UNDER THE UNCITRAL ARBITRATION RULES AND
SECTION B OF CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN:

VITO G. GALLO

Claimant/Investor

v.

GOVERNMENT OF CANADA ("Canada")

Respondent/Party

CLAIMANT'S POST-HEARING BRIEF

RE: OWNERSHIP OF THE INVESTMENT

REDACTED

April 8, 2011

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1. The issue before the Tribunal is whether Mr. Vito Gallo ("Gallo") owned or controlled 1532382 Ontario Inc. (the "Enterprise") prior to the introduction of the *Adams Mine Lake Act* ("AMLA") into the Ontario legislature on April 5th, 2004. The Claimant met his burden of proof by placing the Enterprise's Minute Book into the evidentiary record and by proving how Ontario law – the applicable law under NAFTA Article 1117 – recognizes that Gallo has controlled the Enterprise since its incorporation in 2002. The Minute Book contained both the original shareholders' register and the original share certificates. None of the evidence adduced at the hearing suggested otherwise. Instead, the forensic evidence and the *viva voce* evidence support and verify the authenticity of the documents.

2. The Respondent has no answer to this *prima facie* claim. All of its hopes were placed in the forensic tests, the results of which only strengthened the Claimant's *prima facie* case. The Respondent did not marshal any positive evidence to cast doubt on the authenticity of the shareholders' register or share certificates. Nor did

it produce any expert evidence to challenge the opinion of Professor Welling. In maintaining that Gallo had no connection whatsoever with the Enterprise until after AMLA was introduced on April 5th, 2004, the Respondent has necessarily posited that the Minute Book was reconstituted in 2004 for the express purpose of pursuing this NAFTA claim. Its theory, unsupported by its evidence, is that Gallo was parachuted into ownership of the Enterprise, replacing Mr. Mario Cortellucci ("Cortellucci") as the sole shareholder. In other words, the Respondent is still alleging that Gallo and Cortellucci are attempting to defraud the Government of Canada.

3. The evidence adduced throughout this jurisdictional phase, and tested at the oral hearing, demonstrates that the Respondent grossly misinterpreted the facts of this claim. Moreover, not only has the Respondent failed to prove any of its factual allegations about the Claimant's alleged transgressions; it has also failed to articulate a plausible interpretation of NAFTA Article 1117 in support of its jurisdictional objections.

4. The record is now closed, and the evidence adduced at the hearing has confirmed:

   a. As its sole shareholder, Gallo owns and controls the Enterprise;
   b. Gallo has been the sole shareholder of the Enterprise from the time of its incorporation;
   c. Gallo did not bring this claim on his own behalf, but rather on behalf of the Enterprise, under NAFTA Article 1117;
   d. Gallo certainly did "act as an investor" in Ontario, prior to the introduction of the AMLA. After identifying an investment opportunity in Ontario, with the assistance

of Messrs. Noto and Belardi, Gallo identified crucial points of access to some of the largest players in the North American waste treatment industry, whose capital contributions would have allowed the Enterprise to put the Adams Mine Waste Disposal Site ("Site") to its highest and best use;

e. Cortellucci is a Limited Partner in the Enterprise and an agent of Gallo who acted on behalf of the Enterprise.[1] He was never a shareholder in the Enterprise and did not want to become one because he had no experience in developing waste disposal sites or operating a waste treatment facility. He also believed that long term, high profile involvement in the waste industry was not ultimately compatible with his career as a developer of high quality homes;

f. The forensic investigation conclusively established that the only Minute Book documents signed after April 5th 2004 (i.e. after the AMLA was passed) were the Enterprise's *pro forma* annual year-end resolutions. This fact had already been confirmed by the Claimant before any forensic examinations had occurred;[2]

g. Shortly before the hearing, the Respondent asserted that one of these resolutions, Document #8, dated June 26th 2002, was actually signed within the past two years. This desperate allegation was based upon a manifestly unsound ink-dating theory conceived by Mr. Marc Gaudreau specifically for this hearing. His purported justification for applying this approach was unreasonable, unscientific and too idiosyncratic to be worthy of any consideration.

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[1] Gallo, Day 1, p. 294/6-9.

[2] Letter from Charles Gastle to Michael Owen, August 20, 2010 and Letter from Charles Gastle to Michael Owen, October 5, 2010, Respondent's Comprehensive Document Brief ("RCDB"), Vol. 2, Tabs 52 & 59. The Canadian tax returns had been requested by Mr. Swanick on January 20th, 2010 and the CRA for some reason which has not been explained to date, did not comply with its own internal procedures to produce them within 30 days.

h. The Respondent has attempted to capitalize on an innocent error in the Enterprise's 2002 and 2003 tax returns which incorrectly identified the Enterprise as a CCPC. This simple error, made by Mr. Frank Peri ("Peri"), was not noticed by Mr. Brent Swanick ("Swanick"). Kutner's evidence confirms that these sorts of errors were understandable given the nature of Peri's practice. Mr. Perry Truster's ("Truster") report, which also contained errors, demonstrates just how easily errors can be made by an otherwise qualified professional.[3]

5. Below, we recall the applicable legal standards, addressed during the oral hearing, followed by a brief explanation of each of the aforementioned points of fact.

A. AS ITS SOLE SHAREHOLDER, GALLO OWNS AND CONTROLS THE ENTERPRISE

6. Vito Gallo is an American citizen who resides in Whitehall, Pennsylvania.[4] The Shareholders Register contained in the Enterprise's Minute Book confirms that Gallo is its sole shareholder. As Prof. Welling explained, under the applicable law in this proceeding, Gallo controls the Enterprise,[5] as its sole shareholder, only he has the power to appoint the board of directors or issue a unanimous shareholders' agreement. As such, the directors manage the day-to-day affairs of the Enterprise at Gallo's pleasure.[6] As an unassailable proposition of international law, the sole shareholder of a corporation also constitutes one who "owns" the corporation.

7. Faced with these incontestable facts, the Respondent argued that the Enterprise's corporate records were incomplete, of an irregular format, and therefore insufficient

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[3] Even the Canada Revenue Agency erred in stamping the Enterprise's tax returns "October 2003" instead of "October 2004". Swanick, Day 4, p. 200/8-20.
[4] Gallo, Day 1, p. 175/6-11; Respondent's Witness Statement Book ("RWSB") Tab 1-A.
[5] Welling, Day 2, p. 7/6-20.
[6] Welling, Day 2, p. 7/2-20.

proof of Gallo's ownership and control of the Enterprise.[7] Prof. Welling testified, however, that the corporate records found in the Enterprise's Minute Book do satisfy the statutory requirements for corporate organization.[8] He also explained how Section 250(1) of the *Ontario Business Corporations Act* vests authority to determine the authenticity of corporate records, and their possible rectification, exclusively with the Courts of Ontario.[9] He added that, under the parole evidence rule applicable in Ontario evidence law, it would be improper to accept oral evidence as sufficient to challenge the authenticity of corporate records in a rectification hearing held by an Ontario Court. It should accordingly be concluded that, absent compelling documentary or forensic evidence to the contrary, an Ontario court would accept the Enterprise's share register as conclusive evidence of Gallo's status as its sole shareholder.[10]

8. The agreements that the Enterprise entered into in order to finance and manage the Adams Mine waste disposal site do not have any bearing on Gallo's ownership or control of the Enterprise. Prof. Welling confirmed that the *Ontario Business Corporations Act* accords authority to the director(s) of a corporation to manage its day-to-day business.[11] A director also has the authority to enter into contracts delegating his statutory powers to a third party to exercise them on his behalf.[12] The

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[7] Respondent Submission on Jurisdiction p. 48, para. 110.
[8] Welling, Day 2, p. 45/18 – 47/2. In cross-examination, Prof. Welling rejected the Respondent's submission that Ontario law required a Minute Book to keep a Register of Shareholder addresses. Welling, Day 2, p. 50/3-8. In any event, Swanick confirmed that it was his practice to rely on the Shareholders Register. Swanick, Day 2, p. 271/15-21.The Respondent did not introduce any expert evidence that contradicts either Prof. Welling or Swanick's testimony.
[9] Welling, Day 2, p. 8/4-14.
[10] Welling, Day 2, p. 10/1-20.
[11] Welling, Day 2, p. 16/9-17/6.
[12] Welling, Day 2, p. 19/14-20/2.

Limited Partnership Agreement,[13] the Management Agreement[14] and the Loan Agreement[15] are thus completely consistent with the applicable law in this case and cannot possibly affect the Tribunal's determination of whether Gallo owned or controlled the Enterprise within the meaning of NAFTA Article 1117.

9. The Limited Partnership was formed, and has always functioned, REDACTED REDACTED which did not – and could not – deprive Gallo of either control or ownership of the Enterprise, as per the applicable laws of Ontario. In much the same way as a homeowner does not give up control or ownership of her home just because she takes out a mortgage on it, neither did Gallo somehow lose control of the Enterprise because he chose REDACTED As the *Siag & Vecchi* Tribunal confirmed,[16] the origin of funds used to develop an investment in the territory of the Host State (in that case also property in land), is simply not relevant. The Enterprise's REDACTED REDACTED that would have been derived from the Enterprise's putting its land to its highest and best use as a waste site.

10. The Respondent does not deny that NAFTA Article 1117 is the operative provision for the purposes of jurisdiction. As explained in earlier submissions, it just attempts to obfuscate its meaning by throwing up untenable and/or inapplicable constructions of the terms "investor" and "investment," despite the fact that both are quite clearly

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[13] RCDB, Vol. 1, Tab 21
[14] RCDB, Vol. 1, Tab 18
[15] RCDB, Vol. 1, Tab 19
[16] *Siag & Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, at para. 208; citing: Tokios Tokeles v Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, 20 ICSID Rev. FILJ 205 (2005), paras. 81-82. Investor's Ownership Submission, BOA Tab 23.

defined in the NAFTA, without any need, or reason, to refer to the jurisprudence of ICSID tribunals on the meaning of "investment" in irrelevant bilateral investment treaties and the ICSID Convention. By now it ought to be regarded as axiomatic that the applicable law for the purposes of determining the ownership or control of an enterprise is first the corporate law of the incorporating State.[17]

11. As Prof. Welling confirmed, the fact that the Enterprise entered into the Limited Partnership Agreement does not change the fact that entering into such an agreement does not deprive Gallo of his right to control it under Ontario law.[18] In Canada and in Ontario, there is nothing improper or unusual REDACTED an entrepreneurial venture through a Limited Partnership arrangement.[19] It was a perfectly legitimate and effective means of REDACTED such as the one the Enterprise was planning for the Adams Mine Site.[20] REDACTED REDACTED REDACTED Mr. Truster testified that such a structure was

[17] It is only where there is a lacuna in the applicable law that one would resort to general practice in international law. In this regard, Prof. Welling confirmed what constitutes "control" under Ontario corporate law. He did not pass an opinion upon the question of how "ownership" of an Enterprise is proved under Ontario law because the concept is not applicable given the statutory regime. Hence, one turns to international law to determine whether it is customary for tribunals to regard the 100% possession of the shares of an enterprise to constitute "ownership" of it. The answer is a resounding yes.
[18] Welling, Day 2, p. 70/16-71/8; 27/12-28/13.
[19] Welling, Day 2, p. 27/17 – 28/13.
[20] Swanick, Day 2, p. 131/13-133/9.
[21] Swanick, Day 2, p. 132/1-25.

a valid investment incentive, which was in compliance with all of the requirements of the Canada *Income Tax Act*. [22]

12. Prof. Welling also confirmed that the Management Agreement[23] was valid according to Ontario law. This Agreement provided that the Limited Partnership would REDACTED of the Adams Mine on behalf of the Enterprise. Section 15 of the *Ontario Business Corporations Act* bestows all of the capacity, rights, powers and privileges of a natural person upon a corporation, thereby allowing corporations, such as the Enterprise, to enter into limited partnership arrangements as one of the partners and/or to grant agents the authority to manage its business however it sees fit.[24]

13. During the hearing, Prof. Welling was asked whether it was possible, under Ontario corporate law, for control to be exercised by way of contract (i.e. "control by agreement" theory).[25] NAFTA Article 1117 permits claims to be brought on behalf of investment enterprises that are "owned or controlled" by an investor of another Party. In any event, however, the Supreme Court of Canada has directly addressed the issue of "control" over an Ontario corporation and has confirmed that the only legitimate means of demonstrating control over an enterprise in Ontario is by satisfying the essential terms of the *Ontario Business Corporations Act*; only a sole

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[22] Truster, Day 4, p. 341/9–342/21.
[23] Welling, Day 2, p. 27/12-28/13. During the Swanick cross-examination, the Respondent attempted to suggest that there were two separate management agreements, one which provided that the LP was retaining McGuinty and a second which provided that 1532382 Ontario Inc. was retaining McGuinty. The basis for this was paragraph 90 of the McGuinty witness statement which purports to quote Exhibit "S" to his statement. Claimant's Post-Hearing Document Brief ("CPDB"), Tab 1 and RCDB Tab 23. There is an error in the witness statement. The quotation of the agreement attached as Exhibit "S" refers to 1532382 as retaining McGuinty. Of course, Exhibit "S" was misquoted as it confirms that it is the LP retained McGuinty. The Claimant is not sure what point the Respondent is attempting to make but, whatever it is, it is without foundation. See Swanick, Day 2, p. 250/12-260/12.
[24] Welling, Day 2, p. 27/17–28/13.
[25] Welling, Day 2, p. 66/5–68/24.

shareholder has the power to appoint the board of directors or issue a unanimous shareholder's agreement.[26]

14. The Loan Agreement provided that the Limited Partners REDACTED REDACTED to the Enterprise.[27] In return for assuming this initial business risk, they would receive interest REDACTED REDACTED Adams Mine Site.[28] Swanick's evidence[29] confirms that the Limited Partners bore no obligation to provide additional funding thereafter, and absolutely no right to control the *de facto* 'destiny' of the Enterprise.[30]

15. The REDACTED Agreement"[31] similarly fails to demonstrate that Gallo did not own or control the Enterprise. As Prof. Welling confirmed, it was within Cortellucci's authority, as a matter of Ontario common law, to have taken the initiative to enter into such an agreement, on behalf of the Enterprise, acting as an agent.[32] Prof. Welling also confirmed that, in the event that REDACTED had actually been successful in

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[26] *Business Corporations Act*, R.S.O. 1990, Chapter B. 16, CPDB, Tab 2.
[27] RCBD, Vol. 1, Tab 19.
[28] Swanick, Day 2, p. 137/18-138/5. Mr. Swanick confirms that the Limited Partners REDACTED REDACTED as has been suggested by the Respondent.
[29] Swanick, Day 2, p. 136/5–137/1.
[30] Swanick, Day 2, p. 136/1-10. In answer to a question from the Chair, Prof. Welling stated that there is no special Ontario law providing that managers who pay expenses have a statutory right to the income: Welling, Day 2, p. 73/1-18. Swanick testified that the Enterprise REDACTED Swanick, Day 2, p. 131/7-17. He testified further that the corporation wears two hats, as the corporation in its own right and as the general partner of the LP. Swanick, Day 2, p. 134/18-135/25. It was apparent during the cross-examination that counsel for the Respondent did not understand the manner in which the Enterprise had the two roles and the interaction between them. For example, see Swanick, Day 2, p. 237/5-243/18.
[31] RCDB, Vol. 2, Tab 34. The Respondent produced this agreement. Cortellucci stated that REDACTED REDACTED approached him and suggested that he could sell the Adams Mine waste disposal site for more than $155 million. The agreement was drafted by REDACTED and he kept the only copy due to the sensitivity of his position as a former REDACTED. The agreement terminated on December 31, 2003.
[32] Welling, Day 2, p. 28/23-31/6.

locating a suitable candidate, the purchase agreement did not dictate how the proceeds from the sale of the Adams Mine Site would be distributed, nor could it without first obtaining the approval of a majority of shareholders of the corporation (i.e. Gallo). Gallo testified that Cortellucci discussed the REDACTED Agreement with him.[33]

16. Without foundation in fact or in law,[34] the Respondent has advanced a theory that the Limited Partners would have been the beneficiaries of such a sale. This theory contradicts the applicable laws of Ontario, again as explained by Prof. Welling, which provide that the Enterprise would have been the sole beneficiary of any such sale.[35] Prof. Welling also confirmed how Ontario law recognizes agency agreements,[36] regardless of whether they are reduced to writing.[37]

17. Furthermore, Prof. Welling confirmed that the property interest held by the Enterprise in the Adams Mine Site, namely an estate in fee simple in land permitted for use as a waste disposal facility, gives it full liberty to put the land to any use it sees fit, subject only to any supervening rules found in statute or in the common law.[38] According to Ontario corporate law, because of the significance of this ownership interest in the Site, a shareholder vote would be required before such right could be alienated by

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[33] Gallo, Day 1, p. 295/14-22.
[34] In their opening statement, the Respondent alleged that, "The contemporaneous business documents of the Enterprise also suggest that all the profits from the site would have flowed to either the Limited Partnership or the Cortellucci Group of Companies." Respondent Opening Statement, Day 1, p. 55/18-22. This position is repeated at Day 1, p. 90/3-6.
[35] Welling, Day 2, p. 37/6-38/6.
[36] Gallo, Day 1, p. 188/19–189/4; Cortellucci, Day 4, p. 130/10, 140/12-20.
[37] Welling, Day 2, p. 20/3-23.
[38] Welling, Day 2, p. 13/16–15/22.

an act of the Enterprise.[39] As the sole Shareholder of the Enterprise, Gallo's interest in the Site therefore could never be alienated from him without his express approval.

18. The Respondent has had every opportunity to provide the Tribunal with expert evidence on the applicable municipal law for determining jurisdiction in this case. Not only did it elect not to respond to Prof. Welling's expert report, submitted on October 25th, 2010, it deemed his evidence to be so irrelevant that it saw no need to provide a counter opinion, and then objected to his appearance at the invitation of the Tribunal.[40] At the hearing the Respondent purported to reserve its right to adduce new expert evidence in rebuttal to Prof. Welling's testimony. Although the Tribunal indicated that it was prepared to consider a request to file new evidence,[41] the Respondent ultimately decided against it.[42] It is submitted that the Respondent changed tack because it could not find an expert of Prof. Welling's stature who would disagree with him.[43]

19. Rather, the Respondent has intimated that it can instead present its own arguments on Canadian law in opposition to Prof. Welling.[44] Any attempt, by the Respondent, to expand upon the evidentiary record, for example, by submitting new case law to the Tribunal, should be rejected as prejudicial to the Claimant. Having repeatedly spurned the opportunity to adduce expert evidence on these crucial issues, the

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[39] Welling, Day 2, p. 19/10-13.
[40] CAN 67, CPDB, Tab 3, p. 6.
[41] Tribunal, Day 5, p. 53/18-23.
[42] CAN 70, CPDB, Tab 4.
[43] One of the experts proffered by the Respondent, as part of its merits memorial submission, was retired Canadian Supreme Court judge, Mr. Frank Iacobucci, QC. As fortune would have it, it was none other than Mr. Iacobucci who authored the leading case on the meaning of control under the Canada *Income Tax Act*, in relation to the *Ontario Business Corporations Act*. One might have assumed Mr. Iacobucci would have been prevailed upon by the Respondent to render rebuttal assistance. The problem, however, is that in writing the Court's unanimous decision, Mr. Iacobucci relied heavily (and explicitly) upon the opinion of Prof. Welling to reach this conclusion. A copy of the case is attached as Appendix 2 to Prof. Welling's Opinion in this case, RERB, Tab 1B.
[44] CAN 70, CPDB, Tab 4.

Respondent should not be permitted to effectively nominate its own counsel as experts on the applicable municipal law, without according a right of cross-examination to the Claimant, much less an opportunity to reply to late-submitted evidence.

B. VITO GALLO WAS THE SOLE SHAREHOLDER SINCE INCORPORATION

20. It is the evidence of Gallo,[45] Swanick[46] and Cortellucci[47] that Gallo was always the sole shareholder of the Enterprise. Ms. Anna Viggers ("Viggers") further confirmed that the Minute Book was organized in 2002, with Gallo as the sole shareholder.[48] Peri also confirmed that he had been told that Gallo was the shareholder between February 2003 and March 2004.[49]

21. The original Minute Book of the Enterprise was presented at the hearing, including the key documents evidencing Gallo as the shareholder of the Enterprise: the Shareholders Register and the Share Certificates. Viggers and Swanick bore direct witnesses to the original drafting of these documents. They attested to the authenticity of these documents. Circumstantial evidence regarding the authenticity of these documents was also provided at the hearing, such as evidence from the Minute Book manufacturer,[50] as well as invoices[51] and financial records[52] indicating payments made in return for the incorporation. And in spite of the Respondent's early promises to the contrary, three rounds of extensive forensic

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[45] Gallo, Day 1, p. 193/23–194/4.
[46] Swanick, Day 2, p. 121/1-122/16, 124/16-125/22.
[47] Cortellucci, Day 4, p. 108/15-24, 249/5–254/20.
[48] Viggers, Day 5, p. 11/1–12/2, 16/11-16.
[49] Peri, Day 4, p. 283/11-13.
[50] Bain, Day 1, p. 155/5-6. Also Robert Bain Second Witness Statement, RWSB, Tab 15, p. 2-3. Also, Lindblom, Day 3, p. 73/25–74/2, 76/15-23; Lindblom Report, RERB, Tab 4, p. 16, Sec. 8, paras. 1-2.
[51] RCDB, Tabs 11, 14 and 16.
[52] Bill 49 Compensation Submission of the Enterprise (Bates 02313-02315), Frank Peri's Supplementary Witness Statement, October 25, 2010, Excerpt from Exhibit "A", RWSB, Tab 11A.

testing could not provide it with any definitive evidence to indicate that these documents were prepared in any year other than in 2002.[53]

22. In the office of Swanick and Associates, Viggers was responsible for incorporating companies. It was Viggers who personally organized the Enterprise's Minute Book and who gave it to Swanick for his signature.[54] Viggers demonstrated some recollection of this particular Minute Book and she remembered the share certificates, although she did not remember any more specific details about how she drafted them.[55] Viggers stated that she would have organized the Enterprise's Minute Book as soon as possible because she did not want it or any of the other several minute books she would have been preparing simultaneously to pile up at her desk. She stated that sometimes she had to work through backlogs of as many as ten minute books at a time, all waiting to be incorporated.[56] It was her stated belief that the Minute Book was likely organized and signed approximately one month after either the initial incorporation was completed or the initial notice filed.[57] She also acknowledged that the amount of time she took to organize a minute book varied depending on how busy the office was.[58]

23. The Corporate Point in Time Report[59] for the Enterprise, generated electronically by the Government of Ontario, also indicates that the Form I for this Enterprise was logged into the system on September 12th, 2002. This means that notice documents

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[53] Lindblom, Day 3, p. 23/17-18, 24/17-18, 32/10-12, 63/6-7, 71/20-23.
[54] Viggers, Day 5, p. 7/3-10.
[55] Viggers, Day 5, p. 36/10-36/16.
[56] Viggers, Day 5, p. 10/4-9. Also see Swanick Day 2, p. 103/17-104/14.
[57] Viggers, Day 5, p. 16/17-16/25, 22/23-24.
[58] Anna Viggers Witness Statement, CPDB, Tab 5, p. 3, para. 5.
[59] Swanick, Day 4, p. 205/18-209/14. Corporate Point in Time Report, Exhibit "D" to Anna Viggers Witness Statement, CPDB, Tab 5D.

had to have been mailed to the Ministry before the 12th of September.[60] The Enterprise's Minute Book was organized sometime after that date but before mid-October. Viggers believes that she gave the material to Swanick for signature at that time. It was also her belief that the documents in the Minute Book were signed within a week or two after that, and certainly by the end of October, 2002.[61]

24. Three rounds of forensic testing have markedly diminished the Respondent's case. Rather than proving that the documents were false, the ten days of testing only confirmed that the key documents must have been executed in 2002. For example, when Mr. Brian Lindblom ("Lindblom") examined the first page of the Articles of Incorporation, he found indentations of a signature and of the dates "Aug 21/02", "Oct 16/02".[62] This signature was identified by Swanick as that of Viggers.[63] There is accordingly no question Viggers had the Minute Book open in front of her on those dates. REDACTED

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25. Mr. Robert Bain's ("Bain") evidence established that the Shareholders' Register in the Minute Book was most likely the original Shareholders Register form, which had been

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[60] Viggers, Day 5, p. 13/1-3.
[61] Viggers, Day 5, p. 37/4-37/12, Anna Viggers Witness Statement, CPDB, Tab 5, para. 5.
[62] Lindblom Report, RERB, Tab 4, p. 7, Doc. 2(1).
[63] Swanick, Day 2, p. 112/10-113/1.
[64] Swanick Invoice, August 21, 2002, RCDB, Vol. 1, Tab 14.
[65] Swanick Invoice, August 31, 2002, RCDB, Vol. 1, Tab 16. This invoice deals with a number of matters only one of which was the incorporation. Mr. Swanick testified that the reference to REDACTED REDACTED referred to the real estate transaction which is also referred to in the reference to REDACTED and the REDACTED Swanick, Day 2, p. 97/17-99/24.
[66] Bill 49 Compensation Submission of the Enterprise (Bates 02313-02315), Frank Peri's Supplementary Witness Statement, October 25, 2010, Excerpt from Exhibit "A", RWSB, Tab 11A.

included with the Minute Book when it would have been delivered to Viggers at Swanick's office in 2002.[67] Bain testified that the particular form in the Minute Book was of an old format, which pre-dated a major revision by the manufacturer in August 2002. The evidence only supports the conclusion that this form is the one that was shipped in June 2002, and which was used by Viggers. There can be no serious doubt that this Shareholders Register was the one supplied with the Minute Book in 2002 and that it was used to incorporate the Enterprise during the same year.

26. Viggers confirmed that it was her handwriting on the Shareholders Register as well as the two share certificates.[68] The forensic evidence even confirms her role in the documentation process, as the person who prepared the key corporate records in 2002. Based on both optical and chemical examinations, Lindblom and Gaudreau concluded that the same: "Black Ballpoint Pen Ink #1" ink was used by Viggers on the Shareholders Register as well as on the two share certificates.[69] The Share Certificate forms produced to the Respondent were also the forms that Bain agreed would have been supplied with the Minute Book in summer, 2002.[70] It is implausible that the documents were filled out almost two years apart with the same pen.

27. Viggers stated that even though she did not recall precisely when she completed the documents in question,[71] she was almost one hundred percent sure that the Minute Book was organized and signed in 2002.[72] She emphatically asserted, on multiple occasions, that in the seventeen years she worked with Swanick she was

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[67] Bain, Day 1, p. 160/25-161/9 - Also in Robert Bain's Second Witness Statement, RWSBT Tab 15, p. 2-3. Lindblom testified that he relied on this information when he wrote his report: Lindblom, Day 3, p. 76/5-10.
[68] Viggers, Day 5, p. 11/1-24.
[69] Lindblom Report, RERB, Tab 4, p. 4, para. 6(d), p. 14, Appendix 5, HPTLC Ink Testing Legend, RFRB, Tab 4F.
[70] Bain, Day 1, p. 154/19, 161/21-23, Robert Bain's Second Witness Statement, RWSB, Tab 15, p. 3, para. 6.
[71] Viggers, Day 5, p. 48/11-15.
[72] Viggers, Day 5, p. 49/16-22.

never asked to manipulate a Minute Book in any way and never saw any such conduct.[73] Any post-incorporation changes that she has ever made to minute books throughout her career as a legal assistant have been simple corrections to errors in spelling or numbering of corporate names, which was not the case with the Enterprise.[74]

28. Viggers' evidence contradicts the Respondent's theory that the Minute Book was reorganized after the introduction of the AMLA on April 5th, 2004. Indeed, it demonstrates how the truth is much more banal. The Enterprise's Minute Book is a composite of documents provided by the manufacturer and documents generated by Viggers herself. Viggers ordered the Minute Book in 2002.[75] She prepared all of the key documents in this case, under Swanick's instructions, that same year.[76] Some of the documents she prepared herself using a computer program, as she usually did when minute books were delivered to her workplace in an incomplete state.[77] Documents that were not statutorily necessary were removed by Viggers,[78] as per Swanick's practice, something that he had learned as a young lawyer in 1975 from former Supreme Court Justice Bertha Wilson.[79] Contrary to the Respondent's theory, the only documents in the Minute Book that were prepared and signed after 2004 were the Shareholders Resolutions and Directors Resolutions. The Claimant disclosed long before the hearing that these *pro forma* documents had been prepared after the AMLA was introduced.

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[73] Viggers, Day 5, p. 19/6-23, 49/16-50/3; Anna Viggers Witness Statement, CPDB, Tab 5, p. 3.
[74] Viggers, Day 5, p. 26/6-18.
[75] Viggers, Day 5, p. 8/3.
[76] Viggers, Day 5, p. 16/13-16.
[77] Viggers, Day 5, p. 8/12-9/7; Anna Viggers Witness Statement, CPDB, Tab 5, para. 11.
[78] Anna Viggers Witness Statement, CPDB, Tab 5, p. 4-5, para. 9.
[79] Swanick, Day 2, p. 113/13 – 114/5.

29. Swanick does not recall signing the Minute Book but he does recall that, when the AMLA was introduced, he retrieved the Minute Book from his shelf and noted that everything was signed.[80] The Respondent has suggested that Swanick's evidence has changed, that he said he signed the organizational documents within 60 days of June 26th, 2002, and that he now says that he signed them within 60 days of September 9th, 2002.[81] The Respondent is incorrect. Swanick was speaking as to his office practice.[82] A substantial amount of forensic evidence has since become available and he conducted a corporate search that revealed when the Form 1 was filed.[83]

30. Swanick also explained to the Tribunal the nature of his practice, which is composed almost exclusively of owner/manager entrepreneurs. His clients are referred to him by trusted business contacts. His clients want immediate tax and business planning advice, including an analysis of the risk/reward profile of a particular issue or transaction. Generally, they do not want paperwork but want advice as to what to do and to get it done quickly.[84] In September 2002, Swanick was on the phone almost constantly each day with many different clients. He had a number of pens on his desk and he would get interrupted on a regular basis with documents to sign including interruptions by other lawyers needing to have cheques and other documents signed.[85] Viggers would sometimes provide Swanick with documents awaiting his signature in stacks, with items drawn from multiple Minute Books at a

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[80] Swanick, Day 2, p. 111/4-112/4, 212/7-214/7. He pulled the Minute Book because AMLA called for a calculation of damages. See Swanick, Day 2, p. 215/2-11, 216/18-25. Swanick had very little to do with the Enterprise after incorporation. Swanick, Day 2, p. 215/15-16.
[81] Swanick, Day 2, p. 109/5-112/4.
[82] Swanick, Day 2, p. 111/7-11.
[83] Corporate Point in Time Report, Exhibit "D" to Anna Viggers Witness Statement, CPDB, Tab 5D.
[84] Swanick, Day 2, p. 85/7-86/9.
[85] Swanick, Day 2, p. 114/17-115/21.

single time. Sometimes only signing pages would be provided and the dividers would be present.[86] Viggers confirmed that Swanick was very busy, but was not precisely sure how he signed what she gave him, saying she did not "stand over him" while he signed documents.[87] Although she would present Swanick with "zig-zagged" piles of company documents, she said that he could have shuffled papers together when he signed them.[88] Furthermore, considering how messy his office was, the idea that he might have used five different pens to sign documents in the same pile was not surprising at all.[89] He kept dockets at the time but they included time only and generally the descriptions were left blank.[90] He worked mostly on the telephone. He did not communicate with his clients in writing very often and did not keep his "scratch notes."[91] None of this is surprising with respect to the incorporation of the Enterprise and the preparation of the management agreements. This was a fairly simple structure amongst business people who were aware of the business terms of the deal.[92] It is representative of the kind of practice that Swanick had when dealing with owners/managers.[93]

C. GALLO BROUGHT THE PROCEEDING ON BEHALF OF THE ENTERPRISE

31. Gallo brought this proceeding pursuant to NAFTA Article 1117 on behalf of the Enterprise. He did not do so on his own behalf, which is why he did not make a claim

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[86] Swanick, Day 2, p. 118/17-119/10.
[87] Viggers, Day 5, p. 28/24–29/2; 35/23–36/1.
[88] Viggers, Day 5, p. 31/4-5
[89] Lindblom, Day 3, p. 27/19-28/2; Viggers, Day 5, p. 28/24-29/6.
[90] Swanick, Day 2, p. 100/14-101/2. Swanick does not keep his dockets even though they are blank beyond the year they become statute-barred. Swanick, Day 2, p. 176/17-179/8. He believes he dictated the two invoices dated August 21, 2002 and August 31, 2002. Swanick, Day 2, p. 182/17-183/3.
[91] Swanick, Day 2, p. 183/4-185/5.
[92] Swanick was instructed to deal with Cortellucci as Gallo's agent. He sent the agreements to Cortellucci who dealt with Gallo. REDACTED Swanick, Day 2, p. 233/19-234/15; Gallo, Day 1, p. 258/23-260/7.
[93] Swanick, Day 2, p. 85/7–86/9.

under NAFTA Article 1116. As demonstrated in the Claimant's written and oral submissions, the NAFTA Parties included Article 1117 in the NAFTA specifically in order to escape the customary international law paradigm adopted by the ICJ in the *Barcelona Traction* Case. Article 1117 permits claims to be brought on behalf of investment enterprises incorporated under the laws of the Host State.

32. As set out by Prof. Crawford, Judge Schwebel and Sir Ninian Stephen in the *Mondev v. USA* NAFTA arbitration,[94] and confirmed in the Article 1128 submissions of the NAFTA Parties in other disputes, the right to pursue a claim on behalf of a corporation under Article 1117 is not a personal right held by the investor as it would be under Article 1116. When an Article 1117 claim is pursued, the claimant is simply not allowed to collect the damages himself. Only the investment enterprise can be awarded damages by a tribunal. What the enterprise chooses to do with the proceeds of a damages award is not relevant to this proceeding. Except to the extent that it may be bound by previous contractual obligations, the victorious investment enterprise would be at liberty to dispose of the proceeds as it sees fit.

33. The Respondent is fond of arguing that it would be grossly unfair for a REDACTED investment in Canada (i.e., the coin attached to the corporate records in the Minute Book) to lead to a $120 million, plus interest, "pay day" for Gallo. The creative imagery employed by the Respondent's advocates belies the fact that Gallo is not entitled to be paid any damages at all by the Tribunal. Any award must be rendered in favour of the Enterprise. Moreover, such hyperbole obscures the simple fact that the Respondent cannot be permitted to benefit from the alacrity with

[94] *Mondev International Limited* v *United States*, Award, ICSID Case No ARB(AF)/99/2, IIC 173 (2002), (2004) 6 ICSID Rep 192, (2003) 42 ILM 85, (2004) 125 ILR 110, (2003) 15(3) World Trade and Arb Mat 273 , despatched 11th October 2002, ICSID, para. 86, Investor's Submission on Ownership, BOA Tab 15.

which it acted against the Enterprise, namely to stop it from making use of a valuable piece of permitted land as a functioning waste facility. Such a result would be inequitable, not only because it would allow the Respondent to benefit from its own wrongdoing, but also because its argument misses the point of the claim before this Tribunal: as of the date it was taken from the Enterprise, the Adams Mine Site was a highly valuable asset and worth a great deal of money as a permitted waste landfill.

34. In other words, there can be no "windfall" in this case. The Enterprise has seen its property in land effectively expropriated by a deliberate and high-handed legislative act of the Government of Ontario. Because that land was permitted for use as a waste treatment facility, it was very valuable as of the date taken, and much more so today. Reparation occurs when someone who was undeservedly deprived of his property is made whole by virtue of a damages award.

D. GALLO WAS ACTIVELY INVOLVED AND FULFILLING HIS ROLE AS AN INVESTOR PRIOR TO AMLA

35. Beyond his ownership of the Enterprise, Gallo's primary contribution to the project was his ability to secure the support of interested and experienced investors and/or buyers from the United States, once the site was made ready for construction.

36. As confirmed by the Witness Statement of Mr. Barry Drew,[95] from 1995 until February 2003,[96] Gallo served in the policy office for the Governor of Pennsylvania, ultimately reaching the position as Senior Policy Director.[97] In the course of his employment, he

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[95] Barry Drew Witness Statement, RWSB, Tab 14. The Respondent elected to not cross-examine Drew, so his evidence should be accepted.
[96] Gallo, Day 1, p. 207/24, 271/3; Gallo Supplementary Witness Statement, RWSB, Tab 2, p. 3, paras. 6-7.
[97] Gallo, Day 1, p. 177/8-23.

learned how profitable the waste industry could be, and also how politically sensitive an issue it was. He observed firsthand how both the Pennsylvania waste industry and the public at large reacted to the closing of New York City's landfill.[98] Drawing on lessons learned from that experience, when he heard that the state of Michigan was on the verge of limiting or restricting waste imports from Ontario he recognized that there was a great business opportunity in front of him. Based on his observations of Pennsylvania's landfills, Gallo predicted that the value of an Ontario waste site would skyrocket once Michigan prohibited imports of Ontario waste.[99] He realized that Ontario, and especially the City of Toronto, was facing a waste crisis and very shortly would be in serious need of a waste disposal site.[100]

37. Gallo spoke with his friend and Pennsylvania's Deputy Secretary for International Business, Mr. Michael Wolf ("Wolf"), about investing in Ontario.[101] Wolf told him that there were some Commonwealth of Pennsylvania resources in Ontario to help him, and that Canada was a very investment-friendly place to do business. Gallo knew something about Ontario, having family there who he visited periodically. During one of his visits to Toronto in the summer of 2001, he met Cortellucci at a social event.[102] The two warmed to each other immediately and Gallo seized the opportunity to tell Cortellucci of his idea of investing in the Ontario waste industry.[103] Gallo represented to Cortellucci that he had contacts among waste site developers in Pennsylvania who he could convince to invest in waste projects in Canada.[104]

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[98] Gallo, Day 1, p. 179/12-180/6.
[99] Gallo, Day 1, p. 201/2-7.
[100] Gallo, Day 1, p. 181/15-25.
[101] Gallo, Day 1, p. 182/12-19; Wolf, Day 3, p. 189.
[102] Cortellucci, Day 4, p. 101/6-8, 124/18-21, 125/1-4.
[103] Gallo, Day 1, p. 184/3-16; Cortellucci, Day 4, p. 101/10-25.
[104] Cortellucci, Day 4, p. 135/9–136/7.

Cortellucci was impressed by Gallo. He testified that he saw in Gallo what others had seen in himself at the start of his own career.[105] He was also convinced by his explanation of the potential profitability of the Ontario waste industry, and offered to help him find such an opportunity. [106]

38. Cortellucci canvassed his business contacts for available waste site investments, but with little initial success.[107] Cortellucci first heard of the Adams Lake site when he was approached by Toronto lawyer and entrepreneur Mr. Blake Wallace, who was searching for potential investors for the site.[108] Cortellucci in turn called Gallo and Gallo then asked Cortellucci to investigate the opportunity further.[109] Cortellucci soon called Gallo again with more specific details about the Adams Mine site, and then mailed Gallo the presentation materials about the Adams Mine that had been prepared by its owner, Mr. Gordon McGuinty ("McGuinty").[110]

39. Gallo confirmed with Mr. Jeffrey Belardi ("Belardi") and Mr. Phillip Noto ("Noto") his belief that there would be great interest from wealthy and experienced waste industry leaders in the United States, especially because of its Certificate of Approval. Land that had provisional permits for waste disposal represented a golden investment opportunity.[111] With his knowledge of the politics of waste disposal in the state of Michigan, and Ontario's impending waste crisis Gallo foresaw that the Adams Mine represented "a solution to Ontario's dilemma."[112]

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[105] Cortellucci Supplementary Witness Statement, RWSB, Tab 13, p. 6, para. 17.
[106] Cortellucci, Day 4, p. 102/1-6.
[107] Cortellucci, Day 4, p. 102/17-23.
[108] Cortellucci, Day 4, p. 103/1-4.
[109] Gallo, Day 1, p. 185/6-25; Cortellucci, Day 4, p. 128/9-16.
[110] Cortellucci, Day 4, p. 105/24-106/10; Gallo, Day 1, p. 187/1-7; 225/2-10.
[111] Gallo, Day 1, p. 309/17-310/8.
[112] Gallo, Day 1, p. 187/5-6.

40. After weighing the pros and cons, Gallo decided to pursue the opportunity, using Cortellucci as his agent.[113] He instructed Cortellucci to turn down Mr. Gordon McGuinty's ("McGuinty") initial offer of a leasing arrangement and to put forward a counter-offer to purchase the site from him outright instead.[114] When McGuinty agreed to sell, Cortellucci put Gallo in touch with Swanick to set up the Enterprise, and then on Swanick's recommendation organized a limited partnership to provide the REDACTED After the Enterprise purchased the Adams Mine in 2002, Gallo visited Toronto twice, first in September, then in December,[115] and reviewed the plan to develop the site with Cortellucci.[116] On both occasions, the two discussed moving the project forward by obtaining the Permit to Take Water to de-water the South Pit and the purchase of the Borderlands surrounding the Adams Mine from the Government of Ontario. Both operations would be managed by McGuinty.[117]

41. Gallo's identity was never revealed to the vendor out of a concern that the purchase price would increase if McGuinty believed that a U.S. citizen was interested in the Site. Gallo was also concerned that his acquisition and development of a waste disposal site might impact negatively upon his position as a policy officer in the office of the Governor of Pennsylvania.[118] His exposure to the politics of waste and landfill development in Pennsylvania, Michigan, and New York during his time with the Government taught him that the risk of public controversy

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[113] Both Gallo and Cortellucci testified that the decision was Gallo's: Gallo, Day 1, p. 188/19-22, 239/11-15; Cortellucci, Day 4, p. 103/15-22, 105/6-9, 107/1-6, 130/7-10.
[114] Cortellucci, Day 4, p. 108/2-4.
[115] Gallo, Day 1, p. 191/3-18.
[116] Gallo, Day 1, p. 195/7-17; Credit Card Charges from visit to Toronto in September, 2002, Exhibit "F" to Gallo Witness Statement, RWSB, Tab 2F.
[117] Gallo, Day 1, p. 192/4-22; Cortellucci, Day 4, p. 113/8-114/20.
[118] Gallo, Day 1, p. 190/2-16, 270/6-25; Cortellucci, Day 4, p. 109/7-22.

was significant.[119] Cortellucci and Gallo agreed that Gallo's name should be kept confidential while he was still was in government. He left the Governor's office at the end of February 2003 and it was soon thereafter that the Enterprise entered into the agreement to buy the Borderlands.[120] It was at this time that extensive publicity occurred that Cortellucci described in his evidence as being horrible.[121] It is not surprising that Gallo opted to remain in the background and avoid the media firestorm that broke out in Ontario from the moment that the project's opponents learned that the Enterprise planned to develop the Site as quickly as possible.

42. Gallo approached two contacts of his, Noto and Belardi, who each had large waste site owners as clients and friends.[122] Both Noto and Belardi testified that Gallo turned to them after he had purchased the Adams Mine site, requesting that they make initial overtures to these large waste entrepreneurs.[123]

43. Gallo played an important and crucial role by bringing in key funding and expertise inputs from the United States. The Adams Mine waste disposal site would have been a success had AMLA not been passed and Gallo been permitted to bring in the investors he was soliciting at the time.

(i.) EVIDENCE OF JEFFREY BELARDI

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[119] Gallo, Day 1, p. 179/19-22.
[120] Cortellucci, Day 4, p. 114/14–115/8.
[121] Cortellucci, Day 4, p. 236/1-21.
[122] Gallo, Day 1, p. 196/13-24.
[123] The Respondent has repeatedly tried to exclude or diminish the value of the testimony of Messrs. Noto, Belardi and Wolf as mere "hearsay evidence from a few friends." Such an argument misunderstands both the importance of these witnesses as well as basic principles of domestic and international evidence law. All three witnesses, as well as Gallo himself, testified and were available for cross-examination at the hearing and therefore their past discussions with him do not meet any international or domestic definition of "hearsay" anywhere. On the contrary, their testimony is direct evidence that speaks to what Gallo understood as to the willingness of U.S. investors in the Adams Mine Site as well as Gallo's active contribution to the business of the Enterprise prior to AMLA.

44. Belardi's main client in the Pennsylvania waste disposal industry is REDACTED REDACTED a person Belardi has worked for since he was fourteen years old.[124] REDACTED Landfill sites in Pennsylvania, licensed to receive 5,000 and 2,350 tonnes of waste per day, respectively.[125] Since 1989, Pennsylvania has been one of the leading United States' jurisdictions with respect to the regulation of waste disposal sites,[126] and Belardi has helped his client to successfully navigate both landfill sites through various aspects of the state's licensing/compliance process.[127]

45. It is a matter of public record that REDACTED was worth $2.2 billion as of 2006.[128] Between 2001 and 2003, REDACTED was actively looking for other waste sites to invest in. Belardi helped him with that search by investigating REDACTED REDACTED

46. Belardi was an ideal go-between for Gallo to use to approach REDACTED Belardi was highly knowledgeable of the waste disposal business and for many years had his own business brokering waste deals between transfer stations in New Jersey and the REDACTED Landifills. Belardi would buy "air space" (the volume in which the waste would be placed) at, as an example, $30.00 per tonne, mark it up and sell it to a transfer station. He also set up his own garbage hauling company with seven tractor-trailers that he operated from late 1999 until October, 2002.[130]

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[124] Belardi, Day 1, 147/6-14.
[125] Belardi, Day 1, 100/23-101/12, 109/12-20.
[126] Belardi, Day 1, 103/24-106/22.
[127] Belardi, Day 1, 102/18-103/23.
[128] Belardi, Day 1, 116/12-116/15.
[129] Belardi, Day 1, p. 122/1-123/18.
[130] Belardi, Day 1, p. 109/21-112/19.

47. While Gallo was still an employee of the Government of Pennsylvania, Belardi recalls him seeking his advice whether a waste disposal opportunity would be a good investment to pursue. Belardi told him that it definitely was and that landfill projects had potential to become highly profitable "cash cows" if one was able to overcome the high cost and regulatory barriers to entry. Belardi believed that such opportunities are rare and that establishing a new landfill is difficult in the current regulatory environment.[131]

48. Belardi reviewed an agreement of sale and remembers Gallo considering buying a 4,000 acre site for less than $2 million in 2002. Belardi told Gallo that it sounded too good to be true and that he should be certain that there was no toxic waste buried on the site. If the site was contaminated with polychlorinated biphenyls, or any type of motor oil, transmission fluid oil dumped in mass quantities, he would impoverish himself for the rest of his life trying to get out from that kind of investment.[132] Gallo confirmed that he had Canadian lawyers and an accountant involved in the purchase.[133] One of the great attractions of the Adams Mine site was that no such environmental assessment was necessary because it had no prior history of toxic dumping, and the project had already been subjected to an extensive environmental investigation by the Ontario Ministry of the Environment as part of the process leading to the issuance of the Certificate of Approval.[134] The site also

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[131] Belardi, Day 1, p. 113/9-22.
[132] Belardi, Day 1, p. 126/20-127/4.
[133] Belardi, Day 1, p. 127/4-127/13.
[134] McGuinty Witness Statement, CPDB, Tab 1, paras. 20, 61-74.

recently had been awarded a tender by the City of Toronto for a twenty-year contract to the Rail Cycle North consortium.[135]

49. Belardi testified that at one point in 2002 Gallo went from talking about investments to telling him that he had purchased a site.[136] Gallo told him that it was a former mine operation, that it was in a good location well north of Toronto, and that it had rail access.[137] Belardi asked him how close it was to houses and Gallo said it was five or six miles away from the nearest neighbourhood.[138] Belardi was concerned because as it was a former mine site it might have subsurface support problems. Gallo told him that because it was a former strip mining operation it did not have the kind of problems that had been encountered with deep shaft mines in Pennsylvania.[139] It is Belardi's opinion that, based on his knowledge of the waste industry, this made the Adams Mine site ideal for investors like REDACTED who have significant experience in the construction of waste disposal sites in former mines. REDACTED constructed both his REDACTED landfill on former coal mine sites.[140]

50. Belardi believed that the Adams Mine site had great potential. In fact, he said that anyone in the business would "salivate" at this kind of opportunity.[141] Not only would the site make money, it would also be cheaper to run than similar sites in Pennsylvania. The fact that it had been permitted to use hydraulic retention meant

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[135] McGuinty Witness Statement, CPDB, Tab 1, paras. 75-81.
[136] Belardi, Day 1, p. 116/22-25.
[137] Belardi, Day 1, p. 117/4-7, 15-16.
[138] Belardi, Day 1, p. 117/7-12.
[139] Belardi, Day 1, p. 117/17-118/8. The problem relates to subsurface support because in eastern Pennsylvania, coal is deep mined through tunnels and shafts because one cannot place liners over open mine voids or shafts.
[140] Belardi, Day 1, p. 118/11-17.
[141] Belardi, Day 1, p. 118/22-119/2.

that no internal double liner system was required, which would have saved $1 million per acre compared to the complex systems that had to be installed by Gundle Systems at REDACTED in Pennsylvania. [142]

51. Belardi told Gallo that his clients would be interested in swooping in and purchasing the site as soon as it was prepped and ready for construction.[143] He knew that in the past, when REDACTED purchased the RED ACT Landfill from an investors group in Boston he did not feel it was necessary for the site to have every single required permit in place and finalized before he purchased it.[144] Belardi believed the Adams Mine presented a similar opportunity for REDACTE D especially since the critical Certificate of Approval and other permits had already been acquired.

52. Belardi testified that REDACTE D expressed great interest in the Adams Mine opportunity. [145] The Adams Mine waste disposal site was going to be easier to build than any of his prior landfills even though it was such a large site, similar to his REDACTE D Landfill operation, which was permitted at roughly 4,000 tonnes per day.[146] It was obvious to Belardi that the Adams Mine had the potential to generate significant, long-term profits to willing and experienced investors.

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[142] Belardi, Day 1, p. 119/3-22.
[143] Belardi, Day 1, p. 120/14-22.
[144] Belardi, Day 1, p. 119/14-120/25. In his testimony, Belardi explained how REDAC did business by recounting the story of how he purchased the RE Landfill. REDACT approached the investors group who owned the site to take on the management of the facility at an early stage so that his management team would be placed on the final permit. When it came time to build the facility and the investors were about to head to New York to seek financing with no idea what engineering group they would use to build the site, Belardi witnessed REDACT invite the main investor to his office where he offered to buy the facility and the partnership outright. He took a pad of paper, wrote a line down the middle of it and stated that he was going to write down ten things that he needed to close the deal and that the investor could leave with a cheque that day if he could get the commitment from the remainder of his investment group. Belardi, Day 1, p. 121/1-25.
[145] Belardi, Day 1, p. 124/8-12.
[146] Belardi, Day 1, p. 124/1-7.

53. Belardi never brought REDACTED and Gallo together to negotiate a deal because he knew it was likely that no deal would be done until the site was ready for construction, which AMLA prevented from ever happening.[147]

54. On cross-examination, the Respondent suggested Belardi's evidence was inconsistent with his witness statement in which he stated that "Mr. Gallo's strategy which I agree to was to wait until the Northern Ontario site was ready for construction before approaching REDACTED Belardi stated that this sentence was accurate, because it was when the project was ready for construction that a deal could be done. For a deal with Gallo to be feasible and worth considering, and if Gallo would definitely sell the site, all REDACTED needed to know was whether the Site had any environmental problems and if it was ready for construction. Belardi knew that REDACTED found the Adams Mine site to be an attractive opportunity,[148] but that interest in the project terminated once Belardi heard that the Ontario government had revoked the permits. Everything came to a halt.[149]

(ii.) EVIDENCE OF PHILIP NOTO[150]

55. Gallo and Noto spoke on a number of occasions[151] beginning in 2002[152] about a possible waste disposal project in Canada involving a turn-key operation on an

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[147] Belardi, Day 1, p. 124/16-22.
[148] Belardi, Day 1, p. 142/21-143/4.
[149] Belardi, Day 1, p. 143/16-23.
[150] The Respondent in its counter-memorial stated that Mr. Noto had misled the tribunal because he could not have the RED as clients in 2002 because Mr. Noto was an employee of the Government of Pennsylvania. Mr. Noto explained in his testimony that although he could not technically refer to the RED as "clients" during the time of his employment with the Government because he was not a registered lobbyist, nevertheless at that time "they were close and they were interested in having me represent them." They became his formal "clients" once he stopped working in the Government. Noto Day 4, p. 72/25-74/7.
[151] Noto, Day 4, p. 66/21-25.

already permitted landfill.[153] These discussions occurred while Noto and Gallo were still "at-will" employees with the Pennsylvania Government.[154] Gallo told him that the permitting of the site was done.[155] At the start of these discussions, Noto understood that Gallo was interested in the project and later that he was very strongly involved in it.[156] Gallo knew that Noto had contacts in the landfill industry in Pennsylvania, and Mr. Noto volunteered that he would help Gallo by reaching out to some of his contacts to see if there was any interest on their part in such a project.[157]

56. Even though he did not know the name of the site in Canada, Noto approached REDACTED the owner of the REDACTED Landfill located in Pennsylvania.[158] This was easy for him to do. REDACTED is Noto's neighbour and their homes are 700 meters apart.[159] Two of REDACTED went to high school with Noto, and he was close friends with them.[160]

57. Noto first spoke to REDACTED shortly after Gallo and he had first discussed the Adams Mine site opportunity.[161] Noto explained to RED ACTE that the deal had come through a colleague[162] in government and asked if they would be interested in getting involved by looking for financing or investment and possibly consulting on the project. The REDAC TED are heavily involved in the waste disposal

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[152] Noto, Day 4, p. 74/8-14, 75/16-20.
[153] Noto, Day 4, p. 64/1-15.
[154] Noto, Day 4, p. 98/7-11.
[155] Noto, Day 4, p. 92/17-20. This is statement is consistent with the fact that the Certificate of Approval had been obtained and the remaining certificates were operational in nature, including the Permit to Take Water.
[156] Noto, Day 4, p. 76/17-19.
[157] Noto, Day 4, p. 64/1-15.
[158] Noto, Day 4, p. 64/16-65/10.
[159] Noto, Day 4, p. 68/2-12.
[160] Noto, Day 4, p. 64/25-65/10.
[161] Noto, Day 4, p. 76/23-77/8, 86/5-20.
[162] Noto, Day 4, p. 98/18-24.

business and have been involved in the landfill business for over forty years.[163] The REDACTED landfill generated more than $60 million a year in revenue, and is the cash cow of their business interests. The value of being involved in a project where all the government permits were complete would have been obvious to them.[164] Noto told the REDACTED that the landfill site could easily serve the Toronto municipal trash market.[165] It already had all the permitting done and once things were finalized, it would be a turn-key operation. REDACTED asked him technical questions about the landfill that Noto could not answer. Nevertheless, REDACTED expressed great interest in the project[166] and Noto testified that, in his opinion, the fact that the permitting would be complete and the business ready for construction was most likely what really captured his attention.[167] Noto testified that the REDACTED expressed to him their interest in investing, possibly financing and even personally visiting the site.[168] Noto also stated that he himself considered investing in the project personally if the REDACTED felt it was such a good project.[169]

58. These discussions occurred approximately once a month until 2004 when Gallo informed him that everything was on hold because of a government action.[170] Because Gallo never indicated that he was ready to proceed, the discussions never progressed beyond general discussions.[171] Nevertheless, the REDACTED interest apparently persisted for several years. Noto testified that in 2010 he was asked by

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[163] Noto, Day 4, p. 87/18-88/22.
[164] Noto, Day 4, p. 80/5-16.
[165] Noto, Day 4, p. 87/18-88/22, 91/11-21.
[166] Noto, Day 4, p. 77/3-8.
[167] Noto, Day 4, p. 65/11-66/1, 79/3-6.
[168] Noto, Day 4, p. 66/2-66/15.
[169] Noto, Day 4, p. 90/13-18.
[170] Noto, Day 4, p. 86/21-87/7, 90/22-91/2.
[171] Noto, Day 4, p. 66/16-66/20.

REDACTED what was happening to the waste disposal site in Canada, and it was REDACTED who raised the subject.[172]

(iii.) EVIDENCE OF MICHAEL WOLF

59. The evidence of Wolf also confirmed that Gallo was actively interested in investing in a waste disposal site in Canada prior to AMLA. In 2002, Gallo spoke to Wolf about an opportunity that he was considering pursuing in the Province of Ontario related to the waste management. Wolf offered to connect Gallo to the trade office that Pennsylvania had in Toronto or to the Council of Great Lakes Governors.[173] This discussion occurred before Wolf left government because he remembers offering to connect Gallo with people who were contractors responsible to him at that time.[174] Gallo did not take him up on the offer.[175] The discussion occurred before Gallo purchased the site in Ontario.[176] Wolf's evidence also contradicts the Respondent's theory that Mr. Gallo had no involvement with the Adams Mine waste disposal site prior to the introduction of AMLA on April 5th, 2004.

E. CORTELLUCCI'S INTEREST WAS THAT OF A LIMITED PARTNER

60. Cortellucci never wanted, nor intended, to play any greater role in the development of the Adams Mine Site than as Gallo's agent, and subsequently that of the Enterprise. He did not want to be a shareholder in the Enterprise.[177] He had almost no knowledge of the waste industry prior to meeting Gallo for the first time in

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[172] Noto, Day 4, p. 68/13-68/24.
[173] Wolf, Day 3, p. 182/3-22.
[174] Wolf, Day 3, p. 183/10-14.
[175] Wolf, Day 3, p. 189/20-22.
[176] Wolf, Day 3, p. 189/1-15.
[177] Cortellucci, Day 4, p. 255/11-15.

2001.[178] As he intimated during his testimony, developers of high-value residential homes would be loath to own a waste disposal site, due to the negative publicity that this would generate.[179] Cortellucci also described how the publicity, to which he was ultimately subjected to anyway, was simply horrible for him.[180] It was precisely because of such adverse publicity that Gallo had originally sought to keep his ownership of the Enterprise, and therefore ultimately the Site, kept confidential.

61. The record indicates that it is Cortellucci's preferred practice to execute most transactions on a hand shake, only with people he believes he can trust. This keeps deal-making simple.[181] This is how Cortellucci negotiated Gallo's purchase of the Adams Mine site as Gallo's agent and it is also how he arranged the Limited Partnership. This kind of entrepreneurial business activity constitutes the primary engine of many economies, including Canada's.

62. REDACTED on the purchase of the Adams Mine site; not Cortellucci.[182] Expediency led to the Cortellucci Group of Companies initially acquiring the Site, and the contemporaneous, documentary evidence on the record plainly indicates that the acquisition was made in trust for a nascent corporation (which would become the Enterprise), in which Gallo would be the only shareholder.[183] The Cortellucci Group of Companies had no further involvement in Gallo's investment

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[178] Cortellucci, Day 4, p. 101/12-102/9, 126/24.
[179] Cortellucci, Day 4, p. 255/2–5.
[180] Cortellucci, Day 4, p. 236/1-21.
[181] Cortellucci, Day 4, p. 228/13-229/10.
[182] Cortellucci, Day 4, p. 108/12-109/3. The Respondent has argued that REDACTED REDACTED Swanick explained in his evidence that his clients are entrepreneurs who are owners/managers who want business advice quickly (Swanick, Day 2, p. 85/7-86/3); Gallo was his client and instructed him to incorporate the company (Swanick, Day 2, p. 92/4-10). REDACTED REDACTED (Swanick, Day 2, p. 92/24-93/13). See also Gallo, Day 1, p. 248/2-18.
[183] Cortellucci, Day 4, p. 140/21-142/24.

project. Not a shred of evidence on the record supports the allegation that the Cortellucci Group of Companies ever intended to become involved in the waste disposal industry.[184]

63. Cortellucci did not need to own or control the Enterprise to benefit from its development of the Adams Mine Site. He trusted Gallo's account of how any waste disposal site with a Certificate of Approval represented a golden investment opportunity.[185] He was able to participate in the Limited Partnership and realize an extraordinary return for a very limited exposure. REDACTED REDACTED REDACTED Cortellucci invited family and business colleagues to join the Limited Partnership during the summer of 2002.[187]

64. Cortellucci explained, during his testimony, that there was little for him to do in between the acquisition of the Site and the time when the Permit to Take Water was issued and the transfer of the Borderlands occurred.[188] He was not involved in the day to day activities of the Enterprise. McGuinty had been retained at a fee of $125,000.00 per year to manage the project.[189] McGuinty brought with him the entire history of the efforts to develop a waste disposal facility at the site since 1989.

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[184] Swanick, Day 2, p. 89/4-91/1.
[185] Cortellucci, Day 4, p. 175/15–176/13.
[186] Cortellucci, Day 4, p. 253/18-254/3.
[187] Cortellucci, Day 4, p. 146/18-147/19, 150/1-11.
[188] Cortellucci, Day 4, p. 189/19–190/11.
[189] The Respondent argued that the payment to Mr. McGuinty was $250,000.00 per year. Cortellucci explained that after the Adams Mine site was acquired, McGuinty agreed to reduce the yearly payment to $125,000.00. Cortellucci, Day 4, p. 113/22-25, 114/1-3. The Respondent also argued that there was insufficient funding to keep the project going until construction was to take place. Mr. Gallo explained in his evidence that it was never his understanding that the Enterprise was ever short of funding. Gallo, Day 1, p. 274/9-11.

He had all of the contacts with suppliers and government necessary to develop the Adams Mine waste disposal site.[190]

65. On Gallo's instructions,[191] Swanick, as Director and Officer, REDACTED REDACTED Cortellucci signed relatively few cheques prepared by his staff for the Enterprise prior to the introduction of AMLA.[193] On two occasions, Cortellucci signed cheques on behalf of the Enterprise to repay advances that Cortellucci's companies had made to the Enterprise when other members of the Limited Partnership were delayed in making their contributions to the Enterprise.[194] He also met from time to time with McGuinty, but this required a minimal level of involvement.[195]

66. Gallo was to bring in investors from the United States to develop the site, once the Permit to Take Water was obtained, the Borderlands were acquired and the site was ready for construction. It was everyone's expectation that the Adams Mine waste disposal site would be a highly profitable business, and generate a considerable profit for himself and the members of the LP.

67. As Gallo's agent, Cortellucci also entertained the idea of selling the site when RE DA REDACTE D approached him offering to find a buyer who would be willing to pay $150

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[190] Gallo, Day 1, p. 188/12-16; Cortellucci, Day 4, p. 114/21-24, 215/10-15.
[191] Swanick, Day 2, p. 94/2-19.
[192] REDACTED REDACTED Swanick, Day 2, p. 223/15-224/3. Viggers confirmed in her testimony that both of the signatures were those of Swanick. Viggers, Day 5, p. 13/10-15. Also, the Point in Corporate Time Report confirmed that on September 12, 2002, the public register confirmed that Swanick was both the President and Secretary Treasurer of the Enterprise and, therefore, had to sign the banking resolution on August 21, 2002 in both capacities, Exhibit "D" of Viggers Witness Statement, CPDB, Tab 5D. REDACTED REDACTED
[193] Cortellucci, Day 4, p. 114/21-25, 191/15-25. See also Cortellucci Witness Statements, RWSB Tabs 12 & 13.
[194] Cortellucci, Day 4, p. 116/1-117/21.
[195] Cortellucci, Day 4, p. 135/2-4, 156/18-25, 215/10-15.

million for the site after the Enterprise had acquired the Borderlands and the permit to take water, and he spoke to Gallo about the opportunity.[196] Such a sale would have generated sufficiently large profits for Gallo and the LP that Cortellucci assumed that it was in everybody's interest to pursue the idea.[197] He understood, though, that the ultimate decision to sell the land lay with Gallo.[198]

F. THE FORENSIC INVESTIGATION FAILED TO DISPROVE THAT GALLO OWNED THE ENTERPRISE PRIOR TO 2004.

68. The Tribunal should note that not one of Respondent's three forensic witnesses was able to present a definite, well founded conclusion that even one significant document in the Minute Book was prepared after the AMLA was introduced on April 5th, 2004. The entire forensic examination has been a very expensive waste of time and resources.

69. Lindblom's indentation analysis associated documents with different dates and indicated that they were signed only after the latest dated document had been prepared, but he also commented that they could have been signed long after that date.[199] Under cross-examination, Lindblom readily acknowledged that the converse was also true and they could have been signed on that day, conceding that he could not say one way or the other.[200]

70. In one of these instances a great deal was made about associating three documents bearing two different dates in the summer of 2002 (Documents #8, #9,

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[196] Cortellucci, Day 4, p. 222/13-18, 239/1-12; Gallo, Day 1, p. 295/14-22.
[197] Cortellucci, Day 4, p. 222/19-23.
[198] Cortellucci, Day 4, p. 227/9.
[199] Lindblom, Day 3, p. 33/12-25, 36/20-24; Lindblom Report, RERB Tab 4, p. 3, Summary of Findings, paras. 3, 4, and 5, p. 17, Conclusions, paras. 2, 3, and 4.
[200] Lindblom, Day 3, p. 71/20-23.

and #10) based on indentations of signatures, yet Lindblom admitted that he could not even REDACTED [201]

71. Regarding another document (Document #14, the Shareholders Register) a great deal was made of a simple correction to a date, from September 2 to 9, 2002; however, on the more significant issue of dating, when asked by Respondent's counsel if he could tell if it was written in 2002 or 2005, Lindblom replied, REDACTED REDACTED "[202] Lindblom later confirmed that the form for that same document had been available prior to August 2002, but that he could not comment on when it was actually written.[203]

72. A great deal was made of indentations from Swanick signatures signed on documents not in the Minute Book. Two such indentations appear on the front of Share Certificate No. 1 (Document #15) in positions suggesting that they come from another share certificate aligned above it.[204] Another appears in roughly the same location as a Swanick signature from another document in the Minute Book, and at a distance from the left margin seen in the other documents prepared with the standard layout used at that time in Swanick's office.[205] Lindblom admitted that he was unfamiliar with the practices and procedures of a busy law office such as Swanick's.[206] The indentations from the documents and certificates could well have

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[201] Lindblom, Day 3, p. 32/10-11.
[202] Lindblom, Day 3, p. 24/14-18.
[203] Lindblom, Day 3, p. 101/3-12.
[204] Lindblom, Day 3, p. 78/5-11.
[205] Viggers, Day 5, p. 10/13-21.
[206] Lindblom, Day 3, p. 78/12-81/16.

been a consequence of the batch processing of documents from multiple corporations that was the norm at the Swanick firm.[207]

73. Should the Respondent attempt to use these impressions to create some impression that documents have been removed from the Minute Book, it should be recalled that after his repeated and exhaustive examinations Respondent's expert Lindblom cannot say that any document was removed from the Minute Book.[208]

74. Lindblom also performed several series of optical and chemical ink tests to determine the number of different inks (and therefore different pens) used by Swanick.[209] Each use of a different ink was impressively characterize as a "writing episode" and a great deal was made over the number of separate "writing episodes" involved in the preparation and signing of certain documents in the Minute Book.[210] However, it turns out that writing episodes can last just a few seconds and the time between writing episodes can also be a matter of a few seconds.[211] Again, this is consistent with the descriptions Swanick's hectic office, with momentarily urgent matters constantly interrupting mundane tasks like signing a stack of routine documents for a mixed group of unrelated corporations.[212]

75. In the end, in spite of his extensive REDACTED [213] Lindblom has RED REDACTED [214] whether the significant documents were in fact signed before or after April 5th, 2004. In addition, he cannot say that any document has

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[207] Anna Viggers Witness Statement, CPDB, Tab 5, p. 2, para. 3.
[208] Lindblom, Day 3, p. 93/9-11.
[209] Lindblom, Day 3, p. 24/19-25/12.
[210] Lindblom, Day 3, p. 34/22-35/1.
[211] Lindblom, Day 3, p. 72/7-10.
[212] Swanick, Day 2, p. 106/6-109/1, 114/16-115/21, 118/20/120/6, 209/5-14, 212/1-6, 266/4-268/8, 278/3-25; Viggers Day 5, p. 9/10-10/9, 17/1-18/3, 20/13-22/5, 28/10-36/1.
[213] Lindblom, Day 3, p. 20/22.
[214] Lindblom, Day 3, p. 63/6-7.

been removed from the Minute Book.[215] Any suggestion that a document has been removed is sheer speculation by the Respondent's counsel without any evidence to confirm this.

76. For example, the suggestion that some share certificate may have been signed on top of Share Certificate No. 1 is explained by the fact that it was one signed for another corporation and not the Enterprise. The evidence does not support a conclusion that there was an earlier share certificate signed for the Enterprise itself and it was removed from the Minute Book and destroyed after April 5th, 2004. The Shareholders' Register lists only two shareholders and this is inconsistent with any earlier share certificate for the Enterprise having been signed.

77. Another example is provided by the Respondent's suggestion that there must have been an earlier by-law that was signed due to the impressions found on By-law No. 2. It appears that the Respondent's theory is that an earlier By-law No. 1 had been removed. The problem with this theory is that there is no explanation why one would do so. Viggers stated in her evidence that this b[REDACTED] The corporate search confirms that Swanick has always been the President and Secretary-Treasurer of the Enterprise and there has never been any issue that [REDACTED] Lindblom did not even provide an opinion that there was an earlier by-law.

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[215] Lindblom, Day 3, p. 93/9-11.
[216] Viggers, Day 5, p. 38/2-14.

78. The fact is that the various indentations that were found in the Minute Book can be explained by any number of different scenarios. Apart from this, the indentations that are found do not give rise to the innuendos the Respondent urges upon the Tribunal that documents have been removed and destroyed. Any such submission by the Respondent should be rejected out of hand.

G. MARC GAUDREAU'S ERRONEOUS INK-DATING

79. Mr. Marc Gaudreau ("Gaudreau") seems to suggest that Document #8[217] was signed within the past two years, although even after the hearing it is not clear what he is actually saying. Gaudreau's speculative conclusion was revealed as completely untrustworthy by the report and testimony of Dr. Aginsky,[218] who demonstrated that Gaudreau's conclusion is based on an unsound method and a demonstrably false assumption.

80. Generally an evaluation of expert scientific evidence would begin by focusing on the reliability of the method used, the sufficiency of the underlying data, and the reliability of the technical proficiency and the care used in the application of the method to the data.

81. However, Gaudreau did not use any ink dating method at all to arrive at his opinion on the age of the ink. ("REDACTED"[219]). Furthermore, his opinion was based on data specifically generated for a completely different purpose,[220] and the only technical proficiency applied to the data was when Gaudreau REDACTED

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[217] Director's Resolution dated June 26th, 2002, issuing a share to Brent Swanick in Trust, RCDB, Tab 10, bates 03297.
[218] It is noteworthy that the CBSA's scientific approach to the dating of documents is based on Dr. Aginsky's methodology. Gaudreau, Day 3, p. 243/15-16, 244/3-22.
[219] Gaudreau, Day 3, p. 248/7.
[220] Lindblom, Day 3, p. 106/10-16; Brazeau, Day 3, p. 118/12-16, 121/2-3.

REDACTED or just REDACTED it and noticed[223] something that seemed different from what he remembered of other ink examinations.[224]

82. The criteria for evaluation of an ink aging method were discussed by Lindblom in a recent text:

> "In summary, ink dating must be approached with caution. Only methods that have been thoroughly researched and subjected to multiple blind tests (for reproducibility) will be accepted in the forensic document community."[225]

83. Lindblom indicated that these comments did not apply to "what incidentally might be found on a document."[226] Although Gaudreau characterized his procedure as just noticing an inconsistency in passing,[227] he nevertheless offered a conclusion about the age of the ink on the document relative to the dates they bear,[228] apparently based solely on the presence of benzyl alcohol.

84. Lindblom acknowledged that an expert seeking to date an ink "wouldn't just measure the BA levels of the ink."[229] Mr. Luc Brazeau ("Brazeau"), the lead GC MS ink analyst at the CBSA,[230] was not REDACTED

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[221] Gaudreau, Day 3, p. 204/18-19; see also p. 145/15, 151/9, 201/20, 202/18, 203/12, 205/7, 205/8, 209/22, 210/2, 212/13, 212/5 and 270/25.
[222] Gaudreau, Day 3, p. 212/12.
[223] Gaudreau, Day 3, p. 145/13, 145/24, 163/15, 200/13, and 209/15.
[224] Gaudreau, Day 3, p. 149/5, 151/17, 154/12, 205/9-11, 219/21, and 241/23.
[225] Lindblom, Day 3, p. 92/14-20, reading from B. S. Lindblom, "Dating by Materials: Identification, Comparison, and Examination of Changes," Chapter 30 in *Scientific Examination of Questioned Documents*, 2d ed., J. S. Kelly and B. S. Lindblom, eds., Boca Raton: CRC Press, 2006, at p. 350, CPDB, Tab 6.
[226] Lindblom, Day 3, p. 92/21-23, 107/14-17.
[227] Gaudreau, Day 3, p. 145/26-146/9.
[228] Gaudreau Report, p. 3, Conclusions 2 and 3, RERB, Tab 5.
[229] Lindblom, Day 3, p. 114/17-24.
[230] Brazeau, Day 3, p. 120/9-10.

REDACTED in his report because of limitations in underlying research and case work at the CBSA involving benzyl alcohol.[231] Gaudreau showed no such caution.

85. Unfortunately, in reviewing the GC-MS chromatograms from the CBSA, Gaudreau made an observation of what he erroneously considered to be an unusually large benzyl alcohol peak in an ink chromatogram and hypothesized that it was present because the ink had not yet finished aging. Instead of continuing to research or test this hypothesis in accordance with the basic scientific method, Gaudreau jumped to the conclusion that the ink must be less than two years old.

86. Gaudreau acknowledged that his approach regarding the behaviour of benzyl alcohol REDACTED

REDACTED even by presentation at a professional meeting. He acknowledges that he had only limited published research to consult.[233] Gaudreau relied instead on what he remembered from previous research and case work. He performed no experiments to test this hypothesis and he did not request any.[234]

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[231] Brazeau, Day 3, p. 118/25-119/2, 133/19-134/1. In view of his reluctance to adopt Gaudreau's approach, it should be noted that Brazeau has been working at CBSA since 1997-1998, when development of the Agency's ink aging method began. Brazeau, Day 3, p. 116/14-16; Gaudreau, Day 3, p. 253/12-16. In 2002, he and Gaudreau co-authored their only public disclosure to professional peers of that method. Gaudreau, Day 3, p. 247/19-21, 251/15-17, 253/11-16; Gaudreau Report, RERB, Tab 5, p. 3 (Conclusions 2 and 3), p. 8 (Reference No. 14). Since Gaudreau REDACTED RED he has been involved with those specializing in ink dating methodologies, while lessening his own involvement. Gaudreau, Day 3, p. 272/18-273/1. It could be argued that compared with Gaudreau, Brazeau has equivalent knowledge and superior experience.

[232] Gaudreau, Day 3, p. 252/21-25, 253/17-19.

[233] At the hearing Gaudreau stated that this is because the higher volatility of benzyl alcohol made it less suitable for study than phenoxyethanol. (Gaudreau, Day 3, p. 161/4-11) However, this is a contradiction of the view in his own report where he stated actually because phenoxyethanol is the REDACTED REDACTED REDACTED Gaudreau Report, p. 3, Remark 1, RERB, Tab F4. This view was also expressed by Mr. Brazeau in commenting on the limited literature and the small amount of in-house research done at CBSA. Brazeau, Day 3, p. 133/19-134/1).

[234] Gaudreau, Day 3, p. 200/16-20.

87. Dr. Aginsky demonstrated that Gaudreau's conclusion regarding the behaviour of benzyl alcohol is based on a false assumption, and provided information from peer-reviewed journal articles contradicting Gaudreau's position. Dr. Aginsky also provided data from experiments he had conducted showing significant presence of residual benzyl alcohol in ink resins much older than the two year limit suggested by Gaudreau. Dr Aginsky provided conclusive support for the alternative hypothesis that Gaudreau's observation of a large peak of benzyl alcohol in the chromatograms from the CBSA was the result of an ink formula that retains substantial BA in its matrix even after the ink had stopped aging.

88. At the hearing Gaudreau attempted to reject Dr. Aginsky's experimental results because of differences between his and Brazeau's equipment and other experimental details. Yet, in another glaring inconsistency, he directly compared the absolute levels of BA found in the two sets of results in the slides exhibited to the panel. From a scientific perspective, this simply cannot be done and in and of itself, impeaches Gaudreau's credibility.

89. In summary, Gaudreau's conclusions regarding Document #8 should be rejected out of hand by the Tribunal.

H. IDENTIFICATION OF ENTERPRISE AS A CCPC, AN OBVIOUS AND INCONSEQUENTIAL MISTAKE

90. The Enterprise's tax returns for 2002 and 2003 were filed in October, 2004, as part of the Enterprise's submission for re-imbursement pursuant to the provisions of the AMLA.[235] REDACTED

[235] Peri, Day 4, p. 260/4-18; Swanick, Day 2, p. 216/18-218/3.

REDACTED

listed.[237] Peri mistakenly entered on the federal tax returns that the Enterprise was a CCPC and this error was not caught by Swanick.[238]

91. The tax returns were based on financial statements for the Enterprise which were prepared in March of 2003 and 2004 respectively, so that the tax returns for the limited partnership could file its tax returns by its March 31st deadline.[239] Peri did not complete the tax returns at that time as they were "nil" returns[240] (i.e. no taxable income and no taxes owing) and it was in the middle of tax season[241] and there was no tax consequence to the Enterprise by not filing the tax returns.[242] At no time was Peri was asked to delay the filing of the tax returns.[243]

92. In October, 2004, Peri spent approximately five minutes preparing each of the tax returns.[244] Peri had the financial statements in front of him and his practice is to use the date on the financial statement to date the tax returns.[245] All of Peri's clients are Canadian CCPCs, except for the Enterprise.[246] He identified the Enterprise as a CCPC out of force of habit and without thinking.[247] He used a computer program called "Cantax" when he prepared the tax returns.[248] He designated the Enterprise

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[236] Peri, Day 4, p. 260/22-261/3.
[237] Kutner, Day 4, p. 345/9-21.
[238] Swanick, Day 2, p. 167/9-170/14.
[239] Peri, Day 4, p. 281/2-16, 288/4-18, 289/3-8.
[240] Peri, Day 4, p. 262/20-23.
[241] Peri is a sole practitioner (Peri, Day 4, p. 259/18-20) with a busy practice and March/April is tax season (Peri, Day 4, p. 262/20-263/8) as the deadline for individual tax returns is April 30th. Kutner described tax season REDACTED (Kutner, Day 4, p. 349/3-25).
[242] Peri, Day 4, p. 287/10-18. Kutner stated that in a number of circumstances, filings would be done where one would file two, three, or four years of nil tax returns on a catch-up basis (Kutner, Day 4, p. 353/2-19).
[243] Peri, Day 4, p. 286/14-18.
[244] Peri, Day 4, p. 260/19-21.
[245] Peri, Day 4, p. 262/10-19.
[246] Peri, Day 4, p. 261/23-262/9.
[247] Peri, Day 4, p. 261/23-262/9.
[248] Peri, Day 4, p. 261/19-22.

as a CCPC on the federal return and this automatically carried forward to the provincial return. He mistakenly believed that since Swanick, the director of the Enterprise, was a Canadian resident he stated it was a CCPC REDACTED REDACTED"[249]

93. The fact that Peri made a mistake is underscored that all witnesses confirm that there was absolutely no advantage to designating the Enterprise a CCPC.[250] It had no profits and no scientific research credits and so there was no tax impact.

94. Mr. Lorn Kutner ("Kutner") has been a Chartered Accountant since 1982[251] and is a tax partner with Deloitte.[252] Kutner stated that it was evident that Peri had made a mistake when designating the Enterprise a CCPC while at the same time identifying Gallo as its sole shareholder on Schedule 50.[253] Kutner often notices errors on tax returns prepared by accountants working in small offices, particularly sole practitioners.[254] He notes that they are more prevalent in a nil return situation, as opposed to a return that had taxable income or tax credits of some sort.[255] Kutner notes that Peri's error could be explained by the fact that Peri's practice is limited solely to CCPCs other than the Enterprise.[256]

95. Kutner testified that the date on the tax returns is irrelevant because it is the date the return is actually filed that matters. Throughout his practice, he has never looked at

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[249] Peri, Day 4, p. 278/15-23.
[250] Peri, Day 4, p. 261/3-18.
[251] Kutner, Day 4, p. 344/6-8.
[252] Kutner, Day 4, p. 344/16-24. He has practiced exclusively as a tax accountant, with the vast majority off his clients being CCPCs and shareholders. Prior to Deloitte, he was the head of the tax practice at Mintz & Partners from 1991 until March, 2008 when it merged with Deloitte. Kutner, Day 4, p. 344/9-15
[253] Kutner, Day 4, p. 345/22-346/8.
[254] Kutner, Day 4, p. 346/24-347/1.
[255] Kutner, Day 4, p. 346/12-347/1.
[256] Kutner, Day 4, p. 347/19-23.

the date on the tax return when taking over a new client.[257] There are no formal polices with respect to dating a tax return at Deloitte,[258] which is one of the largest and most prestigious accounting firms in Canada. It is neither an acceptable nor unacceptable practice to date the tax return the same date as the financial statement, because the dating of the return to be relevant.[259]

96. Truster demonstrated that anyone can make an error. He stated in his opinion that REDACTED REDACTED played a dominant role in his condemnation of Peri. Under cross-examination, Truster confirmed that his evidence was that the name non-resident shareholders had to be listed on Schedule 19.[261] Truster did not include a copy of Schedule 19 in his own report and when it was presented to him, he had to admit that he had made a mistake.[262] Notwithstanding the manner in which he later scrambled along with Respondent's counsel to undo this, there can be no question that Truster made a glaring error in an expert report specifically intended to be placed before an international arbitral tribunal and one which severely criticized the characters of Peri and Swanick. Truster confirmed that in preparing his report he was holding Peri to a very high standard.[263] He also agreed that he should be held to an even higher standard.[264] It is clear that Truster did not meet this standard in preparing his report.

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[257] Kutner, Day 4, p. 346/23-347/17.
[258] Kutner, Day 4, p. 348/9-13.
[259] Kutner, Day 4, p. 348/18-349/2.
[260] Truster Report, RERB, Tab 6, p. 4, para. 1.
[261] Truster, Day 4, p. 316/3-5, 321/13-16.
[262] Truster, Day 4, p. 317/6-19.
[263] Truster, Day 4, p. 315/10-12.
[264] Truster, Day 4, p. 315/18-21.

97. There are a number of other factors indicating the deep flaws contained in Truster's report. In his report at page 5, he states that Peri was negligent because he did not review the Enterprise's tax return with Swanick. He states "[i]n my experience, this in generally the practice of Chartered Accountants to review the hard copy (referred to in the evidence as the "narrative copy") with the client."[265] Truster later conceded in his cross-examination that an accountant did not have to review the final return but only needed to make phone calls to obtain information with which to prepare the tax return.[266]

98. Truster then admitted that Peri would have met the standard expected of him if he spoke to Swanick and asked him who the shareholder was and his nationality.[267] Peri's evidence was that Mr. Swanick told him that Gallo was the shareholder and that he was an American citizen.[268]

99. Another deep flaw in Truster's report is that he stated that "it is not credible that Mr. Swanick would sign the GIFI versions without first reviewing the narrative versions."[269] Kutner's report stated that "clients rarely review a nil return and in most instances, sign the nil return with no review at all."[270] At the hearing, Kutner stated that he disagreed with Truster's conclusion, explaining that Swanick was trusting that the preparer got the information correct.[271] Kutner does not spend any time discussing

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[265] Truster Report, RERB, Tab 6, p. 5.
[266] Truster Day 4, p. 323/15-324/13.
[267] Truster, Day 4, p. 324/14-19
[268] RWSP Tab 1-A
[269] Truster Report, RERB, Tab 6, p. 5, para. 3.
[270] Kutner Report, RERB, Tab 2, p. 3, section "C".
[271] Kutner, Day 4, p. 350/11-351/11.

a nil return with the client and it would be sent to the client for signing and filing with the Canadian Revenue Agency.[272]

100. Truster's report is erroneous, over-the-top, and out of touch with the practice of a sole chartered accountant working under the pressures of tax season and a very busy practice. It should be given little, if any, weight.

101. In any event, the Respondent's argument that Swanick intentionally certified the Enterprise as a CCPC is completely without foundation. The tax returns were filed in October, 2004, more than six months after the AMLA was introduced into the Legislature. Even on the Respondent's unfounded allegations of fraud, Swanick would not have certified the Enterprise as a CCPC if he was attempting to manufacture evidence that Gallo owned the Enterprise.

I. CONCLUSION

102. Gallo both owned and controlled the Enterprise prior to the introduction of the AMLA into the Ontario Legislature on April 5th, 2004. NAFTA Article 1117 authorizes U.S. and Mexican investors to bring arbitral claims against the Respondent, on behalf of an enterprise which they either own or control. Ontario law is the governing law with respect to issues of corporate nationality, ownership and control. Ontario law vests control of a corporation in the hands of its shareholders, a majority of whom can appoint and remove directors of the corporation. The Minute Book contained the documents that conclusively established Gallo's standing as sole shareholder of the Enterprise under Ontario law: the shareholders' register and the original share certificates.

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[272] Kutner, Day 4, p. 350/11-17.

103. The Respondent has no answer to the *prima facie* claim brought by Gallo on behalf of the Enterprise under Article 1117. The evidence adduced throughout this jurisdictional phase, and tested at the oral hearing, demonstrates that the Respondent has engaged in a gross misinterpretation of the facts of this claim. Moreover, not only has the Respondent failed to prove any of its factual allegations about the Claimant's alleged transgressions; it has also failed to articulate a plausible construction of NAFTA Article 1117, in support of its jurisdictional objections.

104. The forensic evidence, although demanded by the Respondent, actually validated the authenticity of these key documents. The *viva voce* evidence provided by each fact witness did the same. In addition, Belardi and Noto confirmed that Gallo had found waste site entrepreneurs in the United States with both the interest, and the ability to finance, the development or purchase of the Adams Mine waste disposal site. Belardi and Noto demonstrated a profound knowledge of the waste industry and its largest investors. Their testimony simply does not square with the Respondent's unsubstantiated theory that these men were lying under oath to help out "a friend."

105. Lacking any evidentiary basis, the Respondent committed itself early to a fraud theory. When reminded that the onus for proof of fraud is extremely high, it retreated to a simplistic argument that whatever evidence the Claimant places on the record is not sufficient to establish standing. The Respondent should not be permitted to escape the heavy onus any party would bear when alleging fraud, simply by reframing its fraud arguments as a pleading of facts (which just so happen to establish fraud).

106. He who asserts must prove. It is submitted that the Claimant has manifestly met his burden, and that the Respondent has failed to rebut it. As such, the claim should now proceed to the merits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Charles M. Gastle, Murdoch R. Martyn, Todd Weiler, Michael Leach