property rates between 2006 and 2016, and then, 12:00:46PM
3 when Pacific West emerges as the buyer, they 12:00:50PM
4 renegotiate the agreement to bring it down to \$1.3 12:00:55PM
5 million per year. 12:00:59PM

6 Again, the Claimant provides 12:01:01PM
7 absolutely no explanation as to how this relates 12:01:03PM
8 to its investment. How is it that an agreement 12:01:07PM
9 between Richmond County and NewPage and Port 12:01:12PM
10 Hawkesbury -- how is it that that agreement 12:01:16PM
11 relates to its investment in another province 12:01:18PM
12 entirely where a different tax regime applies, 12:01:21PM
13 where it deals with different counties and 12:01:24PM
14 different province? It merely argues that it 12:01:27PM
15 benefitted PHP, and that's good enough for it to 12:01:30PM
16 be related to Resolute. Well, that's where it's 12:01:34PM
17 just not on. It is not good enough for that to be 12:01:38PM
18 related to Resolute. 12:01:40PM

19 Finally, a word about a 12:01:43PM
20 measure that didn't make the list because it 12:01:44PM
21 wasn't properly brought before you, the biomass 12:01:48PM
22 facility. The Claimants argued in its 12:01:51PM
23 counter-memorial, for the first time in the 12:02:00PM
24 counter-memorial, that a designation of Nova 12:02:00PM
25 Scotia Power's biomass facility as must run also 12:02:01PM

1 constitutes a benefit to PHP. 12:02:03PM

2 Well, this measure equally 12:02:06PM

3 fails to satisfy the "relating to" threshold for 12:02:07PM

4 the same reasons as the Property Tax Agreement, as 12:02:11PM

5 the LRT. You should also refuse -- it fails 12:02:13PM

6 because it doesn't draw the necessary legal 12:02:18PM

7 connection. But you should also refuse to 12:02:21PM

8 consider it, primarily you should refuse to 12:02:24PM

9 consider it, because it wasn't raised by the 12:02:26PM

10 Claimant in its Notice of Arbitration. 12:02:28PM

11 The biomass facility in 12:02:30PM

12 question provides PHP with steam, and Nova Scotia 12:02:31PM

13 designated it as must run in 2013. The basis for 12:02:37PM

14 the claim in the Notice of Arbitration is that 12:02:42PM

15 Nova Scotia undertook a series of measures in 2012 12:02:45PM

16 to ensure that Port Hawkesbury Paper would have 12:02:48PM

17 competitive advantages. 12:02:51PM

18 Now, the measures included, as 12:02:53PM

19 they say, preferential rates and electricity 12:02:57PM

20 rates -- reduced electricity rates, but the NOA 12:03:00PM

21 makes no reference to a measure adopted in 2013, 12:03:04PM

22 and the NOA makes no reference to a biomass 12:03:07PM

23 regulation whatsoever. To allow the Claimant to 12:03:10PM

24 raise this measure now for the first time or for 12:03:12PM

25 the first time in its counter-memorial without 12:03:15PM

1 having included it in the NOA would unfairly 12:03:17PM
2 prejudice Canada. And the Claimant could have 12:03:20PM
3 amended its claim if it needed to, of course. It 12:03:23PM
4 chose not to and didn't have time to, and it must 12:03:28PM
5 live with that decision. 12:03:31PM

6 The summary just provided of 12:03:33PM
7 the challenged measures, I think, gives you a 12:03:36PM
8 little bit more indication of the lack of 12:03:38PM
9 relationship between the measure adopted -- not 12:03:41PM
10 just a bag of money presented to a company to do 12:03:45PM
11 with it what it wanted to, but the measure itself 12:03:48PM
12 and the investor and its investment. The summary 12:03:51PM
13 demonstrates that, in the rare instance where the 12:03:58PM
14 Claimant has made any effort whatsoever to draw or 12:04:00PM
15 to explain the relationship, all it's done is said 12:04:03PM
16 that a benefit was received. PHP got a benefit. 12:04:08PM

17 Well, a benefit to PHP that 12:04:13PM
18 allows it to eventually, if successful, and if 12:04:14PM
19 market conditions permit, cause harm to the 12:04:19PM
20 Claimant's investment can't constitute a measure 12:04:22PM
21 relating to the Claimant's investment. It's 12:04:27PM
22 indirect, and it doesn't establish a legally 12:04:32PM
23 significant connection. 12:04:34PM

24 By the Claimant's own words, 12:04:38PM
25 it recognizes this fact since it is squarely 12:04:39PM

1 admitted that, when the measures were adopted, the 12:04:42PM
2 Port Hawkesbury revival remained speculative and 12:04:45PM
3 its market impact unknown and unknowable. The 12:04:48PM
4 real connection of the funding is to PHP. Any 12:04:51PM
5 effect that the funding would have had on 12:04:54PM
6 Resolute's investment depended on what PHP would 12:04:56PM
7 eventually do with it, as Mr. Valasek said again 12:05:00PM
8 this morning, what they would eventually do with 12:05:04PM
9 it. 12:05:07PM

10 As Professor Hausman said, 12:05:11PM
11 government support is not sufficient to make a 12:05:13PM
12 company successful. There, we're talking again 12:05:15PM
13 about the preconditions. 12:05:18PM

14 If that's the case, if the 12:05:21PM
15 government support isn't sufficient to make the 12:05:23PM
16 company successful in the first place, how is it 12:05:26PM
17 that that same government support has a clear 12:05:29PM
18 relationship to the investor or its investment? 12:05:31PM
19 Clearly it doesn't. 12:05:35PM

20 Thank you for your time. I 12:05:36PM
21 think we have probably gone over the amount of 12:05:37PM
22 time that I intended to spend on this topic, but 12:05:41PM
23 the questions were interesting, and I see that you 12:05:44PM
24 have some more. So I will stay standing right 12:05:48PM
25 here. 12:05:50PM

1 PRESIDENT: No. I was going 12:05:51PM
2 to make the remark it's been very helpful, and you 12:05:52PM
3 shouldn't feel under pressure of time. We have 12:05:55PM
4 time. 12:05:57PM
5 Do either of my colleagues 12:06:00PM
6 have any further questions? 12:06:01PM
7 We have none, Mr. Neufeld. 12:06:09PM
8 MR. NEUFELD: Thank you. 12:06:11PM
9 PRESIDENT: I think we should 12:06:12PM
10 continue. 12:06:13PM
11 MR. LUZ: Judge Crawford, I'm 12:06:14PM
12 happy to continue on unless stomachs start to 12:06:16PM
13 rumble. We can continue on. I would expect to 12:06:19PM
14 take between half an hour to 45 minutes longer. 12:06:22PM
15 I'm happy to go if the tribunal has further 12:06:26PM
16 questions, so I'm in the hands of the tribunal. 12:06:29PM
17 PRESIDENT: It's just after 12:06:31PM
18 twelve and we are surviving. 12:06:33PM
19 MR. LUZ: I'm happy to go. 12:06:35PM
20 PRESIDENT: Yes. 12:06:37PM
21 SUBMISSIONS BY MR. LUZ: 12:06:40PM
22 MR. LUZ: Thank you. It is 12:06:51PM
23 nice to be back again before the tribunal. 12:06:56PM
24 As promised, I will address 12:07:00PM
25 the second jurisdictional objection that Canada 12:07:01PM

1 has with respect to the limitations period in 12:07:05PM
2 1116(2) and 1117(2). I will focus on the legal 12:07:08PM
3 aspects of the case and the interpretation, and I 12:07:12PM
4 will leave the discussion of the factual evidence 12:07:16PM
5 that is before the tribunal to my colleague 12:07:17PM
6 Ms. Wates. 12:07:20PM

7 But I will go on to answer 12:07:21PM
8 some of the questions that the tribunal had asked. 12:07:23PM
9 In particular, both Dean Cass and Judge Crawford, 12:07:26PM
10 you asked about the NAFTA 1128 submissions and the 12:07:29PM
11 Vienna Convention on the Law of Treaties. I'm happy 12:07:32PM
12 to address that and will and, in fact, have direct 12:07:35PM
13 responses on that. But I will also deal with the 12:07:39PM
14 question of whether or not this is a question of 12:07:42PM
15 jurisdiction and admissibility and the tribunal's 12:07:45PM
16 options if it feels that it needs more evidence in 12:07:49PM
17 order to make a determination with respect to the 12:07:52PM
18 limitations period. 12:07:54PM

19 Now, with respect to the 12:07:57PM
20 interpretation of Articles 1116(2) and 1117(2), 12:07:59PM
21 there is not actually much distance between the 12:08:04PM
22 parties on how to interpret the measures 12:08:06PM
23 themselves. Primarily, there's a factual dispute 12:08:07PM
24 here as to when the investor first acquired 12:08:11PM
25 knowledge or should have first acquired knowledge, 12:08:14PM

1 not so much of the measures. That is not in 12:08:17PM
2 dispute. But, rather, that it had incurred some 12:08:19PM
3 loss or damage arising out of those measures. 12:08:22PM
4 But to focus on the first 12:08:26PM
5 acquired knowledge aspect of the rule, that term, 12:08:27PM
6 "first acquired knowledge," is crucial. The 12:08:33PM
7 limitations period is triggered from the first 12:08:36PM
8 moment, that is, a specific day, that a Claimant 12:08:39PM
9 knew or should have known of the alleged breach 12:08:43PM
10 and that it has incurred some loss or damage 12:08:46PM
11 arising out of that breach. 12:08:49PM
12 The limitations period is in 12:08:52PM
13 NAFTA Chapter 11 is both one of actual and 12:08:57PM
14 constructive knowledge. So there are two tests 12:09:00PM
15 that can be applied, and either one of them will 12:09:04PM
16 trigger the limitations period. If the question 12:09:06PM
17 of actual knowledge is in doubt, there's also the 12:09:09PM
18 objective or constructive knowledge test. When 12:09:13PM
19 was the first time that the Claimant should have 12:09:16PM
20 first known about the breach and that there had 12:09:20PM
21 been some loss or damage arising out of? So 12:09:24PM
22 either one of those tests will start the clock 12:09:27PM
23 ticking. 12:09:30PM
24 Once that clock is ticking, as 12:09:31PM
25 the Feldman, Grand River, and Apotex Tribunals 12:09:33PM

1 said, the limitations period in Chapter 11 is 12:09:36PM
2 clear. It's rigid. And it is not subject to 12:09:39PM
3 suspension, prolongation, or other qualification. 12:09:44PM
4 Now, in this case, the cutoff 12:09:48PM
5 date is December 30, 2012, which is more than 12:09:49PM
6 three years prior to when the Claimant filed its 12:09:53PM
7 NOA. And it is Canada's contention that the 12:09:55PM
8 Claimant knew or should have known that it had 12:09:59PM
9 suffered some of the loss or damage that it 12:10:02PM
10 alleges prior to that date, and, therefore, the 12:10:03PM
11 claim is outside of the tribunal's jurisdiction 12:10:06PM
12 *ratione temporis*. 12:10:10PM
13 Now, very briefly, because it 12:10:11PM
14 was something that -- a word was used in this 12:10:13PM
15 morning's presentation with respect to the 12:10:16PM
16 continuing assistance of the government. 12:10:17PM
17 It did not seem that the 12:10:21PM
18 Claimants had ever brought up an issue of a 12:10:23PM
19 continuing breach, which is, as the tribunal 12:10:26PM
20 knows, in some controversy. That is not the 12:10:28PM
21 understanding. Canada had addressed it as 12:10:32PM
22 something that does not toll the limitations period 12:10:36PM
23 in the context of NAFTA Chapter 11, but that 12:10:40PM
24 hasn't been something that has been pursued by the 12:10:43PM
25 Claimant, so we're assuming that that's not in 12:10:45PM

1 issue. I'm just flagging it because the use of 12:10:48PM
2 the word "continuing" sometimes sounds alarm 12:10:50PM
3 bells. 12:10:53PM

4 But the first question posed 12:10:53PM
5 by the tribunal is whether or not time bar goes to 12:10:54PM
6 jurisdiction and admissibility. And this is 12:10:56PM
7 something that Canada addressed in its responses 12:10:59PM
8 to the 1128 submissions, because it was something 12:11:01PM
9 that the Claimant brought up for the first time in 12:11:04PM
10 its rejoinder. 12:11:06PM

11 And the Claimant is wrong to 12:11:08PM
12 assert that the limitations period in NAFTA 12:11:10PM
13 Chapter 11 is not a jurisdictional provision. 12:11:14PM
14 That is not a conclusion based on a good faith 12:11:19PM
15 reading of the treaty. It is contrary to the 12:11:21PM
16 decisions of past NAFTA tribunals, and it is 12:11:24PM
17 contrary to the long-standing and concordant views 12:11:26PM
18 of the three NAFTA parties, and that's something 12:11:30PM
19 that, as I mentioned before, I know is of 12:11:33PM
20 particular interest to the tribunal. But before I 12:11:36PM
21 get to the question of 1128s and the views of the 12:11:38PM
22 NAFTA parties, let me just walk through the 12:11:43PM
23 lineage of where the question of jurisdiction and 12:11:45PM
24 the limitations period originated. 12:11:48PM

25 And it really originates from 12:11:51PM

1 the text of the treaty itself. A NAFTA party does 12:11:52PM
2 not consent to arbitrate an untimely claim, and 12:11:55PM
3 the tribunal has no jurisdiction to hear one. And 12:12:00PM
4 that's clear from Article 1122(1) where the 12:12:02PM
5 only way to perfect a NAFTA party's advanced 12:12:05PM
6 consent to arbitrate is to follow the requisite 12:12:08PM
7 procedure set out in the treaty. That is the only 12:12:11PM
8 way that the arbitral agreement will be formed. 12:12:15PM
9 Now, the Methanex tribunal 12:12:19PM
10 recognized that Articles 1116 and 1117 go to the 12:12:20PM
11 consent of a NAFTA party to arbitrate a dispute 12:12:25PM
12 under Chapter 11. They say it very clearly here: 12:12:30PM
13 "In order to establish 12:12:32PM
14 the necessary consent to 12:12:33PM
15 arbitration, it is 12:12:34PM
16 sufficient to show that 12:12:36PM
17 Chapter 11 applies in the 12:12:37PM
18 first place, i.e., the 12:12:38PM
19 requirements of 1101(1) are 12:12:39PM
20 met --" 12:12:41PM
21 We have already dealt with 12:12:41PM
22 that. 12:12:43PM
23 "-- and that a claim has 12:12:43PM
24 been brought by a 12:12:44PM
25 Claimant investor in 12:12:45PM

1 accordance with 1116 or 12:12:46PM
2 1117 and that all 12:12:48PM
3 preconditions and 12:12:50PM
4 formalities required 12:12:51PM
5 under 1118-1121 are 12:12:52PM
6 satisfied. Where these 12:12:54PM
7 requirements are met by a 12:12:56PM
8 Claimant, Article 1122 is 12:12:58PM
9 satisfied, and the 12:12:59PM
10 consent to arbitration is 12:13:00PM
11 established." 12:13:02PM

12 Now, the Feldman tribunal also 12:13:02PM
13 had the exact same understanding with respect to 12:13:07PM
14 1122(1), and the limitations period was squarely 12:13:10PM
15 before that tribunal. So you can see from the 12:13:13PM
16 Feldman Award, under the heading "The Arbitral 12:13:16PM
17 Agreement," this is where they bring that same 12:13:19PM
18 link that the Methanex tribunal brought. So 12:13:21PM
19 1122(1) in conjunction with NAFTA Articles 1116 12:13:25PM
20 and 1117, Mexico consents to arbitrate. 12:13:27PM

21 MR. CASS: How would you 12:13:31PM
22 characterize the line between what claims are 12:13:32PM
23 admissible before a tribunal and what claims are 12:13:36PM
24 within a tribunal's jurisdiction? How would you 12:13:39PM
25 identify what the dividing line is between those 12:13:43PM

1 two? 12:13:46PM

2 MR. LUZ: Procedures which go 12:13:47PM

3 to the submission of a claim to arbitration and 12:13:48PM

4 the conditions that need to be fulfilled to do 12:13:51PM

5 that will go to the tribunal's jurisdiction, 12:13:53PM

6 because that's a specific condition that the NAFTA 12:13:55PM

7 parties wrote into Article 1122(1). 12:14:00PM

8 So, for example, the 12:14:03PM

9 requirement to file a waiver of domestic remedies 12:14:05PM

10 against the same measure, that goes to the 12:14:10PM

11 tribunal's jurisdiction, and that has been 12:14:11PM

12 affirmed many times, including by the Waste 12:14:14PM

13 Management tribunal, Detroit International Bridge 12:14:17PM

14 Company, KBR. That's one of the procedures that 12:14:19PM

15 must be done. If you don't file the proper waiver 12:14:22PM

16 and you don't actually cease domestic litigations, 12:14:25PM

17 the tribunal will have no jurisdiction over the 12:14:28PM

18 hearing. Similarly, filing a claim that is 12:14:30PM

19 untimely is also one of those conditions on which 12:14:34PM

20 a NAFTA party consents to arbitrate. 12:14:40PM

21 And that's where it all comes 12:14:44PM

22 down to is the conditions upon which the NAFTA 12:14:46PM

23 parties agree to arbitrate are not unconditional. 12:14:51PM

24 You have to follow the procedures set out in the 12:14:53PM

25 agreement and the limitations period, the waiver 12:14:55PM

1 provision. Those are the ones that are covered. 12:14:58PM

2 And that's been upheld in 12:15:02PM

3 virtually all of the past NAFTA cases. The Bilcon 12:15:07PM

4 tribunal, for example, was one of the latest ones 12:15:11PM

5 to deal with that, and they also pointed out in 12:15:14PM

6 their award how important it was to comply with 12:15:17PM

7 the consent to arbitrate, and the Bilcon tribunal 12:15:19PM

8 accepted that the limitations period in Chapter 11 12:15:25PM

9 went to its jurisdiction to hear a claim. 12:15:29PM

10 In that case, it concluded, as 12:15:32PM

11 you can see here, that there were certain measures 12:15:35PM

12 that occurred before the cutoff period and certain 12:15:37PM

13 measures that occurred after the cutoff period, 12:15:39PM

14 and the ones that occurred prior to that date, the 12:15:42PM

15 jurisdictional objection was upheld. 12:15:46PM

16 So really -- 12:15:50PM

17 MR. CASS: Just one last thing 12:15:51PM

18 on that: There are some academics that attach 12:15:52PM

19 importance to the nature of the considerations 12:15:58PM

20 that go into a particular decision so that, if 12:16:03PM

21 it's a set of considerations that are fairly 12:16:06PM

22 modest and clear, like, have you filed the 12:16:10PM

23 appropriate notice, that is a different sort of 12:16:13PM

24 determination by an arbitration tribunal than a 12:16:17PM

25 look at exactly when facts show that something was 12:16:22PM

1 known or should have been known. 12:16:26PM

2 Do you draw any importance in 12:16:29PM

3 terms of the characterization of something as 12:16:31PM

4 jurisdictional or going to admissibility based on 12:16:34PM

5 the nature of the considerations that the tribunal 12:16:37PM

6 will have to take account of? 12:16:41PM

7 MR. LUZ: Well, with respect 12:16:42PM

8 to academic articles in general, which is 12:16:44PM

9 something that the Claimant has relied on, they're 12:16:48PM

10 not of much value in the sense that the sole 12:16:50PM

11 source of the conditions of consent to arbitrate 12:16:54PM

12 are to be found in the treaty. 12:16:58PM

13 So whereas there is a broad 12:17:00PM

14 debate on jurisdiction versus admissibility in 12:17:03PM

15 theory and in general, really, this tribunal has 12:17:06PM

16 to look at whether or not the limitations period 12:17:09PM

17 is one of the conditions on consent to arbitrate 12:17:12PM

18 in this treaty. The result may be different in 12:17:15PM

19 other treaties. The result may be different in 12:17:19PM

20 commercial arbitration awards and so on. 12:17:24PM

21 In this case, it's a question 12:17:26PM

22 of whether or not the submission of a claim to 12:17:29PM

23 arbitration has complied with what has been set 12:17:33PM

24 out in the treaty. And, again, this is one of 12:17:36PM

25 those provisions that has been consistently 12:17:41PM

1 interpreted by NAFTA tribunals as being one of 12:17:44PM
2 those ones that goes to the consent of the party 12:17:47PM
3 to arbitrate. And once you have a condition that 12:17:50PM
4 goes to consent to arbitrate, that is 12:17:52PM
5 jurisdictional. 12:17:56PM
6 MS. LEVESQUE: If I might 12:17:59PM
7 follow up quickly? 12:18:00PM
8 MR. LUZ: Sure. 12:18:02PM
9 MS. LEVESQUE: I will 12:18:02PM
10 disregard your comment about academic articles 12:18:03PM
11 being worth nothing. I'm kidding. 12:18:06PM
12 MR. LUZ: Only those that 12:18:09PM
13 don't specifically address the NAFTA Chapter 11, 12:18:10PM
14 because every treaty can be different. I want to 12:18:15PM
15 make that clear. I mean, obviously the academic 12:18:17PM
16 articles are excellent, and we appreciate their 12:18:20PM
17 value in general for the distinctions, but my only 12:18:24PM
18 point was that the sole source of determining 12:18:27PM
19 whether or not a question is jurisdictional has to 12:18:29PM
20 be based on the treaty itself. 12:18:32PM
21 And I was -- 12:18:34PM
22 MS. LEVESQUE: Understood. I 12:18:36PM
23 do have a question. 12:18:37PM
24 MR. LUZ: Yes. Sorry. 12:18:38PM
25 MS. LEVESQUE: I do have a 12:18:39PM

1 question. Some tribunals, maybe not in the NAFTA 12:18:40PM
2 context have added to the classical titles of 12:18:43PM
3 jurisdiction, *ratione personae*, *ratione materiae*, 12:18:43PM
4 *ratione temporis*. Some have added *ratione voluntatis* 12:18:53PM
5 to encompass all conditions of consent. 12:18:55PM
6 Does it matter, in this case, 12:18:58PM
7 if we said this is *ratione temporis*, a question of 12:19:00PM
8 jurisdiction *ratione temporis*, or if we fold it 12:19:04PM
9 into jurisdiction *ratione voluntatis*? I'm just 12:19:09PM
10 interested in knowing does it matter, if it's all 12:19:13PM
11 the same anyway. 12:19:15PM
12 MR. LUZ: It's a question I 12:19:16PM
13 haven't thought of, and so I will think about it a 12:19:18PM
14 little bit more, but I can give my -- my initial 12:19:21PM
15 reaction is that, if the idea of *ratione* 12:19:24PM
16 *voluntatis* is that the state cannot be brought to 12:19:28PM
17 arbitration without its consent and there are 12:19:29PM
18 conditions upon which that consent -- that those 12:19:32PM
19 conditions have to be fulfilled in order for that 12:19:37PM
20 consent to be brought together, then, yes, 12:19:40PM
21 absolutely, that is part of the point, because as 12:19:42PM
22 the Bilcon tribunal pointed out -- and I think 12:19:46PM
23 that might even be the last slide that was on 12:19:49PM
24 there -- investor state arbitration is an 12:19:51PM
25 extraordinary remedy. It is not one that exists 12:19:55PM

1 generally in international law. And so whatever 12:19:57PM
2 conditions the treaty parties put on their 12:20:00PM
3 agreement to arbitrate have to be fulfilled. 12:20:02PM
4 And so, yes, the limitations 12:20:05PM
5 period is technically a question of jurisdiction 12:20:08PM
6 *ratione temporis* because it's a temporal aspect, 12:20:11PM
7 but the broader question, which I believe, Dean 12:20:15PM
8 Levesque, you're asking is a broader one of: Has 12:20:19PM
9 the NAFTA party consented to this extraordinary 12:20:22PM
10 remedy of investor state arbitration? And, in 12:20:26PM
11 this case, this is one of those situations that, 12:20:29PM
12 if the condition is not fulfilled, if the claim is 12:20:32PM
13 untimely, there is no consent. 12:20:35PM
14 I will quickly go through the 12:20:40PM
15 lineage, as I had mentioned before, because, as I 12:20:42PM
16 said, this is something that has been addressed in 12:20:47PM
17 previous NAFTA cases. The Glamis tribunal 12:20:50PM
18 specifically said that an objection based on a 12:20:53PM
19 limitation period for raising the claim is a plea 12:20:55PM
20 as to jurisdiction for the purposes of the 12:20:57PM
21 UNCITRAL rules. 12:21:00PM
22 The Grand River tribunal also 12:21:01PM
23 agreed that time bar was jurisdictional. And, 12:21:03PM
24 again, time bar was squarely before it as in the 12:21:07PM
25 Glamis tribunal. 12:21:11PM

1 The Apotex tribunal also 12:21:11PM
2 treated it this way. And, in fact, the tribunal 12:21:14PM
3 specifically asked the question of whether or not 12:21:17PM
4 the limitations period went to its jurisdiction 12:21:19PM
5 and quoted the answer of the United States, which 12:21:23PM
6 you can see above here, evidencing that this is 12:21:25PM
7 not a new position for the United States, but the 12:21:30PM
8 tribunal actually quoted the position of the 12:21:33PM
9 United States and then went on to make a decision 12:21:35PM
10 that, yes, this is a jurisdictional objection. 12:21:37PM
11 And then if I can cite -- it's 12:21:42PM
12 not a NAFTA case but submitted in a NAFTA case. 12:21:45PM
13 Professor Michael Reisman, in his expert opinion, 12:21:50PM
14 filed in the Merrill & Ring case, also considered 12:21:52PM
15 it jurisdiction *ratione temporis*. 12:21:57PM
16 So this brings me to the NAFTA 12:21:59PM
17 1128 submissions that have been filed in this 12:22:01PM
18 case. And as I had mentioned before, the 12:22:03PM
19 positions that are taken in this case, this is 12:22:05PM
20 nothing new. It's a long lineage. You can see 12:22:08PM
21 from the 1128 submissions filed in this case that 12:22:11PM
22 Canada, the United States, and Mexico are in full 12:22:15PM
23 agreement that this is a question of jurisdiction, 12:22:19PM
24 and it is for the Claimant to establish -- it is 12:22:21PM
25 its burden to establish that the condition has 12:22:25PM

1 Article 31(3) directs a tribunal on questions of 12:23:30PM
2 interpretation that there shall be taken into 12:23:34PM
3 account, together with the context, subsequent 12:23:38PM
4 agreement and subsequent practice. 12:23:41PM

5 So what does "shall be taken 12:23:43PM
6 into account"? It's certainly not binding, but it 12:23:46PM
7 shall be taken into account. So the tribunal has 12:23:49PM
8 to take into account. 12:23:51PM

9 And then the next question is: 12:23:53PM
10 Well, what weight do you give it? Well, given the 12:23:55PM
11 fact that this, as well as the legally significant 12:23:58PM
12 connection test that we talked about earlier, has 12:24:00PM
13 been such a long-standing and concordant practice 12:24:03PM
14 in other cases, not just in cases in which the 12:24:08PM
15 NAFTA parties were involved directly themselves, 12:24:13PM
16 but in cases where there were non-disputing 12:24:16PM
17 parties, that concordant, long-standing practice 12:24:20PM
18 has to be given strong weight and considerable 12:24:24PM
19 weight because it does evidence a consistent 12:24:26PM
20 practice and agreement. 12:24:29PM

21 And the tribunal in Cattlemen, 12:24:33PM
22 for example, did recognize that, that these 1128 12:24:39PM
23 submissions can constitute practice. And, in that 12:24:41PM
24 case, it really was -- they were dealing with an 12:24:44PM
25 issue that had only come up in that particular 12:24:48PM

1 case. It's very different than here where this 12:24:50PM
2 is -- this goes back many, many years, both for 12:24:53PM
3 the NAFTA parties and NAFTA tribunals. 12:24:56PM

4 So Canada's view is that 12:24:59PM
5 tribunals should be loath to stray away from the 12:25:01PM
6 consistent agreement position of the NAFTA parties 12:25:06PM
7 as well as loath to stray away from the seven 12:25:11PM
8 NAFTA Tribunals that I have already referred to, 12:25:13PM
9 treating it as a jurisdictional question. 12:25:16PM

10 Now, just on this point very 12:25:20PM
11 briefly, the Claimant only really points to the 12:25:23PM
12 Pope and Talbot decision in the Harmac decision 12:25:28PM
13 back in 2000 in which that tribunal characterized 12:25:32PM
14 Canada's time bar defence in that case as an 12:25:39PM
15 affirmative defence. 12:25:42PM

16 Now, that was not actually a 12:25:48PM
17 general legal conclusion as to admissibility 12:25:50PM
18 versus jurisdiction. Indeed, the question was 12:25:52PM
19 never raised. But, rather, it was an observation 12:25:54PM
20 as to how Canada had raised its time bar objection 12:25:57PM
21 for the non-consecutive submission of a waiver by 12:26:00PM
22 the investors' investment. 12:26:04PM

23 But, in any event, if the 12:26:07PM
24 affirmative defence statement from the Harmac 12:26:09PM
25 motion is supposed to mean that compliance with 12:26:12PM

1 1116(2) is not necessary to engage consent to 12:26:18PM
2 arbitrate, well, that proposition has never been 12:26:23PM
3 endorsed by another NAFTA tribunal and nor has 12:26:28PM
4 some of the other conclusions that that Harmac 12:26:31PM
5 motion even brought up, for example. 12:26:34PM

6 And actually, Dean Cass, I 12:26:36PM
7 brought this example up earlier. One of the 12:26:38PM
8 things that that tribunal had said is that 12:26:40PM
9 submitting a waiver actually is not a 12:26:42PM
10 jurisdictional issue. That has been overtaken in 12:26:44PM
11 subsequent years. Other NAFTA Tribunals have said 12:26:48PM
12 very clearly that that is not the case, and it is 12:26:51PM
13 a jurisdictional issue just like the time bar. 12:26:53PM

14 So now that I have dealt with 12:27:00PM
15 that issue, I would like to get back to the 12:27:01PM
16 interpretation of the provision and one of the 12:27:02PM
17 questions that the tribunal asked at A-2. So what 12:27:04PM
18 interpretation should be given to the word 12:27:08PM
19 "incurred"? Does it mean that a party not only 12:27:10PM
20 know that damage will occur, but that it actually 12:27:14PM
21 has occurred? 12:27:16PM

22 Now, before I answer the 12:27:18PM
23 question, I have to emphasize that the evidence on 12:27:21PM
24 this dispute demonstrates multiple grounds which 12:27:26PM
25 demonstrates incurred alleged loss or damage. 12:27:31PM

1 It's not just about the prices that Professor 12:27:35PM
2 Hausman had testified about. There are multiple 12:27:39PM
3 other ways that one can approach, in this 12:27:41PM
4 particular case, the question of incurred. So I'm 12:27:43PM
5 pleased to answer the question, but there's no 12:27:47PM
6 need to try and capture all of the possible 12:27:53PM
7 meanings of "incurred loss or damage." Usually 12:27:55PM
8 it's a factual determination, and, in this case, 12:27:57PM
9 that's where it really would turn. 12:28:00PM

10 But the Grand River tribunal 12:28:03PM
11 actually addressed the meaning of the word "incur" 12:28:05PM
12 as such. And they said that it means to become 12:28:08PM
13 liable to. And I will just read from this because 12:28:11PM
14 they stated it very well: 12:28:14PM

15 "Judicial dicta likewise 12:28:16PM
16 suggests that one incurs 12:28:18PM
17 a loss when liability 12:28:19PM
18 accrues. A person may 12:28:21PM
19 incur expenses before he 12:28:22PM
20 or she actually dispenses 12:28:23PM
21 any funds." 12:28:25PM

22 PRESIDENT: When they say 12:28:26PM
23 "liability," they mean legal liability. 12:28:28PM
24 MR. LUZ: Legal liability. 12:28:30PM
25 PRESIDENT: Because that was 12:28:31PM

1 liability to pay money in future. 12:28:33PM

2 MR. LUZ: Exactly. 12:28:34PM

3 PRESIDENT: It was a present 12:28:36PM

4 legal liability. 12:28:37PM

5 MR. LUZ: That's right. 12:28:38PM

6 That's right. 12:28:38PM

7 So, for example, in Grand 12:28:38PM

8 River, the circumstances were the legal liability 12:28:41PM

9 to pay into a master settlement agreement escrow 12:28:47PM

10 fund had accrued earlier, much earlier than the 12:28:51PM

11 time that the Claimants actually ever paid 12:28:54PM

12 anything. They had averred that they actually 12:28:56PM

13 didn't even know about their liability to pay, so 12:29:00PM

14 they had not actually incurred financial loss in 12:29:02PM

15 the sense that they had taken money out of their 12:29:04PM

16 pockets and put it into the escrow fund. The 12:29:06PM

17 tribunal said, "Well, that's not when the 12:29:11PM

18 limitations period starts. It's when you incur 12:29:13PM

19 the liability to do that." 12:29:16PM

20 And so, as we will talk about 12:29:18PM

21 a little bit later today, if it's true that the 12:29:21PM

22 lower -- just to take an example from this 12:29:25PM

23 particular case, if it's true that lower priced 12:29:28PM

24 contracts were incurred in 2012, even though the 12:29:33PM

25 paper wasn't delivered until 2013, well, your 12:29:39PM

1 damage is incurred at the time that you signed the 12:29:43PM
2 contract because it is, as Judge Crawford said, a 12:29:45PM
3 legal liability. 12:29:49PM

4 MR. CASS: But you're not 12:29:50PM
5 saying that, if prices go down routinely and come 12:29:52PM
6 back up and go down and come back up, that any dip 12:29:57PM
7 in price is equivalent to incurring a loss, and 12:30:02PM
8 one should know at that point that you have 12:30:07PM
9 incurred a loss and why you have incurred a loss, 12:30:10PM
10 or is that your argument? 12:30:14PM

11 MR. LUZ: That's a difficult 12:30:16PM
12 question to answer in the abstract, and I 12:30:21PM
13 understand where this is coming from because of 12:30:24PM
14 the way that the Claimants presented their case. 12:30:26PM

15 It depends on how you 12:30:32PM
16 characterize the breach. So, for example, in this 12:30:33PM
17 case, the Claimants have characterized the breach 12:30:35PM
18 as a damage to their competitive position. When 12:30:37PM
19 was their competitive position incurred or 12:30:43PM
20 damaged? Well, it was when the previously 12:30:47PM
21 shutdown mill came back online and started 12:30:50PM
22 producing paper. So it's possible, in some 12:30:54PM
23 circumstances, that there would be a lag time 12:30:58PM
24 between understanding when a loss had actually 12:31:02PM
25 incurred, but that's not the case here, because 12:31:04PM

1 the Claimants have agreed and admitted that their 12:31:08PM
2 lower priced contracts in January were known to 12:31:12PM
3 them and their prices were known to them in the 12:31:15PM
4 previous year. So that's at the point that they 12:31:18PM
5 had incurred liability and the limitations period 12:31:24PM
6 had been triggered. 12:31:27PM

7 PRESIDENT: There is a link 12:31:28PM
8 between the breach and the injury or damage. 12:31:29PM
9 Sorry. There is a link between the breach and the 12:31:34PM
10 damage. It's not just any effect as you say. It 12:31:37PM
11 is a damage which bears a connection to the 12:31:42PM
12 breach. 12:31:46PM

13 MR. LUZ: Yes. 12:31:47PM

14 PRESIDENT: And it says it has 12:31:50PM
15 been incurred. So it's talking about something 12:31:54PM
16 that is present. Now, it may be present because 12:31:59PM
17 there's a legal liability, and it may be present 12:32:02PM
18 because there's been a factual situation which is 12:32:04PM
19 injured here. But one of those things has to be 12:32:06PM
20 present at the time. It seems, at least arguable, 12:32:10PM
21 that it's not enough to say, "I'm quite certain 12:32:14PM
22 that I will suffer damage in future," if you 12:32:18PM
23 haven't suffered it yet. It is not a legal 12:32:21PM
24 liability, but it's bound to happen that we will 12:32:25PM
25 suffer in future, but we haven't suffered yet. 12:32:28PM

1 But you might add, "Hopefully, perhaps we won't 12:32:32PM
2 suffer it, but we expect we will, but it hasn't 12:32:34PM
3 been incurred yet." 12:32:37PM

4 MR. LUZ: Well, then the 12:32:39PM
5 question becomes: Is that just a question of 12:32:40PM
6 knowledge of the extent or quality of the loss? 12:32:44PM
7 And if that's the emphasis, well, then that 12:32:49PM
8 clearly is in the NAFTA jurisprudence that it's 12:32:51PM
9 not necessary for a party to know. You don't need 12:32:54PM
10 to know the extent of the loss or the quantum of 12:32:57PM
11 the loss. Certainly, if you know that it is going 12:33:01PM
12 to cause you lose or damage; you just don't know 12:33:06PM
13 how much, well, then that is sufficient to incur 12:33:11PM
14 for the purposes of NAFTA. 12:33:15PM

15 So to go back to the Grand 12:33:17PM
16 River case, at that point, the Claimants had said 12:33:19PM
17 that they didn't even know that they had to comply 12:33:23PM
18 with the escrow statutes to be able to put monies 12:33:28PM
19 as a percentage of their cigarette sales every 12:33:32PM
20 year. So they didn't know how much it was going 12:33:35PM
21 to be, but it was something that they should have 12:33:37PM
22 known at the time. Hence, that was the incurred 12:33:39PM
23 loss or damage that triggered the limitations 12:33:45PM
24 period in that case. 12:33:48PM

25 Now, I think -- 12:33:50PM

1 PRESIDENT: Let's take an 12:33:52PM
2 analogy from the law of tort. Let's assume that 12:33:53PM
3 I'm exposed to some chemical substance 12:33:58PM
4 radioactivity or something like that, which is, from 12:34:04PM
5 an etiological point of view, more or less bound 12:34:12PM
6 to cause me harm in the future. So I've become 12:34:14PM
7 especially vulnerable to whatever, the cancer or 12:34:17PM
8 whatever it is, but I haven't got it yet. 12:34:19PM
9 You can't say the damage has 12:34:24PM
10 been incurred merely because of the exposure, can 12:34:25PM
11 you? 12:34:27PM
12 MR. LUZ: Arguably, yes. It 12:34:28PM
13 would be, because you know -- you may not know how 12:34:31PM
14 much damage you will suffer, and that becomes a 12:34:35PM
15 question of quantification, how much damage you 12:34:37PM
16 are going to suffer. But if the question is that 12:34:40PM
17 there's damage in that I have been exposed to 12:34:46PM
18 something that is going to damage me, well, then 12:34:48PM
19 that is damage incurred. 12:34:50PM
20 In fact, I think this actually 12:34:53PM
21 brings me to the next point. 12:34:54PM
22 Sorry, please go ahead. 12:34:57PM
23 MR. CASS: Just to use the 12:34:58PM
24 same example there, if you filed a suit claiming 12:35:00PM
25 damage for exposure to something that increases 12:35:05PM

1 your possibility of getting cancer, you don't 12:35:11PM
2 think there would be a ripeness question or 12:35:14PM
3 challenge to the suit at that point if there has 12:35:19PM
4 been no cancer? 12:35:22PM

5 MR. LUZ: Well, clearly there 12:35:27PM
6 has to be something that's material and cognizable 12:35:28PM
7 in terms of an incurred loss or damage. 12:35:31PM
8 Absolutely we would agree with that. 12:35:34PM

9 But the use of the term "loss" 12:35:36PM
10 or "damage" in 1116(2) and 1117(2) is significant 12:35:39PM
11 because the concepts can mean two different 12:35:46PM
12 things. And, in fact -- and I think this is an 12:35:48PM
13 important factor for the tribunal to keep in mind 12:35:51PM
14 here, especially when it is considering the 12:35:54PM
15 evidence that is currently before it -- the 12:35:56PM
16 Claimant's alleging more than just a loss of its 12:35:59PM
17 Laurentide mill and just a loss in terms of its 12:36:02PM
18 prices. It's alleging damage to its competitive 12:36:05PM
19 position in the market. 12:36:11PM

20 So, now, just to be clear, 12:36:16PM
21 Canada doesn't agree that the damages that the 12:36:17PM
22 Claimants are asking for are compensable under 12:36:19PM
23 Chapter 11, but let's just look at the way that 12:36:23PM
24 they have characterized their claim. 12:36:26PM

25 If you look at paragraph 104 12:36:27PM

1 and 106 of their NOA, paragraph 104: 12:36:29PM

2 "Nova Scotia changed the 12:36:36PM

3 terms of competition 12:36:37PM

4 among SC paper mills in 12:36:38PM

5 Canada when it preserved 12:36:40PM

6 the bankrupt Port 12:36:43PM

7 Hawkesbury mill in hot 12:36:44PM

8 idle, committed more than 12:36:45PM

9 124.5 million to its 12:36:46PM

10 revival, and helped cap 12:36:47PM

11 operating expenses. 12:36:49PM

12 Paragraph 106: 12:36:49PM

13 "Nova Scotia has 12:36:51PM

14 rearranged the SC paper 12:36:52PM

15 market in Canada by 12:36:55PM

16 presenting Resolute with 12:36:56PM

17 a direct competitor that 12:36:56PM

18 is bankrolled by Nova 12:36:57PM

19 Scotia's public purse." 12:36:59PM

20 So the damage that the 12:37:00PM

21 Claimant is alleging is that Nova Scotia changed 12:37:02PM

22 the terms of competition through hot idle funding, 12:37:06PM

23 for example, which was something that had started 12:37:10PM

24 in 2011 and continued on until September 2012. 12:37:12PM

25 And the damage that they're alleging is allegedly 12:37:17PM

1 rearranging the market and unfairly presenting 12:37:21PM
2 Resolute with a direct competitor bankrolled by 12:37:24PM
3 the public purse. Well, that's an allegation of 12:37:26PM
4 damage which occurred in September 2012. 12:37:29PM

5 PRESIDENT: Let's assume that 12:37:31PM
6 my exposure to this putative substance greatly 12:37:34PM
7 increases the risk that I will get cancer or 12:37:40PM
8 something, but doesn't make it absolutely certain. 12:37:43PM
9 And this is true, because I can be exposed to 12:37:48PM
10 quite high levels of carcinogenic substances and 12:37:51PM
11 not get cancer. Not every heavy cigarette smoker 12:37:54PM
12 gets cancer. So I'm in a situation where it's 12:37:59PM
13 likely that I will suffer damage, but I haven't 12:38:03PM
14 suffered it yet. 12:38:06PM

15 You can't say that that injury 12:38:07PM
16 has been incurred, can you? 12:38:11PM

17 MR. LUZ: In that example, 12:38:13PM
18 then that might be an issue of ripeness, because 12:38:16PM
19 then that is a question of whether or not you 12:38:21PM
20 could actually demonstrate you have actually 12:38:23PM
21 incurred loss or damage if you have been exposed 12:38:25PM
22 to it, but there's no indication that your body 12:38:28PM
23 has reacted in a negative way. 12:38:31PM

24 PRESIDENT: Might have, but 12:38:33PM
25 you only find out later on. 12:38:33PM

1 MR. LUZ: Right. But in this 12:38:35PM
2 case, we can see that the evidence is not what the 12:38:36PM
3 Claimants have said. There's not a time delay. 12:38:41PM
4 I mean, I go back to the one 12:38:44PM
5 example, because we heard about it this morning. 12:38:45PM
6 If you know that your contract prices are going to 12:38:49PM
7 be lower at the time that you sign them, the fact 12:38:52PM
8 that the paper is not actually delivered until 12:38:58PM
9 months later, you don't measure the limitations 12:39:00PM
10 period from the latter point. You measure it from 12:39:03PM
11 the former point. 12:39:05PM
12 PRESIDENT: But let's assume 12:39:06PM
13 that prices fluctuate all the time in markets, and 12:39:09PM
14 you can't show at the time that the consequence of 12:39:13PM
15 the mill coming back on stream is the lower 12:39:19PM
16 prices. There may be other reasons for it. In 12:39:23PM
17 effect, the Claimant is put in a more fragile 12:39:25PM
18 situation like the person exposed to radioactivity 12:39:30PM
19 or carcinogenic substances. But whether that is 12:39:33PM
20 going to lead to injury -- it's likely that it 12:39:36PM
21 will. You might say it's practically certain, but 12:39:40PM
22 it hasn't happened yet. It hasn't been incurred. 12:39:43PM
23 MR. LUZ: Well, certainly one 12:39:46PM
24 way to find that out is to do medical tests and 12:39:48PM
25 examine whether or not there actually has been -- 12:39:52PM

1 PRESIDENT: Exactly. Yet the 12:39:54PM
2 medical tests don't show you anything. All the 12:39:55PM
3 doctor can say is there's a real risk, and we have 12:39:57PM
4 to go on doing tests into the future. 12:40:00PM
5 MR. LUZ: So, in this case, 12:40:03PM
6 because we haven't had the opportunity to go into 12:40:04PM
7 Resolute's actual documentation and their 12:40:06PM
8 contemporaneous -- there's no witness here from 12:40:10PM
9 Resolute to tell us what they knew and actually 12:40:15PM
10 knew. We don't have the internal documents as to 12:40:18PM
11 whether or not the people inside Resolute knew 12:40:21PM
12 what was going on. Then we are operating in a bit 12:40:23PM
13 of the dark. 12:40:27PM
14 Now, that's just with respect 12:40:28PM
15 to certain pricing information. We do know, 12:40:30PM
16 because Resolute has admitted that it negotiated 12:40:35PM
17 its lower priced contracts in 2012, so it did know 12:40:39PM
18 at that time that its prices were going to be 12:40:44PM
19 lower. And if you put it all together, in 12:40:46PM
20 addition to all the other evidence, much of which 12:40:49PM
21 is unrebutted by Resolute, including the 12:40:52PM
22 statements of their corporate spokesperson, that 12:40:56PM
23 they started to readjust in order to deal with the 12:40:59PM
24 new competitor on the market, well, then that 12:41:05PM
25 gives the tribunal the picture that they knew or 12:41:10PM

1 ought to have known at the time of the measures 12:41:12PM
2 that it was going to be -- that's sufficient to 12:41:15PM
3 trigger the limitations period. 12:41:19PM

4 Now, again, we already talked 12:41:21PM
5 about this earlier, that this creates a 12:41:22PM
6 jurisdictional catch-22 for the Claimants, because 12:41:27PM
7 if the argument is that, well, no one had any idea 12:41:29PM
8 of what this was going to do to the market at all, 12:41:32PM
9 well, then how could Nova Scotia have ever known 12:41:35PM
10 that it was going to hurt them at all? That 12:41:38PM
11 undercuts everything that the Claimant had said 12:41:41PM
12 right from the very beginning is that Nova Scotia 12:41:43PM
13 intended to hurt them, wanted to hurt them, wanted 12:41:44PM
14 to put their mills out of business. But if what 12:41:47PM
15 we're saying now is no one had any idea what the 12:41:52PM
16 impact was going to be, that hurts them on the 12:41:55PM
17 1101 side simply for the purposes of the 12:41:58PM
18 limitations period. It's a date. It's a fact. 12:42:00PM
19 When did they know or first know? 12:42:04PM

20 And, in this case, the 12:42:07PM
21 evidence is already strong, if not decisive -- I 12:42:09PM
22 would actually say it is decisive -- that they 12:42:14PM
23 actually knew in 2012. But this actually gets to 12:42:16PM
24 something else I want to bring up in terms of the 12:42:24PM
25 evidence. 12:42:26PM

1 MR. CASS: I don't want to 12:42:28PM
2 delay you too long. 12:42:29PM
3 MR. LUZ: Please. 12:42:30PM
4 MR. CASS: But if I throw a 12:42:31PM
5 ball at Mr. Feldman, the moment it leaves my 12:42:33PM
6 hands, I have taken an action; right? Before the 12:42:39PM
7 ball gets to Mr. Feldman, he may try to duck. The 12:42:42PM
8 ball may or may not strike him. If, in a 12:42:47PM
9 slow-motion world, he files suit against me, between 12:42:52PM
10 the time that I throw it and the time it gets to 12:42:55PM
11 him, are you going to say he has incurred a loss 12:42:58PM
12 because it may strike him? He should know it 12:43:03PM
13 might strike him? Or are you are you going to say 12:43:08PM
14 it's premature to file that suit? Because even 12:43:12PM
15 though my intent is to strike him with the ball, 12:43:16PM
16 it may or may not happen. 12:43:20PM
17 MR. LUZ: Certainly if the 12:43:22PM
18 claim had been filed at the time that the Port 12:43:24PM
19 Hawkesbury mill was not even open, then that would 12:43:28PM
20 be -- 12:43:31PM
21 MR. CASS: I'm trying to get 12:43:33PM
22 the test right. 12:43:34PM
23 MR. LUZ: Sure. 12:43:35PM
24 MR. CASS: We will get to the 12:43:36PM
25 evidence, I'm sure. 12:43:37PM

1 MR. LUZ: The ball actually 12:43:37PM
2 has to cause the injury. It has to hit. It has 12:43:39PM
3 to hit, yes. 12:43:42PM

4 MR. CASS: That answers my 12:43:46PM
5 question. 12:43:47PM

6 PRESIDENT: So a vulnerability 12:43:48PM
7 to be hit by a ball is not incurred injury. 12:43:50PM

8 MR. LUZ: No. I don't think 12:43:53PM
9 we could go that far. That's to say, the ball has 12:43:55PM
10 to hit. And, in this case, the way that they pled 12:43:57PM
11 is the ball has hit. The competitor came back 12:44:00PM
12 onto the market. 12:44:03PM

13 So let's not get distracted by 12:44:05PM
14 pricing and so on. They have claimed that their 12:44:08PM
15 competitive position was altered because they 12:44:12PM
16 didn't have an extra competitor before and one 12:44:15PM
17 that had a lot of capacity. 12:44:18PM

18 PRESIDENT: One way of putting 12:44:21PM
19 their case is that they were vulnerable to 12:44:22PM
20 predatory pricing because of the situation that 12:44:25PM
21 Nova Scotia measures had put them -- put the 12:44:27PM
22 various participants in the market in. And so it 12:44:30PM
23 was a case of vulnerability that wasn't triggered 12:44:34PM
24 until the ball hit, which was in 2014. 12:44:38PM

25 MR. LUZ: Well, that's with 12:44:43PM

1 respect to the alleged expropriation of the mill. 12:44:45PM
2 I think we can agree it's a slightly different 12:44:50PM
3 characterization. If the idea is that the 12:44:54PM
4 competitive position -- it was unfair for Nova 12:44:56PM
5 Scotia to bring a competitor back online and alter 12:44:59PM
6 the SC paper market, well, the ball hit when the 12:45:03PM
7 competitor came back onto the market. 12:45:07PM
8 PRESIDENT: There may be a 12:45:10PM
9 difference from the perspective of 1116 and 12:45:12PM
10 1117(2) between the different claims. And I 12:45:16PM
11 wanted to pursue this in relation to 12:45:20PM
12 expropriation, because, in their counter-memorial 12:45:22PM
13 on jurisdiction, the Claimant says that the breach 12:45:28PM
14 of 1110 didn't occur until the mill closed in 12:45:36PM
15 2014. 12:45:42PM
16 If that's true, then there is 12:45:43PM
17 no problem under 1116, because 1116 isn't -- the 12:45:44PM
18 time limit doesn't start to run until both breach 12:45:53PM
19 and injury are known or should have been known. 12:45:55PM
20 So there is, I think, a special problem in the 12:45:59PM
21 context of expropriation. 12:46:05PM
22 Now, of course, there's a lot 12:46:06PM
23 more to be said about expropriation, but I would 12:46:08PM
24 draw your attention -- I draw the Claimant's 12:46:10PM
25 attention too -- to cases that haven't been cited, 12:46:13PM

1 Foremost-McKesson and Iran in the Iran-U.S. claims 12:46:17PM
2 tribunal and in the American courts. Those are 12:46:22PM
3 the leading cases, to my knowledge, on the 12:46:25PM
4 question when indirect expropriation occurs. 12:46:28PM
5 You can't have a breach of 12:46:33PM
6 1110 unless the expropriation has occurred. And 12:46:37PM
7 on the Claimant's case, which you didn't really 12:46:41PM
8 rebut, if I may say so, in the reply, the breach 12:46:47PM
9 didn't occur until 2014. Now, I really have a 12:46:52PM
10 problem that the Claimant has spent most of its 12:46:56PM
11 time arguing about injury rather than breach, but 12:46:58PM
12 it has made that point. 12:47:03PM
13 MR. LUZ: Right. 12:47:04PM
14 PRESIDENT: And I would like 12:47:05PM
15 to know what your response to it is, not 12:47:05PM
16 necessarily now, but at some point today. 12:47:08PM
17 MR. LUZ: Thank you, Judge 12:47:10PM
18 Crawford. And I will leave it mostly to my 12:47:12PM
19 colleague Ms. Wates, because she will address 12:47:15PM
20 this, but just to generally say this is the 12:47:18PM
21 jurisdictional catch-22 that the Claimant has put 12:47:24PM
22 out for itself, because if the expropriation of 12:47:26PM
23 the taking of the mill, the expropriation of the 12:47:30PM
24 mill, didn't occur until October 2014, then the 12:47:32PM
25 question is: Well, who expropriated the mill? It 12:47:38PM

1 wasn't Nova Scotia. I mean, the mill was not even 12:47:42PM
2 in Nova Scotia, so it could not have been 12:47:46PM
3 expropriated by the Government of Nova Scotia. 12:47:48PM
4 So while technically, yes, you 12:47:54PM
5 normally would start an expropriation from the 12:47:57PM
6 time of the actual taking, but there was no taking 12:47:59PM
7 by Nova Scotia in October 2014. Whatever happened 12:48:04PM
8 in 2014, that was PHP allegedly, so that creates a 12:48:09PM
9 problem under 1101(1) in attribution. 12:48:19PM
10 PRESIDENT: You're saying, in 12:48:23PM
11 effect, that, since the expropriation, if there 12:48:24PM
12 was one, didn't occur until 2014, the problem is 12:48:31PM
13 not one of the three-year time limit. The problem 12:48:34PM
14 is that, on the Claimant's own case, there can't 12:48:38PM
15 have been an expropriation. 12:48:43PM
16 MR. LUZ: That is our primary 12:48:45PM
17 view on that. 12:48:46PM
18 PRESIDENT: And you argue that 12:48:47PM
19 by reference to 1101? 12:48:49PM
20 MR. LUZ: Exactly. Exactly. 12:48:51PM
21 The way that the Claimant had originally said was 12:48:58PM
22 that their claim was that Nova Scotia had 12:49:00PM
23 expropriated their market share and their sales 12:49:04PM
24 and that allegedly occurred when the competitor 12:49:07PM
25 came back onto the market. Then they said that 12:49:10PM

1 Nova Scotia must have intended and must have 12:49:13PM
2 wanted to expropriate the mill when it adopted the 12:49:15PM
3 measure. But we've heard testimony and argument 12:49:20PM
4 to say that no one knew that this was going to be 12:49:25PM
5 the case. 12:49:28PM

6 So there's a conflict here. 12:49:28PM
7 If Nova Scotia knew that it was going to 12:49:32PM
8 expropriate the mill in 2012, two years later, 12:49:34PM
9 well, then Resolute must have known as well and so 12:49:41PM
10 would everyone else. But if they didn't know that 12:49:43PM
11 and the expropriation didn't take place until 12:49:47PM
12 October 2014, well, then the question is: Well, 12:49:49PM
13 who expropriated this mill? It certainly wasn't 12:49:52PM
14 Nova Scotia. This was years after the last 12:49:55PM
15 measure. So our view is that it ends up outside 12:49:57PM
16 the tribunal's jurisdiction in either case. 12:50:01PM

17 PRESIDENT: If I'm exposed to 12:50:05PM
18 a carcinogenic substance which does, in fact, 12:50:07PM
19 cause cancer three years later, there's no 12:50:11PM
20 particular problem in saying that the breach was 12:50:13PM
21 attributable to the person who exposed me to the 12:50:20PM
22 substance even though the exposure was a lot 12:50:23PM
23 earlier. In effect, the analogy is this has 12:50:26PM
24 created a vulnerability. The vulnerability wasn't 12:50:30PM
25 triggered until later on, and, therefore, the 12:50:33PM

1 breach occurred later on, but it was still a 12:50:35PM
2 breach attributable to my point of exposure. 12:50:37PM
3 MR. LUZ: Indeed. Although, 12:50:41PM
4 again, I'm putting aside all of the other sources 12:50:42PM
5 of evidence that we already have in here in terms 12:50:46PM
6 of incurred loss or damage. If the idea is that 12:50:48PM
7 the damage is that there's now a competitor that 12:50:53PM
8 was not there before and that competitor came back 12:50:55PM
9 onto the market because of assistance given to it 12:51:00PM
10 by the Government of Nova Scotia, well, then 12:51:03PM
11 that's the damage that has been alleged. 12:51:04PM
12 PRESIDENT: That would mean 12:51:07PM
13 that, if you're right on the facts, that the 12:51:08PM
14 breach and the damage occurred in 2012 in respect 12:51:13PM
15 of the claim under 1102 and 1105, but it wouldn't 12:51:18PM
16 be the case for expro because, even though there was 12:51:24PM
17 exposure in 2012, the breach didn't occur 12:51:28PM
18 until later on when the taking actually occurred, 12:51:34PM
19 and the taking occurred in 2014 on this theory of 12:51:36PM
20 the case. I mean, there are problems with the 12:51:39PM
21 theory of the case, but the question is whether they 12:51:41PM
22 are jurisdictional problems. 12:51:44PM
23 MR. LUZ: Right. Right. No. 12:51:46PM
24 I think we would agree with that. 12:51:47PM
25 I don't want to take up too 12:51:53PM

1 much more time, but I actually do have something 12:51:55PM
2 very important, because I think the tribunal has 12:51:57PM
3 been and we have all been sort of dancing around 12:51:58PM
4 one of these questions. It's sort of the elephant 12:52:00PM
5 in the room. 12:52:03PM
6 Let me go back to the Grand 12:52:05PM
7 River case because I think it's helpful there. In 12:52:06PM
8 that case, the Claimants actually filed sworn 12:52:08PM
9 affidavits with the tribunal in the preliminary 12:52:12PM
10 phase, saying that they did not know of their 12:52:15PM
11 liability to pay into the escrow funds. They did 12:52:18PM
12 not know of the various court proceedings that had 12:52:22PM
13 been launched against them in various other states 12:52:27PM
14 that related to the master settlement agreement 12:52:33PM
15 with respect to cigarettes. 12:52:36PM
16 So, in that case, you actually 12:52:38PM
17 had the Claimants putting forth sworn witness 12:52:40PM
18 statements that, at that time, because it was a 12:52:43PM
19 preliminary phase, there hadn't been document 12:52:44PM
20 production, and there hadn't been 12:52:46PM
21 cross-examination. But at least they had 12:52:49PM
22 something saying they had no actual knowledge. 12:52:51PM
23 Again, the tribunal then 12:52:56PM
24 turned to the second part of the test, 12:52:57PM
25 constructive knowledge, and the tribunal ruled 12:52:59PM

1 that they should have known at the time of the 12:53:01PM
2 master settlement agreement and at the time the 12:53:06PM
3 escrow statutes were enacted that they had 12:53:08PM
4 incurred the loss or damage that they had claimed. 12:53:10PM
5 So that was when the legal liability occurred. 12:53:13PM
6 But, in this case, we don't 12:53:16PM
7 have that. We don't have any witness statement 12:53:18PM
8 from Resolute saying what they actually knew and 12:53:20PM
9 when, and I will leave it again to my colleague to 12:53:26PM
10 talk about the probative value of what the 12:53:28PM
11 Claimants have submitted. But the tribunal did 12:53:31PM
12 ask the question at Question 4: 12:53:34PM
13 If the evidence on the 12:53:36PM
14 record is not sufficient 12:53:37PM
15 for the tribunal to make 12:53:38PM
16 this determination, then 12:53:39PM
17 what should the outcome 12:53:40PM
18 be?" 12:53:42PM
19 The first option is the 12:53:43PM
20 Claimant has not met its burden to prove 12:53:43PM
21 jurisdiction *ratione temporis* or, two, the issue 12:53:47PM
22 is joined to the merits. 12:53:49PM
23 Now, again, Canada's position 12:53:51PM
24 is that there are multiple bases upon which you 12:53:52PM
25 can approach this question to find the limitations 12:53:55PM

1 period has not been met. But, if not, it should 12:54:00PM
2 be the first outcome: The Claimant has not met 12:54:02PM
3 its burden to establish this tribunal's 12:54:06PM
4 jurisdiction. 12:54:08PM

5 But the second alternative in 12:54:09PM
6 the tribunal's question, joined to the merits, 12:54:11PM
7 that actually should not be the second option. 12:54:14PM
8 That really would defeat the purpose of having a 12:54:19PM
9 preliminary phase and why bifurcation was ordered 12:54:21PM
10 in the first place. Instead, if this is 12:54:24PM
11 absolutely necessary for the tribunal to make a 12:54:27PM
12 determination, then there should be targeted 12:54:29PM
13 document production coming from the Claimant. 12:54:31PM

14 Now, the tribunal will recall 12:54:33PM
15 that, earlier on, Canada had specifically asked 12:54:35PM
16 that the schedule in the preliminary phase allow 12:54:38PM
17 for the possibility of document production after 12:54:41PM
18 the Claimant filed its counter-memorial. 12:54:44PM
19 Procedural Order No. 3 took note of that, and 12:54:47PM
20 Procedural Order No. 5 said there would be no 12:54:49PM
21 document production necessary in this phase. 12:54:52PM
22 Obviously Canada respected the decision of the 12:54:54PM
23 tribunal. 12:54:57PM

24 But if Resolute argues that 12:54:58PM
25 it's Canada's burden to prove what it actually 12:55:01PM

1 knew, as if Canada had this omnipotent knowledge 12:55:05PM
2 of what everyone is actually knowing within the 12:55:08PM
3 walls of their offices, then procedural fairness 12:55:12PM
4 demands that Canada be granted access to the 12:55:15PM
5 source of that knowledge. 12:55:20PM

6 So, again, while the first 12:55:21PM
7 option should be that there has been no 12:55:24PM
8 jurisdiction *ratione temporis* or *voluntatis* found, 12:55:27PM
9 because the Claimant hasn't fulfilled it, then the 12:55:32PM
10 tribunal can exercise its authority under 12:55:36PM
11 Procedural Order No. 2, paragraph 12, and the 12:55:39PM
12 UNCITRAL rules Article 24(3) to order the 12:55:43PM
13 Claimants to produce documents, and Canada would 12:55:46PM
14 be pleased to submit categories of documents that 12:55:49PM
15 the tribunal could order. 12:55:54PM

16 But, again, let's hear from 12:55:57PM
17 Ms. Wates first with respect to the evidence that 12:56:00PM
18 is on the record, because Canada's view is that 12:56:02PM
19 the evidence is already very convincing, and so is 12:56:05PM
20 Jenna, so I will stand down now unless the 12:56:09PM
21 tribunal has any questions now. If not, this 12:56:12PM
22 might actually be a good time -- I'm not sure how 12:56:16PM
23 much time we have had, but it's probably the right 12:56:19PM
24 time for a break for lunch, and then we can 12:56:21PM
25 return, if that's what the tribunal would like. 12:56:23PM

1 PRESIDENT: I think that's 12:56:26PM
2 what the tribunal would like. It's ten to one, 12:56:27PM
3 and we will start again at ten to two. 12:56:31PM
4 MR. LUZ: Thank you. 12:56:36PM
5 PRESIDENT: Thank you. 12:56:37PM
6 --- Luncheon recess at 12:56 p.m. 01:02:02PM
7 --- Upon resuming at 1:56 p.m. 01:46:57PM
8 PRESIDENT: Mr. Luz, we reckon 01:56:15PM
9 you have about 40 minutes left in your 01:56:19PM
10 presentation. If that's not enough, we will give 01:56:22PM
11 the Claimant more time and then go over to 01:56:27PM
12 tomorrow morning. 01:56:30PM
13 MR. LUZ: I think it's likely 01:56:34PM
14 we will need a little bit more than 40 minutes, 01:56:37PM
15 given questions I'm sure the tribunal will have. 01:56:41PM
16 PRESIDENT: But the timing 01:56:44PM
17 doesn't make allowances for questions. There have 01:56:45PM
18 been quite a few questions. So take the time you 01:56:47PM
19 need, and we will make sure that, for the rest of 01:56:50PM
20 the day, the Claimant gets equal time. 01:56:52PM
21 MR. LUZ: Thank you. 01:56:56PM
22 PRESIDENT: And this is on the 01:56:58PM
23 basis that the rebuttal and surrebuttal will be 01:56:58PM
24 tomorrow morning. 01:57:01PM
25 MR. LUZ: Yes. 01:57:07PM

1 PRESIDENT: Ms. Wates, I think 01:57:08PM
2 you are next off the block. 01:57:09PM
3 SUBMISSIONS BY MS. WATES: 01:57:18PM
4 MS. WATES: Good afternoon, 01:57:18PM
5 Judge Crawford, Dean Levesque, and Dean Cass. As 01:57:33PM
6 Mr. Luz has introduced me, my name is Jenna Wates, 01:57:37PM
7 and I will be addressing the application of the 01:57:41PM
8 time limitation based on the evidence before the 01:57:44PM
9 tribunal in this case. 01:57:47PM
10 Maybe I will just wait for a 01:57:48PM
11 moment for my slides to come up. There we go. 01:57:50PM
12 So, as you know, the tribunal 01:57:53PM
13 must consider two issues in this regard: First, 01:57:54PM
14 when did the Claimant first acquire knowledge of 01:57:57PM
15 the alleged breaches? And, second, when did the 01:57:59PM
16 Claimant know that it had incurred an alleged loss 01:58:02PM
17 or damage by reason of or arising out of those 01:58:04PM
18 breaches? For each of these issues, the tribunal 01:58:11PM
19 must ask whether the Claimant first acquired 01:58:14PM
20 actual or constructive knowledge before the 01:58:16PM
21 critical date of December 30, 2012 or after. Now, 01:58:19PM
22 to provide an overview, my presentation will 01:58:24PM
23 explain how the record establishes that the 01:58:27PM
24 Claimant knew or should have known of both the 01:58:29PM
25 alleged breaches and the alleged loss or damage 01:58:32PM

1 before that critical date. 01:58:34PM

2 Now, the Claimant only 01:58:36PM

3 disputes knowledge of two of the alleged breaches 01:58:37PM

4 before the cutoff date, and those are the January 01:58:40PM

5 2013 amendment to Nova Scotia's renewable 01:58:43PM

6 electricity regulations and the alleged breach of 01:58:45PM

7 Article 1110. 01:58:48PM

8 Now, with respect to the 01:58:50PM

9 January 2013 regulation, as my colleagues have 01:58:53PM

10 touched on, this measure was not included in the 01:58:56PM

11 Notice of Arbitration and Statement of Claim. I 01:58:59PM

12 will answer the tribunal's Written Question No. 01:59:02PM

13 5 in greater detail later in my presentation, but 01:59:05PM

14 for the moment, it suffices to say that the 01:59:08PM

15 Claimant must amend its claim under Article 20 of 01:59:11PM

16 the UNCITRAL Rules in order to include this 01:59:14PM

17 measure, but that it is too late to do so. 01:59:17PM

18 With respect to the alleged 01:59:19PM

19 breach of Article 1110, as Mr. Luz was outlining, 01:59:21PM

20 we certainly would concede that, if the allegation 01:59:25PM

21 is that a government measure adopted in 2014 01:59:28PM

22 deprived the Claimant of its investment in 2014, 01:59:34PM

23 then the time limitation would run from that date. 01:59:38PM

24 But the point that we would like to make is that 01:59:42PM

25 this is not what the Claimant is arguing. Its 01:59:44PM

1 expropriation claim fails on the jurisdictional 01:59:47PM
2 threshold under Article 1101 because it is based 01:59:49PM
3 on the actions of Port Hawkesbury Paper and not on 01:59:52PM
4 the Nova Scotia measures. 01:59:56PM

5 Now, for the purpose of the 01:59:59PM
6 time bar, however, it's still important to note 02:00:00PM
7 that the expropriation claim is based on the 02:00:02PM
8 premise that Nova Scotia knew or should have known 02:00:05PM
9 when it adopted the measures that they would 02:00:07PM
10 substantially deprive the Claimant of its 02:00:10PM
11 investment. But, if this is true, then Resolute 02:00:12PM
12 and everyone else in the market also knew or must 02:00:15PM
13 have known, in which case the expropriation claim 02:00:17PM
14 would be time-barred. But as has been alluded to, 02:00:20PM
15 this is more a question of how the case has been 02:00:24PM
16 pled. So I will also explain how the evidence 02:00:29PM
17 establishes that the Claimant knew or should have 02:00:31PM
18 known before the cutoff date that it had incurred 02:00:34PM
19 the alleged loss or damage. 02:00:36PM

20 Now the only damage that is 02:00:38PM
21 attributable to Canada allegedly is the Claimant's 02:00:40PM
22 alleged loss of competitive advantage vis-à-vis 02:00:43PM
23 Port Hawkesbury. But this was inherent in the 02:00:46PM
24 measures and should have been known to the 02:00:49PM
25 Claimant as soon as they were adopted in favour of 02:00:51PM

1 Port Hawkesbury and not in favour of Resolute. 02:00:53PM
2 But even if the other alleged loss or damage that 02:00:57PM
3 happened beginning in September 28, 2012 and going 02:00:59PM
4 forward from that date could be attributable to 02:01:04PM
5 Nova Scotia, the Claimant should have known that 02:01:07PM
6 it was incurred before the end of 2012. 02:01:09PM
7 And there are five separate 02:01:13PM
8 grounds on which the tribunal can base this 02:01:15PM
9 finding. First, within three years of most of the 02:01:16PM
10 alleged breaches, the Claimant provided Canada 02:01:20PM
11 with a draft Notice of Intent to submit a NAFTA 02:01:22PM
12 Chapter 11 claim, which stated that it had 02:01:25PM
13 incurred a loss of market share from 2012. Only 02:01:27PM
14 after three years from the measures had passed did 02:01:32PM
15 the Claimant take the position that it only began 02:01:34PM
16 to lose market share in 2013. 02:01:36PM
17 Now, in our view, this is a 02:01:39PM
18 telling discrepancy and one which the Claimant has 02:01:42PM
19 failed to explain. 02:01:46PM
20 PRESIDENT: To be fair, the 02:01:47PM
21 Claimant has said the word "from" means by 02:01:48PM
22 comparison to, so by comparison to the position 02:01:50PM
23 three years later, a reduction in price and market 02:01:56PM
24 share and so on. It wasn't addressing the 02:01:59PM
25 question when it started. 02:02:03PM

1 MS. WATES: Certainly. And 02:02:05PM
2 the Claimant has also made submissions about how 02:02:06PM
3 cartographers and astronomers use the word "from," 02:02:11PM
4 but, from our perspective, the draft NOI was 02:02:15PM
5 provided as a serious document, and it made this 02:02:17PM
6 statement which then didn't appear in the NOA 02:02:20PM
7 which was filed later, and taking the Claimant's 02:02:23PM
8 interpretive point, it's still worth asking that 02:02:29PM
9 question as to why this change appeared. And I 02:02:32PM
10 will deal more with this as we go through the 02:02:40PM
11 presentation. 02:02:42PM
12 Now, the second ground is the 02:02:44PM
13 market price adjustment that took place in the 02:02:45PM
14 fourth quarter of 2012, and this price adjustment 02:02:47PM
15 is documented in several contemporaneous industry 02:02:51PM
16 publications in the record and in the Claimant's 02:02:55PM
17 own price data. 02:02:57PM
18 The third and fourth grounds, 02:03:01PM
19 which I will review, on which the tribunal could 02:03:02PM
20 find that the Claimant had knowledge of the 02:03:04PM
21 alleged loss or damage before the cutoff date is 02:03:06PM
22 found in the statements given to the press by its 02:03:08PM
23 corporate spokesperson, Mr. Pierre Choquette. 02:03:11PM
24 In November 2012, 02:03:15PM
25 Mr. Choquette cited the reopening of Port 02:03:16PM

1 Hawkesbury as a reason why Resolute permanently 02:03:19PM
2 shut down Paper Machine No. 10, which was one of 02:03:21PM
3 two machines then operating at the Laurentide 02:03:24PM
4 mill. In December 2012, Mr. Choquette cited the 02:03:27PM
5 reopening of Port Hawkesbury as a reason why it 02:03:30PM
6 was also temporarily shutting down Machine No. 11 02:03:32PM
7 at Laurentide. 02:03:36PM

8 Finally, the Claimant knew or 02:03:38PM
9 should have known that it had incurred an alleged 02:03:40PM
10 loss or damage as a matter of basic economics and 02:03:43PM
11 common sense, a point which we will see was made 02:03:46PM
12 with respect to prices by one of its competitors. 02:03:49PM
13 Since the Port Hawkesbury reopening would 02:03:54PM
14 drastically expand supply in a market where demand 02:03:56PM
15 was declining, it was obvious that a negative 02:03:59PM
16 price effect would result. Resolute's own CEO 02:04:02PM
17 recognized that Port Hawkesbury's impact on the 02:04:05PM
18 market was inevitable and so did its competitors. 02:04:07PM

19 Any one of these five grounds 02:04:12PM
20 would be sufficient to establish Resolute's 02:04:14PM
21 knowledge of the alleged loss or damage before the 02:04:16PM
22 critical date. But Mr. Choquette's statements 02:04:18PM
23 about the role that Port Hawkesbury played in the 02:04:23PM
24 shutdowns at Laurentide in 2012 are particularly 02:04:25PM
25 important, and that is because they are 02:04:28PM

1 contemporaneous statements demonstrating that 02:04:31PM
2 Resolute actually knew that the reopening of Port 02:04:34PM
3 Hawkesbury had caused it the loss or damage that 02:04:37PM
4 it claims in this arbitration. And his statements 02:04:40PM
5 do remain uncontradicted. The Claimant has not 02:04:44PM
6 offered any fact witness to attempt to explain 02:04:47PM
7 away what he meant. It only insists that, 02:04:50PM
8 regardless of what its own spokesperson said, 02:04:54PM
9 Professor Hausman's report proves that it could 02:04:57PM
10 not have known that it incurred a loss or damage 02:05:00PM
11 before December 30, 2012. 02:05:03PM

12 Instead of asking its own 02:05:07PM
13 employees or managers to attest to what they knew 02:05:08PM
14 and when, the Claimant chose to have Professor 02:05:11PM
15 Hausman attest to what it could have known. It 02:05:15PM
16 chose to hire an MIT economist to conduct a 02:05:17PM
17 regression analysis on a market price index 02:05:20PM
18 instead of asking its own corporate officers to 02:05:23PM
19 provide a witness statement and appear for 02:05:25PM
20 cross-examination. 02:05:27PM

21 Now, unfortunately for the 02:05:27PM
22 Claimant, this is not sufficient to discharge its 02:05:29PM
23 legal burden to establish the tribunal's 02:05:31PM
24 jurisdiction. Evidence commissioned in 2017 about 02:05:33PM
25 what Resolute should have known in 2012 cannot 02:05:38PM

1 erase its own contemporaneous statements revealing 02:05:42PM
2 what it actually knew. 02:05:45PM

3 MR. CASS: Can I just ask: If 02:05:46PM
4 the Claimant had submitted statements from its 02:05:53PM
5 officials saying that it didn't know it had 02:05:57PM
6 incurred a loss in 2012, would you still want an 02:06:01PM
7 analysis of whether it reasonably should have 02:06:08PM
8 known? 02:06:11PM

9 MS. WATES: Yes. That would 02:06:14PM
10 be our position. Mr. Luz referred to a case 02:06:16PM
11 earlier -- I believe it was Grand River -- in 02:06:21PM
12 which the corporate officers did submit a witness 02:06:24PM
13 statement saying that they didn't know, and, 02:06:28PM
14 therefore, the tribunal found that it couldn't 02:06:31PM
15 find actual knowledge given that these statements 02:06:34PM
16 had been submitted. But, on the other hand, the 02:06:37PM
17 basis was there for a finding of constructive 02:06:43PM
18 knowledge, in any event. 02:06:46PM

19 MR. CASS: And do you view the 02:06:47PM
20 report from Professor Hausman as relevant to the 02:06:50PM
21 question of constructive knowledge? 02:06:54PM

22 MS. WATES: Yes. Because 02:06:58PM
23 that's the only issue that his report is capable 02:07:01PM
24 of addressing. It is relevant, Dean Cass, but it 02:07:04PM
25 is not determinative. He, as I will explain 02:07:08PM

1 actually, he analyzed -- 02:07:12PM

2 PRESIDENT: Before we get to 02:07:15PM

3 that -- 02:07:16PM

4 MS. WATES: Sure. 02:07:17PM

5 PRESIDENT: -- I will push the 02:07:20PM

6 right button. We're dealing with markets that 02:07:21PM

7 fluctuate and where there's a fair measure of 02:07:26PM

8 uncertainty. If someone said in November 2012, 02:07:28PM

9 "This is causing us a loss of market share or 02:07:33PM

10 causing lower prices," but you are able to show 02:07:36PM

11 afterwards that it didn't actually do that or the 02:07:39PM

12 prices reverted to where they were, at least in 02:07:41PM

13 the short term, would it be true that that 02:07:46PM

14 evidence went to actual knowledge, or is it simply 02:07:50PM

15 a belief? 02:07:53PM

16 MS. WATES: Well, the Claimant 02:07:54PM

17 and any producer would be making decisions in the 02:08:02PM

18 marketplace based on the information that it has 02:08:06PM

19 at any given time, and, in this case, we have 02:08:08PM

20 statements attributing a decision to close a 02:08:15PM

21 machine to the measure or the effect of the 02:08:18PM

22 measure. 02:08:24PM

23 And while, Judge Crawford, 02:08:25PM

24 your question asks about the potential for market 02:08:29PM

25 price fluctuations afterwards, that's possible, 02:08:34PM

1 and that is one of the categories of damage that 02:08:37PM
2 they've alleged, but another thing that's included 02:08:40PM
3 in that basket of damage is that the decision to 02:08:44PM
4 close Machine No. 10 was made on the basis of the 02:08:52PM
5 measures, they say. So, in that case, it is an 02:08:57PM
6 actual, especially with Mr. Choquette's 02:09:00PM
7 statements. It's acknowledging an actual loss or 02:09:03PM
8 damage regardless of what happens going forward. 02:09:07PM
9 PRESIDENT: Because the 02:09:13PM
10 closure of the plant was, incontrovertibly, 02:09:15PM
11 damage? As far as the machine, it was, 02:09:17PM
12 incontrovertibly, damage? 02:09:23PM
13 MS. WATES: To the extent that 02:09:25PM
14 Resolute could have operated that machine for 02:09:26PM
15 longer and chose to close it down in November 2012 02:09:27PM
16 on the basis of the measures, then, yes, it is. 02:09:32PM
17 MR. CASS: Just two quick 02:09:38PM
18 things: First, following up on the president's 02:09:39PM
19 comment, when 1116 and 1117 speak in terms of 02:09:47PM
20 "knowledge" that loss or damage has been incurred, 02:09:55PM
21 do you give that a different meaning than belief 02:10:01PM
22 that it's been incurred? 02:10:04PM
23 MS. WATES: Well, I mean, as 02:10:07PM
24 your earlier question, as well, alluded, there are 02:10:14PM
25 different phrases that are used: appreciation, 02:10:17PM

1 understanding, belief, knowledge. 02:10:21PM

2 If the Claimant closes a mill 02:10:28PM

3 or closes a machine as a result of the measures at 02:10:30PM

4 issue and acknowledges that that is the cause, 02:10:37PM

5 then that is knowledge, and a belief as to whether 02:10:39PM

6 or not it will be further harmed by the measures 02:10:46PM

7 moving forward into the next quarters is not as 02:10:50PM

8 relevant. 02:10:55PM

9 MR. CASS: And then just 02:10:56PM

10 secondly, quickly, the statement you keep 02:10:58PM

11 referring to by Mr. Choquette, there are a number 02:11:03PM

12 of other statements, both contemporaneous and 02:11:06PM

13 subsequent, that make a different statement as to 02:11:11PM

14 the reason for the closure of Machine No. 10 or 02:11:14PM

15 Line No. 10. Does the tribunal have an obligation 02:11:19PM

16 to weigh the various statements and figure out 02:11:25PM

17 which one is more probative, or are we to take any 02:11:28PM

18 one statement as sufficient proof that that 02:11:34PM

19 counts for knowledge on the part of the company? 02:11:37PM

20 MS. WATES: Of course, Dean 02:11:40PM

21 Cass, the tribunal has to assess all of the 02:11:41PM

22 evidence before it advanced by both the Claimant 02:11:43PM

23 and the Respondent. And with respect to 02:11:46PM

24 Mr. Choquette's statements, our position is that 02:11:50PM

25 they are determinative. They're exactly on point 02:11:53PM

1 in terms of assessing the effect of Port 02:11:58PM
2 Hawkesbury's reopening on the Claimant's SC paper 02:12:01PM
3 investment and Laurentide specifically and that 02:12:06PM
4 the other statements that were made in terms of 02:12:09PM
5 Resolute thinking that it would be able to compete 02:12:13PM
6 and Resolute eventually intending to close down 02:12:15PM
7 that machine in any event, the point -- we will 02:12:20PM
8 get to this later as well, but the point for us is 02:12:23PM
9 that it did so in November 2012, and when it did 02:12:27PM
10 so, it said it was because of Port Hawkesbury. 02:12:30PM
11 And so nothing that the Claimant has provided has, 02:12:34PM
12 in our view, been sufficient to overcome that 02:12:37PM
13 statement. And so we will go through all of that, 02:12:40PM
14 but, yes, the tribunal does have to make an 02:12:45PM
15 assessment based on all of the evidence before it. 02:12:48PM
16 And our position is that these statements by 02:12:51PM
17 Mr. Pierre Choquette, who was the Claimant's 02:12:53PM
18 corporate spokesperson, it's worth noting, should 02:12:56PM
19 be given significant weight. 02:12:59PM
20 So just returning to Professor 02:13:07PM
21 Hausman's report, this report has no probative 02:13:09PM
22 value for the tribunal for several reasons. 02:13:12PM
23 First, Professor Hausman conceded that he has no 02:13:16PM
24 experience working in sales or marketing of 02:13:19PM
25 supercalendered paper. As such, he can't offer an 02:13:21PM

1 opinion on what a reasonable producer should have 02:13:25PM
2 known and when based on specialized industry 02:13:27PM
3 knowledge or expertise. Professor Hausman also 02:13:31PM
4 acknowledged that his report is not based on 02:13:35PM
5 interviews with Resolute's employees or managers 02:13:37PM
6 about what they should have known and when. He 02:13:39PM
7 did say that he talked to one person in the 02:13:42PM
8 finance department, but he didn't ask them what 02:13:44PM
9 they knew or should have known in 2012. 02:13:47PM
10 Professor Hausman also 02:13:52PM
11 acknowledged that his report relies on a limited 02:13:52PM
12 amount of data which was curated by Resolute. It 02:13:55PM
13 does not consider other internal documentation or 02:13:58PM
14 correspondence which may show what they knew or 02:14:01PM
15 should have known and when. Professor Hausman did 02:14:04PM
16 do an econometric analysis to determine whether 02:14:08PM
17 the reopening of Port Hawkesbury had a 02:14:10PM
18 statistically significant effect on prices in Q4 02:14:12PM
19 2012, but he also conceded that his regression 02:14:16PM
20 analysis used a market price index, not Resolute's 02:14:20PM
21 prices, not prices at Laurentide. 02:14:23PM
22 And he also -- 02:14:28PM
23 PRESIDENT: Again, he had 02:14:30PM
24 reasons for saying why he did that. 02:14:31PM
25 MS. WATES: Absolutely. He 02:14:34PM

1 had his reasons for not doing that. But our 02:14:35PM
2 position is that a market price index regression 02:14:37PM
3 analysis is not very helpful in telling the 02:14:43PM
4 tribunal what Resolute knew or should have known 02:14:46PM
5 in terms of its own prices. 02:14:48PM
6 And it should also be noted 02:14:54PM
7 that the econometric analysis that Professor 02:14:56PM
8 Hausman did, it was not even of the same grade of 02:15:00PM
9 paper that is produced at Laurentide. It was of 02:15:02PM
10 SCB paper, whereas Laurentide produced -- sorry, 02:15:06PM
11 it was of SCA while Laurentide produces SCB. 02:15:09PM
12 Now, Professor Hausman's 02:15:14PM
13 conclusion that the price effects of Port 02:15:15PM
14 Hawkesbury's opening were not evident in 2012 also 02:15:17PM
15 rests on the assumption that producers did not 02:15:21PM
16 know their prices in advance, but this doesn't 02:15:24PM
17 really line up with reality since the Claimant 02:15:27PM
18 does not deny that it knew what its prices would 02:15:30PM
19 be for Q1 2013 in Q4 2012. 02:15:32PM
20 Now, Professor Hausman's 02:15:37PM
21 opinion is also based on his observation that 02:15:38PM
22 Resolute's prices were steady in Q4 2012, but, 02:15:41PM
23 again, this was based on the weighted average 02:15:45PM
24 aggregate price of all three of Resolute's mills 02:15:47PM
25 combined and didn't look specifically at 02:15:51PM

1 individual mill prices. And we saw in his 02:15:55PM
2 cross-examination that there was, in fact, a drop 02:15:58PM
3 in the price at Kenogami within Q4 2012, which 02:16:01PM
4 undermines the conclusion that Resolute could not 02:16:08PM
5 have known, because its prices were steady in Q4 02:16:11PM
6 2012. In fact, there was an impact at the Kenogami 02:16:16PM
7 mill during that quarter. 02:16:19PM

8 So, in short, the Hausman 02:16:21PM
9 report offers no valuable insight to the tribunal, 02:16:22PM
10 and as this is the only evidence that the Claimant 02:16:25PM
11 has advanced, it has not met its burden to prove 02:16:28PM
12 the timeliness of its claims and the tribunal's 02:16:32PM
13 jurisdiction over them. 02:16:35PM

14 Now, I will review each of 02:16:36PM
15 these grounds of Resolute's knowledge of alleged 02:16:37PM
16 loss or damage later in my presentation, but I 02:16:40PM
17 will begin with the alleged breaches. Now, 02:16:42PM
18 Mr. Neufeld provided a comprehensive overview of 02:16:45PM
19 the measures earlier, and I won't repeat that 02:16:48PM
20 here, but it suffices to say that all of the 02:16:51PM
21 measures were adopted before December 30, 2012, 02:16:53PM
22 all of the measures that were included in the 02:16:56PM
23 Statement of Claim, that is. 02:16:58PM

24 The tribunal bifurcated the 02:17:00PM
25 time bar issue on the basis that the dates of the 02:17:01PM

1 alleged breaches were uncontested and that they 02:17:03PM
2 were the same as the dates of the measures 02:17:07PM
3 indicated here. Now, the Claimant's position has 02:17:09PM
4 evolved since then, and it now contests knowledge 02:17:12PM
5 of two breaches before the cutoff, the first being 02:17:14PM
6 the January 2013 regulation that designated Nova 02:17:17PM
7 Scotia Power's biomass facility as must run and the 02:17:21PM
8 second being the alleged expropriation under 02:17:24PM
9 Article 1110. 02:17:26PM

10 So dealing first with the 02:17:28PM
11 January 2013 regulation, this came up in the 02:17:30PM
12 tribunal's fifth question, and the tribunal asked 02:17:33PM
13 whether the Claimant needs to amend its claim 02:17:36PM
14 under Article 20 of the UNCITRAL Rules to cover 02:17:39PM
15 this regulation. Canada's answer is that the 02:17:42PM
16 Claimant does need to amend because January 2013 02:17:44PM
17 regulation was not referred to anywhere in the 02:17:48PM
18 Statement of Claim. It's effectively a new 02:17:50PM
19 measure. The Statement of Claim only referred to 02:17:53PM
20 discounted or preferential electricity prices 02:17:55PM
21 allegedly given to Port Hawkesbury. It didn't 02:17:58PM
22 include the designation of an asset owned by a 02:18:01PM
23 third party, Nova Scotia Power, as must run for 02:18:03PM
24 the purposes of the province's renewable 02:18:07PM
25 electricity regulation framework several months, 02:18:09PM

1 it's worth noting, after the rate was actually 02:18:13PM
2 set. 02:18:16PM

3 The Statement of Claim only 02:18:17PM
4 refers to measures undertaken during the court 02:18:18PM
5 supervised sales process in 2011 and 2012 and upon 02:18:21PM
6 the closing of the sale of NewPage Port Hawkesbury 02:18:24PM
7 to Pacific West on September 28, 2012. It 02:18:27PM
8 referred to measures undertaken in late 2012, but 02:18:30PM
9 made no mention of measures adopted in 2013. 02:18:34PM

10 So the next part of the 02:18:37PM
11 tribunal's question asked, if it were to grant 02:18:39PM
12 leave, whether it would have effect from the date 02:18:41PM
13 of the original claim or only from the date of the 02:18:43PM
14 amendment. What are the consequences for the time 02:18:46PM
15 bar? 02:18:49PM

16 Canada's answer here is that 02:18:50PM
17 the time limitation prevents the Claimant from 02:18:51PM
18 obtaining the amendment because it would cause the 02:18:54PM
19 claim to fall outside of the tribunal's temporal 02:18:57PM
20 jurisdiction. So Article 20 allows a party to 02:19:00PM
21 amend its claim unless the tribunal considers it 02:19:03PM
22 inappropriate based on the party's delay, in 02:19:05PM
23 making the amendment or prejudice to the other 02:19:08PM
24 party or other circumstances. However, Article 20 02:19:10PM
25 also states that a claim may not be amended in 02:19:14PM

1 such a manner that the amended claims falls 02:19:16PM
2 outside the scope of the arbitration clause or 02:19:19PM
3 separate arbitration agreement. 02:19:20PM

4 And, as Mr. Luz explained in 02:19:23PM
5 his presentation, compliance with the time 02:19:25PM
6 limitation is a condition of Canada's consent to 02:19:27PM
7 arbitrate under NAFTA Chapter 11, so the claim 02:19:31PM
8 cannot be amended under Article 20 if the amended 02:19:35PM
9 claim would not respect the time limitation, and 02:19:38PM
10 this is the case with any potential claims based 02:19:40PM
11 on the January 2013 regulation. 02:19:43PM

12 So the regulation at issue was 02:19:46PM
13 adopted on January 17, 2013. The Claimant 02:19:47PM
14 concedes that it would have known of the 02:19:52PM
15 regulation when it was adopted. And if it's 02:19:54PM
16 arguing that the measure breached Article 1102 or 02:19:57PM
17 1105, then this is the same date that the Claimant 02:20:00PM
18 should have known of the alleged breach. The date 02:20:03PM
19 of the measure and the date of the breach would 02:20:04PM
20 coincide. The only loss or damage that it alleges 02:20:06PM
21 that resulted from this measure is that Port 02:20:10PM
22 Hawkesbury received a \$6 million to \$8 million 02:20:14PM
23 benefit, allegedly, and Resolute did not. Again, 02:20:17PM
24 the Claimant should have known about that when the 02:20:20PM
25 regulation was adopted. So to comply with the 02:20:22PM

1 three-year time limitation, the Claimant had to 02:20:25PM
2 submit any claims related to this measure by 02:20:28PM
3 January 17, 2016. 02:20:30PM
4 MR. CASS: Can I just ask -- 02:20:33PM
5 MS. WATES: Sure. 02:20:35PM
6 MR. CASS: -- you view the 02:20:36PM
7 claim with respect to the discounted rates that it 02:20:38PM
8 gets from having the biomass facility run on a 02:20:42PM
9 24-hour basis as different in kind from the 02:20:47PM
10 references to discounted rates from any other 02:20:51PM
11 source? 02:20:55PM
12 MS. WATES: So the load 02:20:57PM
13 retention tariff, which established the load 02:20:58PM
14 retention rate that Port Hawkesbury pays for its 02:21:01PM
15 electricity was established at the end of 02:21:05PM
16 September 2012. The regulation that was 02:21:08PM
17 subsequently adopted had no effect on that rate. 02:21:11PM
18 The rate was already established, so the 02:21:15PM
19 regulation being adopted months later didn't have 02:21:18PM
20 any change to the rate that was paid by Port 02:21:22PM
21 Hawkesbury. So for the purposes of when did the 02:21:26PM
22 breach occur, it's when the rate was set in 02:21:29PM
23 September 2012. 02:21:32PM
24 MR. CASS: So Port Hawkesbury 02:21:36PM
25 wasn't getting a discount from having a facility 02:21:38PM

1 running with it only paying 24 percent of the cost 02:21:43PM
2 of the electricity being generated for it? 02:21:51PM
3 MS. WATES: That benefit or 02:21:56PM
4 alleged benefit was established when the rate was 02:21:56PM
5 approved in September 2012. Now, the regulation 02:21:59PM
6 being enacted after the fact, my understanding is 02:22:03PM
7 that this allowed Nova Scotia Power to pass on the 02:22:06PM
8 cost. So Port Hawkesbury pays 24 percent, and 02:22:10PM
9 then there's the remaining 76 percent. Nova 02:22:14PM
10 Scotia Power has to cover that cost until it's 02:22:19PM
11 permitted to pass it on to other ratepayers within 02:22:22PM
12 the electricity transmission system. 02:22:25PM
13 So it is really a question of 02:22:27PM
14 who is paying for the remainder of that benefit. 02:22:28PM
15 Is it Nova Scotia Power, or is it Nova Scotia 02:22:33PM
16 ratepayers? It doesn't affect the amount that 02:22:36PM
17 Port Hawkesbury has to pay. 02:22:41PM
18 PRESIDENT: So why is the 02:22:42PM
19 regulation relevant to the claim? 02:22:43PM
20 MS. WATES: Pardon me? 02:22:45PM
21 PRESIDENT: Why is the 02:22:46PM
22 relevant regulation of January 2013 relevant to 02:22:47PM
23 the claim? 02:22:50PM
24 MS. WATES: Well, our position 02:22:51PM
25 is that it's not, and this measure was, in fact, 02:22:52PM

1 only added in the counter-memorial as an effort to 02:22:54PM
2 extend the time limitation. 02:22:57PM
3 If we can just return to the 02:23:07PM
4 slides, you will see this measure, as I said, 02:23:09PM
5 wasn't mentioned until the counter-memorial on 02:23:11PM
6 February 22, 2017 and, effectively, as I said, as 02:23:12PM
7 an attempt to extend the time limitation. But 02:23:21PM
8 this attempt came too late because, under Article 02:23:23PM
9 20, the amendment is not possible. 02:23:26PM
10 Now, the Claimant also argues 02:23:29PM
11 that it could not have acquired knowledge of the 02:23:31PM
12 alleged expropriation under Article 1110, as we 02:23:32PM
13 have already discussed, because it was not 02:23:36PM
14 substantially deprived of its investment until it 02:23:38PM
15 permanently closed the Laurentide mill in October 02:23:40PM
16 2014. Now, Canada agrees that, to prove an 02:23:43PM
17 unlawful expropriation, the investor must 02:23:47PM
18 establish that the measure at issue amounted to a 02:23:50PM
19 substantial deprivation of its investment. As 02:23:53PM
20 stated in the Article 1128 submission of the 02:23:56PM
21 United States, the Claimant must demonstrate that 02:23:59PM
22 the government measures at issue destroyed all or 02:24:03PM
23 virtually all of the economic value of its 02:24:06PM
24 investment or interfered with it to such a similar 02:24:08PM
25 extent and so restrictively as to: 02:24:11PM

1 "Support a conclusion 02:24:13PM
2 that the property has 02:24:14PM
3 been 'taken' from the 02:24:15PM
4 owner." 02:24:17PM

5 So if the Claimant is arguing 02:24:18PM
6 that a government measure substantially deprived 02:24:19PM
7 it of its investment in October 2014, then Canada 02:24:22PM
8 would agree that the limitation period wouldn't start 02:24:26PM
9 to run until then. However, this is not what the 02:24:29PM
10 Claimant is arguing. It has pleaded that measures 02:24:32PM
11 of a third party expropriated its investment, not 02:24:34PM
12 government measures. 02:24:38PM

13 At paragraph 89 of its Notice 02:24:39PM
14 of Arbitration, the Claimant alleged that Nova 02:24:43PM
15 Scotia measures to resuscitate the Port Hawkesbury 02:24:44PM
16 mill and enable the taking of sales and market 02:24:47PM
17 share from Resolute constituted actions tantamount 02:24:50PM
18 to an unlawful expropriation of Laurentide. 02:24:52PM
19 Now, it has since clarified it is not 02:24:55PM
20 arguing the Nova Scotia measures expropriated its 02:24:58PM
21 sales and market share as we had originally 02:25:01PM
22 understood. But the fact remains that the loss 02:25:03PM
23 and sales of market share to Port Hawkesbury is 02:25:06PM
24 the vehicle through which the Laurentide mill 02:25:08PM
25 allegedly lost its value, according to the 02:25:11PM

1 Claimant. The Claimant's expropriation claim is 02:25:13PM
2 not that Nova Scotia took Resolute's sales and 02:25:16PM
3 market share, resulting in the loss of the 02:25:18PM
4 Laurentide mill, but that it enabled the taking of 02:25:20PM
5 sales and market share by Port Hawkesbury. 02:25:23PM
6 Now, the Claimant makes this 02:25:26PM
7 clear at paragraph 49 of its Notice of Arbitration 02:25:27PM
8 where it alleges that Nova Scotia provided the 02:25:31PM
9 means for Port Hawkesbury's SC paper to take 02:25:33PM
10 Resolute's business unfairly. The Claimant 02:25:36PM
11 alleges that it is Port Hawkesbury that took its 02:25:40PM
12 business, not Nova Scotia. It only alleges Nova 02:25:43PM
13 Scotia made the expropriation possible. But, as 02:25:48PM
14 Mr. Neufeld has already said, the actions of Port 02:25:51PM
15 Hawkesbury are not attributable to Canada under 02:25:53PM
16 Article 1101, meaning that the claim fails on 02:25:55PM
17 jurisdiction. 02:25:59PM
18 Additionally, the Claimant's 02:26:02PM
19 assertion that it did not and could not have known 02:26:04PM
20 that it was substantially deprived of its 02:26:06PM
21 investment in Laurentide in October 2014 when the 02:26:08PM
22 mill closed, it runs counter to the basis for its 02:26:12PM
23 claim as stated at paragraph 90 of the NOA. 02:26:15PM
24 There, the Claimant asserted that Nova Scotia knew 02:26:18PM
25 or should have known that its measures were likely 02:26:21PM

1 to push some of Resolute's SC paper mills out of 02:26:23PM
2 business. But it is simply not plausible that 02:26:27PM
3 Nova Scotia could have known what the impact of 02:26:30PM
4 its measures on the Claimant would be if the 02:26:32PM
5 Claimant itself denies that knowledge. 02:26:34PM

6 The Claimant has not asserted 02:26:37PM
7 that Nova Scotia had any information about its 02:26:38PM
8 investment beyond what is available in the public 02:26:40PM
9 domain, and such internal information would have 02:26:42PM
10 been necessary in order to make the assessment of 02:26:44PM
11 whether or not a substantial deprivation would 02:26:48PM
12 occur. 02:26:50PM

13 The Claimant cannot have it 02:26:53PM
14 both ways. If Nova Scotia knew or must have known 02:26:54PM
15 when the measures were adopted that they would 02:26:57PM
16 result in a substantial deprivation of its 02:26:59PM
17 investment, then the Claimant also knew or must 02:27:02PM
18 have known. 02:27:05PM

19 MR. CASS: I take it that the 02:27:06PM
20 argument from Claimant is that, while a 02:27:09PM
21 deprivation of some sort was likely and that was 02:27:13PM
22 known at the time, that the actual loss had not 02:27:19PM
23 been incurred until later, and, particularly, its 02:27:24PM
24 argument on expropriation is that the 02:27:29PM
25 expropriation wasn't effected until the mill 02:27:32PM

1 closed. 02:27:36PM

2 I don't know if you recall. 02:27:41PM

3 Canada's argument in Mesa Power was that a claim 02:27:43PM

4 couldn't be filed until six months after the last 02:27:47PM

5 event had transpired in a chain of events that 02:27:51PM

6 resulted in a loss so that -- I think the argument 02:27:55PM

7 you are making is at least in tension with the 02:28:00PM

8 argument Canada made in the Mesa Power case. So I 02:28:04PM

9 don't know if that's something you are prepared to 02:28:09PM

10 address. 02:28:10PM

11 MS. WATES: Absolutely, Dean 02:28:11PM

12 Cass. And the answer really lies in Article 1101 02:28:12PM

13 and the requirement that the measure alleged to be 02:28:15PM

14 an expropriation is adopted or maintained by the 02:28:18PM

15 state. And so we saw this, as well, in the -- 02:28:20PM

16 this ripeness requirement that the Claimant relies 02:28:26PM

17 on and the tribunal's award in Glamis Gold and 02:28:28PM

18 United States. The principle is really of limited 02:28:33PM

19 application here, because, in Glamis, the tribunal 02:28:37PM

20 states the question as whether the particular 02:28:42PM

21 governmental act moves beyond a mere threat of 02:28:44PM

22 expropriation to an actual interference with a 02:28:47PM

23 property interest, so is the governmental act or 02:28:49PM

24 acts culminated in a sufficiently final action so 02:28:52PM

25 as to effectively expropriate, and also that the 02:28:55PM

1 issue of ripeness turns on the determination of 02:29:00PM
2 whether the challenged measures effect harm on the 02:29:03PM
3 property interests by the time the claim is 02:29:06PM
4 submitted to arbitration. 02:29:08PM

5 But the tribunal was clear 02:29:09PM
6 that the question in determining whether the 02:29:12PM
7 measures had been applied was whether their mere 02:29:14PM
8 passage so clearly affected the value of the 02:29:18PM
9 project in Glamis so as to affect an actual 02:29:22PM
10 confiscation rather than the mere threat of such. 02:29:24PM
11 So the test really for ripeness would be: The 02:29:27PM
12 governmental acts, are they sufficiently final? 02:29:30PM
13 Have they culminated in a sufficiently final act 02:29:33PM
14 that they effect a confiscation, an effective 02:29:37PM
15 taking of the investment? 02:29:43PM

16 But the problem here is that 02:29:45PM
17 that's not the Claimant's argument. They're 02:29:47PM
18 arguing that the measures needed two years to 02:29:49PM
19 ripen through the actions of a third party, which, 02:29:51PM
20 in our submission, puts the claim outside the 02:29:57PM
21 scope of Article 1101. 02:29:59PM

22 PRESIDENT: So your developed 02:30:03PM
23 position in relation to expropriation is that, if 02:30:05PM
24 the expropriation occurred in 2014, there's not a 02:30:08PM
25 problem with the time limit, but there's an 02:30:11PM

1 insurmountable problem with 1101? 02:30:17PM

2 MS. WATES: That's precisely 02:30:20PM

3 the case, Judge Crawford. 02:30:21PM

4 So just to summarize on this 02:30:28PM

5 point, the tribunal has set up a jurisdictional 02:30:29PM

6 dilemma that, in our view, prevents the 02:30:32PM

7 expropriation claim from proceeding past this 02:30:35PM

8 phase of the arbitration. If the substantial 02:30:38PM

9 deprivation was unknown and unknowable until the 02:30:41PM

10 intervening actions of Port Hawkesbury, as the 02:30:45PM

11 Claimant asserts in its counter-memorial, then the 02:30:48PM

12 Nova Scotia measures did not relate to the 02:30:50PM

13 Claimant, and the expropriation was not a measure 02:30:52PM

14 adopted or maintained by Canada. But if the 02:30:53PM

15 substantial deprivation was known or should have 02:30:56PM

16 been known by Nova Scotia, then Resolute also knew 02:30:58PM

17 and so did everyone else in the market. 02:31:01PM

18 So, as the Claimant has not 02:31:05PM

19 challenged knowledge of any of the other measures 02:31:06PM

20 before the cutoff date, I will now move to when it 02:31:08PM

21 acquired knowledge of the alleged loss or damage. 02:31:11PM

22 So, as the tribunal recognized 02:31:18PM

23 in Procedural Order No. 4, this is the key issue 02:31:19PM

24 for the time limitation in this case, but before 02:31:22PM

25 considering when the Claimant first knew of the 02:31:25PM

1 loss or damage, let's recall what loss or damage 02:31:28PM
2 it says that it suffered. As Mr. Luz and 02:31:31PM
3 Mr. Neufeld touched on, the alleged loss or damage 02:31:34PM
4 at issue centres on Nova Scotia's alleged 02:31:38PM
5 intervention in and distortion of the 02:31:40PM
6 supercalendered paper market in favour of Port 02:31:44PM
7 Hawkesbury. Throughout its Statement of Claim, 02:31:46PM
8 Resolute repeatedly alleges that the Nova Scotia 02:31:48PM
9 measures caused it a competitive disadvantage 02:31:51PM
10 vis-à-vis Port Hawkesbury. 02:31:53PM
11 The Claimant thus argues that 02:31:55PM
12 it suffered a competitive disadvantage which 02:31:57PM
13 enabled Port Hawkesbury to take its sales and 02:31:59PM
14 market share, which caused a loss of value in its 02:32:01PM
15 investment in the Laurentide mill. Alleged damage 02:32:04PM
16 to the Claimant's competitive position in the 02:32:07PM
17 market is at the core of its claims. It is the 02:32:09PM
18 precondition to the other alleged loss or damage 02:32:13PM
19 according to the Claimant. 02:32:15PM
20 And damage to the Claimant's 02:32:16PM
21 competitive position is also the only loss or 02:32:19PM
22 damage that the Claimant attributes directly to 02:32:21PM
23 the Nova Scotia measures. The other loss or 02:32:23PM
24 damage resulted not from the actions of Nova 02:32:26PM
25 Scotia, but from the actions of Port Hawkesbury. 02:32:29PM

1 Now, the alleged damage to 02:32:31PM
2 Resolute's competitive position vis-à-vis Port 02:32:33PM
3 Hawkesbury occurred when the measures were adopted 02:32:37PM
4 in favour of its competitor and not in favour of 02:32:39PM
5 the Claimant. So Resolute should have known about 02:32:42PM
6 this alleged competitive disadvantage on September 02:32:44PM
7 28, 2012 when the last of the measures were 02:32:47PM
8 adopted and the sale of the Port Hawkesbury mill 02:32:50PM
9 to Pacific West closed. But even if the 02:32:53PM
10 subsequent losses allegedly caused by Port 02:32:57PM
11 Hawkesbury were attributable to Canada, the 02:33:00PM
12 Claimant should have known and indeed did know 02:33:02PM
13 that it had started to incur that loss or damage 02:33:04PM
14 before December 30, 2012. 02:33:07PM
15 Now, there are five separate 02:33:11PM
16 grounds demonstrating that the Claimant knew or 02:33:13PM
17 should have known before that critical date. And 02:33:15PM
18 I will address each of these in turn beginning 02:33:17PM
19 with the draft notice. 02:33:19PM
20 So we've already discussed 02:33:22PM
21 this briefly. It was provided to Canada on 02:33:24PM
22 February 24, 2015 and referred to loss or damage 02:33:27PM
23 in the form of reduced market share occurring from 02:33:30PM
24 2012. In comparison, paragraph 50 of the NOA 02:33:33PM
25 stated that Port Hawkesbury began to take the 02:33:38PM

1 Claimant's market share beginning in 2013. 02:33:42PM

2 Now, that sentence did not 02:33:46PM

3 appear in the draft NOI, and the Claimant, you're 02:33:48PM

4 right to point out, has objected to Canada's 02:33:52PM

5 interpretation, strenuously, and has sought to 02:33:54PM

6 muddy the waters with arguments about how 02:33:58PM

7 cartographers and astronomers use the word "from," 02:34:00PM

8 but has failed to answer one simple question, 02:34:04PM

9 which is: What is the reason for this 02:34:06PM

10 discrepancy? 02:34:10PM

11 Some explanation from the 02:34:11PM

12 Claimant is in order considering the timing of 02:34:13PM

13 these documents. If the time limitation did begin 02:34:15PM

14 on September 28, 2012, as we argue, then it 02:34:20PM

15 expired on September 28, 2015. That was the last 02:34:25PM

16 possible date that the Claimant could have 02:34:28PM

17 submitted a claim. And in order to respect the 02:34:29PM

18 90-day waiting period, under Article 1119, it 02:34:32PM

19 would have had to submit the NOI by June 30th. 02:34:36PM

20 Now, the Claimant provided 02:34:39PM

21 Canada with a draft on February 24th, so it still 02:34:41PM

22 had around four months to submit the NOI at that 02:34:44PM

23 time, but it didn't do so until seven months 02:34:47PM

24 later, on September 30th. And because of the 02:34:50PM

25 90-day waiting period, it didn't file its NOA 02:34:53PM

1 until December 30, 2015, well after the three-year 02:34:56PM
2 anniversary of the Nova Scotia measures. 02:35:00PM

3 So the Claimant waited for 29 02:35:02PM
4 months, from September 2012 to February 2015, and 02:35:06PM
5 then, after initially raising the matter with 02:35:09PM
6 Canada, sat on its claim for a further 10 months 02:35:12PM
7 before submitting it to arbitration, but it has 02:35:15PM
8 not provided any explanation for this delay. The 02:35:17PM
9 most plausible explanation is the that draft NOI 02:35:20PM
10 was accurate, that the damage began from 2012, but 02:35:23PM
11 that Resolute had to change its position because 02:35:27PM
12 it realized that it had neglected the time 02:35:30PM
13 limitation. 02:35:32PM

14 Now, the Claimant has 02:35:33PM
15 attempted to trivialize the draft NOA based on the 02:35:34PM
16 fact that it was a draft, but a letter sent by 02:35:38PM
17 Resolute's president and CEO, Mr. Richard Garneau, 02:35:40PM
18 only days later reveals that the document was 02:35:43PM
19 approved at the highest echelon of the Claimant's 02:35:45PM
20 corporate structure and was intended to be taken 02:35:48PM
21 seriously. 02:35:50PM

22 Mr. Garneau's letter is 02:35:53PM
23 addressed to Canada's Minister of International 02:35:54PM
24 Trade, the federal cabinet minister responsible 02:35:57PM
25 for Canada's foreign trade relations, and, in his 02:36:00PM

1 letter, he states his desire for the Minister to 02:36:03PM
2 consider carefully this draft notice. It also 02:36:05PM
3 makes clear that Resolute was using the draft as 02:36:08PM
4 leverage to obtain compensation for harm allegedly 02:36:10PM
5 caused to Resolute through what Mr. Garneau called 02:36:13PM
6 government subsidies to the production of 02:36:16PM
7 supercalendered paper at Port Hawkesbury. The 02:36:18PM
8 letter explicitly threatens Canada with a 02:36:24PM
9 potential cost and embarrassment of a NAFTA claim 02:36:27PM
10 if compensation were not provided. It reinforces 02:36:30PM
11 that Resolute meant for the draft to be taken 02:36:33PM
12 seriously. Given the serious tone and 02:36:35PM
13 implications of both the draft NOI and 02:36:38PM
14 Mr. Garneau's subsequent letter, the document and 02:36:42PM
15 its contents cannot be treated as inconsequential. 02:36:44PM
16 Now, the second ground 02:36:48PM
17 establishing the Claimant's knowledge of the 02:36:51PM
18 alleged loss or damage before the critical date is 02:36:53PM
19 that the reopening of Port Hawkesbury caused a 02:36:55PM
20 substantial price adjustment in Q4 2012. 02:36:57PM
21 Professor Hausman's report 02:37:03PM
22 concluded that the price effects of Port 02:37:03PM
23 Hawkesbury's reopening were not evident until 02:37:06PM
24 January 2013. But, as I noted, he based this 02:37:08PM
25 opinion on a regression analysis of the RISI 02:37:13PM

1 market price index and his interpretation of the 02:37:16PM
2 trends in Resolute's weighted average sales price 02:37:19PM
3 for all three of its mills combined. 02:37:22PM
4 He didn't do a regression 02:37:24PM
5 analysis of the price data for the Laurentide mill 02:37:25PM
6 or even for Resolute and all three of its mills. 02:37:31PM
7 He did a regression analysis on the grade of SC 02:37:35PM
8 paper which is not produced at Laurentide. 02:37:38PM
9 Professor Hausman's opinion is 02:37:44PM
10 detached from the reality of what was going on in 02:37:45PM
11 the market in real time. Producers and industry 02:37:47PM
12 analysts did not just sit back and wait to see how 02:37:50PM
13 Port Hawkesbury would affect the market. They 02:37:54PM
14 couldn't afford, like Resolute, to wait several 02:37:56PM
15 years to hire an MIT economist to conduct a 02:37:58PM
16 regression analysis on 60 observations of prices 02:38:01PM
17 to help them figure out what had happened after 02:38:05PM
18 the fact. 02:38:07PM
19 Market participants and 02:38:09PM
20 observers used their specialized knowledge and 02:38:10PM
21 experience of the market to make an assessment 02:38:12PM
22 during the fourth quarter of 2012, and that 02:38:14PM
23 assessment was that Port Hawkesbury's reopening 02:38:18PM
24 had negatively affected prices. 02:38:19PM
25 Dean Cass, I see you have a 02:38:24PM

1 question. 02:38:26PM

2 MR. CASS: Yes. When prices 02:38:26PM

3 are set for particular purchases, are there things 02:38:31PM

4 that affect the price that might be peculiar to 02:38:35PM

5 particular purchases; the quantity that's 02:38:38PM

6 purchased, whether the customer is a repeat 02:38:42PM

7 customer, how quickly they need the product? Are 02:38:46PM

8 there factors that may cause prices to differ from 02:38:49PM

9 one purchase to another? 02:38:54PM

10 MS. WATES: That is my 02:38:56PM

11 understanding, Dean Cass. Now, there are a range 02:38:58PM

12 of different factors that impact price, including 02:39:03PM

13 if it's a particularly large account or it's a 02:39:06PM

14 smaller buyer, if it's a bulk purchase for a 02:39:10PM

15 longer period of time or if it's a one-off 02:39:13PM

16 transaction. But my understanding is that none of 02:39:16PM

17 these factors were taken into account in Professor 02:39:20PM

18 Hausman's regression analysis, which specifically 02:39:23PM

19 looked at historical prices. 02:39:26PM

20 MR. CASS: But if each 02:39:30PM

21 purchase may vary on that, on those margins, at 02:39:32PM

22 least to me that would seem to be a reason why you 02:39:39PM

23 wouldn't want to do this on a mill-by-mill basis, 02:39:42PM

24 why you would rather do it on the basis of a 02:39:46PM

25 larger number of contracts and purchases. 02:39:49PM

1 I say this as somebody who is 02:39:55PM
2 not in that business and doesn't know the 02:39:57PM
3 business. So it would just seem to me that that 02:40:00PM
4 would be the reason why you would not want to do 02:40:03PM
5 this on a mill-by-mill basis. 02:40:06PM

6 MS. WATES: And, Dean Cass, 02:40:10PM
7 that was the explanation, effectively, that 02:40:13PM
8 Professor Hausman provided as well, but one of the 02:40:16PM
9 factors that you may want to consider on a 02:40:19PM
10 mill-by-mill basis is potentially whether a 02:40:22PM
11 competitor reopened that produces the same grade 02:40:24PM
12 of paper and is adding 360,000 metric tonnes of 02:40:27PM
13 capacity to the market, in which case it would 02:40:32PM
14 actually be more relevant to consider the specific 02:40:35PM
15 mill. 02:40:39PM

16 PRESIDENT: In 1105, the 02:40:42PM
17 consent -- the claim doesn't relate to Laurentide. 02:40:48PM
18 It relates to the Claimant's operations in Canada 02:40:51PM
19 again. It's only the expropriation claim that is 02:40:58PM
20 made specifically with respect to Laurentide. 02:41:00PM

21 MS. WATES: Well, our 02:41:04PM
22 understanding is that the damages -- yes. The 02:41:05PM
23 expropriation claim is specific to Laurentide. 02:41:08PM
24 That's our understanding based on the way the case 02:41:11PM
25 has been pleaded, but we also understand that the 02:41:13PM

1 alleged damage for Article 1102 and 1105 includes 02:41:17PM
2 loss of business value that is related to the 02:41:22PM
3 Laurentide mill. 02:41:26PM

4 PRESIDENT: And the other two? 02:41:27PM
5 MS. WATES: And the other two, 02:41:29PM
6 yes. 02:41:30PM

7 PRESIDENT: Because, their, 02:41:31PM
8 overall operations were affected by the existence of 02:41:33PM
9 this new operation or renewed operation. 02:41:35PM

10 MS. WATES: Right. I think 02:41:42PM
11 perhaps what is the most relevant thing here is 02:41:43PM
12 that, in that case, Kenogami, the impact at 02:41:46PM
13 Kenogami, would have been a sounding bell going 02:41:48PM
14 forward. 02:41:52PM

15 Now, market participants and 02:42:00PM
16 observers considered that Port Hawkesbury had 02:42:01PM
17 negatively affected prices by preventing a price 02:42:03PM
18 increase of \$40 per tonne for SCA paper in October 02:42:06PM
19 2012, and they also considered that Port 02:42:09PM
20 Hawkesbury would cause the market price to drop 02:42:12PM
21 for SC paper in January 2013. 02:42:15PM

22 Now, the Claimant concedes 02:42:19PM
23 that it knew in the fourth quarter of 2012 that 02:42:20PM
24 its prices would be lower in Q1 of 2013. At 02:42:24PM
25 paragraph 51 of its rejoinder, it stated that it 02:42:28PM

1 does not contend that it would not have known its 02:42:31PM
2 prices would be lower. But it could not have 02:42:33PM
3 contended this because the industry practice in 02:42:37PM
4 the SC paper market is that contracts are 02:42:39PM
5 negotiated in advance, and there's a month to a 02:42:43PM
6 month and a half lead time involved, as we heard 02:42:47PM
7 from Professor Hausman. 02:42:50PM
8 So with the majority of 02:42:51PM
9 contracts being negotiated months to a year in 02:42:52PM
10 advance and with lead times of a month to a month 02:42:55PM
11 and a half in advance of delivery, the Claimant 02:42:59PM
12 could not have been ignorant in Q4 2012 that its 02:43:02PM
13 prices would be lower in Q1 2013 as a result of 02:43:06PM
14 the reopening of Port Hawkesbury. 02:43:09PM
15 Now, in questionnaire 02:43:10PM
16 responses filed with the U.S. International Trade 02:43:11PM
17 Commission, U.S. producers and importers reported 02:43:15PM
18 selling most of their SC paper under annual 02:43:18PM
19 contracts and short-term contracts. 02:43:22PM
20 As you can see on the next 02:43:24PM
21 slide, spot sales made up the smallest proportion 02:43:25PM
22 of total sales, and this makes sense because 02:43:28PM
23 typically supercalendered paper is made to order, 02:43:33PM
24 as Professor Hausman said, with little product 02:43:36PM
25 held in inventory. For most importers, these 02:43:39PM

1 short-term contracts ranged from three to six 02:43:43PM
2 months, and one importer reported short-term 02:43:46PM
3 contracts averaging 90 days. So the point here is 02:43:49PM
4 that most sales are made through contracts that 02:43:53PM
5 are negotiated in advance, anywhere from a month 02:43:54PM
6 and a half to a year. 02:43:57PM

7 Now, for annual contracts, the 02:43:59PM
8 practice is to negotiate these annual contracts in 02:44:02PM
9 the fall. So given the types of sales contracts 02:44:06PM
10 involved and the 28- to 45-day lead time between 02:44:11PM
11 orders being placed and paper being delivered, 02:44:14PM
12 there's simply no way that Resolute did not know 02:44:20PM
13 that it was going to be impacted during Q4 2012. 02:44:24PM

14 Now, several industry 02:44:28PM
15 publications confirm that market observers already 02:44:29PM
16 knew this, and I would like to show this to the 02:44:31PM
17 tribunal, if we can go into confidential session, 02:44:35PM
18 because it contains some business confidential 02:44:37PM
19 information. 02:44:39PM

20 --- Whereupon public session ends at 2:44 p.m. 02:44:39PM
21 --- Upon resuming in-camera session at 2:44 p.m. 02:44:42PM

22 MS. WATES: So just moving to 02:44:44PM
23 the next slide -- the tribunal has it in the book 02:44:49PM
24 as well -- this summarizes the November 2012 02:44:54PM
25 editions of three different industry publications 02:44:58PM

1 which considered that the prices would be between 02:45:00PM
2 more than 4 to 5 percent lower as a result of Port 02:45:03PM
3 Hawkesbury's restart. 02:45:06PM

4 With Port Hawkesbury adding so 02:45:08PM
5 much capacity, buyers had greater leverage in 02:45:09PM
6 their negotiations for prices for contracts and 02:45:12PM
7 shipments in 2013. As a result, these 02:45:14PM
8 publications anticipated that prices would drop 02:45:19PM
9 from \$35 to \$45 U.S. per short tonne. 02:45:22PM

10 Now, the December 2012 edition 02:45:27PM
11 of Reel Time reiterated that prices had already 02:45:29PM
12 dropped. Professor Hausman's report focused on 02:45:32PM
13 Reel Time's statement that: 02:45:35PM

14 "All SCA producers are 02:45:36PM
15 ready to respond to more 02:45:38PM
16 aggressive price 02:45:40PM
17 offerings if forced to, 02:45:41PM
18 but that such responses 02:45:42PM
19 have not been necessary." 02:45:43PM

20 But he ignores the report's 02:45:44PM
21 earlier statement that everyone thought SCA prices 02:45:47PM
22 would fall by the first quarter of 2013, and, as 02:45:50PM
23 anticipated, a general and substantial market 02:45:53PM
24 price adjustment has taken place. 02:45:56PM

25 Now, the report goes on to 02:45:58PM

1 explain that Port Hawkesbury had begun setting 02:45:59PM
2 prices at \$30 to \$50 below the fourth quarter 02:46:01PM
3 market level and that other producers had followed 02:46:05PM
4 suit until this became the generally established 02:46:08PM
5 price level. 02:46:10PM

6 And these forecasts, as the 02:46:11PM
7 Claimant calls them, they turn out to be accurate 02:46:14PM
8 as we see in the next slide. The price drop does 02:46:16PM
9 show up in the series filed by both the Claimant 02:46:22PM
10 and the Respondent. And the price drop also 02:46:25PM
11 showed up in Resolute's net sales price for Q1 02:46:28PM
12 2013. And, in fact, Resolute does not deny that 02:46:31PM
13 it knew about this price decrease in Q4 2012. It 02:46:37PM
14 only argues that it could have known that Port 02:46:41PM
15 Hawkesbury was the cause, but this is not a 02:46:43PM
16 tenable position from what a reasonable investor 02:46:45PM
17 should have known. 02:46:47PM

18 PRESIDENT: Could not have -- 02:46:51PM
19 MS. WATES: Pardon me? 02:46:53PM
20 PRESIDENT: You are quoted as 02:46:54PM
21 having saying it could have known that Port 02:46:55PM
22 Hawkesbury was the cause. I think you mean could 02:46:58PM
23 not have known. 02:47:00PM
24 MS. WATES: Could not have 02:47:00PM
25 known. 02:47:01PM

1 PRESIDENT: Thank you. 02:47:02PM

2 MS. WATES: Yes, Judge 02:47:03PM

3 Crawford. Thank you for correcting me. 02:47:04PM

4 So the Claimant, with respect 02:47:07PM

5 to these industry publications, it criticizes them 02:47:08PM

6 as gurus who engage in speculation and 02:47:11PM

7 prognostication, but the fact remains that they 02:47:15PM

8 were accurate, and the fact also remains that the 02:47:16PM

9 Claimant has not cited a single divergent opinion 02:47:19PM

10 from the industry publications at that time. It 02:47:22PM

11 can't feign ignorance of what was reported in 02:47:24PM

12 these industry publications, which was that a 02:47:27PM

13 price impact had occurred. Prices would be lower 02:47:29PM

14 in Q1 2013 as a result of the reopening. 02:47:31PM

15 In any event, as we saw in 02:47:38PM

16 Professor Hausman's cross-examination, the prices 02:47:39PM

17 at Kenogami actually dropped earlier than market 02:47:41PM

18 prices. His report did not address this, only 02:47:44PM

19 showing the aggregate sales price for all three 02:47:46PM

20 mills combined, but we drilled down to that data 02:47:49PM

21 to find there was a more significant price drop in 02:47:52PM

22 the price at Kenogami for Q4 2012. 02:47:55PM

23 Now, as reflected in the table 02:48:00PM

24 on the next slide, the [] U.S. price drop at 02:48:04PM

25 Kenogami amounted to a [] percent reduction in 02:48:09PM

1 U.S. dollars, months over month. And, in the next 02:48:12PM
2 slide, we will see graphically that the drop is 02:48:16PM
3 pronounced. And this makes sense since Kenogami 02:48:22PM
4 produces the same grade of paper as Port 02:48:26PM
5 Hawkesbury according to Resolute's own CEO, 02:48:29PM
6 Mr. Garneau. In August 2012, a financial analyst 02:48:32PM
7 asked him how he expected the reopening of Port 02:48:38PM
8 Hawkesbury to affect Resolute's markets for SCA 02:48:41PM
9 paper, for SC paper, and, in response, he noted 02:48:44PM
10 that Kenogami produced the same grade as Port 02:48:47PM
11 Hawkesbury and that it would be impossible not to 02:48:50PM
12 have an impact on the market. 02:48:53PM

13 Now, I have also included some 02:48:56PM
14 slides on the second way in which a market price 02:48:59PM
15 adjustment was affected which was the preventing 02:49:03PM
16 of a price increase, which would have been about 02:49:07PM
17 \$40 U.S. per tonne, according to the industry 02:49:10PM
18 analysts. 02:49:14PM

19 And just moving to the next 02:49:16PM
20 slide, so we have four different industry 02:49:18PM
21 publications citing the reopening of Port 02:49:24PM
22 Hawkesbury as the reason why the price of SCA 02:49:27PM
23 paper did not increase in Q4 2012. And during the 02:49:29PM
24 U.S. ITC hearings on March 19, 2015, one of 02:49:36PM
25 Resolute's competitors confirmed that its prices 02:49:39PM

1 would have been higher but for the anticipation of 02:49:42PM
2 additional supply from Port Hawkesbury. But 02:49:44PM
3 Resolute responds to this by saying that Canada 02:49:47PM
4 hasn't proved that Resolute was planning a price 02:49:50PM
5 increase, but it's careful not to deny that it 02:49:52PM
6 was. It only asserts that Canada hasn't proven 02:49:56PM
7 it. And we would certainly welcome the 02:49:59PM
8 opportunity to prove that through document 02:50:00PM
9 production or at least to attempt to through 02:50:02PM
10 document production of Resolute. 02:50:04PM
11 But leaving aside the market 02:50:10PM
12 price adjustment caused by Port Hawkesbury in Q4 02:50:12PM
13 2012, the Claimant's own statements during that 02:50:14PM
14 time establish that it actually knew of the 02:50:16PM
15 alleged damage before the cutoff date. 02:50:18PM
16 I will not be referring to any 02:50:20PM
17 more business confidential information at this 02:50:22PM
18 time, so we can go back into the public session. 02:50:24PM
19 --- Whereupon in-camera session ends at 2:50 p.m. 02:50:24PM
20 --- Upon resuming public session at 2:50 p.m. 02:50:24PM
21 MS. WATES: So the third and 02:50:32PM
22 fourth grounds on which the tribunal can find that 02:50:33PM
23 the Claimant knew of the alleged loss or damage 02:50:35PM
24 are found in statements by Mr. Pierre Choquette to 02:50:37PM
25 the press on November 6th and December 19th. 02:50:40PM

1 So, on November 6th, that was 02:50:43PM
2 the date the Claimant announced that it would 02:50:44PM
3 permanently shut down one of two machine at 02:50:48PM
4 Laurentide, No. 10. And, on December 19th, the 02:50:50PM
5 Claimant announced that it would temporarily shut 02:50:52PM
6 down the other machine remaining, which was 02:50:54PM
7 Machine No. 11. 02:50:56PM
8 And, as we will see, the 02:50:59PM
9 Claimant publicly cited the reopening of Port 02:51:00PM
10 Hawkesbury as one of the reasons for its decision 02:51:02PM
11 to implement these closures. But before looking 02:51:04PM
12 at what was said, let's just look at who said it. 02:51:07PM
13 As I indicated, the statements were made by the 02:51:11PM
14 Claimant's corporate spokesperson, Mr. Pierre 02:51:13PM
15 Choquette. 02:51:13PM
16 According to his LinkedIn 02:51:17PM
17 profile, Mr. Choquette was Resolute's national 02:51:18PM
18 principal director of public affairs for over five 02:51:21PM
19 years. So he may have been a single spokesperson, 02:51:23PM
20 as Resolute says, but he was Resolute's 02:51:25PM
21 spokesperson, and he certainly had the authority 02:51:28PM
22 to make statements on behalf of the company. In 02:51:31PM
23 fact, that appears to have been his job. 02:51:35PM
24 So let's look at the first 02:51:39PM
25 article, which was published on November 6, 2012. 02:51:40PM

1 Mr. Choquette is quoted as saying: 02:51:44PM

2 "We have tried in the 02:51:46PM

3 past months to find a new 02:51:46PM

4 grade of paper to produce 02:51:48PM

5 on that machine, but in 02:51:49PM

6 the past weeks, we have 02:51:50PM

7 learned that a new mill 02:51:51PM

8 in Nova Scotia will 02:51:52PM

9 restart by a competitor 02:51:53PM

10 and will add 400,000 02:51:55PM

11 tonnes of the same grade 02:51:58PM

12 of paper. All efforts 02:51:58PM

13 have, therefore, been 02:52:00PM

14 interrupted." 02:52:01PM

15 Now, the next article was 02:52:02PM

16 published on Le Journal de Montréal and TVA also 02:52:04PM

17 on November 6th. These publications quoted 02:52:10PM

18 Mr. Choquette as saying that: 02:52:12PM

19 "Tests have been carried 02:52:13PM

20 out over the past few 02:52:15PM

21 months to see if we could 02:52:16PM

22 not produce another grade 02:52:17PM

23 of paper, but a competing 02:52:18PM

24 plant in Nova Scotia will 02:52:20PM

25 restart and produce more 02:52:21PM

1 than 400,000 tonnes of 02:52:22PM
2 this type of paper. All 02:52:23PM
3 efforts had to be 02:52:25PM
4 interrupted at 02:52:26PM
5 Laurentide." 02:52:27PM
6 The fourth article is from the 02:52:27PM
7 newspaper Le Nouvelliste on November 7, 2012. It 02:52:30PM
8 states: 02:52:34PM
9 "While pointing out that 02:52:34PM
10 several factors must be 02:52:35PM
11 considered to explain the 02:52:36PM
12 closure of Machine No. 02:52:38PM
13 10, Mr. Choquette 02:52:40PM
14 described this additional 02:52:41PM
15 production announcement 02:52:42PM
16 from Pacific West as a 02:52:42PM
17 'coup de grace.' 'We are 02:52:48PM
18 in a declining market, 02:52:48PM
19 and we are adding 02:52:49PM
20 production,' he said. 02:52:50PM
21 'For us, it became 02:52:51PM
22 impossible to continue 02:52:52PM
23 our efforts on Machine 02:52:53PM
24 No. 10.'" 02:52:55PM
25 Now, the fifth article, also 02:52:55PM

1 from Le Nouvelliste, was published on December 02:52:59PM
2 19th following the Claimant's announcement that it 02:53:02PM
3 would temporarily shut down Machine No. 11. This 02:53:05PM
4 article quotes Mr. Choquette as saying: 02:53:08PM
5 "In the last six or seven 02:53:10PM
6 months, demand for these 02:53:11PM
7 paper grades has 02:53:12PM
8 declined, and there was 02:53:13PM
9 a new production from a 02:53:14PM
10 competitor with the 02:53:16PM
11 restart of the Nova 02:53:16PM
12 Scotia mill. It creates 02:53:17PM
13 an imbalance, and we have 02:53:18PM
14 no choice but to adjust." 02:53:20PM
15 So, through Mr. Choquette, the 02:53:21PM
16 Claimant is recognizing that Port Hawkesbury had 02:53:23PM
17 created an imbalance that left it with no choice 02:53:26PM
18 but to adjust. So Mr. Choquette's statements 02:53:29PM
19 actually reinforce that the Claimant should have 02:53:32PM
20 known of the alleged loss or damage as a matter of 02:53:34PM
21 common sense when the measures were adopted. If 02:53:37PM
22 you are a competitor in a declining market and a 02:53:40PM
23 former competitor comes back onto the market and 02:53:42PM
24 expands supply by 25 percent, you have to make 02:53:45PM
25 adjustments if you want to survive. As 02:53:47PM

1 Mr. Choquette acknowledged, for Resolute, that 02:53:50PM
2 meant decommissioning Machine No. 10 in November 02:53:53PM
3 2012 and temporarily laying off workers that 02:53:55PM
4 remained on Machine No. 11 in December 2012. 02:53:59PM

5 Because the Claimant has not 02:54:02PM
6 offered any fact witness to respond to 02:54:03PM
7 Mr. Choquette's statements and has not been 02:54:05PM
8 subject to document production, his statements are 02:54:08PM
9 also the best evidence that the tribunal has of 02:54:10PM
10 when the Claimant actually knew that it had 02:54:12PM
11 incurred the loss or damage it alleges. His 02:54:14PM
12 statements were contemporaneous to the fourth 02:54:18PM
13 quarter of 2012, before Resolute appears to have 02:54:21PM
14 contemplated bringing any litigation against the 02:54:23PM
15 Government of Canada. So they demonstrate that 02:54:26PM
16 Resolute first acquired actual knowledge of the 02:54:30PM
17 alleged loss or damage no later than November 6, 02:54:32PM
18 2012. 02:54:35PM

19 So we will move now to the 02:54:41PM
20 fifth ground on which the tribunal can find that 02:54:42PM
21 the alleged loss or damage was known before the 02:54:46PM
22 cutoff date, which is basic economics and common 02:54:48PM
23 sense. 02:54:51PM

24 We have already seen that the 02:54:52PM
25 industry publications in Q4 2012 concluded that 02:54:53PM

1 the reopening of Port Hawkesbury had caused a 02:54:57PM
2 price adjustment, but Resolute didn't need 02:54:59PM
3 industry publications to reach this conclusion. 02:55:01PM
4 According to its competitors, it should have 02:55:04PM
5 reached that as a matter of basic economics and 02:55:06PM
6 common sense. 02:55:09PM
7 Judge Crawford. 02:55:10PM
8 PRESIDENT: I'm getting a bit 02:55:11PM
9 concerned about time. How much longer do you 02:55:14PM
10 think you have? 02:55:16PM
11 MS. WATES: I expect that this 02:55:18PM
12 would take me no longer than five minutes. 02:55:19PM
13 PRESIDENT: I'm really 02:55:22PM
14 concerned about Mr. Luz's time rather than yours. 02:55:23PM
15 MS. WATES: So basically here 02:55:30PM
16 we have a competitor of Resolute's saying that, as 02:55:32PM
17 a matter of basic economics and common sense, when 02:55:35PM
18 a former competitor comes back online and expands 02:55:39PM
19 a shrinking market by the quantity that it did, 02:55:42PM
20 it's inevitable that there will be a price 02:55:47PM
21 decrease. And this point was made in the November 02:55:49PM
22 2012 issue of Reel Time, which the tribunal has in 02:55:55PM
23 its slides. And we have also noted the fact that 02:55:58PM
24 the market is decreasing. 02:56:02PM
25 But the most important point 02:56:04PM

1 is at Slide 105, if I have the numbers correct. 02:56:06PM
2 But that's where Resolute's CEO, Mr. Garneau, 02:56:11PM
3 admitted this point precisely that, obviously, the 02:56:15PM
4 restart of Port Hawkesbury would certainly have an 02:56:19PM
5 impact on the market and that, quite frankly, the 02:56:21PM
6 restart of a 350,000- or 400,000-tonne machine, 02:56:24PM
7 well, it's impossible not to have an impact on the 02:56:28PM
8 market. 02:56:30PM

9 So, as Mr. Luz said, we do not 02:56:30PM
10 concede that impact on the market can be the 02:56:33PM
11 source of a compensable loss or damage under NAFTA 02:56:37PM
12 Chapter 11, but to the extent that it is, here 02:56:40PM
13 Mr. Garneau is saying that it was inevitable, and, 02:56:43PM
14 therefore, the Claimant should have known on the 02:56:47PM
15 date that the measures were adopted and the sale 02:56:49PM
16 of Port Hawkesbury was finalized. 02:56:51PM

17 So, to conclude, the Claimant 02:56:55PM
18 should have known of the alleged loss or damage 02:56:57PM
19 that is attributable to Canada by the date of the 02:56:59PM
20 last measure, September 28, 2012. That is when 02:57:02PM
21 the measures allegedly placed Resolute at a 02:57:07PM
22 competitive disadvantage. Loss or damage that 02:57:09PM
23 Port Hawkesbury caused allegedly to the Claimant 02:57:14PM
24 by taking its sales or market share after that date 02:57:17PM
25 is not attributable to Canada, but even if it 02:57:20PM

1 were, we have provided the tribunal with five 02:57:22PM
2 independent bases on which it can conclude that 02:57:24PM
3 the Claimant knew or ought to have known by the 02:57:26PM
4 cutoff date. Any one of these points is 02:57:29PM
5 sufficient to justify the dismissal of the Nova 02:57:31PM
6 Scotia claims as time-barred. 02:57:33PM

7 We have put the Claimant's 02:57:36PM
8 actual and constructive knowledge at issue, and it 02:57:38PM
9 has failed to respond with evidence proving that 02:57:40PM
10 its claims are timely. As such, they must be 02:57:45PM
11 dismissed. 02:57:48PM

12 Now, this concludes my 02:57:48PM
13 presentation, and I will hand it back to Mr. Luz 02:57:50PM
14 to address Articles 1102 and 2103. 02:57:52PM

15 PRESIDENT: How long will you 02:57:57PM
16 take? 02:58:01PM

17 MR. LUZ: I don't plan to take 02:58:02PM
18 more than 10 minutes if the tribunal will permit 02:58:04PM
19 me. 02:58:07PM

20 PRESIDENT: I will give you 10 02:58:09PM
21 minutes. 02:58:10PM

22 MR. LUZ: I read your mind, 02:58:11PM
23 Judge Crawford. 02:58:12PM

24 SUBMISSIONS BY MR. LUZ: 02:58:14PM
25 MR. LUZ: I will take only a 02:58:14PM

1 brief time because, again, as Canada has said 02:58:15PM
2 before, we only get to a national treatment claim 02:58:18PM
3 if we even get through the first two 02:58:23PM
4 jurisdictional objections. 02:58:25PM

5 So, again, we are now on 02:58:26PM
6 common ground with Resolute, which was not 02:58:29PM
7 apparent at the very beginning, that the treatment 02:58:31PM
8 that they're complaining of is not with respect to 02:58:34PM
9 treatment received by the Government of Quebec or 02:58:37PM
10 the federal government. That was something that 02:58:39PM
11 originally had seemed to be an issue, and now 02:58:42PM
12 we're not. 02:58:45PM

13 What they are complaining 02:58:46PM
14 about is unique, to say the least, in the sense 02:58:47PM
15 that they're complaining about treatment allegedly 02:58:52PM
16 received from a province in which it has no 02:58:54PM
17 investment and to which its jurisdiction is not 02:58:58PM
18 subject. And that is why Canada's argument is 02:59:01PM
19 that the claim fails prima facie is because the 02:59:04PM
20 factual predicate that is necessary to engage a 02:59:08PM
21 national treatment claim is missing here. 02:59:14PM

22 Now, with respect to the 02:59:16PM
23 measures, if we look at 1102(3), there is a 02:59:18PM
24 requirement that there be treatment accorded by 02:59:23PM
25 the province. Now, with respect to several of the 02:59:27PM

1 measures, the treatment accorded by Nova Scotia 02:59:30PM
2 were to third parties, forestry workers, First 02:59:34PM
3 Nations industries. That's treatment accorded to 02:59:39PM
4 a third party. It's not a treatment accorded to 02:59:44PM
5 Resolute and its investments. 02:59:46PM
6 Similarly, the measures that 02:59:48PM
7 were directed at PWCC, that's also not treatment 02:59:50PM
8 accorded to Resolute. At most, it is treatment 02:59:53PM
9 accorded to Port Hawkesbury, which, in turn, 02:59:58PM
10 treated the market, which, in turn, treated 03:00:01PM
11 Resolute. That is not the kind of scenario that 03:00:05PM
12 the ordinary meaning of Article 1102(3) 03:00:08PM
13 contemplates. 03:00:12PM
14 Part of that is because it's 03:00:13PM
15 simply not possible for a province in which the 03:00:15PM
16 investor is not located could offer that similar 03:00:20PM
17 treatment. Nova Scotia would not be able to offer 03:00:22PM
18 similar treatment to Resolute with respect to 03:00:25PM
19 taxes or power rates because they have no 03:00:29PM
20 jurisdiction to do it. 03:00:31PM
21 Now, one of the tribunal's 03:00:34PM
22 questions, C10, was with respect to the negative 03:00:35PM
23 treatment and in cases where the investor is not 03:00:41PM
24 present in the province. Again, I want to bring 03:00:45PM
25 it back to the Methanex case, because, in the 03:00:49PM

1 Methanex case, there was an allegation later, 03:00:52PM
2 after the initial claim was indicated by the 03:00:55PM
3 tribunal as not meeting the legally significant 03:00:57PM
4 connection test. There was an allegation that the 03:01:00PM
5 Governor of California had colluded with a 03:01:03PM
6 competitor of the Claimant in that case in order 03:01:07PM
7 to favour the domestic industry and drive this 03:01:12PM
8 foreign product out. 03:01:15PM

9 Now, that, of course, could 03:01:16PM
10 have grounded a national treatment claim because 03:01:18PM
11 there was an allegation that they had been 03:01:21PM
12 targeted for discriminatory purposes, but that's 03:01:24PM
13 not what the -- that's not the situation that we 03:01:29PM
14 have here. 03:01:31PM

15 With respect to the tribunal's 03:01:35PM
16 Question C9 -- I'm sorry. I'm just skipping ahead 03:01:36PM
17 a little bit because I do want to get specifically 03:01:38PM
18 to the questions that you have asked about effects 03:01:40PM
19 outside of the province being reconciled with the 03:01:44PM
20 apparent intention of the NAFTA parties to cover 03:01:47PM
21 provincially-granted preferences which have 03:01:50PM
22 negative effects on investors and investments of 03:01:52PM
23 the other NAFTA parties. 03:01:55PM

24 But, again, Canada's view is 03:01:56PM
25 that the answer is in the text of the treaty 03:01:58PM

1 that Canada should not be able to later rely on 03:03:13PM
2 Article 1108(7) with respect to the subsidies 03:03:16PM
3 defence. Canada's position is that this cannot be 03:03:21PM
4 accepted by the tribunal. I just refer the 03:03:26PM
5 tribunal to paragraphs 88 and 89 of our Statement 03:03:29PM
6 of Defence, and at paragraph 25 of our motion to 03:03:34PM
7 bifurcate, Canada has always said that, if the 03:03:36PM
8 national treatment claim does get to the merits 03:03:39PM
9 phase, that, to the extent that any of the 03:03:42PM
10 measures fall within the definition of subsidies 03:03:46PM
11 or procurement at Article 1108(7), those defences 03:03:51PM
12 will be raised at that time as appropriate. 03:03:54PM
13 PRESIDENT: It does not arise 03:03:58PM
14 now? 03:03:59PM
15 MR. LUZ: It does not. It 03:04:00PM
16 does not. I only bring it up because the Claimant 03:04:01PM
17 mentioned it in their rejoinder, and I didn't want 03:04:03PM
18 to leave it hanging out there. 03:04:06PM
19 If there are no other 03:04:09PM
20 questions with respect to national treatment, I 03:04:09PM
21 will be one minute, I think, with respect to the 03:04:11PM
22 taxation measure, because I think we have already 03:04:14PM
23 talked about it. The text is very clear. I think 03:04:16PM
24 Canada's only point with respect to the taxation 03:04:19PM
25 measure is that there is no textual or legal 03:04:24PM

1 distinction for what the Claimant is arguing. 03:04:30PM

2 The Claimant says that it just 03:04:34PM

3 didn't need to comply with Article 2103(6), which 03:04:35PM

4 is the procedure by which an expropriation claim 03:04:40PM

5 against a taxation measure must follow, because 03:04:42PM

6 it's complaining about tax relief given to a 03:04:45PM

7 domestic competitor, which forms parts of an 03:04:49PM

8 ensemble of measures that led to the 03:04:53PM

9 expropriation. 03:04:54PM

10 Again, there's no textual or 03:04:56PM

11 legal justification for that kind of a 03:04:59PM

12 distinction. Taxation measure is a taxation 03:05:02PM

13 measure, whether it's part of an ensemble or by 03:05:04PM

14 itself, and tax relief afforded to a competitor 03:05:07PM

15 which leads to an expropriation allegedly does not 03:05:11PM

16 make it any less of a taxation measure for the 03:05:15PM

17 purposes of NAFTA. And, in that sense, all the 03:05:17PM

18 NAFTA parties are on the same page on this issue. 03:05:22PM

19 So if the expropriation or the 1105 claim were to 03:05:25PM

20 go forward, this taxation measure has to be 03:05:29PM

21 severed from it. 03:05:32PM

22 Dean Cass, if you have a 03:05:33PM

23 question, I'm happy to answer it. 03:05:34PM

24 MR. CASS: Thank you. There 03:05:36PM

25 are other tribunals that have emphasized that the 03:05:40PM

1 basis for exempting taxation measures from 03:05:43PM
2 scrutiny without allowing the national body to 03:05:49PM
3 review it first is that the tribunals are not 03:05:55PM
4 experts on the application of tax law and the 03:06:02PM
5 considerations that go into the computation of 03:06:06PM
6 taxes. 03:06:10PM

7 In this case, we're not 03:06:12PM
8 talking about any measures relating to computation 03:06:14PM
9 of taxes. We're not talking about trying to 03:06:18PM
10 figure out what exemptions apply or what 03:06:21PM
11 deductions apply or what rates apply. Does the 03:06:25PM
12 argument made by other tribunals have purchase 03:06:31PM
13 here in the sense that, if we don't have to worry 03:06:35PM
14 about that, we don't have the concerns that are 03:06:38PM
15 the basis that they see for the 2103(6) 03:06:42PM
16 requirement? 03:06:48PM

17 MR. LUZ: They don't have 03:06:49PM
18 impact on the tribunal's ability to just set aside 03:06:54PM
19 the text of the treaty. In the slides -- I 03:06:57PM
20 haven't referred to them, but in Canfor and 03:07:02PM
21 Feldman, they recognize that the NAFTA parties 03:07:05PM
22 were very clear that taxation measures had very 03:07:07PM
23 limited application within the scope of the 03:07:10PM
24 agreement. 2103 says the NAFTA does not apply to 03:07:13PM
25 taxation measures except as specified in the 03:07:17PM

1 treaty. So if this is a taxation measure, which 03:07:21PM
2 Canada submits it is, Article 1105 does not apply. 03:07:25PM
3 And, similarly, with respect 03:07:34PM
4 to Article 1110, there is a procedure to be 03:07:35PM
5 followed regardless of whether or not it has a 03:07:39PM
6 particular specialized knowledge. That really 03:07:41PM
7 doesn't matter. It's still a procedure that needs 03:07:46PM
8 to be followed in order to engage a party's 03:07:48PM
9 consent. 03:07:51PM
10 And, in Canada's submission, 03:07:52PM
11 this is exactly what has happened in other cases. 03:07:55PM
12 In the Gottlieb case, for example, there was an 03:07:57PM
13 allegation that a tax on distributions from energy 03:08:01PM
14 income trusts constituted an expropriation and a 03:08:05PM
15 violation, and the investor went to the taxation 03:08:10PM
16 authorities and received a decision. 03:08:12PM
17 Similarly, in the Encana v. 03:08:19PM
18 Canada case, the Claimants went to the taxation 03:08:21PM
19 authorities with respect to those taxation 03:08:24PM
20 measures, and there was no decision, and the claim 03:08:25PM
21 went forward. It's something that needs to be 03:08:27PM
22 followed regardless. 03:08:29PM
23 MR. CASS: So just to be 03:08:33PM
24 clear -- 03:08:34PM
25 MR. LUZ: Yes. 03:08:34PM

1 MR. CASS: -- in your 03:08:35PM
2 assessment, if there were, say, a blanket 03:08:37PM
3 exemption of a business from all taxes, all 03:08:40PM
4 regulations, all applicable requirements that 03:08:47PM
5 normally would apply, the fact that taxes are 03:08:52PM
6 included within that would make that a taxation 03:08:57PM
7 measure. Is that correct? 03:09:04PM
8 MR. LUZ: It would and would 03:09:06PM
9 have to be, with respect to an expropriation claim, 03:09:07PM
10 follow the procedures. It would ground in other 03:09:10PM
11 possible provisions, but not expropriation. 03:09:13PM
12 PRESIDENT: To the extent -- 03:09:15PM
13 MR. LUZ: Yes. Thank you. 03:09:19PM
14 Thank you. 03:09:24PM
15 PRESIDENT: The Respondent has 03:09:27PM
16 had about 185 minutes, including time for 03:09:31PM
17 questions from the tribunal, since we finished the 03:09:37PM
18 witness. And the Claimant is entitled to the same 03:09:40PM
19 amount. That gives us about 20 minutes for 03:09:44PM
20 breaks, and we will still finish at 6:30 with 03:09:49PM
21 rebuttal tomorrow. I would like to try and 03:09:53PM
22 finish. If we go a few minutes later than that, 03:09:55PM
23 we can. So we will have a 10-minute break to 03:09:57PM
24 enable you to get your papers together and start, 03:10:03PM
25 and then we will have a 10-minute break at a 03:10:05PM

1 convenient time during the afternoon and finish 03:10:08PM
2 around 6:30 or shortly thereafter. Is that okay? 03:10:10PM
3 I see it is. Thank you very much. 03:10:17PM
4 --- Recess at 3:10 p.m. 03:10:19PM
5 --- Upon resuming at 3:27 p.m. 03:18:10PM
6 PRESIDENT: When can we start? 03:27:13PM
7 As I said, we will have a ten-minute break at a 03:27:18PM
8 convenient time for the Claimant. 03:27:21PM
9 MR. FELDMAN: Whenever you 03:27:23PM
10 say. 03:27:24PM
11 PRESIDENT: If you can finish 03:27:24PM
12 at or around 6:30, Mr. Feldman. 03:27:25PM
13 MR. FELDMAN: We are on your 03:27:29PM
14 clock. 03:27:30PM
15 SUBMISSIONS BY MR. FELDMAN: 03:27:32PM
16 MR. FELDMAN: Are you ready? 03:27:32PM
17 Okay. I think we should go back, if we may, for a 03:27:52PM
18 moment to what the case is about. 03:27:58PM
19 A Canadian government chose a 03:28:01PM
20 national champion for an established industry and 03:28:04PM
21 gave that one company every possible advantage to 03:28:07PM
22 compete against private enterprises. And I may 03:28:10PM
23 add here that it continues to do so, which is the 03:28:15PM
24 origin of our introduction of another measure in 03:28:18PM
25 January of 2013. But, for example, in the 03:28:21PM

1 original measures, there were loans that may have 03:28:24PM
2 been forgiven. We don't know if they've been 03:28:27PM
3 forgiven, but if they have been forgiven, then 03:28:30PM
4 there are continuing measures, and there are other 03:28:33PM
5 continuing measures. There's a \$3.8 million 03:28:35PM
6 subsidy of some kind that's supposed to be annual 03:28:38PM
7 for 10 years. 03:28:41PM

8 So we are noting that the 03:28:42PM
9 measures are continuing. The important point is 03:28:43PM
10 that one company was selected to be the national 03:28:46PM
11 champion and to receive all of these benefits. 03:28:49PM
12 The number of competing private enterprises was 03:28:52PM
13 small and finite. Only one of them constituted a 03:28:55PM
14 foreign investment. 03:28:59PM

15 The publicly-expressed purpose 03:29:01PM
16 of the Canadian government and the designated 03:29:03PM
17 national champion was to be the low-cost producer 03:29:06PM
18 in North America. That's a comparative statement. 03:29:09PM
19 As a comparative statement, it means that it had 03:29:13PM
20 to be a lower cost producer than the others and 03:29:16PM
21 that it was competing with the others. The 03:29:18PM
22 purpose, then, was to compete in the North 03:29:21PM
23 American market and to outcompete the private 03:29:24PM
24 enterprises through whatever financial means were 03:29:27PM
25 necessary. 03:29:29PM

1 This hearing was convened at 03:29:31PM
2 Canada's request and upon Canada's motion. And 03:29:33PM
3 the representations that Canada made in its 03:29:38PM
4 December 5, 2016 letter were that this proceeding 03:29:41PM
5 would be based on law. The facts, as known 03:29:45PM
6 already, would be accepted as presented, and there 03:29:48PM
7 was no expectation of discovery. And we've heard 03:29:51PM
8 today that Canada is dissatisfied with the 03:29:54PM
9 witnesses, wants some other witness to be called, 03:29:58PM
10 and wants some discovery. 03:30:01PM
11 There seems to us six issues 03:30:05PM
12 to which we're exposed today: the time bar or 03:30:07PM
13 statute of limitations, that is, Articles 1116(2) 03:30:11PM
14 and 1117(2); scope, Article 1101(1), the "relating 03:30:15PM
15 to" clause; national treatment, Article 1102; the 03:30:21PM
16 Article 1128 submissions of the parties whether to 03:30:26PM
17 amend; and, lastly, the tax question about which 03:30:30PM
18 the tribunal, as I noted this morning, has not 03:30:34PM
19 presented any questions. 03:30:36PM
20 The time bar. Resolute had 03:30:39PM
21 three years from the time it first incurred 03:30:43PM
22 damages, past tense, from the breaching measures. 03:30:45PM
23 Canada's argument has changed several times. It 03:30:50PM
24 has changed a little bit today too, but I haven't 03:30:54PM
25 accounted for that in my preparation for today. 03:30:57PM

1 The statute of limitations ran 03:31:00PM
2 from the breaching measures. That's where the 03:31:02PM
3 argument began, and we've heard an echo of that 03:31:05PM
4 again today. The statute of limitations ran from 03:31:07PM
5 the time Resolute should have known it would be 03:31:11PM
6 damaged. The statute of limitations ran from the 03:31:13PM
7 time Resolute must have known it had incurred loss 03:31:17PM
8 or damage. So it's a changing story. 03:31:20PM
9 The initial argument, we 03:31:25PM
10 think, appeared in the Statement of Defence, 03:31:27PM
11 paragraph 77. There's no debate on the facts. 03:31:29PM
12 All of the Nova Scotia measures that the Claimant 03:31:33PM
13 alleges violate NAFTA were adopted months before 03:31:35PM
14 December 30, 2012. The adoption of the Nova 03:31:39PM
15 Scotia measures was a matter of public record, 03:31:43PM
16 including through court filings, public 03:31:45PM
17 announcements, press coverage, and the enactment 03:31:49PM
18 of legislation. The Claimant cannot deny that it 03:31:51PM
19 had knowledge of the measures and that it would 03:31:54PM
20 suffer cognizable loss, would suffer cognizable 03:31:56PM
21 loss as soon as Port Hawkesbury re-entered the 03:32:00PM
22 market in September 2012 after emerging from 03:32:03PM
23 creditor protection proceedings. 03:32:07PM
24 Accordingly, accordingly -- 03:32:09PM
25 there's no ellipse there -- any allegation that 03:32:11PM

1 the Nova Scotia measures violate NAFTA Chapter 11 03:32:13PM
2 is outside the tribunal's jurisdiction ratione 03:32:16PM
3 temporis. That is the first version of the story. 03:32:21PM
4 Second argument, we think, 03:32:23PM
5 appeared in the request for bifurcation, paragraph 03:32:25PM
6 13: 03:32:27PM
7 "A Claimant may not bring 03:32:29PM
8 a claim if more than 03:32:30PM
9 three years have elapsed 03:32:31PM
10 since it first acquired 03:32:32PM
11 knowledge or should have 03:32:34PM
12 first acquired knowledge 03:32:34PM
13 of the fact that the 03:32:36PM
14 alleged breach occurred 03:32:37PM
15 and the fact that the 03:32:38PM
16 alleged breach caused the 03:32:39PM
17 Claimant to incur loss or 03:32:41PM
18 damage." 03:32:42PM
19 "In this dispute, all measures 03:32:43PM
20 occurred between 3 and 15 months before the cutoff 03:32:45PM
21 date of December 30, 2012, more than three years 03:32:47PM
22 prior to the Claimant's Notice of Arbitration. 03:32:50PM
23 They are, therefore, time-barred by Articles 03:32:53PM
24 1116(2) and 1117(2), therefore, that the claim is 03:32:57PM
25 time-barred because of the timing of the breach". 03:33:00PM

1 Lastly, Canada's argument now 03:33:08PM
2 -- and I hesitate to say "now" because we haven't 03:33:10PM
3 fully taken apart what has been said today. But 03:33:14PM
4 in its memorial on jurisdiction, paragraph 51: 03:33:16PM
5 "The answer is that the 03:33:20PM
6 Claimant first knew or 03:33:21PM
7 should have known of a 03:33:22PM
8 loss or damage of the 03:33:23PM
9 type it alleges...in the 03:33:24PM
10 form of lost market 03:33:26PM
11 share, lower prices for 03:33:28PM
12 its SC paper, and a 03:33:29PM
13 negative impact on its 03:33:31PM
14 competitive position 03:33:32PM
15 before December 30, 03:33:33PM
16 2012." 03:33:35PM
17 No mention of expropriation. 03:33:35PM
18 The rule, which you have seen 03:33:39PM
19 before and you have seen earlier today, two 03:33:41PM
20 requirements in 1116(2) and 1117(2), first 03:33:45PM
21 acquired knowledge of the breach and first 03:33:50PM
22 incurred loss or damage. Both are required. And 03:33:52PM
23 so we have a dispute on the time bar. 03:33:56PM
24 There is no dispute over when 03:34:00PM
25 the measures occurred and when Resolute knew about 03:34:02PM

1 them as to those that had been pled. We had not 03:34:05PM
2 pled the January 2013 measures nor the subsequent 03:34:09PM
3 measures that are ongoing. But the dispute here 03:34:13PM
4 today is over when Resolute first acquired 03:34:17PM
5 knowledge that it had incurred loss or damage from 03:34:19PM
6 the breach and when it should have known of loss 03:34:22PM
7 or damage. 03:34:25PM

8 This question is not a 03:34:29PM
9 question of law. It's a factual question. And 03:34:30PM
10 Canada said it was accepting the facts as 03:34:34PM
11 presented. Nonetheless, today, Canada is now 03:34:36PM
12 disputing this fact. 03:34:40PM

13 It seems to us there are two 03:34:44PM
14 data points: Professor Hausman's testimony as to 03:34:45PM
15 when Resolute could have known it had incurred 03:34:49PM
16 loss or damage based on the RISI data and based on 03:34:51PM
17 Resolute's quantity price and profits. 03:34:55PM

18 My friend Ms. Wates, in her 03:34:58PM
19 comments this afternoon, suggested that Resolute 03:35:00PM
20 data weren't used, but Professor Hausman 03:35:04PM
21 emphasized that, indeed, he did look at the 03:35:07PM
22 Resolute data, in particular at the price data, 03:35:10PM
23 also at profits. 03:35:12PM

24 Resolute is aligned on both of 03:35:19PM
25 these facts. It says it didn't know it had 03:35:21PM

1 incurred loss or damage earlier than Professor 03:35:23PM
2 Hausman says it could have known. And, as the 03:35:26PM
3 tribunal, it seems to us, has recognized today, 03:35:29PM
4 the loss has to occur before you know it has 03:35:34PM
5 occurred. And you know it has occurred only when 03:35:36PM
6 you know it. 03:35:41PM

7 We saw a number of slides this 03:35:44PM
8 afternoon in which January 2013 appeared on the 03:35:45PM
9 slide, but Ms. Wates kept saying first quarter of 03:35:51PM
10 2013. The slide didn't say first quarter of 2013. 03:35:57PM
11 It said January of 2013. The difference was 03:36:01PM
12 important because, as Professor Hausman 03:36:04PM
13 emphasized, prices went back up in February. So 03:36:07PM
14 this was not a first quarter reading. It was a 03:36:10PM
15 reading of a decline in price in January, which he 03:36:13PM
16 said also was normal, seasonal, with a rebound in 03:36:16PM
17 2013, and the difference being minuscule. If you 03:36:20PM
18 go back through the numbers, you will find that, 03:36:24PM
19 in November and December, the price declines about 03:36:26PM
20 1.9 percent. It's insignificant and, therefore, 03:36:28PM
21 no basis for judging either that there is a 03:36:32PM
22 permanent loss occurring or that it's going to be 03:36:35PM
23 attributable to the reopening of Port Hawkesbury. 03:36:41PM
24 The RISI data indicated the 03:36:47PM
25 same conclusion, and, as Professor Hausman 03:36:48PM

1 explained, the RISI data were preferable because 03:36:52PM
2 they gave you a picture of the whole industry. 03:36:54PM
3 And he explained, as a good econometrician would, 03:36:56PM
4 that if you don't have sufficient data, you can't 03:37:01PM
5 run a useful regression. Because he couldn't have 03:37:03PM
6 the data of the other companies, he couldn't run a 03:37:06PM
7 regression on Resolute data. It made no sense, 03:37:10PM
8 and it would make no sense, even more, to run it 03:37:13PM
9 on a single mill. 03:37:16PM
10 Resolute could not have known 03:37:19PM
11 it had incurred loss or damage before 2013. This 03:37:20PM
12 is from Professor Hausman's witness statement, 03:37:24PM
13 paragraph 14: 03:37:27PM
14 "The management of 03:37:28PM
15 Resolute could not have 03:37:29PM
16 concluded that the firm's 03:37:30PM
17 SCB operation had been 03:37:32PM
18 financially harmed by the 03:37:34PM
19 reopening of the PHP mill 03:37:35PM
20 prior to the first 03:37:36PM
21 quarter of 2013. Several 03:37:37PM
22 factors underlie my 03:37:39PM
23 conclusion. First, the 03:37:41PM
24 price and financial 03:37:42PM
25 effects of the reopening 03:37:43PM

1 were not evident until 03:37:45PM
2 January 2013 or later. 03:37:46PM
3 Second, PHP did not have 03:37:49PM
4 a material impact on the 03:37:50PM
5 North American SCB market 03:37:53PM
6 until 2013." 03:37:54PM
7 That's based on the regression 03:37:56PM
8 using the RISI data. 03:37:57PM
9 PRESIDENT: Mr. Feldman, 03:37:59PM
10 assume for the sake of argument that a 03:38:01PM
11 knowledgeable representative of the Claimant said, 03:38:05PM
12 in 2012, "This is causing us harm." Subjectively 03:38:08PM
13 let's assume that he believed that at the time. 03:38:16PM
14 Is it open to you to say, "Well, it wasn't because 03:38:18PM
15 Professor Hausman tells us it wasn't"? 03:38:22PM
16 MR. FELDMAN: Mr. Choquette 03:38:25PM
17 curiously contradicted the CEO of the company. In 03:38:28PM
18 October of 2011, a full year earlier, M. Garneau 03:38:34PM
19 explained that, if he could get an electricity 03:38:38PM
20 contract that would be financially viable, he 03:38:41PM
21 would reopen Dolbeau, which would be a far more 03:38:44PM
22 efficient and effective mill than Laurentide 03:38:47PM
23 Machine No. 10. And he said at the time that he 03:38:54PM
24 would not be adding to the volumes in the 03:38:57PM
25 supercalendered paper market. He said, "If I can 03:39:01PM

1 open Dolbeau, I will be closing something else." 03:39:05PM
2 And that was the first clear statement, and it was 03:39:08PM
3 repeated later, and M. Garneau made similar 03:39:11PM
4 statements later on that it was his intention and 03:39:13PM
5 expectation to close somewhere else. And the 03:39:16PM
6 somewhere else was inevitably Machine No. 10 at 03:39:21PM
7 Laurentide, which was very, very old and 03:39:24PM
8 inefficient. And in a business dealing with a 03:39:26PM
9 commodity where profit depends on driving down 03:39:29PM
10 cost, the first thing you do is get rid of the 03:39:32PM
11 inefficiency and the cost. You reduce the cost by 03:39:36PM
12 opening something that is much more efficient. 03:39:39PM
13 1997 was the equipment in Dolbeau. You eliminate 03:39:42PM
14 something that almost dates from the 19th Century 03:39:46PM
15 at Laurentide. 03:39:48PM
16 Now, as to what 03:39:50PM
17 Mr. Choquette's motivation was or why he said what 03:39:51PM
18 he did, you're quite right, Judge Crawford. I 03:39:54PM
19 think that he was expressing a belief, 03:39:58PM
20 notwithstanding that it was inconsistent with what 03:40:02PM
21 the chief executive officer and president of the 03:40:05PM
22 corporation had said in explaining the closure at 03:40:07PM
23 Laurentide, and, candidly, I think he also felt a 03:40:10PM
24 little political pressure since these statements 03:40:14PM
25 were made in and around Shawinigan, often in the 03:40:16PM

1 presence of the mayor and in the presence of the 03:40:20PM
2 Member of Parliament. There were political 03:40:21PM
3 pressures to blame someone else, and because there 03:40:23PM
4 was great pressure brought, then, on Resolute 03:40:26PM
5 about closing that machine in the same way that 03:40:29PM
6 there were perceptions in Nova Scotia that they 03:40:32PM
7 had to save jobs and that this was all about job 03:40:34PM
8 saving. 03:40:38PM

9 Well, in making these 03:40:39PM
10 statements in Quebec, this was all about losing 03:40:40PM
11 jobs, and there was a similar kind of pressure. 03:40:43PM
12 It was easy for him to make the statement, but it 03:40:46PM
13 didn't correspond to any of the facts. It was 03:40:49PM
14 inconsistent with the economics. It's belied by 03:40:51PM
15 the testimony of Professor Hausman and, more 03:40:53PM
16 importantly, his testimony and analysis and his 03:40:56PM
17 examination of the facts. 03:41:00PM

18 So M. Choquette was mistaken. 03:41:01PM
19 No one else in the company said it. The only 03:41:04PM
20 evidence that Canada seems to have about this 03:41:07PM
21 question are the statements of the public 03:41:09PM
22 relations officer of the company. 03:41:12PM

23 PRESIDENT: Thank you. 03:41:17PM
24 MS. LEVESQUE: Could I ask 03:41:18PM
25 just a follow-up question. Is there a distinction 03:41:19PM

1 to be made between effect on prices and market 03:41:21PM
2 share or competitive position? Because if you 03:41:26PM
3 look at different things, you might get a 03:41:29PM
4 different result. So could that explain the... 03:41:31PM
5 MR. FELDMAN: I think that's 03:41:34PM
6 right. I don't pretend to be an economist, but I 03:41:35PM
7 think those are all indicia of different things. 03:41:38PM
8 Market share was not lost 03:41:43PM
9 apparently. Prices, in fact, in that last 03:41:46PM
10 quarter, did not go down. But those are measuring 03:41:49PM
11 different things. 03:41:52PM
12 Professor Hausman indicates 03:41:54PM
13 that the most important thing is profit, and 03:41:55PM
14 profit depends on driving down the cost. So 03:41:58PM
15 Resolute, perhaps, is able to show a profit in 03:42:03PM
16 that last quarter when it's closing Laurentide and 03:42:05PM
17 opening Dolbeau even though you're in a start-up 03:42:09PM
18 in Dolbeau, so it is not producing much in October 03:42:11PM
19 or November, but you have driven down costs in and 03:42:14PM
20 you're recovering with a greater efficiency, and 03:42:18PM
21 so you show more profit. 03:42:21PM
22 So, yes, those are all 03:42:22PM
23 different indicia, and what might have been in 03:42:24PM
24 Mr. Choquette's mind as to which index to which he 03:42:26PM
25 was referring, we don't know. He hasn't 03:42:30PM

1 explained. We don't know. 03:42:34PM

2 MS. LEVESQUE: Thanks. 03:42:36PM

3 MR. FELDMAN: Continuing on 03:42:37PM

4 with Professor Hausman's testimony, if I may: 03:42:41PM

5 "Third, there was nothing 03:42:45PM

6 in the financial results 03:42:47PM

7 of Resolute's SCB 03:42:47PM

8 operations during the 03:42:48PM

9 fourth quarter of 2012 to 03:42:49PM

10 suggest that Resolute had 03:42:52PM

11 been materially harmed by 03:42:52PM

12 the reopening, especially 03:42:53PM

13 when viewed in the 03:42:55PM

14 context of declining 03:42:56PM

15 consumption of SCB during 03:42:58PM

16 2012." 03:42:59PM

17 I will continue in a second, 03:43:04PM

18 but just to digress, we heard a lot about how, 03:43:06PM

19 apparently at Resolute, there was no knowledge of 03:43:09PM

20 basic economics and common sense, and it may be 03:43:11PM

21 that basic economics and common sense would tell 03:43:14PM

22 you to get out of this business because it was in 03:43:17PM

23 secular decline. Nevertheless, it was the strong 03:43:21PM

24 view of the CEO and of the company that you could 03:43:24PM

25 continue to be profitable in this business, and 03:43:27PM

1 that appears to be true if you don't overload the 03:43:30PM
2 industry with a subsidized capacity. 03:43:35PM
3 "Fourth, even if 03:43:39PM
4 Resolute's management had 03:43:40PM
5 suspected adverse effects 03:43:41PM
6 might arise from the 03:43:43PM
7 reopening, it would not 03:43:45PM
8 have known the extent of 03:43:46PM
9 any effects or their 03:43:48PM
10 materiality prior to the 03:43:49PM
11 first quarter of 2013." 03:43:50PM
12 Now, here too, we've 03:43:52PM
13 encountered a straw man, as Mr. Valasek suggested 03:43:56PM
14 earlier today. That is, we've been hearing about 03:43:59PM
15 the extent of the effects or that the issue isn't 03:44:04PM
16 whether you know how much loss you have 03:44:08PM
17 experienced, but whether you have lost any at all. 03:44:10PM
18 But that's not in dispute 03:44:15PM
19 here. This isn't a question of how much the loss 03:44:17PM
20 was. It's a question of whether there was any 03:44:20PM
21 cognizable or material loss in 2012, and Professor 03:44:22PM
22 Hausman tells us there wasn't. 03:44:27PM
23 The RISI data, as analyzed by 03:44:31PM
24 Professor Hausman in his statement at paragraph 03:44:33PM
25 22, provides the best indicator, the best analysis 03:44:35PM

1 for what is happening in the fourth quarter of 03:44:40PM
2 2012. He says: 03:44:43PM
3 "I find in Table 3 that 03:44:44PM
4 the PHP effect in 2013 03:44:45PM
5 remains, but essentially 03:44:47PM
6 no effect is observed in 03:44:49PM
7 the fourth quarter of 03:44:50PM
8 2012. Thus, the 03:44:51PM
9 hypothesis that there was 03:44:53PM
10 no effect on the SC price 03:44:55PM
11 from the reopening of PHP 03:44:56PM
12 in 2012 would not be 03:44:58PM
13 rejected. These 03:44:59PM
14 econometric findings are 03:45:01PM
15 consistent with the 03:45:02PM
16 graphs presented above 03:45:03PM
17 that indicate no 03:45:04PM
18 significant decrease in 03:45:06PM
19 price at the end of 03:45:07PM
20 2012." 03:45:08PM
21 And I submit you don't have to 03:45:09PM
22 be a salesman of supercalendered paper to do the 03:45:10PM
23 econometric analysis. 03:45:13PM
24 The tribunal asked what should 03:45:18PM
25 be understood by "has incurred." We don't regard 03:45:19PM

1 this as a very complicated question because the 03:45:25PM
2 grammar is not complicated. "Has incurred" must 03:45:28PM
3 mean it already has happened. The French and 03:45:31PM
4 Spanish texts use the past tense for "has 03:45:34PM
5 incurred" as well. 03:45:38PM
6 Canada's final position, 03:45:40PM
7 therefore, is speculative that Resolute should 03:45:41PM
8 have known that it would incur loss or damage, 03:45:44PM
9 which, of course -- and, as Canada has 03:45:47PM
10 acknowledged today, is not the legal standard. 03:45:50PM
11 So, as we heard, we were a 03:45:54PM
12 little surprised, but Canada's speculation was 03:45:56PM
13 derived from the speculators. And they looked to 03:45:59PM
14 gurus and soothsayers, to the Reel Time report of 03:46:04PM
15 December 2012, for example, which is cited in 03:46:07PM
16 their reply and put on the screen again today. In 03:46:10PM
17 it, there's a definition of prognostication, which 03:46:14PM
18 is to foretell or predict, especially from signs 03:46:17PM
19 or indications. 03:46:19PM
20 At the bottom of the Reel Time 03:46:22PM
21 Report paragraphs that we have cited here, it 03:46:24PM
22 reads: 03:46:28PM
23 "Please note: Each 03:46:29PM
24 month, we will present 03:46:30PM
25 very specific 03:46:31PM

1 projections." 03:46:33PM

2 And before I continue this 03:46:35PM

3 quotation, I think we now all understand from 03:46:36PM

4 Professor Hausman that it's pointless to be 03:46:39PM

5 looking at each month if one is trying to 03:46:41PM

6 establish what a trend is or to establish that 03:46:44PM

7 there's really a loss or a permanent loss or 03:46:47PM

8 damage, because one sale or one customer could 03:46:49PM

9 change, and that would show up in a month in a 03:46:53PM

10 very misleading way for the purpose of analyzing 03:46:57PM

11 what the consequences are of the reopening of Port 03:47:00PM

12 Hawkesbury in this case in particular. 03:47:03PM

13 So the Reel Time report goes 03:47:05PM

14 on: 03:47:07PM

15 "Our hope is to 03:47:08PM

16 accurately forecast 03:47:10PM

17 market direction and 03:47:12PM

18 identify transitions. We 03:47:13PM

19 don't expect to be 03:47:15PM

20 correct very often with 03:47:17PM

21 exact amounts and timing 03:47:19PM

22 of price increases." 03:47:20PM

23 And then notwithstanding the 03:47:22PM

24 argument presented this afternoon that the 03:47:28PM

25 soothsayers got it right, they admitted themselves 03:47:30PM

1 that they got it wrong. In the Reel Time report 03:47:33PM
2 in March of 2013, at pages 4 to 5, the Reel Time 03:47:35PM
3 report says: 03:47:41PM
4 "In other issues of Reel 03:47:42PM
5 Time, we have discussed 03:47:43PM
6 Port Hawkesbury's 03:47:44PM
7 'responsible' approach to 03:47:46PM
8 the market, meaning that 03:47:47PM
9 the company has not cut 03:47:48PM
10 SCA prices by as much as 03:47:52PM
11 most expected, nor have 03:47:53PM
12 they been as generally 03:47:54PM
13 predatory as competitors 03:47:56PM
14 feared and planned for. 03:47:58PM
15 This has reduced the 03:47:59PM
16 impact of the Port 03:48:00PM
17 Hawkesbury restart. 03:48:02PM
18 There are, however, 03:48:03PM
19 additional reasons why 03:48:03PM
20 the Port Hawkesbury 03:48:05PM
21 impact has been muted." 03:48:05PM
22 And pages 4 and 5 -- 03:48:08PM
23 PRESIDENT: Mr. Feldman, that 03:48:15PM
24 doesn't say there's been no impact. It says -- 03:48:16PM
25 MR. FELDMAN: No, it doesn't 03:48:18PM

1 say there's been no impact. But it says that 03:48:19PM
2 their forecasts of what the impacted would be and 03:48:22PM
3 the consequences were wrong. And by saying that 03:48:24PM
4 the impact has been muted is a polite way of 03:48:28PM
5 saying, "We didn't get it right." 03:48:31PM
6 They go on to say: 03:48:38PM
7 "Initially, Port 03:48:40PM
8 Hawkesbury used a few 03:48:41PM
9 large broker converters 03:48:43PM
10 to get up and running. 03:48:44PM
11 These tonnes were 03:48:46PM
12 generally sold outside of 03:48:47PM
13 the SCA market and often 03:48:48PM
14 to end users with ongoing 03:48:50PM
15 supply arrangements. We 03:48:51PM
16 certainly don't have all 03:48:52PM
17 the answers, but we hope 03:48:53PM
18 this item helps explain 03:48:54PM
19 how Port Hawkesbury has 03:48:56PM
20 moved so seamlessly into 03:48:57PM
21 the market." 03:48:59PM
22 Notwithstanding this 03:49:01PM
23 confession from the soothsayers, Canada still 03:49:03PM
24 believes in the soothsayers. We heard that this 03:49:06PM
25 afternoon. It insists that, even when the gurus 03:49:08PM

1 have admitted error, Resolute should have listened 03:49:13PM
2 to them and believed them and concluded, at the 03:49:17PM
3 time prior to the confession, that is, in December 03:49:20PM
4 of 2012, not even with the data of the first 03:49:22PM
5 quarter of 2013, that there had been a loss or 03:49:25PM
6 damage. 03:49:29PM

7 So we learn in Canada's reply, 03:49:31PM
8 paragraph 76: 03:49:34PM

9 "Numerous industry 03:49:36PM
10 publications from 03:49:37PM
11 September to December 03:49:37PM
12 2012 confirm that 03:49:38PM
13 producers such as 03:49:40PM
14 Resolute knew that the 03:49:41PM
15 reopening of the Port 03:49:42PM
16 Hawkesbury mill had 03:49:44PM
17 reduced prices for 2013." 03:49:44PM

18 But, of course, we know that 03:49:47PM
19 the prices went up in February of 2013. 03:49:48PM

20 "These publications 03:49:51PM
21 include Reel Time and 03:49:52PM
22 RISI's Paper Trader." 03:49:53PM

23 And we have just been reading 03:49:55PM
24 passages from the March 2013 edition of Reel Time. 03:49:57PM
25 "The reports of these 03:50:00PM

1 industry publications 03:50:01PM
2 were not mere 03:50:02PM
3 speculation, as Resolute 03:50:03PM
4 asserts, but reasonable 03:50:04PM
5 estimations based on what 03:50:06PM
6 had already occurred in 03:50:07PM
7 the market --" 03:50:08PM
8 But, of course, it hadn't 03:50:09PM
9 occurred in the market. 03:50:11PM
10 "-- market intelligence 03:50:13PM
11 for which Resolute had a 03:50:14PM
12 front row seat." 03:50:15PM
13 There's evidence already on 03:50:17PM
14 the record that there was doubt throughout the 03:50:18PM
15 industry about what might happen, even from Port 03:50:21PM
16 Hawkesbury's point of view, that orders might not 03:50:23PM
17 come in, that the benefits might not be sustained, 03:50:26PM
18 that no amount of money might be enough. 03:50:29PM
19 Professor Hausman suggested 03:50:33PM
20 that maybe a government would choose not to keep 03:50:33PM
21 throwing bad money after good, which 03:50:37PM
22 underestimated, as Resolute probably 03:50:40PM
23 underestimated, and as I suggested this morning, 03:50:42PM
24 the tenacity and generosity of the Government of 03:50:45PM
25 Nova Scotia. That was probably the most important 03:50:48PM

1 underestimate in this story. 03:50:51PM

2 Early results in 2012 were not 03:50:55PM

3 damaging, did not incur loss. 03:50:57PM

4 MS. LEVESQUE: Just one quick 03:51:04PM

5 question. 03:51:05PM

6 MR. FELDMAN: Please. 03:51:06PM

7 MS. LEVESQUE: I understand 03:51:07PM

8 the reasons why Professor Hausman did the 03:51:08PM

9 aggregate, but what do you answer the Respondent 03:51:10PM

10 when they say, "Well, there was one mill, the 03:51:14PM

11 Kenogami one, where there was a price 03:51:18PM

12 differential"? Is that irrelevant? 03:51:20PM

13 MR. FELDMAN: It's irrelevant 03:51:25PM

14 for two reasons. One is they raised that question 03:51:27PM

15 with respect to Kenogami producing SCA paper. The 03:51:29PM

16 other is producing SCB. But, as Professor Hausman 03:51:32PM

17 explained, the market is very movable between 03:51:35PM

18 grades. It's driven by price. At the point at 03:51:39PM

19 which Port Hawkesbury really does move into the 03:51:43PM

20 market, which is later in 2013, and Professor 03:51:45PM

21 Hausman suggests that probably in the second 03:51:50PM

22 quarter of 2013 is when Resolute really should 03:51:51PM

23 have understood what was happening. The lower 03:51:54PM

24 prices for SCA moves sales from SCB to SCA. So 03:52:00PM

25 then the mills that are producing SCB start to 03:52:08PM

1 lose. The SCA mills are still competing directly 03:52:10PM
2 with SCA, because the difference in brightness, 03:52:15PM
3 which is really the only difference of 03:52:17PM
4 consequence, is offset by price advantage. 03:52:21PM

5 So if you can produce SCA 03:52:24PM
6 paper cheaper, then you will grab SCA customers, 03:52:26PM
7 but SCB prices may then fall. So looking at one 03:52:32PM
8 mill, at one snapshot doesn't tell you much, and 03:52:37PM
9 you're looking at the whole company's orders. 03:52:41PM
10 It's not as if the orders have to be confined to 03:52:43PM
11 one mill or another. 03:52:45PM

12 So he's saying, first, it's 03:52:47PM
13 not terribly helpful to divide SCA from SCB, 03:52:49PM
14 because there's movement in orders between the 03:52:52PM
15 grades. And, second, it's not very helpful to 03:52:55PM
16 look at one mill or another within the same 03:52:57PM
17 company because its orders may move especially 03:52:59PM
18 among grades. 03:53:01PM

19 And then he says, of course, 03:53:03PM
20 and there's no point in looking at one company. 03:53:04PM
21 If you don't have the comparable data for the rest 03:53:06PM
22 of the industry, that regression you can't run 03:53:09PM
23 reliably. 03:53:11PM

24 MS. LEVESQUE: Thank you. 03:53:13PM
25 MR. FELDMAN: PHP didn't 03:53:14PM

1 really get into the market. These are statements 03:53:18PM
2 that are coming from PHP. PHP didn't really get 03:53:20PM
3 into the market until 2013. As such, it's 03:53:24PM
4 impossible for PHP to cause any injury in 2012. 03:53:27PM
5 This is quoted in our counter-memorial, but it is 03:53:31PM
6 a statement that appears in the testimony at the 03:53:35PM
7 U.S. International Trade Commission from Port 03:53:38PM
8 Hawkesbury itself. 03:53:41PM
9 PHP's entry into the market in 03:53:42PM
10 late 2012 did not cause a significant disruption 03:53:44PM
11 in the market and could not have caused any injury 03:53:46PM
12 in 2012. We think that's right. 03:53:49PM
13 The Government of Nova Scotia 03:53:54PM
14 was determined and did make Port Hawkesbury the 03:53:56PM
15 low-cost producer, as it had promised the buyers 03:54:01PM
16 it would, but the success didn't come right away, 03:54:04PM
17 and it couldn't have been expected to come right 03:54:08PM
18 away given the location and the history of the 03:54:10PM
19 mill. 03:54:12PM
20 MR. CASS: Let me just ask 03:54:14PM
21 you: The Respondent pointed us to some articles 03:54:15PM
22 from Reel Time from December of 2012. You quoted 03:54:22PM
23 from a Reel Time piece from March. The piece that 03:54:28PM
24 they brought to our attention said that everyone 03:54:34PM
25 thought SCA prices would fall by the first quarter 03:54:37PM

1 of 2013, and, as anticipated, a general and 03:54:40PM
2 substantial market price adjustment has taken 03:54:46PM
3 place. And then they follow that by saying, on 03:54:48PM
4 the other hand, as of December, the market 03:54:51PM
5 dynamics aren't what they thought they would be. 03:54:55PM
6 Is this saying that we know 03:54:57PM
7 that the price fall is coming or that it has 03:55:01PM
8 already taken place or that we don't have a way of 03:55:05PM
9 calculating? What is the import of that article 03:55:10PM
10 that they are citing us to? 03:55:15PM
11 MR. FELDMAN: You ask a 03:55:17PM
12 question I don't think I can answer because we're 03:55:18PM
13 dealing with seasonality as well. So we have 03:55:25PM
14 orders that are slightly in advance. We're 03:55:27PM
15 anticipating prices in January. We know normally 03:55:31PM
16 the prices will go down in January, and they do, 03:55:36PM
17 normally do, not always. And so they did here. 03:55:38PM
18 Some of the information would 03:55:43PM
19 appear that the Reel Time folks at that time, in 03:55:45PM
20 the December issue, were not aware that the prices 03:55:47PM
21 were going back up in February. So as much as 03:55:50PM
22 Canada has insisted that everybody should know the 03:55:52PM
23 prices two, three months in advance, if the Reel 03:55:54PM
24 Time report is telling us in December prices are 03:55:58PM
25 going down and we know that in February they went 03:56:00PM

1 up, then they were missing some information. 03:56:02PM

2 So we think it's more useful 03:56:04PM

3 to see them in hindsight, where in March of 2013 03:56:08PM

4 they're saying, "We were wrong. This didn't 03:56:11PM

5 happen." And instead what happened was a seamless 03:56:13PM

6 entry into the market, which Port Hawkesbury made 03:56:16PM

7 an issue about at the ITC, saying, "We cannot be 03:56:20PM

8 held accountable for injury in 2012 because we 03:56:23PM

9 were very careful about how we entered the market 03:56:27PM

10 in 2012." 03:56:29PM

11 And if you were an outsider, 03:56:31PM

12 like Resolute, you were reading that guarded and 03:56:34PM

13 careful entry a second way. Is it going to 03:56:36PM

14 succeed? A lot of people at the time said -- and 03:56:40PM

15 a customer said at the ITC in the hearing, "This 03:56:44PM

16 place failed before. It lost its customers. Will 03:56:48PM

17 the customers come back and trust it again?" 03:56:51PM

18 Nobody knew for sure. And that was the 03:56:54PM

19 underestimate, as I tried to suggest, of just how 03:56:57PM

20 committed the Nova Scotia government was to make 03:56:59PM

21 it succeed. 03:57:03PM

22 So I don't know what motivated 03:57:04PM

23 the Reel Time report in December of 2012. I can 03:57:06PM

24 only say that they themselves admitted they got it 03:57:09PM

25 wrong. 03:57:12PM

1 So we don't think there can be 03:57:17PM
2 any serious debate about the meaning of "has 03:57:19PM
3 incurred." It's past tense. You have to 03:57:22PM
4 experience the damage or the loss, and you can't 03:57:25PM
5 know it until after it has happened. 03:57:28PM
6 And the cases seem to suggest 03:57:31PM
7 the same thing. In Pope and Talbot, the tribunal 03:57:34PM
8 says: 03:57:37PM
9 "The critical requirement 03:57:38PM
10 is that the loss has 03:57:39PM
11 occurred and was known or 03:57:40PM
12 should have been known by 03:57:42PM
13 the investor, not that it 03:57:43PM
14 was or should have been 03:57:45PM
15 known that loss could or 03:57:47PM
16 would occur." 03:57:49PM
17 And there can be no doubt, and 03:57:50PM
18 there can be no denials that, in the spring and 03:57:54PM
19 summer of 2012, before the reopening of Port 03:57:57PM
20 Hawkesbury, lots of people worried about what was 03:58:01PM
21 going to happen, but no one was sure. And, 03:58:04PM
22 indeed, if you look carefully at the politics of 03:58:09PM
23 the day before the reopening, even on the last 03:58:11PM
24 day, there was uncertainty as to whether the deal 03:58:15PM
25 would be completed. 03:58:17PM

1 The Mondev tribunal said: 03:58:19PM
2 "Courts award 03:58:22PM
3 compensation because loss 03:58:23PM
4 or damage has been 03:58:24PM
5 suffered." 03:58:25PM
6 And this is the normal sense 03:58:25PM
7 of the term loss or damage in Articles 1116 and 03:58:27PM
8 1117. 03:58:31PM
9 PRESIDENT: Very good 03:58:31PM
10 tribunal. 03:58:32PM
11 MR. FELDMAN: I appreciate 03:58:35PM
12 that. I have to see if I quote it more. 03:58:38PM
13 Because Resolute filed its 03:58:44PM
14 Statement of Claim on December 30, 2015, Canada 03:58:45PM
15 insists the damage or loss must have been 03:58:49PM
16 experienced before December 30, 2012. The facts, 03:58:51PM
17 however, say otherwise. 03:58:54PM
18 As Professor Hausman explained 03:58:57PM
19 to us today, bringing the scientist to the 03:59:00PM
20 process, in effect, returning to your analogy 03:59:07PM
21 earlier this afternoon, we brought the scientist 03:59:12PM
22 to do the analysis, and what we have been hearing 03:59:17PM
23 from Canada today is that they would have 03:59:20PM
24 preferred that we brought the patient instead of 03:59:23PM
25 the doctor. 03:59:26PM

1 to the Dolbeau mill." 04:00:40PM

2 And that indeed was what that 04:00:42PM

3 story was about, as I tried to explain a moment 04:00:44PM

4 ago with respect to the comments by Mr. Choquette, 04:00:47PM

5 that Mr. Garneau said from the beginning, if he 04:00:51PM

6 could make the Dolbeau mill work through an 04:00:54PM

7 electricity contract, he would close something 04:00:57PM

8 else, and the inevitable closure was in 04:00:59PM

9 Shawinigan. 04:01:02PM

10 The statement of Canada in the 04:01:05PM

11 reply memorial at paragraph 44 is: 04:01:06PM

12 "The Claimant has 04:01:09PM

13 advanced no evidence as 04:01:10PM

14 to the other reasons it 04:01:12PM

15 may have had for closing 04:01:13PM

16 Laurentide Machine No. 04:01:14PM

17 10 --" 04:01:14PM

18 But, of course, we did present 04:01:16PM

19 those statements from Richard Garneau. 04:01:17PM

20 "-- and to establish it 04:01:20PM

21 had nothing to do with 04:01:21PM

22 Port Hawkesbury's 04:01:22PM

23 reopening." 04:01:23PM

24 And, indeed, the decision had 04:01:23PM

25 been taken a full year earlier as to exactly what 04:01:25PM

1 was going to happen. But, that a company doesn't 04:01:27PM
2 show fully its hand when it has workers who are going 04:01:30PM
3 to be very distressed in a town that depends 04:01:34PM
4 completely on that mill is a different political 04:01:38PM
5 question. 04:01:41PM

6 So Laurentide had two 04:01:43PM
7 different machines, and there's been a tendency, 04:01:44PM
8 it seems to us, sometimes to confuse them. 04:01:47PM
9 Machine No. 10 was older and inefficient. 04:01:49PM
10 Resolute had promised, as I have said, not to add 04:01:53PM
11 capacity. And, in effect, Laurentide Machine 10 04:01:56PM
12 was closed in exchange for the Dolbeau mill repair 04:02:01PM
13 opening with equipment as new as 1997. Machine 04:02:06PM
14 No. 11 continued and operated and would have 04:02:12PM
15 continued to operate but for Port Hawkesbury's 04:02:14PM
16 reopening and more aggressive entry into the 04:02:17PM
17 market starting in later in 2013. 04:02:21PM

18 There was a reference earlier 04:02:24PM
19 that there was a closure of Machine 11 in the 04:02:26PM
20 autumn. There was a temporary closure, but that 04:02:30PM
21 was because there were capital improvements being 04:02:32PM
22 made during the summer of 2012. 04:02:34PM

23 Resolute was, in fact, 04:02:37PM
24 investing in Machine No. 11 at the same time that 04:02:38PM
25 it was anticipating the opening of Port 04:02:43PM

1 Hawkesbury, and Resolute believed that these 04:02:47PM
2 adjustments would be profitable. 04:02:51PM
3 Laurentide was not 04:02:56PM
4 expropriated -- that is, the full loss, 04:02:56PM
5 particularly of Machine 11 -- didn't occur until 04:02:59PM
6 2014. And this goes to the question that has been 04:03:02PM
7 discussed a lot today as to what an expropriation 04:03:06PM
8 is and what it means, and it requires a complete 04:03:09PM
9 deprivation of the property. 04:03:13PM
10 And as we mentioned this 04:03:16PM
11 morning in answer to the tribunal's last question, 04:03:17PM
12 the property is gone. It's been sold off. There 04:03:20PM
13 is nothing there except another company that has 04:03:24PM
14 bought the property. 04:03:28PM
15 PRESIDENT: The reason it's 04:03:29PM
16 gone is that you sold it? 04:03:30PM
17 MR. FELDMAN: It is sold. The 04:03:31PM
18 property is sold. 04:03:33PM
19 PRESIDENT: You sold it. It 04:03:33PM
20 wasn't a forced sale. 04:03:35PM
21 MR. FELDMAN: No. No. It was 04:03:36PM
22 an abandonment, if you like. There was no way 04:03:38PM
23 that it was going to restart. You look puzzled. 04:03:42PM
24 PRESIDENT: Well, I mean, I 04:03:46PM
25 have been raising this issue: How do we analyze 04:03:49PM

1 an expropriation in 2014 when the state entity 04:03:55PM
2 allegedly doing the expropriation, one, didn't 04:04:03PM
3 acquire anything? Two -- 04:04:06PM
4 MR. FELDMAN: Well, we've said 04:04:09PM
5 it's a constructive expropriation. 04:04:09PM
6 PRESIDENT: Yes. 04:04:11PM
7 MR. FELDMAN: And because 04:04:12PM
8 the -- 04:04:14PM
9 PRESIDENT: Two, if I may 04:04:15PM
10 finish my question -- 04:04:16PM
11 MR. FELDMAN: I'm sorry. 04:04:17PM
12 PRESIDENT: -- didn't do 04:04:18PM
13 anything for the two years prior to the -- 04:04:19PM
14 MR. FELDMAN: I'm sorry. Say 04:04:20PM
15 that again. 04:04:21PM
16 PRESIDENT: It didn't do 04:04:22PM
17 anything for the two years prior to the 04:04:23PM
18 expropriation. All its conduct was in 2012. 04:04:25PM
19 MR. FELDMAN: You mean Nova 04:04:28PM
20 Scotia? 04:04:28PM
21 PRESIDENT: Yes. 04:04:29PM
22 MR. FELDMAN: Well, no. We 04:04:29PM
23 don't believe that. We believe the conduct was 04:04:30PM
24 ongoing and not just the argument that we heard 04:04:33PM
25 today. A great deal was, "Well, this is a third 04:04:36PM

1 party. It's Port Hawkesbury, and it's no longer 04:04:38PM
2 the Government of Nova Scotia." 04:04:40PM
3 But the reason that we 04:04:41PM
4 introduced the January 2013 measures and the 04:04:43PM
5 reason I'm indicating that there were forgivable 04:04:48PM
6 loans and other support and ongoing electricity 04:04:52PM
7 contracts and so on is that Port Hawkesbury is 04:04:54PM
8 effectively a state-owned enterprise or, put 04:04:56PM
9 another way, a ward of the state. As a ward of 04:04:59PM
10 the state, it is continuously receiving support 04:05:03PM
11 from the government and from the utility, and, if 04:05:06PM
12 it weren't, we don't believe it would be able to 04:05:09PM
13 compete. 04:05:11PM
14 So that first basket of 04:05:13PM
15 measures, which was the basis for our initial 04:05:15PM
16 claim, is not the completion of the story. This 04:05:19PM
17 continues to be an enterprise that is dependent 04:05:22PM
18 upon the financial support of the Government of 04:05:26PM
19 Nova Scotia. And so it continues to provide that 04:05:30PM
20 support. Nevertheless, Resolute competed at 04:05:33PM
21 Laurentide with Machine No. 11 with that until 04:05:37PM
22 2014, October 2014, when it finally gave up, 04:05:41PM
23 closed that mill. 04:05:46PM
24 The sale of the property and 04:05:49PM
25 the vacating of any possibility of reopening was 04:05:50PM

1 in 2016. So there were two more years in which 04:05:53PM
2 Resolute was still the owner of the property. 04:05:57PM
3 MS. LEVESQUE: A follow-up: I 04:06:01PM
4 realize there's a danger of straying into the 04:06:03PM
5 merits, so I will try not to do that. 04:06:05PM
6 MR. FELDMAN: You will have a 04:06:08PM
7 hard time not doing that. 04:06:09PM
8 MS. LEVESQUE: But sticking to 04:06:11PM
9 the "related to" part in relation to 04:06:12PM
10 expropriation. So you need the governmental act 04:06:15PM
11 "relating to" the investment, so a "taking away". How 04:06:17PM
12 can something be taken away by the government in 04:06:23PM
13 terms of "relating to" when it was sold to a third 04:06:27PM
14 party? 04:06:31PM
15 MR. FELDMAN: The mill was not 04:06:32PM
16 sold to a third party. 04:06:33PM
17 MS. LEVESQUE: The assets? 04:06:36PM
18 MR. FELDMAN: Well, barely. 04:06:37PM
19 The property was sold. 04:06:42PM
20 MS. LEVESQUE: Yes. To 04:06:44PM
21 Shawinigan. 04:06:45PM
22 MR. FELDMAN: To Shawinigan 04:06:46PM
23 and then on to -- I can't pronounce it -- Nemaska 04:06:46PM
24 Lithium battery, right. So you know the story? 04:06:50PM
25 MS. LEVESQUE: Yes. 04:06:53PM

1 MR. FELDMAN: So this was 04:06:53PM
2 ultimately the giving up of the property because 04:06:54PM
3 there was no possibility of operating there any 04:06:58PM
4 more for the purpose of -- 04:07:01PM
5 MS. LEVESQUE: But there was a 04:07:04PM
6 transfer of the property for money; right? 04:07:05PM
7 MR. FELDMAN: I think the 04:07:07PM
8 total was \$3 million, something like that. And I 04:07:08PM
9 believe that -- but I don't have the detail, which 04:07:12PM
10 we can provide subsequently if you want, because 04:07:15PM
11 this is really the merits -- 04:07:18PM
12 MS. LEVESQUE: Yes. 04:07:20PM
13 MR. FELDMAN: -- but I believe 04:07:22PM
14 there was even a subsidy from Resolute in taking 04:07:22PM
15 care of environmental issues and so on so that it 04:07:27PM
16 could, in fact, responsibly give up the property. 04:07:30PM
17 MS. LEVESQUE: Thanks. 04:07:35PM
18 MR. FELDMAN: So back to the 04:07:36PM
19 concept of expropriation or the terms of it. In 04:07:41PM
20 Chemtura Corporation v. Canada, at paragraph 242: 04:07:48PM
21 "For a measure to 04:07:50PM
22 constitute expropriation 04:07:50PM
23 under Article 1110 of 04:07:52PM
24 NAFTA, it's common ground 04:07:53PM
25 that the measure must 04:07:54PM

1 amount to a substantial 04:07:55PM
2 deprivation of the 04:07:57PM
3 Claimant's investment." 04:07:58PM
4 Or in Glamis Gold, which was 04:07:59PM
5 introduced by Canada earlier: 04:08:02PM
6 "Claims only arise under 04:08:05PM
7 NAFTA Article 1110 when 04:08:07PM
8 actual confiscation 04:08:09PM
9 follows, and, thus, mere 04:08:10PM
10 threats of expropriation 04:08:12PM
11 or nationalization are 04:08:13PM
12 not sufficient to make 04:08:15PM
13 such a claim ripe. For 04:08:16PM
14 an Article 1110 claim to 04:08:17PM
15 be ripe, the governmental 04:08:19PM
16 act must have directly or 04:08:20PM
17 indirectly taken a 04:08:22PM
18 property interest 04:08:24PM
19 resulting in actual 04:08:25PM
20 present harm to an 04:08:26PM
21 investor." 04:08:27PM
22 The Laurentide mill did not 04:08:28PM
23 shut down until October 2014, and, therefore, 04:08:30PM
24 there can be no question, it seems to us, that 04:08:34PM
25 this comes within the statute of limitations, so 04:08:37PM

1 the time bar that's being debated here. 04:08:40PM

2 The legal standard required 04:08:42PM

3 Resolute to have known it had experienced loss. 04:08:44PM

4 Any Court, as the approved upon Mondev tribunal 04:08:50PM

5 said, would require as much. In no jurisdiction 04:08:53PM

6 can someone enter court unable to prove that 04:09:00PM

7 damages had been incurred, in the past tense. 04:09:03PM

8 It would make it inadmissible 04:09:09PM

9 to arrive in court saying that the ball that Dean 04:09:13PM

10 Cass threw at me had hit me while it was still 04:09:19PM

11 frozen between him and me. 04:09:23PM

12 Whether Canada or Resolute 04:09:26PM

13 bears the burden of proof, it doesn't matter so 04:09:27PM

14 much in this case. So we have had a lot of debate 04:09:30PM

15 about burden of proof and a lot of semantic debate 04:09:33PM

16 about the difference between jurisdiction and 04:09:37PM

17 admissibility, which I'm going to come to even 04:09:39PM

18 though I'm going to come to it reluctantly, 04:09:41PM

19 because it seems to us not so important and more 04:09:44PM

20 of a semantic discussion. Nevertheless, it's not 04:09:46PM

21 so important in this case, because the evidence is 04:09:49PM

22 unambiguous. There was no loss before December 04:09:53PM

23 30, 2012 for Resolute to know about. If there was 04:09:57PM

24 no loss to know about, then Resolute didn't know 04:10:00PM

25 about it. Nevertheless, notwithstanding the 04:10:04PM

1 simple fact that ought to resolve this debate, the 04:10:09PM
2 time bar is not jurisdictional. 04:10:13PM

3 A jurisdictional issue, it 04:10:18PM
4 seems to us, asks whether the tribunal is the 04:10:21PM
5 correct forum for the dispute, whether, in this 04:10:25PM
6 case, the Claimant is Mexican or American, because 04:10:27PM
7 it's being brought against Canada, whether the 04:10:29PM
8 Claimant had an investment in Canada at the time 04:10:32PM
9 of the alleged breach, whether the breach occurred 04:10:34PM
10 when Chapter 11 of NAFTA was in effect. 04:10:38PM

11 These are jurisdictional 04:10:41PM
12 questions. They're questions that ask whether 04:10:42PM
13 we're in the right place in bringing the 04:10:46PM
14 challenge, bringing the claim. 04:10:49PM

15 Admissibility issues go to a 04:10:51PM
16 different question, whether the claim can be heard 04:10:53PM
17 anywhere at all. Almost all forums have statutes 04:10:56PM
18 of limitations, and they have time bars, and they 04:11:02PM
19 may be different from one place to another. So 04:11:05PM
20 the time bar may vary from forum to forum, but the 04:11:07PM
21 principle is the same, and if you're following 04:11:13PM
22 within it, then no one is going to hear your 04:11:15PM
23 claim. A time-barred claim, therefore, may not be 04:11:18PM
24 heard anywhere. It's inadmissible. 04:11:21PM

25 Time bars, statutes of 04:11:25PM

1 limitations are issues, therefore, not of 04:11:26PM
2 jurisdiction, but of admissibility. That's the 04:11:29PM
3 view of scholars, and we have heard some criticism 04:11:31PM
4 of scholars. 04:11:34PM

5 I taught for 15 years before I 04:11:36PM
6 went to law school, so I'm more sympathetic with 04:11:39PM
7 academic writing than perhaps my good friends from 04:11:42PM
8 Canada. 04:11:47PM

9 It is the view of scholars 04:11:50PM
10 that this is an uncomplicated issue. The time bar 04:11:52PM
11 applies differently to each claim and measure of 04:11:56PM
12 damage. 04:11:59PM

13 So just reviewing quickly some 04:12:03PM
14 of the respected scholars of international law who 04:12:05PM
15 have commented on this particular question. Hanno 04:12:08PM
16 Wehland, for example, says: 04:12:15PM

17 "Some preliminary 04:12:16PM
18 objections are likely to 04:12:16PM
19 raise little contention 04:12:17PM
20 when it comes to their 04:12:18PM
21 classification as 04:12:19PM
22 relating to jurisdiction 04:12:19PM
23 or admissibility. 04:12:21PM
24 Limitations periods 04:12:22PM
25 regarding the assertion 04:12:23PM

1 of claims clearly relate 04:12:24PM
2 to the admissibility of a 04:12:26PM
3 claim." 04:12:27PM
4 Gary Born concurs: 04:12:31PM
5 "A statute of limitations 04:12:34PM
6 or similar time-bar 04:12:35PM
7 defence is 04:12:36PM
8 non-jurisdictional." 04:12:37PM
9 PRESIDENT: The problem with 04:12:37PM
10 those statements is that they're not addressing 04:12:38PM
11 the precise language of NAFTA. NAFTA says, in 04:12:40PM
12 effect, that the parties consent to claims being 04:12:46PM
13 brought if they satisfy the conditions laid down 04:12:49PM
14 in NAFTA, which means they don't consent if they 04:12:53PM
15 don't satisfy these conditions. 04:12:58PM
16 So, I mean, anything can be 04:13:00PM
17 made jurisdictional, even things that would normally 04:13:00PM
18 be matters of admissibility, but the normal 04:13:04PM
19 international law time-bar rule is a rule about 04:13:08PM
20 delay, as articulated by the court in the Harmac 04:13:13PM
21 case, and it's a question of admissibility. I think 04:13:17PM
22 we can agree with that. 04:13:19PM
23 But anything can be made of a 04:13:20PM
24 question of jurisdiction if the relevant 04:13:23PM
25 instrument says so. If you have a provision that 04:13:25PM

1 said, "We consent to a claim that is commenced on 04:13:28PM
2 a Tuesday," the commencement of the claim on the 04:13:32PM
3 Tuesday would be jurisdictional even though it's 04:13:35PM
4 of no substantive weight. 04:13:38PM

5 MR. FELDMAN: You're 04:13:42PM
6 anticipating me. 04:13:43PM

7 PRESIDENT: I'm sorry. 04:13:44PM

8 MR. FELDMAN: No. I'm 04:13:45PM
9 delighted. That means we're roughly in the same 04:13:46PM
10 place. So we have no disagreement on this 04:13:49PM
11 question, but jurisdiction and admissibility are 04:13:51PM
12 concepts that are often merged. They're often 04:13:54PM
13 taken together. They're particularly taken 04:13:57PM
14 together in NAFTA. 04:13:59PM

15 I'm going to walk through 04:14:00PM
16 quickly some of the precedents that have been 04:14:01PM
17 invoked by Canada in this regard. Canada says 04:14:05PM
18 this question has been resolved by a series of 04:14:08PM
19 tribunals under Chapter 11 of NAFTA. We don't 04:14:11PM
20 think it's been resolved, because they haven't 04:14:14PM
21 even asked the question, the question being not so 04:14:17PM
22 much what the label is, what the semantics are, 04:14:20PM
23 the question not being so much whether it's 04:14:23PM
24 jurisdiction or admissibility, but who has the 04:14:25PM
25 burden of proof on each and every question. And 04:14:28PM

1 the tribunals have not resolved that with one 04:14:32PM
2 exception, which was Pope and Talbot, which 04:14:36PM
3 resolved it the way we think it should have been 04:14:38PM
4 resolved. None of the others has addressed that 04:14:40PM
5 question. So what you call it is not so important 04:14:43PM
6 as to how you treat it and how a tribunal 04:14:45PM
7 considers it. 04:14:50PM

8 So if I may, just to complete 04:14:51PM
9 the thought on the scholars -- and you're right; 04:14:53PM
10 they're not necessarily addressing NAFTA, per se, 04:14:55PM
11 but they are articulating the basic rule of 04:14:58PM
12 international law. Paulson says: 04:15:01PM

13 "Timeliness issues are 04:15:04PM
14 unrelated to 04:15:05PM
15 jurisdiction." 04:15:07PM

16 And he distinguishes between 04:15:07PM
17 when the claim could not be brought to the 04:15:09PM
18 particular forum, which he says is ordinarily one 04:15:11PM
19 of jurisdiction and subject to further recourse, 04:15:14PM
20 and when the claim should not be heard at all, or 04:15:18PM
21 at least not yet, the issue is ordinarily one of 04:15:21PM
22 admissibility. 04:15:24PM

23 I'm particularly fond of this 04:15:26PM
24 one because it seemed to me that if we had shown 04:15:27PM
25 up earlier with our claim, Professor Hausman might 04:15:30PM

1 be testifying for Canada because he would have 04:15:33PM
2 said, "You're too early. You haven't been damaged 04:15:36PM
3 yet." And he would have proven that we hadn't 04:15:38PM
4 been damaged yet. He would have been on the other 04:15:41PM
5 side of this case. 04:15:43PM
6 The only Chapter 11 04:15:49PM
7 arbitration exactly on point is Pope and Talbot. 04:15:49PM
8 That tribunal recognized the time bar as an 04:15:52PM
9 affirmative defence, and, as an affirmative 04:15:55PM
10 defence, it carries with it a different 04:15:58PM
11 consequence. Canada's contention that the Harmac 04:16:00PM
12 claim is time-barred is in the nature of an 04:16:03PM
13 affirmative defence, and, as such, Canada has the 04:16:05PM
14 burden of proof. 04:16:08PM
15 Now, I appreciate that Canada 04:16:09PM
16 was a party in this case, and they're particularly 04:16:10PM
17 sensitive to it, and so they spent a fair bit of 04:16:13PM
18 time referencing the Harmac claim and why it's 04:16:15PM
19 wrong, but it's also all we've got. None of the 04:16:18PM
20 cases upon which Canada relies, in fact, supports 04:16:21PM
21 Canada's contention that the time bar is a 04:16:24PM
22 jurisdictional issue and the burden of proof is 04:16:27PM
23 Resolute's, whatever it might be called. 04:16:29PM
24 Apotex. The tribunal stated that: 04:16:36PM
25 "The Claimant bears the 04:16:37PM

1 burden of proof with 04:16:39PM
2 respect to the factual 04:16:40PM
3 elements necessary to 04:16:42PM
4 establish the tribunal's 04:16:42PM
5 jurisdiction in this 04:16:43PM
6 regard."
7 But Apotex dealt only with 04:16:44PM
8 whether an investment had taken place. It didn't 04:16:46PM
9 deal with this question. On the time bar issue, 04:16:49PM
10 it said that the parties agreed that the issue was 04:16:54PM
11 jurisdictional. So the parties had agreement, 04:16:56PM
12 and, therefore, the tribunal didn't decide 04:16:59PM
13 anything on that question. The objection was 04:17:01PM
14 treated by both parties as a jurisdictional issue, 04:17:03PM
15 and, therefore, the tribunal didn't intervene, 04:17:06PM
16 didn't decide the issue. 04:17:09PM
17 In Bayview, a favourite of 04:17:11PM
18 Canada, the tribunal didn't reach the time-bar 04:17:16PM
19 issue: 04:17:18PM
20 "Having reached this 04:17:20PM
21 conclusion that the 04:17:21PM
22 Claimant had not made an 04:17:21PM
23 investment in Mexico, 04:17:23PM
24 it's unnecessary to 04:17:24PM
25 consider further issues 04:17:25PM

1 because it is plain that 04:17:27PM
2 the tribunal cannot have 04:17:27PM
3 jurisdiction over these 04:17:29PM
4 claims." 04:17:30PM
5 This case ended with the 04:17:31PM
6 proposition that there was no such investment. 04:17:33PM
7 Grand River: 04:17:36PM
8 "Nevertheless, both 04:17:37PM
9 parties presented 04:17:39PM
10 extensive evidence to 04:17:40PM
11 support their positions 04:17:41PM
12 regarding the application 04:17:42PM
13 of Articles 1116(2) and 04:17:43PM
14 1117(2). For its 04:17:47PM
15 part, the tribunal 04:17:49PM
16 considered all of the 04:17:50PM
17 extensive documentation 04:17:51PM
18 produced and did not 04:17:52PM
19 exclude any evidence on 04:17:53PM
20 the ground that it was 04:17:54PM
21 belatedly produced. 04:17:56PM
22 Accordingly, the tribunal 04:17:57PM
23 did not find it necessary 04:17:59PM
24 to determine which party 04:18:00PM
25 had a burden of going 04:18:01PM

1 forward with the 04:18:02PM
2 evidence." 04:18:03PM
3 The burden of proof being the 04:18:04PM
4 issue that we're debating as to whether it runs 04:18:07PM
5 with respect to jurisdiction or admissibility. 04:18:10PM
6 The Grand River tribunal didn't decide that 04:18:13PM
7 question. 04:18:15PM
8 The UNCITRAL Article 21(4), I 04:18:19PM
9 think, goes to Judge Crawford's question more 04:18:22PM
10 precisely than anything else I have mentioned so 04:18:25PM
11 far. The U.N. working group report confirmed 04:18:28PM
12 that: 04:18:32PM
13 "The general power of the 04:18:33PM
14 arbitral tribunal...to 04:18:35PM
15 decide upon its 04:18:37PM
16 jurisdiction should be 04:18:38PM
17 interpreted as including 04:18:39PM
18 the power of the arbitral 04:18:40PM
19 tribunal to decide upon 04:18:41PM
20 the admissibility of the 04:18:43PM
21 parties' claims." 04:18:45PM
22 And so jurisdiction and 04:18:47PM
23 admissibility were run together by that working 04:18:48PM
24 group. 04:18:50PM
25 And so UNCITRAL Article 21(4) 04:18:51PM

1 says: 04:18:53PM

2 "In general, the arbitral 04:18:54PM

3 tribunal should rule on a 04:18:56PM

4 plea concerning its 04:18:57PM

5 jurisdiction as a 04:18:58PM

6 preliminary question. 04:18:59PM

7 However, the arbitral 04:19:00PM

8 tribunal may proceed with 04:19:02PM

9 the arbitration and rule 04:19:03PM

10 on such a plea in their 04:19:05PM

11 final award." 04:19:07PM

12 So it's not necessarily a 04:19:08PM

13 preliminary question. If we regard all 04:19:11PM

14 jurisdictional issues as preliminary questions, 04:19:15PM

15 then it's not precisely jurisdictional even though 04:19:17PM

16 that's apparently what it's called. 04:19:19PM

17 In Glamis Gold Procedural 04:19:22PM

18 Order No. 2, the issue is a time-bar objection, 04:19:24PM

19 and it was considered jurisdictional for purposes 04:19:28PM

20 of UNCITRAL Rule Article 21(4), which we just saw 04:19:31PM

21 runs admissibility and jurisdiction together. 04:19:37PM

22 So it questioned whether that 04:19:42PM

23 was a rule on bifurcating. It didn't address the 04:19:45PM

24 burden of proof on a time-bar objection. It found 04:19:48PM

25 that a time-bar objection, for purposes of Article 04:19:52PM

1 21(4), is jurisdictional, and it was so labelled. 04:19:54PM

2 Gallo v. Canada, the tribunal 04:19:57PM

3 was resolving whether the investor had made an 04:20:02PM

4 investment for purposes of NAFTA, not a time bar: 04:20:06PM

5 "Because the investor 04:20:09PM

6 couldn't do so, the 04:20:10PM

7 tribunal questioned 04:20:12PM

8 whether it lacked 04:20:12PM

9 jurisdiction *ratione* 04:20:13PM

10 *temporis*." 04:20:16PM

11 End quote. 04:20:18PM

12 "Investment arbitration 04:20:18PM

13 tribunals have 04:20:20PM

14 unanimously found that 04:20:20PM

15 they do not have 04:20:22PM

16 jurisdiction unless the 04:20:23PM

17 Claimant can establish 04:20:24PM

18 that the investment was 04:20:25PM

19 owned or controlled by 04:20:26PM

20 the investor at the time 04:20:27PM

21 when the challenged 04:20:29PM

22 measure was adopted." 04:20:31PM

23 That was the question the 04:20:32PM

24 Gallo tribunal was answering. 04:20:34PM

25 Bilcon: The tribunal 04:20:37PM

1 classified the time bar as a jurisdictional issue, 04:20:38PM
2 but the tribunal didn't address who had the burden 04:20:41PM
3 of proof on the time bar. 04:20:45PM
4 Spence v. Costa Rica, 04:20:48PM
5 curiously not mentioned, I don't think. I don't 04:20:51PM
6 think I heard it mentioned today, but it was a 04:20:52PM
7 favourite of the Canadian memorials. It involved 04:20:55PM
8 takings of real estate so that damage was caused 04:21:00PM
9 when the breach occurred. 04:21:04PM
10 But CAFTA Article 1018(1), 04:21:07PM
11 because this is a case that comes under CAFTA, not 04:21:10PM
12 NAFTA, stipulates conditions and limitations on 04:21:13PM
13 consent of each party and recognizes that the 04:21:19PM
14 CAFTA provision is unique to CAFTA. Therefore, 04:21:24PM
15 the Spence tribunal concluded: 04:21:28PM
16 "The Tribunal thus 04:21:31PM
17 cautions any reading of 04:21:32PM
18 this award that would 04:21:33PM
19 give it wider 04:21:35PM
20 "precedential effects", 04:21:35PM
21 because it's peculiar to 04:21:37PM
22 CAFTA." 04:21:41PM
23 Or Methanex. Methanex did not 04:21:42PM
24 address a time-bar limitation under NAFTA. It 04:21:45PM
25 didn't address the burden of proof or any 04:21:47PM

1 objection. Instead, it accepted the facts as true 04:21:49PM
2 as pled by the Claimant. It only addressed 04:21:52PM
3 whether the claim was proper under NAFTA Article 04:21:54PM
4 1101. 04:21:54PM

5 The burden of proof, we say, 04:22:00PM
6 is not Resolute's, because the time bar is 04:22:02PM
7 whatever it's called, not jurisdictional. But if 04:22:05PM
8 it were, Resolute has met its burden. 04:22:09PM

9 Canada relies on cases where 04:22:13PM
10 tribunals never decided this question to assert 04:22:15PM
11 that those tribunals agree with Canada's argument. 04:22:18PM
12 None of Canada's authorities involves a tribunal 04:22:21PM
13 judgment that a time-bar limitation is 04:22:24PM
14 jurisdictional in the sense that is intended. 04:22:28PM
15 None of Canada's authorities involves a judgment 04:22:31PM
16 that the burden of proof in a time-bar claim falls 04:22:34PM
17 on the Claimant. 04:22:37PM

18 Resolute filed its Statement 04:22:40PM
19 of Claim within three years of first knowing it 04:22:41PM
20 had incurred loss or damage caused by the Nova 04:22:45PM
21 Scotia measures, which was as early as it could 04:22:49PM
22 have known. That knowledge first came in calendar 04:22:52PM
23 year 2013, not 2012. That's an economic fact 04:22:55PM
24 proven by Professor Hausman and a perceptual fact 04:22:59PM
25 as attested by Resolute. 04:23:03PM

1 The tribunal asks about 04:23:05PM
2 measures Resolute has identified as taken by Nova 04:23:07PM
3 Scotia after December 30, 2012 and, therefore, not 04:23:11PM
4 taken into account in Resolute's Statement of 04:23:14PM
5 Claim. I have made reference to this a couple of 04:23:16PM
6 times today. 04:23:20PM

7 Resolute has demonstrated that 04:23:21PM
8 the breaches continue. This was not the only one. 04:23:22PM
9 But there's no new damages claim that Resolute is 04:23:25PM
10 asserting based on this information. It's not 04:23:29PM
11 apparent to us that this requires an amendment of 04:23:34PM
12 the Statement of Claim, but we would certainly 04:23:38PM
13 accede to the judgment of the tribunal in this 04:23:44PM
14 regard, and if an amendment seemed to be required 04:23:46PM
15 for this to be considered, we certainly would be 04:23:49PM
16 prepared to seek amendment. And we would 04:23:51PM
17 recognize, however, that this is not barred by a 04:23:54PM
18 time limitation, because it refers to the 04:23:57PM
19 expropriation in 2014 and, therefore, should not 04:23:59PM
20 be time-barred and, in any case, is at the 04:24:03PM
21 discretion of the tribunal. 04:24:07PM

22 You have also asked us about 04:24:11PM
23 the 1128 submissions. Canada has a natural 04:24:12PM
24 interest in the 1128 submissions. It's a 04:24:19PM
25 government. It's one of the capital P parties. 04:24:22PM

1 We have less of an interest in 1128 submissions. 04:24:27PM
2 We're a Claimant. 04:24:30PM
3 A tribunal derives its 04:24:33PM
4 authority from the terms of NAFTA, the tribunal's 04:24:34PM
5 interpretation of prior arbitrations, applicable 04:24:36PM
6 international law. Article 1128 invites the 04:24:40PM
7 Parties to interpret the law. Article 1131, 04:24:45PM
8 however, provides for a commission to develop the 04:24:49PM
9 law. The interpretation, therefore, must be 04:24:52PM
10 valued by the tribunal for its persuasive 04:24:55PM
11 authority. 1128 does stipulate that the tribunal 04:24:59PM
12 must take into account what the other parties have 04:25:02PM
13 to say, but it's for the tribunal to judge how 04:25:05PM
14 important and how persuasive that commentary is. 04:25:09PM
15 In some instances, the parties 04:25:14PM
16 will not necessarily agree with each other, and 04:25:19PM
17 one of the curiosities, it seemed to me, of the 04:25:21PM
18 argument we heard earlier was that, whenever the 04:25:25PM
19 parties are in agreement, you should regard that 04:25:29PM
20 as in stone, and nothing was said about when they 04:25:31PM
21 might be in disagreement, in which case, we think, 04:25:35PM
22 even more attention should be paid. And, in this 04:25:40PM
23 case, there is some disagreement among the 04:25:43PM
24 parties. We would encourage you to pay that much 04:25:45PM
25 more attention. 04:25:47PM

1 And now, I will accede to 04:25:49PM
2 Mr. Valasek, who is going to address the other 04:25:51PM
3 issues, but I would be happy to take your 04:25:53PM
4 questions first. 04:25:55PM
5 MR. CASS: Just one: Is this 04:25:56PM
6 supercalendered paper? And, if so, what grade? 04:25:59PM
7 MR. FELDMAN: That's an 04:26:02PM
8 excellent question, but since it was printed here, 04:26:03PM
9 the folks at Arbitration Place would know better 04:26:07PM
10 than we what the grade of paper is. 04:26:09PM
11 MS. LEVESQUE: One question on 04:26:16PM
12 Paulsson, actually. 04:26:19PM
13 MR. FELDMAN: On Paulsson? 04:26:20PM
14 MS. LEVESQUE: On Paulsson, 04:26:21PM
15 yes. I'm going to read a couple of sentences for 04:26:21PM
16 you and if you could tell me how you think it 04:26:23PM
17 applies to our circumstance: 04:26:26PM
18 "If an ephemeral arbitral 04:26:30PM
19 tribunal is established 04:26:32PM
20 under a treaty which contains 04:26:33PM
21 requirements as to the 04:26:35PM
22 nationality of private 04:26:36PM
23 claimants, or as to their 04:26:37PM
24 prior exhaustion of 04:26:40PM
25 domestic remedies, the 04:26:41PM

1 claims, as such, are 04:26:42PM
2 perhaps subject to no 04:26:44PM
3 impediment, but the forum 04:26:45PM
4 seized is lacking one of 04:26:47PM
5 the elements required to 04:26:48PM
6 give it life in the first 04:26:50PM
7 place. For such a 04:26:51PM
8 tribunal, these are 04:26:52PM
9 matters of jurisdiction." 04:26:53PM
10 So... 04:26:55PM
11 MR. FELDMAN: So, yes, I'm 04:26:59PM
12 familiar with the passage. 04:27:00PM
13 MS. LEVESQUE: Yes. 04:27:01PM
14 MR. FELDMAN: And I have 04:27:01PM
15 thought about it a little bit. It seems to me 04:27:03PM
16 that the passage indicates that there are 04:27:06PM
17 alternative possible forums. When there's an 04:27:10PM
18 alternative possible forum, it's a matter of 04:27:13PM
19 jurisdiction. When there's no possible 04:27:16PM
20 alternative forum, it's a matter of admissibility. 04:27:19PM
21 So when he says that you 04:27:22PM
22 should be exhausting remedies elsewhere, there 04:27:24PM
23 must be remedies to exhaust, which suggests the 04:27:27PM
24 possibility of another forum. But if there were 04:27:30PM
25 a time bar and it were the same everywhere, your 04:27:33PM

1 claim can't be heard. And therefore -- 04:27:36PM

2 MS. LEVESQUE: Yes. 04:27:43PM

3 MR. FELDMAN: Because 04:27:44PM

4 you're -- 04:27:46PM

5 MS. LEVESQUE: I'm still 04:27:46PM

6 struggling. 04:27:48PM

7 MR. FELDMAN: I didn't want to 04:27:48PM

8 leave it pregnant. 04:27:49PM

9 And, therefore, if your claim 04:27:50PM

10 can't be heard anywhere else, the burden of 04:27:54PM

11 proving this ought to fall on the party that's 04:27:58PM

12 claiming you can't go anywhere else. And, 04:28:01PM

13 therefore, the burden of proof would be on the 04:28:04PM

14 party that is denying admissibility of a claim. 04:28:06PM

15 So there's a logic to -- it's not simply a rule, 04:28:10PM

16 it seems to me. It seems to me that there's a 04:28:14PM

17 logic to assigning the burden of proof to those 04:28:16PM

18 who would bar you completely from those who would 04:28:19PM

19 bar you from this forum. To establish that this 04:28:22PM

20 forum is correct, that burden is on the Claimant, 04:28:25PM

21 and we think we have met it. But if you want to 04:28:27PM

22 tell us we can't go anywhere; our claim is dead, 04:28:30PM

23 well, that burden should be on you to prove. 04:28:33PM

24 MS. LEVESQUE: Setting just 04:28:37PM

25 the burden of proof aside for one second, then, in 04:28:38PM

1 the latter case you just described, would you 04:28:42PM
2 agree then it is jurisdictional or no? 04:28:44PM
3 MR. FELDMAN: Latter case 04:28:47PM
4 meaning? 04:28:48PM
5 MS. LEVESQUE: What you just 04:28:49PM
6 described, if you can't go anywhere else because 04:28:50PM
7 of that. 04:28:53PM
8 MR. FELDMAN: I think, if I 04:28:53PM
9 can't go anywhere else, I think that's a question 04:28:54PM
10 of admissibility. But what I'm trying to suggest, 04:28:56PM
11 and largely in response to Judge Crawford's 04:28:59PM
12 question earlier, the academic literature shows a 04:29:02PM
13 lot of disagreement about the terminology. The 04:29:09PM
14 vocabulary is a slippery vocabulary. The terms 04:29:12PM
15 are used interchangeably in places, and that's why 04:29:15PM
16 I emphasized it. 04:29:18PM
17 In the UNCITRAL Rules, you 04:29:19PM
18 have the suggestion that admissibility comes 04:29:21PM
19 within jurisdiction, and you permit a tribunal 04:29:24PM
20 to decide both jurisdiction and admissibility. So 04:29:28PM
21 the tribunal, in effect, can also bar you from 04:29:34PM
22 taking your claim somewhere else. So these are 04:29:36PM
23 slippery terms, and that's part of why I'm trying 04:29:39PM
24 to suggest that what they're called is not so 04:29:43PM
25 important. Somewhere, there's a burden of proof 04:29:46PM

1 that's assigned. In our case, it doesn't matter, 04:29:49PM
2 because we're operating with a very simple clear 04:29:53PM
3 fact that we believe Professor Hausman has 04:29:56PM
4 established beyond reproach. But if you were 04:29:59PM
5 looking in the abstract and you wanted a theory 04:30:02PM
6 about it, then you would have to look at it a 04:30:04PM
7 different way. And you would have to be concerned 04:30:06PM
8 not so much with the label, but with where the 04:30:10PM
9 burden of proof lies. 04:30:13PM

10 MS. LEVESQUE: Thank you. 04:30:15PM

11 MR. CASS: Just one more 04:30:19PM
12 question: If we resolve matters of jurisdiction 04:30:20PM
13 favourably to Claimant in this proceeding, are we 04:30:24PM
14 still open, on the basis of further facts adduced, 04:30:30PM
15 to reach a different conclusion in the further 04:30:34PM
16 hearing on merits? 04:30:40PM

17 MR. FELDMAN: Of course. We 04:30:42PM
18 contested bifurcating because we did not believe 04:30:45PM
19 that this proceeding could rely simply on the law. 04:30:49PM
20 We thought the facts were inescapable, and this 04:30:54PM
21 would bleed into the merits, and we think it has 04:30:57PM
22 been bleeding into the merits, and we think the 04:30:59PM
23 facts have been critical. So we're already, in 04:31:01PM
24 effect, partly there. But your judgment about 04:31:05PM
25 liability and damages is now a separate proceeding 04:31:08PM

1 because of the choice made to bifurcate, and, 04:31:14PM
2 therefore, we've only addressed here jurisdiction 04:31:17PM
3 and admissibility, in theory at least. 04:31:20PM
4 PRESIDENT: That wasn't, with 04:31:23PM
5 respect, the question. The question was: If we 04:31:24PM
6 decide jurisdiction in these proceedings, is it 04:31:29PM
7 still open to us to reach a different conclusion 04:31:34PM
8 in a further hearing on the merits? 04:31:37PM
9 MR. FELDMAN: I thought I was 04:31:40PM
10 saying yes, but... 04:31:41PM
11 PRESIDENT: You were saying 04:31:43PM
12 yes, but your explanation didn't support your 04:31:45PM
13 conclusion, I would say, with respect. 04:31:48PM
14 MR. FELDMAN: Please. If the 04:31:51PM
15 explanation wasn't so good I'm open to trying 04:31:51PM
16 again. 04:31:55PM
17 PRESIDENT: My understanding 04:31:55PM
18 is that the International Court of Justice decided 04:31:56PM
19 more or less in the second Southwest Africa case 04:32:03PM
20 that a question could be reopened, but that's now 04:32:06PM
21 not followed, and the Court in the Bosnia genocide 04:32:08PM
22 case decided that the prior finding on 04:32:13PM
23 jurisdiction created a res judicata. It could be 04:32:16PM
24 reopened in accordance with the Statute, but 04:32:21PM
25 otherwise was binding on the Court at the merits 04:32:23PM

1 stage. 04:32:27PM

2 MR. FELDMAN: I'm not sure I 04:32:30PM

3 understand the question. I think you are asking 04:32:32PM

4 me whether you can revisit jurisdiction and 04:32:35PM

5 admissibility in a merits phase. Is that -- 04:32:37PM

6 PRESIDENT: That's my 04:32:41PM

7 understanding of the question, my answer to the 04:32:41PM

8 question. 04:32:43PM

9 MR. FELDMAN: I would rather 04:32:43PM

10 you didn't. 04:32:44PM

11 PRESIDENT: My answer to the 04:32:45PM

12 question is no. 04:32:45PM

13 MR. FELDMAN: I would rather 04:32:47PM

14 you didn't, and I would think you shouldn't, but I 04:32:47PM

15 wasn't really prepared to answer that question 04:32:54PM

16 today. 04:32:55PM

17 PRESIDENT: Well, perhaps we 04:32:56PM

18 will leave it there. 04:32:57PM

19 MR. FELDMAN: Anything else? 04:33:03PM

20 Thank you very much. 04:33:04PM

21 PRESIDENT: Mr. Valasek, are 04:33:09PM

22 you happy to proceed? 04:33:11PM

23 MR. VALASEK: I'm happy to 04:33:13PM

24 proceed, yes. 04:33:14PM

25 PRESIDENT: Then do. 04:33:15PM

1 SUBMISSIONS BY MR. VALASEK: 04:33:21PM

2 MR. VALASEK: Mr. Chairman, 04:33:21PM

3 Dean Levesque, Dean Cass, good afternoon. I have 04:34:02PM

4 the enviable task of being the last presenter of 04:34:08PM

5 the day on two fascinating objections, Canada's 04:34:12PM

6 objections under Article 1101(1) and Article 04:34:17PM

7 1102(3), the "relating to" objection and the 04:34:23PM

8 national treatment in connection with provincial 04:34:29PM

9 measures objection. The tribunal has referred to 04:34:32PM

10 these as the scope objection and the provincial 04:34:36PM

11 treatment objection. We have insisted on using 04:34:40PM

12 "national treatment in connection with provincial 04:34:45PM

13 measures" probably for reasons that are obvious. 04:34:47PM

14 Although the objections are 04:34:54PM

15 obviously distinct, I have a few slides on some of 04:34:56PM

16 the common themes in Canada's approach to these 04:35:00PM

17 objections before getting into each one. The 04:35:05PM

18 first theme is that Canada's approach on the law 04:35:11PM

19 is, to a large extent, to exaggerate the legal 04:35:15PM

20 standard that Resolute needs to meet at this stage 04:35:21PM

21 of the proceedings, we submit, to boost its 04:35:24PM

22 chances of success at this stage, boost its chance 04:35:28PM

23 of success of a dismissal, of course, on strictly 04:35:34PM

24 legal grounds. 04:35:37PM

25 So it has made arguments under 04:35:38PM

1 Article 1101(1), and we have seen that those have 04:35:41PM
2 evolved, but Article 1101(1) does not require that 04:35:45PM
3 the measure impose a legal impediment on the 04:35:50PM
4 investor or the investment or that it specifically 04:35:54PM
5 target or name the investor or investment. So 04:35:56PM
6 that's an example, we say, of an exaggerated or 04:36:00PM
7 unduly burdensome standard that it says we need to 04:36:04PM
8 meet. 04:36:08PM

9 And with respect to Article 04:36:09PM
10 1102(3), we say that that standard does not 04:36:10PM
11 require that the investor have an investment 04:36:16PM
12 within the provincial jurisdiction that is alleged 04:36:19PM
13 to have mistreated the investor. Again, we say 04:36:22PM
14 that's an exaggerated standard and that we can see 04:36:25PM
15 this common theme in the way they have argued the 04:36:30PM
16 law. 04:36:32PM

17 I will, of course, in this 04:36:33PM
18 presentation, go through in detail what we believe 04:36:35PM
19 the proper interpretation is. We suggest that the 04:36:38PM
20 proper standard under each objection is lower than 04:36:41PM
21 the standard that Canada has argued for. 04:36:45PM

22 On the facts, we submit that, 04:36:55PM
23 at the same time as it exaggerates the legal 04:36:59PM
24 standard, Canada tends to diminish Resolute's 04:37:01PM
25 claim into a version that would satisfy the 04:37:05PM

1 requirements for early dismissal. So, for Article 04:37:07PM
2 1101, Canada has been at pains to say that all 04:37:14PM
3 that we're alleging is mere effect, because they 04:37:17PM
4 know they've got the Methanex standard, and if 04:37:20PM
5 they can slot us into that standard, they're home. 04:37:22PM
6 And similarly, on 1102(3), 04:37:28PM
7 they've characterized our claim as being a claim 04:37:32PM
8 that does not relate to treatment by the province. 04:37:38PM
9 But Canada, in doing so, in trying to diminish 04:37:45PM
10 Resolute's claim, ignores the central complaint in 04:37:49PM
11 Resolute's claim, namely, that Nova Scotia adopted 04:37:52PM
12 its measures with the clear intention of making 04:37:55PM
13 Port Hawkesbury the national champion and the 04:37:59PM
14 lowest-cost producer in North America. 04:38:01PM
15 So Canada is not accepting 04:38:06PM
16 Resolute's allegations pro tem, as it promised it 04:38:08PM
17 would, and improperly pushing Resolute to defend 04:38:12PM
18 the merits of this case. And I think we have seen 04:38:16PM
19 that today, that half of the debate has been a 04:38:18PM
20 debate that largely is pushing us into the merits. 04:38:22PM
21 And I will say that there's a 04:38:27PM
22 significant prejudice in that because of the risk 04:38:29PM
23 of a prejudgment of the merits and especially on 04:38:32PM
24 causation. I think we have to be very careful 04:38:35PM
25 because there's a standard of causation on the 04:38:39PM

1 merits. That's, of course, the full legal 04:38:43PM
2 standard of causation. There's the question of 04:38:44PM
3 what kind of causal nexus is required under 04:38:48PM
4 Article 1101. We will see that the standard, we 04:38:50PM
5 submit, is not a full legal standard of causation. 04:38:54PM
6 Otherwise you are prejudging the merits at a 04:38:58PM
7 preliminary stage. 04:39:01PM
8 And then, on top of 04:39:02PM
9 everything, we've got two debates going on today. 04:39:04PM
10 One over statute of limitations and one over these 04:39:07PM
11 other objections, and with respect to each of 04:39:11PM
12 those the tribunal is being asked to look at a 04:39:14PM
13 different time period. And I would submit to you 04:39:16PM
14 that that's very confusing from a causation point 04:39:19PM
15 of view, and you will see that we heard that 04:39:21PM
16 Canada has taken advantage of that. 04:39:24PM
17 So they've said over and over 04:39:27PM
18 how could we meet the 1101 test when we've said 04:39:31PM
19 that it was -- we've said that it was unknown or 04:39:34PM
20 unknowable what the effect would be on Port 04:39:37PM
21 Hawkesbury. But there, we're talking about the 04:39:42PM
22 facts pre-December 2012. So, under the statute of 04:39:45PM
23 limitations, the argument is restricted to that 04:39:51PM
24 very narrow period, whereas, with respect to the 04:39:53PM
25 other objections, we're looking at the full time 04:39:57PM

1 horizon of the allegations we have made in our 04:40:00PM
2 Statement of Claim, which, of course, permit us to 04:40:03PM
3 go into 2013, 2014. So we're dealing with a 04:40:05PM
4 number of different objections. 04:40:11PM

5 We submit that, taken in 04:40:12PM
6 isolation, we submit, Resolute's position is quite 04:40:14PM
7 clear. I would just caution that the tribunal be 04:40:19PM
8 careful in distinguishing the time periods in 04:40:23PM
9 respect of what is relevant for each objection 04:40:26PM
10 and, of course, what the standard is. 04:40:29PM

11 So with that introduction, let 04:40:32PM
12 me turn to 1101. I have a slide with the language 04:40:35PM
13 of the provision. We have seen it a number of 04:40:54PM
14 times. 04:40:55PM

15 I think what is important to 04:40:56PM
16 observe is that the provision calls for -- well, 04:40:57PM
17 first of all, it's an introductory provision. It 04:41:02PM
18 is 1101(1), and it sets out the scope for this 04:41:04PM
19 Chapter of NAFTA. And what it simply does is that 04:41:09PM
20 it says that: 04:41:14PM

21 "This chapter applies to 04:41:14PM
22 measures adopted or 04:41:16PM
23 maintained by a party 04:41:17PM
24 relating to investors or 04:41:18PM
25 investments." 04:41:22PM

1 It's simply saying that this 04:41:23PM
2 chapter will only apply if you have alleged a 04:41:27PM
3 measure that has a connection with investors or 04:41:29PM
4 investments. 04:41:34PM

5 We have heard earlier today 04:41:37PM
6 that sort of a new, as far as I understand, a new 04:41:39PM
7 theory that the tribunal should assess the Article 04:41:43PM
8 1110 claim, the expropriation claim, through the 04:41:47PM
9 lens of 1101, but 1101 says nothing about 04:41:51PM
10 individual claims. This provision simply says 04:41:55PM
11 that this chapter applies to measures adopted and 04:42:00PM
12 whether they relate to investors. It's not a 04:42:04PM
13 provision that is meant to be used to evaluate the 04:42:07PM
14 merits of a claim, even a preliminary assessment 04:42:11PM
15 of the claim. It is really meant to set a 04:42:14PM
16 threshold under which Claimants cannot fall, and 04:42:18PM
17 we submit that that's the Methanex standard. But, 04:42:22PM
18 otherwise, it cannot provide the sort of 04:42:25PM
19 analytical power that Canada suggests it might 04:42:28PM
20 have with respect to any one claim. That's the 04:42:32PM
21 merits. And you would be prejudging the merits if 04:42:35PM
22 you used two words, "relating to," to determine 04:42:38PM
23 whether there's been an expropriation. It's just 04:42:42PM
24 inappropriate. 04:42:44PM

25 I would like to make a number 04:42:51PM

1 of points that are contextual really for the 04:42:52PM
2 concept of interpreting or for the exercise of 04:42:57PM
3 interpreting the words "relating to." 04:43:01PM
4 The only NAFTA tribunal to 04:43:05PM
5 reject a claim based on Article 1101 was Methanex, 04:43:07PM
6 where the Claimant was arguing that "mere effect" 04:43:13PM
7 was sufficient. No subsequent NAFTA tribunal has 04:43:16PM
8 rejected a claim on the grounds that a measure did 04:43:23PM
9 not relate to the investor or investment. 04:43:25PM
10 In our view, it's also 04:43:34PM
11 important to note that the subsequent cases -- 04:43:35PM
12 Cargill, Apotex, Bilcon, Mesa Power -- not only 04:43:38PM
13 did all of them dismiss the objection based on 04:43:42PM
14 Article 1101, but all of them considered the 04:43:45PM
15 objection in conjunction with the merits of the 04:43:48PM
16 case. In other words, most tribunals have 04:43:50PM
17 recognized that, although you cannot ignore the 04:43:57PM
18 text of NAFTA -- and this is a real provision -- it 04:44:00PM
19 is an introductory provision. Some meaning has 04:44:03PM
20 to be given to "relating to". It's extremely 04:44:06PM
21 difficult to do so at a preliminary stage. So 04:44:09PM
22 most have considered what it means only after they 04:44:13PM
23 have the confidence that they have a much better 04:44:17PM
24 sense of causation. 04:44:20PM
25 MR. CASS: In this regard, can 04:44:23PM

1 you tell me what the Methanex test means? What the 04:44:26PM
2 meaning of "legally significant" is as opposed to 04:44:33PM
3 beyond a mere incidental effect? I know what it 04:44:37PM
4 isn't. 04:44:42PM

5 MR. VALASEK: Absolutely. 04:44:43PM

6 MR. CASS: But I'm curious 04:44:44PM
7 whether you can enlighten me what it is. 04:44:46PM

8 MR. VALASEK: Right after this 04:44:48PM
9 contextual slide, I have about 10 slides on that, 04:44:49PM
10 so that's the core of my presentation on 1101. So 04:44:52PM
11 thank you for the question. If I may proceed, I 04:44:56PM
12 hope I will answer it. Please get back to me with 04:44:59PM
13 a follow-up if I haven't. 04:45:03PM

14 MR. CASS: I will. 04:45:05PM

15 MR. VALASEK: Thank you. 04:45:06PM

16 Further contextual point or 04:45:09PM
17 maybe distinguishing point: Bayview, which the 04:45:11PM
18 Respondent has cited, is not a case dealing with 04:45:15PM
19 1101 in the sense that it arises here. Bayview 04:45:20PM
20 was a case dealing with whether the investor had 04:45:23PM
21 an investment in the host state. So it's not 04:45:27PM
22 particularly helpful in the context of this 04:45:32PM
23 matter, but it doesn't really matter either way. 04:45:38PM
24 I mean, as we suggest now, we think that the 04:45:41PM
25 guidance that the tribunal has from Methanex and 04:45:43PM

1 Cargill and others are more than enough to analyze 04:45:46PM
2 the situation. 04:45:51PM

3 So getting to Dean Cass's 04:45:54PM
4 question: What is the meaning of Methanex? We 04:45:56PM
5 have also tried to now delve into this obviously 04:45:58PM
6 through our written submissions and tried to boil 04:46:01PM
7 it down for you on a number of slides. 04:46:04PM

8 We think it is helpful to back 04:46:08PM
9 up, because the parties have been using, to a 04:46:10PM
10 large extent, in the pleadings, they have been 04:46:17PM
11 using phrases, things like legally significant 04:46:19PM
12 connection, things like causal nexus, but what 04:46:22PM
13 does it actually mean? 04:46:26PM

14 Well, let's back up. What was 04:46:27PM
15 at issue in Methanex, and how did the issue arise, 04:46:28PM
16 and what was the source of the argument that 04:46:31PM
17 convinced the tribunal that a threshold should be 04:46:33PM
18 established even at a non-merits level, if you 04:46:36PM
19 will? 04:46:41PM

20 So we looked to the submission 04:46:42PM
21 of the United States, and that was the Respondent 04:46:43PM
22 government in that case. And they said the 04:46:46PM
23 following in their jurisdictional memorial: 04:46:49PM

24 "Measures of general 04:46:51PM
25 applicability --" 04:46:53PM

1 And that was what was at issue 04:46:56PM
2 in Methanex. It was a regulation to ban an 04:46:58PM
3 additive in gasoline adopted for health and 04:47:01PM
4 environmental reasons. 04:47:06PM
5 "Measures of general 04:47:08PM
6 applicability, especially 04:47:09PM
7 ones such as those at 04:47:11PM
8 issue here that are aimed 04:47:13PM
9 at the protection of 04:47:14PM
10 human health and the 04:47:15PM
11 environment, are, by 04:47:16PM
12 their nature, likely to 04:47:18PM
13 affect a vast range of 04:47:20PM
14 actors and economic 04:47:22PM
15 interests. Given the 04:47:23PM
16 potential of such 04:47:24PM
17 measures to affect 04:47:25PM
18 enormous numbers of 04:47:26PM
19 investors and investments 04:47:28PM
20 with respect to any such 04:47:29PM
21 specific measure --" 04:47:31PM
22 Sorry. 04:47:32PM
23 "-- given the potential 04:47:33PM
24 of such measures to 04:47:34PM
25 affect enormous numbers 04:47:34PM

1 of investors and 04:47:36PM
2 investments, with respect 04:47:36PM
3 to any such specific 04:47:37PM
4 measure, there must be a 04:47:38PM
5 legally significant 04:47:39PM
6 connection between the 04:47:40PM
7 measure and the Claimant 04:47:41PM
8 investor or its 04:47:43PM
9 investment." 04:47:43PM
10 And the tribunal's reasoning 04:47:45PM
11 shows that they were moved by that argument, and 04:47:51PM
12 it's worth looking at it at some length. The 04:47:55PM
13 tribunal held in its decision, in its partial 04:47:58PM
14 award: 04:48:01PM
15 "If the threshold 04:48:02PM
16 provided by Article 1101 04:48:03PM
17 were merely one of 04:48:05PM
18 affecting, as the 04:48:06PM
19 Claimant, Methanex, 04:48:09PM
20 contends, it would be 04:48:09PM
21 satisfied wherever any 04:48:11PM
22 economic impact was felt 04:48:12PM
23 by an investor or an 04:48:14PM
24 investment. For example, 04:48:15PM
25 in this case, the test 04:48:17PM

1 could be met by suppliers 04:48:18PM
2 to Methanex who suffered 04:48:19PM
3 as a result of Methanex's 04:48:21PM
4 alleged losses, suppliers 04:48:22PM
5 to those suppliers and so 04:48:24PM
6 on towards infinity. As 04:48:26PM
7 such, Article 1101 would 04:48:28PM
8 provide no significant 04:48:30PM
9 threshold to a NAFTA 04:48:31PM
10 arbitration. A threshold 04:48:33PM
11 which could be surmounted 04:48:35PM
12 by an indeterminate class 04:48:36PM
13 of investors making a 04:48:38PM
14 claim alleging loss is no 04:48:39PM
15 threshold at all, and the 04:48:47PM
16 attractive simplicity of 04:48:49PM
17 Methanex's interpretation 04:48:51PM
18 derives from the fact 04:48:52PM
19 that it imposes no 04:48:53PM
20 practical limit. We 04:48:54PM
21 decide that the phrase 04:48:55PM
22 'relating to' in Article 04:48:57PM
23 1101 signifies something 04:48:58PM
24 more than the mere effect 04:49:01PM
25 of a measure. It 04:49:02PM

1 requires a legally 04:49:03PM
2 significant connection 04:49:05PM
3 between them." 04:49:06PM
4 Unfortunately, as clear as 04:49:07PM
5 that is for the type of measure adopted in 04:49:13PM
6 Methanex and the type of harm alleged in Methanex, 04:49:17PM
7 it's not particularly helpful for establishing 04:49:20PM
8 what that something more is. And so we say, in 04:49:25PM
9 this case, we have a finite number of affected 04:49:30PM
10 market participants, not an indeterminate class of 04:49:34PM
11 investors. And, therefore, Methanex really is 04:49:37PM
12 distinguished right off the bat. The whole worry 04:49:41PM
13 about opening up NAFTA to an indeterminate class, 04:49:44PM
14 infinity, anyone can come and show up at the door 04:49:52PM
15 of a NAFTA tribunal or a Respondent state and say, 04:49:57PM
16 "We have a problem. You've passed legislation. 04:49:59PM
17 We would like a remedy," simply doesn't apply in 04:50:01PM
18 cases where you have measures that are alleged to 04:50:05PM
19 have an impact on a finite number of affected 04:50:09PM
20 participants. 04:50:12PM
21 Methanex is also not 04:50:14PM
22 particularly helpful because it decided only what 04:50:15PM
23 did not satisfy Article 1101, that is, mere effect 04:50:18PM
24 in connection with a measure of general 04:50:22PM
25 applicability, not what does satisfy the "relating 04:50:24PM

1 to" test beyond the phrase "legally significant 04:50:29PM
2 connection." And we submit that that likely 04:50:32PM
3 explains why all other tribunals considering the 04:50:35PM
4 test have decided it in conjunction with the 04:50:38PM
5 merits, because the notion of a legally 04:50:41PM
6 significant connection is closely bound to whether 04:50:43PM
7 the claim has legal merit. And obviously if at 04:50:46PM
8 some point you decide the claim doesn't have legal 04:50:49PM
9 merit, it's quite simple to add on a paragraph to 04:50:51PM
10 your award and say, "Well, we also believe it 04:50:54PM
11 doesn't relate to, or maybe it does, but it 04:50:57PM
12 doesn't have legal merit," but you do it with the 04:50:58PM
13 confidence of the full record. We don't have that 04:51:01PM
14 luxury here, and so we need to push further. 04:51:04PM
15 We submit that Methanex, as we 04:51:09PM
16 said, is a lower standard than what Canada says it 04:51:12PM
17 is. We submit that Canada exaggerates the test. 04:51:15PM
18 Methanex did not adopt a legal impediment test. 04:51:20PM
19 It accepted the reasoning of Pope and Talbot that 04:51:24PM
20 a legally significant connection does not require 04:51:27PM
21 that a measure be primarily directed at the 04:51:30PM
22 investment or the investor. And we think it's 04:51:33PM
23 very important to keep in mind that the test was 04:51:40PM
24 developed in the context of a regulatory measure 04:51:42PM
25 of general applicability with potential impact on 04:51:44PM

1 an indeterminate class of investors, which is 04:51:47PM
2 simply not a policy concern here or not a factual 04:51:49PM
3 concern. 04:51:53PM
4 So what do the other cases say 04:51:57PM
5 that could be -- 04:51:59PM
6 MS. LEVESQUE: Sorry. If I 04:52:01PM
7 may, before you move on from Methanex. 04:52:02PM
8 MR. VALASEK: Yes, please. 04:52:04PM
9 MS. LEVESQUE: Could you 04:52:05PM
10 address the targeting element in the sense that, 04:52:06PM
11 in the first round, the tribunal said, "We don't 04:52:09PM
12 think there's evidence of meeting 1101, so go, 04:52:12PM
13 find evidence, and if there's nationality-based 04:52:18PM
14 discrimination, we will find that is met." And 04:52:23PM
15 you can say in Cargill, it was also the turning 04:52:27PM
16 point, the presence of nationality-based 04:52:30PM
17 discrimination. 04:52:30PM
18 So could you address this, the 04:52:34PM
19 targeting aspect. What do you 04:52:37PM
20 do with that aspect? 04:52:41PM
21 MR. VALASEK: Right. Well, I 04:52:42PM
22 think that that does become very important, that 04:52:47PM
23 where you can demonstrate -- and I think Methanex 04:52:49PM
24 says it and so does Cargill -- where you can 04:52:52PM
25 demonstrate that there is something more than mere 04:52:54PM

1 effect, you've likely met the test. 04:52:56PM

2 Even though intentional 04:52:59PM

3 discrimination against a foreign investor is not 04:53:01PM

4 necessary to ground a claim under NAFTA, it's 04:53:04PM

5 clearly sufficient to establish a claim, and it 04:53:08PM

6 would clearly satisfy 1101. 04:53:13PM

7 So we do find Methanex gave 04:53:16PM

8 the Claimant an opportunity to do that. In the 04:53:18PM

9 end, they said they weren't satisfied with the 04:53:20PM

10 evidence. 04:53:23PM

11 I'm now going to go through 04:53:24PM

12 some of these other cases that have held that 1101 04:53:26PM

13 was satisfied, and I will answer the tribunal's 04:53:29PM

14 Question 7 where you have, in fact, refined the 04:53:31PM

15 question that you have just put, which is: Where 04:53:35PM

16 exactly do we, Resolute, believe that the proper 04:53:37PM

17 test sits? Is it intentional? What is required 04:53:42PM

18 in order to meet 1101? So I think, once again, 04:53:47PM

19 it's probably best that I flow through, and we 04:53:50PM

20 will see if I have satisfied you with my answer. 04:53:53PM

21 We submit that, in looking at 04:54:01PM

22 some of these cases, notably Cargill and Mesa 04:54:04PM

23 Power and others, we believe that, far from some 04:54:08PM

24 sort of legal impediment or specific targeting, that 04:54:11PM

25 just a causal nexus is sufficient. And I will get 04:54:16PM

1 into what that means. 04:54:20PM

2 Resolute need only demonstrate 04:54:21PM

3 that some prima facie causal connection exists 04:54:23PM

4 between the challenged measures and Resolute and 04:54:26PM

5 its investment. Such a causal connection 04:54:29PM

6 satisfies the legally significant connection test 04:54:32PM

7 that was articulated by Methanex. 04:54:35PM

8 So let's first look at 04:54:38PM

9 Cargill. What were the facts? Mexico intervened 04:54:40PM

10 to support the Mexican sugar cane producers over 04:54:44PM

11 U.S. producers of high fructose corn syrup, and 04:54:47PM

12 two measures were challenged: a permit 04:54:50PM

13 requirement to import high fructose corn syrup and 04:54:53PM

14 a tax on products containing sweeteners other than 04:54:57PM

15 sugar produced from sugar cane. 04:54:59PM

16 Importantly, the new tax 04:55:02PM

17 applied to soft drink manufacturers who sold 04:55:04PM

18 products containing the high fructose corn syrup, 04:55:07PM

19 but it did not apply directly to the producers of 04:55:10PM

20 high fructose corn syrup itself, and remember we 04:55:13PM

21 recalled that this morning. We said it applied to 04:55:16PM

22 the bottlers, not to the actual industry that was 04:55:19PM

23 affected by the tax. Cargill was not named in 04:55:22PM

24 these measures, but it was clearly the industry 04:55:27PM

25 that was meant to be affected through the negative 04:55:31PM

1 treatment. 04:55:33PM

2 MR. CASS: Is it fair to 04:55:36PM

3 characterize Cargill with respect not to the 04:55:37PM

4 permitting, but to the tax, as only requiring an 04:55:40PM

5 effect, and an indirect effect at that, but one 04:55:47PM

6 that was substantial and understood to be part of 04:55:52PM

7 what the regulation adopted by Mexico was doing? 04:55:59PM

8 MR. VALASEK: I think so. We 04:56:03PM

9 use slightly different language as we go through 04:56:08PM

10 it, but I think that's a fair characterization. 04:56:10PM

11 One of the standards that the 04:56:13PM

12 tribunal has put to us is whether significant 04:56:14PM

13 effect or significant impact alone is sufficient 04:56:16PM

14 to meet the standard. You will see that I discuss 04:56:20PM

15 that that's a tricky one because that alone may 04:56:23PM

16 not give you enough to know whether you've got a 04:56:28PM

17 sufficient causal connection. Since these cases 04:56:32PM

18 have decided the objection in conjunction with the 04:56:35PM

19 merits, they don't have that problem, but as a 04:56:37PM

20 preliminary objection test, it might not be the 04:56:40PM

21 best one to adopt. 04:56:44PM

22 The additional element that 04:56:45PM

23 you have added there, that the measure has been 04:56:46PM

24 adopted with the understanding, either a subjective 04:56:49PM

25 understanding -- either that you knew or should 04:56:51PM

1 have known that you were doing it on the basis 04:56:53PM
2 that it would have that impact, which, frankly, in 04:56:55PM
3 Cargill and, we submit, in this case is obvious, 04:56:58PM
4 we submit that certainly gets you over the hump. 04:57:01PM
5 So you are anticipating my 04:57:04PM
6 answers or my analysis under Question 7, but I 04:57:07PM
7 think that that has been helpful. 04:57:11PM
8 So Cargill said that -- let me 04:57:14PM
9 make sure I am on the right slide. Yes. So the 04:57:18PM
10 decision, the award in Cargill -- first of all, I 04:57:21PM
11 think it's important to note that the objection 04:57:25PM
12 was decided in conjunction with the decision on 04:57:26PM
13 the merits. I think it's always important to 04:57:29PM
14 remember that. You are in a very difficult 04:57:31PM
15 position here because, well, we're in this stage. 04:57:33PM
16 We know why we're here. And with respect to some 04:57:36PM
17 of these objections, Canada said that this could 04:57:39PM
18 be resolved on a basis of pure legal 04:57:42PM
19 interpretation. But we can see that it's not so 04:57:46PM
20 easy. There is a large element of interpretation 04:57:49PM
21 of the case and what it means and, therefore, 04:57:52PM
22 useful to keep that in mind. 04:57:58PM
23 So Cargill, having knowledge 04:58:04PM
24 of the case, said Article 1101(1) has a causal 04:58:05PM
25 connection requirement. It doesn't say you have 04:58:09PM

1 to meet the full causation test. There's a causal 04:58:11PM
2 connection requirement: 04:58:14PM
3 "The tribunal determines 04:58:14PM
4 that the measures are all 04:58:15PM
5 relating to the 04:58:17PM
6 stipulated investors and 04:58:18PM
7 investments." 04:58:20PM
8 And why is that important? 04:58:20PM
9 Well, it's important because none of the high 04:58:22PM
10 fructose corn syrup producers were named. They 04:58:24PM
11 weren't impacted on in the sense that there wasn't 04:58:34PM
12 a tax on them or there wasn't an impediment to 04:58:38PM
13 them. This was a measure that was adopted with a 04:58:41PM
14 certain purpose, but the actual participants of 04:58:44PM
15 the industry that were affected were out there. 04:58:48PM
16 They weren't within the scope specifically of that 04:58:53PM
17 tax. 04:58:57PM
18 Also very important in 04:58:59PM
19 Cargill, and I think of significant guidance to 04:59:01PM
20 this tribunal, since we are sitting in Toronto 04:59:04PM
21 where the Ontario courts have supervisory 04:59:08PM
22 jurisdiction, Mexico, of course, challenged the 04:59:10PM
23 Cargill award, which awarded damages to Cargill 04:59:16PM
24 for upstream losses, in other words, the losses 04:59:20PM
25 caused by the tax to its operations outside of 04:59:23PM

1 Mexico, and they challenged that decision. And 04:59:27PM
2 the challenge was rejected. The Ontario courts, in 04:59:31PM
3 respect of 1101, said: 04:59:35PM
4 "Clearly the measures 04:59:38PM
5 adopted by Mexico related 04:59:38PM
6 to the investor and the 04:59:40PM
7 investment. The term 04:59:41PM
8 'related' requires only 04:59:42PM
9 some connection and does 04:59:44PM
10 not require that the 04:59:46PM
11 measure be adopted with 04:59:47PM
12 the express purpose of 04:59:48PM
13 causing loss." 04:59:50PM
14 So that's a further indication 04:59:51PM
15 of, certainly, what it doesn't mean. "Relating 04:59:53PM
16 to" doesn't require that it be adopted with the 04:59:57PM
17 express purpose of causing loss. So probably the 05:00:01PM
18 sort of understanding, the either subjective or 05:00:06PM
19 constructive knowledge that the government is 05:00:09PM
20 doing this with a view to supporting a local 05:00:11PM
21 champion or taking other measures that have this 05:00:16PM
22 effect, but effect on a limited class. I think 05:00:23PM
23 that's the key. 05:00:26PM
24 What troubled Methanex is that 05:00:27PM
25 it was a law of general applicability that did not 05:00:29PM

1 have any sort of industry in mind, whereas Cargill 05:00:34PM
2 was clearly dealing with sweeteners, and we 05:00:38PM
3 submit, in Resolute, we're clearly dealing with 05:00:41PM
4 supercalendered paper. 05:00:44PM

5 On the basis of parsing 05:00:50PM
6 Methanex and Cargill -- of course, there are other 05:00:52PM
7 cases, but these are the ones that are very 05:00:54PM
8 helpful to your analysis, we submit -- Resolute 05:00:55PM
9 satisfies the Article 1101 requirement. The Nova 05:00:58PM
10 Scotia measures are similar to the tax in Cargill 05:01:01PM
11 affecting high fructose corn syrup manufacturers 05:01:03PM
12 without directly imposing a burden on them. The 05:01:06PM
13 Nova Scotia measures supported Port Hawkesbury's 05:01:10PM
14 production capacity, thereby affecting Resolute as 05:01:13PM
15 an supercalendered paper market rival without 05:01:16PM
16 directly imposing a burden on Resolute. 05:01:21PM

17 In contrast, the Nova Scotia 05:01:24PM
18 measures are dissimilar to the measures of general 05:01:25PM
19 applicability in Methanex intended to protect 05:01:29PM
20 public health and safety. Again, the Nova Scotia 05:01:32PM
21 measures were aimed at supporting a particular 05:01:35PM
22 player, Port Hawkesbury, in a particular market, 05:01:37PM
23 supercalendered paper, thereby taking away the 05:01:41PM
24 market share of particular competitors, including 05:01:44PM
25 Resolute. 05:01:47PM

1 Importantly, Canada has 05:01:52PM
2 conceded -- and we heard it again this morning -- 05:01:53PM
3 that the measures in Cargill satisfied the legally 05:01:55PM
4 significant connection test and were related to 05:01:58PM
5 the investor or the investment. So they really 05:02:03PM
6 dialled back from the suggestion that something 05:02:07PM
7 more is required. But, again, I'm somewhat 05:02:09PM
8 confused because, this morning, in addressing your 05:02:11PM
9 Question 7, they seemed to suggest that only some 05:02:17PM
10 higher test requiring an impediment on the 05:02:20PM
11 investor would be required. But that's not what 05:02:23PM
12 Cargill found. 05:02:26PM

13 Mesa Power is another helpful 05:02:29PM
14 case. The factual background here is that Ontario 05:02:30PM
15 adopted a feed-in tariff program promoting the 05:02:33PM
16 generation and consumption of renewable energy. 05:02:37PM
17 U.S. energy company Mesa Power failed to receive a 05:02:40PM
18 contract under that program, and three measures 05:02:43PM
19 were challenged: new legislation creating the 05:02:46PM
20 Ontario Power Authority, providing for management 05:02:49PM
21 of electricity supply, capacity, and demand; new 05:02:51PM
22 legislation supporting and developing 05:02:55PM
23 environmentally-friendly energy, and the 05:02:56PM
24 ministerial orders directing the Ontario Power 05:02:59PM
25 Authority to plan for 10.7 gigawatts of renewable 05:03:02PM

1 energy by 2018. None of these measures named, 05:03:06PM
2 created a legal impediment for, or was intended to 05:03:10PM
3 harm Mesa Power. And the holding in Mesa Power 05:03:13PM
4 was that every measure, including the general 05:03:16PM
5 legislation, related to Mesa Power or its 05:03:19PM
6 investment as it was enough that there was a 05:03:22PM
7 causal connection between the legislation and Mesa 05:03:24PM
8 Power's loss. 05:03:27PM

9 The tribunal held that the 05:03:29PM
10 impugned measures must: 05:03:30PM

11 "Relate to an investor of 05:03:32PM
12 another NAFTA party or to 05:03:34PM
13 investments of such an 05:03:36PM
14 investor...this means 05:03:37PM
15 that all of the measures 05:03:38PM
16 identified must have a 05:03:39PM
17 causal nexus with the 05:03:41PM
18 Claimant or its 05:03:42PM
19 investment." 05:03:43PM

20 And it endorsed Cargill. 05:03:44PM

21 Before I get to your Question 05:03:49PM
22 7, I would like to just go through a number of 05:03:51PM
23 slides that list some of the key holdings from 05:03:53PM
24 some of the other cases, which we, again, suggest 05:03:57PM
25 make it very clear that the Methanex test must be 05:04:00PM

1 applied quite carefully and that the threshold is 05:04:07PM
2 actually quite low with respect to the type of 05:04:10PM
3 measure we have here and when it's raised at a 05:04:13PM
4 preliminary stage. 05:04:18PM

5 So, in Apotex, the tribunal 05:04:19PM
6 did acknowledge, of course, that something more 05:04:28PM
7 than mere effect from the measure is required. 05:04:30PM
8 That's the Methanex holding. But it said: 05:04:32PM

9 "The tribunal thinks it 05:04:35PM
10 is inappropriate to 05:04:36PM
11 introduce within NAFTA 05:04:37PM
12 Article 1101 a legal test 05:04:39PM
13 of causation, applicable 05:04:41PM
14 under Chapter 11's 05:04:43PM
15 substantive provisions, 05:04:45PM
16 for the merits of the 05:04:46PM
17 Claimant's claims. There 05:04:47PM
18 is no reason for 05:04:49PM
19 requiring NAFTA Article 05:04:49PM
20 1101 to be so narrowly 05:04:50PM
21 interpreted as to require 05:04:53PM
22 only a Claimant with a 05:04:54PM
23 successful case on 05:04:55PM
24 causation to pass through 05:04:56PM
25 its threshold gateway. 05:04:57PM

1 Otherwise, a Claimant 05:04:59PM
2 investor might have a 05:05:00PM
3 legitimate claim for 05:05:01PM
4 breach, made in good 05:05:02PM
5 faith but, especially at 05:05:05PM
6 a preliminary phase like 05:05:06PM
7 this, may not make it 05:05:07PM
8 through."
9 Similarly Bilcon, here the 05:05:10PM
10 challenged measures included the performance of a 05:05:15PM
11 joint Canadian federal-provincial environmental 05:05:18PM
12 assessment of a proposed quarry. Bilcon itself, 05:05:22PM
13 the Claimant, had no rights or obligations under 05:05:26PM
14 the challenged industrial approvals. The tribunal 05:05:29PM
15 referred to Bilcon's partnership with the company 05:05:32PM
16 to which the relevant approvals had been issued to 05:05:35PM
17 confirm that Bilcon was, in fact, an investor 05:05:38PM
18 under Article 1101, and the tribunal did not refer 05:05:40PM
19 to Bilcon's partnership in support of any legal 05:05:44PM
20 impediment test. So, again, here Bilcon wasn't 05:05:47PM
21 specifically named or targeted. They had a 05:05:51PM
22 partnership, and basically, on the basis of an 05:05:54PM
23 evaluation of the facts, they were able to make 05:05:56PM
24 the causal connection. 05:05:59PM
25 We have already said that 05:06:00PM

1 Bayview did not deal with the meaning of the 05:06:01PM
2 phrase "relating to." It addressed a separate 05:06:04PM
3 question of whether Article 1101 required 05:06:07PM
4 investors to have an investment in the territory 05:06:10PM
5 of the Respondent state. 05:06:13PM
6 So, here, the analogous 05:06:15PM
7 question is: Does Resolute have an investment in 05:06:18PM
8 Canada? I mean, yes. That's not contested. So 05:06:21PM
9 Bayview is really of no assistance here. 05:06:24PM
10 Bayview did discuss the legally 05:06:28PM
11 significant connection test, but between the 05:06:31PM
12 Respondent state and the investor at issue, not 05:06:34PM
13 between the challenged measures and the investment 05:06:36PM
14 or investor at issue. 05:06:39PM
15 So as you, Members of the 05:06:43PM
16 Tribunal, struggle with or hopefully don't 05:06:45PM
17 struggle with the interpretation of Article 1101, 05:06:49PM
18 there are a number of competing policy concerns 05:06:52PM
19 that need to be considered. On the one hand, the 05:06:57PM
20 Methanex concern, avoid opening the 05:07:02PM
21 floodgates of litigation to protect NAFTA parties 05:07:04PM
22 from facially non-meritorious claims asserted by 05:07:08PM
23 investors affected by the distant, indirect ripple 05:07:12PM
24 effects of state measures, that's what Methanex 05:07:15PM
25 was concerned about, and that's why they imposed a 05:07:17PM

1 standard beyond mere effect from general law. 05:07:20PM

2 On the other hand, it is 05:07:25PM

3 important to maintain the distinction between the 05:07:27PM

4 merits issue of causation and the jurisdictional 05:07:30PM

5 question of relating to. It can't be the same as 05:07:33PM

6 the merits standard of causation. It has to be 05:07:38PM

7 something less than that. It has to be a prima 05:07:41PM

8 facie causation standard, a causal nexus, but it 05:07:45PM

9 can't be that Claimants at a jurisdictional phase 05:07:48PM

10 must meet the full merits inquiry of causation. 05:07:53PM

11 And, of course, that's necessary in order to 05:07:58PM

12 protect possibly meritorious claims from early 05:08:00PM

13 dismissal. 05:08:03PM

14 The standard also has to be 05:08:10PM

15 set at the right level to prevent NAFTA parties 05:08:11PM

16 from avoiding liability by not naming foreign 05:08:14PM

17 investors or by couching detrimental measures in 05:08:17PM

18 neutral terms. I mean, we know that that 05:08:21PM

19 sometimes happens. So you cannot establish a test 05:08:23PM

20 that would give NAFTA parties under NAFTA a way of 05:08:28PM

21 avoiding scrutiny under the merits, because they 05:08:31PM

22 would then have an easy way of dismissing claims. 05:08:35PM

23 And, of course, it's relevant 05:08:40PM

24 that, if you set a standard that's too high, it 05:08:42PM

25 probably isn't the right interpretation, because 05:08:45PM

1 it would render other NAFTA provisions futile. 05:08:48PM
2 And there are provisions that carve out certain 05:08:51PM
3 measures of general application, like preserving 05:08:56PM
4 the state's right to perform basic social 05:08:58PM
5 services, such as law enforcement and education. 05:09:01PM
6 Now query, if 1101 is a higher 05:09:04PM
7 standard than something quite low, why would such 05:09:08PM
8 a carve-out be required? Presumably those types 05:09:11PM
9 of measures would never target a foreign investor. 05:09:13PM
10 But, again, I'm not putting a lot of stake in 05:09:16PM
11 this, but I think it is a consideration. 05:09:19PM
12 It is a consideration that led 05:09:21PM
13 the tribunal in BG Group v. Argentina to conclude 05:09:23PM
14 that the interpretation of Article 1101 in 05:09:27PM
15 Methanex cannot be sustained. I mean, that 05:09:31PM
16 tribunal thought that even Methanex was going too 05:09:33PM
17 far. They thought that it was just a purely 05:09:35PM
18 introductory concept. I mean, let the Claimant 05:09:37PM
19 make its case. If it's not a proper case on the 05:09:41PM
20 merits, so be it. 05:09:44PM
21 We haven't gone that far, but 05:09:47PM
22 I think it's relevant to consider, in the context 05:09:48PM
23 of your decision on 1101, that at least one 05:09:51PM
24 tribunal has said this just cannot be a 05:09:55PM
25 substantive standard of any kind, because why do 05:09:58PM

1 you have other provisions that have these 05:10:01PM
2 carve-outs, for example? Worth considering. 05:10:03PM
3 PRESIDENT: That's not a NAFTA 05:10:07PM
4 case. 05:10:08PM
5 MR. VALASEK: It's not a NAFTA 05:10:09PM
6 case, correct. 05:10:10PM
7 So Question 7 from the 05:10:18PM
8 tribunal is up on the screen. And the tribunal 05:10:20PM
9 has asked us to comment on the phrase "relating 05:10:27PM
10 to" in connection with three proposed 05:10:29PM
11 constructions: one, that the term requires that 05:10:31PM
12 the action of the party constitute a legal 05:10:34PM
13 direction to, imposition on, or limitation 05:10:36PM
14 respecting the investor or investment; two, that 05:10:39PM
15 the term only requires the action by a party to 05:10:44PM
16 have a significant impact on an investor or 05:10:48PM
17 investment; or, three, that the term requires the 05:10:50PM
18 action of the party to have been undertaken with 05:10:53PM
19 an understanding or purpose that it have a 05:10:55PM
20 significant impact on an investor or investment. 05:10:58PM
21 Which of these interpretations is to be preferred 05:11:00PM
22 and why? Whichever test is chosen, what is its 05:11:03PM
23 application? 05:11:07PM
24 So I have already hinted at 05:11:08PM
25 this, but here is our best effort at an answer. 05:11:11PM

1 So we have set out the three standards. So the 05:11:17PM
2 first standard we understand to be a standard that 05:11:19PM
3 would require an actual indication on the measure 05:11:23PM
4 itself that it has in mind an impact or that it 05:11:28PM
5 has targeted specifically the particular investor 05:11:33PM
6 in mind. So obviously there was a prior case 05:11:37PM
7 involving the predecessor to Resolute, 05:11:41PM
8 AbitibiBowater. There was an expropriation law 05:11:44PM
9 passed in Newfoundland, and it was called the -- I 05:11:47PM
10 believe it was called The AbitibiBowater 05:11:51PM
11 Expropriation Act, probably the clearest example 05:11:52PM
12 of an imposition on an investor. We're naming 05:11:56PM
13 you. We're naming your assets. And we are taking 05:12:00PM
14 them away. 05:12:02PM
15 Clearly that meets 1101, but 05:12:03PM
16 is it the proper minimum standard for 1101? Of 05:12:06PM
17 course not. It has been rejected by all NAFTA 05:12:10PM
18 precedents, including Cargill and Methanex, and 05:12:14PM
19 it's simply too high a threshold. I mean, if the 05:12:16PM
20 only thing that would get through 1101 were those 05:12:18PM
21 types of measures, you would leave out a great 05:12:21PM
22 deal of what was intended to be prohibited under 05:12:25PM
23 the substantive standards. 05:12:29PM
24 We would note here that 05:12:32PM
25 Canada, this morning, argued that that is the 05:12:34PM

1 right answer. I think they either they -- maybe 05:12:35PM
2 they misinterpreted the standard, but we think 05:12:39PM
3 that it simply cannot be the right standard. It's 05:12:43PM
4 been rejected by all precedents, and it's not the 05:12:46PM
5 precedent or it's not the standard that Methanex 05:12:51PM
6 demands. 05:12:56PM

7 The second test that is 05:12:56PM
8 possible is the test of only a significant impact 05:12:58PM
9 on the investor. Now, it would probably be in our 05:13:01PM
10 interest to say, yes, absolutely. That's a very 05:13:07PM
11 nice low standard. So as soon as you have met 05:13:10PM
12 that, that's satisfactory. But, honestly, we just 05:13:13PM
13 don't think that can be the automatic test. It 05:13:18PM
14 might satisfy 1101 in some cases, but it might 05:13:21PM
15 not. There's simply not enough information to 05:13:25PM
16 determine whether the causal connection is met. 05:13:30PM
17 It is difficult to decide whether the "relating 05:13:34PM
18 to" standard is met if all that you allege is a 05:13:37PM
19 significant impact without more, without getting 05:13:41PM
20 into the merits of the claim. 05:13:43PM

21 We don't have to rely on the 05:13:46PM
22 second standard, because this case falls under 05:13:49PM
23 standard 3: a measure that is adopted with the 05:13:55PM
24 understanding or purpose that a significant impact 05:13:59PM
25 on the investor will result. We think, for this 05:14:03PM

1 case, this is certainly the preferred standard, 05:14:05PM
2 and the tribunal would certainly be adopting a 05:14:08PM
3 standard that meets the Methanex standard of a 05:14:15PM
4 legally significant connection. 05:14:17PM

5 Why is that? Because this 05:14:19PM
6 calls for a prima facie causal nexus. If a 05:14:21PM
7 measure is adopted, if the facts alleged are such 05:14:26PM
8 that the measure was adopted with the 05:14:31PM
9 understanding or purpose that there would be a 05:14:33PM
10 significant impact on investors in an industry, 05:14:35PM
11 then the prima facie causal nexus is met. But it 05:14:40PM
12 does so without prejudging the merits, which is 05:14:43PM
13 also very important. 05:14:45PM

14 So how do we apply this test 05:14:47PM
15 to Resolute's allegations? Well, for purposes of 05:14:50PM
16 this preliminary objection, Canada has accepted 05:14:56PM
17 the allegations in the Statement of Claim pro tem. 05:14:58PM
18 And the allegations satisfy the test formulation 05:15:01PM
19 in both two and three in the tribunal's Question 05:15:04PM
20 7, because Resolute has alleged significant impact 05:15:07PM
21 in relation to measures that were undertaken with 05:15:09PM
22 an understanding or purpose that they would have 05:15:13PM
23 such a significant impact on Port Hawkesbury's 05:15:15PM
24 limited class of competitors, prominent among 05:15:18PM
25 which was Resolute. 05:15:21PM

1 And I don't want to reread the 05:15:25PM
2 whole Statement of Claim, but we have highlighted 05:15:28PM
3 a number of the allegations on the next number of 05:15:30PM
4 slides. So Nova Scotia understood that the 05:15:33PM
5 supercalendered paper market was shrinking, in the 05:15:38PM
6 terms of Professor Hausman, that it was in secular 05:15:41PM
7 decline. Nova Scotia understood that Port 05:15:45PM
8 Hawkesbury competed with a finite number of rivals 05:15:47PM
9 and that Resolute was one of the mill's five 05:15:51PM
10 competitors in North America. 05:15:54PM
11 The measures were adopted to 05:15:55PM
12 ensure that the Port Hawkesbury paper mill would 05:15:57PM
13 have competitive advantages above any other 05:16:00PM
14 supercalendered paper producer, including 05:16:03PM
15 Resolute. And by making Port Hawkesbury the 05:16:05PM
16 national champion, Nova Scotia sought to push 05:16:08PM
17 higher cost operators, such as Resolute, out of 05:16:11PM
18 business. The flip-side of that is that they 05:16:14PM
19 pushed Port Hawkesbury to be the leading producer 05:16:16PM
20 in North America. Therefore, the purpose of the 05:16:19PM
21 Nova Scotia measures was to support Port 05:16:25PM
22 Hawkesbury and to undermine Port Hawkesbury's five 05:16:27PM
23 competitors specifically, including Resolute. 05:16:30PM
24 The supercalendered paper 05:16:35PM
25 market is a commodity-like market experiencing a 05:16:37PM

1 secular decline with a defined class of 05:16:39PM
2 participants, only six competitors, including Port 05:16:42PM
3 Hawkesbury. 05:16:42PM

4 Even this morning during -- or 05:16:47PM
5 early this afternoon -- we added this after 05:16:50PM
6 hearing Ms. Wates mention it in her presentation 05:16:52PM
7 on the statute of limitations -- Canada, in its 05:16:55PM
8 presentation, recognized that: 05:16:59PM

9 "Since the Port 05:17:00PM
10 Hawkesbury reopening 05:17:02PM
11 would drastically expand 05:17:02PM
12 supply in a market where 05:17:04PM
13 demand was declining, it 05:17:05PM
14 was obvious that a 05:17:07PM
15 negative price effect 05:17:08PM
16 would result." 05:17:09PM

17 And in a commodity-type market 05:17:12PM
18 where you have a negative price effect, all the 05:17:15PM
19 participants are necessarily affected. 05:17:17PM

20 In Question 6 from the 05:17:24PM
21 tribunal, there's a reference to the Claimant's 05:17:25PM
22 counter-memorial and the rejoinder, and the 05:17:32PM
23 tribunal says there appears to be a divergence as 05:17:35PM
24 between a general purpose by Nova Scotia to 05:17:38PM
25 undermine all supercalendered paper competitors 05:17:40PM

1 and the purpose to harm Resolute specifically. 05:17:45PM

2 Can this be clarified? 05:17:47PM

3 So, by way of clarification, 05:17:52PM

4 Resolute's claim is that Nova Scotia adopted the 05:17:54PM

5 measures to make Port Hawkesbury the national 05:17:57PM

6 champion, thereby undermining all five 05:18:00PM

7 supercalendered paper competitors in North 05:18:03PM

8 America, including Resolute. Resolute's claim 05:18:05PM

9 builds on Nova Scotia's purpose to make Port 05:18:09PM

10 Hawkesbury the lowest-cost producer, necessarily 05:18:11PM

11 undermining all supercalendered paper producers. 05:18:14PM

12 Given that Resolute was a 05:18:20PM

13 leading supercalendered paper producer at the 05:18:21PM

14 time, it was necessarily one of Port Hawkesbury's 05:18:24PM

15 primary competitors and, thus, necessarily a 05:18:28PM

16 target of the measures that were adopted to 05:18:31PM

17 support Port Hawkesbury's competitive advantage. 05:18:33PM

18 And we might refer back to 05:18:37PM

19 Cargill. Cargill wasn't the only producer of high 05:18:38PM

20 fructose corn syrup. In fact, there have been a 05:18:42PM

21 number of NAFTA cases arising from those 05:18:45PM

22 circumstances. So Mexico adopted a measure, a 05:18:47PM

23 tax, that gave a significant advantage to its 05:18:50PM

24 domestic industry, to the sugar cane producers. 05:18:55PM

25 And it did so on the understanding that there 05:18:58PM

1 would be an impact on a finite number of 05:19:01PM
2 competitors of that industry, and that met the 05:19:05PM
3 "relating" to test. That's our submission here. 05:19:07PM
4 The Mexican measures were not adopted specifically 05:19:13PM
5 targeting Cargill. They were adopted specifically 05:19:20PM
6 to favour the competitor of Cargill and also the 05:19:23PM
7 competitor of all other high fructose corn syrup 05:19:27PM
8 producers. 05:19:31PM

9 MS. LEVESQUE: Do you make a 05:19:32PM
10 distinction, in Cargill, because of the fact that 05:19:33PM
11 the other producers of the high fructose corn 05:19:37PM
12 syrup were American; right? And here, in Canada, 05:19:42PM
13 the two other competitors, Irving and Catalyst, are 05:19:45PM
14 Canadian. So does that make a difference in the 05:19:50PM
15 sense that can you say that the measures from Nova 05:19:53PM
16 Scotia relate to Irving, Catalyst, and Resolute, 05:19:56PM
17 even though the nationality is different? If you 05:20:01PM
18 could address that? 05:20:04PM

19 MR. VALASEK: Sure. They 05:20:06PM
20 relate to the industry. This is a market 05:20:08PM
21 intervention. We are not saying necessarily that 05:20:09PM
22 Nova Scotia had in mind to support Port Hawkesbury 05:20:11PM
23 because it wanted to impact Resolute as a foreign 05:20:14PM
24 investor only. This was a market intervention. 05:20:17PM
25 They wanted Port Hawkesbury to be the champion as 05:20:20PM

1 against any other producer, be it Canadian or 05:20:24PM
2 foreign. We just happened to be the only foreign 05:20:27PM
3 participant with an investment in Canada, so we 05:20:32PM
4 qualified for protection under NAFTA. But I 05:20:34PM
5 think, in terms of 1101, it's not relevant, in my 05:20:37PM
6 view, that there is a distinction in Cargill that 05:20:41PM
7 there perhaps wasn't a producer in Mexico. I 05:20:44PM
8 don't think Mexico would have done it had there 05:20:48PM
9 been high fructose. I think the whole purpose 05:20:51PM
10 behind Mexico's measure was because it wanted to 05:20:54PM
11 support its domestic industry. 05:20:57PM

12 But, on that point, we're also 05:20:58PM
13 on all fours because, in this case, Port 05:21:00PM
14 Hawkesbury is the only producer in Nova Scotia. 05:21:03PM
15 So that's what is important to Nova Scotia. What 05:21:06PM
16 is important is that Port Hawkesbury will be 05:21:08PM
17 supported. It's a Nova Scotia producer, and all 05:21:11PM
18 producers outside of Nova Scotia will suffer 05:21:14PM
19 negatively. 05:21:18PM

20 So, in that sense, it's the 05:21:19PM
21 same. 05:21:21PM

22 MS. LEVESQUE: Yes. I guess, 05:21:21PM
23 let me maybe explain a bit more what was behind 05:21:22PM
24 that question. Both the Respondent and the 05:21:25PM
25 Claimant cite pages of Peter Hogg, right, as a 05:21:29PM

1 constitutional matter, what the province might or 05:21:34PM
2 might not do? So I don't want to get into 05:21:36PM
3 constitutional law, but if there is a limited 05:21:39PM
4 jurisdiction as to certain matters, then I would 05:21:42PM
5 think that for what is outside that jurisdiction, 05:21:46PM
6 there needs to be something more. That's why I have 05:21:49PM
7 been asking about the targeting aspect. 05:21:53PM
8 So if you are outside the 05:21:55PM
9 bounds of the province's jurisdiction for certain 05:21:56PM
10 matters, is there that extra element? Where is 05:21:58PM
11 that element that links specifically the 05:22:02PM
12 out-of-province investor, in this case, with the 05:22:07PM
13 measures? So that's "relating to." Where is the 05:22:11PM
14 "relating to"? 05:22:16PM
15 MR. VALASEK: My answer to you 05:22:17PM
16 is that your analysis, I think, would be very 05:22:18PM
17 important if we were talking about a regulatory 05:22:21PM
18 case, and I think it actually is an analysis 05:22:24PM
19 that's probably particularly important in the like 05:22:27PM
20 circumstances analysis under 1102. 05:22:31PM
21 I'm not so sure it's that 05:22:34PM
22 important under the "relating to" analysis. And 05:22:36PM
23 let me explain. 05:22:39PM
24 Mexico, under Cargill, doesn't 05:22:44PM
25 have statutory jurisdiction, constitutional 05:22:45PM

1 jurisdiction in the United States. It passed a 05:22:49PM
2 tax based on its jurisdiction in Mexico to do 05:22:52PM
3 things in Mexico, but it had an impact on 05:22:55PM
4 investors in the U.S. It had an extraterritorial 05:22:58PM
5 impact because it was making a market 05:23:02PM
6 intervention. 05:23:04PM

7 And we say the exact same 05:23:05PM
8 thing here. Nova Scotia responded to the buyer of 05:23:06PM
9 Port Hawkesbury that wanted financial support. 05:23:11PM
10 And Nova Scotia said, "Well, let's look at it." 05:23:16PM
11 They decided to do it, and they adopted a series 05:23:20PM
12 of measures, some of which were purely financial, 05:23:23PM
13 and, of course, we know that the spending power is 05:23:27PM
14 not limited territorially. But putting that 05:23:29PM
15 aside, even if all of their measures were passed 05:23:33PM
16 through some sort of regulatory or legislative 05:23:36PM
17 action, we're not suggesting that Nova Scotia 05:23:38PM
18 somehow reached out of its jurisdiction with a 05:23:44PM
19 regulation. It adopted measures within its 05:23:46PM
20 competence, but it did so to affect the market. 05:23:50PM
21 It did so because it wanted to affect a North 05:23:53PM
22 American market for supercalendered paper, and it 05:23:56PM
23 did so. And that's sufficient for the "relating 05:23:59PM
24 to" standard 3. 05:24:03PM

25 Now, on the merits, you might 05:24:04PM

1 have other questions, under the specific 05:24:05PM
2 provisions of NAFTA, as to whether there are other 05:24:08PM
3 relevant considerations, and, of course, we're not 05:24:11PM
4 there yet. But for the "relating to," I don't 05:24:13PM
5 think there's a constitutional concern. 05:24:16PM
6 The only concern is: Do we, 05:24:19PM
7 as a Claimant, have an investment in Canada? Yes. 05:24:22PM
8 Was a measure adopted in Nova Scotia, whether it's 05:24:26PM
9 regulatory or anything else, that somehow has a 05:24:30PM
10 causal connection to the loss we are claiming? 05:24:33PM
11 And we're saying yes because it was a market 05:24:36PM
12 intervention in Nova Scotia that necessarily had 05:24:38PM
13 an impact on a finite number of market 05:24:41PM
14 participants. And I think Cargill is very 05:24:43PM
15 similar. 05:24:47PM
16 MS. LEVESQUE: Okay. 05:24:47PM
17 MR. VALASEK: Question 8 from 05:24:48PM
18 the tribunal: 05:24:53PM
19 "Has the Claimant made 05:24:54PM
20 new allegations in its 05:24:55PM
21 counter-memorial relating 05:24:57PM
22 to the deliberate purpose 05:24:58PM
23 of Nova Scotia to 05:24:59PM
24 undermine the competitive 05:25:00PM
25 position of Resolute 05:25:01PM

1 specifically that should 05:25:03PM
2 be subject to an 05:25:05PM
3 amendment of the claim? 05:25:06PM
4 Does Claimant need to 05:25:07PM
5 amends its claim under 05:25:08PM
6 UNCITRAL Rules Article 05:25:10PM
7 20?" 05:25:12PM
8 And building on our answer to 05:25:12PM
9 Question 6, we don't think there's a need for an 05:25:15PM
10 amendment. Resolute's position develops the 05:25:17PM
11 allegations in the Statement of Claim to their 05:25:19PM
12 logical conclusion when combined with the fact 05:25:20PM
13 that Resolute was a leading producer of SC paper 05:25:22PM
14 at the time of Port Hawkesbury's resurrection. 05:25:25PM
15 So just like, for -- certainly 05:25:28PM
16 for purposes of Article 1101, just like Cargill 05:25:31PM
17 wasn't specifically targeted, and I don't think 05:25:34PM
18 Cargill alleged that it was specifically 05:25:37PM
19 targeted as Cargill, we are not alleging that 05:25:39PM
20 Resolute was specifically targeted as Resolute. 05:25:42PM
21 Resolute was a leading producer. There are only 05:25:45PM
22 six leading producers, or six producers in North 05:25:48PM
23 America. It was necessarily impacted, and that's 05:25:50PM
24 the causal connection. 05:25:53PM
25 I would add that Professor 05:26:05PM

1 Hausman's testimony, there is a section of his 05:26:06PM
2 report that deals with the market for 05:26:08PM
3 supercalendered paper, and his testimony supports 05:26:12PM
4 the conclusion that it is a North American market 05:26:15PM
5 and that, from an economic point of view, the 05:26:19PM
6 impact that Port Hawkesbury would have on the 05:26:21PM
7 market would be felt by all the other participants 05:26:23PM
8 if successful. Now, that is the important 05:26:26PM
9 distinction between statute of limitations and 05:26:28PM
10 1101. The question is: When did that become 05:26:31PM
11 apparent? Before December 2012 or after? 05:26:34PM
12 For purposes of 1101, we are 05:26:38PM
13 beyond the restriction of December 2012. So we 05:26:40PM
14 can now say, "They succeeded." The whole argument 05:26:43PM
15 from Canada: How could we possibly claim an 1101 05:26:48PM
16 connection when we didn't know or it was unknown 05:26:53PM
17 or unknowable? Well, it was known and knowable in 05:26:54PM
18 due course. But not before December 2012. 05:26:59PM
19 PRESIDENT: We heard 05:27:05PM
20 Mr. Neufeld this morning going through the various 05:27:06PM
21 measures. And there's clearly rather important 05:27:08PM
22 differences between them. Take hot idle funding, 05:27:12PM
23 which was simply keeping the assets in a state 05:27:16PM
24 where it could be possibly sold. How did that 05:27:20PM
25 relate to your investment? 05:27:26PM

1 MR. VALASEK: Well -- 05:27:29PM

2 PRESIDENT: It didn't, as 05:27:31PM

3 such, have any effect on you. 05:27:34PM

4 MR. VALASEK: It did in the 05:27:36PM

5 sense that it permitted -- it was a necessary 05:27:37PM

6 measure that -- it was necessary to do the hot 05:27:40PM

7 idle funding in order to keep the plant attractive 05:27:45PM

8 for a sale, and but for that measure, the plant 05:27:48PM

9 could not have been sold to the buyer. And then 05:27:53PM

10 there were additional measures that were added to 05:27:56PM

11 the hot idle funding that then made that plant the 05:27:58PM

12 low-cost producer. 05:28:02PM

13 So if Canada is suggesting 05:28:04PM

14 that, had there not been subsequent measures, we 05:28:09PM

15 would be here claiming loss on the basis of just 05:28:11PM

16 the hot idle funding, probably not. But that's 05:28:14PM

17 not our case. Our case was that Nova Scotia 05:28:17PM

18 adopted a series of measures, the first of which 05:28:20PM

19 were meant to preserve the option of selling Port 05:28:24PM

20 Hawkesbury to a buyer. Once a buyer came to the 05:28:30PM

21 table -- and it was not easy to do because Port 05:28:35PM

22 Hawkesbury was in a very difficult position, as 05:28:38PM

23 Mr. Feldman explained. Once the buyer arrived, 05:28:40PM

24 the buyer set out a whole series of additional 05:28:43PM

25 conditions that they required in order to buy it, 05:28:46PM

1 and Nova Scotia consented to those conditions. 05:28:49PM
2 And to treat the measures as independent measures, 05:28:52PM
3 whether it's related to First Nations or forestry, 05:28:57PM
4 is really to misunderstand not just our 05:29:01PM
5 allegations, but really to misunderstand the 05:29:04PM
6 factual predicate or the facts of this case. 05:29:07PM
7 I would point the tribunal to 05:29:10PM
8 Exhibit 9 of our Statement of Claim. And this is 05:29:15PM
9 a press release that was issued by Nova Scotia on 05:29:22PM
10 August 20, 2012, so about a month before the 05:29:24PM
11 reopening, where it touts essentially the 05:29:27PM
12 partnership between Nova Scotia and the buyer for 05:29:30PM
13 launching Port Hawkesbury as a new competitor, 05:29:34PM
14 kind of resuscitated. 05:29:38PM
15 And it refers to all the 05:29:40PM
16 measures. It says Port Hawkesbury came to us, or 05:29:41PM
17 I should say the buyer came to us. It's PWCC, I 05:29:45PM
18 believe. And the Premier's office refers to 05:29:49PM
19 today's investment. It refers to the financial 05:29:56PM
20 package. It refers to the measures that are 05:29:58PM
21 adopted by the Department of Natural Resources, 05:30:01PM
22 including funding for the development of a Mi'kmaq 05:30:04PM
23 forestry strategy, yes, but they're all listed 05:30:08PM
24 together as part of this investment that will 05:30:11PM
25 allow Port Hawkesbury to do what it is doing, and 05:30:13PM

1 one of the concluding sentences says: 05:30:17PM

2 "This investment will 05:30:19PM

3 support the mill, making 05:30:20PM

4 it the lowest-cost, most 05:30:22PM

5 efficient operation in 05:30:24PM

6 North America, help 05:30:25PM

7 revitalize the forestry 05:30:26PM

8 sector to take advantage 05:30:28PM

9 of today's market." 05:30:29PM

10 And the government itself saw 05:30:30PM

11 all of these measures as a basket. We're not 05:30:34PM

12 putting them into a basket. They are in a basket. 05:30:38PM

13 And the whole purpose of them 05:30:41PM

14 was to satisfy the buyers' demands that it get 05:30:43PM

15 financial support. And, honestly, the financial 05:30:47PM

16 worth of all of these measures is about -- I 05:30:52PM

17 believe it's over \$120 million, and I think what 05:30:54PM

18 happened is politically they -- they essentially 05:30:59PM

19 produced that financial benefit through a series 05:31:04PM

20 of measures, some of which were financial, some of 05:31:06PM

21 which were one-off, some of which were long term. 05:31:10PM

22 There's a \$38 million fund over 10 years. There 05:31:13PM

23 are loans that are potentially forgivable. There 05:31:17PM

24 are some worker training funds. 05:31:22PM

25 But, at the end of the day, 05:31:25PM

1 for the private buyer, it's all money. It's all 05:31:26PM
2 money. It's helping the company compete, because 05:31:30PM
3 they would otherwise have to do some of this. If 05:31:34PM
4 the government hadn't supported them in this way, 05:31:37PM
5 then the company would have to have spent some of 05:31:40PM
6 this money. 05:31:42PM

7 So -- 05:31:43PM

8 MR. CASS: Can I offer a 05:31:44PM
9 possible analogy, and you can tell me if this 05:31:47PM
10 fits? There is a well-known story of two campers 05:31:50PM
11 in the woods who come upon a bear, and one camper 05:31:54PM
12 immediately takes out of his backpack, his running 05:31:57PM
13 shoes and puts them on. The other camper says, 05:32:00PM
14 "You're not going to outrun the bear," to which he 05:32:03PM
15 answers, "I don't have to outrun the bear. I only 05:32:05PM
16 have to outrun you." 05:32:07PM

17 Now, I take it that the point 05:32:10PM
18 of the running shoes is relating both to the bear 05:32:13PM
19 and to the other runner. It's not that he wishes 05:32:19PM
20 harm to the other runner, but that's necessary for 05:32:23PM
21 him to outrun the bear. 05:32:25PM

22 And, in this case, I take it 05:32:27PM
23 your argument is that Nova Scotia is providing the 05:32:29PM
24 running shoes to PHP, not in order to harm others, 05:32:34PM
25 but that that is a necessary condition if Port 05:32:42PM

1 Hawkesbury is going to outrun the bear. Is 05:32:47PM
2 that... 05:32:51PM
3 MR. VALASEK: Well, I think 05:32:51PM
4 that's an appropriate analogy, and I think it's -- 05:32:53PM
5 I will get to this a little bit in the national 05:32:58PM
6 treatment section, which I'm coming to, which is 05:33:00PM
7 that we are dealing with a government here who has 05:33:03PM
8 decided to -- the primary purpose of these 05:33:05PM
9 measures was to assist a local company or a buyer 05:33:09PM
10 of a local company to succeed in a market. 05:33:13PM
11 So it necessarily was done in 05:33:17PM
12 the context of the market. It necessarily had to 05:33:22PM
13 understand what the chances of success were for 05:33:25PM
14 this company to actually sustain the workers over 05:33:30PM
15 time and so forth. 05:33:36PM
16 And knowing that there are 05:33:41PM
17 five other participants in this market outside of 05:33:42PM
18 the province, Nova Scotia said, "We are going to 05:33:44PM
19 make you, through these financial measures and 05:33:48PM
20 otherwise, the lowest-cost producer." The press 05:33:50PM
21 release itself says it. It says exactly that, 05:33:54PM
22 that, "We're going to give you these running 05:33:58PM
23 shoes. You are going to be the fastest runner 05:34:00PM
24 among these six. You will have the lowest cost." 05:34:03PM
25 And it's a commodity market, 05:34:06PM

1 so it's not a question of whether you will develop 05:34:07PM
2 the best marketing strategy. It's whether you can 05:34:10PM
3 produce this commodity at the lowest cost. If you 05:34:13PM
4 do, you're going to put other people out of 05:34:15PM
5 business or you're going to take something away 05:34:18PM
6 from them because it is a shrinking market. It's 05:34:20PM
7 not a question of whether everyone can share a 05:34:22PM
8 growing pie. 05:34:26PM

9 The pie is shrinking. It's a 05:34:26PM
10 commodity market. Only the lowest-cost producer 05:34:28PM
11 is going to ultimately do better than others, and 05:34:31PM
12 Nova Scotia, on August 20th, says, "This is 05:34:34PM
13 exactly what we're doing," and is proudly doing 05:34:36PM
14 it. 05:34:39PM

15 Can I just check where we are 05:34:45PM
16 on time? I can go through this quite quickly now, 05:34:46PM
17 but I just wanted to know what else we want to get 05:34:50PM
18 done today and how quickly you would like me to 05:34:52PM
19 finish up. 05:34:55PM

20 PRESIDENT: You have another 05:34:56PM
21 60 minutes. 05:34:57PM

22 MR. VALASEK: Sixteen or 05:35:01PM
23 sixty? 05:35:03PM

24 PRESIDENT: Sixty, to 6:30. 05:35:03PM
25 MR. VALASEK: Mr. Feldman says 05:35:06PM

1 I should use 16, so I will see what I can do. 05:35:07PM

2 PRESIDENT: I don't want to 05:35:12PM

3 enter into a debate between the two of you. 05:35:13PM

4 MR. VALASEK: That's a 05:35:16PM

5 dangerous place to be. 05:35:17PM

6 Perhaps since I have somewhere 05:35:23PM

7 between 16 and 60 minutes, I'm just looking at my 05:35:24PM

8 notes from some of the debates that happened 05:35:31PM

9 earlier today and some of the questions. And 05:35:33PM

10 before getting to the separate topic of 1102, I 05:35:35PM

11 would like to touch on a few of them even though I 05:35:39PM

12 don't have a slide to deal with them. 05:35:42PM

13 PRESIDENT: You are, of 05:35:44PM

14 course, at liberty to come back to that tomorrow 05:35:45PM

15 morning. 05:35:49PM

16 MR. VALASEK: Yes. But I do 05:35:49PM

17 think it's useful to touch on it. 05:35:51PM

18 Judge Crawford, you asked 05:35:53PM

19 about Canada's argument relating to the -- or the 05:35:54PM

20 notion that these measures need to be considered 05:35:58PM

21 independently: "Looking at each one on its own, 05:36:01PM

22 there doesn't seem to be a connection". I've 05:36:04PM

23 answered that. Really, these measures were produced 05:36:05PM

24 as a basket, and the presale measures were necessary 05:36:08PM

25 in order to allow those subsequent measures to 05:36:12PM

1 produce the results that ultimately were produced. 05:36:15PM

2 There was another suggestion 05:36:19PM

3 that really was made. I hadn't really seen it 05:36:20PM

4 argued as strongly in the written materials as it 05:36:24PM

5 was argued this morning, which is that, even under 05:36:27PM

6 Article 1101, somehow Resolute doesn't satisfy the 05:36:31PM

7 test, because the measures have nothing to do with 05:36:36PM

8 Nova Scotia. It's all PHP. It's the private investor05:36:38PM

9 that ultimately came in, and it was their decision to05:36:42PM

10 undertake predatory pricing, and that had nothing 05:36:50PM

11 to do with Nova Scotia or not enough to do with 05:36:53PM

12 Nova Scotia. And it's somewhat related to the 05:36:56PM

13 first point relating to the measures, but I submit 05:37:02PM

14 that that is a completely artificial way of 05:37:05PM

15 looking at what happened here and what we allege 05:37:07PM

16 happened. 05:37:12PM

17 In Canada's telling of this, 05:37:17PM

18 Nova Scotia adopted measures to some extent in its 05:37:19PM

19 own sort of policy environment, adopted the 05:37:21PM

20 measures as a one-off, and then sometime, in due 05:37:25PM

21 course, the buyer decided to undertake predatory 05:37:28PM

22 pricing, but it's quite different. 05:37:33PM

23 If you look at the facts, both 05:37:36PM

24 as we allege them and looking at how they're 05:37:37PM

25 supported through the exhibits, what, in fact, 05:37:40PM

1 happened is that the buyer demanded this support 05:37:42PM
2 as a condition of its purchase of the mill. 05:37:47PM
3 So they were already looking 05:37:51PM
4 ahead to what they wanted to do, and they said, 05:37:53PM
5 "In order to do that, we need you, the government 05:37:57PM
6 support, and we're only going to buy this if you 05:38:00PM
7 guarantee this support." And as early as August 05:38:03PM
8 20th, in this Exhibit 9, the province says, "Yes. 05:38:05PM
9 We will do this for you. We will support the 05:38:09PM
10 buyer of Port Hawkesbury with this basket of 05:38:16PM
11 measures, and that will allow you to be the 05:38:18PM
12 lowest-cost, most efficient operation and take 05:38:23PM
13 advantage of today's market". 05:38:27PM
14 Now, that's a very PR way of 05:38:28PM
15 saying that you can, then, offer cutthroat prices 05:38:31PM
16 because you will be the lowest-cost operator, and, 05:38:35PM
17 in a commodity market, that means that they are 05:38:38PM
18 going to be able to offer the lowest price. So 05:38:41PM
19 it's simply not borne out by the facts. 05:38:43PM
20 And, secondly, it also 05:38:47PM
21 suggests that, once the measures were adopted some 05:38:49PM
22 time in October of 2012, the government sort of 05:38:52PM
23 retreated and wasn't in -- it wasn't relevant to 05:38:55PM
24 the ongoing implementation of the measures. But 05:39:00PM
25 one of the measures is a 10-year long fund. So 05:39:05PM

1 there's a \$38 million support that's provided over 05:39:09PM
2 10 years, so that's 3.8 million per year. There 05:39:12PM
3 are other loans that were made that may or may not 05:39:16PM
4 be forgiven. So there's ongoing activity between 05:39:20PM
5 the government and Port Hawkesbury, which further 05:39:25PM
6 goes to show that this is not a question of a 05:39:29PM
7 distinct act by the government followed by, then, 05:39:32PM
8 a completely distinct act by a non-governmental 05:39:35PM
9 actor. These are measures that are inextricably 05:39:38PM
10 linked with the conduct of the private party as 05:39:43PM
11 well. 05:39:47PM

12 And I also want to make the 05:39:50PM
13 distinction between the ongoing nature of the 05:39:52PM
14 measures and the concept of continuing breach. I 05:39:55PM
15 mean, there is some controversy over whether there 05:39:58PM
16 is continuing breach. We are not entering into 05:40:05PM
17 that, but I think there's no question that these 05:40:08PM
18 are ongoing measures. There's a 10-year fund. 05:40:10PM
19 There's an annual fund that is providing 05:40:13PM
20 continuous financial support, until 2022, for this 05:40:15PM
21 company. So the idea that the government is out 05:40:19PM
22 of the picture once it passes these measures in 05:40:22PM
23 2012, and then it is all up to the company, is 05:40:24PM
24 simply divorced from reality. 05:40:28PM

25 So I think, with that, I will 05:40:35PM

1 turn to the final series of slides. 05:40:37PM

2 Article 1102, of course, is 05:40:47PM

3 the national treatment provision in NAFTA, and the 05:40:49PM

4 previous two paragraphs, which aren't on the 05:40:54PM

5 slide, set out that the NAFTA parties guarantee 05:40:57PM

6 national treatment to investors, and they 05:41:02PM

7 guarantee national treatment to investments. 05:41:04PM

8 Then there's this paragraph 3, 05:41:06PM

9 which is meant to specify what that means in 05:41:09PM

10 respect of measures adopted by state or province 05:41:13PM

11 or sub-national governments, state or provinces. 05:41:17PM

12 And it reads: 05:41:21PM

13 "The treatment accorded 05:41:22PM

14 by a party under 05:41:23PM

15 paragraphs 1 and 2 --" 05:41:24PM

16 So those are the paragraphs 05:41:26PM

17 dealing with national treatment of investors and 05:41:28PM

18 investments. 05:41:30PM

19 "-- with respect to a 05:41:34PM

20 state or province -- the 05:41:35PM

21 treatment accorded by a 05:41:39PM

22 party under paragraphs 1 05:41:40PM

23 and 2 means --" 05:41:41PM

24 Sorry, I left out the 05:41:42PM

25 important word. 05:41:43PM

1 "-- means, with respect 05:41:44PM
2 to a state or province, 05:41:45PM
3 treatment no less 05:41:47PM
4 favourable than the most 05:41:48PM
5 favourable treatment 05:41:49PM
6 accorded in like 05:41:50PM
7 circumstances by that 05:41:51PM
8 state or province to 05:41:52PM
9 investors and to 05:41:53PM
10 investments of investors 05:41:54PM
11 of the party of which it 05:41:55PM
12 forms a part." 05:41:57PM
13 On the basis of this 05:41:58PM
14 provision, Canada made an argument that has since 05:42:01PM
15 evolved quite significantly. And we just want to 05:42:09PM
16 remind the tribunal how that has evolved. 05:42:12PM
17 So Canada sought early 05:42:16PM
18 determination on the basis that Resolute's claim 05:42:18PM
19 is impossible as a matter of law. That was its 05:42:19PM
20 word, and that's the basis on which it felt that 05:42:23PM
21 it was ripe for preliminary determination. 05:42:25PM
22 Now, Canada argues that there 05:42:29PM
23 is no treatment of Resolute, contradicting 05:42:32PM
24 Respondent's factual allegations and essentially 05:42:34PM
25 asking the tribunal to foreclose a debate on the 05:42:37PM

1 merits. And I think this morning I even heard the 05:42:40PM
2 term that we're missing an important factual 05:42:42PM
3 predicate for the claim. So we are getting into 05:42:45PM
4 the facts, and we are far away from where this 05:42:48PM
5 was, I think, where it was meant to be. 05:42:52PM
6 In the Statement of Defence is 05:42:58PM
7 where the original position was set out, and 05:42:59PM
8 Canada wrote that: 05:43:03PM
9 "Article 1102(3) plainly 05:43:03PM
10 limits the national 05:43:06PM
11 treatment obligation with 05:43:07PM
12 respect to provincial 05:43:08PM
13 measures to treatment 05:43:09PM
14 accorded in like 05:43:10PM
15 circumstances by a 05:43:11PM
16 province to other 05:43:12PM
17 Canadian investors within 05:43:13PM
18 that province. As it is 05:43:14PM
19 undisputed that the 05:43:17PM
20 Claimant's investment at 05:43:18PM
21 issue is in Quebec, not 05:43:19PM
22 in Nova Scotia, it is 05:43:20PM
23 impossible for the 05:43:21PM
24 Claimant to assert a 05:43:22PM
25 claim under Article 1102 05:43:23PM

1 resulting from the Nova 05:43:25PM
2 Scotia measures." 05:43:26PM
3 And the tribunal noted the 05:43:27PM
4 position of Canada in its decision on bifurcation: 05:43:31PM
5 "Respondent's preliminary 05:43:35PM
6 objection on the basis of 05:43:35PM
7 Article 1102(3) requires 05:43:37PM
8 the tribunal to accept 05:43:38PM
9 that the national 05:43:40PM
10 treatment protection only 05:43:41PM
11 applies in respect of 05:43:42PM
12 provincial measures where 05:43:47PM
13 the complaining investor 05:43:48PM
14 has an investment within 05:43:49PM
15 that province. Resolving 05:43:50PM
16 the preliminary objection 05:43:52PM
17 will not entail a factual 05:43:52PM
18 assessment of whether the 05:43:54PM
19 two mills were in like 05:43:55PM
20 circumstances." 05:43:56PM
21 So the tribunal noted that 05:43:57PM
22 there was a basis for Respondent's objection, 05:44:00PM
23 which is that we don't have an investment within 05:44:05PM
24 the province, and concluded, "Well, we can do 05:44:08PM
25 that. We can interpret Article 1102(3) and decide 05:44:10PM

1 whether that is or isn't required." 05:44:14PM

2 In Canada's memorial, there 05:44:21PM

3 was a further movement: 05:44:24PM

4 "Article 1102(3) does not 05:44:26PM

5 establish a territorial 05:44:28PM

6 limitation --" 05:44:30PM

7 Even though that's what we saw 05:44:30PM

8 before, referring to within its territory. 05:44:32PM

9 "-- as the Claimant has 05:44:34PM

10 misunderstood Canada's 05:44:35PM

11 argument to be, but 05:44:37PM

12 rather a jurisdictional 05:44:38PM

13 limitation. The 05:44:39PM

14 limitation renders 05:44:40PM

15 inadmissible claims that 05:44:41PM

16 seek to compare treatment 05:44:42PM

17 accorded by one 05:44:43PM

18 government to the 05:44:44PM

19 treatment accorded by a 05:44:45PM

20 different government." 05:44:46PM

21 Of course we never made a 05:44:47PM

22 claim based on the comparison of Nova Scotia to 05:44:49PM

23 any other government. Our claim was always about 05:44:52PM

24 the treatment and necessary -- the negative 05:44:55PM

25 treatment of Nova Scotia in respect of this 05:44:59PM

1 industry. 05:45:03PM

2 PRESIDENT: What treatment? 05:45:04PM

3 If you had gone to Nova Scotia and said, "In order 05:45:05PM

4 to comply with Article 1102, we want to be treated 05:45:09PM

5 the same way," what would that have involved? 05:45:14PM

6 MR. VALASEK: You cannot 05:45:17PM

7 provide the support to your local industry, 05:45:18PM

8 because, otherwise, we are necessarily being 05:45:21PM

9 negatively impacted. I mean, we could have also 05:45:24PM

10 said, although I think it's less realistic, but 05:45:27PM

11 the other hypothetical is that they give us the 05:45:30PM

12 equivalent amount of money. So you give us equal 05:45:32PM

13 treatment -- 05:45:36PM

14 PRESIDENT: But they weren't 05:45:37PM

15 giving much of that money directly to the Claimant 05:45:40PM

16 or even the Claimant's predecessor, they were giving 05:45:46PM

17 money to -- or doing a range of things, buying land, 05:45:49PM

18 for example, maintaining the plant in hot idle. 05:45:52PM

19 MR. VALASEK: Well, I think -- 05:45:59PM

20 PRESIDENT: I mean, that cost 05:46:00PM

21 the Claimant money because it increased the value 05:46:01PM

22 of the asset. You're saying that, under 1102, it 05:46:05PM

23 wasn't open to Nova Scotia to decide to maintain 05:46:12PM

24 the value of an asset in liquidation, because if 05:46:15PM

25 it did so, it would have adverse effects on you. 05:46:18PM

1 MR. VALASEK: Correct. In 05:46:23PM
2 conjunction with the additional measures that they 05:46:26PM
3 adopted. 05:46:29PM
4 Now, let's remember -- 05:46:32PM
5 PRESIDENT: Let's take hot 05:46:38PM
6 idle funding by itself, because that was -- at a 05:46:39PM
7 certain stage of the proceedings, some of the 05:46:42PM
8 other measures were agreed later on. 05:46:44PM
9 You're saying 1102 prevented 05:46:47PM
10 Nova Scotia from maintaining the property in a 05:46:50PM
11 saleable form, because, to maintain it in a 05:46:55PM
12 saleable form left open the contingency which at 05:47:00PM
13 this stage is all it was. 05:47:03PM
14 MR. VALASEK: With all due 05:47:05PM
15 respect to the position that Canada has 05:47:07PM
16 formulated, which is let's look at all of the 05:47:09PM
17 measures independently, that is just an artificial 05:47:11PM
18 way of looking at our case. That is not our case. 05:47:14PM
19 The hot idle funding, on its own, did not create 05:47:16PM
20 an impact in the industry. It was the hot idle 05:47:19PM
21 funding that maintained this asset, which was an 05:47:23PM
22 asset that couldn't be operated economically by a 05:47:26PM
23 private actor. It just wasn't. So the government 05:47:29PM
24 stepped in and said, "Well, what can we do with 05:47:31PM
25 this? Let's keep it in hot idle." 05:47:34PM

1 Once they offered it up for 05:47:37PM
2 auction. No buyer came to buy this. So had that 05:47:39PM
3 been the only thing that Nova Scotia had done, 05:47:43PM
4 that asset would have died. The market wouldn't 05:47:45PM
5 have been affected and we wouldn't have a NAFTA 05:47:48PM
6 case, so that is not our case. 05:47:51PM
7 Our case is about what happens 05:47:52PM
8 after Nova Scotia kept the mill in hot idle, and 05:47:54PM
9 then once a very intrepid buyer come in and 05:47:58PM
10 say, thank you for keeping this mill open. That 05:48:03PM
11 is terrific. Now we would like an additional 05:48:06PM
12 series of benefits. We would like \$40 million. 05:48:09PM
13 We would like \$38 million over ten years. We 05:48:12PM
14 would like a tax benefit. We would like you to 05:48:15PM
15 guarantee an electricity rate. And if you provide 05:48:18PM
16 all of these things, then we will buy this mill. 05:48:22PM
17 And Nova Scotia at that point says, Fine. And 05:48:25PM
18 there are all sorts of merits arguments that exist 05:48:30PM
19 under 1102. We are not there yet. 05:48:32PM
20 The only question under 05:48:34PM
21 1102(3), at this point for the tribunal is: Is it 05:48:36PM
22 impossible for us to bring this claim? And there 05:48:40PM
23 is nothing in the provision that makes this claim 05:48:44PM
24 impossible. 05:48:46PM
25 There are all sorts of 05:48:47PM

1 arguments on the merits that might be raised, but 05:48:48PM
2 there is nothing in the provision that prevents us 05:48:51PM
3 from alleging that those measures mistreated the 05:48:54PM
4 investors outside of the province. 05:48:59PM

5 And the one way that Nova 05:49:02PM
6 Scotia could have insulated itself from the claim 05:49:05PM
7 is not to do it, is simply to say, We're not going 05:49:07PM
8 to become a partner in the supercalendered paper 05:49:10PM
9 market to the detriment of other participants in 05:49:18PM
10 North America, including a foreign investor. 05:49:24PM

11 Canada said this morning it is 05:49:26PM
12 reserving its defences on, you know, on the 05:49:30PM
13 merits. And it could be that the tribunal is 05:49:33PM
14 somehow troubled by the debate here because, in 05:49:37PM
15 part, it is to some extent, again, a very isolated 05:49:42PM
16 debate. We can't have a fulsome discussion over 05:49:46PM
17 all of the elements that will arise on the merits, 05:49:49PM
18 whether there's like circumstances, what are the 05:49:52PM
19 other elements that both Claimants and Respondents 05:49:54PM
20 bring to bear? But we're dealing with simply the 05:49:56PM
21 narrow question of whether we pass the very low 05:50:00PM
22 threshold of simply alleging a claim that meets 05:50:03PM
23 the requirements of 1102(3). And we submit 05:50:06PM
24 that we do. 05:50:12PM

25 Canada's reply picks up on the 05:50:21PM

1 point Judge Crawford, that you have just hit on, 05:50:26PM
2 which is that they say, Nova Scotia cannot accord 05:50:28PM
3 treatment to an investor over which it has no 05:50:31PM
4 jurisdiction. 05:50:35PM

5 This position, though, ignores 05:50:35PM
6 Nova Scotia's own statements that the resurrection 05:50:43PM
7 of Port Hawkesbury was intended to make it the 05:50:46PM
8 lowest-cost producer in the North American market. 05:50:49PM

9 The investment will make the 05:50:53PM
10 Port Hawkesbury mill the lowest-cost, 05:50:55PM
11 most-efficient operation in North America and help 05:50:58PM
12 take advantage of today's market; that is what the 05:51:00PM
13 Premier's office said on August 20th, 2012. 05:51:02PM

14 The Premier didn't say, 05:51:05PM
15 "We've had a long-standing interest in buying 1500 05:51:08PM
16 acres of land. It is a very important policy that 05:51:12PM
17 we are finally doing", or that "we want to put in 05:51:14PM
18 place a sustainable forestry regime". No. They 05:51:17PM
19 said, "We want to make Port Hawkesbury the 05:51:21PM
20 lowest-cost, most efficient operation in North 05:51:24PM
21 America so that it can take advantage of today's 05:51:26PM
22 North American market", and the measures were done 05:51:29PM
23 to do so. 05:51:32PM

24 The Nova Scotia measures were, 05:51:33PM
25 therefore, adopted on the understanding and with 05:51:43PM

1 the purpose that, if successful -- we know again 05:51:45PM
2 on the statute of limitations it took some time to 05:51:47PM
3 determine whether they would be successful -- 05:51:51PM
4 that, if successful, they would have direct 05:51:54PM
5 extraterritorial effects on the North American 05:51:57PM
6 supercalendered paper market and, thus, directly 05:52:00PM
7 affect, in a negative way, the small number of 05:52:02PM
8 Port Hawkesbury's competitors in the 05:52:05PM
9 supercalendered paper market, prominent among 05:52:07PM
10 which was Resolute, and that is supported by 05:52:09PM
11 Professor Hausman's report at paragraph 38. 05:52:13PM
12 The tribunal in its question 05:52:20PM
13 10 has asked: Where a Claimant does not have an 05:52:22PM
14 investment in the province which adopted the 05:52:24PM
15 impugned measures, can negative treatment be found 05:52:27PM
16 to have been accorded only in cases where the 05:52:30PM
17 foreign investor is specifically targeted by the 05:52:32PM
18 province? If not, what is the relevant treatment 05:52:34PM
19 by the province? 05:52:37PM
20 In our submission, negative 05:52:38PM
21 treatment does not require that the foreign 05:52:44PM
22 investor is expressly named or uniquely targeted. 05:52:46PM
23 Only that it is necessarily -- 05:52:51PM
24 PRESIDENT: That is common 05:52:53PM
25 ground. 05:52:54PM

1 MR. VALASEK: Pardon me? 05:52:54PM

2 PRESIDENT: I think that is 05:52:55PM

3 common ground. 05:52:56PM

4 MR. VALASEK: Common ground 05:52:57PM

5 among whom? 05:52:58PM

6 PRESIDENT: Between the two of 05:52:59PM

7 you. Canada will correct me if I am wrong, I 05:53:00PM

8 think it doesn't suggest that there has to be a 05:53:05PM

9 specific naming of the extraterritorial -- 05:53:08PM

10 MR. VALASEK: That is probably 05:53:14PM

11 right. That is probably right. 05:53:15PM

12 So perhaps the common ground 05:53:17PM

13 ends at the comma, because we say only that it is 05:53:20PM

14 necessarily targeted among a determinate class of 05:53:24PM

15 competitors and that's, I think, where we part 05:53:27PM

16 company with Canada, because Canada says -- and 05:53:30PM

17 we submit by ignoring our allegations and the 05:53:33PM

18 evidence they say, Well these were measures that 05:53:36PM

19 were adopted without any thought to the market. 05:53:38PM

20 These were measures that were adopted because of 05:53:43PM

21 local workers or the forestry considerations, and 05:53:46PM

22 these are not measures that have an 05:53:53PM

23 extraterritorial effect mistreating other 05:53:56PM

24 competitors. 05:54:00PM

25 PRESIDENT: What would you say 05:54:01PM

1 if there were a hundred mills rather than five? 05:54:02PM

2 MR. VALASEK: I would say that 05:54:04PM

3 our case, on the merits, might be a little bit 05:54:05PM

4 more challenging, but I wouldn't say that there 05:54:09PM

5 would be any difference for purposes of either 05:54:12PM

6 1101 or 1102(3), because of the nature of this 05:54:17PM

7 industry. 05:54:21PM

8 This is a commodity-type 05:54:21PM

9 industry. All of the participants are affected. 05:54:24PM

10 I think what is most important is the size of Port 05:54:27PM

11 Hawkesbury. 05:54:30PM

12 Port Hawkesbury had the size 05:54:31PM

13 to affect the market. And so obviously, if there 05:54:32PM

14 were a very broad number of participants in the 05:54:43PM

15 market, that would probably say something about 05:54:48PM

16 the industry. 05:54:50PM

17 I am not an economist. I 05:54:51PM

18 think it would probably raise issues that don't 05:54:52PM

19 exist in this case. I mean in this case we have a 05:54:56PM

20 market that is a large market, in the sense that 05:55:00PM

21 it is North American. Very few participants. And 05:55:03PM

22 therefore, the intervention of the kind that we 05:55:07PM

23 see here really does have a significant impact, 05:55:10PM

24 once the -- once it proved to be successful, it 05:55:16PM

25 necessarily has an impact. But I would say that 05:55:21PM

1 for purposes of the jurisdictional questions, I 05:55:24PM
2 would hypothesize that if there were more 05:55:28PM
3 participants the argument would be similar, but 05:55:30PM
4 maybe not as compelling, but the argument would 05:55:33PM
5 still be there, that we're not in the Methanex 05:55:36PM
6 situation. We don't have an infinite class of 05:55:38PM
7 claimants. 05:55:42PM

8 We have, let's say there were 05:55:42PM
9 a hundred, but all of them could say that they 05:55:45PM
10 were supercalendered paper producers, and 05:55:46PM
11 similarly on 1102(3), I would say if one of the 05:55:49PM
12 hundred was alleging that they suffered as a 05:55:53PM
13 result of this support, I would say that is 05:55:56PM
14 negative treatment as a result of the province's 05:55:58PM
15 decision to intervene in the market. 05:56:01PM

16 Going to this point, the Nova 05:56:04PM
17 Scotia measures were intended to confer a 05:56:09PM
18 comparative advantage on a domestic competitor, to 05:56:11PM
19 the detriment of the foreign investor in the same 05:56:13PM
20 business sector, which was not limited to the 05:56:16PM
21 territory of Nova Scotia. Again, here echoes of 05:56:19PM
22 Cargill should be heard. 05:56:23PM

23 The Nova Scotia measures did 05:56:25PM
24 not restrict the supercalendered paper sales of 05:56:27PM
25 Port Hawkesbury to the territory of Nova Scotia. 05:56:33PM

1 To the contrary, the government was clearly 05:56:36PM
2 hopeful that Port Hawkesbury would have great 05:56:40PM
3 success on the North American market. 05:56:43PM
4 As such, by distorting market 05:56:46PM
5 competition, the Nova Scotia measures had extra 05:56:48PM
6 provincial effects that constituted "treatment" 05:56:51PM
7 for Resolute. 05:56:55PM
8 Canada cites no cases in 05:56:56PM
9 support of its position that Resolute received no 05:56:58PM
10 "treatment," but instead refers to the dictionary 05:57:01PM
11 definition of "treatment": 05:57:04PM
12 "The process or manner of 05:57:07PM
13 behaving towards or 05:57:09PM
14 dealing with a person or 05:57:11PM
15 thing." 05:57:12PM
16 The dictionary definition does 05:57:12PM
17 not support Canada's interpretation. Nova Scotia 05:57:14PM
18 is behaving towards or dealing with Resolute and 05:57:16PM
19 the other supercalendered paper producers outside 05:57:19PM
20 of Nova Scotia in choosing to favour Port 05:57:22PM
21 Hawkesbury. If my -- 05:57:27PM
22 PRESIDENT: Let's come back to 05:57:28PM
23 the hot idle funding. At the time when the hot 05:57:29PM
24 idle funding was first decided on, what possible 05:57:33PM
25 treatment was there of you? There was simply a 05:57:35PM

1 contingency in the future that there would be a 05:57:39PM
2 negotiation in respect of the sale of the mill, 05:57:41PM
3 and the terms on which that would be done were not 05:57:47PM
4 determined at that time in any way. 05:57:50PM

5 MR. VALASEK: Correct. 05:57:52PM

6 PRESIDENT: I am putting this 05:57:53PM
7 as a hypothesis. 05:57:54PM

8 MR. VALASEK: I think I have 05:57:56PM
9 already conceded the point that if we were only 05:57:57PM
10 dealing with the hot idle funding, I don't think 05:58:00PM
11 we would be here. 05:58:03PM

12 So as a hypothetical, I am not 05:58:04PM
13 sure it has much power to assist me in explaining 05:58:07PM
14 how these provisions apply to our case, because 05:58:15PM
15 our case, necessarily, has to comprise the 05:58:17PM
16 measures that Nova Scotia itself said it was 05:58:21PM
17 adopting to make Port Hawkesbury the North 05:58:25PM
18 American champion. 05:58:30PM

19 And in that context, we say 05:58:30PM
20 the hot idle measures were a necessary 05:58:32PM
21 precondition to that. They kept the plant in hot 05:58:35PM
22 idle status. I believe there were already some 05:58:40PM
23 -- I might not have the facts exactly right, but I 05:58:44PM
24 do believe that there was some debate over whether 05:58:46PM
25 they should or shouldn't keep the plant in hot 05:58:48PM

1 idle status. And I think everyone agrees it 05:58:52PM
2 would be more likely to, or it would be more 05:58:53PM
3 likely that the province would be able to 05:58:58PM
4 undertake the type of negotiation that it 05:59:01PM
5 eventually did, if it did keep the mill in hot 05:59:03PM
6 idle status. And as such, it was a precondition 05:59:08PM
7 to doing what it did in respect of Port 05:59:12PM
8 Hawkesbury. 05:59:12PM
9 But I will concede the point 05:59:17PM
10 that hot idle funding on its own, sort of divorced 05:59:20PM
11 from the rest of our case, is probably not a 05:59:23PM
12 measure that negatively affected Resolute or, 05:59:30PM
13 frankly, any of the other supercalendered paper 05:59:35PM
14 producers, had it not been combined with the 05:59:39PM
15 measures that were then demanded by the buyer of 05:59:43PM
16 the mill, when it observed what it could purchase, 05:59:46PM
17 precisely because that mill had been kept in hot 05:59:50PM
18 idle funding. 05:59:53PM
19 So I am not sure if I can do 05:59:53PM
20 any better than that. 05:59:55PM
21 PRESIDENT: Mr. Valasek, it is 05:59:57PM
22 6 o'clock. You have still got some time. I just 05:59:59PM
23 wanted to confirm that the court reporter is happy 06:00:02PM
24 to continue. I think a five-minute break would be 06:00:04PM
25 a good thing to do. It still gives you -- you 06:00:12PM

1 have about twenty minutes of your time left. We 06:00:16PM
2 haven't had a break this afternoon. I have been 06:00:18PM
3 so intrigued by the argument that I haven't been 06:00:22PM
4 thinking of a break. So we will have a 06:00:24PM
5 five-minute break now and then return. 06:00:29PM

6 MR. NEUFELD: Prior to 06:00:31PM
7 breaking, I'm sorry to interrupt here, Michelle 06:00:32PM
8 and I are off this evening to a neighbour to the 06:00:35PM
9 south. There is some discussions that are taking 06:00:40PM
10 place in D.C. on a topic that might be relevant at 06:00:42PM
11 a future point to NAFTA tribunals, and we have a 06:00:44PM
12 flight that leaves this evening. 06:00:49PM

13 I think what we will do is 06:00:50PM
14 take the opportunity at the break as well and just 06:00:52PM
15 say goodbye to everybody today and thank you for 06:00:54PM
16 the collegiality. It was a pleasure meeting all, 06:00:59PM
17 and we will look forward to seeing you in the 06:01:02PM
18 future. 06:01:06PM

19 PRESIDENT: Thank you. The 06:01:06PM
20 terms on which we see you in the future will be 06:01:08PM
21 determined in due course. 06:01:10PM

22 PRESIDENT: A five-minute 06:01:13PM
23 break. 06:01:14PM

24 --- Recess at 6:01 p.m. 06:01:32PM
25 --- Upon resuming at 6:09 p.m. 06:09:49PM

1 PRESIDENT: I think we are as 06:10:39PM
2 ready as we will ever be, so let's go. 06:10:41PM

3 MR. VALASEK: Before moving 06:10:45PM
4 on, I just wanted to come back -- before moving 06:10:54PM
5 on, I wanted to supplement my answer to your 06:10:59PM
6 question on hot idle funding, just by referring to 06:11:03PM
7 the paragraph in the Statement of Claim which 06:11:07PM
8 highlights the importance of the hot idle funding 06:11:09PM
9 in connection with the support for Port 06:11:11PM
10 Hawkesbury, and to show that in the context of our 06:11:15PM
11 claim. It is actually a very important component 06:11:17PM
12 of it. 06:11:19PM

13 I may have left the impression 06:11:20PM
14 that, in the hypothetical, where the rest of our 06:11:22PM
15 allegations aren't there, it kind of falls away, 06:11:26PM
16 but I think it really does need to be looked at in 06:11:29PM
17 the context of our claim and how important it was 06:11:32PM
18 for selling the mill as a going-concern to the 06:11:35PM
19 buyer. 06:11:39PM

20 It is paragraph 33 of the 06:11:40PM
21 Statement of Claim. I will just read it into the 06:11:41PM
22 record. 06:11:45PM

23 Nova Scotia decided to pay for 06:11:46PM
24 maintaining the Port Hawkesbury mill in a hot idle 06:11:47PM
25 condition during the CCAA proceedings -- those are 06:11:50PM

1 the bankruptcy proceedings in relation to the 06:11:55PM
2 prior owner -- in order to make it attractive as 06:11:58PM
3 an ongoing viable concern. 06:12:01PM
4 The high costs of operating 06:12:03PM
5 the Port Hawkesbury mill, however, meant that it 06:12:05PM
6 would take more than the government's base line 06:12:07PM
7 maintenance to render the mill viable for 06:12:10PM
8 purchase. 06:12:12PM
9 The Monitor, that is the 06:12:12PM
10 Monitor overseeing the bankruptcy proceedings, 06:12:14PM
11 observed that Nova Scotia's hot idle measures were 06:12:16PM
12 exceptional and would enable the completion of a 06:12:19PM
13 going concern sale to PWCC, that's the buyer, on 06:12:22PM
14 "inexpensive commercial terms." 06:12:26PM
15 It stated that it was unaware 06:12:28PM
16 of any other lender that would provide similar 06:12:30PM
17 financing and that it could not anticipate that 06:12:33PM
18 any more favourable terms could be achieved with 06:12:36PM
19 any other lender. 06:12:38PM
20 So in the context of our 06:12:39PM
21 claim, the hot idle funding was important and, as 06:12:41PM
22 we know, in the harsh Canadian winters that we 06:12:45PM
23 have, if the plant isn't maintained in hot idle 06:12:51PM
24 during the period during which negotiations are 06:12:55PM
25 taking place, you know the equipment will be 06:12:57PM

1 destroyed. So that is just a supplement. 06:13:00PM

2 If I can get the presentation 06:13:05PM

3 back up on the screen, I will complete the few 06:13:07PM

4 slides that I have on the 1102 objection. 06:13:09PM

5 So we were in the discussion 06:13:16PM

6 on what negative treatment means in the context of 06:13:25PM

7 this case in answer to the Tribunal's question 10, 06:13:28PM

8 and I was saying that the dictionary definition on 06:13:31PM

9 which Canada relies is not helpful. The 06:13:36PM

10 definition does not support Canada's 06:13:39PM

11 interpretation. Nova Scotia is behaving towards 06:13:41PM

12 or dealing with Resolute and the other 06:13:44PM

13 supercalendered paper producers outside of Nova 06:13:47PM

14 Scotia in choosing to favour Port Hawkesbury. And 06:13:50PM

15 I think the basic concept is that treatment is 06:13:54PM

16 necessarily comparative. You cannot isolate 06:13:57PM

17 treatment of a local investor from treatment of a 06:14:00PM

18 foreign investor if they are in like 06:14:03PM

19 circumstances. 06:14:05PM

20 I was thinking about this the 06:14:05PM

21 other day. I have three children. So if they're 06:14:07PM

22 at the table and I decide to give one of my 06:14:09PM

23 children dinner, I don't think the other children 06:14:13PM

24 would -- and not give dinner to the other two, I 06:14:16PM

25 don't think that they would consider that I am not 06:14:18PM

1 behaving towards them or dealing with them. They 06:14:20PM
2 would consider that they're being mistreated. 06:14:23PM
3 So mistreatment, or negative 06:14:26PM
4 treatment, isn't just taking away their dinner. 06:14:28PM
5 It is not providing them something that I am 06:14:31PM
6 providing to only one. 06:14:33PM
7 Now, the question of whether 06:14:35PM
8 they're in like circumstances, my three children, 06:14:36PM
9 in that context, are of course in like 06:14:39PM
10 circumstances, but that is not the question here. 06:14:41PM
11 We're not debating the merits 06:14:44PM
12 of the Article 1102 case at this stage. We are 06:14:48PM
13 just dealing with whether there is treatment. 06:14:52PM
14 I think there can be no 06:14:54PM
15 question that when you have a benefit, and such a 06:14:56PM
16 substantial benefit provided to one out of several 06:15:01PM
17 competitors, in a market where there is a finite 06:15:05PM
18 number, and it is a commodity market, I really 06:15:09PM
19 believe that it is difficult to conclude that 06:15:15PM
20 there isn't negative treatment of those that don't 06:15:18PM
21 receive the benefit. 06:15:22PM
22 PRESIDENT: On that argument, 06:15:25PM
23 there would be treatment -- if your mill had been 06:15:26PM
24 in the United States, it would certainly be 06:15:29PM
25 treated by Nova Scotia. It didn't matter that it 06:15:32PM

1 was in Quebec for this purpose, because -- 06:15:35PM

2 MR. VALASEK: Correct. But 06:15:38PM

3 then we wouldn't have a NAFTA claim, because we 06:15:39PM

4 need an investment in Canada. 06:15:42PM

5 PRESIDENT: That is extraneous 06:15:45PM

6 to 1102, isn't it? 06:15:46PM

7 MR. VALASEK: Well, the 06:15:49PM

8 producers -- I'm not arguing that the producers in 06:15:53PM

9 the United States weren't -- they were also 06:15:55PM

10 receiving treatment, negative treatment as a 06:15:57PM

11 result. 06:15:59PM

12 PRESIDENT: That is my point. 06:15:59PM

13 MR. VALASEK: Yes. 06:16:01PM

14 PRESIDENT: They just didn't 06:16:04PM

15 have a NAFTA claim, because it met another 06:16:05PM

16 condition? 06:16:08PM

17 MR. VALASEK: Correct, 06:16:08PM

18 correct. 06:16:09PM

19 MR. FELDMAN: If I may, but 06:16:17PM

20 they did have another claim. They brought a 06:16:18PM

21 countervailing duty case over the subsidies 06:16:20PM

22 against all the Canadian producers. So they did 06:16:22PM

23 have another remedy available outside of Chapter 06:16:26PM

24 11. 06:16:30PM

25 MR. VALASEK: Question 9 from 06:16:32PM

1 the tribunal: How is Canada's assertion that 06:16:40PM
2 NAFTA Article 1102 does not reach conduct by a 06:16:43PM
3 province that has effects outside the province to 06:16:46PM
4 be reconciled with the apparent intention of the 06:16:49PM
5 NAFTA parties to cover provincially-granted 06:16:51PM
6 preferences which have negative effects on 06:16:54PM
7 investors of other NAFTA parties? 06:16:56PM
8 We submit that Canada's 06:16:58PM
9 assertion just cannot be reconciled with the 06:17:00PM
10 apparent purpose of Article 1102(3). Canada's 06:17:03PM
11 position would allow a province to do what Canada 06:17:06PM
12 could not, choosing a domestic company to be 06:17:09PM
13 elevated in a national market over its foreign 06:17:10PM
14 competitors in like circumstances. This is 06:17:13PM
15 contrary to the object and purpose of NAFTA and 06:17:16PM
16 would likely lead to those consequences. 06:17:19PM
17 Finally, and where I thought 06:17:22PM
18 this debate was originally going to be based on 06:17:28PM
19 the argument that was initially presented by 06:17:32PM
20 Canada in its Statement of Defence, Canada's 06:17:35PM
21 interpretation is not supported by the text. 06:17:40PM
22 Canada's interpretation, which would require that 06:17:45PM
23 Resolute have an investment in the province, is 06:17:50PM
24 simply not supported by the text and requires 06:17:52PM
25 additional words to be inserted. 06:17:55PM

1 According to Canada, the 06:17:57PM
2 reading of 1102 is based on language that would 06:18:01PM
3 read: 06:18:08PM
4 "The treatment accorded 06:18:09PM
5 by a Party under 06:18:09PM
6 paragraphs 1 and 2 means, 06:18:10PM
7 with respect to a state 06:18:12PM
8 or province, treatment in 06:18:13PM
9 that state or province no 06:18:15PM
10 less favourable than the 06:18:16PM
11 most favourable treatment 06:18:17PM
12 in that state or province 06:18:18PM
13 accorded, in like 06:18:20PM
14 circumstances, by that 06:18:22PM
15 state or province to 06:18:24PM
16 investors, and to 06:18:25PM
17 investments of investors 06:18:26PM
18 of the Party of which it 06:18:28PM
19 forms a part." 06:18:29PM
20 Now, interestingly, that 06:18:30PM
21 language was mooted during the negotiations. Each 06:18:33PM
22 of the NAFTA parties proposed several draft 06:18:37PM
23 clauses to address how national treatment might 06:18:40PM
24 apply to provincial and state measures. 06:18:43PM
25 And in our counter-memorial at 06:18:45PM

1 paragraph 187, we referred to the U.S. proposal 06:18:48PM
2 from December 1991, which I believe was the 06:18:51PM
3 original draft. And there, in the sort of 06:18:54PM
4 preliminary draft, the US did formulate the 06:19:01PM
5 provision in a way that restricted the concepts to 06:19:06PM
6 a comparison of what is happening in the political 06:19:11PM
7 subdivision. You can see the language there that 06:19:14PM
8 is bolded. 06:19:17PM

9 So it would read: "Application 06:19:18PM
10 to political subdivisions. The treatment accorded 06:19:20PM
11 to a party under Article with respect to nationals 06:19:22PM
12 and companies of another party. And under article 06:19:25PM
13 2.2, with respect to the investments, shall, in 06:19:29PM
14 any state or political subdivision, be no less 06:19:33PM
15 favourable than the treatment accorded by such 06:19:36PM
16 state or political subdivision to its residents or 06:19:38PM
17 companies legally constituted under its laws or 06:19:42PM
18 their investments in its territory". 06:19:45PM

19 And in its reply, Canada 06:19:47PM
20 criticized Resolute for failing to consider 06:19:51PM
21 subsequent negotiating drafts, and that is 06:19:54PM
22 paragraph 156. 06:19:55PM

23 So we had a look, and the 06:19:56PM
24 subsequent drafts confirm our position. In fact, 06:19:58PM
25 the choice for the language became even more 06:20:02PM

1 stark, as the negotiating drafts continued. 06:20:06PM
2 Ultimately, in the draft just before the final 06:20:08PM
3 draft that was adopted, these were the two options 06:20:11PM
4 that were before the NAFTA parties. The top 06:20:15PM
5 version, which was a combination or draft proposed 06:20:19PM
6 by Mexico and the United States, and then the 06:20:23PM
7 bottom version which was Canada's preferred 06:20:25PM
8 version. 06:20:27PM

9 And we all know that the 06:20:27PM
10 version that was chosen was Canada's version. But 06:20:30PM
11 the version that was rejected, not adopted, would 06:20:33PM
12 have had the restriction on treatment in the 06:20:36PM
13 subdivision. 06:20:42PM

14 So it read: "The treatment 06:20:42PM
15 accorded by a party under this paragraph with 06:20:44PM
16 respect to investors of another party and their 06:20:46PM
17 investments shall, in any state or political 06:20:49PM
18 subdivision, be no less favourable than the 06:20:52PM
19 treatment accorded by such state or political 06:20:54PM
20 subdivision to its residents or entities legally 06:20:57PM
21 constituted under its laws or their investments in 06:21:00PM
22 its territory". 06:21:02PM

23 Now, that was not adopted. 06:21:03PM

24 The language in 1102(3) is 06:21:06PM
25 more open-ended and does allow, as a matter of 06:21:08PM

1 law, an allegation that an investor that is 06:21:13PM
2 outside the province is being treated by the 06:21:16PM
3 province. 06:21:18PM
4 Now, the merits is obviously 06:21:18PM
5 the phase where you determine whether there is a 06:21:21PM
6 violation, but nothing as a matter of law prevents 06:21:23PM
7 it. 06:21:26PM
8 MS. LEVESQUE: Just a quick 06:21:31PM
9 question. 06:21:32PM
10 MR. VALASEK: Yes. 06:21:33PM
11 MS. LEVESQUE: Could it be 06:21:33PM
12 that, at the end of the paragraph "of the party of 06:21:34PM
13 which it forms a part," could that be a reference 06:21:39PM
14 to territory? 06:21:42PM
15 MR. VALASEK: No. 06:21:44PM
16 MS. LEVESQUE: So why is it 06:21:49PM
17 there? I will ask Canada too. 06:21:50PM
18 MR. VALASEK: Well, "of the 06:21:53PM
19 party of which it forms a part" refers to the -- 06:21:54PM
20 so, in this context it is, if you are complaining 06:21:58PM
21 about a provincial measure, the question is, what 06:22:00PM
22 is the foreign investor to complain about? And 06:22:03PM
23 the foreign investor can complain about the 06:22:06PM
24 treatment it has received compared to the most 06:22:09PM
25 favourable treatment the province has accorded to 06:22:12PM

1 whom. 06:22:15PM

2 And the answer is, to 06:22:16PM

3 investors in like circumstances of the party of 06:22:19PM

4 which it forms a part. 06:22:22PM

5 So that means the most 06:22:23PM

6 favourable treatment accorded to investors of 06:22:26PM

7 Canada. 06:22:28PM

8 So the relative comparison 06:22:29PM

9 here is the treatment that Resolute received 06:22:32PM

10 compared to the most favourable treatment that 06:22:36PM

11 Nova Scotia provided to any Canadian investor, and 06:22:38PM

12 in this case the most favourable treatment was the 06:22:43PM

13 treatment it accorded to Port Hawkesbury. 06:22:45PM

14 PRESIDENT: If the purchaser of 06:22:50PM

15 the Port Hawkesbury plant had been an American 06:22:51PM

16 company, you wouldn't have an 1102 claim? 06:22:55PM

17 MR. VALASEK: Correct. 06:22:59PM

18 Because in that case it wouldn't be treatment 06:23:04PM

19 accorded to an investor of the party of which it 06:23:06PM

20 is a part. 06:23:12PM

21 PRESIDENT: Yes. 06:23:13PM

22 MR. VALASEK: Nor does the 06:23:14PM

23 Merrill & Ring case assist Canada. 06:23:20PM

24 The Merrill & Ring case found 06:23:24PM

25 that the proper 'like circumstances' comparison in 06:23:26PM

1 an 1102 case was between foreign and domestic 06:23:28PM
2 companies or competitors, subject to the same 06:23:32PM
3 federal restrictions on private land in British 06:23:36PM
4 Columbia. Not between foreign competitors subject 06:23:39PM
5 to federal restrictions on private timberland 06:23:43PM
6 versus domestic competitors subject to provincial 06:23:46PM
7 regulations on BC-owned timberland. 06:23:48PM
8 So in the award, the tribunal 06:23:52PM
9 held the treatment accorded to foreign investors 06:23:54PM
10 by the national government needs to be compared to 06:23:56PM
11 that accorded by the same government to domestic 06:23:59PM
12 investors, just as the treatment accorded by a 06:24:03PM
13 province ought to be compared to the treatment of 06:24:05PM
14 that province in respect of like investments. 06:24:08PM
15 Here, Resolute is complaining 06:24:11PM
16 about treatment by the same province, which 06:24:13PM
17 intervened directly in a North American market 06:24:16PM
18 using powers with extraterritorial reach and thus 06:24:19PM
19 does not violate the principle of Merrill & Ring. 06:24:22PM
20 There was some discussion 06:24:26PM
21 earlier about Article 1128, and Mr. Feldman 06:24:28PM
22 referred to the need to also take note of where 06:24:32PM
23 the parties diverge on their positions and this is 06:24:37PM
24 one of those circumstances. 06:24:41PM
25 The US submission in this 06:24:42PM

1 case, under 1128, supports Resolute's position, 06:24:43PM
2 and we have cited the paragraph of their 06:24:49PM
3 submission, paragraph 17. 06:24:53PM
4 And the relevant language 06:24:55PM
5 there is in the middle of the paragraph: 06:24:58PM
6 "An investor cannot rest its 06:25:02PM
7 claim under Article 1102(3) on the fact that a 06:25:04PM
8 domestic enterprise operating in another state or 06:25:07PM
9 province receives a different or greater benefit 06:25:10PM
10 or is subject to a different or lesser burden, 06:25:13PM
11 unless it is in like circumstances with that 06:25:16PM
12 enterprise." 06:25:19PM
13 "Whether such measures 06:25:21PM
14 constitute less 06:25:22PM
15 favourable treatment 06:25:22PM
16 accorded to the foreign 06:25:23PM
17 investor or its 06:25:24PM
18 investment in like 06:25:25PM
19 circumstances on the 06:25:26PM
20 basis of nationality is a 06:25:27PM
21 fact-specific inquiry at 06:25:29PM
22 the merits phase." 06:25:31PM
23 That is exactly our position 06:25:32PM
24 at this preliminary stage. 06:25:35PM
25 And not surprisingly, 06:25:36PM

1 therefore, we had to get into the merits, and 06:25:43PM
2 Canada's argument has strayed into that territory. 06:25:48PM
3 The issues of whether Nova 06:25:51PM
4 Scotia could and did accord treatment, and of 06:25:53PM
5 whether Resolute and Port Hawkesbury were in like 06:25:55PM
6 circumstances, are central to Resolute's claim on 06:25:58PM
7 the merits, which cannot be addressed at this 06:26:01PM
8 jurisdictional phase. 06:26:05PM
9 Resolute must be afforded an 06:26:06PM
10 opportunity, at the merits stage, to demonstrate 06:26:08PM
11 that Resolute was in like circumstances to Port 06:26:10PM
12 Hawkesbury. 06:26:13PM
13 This is not a regulatory case, 06:26:13PM
14 but instead a case where a province has used its 06:26:17PM
15 powers to intervene directly in a market to 06:26:20PM
16 support a local company to become the national 06:26:23PM
17 champion, to the detriment of all of the other 06:26:26PM
18 market participants, all of which were outside of 06:26:28PM
19 Nova Scotia. 06:26:31PM
20 What is clear at this stage is 06:26:31PM
21 that nothing in the text of Article 1102(3) 06:26:34PM
22 prohibits such a claim as a matter of law. 06:26:37PM
23 Unless the tribunal has any 06:26:43PM
24 other questions at this late time, I would end 06:26:46PM
25 there. 06:26:50PM

1 PRESIDENT: I think at this 06:26:50PM
2 late time the tribunal doesn't have any other 06:26:52PM
3 questions, but we may well have some tomorrow 06:26:54PM
4 morning. 06:26:56PM

5 I propose we start at 9:30 to 06:26:57PM
6 give you a bit of time to reflect. There are some 06:27:00PM
7 questions that have been asked of both parties, 06:27:02PM
8 which haven't been fully answered I think it is 06:27:04PM
9 fair to say, and in any event, do we have access 06:27:08PM
10 to the transcript tonight? A rough draft is all 06:27:13PM
11 we need. The draft, I have been looking at it, is 06:27:20PM
12 very, very good indeed, under the circumstances. 06:27:24PM
13 Thank you very much. 06:27:28PM

14 You will have access to a 06:27:28PM
15 rough draft of the questions. If you need any 06:27:30PM
16 clarifications as to what the questions were, you 06:27:33PM
17 can always ask for it. So I suggest that each 06:27:36PM
18 party have half an hour tomorrow, starting with 06:27:38PM
19 the Respondent. 06:27:40PM

20 And the half hour is slightly 06:27:43PM
21 flexible, in that we may have more questions, we 06:27:45PM
22 may have thought of some overnight, after further 06:27:48PM
23 refreshment. But on that basis, we will adjourn 06:27:52PM
24 until 9:30 tomorrow morning. 06:27:55PM

25 Thank you very much. 06:27:58PM

1 --- Whereupon hearing adjourns at 6:27 p.m., to 06:27:59PM
2 resume Wednesday, August 16, 2017, at 9:30 a.m.

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I HEREBY CERTIFY THAT I have, to the best
of my skill and ability accurately
transcribed the foregoing proceeding.

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Teresa A. Forbes, RMR, CRR, CSR