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**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES**

BETWEEN:

VITO G. GALLO

Claimant/Investor

AND:

GOVERNMENT OF CANADA

Respondent/Party

GOVERNMENT OF CANADA

COUNTER-MEMORIAL

PUBLIC VERSION

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TABLE OF ABBREVIATIONS	
ABBREVIATION	DEFINITION
Aecon	Aecon Construction Group
<i>AMLA</i>	<i>Adams Mine Lake Act, 2004</i>
BIT	Bilateral Investment Treaty
Board	Ontario Environmental Assessment Board
Borderlands	Lands adjacent to the Adams Mine site
Borderlands Application	The Enterprise's 2003 application to acquire the Borderlands from the MNR
Borderlands Litigation	<i>1532382 Ontario Inc. v. Minister of Natural Resources</i> , Court File No. 22368/A3 (9 October 2003) (Ont. Sup. Ct.).
BFI	Browning-Ferris Industries Ltd.
CCPC	Canadian Controlled Private Corporation under Canada's <i>Income Tax Act</i>
CEAA	Canadian Environmental Assessment Agency
Chevron	Chevron Company of California
Claimant	Vito G. Gallo
Cortellucci Group	Cortellucci Group of Companies, Inc.
CN	Canadian National Railway Company
CWS	Canadian Waste Services Inc.
CWS Lawsuit	<i>Canadian Waste Services Inc. v. Notre Development Corp.</i> , Court File No. 03-CV-244717 (February 28, 2003) (Ont. Sup. Ct.)
DCF	Discounted Cash Flow Analysis
Dofasco	Dofasco, Inc.
EAB	Ontario Environmental Assessment Board
<i>EAA</i>	<i>Ontario Environmental Assessment Act</i>

EA Approval	Notice of Approval to Proceed with an Undertaking under the Ontario <i>Environmental Assessment Act</i>
ECHR	European Court of Human Rights
Enterprise	1532382 Ontario Inc.
Environment Canada	The Department of the Environment Canada
<i>EPA</i>	Ontario <i>Environmental Protection Act</i>
Golder	Golder Associates Ltd.
GTA	Greater Toronto Area, which includes Toronto and the regional municipalities of York, Durham, and Peel
Howard Report	Dr. Ken Howard, <i>The Adams Mine Landfill Proposal, An Independent Review and Critical Analysis of Hydrogeological Investigations and Recent Monitoring Data</i> (August 12, 2003)
IC&I	Industrial, Commercial, and Institutional Waste
Limited Partners	Limited Partners of 1532382 Limited Partnership
LP or Limited Partnership	1532382 Limited Partnership
Miller	Miller Waste Systems
MOE	Ontario Ministry of the Environment
MNR	Ontario Ministry of Natural Resources
MSW	Municipal Solid Waste
NAFTA	North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, December 17, 1992
Navigant	Navigant Consulting, Inc.
Notre	Notre Development Corporation
NRCan	The Department of National Resources Canada
NWRI	National Water Research Institute

ONTC	Ontario Northland Transportation Commission
<i>OWRA</i>	<i>Ontario Water Resources Act</i>
Provisional Certificate	Provisional Certificate of Approval under the Ontario <i>Environmental Protection Act</i>
PTTW	Permit to Take Water under the <i>Ontario Water Resources Act</i>
RCN	Rail Cycle North Consortium
Republic	Republic Services of Canada Inc.
Rutherford Eggers	Rutherford Eggers and Associates P.C.
TIRM	Toronto Integrated Solid Waste Resource Management
Toronto	City of Toronto, Ontario, Canada

INTRODUCTION

1. The *Adams Mine Lake Act, 2004* (“*AMLA*”) was adopted as part of the Government of Ontario’s efforts to minimise risks to water resources in the province, and to respond to the widespread concerns of its constituents. This legislation was enacted in good faith through a transparent, fair and democratic legislative process.
2. At the time the *AMLA* was introduced into the Ontario Legislature, the protection of water resources was a tremendous province-wide concern. In May 2000, seven people died and more than 2,300 people became seriously ill from drinking water contaminated by agricultural activities in Walkerton, Ontario. This tragedy resulted in a widely publicised two-year judicial inquiry. That inquiry issued a final report in May, 2002 that highlighted the need to protect Ontario’s water resources from contamination by large-scale agricultural and industrial activities such as landfills.
3. A new Government of Ontario was elected in 2003. It was determined not to allow another “Walkerton” to happen, and set about implementing new policies designed to protect the province’s water resources. In particular, the Government was of the view that landfilling posed a serious threat to the province’s water resources. However, technology was not sufficiently advanced to eliminate landfilling altogether. As a result, the Government resolved to prevent the development of landfills anywhere other than the most environmentally benign areas, where the threat to the province’s water resources could be minimised. It was in this context that the *AMLA* was enacted to prevent the development of Adams Mine, and all potential landfills like it.
4. Adams Mine is an abandoned open-pit iron ore mine located in northeastern Ontario. It is situated at one of the highest elevations of the local watershed, which provides drinking and irrigation water to a number of rural, agricultural communities located downstream. The region is also home to several Aboriginal communities.
5. Adams Mine consists of several very large pits, which were excavated when it was operated as a mine. These pits have since filled with millions of litres of water.

6. In 1989, a Canadian businessman named Gordon McGuinty purchased Adams Mine through a company he incorporated called Notre Development Corporation (“Notre”). Mr. McGuinty’s plan was to promote the site to municipalities and waste disposal companies as a potential landfill.

7. Mr. McGuinty retained consultants who undertook tests and modeling to show that Adams Mine would not contaminate the local watershed. On the strength of these, Notre was able to obtain a number of conditional permits to develop Adams Mine as a landfill. However, Notre obtained only some of the permits it required to develop a landfill, and even these were subject to many conditions. There was never any guarantee that Adams Mine would ever be approved for the construction and operation of a landfill.

8. From 1989 until 2002, Mr. McGuinty continuously attempted to promote Adams Mine to potential partners, investors, and customers as an environmentally sound and economically viable landfill. Each of these efforts failed and by 2002, the Adams Mine project was in financial distress.

9. As a result, Mr. McGuinty sold Adams Mine to a Canadian real estate developer named Mario Cortellucci. Mr. Cortellucci conveyed Adams Mine to a company

REDACTED – 1532382 Ontario Inc. (the “Enterprise”). Mr. Cortellucci also formed a Limited Partnership, which retained Mr. McGuinty as the Managing Director of the Enterprise. REDACTED

REDACTED

REDACTED However, these efforts, as with those of Mr. McGuinty during the preceding thirteen years, ended in failure.

10. This was partly due to the consistent public opposition to and concern with the Adams Mine project. Local residents and farmers downstream of Adams Mine were concerned that the proposed landfill would contaminate their drinking and irrigation water. Aboriginal communities vociferously opposed the project, and feared that contamination would have an adverse impact on their hunting and fishing activities. Environmental groups, too, were very concerned with the project, going so far as to initiate a number of legal proceedings to enjoin it from moving forward.

11. In 2003, these concerns intensified with the release of new scientific evidence that called into question the tests and modeling which had previously been carried out by Mr. McGuinty's consultants to show that Adams Mine would not contaminate the local watershed. Government scientists reviewed this evidence, and retained independent environmental experts to perform a detailed review. These scientists and experts concluded that the tests and modelling that had been conducted by Mr. McGuinty's consultants to obtain the permits for Adams Mine were unreliable. As a result, there was considerable doubt as to whether Adams Mine could ever be developed in an environmentally safe landfill.

12. Therefore, in 2004, two years after the conclusion of the judicial inquiry into the Walkerton tragedy, with significant concern over the environmental impacts of the project, and in light of new scientific evidence which called into question whether it could ever be developed in an environmentally safe way, the Government of Ontario enacted the *AMLA*. It did so in accordance with its responsibility to protect Ontario's water resources and in response to the widespread concern expressed by its constituents.

13. Briefly put, the *AMLA* prohibited the disposal of waste at Adams Mine, and amended Ontario's environmental laws to prohibit the disposal of waste in lakes. It also revoked all of the permits obtained by Mr. McGuinty, which were based on tests and modeling found to be unreliable. Further, to guarantee the protection of Ontario's water resources it prohibited anyone from seeking to repeal the Act before municipal courts.

14. The *AMLA* also provided compensation to the Enterprise and Mr. McGuinty's firm, Notre, for the expenses they incurred in connection with the development of Adams Mine as a landfill. It permitted the Enterprise or Notre to petition an Ontario court to seek whatever compensation they felt they were legally entitled to, including lost profits and loss of goodwill, or any other form of compensation they could prove was permitted under Ontario law.

15. The *AMLA* was enacted fairly and transparently. The Enterprise and its Managing Director, Mr. McGuinty, were themselves the most active participants in the process leading up to its enactment. In fact, after the Act was first introduced, the Government of

Ontario contacted the Enterprise to determine if it had any comments, and to ensure that it was fully and fairly engaged in the legislative process. The Enterprise and Mr. McGuinty participated directly and extensively in this process, and requested a number of amendments. Every single one of those requested amendments were made to the *AMLA* by the Government, at considerable expense.

16. Following the enactment of the *AMLA*, both Notre and the Enterprise submitted claims for compensation. Notre ultimately received some REDACTED in compensation, and signed a full and final release. The Enterprise claimed nearly REDACTED in compensation, REDACTED
REDACTED

17. Instead, the Claimant – a United States citizen who was unknown to Ontario officials or to anyone dealing with the Enterprise – brings this arbitration on behalf of the Enterprise, alleging that the *AMLA* violates Chapter Eleven of the North America Free Trade Agreement (the “NAFTA”). The Claimant argues that this Tribunal has jurisdiction because he owned the Enterprise when the *AMLA* was enacted. He contends that the *AMLA* is inconsistent with the minimum standard of treatment under Article 1105(1), and that it amounts to an indirect expropriation under Article 1110. The Claimant alleges that these supposed breaches of the NAFTA caused damages in the amount of \$105 million. The Claimant’s contentions have no basis in fact or in law, and must be dismissed.

18. *First*, the Claimant has not established that he owned the Enterprise when the *AMLA* was enacted, and therefore, has not met his burden to prove that this Tribunal has jurisdiction over the claim. The Claimant has relied on a mere *three* documents in his Memorial to prove that he owned the Enterprise, none of which prove that he owned it prior to the enactment of the *AMLA*. The Claimant also relies on a number of witness statements – including his own – to substantiate his assertion that he owned the Enterprise when the *AMLA* became law. These witness statements contain numerous misrepresentations and are not corroborated by a single document on the record. They are simply not reliable. To the contrary, there is substantial evidence on the record indicating that the Claimant did *not* own the Enterprise prior to the enactment of the

AMLA. Thus the Claimant does not have standing to bring this claim and the Tribunal does not have jurisdiction to hear it.

19. *Second*, even assuming for the sake of argument that the Claimant does have standing, his contention that the *AMLA* violates Article 1105(1) of the NAFTA must be dismissed. To begin, the Claimant alleges that the *AMLA*'s prohibition on the disposal of waste at Adams Mine, and the revocation of its conditional permits, is inconsistent with Article 1105(1) because these provisions frustrated the Enterprise's "legitimate expectations" and were not enacted "transparently." However, the Claimant has failed to establish that the failure to protect "legitimate expectations" or provide "transparency" breaches the customary international law minimum standard of treatment under Article 1105(1). Even if Article 1105(1) did require the protection of "legitimate expectations" or "transparency"—which it does not—the *AMLA* was enacted in a transparent manner and did not frustrate the Enterprise's expectations.

20. The Claimant also alleges that certain provisions of the *AMLA* are inconsistent with Article 1105(1) because they amount to a "denial of justice." These provisions cancelled the transfer of certain lands adjacent to Adams Mine to the Enterprise, and prevented the Enterprise from pursuing a lawsuit it had begun against the Government over the sale of those lands. Yet, the Claimant ignores the fact that the Enterprise *settled* that litigation with the Government. Moreover, those provisions do not amount to a denial of justice because under the *AMLA* the Enterprise could, in fact, petition the courts of Ontario to determine the appropriate measure of compensation to which it felt it was legally entitled.

21. *Third*, and again assuming that he has standing, the Claimant cannot demonstrate that the *AMLA* is inconsistent with NAFTA Article 1110(1). The Claimant alleges that the *AMLA* expropriated certain permits, which allowed the Enterprise to operate Adams Mine as a waste disposal site. This entirely ignores the fact that the Enterprise was only part way through the regulatory approval process and that these conditional permits only provided it with a contingent right to construct and operate Adams Mine as a waste disposal site. This type of contingent right is not intangible property or an investment that is capable of being expropriated under the NAFTA.

22. Nor did the *AMLA* result in a substantial deprivation of the economic value of the Claimant's alleged investment. For an expropriation claim to succeed, the Claimant must suffer a substantial deprivation of his fundamental ownership rights and the economic value of his investment. However, Adams Mine was already widely acknowledged to be a failed business project that was virtually worthless.

23. Even if the *AMLA* could be considered an expropriation – which it is not – it would be a *legal* expropriation that meets all of the requirements of Article 1110. The *AMLA* was enacted for the public purpose of protecting Ontario's water resources, was non-discriminatory on the basis of nationality, provided the Enterprise with due process of law, and offered the Enterprise prompt, adequate and effective compensation.

24. *Finally*, even if the Claimant could prove that Canada has breached its obligations under Chapter 11 of NAFTA, which he cannot, the Enterprise has suffered no damages as a result of those breaches. Adams Mine simply had no value at the time of the *AMLA*. It was a completely failed business proposition: it did not have clear title to the Adams Mine site; it did not have a contract for a single bag of garbage; it lacked the necessary regulatory approvals; and it lacked the financial resources required to turn Adams Mine from a hole in the ground into a landfill facility. In such circumstances, an award of damages would be wholly inappropriate. If the Tribunal does find that the Claimant is entitled to damages, the only approach accepted at international law in these circumstances is to award the Enterprise's investment costs—the same costs that were already offered to the Enterprise pursuant to the *AMLA*. Finally, even if the Claimant's inappropriate valuation methods are considered by this Tribunal, when correctly applied, they do not support the damages claimed.

FACTUAL BACKGROUND

I. THE REGULATION OF WASTE DISPOSAL IN ONTARIO

25. The disposal of garbage seems simple enough. People and businesses leave it at the side of the road. Then garbage trucks collect it and take it to a landfill, where it is deposited. However, the landfilling of garbage has long-term consequences. Indeed, garbage can contaminate its surroundings for centuries and, in some cases, even for millennia.¹

26. Throughout this time, precipitation and groundwater filter through the garbage, picking up metals, minerals, chemicals, bacteria, viruses and other potentially toxic and harmful contaminants.² This process produces contaminated water called “leachate.” If leachate escapes the landfill, it can contaminate ground and surface water, eventually finding its way into drinking water and the local ecosystem where it can have serious adverse consequences on nearby residents, businesses, and the environment.³

27. For more than a decade, decision-makers in major urban centres in the Province of Ontario like the City of Toronto (“Toronto”) have recognised the risks associated with landfilling. They have established ambitious goals, including the diversion of all waste from landfills by using recycling and other new and emerging technologies.⁴ However, technology has yet to catch up to these aspirations, and landfilling, with all of its attendant risks, continues to exist as the primary means of waste disposal in Ontario.

28. In light of this, Ontario’s legislators, policy makers and regulators use their judgment and the information available to them to develop laws, regulations and policies to manage the short and long-term risks posed by landfilling garbage.⁵ These public

¹ Witness Statement of Doug Barnes, ¶ 14; *see also Notre Development Corporation (Adams Mine Site)*, Case No. EA-97-01 (June 19, 1998) (Environmental Assessment Board), Section 3.1.3, p. 20 (“EAB-97-01”)(CAN-55).

² Witness Statement of Mark Puumala, ¶ 16.

³ Witness Statement of Mark Puumala, ¶ 16.

⁴ Witness Statement of Richard Butts, ¶ 13; *see also City of Toronto, Waste Diversion Task Force 2010 Report* (June 2001) (CAN-77).

⁵ Witness Statement of Doug Barnes, ¶ 22.

officials may, of course, differ on whether any particular approach is more effective than another, but the burden of protecting Ontario's people and its environment falls on them alone. Thus, landfills are required to be carefully engineered to meet strict standards to ensure that leachate does not contaminate surface and groundwater.

29. To this end, Ontario's *Environmental Assessment Act* ("EAA"),⁶ *Environmental Protection Act* ("EPA"),⁷ and the *Ontario Water Resources Act* ("OWRA"),⁸ establish a rigorous process governing any application to construct and operate a landfill. This process is an iterative one, and involves many engineers, scientists, regulators, and officials throughout the Government of Ontario, all of whom have as their mandate the protection of Ontario's people and its natural environment. Collectively, they provide a carefully structured system of checks and balances to minimise the risks of landfilling, including leachate contamination. This is a complex, technical, and time-consuming process that requires compliance with a multitude of laws, regulations, and policies. A failure at any stage of this process to convince a regulator that the risks inherent in landfilling can be adequately managed will result in the non-approval of a project.⁹ The potential dangers posed by landfilling make no other approach responsible.

30. Thus, to be approved to construct and operate a landfill, a proponent must obtain numerous permits and certificates and fulfill many conditions. If a proponent can meet the requirements imposed at every stage of this process, it will be permitted to construct and operate a landfill in Ontario. Of course, merely having the right to do so does not ensure business success in Ontario's highly competitive waste disposal market.

II. THE WASTE DISPOSAL MARKET IN ONTARIO

31. Acquiring all of the necessary environmental approvals is only the first step in the landfill business. Proponents must also convince partners, investors, and potential

⁶ *Environmental Assessment Act*, R.S.O. 1990, c. E-18 ("EAA") (CAN-179).

⁷ *Environmental Protection Act*, R.S.O. 1990, c. E-19 ("EPA") (CAN-180).

⁸ *Ontario Water Resources Act*, R.S.O. 1990, c. O-40 ("OWRA") (CAN-181).

⁹ Witness Statement of Ian Parrott, ¶¶ 8-14.

customers that they can run an environmentally sound site in a financially viable and logistically smooth manner.

32. It is critical that proponents can guarantee they will, to use a maxim of the waste disposal industry, “keep the waste moving.”¹⁰ Every day, waste is generated, collected, loaded, processed or transported. If this process is interrupted, serious problems can arise because people and businesses never stop generating garbage.

A. Types of Waste

33. There are two types of non-hazardous¹¹ waste landfilled in Ontario: Municipal Solid Waste (“MSW”) and Industrial, Commercial, and Institutional Waste (“IC&I”).

34. MSW is waste generated by residents, either in single-family homes or in multiple-family dwellings.¹² The collection, processing and disposal of MSW are ordinarily the responsibility of municipalities.¹³ MSW is either disposed of in municipality-owned landfills, or in landfills owned and operated by private-sector companies with which a municipality has contracted.¹⁴

35. The most important factor for municipalities in respect of MSW is disposal security – *i.e.*, the assurance that waste will be “kept moving.” As mentioned above, people do not simply stop generating waste if disposal is interrupted for any reason. As a result, municipalities typically prefer to own a landfill or enter into long-term, rather than short-term, contracts with private-sector companies. Moreover, while the price of waste disposal is important to municipalities, a more important consideration for them is that the companies with which they contract have established reputations of operating safe and reliable landfills.¹⁵ As Richard Butts, the Deputy City Manager of Toronto explains, it is extremely important for any municipality that it is negotiating with “reputable and

¹⁰ Witness Statement of Richard Butts, ¶ 6.

¹¹ Hazardous waste is regulated separately and includes substances such as PCBs, asbestos and other toxic substances.

¹² Witness Statement of Richard Butts, ¶ 5.

¹³ Witness Statement of Richard Butts, ¶ 5.

¹⁴ Witness Statement of Richard Butts, ¶ 11.

¹⁵ Witness Statement of Richard Butts, ¶ 24.

well-established companies”¹⁶ so that it can have “confidence” that the operator will “ensure performance, even under unforeseen adverse conditions.”¹⁷

36. IC&I is the garbage generated by businesses and institutions.¹⁸ It includes waste from entities such as manufacturers, retailers, hotels, offices, hospitals, schools, universities, and construction sites.¹⁹ These businesses and institutions are ordinarily responsible for arranging the collection, processing and disposal of their own waste.²⁰

37. Unlike municipalities, they will typically enter into short-term, rather than long-term, contracts with private-sector companies, as this allows them to better take advantage of market fluctuations.²¹ However, like municipalities, while the price of waste disposal is important to businesses and institutions, they too are concerned about keeping their waste moving. Thus, they will also seek to contract with proven and reliable operators.

B. The Waste Disposal Options in Ontario

38. Generally, once waste is collected, it must be handled locally by either depositing it at a nearby landfill or dropping it off at a transfer station where it can be processed or consolidated. Garbage collection trucks have a limited range and capacity and must dump their loads several times a day. Therefore, for the collection logistics to work, it is inefficient for them to transport waste long distances.²²

39. However, at a transfer station, waste can be consolidated, compacted and transferred to transport trucks for haulage to distant landfills. This can be desirable, in particular, for companies that wish to deposit waste into their own landfills. It might also be preferred if a distant landfill, operated by a known and reliable operator, offers a

¹⁶ Witness Statement of Richard Butts, ¶ 24.

¹⁷ Witness Statement of Richard Butts, ¶ 23.

¹⁸ Witness Statement of Richard Butts, ¶ 5.

¹⁹ IC&I includes construction and demolition waste (“C&D”), which is sometimes categorised separately from IC&I.

²⁰ Witness Statement of Richard Butts, ¶ 7.

²¹ Witness Statement of Richard Butts, ¶ 15.

²² Witness Statement of Richard Butts, ¶ 8.

discounted disposal fee that offsets the increased costs of long-distance haulage. As a result, the waste disposal market for Ontario includes not just landfill sites within the province, but also sites in nearby states like Michigan and New York. This is particularly true for the GTA, which includes Toronto and the regional municipalities of York, Peel, and Durham (collectively, the “GTA Municipalities”), which are closer to certain landfills in Michigan and New York than to many sites in Ontario.

40. Overall, in addition to municipalities, there are approximately 450 private companies competing in the Ontario waste disposal market.²³ These companies operate collection networks, dozens of transfer stations,²⁴ and approximately 70 landfills in Ontario. There are also more than 10 landfills in Michigan and New York serving the Ontario market, which, together with Ontario’s landfills, offer tens of millions of tonnes of annual disposal capacity to Ontario customers.

41. Some of these companies operate only one aspect of the waste management business, *i.e.* collection, transfer station processing, or disposal. Others are large companies that offer all three services. Such “vertically integrated” companies enjoy a significant competitive advantage because they can collect waste from the curb, process it at their own transfer stations, and then ship it to their own landfills.²⁵ This permits them to realize higher consolidated revenues.²⁶ Integrated waste management companies typically are able to compete on price when a new participant enters the market.²⁷

42. It was into this highly regulated and highly competitive market that the proponents of Adams Mine sought to enter in 1989.

²³ See Waste Management Industry Survey: Business and Government Sectors 2004, Statistics Canada, Catalogue no. 16F0023XIE, at Table A.5 (CAN-321); and Ontario Waste Management Association, *A Guide to Waste Recycling Services for Ontario Businesses* (July 2008), at 2. (CAN-350)

²⁴ There are 62 transfer stations in the GTA area alone. Witness Statement of Richard Butts, ¶ 8.

²⁵ Witness Statement of Richard Butts, ¶ 14.

²⁶ Waste Management Inc. 2004 Annual Report (February 17, 2005) at 4,7 (CAN-342); Waste Management Inc., Browning-Ferris Industries, Republic Services Inc., and Waste Services, Inc. are examples of some of the vertically integrated companies serving the Ontario market.

²⁷ Dr. Kenneth T. Wise, *Rebuttal Report on the Fair Market Value of the Adams Mine Site in the Matter of Vito G. Gallo v. Government of Canada* (June 25, 2010), ¶ 95.

III. ADAMS MINE

A. Location and Description

43. Adams Mine is located 600 kilometres north of Toronto in the District of Timiskaming, a remote area of northern Ontario near the Province of Quebec.²⁸ Adams Mine consists of roughly 4,000 acres of land in Boston Township, approximately 9 kilometres from Kirkland Lake.²⁹ The location of Adams Mine is shown in **Figure 1**.

44. More than 33,000 people live in the District.³⁰ The major population centres include the City of Temiskaming Shores, the Towns of Cobalt, Englehart and Kirkland Lake and a number of townships.³¹ Many of these communities lie south, or downstream, of Adams Mine. The area is also home to several Aboriginal communities, including Beaverhouse First Nation Community and the Temagami, Mattagami, Matchewan, Wahgoshig and Timiskaming First Nations.³²

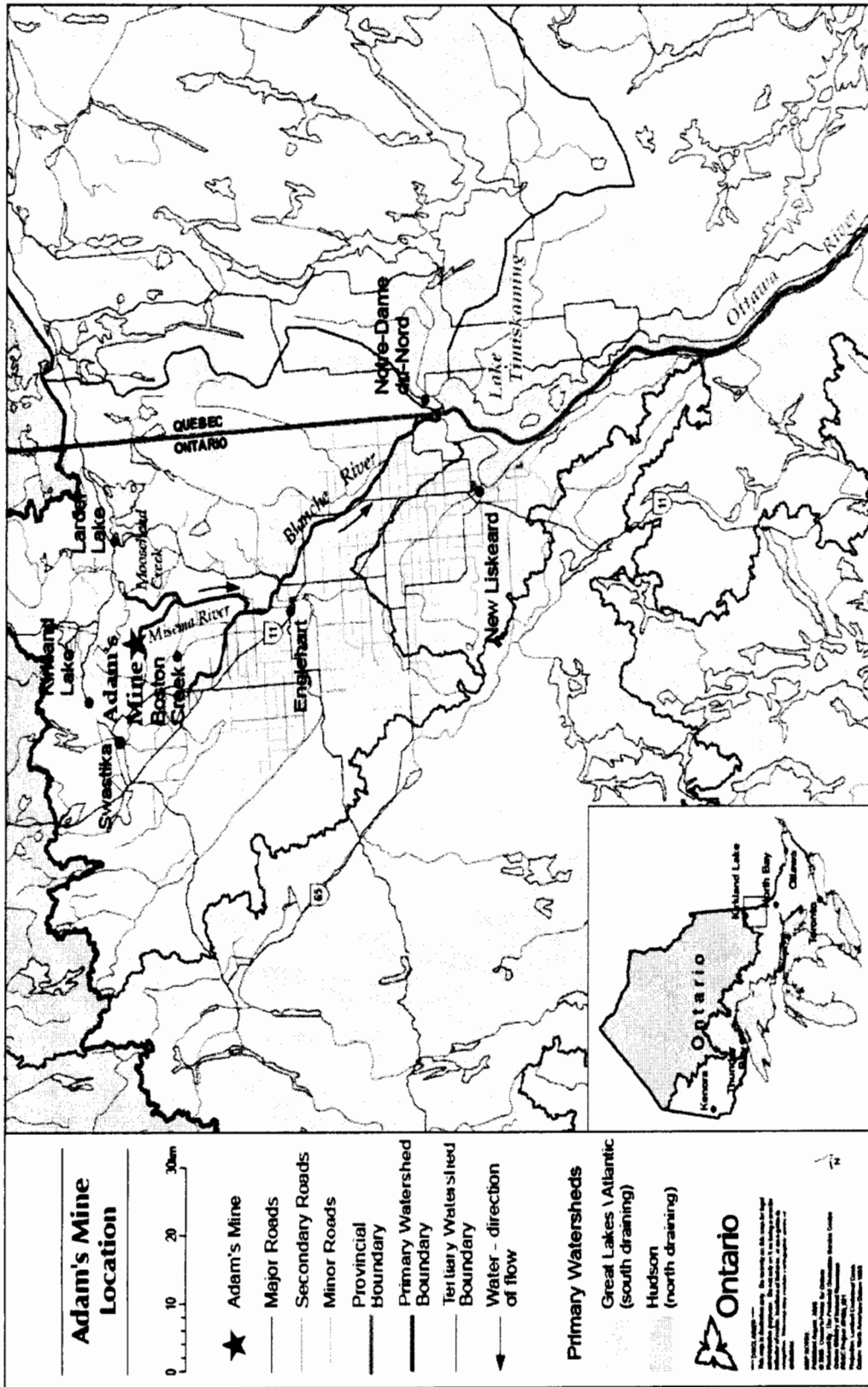
²⁸ Adams Mine is located 28 km from Quebec. REDACTED
REDACTED REDACTED

²⁹ REDACTED A small portion of the site is located in McElroy Township.

³⁰ Statistics Canada, *Census, Population and Dwelling Counts* (Ottawa: Statistics Canada, 2006), online: Statistics Canada, *Census of Canada* <<http://www.12.statscan.ca/census-recensement/2006/dp-pd/hlt/97-0550/Index.cfm?TPL=PIC&Page=RETR&LANG=Eng&T=30>> (CAN-344).

³¹ See *Ibid.* (CAN-344).

³² Witness Statement of Chris Maher, ¶ 19. The Timiskaming First Nation Reserve is adjacent to the Quebec municipality of Notre-Dame-Du-Nord, both of which lie downstream from Adams Mine. See online: Indian and North Affairs Canada, *Timiskaming First Nation* <<http://www.ainc-inac.gc.ca/ai/sct/qc/aqc/prof/Timiskaming-eng.asp>> (CAN-365).



45. In 1963, Dofasco Inc. (“Dofasco”) and the Chevron Company of California (“Chevron”) opened Adams Mine as an open-pit iron ore mine. The site was closed on March 31, 1990 when extracting the iron ore was no longer economically viable.³³ Decades of mining activity, however, substantially altered the site.³⁴

46. Adams Mine contains several very large pits, which Dofasco and Chevron blasted deep into fractured bedrock to extract iron-ore. The three largest of these are the South Pit, the Central Pit, and the Peria Pit. All these pits have since filled with surface and groundwater. REDACTED

REDACTED The remainder of the site consists of tailings³⁶ and rock piles remaining from the mine’s operations as well as REDACTED

REDACTED

B. Regional Economy and Geography

47. The northern part of the District of Timiskaming was once a prosperous mining region. However, the closure of local mines, including Adams Mine, led to an economic crisis in the 1990s, which in turn led to “aggressive economic diversification agendas” being pursued by the Town of Kirkland Lake.³⁸ Greater economic diversity now exists and mining has since re-emerged as an important industry in the area.

48. The southern part of the District of Timiskaming, downstream of Adams Mine, has a different economic profile. This area includes the City of Temiskaming Shores and the Town of Cobalt, which are located about 63 kilometres south of Adams Mine. This

³³ REDACTED and Adams Mine Decommissioning, Vol. 3, Verification, p. 1 (CAN-377).

³⁴ REDACTED

³⁵ REDACTED
REDACTED

REDACTED For this reason, opponents of Adams Mine sometimes referred to the South Pit as “Adams Mine Lake”.

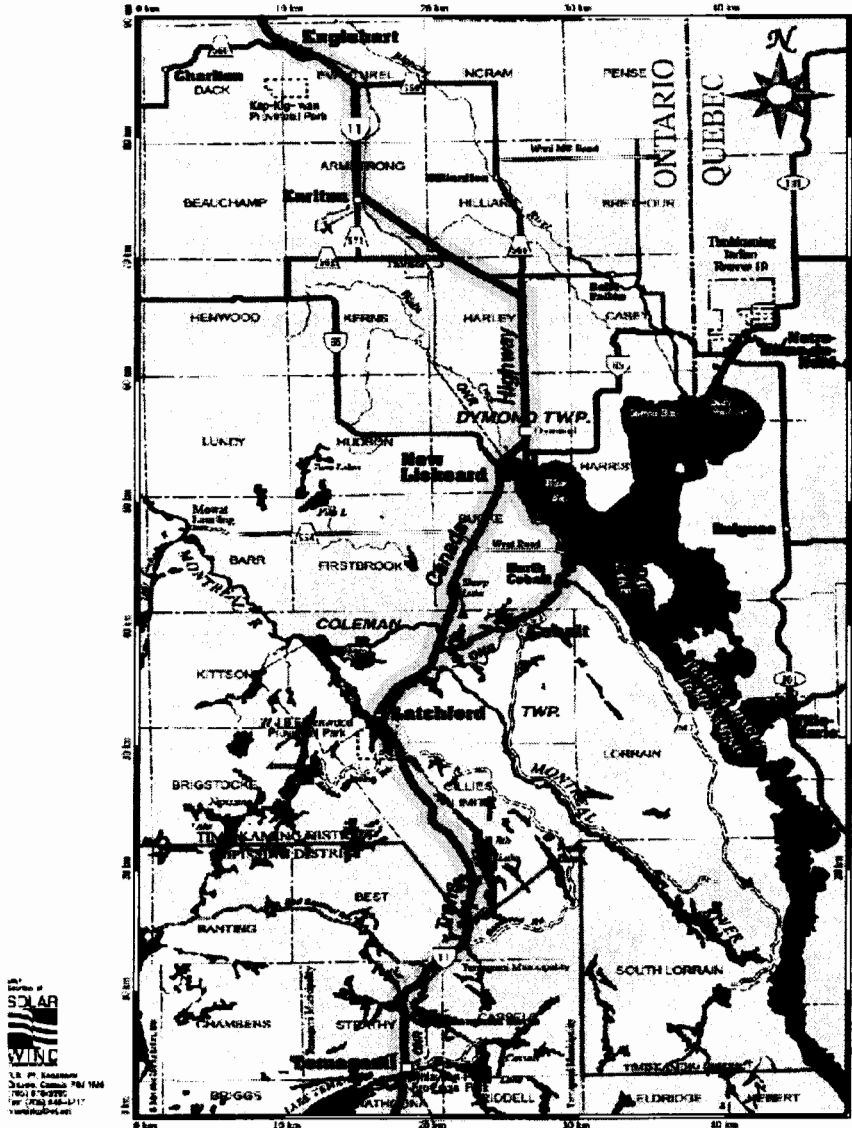
³⁶ “Tailings” are crushed or ground rock produced as a result of the extraction of minerals during mining activities.

³⁷ REDACTED

³⁸ See Online: Town of Kirkland Lake <<http://www.town.kirklandlake.on.ca/profile/economy.php>> (CAN-367).

area includes a prosperous and extensive dairy and canola farming industry.³⁹ Nature-based tourism and recreation activities such as hunting, fishing, camping, water sports, and wildlife-watching are also important parts of the area's economy. A detailed map of south Timiskaming is shown on the next page in **Figure 2**.

SOUTH TEMISKAMING AREA



³⁹ REDACTED See also, online: City of Temiskaming Shores <http://www.temiskamingshores.ca/en/cityhall/history.asp> (CAN-368).

49. Adams Mine is situated at one of the highest elevations in the watershed of the Misema-Blanche Rivers, which flow south into Lake Timiskaming. This watershed consists of both surface water (*i.e.*, streams, rivers and lakes) and groundwater. The latter provides drinking water for the residents living downstream from Adams Mine, as well as irrigation for South Timiskaming's agricultural lands. The watershed is also directly linked to Lake Timiskaming, the region's primary tourism, recreation, and fishing destination.⁴⁰

IV. NOTRE'S EFFORTS TO DEVELOP ADAMS MINE AS A WASTE DISPOSAL SITE FROM 1989 TO 2002

A. Notre's Proposal to Develop Adams Mine as a Waste Disposal Site

50. In the late 1980s, Gordon McGuinty, a Canadian businessman with a small construction company, identified Adams Mine as a potential landfill site.⁴¹ In November, 1989, Mr. McGuinty incorporated Notre Development Corporation ("Notre") in Ontario and purchased Adams Mine from Dofasco and Chevron for \$1.5 million⁴² plus additional royalties in the event Adams Mine was ever operated as a landfill.⁴³

51. Notre initially promoted Adams Mine as a potential landfill to municipalities in the GTA. However, Adams Mine had been blasted deep into fractured bedrock and could not be developed into a conventional landfill. Instead, Notre proposed to use a method called "hydraulic containment" to prevent leachate from contaminating the local watershed.

⁴⁰ See Online: City of Temiskaming Shores <http://www.temiskamingshores.ca> (CAN-372).

⁴¹ Gordon E. McGuinty, Christopher Gordon Associates, Ltd., Profile, Bates Number 00320 (CAN-378). McGuinty Construction Inc. appears to have focused its business on road paving. Mr. McGuinty also operated Christopher Gordon Associates Ltd., a small consulting firm. Mr. McGuinty refers to himself as "managing partner" of Christopher Gordon Associates Ltd. However, this firm is actually a corporation.

⁴² All dollar amounts in this Counter-Memorial are expressed in Canadian funds unless otherwise indicated.

⁴³ *Canadian Waste Services Inc. v. Notre Development Corporation et al.*, Court File No. 03-CV-244717CM2 (Ont. Sup. Ct.) Amended Statement of Defence (May 20, 2003), ¶¶ 3-4 (CAN-302). As explained in ¶ 59, fn 55, the \$1.5 million used by Notre to purchase the site was drawn from funds raised through an option agreement with Toronto.

52. Hydraulic containment landfills typically rely on a combination of engineering and the natural characteristics of soil around the landfill site to prevent groundwater contamination. Thus, the leachate in hydraulic containment landfills must be kept *below* the elevation of the natural water table (*i.e.*, the level below which the ground is saturated with water) so that leachate will not leak out of the landfill and contaminate nearby groundwater or surface water. Further, hydraulic containment landfills will typically require the pumping of leachate from the bottom of the landfill, to cause groundwater in the soil near the landfill to flow inward, rather than outward. This will prevent any escape of leachate into the natural environment.⁴⁴ For added protection, hydraulic containment landfills are often constructed with plastic liners to prevent leachate from leaking out in the event that hydraulic containment fails.⁴⁵

53. Notre's hydraulic containment proposal was unusual because its landfill was to be located in fractured bedrock – as opposed to soil – and because it contemplated developing the South Pit without the added protection of a liner. No landfill using hydraulic containment under these conditions has ever been approved in Ontario.⁴⁶

54. Moreover, Notre only proposed to pump leachate from the site for part of its contaminating lifespan. According to Notre's own estimates, a landfill at Adams Mine would have produced over 83 billion litres of leachate over 1000 years.⁴⁷ Notre, however, proposed to pump leachate only for the first 100 years.⁴⁸ After 100 years, Notre proposed to utilize a "passive drain system" that would dilute and drain the leachate from the South Pit into adjacent lands owned by the Government of Ontario (the

⁴⁴ Witness Statement of Mark Puumala, ¶ 18.

⁴⁵ One example of such a doubly-safeguarded site using hydraulic containment is the Halton, Ontario landfill.

⁴⁶ Witness Statement of Doug Barnes, ¶ 14. The Claimant refers to the Rabbit Lake site in Saskatchewan in ¶¶ 94 to 96 of his Memorial as support for the proposition that landfills of the type proposed by Notre are not novel and are effective. However, Rabbit Lake is an impoundment area for mine tailings and the Claimant has provided no evidence that this site has the same hydrogeological conditions as Adams Mine. Moreover, the regulatory regime governing mines in Saskatchewan has no applicability to the regulation of landfills in Ontario.

⁴⁷ Golder Associates Ltd., Adams Mine Environmental Assessment, Technical Appendix B, Design and Operations - South Pit (1996), p. B.6-21 (CAN-195).

⁴⁸ EAB-97-01, Section 3.1.1, p. 17 (CAN-55).

“Borderlands”). The leachate would then be treated by natural processes as it drained through the Borderlands. Such a passive drain system has never been used in Ontario for a hydraulic containment landfill.

B. Notre’s Attempts to Secure a Waste Disposal Contract

55. Notre’s business model required that it obtain a waste stream in excess of 1 million tonnes per year for 20 years in order for a landfill at Adams Mine to be economically viable.⁴⁹ REDACTED

REDACTED

56. In Ontario, only the GTA Municipalities generated a waste stream of 1 million tonnes of waste per year. Accordingly, Notre’s business model focused exclusively on promoting Adams Mine to the GTA Municipalities for its MSW. Even its financing was conditional on securing a long-term contract for at least 1 million tonnes of waste per year.⁵¹

57. In an affidavit, Michael McGuinty⁵², a Project Manager for Notre, explained:

Notre requires large contracts for the landfilling of waste (from a source of the general size of the City of Toronto) in order to justify the cost of developing the Adams Mine site for use as a landfill. Without such contracts, Notre will be unable to continue carrying on business or develop the landfill.⁵³

⁴⁹ *Adams Mine Intervention Coalition v. Environmental Assessment Board et al.*, Div. Court File No. 580/98 (Ont. Div. Ct.) Supplementary Affidavit of Michael McGuinty (April 1999) ¶ 3 (“Affidavit of Michael McGuinty”) (CAN-211).

REDACTED

⁵¹ As set forth in ¶¶ 65-66 below, Notre executed contracts in 1997 with Canadian Waste Services, Inc., pursuant to which it agreed to finance Notre’s development of Adams Mine as a landfill. These contracts permitted Canadian Waste Services Inc. to terminate its financing arrangement should Notre fail to execute an agreement with Toronto for 1 million tonnes of waste per year. *See Agreement between WMI Waste Management of Canada, Inc., Notre Development Corporation and Michael McGuinty* (May 31, 1997), Section 3.3(a), p. 5 (CAN-204).

⁵² Michael McGuinty is also the son of Gordon McGuinty.

⁵³ Affidavit of Michael McGuinty, ¶ 3 (CAN-211).

58. However, despite its efforts which would span more than a decade, Notre never succeeded in securing a contract for even a single bag of garbage from a GTA Municipality.

1. Notre's Early Efforts with Toronto – 1990 to 1995

59. Notre did not have the funds to construct and operate Adams Mine as a waste disposal site. Thus, it originally planned to sell Adams Mine to Toronto.⁵⁴ To this end, it entered into a contract with Toronto on December 6, 1990, under which Toronto was given the option to purchase Adams Mine.⁵⁵

60. In 1995, Toronto retained consultants to examine, among other things, the economic feasibility of the site as a landfill. This evaluation was important as Michigan's vast waste disposal capacity had recently become available to the GTA municipalities.⁵⁶ The analysis conducted by Toronto's consultants and City Staff confirmed Notre's conclusion that Adams Mine would only be economically viable if it received more than 1 million tonnes of garbage a year. This meant securing the waste generated by the entire GTA region.⁵⁷ However, none of the three municipalities were willing to commit to the project.⁵⁸

61. This analysis also showed that private-sector contracts to dispose of waste in Michigan were less expensive than constructing and operating Adams Mine as a

⁵⁴ At the time, Toronto was called the Municipality of Metropolitan Toronto. It consisted of the City of Toronto and several smaller municipalities. These constituent municipalities were amalgamated on January 1, 1998 to form the City of Toronto. *See* online: City of Toronto, Mayor Mel Lastman http://www.toronto.ca/mel_lastman/programs/new_deal_background.html (CAN-373).

⁵⁵ REDACTED
REDACTED Toronto agreed to pay Notre \$1.5 million for this five year option; REDACTED This option could be exercised any time between January 1, 1991 and December 31, 1995; REDACTED Toronto could exercise this option by paying Dofasco, the previous owner of the mine, at least \$1 million per year in royalties and paying Notre either \$35 million R REDACTED

⁵⁶ Witness Statement of Shaun Hewitt, ¶ 6.

⁵⁷ Witness Statement of Shaun Hewitt, ¶ 9. At that time, Toronto generated less than 1,000,000 tonnes of waste a year.

⁵⁸ Witness Statement of Shaun Hewitt, ¶ 10.

landfill.⁵⁹ Accordingly, Toronto decided to allow its option to purchase Adams Mine to expire in December, 1995.

2. The First Rail Cycle North Consortium – 1995 to 1996

62. Once it became apparent to Notre that Toronto might let its option to purchase Adams Mine lapse, Notre began looking for business partners to finance its construction and operation of Adams Mine as a private-sector waste disposal site. Thus, on September 13, 1995, Notre entered into an agreement with Browning-Ferris Industries (“BFI”), a large waste disposal company, under which BFI paid Notre \$500,000 in return for the exclusive right to operate Adams Mine as a landfill.⁶⁰ BFI and Notre then joined with the Canadian National Railway Company (“CN”) and Ontario Northland Transportation Commission (“ONTC”) to form a private sector consortium known as Rail Cycle North (“RCN”).⁶¹

63. On October 2, 1995, Toronto issued a Request for Proposals for private sector waste solutions,⁶² in response to which RCN submitted two proposals.⁶³ Toronto rejected both RCN proposals and, in December 1996, entered into a 5 year contract with BFI

⁵⁹ Witness Statement of Shaun Hewitt, ¶ 8.

⁶⁰ BFI further committed to pay Notre between \$0.50 and \$1.00 per tonne of waste disposed at the site; *see* Agreement between Notre Development Corporation and Browning-Ferris Industries Ltd., Re Adams Mine (September 13, 1995) (CAN-191).

⁶¹ Consortium Agreement between Notre Development Corporation, Browning-Ferris Industries Ltd., Canadian National Railway Company, and Ontario Northland Transportation Commission (November 1995) (CAN-193).

⁶² The Municipality of Metropolitan Toronto, Financial Priorities Committee, Report No. 30, For Consideration by the Council of the Municipality of Metropolitan Toronto (December 18, 1996) p. 22 (CAN-201).

⁶³ *See Ibid.* p. 22. (CAN-201). The first proposal contemplated transporting Toronto’s garbage initially to landfills operated by BFI in the United States until such times as Adams Mine could be developed and approved. If RCN secured the required environmental and regulatory approvals for Adams Mine, it would then shift Toronto’s waste stream from BFI’s sites to Adams Mine. Toronto short listed this proposal “on the operational and financial strength of [BFI]”; *see Ibid.*, p. 29. The second proposal contemplated that Toronto and RCN enter into a public-private partnership to develop and operate Adams Mine; *see Ibid.* p. 25.

alone to dispose its waste at BFI's landfill in Michigan beginning on January 1, 1998.⁶⁴ As a result, BFI withdrew from the RCN consortium.

3. The Second Rail Cycle North Consortium – 1997 to 2001

64. Notre believed that its failures to promote Adams Mine as a viable landfill to Toronto were due to the fact that it did not have the environmental approvals required to construct and operate a landfill.⁶⁵ As set out above,⁶⁶ the regulatory process for obtaining the requisite certificates and permits to construct and operate a landfill is exacting and complex and requires compliance with many laws, regulations, and policies. Accordingly, it is an expensive process.

65. Notre, however, could not on its own finance the acquisition of these environmental approvals. Thus, on May 30 and 31, 1997, Notre entered into three interrelated agreements with Waste Management of Canada, Inc., which would later become Canadian Waste Services, Inc. ("CWS"), under which CWS agreed to fund Notre's acquisition of environmental approvals, and to finance, develop, and operate Adams Mine as a landfill.⁶⁷ CWS would loan Notre approximately \$4.6 million under these agreements over the next few years.⁶⁸

66. In exchange, CWS obtained an option to purchase all of Notre's shares once all of the permits for Adams Mine had been obtained and a long-term contract with Toronto was in place.⁶⁹ Further, CWS obtained a right of first refusal on any sale of Adams Mine

⁶⁴ The Municipality of Metropolitan Toronto, Report from M.A. Price to the Works and Utilities Committee, Long-Term Solid Waste Disposal Planning (January 29, 1998) (CAN-205).

⁶⁵ Witness Statement of Gordon McGuinty, ¶ 14.

⁶⁶ Counter-Memorial, ¶¶ 28 to 29.

⁶⁷ Loan Agreement between WMI Waste Management of Canada, Inc. and Notre Development Corporation (May 30, 1997) (CAN-203); Agreement between WMI Waste Management of Canada, Inc., Notre Development Corporation and Michael McGuinty (May 31, 1997) (CAN-204); and Agreement for the Purchase of Shares in Notre Development Corporation between the Shareholders of Notre Development Corporation, WMI Waste Management of Canada, Inc. and Notre Development Corporation (May 30, 1997) (CAN-202).

⁶⁸ *Canadian Waste Services, Inc. v. Notre Development Corporation et al.*, Court File No. 03CV244717CM2 (Ont. Sup. Ct.) Statement of Claim (February 28, 2003) ¶ 22 (CAN-288).

⁶⁹ Agreement for the Purchase of Shares in Notre Development Corporation between the Shareholders of Notre Development Corporation, WMI Waste Management of Canada, Inc. and Notre Development Corporation (May 30, 1997) Section 1.1(a), p. 2 (CAN-202). CWS' option to purchase

by Notre.⁷⁰ In the event that Notre were to sell Adams Mine to a third party and CWS did not exercise its right of first refusal, only those amounts Notre received in excess of \$1.8 million from the sale were to be repaid to CWS for the amounts loaned under the agreements. This right of first refusal would later become the focal point of an important legal dispute concerning the ownership of Adams Mine.⁷¹

67. CWS, Notre, Miller Waste Systems (“Miller”), CN and ONTC would subsequently form a second RCN consortium.⁷²

(a) The Provisional Certificate of Approval

68. As set out above,⁷³ there were many environmental approvals, permits, and certificates Notre was required to obtain under Ontario law in order for Adams Mine to legally operate as a landfill in Ontario. The first of these required Notre to obtain a Notice of Approval to Proceed with an Undertaking under the *EAA* (“EA Approval”).⁷⁴ Notre’s proposal also had to be considered by a three-member panel of the Environmental Assessment Board (the “Board”) as part of this process.

69. The Board normally considered a wide range of issues with respect to proposals to develop new landfills. However, in 1997 the *EPA* was amended to provide Ontario’s Minister of the Environment the discretion to “scope” or narrow the issues considered by the Board. The Minister subsequently “scoped” the Board hearing for Notre to the issue of the effectiveness of hydraulic containment at the site.⁷⁵ The decision to “scope” the Board hearing would become a focal point of criticism for local residents, Aboriginal communities and environmentalists.

Notre’s outstanding shares was valued at \$10.3 million less any payments for Notre’s debts to CWS. Notre would also receive a royalty of \$1.75 per tonne of waste disposed of at Adams Mine.

⁷⁰ See *Ibid.* (CAN-202).

⁷¹ Counter-Memorial, ¶¶ 100-102.

⁷² See Consortium Agreement between Notre Development Corporation, Waste Management of Canada Inc. and its affiliated company Canadian Waste Services Inc., Miller Waste Systems a division of Miller Paving Ltd., Canadian National Railway Company, and Ontario Northland Transportation Commission (November 1999), at Articles 3.1 and 3.3 (CAN-213).

⁷³ Counter-Memorial, ¶¶ 28-29.

⁷⁴ *EAA*, s. 5(1) (CAN-179).

⁷⁵ EAB-97-01, Section 4.1.3, p. 36 (CAN-55). Witness Statement of Doug Barnes, ¶ 13.

70. On June 19, 1998, two of the three Board members found, on a balance of probabilities, that hydraulic containment would be effective at Adams Mine, and made a qualified recommendation⁷⁶ that the EA Approval should be issued, subject to 26 conditions.⁷⁷ The dissenting member found that the evidence did not establish hydraulic containment would be effective.⁷⁸ The focus of this member's dissent was his concern that the evidence failed to establish that hydraulic containment would work throughout the 1000 years that Adams Mine would generate leachate.

71. On August 20, 1998, Notre received its EA Approval, which was subject to 37 conditions, including the 26 recommended by the majority of the Board.⁷⁹ Among those conditions was a requirement that the proponent gather further field data and conduct additional testing at Adams Mine to ensure that hydraulic containment would be effective. The results of these tests were to be submitted to Ontario's Ministry of the Environment ("MOE") so that Notre could obtain the next approval it required to construct and operate a landfill at Adams Mine: a Provisional Certificate of Approval under the *EPA* ("Provisional Certificate").⁸⁰

72. The tests ordered by the Board majority were carried out by Notre's consultants, Golder Associates Ltd. ("Golder").⁸¹ However, the field data did not confirm that hydraulic containment could be maintained over the entire 1000 year contaminated lifespan of the site.⁸² To address this problem, Golder used computer modelling, in an attempt to show that hydraulic containment could be maintained.⁸³ The tests carried out

⁷⁶ EAB-97-01, Section 4.1.3, p. 36 (CAN-55).

⁷⁷ See *Ibid.*, Section 4.2.1, pp. 41-54 (CAN-55).

⁷⁸ See *Ibid.*, Section 4.1.3 pp. 56-64 (CAN-55).

⁷⁹ Ministry of the Environment, Notice of Approval to Proceed with the Undertaking (August 20, 1998) (CDA-209). See also Order-in-Council, 1887/98 (CDA-208).

⁸⁰ EAB-97-01, Section 4.2.1, Condition 10, p. 44 (CAN-55).

⁸¹ Golder Associates Ltd., *Results of Drilling, Packer Testing and Groundwater Flow Modelling of Drillholes DH 98-1 and DH 98-2 Adams Mine Landfill* (November 1998) (CAN-57).

⁸² EAB-97-01, Section 4.2.1-4.2.2, pp. 7-9 (CAN-55).

⁸³ See *Ibid.*, Section 5, pp. 9-13 (CAN-55).

by Golder as well as the computer model which it utilized would also become a focal point of criticism over the environmental risks of the Adams Mine project.⁸⁴

73. The results of Golder's tests and computer modelling were submitted to the MOE, and on April 23, 1999, Notre received a Provisional Certificate.⁸⁵ A Provisional Certificate permits a proponent to construct and operate a landfill, *provided that* it meets certain conditions which may include obtaining additional regulatory approvals under the *EPA* and the *OWRA*. This Provisional Certificate was issued subject to sixty six conditions. The most important of these required Notre to fulfill the following requirements before it could construct or operate a landfill at Adams Mine:

- acquire legal access to the Borderlands which, as explained above, was the land surrounding the site, required as part of the site's hydraulic containment process;
- obtain approval of a final detailed design and site operations manual prior to the receipt of any waste;
- obtain approval of surface water triggers and remedial action contingency plans;⁸⁶
- obtain several other certificates and permits⁸⁷ before beginning construction, including, among others:
 - a Certificate of Approval under the *OWRA* for an on-site leachate treatment plant and constructed wetlands,⁸⁸
 - a Certificate of Approval under the *OWRA* for stormwater management facilities,⁸⁹

⁸⁴ For more information on the precise nature of the tests and computer modelling carried out by Golder, see the Witness Statement of Mark Puumala, ¶¶ 23-24.

⁸⁵ Provisional Certificate of Approval for a Waste Disposal Site, No. A612007 (April 23, 1999) ("Provisional COA") (CAN-60).

⁸⁶ The remedial contingency plans are plans to control surface water if the level of contaminants in water being discharged into the watershed exceeded approved standards.

⁸⁷ Notre also would have had to apply for a long term Permit to Take Water to pump leachate from the South Pit under Section 34 of the *OWRA* and an additional certificate of approval under Section 53 of the *OWRA* for the installation of pumps, a pump station, a pad and other works necessary to drain the South Pit. See *OWRA*, ss. 34 and 53 (CAN-181).

⁸⁸ A leachate treatment plant treats leachate to remove contaminants from water. A constructed wetland is an artificial swamp that is designed to filter and treat wastewater or stormwater.

- a short-term Permit to Take Water (“PTTW”) under the *OWRA* to dewater the South Pit, and
- a Certificate of Approval under the *EPA* for the landfill gas control plant and flares;⁹⁰
- submit a Site Preparation Report; and
- provide ongoing financial assurance to pay for compliance with, and performance of, actions specified in the Certificate of Approval.⁹¹

74. None of the conditions were fulfilled by the time Notre sold Adams Mine to the Enterprise in 2002. Neither Notre nor the Enterprise ever had the right to construct or operate a landfill at Adams Mine.

(b) The Second RCN Consortium’s Bid for Toronto’s Waste

75. In 1999, Toronto was sending approximately 450,000 tonnes of waste to BFI’s landfill in Michigan pursuant to their agreement of September 13, 1995 as set forth above and approximately 1.4 million tonnes of garbage annually to its own municipally-owned landfill, Keele Valley.⁹² However, Keele Valley was due to close in 2002. As a result, Toronto initiated a process called the Toronto Integrated Solid Waste Resource Management (“TIRM”) to identify other sites for Toronto’s garbage.

76. On October 5, 1999, Toronto issued a request for proposals as part of the TIRM process. Seven companies submitted proposals in response, including the new RCN consortium.

77. The RCN proposal called for the rail haul of garbage from CN’s MacMillan Yard, a train yard, located northwest of Toronto, to the Adams Mine site. Toronto’s garbage

⁸⁹ Stormwater management facilities refer to infrastructure which controls runoff from precipitation and snowmelt before being discharged into the local watershed.

⁹⁰ A gas control plant collects and flares methane and other gases to control odours. A gas flare is an elevated vertical stack or chimney that is used for controlled burning of waste gas.

⁹¹ Provisional COA, pp. 4-14 (CAN-60).

⁹² Witness Statement of Richard Butts, ¶¶ 18-19. These figures included 300,000 tonnes from the municipalities York and Durham regions as well as 600,000 tonnes of private sector IC&I that Toronto was managing at that time.

would be collected and then packed into specially designed “intermodal” containers⁹³ at transfer stations through Toronto. REDACTED

REDACTED

REDACTED

78. In early 2000, Toronto’s staff conducted due diligence on each of the proposals and recommended that the best financial and operational option was to extend the life of Keele Valley at a reduced volume, and send the remainder of Toronto’s garbage to landfills called Green Lane, Essex-Kent, and Arbor Hills.⁹⁶

79. Toronto, however, was informed that the life of the Keele Valley landfill could not be extended.⁹⁷ The Green Lane, Essex-Kent, and Arbor Hills landfills did not have sufficient capacity to absorb Toronto’s waste by themselves. Toronto’s staff, therefore, recommended that contracts be pursued with RCN for Toronto’s MSW, and with Republic Services of Canada Inc. (“Republic”) for the IC&I that Toronto managed.

⁹³ An intermodal container is one that can be transported either by truck or by rail.

⁹⁴ REDACTED

REDACTED

REDACTED

⁹⁵ REDACTED

REDACTED

⁹⁶ City of Toronto, Staff Report, Toronto Integrated Solid Waste Resource Management (“TIRM”) Process Category 2 Proven Disposal Capacity Residual Solid Waste Disposal Capacity Options (June 19, 2000), pp. 14-19 (CAN-67).

⁹⁷ Witness Statement of Richard Butts, ¶ 31.

80. The proposed contract with RCN was to be between Toronto, CWS, Waste Management Inc. (the U.S. parent of CWS), and RCN.⁹⁸ From Toronto's perspective, it was important that CWS' U.S. parent be a party to the contract so that Toronto could be "assured of the financial stability of the consortium."⁹⁹

(c) The Collapse of Negotiations with Toronto and the Dissolution of RCN

81. During negotiations between RCN and Toronto, RCN requested a clause stating that Toronto would be "liable to pay any of the unavoidable increased costs incurred as a result of any change in law affecting the project" above \$1.00.¹⁰⁰ Toronto's City Council refused to accept this condition,¹⁰¹ and RCN terminated the negotiations.¹⁰²

82. REDACTED

REDACTED

Under this agreement, Toronto was given the option to renew up to 5 times for up to a maximum of 20 years.

83. On November 6, 2000, Toronto announced that any deal to dispose its waste at Adams Mine was "dead."¹⁰⁴ Toronto City Council subsequently passed a binding motion on January 31, 2001, by a nearly unanimous vote of 36 to 4, which stated that:

WHEREAS the proponent, Rail Cycle North, refuses to agree with the removal of certain liability clauses from the contract and therefore the proposal failed; and

⁹⁸ City of Toronto, Staff Report from Barry Gutteridge, Commissioner of Works and Emergency Services to Toronto City Council, Toronto Integrated Solid Waste Resource Management ("TIRM") Process Category 2, Proven Disposal Capacity Response to Requests for Information (October 3, 2000), p. 11(CAN-71).

⁹⁹ Witness Statement of Richard Butts, ¶ 36.

¹⁰⁰ Witness Statement of Richard Butts, ¶ 38.

¹⁰¹ Witness Statement of Richard Butts, ¶¶ 41-42.

¹⁰² Witness Statement of Richard Butts, ¶ 44.

¹⁰³ REDACTED

REDACTED

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¹⁰⁴ City of Toronto, Press Release, "City of Toronto Confirms RCN Deal is Dead" (November 6, 2000) (CAN-76).

WHEREAS there has been great public outcry, both in the City of Toronto and in the municipalities where the Adams Mine Dump site is located, against this proposal; and

WHEREAS the proponent of the Adams Mine Site, Mr. Gordon McGuinty, is again here in Toronto City Hall attempting to push his 'dark ages' concept of dumping trash into an abandoned mine; and

...

NOW THEREFORE BE IT RESOLVED THAT City Council formally reject the Adams Mine Site as a current or future option for dumping the City of Toronto municipal waste.¹⁰⁵

84. A number of GTA Municipalities, including York, Peel, and Durham, closely followed Toronto's negotiations with RCN. In light of Toronto's decision to reject Adams Mine as a landfill, those municipalities, too, decided not to contract with Adams Mine, and contracted with other waste disposal companies.¹⁰⁶ In fact, Peel had already rejected the RCN proposal even before the Toronto decision because Peel was not satisfied that Adams Mine was environmentally safe or economically efficient.¹⁰⁷ Moreover, an environmental engineering consultant retained by York, Peel, and Durham regions expressed serious reservations over the environmental safety and the operational feasibility of the project.¹⁰⁸

¹⁰⁵ City of Toronto, Minutes of the Council of the City of Toronto, January 30, January 31 and February 1, 2001 (March 6, 2001) pp. 87-88 (CAN-78).

¹⁰⁶ York and Durham did not pass a formal resolution but decided not to use Adams Mine because of the City of Toronto's decision. Darlene Wroe, "Toronto Regions looking for waste management proposals" *Timiskaming Speaker* (November 8, 2000) (CAN-227); see also Regional Municipality of Durham, Report to the Joint Works Committee, No. 2007-J-09, The Annual Solid Waste Management Servicing and Financing Study and Proposed 2007 Business Plans, Budget and Related Financing (March 20, 2007), Section 3.4.13 (CAN-397).

¹⁰⁷ See e.g., Regional Municipality of Peel, News Release, "Region of Peel Will Not Send Waste to Adams Mine Site" (October 19, 2000) (CAN-230); see also The Regional Municipality of Peel, General Committee, Minutes, GC-2000-12 (October 19, 2000) (CAN-231); and Regional Municipality of Peel, Waste Management, Toronto Integrated Solid Waste Resource Management, Long Term Disposal Options (October 15, 2000) (CAN-229).

¹⁰⁸ AMEC Earth & Environmental Ltd., Regional Municipalities of Peel, York and Durham Peer Review of TIRM Due Diligence Report, Final Report (December 2000) (CAN-237).

85. On February 20, 2001, Notre approached CWS for more funds. REDACTED

REDACTED

REDACTED

On the same date, CWS terminated the RCN consortium.¹¹¹ CWS formally registered its right of first refusal on the title of Adams Mine on February 26, 2002.¹¹²

4. The Aecon Agreement of 2001

86. With the withdrawal of CWS, Notre was left searching, yet again, for a business partner that was capable of financing the development and operation of Adams Mine. In April 2001, Notre concluded a Memorandum of Agreement with BFC Construction Group, later renamed Aecon Construction Group (“Aecon”), to develop and operate the site.¹¹³ This agreement required Notre to, among other things, secure Aecon’s loans with a mortgage on the Adams Mine site. Both parties also acknowledged CWS’ right of first refusal.¹¹⁴

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¹¹² Parcel Register, Parcel 19616 (CAN-327).

¹¹³ Memorandum of Agreement between Notre Development Corporation and BFC Construction Group Inc. (April 6, 2001) (CAN-241). Aecon agreed make monthly advances to Notre of \$25,000 to support its efforts to secure a contract with the Toronto. Aecon also agreed to pay the costs of certain consultants. In exchange for this financial support, Notre agreed to provide security for these advances in the form of a mortgage. Notre also agreed to notify Aecon in the event of a sale of the site to a third party and to repay these advances from the proceeds should purchase price exceed \$1.8 million. This Agreement also indicated that Notre would retain ownership of Adams Mine. *See Aecon Construction Group Inc., and Aecon Group Inc. v. Notre Development Corporation*, Court File No. 06-CV-313385PD3 (Ont. Sup. Ct.) Statement of Claim (July 12, 2006) ¶ 10 (CAN-346).

¹¹⁴ Memorandum of Agreement, between Notre Development Corporation, Aecon Construction Group Inc. and Canadian Waste Services Inc. (September 7, 2001) (CAN-245).

87. On August 24, 2001, Toronto's Chair of the Works Committee met with Notre as a "courtesy" and explained that Toronto was not interested in Adams Mine as a landfill.¹¹⁵ Notre failed to provide the security required under its agreement with Aecon as there were restrictions on the title of Adams Mine which prevented it from doing so. By this point in time, Aecon had loaned Notre more than \$439,000. Accordingly, on December 13, 2001, Aecon ended its relationship with Notre, realizing that the project was not economically viable.¹¹⁶ Aecon would never again show any interest in investing in the site.

5. The Republic Offer of 2002

88. On February 15, 2002, Notre approached Republic to suggest that they enter into an agreement that would allow Republic to assume control of the development and operation of Adams Mine.¹¹⁷ Republic did not enter into any agreement with Notre, opting instead to keep its existing long-term contract with Toronto.

V. NOTRE SELLS ADAMS MINE TO THE ENTERPRISE

A. Mr. Cortellucci Purchases Adams Mine in 2002

89. Faced with the reality that no waste management company was interested in financing Notre's construction and operation of Adams Mine, Notre approached a wealthy Canadian real estate developer named Mario Cortellucci to finance the project.¹¹⁸

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¹¹⁵ Paul Moloney and Bruce DeMara, "Disero trashes Adams Mine pitch" *Toronto Star* (August 27, 2001) (CAN-244).

¹¹⁶ *Aecon Construction Group Inc., and Aecon Group Inc. v. Notre Development Corporation*, Court File No. 06-CV-313385PD3 (Ont. Sup. Ct.) Statement of Claim (July 12, 2006) ¶ 10 (CAN-346).

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However, CWS still had a right of first refusal to purchase Adams Mine.

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On May 10, 2002, Notre and Mr. Cortellucci's enterprise, the Cortellucci Group of Companies ("Cortellucci Group") entered into an Agreement of Purchase and Sale in respect of Adams Mine.¹²⁴ This agreement included the "penalty clause" which provided that:

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92. Because CWS was part of an integrated corporation that operated numerous waste disposal facilities in Ontario and the U.S., this penalty clause would have resulted in significant liability on its part to Notre, while it would have had no impact on the Cortellucci Group or Mr. Cortellucci, which did not conduct any waste disposal activities. The agreement also provided that Notre would be paid only \$1.8 million for Adams Mine, which guaranteed that Notre would not have to repay a cent of the \$4.6 million loaned to it by CWS and the more than \$439,000 it had received from Aecon as set forth in paragraphs 66 and 87 above.

93. Notre notified CWS of the agreement on May 10, 2002.¹²⁶ CWS immediately replied to Notre and the Cortellucci Group that they were not entering into the agreement in good faith. According to CWS, the agreement was thus ineffective and CWS' right of first refusal had not validly been triggered.¹²⁷

REDACTED

REDACTED

¹²⁶ *Canadian Waste Services Inc. v. Notre Development Corp, et.al*, Court File No. 03-CV-244717 CM2, Statement of Claim (February 28, 2003) ¶ 16 (CAN-288).

¹²⁷ *See Ibid.* ¶ 17 (CAN-288).

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95. On June 26, 2002, Mr. Swanick incorporated 1532382 Ontario, Inc. (the "Enterprise").¹³⁰ Mr. Swanick was appointed the President, Secretary and Director of the Enterprise.¹³¹ His law offices were listed as the business address of the Enterprise,¹³² and

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September 9, 2002, Notre conveyed Adams Mine to the Enterprise.¹³⁶

B. The Formation of the Limited Partnership in 2002

97. The day after Adams Mine was conveyed to the Enterprise, Mr. Swanick also formed a Limited Partnership on behalf of Mr. Cortellucci called 1532382 Limited Partnership ("LP").¹³⁷ REDACTED

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¹³⁰ Ontario Ministry of Consumer and Business Services, Corporation Profile Report, 1532382 Ontario Inc. (October 25, 2004) (CAN-341).

¹³¹ See *Ibid.* (CAN-341).

¹³² See *Ibid.* (CAN-341).

¹³³ REDACTED
REDACTED

REDACTED

¹³⁶ Document number 0319677 in the Land Titles Office for Temiskaming (54) Haileybury (September 9, 2002) (CAN-269). See *Canadian Waste Services Inc. v. Notre Development Corp, et al*, Court File No. 03-CV-244717 CM2 (Statement of Claim) (February 28, 2003) ¶ 20 (CAN-288).

¹³⁷ 1532382 Limited Partnership Registration Documents (September 10, 2002) (CAN-273). Mr. Swanick registered the LP. REDACTED

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REDACTED



REDACTED



99. Mr. McGuinty and his consulting firm, Christopher Gordon Associates, were retained by the LP to promote Adams Mine as a waste disposal site, and Mr. McGuinty was appointed Managing Director of the Enterprise.¹⁴⁸

C. CWS Commences a Lawsuit to Unwind the Sale of Adams Mine to the Enterprise in 2003

100. On February 28, 2003, CWS commenced a lawsuit against Notre, the Cortellucci Group and the Enterprise before the Ontario Superior Court of Justice on the ground that the transfer of the site's ownership was invalid because it intentionally frustrated CWS' right of first refusal in bad faith.¹⁴⁹

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¹⁴⁹ *Canadian Waste Services Inc. v. Notre Development Corp., et al*, Court File No. 03-CV-244717 CM2, Statement of Claim (February 28, 2003) (CAN-288).

101. CWS sought repayment of its \$4.6 million in loans, a declaration that the APS was null and void, and an order nullifying the transfer of Adams Mine from Notre to the Enterprise. In the alternative, CWS sought the repayment of its loans of \$4.6 million and damages of \$5 million for the loss of its business opportunity to purchase and develop Adams Mine as a waste disposal site.¹⁵⁰

102. This lawsuit remained pending until after the *AMLA* was enacted. It was ultimately settled on March 2, 2006.¹⁵¹

VI. THE ENTERPRISE'S EFFORTS TO DEVELOP ADAMS MINE AS A WASTE DISPOSAL SITE FROM 2002 TO 2004

103. REDACTED

REDACTED Notre had no customers, no financing and only a few of the permits required to construct and operate a waste disposal site. Mr. Cortellucci and the Limited Partners appear to have invested in Adams Mine on the gamble that REDACTED to reconsider the site, as set out below.¹⁵³ All of their efforts to do so failed.

A. The Enterprise's Efforts to Secure a Waste Disposal Contract

104. As set out above,¹⁵⁴ it was clear by 2001 that Toronto was not interested in Adams Mine. Toronto had formally rejected it as a landfill, and had entered into a 5 year renewable contract with Republic. Yet, once it acquired Adams Mine in 2002, the Enterprise renewed its decade-long effort to secure a contract for Toronto's waste.

¹⁵⁰ See *Ibid.* ¶¶ 1(a) and 2(d)(iv) (CAN-288).

¹⁵¹ *Canadian Waste Services Inc. v. Notre Development Corp., et. al.*, Court File No. 03-CV-244717 CM2, Case Management Motion Form (March 2, 2006) and Order (March 3, 2006) (CAN-345).

REDACTED

¹⁵³ Counter-Memorial, ¶¶ 109-110.

¹⁵⁴ Counter-Memorial, ¶¶ 82-84.

1. The “Smart Growth” Process – 2002 to 2003

105. On February 11, 2002, the Government of Ontario initiated a process called “Smart Growth” which would study, among other things, the effects of urban sprawl.¹⁵⁵ Five regional “Smart Growth Panels” were tasked with preparing reports on different parts of Ontario. The Central Region Smart Growth Panel, which encompasses the GTA region, was asked to examine, in addition to the effects of urban sprawl, the waste disposal needs of the region.

106. Despite the fact that the Smart Growth Process was focused on issues other than waste disposal, REDACTED

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107. To this end, the Enterprise submitted a proposal to the Northeastern Ontario Smart Growth Panel in the Fall of 2002 concerning the economic benefits of the project.

¹⁵⁵ Ontario Ministry of Affairs and Housing, Smart Growth Overview (February 11, 2002) (CAN-398).

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¹⁵⁷ The Northeastern Ontario Smart Growth Panel encompassed the region in which the Adams Mine site was located.

REDACTED

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The Enterprise submitted a separate document to the Central Region Smart Growth Panel on February 10, 2003 entitled "The Rail Haul of Solid Waste, The Ontario Solution."¹⁶⁰ The Enterprise in this document recommended that: "... the Province, the City of Toronto, and the GTA Regions meet as early as possible in an effort to structure an agreement to immediately begin development of the rail system and landfill."¹⁶¹

108. On April 17 and May 27, 2003 the Central and Northeastern Region Smart Growth Panels issued their final reports, respectively.¹⁶² No mention of Adams Mine is contained anywhere in either of these reports.

REDACTED

110. REDACTED

REDACTED

No support appears to have been forthcoming from provincial politicians. Moreover, during the election for Mayor of Toronto in 2003, David Miller and Barbara Hall in fact stated their commitment **not** to reconsider the use of Adams Mine as a waste

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¹⁶¹ See Adams Mine Rail Haul, The Rail Haul of Solid Waste, The Ontario Solution (February 10, 2003) Claimant's Bates Number 02975 (CAN-286).

¹⁶² Ontario Smart Growth, Shape the Future, Central Ontario Smart Growth Panel, Final Report (April 17, 2003) (CAN-296); Northeastern Smart Growth Panel, Shape the Future – Final Report (May 27, 2003) (CAN-304).

REDACTED

disposal site for Toronto.¹⁶⁴ John Tory endorsed the incineration of Toronto's waste, and made no mention of Adams Mine.¹⁶⁵

2. The Waste Management Strategy Group – 2003

111. In July of 2003, the GTA Municipalities established the GTA Waste Management Strategy Group to discuss a long-term waste disposal solution for the GTA region.¹⁶⁶

112. On June 11, 2003, the Enterprise, which remained fixated on obtaining MSW contracts from the GTA Municipalities, REDACTED
REDACTED
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However, Adams Mine was never seriously considered as an option for the GTA Municipalities during any meetings that were held by the Waste Management Strategy Group because Adams Mine was unbuilt and its future availability unpredictable. In fact, municipal and provincial officials that were present at virtually every meeting do not recall Adams Mine being discussed at all.¹⁶⁸

3. The Enterprise Enters a “Standstill Phase” – 2003 to 2004

113. On November 10, 2003, David Miller was elected mayor of Toronto. As stated above,¹⁶⁹ he was publicly opposed to sending Toronto's waste to Adams Mine.¹⁷⁰ Around

¹⁶⁴ REDACTED

REDACTED *See also* Dana Borcea, Miller “Remains Opposed to Adams Mine: Toronto's Trash” *National Post* (November 19, 2003) p. A8, “Mayor-elect David Miller said yesterday that despite efforts to revive the Adams mine landfill, he remains opposed to shipping Toronto's trash to a proposed dump on the Kirkland Lake site. ‘I can't imagine anything would change my mind’ Mr. Miller said. ‘I've debated the issue twice since I've been elected [to council]. I'm thoroughly familiar with the strengths and weaknesses of it and I don't think it's a good solution for Toronto.’” (CAN-317). *See also* George Christopoulos “Miller Dumps on Mine Revival of Trash Proposal Tossed” *The Toronto Sun* (November 20, 2003) (CAN-318).

¹⁶⁵ *Novae Res Urbis* article “City looking to end its love affair with landfill” (May 16, 2003) (CAN-300).

¹⁶⁶ Witness Statement of Doug Barnes, ¶ 41.

REDACTED

¹⁶⁸ Rathbone Witness Statement, ¶ 13. Witness Statement of Doug Barnes, ¶ 41.

¹⁶⁹ Counter-Memorial, ¶ 110; Witness Statement of Richard Butts, ¶ 41.

the same time, REDACTED

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¹⁷⁰ *See, e.g.*, Dana Borcea, "Miller remains opposed to Adams mine: Toronto's trash", *National Post* (November 19, 2003) p. A8 (CAN-317).

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B. The Enterprise's Efforts to Finance the Development of Adams Mine

116. When the Adams Mine site was purchased by the Cortellucci Group, REDACTED

REDACTED

REDACTED This left the Enterprise with less than REDACTED to develop a landfill that would have cost over \$100 million to construct according to the expert report prepared by Mr. Greg Ferraro, an engineer with the internationally recognized firm of Conestoga Rovers & Associates.¹⁸⁰ No infrastructure had been built at the site, the Enterprise was embroiled in a lawsuit with CWS, and no evidence on the record shows that any financing was forthcoming.¹⁸¹

117. Indeed, there is no evidence that any money was or would soon be made available to the Enterprise from any other investors. For example, there is no evidence of any direct contact between any of the proponents of Adams Mine and a potential investor — not a term sheet; not a letter; not a draft agreement; not even a pitch letter, email or presentation. Further, even the Claimant's own witnesses make clear REDACTED

REDACTED

118. Moreover, the Enterprise itself didn't show any willingness to REDACTED phase and begin construction of a landfill at Adams Mine. Thus, for example, REDACTED

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¹⁸⁰ Evaluation of Site Improvement and Landfill Operation Costs, prepared by Gregory D. Ferraro, Conestoga-Rovers & Assocs. (June 2010), pp. 2, 50, Table 5.1a.

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119. By the beginning of 2004, therefore, the Enterprise had insufficient funds to construct a landfill at Adams Mine, had no prospects for raising those funds with other investors, and even Mr. Cortellucci himself had shown an unwillingness to cover all of the expenses for the Enterprise's activities.¹⁸⁶ REDACTED

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REDACTED

Thus, in 2002, the Enterprise acquired, by its own admission, a failing business, and by 2004, nothing had changed.

C. The Enterprise's Efforts to Meet the Conditions of the Provisional Certificate

120. When it acquired Adams Mine, the Enterprise also acquired the EA Approval and the Provisional Certificate, along with the obligation to fulfill all of the sixty six conditions described at paragraph 73 above. The vast majority of these conditions remained unfulfilled when the Enterprise acquired Adams Mine, including the requirements to obtain a short-term Permit to Take Water and secure legal access to the Borderlands. The Enterprise failed to make any progress in satisfying them.

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121. Moreover, a new scientific report was released, which raised serious questions regarding some of the earlier data developed by Notre's consultants to show that hydraulic containment would be effective. Furthermore, Canadian law developed which required Government officials to conduct further consultations with Aboriginal communities. Thus, by 2004 the Enterprise was not further advanced than it had been in 2002 when it acquired Adams Mine.

1. The Enterprise's Application for a Short-Term Permit to take Water

122. A Permit to Take Water (PTTW¹⁸⁸) is a permit that is required under the *OWRA* to remove or "take" more than 50,000 litres of water per day.¹⁸⁸ REDACTED

REDACTED

REDACTED Accordingly, the Provisional Certificate required the Enterprise to obtain a PTTW for two reasons. First, the Enterprise's plan was to dewater the South Pit at more than 50,000 litres of water per day prior to developing it into a landfill.¹⁹⁰ Second, scientists in the MOE needed to gather field data during the dewatering of the South Pit to determine whether hydraulic containment would be effective.¹⁹¹

123. Notre had been granted a PTTW to dewater the South Pit on October 18, 2000, but having never commenced dewatering, Notre allowed it to expire on October 30, 2001.¹⁹²

¹⁸⁸ Witness Statement of Mark Puumala, ¶ 10.

¹⁸⁹ REDACTED
REDACTED

¹⁹⁰ Witness Statement of Mark Puumala, ¶ 26.

¹⁹¹ Witness Statement of Mark Puumala, ¶ 27. Notre and the Enterprise's own experts acknowledged the need to gather field data during the dewatering of the South Pit to determine whether hydraulic containment would be effective. Letter from Steven J. Usher, Gartner Lee Limited to David Hollinger, Ministry of the Environment and Gordon McGuinty (July 4, 2003) (CAN-309).

¹⁹² Notre requested a 5 year "amendment" to the expired PTTW, without indicating any date on which it proposed to begin dewatering. Letter from Gordon McGuinty to David Hollinger, Director, Water Resources Unit, Re: Adams Mine Landfill – South Pit Dewatering, Application for Amendment of Temporary Permit to Take Water No. 00-P-6040 (January 4, 2002) Bates Number 00460 (CAN-81). The MOE replied on January 15, 2002, that it could not "amend" the PTTW, but offered to retain Notre's application on file until such time as Notre had a specific date on which it desired to commence dewatering, at which time it would issue a new PTTW, provided that nothing had changed. Letter from David

124. On July 7, 2003, the Enterprise applied for a new PTTW. The Enterprise's application indicated that the water level in the South Pit had risen some 10 metres since the time the MOE granted a PTTW to Notre in October, 2000. The MOE was concerned that the increased water elevation might reflect a material change that could have an impact on the Enterprise's proposed water taking. Therefore, on July 17, 2003, the MOE requested that the Enterprise provide it with more information, including all water elevation measurements for the South Pit since October, 2000.

125. The Enterprise responded that it had measured the water level in the South Pit only once during that period.¹⁹³ On July 30, 2003, the MOE asked the Enterprise to provide it with the model and underlying calculations that had been used to estimate the water level.¹⁹⁴ The MOE received no response until [REDACTED].¹⁹⁵

126. During that time, MOE officials conducted a technical review of the Enterprise's application, which they completed in October, 2003. On November 14, 2003, the MOE posted a draft PTTW on the Environmental Bill of Rights Registry for public comment.¹⁹⁶ The MOE received more than 23,000 submissions in response, with almost all of these comments expressing strong objections to the site being used as a landfill.¹⁹⁷

Hollinger, Director, Water Resources Unit to Gordon McGuinty, Re: Permit to Take Water (PTTW) – Adams Mine Landfill South Pit Dewatering (January 15, 2002) (CAN-83).

¹⁹³ Letter from Steven Usher, Senior Hydrogeologist, Gartner Lee Ltd. to Perry Sarvas, Hydrogeologist, Ministry of Environment, Re: 23-481 Adams Mine Dewatering, Additional Water Level Information (July 19, 2003) (CAN-97). Gartner Lee indicated that the last time it had measured the water levels in the South Pit before the measurements taken for this application was on September 25, 2000.

¹⁹⁴ Letter from Perry Sarvas, Hydrogeologist, Ministry of Environment and Energy to Gordon McGuinty, Managing Director, Adams Mine Rail Haul, Re: Adams Mine Landfill – Permit to Take Water, South Pit Dewatering (July 30, 2003) (CAN-99).

¹⁹⁵ Letter from Perry Sarvas, Hydrogeologist, Ministry of Environment and Energy to Gordon McGuinty, Managing Director, Adams Mine Rail Haul, Adams Mine Landfill – Permit to Take Water, South Pit Dewatering, (August 26, 2003) (CAN-102); [REDACTED]
[REDACTED]

¹⁹⁶ Information Notice, Adams Mine Permit to Take Water, EBR Registry Number XA03E0019 (November 14, 2003) (CAN-114). *See also* Witness Statement of Mark Puumala, ¶ 40.

¹⁹⁷ Information Notice, Written Submissions on the Draft Permit to Take Water for Adams Mine, EBR Registry Number XA04E0002 (January 30, 2004) (CAN-126). Most of these submissions were form letters organized by opponents of Adams Mine. MOE staff identified approximately 100 substantive comments on the draft PTTW.

127. REDACTED
REDACTED an expert report prepared by Dr. Ken Howard, a Professor of Hydrogeology in the Groundwater Research Group at the University of Toronto, on the hydrogeological conditions of Adams Mine (“Howard Report”).¹⁹⁸ His report criticized the testing and computer modelling which were carried out by Notre’s consultant Golder in 1998 to prove that hydraulic containment at Adams Mine would be effective, as described at paragraph 72 above. The report concluded that the Provisional Certificate was issued prematurely, and suggested that better computer modeling be employed and further testing be conducted to determine whether hydraulic containment would be effective to prevent leachate contamination at Adams Mine.¹⁹⁹

128. The MOE hydrogeologist who was responsible for reviewing the Enterprise’s PTTW application agreed with many of Dr. Howard’s concerns. As a result, the MOE retained private-sector experts from Franz Environmental Ltd., Intera Engineering Ltd, and Azimuth Environmental, to consider the issues raised by Dr. Howard.²⁰⁰

129. These experts reported their initial findings to MOE in a conference call on march 23, 2004.²⁰¹ These experts subsequently produced a draft outline of their findings on March 31, 2004 and a draft of their final report in May 2004.²⁰² They agreed with many of Dr. Howard’s conclusions, in particular, that the tests and computer modeling employed by Golder were unreliable.²⁰³ Moreover, these consultants identified additional concerns with the field data collected by Golder in support of the original EA Approval. These

¹⁹⁸ REDACTED
REDACTED See also Witness Statement of Doug Barnes, ¶ 32.

¹⁹⁹ Dr. Ken Howard, *The Adams Mine Landfill Proposal, An Independent Review and Critical Analysis of Hydrogeological Investigations and Recent Monitoring Data* (August 12, 2003) (CAN-100).

²⁰⁰ Witness Statement of Mark Puumala, ¶¶ 45 and 49.

²⁰¹ Mark Puumala, *Adams Mine Groundwater Group T.C., Notes* (March 23, 2004) (CAN-131)

²⁰² Franz Environmental Inc., *Draft Review of Groundwater Flow Modelling for Adams Mine* (March 31, 2004) (CAN-33); and Franz Environmental Inc. and Intera Engineering Ltd., *Recommendations Based on a Hydrogeological Review of the Permit to Take Water Application for the Dewatering of South Pit, Former Adams Mine near Kirkland Lake, Ontario* (May, 2004) (CAN-143).

²⁰³ See *Ibid.* p. 3 (CAN-143).

consultants recommended that better computer modeling and further testing be conducted for a period of at least six months to determine whether hydraulic containment would be effective.²⁰⁴

130. The enactment of the *AMLA* in June 2004 ended the technical work of the MOE and its environmental consultants, before the review of the Enterprise's PTTW could be completed.²⁰⁵ None of the MOE officials considering the PTTW application had any knowledge of the *AMLA* until it was introduced into the Ontario Legislature.²⁰⁶ All of the decisions concerning the need for further information and additional technical studies were made solely by MOE scientists, without political direction as part of the normal process for assessing the Enterprise's PTTW application.²⁰⁷

2. The Enterprise's Efforts to Acquire Access to the Borderlands

131. The Provisional Certificate required the Enterprise to secure legal access to the Borderlands, which were the property of the Government of Ontario.²⁰⁸ Ontario's Ministry of Natural Resources ("MNR") had offered to convey the Borderlands to Notre in 2000, but Notre asked it to "hold off" on the land transfer after RCN's negotiations with Toronto collapsed that year.²⁰⁹

132. The MNR did not hear back from Notre or the Enterprise regarding the Borderlands until two years later on October 29, 2002. On that date, Gordon McGuinty met with MNR officials and indicated the Enterprise's desire to purchase the Borderlands.²¹⁰ The MNR officials indicated that, in order to transfer the Borderlands, Mr. McGuinty would have to submit a new application on behalf of the Enterprise with a

²⁰⁴ See *Ibid.* (CAN-143).

²⁰⁵ Email from Heather Brodie-Brown to Thomas Franz, Ken Raven and Thomas Franz, Re: Recommendations for your Review (July 5, 2004) Bates Number 011582 (CAN-334).

²⁰⁶ Witness Statement of Mark Puumala, ¶ 54.

²⁰⁷ Witness Statement of Mark Puumala, ¶ 57.

²⁰⁸ Provisional Certificate of Approval for a Waste Disposal Site, No. A612007 (April 23, 1999), Condition 10 (CAN-60).

²⁰⁹ Record of Verbal Transaction with Mike McGuinty (October 24, 2000) (CAN-234).

²¹⁰ Email from Ivan Cragg, Ministry of Natural Resources to Eleanor Moro, Ministry of Natural Resources *et al.*, Adams Mine – Disp of Crown Land (October 29, 2002) (CAN-276).

map of the area it wanted to purchase.²¹¹ Mr. McGuinty was also required to complete an indemnity agreement transferring legal responsibility for the Borderlands to the Enterprise.²¹²

133. The MNR officials also advised that they intended to conduct a full review of the disposition of the Borderlands to ensure that it did not conflict with any environmental or other public interests.²¹³ In addition, they informed Mr. McGuinty that the Timiskaming First Nation intended to file an Aboriginal land claim in the area,²¹⁴ the effect of which is set out below.

134. On November 18, 2002, the MNR initiated its review of the disposition of the Borderlands. The staff concluded that, at that time, the disposition of the land would have "... [n]o impact on currently identified aboriginal values."²¹⁵ Moreover, the MNR identified an organization called the Timiskaming Forest Alliance Inc., which held a Sustainable Forest License to harvest trees on the Borderlands. Therefore, the MNR determined that the purchase price for the Borderlands should be reduced from \$102,700 to \$51,360 to reflect the fact that the land transfer did not include the right to harvest trees.²¹⁶ The MNR completed its review on February 11, 2003.²¹⁷

²¹¹ *See Ibid.* (CAN-276).

²¹² *See Ibid.* (CAN-276); *see also* Letter and attachments from Gordon McGuinty, Adams Mine Rail Haul to Craig Greenwood, District Manager, Ministry of Natural Resources (April 10, 2003) (CAN-294).

²¹³ *See Ibid.* (CAN-294).

²¹⁴ The MNR had previously notified Michael McGuinty of Notre that the Timiskaming First Nation had indicated that it intended to file a land claim in late 2000. *See* Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Mike McGuinty, Project Manager, Notre Development Corporation (September 7, 2000) (CAN-222); *see also* Letter from Beverly Chevrier-Polson, Vice Chief, Algonquin Nation Programs & Services Secretariat to Hon. Jerry Ouellette, Minister of Natural Resources (April 22, 2003) (CAN-7).

²¹⁵ Ministry of Natural Resources, 26/7 Review, Disp of 971.37 Ha of Crown Land to Notre Development (February 13, 2003) (CAN-287).

²¹⁶ *See Ibid.* (CAN-287).

²¹⁷ *See Ibid.* (CAN-287).

135. On March 10, 2003, the MNR delivered a letter to the Enterprise asking it to submit the following documents within three months:²¹⁸

- a completed application for Crown land for the Borderlands;
- a cheque in the amount of \$51,360;
- a Corporate Profile Report for the Enterprise; and
- an executed copy of the indemnity agreement.

136. The letter did not include a closing date or provide any assurances as to the length of time it would take to convey the Borderlands.²¹⁹

137. On April 1, 2003, the MNR finalized a “Land Disposition Policy”²²⁰ that required it to consult with Aboriginal communities where a requested disposition could result in the infringement of an existing Aboriginal or treaty right, or where a disposition involved lands that are subject to an Aboriginal land claim.²²¹

²¹⁸ Ministry of Natural Resources, Telephone Conversation Record of Ivan Craig (March 10, 2003) (CAN-293).

²¹⁹ Contrary to the Claimant’s assertions, the disposition of Crown land in the province of Ontario is not identical to a residential Agreement of Purchase and Sale: *see e.g.*, Claimant’s Memorial, ¶¶220, 232, 234. The Government of Ontario has legislative powers over public property that enables it to dispose of the province’s property. The actual conveyance of the Province’s land is authorized by the issuance of “Letters Patent,” which requires the recommendation of the responsible Minister, approval of Cabinet and the signature of the Lieutenant Governor of Ontario. Therefore, even where an agreement with a prospective purchaser has been reached, the Minister may still reserve his or her recommendation or direction that Letters Patent be completed until a further review of the disposition is complete. The *Public Lands Act* gives no specific rights to prospective purchasers of the Province’s lands, such as the Enterprise. A conveyance is complete once the Letters Patent are issued, and have been registered. Only then is the Government of Ontario no longer the proprietor of the land in question. *See Public Lands Act*, R.S.O. 1990, c. P.43, ss. 2, 5(1) and 16 (CAN-391).

²²⁰ Ministry of Natural Resources, Application Review and Land Disposition Review Process (April 1, 2003) (CAN-2).

²²¹ Treaty rights are rights embodied in the treaties Aboriginal peoples entered into with the Crown (e.g. the Government of Ontario or the Government of Canada). Aboriginal rights, which are distinct from treaty rights, are practices, customs or traditions integral to the distinctive culture of the Aboriginal community claiming the right (see *R. v. Van der Peet* [1996] 2 R.C.S. 507) (CAN-392). Aboriginal title, a form of Aboriginal right, may exist where an Aboriginal community exclusively occupied land prior to the Crown asserting sovereignty over it (*R v. Delgamuukw* [1997] 3 S.C.R. 1010) (CAN-393). Existing Aboriginal rights and treaty rights are recognized and affirmed under section 35 of the *Constitution Act, 1982*. Examples of Aboriginal and treaty rights include hunting and fishing.

138. On April 14, 2003, the MNR received the Enterprise's completed application and other documentation from the Enterprise, including a cheque for \$51,360 signed by Mr. Cortellucci.²²²

139. At virtually the same time, the MNR received correspondence from area Aboriginal communities claiming that they had not been adequately consulted and that the proposed transfer of the Borderlands had the potential to adversely affect their Aboriginal or treaty rights.²²³ As such, MNR decided to delay the decision to transfer the Borderlands in order to undertake further consultation with Aboriginal communities and to determine whether or not the proposed disposition of the Borderlands might infringe any existing Aboriginal or treaty rights.²²⁴

140. In addition, since MNR had sent its March 10, 2003 letter to the Enterprise outlining the conditions for the Enterprise to purchase the Borderlands, the Supreme Court of Canada had granted leave to hear one of two companion cases articulating the law on the duty to consult.²²⁵ If affirmed, these two decisions would significantly expand existing consultation obligations owed to Aboriginal peoples.

²²² Mr. McGuinty's letter is dated April 10, 2003 and is marked received April 14, 2003. See Letter and attachments from Gordon McGuinty, Adams Mine Rail Haul to Craig Greenwood, District Manager, Ministry of Natural Resources (April 10, 2003) (CAN-294).

²²³ For a list of the relevant Aboriginal communities, their interests and complaints, please see Witness Statement of Chris Maher, ¶19; *see also* Letter from Mary Batise for Fabian Batise, Band Manager, Matachewan First Nation to Hon. Jerry Ouellette, Minister of Natural Resources (April 14, 2003) (CAN-3); and Letter from Chief Roy Meaniss, Beaverhouse First Nation Community to Hon. Jerry Ouellette, Minister of Natural Resources (April 15, 2003) (CAN-4); and Email from Rob Galloway, Regional Director, Northeast Region, Ministry of Natural Resources to Eric Doidge, Ministry of Natural Resources, Wabun Tribal Council & Adams Mine (April 15 2003) (CAN-5); and Wabun Tribal Council, Media Release, "First Nations Oppose Adams Mine Dump Proposal For Lack of Consultation" (April 15, 2003) (CAN-6); and Letter from Beverly Chevrier-Polson, Vice Chief, Algonquin Nation Programs & Services Secretariat to Hon. Jerry Ouellette, Minister of Natural Resources (April 22, 2003) (CAN-7); and Letter from Stan Beardy, Grand Chief, Nishnawbe Aski Nation to Hon. Jerry Ouellette (June 20, 2003) (CAN-10); and REDACTED

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²²⁵ *Haida Nation v. British Columbia (Minister of Forests)*, 216 D.L.R. (4th) 1 (B.C.C.A.) (March 20, 2003) (CAN-386); *see also Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 ["*Haida Nation SCC*"] (CAN-387). In that case, licenses that were granted by the Government of British Columbia to a corporation to harvest trees on lands to which the Haida Nation asserted title. The Haida Nation challenged the issuance of the licenses, which they alleged were made without their consent

141. The duty to consult is a constitutionally mandated government obligation that triggered “when the Crown [e.g. the Governments of Ontario and Canada] has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”²²⁶

142. As a result, on April 29, 2003, MNR staff advised the Enterprise that the MNR had to conduct further consultations with Aboriginal communities before transferring the Borderlands.²²⁷ The Enterprise’s response was to threaten to commence legal proceedings if the Borderlands were not immediately transferred to it.²²⁸

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and over their ongoing objections. The Supreme Court of Canada ruled that the Government of British Columbia had a constitutional duty to consult with the Haida Nation prior to issuing the licenses. See also, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 211 D.L.R. (4th) 89 (B.C.C.A.) (November 14, 2002) (CAN-395); see also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 (CAN-396).

²²⁶ *Haida Nation SCC*. ¶ 35 (CAN-387). See also Witness Statement of Chris Maher, ¶¶ 6-7.

²²⁷ Email from Craig Greenwood, District Manager, Ministry of Natural Resources to Ivan Cragg, Ministry of Natural Resources and Rick Tapley, Ministry of Natural Resources, Adams Mine – Gord McGuinty (May 1, 2003) (CAN-297).

²²⁸ Letter from Gordon Acton, Wishart Law Firm to Craig Greenwood, District Manager, Ministry of Natural Resources, Re: Adams Mine Site (May 28, 2003) (CAN-305).

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146. The MNR, in turn, advised the Enterprise on June 5, 2003, that the transaction was still under review.²³² The Enterprise's response was to file a formal notice of intent to make a claim against the Crown in the amount of \$50 million.²³³

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REDACTED Accordingly, the MNR initiated the Aboriginal consultation process and asked Mr. Chris Maher, Director of the Land Claims Negotiations Branch of the Ontario Native Affairs Secretariat to lead and coordinate that process.²³⁵

148. In September 2003, prior to the actual filing of a formal claim against the Government of Ontario, Mr. Maher met with Gordon McGuinty to address the MNR's plan to undertake further consultations with area Aboriginal communities. Mr. McGuinty alleged that there was no need for the MNR to conduct further consultations with

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²³² Email from Craig Greenwood, Ministry of Natural Resources, to Peter Richard *et al.* Ministry of Natural Resources (June 5, 2003) (CAN-307).

²³³ *In The Matter Of An Agreement Entered Into Between 1532382 Ontario Inc. carrying on business as Adams Mine Rail Haul and Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources*, Notice of Claim (July 28, 2003), ¶ 1 (CAN-98). Under Canadian law, a notice of intent to make a claim against the Government is required.

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²³⁵ See generally Witness Statement of Chris Maher.

Aboriginal communities as the Enterprise had already done so.²³⁶ Mr. Maher responded that contrary to what Mr. McGuinty understood, the duty to consult was a governmental responsibility.²³⁷ During this discussion, Mr. McGuinty conceded that it was “better to do this than not.”²³⁸

149. Nonetheless, on October 9, 2003, the Enterprise filed a Statement of Claim against the MNR in the Ontario Superior Court of Justice (“Borderlands Litigation”).²³⁹ In the Borderlands Litigation, the Enterprise alleged that it had entered into a contract with the MNR for the conveyance of the Borderlands (“Borderlands Application”). The Enterprise requested a permanent declaration that it was entitled to the Borderlands²⁴⁰ or, in the alternative, damages which it claimed amounted to \$301 million.²⁴¹ The Enterprise also brought a motion for summary judgment that was scheduled to be heard by Ontario’s Superior Court of Justice on April 17, 2004.²⁴²

150. During this time frame, the MNR prepared a plan to consult area Aboriginal communities.²⁴³ These communities included the First Nations of Timiskaming, Mattagami, Temagami, Wahgoshig, and Matachewan, as well as communities of Teme-

²³⁶ Witness Statement of Chris Maher, ¶¶ 32-33

²³⁷ Witness Statement of Chris Maher, ¶ 33. Mr. McGuinty continues to be under the misimpression that Aboriginal consultation could be discharged by the Enterprise: *see e.g.* Witness Statement of Gordon McGuinty, ¶ 115; Claimants’ Memorial, ¶ 239.

²³⁸ Email of Chris Maher, Ontario Native Affairs Secretariat, to Rick Tapley, Ministry of Natural Resources (September 17, 2003) (CAN-23); *see also* Witness Statement of Chris Maher, ¶ 34.

²³⁹ *1532382 Ontario Inc. v. Minister of Natural Resources*, Court File No. 22368/A3 (Ont. Sup. Ct.) (Statement of Claim) (October 9, 2003) (CAN-107).

²⁴⁰ *See Ibid.* ¶ 1(CAN-107). Under Ontario law, the Government of Ontario cannot be compelled by a court to transfer ownership of Crown land. *See Masher v. Ontario*, 48 R.P.R. (3d) 151 (Ont. Sup. Ct.) (CAN-390).

²⁴¹ *1532382 Ontario Inc. v. Minister of Natural Resources*, Court File No. 22368/A3 (Ont. Sup. Ct.) Statement of Claim (October 9, 2003) ¶ 1 (CAN-107).

²⁴² *1532382 Ontario Inc. v. Minister of Natural Resources*, Court File No. 22368/A3 (Ont. Sup. Ct.) (April 17, 2004). As described at ¶ 207, this lawsuit was settled and the motion subsequently adjourned (CAN-130). The motion for summary judgment was for a declaratory order only and did not request damages.

²⁴³ Bob Johnston, Ministry of Natural Resources, Adams Mine lake Disposition Summary (November 6, 2003) (CAN-39).

Augama Anishnabai and Beaverhouse.²⁴⁴ The MNR prepared a plan which envisaged meeting two or three times with each Aboriginal community concerning the sale of the Borderlands. On August 27, 2003, the MNR invited area Aboriginal communities to attend the planned consultations.²⁴⁵

151. However, because of the hunting season, which is of great cultural and economic importance to Aboriginal communities in northern Ontario, the MNR was unable to schedule the first round of these meetings until early November.²⁴⁶ Consultations ultimately stretched into the spring of 2004. The MNR repeatedly contacted Mr. McGuinty and the Enterprise throughout the Aboriginal consultation process to keep them informed of their progress.²⁴⁷

²⁴⁴ *1532382 Ontario Inc. v. Minister of Natural Resources*, Court File No. 22368/A3 (Ont. Sup. Ct.) Affidavit of Bob Johnson (April 1, 2004) ¶ 15 (CAN-45).

²⁴⁵ Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Roy Meaniss, Chief, Beaverhouse First Nation Community (August 27, 2003) (CAN-11); *see also* Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Chief Elenor Hendrix and Council, Matachewan First Nation (August 27, 2003) (CAN-12); Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Chad Boissonneau, Chief, Mattagami First Nation (August 27, 2003) (CAN-13); Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Alex Paul, Chief, Temagami First Nation (August 27, 2003) (CAN-14); Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Doug MacKenzie, Chief, Tem-Augama Anishnabai (August 27, 2003) (CAN-15); Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Beverly Chevrier-Polson, Band Administrator, Timiskaming First Nation (August 27, 2003) (CAN-16); Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Shawn Batise, Executive Director, Wabun Tribal Council (August 27, 2003) (CAN-17); Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Paul MacKenzie, Chief, Waghoshig First Nation (August 27, 2003) (CAN-18); Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Carol McBride, Grand Chief, Algonquin Nation Secretariat (August 28, 2003) (CAN-19).

²⁴⁶ Witness Statement of Chris Maher, ¶ 23.

²⁴⁷ *See e.g.* Email from Rick Tapley, Ministry of Natural Resources to Craig Greenwood, District Manager, Ministry of Natural Resources, Adams Consultation (September 3, 2003) (CAN-20); Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Gordon McGuinty, President, Notre Development Corporation, First Nations Consultations, Adams Mine (September 4, 2003) (CAN-21); Email from Craig Greenwood, District Manager, Ministry of Natural Resources to Rob Galloway *et al.*, Adams Mine – Voicemail from Gord McGuinty (October 10, 2003) (CAN-37); Email from Craig Greenwood, District Manager, Ministry of Natural Resources to Peter Richard, *et al.*, Adams Mine – Call With Mr. McGuinty (October 14, 2003) (CAN-38); Letter Craig Greenwood, District Manager, Ministry of Natural Resources to Gordon McGuinty, Managing Director, Adams Mine Rail Haul, Land Transfer – Adams Mine Site (November 14, 2003) (CAN-40); Email Chris Maher, Deputy Director, Negotiations, Ontario Native Affairs Secretariat to Gordon McGuinty, Managing Director, Adams Mine Rail Haul, Tour of Adams Mine Site (September 26, 2003) (CAN-24).

152. On April 1, 2004, the MNR estimated that these consultations would be complete by no later than June.²⁴⁸ The MNR would then have been in a position to determine whether it should proceed with the immediate sale of the Borderlands to the Enterprise.

153. Any further discussion and consultation with the Aboriginal communities on the proposal ceased with the enactment of the *AMLA* in June 2004, as it prevented the disposition of the Borderlands.

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155. All the decisions concerning the need to consult were made solely by MNR officials, without political direction, and without prior knowledge of the *AMLA*.²⁴⁹

3. The Enterprise Did Not Acquire the Additional Approvals Needed for the Adams Mine Site

156. Even if the Enterprise obtained the PTTW and acquired legal access to the Borderlands after consultations with local Aboriginal communities, the Enterprise would still have needed to acquire numerous other approvals from the Government of Ontario, including, among others:

- a Certificate of Approval under the *OWRA* for the transmission, treatment and discharge of leachate from the landfill site;
- a Certificate of Approval under the *OWRA* for Stormwater Management Facilities to capture surface water from precipitation and to hold all of the treated leachate over the course of the winter as the leachate could not be discharged into the wetlands at that time;

²⁴⁸ Witness Statement of Chris Maher, ¶ 29.

²⁴⁹ The Claimant has attempted to characterize the MNR's decision to delay the transfer, as motivated by bad faith and the political meddling of Minister Ramsay with nothing but a series inferences for evidence. As Chris Maher, then Director of the Land Claims Negotiations Branch has explained, he did not witness any political interference. See Witness Statement of Chris Maher, ¶ 36.

- a Certificate of Approval under the *EPA* for a Landfill Gas Control Plant and Flares;
- a long-term PTTW for the continuous pumping of leachate-impacted water from the South Pit under the *OWRA*,²⁵⁰ and
- up to four additional approvals under the *EPA* for: (1) the transfer of waste onto trucks (transfer station); (2) the transport of the waste by trucks to the rail yard (systems approval); (3) the transfer of the containers of waste from the trucks onto the rail cars (transfer station); and (4) ONTC to haul the waste as freight from North Bay to Adams Mine.

157. None of these permits and approvals had been secured before the enactment of the *AMLA*. In fact, the Enterprise had not even submitted a complete application for any of these permits and approvals.

158. Further, it was possible that a federal environmental assessment for Adams Mine would be required. In Canada, jurisdiction over the environment is shared between the federal and provincial governments. The *Canadian Environmental Assessment Act* gives the federal Department of the Environment (“Environment Canada”) the discretion to refer a project for review if it might cause adverse environmental effects in another province,²⁵¹ or on an Indian reserve.²⁵²

159. The Adams Mine site is less than 30 kilometres from the Quebec border. Further, in 2000, the Timiskaming First Nation submitted a formal petition for a federal environmental assessment because of the potential environmental effects of the site on First Nations reserves and land in the province of Quebec.²⁵³

²⁵⁰ This permit could not be applied for until the dewatering of the pit pursuant to the short-term PTTW had been completed.

²⁵¹ *Canadian Environmental Assessment Act*, S.C. 1992, c.37, ss. 29(1)(a)(ii), 33(1), 46(1) and 46(3)(b) (CAN-384).

²⁵² *See Ibid.*, ss. 29(1)(a)(ii), 33(1), 48(1)(a), (b) and (e) and 48(4)(b) (CAN-384).

²⁵³ Letter from Rheal Thivierge, Vice-Chief, Timiskaming First Nation to the Hon. David Anderson, Minister of the Environment, Re: Adams Mine/Timiskaming First Nation (September 1, 2000), enclosing Petition to Federal Minister of the Environment Requesting a Federal Environmental Assessment of Rail Cycle North’s Proposal for the Adams Mine Site (September 1, 2000) (CAN-221). A public interest group, known as the Campaign Against Adams Mine, also filed a petition for a federal environmental review. The Campaign Against Adams Mine included the following public interest groups & municipalities: Comité de la Sauvegarde du lac Témiscamingue, Municipalités régionales du Comité de Témiscamingue, Timiskaming Federation of Agriculture, Northwatch, Great Lakes United, and

160. The Canadian Environmental Assessment Agency (“CEAA”) contacted Environment Canada’s National Water Resources Institute (“NWRI”) and National Resources Canada (“NRCan”) to request a scientific review of the proposal to develop Adams Mine.²⁵⁴ As part of this review, hydrogeologists at both the NWRI and NRCan noted that adverse inter-provincial effects were unlikely. However, as in the Howard Report, the NWRI and NRCan noted that they had serious reservations concerning the modelling used by the proponents to establish that hydraulic containment would be effective,²⁵⁵ the assumptions upon which that model was based,²⁵⁶ as well as the lack of relevant data and data collection.²⁵⁷

161. The NWRI and NRCan communicated these preliminary findings to the CEAA on November 20, 2000, and to Environment Canada on July 23, 2001.²⁵⁸ Ultimately, Environment Canada never made a decision on whether a federal assessment would be required because the review process was halted when RCN terminated the negotiations with Toronto in 2000.

Municipalities of Timiskaming. *See* Pierre Belanger, Campaign Against Adams Mine to Hon. David Anderson, Minister of Environment (September 20, 2000) enclosing Petition for a Federal Environmental Assessment of a Proposed Landfill at the Adams Mine – Supporting Brief, submitted by Campaign Against Adams Mine (September 21, 2000) (CAN-223).

²⁵⁴ Letter from Louise Knox, Regional Director, Canadian Environmental Assessment Agency to Rob Dobos, Head, Environmental Assessment, Environment Canada, Re: Adams Mine Landfill Project (September 25, 2000) (CAN-224); *see also* Letter from Louise Knox, Regional Director, Canadian Environmental Assessment Agency to Rennie Tupper, Environmental Assessment, Natural Resources Canada, Re: Adams Mine Landfill Project (September 25, 2000) (CAN-225).

²⁵⁵ Memorandum from Allan Crowe, Project Chief and Pat Lapcevic, Hydrogeologist, National Water Research Institute to Rod Allan, Associate Executive Director, National Water Research Institute, Re: Federal Review of Adams Mine Landfill Proposal DRAFT (November 20, 2000), Question 5(a), p. 3. (CAN-236). *See also* Draft NRCan Advice to CEAA re Adams Mine (Undated) (CAN 381).

²⁵⁶ Memorandum from Allan Crowe, Project Chief and Pat Lapcevic, Hydrogeologist, National Water Research Institute to Rod Allan, Associate Executive Director, National Water Research Institute, Re: Federal Review of Adams Mine Landfill Proposal DRAFT (November 20, 2000), Question 5(b), p. 4. (CAN-236); *See also* Draft NRCan Advice to CEAA re Adams Mine (Undated) (CAN 381).

²⁵⁷ Memorandum from Allan Crowe, Project Chief and Pat Lapcevic, Hydrogeologist, National Water Research Institute to Rod Allan, Associate Executive Director, National Water Research Institute, Re: Federal Review of Adams Mine Landfill Proposal DRAFT (November 20, 2000), Question 5(a), p. 3. (CAN-236); *See also* Draft NRCan Advice to CEAA re Adams Mine (Undated) (CAN 381).

²⁵⁸ Email from Pat Lapcevic, Hydrogeologist, National Water Resources Institute, to Rob Dobos, Environment Canada and Dave Stasseff, Ministry of the Environment (July 23, 2001) (CAN-243).

VII. THE ADAMS MINE LAKE ACT, 2004

A. Background to the Government's Policy on Adams Mine

162. When considering any development proposal, a responsible government must take a number of factors into account. Among these are public concern over a project and the potential for adverse environmental effects.²⁵⁹ In the case of the proposal to develop Adams Mine into a waste disposal facility, public concern was intense, and the new Government was not comfortable with the environmental risks associated with the project.

1. The Walkerton Tragedy

163. The public and governmental concern over the Adams Mine project cannot be fully appreciated without understanding the tragedy that took place in Walkerton, Ontario, in 2000. In May of that year, 2,300 residents or roughly half of Walkerton's residents became seriously ill from contaminated drinking water, with seven of them dying and many more still facing long-term health effects.²⁶⁰ The long-term consequences of this tragedy reached well beyond the town's limits, changing the environmental policy landscape in the province and influencing international health policy.²⁶¹

164. The tragic events at Walkerton resulted in the provincial government launching a two year judicial inquiry into the tragedy.²⁶² That inquiry took place from June 3, 2000 to January 14, 2002 which attracted intense media scrutiny, especially during the 9 months of the televised public hearings which it received testimony from 114 witnesses including

²⁵⁹ See e.g., Canadian Environmental Assessment Act, S.C. 1992, c. 37, Preamble s. 4 (CAN-388).

²⁶⁰ Report of the Walkerton Inquiry, Part One, January, 2002, p. 3 (CAN-82) For more on a 2007 follow-up health study, see online: <http://www.cbc.ca/health/story/2007/10/26/walkerton-study.html>, or for a ten year anniversary story from 2010, see online: <http://www.cbc.ca/canada/toronto/story/2010/05/16/walkerton-sunday.html>.

²⁶¹ For example, a comparison of Walkerton to other similar incidences around the world was discussed at the April 2002 International Water Association World Water Congress, Health-Related Water Microbiology Symposium, Melbourne Australia, as cited in Report of the Walkerton Inquiry, Part Two, May, 2002, p. 2 (CAN-88).

²⁶² Report of the Walkerton Inquiry, Part One, January, 2002, p. 2 (CAN-82).

two cabinet ministers and the then Premier of Ontario, Mike Harris.²⁶³ It marked the first time in half a century that a sitting premier was required to testify before a judicial inquiry, and media coverage was widespread in the province.

165. The Walkerton tragedy propelled environmental concerns with respect to Ontario's water resources to the forefront of public discourse. The tragedy that took place there caused water quality to become a paramount issue among Ontario's population and decision makers.²⁶⁴

166. At the same time events were unfolding in Walkerton, Adams Mine was being considered as a potential waste disposal site for Toronto. Many drew parallels between the contamination of drinking water in Walkerton and the potential threat Adams Mine posed to Ontario's water resources.²⁶⁵ Indeed, the judicial inquiry determined that landfill leachate contains chemicals which pose a risk to drinking water in Ontario.²⁶⁶

2. Public Concern over Using Adams Mine as a Waste Site

167. In 1990, Notre convinced Kirkland Lake, Larder Lake and Englehart to support the Adams Mine project. These communities were located *upstream* from Adams Mine and due to their proximity to the site hoped to receive some economic benefit from the project. This allowed Notre to assert that the local communities around Adams Mine were a "willing host" for the receipt of Toronto's MSW. However, the communities *downstream* of Adams Mine, where most of the area's population lived and had a separate economic base, consistently opposed the project from its inception. In any event, as public awareness of the project grew, even the communities that originally supported it became divided over the proposal to develop the site.²⁶⁷

²⁶³ See *Ibid.* pp. 2-3 (CAN-82).

²⁶⁴ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 82 (October 2, 2000) (CAN-226).

²⁶⁵ See *Ibid.* (CAN-226).

²⁶⁶ Part Two, Report of the Walkerton Inquiry a Strategy for Safe Drinking Water, Chapter 5, p. 165 (CAN-88).

²⁶⁷ See "Larder Grapples with Opposition to Garbage" *Kirkland Lake Gazette* (September 27, 1995) (CAN-192); Concerned Citizens of Larder Lake, Adams Mine Site Assessment Project, Larder Lake 'Willing Host' Survey (August 1995) (CAN-190).

168. Local citizens groups conducted numerous petitions and polls concerning the proposal to develop Adams Mine, both in the Boston Township where Adams Mine is actually located, and in downstream communities. These polls consistently showed a significant amount of concern about the proposal. In fact, a poll of the residents of Boston Township showed that 95 percent of its respondents opposed the proposal to develop Adams Mine.²⁶⁸ Other polls in Chamberlain Township,²⁶⁹ and in Dymond, Evanturel, Dack and Ingram townships²⁷⁰ all showed overwhelming opposition to the project. The agricultural industry located downstream of Adams Mine, too, overwhelmingly opposed the Adams Mine project.²⁷¹

169. These townships and businesses were primarily concerned about the impact that the Adams Mine project might have on drinking and irrigation water. The opposition to Adams Mine intensified when the site received its Provisional Certificate in 1998, during contract negotiations between RCN and Toronto, which occurred shortly after the events at Walkerton in 2000, and during the consideration of the Enterprise's application for a short-term PTTW and for the purchase of the Borderlands in 2003.

170. In February 2000, a poll conducted by Oracle Research Ltd. of residents in Timiskaming District showed that 85 percent had concerns over ground and surface water contamination from the proposal to develop Adams Mine.²⁷² A further 72 percent indicated that they were concerned that there had not been a local referendum on the issue. The poll concluded that a total of 66 percent of the local residents opposed the plan to develop Adams Mine as a waste disposal site.²⁷³ The poll also noted that support for the project was strongest amongst residents in Kirkland Lake.

²⁶⁸ Measuring the "Willingness/Unwillingness" of Temiskaming Residents, the Adams Mine Issue (December 13, 1995) p. 5 (CAN-194).

²⁶⁹ See *Ibid.* p. 7 (CAN-194).

²⁷⁰ See *Ibid.* pp. 5-7 (CAN-194). These polls showed that of those participating 93 percent in Dymond Township, 95 percent of respondents in Evanturel Township, 94 percent of respondents in Dack Township and 97 percent of respondents in Ingram Township opposed the project.

²⁷¹ See *Ibid.* p. 7 (CAN-194).

²⁷² Richard MacKie, "Toronto's Garbage Unwelcome: Survey Poll Commissioned by Liberal MPP Says Shipping Waste North is Unpopular", *Globe and Mail* (February 15, 2000), p. A7. (CAN-404)

²⁷³ See *Ibid.* (CAN-404)

171. The opposition to the project further intensified following the Walkerton tragedy in May 2000.²⁷⁴ The water contamination in Walkerton was linked directly to the perceived threat that Adams Mine posed to local ground and surface water. In 2003, opponents became even more vocal following the Enterprise's application for a short-term PTTW, the release of the Howard Report, and the Enterprise's attempt to purchase the Borderlands. The concern over the proposal to develop Adams Mine became so widespread that all of the local candidates in the 2003 provincial election ran on platforms promising the government would halt, or at a minimum, conduct extensive additional review of the project.²⁷⁵

3. The Government's Concerns over the Potential Adverse Environmental Impacts of Adams Mine

172. In October 2003, the Liberal Party, which had been in opposition, was elected the new Government of Ontario. Even prior to its election, it was concerned that the proposal to develop Adams Mine posed a threat to the environment and the local watershed.

173. While in opposition, the Liberal Party made clear that it was committed to the protection of Ontario's water resources for future generations. In light of the Walkerton tragedy,²⁷⁶ Dalton McGuinty, the leader of the Liberal Party and the future premier, explained:

²⁷⁴ Witness Statement of Richard Butts, ¶¶ 27, 35.

²⁷⁵ "Campaign Trail Littered by Adams Mine Platforms" *Timiskaming Speaker* (October 1, 2003) (CAN-315). See Darlene Wroe, "Debate by provincial candidates centres on Adams Mine concerns" *Timiskaming Speaker* (19 September 2003) and "Question for the Candidates" *Timiskaming Speaker* (September 12, 2003) both available at <http://speaker.northernontario.ca/texts/archives/adams/2003.html> (CAN-399).

²⁷⁶ See for example Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 82 (October 2, 2000) pp. 4314-4316 (CAN-226); No. 87A (October 11, 2000) pp. 4541-4542 (CAN-228); No. 92 (October 19, 2000) p. 4839 (CAN-232); No. 93A (October 23, 2000) p. 4927 (CAN-233); No. 10 (May 3, 2001) p. 433 (CAN-242); No. 69 (November 22, 2001) pp. 3795-3796 (CAN-400); No. 74B (December 3, 2001) p. 4144 (CAN-246); No. 4A (May 6, 2003) p. 112 (CAN-298); No. 13 (May 22, 2003) pp. 535, 539 (CAN-303).

I believe we should be doing everything possible to prevent another Walkerton. That means assigning the highest possible priority to protection of our water.²⁷⁷

174. Because all landfills pose some risk of water contamination,²⁷⁸ the Liberals recognized that it was necessary for Ontario to rely less on landfills. They viewed landfilling as an archaic method of waste management²⁷⁹ and advocated the diversion of waste from landfills by recycling²⁸⁰ and investment in emerging technologies.²⁸¹ Where waste could not be diverted, the goal was for it to be landfilled “in the most environmentally benign area possible.”²⁸²

175. However, the potential for water contamination was felt to be acute with the Adams Mine proposal, and the Liberals considered the proposal to be “a water issue.”²⁸³ In particular, they were concerned that hydraulic containment at the site could fail and that leachate could contaminate the local watershed.²⁸⁴ The potential long-term

²⁷⁷ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 82 (October 2, 2000) pp. 4313, 4315 (CAN-226).

²⁷⁸ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 73 (June 15, 2000) pp. 3822, 3824-3825 (CAN-219); No. 75B (June 20, 2000) p. 4012 (CAN-220); No. 82 (October 2, 2000) p. 4314 (CAN-226); No. 74B (December 3, 2001) p. 4144 (CAN-246); No. 75A (December 4, 2001) p. 4147 (CAN-247); No. 78B (December 10, 2001) pp. 4401-4403 (CAN-248); No. 53B (November 4, 2002) p. 2796 (CAN-278); No. 72A (December 12, 2002) p. 3839 (CAN-281).

²⁷⁹ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 93 (June 24, 1996) p. 2010 (CAN-198); No. 72A (December 12, 2002) p. 3838 (CAN-281). See also Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 74B (December 3, 2001) pp. 4121, 4123 (CAN-246).

²⁸⁰ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 88 (June 13, 1996) p. 1050 (CAN-197); No. 73 (June 15, 2000) pp. 3824, 3828 (CAN-219); No. 82 (October 2, 2000) pp. 4315-4316, 4318 (CAN-226); No. 93A (October 23, 2000) pp. 4896-4897 (CAN-233); No. 74B (December 3, 2001) pp. 4115, 4117-4120, 4121-4124, 4134, 4140-4143 (CAN-246); No. 78B (December 10, 2001) pp. 4400, 4403 (CAN-248); No. 11A (May 29, 2002) p. 446 (CAN-260); No. 20B (June 13, 2002) pp. 986, 988 (CAN-261); No. 72A (December 12, 2002) pp. 3841-3842 (CAN-281); No. 21 (June 5, 2003) p. 918 (CAN-308).

²⁸¹ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 93 (June 24, 1996) p. 2010 (CAN-198); No. 75B (June 20, 2000) p. 4012 (CAN-220); No. 82 (October 2, 2000) pp. 4315-4316, 4318-4319 (CAN-226); No. 93A (October 23, 2000) p. 4928 (CAN-233).

²⁸² Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 82 (October 2, 2000) p. 4319 (CAN-226).

²⁸³ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 93A (October 23, 2000) p. 4927 (CAN-233). See also No. 82 (October 2, 2000) p. 4313. (CAN-226).

²⁸⁴ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 88 (June 13, 1996) p. 1010 (CAN-197); No. 93 (June 24, 1996) pp. 2000-2020 (CAN-198); No. 119 (November 4, 1996) p. 1700 (CAN-200); No. 11B (May 12, 1998) p. 1940 (CAN-207); No. 65A (December 7, 1998) p. 1730

environmental and health costs were seen to far outweigh any potential short-term economic benefits, particularly after the experience of Walkerton.²⁸⁵

176. Thus, with respect to Adams Mine, Dalton McGuinty, stated:

Surely one of the things that the Walkerton tragedy fairly shouts out to us here is that it is irresponsible. It is dangerous to proceed with [Adams Mine] on the basis of incomplete and inconclusive results. Walkerton tells us that when it comes to protecting our water we must be absolutely sure; there can be no doubt; we can take no risks. Surely that's what Walkerton tells us.²⁸⁶

177. Accordingly, after the Enterprise attempted to purchase the Borderlands in 2003, Dalton McGuinty stated that if his party were elected the next Government of Ontario, it would not allow the Adams Mine project to proceed until it had been determined that there would be no negative impacts on the region's groundwater, and a referendum had established that the community was a willing host.²⁸⁷ David Ramsay promised to go further and shut down the site and ban the use of:

any spent mining operation anywhere in the province, whether it be a shaft or an open pit, so we never use these fractured rock quarries, pits or shafts for garbage. Why? Because of water. I think we finally need to understand we have to preserve our groundwater resources in this province. We can't squander them.²⁸⁸

178. Only a few months later, on October 2, 2003, the Liberal Party won a provincial election and became the new Government of Ontario. Premier Dalton McGuinty was

(CAN-210); No. 73 (June 15, 2000) pp. 3822-3823 (CAN-219); No. 82 (October 2, 2000) pp. 4314-4315, 4318-4319, 4323, 4331 (CAN-226); No. 87A (October 11, 2000) p. 4542 (CAN-228).

²⁸⁵ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 93 (June 24, 1996) p. 2020 (CAN-198); No. 119 (November 4, 1996) pp. 1700-1710 (CAN-200); No. 11B (May 12, 1998) p. 1940 (CAN-207); No. 65A (December 7, 1998) p. 1730 (CAN-210); No. 73 (June 15, 2000) p. 3823 (CAN-219); No. 82 (October 2, 2000) pp. 4314, 4316, 4318-4319, 4323, 4331 (CAN-226).

²⁸⁶ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 82 (October 2, 2000) p. 4314 (CAN-226).

²⁸⁷ Honourable Dalton McGuinty, Leader of the Official Opposition, "The Future is in Waste Diversion" *The Temiskaming Speaker* (August 13, 2003) Claimant's Bates Number 01279 (CAN-311)

²⁸⁸ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 93A (October 23, 2000) p. 4928 (CAN-233).

sworn in as the Premier with a new Cabinet, which included Leona Dombrowsky as the Minister of the Environment and David Ramsay as the Minister of Natural Resources.²⁸⁹

179. Mr. Ramsey was the provincially elected representative for the District of Timiskaming since 1985. He was especially concerned over the environmental effects of the Adams Mine project. However, as shown above, he was not alone. His view was shared by many of his colleagues.

B. The Development of the Policy behind the AMLA

180. After the election of the new Government, MOE policy officials prepared briefing books for the incoming Government to familiarise them with current issues. Minister Dombrowsky was briefed on Adams Mine shortly after her appointment in late October 2003.²⁹⁰

181. Minister Dombrowsky requested that Government officials develop policy options to address the concerns of the new government over the Adams Mine project.²⁹¹ These officials intentionally excluded from the development of policy options the staff who were responsible for considering the Enterprise's application for a short-term PTTW.²⁹² For the similar reasons, the MNR officials responsible for conducting the Aboriginal consultations concerning the Borderlands were also not aware of the development of policy options concerning Adams Mine.²⁹³

²⁸⁹ See Online: McGuinty Government Takes Office; Ready To Get To Work For All Ontarians (October 23, 2003) <http://news.ontario.ca/opo/en/2003/10/mcguinty-government-takes-office-ready-to-get-to-...> (CAN-316); Online: Legislative Assembly of Ontario | Members (MPPs) | Current MPPs | MPP Hon Dalton McGuinty http://www.ontla.on.ca/web/members/members_detail.co?locale=en&ID=66&detailPage... (CAN-369); See also online: Legislative Assembly of Ontario | Members (MPPs) | Current MPPs | MPP Leona Dombrowsky <http://www.ontla.on.ca/web/members/members_all_detail.do?locale=en&ID=30> (CAN-370); See also online: Legislative Assembly of Ontario | Members (MPPs) | Current MPPs | MPP David Ramsay http://www.ontla.on.ca/web/members/members_detail.do?locale=en&ID=83&detailPage... (CAN-371)

²⁹⁰ Witness Statement of Doug Barnes, ¶ 27.

²⁹¹ Witness Statement of Doug Barnes, ¶¶ 27-28.

²⁹² Witness Statement of Doug Barnes, ¶ 30.

²⁹³ Witness Statement of Chris Maher, ¶¶ 30, 36.

182. The development of policy options started in early November 2003.²⁹⁴ The officials responsible for developing these policy options did not consider political developments, including media reports a few weeks later that Minister Ramsay had previously made a campaign promise to resign from provincial Cabinet if Adams Mine became a waste disposal site.²⁹⁵

183. REDACTED

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184. In January 2004, policy officials concluded that the best course of action was to draft legislation which would prohibit the disposal of waste at the site, revoke the existing conditional permits and provide compensation to the Enterprise.²⁹⁸ These officials also recommended prohibiting waste disposal at other sites, which raised similar concerns by amending the *EPA* to prohibit the disposal of waste in lakes.²⁹⁹ No political direction was given to policy officials to make this recommendation.³⁰⁰ Nor did Minister Ramsay or his political staff provide any direction to these policy officials.³⁰¹

²⁹⁴ Witness Statement of Doug Barnes, ¶ 28.

²⁹⁵ Witness Statement of Doug Barnes, ¶ 31.

²⁹⁶ REDACTED

REDACTED

²⁹⁷ REDACTED

REDACTED

²⁹⁸ Witness Statement of Doug Barnes, ¶ 34.

²⁹⁹ Witness Statement of Doug Barnes, ¶ 35.

³⁰⁰ Witness Statement of Doug Barnes, ¶ 34.

³⁰¹ Witness Statement of Doug Barnes, ¶ 31.

C. The Final Cabinet Submission³⁰²

185. On March 31, 2004, the MOE submitted a final proposal to the Cabinet for its consideration entitled “Approaches to Waste” (the “Final Cabinet Submission”).

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REDACTED



REDACTED

189. REDACTED

In fact, at all times, the Government had made it clear that it intended to provide the proponents of Adams Mine fair compensation.³⁰⁸

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³⁰⁸ Legislative Assembly of Ontario, First Session 38th Parliament, Official Report of Debates (Hansard) (April 20, 2004) p. 1617 (“Bill 49 provides for a mechanism for the owner to obtain compensation. ... What this means is that our government is being fair and dealing openly with everyone, including the owner of the land. This is an open and transparent process. We are doing the right thing and taking the action desired by the majority, but we are also being fair to all parties and clear from the outset on how to conclude this issue.”) (CAN-402).

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D. The Introduction of Bill 49 into the Legislature

191. On April 5, 2004, Minister Dombrowsky introduced Bill 49, the *AMLA*, into the Ontario Legislative Assembly.³¹⁰ Minister Dombrowsky, on first reading, reiterated the reasons for introducing this legislation:

The key approvals for this proposal came before the Walkerton tragedy. That sad event raised our awareness of the need to safeguard our precious water resources.... For this government, the protection of our communities is of paramount concern. We have promised to address the situation, and today we are keeping that commitment. This is about protecting our environment and respecting our communities.³¹¹

192. After the introduction of Bill 49, the Government contacted the Enterprise concerning the legislation to determine if it had any comments.³¹²

193. The initial compensation provision under Bill 49, as introduced, proposed compensation to the Enterprise for all of the expenses paid by the Enterprise and by Notre in connection with the development of Adams Mine as a landfill, during the period January 1, 1989 to April 4, 2004. Thus, the Bill proposed paying compensation to the Enterprise for all the expenses paid during the 1989-2004 period, whether paid by the Enterprise or by Notre.

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³¹⁰ The short title of this Act is the *Adams Mine Lake Act, 2004*, and the full title is *An Act to Prevent the Disposal of Waste at the Adams Mine Site and to Amend the Environmental Protection Act in Respect of the Disposal of Waste in Lakes*.

³¹¹ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 26A (April 5, 2004) pp. 1246-1247 (CAN-326).

³¹² Witness Statement of James Kendik, ¶ 16.

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196. On April 13, 2004, Mr. Acton wrote again on behalf of the Enterprise to request further amendments to Bill 49. Specifically, he requested that the compensation provisions in Bill 49 be expanded to include compensation for not only expenses incurred by the Enterprise and Notre, but also expenses incurred but not yet paid.³¹⁶

197. Mr. Acton followed-up this correspondence with a phone call to Mr. James Kendik, litigation counsel for the Government in the Borderlands Litigation, on April 16, 2004. In this call, Mr. Acton advised Mr. Kendik that the Enterprise was “willing to walk away” from the Borderlands Litigation if the Enterprise’s requested amendments could be recommended to give his client some comfort that there was a realistic possibility that the amendments would be adopted.³¹⁷ Mr. Acton appreciated that Mr. Kendik could not guarantee that the amendments would be undertaken.

198. There was no question in Mr. Kendik’s mind that Mr. Acton was offering to settle the Borderlands Litigation.³¹⁸ Accordingly, on April 20, 2004, Mr. Kendik and Dennis Brown, also a litigation counsel for Ontario, called Mr. Acton to accept his offer to settle.

³¹³ Witness Statement of James Kendik, ¶ 16; REDACTED

REDACTED

³¹⁴ Witness Statement of Joan Andrew, ¶ 25.

³¹⁵ Witness Statement of Joan Andrew, ¶ 28.

³¹⁶ Witness Statement of James Kendik, ¶ 18; Letter from Gordon Acton to James Kendik and Dennis Brown, *1532382 Ontario Inc. c.o.b. Adams Mine Rail Haul v. Her Majesty the Queen* – Ministry of Natural Resources Court File No. 22368/A3 (April 13, 2004) (CAN-139).

³¹⁷ Witness Statement of James Kendik, ¶ 19.

³¹⁸ Witness Statement of James Kendik, ¶ 21.

In a letter to Mr. Acton dated April 22, 2004, pursuant to the parties' agreement to settle, Mr. Brown wrote that he would be "recommending to senior staff at the Ministry of the Environment that consideration be given to the aforesaid amendments."³¹⁹ In accordance with the agreed terms, and in order to bring the settlement into full effect, Mr. Acton and Mr. Kendik subsequently made a joint request to delay the hearing for summary judgment.³²⁰

199. On May 6, 2004, Mr. Acton contacted Mr. Leo Fitzpatrick, an MOE lawyer working on the drafting of the *AMLA*, to suggest an appropriate division of potential compensation for expenses incurred but not paid between Notre and the Enterprise.³²¹

200. On May 21, 2004, Gordon McGuinty made a presentation to the Standing Committee on the Legislative Assembly concerning Bill 49 as both the Managing Director of the Enterprise and the President of Notre.³²² Mr. McGuinty complained that as Bill 49 was drafted, the proposed compensation was insufficient but that the amendments proposed by the Enterprise would remedy that insufficiency if adopted:

The Minister of the Environment has stated that the Government will be fair. The government formula is not fair. On one hand the Bill allows us to submit "expenses", but then proposes to reduce the expenses by the amounts "reimbursed" to us by any person. All of our expenses paid or incurred relative to the Adams Mine should be paid by the Government. We will deal with, and be responsible for any third party directly. The Government should not try to micro manage our business, nor the settlement of our affaires [*sic*], all of which is caused by the introduction of this Bill and the ultimate passage of this Act.

*We will forward to the committee proposed amendments that will attempt to address these inequities, and I trust the amendment [*sic*] will be reviewed fairly.*³²³

³¹⁹ Letter from Dennis Brown, Q.C. to Gordon Acton, Re: *1532382 Ontario Inc. c.o.b. Adam's Mine Rail haul v. HMQ/MNR* Court File No. 03-CT-022368/A3 (April 22, 2004) (CAN-141).

³²⁰ Witness Statement of James Kendik, ¶ 25.

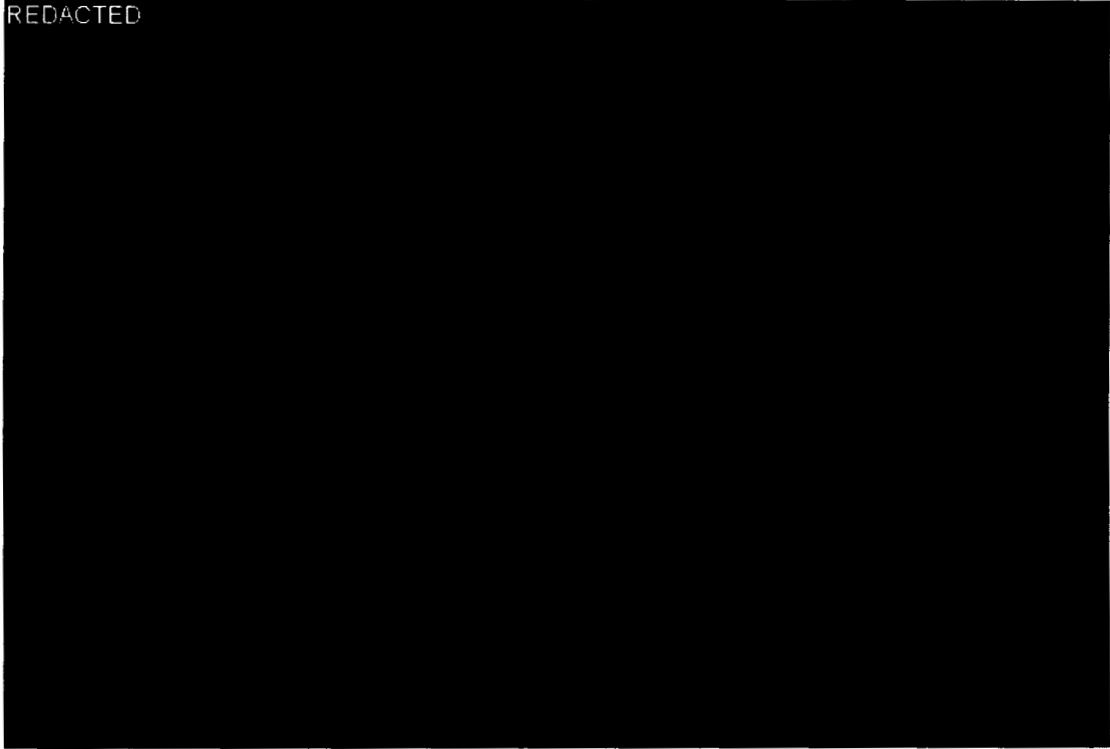
³²¹ Email from Gordon Acton, Wishart Law Firm LLP to Leo Fitzpatrick, Counsel, Ministry of the Environment, Re Bill 49 (May 6, 2004) (CAN-329).

³²² Gordon E. McGuinty, Re Adams Mine Lake Act, 2004 (May 21, 2004) p. 1 (CAN-330).

³²³ See *Ibid.* p. 1 (CAN-330).

201. The amendments referred to by Mr. McGuinty were those proposed by Mr. Acton on behalf of the Enterprise.

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204. These were the last of the amendments requested by the Enterprise. It never requested amendments to any other clause in the Bill, including the clause terminating the Borderlands Litigation, the clause annulling the Enterprise's purported rights under the Borderlands Application, the clause revoking the Enterprise's environmental approvals, or the clause prohibiting the recovery of lost profits.

205. On June 3, 2004, Bill 49 was subject to a clause-by-clause reading during which the Government made every one of the amendments the Enterprise requested to Bill 49.

206. Two weeks after the Bill became law, Mr. Acton permanently adjourned the Enterprise's motion for summary judgment in the Borderlands Litigation, which had the

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effect of terminating the Borderlands Litigation, pursuant to the parties' agreement to settle that litigation.

207. After the *AMLA* became law, Mr. Acton represented Notre in its application for compensation under the *AMLA*. REDACTED

REDACTED

E. The Government of Ontario Provides Compensation to Notre and the Enterprise

208. Pursuant to the Enterprise's request, the *AMLA* required the Government of Ontario to compensate both the Enterprise and Notre for their reasonable expenses in connection with their efforts to develop Adams Mine as a landfill.

209. In February 2005, Navigant Consulting ("Navigant") was retained by the Ministry of the Attorney General for the Province of Ontario to assess the compensation claims submitted by Notre and the Enterprise and to ascertain whether the amounts claimed would be eligible for compensation under the *AMLA*.³²⁸ Mr. Ted Baskerville and Mr. Josh Epstein were to perform the assessment and completed the review of any claim submitted.³²⁹

210. On October 8, 2004, Notre submitted a compensation claim for REDACTED with an inflation adjustment claim of REDACTED³³⁰ Navigant reviewed this

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³²⁸ Witness Statement of James Edward Baskerville, ¶ 2.

³²⁹ Witness Statement of James Edward Baskerville, ¶ 2.

³³⁰ Witness Statement of James Edward Baskerville, ¶ 13.

submission, and determined that some of the claimed expenses were ineligible for reimbursement under the *AMLA*. On November 1, 2005, Notre reached an agreement with the Government of Ontario and accepted compensation of REDACTED. Included in this amount was roughly REDACTED for expenses incurred but not yet paid by Notre in connection with the development of Adams Mine, which would not have otherwise been paid but for the Enterprise's requested amendments to the *AMLA*.

211. Notre received the payment on November 30, 2005 and signed a full and final release of all potential claims against the Government of Ontario.³³² The Government had originally proposed to pay this money to the Enterprise under Bill 49 but at the Enterprise's request, paid it to Notre.

212. On September 30, 2004, the Enterprise submitted a claim for compensation of REDACTED. Navigant also reviewed this claim and submitted its assessment to Government officials on October 17, 2005.³³⁴ The claim submitted by the Enterprise included ineligible expenses as well. Navigant determined that the Enterprise's expenses were REDACTED however, this included expenses that were more than the limit proposed by the Enterprise itself for expenses that it had incurred but not paid.³³⁵

213. A meeting was held on November 24, 2005 between the Government, Navigant, and the Enterprise – which was represented now by Mr. Brent Swanick, counsel for Mr. Cortellucci during his acquisition of Adams Mine – to discuss settlement of the Enterprise's claim for compensation.³³⁶ The Government proposed compensation in exchange for a full and final release. However, Mr. Swanick strongly opposed providing

³³¹ Witness Statement of James Edward Baskerville, ¶ 15.

³³² Witness Statement of James Edward Baskerville, ¶ 15.

³³³ Witness Statement of James Edward Baskerville, ¶ 5.

³³⁴ Witness Statement of James Edward Baskerville, ¶ 9.

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³³⁶ Witness Statement of James Edward Baskerville, ¶ 16.

such a release and refused to discuss a final settlement amount. Mr. Swanick then abruptly left the settlement discussions and no settlement was reached.³³⁷

214. In total, in administering the compensation provisions of the *AMLA*, representatives of the Government of Ontario paid and offered more than REDACTED in compensation. Of this, REDACTED was paid to Notre that would not otherwise have been paid, but for the Enterprise's requested amendments to Bill 49. Further, all of this compensation would have been paid directly to the Enterprise, but for the amendments requested by the Enterprise which split the payment of the compensation between the Enterprise and Notre.

VIII. THE CLAIMANT: MR. VITO G. GALLO

215. In the preceding 214 paragraphs, there is no mention of the Claimant, Mr. Vito G. Gallo. The reason for this is simple. The Claimant has offered no documentary evidence in his Memorial, and there is no such evidence, reliably to demonstrate any connection between the Claimant and the Enterprise prior to the introduction of the *AMLA* in April, 2004. To the contrary, the evidence on the record shows that the Claimant did not become connected in any way with the Enterprise until *after* the introduction of the *AMLA* in Ontario's legislature.

216. Public records show that between October, 1995 and January, 1999, the Claimant served as a policy official in Pennsylvania's Department of Revenue.³³⁸ Between January, 1999 and March 29, 2002, the Claimant was employed as a policy official with Pennsylvania's Department of Military and Veteran Affairs.³³⁹ On March 30, 2002, the Claimant returned to the Department of Revenue and remained there until he left the Pennsylvania Government in April, 2003.³⁴⁰

³³⁷ Witness Statement of James Edward Baskerville, ¶ 18.

³³⁸ Bureau of Human Resources, Department of Revenue, Employment History, May 24, 2010 (CAN-366); *see also* Commonwealth of Pennsylvania Telephone Directory 1995, 1997, 1999, 2001-2003 (excerpts) (CAN-188).

³³⁹ *See Ibid.* (CAN-366) (CAN-188).

³⁴⁰ *See Ibid.* (CAN-366) (CAN-188).

217. While the Claimant was employed with the Department of Revenue between March, 2002 and April, 2003, Mr. Cortellucci purchased Adams Mine from Notre on May 10, 2002 and conveyed it to the Enterprise on September 9, 2002. There are no documents on the record to show that this was done on behalf of the Claimant, or that Mr. Cortellucci was communicating in any way with the Claimant during this time.

218. Rather, the record shows that it was Mr. Cortellucci who negotiated the purchase of Adams Mine for himself, REDACTED Mr. Swanick, controlled every aspect of the Enterprise's business until the introduction of the *AMLA* in 2004.³⁴¹ Mr. Swanick was the President and sole Director of the Enterprise.³⁴² Mr. Cortellucci:

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³⁴² Ontario Ministry of Consumer and Business Services, Corporation Profile Report, 1532382 Ontario Inc. (October 25, 2004) (CAN-341).

REDACTED

³⁴⁷ The address for the Enterprise as the payee on 60 of 90 invoices produced by the Claimant was 2800 Highway No. 7, West which is the location of the Hollywood Princess Banquet Hall and the address of Mr. Cortellucci's business.

REDACTED

219. There are no documents on the record to show that any of the foregoing activities were done on behalf of the Claimant, or that the Claimant engaged in any such activities himself in relation to the Enterprise. Indeed, the Claimant, he did not:

- pay anything to acquire the Enterprise or Adams Mine;
- pay a single expense of the Enterprise or Adams Mine;³⁵³
- loan any money to the Enterprise;³⁵⁴
- contribute any technical, management or any other expertise;³⁵⁵ or

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³⁵³ The Claimant produced no documents in response to the request, in Document Request 20, for documents concerning “expenses the Claimant paid on behalf of the Enterprise...” *See* Claimant’s Response to Document Request Sorted by Issue, Request # 20.

³⁵⁴ Canada requested in Document Request 19 that the Claimant produce “Documents indicating the dates and amounts of capital the Claimant invested in the Enterprise ...by way of loans or contributions of capital.” The Claimant indicated in his list of responsive documents that the Shareholders Register was the only document that was responsive to this document request. *See* Claimant’s Response to Document Request Sorted by Issue, Request #19.

³⁵⁵ Canada requested in Document Request 21 that the Claimant produce any documents that show that he “made a non-financial contribution such as providing technical or management expertise to the

- receive or request any legal advice in writing concerning his alleged interest in the Adams Mine site.³³⁶

REDACTED

221. On May 6, 2004, over a month after the *AMLA* was introduced into the Ontario

legislature, REDACTED

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Enterprise...” The Claimant indicated in his list of responsive documents that the annual shareholders resolutions he signed each year are the only documents that are responsive to this request. See Claimant’s Response to Document Request Sorted by Issue, Request #21. These resolutions are identical and rubber-stamp the financial statements and the actions of Mr. Swanick as a Director. See Resolution of the Shareholder of 1532382 Ontario Inc.

REDACTED

³³⁹ REDACTED

REDACTED

REDACTED



REDACTED



LEGAL ARGUMENT

IX. THE TRIBUNAL HAS NO JURISDICTION

223. The Claimant has failed to meet his burden of proving that this Tribunal has jurisdiction. Specifically, the Claimant has not established that he owned the Enterprise at the relevant time.

A. The Claimant Does Not Have Standing

1. The Claimant Bears the Burden of Proving that he Owned the Enterprise at the time of the *AMLA*

224. A claimant bears the burden of proving that a NAFTA Chapter Eleven tribunal has jurisdiction to hear its claims.³⁶² Tribunals under international investment treaties have consistently held that they do not have jurisdiction unless the claimant can prove that it owned an investment when an impugned measure is undertaken. Thus, for example, in *Cementownia v. Turkey*, the tribunal held that “[i]t is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, *i.e.*, at the moment when the events on which its claim is based occurred.”³⁶³ Similarly, in *Europe Cement v. Turkey*, the tribunal held that in order for it “to have jurisdiction the Claimant would have to show that it has acquired ownership in an investment in Turkey at the time the alleged breaches of the provisions of the Energy Charter Treaty took place”³⁶⁴

225. The obligation of the claimant to prove it owned the investment at the time of the impugned measure is unsurprising. Chapter Eleven of the NAFTA, like all international investment treaties, does not protect domestic investments. Rather, it protects foreign investments. Therefore, in order for a NAFTA tribunal to exercise jurisdiction, a foreign investor must establish that he owned an investment in the Respondent State *at the time*

³⁶² *International Thunderbird Gaming Corp. v. United Mexican States* (UNCITRAL) Final Award (26 January 2006) ¶¶ 95, 102 (“*Thunderbird-Award*”) (BOA-82).

³⁶³ *Cementownia “Nowa Huta” S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/02) Award (17 September 2009) ¶ 112 (“*Cementownia-Award*”) (BOA-16).

³⁶⁴ *Europe Cement Investment & Trade, S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2) Award (13 August 2009) ¶ 140 (“*Europe Cement-Award*”) (BOA-27).

an impugned measure is undertaken. This restriction on the jurisdiction of a NAFTA tribunal is reflected in the provisions of the NAFTA on which the Claimant relies.³⁶⁵

226. Accordingly, the Claimant bears the burden of proving that he owned the Enterprise at the time of the *AMLA* in order for this Tribunal to have jurisdiction to hear his claims.

2. The Claimant Has Not Established That He Owned the Enterprise at the time of the *AMLA*

227. International investment treaty tribunals have ruled that only reliable, independent documentary evidence will prove the claimant's ownership of an investment at the time of the challenged measure. Witness statements and documents that cannot be independently verified are insufficient, particularly when there is evidence which indicates that the investor did not own the investment at the relevant time.

228. For example, *Europe Cement* held that a copy of a share certificate, a share transfer agreement and a witness statement were insufficient to prove that a foreign investor owned shares in a Turkish company at the time an impugned Turkish measure was undertaken. While the share certificate and transfer agreement were dated before this time, Turkey questioned the date on which they were actually executed. The tribunal ordered the claimant to provide originals so they could be subjected to forensic examination. The claimant was unable to comply with this order and conceded that it could not prove that the tribunal had jurisdiction.³⁶⁶ However, the tribunal went on to hold that, even if the claimant had not made this concession, the tribunal would still have found that the claimant failed to prove it owned the shares at the relevant time because there was evidence which indicated the claimant did not own the shares at that time.³⁶⁷

³⁶⁵ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, December 17, 1992, Can. T.S. 1994, No. 2, 32 I.L.M. 289 (entered into force January 1, 1994) ("NAFTA"). Article 1101(1)(b) of the NAFTA states that "[t]his Chapter applies to measures adopted or maintained by a Party relating to ... investments of investors of another Party" Article 1105(1) of the NAFTA only requires the Parties to accord the customary international law minimum standard of treatment to "investments of investors of another Party." Article 1110 states that "[n]o Party may ... expropriate an investment of an investor of another Party"

³⁶⁶ *Europe Cement-Award*, ¶ 143 (BOA-27).

³⁶⁷ *See Ibid*, ¶ 145 (BOA-27).

This evidence primarily included anomalies in the agreements,³⁶⁸ the absence of a “paper trail,”³⁶⁹ the absence of required approvals of the transaction by regulators,³⁷⁰ and the claimant’s financial statements at the relevant time which did not refer to the shareholding.³⁷¹

229. Similarly, *Cementownia* held that a copy of a share certificate, a share transfer agreement, and a witness statement were insufficient to prove that a foreign investor owned shares in a Turkish company at the time of the Turkish measure and dismissed the case for lack of jurisdiction. As in *Europe Cement*, there was evidence which indicated that the claimant did not own the shares at the appropriate time. That evidence mainly included the transfer agreement, which was only signed by one party³⁷² and was only one page long,³⁷³ the failure to report the transaction to the necessary regulatory authorities,³⁷⁴ and the failure to record the transaction in the claimant’s financial statements.³⁷⁵

230. In the instant case, the Claimant alleges that the *AMLA* breached Canada’s obligations in the NAFTA. Thus, to establish the Tribunal’s jurisdiction, the Claimant must establish that he owned the Enterprise at the time of the *AMLA* in 2004. The Claimant has failed to carry this burden. As in *Europe Cement* and *Cementownia*, the Claimant has produced no independent and reliable evidence to prove that he acquired the Enterprise before the *AMLA* was undertaken and there is evidence that he did not.

³⁶⁸ See *Ibid.* ¶ 153 (BOA-27).

³⁶⁹ See *Ibid.* ¶ 154 (BOA-27).

³⁷⁰ See *Ibid.* ¶ 156 (BOA-27).

³⁷¹ See *Ibid.* ¶ 94 (BOA-27).

³⁷² *Cementownia-Award*, ¶ 125 (BOA-16).

³⁷³ See *Ibid.* ¶ 125 (BOA-16).

³⁷⁴ See *Ibid.* ¶ 129 (BOA-16).

³⁷⁵ See *Ibid.* ¶ 129 (BOA-16).

(a) **None of the Documents Establish the Claimant's Ownership of the Enterprise at the time of the AMLA**

231. In his Memorial, the Claimant relies solely on *three* documents to establish that he owned the Enterprise at the time of the AMLA.³⁷⁶ REDACTED
REDACTED and a single two-page share certificate.

None of these three documents, however, prove that the Claimant owned the Enterprise at the relevant time.

REDACTED

233. REDACTED
REDACTED Under

Canadian tax law, a corporation is not a CCPC unless it is “controlled, directly or indirectly in any manner whatever, by one or more non-resident persons.”³⁷⁸ REDACTED

REDACTED

REDACTED Thus, as in *Europe Cement*, there are irreconcilable anomalies REDACTED

REDACTED

234. The explanation for the foregoing anomalies provided by the Claimant and his witnesses is unconvincing. The Claimant's witness, Mr. Brent Swanick, the President, Director and sole officer of the Enterprise, as well as an experienced tax attorney of some

³⁷⁶ Claimant's Memorial, ¶¶ 209-REDACTED

REDACTED

³⁷⁸ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 125(7) (CAN-388). It impossible that the Enterprise was a “Canadian-Controlled Private Corporation”.

³⁷⁹ *Europe Cement-Award*, ¶ 153 (BOA-27).

33 years, claims that the anomalies REDACTED

REDACTED

REDACTED

³⁸³ CCPC status is a pre-requisite to a corporation claiming the small business deductions, which is one of the most common income tax deductions under the Canadian Income tax Act. *See* Canada Revenue Agency, *Canadian Controlled Private Corporation*, IT-A58R2 (May 31, 2000) (CAN-388).

REDACTED

(b) **The Witness Statements Do Not Establish the Claimant's Ownership of the Enterprise at the time of the AMLA**

236. REDACTED none of which establish that the Claimant owned the Enterprise at the time of the *AMLA* – the Claimant has not referred to a *single* other document in his Memorial to establish that he owned the Enterprise at the relevant time. REDACTED

REDACTED Yet, none of these statements prove that the Claimant owned the Enterprise when the *AMLA* was enacted. They are not reliable because they contain misrepresentations, are inconsistent with publicly available documents, and are not corroborated by a single independent document. Accordingly, they are insufficient to meet the Claimant's burden of proving that he owned the Enterprise at the time of the *AMLA*.

237. *First*, the witness statements are unreliable because they contain misrepresentations or are inconsistent with publicly available documents. For example, the Claimant alleges he was the "Senior Policy Director" in the Governor's Policy Office from 1995 to 2003.³⁸⁵ However, public records show that between 1995 and 2003, the Policy Directors in that office were Charles Zogby, then Lee Anne Labecki and, finally, David Kerr, not the Claimant.³⁸⁶ Public records show that during this time, the Claimant was a policy specialist in Pennsylvania's Department of Revenue and Department of Military and Veteran Affairs.³⁸⁷

REDACTED

³⁸⁵ Witness Statement of Vito G. Gallo, ¶¶ 23, 24, RE 30.

³⁸⁶ State Yellow Book, Leadership Directories, Inc - Listings for the Governor's Office and all state departments and agencies for 1995-2003 as published – winter 1995 to spring 2003 (CAN-189).

REDACTED

REDACTED However, public records show that Mr. Noto was employed by Pennsylvania's Department of Military and Veteran Affairs until December 17, 2004, REDACTED

REDACTED Indeed, public records show that Mr. Noto's lobbying firm, Rutherford Eggers and Associates P.C. ("Rutherford Eggers"), was not created until April 6, 2004, REDACTED

REDACTED³⁹⁰ Therefore, in 2001 and in 2002, Mr. Noto REDACTED
REDACTED but was an employee of the Pennsylvania government
REDACTED

239. The foregoing facts also reveal misrepresentations or, at the very least, misleading statements in Mr. Noto's witness statement. REDACTED

REDACTED

REDACTED However, as stated above, Mr. Noto was employed with the Pennsylvania government until the end of 2004 and Rutherford Eggers was not established until April 6, 2004.³⁹² REDACTED

REDACTED

240. Mr. Swarick's witness statement also contains misrepresentations. REDACTED

REDACTED

REDACTED

³⁹⁰ Business Entity Filing – Rutherford Eggers (CAN-374).

REDACTED

³⁹² Business Entity Filing – Rutherford Eggers (CAN-374).

³⁹³ Counter-Memorial, ¶ 234.

REDACTED

REDACTED Therefore, Mr. Swarick made a misrepresentation to this Tribunal in an effort to explain anomalies REDACTED an effort to establish the Claimant's ownership of the Enterprise prior to the *AMLA*.

241. *Second*, the witness statements are unreliable because, as in *Europe Cement*, there is no "paper trail" to corroborate the witnesses' story. For example, the Claimant alleges he REDACTED

REDACTED

REDACTED there must have been pitch documents, spreadsheets, financial analyses, financial data, or even a simple powerpoint presentation or handouts. REDACTED

REDACTED there must have been e-mails, letters, faxes, or some other documents reflecting those expressions of interest. Yet, the Claimant has failed to produce any such documents.

242. The Claimant also alleges that he REDACTED

REDACTED

REDACTED

REDACTED

243. A “paper trail” is also markedly absent to evidence the Claimant’s relationship with Mr. Cortellucci. According to the witness statements, REDACTED

REDACTED

REDACTED It is implausible that Mr. Cortellucci, a sophisticated and experienced real estate developer for over 4 decades, would not have reviewed some financial data, financial analyses, spreadsheets, pitch documents, term-sheets, or some other documentation.

244. It is also not plausible that, without reviewing a single document, Mr. Cortellucci would REDACTED

REDACTED

REDACTED In any event, Mr. Cortellucci’s own conduct belied his allegation. As shown in footnote 144 above, Mr. Cortellucci exhaustively documented his and his family members’ investment in the Limited Partnership, and Mr. Cortellucci very carefully papered his dealings with Mr. McGuinty.

REDACTED

245. There are also no documents to corroborate the Claimant's supposed relationship and communications with Mr. Swanick. REDACTED

REDACTED

there would at least be a few e-mails, letters, faxes, memoranda or handwritten notes. Indeed, the Enterprise was embroiled in *two* significant lawsuits following the date on which the Claimant alleges he acquired the Enterprise – the CWS lawsuit as well as the Borderlands Litigation – REDACTED

REDACTED

246. Hence, the witness statements are unreliable, and do not establish that the Claimant owned the Enterprise prior to the *AMLA*.

(c) There is Considerable Evidence that the Claimant Acquired the Enterprise After the *AMLA*

247. There is considerable evidence that the Claimant did not acquire the Enterprise until *after* the *AMLA*. For example, as stated above, the first mention of the Claimant REDACTED

REDACTED

REDACTED is strong evidence that the Claimant did not acquire the Enterprise until after the *AMLA*.

REDACTED

248. REDACTED
REDACTED REDACTE

REDACTED

This, too, is strong evidence the Claimant did not actually acquire the Enterprise until after the *AMLA*.

249. Moreover, the Claimant's own testimony – if it is to be believed – suggests that he did not acquire the Enterprise until after the *AMLA*. In his witness statement, the Claimant alleges that before he acquired the Enterprise, REDACTED

REDACTED
REDACTED

However, as stated above, public records show that Mr. Noto was not a lobbyist until at least *December 17, 2004*,⁴⁰⁹ which is eight months after the *AMLA* was tabled, and six months after the *AMLA* was enacted. Prior to this date, he was employed as a civil servant with the Government of Pennsylvania. Public records also show that the lobbying firm at which Mr. Noto was eventually employed following the end of his employment with the Government of Pennsylvania was not even created until *April 6, 2004*, which is the day after the *AMLA* was tabled.⁴¹⁰

Accordingly, if the Claimant's testimony is to be believed, REDACTED

REDACTED

⁴⁰⁴ REDACTED

⁴⁰⁵ Counter-Memorial, ¶ 232.

REDACTED

⁴¹⁰ Business Entity Filing – Rutherford Eggars (CAN-374).

250. Further, prior to the *AMLA*, there is substantial evidence on the record to suggest that Mr. Cortellucci – not the Claimant – was the owner of the Enterprise, as set out in paragraph 218 above. Indeed, the Claimant does not dispute he did not:

- pay anything to acquire the Enterprise;
- pay any of the \$1.8 million which the Enterprise paid to acquire Adams Mine;
- pay a single expense;
- loan the Enterprise any money;
- contribute any technical, management or any other expertise;

REDACTED

- receive or send a single letter or email;
- record a single conversation;

REDACTED

- record anything in writing at all.⁴¹¹

251. Accordingly, the Claimant has not established that he owned the Enterprise at the time of the *AMLA* and has failed to meet his burden to prove that this Tribunal has jurisdiction.

B. The Claimant Has Abused His Right to Claim on Behalf of the Enterprise

252. Even if, somehow, the Claimant has a right to claim under the NAFTA, he has abused that right. The Claimant has accepted that this Tribunal has the authority to prevent the abuse of rights.⁴¹² The *Phoenix v. Czech Republic* investment treaty tribunal

⁴¹¹ Counter-Memorial, ¶¶ 241-245.

⁴¹² Claimant's Memorial, ¶ 414.

confirmed that a claimant which is abusing its right to claim has no standing.⁴¹³ *Phoenix* applied this principle to deny standing to a claimant who purchased an investment with “the sole purpose ... to pursue an ICSID claim, without any intent to perform any economic activity in the host country.”⁴¹⁴ This decision was subsequently endorsed in *Cementownia* and *Europe Cement*, which both denied standing to the claimant for the same reason.⁴¹⁵

253. As shown above, the evidence shows that the Claimant did not own the Enterprise at the time of the *AMLA*. Accordingly, his sole purpose in acquiring the Enterprise could only have been to create jurisdiction to bring this arbitration pursuant to Chapter Eleven of the NAFTA. This is an abuse of rights and this Tribunal does not have jurisdiction.

X. THE CLAIMANT HAS FAILED TO DEMONSTRATE A VIOLATION OF ARTICLE 1105(1)

A. Summary

254. The Claimant alleges that Sections 2 and 3 of the *AMLA* violate Article 1105(1) of the NAFTA because they breach rules relating to legitimate expectations and transparency. However, the Claimant has failed to establish that Article 1105(1) includes

⁴¹³ *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award (15 April 2009) ¶ 107 (“*Phoenix Action – Award*”) (BOA-63): “The principle of good faith has long been recognized in public international law, as it is also in all national legal systems. This principle requires parties ‘to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage ...’ This principle governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused.”

⁴¹⁴ *See Ibid.* ¶ 93 (BOA-63).

⁴¹⁵ *Cementownia-Award*, ¶ 117 (BOA-16): “Even if they did occur, the share transfers would not have been *bona fide* transactions, but rather attempts ... to fabricate international jurisdiction where none should exist;” ¶ 154: “In recent cases, some tribunals have found that a party that makes an investment, not for the purpose of engaging in commercial activity, but for the sole purpose of gaining access to international jurisdiction, does not engage in a *bona fide* transaction. Such a transaction is deemed not to be a protected investment and a party’s creation of a legal fiction so as to gain access to an international arbitration procedure to which it was not entitled is an abuse ...” *Europe Cement-Award*, ¶ 175 (BOA-27): “In the present case, there was in fact no investment at all, at least at the relevant time, and the lack of good faith is in the assertion of an investment on the basis of documents that according to the evidence presented were not authentic. The Claimant asserted jurisdiction on the basis of a claim to ownership of shares, which the uncontradicted evidence before the Tribunal suggests was false. Such a claim cannot be said to have been made in good faith. If, as in *Phoenix*, a claim that is based on the purchase of an investment solely for the purpose of commencing litigation is an abuse of process, then surely a claim based on the false assertion of ownership of an investment is equally an abuse of process.”

such rules and, even if it did, the Claimant has not shown that Sections 2 and 3 of the *AMLA* frustrated the Claimant's expectations, or were not enacted transparently.

255. The Claimant also contends that Sections 4 and 5 of the *AMLA* violate Article 1105(1) because they amount to a "denial of justice" by annulling the Borderlands Application, and extinguishing the Borderlands Litigation. The Claimant alleges that these sections amount to a denial of justice because they prohibited the Enterprise from accessing the courts of Ontario to obtain what the Claimant views to be the "appropriate measure of damages" for breach of the Borderlands Application.

256. Yet, this claim ignores that the Enterprise *did* access the courts of Ontario to enforce its purported rights under the Borderlands Application, and *settled* the Borderlands Litigation. Thus, the Claimant's denial of justice claim is little more than an effort to re-open that litigation before this Tribunal. Moreover, the Claimant's denial of justice claim is without foundation because under the *AMLA*, the Enterprise could, in fact, petition the courts of Ontario to determine the appropriate measure of compensation to which it was legally entitled. Further, the denial of justice claim is not ripe because the Enterprise did not exhaust that remedy.

257. Finally, the Claimant alleges that the *AMLA* generally violates Article 1105(1) because it was purportedly enacted in "bad faith." However, the Claimant has failed to adduce any evidence or authority in support of this allegation, and ignores the fact that even though the *AMLA* was brought about by the Adams Mine proposal, it was an act of general application that has since been applied to other landfills.

258. Accordingly, the Claimant's Article 1105(1) claim should be dismissed.

B. Customary International Law is the Applicable Source of Law for Article 1105(1)

259. Article 1105(1) of the NAFTA provides:

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.⁴¹⁶

260. There was some confusion early on with respect to the scope of Article 1105(1).⁴¹⁷ Article 1105(1) refers to the customary international law minimum standard of treatment of aliens, and the phrase “fair and equitable treatment” is an example of that standard.⁴¹⁸ However, the early NAFTA case of *Pope & Talbot* interpreted the phrase “fair and equitable treatment” as setting forth a standard *autonomous* of the customary international law minimum standard of treatment.⁴¹⁹ This latter view, which was based primarily on a note published by F.A. Mann in the *British Year Book of International Law* in 1981,⁴²⁰ ignored the word “including” in Article 1105(1) and interpreted it as entitling foreign investors to the customary international law standard *plus* “fair” and “equitable” treatment, according to the ordinary meaning of those words.⁴²¹

261. The foregoing confusion prompted the NAFTA Parties to issue a *Note of Interpretation* in 2001 to clarify the scope of Article 1105(1).⁴²² This *Note of Interpretation*, which is binding on NAFTA Chapter Eleven tribunals,⁴²³ states:

⁴¹⁶ NAFTA, Article 1105(1).

⁴¹⁷ See e.g., J.C. Thomas, “Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators” (2002) 17 ICSID Rev. FILJ 21 (BOA-126).

⁴¹⁸ See *Ibid.* This view was supported by, among other things: OECD, *1967 Draft Convention on the Protection of Foreign Property*, reprinted in 7 I.L.M. 117, 119 (1968) (BOA-56); *Canada Statement on Implementation of the NAFTA*, Canada Gazette, Part I, January 1, 1994, p. 149 (BOA-52).

⁴¹⁹ *Pope & Talbot v. Canada* (UNCITRAL) Award on Merits, Phase II (April 10, 2001) ¶ 110 (“*Pope & Talbot-Award on Merits*”) (BOA-65).

⁴²⁰ F.A. Mann, “British Treaties for the Promotion and Protection of Investments” in *Further Studies in International Law* (Oxford: Clarendon Press, 1990) p. 244 (BOA-114).

⁴²¹ *Pope & Talbot-Award on Merits*, ¶ 110 [emphasis added] (holding that “investors under NAFTA are entitled to the international law minimum, plus the fairness elements”) (BOA-65).

⁴²² NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions, s. 2 (July 31, 2001) (“*NAFTA – Notes of Interpretation*”) (BOA-53). Article 2001 of the NAFTA established the Free Trade Commission to, among other things, “resolve disputes that may arise regarding [the NAFTA’s] interpretation or application.”

⁴²³ NAFTA, Article 1131(2) provides that “[a]n interpretation by the [Free Trade] Commission of a provision of [the NAFTA] shall be binding on a Tribunal established under this Section.” Previous NAFTA tribunals have consistently recognized the *Note of Interpretation* as binding on them. See e.g., *Glamis Gold, Ltd. v. United States* (UNCITRAL) Award (8 June 2009) ¶ 599 (“*Glamis-Award*”) (BOA-

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.⁴²⁴

262. Thus, the *Note of Interpretation* rejects the interpretation of “fair and equitable treatment” in *Pope & Talbot* as a standard of fairness autonomous of the customary international law minimum standard of treatment. It confirms that customary international law is the applicable source of law to determine the minimum standard of treatment under Article 1105(1), and that “Article 1105 requires no more, nor less, than the minimum standard of treatment demanded by customary international law.”⁴²⁵

C. The Threshold to Establish a Violation of Article 1105(1) is Very High

263. Article 1105(1) was included in the NAFTA “to avoid what might otherwise be a gap.”⁴²⁶ For instance, the NAFTA contains national and most favoured nation treatment provisions. However, these are *contingent* on the way in which a Host State treats its nationals and others. Consequently, Article 1105(1) was included to set a absolute minimum “*floor* below which treatment of foreign investors must not fall.”⁴²⁷

33); *International Thunderbird Gaming Corp. v. United Mexican States* (UNCITRAL) Final Award (26 January 2006) ¶¶ 192 *et seq.* (“*Thunderbird-Award*”) (BOA-82); *Methanex v. United States* (UNCITRAL) Award, Part IV, Chapter C (3 August 2005) Part IV, Chapter C, ¶ 20 (“*Methanex-Award*”) (BOA-43); *Mondev International Ltd. v. United States* (ICSID No. ARB(AF)/99/2) Award (11 October 2002) ¶¶ 100 *et seq.* (“*Mondev-Award*”) (BOA-49); *Loewen Group, Inc. and Raymond L. Loewen v. United States* (ICSID No. ARB/98/3) Award on Merits (26 June 2003) ¶ 126 (“*Loewen-Award*”) (BOA-40); *Waste Management Inc. v. United Mexican States* (ICSID No. ARB(AF)/00/3) Award (30 April 2004) ¶¶ 90 *et seq.* (“*Waste Management II-Award*”) (BOA-91); *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award (18 September 2009) ¶¶ 135, 267-268 (“*Cargill-Award*”) (BOA-15); *ADF Group Inc. v. United States* (ICSID Case No. ARB (AF)/00/1) Award (9 January 2003) ¶ 176 (“*ADF-Award*”) (BOA-1).

⁴²⁴ NAFTA – *Notes of Interpretation*, s. 2 (BOA-53).

⁴²⁵ *Cargill-Award*, ¶ 268 (BOA-15).

⁴²⁶ *S.D. Myers v. Canada* (UNCITRAL) First Partial Award (13 November 2000) ¶ 259 (“*S.D. Myers-First Partial Award*”) (BOA-72).

⁴²⁷ *See Ibid.* ¶ 259 [emphasis added] (BOA-72).

264. However, Article 1105(1) does not call for NAFTA tribunals to second-guess governmental policy. To the contrary, international law accords a “high measure of deference ... to the right of domestic authorities to regulate matters within their own borders.”⁴²⁸ The exercise of regulatory or legislative powers in the context of shifting governmental policies and conflicting public interests will inevitably result in outcomes that will be perceived as unfair or inequitable by some members of the public.⁴²⁹ To prohibit a State from exercising its powers in a manner merely perceived to be unfair or inequitable, therefore, would effectively cripple governments from regulating and legislating altogether.

265. As a result, the customary international law minimum standard of treatment is just that, an *absolute minimum standard of treatment*, and the threshold for showing a violation of that standard is extremely high. Thus, the NAFTA tribunal in *Glamis* summarized the customary international law applicable to Article 1105(1) as follows:

[A] violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is *sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons* – so as to fall below accepted international standards and constitute a breach of Article 1105.⁴³⁰

266. Similarly, the NAFTA tribunal in *Cargill* recently summed up the customary international standard of treatment applicable to Article 1105(1) in the following terms:

If the conduct of the government toward the investment amounts to *gross misconduct, manifest injustice* or ... *bad faith* or the *wilful neglect of duty*, whatever the particular context the actions take in regard to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment.⁴³¹

⁴²⁸ See *Ibid.* ¶ 263 [emphasis added] (BOA-72).

⁴²⁹ *Azinian, Davitian, & Baca v. Mexico* (ICSID No. ARB (AF)/97/2) Award (1 November 1999) ¶ 83 (“*Azinian-Award*”) (BOA-5).

⁴³⁰ *Glamis-Award*, ¶ 627 [emphasis added] (BOA-33).

⁴³¹ *Cargill-Award*, ¶ 286 [emphasis added] (BOA-15). The standards set forth in both *Glamis-Award* and *Cargill-Award* are based, in part, on a contemporary understanding of the statement set forth by the United States-Mexico General Claims Commission in *L.F.H. Neer and Pauline Neer (United States) v. Mexico* (1926) 3. I.L.R. (15 October 1926) pp. 61-62 (“*Neer-Award*”) (BOA-51). International legal

267. The use of adjective modifiers such as “*egregious*,” “*shocking*,” “*gross*,” “*blatant*,” “*manifest*,” “*complete*,” and “*wilful*” in describing the threshold to show a violation of Article 1105(1) is not insignificant.⁴³² As stated above, States are forced to exercise their powers in an environment of shifting governmental policies and conflicting public interests. In this context, as the NAFTA tribunal in *S.D. Myers* observed, “[g]overnments have to make many potentially controversial choices.”⁴³³ It is for this reason that the threshold to show a violation of Article 1105(1) requires “*egregious and shocking acts*,” “*gross denials of justice*,” “*complete lack of due process*,” “*gross misconducts*,” “*manifest injustices*,” or “*wilful neglect of duties*.” The threshold to show a violation of Article 1105(1) is therefore very high.

D. The Claimant Has Not Shown Sections 2 and 3 of the AMLA Violate Article 1105(1) of the NAFTA

1. NAFTA Article 1105 Does Not Require the Protection of Legitimate Expectations or Transparency

268. The Claimant alleges that Articles 2 and 3 of the *AMLA* are inconsistent with Article 1105(1) because they frustrated his legitimate expectations and were not enacted transparently.⁴³⁴ However, Article 1105 (1) does not require the protection of legislative expectations or the provision of transparency.

scholars and international tribunals have consistently referred to the *Neer* standard as setting forth the customary international law minimum standard of treatment of aliens. See e.g., Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008) p. 525 (BOA-97); M. Shaw, *International Law*, 4th ed. (Cambridge: Cambridge University Press, 1997) pp. 569-573 (BOA-122); Peter Malanczuk, ed., *Akehurst's Modern Introduction to International Law*, 7th ed. (New York: Routledge, 1997), p. 261 (BOA-113); J.L. Brierly, *The Law of Nations*, 6th ed. by Sir Humphrey Waldock (Oxford: Oxford University Press, 1963), pp. 280-81 (BOA-96); Sir Robert Jennings & Sir Arnold Watts, eds., *Oppenheim's International Law*, 9th ed., vol. 1 (Oxford: Oxford University Press, 1996), p. 931, fn. 2 (BOA-107); A.R. Roth, *The minimum standard of international law applied to aliens* (Leiden: A.W. Sijthoff, 1949), p. 95 (BOA-120); G. Schwarzenberger, *International Law : International Law as Applied by International Courts and Tribunals*, vol. 1 (London: Stevens & Sons Ltd., 1957), p. 201 (BOA-123).

⁴³² *Cargill-Award*, ¶ 285 (BOA-15); *Glamis-Award*, ¶ 614 (BOA-33). Other NAFTA tribunals have made use of similar adjective modifiers when describing the kind of conduct that would give rise to a violation of Article 1105(1). See e.g., *Thunderbird-Award*, ¶ 194 [emphasis added] (“a gross denial of justice or manifest arbitrariness.”) (BOA-82); *Waste Management II-Award*, ¶¶ 96, 98 [emphasis added] (“grossly unfair”) (BOA-91).

⁴³³ *S.D. Myers-First Partial Award*, ¶ 261(BOA-72).

⁴³⁴ Claimant's Memorial, ¶ 462.

(a) The Claimant Bears the Burden of Establishing that Article 1105(1) Requires the Protection of Legitimate Expectations and Transparency

269. The burden of proving the existence of a rule of customary international law rests on the party that alleges it. The ICJ has held that “the Party which relies on a [rule of customary international law] must prove that this custom is established in such a manner that it has become binding on the other party.”⁴³⁵ Similarly, NAFTA tribunals have consistently held where a Claimant alleges the existence of a rule of customary international law, “then the burden of establishing what the standard [] requires is upon the Claimant.”⁴³⁶

270. Accordingly, the Claimant bears the burden of establishing that the customary international law applicable to Article 1105(1) includes rules concerning legitimate expectations and transparency.

(b) The Claimant Has Not Submitted Any Evidence of State Practice or *Opinio Juris*

271. In order to prove the existence of a rule of customary international law, two elements must be established: (i) consistent state practice, and (ii) an understanding that such practice is required by or consistent with prevailing international law (*opinio juris sive necessitatis*).⁴³⁷

⁴³⁵ *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, [1952] I.C.J. Rep. at 176 (27 August 1952), p. 200 (BOA-31) (quoting *Asylum (Colombia v. Peru)*, [1950] I.C.J. 266).

⁴³⁶ *Glamis-Award*, ¶ 601 (BOA-33); *Cargill-Award*, ¶¶ 271, 273 (BOA-15); *ADF-Award*, ¶¶ 183-185 (BOA-1); *United Parcel Service v. Canada* (UNCITRAL) Decision on Jurisdiction (22 November 2002) ¶84 (“*UPS-Decision on Jurisdiction*”) (BOA-88). See also Ian Brownlie, *Principles of Public International Law*, p. 12 (BOA-97).

⁴³⁷ *Statute of the International Court of Justice*, Article 38(1)(b) (providing that in making decisions in accordance with international law, the Court shall apply, *inter alia*, “international custom, as evidence of a general practice accepted as law.”) (“*ICJ Statute*”) (BOA-34); *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, [1969] I.C.J. Rep. (20 February 1969), (“*Continental Shelf – Germany v. Denmark*”) p. 31. (holding that it is an “indispensable requirement” to show that “State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved”) (BOA-21); *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, [1985] I.C.J. Rep. (3 June 1985), (“*Continental Shelf – Libya v. Malta*”) p. 30 ¶ 27 (“it is of course axiomatic that the material of customary international law is to be looked for primarily in

272. The Claimant has not attempted to submit evidence of state practice or *opinio juris* to support his claim that Article 1105(1) requires the protection of legitimate expectations or transparency. Rather, the Claimant has merely cited inapplicable, non-NAFTA arbitral awards that apply the autonomous “fair and equitable treatment” standard, rather than the customary international law minimum standard of treatment.

273. This falls far short of what is required to fulfill the Claimant’s burden of proving a rule of customary international law. Arbitral awards cannot create rules of customary international law; only States can through state practice and *opinio juris*.⁴³⁸ International legal scholars have affirmed that “[d]ecisions of international courts are not a source of international law [and are] are not direct evidence of the practice of States or of what States conceive to be the law.”⁴³⁹ NAFTA tribunals have also stated that “[a]rbitral awards ... do not constitute State practice and thus cannot create or prove customary international law.”⁴⁴⁰

(c) The Claimant Relies on Irrelevant Awards

274. While arbitral awards cannot create rules of customary international law, they can “serve as illustrations of customary international law if they involve an examination of customary international law.”⁴⁴¹ However, the awards cited by the Claimant do not undertake such an examination, and accordingly do not establish that Article 1105(1) includes rules concerning legitimate expectations and transparency.

the actual practice and *opinio juris* of states ...”) (BOA-22); *Case of Nicaragua v. United States*, [1986] I.C.J. Rep. 14, Award on the Merits (27 June 1986), (“*Nicaragua – Award*”) pp. 108-109, ¶ 207 (“For a new customary rule to be formed, not only must the acts concerned ‘amount to settled practice,’ but they must be accompanied by the *opinio juris sive necessitates*.”) (BOA-54); *Glamis-Award*, ¶¶ 602-603 (“establishment of a rule of customary international law requires: (1) ‘a concordant practice of a number of States acquiesced in by others,’ and (2) ‘a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)’”) (BOA-33); *UPS-Decision on Jurisdiction*, ¶ 84 (BOA-88); *Cargill-Award*, ¶ 274 (BOA-15).

⁴³⁸ *ICJ Statute*, Article 38(1)(d), stating that arbitral awards are only “subsidiary means for the determination of rules of law” (BOA-34).

⁴³⁹ H. Lauterpacht, *The Development of International Law by the International Court* (London: Stevens, 1958), pp. 20-21 (BOA-109). See also Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge University Press, 1996) pp. 71-72 (BOA-121).

⁴⁴⁰ *Glamis-Award*, ¶ 605 (BOA-33); *Cargill-Award*, ¶ 277 (BOA-15).

⁴⁴¹ *Glamis-Award*, ¶ 605 (BOA-33).

275. First, all of the cases cited by the Claimant apply the *autonomous* standard of “fair and equitable treatment” that was rejected by the *Note of Interpretation*. NAFTA tribunals have ruled that arbitral decisions which apply this “autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom.”⁴⁴²

276. Second, the cases cited by the Claimant are unavailing because none of them undertake the requisite examination of state practice and *opinio juris* to prove the existence of a rule of customary international law.

277. Thus, for example, the Claimant relies heavily on the *Tecmed* award to establish that Article 1105(1) requires the protection of legitimate expectations and transparency.⁴⁴³ That case concerned alleged violations of a Spanish-Mexican bilateral investment treaty (“BIT”).⁴⁴⁴ Article 4(1) of that BIT provided that each party would guarantee “fair and equitable treatment, according to International Law.”⁴⁴⁵ However, contrary to the Claimant’s contention that *Tecmed* sets forth the “customary international law standard of fair and equitable treatment,”⁴⁴⁶ the *Tecmed* tribunal stated that it “understands that the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement ... is that resulting from *an autonomous interpretation*.”⁴⁴⁷ Therefore, as the NAFTA tribunal in *Cargill* held, “[t]he award and statements of the *Tecmed* tribunal do not bear on the customary international law minimum standard of treatment, but rather reflect an *autonomous* standard based on an interpretation of the text.”⁴⁴⁸ It was for this reason that NAFTA tribunals in both *Cargill* and *Glamis* ruled “the holding in *Tecmed* is

⁴⁴² See *Ibid.* ¶ 608 (BOA-33). See also, *Cargill-Award*, ¶ 278 (holding that arbitral awards are only “relevant to the issue presented in Article 1105(1) if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language.”) (BOA-15).

⁴⁴³ *Técnicas Medioambientales Tecmed, S.A. v. Mexico* (ICSID No. ARB(AF)/00/2) Award (29 May 2003) (“*Tecmed – Award*”) (BOA-81).

⁴⁴⁴ See *Ibid.* ¶ 4 citing Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States (1996) (BOA-81).

⁴⁴⁵ See *Ibid.* ¶ 152 (BOA-81).

⁴⁴⁶ Claimant’s Memorial, ¶ 399.

⁴⁴⁷ *Tecmed – Award*, ¶ 155 [emphasis added] (BOA-81).

⁴⁴⁸ *Cargill-Award*, ¶ 280 [emphasis added] (BOA-15).

not instructive ... as to the scope and bounds of the fair and equitable treatment required by Article 1105 of the NAFTA.”⁴⁴⁹

278. Similarly, *Saluka* and *CME* are inapposite. Those cases concerned alleged violations of a Dutch-Czech BIT. The fair and equitable treatment clause at Article 3.1 of that treaty did not refer to international law and was expressly distinguished from the fair and equitable treatment standard in the NAFTA:

[T]his Tribunal has to limit itself to the interpretation of the “fair and equitable treatment” standard as embodied in Article 3.1 of the Treaty. That Article omits any express reference to the customary minimum standard. The interpretation of Article 3.1 does not therefore share the difficulty that may arise under treaties (*such as the NAFTA*) which expressly tie the “fair and equitable” treatment standard to the customary minimum standard. Avoidance of these difficulties may even be regarded as the very purpose of the lack of a reference to an international standard in the Treaty. This clearly points to the *autonomous* character of a “fair and equitable treatment” standard such as the one laid down in Article 3.1 of the Treaty.⁴⁵⁰

279. Likewise, the *MTD*, *Eureko*, *Sempra*, *Azurix*, *CMS*, *PSEG*, and *Siemens* decisions are unavailing to the Claimant. Those cases all concerned fair and equitable treatment clauses that did not refer to the customary international law minimum standard of treatment, and the tribunals in those cases did not undertake any analysis of state practice or *opinio juris*.

280. In *MTD*, the arbitral tribunal applied an interpretation of the *autonomous* standard of “fair and equitable treatment” because “there [was] no reference to customary international law in the BIT in relation to fair and equitable treatment.”⁴⁵¹ In *Eureko*, the

⁴⁴⁹ See *Ibid.* ¶ 280 (BOA-15); *Glamis-Award*, ¶ 610 (BOA-33).

⁴⁵⁰ *Saluka Investments B.V. v. Czech Republic* (UNCITRAL) Partial Award (17 March 2006), ¶ 294 [emphasis added] (“*Saluka-Partial Award*”) (BOA-70). *CME* was a 179 page opinion consisting of 625 paragraphs, and the tribunal in that case used but one paragraph to analyze the claimant’s fair and equitable treatment claim. It did not undertake any analysis of state practice or *opinio juris*, and did not even refer to the customary international law minimum standard of treatment of aliens. *CME Czech Republic B.V. v The Czech Republic* (UNCITRAL) Final Award (14 March 2003) (“*CME – Award*”) (BOA-18).

⁴⁵¹ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID No. ARB/01/7) Award (25 May 2004) ¶111 (“*MTD – Award*”) (BOA-50).

fair and equitable treatment provision in a Polish-Dutch BIT did not refer to international law, and the tribunal did not interpret it in accordance with customary international law.⁴⁵² *Sempra*, *Azurix*, and *CMS* analyzed a fair and equitable treatment clause in a U.S.-Argentine BIT. The *Azurix* tribunal interpreted that clause as requiring “higher standards than required by international law,”⁴⁵³ and the *Sempra* tribunal viewed it as permitting “treatment additional to or beyond that of customary international law.”⁴⁵⁴ In *PSEG*, there was no analysis of customary international law with respect to a fair and equitable treatment clause in a U.S.-Turkish BIT, and the tribunal observed that the clause “acquir[ed] a standing on its own,”⁴⁵⁵ autonomous of “the more traditional ... international law standards.”⁴⁵⁶ Finally, *Siemens* interpreted a fair and equitable treatment clause in a German-Argentine BIT according to the “ordinary meaning” of “fair” and “equitable” in light of the object and purpose of the BIT.⁴⁵⁷

281. The Claimant’s reliance on *Rumeli* is also misplaced. While the tribunal in that case summarily stated in *dicta* that “the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law,”⁴⁵⁸ it did not undertake any analysis of customary international law, or cite any arbitral awards which did. In any event, the *Rumeli* tribunal applied the autonomous standard when interpreting a Turkish-Kazakh BIT. In setting out the standard that it was employing, the *Rumeli* tribunal stated that it was “left to the determination of the Tribunal which ‘will have to decide whether in all the circumstances

⁴⁵² *Eureko B.V. v. Republic of Poland*, Ad Hoc (Netherlands/Poland BIT). Partial Award and Dissenting Opinion (19 August 2005) ¶¶ 77, 231-235 (“*Eureko-Partial Award*”) (BOA-28).

⁴⁵³ *Azurix v. Argentine Republic* (ICSID No. ARB/01/12) Award (14 July 2006) ¶361 (“*Azurix-Award*”) (BOA-6).

⁴⁵⁴ *Sempra Energy International v. Argentine Republic* (ICSID No. ARB/02/15) Award (28 September 2007) ¶302 (“*Sempra-Award*”) (BOA-75).

⁴⁵⁵ *PSEG Global Inc. and Konya Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID No. ARB/02/5) Award (19 January 2007) ¶ 239 (“*PSEG-Award*”) (BOA-66).

⁴⁵⁶ *See Ibid.* (BOA-66).

⁴⁵⁷ *Siemens A.G. v. Argentine Republic* (ICSID No. ARB/02/8) Award (6 February 2007), ¶ 290 (“*Siemens-Award*”) (BOA-77).

⁴⁵⁸ *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16) Award (29 July 2008)¶ 611 (“*Rumeli-Award*”) (BOA-69).

the conduct in issue is fair and equitable or unfair and inequitable.”⁴⁵⁹ The italicised language is a direct quotation from Dr. Mann’s note — which the *Rumeli* tribunal cited — and demonstrates that it employed the *autonomous* standard of “fair and equitable treatment” that was rejected by the *Note of Interpretation*.⁴⁶⁰

282. The UNCTAD study on which the Claimant relies is also unhelpful. That study recognizes that there exist “[a]t least two different views ... as to the precise meaning of the term ‘fair and equitable treatment’ in investment relations: the plain meaning approach; and equating fair and equitable treatment with the international minimum standard.”⁴⁶¹ The statement in the study on which the Claimant relies to establish that Article 1105(1) includes transparency obligations applies the former approach.

283. Even the Claimant’s reliance on the treatise by Dolzer and Schreuer is misplaced. In fact, Dolzer and Schreuer expressly caution that “[i]n contrast to the NAFTA practice, arbitral tribunals applying treaties that do not contain statements about the relationship of [fair and equitable treatment] to customary international law have interpreted the relevant provisions in BITs autonomously on the basis of their respective wording.”⁴⁶²

284. In sum, as the NAFTA tribunal in *Glamis* held, this Tribunal “may look solely to arbitral awards – including BIT awards – that seek to be understood by reference to the customary international law minimum standard of treatment, as opposed to any autonomous standard.”⁴⁶³ The Claimant has not referred to a single award that analyses the minimum standard of treatment under customary international law. It follows that

⁴⁵⁹ See *Ibid.* ¶ 610 [italics in original], citing F.A. Mann (BOA-69).

⁴⁶⁰ The *CMS* decision also summarily equated the customary international law minimum standard of treatment with the autonomous standard of fair and equitable treatment in *dicta*. Yet, as in *Rumeli*, it did so without any evidence or analysis whatsoever. Indeed, it had no evidentiary basis for expressing this as an accurate statement of law because neither the tribunal nor the arbitral awards on which it relied undertook any analysis of state practice or *opinio juris*. In any event, the *CMS* tribunal ultimately employed an autonomous interpretation of fair and equitable treatment. See, *CMS Gas Transmission Company v The Argentine Republic* (ICSID Case No. ARB/01/8) Award (12 May 2005) ¶¶ 274, 284 (“*CMS-Award*”) (BOA-20).

⁴⁶¹ United Nations Conference on Trade and Development, UNCTAD/TTE/IIT/11 (Vol. III) *Fair and Equitable Treatment* (United Nations: New York and Geneva, May 1999), p. 10 (BOA-86).

⁴⁶² Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008), p. 126 (BOA-102).

⁴⁶³ *Glamis-Award*, ¶ 611 (BOA-33).

none of these cases illustrate the customary international law standard of treatment codified in NAFTA Article 1105(1).

(d) Article 1105(1) Does Not Require the Protection of Legitimate Expectations or Transparency

285. It is not surprising that the Claimant has failed to establish that the customary international law applicable to Article 1105(1) includes rules concerning legitimate expectations and transparency. Neither has crystallized into a rule of custom.

286. The Claimant has not cited a single NAFTA case subsequent to the *Note of Interpretation* to support his allegation that the customary international law applicable to Article 1105(1) requires the protection of legitimate expectations and transparency. In *Cargill*, the NAFTA tribunal was unconvinced that Article 1105(1) requires the NAFTA Parties “to provide a stable and predictable environment in which reasonable expectations are upheld.”⁴⁶⁴ Likewise, the *Cargill* tribunal was not persuaded that “a general duty of transparency is included in the customary international law minimum standard of treatment owed to foreign investors per Article 1105’s requirement to afford fair and equitable treatment.”⁴⁶⁵ Similarly, the Supreme Court of British Columbia held that the *Metalclad* tribunal exceeded its jurisdiction by ruling that Article 1105(1) included a transparency obligation.⁴⁶⁶

287. In *Glamis*, the tribunal considered it possible that “the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations” could be a *factor* as to whether there had been a sufficiently egregious and shocking act so as to fall below the customary international law minimum standard of treatment.⁴⁶⁷ The tribunal did not, however, state that the frustration of an investor’s expectations amounted to a violation in and of itself. To the contrary, it stated that “[m]erely not living up to expectations cannot be sufficient to find a breach of

⁴⁶⁴ *Cargill-Award*, ¶ 289-290 (BOA-15).

⁴⁶⁵ *See Ibid.* ¶ 294 (BOA-15).

⁴⁶⁶ *Metalclad Corporation v. United Mexican States* – Supreme Court of British Columbia 2001 BCSC 664, ¶¶ 70-76 (“*Metalclad-Challenge*”) (BOA-45).

⁴⁶⁷ *Glamis-Award*, ¶ 627 (BOA-33).

Article 1105 of the NAFTA.⁴⁶⁸ Similarly, the tribunal in *International Thunderbird* only considered the frustration of a claimant's expectations as part of the NAFTA "context" when determining whether the impugned actions amounted to a "gross denial of justice or manifest arbitrariness."⁴⁶⁹ Likewise, in *Waste Management II*, the tribunal considered the breach of representations made by a NAFTA Party to a claimant as "relevant" to the determination of whether the NAFTA Party acted in a way that was "grossly unfair, unjust, or idiosyncratic."⁴⁷⁰

288. In sum, under Article 1105(1), there is no rule of customary international law which requires NAFTA Parties to protect a foreign investor's legitimate expectations or to act transparently.

2. Even if Article 1105(1) Requires the Protection of Legitimate Expectations and Transparency, the Claimant Has Not Shown that Sections 2 or 3 of the AMLA Violate Those Requirements

289. Section 2 of the *AMLA* prohibits the disposal of waste at the Adams Mine site, and Section 3 of the *AMLA* revokes all approvals the Enterprise and Notre obtained in relation to Adams Mine. Even accepting, *arguendo*, the Claimant's flawed interpretation of Article 1105(1) – which Canada does not – the Claimant fails to demonstrate that Sections 2 or 3 of the *AMLA* frustrated the Enterprise's legitimate expectations or were enacted in a non-transparent manner.

⁴⁶⁸ See *Ibid.* ¶ 620 (BOA-33).

⁴⁶⁹ *Thunderbird-Award*, ¶¶ 147, 194 (BOA-82).

⁴⁷⁰ *Waste Management II-Award*, ¶ 98 (BOA-91).

(a) The Enterprise's Legitimate Expectations Were Not Frustrated⁴⁷¹

290. In cases where legitimate expectations have been recognized as an obligation under the autonomous standard, tribunals have identified several elements that must be established by a foreign investor to show that his expectations were legitimate and entitled to protection. The claimant must prove that his expectations arose from a specific assurance made by the Host State to induce the investment.⁴⁷² Further, the relevant expectations must be those existing at the time the investment was made.⁴⁷³ Moreover, the expectations must be based on objective rather than the subjective expectations.⁴⁷⁴ Finally, the Tribunal should take into account "all circumstances,

⁴⁷¹ In his Memorial, the Claimant conflates his expectations with those of the Enterprise, and appears to allege that it is *his* expectations that are relevant. Thus, for example, he alleges that "[a]t the time the Enterprise was established, and at the time the Adams Mine Site was acquired, *Mr. Gallo* held, and was entitled to hold, a legitimate expectation that this investment in land could be developed and enjoyed as per the permits that had already been issued in respect of its potential use." Claimant's Memorial, ¶ 460. Of course, it was the *Enterprise*, not the Claimant, which acquired Adams Mine and had an "investment in land," and it is therefore the Enterprise's expectations – and those of its officers, directors, managers, and shareholders – which are relevant to determining whether there was any violation of a rule relating to legitimate expectations. Moreover, this arbitration is brought pursuant to Article 1117 of the NAFTA, under which the Claimant brings this arbitration *on behalf* of the Enterprise. Therefore, again, it is the *Enterprise's* expectations that are relevant, not the Claimant's alone.

⁴⁷² See, e.g., *EDF Services Limited c Romania (ICSID Case No. ARB05/13) Award* (8 October 2009) ¶ 217 ("*EDF-Award*") (BOA-24). Even in NAFTA cases that have considered the frustration of legitimate expectations as a relevant factor in determining whether there was a violation of the customary international law minimum standard of treatment, tribunals have ruled that to show such expectations were legitimate, a foreign investor need show that his expectations arose from a specific assurance made to induce his investment. See, e.g., *Glamis-Award*, ¶ 620 ("Merely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA. Instead, Article 1105(1) requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations.") (BOA-33); *Waste Management II-Award*, ¶ 98 (there must have been a "breach of representations made by the host State which were reasonably relied on by the claimant.") (BOA-91); *ADF-Award*, ¶ 189 (denying the investor's claim of legitimate expectations because "any expectations that the Investor had ... were not created by any misleading representations made by authorized officials of the U.S. Federal Government.") (BOA-1).

⁴⁷³ See, e.g., *Bayındır İnşaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID ARB/03/29) Award* (27 August 2009), ("*Bayındır – Award*") ¶¶ 190-191 ("Several awards have stressed that the expectations to be taken into account are those existing at the time when the investor made the decision to invest. There is no reason not to follow this view here.") (BOA-8); *Duke Energy Electroquil Partners, et al. v. Republic of Ecuador (ICSID No. ARB/04/19) Award* (18 August 2008) ¶ 340 ("*Duke Energy-Award*") (BOA-23).

⁴⁷⁴ See, e.g., *EDF-Award*, ¶ 219 ("Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they may be deduced from all of the circumstances of the case, due regard being paid to the host

including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.”⁴⁷⁵

i. No Specific Assurances Were Ever Provided to Induce the Enterprise’s Investment

291. In order for a foreign investor to establish that he had expectations which were legitimate and entitled to protection, he must first establish that his expectations arose out of a “*specific assurance or commitment*”⁴⁷⁶ which “*purposely and specifically induced the investment*.”⁴⁷⁷ Such assurances must have been “definitive, unambiguous and repeated.”⁴⁷⁸ Here, however, the Claimant has provided no evidence that any governmental entity made any specific assurance to induce the Enterprise’s alleged acquisition of Adams Mine. He has not, because no such evidence exists.

292. Rather, the Claimant alleges that the Enterprise’s expectations arose out of the EA Approval and the Provisional Certificate. Namely, he argues that when the Enterprise acquired Adams Mine, it was entitled to hold “a legitimate expectation that this investment in land could be developed and enjoyed *as per the permits that had already been issued in respect of its potential use*.”⁴⁷⁹ However, the Claimant cannot genuinely claim that the EA Approval and Provisional Certificate were issued to “purposely and specifically” induce the Enterprise to acquire Adams Mine. Such a strained interpretation would border on the absurd. The Enterprise was not incorporated until years after the EA Approval and Provisional Certificate were issued. Hence, it would be nonsensical to

State’s power to regulate its economic life in the public interest.”) (BOA-24). *See also, Glamis-Award*, ¶ 627 (“Creation by the state of objective expectations in order to induce investment”) (BOA-33).

⁴⁷⁵ *Duke Energy-Award*, ¶ 340 (BOA-23). *See also, Bayindir-Award*, ¶ 182 (BOA-8); *Saluka-Partial Award*, ¶ 304 (noting that the expectations of investors, “in order for them to be protected, must rise to the level of legitimacy and reasonableness *in light of the circumstances*.”) (BOA-70).

⁴⁷⁶ *Glamis-Award*, ¶ 620. [Emphasis Added] (BOA-33).

⁴⁷⁷ *See Ibid.* ¶ 766 [emphasis added] (stating in full that “a violation of Article 1105 based on the unsettling of reasonable, investment-backed expectations requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment.”) (BOA-33).

⁴⁷⁸ *See Ibid.* ¶ 802 (BOA-33) quoting *Feldman-Award*, ¶ 148 (BOA-29).

⁴⁷⁹ Claimant’s Memorial, ¶ 460 [emphasis added].

suggest that anyone in the Government of Ontario granted them in order to *induce* the Enterprise to acquire Adams Mine.

293. In any event, the EA Approval and Provisional Certificate were only the first of many steps in a long and complex process to obtain approval to construct and operate a landfill. By themselves, they did not amount to a specific assurance or commitment by the Government that the Enterprise would ever be entitled to operate a landfill.

ii. The Enterprise's Expectations Were Not Objectively Reasonable

294. To be legitimate and entitled to protection, a foreign investor's expectations at the time he made his investment must be objectively reasonable in light of all surrounding circumstances, including the context of the investment, and the political, socioeconomic, cultural, and historical conditions prevailing in the Host State. In the instant case, the Enterprise's alleged "investment" is its supposed acquisition of Adams Mine on September 9, 2002.⁴⁸⁰ It is not credible that at that time the Enterprise expected that it would absolutely be allowed to proceed with the construction and operation of a landfill at Adams Mine.

295. When the Enterprise allegedly acquired Adams Mine, it would no doubt have been aware of the significant public, environmental, and Aboriginal opposition to and concern with the proposed operation of the site as a landfill. For example, as early as 1995, public interest groups expressed their concern with the Adams Mine project for environmental reasons.⁴⁸¹ In 1999 the Adams Mine Intervention Coalition requested judicial review to prevent the project from going forward.⁴⁸² Intense opposition and concern was also expressed during RCN's negotiations with Toronto in 2000, when community based opponents to the site carried out a series of prominent public protests which were widely covered by local and national media.⁴⁸³ Similarly, the Timiskaming

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⁴⁸¹ Counter-Memorial, ¶ 167-171.

⁴⁸² *Adams Mine Intervention Coalition v. Ontario (Environmental Assessment Board)* [1999] O.J. No. 2886 (On. Div. Ct.) (CAN-382); *Adams Mine Intervention Coalition v. Ontario (Environmental Assessment Board)* [1999] O.J. No. 2701 (On. Div. Ct.) (CAN-383).

⁴⁸³ Witness Statement of Richard Butts, ¶ 47; Witness Statement of Angelos Bacopoulos, ¶ 79.

First Nation, an Aboriginal community located downstream from Adams Mine, was deeply opposed to the development of Adams Mine as a landfill. Among other things, it publicly petitioned Environment Canada on September 1, 2000, to request a federal environmental assessment of Adams Mine.⁴⁸⁴ Likewise, a public interest group calling itself the Campaign Against Adams Mine – which represented a number of municipalities, agricultural groups and environmentalists – publicly petitioned Environment Canada to oppose development of Adams Mine as a waste disposal site.⁴⁸⁵ All of these concerns and opposition intensified yet again following the Walkerton tragedy, and the nearly two-year judicial inquiry which followed it.

296. The foregoing environmental, public, and Aboriginal concerns were echoed by municipal and provincial politicians in Ontario. For example, by the Claimant's own admission, David Ramsay – the local Member of Provincial Parliament for the area encompassing Adams Mine for more than a decade prior to the Claimant's acquisition of the Enterprise – was an “opponent of the Adams Mine waste disposal site,”⁴⁸⁶ and had publicly opposed the development of Adams Mine as a landfill “for years.”⁴⁸⁷ The Claimant himself quotes Mr. Ramsay as publicly stating that “[w]e have to make sure we bury that certificate of approval for [Adams Mine],”⁴⁸⁸ and “[w]e will never rest until that certificate of approval is gone,”⁴⁸⁹ before the Enterprise acquired the site.

297. It is inconceivable that the Enterprise and its representatives would not have appreciated that the foregoing environmental, public, and Aboriginal concerns might result in the prohibition of the disposal of waste at Adams Mine. When it allegedly

⁴⁸⁴ Letter from Rheel Thivierge, Vice-Chief, Timiskaming First Nation to the Hon. David Anderson, Minister of the Environment, Re: Adams Mine/Timiskaming First Nation, enclosing Petition to Federal Minister of the Environment Requesting a Federal Environmental Assessment of Rail Cycle North's Proposal for the Adams Mine Site (September 1, 2000) (CAN-221).

⁴⁸⁵ Letter from Pierre Belanger, Campaign Against Adams Mine to Hon. David Anderson, Minister of Environment enclosing Petition for a Federal Environmental Assessment of a Proposed Landfill at the Adams Mine – Supporting Brief, submitted by Campaign Against Adams Mine dated September 21, 2000 (CAN-223).

⁴⁸⁶ Claimant's Memorial, ¶ 269.

⁴⁸⁷ Claimant's Memorial, ¶ 278.

⁴⁸⁸ Claimant's Memorial, ¶ 273.

⁴⁸⁹ Claimant's Memorial, ¶ 273.

purchased Adams Mine, the Enterprise entered what was widely known to be a heavily regulated industry that governmental institutions, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, regulated very carefully.

298. As the *Methanex* tribunal observed, foreign investors must “appreciate[] that the process of regulation ... involve[s] wide participation of industry groups, non-governmental organizations, academics and other individuals, many of these actors deploying lobbyists.”⁴⁹⁰ The Enterprise itself actively lobbied provincial and municipal politicians in Ontario to seek endorsements for Adams Mine.⁴⁹¹ As a result, the Enterprise and its representatives must have appreciated that receiving input from, and acting in response to, members of the public with differing interests and concerns is a normal – indeed, an *essential* – part of the democratic process in respect of the waste disposal industry.

299. Indeed, had the Enterprise conducted any due diligence prior to its supposed acquisition of Adams Mine, it would have discovered that legislation like the *AMLA* was not at all unique in Ontario. For example, some ten years prior to the enactment of the *AMLA*, the Government of Ontario, responding to significant public concerns, passed an Act to prohibit the disposal of waste in a mined-out quarry in the Niagara Escarpment region of the province.⁴⁹²

⁴⁹⁰ *Methanex v. United States* (UNCITRAL) Award, Part IV, Chapter C (3 August 2005) ¶ 9 (“*Methanex-Award*”) (BOA-43).

⁴⁹¹ Counter-Memorial, ¶ 105-110.

⁴⁹² Witness Statement of Doug Barnes, ¶ 37. *Environmental Protection Amendment Act (Niagara Escarpment)*, R.S.O. 1990, Chapter N.2 as amended (CAN-50). A company called Reclamation Systems Inc. (“RSI”) acquired the quarry, and sought the necessary approvals from provincial authorities to convert the quarry into a landfill. However, as with Adams Mine, there was significant public opposition to its development as a waste disposal site. Accordingly, the Member of Provincial Parliament representing the area in which the quarry was located introduced a bill to provide for a non-reviewable ban on any new waste disposal sites in the Niagara Escarpment area, including the landfill proposed by RSI. This bill was formally passed and became law, with the effect of prohibiting RSI from converting the quarry into a waste disposal site. *Reclamation Systems Inc. v. The Honourable Bob Rae et al.*, 27 O.R. (3d) 419, p. 4-5, ¶ 18 (CAN-52).

300. In sum, the Claimant's allegation that [REDACTED] [REDACTED] is simply not credible. It is implausible that an informed participant in the heavily regulated and uncertain waste industry would not have anticipated that efforts to establish a waste disposal site at Adams Mine might not succeed.

(b) The Government of Ontario Acted Transparently

301. The Claimant's allegation that the *AMLA* was not enacted transparently must also be rejected. The Enterprise was the most active public participant in the legislative process leading to the enactment of the *AMLA*. The Claimant makes much of the fact that "[t]here was no consultation with the Enterprise before the *Adams Mine Lake Act* was tabled."⁴⁹⁴ However, not only is this completely normal, it is also beside the point. The Enterprise was extensively consulted between the time the *AMLA* was tabled and the time it was ultimately enacted.

302. Thus, after Bill 49 was tabled, the Enterprise requested numerous amendments to the Bill.⁴⁹⁵ Each of the Enterprise's requested amendments were accepted and incorporated into the *AMLA*. These amendments required Ontario to pay an additional \$1.5 million to Notre for expenses incurred but not paid that Ontario would not have had to pay without undertaking the Enterprise's requested amendments.⁴⁹⁶

303. The Claimant does not dispute this. Rather, he only alleges that the Enterprise was not consulted before Bill 49 was tabled, and that Mr. Acton did not represent the

[REDACTED]

⁴⁹⁴ Claimant's Memorial, ¶ 324 [italics in original, underlining added].

⁴⁹⁵ [REDACTED]

[REDACTED]

[REDACTED] Letter from Gordon Acton, Wishart Law Firm to James Kendik and Dennis Brown, Crown Law Office Civil, *Re: 1532382 Ontario Inc., c.o.b. Adam's Mine Rail Haul v. Her Majesty the Queen – Ministry of Natural Resources* (April 13, 2004) (CAN-139); Email from Gordon Acton, Wishart Law Firm LLP to Leo Fitzpatrick, Counsel, Ministry of the Environment, *Re Bill 49* (May 6, 2004) (CAN-329).

⁴⁹⁶ Counter-Memorial, ¶ 214.

Enterprise after “the AMLA was passed.”⁴⁹⁷ Canada does not contest either of these assertions, and they are, in any event, irrelevant.

304. The Claimant’s allegation that the *AMLA* was not enacted transparently is also contradicted by the fact that it was enacted in accordance with the ordinary democratic process in Ontario. In particular, the Ontario Standing Committee on the Legislative Assembly conducted public hearings to seek input, including the input of the Enterprise which was provided through the testimony of its Managing Director Gordon McGuinty. It also posted the proposed *AMLA* to the Environmental Bill of Rights Registry for public comment more than a month before it was enacted.⁴⁹⁸

E. The Claimant Has Not Established that Sections 4 and 5 of the *AMLA* Violate Article 1105(1)

305. The Claimant also alleges that Sections 4 and 5 of the *AMLA* constituted a “denial of justice” in violation of Article 1105(1) because they “purport[] to annul the Enterprise’s rights under the Border Lands contract and to prohibit it from obtaining any redress for the breach, or for the prohibition, from an Ontario Court.”⁴⁹⁹ In other words, the Claimant alleges that Sections 4 and 5 of the *AMLA* violate Article 1105(1) because they annulled the Borderlands Application and extinguished the Borderlands Litigation. This claim, which completely ignores all of the evidence on the record, is without merit.

306. An allegation of a denial of justice is an extreme one. As Judge Tanaka of the ICJ observed in the *Barcelona Traction* case, “[i]t is an extremely serious matter to make a charge of a denial of justice vis-à-vis a State.”⁵⁰⁰ Likewise, international legal scholars

⁴⁹⁷ Claimant’s Memorial, ¶ 328. While the Claimant or his witnesses nowhere deny that Mr. Acton represented the Enterprise in his negotiations with Ontario prior to the enactment of the *AMLA*, the Memorial and a number of the Witness Statements appear to be crafted in a way to give this misimpression. For example, REDACTED

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⁴⁹⁸ *Environmental Bill of Rights*, S.O. 1993, c. 28, s. 15(1) (CAN-385).

⁴⁹⁹ Claimant’s Memorial, ¶ 464.

⁵⁰⁰ *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)* [1970] I.C.J. Rep 4, Judgment (5 February 1970) (“*Barcelona Traction – Judgment*”) p. 160. The ICJ has not directly

have observed “that an allegation of a denial of justice is a serious step” for which “the misconduct [at issue] must be extremely gross.”⁵⁰¹ It is for this reason that NAFTA tribunals have held that only *gross* or *manifest* denials of justice will suffice to show a violation of Article 1105(1).⁵⁰² The Claimant has failed to meet this standard.

1. The Enterprise’s Settlement of the Borderlands Litigation Defeats the Claimant’s Denial of Justice Claim

307. In 1961, Sohn & Baxter recognized that “[n]o claim may be presented by a claimant if, after the injury and without duress, the claimant himself or the person through whom he derived his claim waived, compromised, or settled the claim.”⁵⁰³ In the instant case, the Claimant alleges that the *AMLA* constituted a denial of justice because it annulled the Enterprise’s purported rights under the Borderlands Application and prohibited the Enterprise from obtaining redress for the annulment of those rights before the courts of Ontario. However, this claim ignores the fact that the Enterprise *did* pursue its rights under the Borderlands Application in the Borderlands Litigation before an Ontario court, and *settled* that litigation prior to the enactment of the *AMLA*.

308. On October 9, 2003, the Enterprise commenced the Borderlands Litigation, alleging that the MNR breached the Borderlands Application by failing to convey the Borderlands to the Enterprise. The Enterprise sought a Declaratory Order that it was entitled to the Borderlands or, in the alternative, damages.⁵⁰⁴

309. On April 5, 2004, Bill 49 was introduced. Shortly thereafter, the Enterprise’s litigation counsel, Mr. Acton, wrote two letters to Ontario’s litigation counsel, Mr.

addressed the doctrine of “denial of justice.” *Barcelona Traction* was dismissed on procedural grounds, but Judge Tanaka, in his separate opinion, set forth the quoted language (BOA-7). See, e.g., A.K. Bjorklund, “Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims” (2005) 45:4 *Virginia Journal of International Law*, pp. 847-848 (BOA-94).

⁵⁰¹ A.K. Bjorklund, “Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims,” p. 813 (“[A] state is deemed to ‘deny justice’ only in extreme cases.”) (BOA-94); J.L. Brierty, *The Law of Nations*, p. 287 (BOA-96).

⁵⁰² *Glamis-Award*, ¶ 627; *Cargill-Award*, ¶ 286; *Loewen-Award*, ¶¶ 129-130.

⁵⁰³ Sohn, L. & Baxter, R. “Convention on the International Responsibility of States for Injuries to Aliens” 186 (1961) (BOA-125).

⁵⁰⁴ Witness Statement of James Kendik, ¶ 7.

Kendik and Mr. Brown, requesting amendments to the compensation provisions of Bill 49.⁵⁰⁵ On April 16, 2004, Mr. Acton telephoned Mr. Kendik and offered to settle the Borderlands Litigation in exchange for Mr. Kendik's recommendation of the Enterprise's requested amendments.⁵⁰⁶

310. On April 20, 2004, Mr. Kendik and Mr. Brown called Mr. Acton and accepted the Enterprise's offer to settle.⁵⁰⁷ On June 17, 2004, the *AMLA* was formally enacted, incorporating all of the Enterprise's requested amendments. In accordance with the agreement to settle, on July 5, 2004, the Enterprise permanently adjourned its summary judgment motion *sine die*, effectively terminating the Borderlands Litigation.⁵⁰⁸

311. The Claimant does not deny that the Enterprise pursued its rights under the Borderlands Application in a legal action before an Ontario court. Nor does he deny that the Enterprise voluntarily settled that action in exchange for concessions by the Government in relation to Bill 49. Indeed, that the Enterprise's offer to settle was *unsolicited* by the Government proves beyond any doubt that its agreement to settle the Borderlands Litigation was voluntary. The Enterprise could have requested amendments to Bill 49, without offering to settle,⁵⁰⁹ but made a business decision to settle the Borderlands Litigation in exchange for the amendments it requested.

⁵⁰⁵ See *Ibid.* ¶¶ 16, 18; REDACTED

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Letter from Gordon Acton, Wishart Law Firm to James Kendik and Dennis Brown, Crown Law Office Civil, *Re: 1532382 Ontario Inc., c.o.b. Adam's Mine Rail Haul v. Her Majesty the Queen – Ministry of Natural Resources* (April 13, 2004) (CAN-139).

⁵⁰⁶ Witness Statement of James Kendik, ¶ 19.

⁵⁰⁷ See *Ibid.* ¶ 23; see also Letter from Dennis Brown, Q.C. to Gordon Acton, Wishart Law Firm, LLP, *Re: 1532382 Ontario Inc. c.o.b. Adam's Mine Rail Haul v. HMQ/MNR*, Court File No. 03-CT-022368 (April 22, 2004) (CAN-141).

⁵⁰⁸ Witness Statement of James Kendik, ¶ 30.

⁵⁰⁹ In fact, after Bill 49 was tabled, the Government invited the Enterprise to make comments on the Bill to ensure that it was fully and fairly engaged in the legislative process leading up to the enactment of the *AMLA*. Therefore, the Enterprise was asked to suggest amendments to the Bill, and the fact that the Enterprise chose to make an offer to settle and discontinue the Borderlands Litigation in exchange for those amendments does not in any way demonstrate that the settlement was involuntary.

312. Rather, the Claimant summarily alleges that Bill 49 was presented to the Enterprise as a “fait accompli.”⁵¹⁰ However, this allegation is belied by the fact that every one of the Enterprise’s requested amendments was undertaken in the final version of the *AMLA*. All of these amendments were undertaken by the Government in good faith pursuant to the parties’ agreement to settle the Borderlands Application. Moreover, as a result of these amendments to Bill 49, the Government paid an additional [REDACTED] in compensation and incurred an additional obligation to pay the Enterprise a further \$500,000.⁵¹¹ Had Bill 49 been presented to the Enterprise as a “fait accompli” as the Claimant contends, none of these amendments would have been made.

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314. The inescapable fact is that the Enterprise made a considered and expedient business decision on the advice of legal counsel to settle the Borderlands Litigation in exchange for amendments to Bill 49. By now alleging that the annulment of the Borderlands Application and extinguishment of the Borderlands Litigation constituted a “denial of justice,” the Claimant is doing little more than attempting to re-open that litigation in a different forum. The Government of Ontario made all of the Enterprise’s requested amendments in good faith and at considerable expense pursuant to the parties’ agreement to settle. The Claimant’s denial of justice claim must therefore be dismissed.

⁵¹⁰ Claimant’s Memorial, ¶ 327.

⁵¹¹ Counter-Memorial, ¶¶ 210-214.

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⁵¹³ Counter-Memorial, ¶¶ 185-190.

2. The Claimant's Denial of Justice Claim is Without Foundation

315. The Claimant does not allege that Sections 4 and 5 of the *AMLA* amounted to a denial of justice because it deprived the Enterprise access to Ontario courts in and of itself, or to seek to repeal the *AMLA*. Rather, the Claimant asserts that the *AMLA* constituted a denial of justice because it prevented the Enterprise from accessing the courts of Ontario to obtain what he views to be the “*appropriate measure of damages*”⁵¹⁴ for the annulment of the Enterprise’s purported rights under the Borderlands Application.

316. Thus, the Claimant alleges Sections 4 and 5 of the *AMLA* amounted to a denial of justice because they caused the Enterprise to “suffer[] the loss of its right to *seek damages* from an Ontario court for breach of contract in respect of the Border Lands purchase agreement,”⁵¹⁵ because they “stripped the Enterprise of its fundamental due process right of having access to an impartial and independent municipal court, *from which to obtain compensation* for the Ontario Government’s breach of contract in respect of the Border Lands,”⁵¹⁶ and because they “deprived the Enterprise of its right to *seek and collect [the appropriate measure of] damages* from an Ontario Court.”⁵¹⁷ The Claimant argues that this “appropriate measure of damages ... would have been the fair market value of the Adams Mine site itself.”⁵¹⁸ According to the Claimant, this would have included damages for lost profits and loss of goodwill.⁵¹⁹ In sum, therefore, the Claimant’s denial of justice claim is based entirely on his allegation that the *AMLA* “severely restricted the quantum of damages [the Enterprise] could obtain by providing an inflexible and restrictive formula to calculate losses and providing that no compensation is to be payable for loss of goodwill or possible future profits.”⁵²⁰

⁵¹⁴ Claimant’s Memorial, ¶ 472 [emphasis added].

⁵¹⁵ Claimant’s Memorial, ¶ 470 [emphasis added].

⁵¹⁶ Claimant’s Memorial, ¶ 474 [emphasis added].

⁵¹⁷ Claimant’s Memorial, ¶ 472 [emphasis added].

⁵¹⁸ Claimant’s Memorial, ¶ 472.

⁵¹⁹ Witness Statement of Rosenblatt, pp. 4-5.

⁵²⁰ Witness Statement of Rosenblatt, pp. 4-5.

317. Yet, this ignores the fact that under the *AMLA*, the Enterprise was expressly entitled to petition an Ontario court to determine the appropriate measure of compensation to which it was legally entitled.

318. Section 6 of the *AMLA* is the provision addressing compensation payable to the Enterprise under the Act. Section 6(2) provides that the Enterprise was entitled to compensation for “reasonable expenses incurred and paid,” “reasonable expenses incurred ... but not paid,” and “reasonable expenses incurred ... for legal fees and disbursements” in connection with the development of Adams Mine as a waste disposal site. Section 6(8) provides that “no compensation is payable under subsection (1) for any loss of goodwill or possible profits.” *However*, Section 6(6) states:

[The Enterprise], [Notre] or the Crown in right of Ontario may apply to the Superior Court of Justice to determine any issue of fact or law related to this section that is in dispute.

319. Therefore, under Section 6(6), the Enterprise had the ability to challenge the nature and quantum of compensation made available and denied to it under Section 6 of the *AMLA*. There is simply no other way to interpret the language of the section.

320. Thus, the Enterprise could have petitioned an Ontario court to seek whatever it viewed to be the “fair market value of the Adams Mine site.”⁵²¹ It could have sought not only expenses incurred and paid, expenses incurred but not paid, and expenses for legal fees and disbursements, but also a determination that it was, under Ontario law, permitted to recover for lost profits, loss of goodwill, and any other form of compensation to which it felt it was legally entitled. The *AMLA* therefore provided the Enterprise with a specific legal mechanism to have an impartial domestic court determine whether the compensation provided under the Act was adequate.

321. The Claimant argues, without citing any authority, that the *AMLA*’s compensation provisions could not be challenged because “[t]he fact of the legislation or the provisions thereof, could not be challenged.”⁵²² In light of Section 6(6) of the *AMLA*, however, this

⁵²¹ Claimant’s Memorial, ¶ 472.

⁵²² Claimant’s Memorial, ¶ 471.

is simply incorrect. Had Section 6(6) of the *AMLA* stated that the Enterprise could only apply to an Ontario court to determine any issue of “fact” related to the compensation provision, the Claimant might be correct. But Section 6(6) states that the Enterprise could apply to the Ontario court to determine any issue of “fact or law” in relation to the compensation provision. Therefore, the *AMLA* clearly permitted a legal challenge to the nature and quantum of compensation provided under the Act.⁵²³

322. For this reason, all of the authorities cited by the Claimant for the proposition that a State’s denial of access to its domestic courts constitutes a denial of justice are beside the point. Sections 4 and 5 of the *AMLA* did not deny the Enterprise access to the courts of Ontario to determine the appropriate measure of compensation to which it was legally entitled, which is the very basis of the Claimant’s denial of justice claim. Thus, the Claimant’s denial of justice claim is without foundation and must be dismissed.

3. The Claimant’s Denial of Justice Claim is Not Ripe

323. A claim for denial of justice may not be made before all local remedies have first been exhausted. Thus, international legal scholars have almost universally recognized that “[t]here must be exhaustion of local remedies [] to claim denial of justice.”⁵²⁴ International investment tribunals have also recognized that a “[d]enial of justice does not

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⁵²⁴ A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Netherlands: Kluwer Law International, 2009), p. 241 (BOA-116). See also Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005), p. 108 (holding that “[i]n the particular case of denial of justice claims will not succeed unless the victim has indeed exhausted municipal remedies . . .”) (BOA-117); A.V. Freeman, *The International Responsibility of States for Denial of Justice* (London: Longman, 1938) at pp. 56, 403 *et seq.*, 291-292, 311-312 (stating that “a denial of justice engages the international responsibility of the State but that diplomatic claims may not be made until there has been compliance with the rule that local remedies must first be exhausted.”) (BOA-105); E.M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (New York: The Banks Law Publishing, 1915), p. 332 (holding “as a general rule the exhaustion of local remedies is considered a necessary condition precedent to” denial of justice claims) (BOA-95); G. Schwarzenberger, *International Law: International Law as Applied by International Courts and Tribunals*, vol. 1 (London: Stevens & Sons Ltd., 1957), p. 619 (holding that “the first condition of any [denial of justice] claim is that every attempt has been made to exhaust all available judicial remedies.”) (BOA-123).

arise⁵²⁵ unless the claimant has exhausted local remedies. Similarly, previous NAFTA tribunals have held that the exhaustion of local remedies doctrine is applicable to denial of justice claims in the NAFTA context.⁵²⁶

324. This is true even with respect to treaties that generally waive the exhaustion of local remedies doctrine.⁵²⁷ This is unsurprising when one considers the nature of denial of justice claims: they are claims that allege that a State has failed to provide *justice*.⁵²⁸ When considering whether a State has provided justice, one cannot look solely to the conduct of legislators in respect of an impugned measure; one must also look to the conduct of the judiciary which is tasked with the very responsibility of administering justice. In short, one must consider the entire *system of justice* in a State to determine whether there has been a denial of justice.⁵²⁹ There cannot be a denial of justice unless a

⁵²⁵ *Pantehnikisa Contractors v Albania* (ICSID Case No. ARB/07/21) Award (30 July 2009) ¶ 96 (“*Pantehnik-Award*”) (holding that a trial court’s “extreme misapplication of law” did not constitute a denial of justice because “[d]enial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole.”) (BOA-60).

⁵²⁶ *Loewen-Award*, ¶ 2 (holding that a trial court’s “disgraceful” conduct did not amount to a denial of justice because the claimant failed to show that it “had no reasonably available and adequate remedy under United States municipal law in respect of the matters of which it complains, being matters alleged to be violations of NAFTA.”) (BOA-40); *Thunderbird-Award*, ¶ 201 (holding that proceedings before an administrative tribunal did not amount to a denial of justice because they “were subject to judicial review before the Mexican courts.”) (BOA-82); *Feldman-Award*, ¶¶ 139-140 (holding that certain Mexican regulatory decisions did not constitute a denial of justice because “Mexican courts and administrative procedures at all relevant times have been open to Claimant ... [so] ... there appears to have been no denial of due process or denial of justice there as would rise to the level of a violation of international law.”) (BOA-29).

⁵²⁷ Jan Paulsson, *Denial of Justice in International Law*, *supra* note 530, p. 102-112 (BOA-117). Thus, for example, in *Loewen*, the claimant alleged that the exhaustion of local remedies doctrine was inapplicable to its denial of justice claim due to Article 1121(1)(b) of the NAFTA. That provision requires a claimant to waive its right to initiate or continue any domestic proceedings with respect to the measure that is alleged to be in breach of the NAFTA prior to submitting a claim to arbitration. The claimant argued that such a waiver would be unnecessary if foreign investors were required to exhaust all local remedies prior to initiating a NAFTA arbitration. The *Loewen* tribunal, however, disagreed and ruled that Article 1121(1)(b) did not waive the local remedies rule in cases alleging a denial of justice because the substance of such a claim was that the domestic system of justice had failed. *Loewen-Award*, ¶¶ 142-157 (BOA-40).

⁵²⁸ *See, e.g.*, Jan Paulsson, *Denial of Justice in International Law*, *supra* note 530, p. 108 (noting that the requirement that all local remedies be exhausted prior to initiating a claim for denial of justice “is neither a paradox nor an aberration, for it is in the very nature of the delict that a state is judged by the final product – or at least a *sufficiently* final product – of its administration of justice.”) (BOA-117).

⁵²⁹ *See Ibid.* p. 109 [emphasis in original] (“The obligation [at international law] is to establish and maintain a *system* which does not deny justice ...”) (BOA-117). A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, *supra* note 530, pp. 241-242 [emphasis in original] (“Denial of justice arises where a national legal *system* fails to provide justice ...”) (BOA-116);

State's judiciary has been afforded the opportunity to correct actions which might constitute a dereliction of international law by other members of the Government.⁵³⁰

325. In this case, as stated above,⁵³¹ the Claimant's allegation that Sections 4 and 5 of the *AMLA* amounted to a denial of justice is based entirely upon his assertion that it prevented the Enterprise from petitioning an Ontario court to obtain what he views to be the "appropriate measure of damages"⁵³² for the annulment of his purported rights under the Borderlands Application. Section 6(6) of the *AMLA*, however, provided the Enterprise with a legal remedy to have an impartial court determine whether the compensation provided under the Act was adequate.

326. The Enterprise failed to avail itself of the foregoing legal remedy provided by the courts of Ontario to determine whether the measure of compensation under the *AMLA* was sufficient, and the Claimant has failed to exhaust all local remedies. Accordingly, his denial of justice claim is not yet ripe, and must be dismissed.

F. The Claimant Has Failed to Establish that the *AMLA* Was Enacted in Bad Faith

327. The Claimant also alleges that the *AMLA* generally violates Article 1105(1) because it was enacted in "bad faith."⁵³³ Leaving aside the question of whether and to

Loewen-Award, ¶ 153 [emphasis added] (noting that "the duty imposed upon a State by international law [is] to provide a fair and efficient system of justice.") (BOA-40); International Law Commission, Second Report on State Responsibility, UN Doc A/CN.4/498/34 (3 May-23 July 1999), ¶ 75 (observing that "the obligation is to have a system of a certain kind, e.g., the obligation to provide a fair and efficient system of justice.") ("ILC – Second Report") (BOA-35).

⁵³⁰ See, e.g., Jan Paulsson, *Denial of Justice in International Law*, p. 108 ("For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself.") (BOA-117). See also, *Partechnik-Award*, ¶ 96 (holding that "[d]enial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole.") (BOA-60); *Loewen-Award*, ¶ 156 (holding that "[t]he purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision.") (BOA-40); *ILC – Second Report* (stating that "an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act") (BOA-35).

⁵³¹ Counter-Memorial, ¶¶ 315-319.

⁵³² Claimant's Memorial, ¶ 472 [emphasis added].

⁵³³ Claimant's Memorial, ¶ 475.

what extent bad faith can be the basis of an Article 1105(1) claim in and of itself, there is simply no evidence that supports the Claimant's allegation that the *AMLA* was enacted in bad faith here.

328. Previous NAFTA tribunals have ruled that a measure by a NAFTA Party is undertaken in "bad faith" where the intent underlying the measure was to harm foreign investors. Thus, for example, in *Cargill*, Mexico passed measures with the intention of harming U.S. investors in Mexico for the purpose of forcing the United States government to reverse certain trade policies. The *Cargill* tribunal ruled that this constituted bad faith conduct in violation of Article 1105(1) because the measures taken by Mexico were "expressly intended to injure United States producers and suppliers in Mexico in an effort to persuade the United States government to change its policy on sugar imports from Mexico."⁵³⁴

329. In the instant case, the Claimant has adduced no evidence that the Government of Ontario intended to harm the Enterprise when enacting the *AMLA*. There is no evidence that it was passed to exert pressure on a third party, or was part of some plot to punish the Claimant's state of nationality. To the contrary, it was enacted for the genuine purpose of protecting Ontario's water resources and in response to the concerns raised by environmental groups, Aboriginal groups, and the general public.

330. In fact, the *AMLA* was a manifestation of the concern that the newly elected Government of Ontario had regarding the protection of Ontario's water resources in the wake of the Walkerton tragedy. That Walkerton is located "600 kilometres away"⁵³⁵ and that the Walkerton tragedy was "four years removed"⁵³⁶ from the enactment of the *AMLA* is irrelevant.⁵³⁷ The fact is that there was an Ontario-wide concern over the contamination

⁵³⁴ *Cargill-Award*, ¶ 299 (BOA-15).

⁵³⁵ Claimant's Memorial, ¶ 477.

⁵³⁶ Claimant's Memorial, ¶ 477.

⁵³⁷ It is noteworthy that the judicial inquiry into the Walkerton tragedy ended only months before the introduction of the *AMLA* into the Ontario legislature, and was still very much on the minds of the public and legislators in Ontario. Thus, it is disingenuous to suggest that Walkerton is somehow irrelevant to this Tribunal's inquiry because it was "four years removed" from the enactment of the *AMLA*. Moreover, since the enactment of the *AMLA*, the Ontario legislature has enacted two other measures to protect water

of the province's water resources by large-scale industrial and agricultural activities. It was this concern that led the Government to prohibit the disposal of waste at Adams Mine, not some imagined political conspiracy to destroy the Claimant's investment.

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case of the *AMLA*, that policy rationale, which was stated repeatedly by Ontario legislators prior to the enactment of the *AMLA*, was to protect Ontario's water resources from contamination by landfilling and to respond to public concerns over the project that had been expressed repeatedly for almost fifteen years.

333. Moreover, that the Adams Mine project provided the initial impetus to ban the disposal of waste into Ontario lakes does mean that the *AMLA* was enacted in bad faith with the intent of "exclusively targeting" the Enterprise in violation of Article 1105(1). As the NAFTA tribunal held in *Glamis*, legislation is routinely passed with a specific project "on the minds of the legislators."⁵⁴⁰ It is often the case that a certain project convinces legislators and regulators that legislation needs to be undertaken to correct or prevent a larger class of problems. "[I]f, however, this [] project is merely a very visible

resources: the *Clean Water Act*, 2006, S.O. 2006, c. 22 and the *Lake Simcoe Protection Act*, 2008, S.O. 2008, c. 23.

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⁵³⁹ Claimant's Memorial, ¶ 479.

⁵⁴⁰ *Glamis-Award*, ¶ 791 (BOA-33).

member of a larger class of projects that are viewed as harmful by the legislature ... it cannot be said that this project alone was ‘targeted.’”⁵⁴¹

334. In the instant case, the Adams Mine project was just that – a very visible member of a larger class of projects that were viewed by the Government of Ontario as harmful. The Government was concerned about the contamination of drinking water in Ontario following the Walkerton tragedy, and felt it imperative to prevent landfilling in lakes to prevent the contamination of Ontario’s water resources.

335. In any event, contrary to the Claimant’s suggestion, the *AMLA* does not have the hallmarks of “targeted legislation.” In *Glamis*, the tribunal held that targeted legislation is ordinarily “strictly limited in time or geographic scope, and [] is [] crafted so as to exclude from its regulation all, or most, other similarly situated actors.”⁵⁴² The *AMLA* was not limited in time or geographic scope, and was not crafted so as to exclude from its regulation similarly situated actors. To the contrary, *on its very face* it applies to any and every proposed waste disposal project in a lake in Ontario.⁵⁴³ Indeed, in 2004 the *AMLA* was applied to another Ontario company to prevent it from expanding its landfill.⁵⁴⁴ This proves, beyond any doubt, that the *AMLA* was an act of *general application* that did not “exclusively target” the Enterprise.⁵⁴⁵

336. In sum, the Claimant has not adduced any evidence that the Government of Ontario intended to harm his investment, has failed to show that the *AMLA* exclusively targeted his alleged investment, and has not rebutted the fact that the *AMLA* is, in fact, an

⁵⁴¹ See *Ibid.* ¶ 792 (BOA-33).

⁵⁴² See *Ibid.* ¶ 793 (BOA-33).

⁵⁴³ *Glamis-Award*, ¶ 794 (holding that legislation did not target the claimant’s project because “*on its face*, [the legislation] appears to apply to potentially several mines, if not yet at present, then in the future.”) (BOA-33).

⁵⁴⁴ Witness Statement of Ian Parrott, ¶ 18. Inter-Recycling Systems Inc. has been prevented from operating a waste disposal site in the City of Sarnia, in the County of Lambton, Ontario as the *AMLA* provisions of the *Environmental Protection Act* applied to the site and prohibited from deposition waste in a lake. See the decision of the Environmental Review Tribunal, *Inter-Recycling Systems Inc. v. Director, Ministry of the Environment*, Decision of Environmental Review Tribunal (August 25, 2009) (CAN-363).

⁵⁴⁵ *Glamis-Award*, ¶ 820 (holding that legislation was applied to a project other than that of the claimant “and thus [is] proven of general application.”) (BOA-33).

Act of general application. Accordingly, his allegation that the *AMLA* was enacted in bad faith must be dismissed.

XI. THE CLAIMANT HAS NOT ESTABLISHED A VIOLATION OF ARTICLE 1110**A. Summary**

337. For a successful expropriation claim under NAFTA Article 1110(1), a claimant must identify an investment that is capable of being expropriated. The Claimant in this arbitration has not done so. Rather, he asserts that the Enterprise was deprived of its right to operate a waste disposal site – a right that it never had. The Enterprise was only part of the way through the regulatory approvals process. It had received some permits, but these were contingent on a legal requirement to obtain others. Moreover, the modeling and testing that Notre had conducted in support of the original permits had been found to be unreliable. It follows that these permits only afforded the Enterprise a contingent right to operate a waste disposal site which does not constitute property and cannot be expropriated as an investment under the NAFTA.

338. Nor has the Claimant shown that the revocation of these permits resulted in a substantial deprivation of the alleged investment. The Enterprise acquired Adams Mine as a failed business. To complete this acquisition, the Enterprise REDACTED REDACTED resulting in an acrimonious lawsuit over its ownership of the site. Mr. Cortellucci hoped to use REDACTED REDACTED to force the municipalities in the GTA to purchase the site. These efforts failed. Moreover, scientific evidence would also call into question whether the site could ever be developed safely and local Aboriginal communities insisted on formal consultations on many aspects of the project. By April 2004, the Enterprise REDACTED REDACTED REDACTED The Enterprise acquired a failed business when it purchased Adams Mine in 2002. Nothing had changed a year and half later when the *AMLA* was introduced into the legislature. If anything the prospects of the project moving forward had become even worse.

339. Even if the Tribunal were to find that the *AMLA* constituted an expropriation, it would be a lawful one. The public purpose of the *AMLA* was to address concerns over the potential contamination of water resources. The *AMLA* was also intended to deal with the significant concerns of local residents. The measure is also non-discriminatory as it

does not distinguish between Canadians and investors of another NAFTA Party. Moreover, the *AMLA* amended the *EPA* to prohibit waste disposal in similar sites making the statute a measure of general application. The *AMLA* also provided due process to the Enterprise by permitting it to appeal any issue of “fact or law” concerning the compensation provided under the Act to an Ontario Court. The Enterprise was also provided with notice of the legislation, was afforded a right to appear before a Legislative Committee and had every single one of its proposed amendments to the legislation adopted before the legislation was enacted. Finally, the *AMLA* provided for compensation to the Enterprise which exceeded the fair market value of the site.

B. NAFTA Article 1110 – Expropriation and Compensation

340. NAFTA Article 1110(1) sets out the substantive obligations concerning expropriation. This provision provides that:

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.

341. NAFTA does not define the term “expropriation.” As a result, NAFTA Chapter 11 tribunals have interpreted “expropriation” in accordance with international law, as required under Article 1131(1).⁵⁴⁶ Arbitral tribunals have interpreted expropriation as

⁵⁴⁶ *S.D. Myers-First Partial Award*, ¶ 280 (“The term ‘expropriation’ in Article 1110 must be interpreted in the light of the whole body of state practice, treaties and judicial interpretations of that term in international law cases.”) (BOA-72). The awards of other international tribunals interpreting the term “expropriation” must be treated with caution as these decisions are often fact-driven and based on treaties that differ from the NAFTA. This is especially the case in relation to awards of the Iran-U.S. Claims Tribunal where the *Algiers Accord* defined expropriation in a manner that partially departs from customary international law and which differs from that found in NAFTA Article 1110. See *Fireman's Fund Insurance Company v. Mexico* (ICSID No. ARB(AF)/02/1) Award (14 July 2006), ¶ 173. (“*Fireman's*

referring to a “taking” of fundamental ownership rights that results in a substantial deprivation of the economic value of an investment.

342. A NAFTA Chapter 11 tribunal analysing this provision must first determine whether there is an investment capable of being expropriated. If an investment exists, the tribunal must determine whether it has been expropriated and, if so, whether the expropriation is lawful under the conditions in sub-paragraphs (a)-(d).⁵⁴⁷

343. NAFTA Article 1110(1) applies both to direct and indirect expropriations. A direct expropriation normally occurs in situations involving the physical seizure or transfer of legal title of a specific investment to another beneficiary.⁵⁴⁸ An indirect expropriation occurs where a measure or series of measures of a NAFTA Party have an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

C. Contingent Rights are Not “Investments” Capable of Being Expropriated under the NAFTA or International Law

1. The Claimant’s Allegations Concerning the Investment

344. An analysis of whether an expropriation has occurred under NAFTA Article 1110(1) must first determine whether there is an investment that is capable of being expropriated. The Claimant has not alleged that the Government of Ontario interfered

Fund - Award) ([T]he Algiers Accords give a notion of expropriation different from Article 1110 of the NAFTA and also partially depart from customary international law (in particular: “other measures affecting property rights”). It is also true that some arbitral awards of the Iran-U.S. Claims Tribunal are contradicted by others. However, keeping these caveats in mind, it is justified to rely on certain awards, or at least portions thereof, in determining the customary international law meaning of expropriation in the present case (BOA-30); *Pope & Talbot, Inc v. Canada* (UNCITRAL) Interim Award (26 June 2000) ¶ 104 (“*Pope & Talbot - Interim Award*”). (“References to the decisions of the Iran-U.S. Claims Tribunal ignore the fact that that tribunal’s mandate expressly extends beyond expropriation to include ‘other measures affecting property rights.’”) (BOA-64).

⁵⁴⁷ *Fireman’s Fund - Award*, ¶ 174. (“[T]he conditions contained in paragraphs (a) through (d) specify the parameters as to when a State would not be liable under Article 1110.”) (BOA-30); *Feldman-Award*, ¶ 98 (BOA-29).

⁵⁴⁸ *Feldman-Award*, ¶ 100; (“Recognizing direct expropriation is relatively easy: governmental authorities take over a mine or factory, depriving the investor of all meaningful benefits of ownership and control.”) (BOA-29); *Enron Corporation & Ponderosa Assets v. Argentine Republic* (ICSID Case No. ARB/01/3) Award (22 May 2007) (“*Enron - Award*”), ¶ 243 (BOA-26).

with his ownership of the Enterprise.⁵⁴⁹ Nor has he alleged that the *AMLA* transferred ownership of the Adams Mine site.

345. Although his Memorial is unclear, the Claimant appears to assert that the *AMLA* expropriated the conditional permits, which were associated with the site.⁵⁵⁰ For example, the Claimant asserts that the Enterprise's investment was "the bundle of property rights that forms the subject of this claim, i.e., the Adams Mine site, including the land fill capacity for which it had received governmental approval."⁵⁵¹ Moreover, the Claimant asserts elsewhere that the *AMLA* "...annulled the valuable commercial rights of use associated with ownership of the Site ..." and that it was designed to ensure that the site was "... never going to be capable of the use for which it was approved: as a waste disposal site."⁵⁵² Accordingly, the Claimant appears to allege that these permits are some form of intangible "property" under the definition of "investment" in NAFTA Article 1139(g).

2. NAFTA Article 1110 Requires the Expropriation of an "Investment"

346. NAFTA Article 1110 prohibits a NAFTA Party from expropriating an "investment" unless it satisfies the conditions in this provision. An exhaustive list of investments is provided in NAFTA Article 1139. Accordingly, a claimant must demonstrate that the interest alleged to have been expropriated is an investment.

347. NAFTA Article 1139 (g) defines an "investment" as including the following:

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes.

⁵⁴⁹ Claimant's Memorial, ¶ 436. However, the Claimant does refer to the Enterprise as an "investment." While not relevant here, Canada does not contest that real property can constitute an "investment."

⁵⁵⁰ Claimant's Memorial, ¶ 448.

⁵⁵¹ Claimant's Memorial, ¶ 436.

⁵⁵² Claimant's Memorial, ¶ 448.

348. The NAFTA does not define the term “property.” At international law, the term “property” refers to the right to use, enjoy and dispose of a property.⁵⁵³ This notion of “property” is understood as a thing or possession and can be acquired, owned or alienated by its owner. However, “property” does not normally include rights that are contingent or that have not been acquired.⁵⁵⁴

349. A measure constitutes an expropriation only if the deprivation or taking concerns such a “vested right” or a right otherwise “possessed” by a claimant.⁵⁵⁵ For example, the NAFTA Chapter 11 tribunal in *Thunderbird*, when considering whether the claimant had acquired a legal right to operate gaming facilities in Mexico, found that:

*[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited.*⁵⁵⁶
Indeed, an investor cannot suffer any deprivation and claim damage for a right that he never possessed.⁵⁵⁷

350. Similarly, the NAFTA Chapter 11 tribunal in *Merrill & Ring* recently found with respect to Canada’s log export regime that:

[t]he right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument. This reasoning underlies the Feldman tribunal’s conclusion that an investor cannot recover

⁵⁵³ See e.g., *Libyan American Oil Company v. Libya*, Award, 20 I.L.M. 1, (1981) (12 April 1977) ¶ 89 (“*Lianco – Award*”) (“One of the fundamental rights universally recognized is the right to private ownership or property (Dominium). The Classical concept of this right defines it as the right to the use, exploitation, and disposition (usus, fructus, abusus) of the object owned.”) (BOA-38). See B.A. Wortley, *Expropriation in Public International Law* (Cambridge University Press, 1959) at 50 (“[A] withdrawal of all the attributes of ownership, of the rights of *uti, frui* or *abuti*, over a thing, leaving the owner with a mere shadow of title, will be confiscation and may be treated as such.”) (BOA-128).

⁵⁵⁴ *Eureko B.V. v. Republic of Poland*, Ad Hoc (Netherlands/Poland BIT). Partial Award and Dissenting Opinion (19 August 2005), ¶ 151 (“*Eureko-Partial Award*”) (“Eureko had a contingent right and an investor cannot be deprived of a contingent right with the reach of the Treaty as long as the contingency had not been realised.”) (BOA-28).

⁵⁵⁵ *Feldman-Award*, ¶ 152. (“However, as with *S.D. Myers*, it may be questioned as to whether the Claimant ever possessed a “right” to export that has been “taken” by the Mexican government.”) (BOA-29).

⁵⁵⁶ *Thunderbird-Award*, ¶ 208 [Emphasis Added] (BOA-82).

⁵⁵⁷ *Feldman-Award*, ¶ 118 (BOA-29); *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) Award (31 March 2010), ¶ 142 (“*Merrill & Ring – Award*”) [Emphasis Added] (BOA-42).

damages for the expropriation of a right it never had.
*Expropriation cannot affect potential interests.*⁵⁵⁸

351. Accordingly, a conditional or contingent right is not a “vested right” which is capable of constituting “property” under NAFTA Article 1139. It also follows that such contingent rights are not capable of being expropriated under NAFTA Article 1110.

3. The Provisional Certificate Is Not an “Investment” as it Does Not Confer a Right to Construct or Operate a Waste Disposal Site

352. The regulatory process for the approval for the construction and operation of a landfill in Ontario is set out under the *EAA*, the *EPA*, and the *OWRA*.⁵⁵⁹ This process is an iterative one, involving different regulatory units, technical reviewers, scientists and policy officials. Mr. Parrot, the Manager of the Certificate of Approval Section in the MOE and a professional engineer explains that this process of overlapping permits and conditions is intended to create a system of checks and balances to ensure that a project does not cause adverse effects to the environment.⁵⁶⁰

353. The *EAA* essentially provides a planning process which evaluates the potential effects of a proposed project or undertaking on the environment.⁵⁶¹ The *EPA*⁵⁶² and the

⁵⁵⁸ *Merrill & Ring- Award*, ¶ 142 (BOA-42).

⁵⁵⁹ Ministry of the Environment, *Landfill Standards, A Guideline on the Regulatory and Approval Requirements for New or Expanding Landfill Sites* (May 1998), Section 2.3. (“The focus of this Guideline is on the regulatory and approval requirements under Part V of the *Environmental Protection Act*. Landfilling sites, however, may also be subject to approval under the *Environmental Assessment Act* and the *Ontario Water Resources Act*.”) (CAN-54). See also Ministry of the Environment, Environmental Assessment and Approvals Branch, *Guide for Applying for Approval of Waste Disposal Sites* (November 1999), at iii. (“In addition to approvals under the *EAA* and Part V of the *EPA*, the proposal may require approvals under Section 9 of the *EPA* for discharge of contaminants into the natural environment as well as under Section 53 of the *OWRA* for sewage works.”) (CAN-61); Ministry of the Environment, Green Facts, *Certificates of Approval – Waste Disposal and Management* (April 2005), p. 2 (“In addition to approval under the *EAA* and Section 27 of *EPA*, the proposal may require approval under Section 9 of the *EPA* (air & noise) and/or Section 53 of the *OWRA* (sewage works). The proposal may also require approval from other Ontario ministries and other levels of government (i.e., federal or municipal). Approval under one Act does not imply approval under other Acts, under other sections of the same Act or under any other legislation.”) (CAN-343).

⁵⁶⁰ Witness Statement of Ian Parrott, ¶ 8.

⁵⁶¹ Witness Statement of Ian Parrott, ¶ 9.

⁵⁶² Ministry of the Environment, *Landfill Standards, A Guideline on the Regulatory and Approval Requirements for New or Expanding Landfill Sites* (May 1998), Section 2.3. (CAN-54).

*OWRA*⁵⁶³ provide a review process that assesses site specific engineering and environmental conditions to ensure that the proposed landfill is designed, built and operated in a manner that will mitigate adverse effects to the environment. Mr. Parrot explains that applications for *EPA* and *OWRA* approvals are submitted separately, considered by specialized and different technical reviewers (e.g. hydrogeologists), and approved by different signing Directors who are appointed under the relevant legislation. The *EPA* and *OWRA* also impose separate conditions, which a proponent must fulfill in order to construct and operate a landfill.

354. The Claimant's assertion of indirect expropriation is founded on the erroneous assumption that the Provisional Certificate under the *EPA* vested the Enterprise with a right to construct and operate a waste disposal site at Adams Mine.⁵⁶⁴ The Provisional Certificate for Adams Mine imposed 66 conditions that had to be met before the Enterprise could construct and operate a waste disposal site.⁵⁶⁵ These included conditions that reflected legal requirements to obtain additional regulatory permits under the *EPA* and the *OWRA* before construction of the site could begin. The conditions also required the Enterprise to develop a detailed Design and Operations plan – as the site engineering remained at a conceptual level – and a detailed Financial Assurance plan.

355. In particular, the Enterprise was legally required to secure the following additional permits prior to construction:

- a short-term PTTW under Section 34 of the *OWRA* for dewatering the South Pit;
- a Certificate of Approval under Section 53 of the *OWRA* for an on-site leachate treatment plant and constructed wetlands;
- a Certificate of Approval under Section 53 of the *OWRA* for stormwater management facilities; and

⁵⁶³ See *Ibid.* ("Discharges to surface water are dealt with and require approval under the *Ontario Water Resources Act*. Provincial water quality objectives have been established by the Ministry of the Environment and any surface water discharges from a landfilling site must meet these criteria.") (CAN-54).

⁵⁶⁴ Claimant's Memorial, ¶ 436.

⁵⁶⁵ Witness Statement of Ian Parrott, ¶ 14.

- a Certificate of Approval under Section 9 of the *EPA* for the landfill gas control plant and flares.⁵⁶⁶

356. The Enterprise had not secured any of these permits or approvals before the enactment of the *AMLA*. The only permit it was actively pursuing when the *AMLA* was enacted was the short-term PTTW to de-water the South Pit. Moreover, the hydrogeologists reviewing the application for the PTTW had determined that the modeling and testing the proponents had relied on to obtain an EA Approval and a Provisional Certificate had been called into question.

357. The Provisional Certificate did not permit the Enterprise to dispose of a single bag of garbage at the site until it had acquired these permits and fulfilled numerous other conditions. It is true that the Enterprise might have eventually received these permits in the ordinary course. However, this is entirely speculative given that a full reassessment of the hydrogeological evidence supporting the original EA Approval and Provisional Certificate was underway.

358. In conclusion, the Enterprise did not have a right to use the site for garbage disposal as it never obtained the necessary permits and fulfilled the remaining conditions. It follows that the revocation of the Provisional Certificate did not deprive the Enterprise of “property” which constitutes an “investment” that was capable of being expropriated under NAFTA Article 1110.

D. The Enactment of the *AMLA* Did Not Cause a Substantial Deprivation

359. An expropriation requires a “taking” of fundamental ownership rights that causes a substantial deprivation of the economic value of an investment.⁵⁶⁷ The Claimant does not dispute this requirement to show a substantial deprivation.⁵⁶⁸

⁵⁶⁶ Witness Statement of Ian Parrott, ¶¶ 12, 13. Mr. Parrott the Manager of the Certificate of Approval Review Section explains that the *EPA* and *OWRA* regulatory approvals are legal requirements which are issued at the discretion of the relevant signing Director. REDACTED
REDACTED See Claimant’s Memorial, ¶¶ 108-109;

⁵⁶⁷ See e.g., *Pope & Talbot - Interim Award*, ¶ 102. (“... under international law, expropriation requires a ‘substantial deprivation’”) (BOA-64).

360. A recent description of the concept of substantial deprivation was provided by the NAFTA Chapter 11 tribunal in *Fireman's Fund*:

The taking must be a substantially complete deprivation of the economic use of the property, or of identifiable distinct parts thereof (*i.e.*, it approaches total impairment).⁵⁶⁹

361. It also found that a substantial deprivation has been characterised as a “significant,” “fundamental,” “radical” or “serious” deprivation.⁵⁷⁰ It is also well settled that a substantial deprivation does not occur where an investment has lost its economic value prior to the alleged expropriation for other reasons.⁵⁷¹

362. As demonstrated in detail below at paragraphs 410 to 520 and in the report of Dr. Ken Wise,⁵⁷² Adams Mine was a failed business that was virtually worthless, as of June 17, 2004, the date on which the *AMLA* came into force. Adams Mine had become so encumbered with economic, legal, environmental and social problems that no knowledgeable market participant would have considered it to have any significant value. Thus, the *AMLA* did not result in a substantial deprivation of the economic value of the Adams Mine site.

E. Even if the *AMLA* could be Considered An Expropriation, it is a Lawful Expropriation Under NAFTA Article 1110(1)

363. NAFTA Article 1110(1) provides that a lawful expropriation must serve a public purpose, be non-discriminatory, provide due process and compensation.⁵⁷³ Although a

⁵⁶⁸ Claimant's Memorial, ¶ 416. (“NAFTA, Article 1110 requires Respondent [*sic*] to pay compensation, equivalent to the fair market value (FMV) of an investment, when it measures substantially deprive an Investor or Investment Enterprise [*sic*] of the use or enjoyment of its investment.”) *See also* Claimant's Memorial, ¶ 420. (“Impairment rises to the level of an expropriation under Article 1110 when it results in a substantial deprivation of the investor's ability to enjoy the reasonably expected benefits of that investment.”).

⁵⁶⁹ *Fireman's Fund - Award*, ¶ 176 (c) (BOA-30).

⁵⁷⁰ *Ibid.* fn 157 (BOA-30).

⁵⁷¹ *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9) Award (16 September 2003), ¶ 20.30 (“*Ukraine-Award*”) (BOA-83).

⁵⁷² Dr. Kenneth T. Wise, *Rebuttal Report on the Fair Market Value of the Adams Mine Site in the Matter of Vito G. Gallo v. Government of Canada* (June 25, 2010).

⁵⁷³ NAFTA, Article 1110 also has a direct antecedent in Article 1605 of the *Canada-U.S. Free Trade Agreement*. Article 1605 imposed similar disciplines between Canada and the United States but did

lawful expropriation must meet all of these requirements, the provision for prompt, adequate and effective compensation is generally recognised as the most important.⁵⁷⁴

364. NAFTA Article 1110 is similar to expropriation provisions under early U.S. Bilateral Investment Treaties and Canadian Foreign Investment Promotion and Protection Agreements.⁵⁷⁵ These treaties effectively codified the requirements for a lawful expropriation under customary international law.⁵⁷⁶ It follows that an understanding of customary international law concerning lawful expropriation is critical to the proper interpretation of this provision.

not provide investors with direct recourse to international arbitration. See Canada-USA Free Trade Agreement Chapter 16 (1989), Chapter 16, Article 1605 (“*Canada-US FTA*”) (“Neither Party shall directly or indirectly nationalize or expropriate an investment in the territory by an investor of the other Party or take any measure or series of measures tantamount to an expropriation of such an investment, except: (a) for a public purpose; (b) in accordance with due process of law; (c) on a non-discriminatory basis; and (d) upon payment of prompt, adequate and effective compensation at fair market value.”) (BOA-13).

⁵⁷⁴ See *Feldman-Award*, ¶ 99 (“... the view that the conditions (other than the requirement for compensation) are not of major importance in determining expropriation is confirmed by the Restatement of the Law of Foreign Relations of the United States...” (BOA-29); Andrew Newcombe and Luis Paradell, *Law and Practice of Investment Treaties: Standard of Treatment*, p. 369 (“The most important, and historically the most contested requirement, is the standard of compensation.”) (BOA-116).

⁵⁷⁵ See e.g. *Treaty between the Government of the USA and the Government of the Republic of Panama Concerning the Treatment and Protection of Investments*, Article IV (“*US – Panama Treaty*”) (“Investment of a national or a company of either Party shall not be expropriated, nationalized or subjected to any other direct or indirect measure having an effect equivalent to expropriation or nationalization ... except for a public or social purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation and in accordance with due process and the general principles of treatment laid down in Article II(2) [minimum standard of treatment.]”) (BOA-89); *Agreement between the Government of Canada and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments* (20 November 20 1989), Article VI, p. 8 (“*Canada – USSR Agreement*”) (“Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose, under due process of law, in a non-discriminatory manner and provided that it is accompanied by prompt, adequate and effective compensation.”) (BOA-14).

⁵⁷⁶ See K. Vandeveld, *United States Investment Treaties – Policy and Practice* (Boston: Kluwer Law and Taxation, 1992), p. 120 (“The BITs in essence codify the United States’ view that expropriation is lawful only if it is for a public purpose, nondiscriminatory [*sic*], in accordance with due process of law, accompanied by prompt adequate and effective compensation ...”) (BOA-127). The United States also considered compliance with investment agreements to be a requirement of a lawful expropriation. However, this requirement is not reflected in the NAFTA. See also American Law Institute, *Restatement of the Law (Third) Foreign Relations Law of the United States*, section 712 (“*Restatement-Third*”) (“This section sets for the responsibility of a state under customary international law for certain economic injury to foreign nationals.”) (BOA-68). The Third Restatement indicates that a lawful expropriation must be for a public purpose, be non-discriminatory and be accompanied by provision for just compensation.

1. The AMLA was enacted for a Public Purpose

(a) The Concept of Public Purpose

365. The right of States to expropriate private property for “public utility” or for a “public purpose” is well established under international law.⁵⁷⁷ In general, the expropriatory measure must address a public policy rationale including economic, social and environmental concerns.⁵⁷⁸ As these concerns change depending on the values and preferences of society, the notion of “public purpose” is not static and evolves according to State practice.⁵⁷⁹ Indeed, international courts and tribunals agree that States are accorded “extensive discretion” in determining what is in the public interest,⁵⁸⁰ and that tribunals should normally defer to the State’s determination in this regard.⁵⁸¹

⁵⁷⁷ *German Interests in Polish Upper Silesia* (Merits) (1926), *Germany v. Poland*, 1926 PCIJ (Ser. A) No. 7 (May 1925), p. 22 (“*Germany v Poland*”) (“It follows from these same principles that the only measures prohibited are those which generally accepted international law does not sanction in respect of foreigners; expropriation for reasons of public utility, judicial liquidation and similar measures are not affected by the Convention.”) (BOA-32) and *Norwegian Claims Case* (1922), Norway/U.S.A., 2 H.C.R., (October 1922), p. 332 (“*Norwegian Award*”) (“the power of a sovereign State to expropriate, take or authorise the taking of any property within its jurisdiction which may be required for the “public good” or for the “general welfare”) (BOA-55).

⁵⁷⁸ *Feldman-Award*, ¶ 103. (“[G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like.”) (BOA-29); *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, (ICSID Case No. ARB/96/1) Final Award (17 February 2000), ¶ 71 (“*Santa Elena-Award*”) (“...an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate ...”) (BOA-71).

⁵⁷⁹ Walid Ben Hamida, “La prise en compte de l’intérêt général et des impératifs de développement dans le droit des investissements” (Paper presented to the UNCTAD, *Expert Meeting on Development Implications of International Investment Rule Making*, 28-29 June 2007), p. 2. (BOA-93).

⁵⁸⁰ See e.g., *Amoco International Finance Corporation v. Iran* (1987) 15 Iran-US CTR 189 (14 July 1987) (“*Amoco – Award*”), ¶ 145 (“A precise definition of the public purpose for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even suggested. It is clear that, as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and that States, in practice, are granted extensive discretion.”) (BOA-4).

⁵⁸¹ *Feldman-Award*, ¶ 99; (BOA-29); United Nations Conference on Trade and Development, UNCTAD/ITE/IIT/2004/10, Vol. 1, *International Investment Agreements: Key Issues*, (United Nations: New York and Geneva, September 2004), p. 239 (BOA-87). A few publicists have also taken the position that the discretion afforded states is so extensive that no requirement exists to determine whether an expropriation occurs for a public purpose. See e.g., S. Friedman, *Expropriation in International Law* (London: Stevens & Sons Ltd., 1953, p. 141 (“As to motives, these are a matter of indifference to international law, since the latter does not contain its own definition of public utility. On the contrary, it leaves it to each State, in the exercise of its jurisdiction, to judge for itself what it considers useful or necessary for the public good.”) (BOA-106). See also *Liamco - Award*, ¶ 58 (BOA-38).

366. The European Court of Human Rights (“ECHR”), in considering the somewhat analogous concept of “public interest,” has found that “national authorities are better placed than the international judge to appreciate what is in the public interest” as they have a better knowledge of the needs of their society.⁵⁸² Moreover, it has emphasised that the legislature’s decision to adopt laws expropriating property entails consideration of political, economic and social issues on which opinions can differ within a democratic society.⁵⁸³ Accordingly, the notion of “public interest” is necessarily extensive and the margin of appreciation available to a legislature to implement policies will be respected unless that judgment is manifestly without reasonable foundation.⁵⁸⁴

367. The learned commentaries on public international law also recognise the extensive discretion afforded to States to determine whether a measure is for a public purpose. For example, the *Third Restatement of Foreign Relations Law* explains that:

The requirement that a taking be for a public purpose is reiterated in most formulations of the rules of international law on expropriation of foreign property. *That limitation, however, has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and not subject to effective reexamination by other states.*⁵⁸⁵

368. Similarly, the *Draft Convention on the International Responsibility of States for Injuries to Aliens* (“*Harvard Draft*”) indicates in an explanatory note that:

⁵⁸² *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) 9, 42-45 (1986) (21 February 1986), ¶ 46 (“*James-Judgment*”) (BOA-37).

⁵⁸³ *Ibid.* ¶ 46. (BOA-37).

⁵⁸⁴ *Ibid.* (BOA-37). *See also* *Lithgow and Others* (1986) ILR 75, 439 (8 July 1986), pp. 121-122 (“*Lithgow-Judgment*”) (“[T]he Court’s power of review in the present case is limited to ascertaining whether the decisions regarding compensation fell outside the United Kingdom’s wide margin of appreciation, it will respect the legislature’s judgment in this connection unless that judgment was manifestly without reasonable foundation.”) (BOA-39); *Beyeler v. Italy* [GC] no. 33202/96 ECHR 2000-I, Judgment (5 January 2000), ¶ 112 (“*Beyeler-Judgment*”) (“The Court points out in this respect that the national authorities enjoy a certain margin of appreciation in determining what is in the general interest of the community . . .”) An arbitral tribunal could find that a measure is not a taking for a “public purpose” where it was intended to enrich a private individual (BOA-9). *See e.g., Walter Fletcher Smith Claim, R.I.A.A. Vol. II* (2 May 1929), pp. 917-918 (“*Smith Award*”) (“While the [expropriation] proceedings were municipal in form, the properties seized were turned over immediately to the defendant company, ostensibly for public purposes, but, in fact, to be used by the defendant for purposes of amusement and private profit, without any reference to public utility.”) (BOA-78).

⁵⁸⁵ *Restatement-Third*, section 712 Comment (e) [Emphasis Added] (BOA-68).

It is not without significance that what constitutes a “public purpose” has rarely been discussed by international tribunals and that in no case has property been ordered restored to its former owner because the taking was considered to be for other than a public purpose. This unwillingness to impose an international standard of public purpose must be taken as reflecting the great hesitancy upon the part of tribunals and of States adjusting claims through diplomatic settlement to embark upon a survey of what the needs of a nation are and how these may best be satisfied.⁵⁸⁶

369. These commentaries indicate that a State has considerable discretion in determining whether to adopt a measure for a public purpose. Accordingly, international tribunals will normally accept the determination of public officials as to whether measures are for a public purpose or in the public interest.

(b) The AMLA was enacted in Response to Concerns over Environmental Safety and Local Opposition to the Project

370. After the contamination of drinking water in Walkerton left seven people dead and over 2,300 seriously ill, the Government of Ontario adopted a more precautionary approach to the protection of the province’s water resources.⁵⁸⁷ The Walkerton Commission released the second part of its report, which provided recommendations to protect water in May 2002. The Ministry of the Environment was still in the process of implementing these recommendations when the new government was elected in 2003.⁵⁸⁸

371. As the official opposition before the election, the new Government had expressed serious reservations over the environmental safety of Adams Mine. The new Government believed that the site posed a threat to local ground and surface water.⁵⁸⁹ Not

⁵⁸⁶ Sohn, L. & Baxter, R. “Convention on the International Responsibility of States for Injuries to Aliens 186 (1961), Article 10, Explanatory Note, p. 555 (BOA-125).

⁵⁸⁷ Witness Statement of Doug Barnes, ¶¶ 19-20; Witness Statement of Joan Andrew, ¶ 8.

⁵⁸⁸ Witness Statement of Joan Andrew, ¶ 9.

⁵⁸⁹ See e.g., Ontario, Legislative Assembly, Official Report of Debates (Hansard), No. 93A (October 23, 2000), p. 4928 (CAN-233).

surprisingly, they made commitments concerning Adams Mine on the basis of these environmental concerns.⁵⁹⁰

372. Mr. Doug Barnes, the former Assistant Deputy Minister responsible for the development of policy concerning Adams Mine explains that the *AMLA* was enacted to protect water resources, address public concern over the site and deal with concerns over the potential legacy costs of Adams Mine.⁵⁹¹ In particular, the *AMLA* was intended to deal specifically with the perceived threat Adams Mine posed to water. However, the *AMLA* also amended the *EPA* to include a more general prohibition on the disposal of waste in sites that would raise similar hydrogeological concerns (*i.e.*, lakes).⁵⁹²

373. The Claimant asserts that the *AMLA* was not implemented for a public purpose because it was enacted to satisfy a campaign commitment.⁵⁹³ The Claimant provides no support — not a single legal authority — for his assertion that a measure taken to implement a political commitment cannot also have a public purpose. The decisions of international tribunals – and common sense – suggest the opposite is true.

374. For example, in *James*, the ECHR considered a similar argument that the *Leasehold Reform Act* was a vote-seeking measure that was motivated only by political considerations. The ECHR rejected this argument as the reform was a matter of public concern and political considerations did not preclude the objective of the Act from being

⁵⁹⁰ Honourable Dalton McGuinty, Leader of the Official Opposition, “The Future is in Waste Diversion” The *Terniskaming Speaker* (August 13, 2003) (CAN-311).

⁵⁹¹ Witness Statement of Doug Barnes, ¶¶ 18-26; REDACTED Ontario, Legislative Assembly, Official Report of Debates (Hansard), No. 26A (April 5, 2004), pp. 1246-1247, (“The key approvals for this proposal came before the Walkerton tragedy. That sad event raised our awareness of the need to safeguard our precious water resources...For this government, the protection of our communities is of paramount concern. We have promised to address the situation, and today we are keeping that commitment. This is about protecting our environment and respecting our communities.”) (CAN-326).

⁵⁹² See *Ibid.* p. 15 (CAN-326); Legislative Assembly of Ontario, First Session, 38th Parliament, Official Reports of Debates (Hansard) (June 3, 2004) *Adams Mine Lake Act*, 2004, p. M-81 (“The intent of this legislation is to protect water sources in Ontario. The intent of this amendment is to ensure that a waste disposal site will not deposit waste in a lake in Ontario.”) (CAN-145).

⁵⁹³ Claimant’s Memorial, ¶¶ 449-450. The also complains that the *AMLA* is contrary to the principles of economic efficiency and sustainable development. No explanation is provided by the Claimant as to how such an expensive “mega-landfill” is economically efficient. Nor does the Claimant attempt to reconcile landfilling with the principle of sustainable development.

in the public interest.⁵⁹⁴ Similarly, the *Amoco* tribunal also confirmed that nationalization is “always linked to determined political choices.”⁵⁹⁵ The fact that the *AMLA* was motivated, in part, by political commitments does not negate the fact that this statute has a public purpose.

REDACTED

376. Nor does the Claimant provide support for his assertion that a measure taken for a public purpose must be of general application. The Claimant’s simplistic assertion that a State can only expropriate through measures of general application would mean that it could never expropriate a specific piece of land for a highway or other public uses. Moreover, measures of general application that are for a public purpose normally constitute an exercise of “police powers,” which cannot be considered to be an expropriation in the first place.⁵⁹⁷

377. In any event, the *AMLA* actually contains a restriction on the disposal of waste in lakes, which applies equally to all landfills in Ontario.⁵⁹⁸ Indeed, in *Inter-Recycling Systems, Inc. v. Director, Ministry of the Environment*, the Ontario Environmental

⁵⁹⁴ *James-Judgment*, ¶ 48 (BOA-37); See *ELSI-Award*, p. 75, The International Court of Justice stated that it was understandable that the Mayor made the order of requisition to address local public pressures and to show that the public administration intervened to face the problem (BOA-25).

⁵⁹⁵ *Amoco-Award*, ¶ 114 (BOA-4).

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⁵⁹⁷ *S.D. Myers-First Partial Award*, ¶ 281, (“The general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out the possibility.”) (BOA-72). See also *Feldman-Award*, ¶ 103, (“At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable government regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.”) (BOA-29). See also *Restatement- Third*, section 712 Comment (g) (BOA-68).

⁵⁹⁸ Witness Statement of Ian Parrott, ¶¶ 16-17.

Review Tribunal considered and rejected the argument that the *AMLA* was only intended to deal with Adams Mine. The tribunal found that:

[C]ertain provisions of the [*AMLA*] were directly incorporated into the EPA and now form part of the general regime for waste approvals in Ontario. More specifically, section 7 of the *AMLA* amends section 27 of the EPA. These section are now sections 27(3.1) and 27(3.2) of the EPA and they prohibit the deposit of waste in a lake, irrespective of any C of A governing the waste facility. Hence, the intent of the *AMLA* was both to address the specific proposal for a landfill at the Adams Mine site and to amend the legislative framework generally governing landfills in Ontario by establishing this new prohibition.

...

The dual intent of the legislation is expressly outlined in the full title of the legislation, namely, *An Act to Prevent the Disposal of Waste at the Adams Mine Site and to Amend the Environmental Protection Act in respect of the Disposal of Waste in Lakes*. The title confirms that the legislation had both a specific purpose to address an issue at the Adams Mine and a more general purpose to change the framework for waste approvals in the province.

...

The Tribunal finds that the legislative history of the *AMLA* as presented to the Tribunal does not lead to a finding that the application of that Act was solely focused on the Adams Mine. To the contrary, the evidence is that portions of the new law were intended to have general application in Ontario through amendments to the *EPA*, which applies to all waste deposit sites.⁵⁹⁹

378. In conclusion, the *AMLA* was enacted both for the specific purpose of dealing with the potential threat Adams Mine posed to ground and surface water and the broader intention of protecting that water at sites that could raise similar hydrogeological concerns.

⁵⁹⁹ *Environmental Review Tribunal, Inter-Recycling Systems Inc. v. Director, Ministry of the Environment*, Case No. : 08-065 (August 25, 2009), pp. 13-14, 16 (CAN-174).

2. The AMLA is Not Discriminatory

(a) The Concept of Non-Discrimination

379. NAFTA Article 1110(1)(b) prohibits discrimination against a particular person or group on the basis of nationality. This provision reflects a similar requirement under customary international law.⁶⁰⁰

380. Although some commentators have suggested that non-discrimination may be broader than discrimination on the basis of nationality, NAFTA Chapter 11 tribunals have rejected this approach. For example, the NAFTA Chapter 11 tribunal in *Feldman* found that:

[U]nder international law, there is considerable doubt whether the discrimination provision of Article 1110 covers discrimination other than that between nationals and foreign investors, i.e., it is not applicable to discrimination among different classes of investors, such as between producers and resellers of tobacco products, at least unless all producers are nationals and all resellers aliens.⁶⁰¹

381. Similarly, the Third Restatement of the Foreign Relations Law of the United States indicates in its commentary that:

Formulations of the rules on expropriation generally include a prohibition of discrimination, implying that a program of taking that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law.⁶⁰²

382. Non-discriminatory expropriation does not distinguish between national and foreign investors.⁶⁰³ An expropriatory measure is discriminatory when it leads to real prejudice to foreign investors and has been taken to harm their investments and favour

⁶⁰⁰ See e.g., *Liamco-Award* p. 194 (“It is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well established in international legal theory and practice.”) (BOA-38).

⁶⁰¹ *Feldman-Award*, ¶ 137, footnote 26 (BOA-29).

⁶⁰² *Restatement-Third*, Section 712, Comment (f) (BOA-68).

⁶⁰³ *Feldman-Award*, ¶ 137, footnote 26 (BOA-29). See also Sir Robert Jennings & Sir Arnold Watts, eds., *Oppenheim's International Law*, 9th ed., vol. 1 (Oxford: Oxford University Press, 1996), p. 920 (BOA-107).

national investors.⁶⁰⁴ The analysis of discrimination is mostly based on the facts and circumstances of the case.⁶⁰⁵ In *Kuwait v. Aminoil*, although the only enterprise affected by the expropriation was foreign, the tribunal found that there was no discrimination as there was evidence that the State was pursuing a coherent plan to establish control over its main resources.⁶⁰⁶

(b) The AMLA Does Not Discriminate on the Basis of Nationality

383. As explained above, NAFTA Article 1110(1)(b) prohibits discrimination on the basis of different treatment between investors of the host NAFTA Party and investors of another NAFTA Party.⁶⁰⁷

384. The Claimant has failed to present a *prima facie* case of a breach of the non-discrimination requirement in NAFTA Article 1110(1)(b). The Claimant dedicates only two sentences in his Memorial to the concept of non-discrimination, both of which wrongly refer to NAFTA Article 1110(1)(a).⁶⁰⁸ No legal authorities are cited in support of his position that a measure will be discriminatory if it targets a specific property.⁶⁰⁹

385. At a more fundamental level, the Claimant's interpretation of non-discrimination would lead to lead an absurd result – a prohibition on a State from expropriating a

⁶⁰⁴ OECD, *Indirect Expropriation and the Right to Regulate in International Investment Law*, Working Paper on International Investment, no 2004/4 (2004), p. 5, footnote 10 (“A state measure will be discriminatory if it results ‘in an actual injury to the alien ... with the intention to harm the aggrieved alien’ to favour national companies.”) (BOA-57). See also Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties*, (The Hague: Kluwer Law International 1995), p. 62 (BOA-101); Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008), p. 539. Brownlie refers to the concept of discriminatory as “being aimed at persons of particular groups or nationals of particular states”. See also *ibid*, fn 99. (“The test of discrimination is the intention of the government: the fact that only one aliens are affected may be incidental, and, if the taking is based on economic and social policies, it is not directed against particular groups simply because they own the property involved”). (BOA-97).

⁶⁰⁵ Sir Robert Jennings & Sir Arnold Watts, eds., *Oppenheim's International Law*, 9th ed., vol. 1 (Oxford: Oxford University Press, 1996), p. 920, footnote 34 (BOA-107).

⁶⁰⁶ *Kuwait v. American Independent Oil Co.* Award 21 I.L.M. 976 (1982) 584-586 (24 March 1982), pp. 584-586 (“*Aminoil-Award*”) (BOA-3); *ELSI-Award*, ¶¶ 72-73 (BOA-25).

⁶⁰⁷ *Feldman-Award*, ¶ 137, footnote 26 (BOA-29).

⁶⁰⁸ Claimant's Memorial, ¶ 451.

⁶⁰⁹ Claimant's Memorial, ¶ 451.

specific piece of property under any circumstances. As August Reinische has recently explained:

Any expropriation – short of a general nationalization – will target specific groups of property owners or investors, whether airport operators, oil exploring companies, or highway construction entities. The fact that there may be only one affected entity, and that this one entity may be a foreign investor, is usually not enough to constitute a discriminatory taking which singles out particular persons without a reasonable basis. The fact that only foreigners are affected by an expropriatory measure as such may be incidental. Illegal discrimination usually requires the targeting of foreign investors as a result of unreasonable policies or motives such as racism or political retaliation against nationals of certain States.⁶¹⁰

386. In any event, the *AMLA* does not discriminate against investors or investments of investors of another NAFTA Party. None of the provisions of the *AMLA* concern the nationality of the owner of Adams Mine. Moreover, the *AMLA* amends the *EPA* to prohibit the use of similar waste disposal sites in Ontario.⁶¹¹ The Claimant's accusations of discrimination are also difficult to reconcile with the fact that the Government of Ontario was not aware that there was a U.S. investor. Indeed, the Claimant asserts that he kept his alleged ownership of the Enterprise a secret from almost everyone – even the Managing Director of the Enterprise.

387. Finally, the amendments to the *EPA* which prohibit the disposal of waste in lakes have been applied by MOE to prevent the expansion of a waste disposal site operated by Inter-Recycling Systems Inc., a Canadian corporation.⁶¹² In many respects, the *EPA* amendments have actually provided less favourable treatment to Inter-Recycling Systems Inc., which received no compensation for the termination of the expansion of its landfill. Moreover, the MOE has investigated at least two other instances where a waste disposal

⁶¹⁰ A. Reinisch, "Legality of Expropriations" in A. Reinisch, ed., *Standards of Investment Protection* (Oxford: Oxford University Press, 2008), p. 190 (BOA-118).

⁶¹¹ Witness Statement of Ian Parrott, ¶¶ 16-17.

⁶¹² Witness Statement of Ian Parrott, ¶ 18. See the decision of the Environmental Review Tribunal, *Inter-Recycling Systems Inc. v. Director, Ministry of the Environment*, Case No. : 08-065 (August 25, 2009) (CAN-174).

site owned by a Canadian company had a considerable amount of water, which the proponent planned on draining to construct a landfill.⁶¹³ However, in both instances the signing Director ultimately concluded that the water fell below the *de minimis* threshold of 1 hectare.

3. Due Process of Law and NAFTA Article 1105

388. Article 1110(1)(c) requires an expropriation to be in accordance with due process of law and the minimum standard of treatment under Article 1105(1). The analysis related to Article 1105(1), dealt with *supra* in Section X, should therefore be read in conjunction with this section.

(a) Due Process of Law

389. As explained above, the right of a State to expropriate under international law has traditionally been subject only to a requirement to provide compensation to foreign nationals.⁶¹⁴ However, States were divided over how much compensation should be provided to foreigners. A fierce debate ensued between capital exporting states and developing economies – particularly in Latin America – over whether compensation had to be prompt, adequate and effective (*i.e.*, the fair market value) or merely needed to be offered in accordance with the municipal law of the host State.⁶¹⁵ The requirement to provide “due process of law” soon started to appear in some bilateral treaties. It follows

⁶¹³ Witness Statement of Ian Parrott, ¶¶ 23-24.

⁶¹⁴ See *e.g.*, Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008), p. 533. Brownlie continues to maintain that this is the only relevant requirement under international law (BOA-97).

⁶¹⁵ See Mexico United States: Expropriation by Mexico of Agrarian Properties Owned by American Citizens (1938). Reproduced in “Mexico United States: Expropriation by Mexico of Agrarian Properties Owned by American Citizens (1938), 33 *AJIL* Supp, pp. 191-201 (BOA-46). See generally Elihu Lauterpacht, “International Law and Private Foreign Investment” (1997) 4 *Ind. J. Global Legal Stud.* 259. (BOA-110); see also United Nations General Assembly, 28th Sess., *Permanent Sovereignty over Natural Resources* (December 17, 1973) (BOA-84) (“Affirms the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures United Nations General Assembly, 29th Sess., *Charter of Economic Rights and Duties of States* (12 December 1974), Article 2 (“To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances the State considers pertinent.”) (BOA-85).

that the requirement to provide “due process of law” evolved out of the need of capital exporting States to provide some basic procedural protections to their nationals concerning the determination of compensation.

390. “Due process of law” is normally understood as referring to due process under international law – and not the municipal law of the host State.⁶¹⁶ A State enjoys broad discretion to determine the manner in which it expropriates property under international law.⁶¹⁷ However, due process of law requires the expropriating State to provide certain procedural protections. Most publicists indicate that a foreign investor must be provided notice⁶¹⁸ of the expropriation and some form of hearing.⁶¹⁹ Moreover, these publicists also indicate that a judicial or administrative process must be permitted to review the compensation provided for under municipal law.⁶²⁰ No requirement exists to provide a foreign national with the right to challenge the expropriation itself.

⁶¹⁶ A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Netherlands: Kluwer Law International, 2009), p. 376 (BOA-116).

⁶¹⁷ *Amoco-Award*, ¶¶ 129-132, 136-138 (BOA-4); *Liamco-Award*, p. 50 (BOA-38); 1959 ILC Report, ¶ 60. (“[...] a State is under no obligation to adopt a method or procedure other than those provided for in relevant provisions of municipal law”) (BOA-131).

⁶¹⁸ See e.g., *Middle East Cement Shipping and Handling Co., S.A. v. Egypt* (ICSID Case No. ARB/99/6) Award (12 April 2002) ¶ 143 (“*Middle East Cement – Award*”) (BOA-47).

⁶¹⁹ *Restatement-Third*, section 712, Comment (j) (“Economic injury to foreign nationals is often intertwined with a denial of domestic remedies. ... In the case of a taking of property, Subsection (1), an impartial determination is required by international law, particularly as to whether the compensation provided is just.”) (BOA-68).

⁶²⁰ United Nations Conference on Trade and Development, UNCTAD/TTE/IIT/2004/10, Vol. 1, *International Investment Agreements: Key Issues*, (United Nations: New York and Geneva, September 2004), p. 240 (“The [due process] requirement that the compensation due to a foreign investor should be assessed by an independent host country tribunal is now found in the takings provisions of many bilateral and some regional agreements. This requirement is usually satisfied by the legislation effecting the taking which will provide for the mechanism for the assessment of compensation. Thus due process may be met by other kinds of regular administrative procedures other than courts of law.”) (BOA-87); See *Ibid.* p. 245; (“[T]he view that a taking must be reviewed by appropriate, usually judicial, bodies (*especially in relation to the assessment of compensation*) finds expression in the practice of a large number of States and is indeed found in many national constitutional provisions. ... While bilateral investment dispute provisions do mention due process requirements, they usually seem to allude to the requirement only after a taking so that there could be a review of whether proper compensation standards were used in assessing the compensation.”) (BOA-87); A. Reinisch, “Legality of Expropriations” in A. Reinisch, ed., *Standards of Investment Protection* (Oxford: Oxford University Press, 2008), p. 191 (“The due process prerequisite is usually understood as a requirement to provide for a possibility to have the expropriation, and, in particular, the determination of the amount of compensation reviewed before an independent body.”) (BOA-118).

(b) The AMLA Provided Due Process to the Enterprise Through the Ontario Legislature and by Giving it Access to the Domestic Courts

391. Following the introduction of the Bill 49, the Government of Ontario provided due process to the Enterprise in accordance with international law, by providing it with notice, the opportunity to be heard and a right to review any compensation before the domestic courts of Ontario.

392. The *AMLA* was enacted through a democratic process in the Legislative Assembly of Ontario. Bill 49 was publicly introduced into the Legislature on April 5, 2004.⁶²¹ Bill 49 then received first reading and was accepted for future debate in the Legislature. The Ministry of the Attorney General separately notified the Enterprise directly concerning Bill 49.⁶²²

393. On April 20, 2004, Bill 49 received second reading and was then debated over the course of the following two weeks in the Ontario Legislature. It was then referred to the Standing Committee on the Legislative Assembly.

394. The Standing Committee is an independent legislative committee comprised of members of all political parties. The Standing Committee provides the public with an opportunity to present their views at hearings on proposed legislation. The Enterprise was provided with an opportunity to make a presentation to the Standing Committee on May 21, 2004.⁶²³ The Enterprise had already requested several amendments to Bill 49.⁶²⁴ It used its appearance at the Standing Committee to reiterate these requests for amendments.⁶²⁵

⁶²¹ Bill 49, *An Act to prevent the disposal of waste at the Adams Mine site and to amend the Environmental Protection Act in respect of the disposal of waste in lakes*, 1st Sess., 38th Leg., Ontario, 2004 (1st Reading) (CAN-136); Ontario, Legislative Assembly, Official Report of Debates (Hansard), No. 26A (April 5, 2004), pp. 1246-1247 (CAN-326).

⁶²² Witness Statement of James Kendik, ¶ 16.

⁶²³ Presentation by Gordon E. McGuinty, Re Adams Mine Lake Act, 2004 (May 21, 2004) (CAN-330).

⁶²⁴ Witness Statement of James Kendik, ¶ 16.

⁶²⁵ Presentation by Gordon E. McGuinty, Re Adams Mine Lake Act, 2004 (May 21, 2004) (CAN-330).

395. The Standing Committee subsequently undertook a clause by clause review of Bill 49 on June 3, 2004.⁶²⁶ All of the Enterprise's proposed amendments were accepted.

396. Bill 49 was then introduced into the Ontario Legislature for third reading and final debate on June 15, 2004. A few days later the Ontario Legislature voted on Bill 49. A total of 63 Members of Provincial Parliament, including members of the opposition, voted in favour of this legislation. Only 18 voted against it. The *AMLA* subsequently came into force on June 17, 2004.⁶²⁷

397. As explained above, the *AMLA* also allowed the Enterprise to apply to a domestic court to determine any issue of "fact or law" concerning compensation. Accordingly, the *AMLA* provided recourse to the Enterprise to challenge the methodology or the assessment of compensation – the Enterprise never availed itself of this recourse.

398. The Claimant asserts that the Enterprise was denied due process of law because the *AMLA* terminated the Borderlands Litigation and eliminated other claims for damages under municipal law. None of the Claimant's assertions regarding due process of law take into consideration the legislative process or the Enterprise's right to seek recourse in domestic courts concerning compensation. Nor does the Claimant provide any legal authority to support his interpretation of due process of law.

399. The Claimant's assertion that it should have been notified of the *AMLA* before it was introduced into the legislature is also meritless. The pre-legislative phase of most proposed legislation in Ontario occurs entirely out of the public eye and is protected by confidentiality. The public only learns of legislative proposals that survive this phase and are introduced into the provincial legislature. The intentional release of draft legislation before its introduction into the provincial legislature is considered to be an act in contempt of the legislature.⁶²⁸

⁶²⁶ Ontario, Legislative Assembly, Official Report of Debates (Hansard) No. 56 (June 3, 2004) (CAN-145).

⁶²⁷ *AMLA* (CAN-146).

⁶²⁸ The Enterprise refers briefly to a sentence in the Final Cabinet Submission, which indicates that the Timiskaming First Nation should be notified that the government intended to make an announcement on Adams Mine. However, this notification would not have given the First Nation notice of the content of Bill 49.

4. Provision for Compensation

(a) Compensation for Expropriation under International Law

400. According to Article 1110(1)(d), a lawful expropriation requires that a NAFTA Party provide compensation equivalent to the fair market value of the investment and respecting the conditions set out under Article 1110(2) through (6).

401. The NAFTA Chapter 11 tribunal in *Mondev* explained this requirement in the following manner:

[T]he obligation to compensate as a condition for a lawful expropriation (NAFTA Article 1110(1)(d)) does not require that the award of compensation should occur at exactly the same time as the taking. But for a taking to be lawful under Article 1110, at least the obligation to compensate must be recognised by the taking State at the time of the taking or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation.⁶²⁹

402. This provision requires a NAFTA Party at the time of the taking to provide a mechanism to pay the investor of another NAFTA Party or at least clearly offer to make such payment.⁶³⁰ This interpretation of NAFTA Article 1110(1)(d) is consistent with customary international law.

⁶²⁹ *Mondev-Award*, ¶ 71 (BOA-49); See also Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford: Oxford University Press, 2009), ¶¶ 3.46-3.50. (BOA-115).

⁶³⁰ Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford: Oxford University Press, 2009), p. 57, ¶ 3.46. (“[T]oday there seems to be consensus that it is sufficient, if a State, at the time of the expropriation, offers compensation or provides for the determination of compensation.”) (BOA-115); See also American Law Institute, *Restatement of the Law (Second) Foreign Relations Law of the United States* 189 (May 26, 1962), section 189, comment (a) [*Restatement-Second*] (“It is often stated that a taking must be accompanied by payment of compensation. This can not mean that payment must actually be completed no later than the time when the taking becomes effective, since the amount payable must often be determined by administrative or court proceedings and it is customary in eminent domain practice in many states, including the United States, to vest title in the state before such proceedings are instituted. However, as indicated in § 185, provision for determining compensation must exist at the time of taking. It must include provision for determination within a reasonable time and for payment promptly after determination.”) (BOA-67). The Second and the Third Restatement do not require the payment of compensation but a provision for compensation. The Second Restatement requires in § 185 that: “[t]he taking by a state of property of an alien is wrongful under international law if either (b) there is not reasonable provision for the determination and payment of just compensation, as defined in § 187, under the law and practice of the state in effect at the time of taking”.

403. Although immediate payment is not required, the delay in payment of compensation must be reasonable.⁶³¹ For example, in *BP Exploration Company v. Libya*,⁶³² the tribunal decided that the taking was confiscatory as no offer of compensation was made in two years following the nationalization.⁶³³ Similarly, the *Amoco* tribunal found that "... the provisions for the determination and payment of compensation must provide the owner of the expropriated assets a sufficient guarantee that the compensation will be actually determined and paid in conformity with the requisites of international law..."⁶³⁴ The tribunal decided that the establishment of a commission to determine the amount of compensation was lawful under international law.⁶³⁵ It follows that a statutory provision that sets out a straightforward process for an investor to obtain compensation from a NAFTA Party will meet the requirements of this provision.⁶³⁶

(b) The Provision of Compensation under the AMLA

404. The *AMLA* provided the Enterprise with a right to claim compensation that exceeded the fair market value of Adams Mine through a straightforward process.

Similarly, the Third Restatement states in § 712 that: "[a] state is responsible under international law for injury resulting from: (a) taking by the state of the property of a national of another state that (c) is not accompanied by provision for just compensation".

⁶³¹ Jean-Pierre, Laviee, *Protection et promotion des investissements: Étude de droit international économique* (Geneva: Publications de l'Institut Universitaire de Hautes Études Internationales, 1985), p. 206 (BOA-111); See also *Starrett Housing Corporation v. Iran*, 16 Iran-U.S. C.T.R. 189, Final Award No. 314-24-1 (14 Aug. 1987), ¶ 367 ("Starrett – Award") ("... while the award of interest from the date of the taking in the present case is in accordance with the tribunal's practice, this does not necessarily reflect the existence of any general obligation in current international law to make payment of compensation immediately on the date of the taking") (BOA-80).

⁶³² *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*, ILR, v. 53 (1979) (10 October 1973) ("BP-Award") (BOA-12).

⁶³³ *BP-Award*, p. 329 (BOA-12).

⁶³⁴ *Amoco-Award*, ¶ 137 (BOA-4); Wyman Claim (1962) ILR, 40, 97, p. 101 (BOA-132); Robert Jennings and Arthur Watts, *Oppenheim's International Law*, 9th Ed., vol. 1 (Oxford: Oxford University Press, 1996) p. 921, footnote 35 (BOA-107).

⁶³⁵ *Amoco-Award*, ¶ 138 (BOA-4); Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford: Oxford University Press, 2009), p. 55, ¶ 3.41 and footnote 81. (CAN-115).

⁶³⁶ *Amoco-Award*, ¶¶ 136-138 (BOA-4); Allahyar Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunals* (The Netherlands: Martinus Nijhoff Publishers, 1994), pp. 336-337 (BOA-133); Jean-Pierre, Laviee, *Protection et promotion des investissements: Étude de droit international économique* (Geneva: Publications de l'Institut Universitaire de Hautes Études Internationales, 1985), p. 207 (BOA-111).

Consequently, the *AMLA* satisfied the compensation requirement for a legal expropriation under Article 1110(1)(d).

405. The Claimant asserts that the *AMLA* “blatantly contradicts” Canada’s obligation to pay prompt, adequate and effective compensation because the amount offered is not in *his* view equivalent to the fair market value of Adams Mine.⁶³⁷ However, the compensation offered to the Enterprise is consistent with all of the international arbitral awards concerning the valuation of a business that is not a going concern.⁶³⁸

406. A disagreement over the proper amount of compensation is not enough, of itself, to render an expropriation unlawful. For example, in *Sedco* Judge Brower acknowledged that:

Likewise, I must express doubt as to whether, under customary international law, a State’s mere failure, in the end, actually to have compensated in accordance with the international law standard set forth herein necessarily renders the underlying taking *ipso facto* wrongful. If, for example, contemporaneously with the taking the expropriating Sates provides a means for the determination of compensation which on its face appears calculated to result in the required compensation ... it would appear appropriate not to find that the taking itself was unlawful but rather only to conclude that the independent obligation to compensate has not been satisfied.⁶³⁹

407. It follows that even if the Claimant’s hyperbolic assertions concerning the fair market value of Adams Mine are true – and they are not – that this alone would not render an expropriation unlawful.⁶⁴⁰

⁶³⁷ Claimant’s Memorial, ¶ 454.

⁶³⁸ Counter-Memorial, ¶¶ 458-464, 520. *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1) Award (30 August 2000) (“*Metalclad-Award*”) (BOA-44); *Wena-Award*, ¶ 122 (BOA-92).

⁶³⁹ *Sedco v. NIOC*, Separate Opinion Brower, 10 Iran-U.S. CTR (1986), 189, p. 204. (BOA-134);

⁶⁴⁰ D. Bowett, “State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach (1988) 59 BYIL 49, pp. 69-70. (“Of course, there may well be a dispute over the adequacy of the compensation offered. But the fact that a tribunal awards compensation higher than a State was prepared to offer does not, *per se*, make the nationalization unlawful. The State’s offer would have to be so low as to amount to a virtual rejection of the obligation to compensate.”) (BOA-135).

408. The Claimant also mischaracterises the amount of compensation offered to the Enterprise by suggesting that it was only equivalent to [REDACTED]. Rather, Bill 49 required the Government of Ontario to provide compensation to the Enterprise for all of the *reasonable expenses that the Enterprise and Notre incurred to promote Adams Mine as a potential landfill*. The Government of Ontario was subsequently directed by the Enterprise to compensate Notre for its own reasonable expenses – an amount equivalent to [REDACTED]. Moreover, the Government of Ontario also agreed at the request of the Enterprise to pay the Enterprise and Notre for the costs these companies incurred to develop the site but had not yet paid. Accordingly, the Government of Ontario would eventually pay Notre [REDACTED] and offer to provide the Enterprise with an additional amount of nearly [REDACTED] in compensation.

409. Finally, the compensation was offered promptly⁶⁴² and was more than equivalent to the fair market value of Adams Mine for the reasons explained below.

XII. THE CLAIMANT IS NOT ENTITLED TO DAMAGES

A. Summary

410. In the late 1980s, Gordon McGuinty had an idea — take a massive hole in the ground in northern Ontario at the abandoned Adams Mine site and turn it into a waste disposal facility for all of the residential garbage of Toronto. The idea, however, failed. By 2002, Toronto had decided to send its garbage somewhere else, Mr. McGuinty had run out of money and investors, the rail transportation company was no longer interested, and not a single waste management company was willing to participate in the development of the site.⁶⁴³

411. After thirteen years of disappointment, and struggling under the weight of his collapsing business, Mr. McGuinty sold the site to the Cortellucci Group, a construction,

⁶⁴¹ Witness Statement of James Edward Baskerville, ¶ 15.

⁶⁴² Witness Statement of James Edward Baskerville, ¶ 5-9, 16-18. Notre received payment of its compensation a month after an agreement on compensation was reached. *Ibid.*, ¶ 15.

⁶⁴³ Counter-Memorial, ¶¶ 63, 82, 85-88.

residential development, and property investment company.⁶⁴⁴ The Cortellucci Group purchased, and later transferred to the Enterprise, a failed business with no serious prospects of success. It did so based on speculation that the situation might change for the better because of Mr. Cortellucci's perceived ability REDACTED

REDACTED

412. In the two years after the purchase of the site, nothing changed for the better, and certainly nothing happened to increase the value of the site above the amount that had been paid for it. No one agreed to invest in the site's development. No one agreed to send any of their waste to it. No one agreed to haul any waste to it. No work was done to make the site ready to receive waste. No further conditions of the Provisional Certificate were met. Further, new scientific evidence emerged that challenged the basis of the site's engineering design and a lawsuit by a former partner likely meant that the Enterprise did not even have title to the site. In short, after over fifteen years of effort, the massive hole in the ground at the abandoned Adams Mine site in Northern Ontario remained exactly that and nothing more.

413. Under Article 1117, the Claimant may only recover damages for harm caused by the alleged breach of the NAFTA. In this case, neither the alleged breach of Article 1110 nor that of Article 1105 actually caused any damage to the Enterprise. Rather, any loss of value was solely a result of the Enterprise's business failures long before the *AMLA* was enacted.

414. With respect to the alleged breach of Article 1110, the *AMLA*'s revocation of the Enterprise's permits and its prohibition on landfilling at the Adams Mine site, did not cause any damage to the Enterprise. By the time the *AMLA* was enacted on June 17, 2004 (the "Valuation Date"),⁶⁴⁶ market factors had already rendered the investment

⁶⁴⁴ Counter-Memorial, ¶¶ 89-96.

⁶⁴⁵ Counter-Memorial, ¶¶ 103-112; *see also* Rebuttal Report of the Fair Market Value of the Adams Mine Site in the Matter of Vito G. Gallo v Government of Canada, prepared by Kenneth T. Wise, The Brattle Group (June 25, 2010) ("Dr. Wise Report"), ¶201.

⁶⁴⁶ NAFTA Article 1110(2) sets as the valuation date the time "immediately before the expropriation took place ("the date of expropriation"). The *AMLA* was enacted on June 17, 2004, and thus, that is the relevant "date of expropriation." However, pursuant to Article 1110(2), the valuation as of the date of expropriation "shall not reflect any change in value occurring because the intended expropriation

essentially valueless. As Dr. Wise, an economist with over 25 years of experience calculating economic damages in connection with litigation and arbitration proceedings, explains in his expert report, “a typical investor would not invest in the Site with the intent to develop the site into an operating landfill”⁶⁴⁷

415. Even assuming that the Claimant could recover some damages for the alleged breach of Article 1110, he should not be permitted to recover more than the money he put at risk, *i.e.* his investment costs. In this case, investment costs are more than reasonable compensation. In fact, as is shown by the conclusions reached by Dr. Wise, payment of damages equivalent to investment costs actually exceeds the fair market value of the site at the time the *AMLA* was enacted.⁶⁴⁸ This is consistent with what the Enterprise itself admitted one year before the *AMLA* — valuing the business opportunity presented by the site at even \$5,000,000 is “excessive, remote, speculative and unreasonable.”⁶⁴⁹ With respect to the alleged breach of Article 1105, the termination of the Borderlands lawsuit did not cause the Enterprise any damages because that lawsuit was valueless in light of the other provisions of the *AMLA*.

416. Finally, if the Tribunal does award the Claimant damages, those damages must be reduced to reflect the percentage of the site’s value that the Enterprise gave away in order to secure its initial financing. Further, in any award of damages, the Tribunal should recognize that the Government of Ontario has already paid out over REDACTED at the Enterprise’s direction. It remains statutorily obligated to pay the Enterprise for its investment costs, and has already offered the Enterprise nearly REDACTED in this regard. In these circumstances, awarding the Claimant damages without taking into account these amounts will provide him with both a speculative and a wholly unjustified windfall.

had become known earlier.” Thus, while the date of expropriation is June 17, 2004, any change in value that resulted from the introduction of the *AMLA* on April 5, 2004, has been ignored in the damages analysis, Dr. Wise Report, ¶ 2.

⁶⁴⁷ Dr. Wise Report, ¶ 23.

⁶⁴⁸ Dr. Wise Report, ¶¶ 20-25.

⁶⁴⁹ *Canadian Waste Services Inc., v. Notre Development Corporation et al.*, Statement of Defence and Counterclaim of the Defendant (May 20, 2003) ¶ 19 (CAN-302).

B. The Enterprise Has Suffered No Damage As a Result of the Alleged Breaches of NAFTA Article 1110

1. Under NAFTA, the Claimant Must Prove that the Alleged Breach Caused the Damages Claimed

417. Article 1117 provides that a Claimant may recover damages on behalf of an enterprise *only if* the “enterprise has incurred loss or damage *by reason of, or arising out of, that breach.*”⁶⁵⁰ Various NAFTA tribunals have interpreted this language as requiring a “sufficient causal link”⁶⁵¹ or an “adequate[] connect[ion]”⁶⁵² between the alleged breach of the NAFTA and the loss sustained by the investor.

418. In the ICSID arbitration *Biwater Gauff v. Tanzania*,⁶⁵³ the tribunal offered further explanation of the requirement of causation in international law, stating that it “comprises a number of different elements, including (inter alia) (a) a sufficient link between the wrongful act and the damage in question, and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote.”⁶⁵⁴ Similarly, in his commentary on Article 31 of the International Law Commission’s *Articles on State Responsibility*, Professor Crawford, drawing from a wide range of international decisions, described the requirement of causation as follows:

[R]eference may be made to losses ‘attributable [to the wrongful act] as a proximate cause’, or to damage which is ‘too indirect, remote, and uncertain to be appraised’, or to ‘any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of’ the wrongful act. This causality in fact is a necessary but not a sufficient condition of reparation. ... The

⁶⁵⁰ See NAFTA Article 1117 [emphasis added].

⁶⁵¹ *S.D. Myers Inc. v. Canada* (UNCITRAL) Second Partial Award (21 October 2002) (“*S.D. Myers - Second Partial Award*”) ¶ 140 (BOA-73); see also *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, (ICSID Case No. Arb/05/22) Award (24 July 2008) (“*Biwater - Award*”) ¶ 779 (BOA-11) (“Compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by [the Enterprise].”).

⁶⁵² *Marvin Feldman and the United Mexican States* (ICSID Case No. ARB(AF)/99/1) Final Award (16 December 2002) (“*Feldman - Award*”) ¶ 194 (BOA-29).

⁶⁵³ *Biwater - Award* (BOA-11).

⁶⁵⁴ See *Ibid.* ¶ 785 (BOA-11).

notion of a sufficient causal link which is not too remote is embodied in the general requirement in Article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.⁶⁵⁵

419. In accordance with these principles, international arbitral tribunals have prevented the recovery of damages in situations where the investment had already failed by the time of the impugned measures. Investment treaties such as the NAFTA are not “insurance policies against bad business decisions.”⁶⁵⁶ As such, they are not tools to be used by claimants to recover money related to the failure of their businesses for reasons unrelated to a host State’s allegedly wrongful acts.

420. For example, in the *Biwater* arbitration, the tribunal concluded that there was no factual link between the damage claimed and the breach of the investment treaty at issue because the claimant’s investment had lost all of its value before the date of the breach. In that case, the claimant had made a poorly prepared bid for a contract, committed numerous management errors and encountered serious implementation problems, all of which resulted in its financial failure. Indeed, financial projections showed that the investment would continue to suffer significant operating losses going forward.⁶⁵⁷ As a result, the tribunal held that none of the breaches of the treaty by Tanzania “in fact caused the loss and damage in question, or broke the chain of causation that was already in place.”⁶⁵⁸

421. Similarly, in *ELSI*, the International Court of Justice concluded there were no damages to be awarded because the company was worthless before the allegedly wrongful act by the host State. In that case, the company had failed because it was under-capitalized, losing money, and debt-ridden. Further, the company had lost the

⁶⁵⁵ Crawford, J., “The International Law Commission’s Articles On State Responsibility, Introduction, Text And Commentaries” (2002) pp. 204–205 [citations omitted] (BOA-100).

⁶⁵⁶ *Waste Management Inc. v. United Mexican States* (ICSID No. ARB(AF)00/3) Award (30 April 2004) (“*Waste Management II – Award*”) ¶ 114 (BOA-91); *See also Emilio Maffezini v. Spain* (ICSID Case No. ARB/97/7) Award on the Merits (13 November 2000) (“*Maffezini – Award*”) ¶ 64 (BOA-41); *See also CMS Gas Transmission Company v The Argentine Republic* (ICSID Case No. ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) (“*CMS – Jurisdiction*”) ¶ 29 (BOA-19).

⁶⁵⁷ *Biwater – Award*, ¶¶ 789–790 (BOA-11).

⁶⁵⁸ *See Ibid.* ¶ 798 (BOA-11).

confidence of its investors who had made it clear they did not want to finance it further. The Court therefore concluded that the “underlying cause [of ELSI’s demise] was ELSI’s headlong course towards insolvency: which state of affairs it seems to have attained even prior to the requisition.”⁶⁵⁹

422. As explained in detail below, the facts of this case are remarkably similar to those present in both *Biwater* and *ELSI*. The Claimant is no doubt disappointed that he was unable to realize his plans to turn the abandoned Adams Mine into a waste disposal facility – but NAFTA does not provide compensation for ill-advised investments and failed ideas. Instead of addressing this reality, the Claimant has ignored the issue. His entire causation argument consists of a single declarative sentence on nearly the last page of his Memorial: “Implementation of the AMLA was a direct cause of a dramatic reduction of value in the Enterprise’s investment.”⁶⁶⁰ In light of the facts presented below, such an assertion is certainly insufficient; moreover, it is inconsistent with all of the relevant evidence.

2. The Alleged Breach of Article 1110 Did Not Cause the Enterprise Damage

423. The Claimant has alleged that the *AMLA*’s cancellation of the Enterprise’s permits and its prohibition on landfilling at Adams Mine constitute a breach of Article 1110. As has been shown above, this is incorrect. But even if these measures could be considered a breach of Article 1110, they did not cause the Enterprise any damages. Indeed, by the time these measures were enacted, it was impossible to cause damage to the Enterprise: Adams Mine already had no market value as a landfill facility.⁶⁶¹

⁶⁵⁹ *Electronica Sicula S.p.A. (US v. Italy)* [1989] I.C.J. Rep. (July 20, 1989) (“*ELSI – Award*”) ¶ 101 (BOA-25).

⁶⁶⁰ Claimant’s Memorial, ¶ 500.

⁶⁶¹ Dr. Wise Report, ¶¶ 152-162.

424. REDACTED the existence of a Provisional Certificate is of little value in and of itself.⁶⁶² As Dr. Wise explains, the value of Adams Mine actually depends on a number of factors, including:

- unencumbered ownership of the site;
- the ability to obtain a waste stream sufficient to obtain cheap rail haul and make the site profitable;
- the ability to meet the regulatory conditions imposed; and
- the ability to obtain the financing necessary for development.⁶⁶³

425. With respect to each of these factors, the project to develop the abandoned Adams Mine into a waste disposal facility had failed.

(a) The Enterprise Did Not Have Clear Title to the Adams Mine Site

426. When the Cortellucci Group purchased the Adams Mine site in 2002, the sale transaction was specifically structured to render it impossible for CWS to exercise its right of first refusal.⁶⁶⁴ CWS immediately challenged the sale, seeking its nullification and the return of title to the Adams Mine site to Notre. In the alternative, it sought damages for the “lost opportunity” to “exploit the business opportunity the site represents,” which CWS valued as \$5 million.⁶⁶⁵

427. As Judge Iacobucci, a recently retired Justice of the Supreme Court of Canada, explains in his expert opinion, there is no question that any purchaser or investor in the market would have been aware of and would have fully investigated the circumstances of the CWS lawsuit.⁶⁶⁶ As he further opines, any counsel considering these circumstances

⁶⁶² Expert Report on behalf of the Government of Canada, Edward S. Roberts, Conestoga-Rovers & Associates (June 24, 2010) (“Mr. Roberts Report”), REDACTED

⁶⁶³ Dr. Wise Report, ¶¶ 63-66, 152.

⁶⁶⁴ Counter-Memorial, ¶¶ 90-93.

⁶⁶⁵ Counter-Memorial, ¶¶ 100-102. As is explained in detail below, the Enterprise argued that \$5 million far exceeded the value of the business opportunity presented by the site. *See* Counter-Memorial ¶¶ 477-479.

⁶⁶⁶ Justice Frank Iacobucci, Expert Report, ¶ 18 (June 29, 2010) (“Justice Iacobucci Report”).

would likely have concluded that the structuring of the deal between Notre and the Enterprise was impermissible under Canadian and Ontario law, and that the court seized of the matter would likely grant CWS the relief it requested, namely, the nullification of the transfer of title to Adams Mine to the Enterprise.⁶⁶⁷ Any diligent purchaser, receiving competent legal advice, would have realized that it was more likely than not that the Enterprise did not have good title to Adams Mine. Accordingly, it is nonsense to suggest that in June 2004, with this lawsuit pending, a buyer would have offered any sort of significant value to purchase the site from the Enterprise.⁶⁶⁸

428. This legal impediment to any transaction involving the site effectively eliminated the site's market value. In fact, the Enterprise has admitted this. In defending against the lawsuit brought by CWS, the Enterprise and the Cortellucci Group brought a counterclaim in May 2003.⁶⁶⁹ They claimed that as long as the CWS lawsuit subsisted, their "ability to enter into contracts for the development and use of the [Adams Mine site]" was effectively impaired.⁶⁷⁰ In at least this respect, the Enterprise was right. No reasonable investor would have been willing to purchase the site or fund its development while this lawsuit was pending.⁶⁷¹ And indeed, the lawsuit was pending at the Valuation Date here.

(b) The Enterprise Could Not Obtain a Sufficient Waste Stream to Operate the Adams Mine Site

429. In order for a waste disposal site to be developed at Adams Mine, a *long-term* contract guaranteeing *at least 1 million tonnes per year* was an absolute requirement. This was the case for two reasons. First and foremost, as is explained by Michael Corr, the account manager at CN during the Rail Cycle North Consortium's bid for Toronto's municipal waste in 2000, CN would not have been willing to make the necessary accommodations at the MacMillan Rail Yard "unless [it] had a guarantee that there

⁶⁶⁷ Justice Iacobucci Report, ¶ 52

⁶⁶⁸ Dr. Wise Report, ¶¶ 61-62.

⁶⁶⁹ *Canadian Waste Services Inc v Notre Development Corporation* – (Ont. Sup. Ct.) Court File No. 03-Cv-244717CM2, Statement of Defence and Counterclaim (May 15, 2003) (CAN-299).

⁶⁷⁰ *See Ibid.* ¶ 27 (CAN-299).

⁶⁷¹ Justice Iacobucci Report, ¶ 52.

would be a million tonnes of waste per year, for a long period of time.”⁶⁷² As is explained by Dr. Wise, without rail haul, Adams Mine could not work.⁶⁷³ Second, without the volume and duration of such a waste stream, the large capital and operating costs of the site would essentially reduce its value to such an extent that it would not be worth developing.⁶⁷⁴

430. The necessity for a waste stream of this size and duration was never lost on the various proponents of Adams Mine. Indeed, for the entire lifetime of the project, the proponents of Adams Mine were aware that the site would require such a waste stream to be successful.⁶⁷⁵ REDACTED

REDACTED

431. However, as is explained at length by Dr. Wise and addressed in more summary fashion below, the market conditions in southern Ontario at the time meant that Adams Mine could not hope to secure such a waste stream at the prices it needed.⁶⁷⁷

i. Toronto Was Not Interested in Disposing of its Waste at Adams Mine

432. The need for long-term waste disposal contracts essentially meant that Adams Mine needed a significant stream of MSW.⁶⁷⁸ Further, given the size of the waste stream

⁶⁷² Witness Statement of Michael Corr, ¶ 8.

⁶⁷³ Dr. Wise Report, ¶ 76, 153, 155-158.

⁶⁷⁴ Dr. Wise Report, ¶¶ 66, 77-78, 160-162.

⁶⁷⁵ Counter-Memorial, ¶¶ 55-58; *See also* Witness Statement of Michael Corr, ¶ 10; Witness Statement of Shaun Hewitt, ¶ 9.

REDACTED

⁶⁷⁷ Dr. Wise Report, ¶¶ 90-135.

required, Adams Mine principally required a deal with Toronto.⁶⁷⁹ However, by 2002, when the Enterprise acquired the Adams Mine site, every effort to make a deal with Toronto to ship waste to Adams Mine had ended in failure.⁶⁸⁰

433. Toronto had let its option on Adams Mine expire in 1995.⁶⁸¹ Then, in October 2000, it had agreed to send all of its MSW and IC&I to a landfill in Michigan.⁶⁸² On January 31, 2001, Toronto made clear that it was not willing to reconsider its decision not to ship its waste to Adams Mine. In particular, it resolved:

NOW THEREFORE BE IT RESOLVED THAT City Council formally reject the Adams Mine site *as a current or future option* for dumping the City of Toronto municipal waste. (emphasis added.)⁶⁸³

434. After his election in November 2003, the Mayor of Toronto, David Miller, stated “I can’t imagine anything would change my mind. I’ve debated the issue twice since I’ve been elected [to council]. I’m thoroughly familiar with the strengths and weaknesses of [Adams Mine] and I don’t think it’s a good solution for Toronto.”⁶⁸⁴

435. REDACTED

REDACTED

As the testimony of both Toronto Deputy City Manager Richard Butts and Toronto General Manager of Solid Waste Services Geoff Rathbone makes clear, Toronto had definitively

⁶⁷⁸ Dr. Wise Report, ¶¶ 4, 6, 22, 31, 75, 162; *See also* Witness Statement of Richard Butts, ¶ 37.

⁶⁷⁹ Dr. Wise Report, ¶¶ 4, 24, 75, 197; *See also* Witness Statement Michael Corr, ¶ 10.

⁶⁸⁰ Counter-Memorial, ¶¶ 55-85.

⁶⁸¹ Counter-Memorial, ¶¶ 59-61.

⁶⁸² Witness Statement of Richard Butts, ¶ 46.

⁶⁸³ Counter-Memorial, ¶83; City of Toronto, Minutes of the Council of the City of Toronto, January 31 and February 1, 2001, pp. 87-88 (CAN-78).

⁶⁸⁴ Counter-Memorial, ¶ 111; Dana Borcea, “Miller remains opposed to Adams Mine: Toronto’s trash”, National Post (November 19, 2003) (CAN-317).

⁶⁸⁵ Counter-Memorial, ¶¶ 105-112.

rejected Adams Mine in 2001 and, from that time on, it never again considered the Adams Mine project as a viable option.⁶⁸⁶

436. The market belief that, without Toronto, the project to develop Adams Mine was dead, is evidenced by the fact that upon Toronto's decision in 2000 and its resolution in 2001, all interest in Adams Mine dried up in the private sector. In particular, CWS dropped out of and disbanded the RCN consortium in 2001.⁶⁸⁷ Republic, a significant player in the waste management marketplace in Ontario, also passed on an opportunity to develop Adams Mine.⁶⁸⁸ Even a 2001 partnership with Aecon, a construction company, lasted only a few months, falling apart when the Toronto deal to send its waste to Michigan was finalized.⁶⁸⁹

ii. No Other Municipality Was Interested in Disposing of its Waste at Adams Mine

437. The Enterprise also failed to reach any agreements with other municipalities to deposit waste in Adams Mine. In reality, because of the logistics involved, as well as existing market conditions, the only municipalities that were realistic potential customers for Adams Mine were in the Greater Toronto Area.⁶⁹⁰ REDACTED

⁶⁸⁶ Witness Statement of Richard Butts ¶ 48; *See also* Witness Statement of Geoffrey Rathbone ¶¶ 8-9.

⁶⁸⁷ Counter-Memorial, ¶ 85.

⁶⁸⁸ Counter-Memorial, ¶ 88.

⁶⁸⁹ Counter-Memorial, ¶¶ 86-87.

⁶⁹⁰ Dr. Wise Report, ¶ 117, fn 161. As explained by Dr. Wise the mere idea of using waste streams from multiple geographic areas is ludicrous given the logistics of Adams Mine. The premise of the site has always been, and must be in light of costs and timing, that there would be a train to Adams Mine dedicated to its task—a so-called "unit train." Collecting waste from additional cities would require multiple trains, as it would make no sense to run a train hundreds of kilometres from, for example, Ottawa to Toronto, so that it could be added to the unit train heading north to Adams Mine. The transportation costs of doing so would be prohibitive. None of the other municipalities in Ontario, including Ottawa, generate nearly enough waste to support the formation of a unit train on their own. As a result, rail haul from any city other than Toronto simply would not be logistically feasible. The Claimant has also not produced a single document showing how the financial and logistical hurdles could be overcome, nor showing any discussions with municipalities outside of the GTA.

REDACTED

438. However, none of the municipalities within that radius (essentially Peel, Durham and York Regions) signed a contract with Adams Mine.⁶⁹² In fact, the positions adopted by each of these municipalities either before or after the collapse of the RCN consortium in 2001 made it clear that they were not interested in sending their waste to Adams Mine. The Region of Peel rejected the Adams Mine option in October 2000 through a resolution that it “would not participate in the Rail Cycle North resolution.”⁶⁹³ York and Durham conditioned their participation with Adams Mine on a successful deal with Toronto.⁶⁹⁴ When the deal with Toronto did not materialize, both municipalities moved on in their waste management planning. York and Peel signed long-term contracts with Republic for Michigan disposal and Durham signed a contract with CWS and Miller for the disposal of its waste.⁶⁹⁵

iii. No IC&I Customers or Managers Were Interested in Disposing of Their Waste at Adams Mine

439. The business plan of every one of the proponents to develop a waste disposal facility at Adams Mine, including the Enterprise, was to obtain a stream of MSW. There had never been any attempt to enter the IC&I market or even any serious consideration of doing so.⁶⁹⁶

440. Nor would Adams Mine have been able to enter the IC&I market even if it had wanted to. The IC&I market operates on short-term disposal contracts of typically less than three years in length.⁶⁹⁷ CN required the guarantee of a large, long-term contract,

REDACTED

⁶⁹² Counter-Memorial, ¶ 84.

⁶⁹³ Counter-Memorial, ¶ 84.

⁶⁹⁴ “Toronto Regions Looking For Waste Management Proposals” by Darlene Wroe, Speaker Reporter, 2000. (CAN-227).

⁶⁹⁵ Counter-Memorial, ¶ 84.

⁶⁹⁶ Counter-Memorial, ¶¶ 55-58, 104-115.

⁶⁹⁷ Witness Statement of Richard Butts, ¶ 15.

otherwise it was not willing to make available the space necessary at the MacMillan Yard for the Adams Mine project.⁶⁹⁸ Moreover, Adams Mine required such heavy initial capital expenditures, and had such high operating costs, that a long-term contract for a substantial amount of waste was simply a business necessity.⁶⁹⁹

441. Further, the IC&I market was simply too risky and too volatile a market to form the basis for a capital intensive venture such as the Adams Mine project. In January 2004, just months before the *AMLA* was introduced, REDACTED

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However, with the exception of Miller, all of these companies are vertically integrated, meaning that they own landfills, and would seek to internalize the revenue by depositing their waste there.⁷⁰²

442. Even if it had attempted to enter the IC&I market, Adams Mine could not have been successful. As explained by Dr. Wise, the IC&I market in Ontario is simply too competitive to assume that the Adams Mine would be able to completely dominate it in the way that would be required if it were to succeed as a primarily IC&I disposal facility.⁷⁰³ An analysis of the market shows that Adams Mine would have needed to

⁶⁹⁸Witness Statement of Michael Corr, ¶ 6.

⁶⁹⁹Dr. Wise Report, ¶ 4, 21-23, 66, 162.

REDACTED

⁷⁰¹Counter-Memorial, ¶¶ 100-102.

⁷⁰²Dr. Wise Report, ¶¶ 89, 95, 99-100.

⁷⁰³Dr. Wise Report, ¶¶ 89, 90-134.

capture more than 60% of the IC&I waste available.⁷⁰⁴ In a concentrated market, dominated by a few major integrated companies known to compete fiercely with each other, the assertion that Adams Mine, a single landfill with no collection or transfer station operations, “could have attracted more than 60 percent of non-municipal IC&I waste [is] implausible.”⁷⁰⁵

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(c) The Enterprise Did Not Have the Regulatory Approvals Necessary to Develop and Operate the Adams Mine Site

444. The Claimant has disingenuously attempted to confuse this Tribunal by portraying Adams Mine as a permitted landfill that could begin accepting waste. This is simply not true. In fact, at least four environmental permits (and numerous other approvals) were still required to operate the site and the rail haul components of the Adams Mine plan.⁷⁰⁷ In its two years of ownership, the Enterprise had failed to obtain a single additional environmental permit or approval.⁷⁰⁸

445. Further, a new scientific analysis done by a respected hydrogeologist, Dr. Ken Howard, questioned the modelling used by Notre’s consultants to establish that hydraulic containment at the site would be effective. This new analysis, which had caught the attention of the hydrogeologists at the MOE, raised serious scientific concerns about the proof of hydraulic containment that had been accepted as the basis for several earlier

⁷⁰⁴ Dr. Wise Report, ¶¶ 6, 123, 159.

⁷⁰⁵ Dr. Wise Report, ¶ 124.

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⁷⁰⁷ Counter-Memorial, ¶ 156.

⁷⁰⁸ Counter-Memorial ¶¶ 120-130, 156-161.

environmental approvals.⁷⁰⁹ While this new analysis did not prove that hydraulic containment would fail, it certainly raised enough serious doubts about the testing that had been done that the MOE was going to require further significant tests over an extended duration.⁷¹⁰ Until those tests were complete, and the evidence from them deemed satisfactory, the site would not be able to begin development, let alone receive waste.⁷¹¹

446. As a result, the regulatory risk related to the project was high. This regulatory uncertainty would negatively affect the value of the site for a potential buyer – a fact ignored by the Claimant.⁷¹²

(d) The Enterprise Lacked the Financial Resources to Develop the Site

447. As explained by Mr. Ferraro in his expert report, the site required over \$100 million in development capital over a three year period prior to the start-up of operations.⁷¹³ However, by the end of 2003, the Enterprise was practically out of money;

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448. It is also clear that neither Mr. Cortellucci nor the other Limited Partners were content to throw further good money after bad.⁷¹⁵ Further, nowhere has the Claimant pled that he intended to invest significant funds himself to complete the construction of the

⁷⁰⁹ Witness Statement of Mark Puumala, ¶ 49.

⁷¹⁰ Witness Statement of Mark Puumala ¶¶ 49, 51.

⁷¹¹ Witness Statement of Mark Puumala, ¶ 53.

⁷¹² Dr. Wise Report, ¶¶ 6, 8, 22.

⁷¹³ Evaluation of Site Improvement and Landfill Operation Costs, prepared by Gregory D. Ferraro, Conestoga – Rovers & Associates (June 2010) (“Mr. Ferraro Report”) pp. 2, 50, REDACTED

⁷¹⁴ Counter-Memorial, ¶ 116.

⁷¹⁵ Counter-Memorial, ¶¶ 117-119.

site. REDACTED

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449. However, as explained by Dr. Wise and Mr. Ed Roberts (who has direct experience trying to sell landfills in southern Ontario), the plan to obtain financing on the basis of nothing more than a Provisional Certificate and no customers is economic nonsense.⁷¹⁷ No one knowledgeable about the waste industry would be willing to invest any significant amount of money, let alone \$100 million, on the speculation that they might get enough of a waste stream at some point in the future to make a little money. That is just not how the business works. A Provisional Certificate and available site capacity are not enough for a financial partner to have confidence in the future profitability of a site.⁷¹⁸ REDACTED

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Accordingly, the idea that the Claimant would have been able to raise over \$100 million in start-up capital without a single contract for waste is not credible.

450. In light of this, it is hardly surprising that the Claimant has not presented evidence of a single dollar raised. In fact, there is not a single document or piece of correspondence on the record to prove that the Claimant ever had any discussions with potential investors. REDACTED

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⁷¹⁷ Dr. Wise Report, ¶ 66, 177-179; REDACTED

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⁷¹⁸ REDAC

⁷¹⁹ REDAC See also Witness Statement of Geoffrey Rathbone, ¶ 22.

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451. The Claimant's belief that the Enterprise would be able to secure over \$100 million in financing to develop Adams Mine on the basis of nothing more than a market analysis and a "build it and they will come" mentality is unrealistic. This is evidenced by the real world withdrawal of CWS from the RCN consortium in 2001. CWS actually controls enough of the IC&I market in Ontario to operate Adams Mine at capacity using nothing more than the waste it controls. However, when the negotiations with Toronto broke down in 2000, CWS did not purchase Adams Mine to use it as the disposal site for its own IC&I, and it certainly did not make an offer of over \$100 million dollars.⁷²² In fact, in its pleading in 2003, CWS recognized the failure of the business and the fact that it could never be viable without Toronto's waste when it valued the opportunity to develop and operate the Adams Mine site at no more than \$5 million.⁷²³ Other waste management companies, including Republic, have similarly declined to purchase the site for their own waste.

3. Summary

452. The *AMLA*'s cancellation of the Enterprise's permits and its prohibition on landfilling at Adams Mine did not cause the Enterprise any damages for a very simple and fundamental reason: the site had no value as a future landfill on the date the *AMLA* was passed. As of that date, it was unclear who had title to the site, it was not realistic for the Enterprise to obtain the waste stream it needed to profitably operate, it was uncertain when or if the site would receive the necessary regulatory approvals, and it was unreasonable to expect that it could obtain the financial resources to be developed. In short, in every aspect that matters, the project was a total business failure and the Claimant should not now be permitted to recover a windfall.

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⁷²² Counter-Memorial, ¶ 85.

⁷²³ *Canadian Waste Services Inc. v. Notre Development Corporation, Cortellucci Group of Companies and 1532392 Inc.* Court File No. 03-CV-244717 CM2, Statement of Claim (February 28, 2003) ¶ 28 (CAN-288).

C. Even Assuming that the Claimant Has Established Causation, the Claim for Damages for the Alleged Breach of Article 1110 is Unfounded

453. Even assuming that the Claimant has met his burden of proving that Canada breached Article 1110, and he has not, he should not be awarded any damages for the reasons above. Assuming *arguendo* that the Tribunal does award the Claimant damages, those damages are in fact a small fraction of the exorbitant and unrealistic amount that the Claimant has sought here.

1. Standard of Compensation for Expropriation

454. Article 1110(2) of the NAFTA provides that the compensation for an alleged breach of Article 1110:

shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier.

455. It further provides that the “valuation criteria” for determining fair market value “...shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate.”

456. As suggested by the requirement in Article 1110(2) that the valuation method should be appropriate in the circumstances, fair market value can be assessed in a number of ways, including those specifically enumerated in the Article. The choice of valuation methodology depends on the specific facts of the case, including the circumstances of the enterprise at issue.

2. The Claimant May Collect No More than the Investment Value of the Enterprise for any Expropriation

457. In this case, the only appropriate approach to damages is to calculate the Enterprise’s investment costs. Where an enterprise is still in the pre-operational stage and/or has no history of profits, other less speculative approaches are more appropriate,

such as book-value, or an assessment of the investment costs.⁷²⁴ This is exactly the situation here. The Adams Mine site was an undeveloped and partially permitted project without a single customer. At the time the *AMLA* was enacted, it remained a highly speculative project. It was never a going concern.⁷²⁵ In such circumstances, international law dictates that the fair market value of a project is best determined by its investment value, that is, its sunk costs.

(a) The Value of a Pre-Operational Business is its Investment Costs

458. A claim involving the assessment of the fair market value of a landfill project was decided almost a decade ago in *Metalclad Corp. v. Mexico*. In that case, Metalclad, a large U.S. corporation, had become involved in the Mexican hazardous waste disposal industry.⁷²⁶ Its goal was to become a fully integrated company, and by the mid-1990s, it in fact had collection and transfer station operations as well as a partnership with BFI-Mexico.⁷²⁷ In order to complete its integrated operations structure, Metalclad purchased, permitted, financed and constructed a state-of-the-art waste disposal facility with a permitted capacity of 360,000 tons (approximately 320,000 tonnes) per year.⁷²⁸ However, it was unable to bring this site into operation, because an Ecological Decree issued by the local governor essentially made it impossible to operate the facility.⁷²⁹

⁷²⁴ See for example: *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1) Award (30 August 2000) (“*Metalclad – Award*”) ¶ 122 (BOA-44); *Siemens A. G. v. Argentine Republic* (ICSID No. ARB/02/8) Award (6 February 2007) (“*Siemens – Award*”) ¶ 355, 368, 370. (BOA- 77); *Wena Hotels Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Award on Merits (8 December 2000) (“*Wena – Award*”) ¶ 123-125 (BOA-92).

⁷²⁵ According to the World Bank, in the context of claims of expropriation, “a “*going concern*” means an enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty, if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State;” World Bank Guidelines on the Treatment of Foreign Direct Investment, Section IV (6) *available at* <http://ita.law.uvic.ca/documents/WorldBank.pdf>.

⁷²⁶ *Metalclad - Award*, ¶ 2 (BOA- 44).

⁷²⁷ Metalclad Corporation, 10-K Annual Report for the fiscal year ended May 31, 1996, p. 3 (CAN-196).

⁷²⁸ *Metalclad - Award*, ¶ 57 (BOA-44).

⁷²⁹ *Metalclad - Award*, ¶ 109 (BOA- 44).

459. In short, Metalclad had a fully permitted, constructed and financed waste disposal facility with a guaranteed stream of waste because of its integrated collection and transportation businesses. Further, it was operating in a market in a hazardous waste disposal crisis where it expected little competition,⁷³⁰ and it had partnered with one of the major market participants, in BFI. In fact, in many ways, Metalclad's investment in Mexico was everything that the Claimant's investment in Adams Mine was not.

460. Nevertheless, the tribunal in *Metalclad* ruled that even in these circumstances, because the landfill was never operative, the "fair market value is best arrived at . . . by reference to Metalclad's actual investment in the project."⁷³¹

461. The *Metalclad* tribunal's ruling is consistent with the decision of nearly every other international investment tribunal that has considered the question of the fair market value of a non-operating company or one without a proven track record. In *Wena Hotels*, the company at issue had operated one of its hotels for less than 18 months and had not completed the construction of the other.⁷³² The tribunal awarded the investment costs of the enterprise.⁷³³ In *Vivendi*,⁷³⁴ the enterprise was not a going concern, and had never been financially viable or ever turned a profit.⁷³⁵ The tribunal in that case awarded investment value as the "closest proxy" for fair market value. Similarly, in *Siemens*, the business was not a going concern, and the tribunal awarded only the investor's sunk costs.⁷³⁶

462. The Claimant here fails to address any of this jurisprudence, instead trying to obscure the true legal test by reference to legally irrelevant accounting concepts such as

⁷³⁰ Metalclad Corporation, 10-K Annual Report for the fiscal year ended May 31, 1996, pp. 7-8 (CAN-196).

⁷³¹ *Metalclad – Award*, ¶ 121-22 (citing *Phelps Dodge Corp. v. Iran* (10 Iran-U.S. C.T.R. 121 (1986) (BOA-44); *Biloune, et al. v. Ghana Investment Centre, et al.*, 95 I.L.R.183, 207-10, 228-9 (1993) ("*Biloune – Award*") (BOA-10).

⁷³² *Wena – Award*, ¶ 124 (BOA-92).

⁷³³ *Wena – Award*, ¶ 122 (BOA-92).

⁷³⁴ *Compagna de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina* (ICSID Case ARB/97/3) Award (20 August 2007) ("*Vivendi – Award*") (BOA-90).

⁷³⁵ *Vivendi – Award*, ¶ 8.3.13 (BOA-90).

⁷³⁶ *Siemens – Award*, ¶¶ 362-389 (BOA-77).

“highest and best possible use.”⁷³⁷ The Claimant also attempts to confuse the issue by relying on inapposite decisions of other tribunals. For example, the Claimant relies on the case of *Rumeli*, which involved a mobile phone business in Kazakhstan. In *Rumeli*, although the business was balance sheet insolvent and badly managed, it was still a going concern and was fully operational.⁷³⁸ The bulk of the necessary capital expenditures had actually been made. The network infrastructure existed and the company had a significant market presence with respect to the existing mobile phone service subscribers in the country. Indeed, the company had been operating, although because of bad management, not successfully, for a number of years. As a result, the tribunal awarded the claimant more than its investment costs. However, because *Rumeli* involved an operating business, it is irrelevant here.

(b) The Investment Value Adams Mine is No More than

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463. In this case, the Tribunal’s task in determining the investment costs is relatively simple because the amount is not substantially in dispute between the parties. Pursuant to Section 6 of the *AMLA*, the Enterprise was permitted to recover (1) all expenses incurred and paid associated with the development of the Adams Mine landfill, (2) all expenses incurred but not paid until a maximum of \$500,000 (a dollar figure suggested by the Enterprise itself) and (3) all expenses for legal fees and disbursements related to advice provided with respect to the *AMLA*.⁷³⁹ As such, not only was the Enterprise permitted to

⁷³⁷ Even ignoring for a moment that the concept has no application in international investment law, and the fact that the Claimant has cited not a single authority to the contrary, it is clear from even a cursory examination of the alleged test that it would not support the Claimant’s assertion of damages. First, at the time of the allegedly wrongful acts by Canada, it was not legally permissible to develop or operate a landfill at Adams Mine because the Enterprise did not have good title to the site and because it did not have all of the necessary regulatory approvals. Second, at the time of the alleged breach, it was unclear that establishing a hydraulic containment landfill at Adams Mine was physically possible because new science had casts doubt onto the hydrogeological conclusions. Third, the Adams Mine project was not financially feasible because the Enterprise lacked both the funds and the investors to turn this huge hole in the ground into a waste disposal facility. As a result, the maximally productive use for the Adams Mine site at the time of the alleged breach was not as a landfill, but rather as a piece of old, abandoned industrial land.

⁷³⁸ *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16) Award (29 July 2008) ¶¶ 727, 806 (“*Rumeli – Award*”) (BOA-69).

⁷³⁹ Further, the compensation payable to the Enterprise also would have included the expenses paid by Notre, but for specific amendments to the *AMLA* requested by the Enterprise.

obtain compensation for “its actual investment in the project,” the *AMLA* also permitted it to obtain compensation for legal fees that would generally not be considered an investment cost.⁷⁴⁰

464. On September 30, 2004, the Enterprise submitted a claim for compensation pursuant to Section 6 of the *AMLA* REDACTED

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This number, which actually represents more than the actual investment of the Enterprise in the project to develop Adams Mine, can inform the Tribunal’s determination of the amount of investment costs at issue here.

(c) The Claimant Should Not Be Permitted to Renegotiate the Value of the Adams Mine Site

465. The compensation provisions of the *AMLA*, which aimed to fairly compensate the Enterprise, were extensively negotiated between the Enterprise and the Government of Ontario.⁷⁴⁴ In fact, during the entire negotiation process surrounding the drafting of the *AMLA*, the Claimant did not take issue with the *AMLA* formula’s focus on investment costs. It did make requests for other amendments to the formula—all of which were incorporated into the Act. As a result of its other requests, the Government of Ontario actually accepted several million dollars in additional liability for compensation.⁷⁴⁵ As a result of the amendments requested by the Enterprise, Ontario also paid out over \$ REDACTED

⁷⁴⁰ *Metalclad - Award* ¶ 121-22 (citing *Phelps Dodge Corp. v. Iran* (10 Iran-U.S. C.T.R. 121 (1986) (BOA-44)).

⁷⁴¹ Witness Statement of James Edward Baskerville, ¶ 5.

⁷⁴² Witness Statement of James Edward Baskerville, ¶ 10.

⁷⁴³ Witness Statement of James Edward Baskerville, ¶ 9.

⁷⁴⁴ Counter-Memorial, ¶¶ 193-207.

⁷⁴⁵ Counter-Memorial, ¶¶ 196, 214.

REDACTED at the Enterprise's request to a third party, Notre. Not once during the negotiations, and not during the time that Ontario was paying a vast sum pursuant to the Enterprise's request, did the Enterprise ever suggest that other factors should be taken into account in determining the compensation to which it was statutorily entitled. Further, the *AMLA* expressly grants the Enterprise the right to bring a domestic claim in Canadian courts to challenge the type of compensation available pursuant to the Act at fact or law. The Enterprise never did so.

466. Ontario relied on the Enterprise's good faith in the negotiations that were conducted to determine the compensation that the Enterprise would be able to collect. Accordingly, the Enterprise should not now be able to back away from the approach to compensation it accepted simply because the Claimant now perceives it to be in his interest to do so.⁷⁴⁶

3. The Valuation Methodologies Proposed by the Claimant are Inappropriate

467. The Claimant purports to offer two separate primary valuation approaches in order to arrive at his grossly inflated damages figure: a sales comparison and a discounted cash flow analysis ("DCF"). However, in reality, the Claimant has merely offered a DCF analysis, simply clothed with two separate names.⁷⁴⁷ REDACTED

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⁷⁴⁶ In *Kuwait v. American Independent Oil Co.* Award 21 I.L.M. 976 (1982) 584-586 (March 24, 1982) ("*Aminoil – Award*"), the tribunal emphasized that when determining compensation, the reasonable expectations of the parties with respect to the compensation provisions negotiated in a contract are important: "For assessment of ... legitimate expectations..., it is above all the...text [which] should be precise and exhaustive. But it is not only a question of the original text; there are also the amendments, the interpretations and the behaviour manifested along the course of its existence, that indicate (often fortuitously) how the legitimate expectations of the Parties are to be seen, and sometimes seen as becoming modified according to the circumstances." The tribunal concluded that "the record of the negotiations in the present case made clear that Aminoil's expectations were confined to a reasonable rate of return..." (BOA-3).

⁷⁴⁷ Dr. Wise makes this clear in his report: "Adjusting for the Adams Mine Site's uncertainties and differences relative to Deloitte's operating landfill "comparables" would be difficult, if not impossible, without performing a DCF analysis." ¶ 172. Also see *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (ICSID Case No. ARB/05/15) Award (1 June 2009) ("*Siag – Award*") ¶¶ 566, 570, 583, where the tribunal rejects Residual Land Value because it is based on a DCF analysis, which was deemed inappropriate on the facts of the case (BOA-76).

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The projection of an “expected income stream” necessarily involves the same future projections of revenue and expenses as in a DCF analysis. Such projections need to be done in order to confirm that the comparison of income-producing properties is, in fact, an apples-to-apples comparison.⁷⁴⁹

468. That the Claimant pretends that the offered comparative analysis is actually different from a DCF analysis is hardly surprising. It is nearly universally recognized by tribunals that a DCF analysis, while often used in business and economics, is not the appropriate methodology *at law* for determining the fair market value of a non-going concern. Indeed, investment tribunals “are unwilling to project forward for estimated revenues and expenses of operation”⁷⁵⁰ for a business that is not a going concern. As the tribunal in *Metalclad* explained, “where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value.”⁷⁵¹

469. In the case of Adams Mine, not only did the project have no operating history at the time of the alleged breach of the NAFTA, but it also lacked sufficient finances to complete and operate the project. Further, there is a large disparity between what was actually invested in the project REDACTED, and the amount claimed

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⁷⁴⁹ See Dr. Wise Report, ¶ 172

⁷⁵⁰ Mark Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (The Netherlands: Kluwer International Law, 2008) p. 91 (BOA-108).

⁷⁵¹ *Metalclad – Award*, ¶¶ 119-120 (BOA-44). Similarly, in *Wena Hotels*, the tribunal rejected the claimant’s DCF calculation as too speculative because the business at issue had a very limited track record, the tribunal questioned whether the claimant had the finances necessary to fund the renovation and operation of the hotels, and there was a large disparity between the claimed amount and the actual investment in the hotels, *Wena – Award*, ¶¶ 122-124 (BOA-92). In *Siag*, the Tribunal rejected the use of the DCF method because the resort “[was] still in its relatively early development phase and has no trading history at all,” and it similarly rejected a comparative approach, *Siag – Award*, ¶ 570 (BOA-76).

(\$105 million).⁷⁵² Finally, the Claimant has no evidence that he would be able to make the project profitable if it was, by some miracle, able to secure the necessary financing. For all of these reasons, in these circumstances, a DCF analysis is an inappropriate valuation methodology at international law and, hence, both the Claimant's comparative and DCF analyses must be rejected.

470. The Claimant also offers a third methodology as a "complementary" approach. However, in this case, the "Cost Approach" suggested is wholly inappropriate. Tribunals have recognized that the Cost Approach is appropriate in cases where the loss has arisen from the taking of specific items of property which need to be replaced. In *Petrolane v. Iran*,⁷⁵³ and in *Oil Field of Texas v. Iran*,⁷⁵⁴ Iran expropriated drilling equipment and the tribunal awarded the replacement value of that equipment. The *AMLA* simply is not comparable in any way to these cases. REDACTED

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Moreover, the calculation proposed by the Claimant is so fundamentally flawed that the whole approach must be disregarded. As Dr. Wise explains, the Cost Approach calculation used by the Claimant amounts to nothing more than a tautology that necessarily achieves the outcome that the Claimant desires⁷⁵⁶ and "adds no information about the value of the Adams Mine Site."⁷⁵⁷

4. The Reasonableness of Investment Value of the Enterprise is Reinforced by the Other Recent Valuations

471. In the years prior to and following the acquisition of the site by the Enterprise, there were several transactions and valuations that indicate that, much like in *Vivendi*, the investment expenses of the Enterprise are more than a fair proxy for its market value in

⁷⁵² Imrgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford: Oxford University Press, 2009) pp. 263-265 (BOA-115).

⁷⁵³ *Petrolane v. Iran*, 27 Iran-US C.T.R. 131, Award (14 August 1991) ¶¶ 106-108 ("Petrolane – Award") (BOA-61).

⁷⁵⁴ *Oil Field of Texas v. Iran*, 12 Iran-US CTR 308, 319 Award (8 October 1986) ¶¶ 43-45 ("Oil Fields – Award") (BOA-58).

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⁷⁵⁶ Dr. Wise Report, ¶ 18, Appendix F, ¶20.

⁷⁵⁷ *Ibid.*

2004. In particular, the site had been valued by CWS as part of the RCN negotiations in 2000 when a contract with Toronto was on the horizon, it had been valued by Mr. Cortellucci when he purchased the site in 2002, and it had been valued again by CWS as part of a 2003 litigation, after the possibility of a contract with Toronto had long faded.

472. These market valuations can be useful tools for the Tribunal to conduct a check on the reasonableness of the amount being considered under the primary valuation methodology, here, sunk costs, because “whether actually executed or only contemplated by the parties at arm’s length, [they] represent strong evidence of the asset’s [fair market value], provided that no value-affecting factors have interfered between the date of the transaction and the valuation date.”⁷⁵⁸

473. As is explained below, what is clear from these valuations is that the site was worth more in 2000 than it was in 2004, and that right before the *AMLA* was enacted it was worth very little at all, if anything. The key ‘value-affecting factor’ that changed between 2000 and 2004 was the market’s realization that there was simply no way that Adams Mine could obtain the sizeable, long-term waste stream it needed to develop the site in light of Toronto’s definitive rejection of the project. In other words, as would be expected, the value of the site tracked increasingly downward the more the market incorporated the reality that the site had less and less chance of ever becoming a landfill.

(a) CWS’ 1997 Valuation of Adams Mine Confirms the Reasonableness of Investment Costs as the Measure of Damages in this Case

474. In 1997, as part of its agreements with Notre, CWS secured an option to purchase the outstanding shares of Notre, which would have given it control of the Adams Mine site. The option could not be exercised until the site had acquired the necessary permits to operate the site and had a contract with Toronto in place for the disposal of at least 1 million tonnes of MSW for a term of not less than 20 years.⁷⁵⁹ Thus, even in 2000, when a contract for Toronto’s waste seemed within reach, CWS was only willing to pay \$10.3

⁷⁵⁸ Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law* (London: British Institute of International and Comparative Law, 2008) p. 216 (BOA-119).

⁷⁵⁹ Counter-Memorial, ¶ 65-66.

million plus a royalty for control of the site. That is, of course, just a fraction of the total damages to which the Claimant now alleges he is entitled.

(b) Mr. Cortellucci's Valuation of Adams Mine in 2002 Confirms the Reasonableness of Investment Costs as the Measure of Damages in this Case

475. In reality, the value of the site spiralled downward after Toronto announced in 2001 that it would not then, and not ever, use the Adams Mine site to dispose of its waste. In 2002, Mr. Cortellucci paid approximately \$2 million dollars for the site,⁷⁶⁰ representing a decline in value of over 80% from the CWS option. The Claimant argues that this figure does not reflect the value of the Adams Mine site⁷⁶¹ because it was a distressed sale. As is explained by Dr. Wise, this explanation does not hold—the value placed on the site by Mr. Cortellucci actually accurately reflects the market perception of the site's value.⁷⁶²

476. The Claimant also alleges that the sale to Mr. Cortellucci is not reflective of the value of the site because it was priced in such a way to avoid repaying the loans CWS had granted. In addition to being an admission of bad faith, that explanation ignores the bigger picture. Pursuant to its agreement with CWS, if Notre sold Adams Mine and received more than \$1.8 million for the site, it was obligated to pay the amount above \$1.8 million and up to \$6.4 million to CWS.⁷⁶³ (This reflects the fact that Notre owed CWS \$4.6 million in loans.) However, if the site had been sold for more than \$6.4 million, Notre could pocket that additional money. Thus, Notre had every incentive to sell the site for more than \$6.4 million. It did not because it could not.

⁷⁶⁰ Dr. Wise Report, ¶ 44-45.

⁷⁶¹ Claimant's Memorial, ¶ 202

⁷⁶² Dr. Wise Report, Appendix C, ¶¶ 10-16.

⁷⁶³ Loan Agreement between WMI Waste Management of Canada, Inc. and Notre Development Corporation (CAN-203).

(c) **CWS' 2003 Valuation of Adams Mine Confirms the Reasonableness of Investment Costs as the Measure of Damages in this Case**

477. In CWS' suit challenging the validity of the sale of the Adams Mine site to the Enterprise, CWS sought, in the alternative, damages to compensate it for the loss of "the business opportunity which the Site represents."⁷⁶⁴ CWS' opinion in 2003 was that "the value of this lost opportunity is \$5,000,000."⁷⁶⁵ Of course, even that amount is higher than the value of the business opportunity to develop the site on the open market. CWS is a dominant market participant in Ontario with enough waste under its control to run Adams Mine at capacity. Accordingly, the value that it placed on Adams Mine was no doubt higher than would be placed on the site in 2003 by others.

478. The Enterprise and Mr. Cortellucci apparently agreed. The Enterprise's response to the claim of CWS that the lost business opportunity was worth \$5 million is rather startling considering that they seek roughly 20 times the damages in this arbitration. The Enterprise argued in 2003, only slightly more than 1 year before the enactment of the *AMLA*, that CWS' claim for \$5 million was "excessive, remote, speculative and unreasonable."⁷⁶⁶

479. The Claimant offers no explanation why he is now attempting to persuade the Tribunal that by April 2004, the site was worth not just \$5 million, but \$105 million. Not a single "value affecting factor" occurred in 2003 which could provide an explanation for this stunning difference in valuation. In fact, every effort of the Enterprise to restart the business in that period, few that they were, ended in yet more failure.

⁷⁶⁴ *Canadian Waste Services Inc. v. Notre Development Corp, et al.*, Court File No. 03-CV-244717 CM2, Statement of Claim (February 28, 2003) ¶ 28 (CAN-288).

⁷⁶⁵ *See Ibid.* ¶ 28 (CAN-288).

⁷⁶⁶ *Canadian Waste Services Inc v Notre Development Corporation*, (Ont. Sup. Ct.) Court File No. 03-Cv-244717CM2, Statement of Defence and Counterclaim (May 8, 2003) ¶ 19 [emphasis added] (CAN-299).

5. Even if the Tribunal Were to Consider the Valuation Methodologies Proposed by the Claimant, They Do Not Support the Award of Damages Sought

480. The comparative analysis and the income analysis which are offered by the Claimants as the primary methods of valuation are inappropriate at international law and the Tribunal should reject their use. However, if the Tribunal were to look to these methodologies, it is clear that a correct application of them, as done by Dr. Wise, actually proves that this site was worth less than the investment costs which had been sunk into it.

(a) A Properly Done Comparative Analysis Shows that the Investment Expenses Are More than Adequate Compensation

- i. The Comparators Offered by the Claimant Are Inappropriate

481. As Dr. Wise explains, the “spirit of the Sales Comparison approach is to find market transactions for comparable properties or businesses that are similar to the subject property, in this case the Adams Mine Site, *in as many relevant dimensions as possible*.”⁷⁶⁷ The comparables offered by the Claimant utterly fail to meet this standard.

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482. The reality is that the Adams Mine site was not an operating landfill and may never have operated as a landfill. REDACTED

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- Permitting: The Provisional Certificate of Approval still required numerous conditions to be met, including the issuance of a short term PTTW and access to the Borderlands;

⁷⁶⁷ Dr. Wise Report, ¶ 165 (emphasis added).

⁷⁶⁸ Dr. Wise Report, ¶ 169.

- Site Ownership: The title of the site was in question in the CWS litigation against Notre;
- Duration of Construction: CRA has estimated that construction of the landfill would take at least three years, and this is a best case scenario with no delays;
- Cost of Construction and Operations: The level of design for the Adams Mine site was so conceptual that the cost estimates are substantially uncertain;
- Low-Cost Transportation: Rail-haul was only available if there was a guarantee of a million tonnes over a long period of time;⁷⁶⁹
- Volume of Waste: It is unreasonably speculative to assume that the site would have secured anything close to the amount of waste it needed, especially once Toronto rejected it;⁷⁷⁰ and
- Competitive Price: In order to attract the amount of waste needed to make the site financially viable (1 million tonnes), it would have had to reduce its per tonne price so much that it would not have been profitable.

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As a result, its analysis is “unreliable, highly uncertain, and high.”⁷⁷²

484. Moreover, even if the Adams Mine had been developed and was operating, the comparators proposed by the Claimant are still unsuitable because of the significant differences bearing on profitability.⁷⁷³

485. First, unlike Adams Mine, the comparator landfills all had significant operating histories. Empire Sanitary had operated for 9 years, while Green Lane, Ridge Landfill and Seneca Meadows all had at least 25 years of operating history. Because they have known net income streams, it is easier to determine expected fill rates, price and

⁷⁶⁹Witness Statement of Michael Corr, ¶ 8.

⁷⁷⁰Dr. Wise Report, ¶¶ 22, 117.

⁷⁷¹Dr. Wise Report, ¶ 172.

⁷⁷²Dr. Wise Report, ¶ 169.

⁷⁷³Dr. Wise Report ¶ 173: REDACTED

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operating costs for these sites. In contrast, Adams Mine had no operating history as a landfill at the Valuation Date, and as a result, it is nearly impossible to determine what its waste stream, landfill price per tonne and capital and operating costs would have been.

486. Second, each and every one of the comparable sites had secure waste contracts and proven waste streams.⁷⁷⁴ Green Lane had a secured waste stream from Toronto. Seneca Meadows and Ridge Landfill each had assured waste streams because of the integrated operations of their new owners, IESE and BFI Canada, respectively. Finally, Empire Sanitary Landfill had a assured waste stream because of the new owner's assumption of existing long-term contracts.

487. This waste security is incorporated into the transaction price of the comparison transaction. As Dr. Wise states: "a site with an assured waste stream [is] more valuable than a non-operating site with no assured supply."⁷⁷⁵ REDACTED

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A guaranteed waste stream is even more pivotal to the Adams Mine site; it "hinged critically on the ability to obtain an assured supply of more than one million tonnes of waste per year."⁷⁷⁷ REDACTED

REDACTED

488. REDACTED

REDACTED

Profitability depends, of course, both on revenue and on cost. REDACTED

REDACTED

REDACTED

"The lower disposal price

indicates lower profitability, all else equal."⁷⁷⁸ REDACTED

REDACTED

⁷⁷⁴ Dr. Wise Report, ¶¶ 177 -179.

⁷⁷⁵ Dr. Wise Report, ¶ 179.

⁷⁷⁶ REDACTED

⁷⁷⁷ Dr. Wise Report, ¶ 179.

⁷⁷⁸ Dr. Wise Report, ¶ 181.

REDACTED of the fact that the unconventional nature of the Adams Mine site required certain operations (i.e. unloading the trains and loading the waste into trucks for transport to the bottom of the pit) that are not required at conventional landfills.⁷⁷⁹ Indeed, the landfilling costs alone at Adams Mine may be as much as 50% higher than at the Green Lane Landfill.⁷⁸⁰

ii. More Similar Comparators Suggest a Value for Adams Mine of Less than its Investment Costs

489. Dr. Wise has been unable to identify any truly similar comparator to Adams Mine both because of its expensive, complicated and unusual design, and its partially permitted and undeveloped status. As explained in his report however, he has identified two sites (also both former mines) in California that are more similar than any of the four sites identified by the Claimant: Eagle Mountain Landfill and Mesquite Regional Landfill.⁷⁸¹ In 2000, the Los Angeles Sanitation District (which consists of the municipalities in the Los Angeles area) entered into purchase agreements for both sites.

490. In certain ways these sites are similar to Adams Mine:

- both sites were permitted to be used as landfills;
- both sites were not yet developed;
- both sites were located along railways and the intent was to eventually serve the sites by rail-haul;
- both sites were owned by investors who had no particular access to a waste stream; and
- both sites required the purchase of adjacent lands.

491. Although numerous adjustments would be required to truly compare apples to apples, these sites at least start from a somewhat similar position as Adams Mine. As Dr. Wise explains, in 2004 Canadian dollars, the purchase price for these landfills was only

⁷⁷⁹ Mr. Ferraro Report, Section 5.1, p. 21, Section 5.2, pp. 43-44.

⁷⁸⁰ Mr. Roberts Report, Section 4.2, pp. 8-9.

⁷⁸¹ Dr. Wise Report, ¶¶ 185-186.

10 cents and 13 cents per tonne, respectively.⁷⁸² A comparative analysis with these sites suggests that an ultimate price for Adams Mine is something between \$2.4 million and \$3 million Canadian in 2004. These figures essentially confirm the reasonableness of using the Claimant's investment costs to value the Adams Mine site.

(b) A Properly Done DCF Analysis Shows that Investment Expenses Are More than Adequate Compensation

- i. The Deloitte Report DCF Analysis Requires Correction for a Number of Analytical Errors

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- ii. A Properly Done Discount Rate Results in a Negative Net Present Value for Adams Mine

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⁷⁸² Dr. Wise Report, ¶ 189.

⁷⁸³ Spreading the costs out over the development period actually *increases* the estimated value of the Site by \$5.6 million. See Dr. Wise Report, ¶ 147.

⁷⁸⁴ Dr. Wise Report, ¶¶ 147-151.

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REDACTED Contrary to the conclusion of Mr. Main, but in line with every other valuation of the site over the last several years, Dr. Wise concludes that the Deloitte Report is close to a best case scenario rather than an expected scenario, and a correct analysis demonstrates that the site, on expectation, had no present value as an operating landfill.⁷⁸⁶

497. The proper implementation of a DCF requires the identification of probable risks that could affect expected cash flows, an estimate of the expected cash flows resulting from the various possible outcomes, and the application of an appropriate discount rate that accounts for the market risk characteristics of a particular project.⁷⁸⁷ However, the Deloitte Report has ignored all of the probable risks associated with the site by incorporating a number of unrealistic assumptions into its DCF analysis. REDACTED

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REDACTED As a result, the DCF assessment is “unreliable and high.”⁷⁹⁰

498. Dr. Wise has determined that these assumptions, cumulatively, REDACTED REDACTED As he states in his report, when taking these uncertainties into account, the appropriate discount rate for the project is more in the range of 30-60% REDACTED REDACTED this would result in a negative present value for the Adams Mine site

⁷⁸⁵ Dr. Wise Report, ¶ 8, 138.

⁷⁸⁶ Dr. Wise Report, ¶¶ 22, 139.

⁷⁸⁷ Dr. Wise Report, ¶¶ 13, 137.

⁷⁸⁸ Dr. Wise Report, ¶ 139.

⁷⁸⁹ Dr. Wise Report, ¶ 139.

⁷⁹⁰ Dr. Wise Report, ¶ 12

as an operating landfill.⁷⁹¹ As a result, reasonable investors would not be willing to put up capital sufficient to turn the site into an operating landfill.⁷⁹²

iii. Adjusting Any One of Certain Key Factors Results in a Negative Net Present Value for Adams Mine

499. Using an appropriate discount rate alone results in a negative net present value for the site. However, even if just one of the other key assumptions incorporated into the Deloitte DCF analysis was different, the site would also likely have a negative net present value.

500. For example, REDACTED

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In fact, because the sensitivity of profits to volume is particularly high in the case of Adams Mine, the economic feasibility of the project *hinged* on being able to secure cheap rail transport to offset the disadvantage of the site being so far from Toronto. However, CN would only provide the space and make the modifications necessary at the MacMillan Rail Yard to facilitate rail transport if there was a guarantee of a million tonnes of waste per year, for a long period of time.⁷⁹³

501. However, every attempt to secure long-term municipal waste contracts for Adams Mine had failed. Further, the chances of convincing CN that Adams Mine could secure one million tonnes of IC&I waste were slim, especially as such contracts are generally short rather than long-term.⁷⁹⁴ The alternative to using rail would have been to transport it by truck, but “assuming truck instead of rail transport yields a present value of *negative* \$172.6 million.”⁷⁹⁵ Without rail-haul, the site was completely non-economic.⁷⁹⁶

502. If one assumes that inexpensive rail haul could be obtained, but makes necessary adjustments to the capital and operating costs, and construction time used by Deloitte, the

⁷⁹¹ In fact, Dr. Wise determines that the net present value of the Site is zero when the discount rate reaches 23%. See Dr. Wise Report, ¶ 154.

⁷⁹² Dr. Wise Report, ¶ 154.

⁷⁹³ Witness Statement of Michael Corr, ¶ 7.

⁷⁹⁴ Dr. Wise Report, ¶ 75; Witness Statement of Michael Corr, ¶ 9.

⁷⁹⁵ Dr. Wise Report, ¶ 155.

⁷⁹⁶ Dr. Wise Report, ¶ 156.

value of the site is reduced significantly. CRA's capital costs exceed those used by Deloitte by REDACTED. CRA's cost of equipment and ongoing capital costs exceed those of Deloitte by REDACTED. CRA's operating costs exceed those used by Deloitte by REDACTED. Further, the construction period is six months longer than the period used by Deloitte. The value of the site using the adjusted capital costs, operating costs and construction time is \$23.6 million. This figure is overstated as it incorporates assumptions that the site would rapidly achieve full capacity operation without having to compete on price.⁷⁹⁷

503. If adjustments are made to Deloitte's assumptions with respect to volume and price, the site also yields a negative net present value. The volume risk factor in the case of Adams Mine was high as even the site's proponents have consistently confirmed. In 2000, CWS wrote of the proposal to develop Adams Mine:

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504. Dr. Wise has determined that in order to secure 1.3 million tonnes of IC&I waste, the site would have had to capture more than 60% of the market, while competing with integrated companies that control IC&I waste at their transfer stations. The ability of the site to achieve volumes of 1.3 million tonnes per year was at least uncertain if not doubtful⁷⁹⁹ and in order to try and achieve such volumes, the site would have had to compete and lower their market price.

505. In light of the sensitivities and the risks involved, Dr. Wise concludes that even assuming that unit-train transport would be available, reasonable combinations of assumptions regarding capital and operating costs, construction time, volume and price

⁷⁹⁷ Dr. Wise Report, ¶ 158

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⁷⁹⁹ Dr. Wise Report, ¶ 159.

reduce the estimated present value below zero. The most optimistic (and unlikely) combination would not yield a value sufficient to offset the significant likelihood of losing the entire capital investment if unit-train transport could not be secured.⁸⁰⁰

506. In the end, an appropriately done DCF analysis indicates that the net present value of the site as an operating landfill would have been zero. As Dr. Wise succinctly concludes:

Discounted cash flow analyses that incorporate reasonable assumptions about these risks reveal that the present value of the Adams Mine Site on the Valuation Date would, in fact, have been negative. Reasonable adjustments for factors such as the discount rate and the low likelihood of rail transport by themselves result in a negative present value. Accounting for other uncertainties in combination also yields negative present values. My overall conclusion is that a reasonable investor would not invest to develop the Adams Mine Site into an operating landfill.⁸⁰¹

507. At most, a uniquely situated purchaser might have purchased the Adams Mine site as a speculative option. However, as Dr. Wise concludes, in such a purchase it is unreasonable to assume that the Enterprise could get anything more than the price it effectively paid for the site, between \$2.1 and \$3.3 million.⁸⁰² Indeed, it is unlikely that it could even get that in an open market transaction.

D. The Enterprise has Suffered No Damages as a Result of the Alleged Breach of Article 1105

508. The Claimant has calculated his damages for the alleged breach of Article 1105 by valuing his damages arising from the termination of the Borderlands Litigation pursuant to Sections 4 and 5 of the *AMLA*.⁸⁰³ Even if the termination of this lawsuit was a breach of Article 1105 – which it was not, as explained above – it did not result in any damages to the Enterprise.

⁸⁰⁰ Dr. Wise Report, ¶ 160.

⁸⁰¹ Dr. Wise Report, ¶ 153.

⁸⁰² Dr. Wise Report, ¶ 5, 25.

⁸⁰³ The Claimant has also alleged that sections 2 and 3 of the *AMLA* also breach Article 1105. However, he has not attempted to value the damages arising from that breach and, consequently, Canada does not address those damages here.

1. The Termination of the Borderlands Lawsuit Did Not Cause the Enterprise Damages

509. As is the case with respect to damages for a breach of Article 1110, in order to recover damages for a breach of Article 1105, a claimant must first and foremost prove that the breach is the “but for” legal and factual cause of the damages in question. In *Feldman*, in assessing the appropriate compensation standard for non-expropriation breaches, the tribunal stated: “what is owed by the responding Party is the amount of loss or damage that is adequately connected to the breach.”⁸⁰⁴ That is, the Claimant must show that in a hypothetical world where only the allegedly offending measure is assumed away, the Claimant would not have suffered the damages in question. Thus, in a case where a claimant alleges that a particular clause of a legislative measure has caused them damages, it must show that if that clause were stricken, and the rest of the legislation left intact, that it would not have suffered damages.

510. Consequently, in order for the Claimant to recover any damages as a result of the *AMLA*’s extinguishment of the Enterprise’s lawsuit against the Ministry of Natural Resources concerning the Borderlands, he must prove that this extinguishment itself, rather than other provisions of the *AMLA*, was the “but for” cause of the damages claimed.

511. The Claimant does not appear to dispute this, arguing that “the same result [*i.e.* the reduction of the fair market value of the Adams Mine Site from \$105 million to \$81,000] would have accrued but for the inclusion of sections 4 and 5 of the AMLA, as implemented.”⁸⁰⁵ Sections 4 and 5 of the *AMLA* prevent the transfer of the Borderlands to the Enterprise, and extinguish all existing lawsuits against Ontario with respect to the Adams Mine site.

512. Accordingly, the sole question is what the value of the Enterprise’s court action would have been if it had been allowed to continue its lawsuit with respect to the transfer

⁸⁰⁴ *Feldman - Award* ¶ 194 (BOA-29); *SD Myers – First Partial Award* ¶¶ 305-309 (BOA-72); *Archer Daniel Midland v. Mexico* (ICSID No. ARB(AF)/04/05) Award (21 November 2007) (“*ADM Award*”) ¶ 282 (BOA-2).

⁸⁰⁵ Claimant’s Memorial, ¶ 501.

of the Borderlands if the other provisions of the *AMLA* had still been enacted. Importantly, the action before the court in the lawsuit with the MNR was about the Borderlands, and not about the other provisions of the *AMLA*. Therefore, if Sections 4 and 5 were not in the *AMLA*, and the Borderlands lawsuit had been allowed to proceed, and the Claimant had been successful, the Court either would have issued a declaration stating that Ontario was under a legal obligation to transfer the Borderlands to the Enterprise, or it would have valued the Borderlands *without the possibility* of the Adams Mine site being developed into a landfill.

513. The Claimant does not provide an assessment of this latter value. However, despite the Claimant's attempt to confuse the issue, it can be determined relatively easily. It is zero. While access (not ownership) to the Borderlands was a necessary condition of the Enterprise's ability to operate the site as a waste disposal facility as a result of the Provisional Certificate, it was not a sufficient condition in and of itself. Accordingly, once it became impossible to operate the Adams Mine site as a waste disposal facility for other reasons, namely the other provisions in the *AMLA*, access to the Borderlands became a moot issue. The lawsuit to acquire them became pointless and certainly valueless. Thus, it was not the extinguishment of the Enterprise's lawsuit regarding the Borderlands that caused it any damages.

2. If the Alleged Breach of Article 1105 Did Cause Damages, They Are No More than Fifty Thousand Dollars

514. NAFTA Chapter 11 does not have a provision that explicitly deals with compensation for non-expropriation breaches. As a result, tribunals have relied on Article 1135: "Final Award" for guidance. Article 1135 allows a tribunal to award either money damages or restitution of property.⁸⁰⁶ Accordingly, the primary standard is restitution, whether it be in cash or in kind.⁸⁰⁷ As the PCIJ explained in *Chorzow Factory*, restitution means damages which "as far as possible, wipe-out all the

⁸⁰⁶ NAFTA Article 1135, ¶ 1(a)-(b).

⁸⁰⁷ *SD Myers Second Partial Award* ¶ 144: "...the NAFTA deals explicitly with the measure of damages for an expropriation and those provisions are not controlling in this case" (BOA-73).

consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’⁸⁰⁸

515. The Claimant is incorrect when he asserts that the damages analysis in this case is the same for the alleged breach of Article 1105 as it is for Article 1110.⁸⁰⁹ Fair market value may be appropriate for a non-expropriatory breach if that breach directly caused total loss of the investment, but “in the absence of discrimination that also constitutes indirect expropriation or is tantamount to expropriation, a claimant [is] not entitled to the full market value of the investment which is granted by NAFTA Article 1110.”⁸¹⁰

516. In this case, the alleged breach of Article 1105 is connected only to the value of the Borderlands in the absence of the ability to operate a waste disposal facility at Adams Mine. The Enterprise was only willing to pay approximately \$50,000 for the Borderlands on the belief that they would operate a waste disposal site at Adams Mine. Therefore, any damages caused by the extinguishment of the Borderlands Litigation would be less than this amount.

E. If the Enterprise is Entitled to Damages, Those Damages Must be Reduced to Account for the Enterprise’s Reduced Interest in the Site and the Payments Already Made by Ontario

517. As a matter of principle, the Enterprise cannot be permitted to collect more than it would have been entitled to in the ordinary course of business. In this case, that principle requires a reduction in the amount due to the Enterprise for any alleged damages.

518. In *Siag*, the tribunal explained that because the claimants were only entitled to 50% of the sale value of the enterprise in the event of a sale of the property, the appropriate compensation to put the injured party in the position he would have been had there been no expropriation would be 50% of the value of the enterprise:

[I]n circumstances where the Claimants themselves were content to bind themselves to an entitlement of only 50% of the value of the

⁸⁰⁸ *Case Concerning the Factory at Chorzow, (Germany v. Poland Republic)* (1928), 17 P.C.I.J., Ser. A No. 17, 3 (13 September 1928) (“*Chorzow*”) p. 47 (BOA-17).

⁸⁰⁹ Claimant’s Memorial, ¶ 484

⁸¹⁰ *Feldman – Award*, ¶¶ 194 (BOA-29).

land in the event of any sale of the Property or part of it . . . the Tribunal considers it would be surprising if the expropriation would result in payment to the Claimants of a sum representing the whole value of the Property.⁸¹¹

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520. Similarly, in determining any amount of damages, the Tribunal must take into account that the Government of Ontario has already provided the Enterprise with more than REDACTED. Further, the Enterprise has been offered, and is statutorily entitled to, approximately REDACTED. As is explained above, the Enterprise had essentially no value at the time of the *AMLA*. At most, it was worth approximately \$2 million. As such, Canada has already more than fairly compensated the Claimants, and they should not be permitted further recovery here.

⁸¹¹ *Siag – Award*, ¶ 583 (BOA-76).

⁸¹² Counter-Memorial, ¶ 98.

CONCLUSION

521. For the foregoing reasons, Canada respectfully requests that the Tribunal dismiss the Claimant's claims in their entirety and with prejudice, order that the Claimant bear the costs of this arbitration including Canada's costs for legal representation and assistance, and grant any further relief it deems just and proper.

Dated: June 29, 2010

Respectfully submitted,



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