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

BETWEEN:

VITO G. GALLO

Investor

v.

GOVERNMENT OF CANADA ("Canada")

Party

INVESTOR'S MEMORIAL
PUBLIC VERSION

OVERVIEW

1. The *Adams Mine Lake Act* ("the AMLA") was a political decision made by a new and inexperienced Government, which would remove, by legislative fiat, the right of 1532382 Ontario Inc. (the "Enterprise") to enjoy the property rights it held in the Adams Site. Had it been allowed to exercise these rights, the Enterprise would have completed development of an urgently needed waste disposal facility that would have helped Ontario to address a growing waste disposal crisis. The legislative fiat was undertaken because of the personal commitment by Minister David Ramsay that either the Adams Mine site had to be shut down or he would resign as Minister of Natural Resources in the newly formed Government of Ontario. He was a long time enemy of the Adams Mine and Member of Provincial Parliament for the electoral riding where the Adams Mine is located,

(I). THE AMLA BREACHED NAFTA ARTICLES 1105 AND 1110

2. The Government of Ontario adopted a measure that singled out the Certificate of Approval, previously granted in respect of the Adams Mine Site, and extinguished it. It also identified and terminated contractual rights owed by the Government to the Enterprise and terminated them too, additionally barring access to its courts for any remedy. This specific prohibition included an action for breach of contract commenced by the Enterprise, eight months earlier, in the Ontario Superior Court of Justice.

3. The Government of Ontario had had no other way of permanently shutting down the Adams Mine project. The Enterprise had the legal right to complete development of a licensed waste disposal facility on the Site, as it had obtained its Certificate of Approval For A Waste Disposal Site, issued by the Ontario Ministry of the Environment, on April 23rd, 1999 (the "Certificate of Approval"). The Enterprise also had the right to obtain damages equivalent to the fair market value of this permitted land, through the Ontario Court Superior Court of Justice, in the event that the Government of Ontario refused to honour its contractual commitment to transfer the surrounding Borderlands to the Enterprise. The Government of Ontario knew, at all times, that its failure to transfer the Borderlands would render impossible the Enterprise's use of the Adams Mine Site as a waste disposal facility.

4. REDACTED that the newly elected Government of Ontario began investigating ways in which it could permanently shut down any waste disposal facility established at the Adams Mine. The Respondent has claimed REDACTED that generated in the short period between swearing in the new cabinet, October 20th, 2003, and introducing of the Act, on April 5th,

2004. REDACTED

5. REDACTED

REDACTED

6. REDACTED REDACTED

7. The only remaining requirement, to commence construction on the site, was the renewal of a previously granted Permit to Take Water ("PTTW"), which would permit the Enterprise to remove the water which had accumulated in the South Pit of the Adams Mine Site, after open pit mining operations ceased. REDACTED

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[1] REDACTED The Adams Mine Lake Act is attached as Schedule "B".

REDACTED

8. The only outstanding condition, imposed by the Certificate of Approval that was not about technical design was the requirement that the Enterprise obtain title to Borderlands adjacent to the site, which were then owned by the Government of Ontario. These Borderlands contained the tailings, or waste rock piles, generated from the iron ore mining operation, which had been leased by the Government of Ontario in order to facilitate iron ore operations at the Site. The Enterprise obtained a binding agreement of purchase and sale on those Borderlands, and paid the sum required, but the Government of Ontario refused to convey title. As such, on October 9th, 2003 the Enterprise commenced action before the Ontario Superior Court of Justice, and had brought a motion for summary judgment against the Government of Ontario in March 2004.

9. At the request of the Government of Ontario, the motion for summary judgment was adjourned to April 22nd, 2004. REDACTED

REDACTED

10. The entitlement of the Enterprise to the PTTW, and to summary judgment for breach of contract, was the reason why the AMLA was rushed into passage. It was necessary to pre-empt any further exercise, by the Enterprise, of its legal rights in respect of the Adams Mine Site. REDACTED

REDACTED

And further:

REDACTED

REDACTED

REDACTED

12. The legislation was tabled, without any notice, on April 5th, 2004 – just one day before the PTTW should have been granted, and before the Motion for Summary Judgment could be heard in the Ontario Superior Court of Justice.

REDACTED

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2 REDACTED

3 REDACTED

5 REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

16. The AMLA went beyond permanently shutting down the Adams Mine site, by cancelling all present and future governmental approvals. If the goal of the measure was strictly limited to shutting down the Site, these provisions would have been enough. It was necessary to extinguish the Enterprise's contractual rights, in respect of its Agreement of Purchase and Sale for the Borderlands with the Government of Ontario. The measure obviously included these additional

provisions to limit the possibility that it would be forced to compensate the Enterprise, fairly, for what it had done. REDACTED

REDACTED

17. The Government of Ontario barred the Enterprise's cause of action specifically to deny the Enterprise justice and its day in court and did so specifically to prevent damages from being awarded against the Government of Ontario and for no other purpose.

18. The conduct of the Government of Ontario, in enacting the AMLA, plainly represents a breach of Articles 1105 and 1110 of the NAFTA. In particular, it results in:

    a. a breach of Article 1105 because of the denial of justice, entitling the Enterprise to the damages that would have been awarded under Ontario domestic law; and

    b. a breach of Article 1110 because of the conduct tantamount to expropriation, entitling the Enterprise to damages calculated in accordance with the provision itself and at international law.

19. Under Ontario law, the Enterprise would have been entitled to damages equivalent to the fair market value of the Adams Mine Site, as approved for use as a landfill, because refusing to transfer the Borderlands denied the Enterprise of the opportunity to develop it. The same result accrues, under international law, for indirect takings such as the revocation of approvals carried out under the

AMLA. Whether found in breach of Article 1105 or Article 1110, the result is the same: compensation must be paid to the Enterprise that is equivalent to the fair market value of the investment immediately before the AMLA was adopted, without reflecting any change in value occurring as a result of the measure's introduction in the Legislature, as Bill 49, on April 5, 2004.

(II). THE DETERMINATION OF FAIR MARKET VALUE

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21. Deloitte has based its opinion primarily on a comparative sales analysis involving the following sales of comparable waste disposal sites:

Landfill	*Capacity (mil Tonnes)*	*Sale ($mil)*	*Date*
Greenlane, Ont	13.8	220.3	April 2/07
Ridge Landfill, Ont	12.5	110.0	Jan 4/05
Seneca Meadows, NY	12.5	303.0	Oct 9/03
Empire (Alliance, PA	7.7	131.9	Dec 12/96

22. Approved landfill capacity was, and remains, an extremely rare commodity in the Province of Ontario. All levels of government affected by the Ontario waste crisis have recognized the risk of the Michigan border closing to Ontario waste and the fact that, sooner or later, an Ontario solution to its waste disposal crisis would have to be found. Ontario's inability to solve its waste management problems have been recognized since mid-1980s and more than $120,000,000.00 has been spent by the Government of Ontario just on the search for new waste disposal capacity to solve Ontario's waste disposal problems.

[6] Deloitte Financial Advisory Services LLP. Expert Report, dated February 25, 2010.

23. The Adams Mine waste disposal site had its waste disposal site Certificate of Approval which entitled development a waste disposal facility. The remaining certificates and conditions (apart from the condition to obtain the Borderlands) were operational/ technical in nature that would be complied with as the waste disposal facility was developed. There were no unusual conditions included in the Certificate of Approval and they may be compared to the Certificate of Approval for the Keele Valley Landfill.

24. The fact that the Adams Mine waste disposal site was a viable project is established by the fact that, after an investigation and due diligence process lasting two years, the Rail Cycle North consortium won the Toronto waste disposal contract for a twenty year period. The contract was cancelled because the negotiations broke down over a contractual clause having nothing to do with the environmental safety of the site in the midst of a municipal election.

25. There was also the demand for waste disposal capacity that would have ensured the full utilization of the Adams Mine waste disposal facility. At the time that the AMLA was enacted in June 2004, more than 3.4 million tonnes of waste was being exported to Michigan in both municipal and Industrial Commercial and Institutional (IC&I) waste. Even excluding the City of Toronto and other municipalities, there was more than enough demand from IC&I waste alone (2.3 million tonnes exported each year) to ensure full utilization. Ontario was in the midst of a waste disposal crisis that was only going to worsen as time progressed, especially in circumstances where it was clear that the Michigan border would eventually close to Ontario municipal waste.

(III). VITO GALLO HAS STANDING

26. Mr. Gallo has brought this claim under the provisions of NAFTA Article 1117 on behalf of 1532382 Ontario Inc. (the "Enterprise").

27. Mr. Gallo realized that an investment opportunity existed in Ontario if a suitable waste disposal site could be found, REDACTED

Mr. Gallo REDACTED knew well the mounting opposition to Toronto's waste being shipped across the border. Mr. Gallo was introduced to Mr. Mario Cortellucci who had no experience in waste disposal facilities. REDACTED

28. REDACTED

29. REDACTED

30. NAFTA Article 1139 provides that an "investor" includes a national of another NAFTA Party who has made, is making or seeks to make an investment. Under the same provision, 'investment' is defined as including both real and intangible property, an 'enterprise,' and a variety of other types of *choses*

in action. Article 201 provides that 'enterprise' includes a corporation or partnership, joint venture or other association constituted or organized under the laws of a Party. Previous NAFTA Chapter 11 Tribunals have recognized that the NAFTA definitions of 'investment' and 'enterprise' are to be construed broadly, reflecting the object and purpose of the NAFTA.

31. Mr. Gallo caused 1532382 Ontario Inc. to be incorporated and for it to purchase the Adams Mine Landfill. He also caused it to borrow the funds necessary to complete the dewatering and scaling of the site. Had the AMLA not been enacted, he would have raised the funds to complete the building of the infrastructure. The Government of Ontario had specifically rushed the enactment of the AMLA specifically so that no completion could occur and worded it specifically so that no new government in Ontario could easily reverse course.

SECTION ONE: THE FACTS

PART ONE: THE ISSUANCE OF THE CERTIFICATE OF APPROVAL

(A). THE WASTE CRISIS IN ONTARIO

32. A waste disposal crisis has existed in Ontario since the mid-1980s and continues to exist today. Throughout this time period, more than $120,000,000.00 has been spent attempting to find additional waste disposal capacity in Ontario.[7] However, apart from one waste disposal site in Halton which was approved in 1989, there has not been another mega landfill approved in Ontario except for the Adams Mine waste disposal site.[8]

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[7] Angelos Bacopoulos Witness Statement ("Bacopoulos Statement"), para 95

[8] Bacopoulos Statement, paras 27 and 95

33. One of the objectives of the *North American Free Trade Agreement* ("NAFTA") set forth in the Preamble is to "ensure a predictable commercial framework for business planning and investment." The AMLA has created the kind of unstable business environment that NAFTA is directed against. The AMLA has sent a chill through private industry, with no-one willing to invest the millions of dollars over the course of many years to obtain a Certificate of Approval and then face the prospect of the Government of Ontario removing it by a legislative fiat.[9] The Government of Ontario knew that the legislation would have this impact,

REDACTED

34. The waste disposal crisis in Ontario was evident by the mid-1980s, even though the Keele Valley Landfill had begun operations and accepted its first waste on November 28th, 1983. It was projected to close at some point between 1993 and 1998 depending on the volume of waste being placed in the landfill. As a result, new waste disposal capacity had to be located.[11]

35. In 1982, Metropolitan Toronto[12] (Metro) had purchased the Keele Valley site when it just had its Certificate of Approval for $40,380,000.00 of which at least 90 percent of the purchase price was attributable to the Certificate of Approval.[13] The Keele Valley Landfill operated from November 28th, 1983 until December 31st, 2002, when it was closed. During that period, approximately 27,878,272 tonnes of

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[9] Bacopoulos Statement, paras 96-97

[10] REDACTED

[11] Bacopoulos Statement, para 6,

[12]. In the 1980s, what is now known as the City of Toronto was known as Metropolitan Toronto, including what was then the City of Toronto along with a number of surrounding boroughs and cities (i.e. North York). They were amalgamated into the City of Toronto on January 1st, 1998.

waste were received. [14] The Keele Valley Landfill eventually closed in 2002, after its lifespan was extended by a short term waste disposal contract with BFI by which Metro began shipping waste to Michigan.[15] By the end of its lifespan, it was estimated to have produced over $84 million in profit to Metro/City of Toronto (Toronto), without accounting for roughly $900 million worth of waste deposited by Metro during the lifetime of the Keele Valley Landfill. The true value to Toronto of the waste disposal site was close to $1 billion.[16]

36. Metro began its search for new waste disposal capacity in 1986, appointing a team of consultants and staff to produce a Solid Waste Environmental Assessment Plan (SWEAP), which produced a series of background reports. A solid waste management master plan which considered waste disposal capacity for the Regions of York and Durham and Metro was eventually developed, although York and Durham Regions opted out of the process in the later stages of SWEAP. This plan never went beyond the draft stage and was not implemented because in 1990 the Interim Waste Authority (IWA) took over the responsibility of identifying landfills for the Greater Toronto Area (GTA). The SWEAP process terminated at some point in 1991.[17]

37. It was very difficult to find a suitable site in the GTA. It appeared that no-one wanted a waste disposal facility located in their vicinity. Angelos Bacopoulos was at Metro/City of Toronto from 1982 to 2005 and is the former General Manager of Waste Management Services for the City of Toronto. He was involved as a representative of Metro in the search for new waste disposal capacity and in the evaluation of the Adams Mine site until the contract negotiations were terminated in 2000. He remained at the City of Toronto until 2005. During the 1980s, he was sent

up to Muskoka cottage country to speak to the residents about locating a landfill site in their community. As he made his presentation, he had snowballs, scarves, ear muffs and toques hurled his way by unhappy residents. In another incident Metro's Commissioner of Works was visiting a potential landfill site in eastern Ontario and angry residents began rocking his parked car. It was feared that it could be pushed into a mine pit that he had parked next to.[18]

38. In October/November, 1987, a number of public meetings were held in Region of Durham high school gymnasiums, in order to discuss the use of the Brock South property, on the Pickering/Ajax border, as an interim landfill. Metro had a Certificate of Approval on that property in the 1970s but it had been dormant for quite a while. Mr. Bacopoulos attended the public meetings and at one meeting a riot just about broke out, including people throwing garbage at Metro staff and its consultants. One of the people sitting on stage with Mr. Bacopoulos received a glancing blow from a rotten fish that was thrown by one of the audience. Metro never did open that site.[19]

39. From the commencement of Mr. Bacopoulos' employment in 1982 until 2005 when he left his position at Toronto, whenever Toronto staff and politicians attended public meetings to discuss the potential of locating a landfill site they were not well received. This held true whether the meetings were within Toronto, within the province or in Michigan. [20]

40. Between 1980 and 2005, the only mega waste disposal sites in Ontario that were approved were the Adams Mine waste disposal site and the Halton Region landfill. Halton received approval to develop an approximately 4.0 million-tonne landfill site to accept only waste generated from within Halton Region. It took Halton Region

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[18] Bacopoulos Statement, paras 1, 3, 5, 29,

[19] Bacopoulos Statement, para 30

[20] Bacopoulos Statement, para 31

approximately fifteen years to obtain its Certificate of Approval at a cost of approximately $10,000,000.00 to $12,000,000.00.[21]

41. In March 1989, another initiative known as the Solid Waste Interim Steering Committee (SWISC), was formed when the Province (David Peterson's Liberal Party) brought together the five GTA regions to prepare a collaborative strategy for developing a solid waste management system. The SWISC was comprised of the Chairpersons of the Regional Municipalities and Metro, the Chairpersons of their respective Works Committees, as well as the Deputy Ministers of the Environment and the Office for the Greater Toronto Area.[22]

42. The SWISC was working to have long-term waste management facilities in place by 1996 which was the date that the Keele Valley Landfill was intended to close. In the short term, the SWISC identified two emergency landfill sites in Whitevale (Durham Region) and Brampton (Peel Region) to cover the shortfall in landfill capacity that was expected to occur between 1992 and 1996. These sites were granted exemptions from approvals under the *Environmental Assessment Act* (EAA) by the Peterson government in July 1990.[23]

43. On a longer term basis, in 1989 the SWISC issued a request for proposals (RFP) to acquire landfill capacity. The RFP required that the community hosting the waste disposal facility being offered in response to the RFP had to be a willing host. Adams Mine responded to this proposal.[24]

(B). NOTRE PROPOSES ADAMS MINE WASTE DISPOSAL AS PART OF SWISC

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[21] Bacopoulos Statement, para 27

[22] Bacopoulos Statement, para 32

[23] Bacopoulos Statement, para 33

[24] Bacopoulos Statement, para 34

44. In 1989 Gordon McGuinty recognized that the Adams Mine may be an excellent candidate for a waste disposal site. With his partners he had attempted to develop a similar open pit mine as a waste disposal site in Shawville, Quebec. The geology of that site and the operations at the Adams Mine near Kirkland Lake were similar. When Dofasco announced the closure of the Adams Mine, he negotiated an option to purchase the Adams Mine from Dofasco and Chevron. [25]

45. The Adams Mine site is located in Northern Ontario, within the unorganized Township of Boston, southeast of the Town of Kirkland Lake in Northern Ontario. It is a former iron mine which began operation in 1964 and closed on March 30th, 1990. The nearest residences to the site are six to seven kilometres away. Five pits were excavated along with a linear bedrock ridge formed by an ore body resistant to erosion.[26] Roughly twenty million cubic meters of rock was removed from the largest of the pits, the South Pit which was excavated to a level of three hundred metres. The ore was shipped by train from a rail head on site to the steel mills in Hamilton, Ontario.[27]

46. The closure of the Adams Mine and other mines in Northern Ontario at that time had a devastating impact on Kirkland Lake and surrounding communities. Kirkland Lake described this impact in the following terms in 2001:

> The Town of Kirkland Lake has undergone a dramatic decline over the past two decades, as its once thriving mining industry has exhausted the economically viable mineral deposits in the area. The population, which in 1975 exceeded 14,000 has dropped to approximately 9,000 as a result of a net out-migration.
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> Today, the Town of Kirkland Lake has a very serious unemployment problem affecting young people and experienced workers alike. The

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[25] Gordon McGuinty Witness Statement ("McGuinty Statement") para 46

[26] Memorial Doc Tab 5A, Adams Mine Site Assessment Overview Document, Summary of Draft Technical Reports, Prepared by Senes Consultants and Golder Associates Ltd., April 1996 at page 2-1, 2-2

[27] McGuinty Statement, para 43

> overall economic climate in the community is bleak; unpaid property taxes, store closures and a lack of new opportunities of all kinds, represent a challenge that must be addressed immediately.[28]

47. Turning the Adams Mine into a waste disposal site was an important opportunity for Northern Ontario which would have created significant economic activity, particularly for the Ontario Northland Railway that was suffering financially at the time. McGuinty negotiated host community agreements with Kirkland Lake, Englehart, Larder Lake, residents in Boston Township and the neighbouring unorganized townships. Notre secured their support for an environmental assessment of the site and also negotiated host agreements that, subject to the landfill becoming operational, would have provided millions of dollars in benefits for these communities.[29]

48. Notre responded to the SWISC by proposing the Adams Mine site as an appropriate waste disposal site. Other proposals in northern Ontario included Ontario Northland Railway (four proposals), Canadian National Railway and Kapukasing (for an incinerator). The Notre proposal was the only one that provided that was supported by a willing host agreement and it was ranked first out of the various proposals that were submitted.[30]

49. In 1990, Metro Toronto retained M.M. Dillon Limited and Golder Associates Ltd. (Golder), the latter to undertake testing to determine whether the site could maintain hydrological containment to ensure that the waste disposal site was feasible. Golder issued a report dated December 28th, 1990[31] and it stated as follows:

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[28] Memorial Doc Tab 42 *Environganic 2010 Waste Diversion Partnership, City of Toronto – Town of Kirkland Lake, Proposal to the City of Toronto*, September 10, 2001, by the Corporation of the Town of Kirkland Lake, at page 5

[29] McGuinty Statement, para 46

[30] McGuinty Statement, para 47

[31] Memorial Doc Tab 3A, Golder Report to M.M. Dillon Limited - Preliminary Hydrogeological Investigation, December 28, 1990, Claimant's Productions, Tab 796.

> The results of the preliminary investigation have indicated that favourable conditions exist for the development of landfill(s) in the Adams Mine open pits using the hydraulic containment design concept. The low bulk hydraulic conductivity of the surrounding rock and the corresponding low groundwater influx favour this approach. The low hydraulic conductivity of the rock would limit contaminant migration under natural conditions but maintenance of a hydraulic sink should achieve full containment to enable on-site collection and treatment of leachate. Hydraulic containment is considered to be a proven method in waste management engineering.

50. Metro knew the results before the report was issued. Angelos Bacopoulos had met with Golder and M.M. Dillon Limited to review the findings and to ensure that the waste disposal site was feasible. Based on this testing, it was the opinion of Metro's staff, that three pits (South, Central and Peria Pits) at the Adams Mine site could be developed into waste disposal sites, with a total of more than 40 million tonnes of capacity. Throughout the time that Metro held the option, the intention was to develop all three pits.[32]

51. REDACTED

52. REDACTED

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[32] REDACTED para 38

[33] Memorial Doc Tab 3, REDACTED Claimant's Productions Tab 825

[34] McGuinty Statement, para 53

REDACTED

(C) THE ADAMS MINE WASTE INVESTIGATION PLACED ON HOLD

55. On November 21st, 1990, Ruth Grier, the Minister of the Environment in the newly elected Bob Rae NDP government, announced a comprehensive waste management strategy for the province and the GTA, which included three initiatives:

    a. Emphasize waste reduction and reuse over recycling in the hierarchy of the 3Rs of waste management;

    b. Change the EAA process to keep it environmentally sensitive, while making it timely and cost-effective; and

    c. Establish a new public sector authority to search for, select and start-up long- term landfill sites in the GTA consistent with the fundamental principles of the EAA. [35]

56. In addition, the Minister suspended exemptions to the EAA which had been granted by the former Peterson government to new short-term landfill sites in Whitevale and Brampton. It was believed that the exemptions would have placed the sites in a faster approvals process under the *Environmental Protection Act,* but still not fast enough to avert the disposal gap. [36]

57. The Minister also recognized the SWISC's contribution, but indicated that the process designed by the Peterson government to solve the GTA waste crisis was not working fast enough. This announcement, in effect, concluded the SWISC's formal site search activity and it became an advisory body to the Ministry on the role and mandate of the new public sector authority. The public sector authority to search for new disposal capacity in the GTA was subsequently incorporated under the *Ontario Business Corporations Act* as the Interim Waste Authority Ltd. (IWA). The SWISC was dissolved, after the creation of the IWA, which was placed under the jurisdiction of the Office of the GTA. [37]

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[35] Bacopoulos Statement, para 44

[36] Bacopoulos Statement, para 45

[37] Bacopoulos Statement, para 46-47

58. The waste crisis was increasing throughout the period of time it was taking to locate additional waste disposal capacity. As of January 1, 1991, the GTA had only 9.4 million tonnes of remaining residual waste disposal capacity available. This was only going to erode over time and the waste disposal crisis was growing increasingly acute as time passed. [38]

59. Notwithstanding this, the Minister responsible for the Office for the GTA announced that the search for long-term waste disposal sites by the IWA would not include sites outside the GTA. This announcement prohibited the consideration of the Adams Mine proposal at that point in time. Three landfill sites were to be selected by the Authority: (a) a site in Durham Region servicing Durham's residual waste disposal needs; (b) a site in Peel Region servicing Peel's residual waste disposal needs; and (c) a site in Metropolitan Toronto or York Region to serve the residual waste disposal needs of these two upper-tier municipalities. By 1994 there were environmental assessments started on sites to service the GTA. [39]

60. Throughout this period, REDACTED

that no waste disposal capacity would be found within the GTA. The politics of developing waste disposal sites was such that the opposition to developing such a site was overwhelming. It was obvious at all times that a solution outside of the GTA would be required. Metro held onto the option of the Adams Mine waste disposal site.

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38 REDACTED

39 REDACTED

40 REDACTED

(D) METRO COMPLETES ITS ANALYSIS OF THE ADAMS MINE SITE

61. In 1995 the newly elected Provincial Conservative government lead by Mike Harris dismantled the IWA and placed the responsibility for solid waste management planning back in the hands of the municipalities. [41]

62. By 1995, Metropolitan Toronto completed the drilling programs at the Adams Mine Site and the design of the site based on hydraulic containment and completed 70 percent of the studies required for the full environmental assessment review to be undertaken by the Government of Ontario pursuant to the provisions of the *Environmental Assessment Act.* [42]

63. Metropolitan Toronto was so sure that the geology of the Adams Mine site would maintain hydraulic containment that its EAA application was for all three pits, representing the full 40 million tonnes of waste disposal capacity.[43]

64. As part of the evaluation process, Metro set up a Public Liaison Committee which hired Gartner Lee Ltd. as the main technical peer reviewer. It was retained in 1995 to provide an independent analysis and review of the study and design of the site. GLL did so on behalf of the Public Liaison Committee, which was a multi-stakeholder committee. Gartner Lee Ltd. focussed on the substantive technical issues for the Adams Mine site, as well as other later issues that were brought forward by the Public Liaison Committee.[45] After Notre became the proponent of the Adams Mine site, Gartner Lee Ltd. took instructions from the Peer Review Process Committee, a new public advisory group created by Notre. It was normal procedure on major environmental projects to require public consultation and for

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[41] Bacopoulos Statement, para 51

[42] McGuinty Statement, para 52

[43] Bacopoulos Statement, para 38

[45] Bill Balfour Witness Statement ("Balfour Statement"), paras 10-14

the proponent to pay the costs associated with that consultation. Gartner Lee Ltd.'s work as peer reviewer was summarized at the Environmental Assessment Board as follows:

> The primary objectives of GLL's role have always been twofold: to review in a critical manner the work of the proponent's consulting team, and to offer constructive recommendations too improve the quality of the studies and work. In this way we could be satisfied that this proposal would not adversely affect the environment.
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> Both with Metro, and with Notre, these roles have been possible. GLL has had the opportunity to comment on the key work plans of the consultants so that we could accept and/or suggest improvements to the methodologies and field and design work. GLL has ah d unrestricted access to the consultants to ensure that we understood their work and were able to offer constructive recommendations. ...
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> Gartner Lee has concluded that the construction and operation of a Hydraulic containment Landfill in the South Pit of the Adams Mine is feasible and can be operated in an environmentally safe manner, provided that it is built according to the design presented in the supporting documentation.

65. A witness statement from Bill Balfour has been provided. He has a Civil Engineering Degree and a Master of Business Administration Degree from the University of Toronto. He worked for the Government of Ontario from 1970 to 1989. From 1986 to 1989, he was the Director of Approvals and Land Use Planning Branch at the Ministry of the Environment. In that role he was directly responsible for the issuance of Certificates of Approval for waste disposal. From 1990 until 2001 he was a Principal with Gartner Lee Limited and from 1995 until 1998 he was the Project Manager of the Peer Review for the Adams Mine waste disposal site. He gave evidence at the Environmental Assessment Board in 1998. From 2001 to 2003, he was the Vice-chair of the Ontario Environmental Review Tribunal, the successor to the Environmental Assessment Board.[46]

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[46] Balfour statement, paragraphs 1-3, 8

66. Mr. Balfour helped draft the overview quoted above and confirms this last paragraph in his witness statement that:

> GLL had reached its own conclusion that the Adams Mine waste disposal site could be operated in an environmentally safe manner by the time the final studies were provided to the Ontario Ministry of the Environment as part of the environmental review process.

67. By December, 1995, REDACTED convinced that the Adams Mine site could be developed as a waste disposal site and operated safely, and was environmentally and technically sound. It was REDACTED expectation REDACTED that Metro would exercise its option on the Adams Mine and purchase the site to develop it. Metro Staff had actually arranged a party in December, 1995 to celebrate all of the hard work that Staff had done on the site and the fact that Metro would be continuing in the waste disposal business. REDACTED REDACTED when Metro Chairman, Alan Tonks recommended to Council to reject the option and not purchase the site. The party that had been planned went ahead but it turned into an opportunity by which Staff could congratulate one another on the hard work that they had done on the project.[47]

68. REDACTED has no idea why Alan Tonks decided to recommend to Metro Council not to exercise the option on the Adams Mine waste disposal site. REDACTED was not due to any concern with the environmental suitability of the Adams Mine waste disposal site. REDACTED that environmental safety was a concern. The issue did not come up at that time as a factor in the decision not to exercise the option.[48]

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47 REDACTED

48 REDACTED

69. The studies funded by Metro regarding the investigation of the Adams Mine site and the design of the waste disposal facility were provided to Notre which undertook the remaining studies necessary to complete Toronto's *Environmental Assessment Act* application. Notre amended the application to seek approval only for the South Pit with its 23 million tonnes of capacity. The approval of the central and Piera pits could be sought at a later point in time. [49]

(E). THE DESIGN OF THE ADAMS MINE WASTE DISPOSAL SITE

70. REDACTED REDACTED describes the Landfill Design Concept in the following manner:

> "The original design of the landfill was done by consultants retained by Metro Toronto in 1995. To develop the South Pit as a landfill, water in the pit will have to be drawn down to the bottom. The leachate collection system will be constructed on the base and walls of the pit to collect leachate generated from the waste and to maintain an inward hydraulic gradient that will prevent release of leachate REDACTED
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> The inward hydraulic gradient is achieved by maintaining leachate levels in the pit below groundwater levels outside of the pit. As a result, groundwater will flow into the pit and prevent leachate contaminants from migrating away from the pit. This leachate control concept is variously known as "hydraulic containment" or "hydraulic trap" or "inward gradient."

71. The South Pit of the Adams mine was excavated to an elevation of 156 meters above sea level (masl), although parts of the pit were backfilled with waste rock to an elevation of 168 meters. The base of the South Pit is reported to be about 200 meters below the surrounding ground surface elevation.[51] The shallow and deep groundwater levels in the vicinity of the South Pit have been reported to be

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[49] McGuinty Statement, para 53

[50] REDACTED

[51] Memorial Doc Tab 5A, REDACTED
REDACTED

20 to 30 meters below ground surface and ranged between elevations 340 masl and 360 masl.[52]

72. REDACTED

> The leachate collection system is a blanket of permeable crushed rock on the base and up the sides of the pit. Perforated pipes at the bottom of the leachate collection system will convey collected leachate/ groundwater through a tunnel (or adit) to outside the pit area. A vertical shaft from ground surface will intersect the tunnel (adit). Pumps at the base of the shaft will pump collected leachate/groundwater to surface for treatment in a dedicated on-site leachate treatment plant next to the South Pit. Treated leachate will then discharge to a stormwater management pond and a constructed wetland for polishing, if required, and then through an on-site tailings area ultimately discharging to Moosehead Creek southeast of the site.
>
> The landfill is expected to have an operating life of about 20 years. Final cover applied after landfill closure will promote runoff and reduce infiltration, consequently reducing leachate generation.
>
> The inward gradient will have to be maintained for a long time after landfill closure to control leachate impacts on groundwater. Leachate pumping will continue for about 100 years after closure ("Pumping Phase") until leachate strength has decreased sufficiently to allow direct discharge to surface water.
>
> During the first part of the Pumping Phase, landfill gas (mostly methane and carbon dioxide) will be produced by decomposing waste. Gas extraction wells will be installed in the waste and used to collect landfill gas and prevent its release to the atmosphere. The methane in landfill gas is combustible. Landfill gas will be used as fuel for an electrical power generating plant, conservatively sized at 22.5 to 25 megawatts capacity. Any collected gas that is not used to produce electricity will be burned in a flare.
>
> When leachate strength is low enough for a discharge to surface water, pumps can then be turned off and removed. Water levels in the landfill will then rise over a number of years and will eventually reach the level of a perimeter drain. The perimeter drain

[52] Memorial Doc Tab 5A REDACTED Claimant's Productions Tab 726

> will be constructed at an elevation lower than the surrounding groundwater level so that low inward gradients remain. Groundwater will continue to flow toward the landfill. A tunnel from the perimeter drain to the tailings area will allow discharge by gravity indefinitely ("Gravity Drainage Phase").[53]

73. Based on the results of the service life calculations, the service life of the groundwater/leachate management layer was estimated to be in excess of 180 years,[54] compared to the 100 years for the leachate collection systems in most Ontario landfills.[55] During the gravity drainage phase, the groundwater/leachate management system had an estimated service life of 3,000 years, and was expected to remain at permeability high enough relative to the surrounding bedrock to maintain inward flows indefinitely. The Environmental Assessment Board heard testimony from MOE engineer Mr. Staseff and hydrogeologist Dr. Zaltsberg as follows:

> Mr Staseff: "In my experience, almost 10 years now with Approval Branch, the design proposed for this site has conservatism built into it. The drainage layer is much thicker than designs I have seen in the past. It's thicker than the design requirements in the Ministry's proposed landfill standards.[56]

74. Dr. Zaltsberg was later asked "will the perimeter collection system work?" He replied:

> "This system is very feasible. You could find similar systems at numerous landfill sties in Ontario and elsewhere and all of them work very efficiently and all of them provide some sort of hydraulic containment at numerous landfill sites throughout the world. So I don't have any doubt that the perimeter leachate collections system work properly and will provide hydraulic

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53 REDACTED

54 REDACTED

55 REDACTED

56 Memorial Doc Tab 15, Environmental Assessment Board Transcripts, April 14, 1998, page 25, Claimant's Productions Tab 762

containment during the second, the so called gravity drainage phase."[57]

75. With respect to waste transport/handling, REDACTED

> Waste will be loaded onto specially designed intermodal waste containers in the Greater Toronto Area (MacMillan Yard in Vaughan) and shipped by rail to eh Adams Mine Landfill. The rail transport route is 608 km long and will use Canadian National (CN) and Ontario Northland (ON) railways (CN from MacMillan yard to North Bay; ON from North Bay to Adams Mine Landfill). A priority train will comprise 80 rail cars each with two containers, single stacked. Such a train with 160 containers will carry about 5,600 tonnes of waste. The number of trains will depend on waste volume and waste stream seasonality, but will average 4.5 trains per week, equivalent to 1.3 million tonnes per year.
>
> A train will be separated into two sections and each section positioned onto a designated unloading track at the Dams Mine Landfill. Stacker/loaders will unload the intermodal containers onto flat bed trucks which will move the containers to a transfer building (about 100 m X 75 m). Waste will be extracted from the containers in the transfer facility using a hydraulic ejection system and the empty containers returned and placed on rail cars. Waste ejected/tipped from containers onto the tippling/storage floor will then be loaded into large mining trucks for transport to the landfill working face. The transfer building will also accommodate local waste trucks. The site layout, including the rail access, intermodal facility, transfer station, and pit is shown on figure 3, *Adams Mine Landfill Facilities.* [58]

76. REDACTED steps required to build out the site include as well as the costs for each step in the build out, as of June, 2004 if the *Adams Mine Lake Act* had not been enacted. These steps include:

Additional Monitoring Wells:

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[57] Memorial Doc Tab 15, Environmental Assessment Board Transcripts, April 14, 1998, pages 52-53, Claimant's Productions Tab 762

[58] REDACTED Addendum D

Six additional monitoring wells will be installed, as required by the certificate of Approval, to monitor groundwater levels outside of the pit;

Pit Dewatering:
The pit will be dewatered by pumping water from the pit to the tailings area. Groundwater levels will be monitored as dewatering is undertaken. Dewatering requires a Permit to Take Water and an OWRA approval for discharge of the pit water.

Scale and Stabilize Pit Walls
Scaling involves the removal of loose rock from the pit walls using mechanical and hydraulic equipment. Stabilization will include the application of wire netting over a portion of the pit wall to guard against continuing fall of loose rock and the use of rock bolts to secure large segments of rock on the walls. In addition, a zone of wall that previously failed will be supported with a buttress of rock fill.

Construct Adit and Shaft
A shaft, approximately 2.5 m in diameter, will be sunk from ground surface at the south side of the pit to the elevation of the pit bottom. A sump will be constructed at the bottom of the shaft. The shaft will be equipped with a hoist and ventilation system as well as pumps and discharge piping to the nearby Leachate Treatment Plant and related electrical systems for these components. An adit (tunnel), about 3.5 m wide and 3.5 m high but with horseshoe shaped cross section, will be excavated between the pit bottom and the shaft. Gravity flow piping from the leachate collection system will be installed in the adit.

Construct Leachate Collection System
The base of the leachate collection system, comprising a 4 metre thick clear stone drainage layer with a perforated pipe network and two overlying filter layers, will be constructed. In addition, the first 2 metres of drainage layer up the pit wall will be constructed prior to waste receipt.

Construct Sewage System
Sanitary sewage connections to the Leachate Treatment Plant from the Office Building, Maintenance Building, Scale House and Landfill Gas to Energy Plant.

Construct Water System
The water supply for the domestic uses (excluding drinking water) will be the Peria Pit. A local domestic distribution system will be constructed to convey this water to site buildings for domestic use.

Water for fire fighting will be supplied from small clay-lined ponds, established at four locations.

Construct Stormwater Management System
The first of two stormwater ponds will be constructed, located east of the South Pit. The pond requires no excavation but will be lined with clay. The work will include the outlet structure, downstream culverts, and related ditching.

Construct New Office Building and Renovate Maintenance Building
A new Office Building will be constructed, to replace the existing office which will be demolished. The building will provide space for administration and employee amenities. The existing Maintenance Building will be renovated for landfill equipment maintenance and container cleaning.

Renovate Scale and Scale House
The existing Scale and Scale House will be renovated for weighing of local waste trucks.

Rehabilitate Entrance Road
The existing road from the property boundary to the maintenance building will be repaved.

Construct On-Ste Roads
The paved road will be extended to the Transfer/Container Unloading Building and the Intermodal Facility. Gravel roads will be constructed linking site facilities (except where paved as noted above) and extending into the pit.

Construct Intermodal Facility
The intermodal facility will consist of terminal tracks where the train is split into two segments for loading and unloading as well as tracks to allow the locomotives to move from one end of a complete train to the other end. Trackage is the responsibility of the ONR. The unloading/loading area of the intermodal facility will be paved and illuminated. An area will be provided for storage of empty containers.

Construct Transfer/Container Unloading Building
A new building will be constructed in which waste in intermodal containers will be unloaded onto a tipping floor and then loaded onto large mining trucks for transport into the pit. The building will also accommodate waste tipping from local waste trucks.

Construct Landfill Gas System

> A landfill gas header, condensate management system, and blower/flare station with electrical generators will be constructed by the operator of the system to manage landfill gas generated by the waste.
>
> *Refurbish Power Supply throughout Site*
> The existing transformer stations will be refurbished and power will be extended to the Leachate Treatment Plant (and shaft), the Transfer/Container Unloading Building, Intermodal Facility, and to the pump house for the domestic water supply.[59]

77. REDACTED as of June, 2004, the cost to build this infrastructure at the Adams Mine amounted to REDACTED It is also the opinion Bill Balfour, that the remaining certificates required to build the infrastructure and begin operations would have been issued and the Adams Mine infrastructure built by 2006. It is their opinion that, in the ordinary course, the Adams Mine Waste facility would have been ready to accept waste by the end of 2006 if the Adams Mine Lake Act had not been passed.[61]

(F). MOE UNDERTOOK A FULL ENVIRONMENTAL ASSESSMENT

78. Notre filed an environmental assessment document to support an application for approval of the development and operation of a new landfill site under the EAA. On June 6th, 1997, Notre was "designated" for this proposal.[62]

79. The Adams Mine had obtained the certificates entitling the development of a waste disposal site after a thorough environmental review pursuant to the *Environmental Assessment Act*. The Ministries of Natural Resources and Environment and Energy were directly involved in reviewing and commenting on

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[59] REDACTED

[61] Balfour statement, paragraph 40 REDACTED

[62] Memorial Doc Tab 10, *Review Under the Environmental Assessment Act, prepared by Ministries and Agencies of the Province of Ontario*, July 1997, Claimant's Productions ,Tab 772, at 9, Bates No 17267.

the technical document submitted by Notre.[63] The Ministries of Natural Resources, and Environment and Energy provided technical assessments of initial documentation and ongoing studies during the preparation of the EA. Specific technical assistance was provided during the development of data collection work plans for various environmental disciplines, such as but not limited to hydrogeology, surface water, design and operation, and aquatic biology. Preliminary reports were reviewed and comments provided. These comments were then considered by the proponent in the finalization of the EA documents and supporting documents.

80. A wide range of other provincial ministries were involved in the approval process, including:[64]

    a. The Ministry of Agriculture, Food and Rural Affairs;
    b. Ministry of Culture, Tourism and Recreation;
    c. Ministry of Education;
    d. Ministry of Environment and Energy;
    e. Ministry of Health – Timiskaming Medical Officer of Health
    f. Ministry of Natural Resources
    g. Ministry of Municipal Affairs and Housing
    h. Ministry of Northern Development and Mines
    i. Ontario Native Affairs Secretariats
    j. Ministry of Solicitor General
    k. Ministry of Transportation
    l. Ontario Hydro[65]

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[63] *Ibid.*, at 9, Bates No 17277

[64] *Ibid.*

[65] The Government Review Team noted, *Ibid.*, at bates No. 17297:

> "Of the 20 government agencies that were circulated the EA document, 16 agencies responded to the requisite for comments. Of the 16 agencies that responded, 14 noted no concerns and 5 agencies had questions regarding the proposal that required further discussion and the provision of additional documentation... The members of the Government Review Team have indicated that any remaining issues can be addressed through the Certificate of Approval process. No technical issues are outstanding at this time."

81. Environment Canada, the Federal Department of Fisheries and Oceans and Health Canada were also involved, along with the Quebec Ministère de L'environement.[66]

82. The environmental effects of the undertaking were identified during the Environmental Review as follows:[67]

ISSUE	*HEALTH & NUISANCE NET EFFECTS*
Bird Nuisance and Health	Possible hazard to aviation that will be monitored.
Dust	Dust impacts are assessed as low within 1 km of the edge of the pit and negligible at the closet residents, and can be mitigated with proper road maintenance and site operation.
Landfill Gas (methane)	Minimal negative effect.
Landfill gas (vinyl chloride)	Possible effects immediately off-site, but not at nearest residences
Litter	Low negative effect.
Odour	Low negative effect
Noise	High negative effect on access/haul route during morning shift change that decreases with distance from centre of the highway
Non-bird vectors (Animal Nuisance)	Increase in pests will be monitored, and appropriate contingency plans developed
Visual	No visual effects anticipated
ISSUE	*NATURAL ENVIRONMENT*
Geology/Hydrogeology	No negative effects
Surface Water	A negligible impact on the hydraulic regime of McElroy Creek, and minimal effects to the Misema River. The tailings pond may be impacted by increased levels of boron and copper from the pit water which may affect aquatic life. Discussions are currently ongoing between the proponent and the Government Review

[66] *Ibid.*

[67] *Ibid.*, Table 30-35, pages 17298-17303

	Team regarding the best method to monitor this situation and possible opportunities to enhancing treatment of leachate with the proposed PACT ("powdered activation carbon treatment") plant....
Biology	Minor negative effects.
ISSUE	*SOCIAL ECONOMIC ENVIRONMENT*
Agriculture	No negative effects
Archaeology	Minimal negative effects
Economics	Positive effects
Heritage	No negative effects.
Planned Land-use	No negative effects.
Social	Low odour effects, potential safety impacts on the snowmobile route, and positive effects on the local communities. In consideration of concerns raised by the public during the Notice of Submission comment period, several conditions have been proposed by the Government Review Team that address the need for ongoing public involvement in any operation of the Adams Mine site as a landfill.
Transportation	No negative effects.

83. The Government Review team indicated that:

> Of the main issues raised by the public in their submissions the following two areas have not been discussed in detail in this Review. They are:
>
> * a lack of confidence in hydraulic containment concept; and
>
> * the ability of proponent to financially provide for the continued proper operation and monitoring of the site over its contaminating life span given the uncertainty of the Metro contract.[68]

84. The Government Review Team stated with respect to the issue of hydraulic containment:

[68] Ibid., at bates 17296

> The design of the site is based on the principle of hydraulic containment such that there should be "no landfill related groundwater impacts at the property boundary." If, however, in the unexpected event that the hydraulic gradients reverse such that groundwater begins to flow away from the pits, a contingency plan must be implemented. Monitoring of the site must provide early warning of any gradient so that there is sufficient time from implementation of the contingency plans described. ...
>
> It is our opinion that from a hydrogeological perspective, it is feasible to develop engineered landfill facilities within the South, Central and Peria Pits, based on the hydraulic containment design concept. Based on Notre's documentation, it appears that the Peria Pit is least favourable for future development and operation as a landfill...[69]

85. With respect to the financial assurance issue, the Government Review Team stated:

> The second issue, financial assurance, is not discussed in detail in this Review as it is a standard requirement of this Ministry's Environmental Protection approval process. A financial assurance plan was submitted by the proponent in support of their application for EPA approval and is currently under review. This Plan must satisfy the Ministry of Environment and Energy in order for EPA approval to be granted...
>
> If and when the Adams Mine site is approved for landfilling, the EPA Certificate of Approval issued for the South Pit will include conditions requiring the provision of financial assurance by Notre based on detailed cost estimates of planned closure, long term post-financial assurance by Notre based on detailed cost estimates of planned closure, long term post-closure monitoring, inspection and maintenance, and implementation of contingency plans. The amount provided by the proponent must be sufficient to cover the cost estimates for the amount provided by the proponent must be sufficient to cover the cost estimates for the contaminating life span of the site.[70]

86. As a result, the conclusion of the Government Review Team in July 1997 was that Notre had met all the requirements of the EAA process, stating:

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[69] *Ibid.*

[70] *Ibid.*, at bates no. 17296-7

> The conclusion of this Review is that the proponent has considered and addressed the requirements of the EAA, as they existed under subsection 5(3) of the EAA, R.S.O. 1990. The Government Review Team is satisfied with the level of technical detail provided regarding the development and operation of the South Pit, and the manner in which the proponent has addressed, of proposed to address any concerns identified. The Government Review Team has identified a number of conditions to be addressed regarding the development and operation of the proposed facility ...[71]

And further,

> As required by the EAA, environmental effects have been considered within the proponent's decision-making process and the Government Review Team is satisfied that appropriate mitigation measures have been identified and the level of detail of the technical information submitted is sufficient to support the conclusions drawn by the proponent.[72]

87. The Government Review Team then set out the options open to the Minister of the Environment:

> The decision options available to the Minister under the EAA include: (i) approve, with the concurrence of Cabinet; (ii) approve with conditions, with the concurrence of Cabinet; (iii) send the application, or a matter relating to it, to a hearing; or (iv), deny approval.[73]

88. In summary, as of July, 1997, the technical staff of the Ministry of the Environment and all other Ministries that were contacted supported the Adams Mine as a suitable location for a waste disposal facility based on a hydraulic containment design. This support was to be maintained throughout the Environmental Assessment Board hearing to follow, the contracting process for the City of Toronto until the time that the *AMLA* was enacted.

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[71] *Ibid.*, at bates no 17268

[72] Ibid., at bates no 17308

[73] Ibid., at 40 at bates no 17308

(G). ENVIRONMENTAL ASSESSMENT BOARD HEARING

89. On December 16th, 1997,[74] the Minister of the Environment directed that an Environmental Assessment Board hearing be held with respect to the hydraulic containment method. The Minster indicated that all other aspects of the project would be approved.[75]

90. The hearing was held during March and April 1998 and a total of forty-one witnesses were heard, including the following:

a. Notre:

i. Dr. Gail Atkinson, Engineering Seismologist Carleton University;
ii. Bill Balfour, Civil Engineer, Principal Gartner Lee Limited;
iii. Dr. Frank Barone, Geoenvironmental Specialist, Golder Associates;
iv. Stanley Frost, Vice-President Environment and Safety, Cameco Corporation
v. Sean McFarland, Senior Hydrogeologist, Golder Associates;
vi. Doug McLachlin, Geological Engineer (landfill design), Golder Associates
vii. Paul Murray, Environmental Engineering, Principal Gartner Lee Limited
viii. Steven Usher, Senior Hydrogeologist;

b. Ministry of the Environment:

i. Linda Cioffi, Ministry of the Environment, Environmental Inspector, Keele Valley Landfill
ii. John Walter Parks, Ministry of the Environment, Surface Water Evaluator, Technical support Unit, Northern Region
iii. David Staseff, Ministry of the Environment, Senior Engineer, Waste Section, Approvals Branch, Technical Review Co-ordinator, Adams Mine Landfill
iv. Dr. Ernst Zaltsberg, Ministry of the Environment, Waste Management Hydrogeologist, Waste Section, Approvals Branch

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[74] Memorial Doc Tab 17, Environmental Assessment Board, Decision and Reasons for Decision, EA-97-01, June 19, 1998, Investor's Statement of Claim Tab 16

[75] Memorial Doc Tab 17, Environmental Assessment Board and Reasons for Decision, EA-97-01, June 19, 1998, at pages 1-3, Investor's Statement of Claim Tab 16

c. Beaverhouse First Nation

i. Peter Cizek, Environmental Consultant
ii. Emmaline MacPhershon, Councillor, Beaverhouse First Nation
iii. Chief Roy Maniss, Chief, Beaverhouse First Nation

91. The witnesses from the Ministry of the Environment supported the project. For instance, the MOE's technical expert on hydrogeology, Dr Zaltsberg, testified that:

> The main objectives of my review were as follows: First, to ensure that hydraulic containment is a feasible and viable design ... Then to ensure that groundwater at or beyond the site boundary will not be deteriorated beyond an acceptable level or, in other words, to ensure compliance with the Reasonable Use Policy Objectives at the site boundary.[76]

And further,

> My overall conclusion was that hydrogeological investigations conducted at the site clearly ensure that hydraulic containment is a feasible and viable design. I am quite confident that groundwater at or beyond the site boundary will not be deteriorated to any unacceptable level.[77]

92. The MOE's technical expert on landfill design, Mr Staseff indicated that:

> At the end of my review on design and operations, my conclusion is that the proposed hydraulic containment design is an effective solution for the containment and collection of leachate that will be generated at this site, that there are effective contingency measures that can be implemented, if required, in the event of loss of hydraulic containment.[78]

93. The Environmental Assessment Board commented with respect to the evidence of the MOE as follows:

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[76] Memorial Doc Tab 15, EAB Transcripts, April 14th, 1998 at 11, Claimant's Productions Tab 762

[77] Memorial Doc Tab 15, EAB Transcripts, April 14, 1998, p 12, Claimant's Productions Tab 762

[78] Memorial Doc Tab 15, EAB Transcripts, April 14, 1998, p 15, Claimant's Productions Tab 762

> The MOE, which concluded that "the proposed hydraulic containment design is an effective solution for containment and collection of leachate", submitted evidence in support of a set of recommended conditions of approval (accepted, through consultation and discussion, by the proponent) through three specialist witnesses, concerned respectively with hydrogeology, engineering design and operations, and surface water evaluation; and the environmental inspector of the Keele Valley Landfill.[79]

And later:

> Throughout the hearing, questions, concerns and criticism raised about the effectiveness of hydraulic containment were carefully and systematically addressed by Notre's impressive array of expertise. And, on most of the issues raised, the MOE provided often illuminating confirmation of the viability of the proponent's design.[80]

(H). THE ADAMS MINE AND RABBIT LAKE DISPOSAL FACILITY

94. Evidence presented at the EAB hearing in 1998 demonstrated that the concepts of large scale hydraulic containment of contaminants in a worked out mine pit was not novel and had in fact been successfully achieved at the Rabbit Lake pit. This is important since it demonstrated in action the feasibility of many of the features of the proposed Adams Mine South Pit landfill. As indicated by Mr. McLachlin of Golder Associates Ltd. in his witness statement:

> The designs are similar in many significant aspects. Both facilities incorporate a hydraulic containment design and both use a granular drainage blanket to collect the combined groundwater and "leachate" flows and convey them to the base of the pits during the pumping phase. Both use a shaft and adit system with pumps at the base of the shaft to pump water from the bottom of the pits to the surface for treatment.
>
> At both pits, groundwater monitoring has demonstrated that there are strong inward hydraulic gradients and inward ground water flow into the pits when water levels in the pits are maintained below the

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[79] Memorial Doc Tab 17, EAB Decision, EA-97-01, June 19, 1998, at para 23, Investors Statement of Claim Tab 16

[80] Ibid., at 26

> surrounding groundwater levels. Also, both pits are deep. The Adams Mine South Pit is approximately 200 meters deep and the Rabbit Lake Pit approximately 115 members deep.
>
> These similarities, coupled with Rabbit Lake's performance record, give us added degree of confidence in the Adams Mine landfill design and its future construction and operation.
>
> Both designs use two layers of graded granular filter on the base of the pit and one filter layer on the side slopes to limit migration of fine particles into the drainage material. Standard road building construction practices are used, or can be used to construct the drainage and filter layers at both sites. Also, both sites can be instrumented with piezometers to monitor the performance of the drainage systems (the Rabbit Lake facility already is).
>
> The major difference [between facilities] is that the Adams Mine landfill will be used to contain non-hazardous municipal solid waste whereas the Rabbit lake input disposal facility is used for the disposal of radioactive mine tailings from the processing of uranium ore.[81]
>
> Another difference is that hydraulic containment will be maintained in the long term at the Adams Mine landfill using a gravity drain. At Rabbit Lake, the plan is to stop filling before the water table level and allow water levels to recover (rise) so that the tailings will become submerged.[82]

95. Equally relevant is the evidenced given by Mr. Frost of Cameco Corporation (owner of Rabbit Lake) that the Rabbit Lake facility is working well:[83]

> A State of the Environment report was completed for Rabbit Lake in 1996 to assess the physical environment around the operation and to compare its current condition with the original predictions made in the Environmental Impact Statements (EIS), which had been filed at various stages of the development. The conclusion was that impacts from the Rabbit Lake facility compared favourably with predictions.

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[81] It should be noted that the waste at Rabbit Lake includes significant quantities of arsenic and calcium sulphate (Memorial Doc Tab 12, Frost, Panel 6, pg 8-9, Claimant's Productions Tab 756).

[82] Memorial Doc Tab 13, Statement of Doug McLachlin, March 6 1998, Environmental Assessment Board, Panel 5, at pages 6-7, Claimant's Productions Tab 755, bates no. 14162-3

[83] Memorial Doc Tab 13, Statement of Stan Frost, March 6, 1998, Environmental Assessment Board, Panel 5, at pages 7-8, Claimant's Productions Tab 755, bates no. 14163-4

96. It is clear that the Environmental Assessment Board accepted the Rabbit Lake operation as demonstrating the feasibility of what was proposed for the Adams Mine South pit both in terms of construction and operations.

(I). CERTIFICATE OF APPROVAL ISSUED

97. On June 19th, 1998, the Environmental Assessment Board concluded that:

> The proposed hydraulic containment design would be an effective solution for the containment and collection of leachate that will be generated at the proposed site, subject to the twenty-six conditions of approval.[84]

98. The conditions were based in large measure on draft conditions that had been agreed upon by the Ministry of the Environment and the proponent, Notre. The Environmental Assessment Board added certain new conditions, but the majority of the additions were an extension of conditions already proposed.[85]

99. The conditions included a requirement that, as part of its application for a Certificate of Approval, a monitoring program for groundwater and surface water (Condition 2) and the results of further testing of groundwater levels from two additional deep angled boreholes under the South Pit (Condition 10) be submitted. The Board noted:

> [a] preponderance of professional expertise: of Notre's consultants, Golder Associates, Ltd.; the peer review group of Gartner Lee Ltd; and the MOE specialists, directly or indirectly upholding the effectiveness of hydraulic containment.[86]

100. The Board included Condition # 10 which states that:

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[84] Memorial Doc Tab 17, Environmental Assessment Board Decision, EA-97-01, page 23, Investor's Statement of Claim Tab 16

[85] Memorial Doc Tab 17, Environmental Assessment Board, EA-97-01, pages 41-46, 49-55, Investor's Statement of Claim Tab 16

[86] Memorial Doc Tab 17, Environmental Assessment Board, EA-97-01, page 42, Investor's Statement of Claim Tab 16

> .... No waste shall be placed in the South Pit until the Director evaluates the results of the tests and determines, without reservation, that the recorded groundwater level will sustain hydraulic containment in the South Pit such that the environment will be protected during both the pumping and gravity drainage phases.[87]

(J). MOE APPROVAL AFTER ADDITIONAL TESTING COMPLETED

101. Notre took steps after the decision was issued by the Environmental Assessment Board to drill the two additional deep holes beneath the south pit that were required. In July, 1998, Golder consulted closely with the Ministry of the Environment and the peer reviewer, Gartner Lee Ltd., regarding the placement of the holes. The degree of coordination is reflected in Golder's final drilling report dated, November 1998. It states in part:

> In preparing to undertake the work to complete the requirements of Condition #10, Golder first met with the Ministry of Environment Approvals Branch to determine the scope of work, the actual locations of the holes to be drilled, and the criteria for the acceptance of the work. Golder submitted a draft work plan to both the Ministry of Environment Approvals Branch, and the peer reviewer. Based on comments received from both parties, the work plan and acceptance criteria were finalized and were approved by the Ministry of the Environment Approvals Branch prior to the start of drilling.[88]

102. With the concurrence of the Ministry of the Environment and Gartner Lee Limited, Notre drilled DH 98-1 from outside the northern extent of the rim of the South Pit to penetrate the bedrock beneath the central portion of the pit. Drillhole DH 98-2 was drilled from outside the southern rim of the pit and it was drilled to a 120 meter depth below the base of the pit.[89]

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[87] Memorial Doc Tab 17, Environmental Assessment Board, EA-97-01, page 42, Investor's Statement of Claim Tab 16

[88] Memorial Doc Tab 18, Golder Associates Ltd., Report on Results of Drilling, Packer Testing and Groundwater Flow Modeling of Drillholes DH 98-1 and DH 98-2, Adams Mine Landfill, November, 1998, at page II, Claimant's Productions, Tab 6, bates no 00072

[89] Ibid., at 3

103. As a result of this testing, both Golder[90] and Gartner Lee Ltd[91] considered that hydraulic containment would be sustained during both the pumping and gravity drainage phases. Golder stated:

> The results of the groundwater flow modelling of DH 98-1 and DH 98-2 show that the groundwater levels beneath the South Pit will meet the Acceptance Criteria for both the pumping phase and the gravity drainage phase of landfill operations. The results of the groundwater flow modelling also establish that the lowest water level reading for the original drillhole, DH 95-12, meets the Acceptance Criteria for the existing conditions, and for the pumping and gravity drainage phases of the landfill operations.[92]

104. Gartner Lee Ltd. stated in its report to the Ministry of the Environment that:

> We have reviewed the draft technical documents to be filed in support of satisfying Condition 10 of the EA Decision. We have no reservations in agreeing with the Golder conclusion that hydraulic containment can be maintained under future pumping and gravity drainage scenarios.[93]

105. The Ministry of the Environment concluded that the Condition #10 had been satisfied. In a memo from Dr. E. Zaltsberg, Hydrogeologist to D. Staseff, Senior Engineer, Waste Section, he stated:

> As a result, in the final report the Consultant satisfactorily addressed my concerns and provided clarifications and/or explanations I requested. According to groundwater level measurements in deep wells DH 98-1 and DH 98-2, hydraulic containment (i.e. inward flow) for the South Pit exists under present conditions and will be maintained during the pumping phase of operations.

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[90] Memorial Doc Tab 18, Golder, 1998, pg 14, bates no 00088, Claimants' Productions Tab 6

[91] Memorial Doc Tab 20, Gartner Lee Ltd., Adams Mine Landfill Peer review of Deep Drillhole Technical Report, December , 1998, page 4, Claimant's Productions Tab 8, bates no 00124

[92] Memorial Doc Tab 18, Golder Associates Ltd., Report on Results of Drilling, Packer Testing and Groundwater Flow Modeling of Drillholes DH 98-1 and DH 98-2, Adams Mine Landfill, November, 1998, at page II, Claimant's Productions, Tab 6, bates no 00072

[93] Memorial Doc Tab 20, Gartner Lee Ltd., Adams Mine Landfill Peer review of Deep Drillhole Technical Report, December , 1998, page 4, Claimant's Productions Tab 8, bates no 00124

> In general, I agree with this conclusion. Moreover, I do not think that anything else could be done in order to confirm hydraulic containment after the cease of pumping from the bottom of the South Pit. However, it is necessary to point out that this confirmation is derived exclusively from the modelling results. The model applied is based on several assumptions which cannot be verified in the field (rock anisotropy and its range, hydraulic connection between the pit and surrounding rocks, the assigned average hydraulic conductivity values). Although all assumptions made as well as model calibration conduct are reasonable and convincing, the hypothetical nature of many assumptions and inability to verify them in the field causes inevitable uncertainty associated with the range of the expected groundwater level rebound during the gravity drainage phase.
>
> To some extent this uncertainty could be eliminated by means of:
>
> (a) monitoring the groundwater level response in three deep wells (DH 98-1, DH 98-2 and DH 95-12) as well as in other monitoring wells during the dewatering/construction period;
>
> (b) re-calibration of the groundwater model used if the reliable data from (a) are available; and
>
> (c) re-running the model using the refined input parameters derived from (b).
>
> In the unlikely event that the updated modelling results indicate the absence of hydraulic containment during the gravity drainage phase, the Proponent should undertake all necessary contingency measures in order to restore and maintain such containment.[94]

106. The Certificate of Approval issued on April 23rd, 1999 granted a license for non-hazardous waste for all of Ontario. A total of 1,341,600 tonnes were permitted each year with a total fill capacity of 21.9 million cubic meters establishes a number of conditions that cover the design, construction, operation and closure of

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[94] Memorial Doc Tab 21, Dr. E. Zaltsberg, Hydrogeologist to D. Staseff Senior Engineer Waste Section, Report on Results of Drilling, Testing and Groundwater Flow Modelling of Drillholes DH98-1 and DH98-2 Adams Mine Landfill Prepared by Golder Associates and dated December 1998, Respondent's Productions, bates pages 011094-011095

the waste disposal site. It also established notification, monitoring, inspection, contingency planning and reporting requirements for the disposal site.[95]

107. Every Certificate of Approval is subject to such conditions and there is nothing extraordinary or unusual about the Certificate of Approval issued in favour of the Adams Mine site.[96]

108. Mr. Bacopoulos reviewed the Adams Mine site Certificate of Approval at the time it was issued and again when preparing his witness statement. His evidence is that there is nothing unusual included in the Adams Mine Certificate of Approval. It is his view that some of the conditions reflect the MOE's experience at the Keele Valley site. The fact that it is identified as "provisional" is meaningless as the Keele Valley Certificate of Approval was always identified as a "provisional" certificate up to and including the time it closed. In addition, the Keele Valley Landfill over its life time was subject to many more conditions than the Adams Mine Certificate of Approval.[97]

109. Mr. Bacopoulos states his understanding that the Adams Mine Certificate of Approval was the entitlement to develop a waste disposal site in compliance with the conditions included in the Certificate. Those conditions were operational in nature, setting out what had to be done to build out the site. [98]

(K). COURT CHALLENGES TO GRANTING OF CERTIFICATE OF APPROVAL

110. After the Certificate of Approval was issued, an application was made on a Judicial Review Application by the Adams Mine Intervention Coalition. The

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[95] Memorial Doc Tab 22, Adams Mine Landfill Site-South Pit, Provincial Certificate of Approval, No. A612007, Claimant's Productions Tab 9, Bates no 00125-00150

[96] Bacopoulos Statement, para 59; McGuinty Statement, para 6

[97] Bacopoulos Statement, paras 15 and 59

[98] Bacopoulos Statement, para 59

application was opposed by Counsel for Notre and Counsel for the Minister of the Environment, The Ontario Cabinet and the Director under the Environmental Protection Act. The Application was dismissed on October 14th, 1999.[99]

111. As a result, Notre complied with all legal obligations pursuant to the *Environmental Protection Act*, obtained its Certificate of Approval and successfully defended it through all levels of appeal. It was final and binding on the Province of Ontario.

112. Based on Mr. Bacopoulos' experience with the Keele Valley waste disposal site, once a Certificate of Approval is obtained, the MOE and the operator develop a close working relationship to complete the development of the site and to begin operations.[100]

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[99] McGuinty Statement, para 73

[100] Bacopoulos Statement, paras 24-25

PART TWO:
TORONTO AWARDS CONTRACT TO ADAMS MINE

II.A. TORONTO TENDER PROCESS AWARDS CONTRACT TO RAIL CYCLE NORTH

113. The City of Toronto was continuing its search for long term waste disposal capacity. The Keele Valley Waste Disposal site was quickly filling up while serious efforts to locate an alternative site had been delayed for three years due to the NDP's insistence of the placement of mega-landfills in the GTA.[101]

114. As a short-term measure, the City of Toronto in 1995 put out a tender for a five year contract to divert waste out of the Keele Valley waste disposal site to lengthen its service life until at least 2002.[102]

115. Notre partnered with Canadian National and BFI to make a proposal. CN was a partner for Notre throughout the entire history of the Adams Mine site, including up to the passage of the *AMLA*. REDACTED

REDACTED

CN would provide significant resources throughout the entire relationship, including, the provision of sites throughout Ontario for transfer stations when required.[103]

116. Notre was hampered in this bid by the fact that the Adams Mine site did not have its Certificate of Approval. It was also hampered by the fact that BFI submitted two proposals, one through Notre and another independently. Notre was unsuccessful in its bid and BFI was awarded the contract for a five year period to

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[101] Bacopoulos Statement, paras 44-51

[102] Bacopoulos Statement, paras 60-61; McGuinty Statement, para 56

[103] McGuinty Statement, para 57

divert waste from the Keele Valley waste disposal site.[104] It was the submission of this separate proposal that led to BFI exiting the Rail Cycle North consortium. [105]

117. After BFI terminated its involvement, Notre put out a request for expressions of interest in partners to develop the Adams Mine waste disposal site. Notre received seven responses, including one from Waste Management Inc. which was to become the replacement for BFI in the Rail Cycle North consortium. [106]

118. This experience underscored for Notre the importance of obtaining its Certificate of Approval. [107]

119. With its long-term needs, Toronto undertook a planning analysis and identified that it required an estimated 20 million tonnes of waste diversion capacity and at least 15 million tonnes waste disposal capacity over the 2002-2022 planning period.[108]

120. On December 18th, 1996, Metro Toronto Council began planning for a long-term solution to its waste disposal problem, underscoring the fact that the 1995 RFP process was a short-term initiative. An added impetus for this planning initiative was the Conservative Government's amendment to Bill 76 requiring an environmental assessment of any municipality that entered into a waste disposal contract involving private contractors.[109] In order to avoid the likelihood of

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[104] McGuinty Statement, para 48

[105] McGuinty Statement, para 14

[106] McGuinty Statement, para 60

[107] McGuinty Statement, para 59

[108] Memorial Doc Tab 19, Solid Waste Management Marketplace Engagement Program, Stage One (draft) Planning Document, November 23, 1998 at page 1

[109] Ibid., at 18,

> "This decision was taken in response to an amendment to Bill 76, *The Environmental Assessment and Consultation Improvement Act, 1997*. The amendment provides that municipalities prescribed by Regulation of Cabinet cannot proceed with an undertaking to dispose of waste via the facilities and services of another person (i.e. "contracting out") without EA Act approval. Hence, Toronto's

designation, the City of Toronto engaged in an initiative Toronto's Solid Waste Management Marketplace Engagement Program project (SWM-MEP):

> While the current SWM-MEP will engage the marketplace to identify new long term disposal capacity (i.e. a process of "contracting out"), Toronto Council has taken the position that formal EA Act approval is not necessary. This position derives from the fact that the SWM-MEP is structured to address those matters considered in environmental assessment planning, and thus the Act's intent will be fully served. By avoiding the time which would otherwise be involved in obtaining formal EA Act approval prior to engaging the marketplace, Toronto and the Regions that partner in a GTA shared solution have a significantly higher probability of having a long term waste disposal capacity solution in place in time for the Keele Valley Landfill Site Closure (estimated late 2002).
>
> It is noted that notwithstanding the above circumstances, the Province could prescribe Toronto's program under the EA Act. However, provided Toronto's process is exercised as it is proposed to be structure – i.e. to be consistent with environmental assessment planning, there should be no need for the province to prescribe the program.

121. Toronto specifically pursued a "process which will fulfill the spirit and intent of the *Environmental Assessment Act* and which has a high probability of identifying Toronto's (and potentially GTA partners') long term waste disposal capacity solution in time for the Keele Valley Landfill site's closure."[110] The SWM-MEP initiative involved the following stages:[111]

STAGE	TARGET DATE[112]
1: Planning;	November 23, 1998
2: Requests for Expression of Interests	June, 1999
3: Requests for Proposal	September, 1999
4: Due Diligence;	March, 2000

planning process – Solid Waste Environmental Assessment for Long-term Disposal "SWEAD" – was focused on preparing for formal EA Act approval.

[110] Ibid., at 43

[111] Ibid., at 40-1

[112] Ibid., at 20-1

5: Final Contract negotiations	February, 2001
6: Implement Contract	2002-2022

122. On May 27th, 1999, Rail Cycle North (RCN), the consortium to develop the Adams Mine waste disposal site, submitted its response to the Request for Expressions of Interest.[113] The response stated:

> Our submission (which includes our companion submission for Proven Waste Diversion Capacity) is designed to provide Toronto and the Regions with an integrated waste management system, in a long term partnership with RCN, within a contractual relationship intended to promote waste diversion. Specifically, we are offering:
>
> - Disposal capacity for 20 years.
> - Permitted landfill capacity.
> - A sophisticated transportation and dispatch system.
> - Contractual flexibility to promote diversion.
> - Proven waste diversion (through our companion submission).
> - Comprehensive contingency plans to cover all eventualities.
> - No dependence on facilities outside Ontario.
> - Minimal impact on Ontario's environment, infrastructure and social fabric.
> - Employment opportunities for municipal employees displaced by operating changes.
> - A wide range of partnership options between RCN and Toronto and the Regions.

[113] Memorial Doc Tab 23, RCN letter to Chief Financial Officer and Treasurer, City of Toronto, May 27, 1999, Claimant's Production Tab 776, bates no 17710

123. In September 1999, Toronto Council approved the issuance of a RFP for long term waste disposal capacity. At this meeting Toronto Council determined that a "willing host" criterion was not part of the TIRM RPF Process.

124. Responses to the RFP were received from a number of proponents, including RCN, in December, 1999. RCN's proposal was dated December 13th, 1999,[114] offering a "fully permitted landfill capacity" capable of meeting "for 20 years for all the residual waste from Toronto and the regions." The RCN proposal stated the following in the Executive Summary:

> Rail Cycle North is pleased to submit its comprehensive proposal to address Toronto's long term waste management requirements. In preparing this proposal we believe we have responded to both the letter and the spirit of the City's search for the right combination of flexibility, dependability, security and cost. We have included offers of partnership which we believe will every attractive to the City and which will result in reduced costs.
>
> *Envelope 1:*
> In Envelope 1 we have provided the Declarations and Securities, the Proposed Service Plan and the Technical Performance Forms. We believe that the system we have proposed has the least impact on the environment and offers the greatest economic and social benefits to the residents of the GTA and Ontario.
>
> *Envelope 2:*
> In Envelope 2 we have *included* all the price forms and *completed* those applicable to our offer of service.
>
> *Envelope 3:*
> We have included five separate offers of partnership which may be accepted individually or collectively in any combination. Specifically we have sought to propose a mechanism whereby 'Toronto and the Regions can create a long term partnership with the private sector. This arrangement would create an integrated waste management system to meet the needs of the GTA for the next twenty years, and beyond, in a manner that is both environmentally and economically sound.[115]

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[114] Memorial Doc Tab 24, RCN Proposal to Provide Long Term solid waste disposal to City of Toronto, December 13, 1999, Claimant's Production, Tab 781, bates No 19490

[115] Ibid.

125. Mr. Bacopoulos and the Toronto Staff undertook a paper review of each of the proposals and the various alternatives were weighted by a Consultant, EarthTech based on the following criteria:

a. Human Health and Safety and Environment – 35%:

i. Greenhouse gas emissions – 5%;
ii. Acid gas emissions – 5%;
iii. Smog precursor emissions – 5%;
iv. Heavy metal emissions – 2.5%;
v. Trace organic emissions – 2.5%;
vi. Chloride emissions – 5%;
vii. Energy Resource Management – 5%;
viii. Traffic Safety – 5%;

b. GTA and Ontario Benefits – 30%;

i. Number of jobs (GTA) – 6%;
ii. Number of jobs (Ontario) – 4%;
iii. Value of jobs (GTA) – 6%;
iv. Value of Jobs (Ontario) – 4%;
v. Value of goods (GTA) – 6%;
vi. Value of jobs (Ontario) – 4%.

c. Financial – 35%;

i. Price 35%.[116]

126. An emphasis was placed on the potential benefits that might accrue from Ontario-based waste management facilities reflecting a preference that exports to the United States be limited.[117] The evaluation criteria were to include:

- traffic safety effects of waste haul transportation;
- emission of priority pollutants (e.g. greenhouse gases smog precursors);

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[116] Bacopoulos Statement, para 72, Letter to Members of Council from Trudy Perrin, February 25th, 2000, Exhibit "E" to Bacopoulos affidavit

[117] Memorial Doc Tab 19, Solid Waste Management Marketplace Engagement Program, Stage One (Draft) Planning Document, November 23, 1998, at page 44

- consumption of energy resources, creation/loss of jobs and investment, and
- the financial cost to Toronto of the waste management capacity services offered(i.e. cost/tonne).[118]

127. The result of EarthTech's analysis was that the RCN bid was ranked first and well ahead of all other competitors. The ranking was as follows:[119]

Respondent	*Ranking Based on Total Score Spreads*	*Weighted Score*
Rail Cycle North	First	74.7
BFI	Second	55.04
Republic (high volume truck based transport)	Third	50.66
Republic (low volume truck based transport)	Fourth	49.53
Essex-Windsor	Fifth	44.74
Green Lane	Sixth	42.08
Republic (high volume train based transport)	Seventh	36.95
Republic (low volume train based transport)	Eighth	36.55

128. The report in which the weighting of the various bids also included the following comment:

> RCN scored high in-part because their high volume train and 'all Ontario solution' result in low fuel consumption emissions, accident rate and increased benefits to the GTA respectively.

[118] Ibid., at 46

[119] Memorial Doc Tab 25, Letter to Members of Council from Trudy Perrin, February 25, 2000, Exhibit "E" to Bacopoulos affidavit

129. After the ranking was done, Mr. Bacopoulos as the lead civil servant for Toronto conducted a thorough due diligence on the following proposals:

a. BFI's Onyx Arbor Hills Landfill, Inc.
b. Essex-Windsor Solid Waste Authority;
c. Green Lane Environmental Group Ltd.;
d. RCN; and
e. Republic Services of Canada Inc. [120]

130. The due diligence included sending consultants and staff members to speak to operators, regulators and the local municipalities, including visits to the various landfill sites including the Adams Mine. The due diligence also included in-house and outside legal counsel. Toronto Staff paid special attention to environmental issues to ensure that the sites would be operated safely. Toronto Staff were concerned that existing waste disposal sites had been operated safely. Mr. Bacopoulos was concerned with the history of the operation of the sites in Michigan, due to the possibility of Superfund liability. [121]

131. The Adams Mine waste disposal site was subject to extensive due diligence that the Adams Mine site could be operated safely. It had its Certificate of Approval and it had the right to be developed. It was also the lowest price option of the various submissions. Finally, the rail haul component was very attractive to the City of Toronto. This was a more environmentally responsible alternative that would lower greenhouse gasses. Republic also offered a partial rail haul solution (truck – rail – truck) but it was a much more expensive option. [122]

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[120] Bacopoulos Statement, para 74

[121] Bacopoulos Statement, para 75

[122] Bacopoulos Statement, para 76

132. Mr. Bacopoulos office issued a Works and Emergency Services report in June, to a joint meeting of the Policy and Finance and the Works Committees of the Toronto City Council. It recommended that the Keele Valley landfill be extended, and that Toronto contract with the Windsor-Essex and Green Lane landfills in Southwestern Ontario and Onyx's landfill in Michigan for solid waste disposal. The Committees made it clear that the life of the Keele Valley Waste disposal site could not be extended. They asked Toronto Staff to return with other options. Toronto Staff had proposed the extension of the Keele Valley waste disposal site to stay in the land fill business and try to protect the employment of the number of Toronto employees who were involved in the management and operation of the site. [123]

133. Subsequently, Mr. Bacopuolos' office generated a Works and Emergency Services report in July, 1999, to a joint meeting of the Policy and Finance and the Works Committees of the Toronto City Council, stating that if the life of the Keele Valley Landfill could not be extended, the best option for the City of Toronto was to sign contracts with RCN and Republic. The City of Toronto had an obligation to ensure that municipal waste had to be disposed of, but there was no similar legal obligation on the City of Toronto to ensure that Industrial Commercial and Institutional (IC&I) waste was disposed of. As a result, the contracts would be structured in such a way that all of the municipal waste could be delivered to the Adams Mine waste disposal site and that the IC&I waste would be sent to Michigan. If there was ever a border closure, the City of Toronto could meet its obligation to send all of the municipal waste to the Adams Mine site and the private contractors would be left on their own to find disposal facilities for the IC&I waste. The committees recommended to the Toronto City Council that staff be directed to proceed to final contract negotiations with the RCN consortium and Republic.[124]

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[123] Bacopoulos Statement, para 77

[124] Bacopoulos Statement, para 78

134. The proposal to proceed to contract negotiations with RCN and Republic went before Toronto City Council at its meeting on August 1st through 4th, 2000. Mr. Bacopoulos was present at the meeting and answered the questions of councillors regarding the Adams Mine waste disposal site. There was a lot of political interference at the meetings with a number of stunts pulled to try to shut the council down. However, it was clear that the only options that the City of Toronto had were those placed on the table, the most attractive of which was the long-term waste disposal contract with the RCN. [125]

135. Toronto Staff issued

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[125] Bacopoulos Statement, para 79

[126] Memorial Doc Tab 27, City of Toronto, September 12, 2000, Exhibit "F" to Bacopoulos Statement, para 80

136. At that time, opposition groups were mounting significant pressure on public officials to reject the Adams Mine waste disposal site. In response to the opposition to the project, four senior experts from Golder wrote the following

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[127] Memorial Doc Tab 28, Minutes of Council of the Regional Municipality of York, Finance & Administration and Works Committees, September 13, 2000 confirms that the following motion was passed:

> MOVE by Regional Chair Anderson, "that we recommend to Council:
>
> a). THAT the Region of Durham accept, in principle, a proposal from Rail Cycle North for a 'no put or pay' contract for the hauling and disposal of solid non hazardous residual municipal waste from Durham, subject to further negotiations ... ;
>
> b). THAT the Region of Durham undertake negotiations with Miller Waste systems Inc. for the receiving and processing of residual municipal waste at their waste transfer stations located in Durham;
>
> c). THAT the Region of Durham negotiate with the City of Toronto and the Regions of York and Peel for the allocation of waste tonnage and liabilities related to the Rail Cycle North proposal;

[128] Memorial Doc Tab 31, Minutes, the Regional Council of Durham, September 20, 2000, confirm in that the following "Tenth Joint Report" was passed:

> a) "THAT the Region of Durham accept, in principle, a proposal from Rail Cycle North for a 'no put or pay' contract for the hauling and disposal of solid non hazardous residual municipal waste from Durham, subject to further negotiations to include the Region's ability to pursue current diversion strategies such as energy from waste and as outlined in Joint Report #2000-J-13 of the Commissioners of Works and Finance;
>
> b). THAT the region of Durham undertake negotiations with Miller Waste Systems Inc. for the receiving and processing of residual municipal waste at their waste transfer stations located in Durham;
>
> c). THAT the Region of Durham negotiate with the City of Toronto and the Regions of York and Peel for the allocation of waste tonnage and liabilities related to the Rail Cycle North proposal; ...."

letter dated September 15th, 2000, to the then Mayor of Toronto, Mel Lastman, rebutting the activists' claims. The letter stated, in part:[129]

> Golder Associates Ltd. is providing this letter is in response to statements being reported in the media regarding the environmental acceptability of the Adams Mine Landfill site.
>
> Golder Associates is an international consulting engineering firm founded in Toronto in 1960 with extensive expertise in hydrogeological assessment, engineering design and environmental monitoring. We have conducted detailed technical studies and analyses over a 10 year period on the Adams Mine Site and completed the landfill design. We want to assure you, and your council, that we stand solidly behind our technical design.
>
> The Adams Mine Landfill incorporates a proven method of hydraulic containment design. We are confident that our landfill design will protect the groundwater resources in the surrounding area. Our professional opinion is based 'on proven' engineering and scientific principles. All technical studies have conclusively demonstrated that inward groundwater flow to the landfill will be maintained, thereby preventing any groundwater impacts in the surrounding area. As a result, the Adams Mine Landfill received approval under the *Environmental Assessment Act* following a public hearing in Kirkland Lake. The landfill has subsequently received the necessary Certificate of Approval for operation from the Ontario Ministry of the Environment.
>
> The Adams Mine landfill is a proper design that provides an environmentally sound solution to solid waste disposal. Our confidence is shared by the technical specialists and peer reviewers who were chosen, by others, to evaluate our work.

137. Gartner Lee Limited also wrote a letter to Mayor Lastman on September 14, 2000 stating in part:[130]

> Gartner Lee Limited was involved as the independent peer reviewer of the Adams Mine Landfill from 1995 to 1999. Over that period our

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[129] Memorial Doc Tab 30, Golder Associates letter to Mayor Mel Lastman, City of Toronto, September 15, 2000

[130] Memorial Doc Tab 29, Garner Lee Limited letter to Mayor Mel Lastman, City of Toronto, September 14, 2000

experts examined technical studies prepared by professional engineers and geoscientists that detailed the landfill design and operations.

Recently, we have become concerned at the amount of incorrect and misleading information being reported by the media. Under the perceived endorsement of public reporting, many false statements have been given credence. The purpose of this letter is to set the record straight.

On behalf of two public liaison committees which included representation from the communities of Kirkland Lake, Larder Lake and Engelhart, Gartner Lee Limited and independently evaluated the environmental integrity of the Adams Mine Landfill. Any assertion that the undertaking will cause environmental harm, is untrue and has no basis in fact.

The Adams Mine Landfill has been publicly scrutinized and the thoroughness and depth of investigation of the detailed studies has been accepted by the specific professional engineers and geoscientists who were involved in the extensive due diligence and approval of the undertaking.

It is our professional opinion, based on much first hand study and extensive review, that the design of the Adams Mine Landfill ensures environmental security for the residents of the three surrounding communities and beyond. Furthermore, based on our experience, the scope of the approved monitoring programs exceed those which are in place at other landfills. For these reasons Gartner Lee Limited looks forward to continued involvement in the development and operation of the landfill. We trust that this sets the record straight.

138. REDACTED of the waste that was to be generated by the City of Toronto throughout the duration of the contract and a second contract was necessary. [131]

139. After approval was given to negotiate the contracts, REDACTED REDACTED negotiations led to a draft contract by October 11th, 2000 which was presented to

131 REDACTED

Toronto Council. The agreement provided that it could be cancelled at the option of the City of Toronto if the federal Minister of the Environment commenced an environmental assessment pursuant to the *Canadian Environmental Assessment Act*. Toronto Staff never thought that a federal environmental assessment would occur because the Adams Mine site had been vetted by the Province of Ontario but more importantly because Toronto was in such dire straits for waste disposal capacity. The Adams Mine was considered to be the solution to Toronto's waste disposal crisis. It would not be necessary to conduct a federal environmental assessment. [132]

140. The contract contained a clause regarding unavoidable cost increases with an unavoidable cost defined as "any increase in the cost to RCN of providing the Facilities and services under the Agreement resulting from a change in Applicable Law that is not otherwise factored into the Consumer Price Index."[133]

141. The draft contract was presented to Toronto Council by October 11th, 2000 and the "unavoidable cost increase" clause became a focal point for criticism. The Toronto City Council approved the contract as long as the unavoidable cost increase clause was removed from the contract within four days.[134] The negotiators were given seven to negotiate the removal of the provision.

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RCN did agree to remove the provision but asked to negotiate certain other clauses in the agreement.

REDACTED

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132 REDACTED

133 REDACTED

134 Memorial Doc Tab 33, City of Toronto Minutes of Council dated October 11, 2000

REDACTED Mel Lastman then announced that the Adams Mine waste disposal contract was "Dead."[135]

142. REDACTED the termination of the negotiations was due to the political pressure that had been brought to bear on the supporters of Mel Lastman in the Council who were in danger of losing their seats in the election that took place in November, 2000. It had nothing to do with the environmental safety at the Adams Mine waste disposal site. [136]

143. Toronto Council subsequently voted not to proceed with the Adams Mine waste disposal site and approved the signing of a contract with Republic Services to haul municipal waste to Michigan.[137]

144. After the termination of the negotiations, REDACTED negotiated an agreement with Republic to ship Toronto's waste to Michigan. REDACTED a second best option for the reasons set forth above.[138]

145. At the time that the decision was made not to proceed with the Adams Mine site, Toronto Council committed to achieving a 100% waste diversion rate by 2010.[139] Mr. Bacopoulos considered that this diversion rate was impossible to achieve in such a short period of time and the rate that has been achieved by the end of 2008 is 44%. This vote to achieve a 100% diversion rate captures well what Mr. Bacopoulos believe to be the opposition to the Adams Mine site. It appeared that some Toronto Councillors opposed the Adams Mine site because a relatively

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135 REDACTED

136 REDACTED

137 REDACTED

138 REDACTED

[139] Memorial Doc Tab 39, Waste Diversion Task Force 2010 Report, June 2001, http://www.toronto.ca/taskforce2010/report.pdf (last visited February 28th, 2010)

cheap waste disposal site would offset the need to achieve an impossibly high diversion rate.[140]

146. In summary, the evidence shows that:

a. RCN provided an "all-Ontario" solution based on "fully permitted" waste disposal capacity in excess of 20 million tonnes;

b. RCN provided a complete bid covering all aspects of the development and operation of the waste disposal facility, including all ancillary services such as waste transfer and rail haul;

c. the Adams Mine was subjected to a thorough due diligence process that reviewed the environmental safety of the site in detail;

d. the Adams Mine site was ranked the best alternative for Toronto's long-term waste disposal requirements;

e. Toronto formed the conclusion based on the advice that it received that a federal environmental assessment was highly unlikely in the circumstances;

f. RCN was awarded the contract but the negotiations broke down over a term that had nothing to do with the environmental safety of the site;

g. the termination of negotiations took place in the context of a municipal election in which the Mayor was under severe political pressure by his supporters who feared losing their seats; and

h. the new Toronto Council had an unrealistic expectation of the ability of the City to achieve a 100% diversion rate that would make any waste disposal site a "dark ages concept."

147. After the contract negotiations ended, the Rail Cycle North consortium continued to lobby for the contract.[141]

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[140] REDACTED

[141] McGuinty Statement, paras 17-18

II.B. NOTRE'S CONTINUING EFFORTS IN 2001 TO DEVELOP THE ADAMS MINE SITE

148. REDACTED

149. An opportunity was created by Toronto's *2010 Waste Diversion Task Force Report* that had been released in or about June, 2001. It required a thirty percent diversion of household waste by 2003, sixty percent by 2006 and one hundred percent by 2010.

143

150. On September 10th, 2001, Kirkland Lake issued a proposal to the City of Toronto to construct at the Adams Mine waste disposal site, a state-of-the-art composting facility. Kirkland Lake was in partnership with Notre, Aecon, Miller Waste, Canadian National Railways and Ontario Northland Railways. The proposal was to build a composting facility to be able to process a total of 50,000 tonnes of organic waste per year for a period of twenty years. The project was to provide over $600 million in economic investment, jobs and spin-off. [144]

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[143] Memorial Doc Tab 39, Waste Diversion Task Force 2010 Report, June 2001, http://www.toronto.ca/taskforce2010/report.pdf (last visited February 28th, 2010)

[144] Memorial Doc Tab 41, Gartner Lee Limited, Overview of the Environmental Security of the Adams Mine Landfill, September 2001, Claimant's Productions Tab 20

[146] Ibid

151. The waste facility would also have the ability to expand to meet any growing needs by the City of Toronto, as necessary. It was expected that ninety new jobs would be created in Kirkland Lake and "[t]he intent and objective ... [is to] provide a foundation for renewed economic investment in Kirkland Lake and the surrounding area." It was projected to generate in excess of $300 million of investment into the regional economy.[146]

152. With respect to environmental safety of the Adams Mine waste disposal site Gartner Lee Limited's report stated:[147]

> We have examined the full Environmental Assessment conducted by the property owner, Notre Development Inc. from a technical feasibility perspective. Based on our own extensive experience in landfill design, construction, operations and monitoring, we have concluded that this landfill can be built, operated and monitored successfully with no adverse environmental impact. We have also had the opportunity to review several submissions calling for a Federal Environmental assessment. Nothing exists in these submissions to CEAA that has not already been addressed or refuted with scientific fact. It is our opinion that a *Federal Environmental Assessment* is unnecessary on technical grounds as discussed in Section 5 of the report. This is based on our peer review of the extensive environmental assessment conducted by the proponents, and considers the extensive review this undertaking has been subject to by many qualified individuals from the Provincial review agencies.
>
> In Ontario there are many significant levels of checks and balances incorporated into all landfill approvals to protect the natural environment. The Adams Mine Landfill, as legally mandated by its' Certificate of Approval, will have the most extensive application of these checks and balances to ensure environmental protection. Several examples include regular monitoring, independent inspection by the MOE, regular reporting, approved remedial action and contingency plans, and financial assurances.
>
> Gartner Lee Limited is of the opinion that there cannot be any significant or adverse environmental impact from this site, if it is built, operated and monitored as designed.

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[147] Ibid., at page 1

153. Aecon re-evaluated its participation in the consortium after this proposal was not accepted and the City of Toronto signed a five year agreement with Republic to ship its waste to Michigan. REDACTED

PART THREE:
THE PURCHASE OF ADAMS MINE BY THE ENTERPRISE

154. Vito Gallo is an American Citizen[150] and he resides in Pennsylvania where he has lived all of his life. He graduated with a Bachelor of Science Degree in Business Management from the University of Scranton, Scranton, Pennsylvania in 1990 and later graduated with a Juris Doctorate from Widener University School of Law, Harrisburg, Pennsylvania in 1995.[151]

155. REDACTED

III.A. MR. GALLO'S CURRENT POSITIONS

156. Mr. Gallo is currently Assistant Vice-President for State Government Relations at Lehigh University, in Bethlehem, Pennsylvania, and has held that position since

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[150] Vito G. Gallo Witness Statement ("Gallo Statement"), para 1. REDACTED

[151] Gallo Statement, para 4

2003 after leaving the Pennsylvania Governor's Office, Harrisburg, where he had worked for eight years.

157. Lehigh University has approximately 4,000 undergraduate students and 1,500 post-graduate students and is one of the leading research universities in the United States. One of Mr. Gallo's major responsibilities is to obtain funding from federal, state and local government sources, and also from the private sector for specialized research and applied education programs at Lehigh University.

158. Lehigh University's annual operating budget is about $350 million, while research expenditures for these specialized programs can range from approximately $40-50 million dollars each year. These specialized research programs emphasize partnerships between private sector entrepreneurs, the university, as well as federal and state government to create new opportunities to benefit all three sectors and the local and state economy in general.[152]

159. Research funding projects range from small to large and are frequently multi-year deals. For example, one of the larger projects requiring six years of effort was to attract funding for the Engineering Research Center for Advanced Technology for Large Structural Systems (ATLSS): a facility that specializes in civil and materials engineering for large structural systems, earthquake testing, and projects involving state of the art building materials (advanced steel and concrete) for interstate highways, bridges and large office towers.[153]

160. To date, Mr. Gallo has been responsible for attracting approximately $15 million in state and federal government funding for ATLSS. The private sector has added more than $30 million in leveraged contributions since his involvement. These funds allow ATLSS conduct research develop technologies and find commercial

[152] Gallo Statement, para 9

[153] Gallo Statement, para 10

applications for private and public sector benefits. Partners include the Commonwealth of Pennsylvania and Carnegie-Mellon University Pittsburgh, Pennsylvania, under a program known as the Pennsylvania Infrastructure Technology Alliance ("PITA"). The mission of PITA is to assist the Commonwealth of Pennsylvania and its companies in increasing operating efficiency and enhancing economic development; in short, to solve problems and to make money.[154]

161. Mr. Gallo also works with three major economic development agencies that coordinate government, business and research partners and projects in Eastern Pennsylvania and Western New Jersey, known as the "Lehigh Valley" municipal area. Lehigh Valley is the third most populous region in Pennsylvania. It is approximately one hour's drive west of New York City and one hour's drive north of Philadelphia. Roughly 650,000 people live in Lehigh Valley. It is an education and research hub, with 11 universities and colleges teaching more than 50,000 students. [155]

162. Since joining Lehigh University, Mr. Gallo has succeeded in attracting more than $70 million dollars for Lehigh University and its various business and government partners through innovative partnerships.

III.B. MR GALLO'S EXPERIENCE IN GOVERNMENT

163. Mr Gallo's first government job occurred while he was at law school as a policy advisor to the State Treasurer of Pennsylvania, Catherine Baker Knoll, on legislative matters in the Office of General Counsel, State Treasury Department. During that time, he drafted initiatives on state pension funds, community

[154] Gallo Statement, para 11, Memorial Tab __, Exhibit "C" to Gallo Statement

[155] Gallo Statement, para 15

reinvestment, unclaimed property, local government investments, and other state-wide programs administered by the State Treasurer's Department. [156]

164. By graduation, he had decided to work full time in government becoming the Senior Policy Director in the Governor's Office at the state capital. For eight years, he advised two Pennsylvania Governors, first, Tom Ridge, and later, Mark Schweiker once Governor Ridge became Secretary of Homeland Security after 9/11. [157]

165. In Mr. Gallo's role as Senior Policy Director, he advised the Governor and several Pennsylvania cabinet secretaries on issues such as the environment, economic development, real estate development and income tax policy. He usually met weekly with the Governor and Cabinet on major policy issues and often had to deal with lobbyists, corporate executives and other stakeholder interests on the policy matters of the day. [158]

166. While at government, he learned the importance of partnerships between government and the private sector. For example, he co-authored Pennsylvania's *Keystone Opportunity Zone Program*, a nationally recognized economic development tax abatement program that Pennsylvania patterned on Michigan's "Renaissance Zone" program. The *Keystone Opportunity Zone Program* created economic growth in urban and rural parts of Pennsylvania that had been in economic distress and covered, initially, 25,000 acres of land in economic difficulties. The program succeeded by waiving state and local taxes to eligible properties for a period of up to 20 years. It has kept investment in Pennsylvania and attracts foreign investment to the state and has been used by the Council of

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[156] Gallo Statement, para 21

[157] Gallo Statement, para 23

[158] Gallo Statement, para 25

American States in Canada as a major reason why Canadians considering investing in the United States should choose Pennsylvania. [159]

III.C. MR GALLO'S KNOWLEDGE OF THE WASTE DISPOSAL INDUSTRY

167. REDACTED

Mr. Gallo began to develop an understanding of the value of waste airspace, due to its scarcity, initially with respect to problems for New York City as it faced a growing shortage in landfill capacity and as it tried to solve its problems by sending its waste to neighbouring Pennsylvania.[160]

168. In the 1990s, the City of New York needed new waste disposal capacity because its primary waste disposal site, Fresh Kills, a landfill on Staten Island, was scheduled to shutdown in 2001. For New York City, and also New Jersey, Eastern Pennsylvania was the preferred destination: distances were short and trucks could make at least two trips each day.[161]

169. As New York became desperate for a solution to its waste problems, Mr. Gallo saw the effects that such desperation would have, particularly as the importation of New York City's waste was not popular with the people of Pennsylvania.

REDACTED

With few

[159] Gallo Statement, para 28

[160] Gallo Statement, para 30

[161] Gallo Statement, para 31

options as alternatives to deal with its waste, New York City paid these significantly increased "tipping" fees as a cost of doing business.[162]

170. REDACTED

171. As there was limited capacity for waste disposal in Eastern Pennsylvania and no new capacity was being added to serve the never ending supply of nearby New York City's waste, disposal sites with permitted capacity – which was a scarce and limited resource in Pennsylvania given how long it took to obtain new waste disposal permits -- became increasingly more valuable to their owners as Pennsylvania's imports of New York City waste continued. [164]

172. Mr Gallo also saw that the moratorium on new waste site capacity in Eastern Pennsylvania caused waste from New York City to be shipped to sites in Western Pennsylvania, Ohio and Kentucky, even though these destinations were far less attractive as only one trip per day could be made, rather than the two trips per day that could be made if the destination was in Eastern Pennsylvania. These longer trips to the farther destinations led to complaints to the Governor's office that there were too many New York City garbage trucks on the state's highways, that these trucks were polluting the air with diesel fumes and that they caused too much wear and tear on the state's highways.[165]

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[162] Gallo Statement, para 33

[163] Gallo Statement, para 34

[164] Gallo Statement, para 35

[165] Gallo Statement, para 37

173. This led Mr. Gallo to understand how valuable waste disposal capacity could be and how much municipalities would be willing to pay to get new capacity to solve capacity problems. It also taught him that most of the waste disposal capacity in Pennsylvania is privately owned and in his dealings with waste policy, he made many contacts in the waste disposal industry who sought to have their views on New York City's problems made known to the state government. REDACTED

REDACTED

174. REDACTED

175. In Mr. Gallo's experience, there is a "not in my backyard" ("NIMBY") reaction to waste disposal, particularly when one's neighbour can no longer dispose of its own waste and must send it elsewhere. He had seen this done in Eastern Pennsylvania and expected that Michigan would ultimately ban waste from Toronto, either by convincing the United States' federal government to ban such imports or by finding some means of itself preventing Ontario garbage from entering Michigan which would not violate the U.S. constitution.

176. Mr. Gallo was aware that there were many Michigan officials and lawyers working on such solutions to stop Ontario's waste from entering Michigan. This would be politically popular in Michigan. His conclusion was if an import ban was imposed, the value of waste disposal sites in Ontario would increase, just as

[166] Gallo Statement, para 39

they had done in Pennsylvania after New York City could no longer dispose of its own waste.

177. The question was whether a suitable investment opportunity could be found in Ontario. Mr. Gallo believed that he had the contacts in the private sector of Pennsylvania's waste industry and that they would want to invest in what he considered was a rare but timely opportunity.

178. REDACTED

179. From Mr. Gallo's experience in government, he believed that Ontario was friendly to U.S. investors (this was reinforced from his review of the Government of Canada's website in 2001, which welcomed foreign investment into Canada). There was no question to him that in 2001 an investment opportunity existed given the political situation occurring in Michigan – in his view at the time history was going to repeat itself and existing landfill capacity in Ontario would increase in value much like it did in Pennsylvania, after Michigan prevented or impeded Toronto's waste from being disposed of in Michigan.

180. REDACTED

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[167] Gallo Statement, para 46

REDACTED

181. At this time, Mr. Gallo had not heard of the Adams Mine. Mr. Gallo's idea at this time only was general, to make an investment in Ontario that could profit from a border closure with Michigan.

III.D. INTRODUCTION TO MARIO CORTELLUCCI

182. On one of Mr. Gallo's visits to Ontario in 2001, he met Mr. Mario Cortellucci ("Mr. Cortellucci"). Mr. Gallo learned that Mr. Cortellucci was a significant land developer in Ontario and had extensive contacts throughout the province. Mr. Gallo found Mr. Cortellucci to be very knowledgeable regarding the Ontario real estate sector and discovered that Mr. Cortellucci was a successful entrepreneur. At the first meeting, Mr. Gallo spoke of the nature of the United States' waste disposal industry and what had happened in Pennsylvania once New York City became desperate to secure new waste disposal capacity. [169]

183. Mr. Gallo told Mr. Cortellucci that Mr. Gallo thought that a waste disposal site in Ontario would be highly valuable, particularly due to his strong belief that Michigan would soon restrict Ontario's waste from coming to Michigan. RE DA

REDACTED

168 REDACTED

169 REDACTED

REDACTED Mr. Cortellucci told Mr. Gallo that he would keep an eye out for any opportunity that presented itself.

184. Nothing further happened in 2001 regarding a potential investment in Ontario. Mr. Gallo was busy on government issues following 9/11 and the number of security issues that were critical to Pennsylvania. Mr. Cortellucci did not come across any suitable investment.[170]

III.E. NEGOTIATING THE PURCHASE OF THE ADAMS MINE WASTE DISPOSAL SITE

185. By 2002, it was clear to Gordon McGuinty that he had to change strategy to develop the Adams Mine site further. Instead of obtaining a contract and then developing the site, Notre needed to build the waste disposal infrastructure at the Adams Mine waste disposal site. Once operating, Notre could then offer the waste disposal capacity to municipalities across Ontario. It was also clear at all times that there would be take-up of the capacity. A total of 3.5 million tonnes of waste was being shipped into Michigan and the demand for waste disposal capacity would only grow. It was clear from the impact that 9/11 had on shutting the border that the waste crisis in Ontario would be acute if the border was shutdown.[171]

186. As of 2002, therefore, the plan was to build the site and Gordon McGuinty was only interested in working with prospective partners that were willing to commit the funds necessary to build the site. Mr. McGuinty was not prepared to let the site sit idle, or be held as inventory for some future development. It had been his experience that the major waste disposal firms all wanted to ship waste to Michigan in priority to developing disposal capacity in Ontario. As a result, he was not looking to partner with any large waste disposal conglomerate that simply

[170] Mario Cortellucci Witness Statement ("Cortellucci Statement"), para 8

[171] McGuinty Statement, para 83

wanted to warehouse the Adams Mine site. In addition, REDACTED REDACTED

187. REDACTED The introduction took place in February, 2002. REDACTED

RED ACT REDACTED

RED ACT REDACTED

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[172] McGuinty Statement, para 84

R REDACTED

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175 REDACTED

176 REDACTED

177 REDACTED

REDACTED

190. There were a number of factors that made this an attractive project. Firstly, the site had permitted waste disposal capacity of more than 20 million tonnes. Secondly, the waste disposal crisis in Ontario was only going to become more acute. Thirdly, there was significant pressure in Michigan to shut down the border, much as Mr. Gallo had predicted. Fourthly, there was pressure within Ontario to find an Ontario solution for the GTA's long term waste disposal requirements, particularly since the contract with Republic would be re-opened for re-negotiation in 2005.

191. Mr. Gallo was interested in this site not only for its current regulatory permits, but also for the opportunities of expanding the activities at the site to include such matters as providing energy generation through the capture of methane gases. A goal of any business including a landfill would be to develop the site's potential as an environmental company that could provide long term environmental and energy solutions.[179]

192. REDACTED

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[179] Gallo Statement, para 59

REDACTED

193. REDACTED

194. REDACTED

195. The fact that the Adams Mine site had its licence to take waste was critical to getting interest in the Adams Mine. REDACTED

196. REDACTED

[180] Gallo Statement, para 76; Noto para 7

REDACTED

197. After the negotiations progressed, Gordon McGuinty knew that Mr. Cortellucci had other investors in the project.

198. Mr. McGuinty and Mr. Acton negotiated the draft Agreement of Purchase and Sale.[183]

199. The terms of the Agreement of Purchase and Sale was signed by the Cortellucci Group of Companies Inc. "in trust" for a corporation to be incorporated (MCG).

RE DA REDACTED

REDACTED

REDACTED

[182] Cortellucci Statement, para 17

[183] Cortellucci Statement, para 22; McGuinty Statement, para 88, Memorial Doc Tab 52, REDACTED REDACTED

REDACTED

201. The Enterprise was responsible for the following additional obligations:

REDACTED

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184 REDACTED

REDACTED

202. The contract provides for the transfer of the Adams Mine property to the Enterprise at a cost of $1.8 million. REDACTED

[185] Ibid

REDACTED

203. REDACTED

III.F. 1532382 ONTARIO INC.AND LIMITED PARTNERSHIP

204. Mr. Gallo had to set up a corporation to purchase the purchase to the Adams Mine site, Mr. Cortellucci suggested that Mr. Gallo get in touch with Brent Swanick ("Mr. Swanick"), who was identified a corporate and tax lawyer to look after his interests in Canada.[188]

205. Mr. Gallo called Mr. Swanick and informed him of his intention to buy the Adams Mine site. REDACTED

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[186] McGuinty Statement, para 89

[188] Gallo Statement, paras 67 and 68

[189] Gallo Statement, para 69

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DA

REDACTED

207. REDACTED

208. REDACTED

209. 1532382 Ontario Inc. was incorporated on June 26, 2002.[193] The company was then organized with Mr. Swanick as President and sole Director. One common share was issued to Brent Swanick in trust and he signed a Declaration of Trust

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REDACTED

R REDACTED

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[193] Swanick Statement, para 18, Articles of Incorporation - 1532382 Ontario Inc., Claimant's Productions Tab 340, Exhibit "A" to Swanick Statement

that the share be held for Vito Gallo.[194] A share certificate was issued to "Brent Swanick, in Trust."[195] On September 9th, 2002, Brent Swanick transferred the share to Vito Gallo with the following endorsement:

> ~~For Value Received~~, the undersigned hereby sells, endorses and transfers unto Vito Gallo 1 Common Shares of the Common Shares represented by the within Certificate.

210. The words "For Value Received" were struck out because, Mr. Swanick was holding the share in trust for Mr. Gallo. In other words, Mr. Gallo was already the beneficial owner of the share and it is trite trust law that a beneficiary can have property transferred to her/him without any payment of consideration.

211. REDACTED

212. A Limited Partnership Agreement was signed creating the 1532382 Limited Partnership dated September 10th, 2002.[201] An Agreement between 1532382

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194 REDACTED

198 REDACTED

199 REDACTED

200 REDACTED

201 REDACTED

Ontario Inc. and the 1532382 Limited Partnership was also signed dated September 9th, 2002.[202] REDACTED

REDACTED

REDACTED

REDACTED

213. REDACTED

214. REDACTED

[202] Swanick Statement, para 28, Investor's Statement of Claim, REDACTED

[203] Swanick Statement, paras 29 and 30

PART FOUR:
DEVELOPMENT OF THE SITE BY THE ENTERPRISE

215. After the purchase, the 1532382 Limited Partnership and 1532382 Ontario Inc. entered into an agreement with Christopher Gordon Associates Ltd[204] to manage the Adams Mine waste disposal site. This agreement retained the services of Gordon McGuinty to continue to manage the day to day affairs of the development of the Adams Mine site. This maintained the continuity of the existing management which by that time, had thirteen years of experience with the Adams Mine site, and had managed it through all of its different phases.

REDACTED

216. REDACTED

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[205] McGuinty Statement, para 91

[206] Swanick Statement, para 36; Cortellucci Statement, paragraph 30

217. The approach to development was changed. Prior to the purchase of the Adams Mine waste disposal site, Notre's approach to development was to obtain a contract and then develop the site. After 1532382 Ontario Inc. bought the site, the development of the Adams Mine was to occur and after the development had commenced, then, offer the waste disposal capacity to any municipality in Ontario that had need of it, including those in the Greater Toronto Area. The goal was to develop the Adams Mine site as quickly as possible.[207]

218. The trade name Adams Mine Rail Haul ("AMRH") was registered and Gordon McGuinty held himself out as "Managing Director", even though AMRH was not a company.[208] Mr. McGuinty was not an officer or director of 1532382 Ontario Inc. Brent Swanick was the sole officer and director of 1532382 Ontario Inc.[209]

IV.(A). BACKGROUND TO THE PURCHASE OF THE BORDER LANDS

219. It was a condition of the Adam Mine Certificate of Approval[210] that the Enterprise obtain certain lands located at the perimeter of the mine site. Condition #10 of the Certificate provides as follows:

> Prior to the receipt of waste for disposal at this Site, the Owner shall acquire legal access to the portions of the existing tailings area not currently controlled by the owner (described in Schedule "A", Item 16, Tab 1) and required for the management and discharge of surface water and the treatment and discharge of drainage layer effluent, including constructed wetlands and a constructed channel to direct treated leachate to the tailings pond upgradient of Dam #6 and subsequently into the Misema River via Moosehead Creek.

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[207] McGuinty Statement, para 92; Cortellucci Statement, para 17

[208] McGuinty Statement, para 91

[209] Swanick Statement, para 35

[210] Memorial Doc Tab 22, Ontario Ministry of the Environment, Provisional Certificate of Approval, No A612007, April 23, 1999, Claimant's production Tab 9, bates no 00125

220. Adjacent to the Adams Mine when it was in operation were certain abutting lands where the tailings from refining operations were stored and a series of tailings dams. These lands were always used by Dofasco in its mining operations. They are not pristine wilderness, but instead, the lands look like an industrial waste site, with piles of waste rock from the mining operation scattered about. These "Borderlands" were the subject of leases from the Crown that had existed for the period during which mining occurred. These leased lands were part of the Agreement of Purchase and Sale entered into between Notre, Dofasco and Chevron and were to be surrendered to the Crown after closing of the purchase of the patented lands by Notre, and after Dofasco had decommissioned the mine, completed its closure plan, which included rehabilitation of parts of the site and had its closure plan accepted as complete by the Ministries of the Environment, Northern Development and Mines and Natural Resources.[211]

221. Throughout the period that Metro Toronto held the option on the site, Notre and Metro proceeded on the understanding by all parties and specifically the Ministry of Natural Resources, that the Borderlands would be leased from the Provincial Crown by Notre upon Dofasco's completion and the acceptance of its closure plan and the lapsing, or surrender, of the leases held by Dofasco.[212]

222. The Ministry of Natural Resources District Manager stated in a letter dated March 31, 1998 that the Ministry of Natural was "willing to issue land tenure upon the Ministry of Environment approval to proceed with your landfill site proposal and completion of the surrender of the remaining leases by Dofasco Inc... "[213]

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[211] McGuinty Statement, para 95. Memorial Doc Tab 75, Also see Exhibit "I" to his affidavit, which is his affidavit sworn January 7, 2004, filed in support of 1532382 Ontario Inc's motion for summary judgment.

[212] McGuinty Statement, para 96 and Exhibit "I" thereto, Memorial Doc Tab 75

[213] McGuinty Statement, para 97, and Exhibit "I" thereto, Memorial Doc Tab 75

223. At the Environmental Assessment Board's Public Hearing, confirmation that the Ministry of Natural Resources was prepared to transfer the lands to Notre was supplied by the tendering of the March 31, 1998 letter from the Ministry of Natural Resources as evidence in the hearing and marked as Exhibit 83. To be clear, the Ministry of Natural Resources confirmed it would transfer the tailings leases to Notre in the March 31, 1998 letter.[214]

224. Evidence supplied to the Environmental Assessment Board of Ontario from the Ministry of Environment, by Mr. David Staseff, included a draft provisional certificate. It contained a number of conditions, and condition seven stated that "this approval is conditional upon the owners acquiring legal access to the portions of the existing tailings area not currently controlled by the owner and required for the management and discharge of surface water and treatment and discharge of drainage layer effluent including constructed wet lands and constructed channels to direct treated leachate to the tailings pond upgradient of dam number 6 and subsequently into the Misema River via Moose Head Creek."[215]

225. Notre agreed to a joint submission to the Environmental Assessment Board with the Ministry of the Environment on the inclusion of a draft condition in the Certificate of Approval that Notre had to "acquire legal access to the portions of the existing tailings area not currently controlled by the owner and required for the management and discharge of surface water and treatment and discharge of drainage layer effluent." Had Notre not received confirmation that the Ministry of Natural Resources was prepared to transfer these lands, it would not have

[214] McGuinty Statement, para 98, and Exhibit "I" thereto, Memorial Doc Tab 75

[215] McGuinty Statement, para 99, and Exhibit "I" thereto, Memorial Doc Tab 75

agreed to the joint submission with the Ministry of the Environment and would have proposed alternate conditions.[216]

226. On July 31, 1998 after the Environmental Assessment Board released its decisions, the Ministry of Natural Resources wrote to Notre and indicted that "the former Adams Mine leases have been cancelled by the Ministry of Northern Development and Mines and withdrawn from disposition from the *Mining Act* so that tenure may be issued under the *Public Lands Act*. Your letter of July 9, 1998 is requesting tenure for mining leases which no longer exist; therefore we require maps showing the exact locations you wish to purchase. As Crown land is sold at appraised market value you should decide exactly what lands you require for the project. It will be Notre's responsibility to obtain an appraisal from a recognized appraiser. The lands will have to be surveyed at Notre's expense and the plan recorded in the land Registry Office before patents can be issued. An interim land use permit will be issued with annual rental as a percentage of market value when the project is to proceed."[217]

227. Between July 1998 and December 2000 conversations took place as between Notre and the Ministry of Natural Resources ("MNR"). An appraisal was conducted by the MNR using an appraiser that was experienced in similar Crown land evaluations for the MNR. Negotiations with the MNR also resulted in the MNR stating they did not want to issue leases for the properties as had previously been done with Dofasco. MNR wanted to sell the properties to Notre with Notre assuming all responsibilities and liabilities for the property which included a number of tailings dams. Notre subsequently evaluated the conditions of the

[216] McGuinty Statement, para 100, and Exhibit "I" thereto, Memorial Doc Tab 75

[217] McGuinty Statement, para 101, and Exhibit "I" thereto, Memorial Doc Tab 75

dams, and any other relevant factors that would arise from ownership as opposed to leasing, and agreed to a sale of the tailings leases in question to Notre.[218]

228. On December 1, 2000, the Ministry of Natural Resources wrote to Notre and indicated that the appraised price of the land, consisting of 971.37 hectares, to be transferred to Notre was $96,000.00 plus GST.[219]

229. After 1532382 Ontario Inc. obtained title to the Adams Mine waste disposal site, Mr. McGuinty met with Rick Tapley and Ivan Cragg at the MNR to purchase the tailings area. On December 9, 2002, the MNR confirmed that no new survey would be required and requested confirmation whether there was an intention to harvest the trees.[220]

230. On December 16, 2002, Mr. McGuinty replied to the MNR letter of December 9, 2002, and confirmed that "... the reason for finalizing the purchase is to comply with the mandate of the Ministry of Environment to acquire the property as required by our Certificate of Approval should we develop the waste management operations of the site." Mr. McGuinty further confirmed that the ownership of the property had changed and that the owner was now 1532382 Ontario Inc., which was prepared to close the transaction in early 2003.[221]

231. As a result of the MNR review of the area to be sold to Notre, the determination was made that the Ministry wanted the standing timber on the property to be

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[218] McGuinty Statement, para 102, and Exhibit "I" thereto, Memorial Doc Tab 75

[219] McGuinty Statement, para 103, and Exhibit 12 to his 2004 affidavit, Exhibit "I" to McGuinty Statement, Memorial Doc Tab 75

[220] McGuinty Statement, para 103, and Exhibit 14 to his 2004 affidavit, Exhibit "I" to McGuinty Statement, Memorial Doc Tab 75

[221] McGuinty Statement, para 105, and Exhibit 15 to his 2004 affidavit, Exhibit "I" to Swanick Statement, Memorial Doc Tab 75

excluded from the purchase price in order that such timber would be available for harvesting by the Temiskaming Forestry Alliance Inc. or others. As a result of the initial appraisal of the value of the lands being $96,000.00, which included the timber, the MNR indicted that they would take the timber out of the transaction and this would reduce the market value of the land to $48,000.00 plus GST. [222]

232. By letter dated February 17, 2003, the MNR made a binding offer to sell the tailings area in question to 1532382 Ontario Inc., the letter stating in part:

> As outlined to you, our original offer to you for the lands was $96,000 plus GST and this offer included the trees situated on the lands. As discussed yesterday, due to concerns recently raised as a result of our supplemental environmental review we are prepared to (and you stated your agreement to) finalize the sale to you at this time for the appraised market value of the land at only ($48,000.00) plus GST for a total price of $51,360.00. **Please note that this offer will be valid for a period of three months from the date of this letter.** *(Emphasis in the original).* [223]

233. Additional discussions took place between Mr. McGuinty and Ivan Craig of the MNR on or around the 11th day of April, 2003, regarding closing of the transaction, specifically who would register the necessary documentation at the lands office in the District Land Titles Registry Office located in Haileybury, Ontario and Ivan Craig of the MNR assured Gordon McGuinty that the registration would be done immediately by the MNR.[224]

234. In acceptance of the offer of the MNR, 1532382 Ontario Inc. by way of letter dated April 10, 2003, well within the three month period, forwarded the requested

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[222] McGuinty Statement, para 106, and Exhibit "I" thereto, Memorial Doc Tab 75

[223] McGuinty Statement, para 107 and Exhibit 16 to his 2004 affidavit which is Exhibit "I" to his Swanick Statement

[224] McGuinty Statement, para 108

documentation and certified cheque for the lands to the Ministry of Natural Resources.[225]

235. Subsequent to the tendering by 1532382 Ontario Inc. of the necessary funds and all of the necessary documentation to complete the transaction, Mr. McGuinty spoke to the District Manager, Craig Greenwood, who confirmed that the MNR had received all of the necessary documentation and cheque to close the purchase of the tailings area. In the discussions with Mr. Greenwood, it became obvious to McGuinty that recent statements in the press on May 6, 2003, by Mr. David Ramsay and a group opposed to the development of the Adams Mine site as a sanitary landfill site was impacting on the government moving ahead and transferring the lands to 1532382 Ontario Inc. as had been agreed.[226]

236. At no time prior to this date had the MNR ever indicated to McGuinty that the sale would be delayed for any reason. Importantly, the MNR had never indicated to me that "further consultation" with First Nations was required. Further to discussions with Mr. Greenwood on May 6, 2003, Mr. McGuinty wrote a letter to him. He addressed four issues which had appeared in the local press that he felt were impacting the MNR and/or the government.[227]

237. On May 28, 2003 Wishart Law Firm wrote to Mr. Greenwood of the MNR and indicated that although "...the purchase has become the subject of public debate – generated by false statements by a group interested in frustrating our client's project, we must and do insist on the crown transferring the borderlands into our client's name in satisfaction of our binding Agreement of Purchase and Sale. We

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[225] McGuinty Statement, para 109 and Exhibit 17 to his 2004 affidavit , Exhibit "I" to McGuinty Statement, Memorial Doc Tab 75; Cortellucci Statement, para 37; Swanick Statement, para 39

[226] McGuinty Statement, para 110 and Exhibit 18 to his 2004 affidavit ,Exhibit "I" to McGuinty Statement

[227] McGuinty Statement, para 111 and Exhibit 19 to his 2004 affidavit, Exhibit "I" to his McGuinty Statement, Memorial Doc Tab 75

require written evidence of the land having been transferred into our client within ten days (by June 7, 2003), failing which we are under instructions to commence an action for specific performance and request our client's legal costs on a substantial indemnity scale."[228]

238. By July 28, 2003, the Enterprise had not received transfer of the property into its name from the MNR and therefore 1532382's lawyers were instructed to proceed with a Notice pursuant to the *Proceedings Against the Crown Act*. A Notice of Claim was served on the District Manager for the Ministry of Natural Resources, Craig Greenwood, as well as the Attorney General for Ontario.[229]

239. On September 4, 2003 after a number of earlier discussions and communications with Ministry of Natural Resources officials, a letter was provided from Mr. Greenwood stating that "MNR has decided to respond to issues raised by First Nation and Aboriginal communities by further consultation with First Nations about the disposition of Crown land associated with the Adams Mine landfill project". The letter further stated, "we are proposing to conduct consultations with First Nations focused specifically on the disposition of Crown land in relationship to treaty or aboriginal rights issues, especially ones not previously identified."[230]

240. On September 17, 2003 Mr. McGuinty met with Mr. Chris Mahar of the Native Affairs Secretariat, Government of Ontario to make the Native Affairs Secretariat aware of all of the consultations which had taken place regarding the disposition of the property formerly leased to Dofasco by the MNR to 1532382 Ontario Inc.

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[228] McGuinty Statement, para 112 and Exhibit 20 to his 2004 affidavit, Exhibit "I" to his McGuinty Statement, Memorial Doc Tab 75

[229] McGuinty Statement, para 113 and Exhibit 21 to his 2004 affidavit, Exhibit "I" to his McGuinty statement, Memorial Doc Tab 75

[230] McGuinty Statement, para 114

Mr. McGuinty also did this to show the degree of reliance which had been placed on this transfer by 1532382 Ontario Inc.[231]

241. On October 9, 2003, 1532382 Ontario Inc. commenced action against the Government of Ontario for specific performance or damages. A motion for summary judgment was brought on March 3, 2004 and it was originally returnable on March 11, 2004. The motion was adjourned until April 22, 2004.[232]

IV.B A FEDERAL ENVIRONMENTAL ASSESSMENT – A LEGAL "RED HERRING"

242. The Respondent has raised the issue of a federal environmental assessment. It is important to recognize that this is a legal "red herring": there is simply no evidence that any such assessment was imminent or available at the time that Provincial law was passed to give rise to this litigation. Indeed, it is more likely that one of the rationale for this legislation was the lack of any recourse to federal assessment as a means of delaying or denying operation of the site as a landfill.

243. Legal redress through federal environmental assessment first became possible in the late 1980s, when, contrary to the position now put forth by Respondent, of federal government, federal courts ruled that the Environmental Assessment and Review Process Guidelines Order ("EARPGO") was not merely a "guideline", but a binding "order". Thereafter, many parties petitioned the federal government and went to court to court to require federal assessment of projects; however, there is no evidence of any such EARPGO challenge in relation to the Adams Mine

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[231] McGuinty Statement, para 115

[232] McGuinty Statement, para 116, Statement of Claim, Exhibit "X" to McGuinty Statement, Memorial Doc Tab 75

project, either after these initial federal court rulings or after the Supreme Court of Canada upheld the legal status of EARPGO in 1992.[233]

244. In early 1995, the federal government replaced EARPGO with the *Canadian Environmental Assessment Act* ("CEAA")[234]. The principal focus of the CEAA was and is ensuring federal assessment of projects that involve federal proponency, federal money, or federal land, as demonstrated in the plain language of section 5 of the CEAA. None of these circumstances apply to the Adams Mine project. The CEAA also contains a fourth means of triggering federal assessment – namely, where there is a federal approval required for a project. This has been the subject of much municipal litigation and the CEAA was passed, in part, to reduce uncertainty about when and if such approval would trigger federal assessment, as demonstrated in the three specific regulations to reduce this kind of uncertainty. As made clear regulations promulgated immediately upon the CEAA's implementation. As a result of these regulations, a federal approval must be designated on the "Law List Regulations" to even raise the possibility of federal Environmental Assessment. But even with such regulations, some uncertainty remained. For example, the CEAA Law List Regulations name Section 35 of the *Fisheries Act* as one of the legislative provisions whose application could trigger federal environmental assessment. However, in a 1992 decision, the Supreme Court concluded that such provisions involved the exercise of discretion; not a duty-based "decision making responsibility".[235]

245. Turning to the record, appears to have been efforts to trigger the CEAA such as: see the September 1st, and September 20th, 2001 letters from the Timiskaming First Nation, and the September 21st, 2001 petition from a group of petitioners

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[233] Memorial Doc Tab 4, *Friends of the Oldman River Society v Canada* (Minister of Transport) [1992] 1 S.C.R. 3 (SCC)

[234] Memorial Doc Tab 5, *Canadian Environmental Assessment Act*

[235] ibid

that included this First Nation[236]. However, these efforts identified only one "List List" trigger: the Section 35 *Fisheries Act* trigger considered by the Supreme Court of Canada. REDACTED

and rejected it.[237]

246. REDACTED

It is important to recognize that these means would be exceptional, as they are not part of the normal route to applying the CEAA. Again, as set out above, the governing triggers are: federal proponency, money, lands (or approval); the provisions upon which the Respondent is attempting to rely for its "First Nations" assessment theory are designed to address the unusual situation of there being no normal CEAA trigger, necessarily in cases where some exceptional potential for "significant" effects on matters of federal interest exists, such as interprovincial effects or effects on First Nation lands. REDACTED

247. The only potentially significant pathway of federal concern identified by officials, scrambling to comply with the political whims of the new Government, was the alleged potential for contaminated groundwater discharge into a local river. However, the record also shows that the Certificate of Approval issued for this landfill contained many conditions to prevent just such a discharge: see conditions

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236 REDACTED

237 REDACTED

238 REDACTED

22, 26, 27, 31, 38, 39, 55. Further, in 1997 and 1998, the Federal Government, through Environment Canada, was already directly involved in setting these conditions, including the overall provincial approval requirement to ensure that any such discharge met Provincial Water Quality Objectives for the Protection of Aquatic Life at the point of discharge into fisheries waters.[239] REDACTED

248. The record also shows that the Quebec government concluded that this project was not likely to cause interprovincial effects from Ontario. For example, in October 2000, the Quebec Ministry of the Environment stated that in a press released issued on October 2nd, 2000 that Quebec had no concerns with respect to the Adams Mine waste disposal site project as long as the conditions in the Certificate of Approval were met.[241] REDACTED

249. The final point supporting the position that any use of Sections.46 or 48 of the CEAA to trigger a federal environmental assessment review would have been exceptional, and therefore, extremely unlikely, is the domestic record for just such federal reviews. Federal Government has <u>never</u> used any of these exceptional

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R REDACTED

[240] Memorial Doc Tab 11, Adams Mine Landfill Environmental Assessment Public Hearing, February 4, 1998, bates no 021641.

R REDACTED

REDACTED

REDACT

F REDACTED

triggers to impose any federal environmental assessment or review of any project anywhere in Canada. Thus, based on law and the record, there was obviously no real route to triggering the CEAA – either through the normal triggers or through any of the exceptional triggers.

250. In addition, the record also shows that third parties were very aware of these CEAA limits at the time. For example, in late 2001, Gartner Lee Limited provided an opinion to the Town of Kirkland Lake, dated September 10th, 2001, stating that there were no grounds for a federal environmental review.[243] Also, in late 2000, the City of Toronto addressed this matter while of its contractual negotiations with the RCN were underway. The research that had been undertaken by the City of Toronto indicated that there would be no federal Environmental Assessment.[244] As this belief was also shared by the belief of the RCN participants,[245] a clause was included in the draft contract between RCN and the City of Toronto that the contract could be cancelled if a federal Environmental Assessment was actually established. This clause was included in the contract to force the Government of Canada to confirm, for greater certainty, that there would be no federal environmental assessment in respect of the Adams Mine site, after the Provincial assessment was completed.

251. The fact that no federal environmental assessment could have occurred in this case is also underscored by the passage of the AMLA itself. After the project was revived in 2002/2003, no federal review occurred at the time REDACTED

[243] Memorial Doc Tab 41, Gartner Lee Limited, Overview of the Environmental Security of the Adams Mine Landfill, September 2001, Claimant's Production Tab 20, bates no 00398

[244] Bacopoulos Statement, para 82

[245] McGuinty Statement, para 79

REDACTED

246

REDACTED

IV.C. THE ENTERPRISE APPLIES FOR THE PERMIT TO TAKE WATER, JULY, 2003.

252. As part of the Adams Mine waste disposal site Certificate of Approval,[247] the Enterprise had to dewater the South Pit. This was due to the fact that because of the hydrology of the site, water was accumulating in the South Pit each year.

253. Notre made application for the Permit to Take Water on August 17th, 2000.[248] The Permit was granted on October 18th, 2000, approving the dewatering of the South Pit at a rate of 18,000 litres per minute. The permit was to commence on November 1st, 2000 and last until October 30th, 2001.[249]

254. The certificate had been obtained in the context of the negotiations for the contract between the City of Toronto and Rail Cycle North. The South Pit was not dewatered at the time due to the cancellation of the contract negotiations.

255. On January 4th, 2002,[250] Notre applied for an Amendment to Temporary Permit to Take Water. The amendment proposed that Notre be able to dewater during a 12 month period at any point during the next five year period.

256. On January 15th, 2002,[251] the Ministry of the Environment responded to the application as follows:

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[247] Memorial Doc Tab 22, Adams Mine Landfill Site-South Pit, Provincial Certificate of Approval, No. A612007, Claimant's Productions Tab 9, Bates no 00125-00150, Condition 28(c)

[248] Memorial Doc Tab 26, Gartner Lee Limited letter to Director, Section 53 OWRA, Ministry of the Environment, Application for Approval of Discharge of Water from the Adams Mine, August 17th, 2000, Claimant's production Tab 528, bates no 8556

[249] Memorial Doc Tab 38, Ministry of the Environment letter to Notre, April 6th, 2001, Claimant's production Tab 338, bates no 03077

[250] Memorial Doc Tab 43, Notre letter to Mr. Dave Hollinger, Water Resources Unit, Ministry of the Environment, January 4th, 2002, Claimant's production Tab 21, bates no 000460

> The PTTW application request a Permit to cover 12 months of water taking over a five year period and indicates that no date has yet been set for the commencement of dewatering activities. Further, we understand that no water was taken under PTTW 00-P-6040, which expired on October 30, 2001. Permits to Take Water are not issued to reserve water taking regardless of the use, and cannot be maintained in the absence of a definite need for the taking.
>
> As you appear not to have an immediate or definite need for this Permit, I suggest that we retain your application on file and ask that you notify us within six months of the anticipated commencement of water taking. Providing that the details of this taking and the uses being made of the local environment remained unchanged from your original submission, which PTTW 00-P-6040 was based on, this new PTTW application will be able to be reviewed and approval issued promptly.

257. Notre responded to the letter from the Ministry of the Environment on January 16th, 2002,[252] stating in part:

> We therefore concur with your intent to keep our application on file, and agree that Notre will notify the Ministry within six months of any projected dewatering activities. We further understand that upon notification, the Ministry will review the application on file, and subject to the uses and any impacts on the local environment being unchanged from the basis for which the original permit was issued, the Ministry will issue the approval promptly.

258. The Enterprise applied for a replacement Permit To Take Water on July 7th, 2003.[253] The application included a description of the Landfill Construction and

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[251] Memorial Doc Tab 44, Ministry of the Environment letter to Notre, January 15th, 2002, Claimant's Production Tab 23, bates no 00465

[252] Memorial Doc Tab 45, Notre letter to Ministry of Environment, January 16th, 2002, Claimant's production no 25, bates no 00469

[253] Memorial Doc Tab 60, Adams Mine Railhaul to Dave Hollinger, Ministry of the Environment, July 7th, 2003, Claimant's production no 108, bates no 00966

development timeframe which included the plan to begin dewatering in October 2003 and have waste disposal capacity available by 2005:[254]

> The projected time frame for dewatering and construction of the infrastructure at the Adams Mine is 18 to 24 months. It is therefore critical that dewatering begin in the fall of 2003 to ensure that there is sufficient time to develop Ontario capacity before 2005. The following is a preliminary time frame for the development work:
>
> | | | |
> |---|---|---|
> | a). | August, Sept, October 2003 | -site work, monitoring installation,
- mobilization of dewatering equipment
-detailed engineering design for landfill
- detailed site infrastructure design |
> | b). | Oct, 2003 – Aug 2004 | - dewatering operations, monitoring
- pit scaling during dewatering
- site development, infrastructure |
> | c). | Aug 2004-Dec 2004 | - installation of shaft and adit to facilitate a leachate collection system in landfill |
> | d). | Jan 2005-April 2005 | - commissioning system, disposal capacity available spring of 2005 |
>
> The above timeframe illustrates that the key to being operational by 2005 is the dewatering of the South Pit Landfill. Although it is possible to prepare all of the other infrastructure including the intermodal yard, leachate treatment, etc., the pit must be dewatered to allow the installation of the shaft and adit from the bottom of the pit prior to the end of 2004.

259. The application included a report from Gartner Lee Limited dated July 4th, 2002 provided the background to the dewatering process and confirmed that the conditions of the site remained the same, thus meeting the requirement set forth in the Ministry's January 15th, 2002 letter to enable the application to be "reviewed and renewed promptly." Gartner Lee's letter concluded:

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[254] Swanick Statement, para 41

> Dewatering of the South Pit was previously approved under PTTW-00-P-6040, but did not proceed at that time. This reapplication demonstrates that the details of this taking, and the uses being made of the local environment, remain unchanged from the original submission. Specifically, dewatering will be accomplished within the 12 month period, at the same rate (0.3 m3/day) as previously approved. The discharge point will be the same (at the head of the tailings area), and the previous intensive monitoring program remains appropriate. The contingency plan, which entailed temporary pumping to the Central Pit remains viable. Certificate of Approval No 3250-4NMPDN for the discharge of the water is still in force, and its corresponding monitoring plan will be followed as previously planned. There is time to install the necessary instrumentation prior to commencement of dewatering at the end of October.

260. Over the summer months, Gartner Lee provided all documentation required by the Ministry of the Environment in carrying out its review. On September 11th, 2003, the Adams Mine Community Liaison Committee held a meeting in which the Permit to Take Water from the Ministry of the Environment was discussed. A presentation was made by the Steven Usher of Gartner Lee Limited, explaining the background and the all aspects of the dewatering plan.[255] This meeting was attended by two representatives of the Ministry of the Environment.

261. The Ministry issued a draft Permit to Take Water on November 14th, 2003[256] and posted it on the Environmental Registry for comment.

IV.D. EFFORTS BY THE ENTERPRISE TO DEVELOP THE SITE

262. In order to begin construction, the Enterprise published throughout Northern Ontario a Request for Expressions of Interest to undertake the dewatering, de-scaling of the pit walls and construction of the waste disposal site. The

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[255] Memorial Doc Tab 62, Adams Mine Community Liaison Committee, September 11th, 2003, Claimant's Production Tab 618, bates no 9071; Memorial Doc Tab 62, Gartner Lee Limited Presentation, September 11th, 2003, Claimant's Production Tab 619, bates no 9078

[256] Investor's Statement of Claim Tab 31

advertisement, that was published in northern newspapers in September 2003[257], stated as follows:

> ADAMS MINE LANDFILL EXPRESSION OF INTEREST
>
> In preparation for the development and construction of the Adams Mine Landfill, Adams Mine Rail Haul will be accepting letters of interest from contractors and suppliers interested in submitting quotations and/or proposals for the following:
>
> - Heavy Equipment Rentals
> - General Contractors
> - Mechanical Contractors
> - Mining Contractors
> - Electrical Contractors
> - Steel Fabrication Services
> - Road Building Contractors
> - Civil & Mining Engineering Services
> - Aggregate Crushing
>
> The construction on the site will begin in late 2003 and continue over an eighteen-month period until the landfill is ready to accept waste in 2005.
>
> The $50 Million Site Development will include:
>
> - Detailed Design & Engineering
> - Shaft and Adit Construction
> - Water Treatment Plant
> - Landfill Gas Utilization Plant
> - New Building Construction & Renovation
> - On-site & Access Road Construction
> - Upgrades to Hydro Electric Plant
> - Intermodal Rail Facility
>
> A Bidders List will be prepared in anticipation of tender calls and quotations for services. Adams Mine Rail Haul will give preference to companies who provide competitive prices and are located in Temiskaming Cochrane District or who will crate employment in the district.[258]

[257] Memorial Doc Tab 66, Letter from Gordon McGuinty, Managing Director, Adams Mine Railhaul, to Mr. Denis Alarie, president, Leo Alarie & Sons Limited, Claimant's Tab 782, bates no 19593

[258] Ibid.

263. Responses were required by October 15th, 2003, and a number of responses were received, summarized and included in a bidders' list that was prepared for the construction to begin.[R] One of those responding was Leo Alaire and Sons Limited, General Contractors, located in Timmins, Ontario in the vicinity of the Adams Mine site. It was intended by the Enterprise that this contracting company would be the general contractor on the dewatering and de-scaling of the South Pit. This company had been involved in the costing of the Adams Mine waste disposal site since at least 1997, providing the cost breakdown that was used as part of the pricing used in the response to the City of Toronto request for expressions of interest and the tender that was eventually issued.[260]

264. By the closing date, it was apparent that construction would not begin in the Fall and so it became the intention to begin dewatering the site in the Spring of 2004, as soon as the Permit to Take Water was issued.

265. In the expectation that the pit would be dewatered in Spring, 2004, the Enterprise and Canadian National Railways which continued as a partner at the time prepared a Market Review and Forecast. REDACTED

REDACTED

R REDACTED

260 REDACTED

REDACTED

266. By the spring of 2004, the Enterprise was prepared to dewater the site, begin construction and also begin marketing the waste disposal capacity. Gordon McGuinty's plan was to wait until shovels were in the ground beginning the dewatering and scaling process, and then offer the waste disposal capacity throughout the province on a first-come, first-served basis. It was his view that the waste disposal site could be operated profitably at prices above that which had been offered to the City of Toronto earlier, as higher prices would be charged depending on the amount of waste being disposed of from a particular source.

267. Unfortunately, instead of beginning dewatering and construction, the Enterprise was caught by complete surprise when the *Adams Mine Lake Act* was tabled in the Ontario legislature in early April, 2004. The author and prime mover of this legislation was Mr. David Ramsay, the new Minister of Natural Resources who had staked his position in government on shutting down the Adams Mine waste disposal site once and for all by cancelling its Certificate of Approval and the other certificates that it had acquired.

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261 REDACTED

PART FIVE:
NEW GOVERNMENT'S SINGLE-MINDED DETERMINATION TO KILL THE PROJECT

REDACTED

V.A. RAMSAY HAD STAKED HIS POLITICAL CAREER ON SHUTTING DOWN THE PROJECT

269. The fact that shutting down the Adams Mine site was its first priority is not at all surprising, given that David Ramsay ("Ramsay") was the newly appointed Minister of Natural Resources. Ramsay was the most virulent opponent of the Adams Mine waste disposal site, and the local MPP for that area for more than one decade.

270. Throughout, Ramsay's opposition has been dogmatic without regard to the technical analyses that had been completed at the site. For instance, Ramsay attended the Environmental Assessment Board hearing stating under oath that he would not accept the evidence of any expert witness relating to the site.

> Q. So basically you question the judgment of the professionals who

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R REDACTED

performed that report?

A. Yes, absolutely.

Q That's what you're saying?

A. Absolutely, yes.

Q So Mr. Bowen, the author right here who is the lead witness for the Coalition; you question his judgment, for example, right? And you also question the judgment of the Ministry of Environment which has reviewed this and you don't accept their judgment either. And you don't accept the judgement of Gartner Lee, who is the peer review consultants who acted for the TFA. Is that what you're telling us?

A. But what I'm saying and I mentioned in my brief that throughout history, science and technology have designed schemes, have built projects that have failed and that's the nature of human nature and that is going to continue to happen and I – you know, you can't stop that.

What I am saying is that of a project of this scale, of this dimension, of this lifetime, I think it would be a grave error to go ahead with this because the risk potential is enormous. ...

A. But yet, you're not willing to defer to the judgment of the experts, is what you have told us here?

A. That's correct.

Q. Would you defer to the judgment of this Board?

A. As a law abiding citizen, I have to respect the judgment of this Board.

Q. Okay. So you'll respect the decision of this Board.

A. Yes.[263]

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[263] Memorial Doc Tab 16, EAB Hearing Transcript, April 23, 1998, Claimant's Productions Tab 764, Bates No. 15493-4

271. Ramsay stated under oath that he would respect the decision of the Environmental Assessment Board. Even though he gave this sworn testimony as a member of the Ontario Legislature, as soon as the decision was released he began a campaign to undermine it.

272. During the contract negotiations and as part of this campaign, Ramsay appeared before the Durham, York and Peel Councils opposing the project. His opposition was so strident that at one point, on October 17th, 2000, he introduced a private member's bill into the Ontario Legislature to rename the Adams Mine "Toronto Garbage Lake". The Hansard Report states:

> *Mr David Ramsay (Timiskaming-Cochrane):* I just felt it would be appropriate to rename the Adams mine site since it hasn't been an iron ore mine now for 11 years. As you know, presently it is a lake, and as of October 11 Toronto decided to send its garbage up there, therefore making it a garbage lake.
>
> I would seek unanimous consent to have second and third reading today.
>
> *The Speaker*: Is there unanimous consent? No.[264]

273. After the City of Toronto had reached the decision not to sign the contract with the Adams Mine waste disposal site, Ramsay stated that opponents could not rest until the Certificate of Approval was taken away. At a rally on October 27th, 2000, Ramsay is reported by the Temiskaming Speaker to have stated "[w]e have to make sure we bury that certificate of approval for that site." In an article published on November 3rd, 2000, a report of Ramsay's statement at a meeting in the Kirkland Lake Gazette, states:

> Temiskaming-Cochrane MPP David Ramsay reminded the crowd that the fight isn't over and that the landfill proponent still has a certificate of approval to use the Adams Mine as a garbage dump,

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[264] Memorial Doc Tab 34, Hansard, Ontario Legislature, October 17, 2000, http://www.ontla.on.ca/web/house-proceedings/hansard_search.jsp?locale=en&go (last visited, February 28th, 2010

> "We will never rest until that certificate of approval is gone and that is our next goal - to destroy that certificate of approval forever" the MPP said."

274. In the 2003 Provincial election campaign, David Ramsay staked his political reputation on shutting down the Adams Mine waste disposal site. He ran his entire campaign on the platform of shutting down the project. The Northern Daily News reported on October 3rd that at his victory celebration the night before, Ramsay stated "[t]he number one issue is the Adams Mine." "My pledge is that we will put it to bed once and for all. We've got to kill that project."[266] Soon thereafter he stated to a Temiskaming Speaker reporter that he had two issues, the first being jobs and the second being the Adams Mine. The press report states:

> "Mr. Ramsay notes that in this provincial election he received the largest plurality of any of the previous five elections which he has won. "While I certainly attribute some of that to the Liberal popularity across the province," Mr. Ramsay says he notes "how particularly heavy it was in my favour in south Temiskaming. I take that as an affirmation" of the opposition to the Adams Mine project. He states that he will continue to work to end the project.[267]

275. He confirmed this on a CBC Radio program on November 18th, 2003 on the 1:00 p.m. news, stating:

> CBC: Ontario's Natural Resources Minister has put his job on the line over the future of the Adams Mine project. David Ramsey says he would quit cabinet if it ever starts to receive Toronto's garbage. Premier McGuinty says there will have to be a full environmental assessment and a local referendum before he'll allow the abandoned open pit mine near Kirkland to be turned into a garbage dump but that's not good enough for Ramsey.

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[266] Memorial Doc Tab 64, Northern Daily News Article, October 3, 2003, Respondent's production, document 009614

[267] Memorial Doc Tab 67, Respondent's production, document 009938.

> DAVID RAMSAY (Natural Resources Minister): Actually, I made that commitment during the campaign quite frankly, that if I had been named ... if I had been appointed to the cabinet, if that were to happen, if we were elected ... and this dump were to proceed that I couldn't remain.[268]

276. The Toronto Star reported on November 19th, 2003 in an article entitled "Ramsay vows to quit if mine plan proceeds":

> The Minister of Natural Resources is threatening to quit cabinet if the Liberals allow a landfill site at the Adams Mine in Kirkland Lake.
>
> David Ramsay's vow came in the wake of revelations the owners of the abandoned open-pit mine have applied for a provincial permit to drain water so they can begin construction of a dump.
>
> "If the Adams Mine ever became a working dump, I certainly couldn't stay in government," Ramsay, a long-term opponent of the scheme, said yesterday.
>
> "I gave my word to the people that elected me that I would continue to oppose this project and that has not changed."[269]

277. REDACTED

278. As can be seen, Ramsay had a record for years of opposing the Adams Mine waste disposal site. However, there are almost no documents that have been

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[268] Memorial Doc Tab 69, Email from MNR, November 18, 2003, Respondent's production, page 009620

[269] Memorial Doc Tab 70, The Toronto Star Article, November 19, 2003, Page A8, Respondent's production no 009627

produced during the course of this proceeding relating to Ramsay, during the critical period from the date of his election on October 2nd, 2003 and the tabling of the *Adams Mine Lake Act* on April 5th, 2004. REDACTED

279. The production of documents with respect to Ramsay is completely inadequate. There can be no question that he was deeply involved in the shutting down of the Adams Mine waste disposal site. Ramsay had staked his political career on shutting it down. However, the Respondent would have the Tribunal believe that Ramsay had nothing to do with the decision except as a passive bystander. It is as if Ramsay had been completely silent and had not taken any part in this issue at all, except as just another member of Cabinet. This is simply not credible and it is beyond belief that there is not a large volume of documents that would reflect his direct involvement in attempting to terminate the project.

280. The Tribunal should draw an adverse inference from the fact that there has been a failure to produce the documents revealing the degree to which David Ramsay was involved in the efforts to shut down the Adams Mine waste disposal site.

V.B. THE NEW GOVERNMENT WAS UNDER SIGNIFICANT POLITICAL PRESSURE TO SHUT DOWN THE ADAMS MINE PROJECT;

281. It is clear that the new Liberal government was under significant political pressure from Ramsay to shut the project down and take away the Certificate of Approval.

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271 REDACTED

282. In addition to this, in the months prior to the election of October 2nd, 2003, the Adams Mine waste disposal site increasingly became a political issue as the Enterprise revived the project and it became apparent that the Adams Mine waste disposal site would be developed. As indicated above, by April, 2003, the fact of the transfer of the property had become an issue in the press. On July 7th, 2003, the Enterprise filed the application to obtain the Permit to Take Water and in September, Dr. Howard's report had been the subject of press releases by the Temiskaming federation of Agriculture. In mid-September, the Enterprise had advertised through Northern Ontario requesting expressions of interest for construction companies to undertake the dewatering, de-scaling of the pit walls and construction of waste disposal site. Also, on September 11th, 2003, the Community Liaison Committee meeting was held by the Enterprise to advise of the plans to develop the waste disposal site.

283. As a result, the Adams Mine waste disposal site was in the press throughout the election campaign. The Temiskaming Speaker on October 1st, 2003, commented that the "Campaign trail [was] littered by Adams Mine platforms."[272]

284. The Adams Mine waste disposal site remained an issue after the election. On October 9th, 2003, the Enterprise commenced action against the Government of Ontario. On November 14th, 2003, the draft Permit to Take Water was listed on the Environmental Registry for comment.[273] As a result, the Adams Mine waste disposal site was in the press throughout the period after the election.[274] The fact that the Enterprise was proceeding to develop the site and each step that it took to do so received significant publicity during the election campaign and the period thereafter.

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[272] Memorial Doc Tab 63, Temiskaming Speaker, October 1, 2003, Respondent's productions, 009611

[273] Investor's Statement of Claim Tab 31

[274] For example, Memorial Doc Tab 72, Temiskaming Speaker, November 26, 2003, re: "Adams Mine Lawsuit: Developer says Government Reneged" , Respondent's Production bates no 009650

285. The Liberal government included in its election platform on September 30th, 2003, (two days before the election) the following statements:

a. REDACTED

b. Dalton McGuinty stated that "there will be a further environmental review of the Adams Mine proposal."[276]

286. REDACTED

Every waste disposal site has some environmental impact but the question is whether that impact is within the margins provided by Ontario law. For instance, "reasonable use" guidelines have been prepared for Ontario water resources and the question is whether the impact of any particular waste disposal site fits within the margins established by the guidelines.

287. REDACTED

It is notable that the City of Toronto during the 1999 Request for Proposal did not require a "willing host."

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275 REDACTED

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288. With respect to the suggestion of a "further environmental review," it is clear that this option was investigated and quickly rejected as a possible course of action. As set out in the introduction, REDACTED

Ramsay is quoted

REDACTED

REDACTED

289. REDACTED

290. REDACTED

[277] Memorial Doc Tab 71. REDACTED

278

291. REDACTED

must have been due in part to the fact that the Adams Mine waste disposal facility was subject to a full environmental review by the Government of Ontario before the hearing took place before the Environmental Assessment Board.

292. At the same time, the new Liberal Government immediately began investigating REDACTED

2003.

293. RED ACT the only alternative available to shut down the Adams Mine waste disposal site was through the tabling of legislation in the form of the *Adams Mine Lake Act*.

R REDACTED

V.C. THE GOVERNMENT COULD NOT STOP THE DEVELOPMENT OTHER THAN BY CONDUCT TANTAMOUNT TO EXPROPRIATION

294. The new Liberal Government made a political decision to shut down the Adams Mine waste disposal site and it was not driven by technical concerns regarding the safety of the project. It demonstrates that Liberal commitments to shut the project down, the Enterprise's resolve in moving to construction and the public backlash and pressure on this new government to act. REDACTED

REDACTED

295. The new government also knew that it had no mechanism to stop the issuance of the Permit to Take Water and that it would be issued by early April 2004. The fact that the Permit to Take Water would be issued was one of the reasons why the Adams Mine Lake Act was rushed and became one of the main priorities of the Respondent's first few months in power. REDACTED

REDACTED

REDACTED

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280 REDACTED

REDACTED

296. As a result, the conclusion of RED ACT civil servants concluded REDACTED that the Adams Mine waste disposal site was

REDACTED

297. REDACTED

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281 REDACTED

282 REDACTED

283 REDACTED

298. The new government had to act quickly because, REDACTED REDACTED the Director's decision with respect to the Permit to Take Water should have been released by April 5th, 2004, the very day that the proposed *Adams Mine Lake Act* was tabled in the Ontario legislature:

REDACTED

299. REDACTED

300. The Enterprise's right to a PPTW was specifically removed by the AMLA, Section 3(4).4:

> Any permit that was issued under section 34 of the *Ontario Water Resources Act* before this Act comes into force in response to the application submitted by 1532382 Ontario Inc. for New Permit #4121-5SCN9N (00-P-6040) and described on the environmental registry established under the *Environmental Bill of Rights, 1993* as EBR Registry Number XA03E0019.

301. REDACTED

R REDACTED

R REDACTED

REDACTED

REDACTED

303. REDACTED

REDACTED

304. REDACTED

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286 REDACTED

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289 REDACTED

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306. REDACTED

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290 RE DA REDACTED

291 RE DA REDACTED

307. REDACTED was Sections 4 and 5 of the Adams Mine Lake Act which state:

> 4.(1) An agreement entered into by Notre Development Corporation or 1532382 Ontario Inc. after December 31, 1988 and before this Act comes into force is of no force or effect if the agreement is with the Crown in right of Ontario and is in respect of,
>
> (a) the purchase or sale of the lands described in Schedule 1 or any part of those lands;
>
> (b) the granting of letters patent for the lands described in Schedule 1 or any part of those lands; or
>
> (c) any interest in, or any occupation or use of, the lands described in Schedule 1 or any part of those lands.

308. The *Adams Mine Lake Act* also extinguished the cause of action that the Enterprise had in respect of the land in Section 5:

> **5.** (1) Any cause of action that exists on the day this Act comes into force against the Crown in right of Ontario, a member or former member of the Executive Council, or an employee or agent or former employee or agent of the Crown in right of Ontario in respect of the Adams Mine site or the lands described in Schedule 1 is hereby extinguished.

309. This provision was included not to shut down the Adams Mine site but specifically to prevent the Enterprise's access to the courts. It was directed solely to deny justice to the Enterprise.

310. As a result, the new government had no way to stop the Adams Mine waste disposal site. The Enterprise was entitled to its Permit To Take Water and also to the transfer of the lands. This is the reason why the Adams Mine Lake Act was drafted in the manner it was, to cancel the Certificate of Approval, to cancel the agreement of purchase and sale regarding the lands and to bar the cause of action arising from the failure to transfer the lands.

V.D THE ADAMS MINE LAKE ACT CONSTITUTES CONDUCT TANTAMOUNT TO EXPROPRIATION

311. The *Adams Mine Lake Act* was introduced into the Ontario legislature on April 5th, 2004, without any warning of any kind or nature. It was a statute that was drafted in secret so much so that the Respondent claims that those from the Ministry of Environment dealing with the Permit to Take Water and the Ministry of Natural Resources dealing with the transfer of the borderlands, had absolutely no idea that the legislation was being drafted.

312. The bill was introduced less than six months after the new government was elected. The bill also was introduced without any notice or consultation, even without the required advance notification required pursuant to the *Ontario Environmental Bill of Rights* S.O. 1993, c.28 s.15(1).

313. Bill 49 was enacted on June 17, 2004 Bill 49. It received Royal Assent on the very same day and was immediately proclaimed in force. The effect of Bill 49 was far reaching, cancelling all of the environmental approvals that had been obtained or were pending, Section 3(1) thereof stating:

> The following are revoked:
>
> 1. The approval dated August 13, 1998 that was issued to Notre Development Corporation under the Environmental Assessment Act, including any amendments made after that date.
>
> 2. Certificate of Approval No. A 612007, dated April 23, 1999, issued to Notre Development Corporation under Part V of the Environmental Protection Act, including any amendments made after that date.
>
> 3. Approval No. 3250-4NMPDN, dated July 9, 2001, issued to Notre Development Corporation under section 53 of the Ontario Water Resources Act, including any amendments made after that date.
>
> 4. Any permit that was issued under section 34 of the Ontario Water Resources Act before this Act comes into force in response

to the application submitted by 1532382 Ontario Inc. for New Permit #4121-5SCN9N (00-P-6040) and described on the environmental registry established under the Environmental Bill of Rights, 1993 as EBR Registry Number XA03E0019. 2004,

No permit for specified application

(2) No permit shall be issued under section 34 of the Ontario Water Resources Act after this Act comes into force in response to the application referred to in paragraph 4 of subsection (1).

314. Bill 49 went on also to extinguish the agreement to purchase the Borderlands in Article 4 thereof:

4. (1) An agreement entered into by Notre Development Corporation or 1532382 Ontario Inc. after December 31, 1988 and before this Act comes into force is of no force or effect if the agreement is with the Crown in right of Ontario and is in respect of,

(a) the purchase or sale of the lands described in Schedule 1 or any part of those lands;

(b) the granting of letters patent for the lands described in Schedule 1 or any part of those lands; or

(c) any interest in, or any occupation or use of, the lands described in Schedule 1 or any part of those lands.

SCHEDULE 1

The lands described as:

Location CL 411-A, Boston Township, District of Timiskaming, containing 387.48 hectares;

Location CLM 104, McElroy Township, District of Timiskaming, containing 238.72 hectares;

Parts 1, 2, 3, 4, 5, 6, Plan 54R-2947, Boston Township, District of Timiskaming, containing 14.58 hectares;

Parts 1, 2, 3, Plan 54R-1694, Boston Township, District of Timiskaming, containing 18.76 hectares;

Location CL 936, Plan TER-670, Boston Township, District of Timiskaming, containing 33.46 hectares;

Parts 1, 2, Plan 54R-1807, Boston Township, District of Timiskaming, containing 37.10 hectares;

Parts 1, 2, 3, Plan 54R-1693, Boston Township, District of Timiskaming, containing 12.12 hectares;

Parts 1, 2, Plan 54R-2322, Boston Township, District of Timiskaming, containing 18.69 hectares;

Part 1, Plan 54R-1540, Boston Township, District of Timiskaming, containing 14.48 hectares;

Location CL 1584, Part 1, Plan 54R-1511, Boston Township, District of Timiskaming, containing 16.06 hectares;

Location CL 1221, CL 1222, Parts 1, 2, Plan 54R-1291, McElroy Township, District of Timiskaming, containing 34.02 hectares;

Location CL 1220, Parts 1, 2, 3, 4, 5, 6, 7, Plan 54R-1292, McElroy Township, District of Timiskaming, containing 102.62 hectares;

Parts 1, 2, 3, Plan 54R-1619, McElroy Township, District of Timiskaming, containing 43.28 hectares.

315. Bill 49 also terminated without any compensation the cause of action including, without limitation, the relief sought in the Statement of Claim that was issued on October 9, 2003 in the circumstances described above:

Extinguishment of causes of action

5. (1) Any cause of action that exists on the day this Act comes into force against the Crown in right of Ontario, a member or former member of the Executive Council, or an employee or agent or former employee or agent of the Crown in right of Ontario in respect of the Adams Mine site or the lands described in Schedule 1 is hereby extinguished.

(2) No cause of action arises after this Act comes into force against a person referred to in subsection (1) in respect of the Adams Mine site or the lands described in Schedule 1 if the cause of action would arise, in whole or in part, from anything that occurred after December 31, 1988 and before this Act comes into force.

(3) Subsections (1) and (2) do not apply to a cause of action that arises from any aboriginal or treaty right that is recognized and affirmed by section 35 of the Constitution Act, 1982.

Enactment of this Act

(4) Subject to section 6, no cause of action arises against a person referred to in subsection (1), and no compensation is payable by a person referred to in subsection (1), as a direct or indirect result of the enactment of any provision of this Act.

Application

(5) Without limiting the generality of subsections (1), (2) and (4), those subsections apply to a cause of action in respect of any agreement, or in respect of any representation or other conduct, that is related to the Adams Mine site or the lands described in Schedule 1.

Same

(6) Without limiting the generality of subsections (1), (2) and (4), those subsections apply to a cause of action arising in contract, tort, restitution, trust, fiduciary obligations or otherwise.

Legal proceedings

(7) No action or other proceeding shall be commenced or continued by any person against a person referred to in subsection (1) in respect of a cause of action that is extinguished by subsection (1) or a cause of action that, pursuant to subsection (2) or (4), does not arise.

(8) Without limiting the generality of subsection (7), that subsection applies to an action or other proceeding claiming any remedy or relief, including specific performance, injunction, declaratory relief, any form of compensation or damages, or any other remedy or relief.

(9) Subsection (7) applies to actions and other proceedings commenced before or after this Act comes into force.

316. Bill 49 also included a provision declaring that the statute itself does not constitute an expropriation, even though it constitutes an expropriation or conduct tantamount to expropriation at international law:

5(10) Nothing in this Act and nothing done or not done in accordance with this Act constitutes an expropriation or injurious affection for the purposes of the Expropriations Act or otherwise at law.

317. The amount of compensation under the Statute was unduly limited and in no manner compensated the Enterprise for its losses or compensated the Enterprise for its rights purchased from Notre, stating, inter alia:

Compensation

6. (1) The Crown in right of Ontario shall pay compensation to 1532382 Ontario Inc. and Notre Development Corporation in accordance with this section.

Amount

(2) Subject to subsection (3), the amount of the compensation payable to a corporation under subsection (1) shall be determined in accordance with the following formula:

A + B + C

where,

A = the reasonable expenses incurred and paid by the corporation after December 31, 1988 and before April 5, 2004 for the purpose of using the Adams Mine site to dispose of waste,

B = the lesser of,

i. the reasonable expenses incurred by the corporation after December 31, 1988 and before April 5, 2004, but not paid before April 5, 2004, for the purpose of using the Adams Mine site to dispose of waste, and

ii. $1,500,000, in the case of Notre Development Corporation, or $500,000, in the case of 1532382 Ontario Inc.,

C = the reasonable expenses incurred by the corporation on or after April 5, 2004 for the purpose of using the Adams Mine site to dispose of waste, if the expenses are for legal fees and disbursements in respect of legal services provided on or after April 5, 2004 and before this Act comes into force.

Same

(3) The amount of the compensation payable to 1532382 Ontario Inc. under subsection (1) shall be the amount determined for that corporation under subsection (2), less the fair market value, on the day this Act comes into force, of the Adams Mine site.

318. Bill 49 also specifically states that no payment will be made for any loss of goodwill or possible loss of profits:

Loss of goodwill or possible profits

(8) For greater certainty, no compensation is payable under subsection (1) for any loss of goodwill or possible profits.

319. The intent of Bill 49 was clear and beyond dispute: to eliminate the Investment as a solid waste landfill site and to destroy its value for the Enterprise, while preserving its title in order to ensure that any ongoing liabilities in respect of the land would be borne by the Enterprise rather than the Province of Ontario. The statute specifically:

a. Revoked each of the approvals that the Enterprise held to operate the Adams Mine Site as a waste disposal site;

b. Terminated the application process for the issuance of the Permit to Take Water and cancelled the draft Permit to Take Water that had been issued in November 2003;

c. Cancelled the binding agreement to sell the Borderlands to the Enterprise;

d. Extinguished the Enterprise's causes of action that had been made in its Superior Court of Justice proceeding that had been commenced on October 9, 2003;

e. Extinguished all other causes of action that the Enterprise either had or would have in the future;

f. Restricted damages and/or compensation, limiting the costs that could be recovered and specifically limited recovery for future expenses and liabilities on the site and for any recovery on the basis of goodwill or loss of profits;

320. The AMLA includes a provision that no waste be thrown into lakes and that lakes cannot be developed into waste disposal sites. The Respondent seems to suggest that this provision should be interpreted in a manner showing that the *Adams Mine Lake Act* was a statute of general application and not directed at the Adams Mine per se. The section provides:

> 7(1). Section 27 of the *Environmental Protection Act,* as amended by the Statutes of Ontario, 1994, Chapter 5, section 1, is amended by adding the following subsections:
>
> Lakes
> 3(1). Despite subsection (1), no person shall use, operate, establish, alter, enlarge or extend a waste disposal site where waste is deposited in a lake.
>
> "lake" includes,
>
> (a) a body of surface water that,
> (i). results from human activities, and
> (ii). Directly influences or is directly influenced by ground water, ...

REDACTED

REDACTED

323. It is clear that this provision was included simply to block the Adams Mine waste disposal site in the future. REDACTED

REDACTED

V.E. NO CONSULATION BEFORE THE STATUTE PASSED

324. There was no consultation with the Enterprise before the *Adams Mine Lake Act was* tabled, REDACTED

REDACTED

325. Between October 2003 and April 2004, representatives of the Enterprise were only able to arrange two meetings with government officials. REDACTED

326. Remarkably, the Ministry of the Environment's own experts who had worked on the Adams Mine site extensively were cut out of the process, REDACTED

29:R

REDACTED

327. The Respondent claims that there was consultation between the Enterprise and the Government of Ontario. There was no consultation with 1532382 Ontario Inc. or Gordon McGuinty before the legislation was tabled in the Ontario Legislature.[294] The draft legislation came as a complete surprise. Any consultation that was alleged occurred after the statute had been tabled and had been presented as a fait accompli.

328. Once the AMLA was passed, Gordon Acton and Gordon McGuinty negotiated on behalf of Notre and not for 1532382 Ontario Inc.. The Government of Ontario required this negotiation to be confidential. [295] Apart from the fact of the negotiation, the Enterprise had no knowledge of the substance or the result of the negotiation.

PART SIX:
FAIR MARKET VALUE OF THE ADAMS MINE SITE

329. Douglas Main of Deloitte Financial Advisory Services LLP (Deloitte) has provided an opinion of the value of the Adams Mine waste disposal site on April 5th, 2004, the day the *Adams Mine Lake Act* was tabled in the Ontario Legislature.

330. Mr. Main is a Certified Environmental Consultant (CEC) and has more than 18 years experience in the waste industry. As a director at Deloitte FAS, he heads up a team of specialists dedicated to the waste industry. He has been recognized as an expert in the waste management and environmental industry, having provided

REDACTED

[294] McGuinty Statement, paras 132-133

[295] McGuinty Statement, paras 132-133

expert advice on matters involving more than 800 waste companies, operations and assets covering a number of regions throughout the United States as well as internationally (e.g., China, Canada, United Kingdom, Brazil, Puerto Rico, etc.).

331. His experience ranges from the analysis and valuation of single and/or privately held small businesses to multiple vertically integrated billion dollar waste companies / portfolios and their related assets both tangible (e.g. MSW, C&D, hazardous, ash, industrial and waste-by-rail landfills, nuclear repositories, transfer stations, MRFs, W-T-E Facilities, etc.) and intangible assets (e.g. airspace, contracts, customer relations, non-compete agreements, in place work force, etc.). Mr Main was designated as the valuation expert by the Department of Energy concerning the proposed high-energy nuclear repository site in Hanford, Washington. Also, he was a consultant for the proposed Yucca Mountain Nuclear Repository located in Nye County, Nevada, the site selected to become the United States' only operational high-level nuclear repository. He has also provided advisory and valuation services relating to the purchase of one of the European Union's (EU) major integrated waste companies (e.g. major collection and hauling operations, 30+ landfills, 40+ transfer stations, and a number of material recovery facilities.) Mr. Main valued and co-lead sell side due diligence for the largest private waste management company on Puerto Rico, a company that includes significant waste haul and collection operations, a number of transfer stations / recovery facilities and landfills.[296]

332. Mr. Main's specialized environmental and waste industry consultation and valuation experience includes merger and acquisitions, consulting/due diligence, tangible and intangible/business valuations, privatization analysis, highest and best use studies among many others. He has valued a large number of waste disposal sites and transfer stations.[297] Mr. Main has been a speaker on various waste industry related topics at such events as the IAAO's Conference held in

[296] C.V. of Douglas Main, Addendum I to Deloitte Expert Report

[297] Deloitte Expert Report, Douglas Main, Statement of Qualifications

Toronto, Canada, various Environmental Industry Associations Waste Expositions, various Chartwell Waste Industry Summits and related opportunities.

333. Deloitte values the Adams Mine waste disposal site on the April 4, 2004 date with a value of $105,000,000.00. The value of the Adams Mine waste disposal site after the expropriation was valued at $80,750.00 and so the damages are valued at $104,920,000.00.[298]

334. The *AMLA* permanently shut down the Adams Mine waste disposal site and it represents an expropriation or conduct tantamount to expropriation according to international law. NAFTA Article 1110(2) provides that fair market value must be paid:

> Compensation 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. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value. (Emphasis Added)

335. Deloitte identifies that there are three different approaches to value, being the asset or cost approach, the market or sales comparison approach, and the income approach. The sales comparison approach is defined in the following terms:

> "This approach is based upon the principle of substitution that the value of a property tends to be set by the price at which comparable properties have recently sold or for which they can be acquired. This approach requires a detailed comparison between the subject and the sale of other landfills. One of the main requisites, therefore, is that sufficient transactions of comparable properties be available to provide an accurate indicator of value and that accurate information regarding price, terms, property

[298] Deloitte Expert Report, at 120-123

> description, and use be obtained through interview and observation.[299]

336. Fair market value is determined according to what the highest and best use is of the property in question. The highest and best use of the Adams Mine prior to expropriation was as a waste disposal facility. In determining the fair market value before the expropriation, Deloitte weighted the approaches to value in the following manner:

> While all three approaches to value were considered, the Sales Comparison approach was determined to be the most relevant and appropriate for the fair market valuation of the assets under NAFTA guidelines. Several relevant comparable sales were identified and analyzed, including two landfill sales in the same Southern Ontario market as the Subject. The smaller Green Lane landfill recently sold for $220,000,000, with additional incentives and future payouts in the form of royalties. Ridge Landfill near Chatham sold for $110,000,000; it was also smaller and permit restricted (permits only about half the waste intake that Adams Mine is permitted to accept). These sales are also located in Ontario and serve as Southern Ontario market support in our FMV estimate of Adams Mine prior to expropriation (April 4th, 2004). We developed an Income Approach based on market and industry data that was well supported as outlined in our Market Analysis and Income Approach sections. We also developed a Cost Approach value that included land value with an assumed highest and best use as a permitted landfill, the cost value of the existing improvements at Adams Mine (e.g., rail spurs, roadway, utilities, and various building and site improvements), as well as indirect cost, entrepreneurial profit, and a reconciliation adjustment to recognize the contribution of the valuable landfill permit. However, this approach was only given secondary consideration in the final value and reconciliation of the fair market value of Adams Mine prior to expropriation because of the adjustments to account for the value of the existing landfill permit."[300]

337. The Adams Mine waste disposal site was a mega landfill, providing annually 1.341 million tonnes of waste disposal supply in a market exporting more than 3.4

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[299] Deloitte Expert Report, page 15

[300] Deloitte Expert Report, page 16

million tonnes annually of excess waste. The demand for waste disposal capacity at the Adams Mine site was much greater than the annual intake of waste permitted by the Adams Mine Certificate of Approval.

6.A DELOITTE'S WASTE MARKET ANALYSIS

338. Waste is a commodity that flows to the nearest and/or most cost effective disposal facility. In a competitive, non-franchised market setting, a waste hauler (all else equal) will try to minimize his or her costs of delivering and disposing of the waste collected. A waste hauler is not discriminatory to the look of a landfill, the concern is the nearest possible option at the lowest possible price.[301]

339. Deloitte notes that in 2004, Ontario residents produced 13.8 million tonnes of waste. Of this total, 4 million tonnes was diverted from landfills through recycling efforts. This placed Ontario's overall diversion rate at approximately 30 percent, which was in line with national estimates.[302] The diversion rate was slightly higher in the Greater Toronto Area which, through the use of a City-specific program emphasizing recycling, increased the diversion rate to 40 percent.[303]

340. There are two kinds of waste that must be dealt with. The first is Municipal Solid Waste (MSW) and the second is Industrial, Commercial and Institutional waste which also includes construction and demolition debris (IC&I).

341. In the GTA submarket, the largest network of customers that the Adams Mine, with its province-wide permit could access, was the privately owned transfer stations dealing with IC&I waste[304]. This source controlled approximately

[301] Deloitte Expert Report, page 22

[302] Deloitte Expert Report, page 39

[303] By 2008, the diversion rate had increased to 44 percent but, the actual diversion rate that the City of Toronto established in 2004 was 100 percent by 2010. Obviously, this is an impossible objective.

[304] Deloitte Expert Report, page 40

2,300,000 tonnes annually. This would have been the primary market for the Adams Mine waste disposal site with the municipal customers being secondary. With respect to the municipalities in the Greater Toronto Area, the City of Toronto controlled 875,000 tonnes, and the municipalities of York, Durham and Peel controlled approximately 406,000 tonnes annually. The overall demand characteristics for the Greater Toronto area was 5,679,735 tonnes of waste generated, less 2,271,894 tonnes diverted (a 40% recycling rate), leaving a landfill disposal demand of 3,407,841 tonnes.[305]

342. As of 2004, the Greater Toronto Area had no significant domestic waste disposal capacity to meet the demand that existed. The Keele Valley Landfill closed in 2002 and there were no facilities that were able to supply any significant airspace to the Greater Toronto Area.[306] Each day there were six pounds of waste being generated by each citizen and company (total MSW and IC&I) and "the municipalities had absolutely no airspace supply to meet the demand."[307] There also did not appear to be further capacity coming on-line as of 2004. This was primarily attributable to the increased difficulty in obtaining the necessary approvals for new landfill sites. This is evidenced by the fact that in the previous fifteen years, the Province had issued Certificates of Approval to only three landfills that had an overall capacity of 10 million tonnes or more.[308] As a result, in 2004, there was no current or future capacity proposed to help reduce the 3.4 million tonnes of excess demand or supply shortfall. Deloitte states:

> The above graph offers a clear picture of the growing excess demand ... that exists in the subject's primary market (e.g., Southern Ontario) and how Adams Mine's fair share ... represents 1/3 or less of the excess demand resulting from the dramatic annual shortage of available permitted landfill airspace in Ontario.

[305] Deloitte Expert Report, page 40

[306] Deloitte Expert Report, page 40

[307] Deloitte Expert Report, page 40

[308] The Adams Mine was the largest with 23 million tonnes, with the other two being Ridge Landfill of 13 million tonnes and Taro Landfill of 10 million tonnes. Deloitte Expert Report, page 41

> The data reveal an immediate demand for more than 3.4 million tonnes of disposal space as of the date of expropriation, which is manifested in economic viability indicating the highest and best use of the subject is a permitted large volume rail and truck haul landfill. Prior to 2001, the Southern Ontario market was already experiencing a dramatic shortage of disposal space, resulting in more than one million tonnes of excess demand.... In 2002, after the closure of the Keele Valley landfill (the largest single permitted landfill in Southern Ontario/GTA), the excess demand jumped by 46% as a result of there being no additional permitted airspace within the GTA market. Also, without an expansion in place or alternative options in the Greater Ottawa market, the excess demand in Southern Ontario would jump once again by approximately 10% following the anticipated closure of the WM Carp Road Landfill outside of Ottawa ... Despite the large annual permitted capacity at the Adams Mine Landfill, a huge amount of excess demand still exists in the Southern Ontario market.[309]

343. Deloitte undertook an analysis of the Ottawa market as well, indicating that the landfill disposal demand in 2004 was 794,525 tonnes.[310] As of 2004, there were four landfills that had an annual waste capacity of 1,034,750 tonnes.[311] Deloitte comments:

> Without modifications to the other landfills' Certificates of Approval to increase their capacities, Ottawa would have faced an increase in its excess demand in each of the closure years (for three of the four landfills in the Ottawa region), 2007, 2009, and 2011 ... The role that the Adams Mine Landfill would have played was to offer Ottawa one more option for disposal and another direction for the waste commodity to flow. If the Waste Management landfill, Trail Road, and Lafleche could have accepted less than their maximum annual permitted amount, their remaining lives would have been greatly extended.[312]

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[309] Deloitte Expert Report, page 43

[310] Deloitte Expert Report, page 44, 1,015,035 (waste generated) – 304,510 (waste diverted 30% recycling rate) = 710,525 (Landfill Disposal Rate).

[311] Deloitte Expert Report, page 45

[312] Deloitte Expert Report, page 45

344. From the standpoint of 2004, Deloitte projected a growing excess demand in the Ottawa market beginning in 2008 through 2014 when it would amount to almost 600,000 tonnes per year.

345. Deloitte next dealt with the absence of any waste disposal capacity in Ontario for waste from the Province of Ontario. The City of Toronto and other municipalities in the Greater Toronto Area relied on the exportation of waste, despite the increased cost, inefficient transportation requirements and uncertainty as to future border closure or controls. [313]

346. The exportation of waste to the United States was an inferior alternative to the Adams Mine. The City of Toronto itself rated the Adams Mine site a superior option as part of the TIRM process, as set out above. The shipping of waste to Michigan also was an inferior option due to the congestion of surface streets and highways between the GTA and Michigan. Deloitte estimates that 430 trips per day or 111,906 trips per year were required between Toronto and Michigan. This compares to the Adams Mine option that would have involved one train trip per day, and 240 trips per year to cover the entire 1,341,600 tonnes of waste disposal capacity.[314] Deloitte notes that the distance travelled by trucks to Michigan and back would cover a trip around the world at the equator more than four and one-half times (110,000 miles or 177,028 km).[315] Deloitte indicates that Toronto's trucking of waste to Michigan is unique in North America:

> "In addition to these examples, the distance between the GTA and the Michigan landfills added to the impracticality and inefficiency of the export option. The vast majority of truck-hauled waste disposed of in North America travels only approximately 50 miles (80 km) or less from its source to a landfill. Not only does a shorter trip keep transportation costs down, but it also allows for two trips

[313] Deloitte Expert Report, page 49

[314] Deloitte Expert Report, page 52

[315] Deloitte Expert Report, page 50

> to the site per day to be made by the truck driver, which greatly increases the efficiency of collection companies, transfer facilities, and the landfill itself. However, when a truck driver must travel 275 miles (442 km) (one way) from the waste source to the disposal facility (as is the case with the GTA exporting waste to Michigan), only one trip can be made per day and the cost associated with such a trip becomes unrealistic, given less expensive options. This is the reason that direct truck hauling of waste to facilities within approximately 50 miles (80 km) is customary in North America. In fact, this 275 mile (442 km) (one-way) trip scenario does not occur anywhere else in North America at this scale, with the exception of New York City. The difference is that the landfill that receives much of New York's waste by long-haul truck, Seneca Meadows, has realized the inefficiencies associated with such transportation, and plans to begin accepting waste by rail. When that occurs, the GTA-Michigan long haul by truck scenario will be the only such situation on the continent. This further shows how unusual, inefficient, and undesirable such an arrangement is. Exporting waste to Michigan was an inefficient and expensive short-term solution to a long-term problem.[316]

347. Deloitte noted further that the municipalities in the GTA were reminded of the inefficiency of exporting its waste when the Canada/USA border was closed on May 20th and May 21st, 2003 due to an outbreak of Mad Cow disease in Alberta. In the months that followed a number of studies were undertaken that concluded that Ontario had no significant available disposal capacity at private sector landfills or municipal landfills that was not already spoken for by current customers or the facility owners. "In other words, not a single landfill in Ontario was able to accommodate any additional waste."[317] The option of re-opening the Keele Valley landfill was discussed. Deloitte also notes the political opposition to Ontario's waste being trucked to Michigan. "Michigan's citizens, representatives, and governor, among others have consistently voiced their strong opposition and displeasure with being the dumping grounds for Canadian waste on many occasions."[318]

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[316] Deloitte Expert Report, pages 58-59

[317] Deloitte Expert Report, page 59

[318] Deloitte Expert Report, page 58

6.B. ADAMS MINE'S FAIR SHARE OF THE WASTE

348. Deloitte calculates what Adams Mine fair share of the excess demand of 3,400,000 tonnes in the Greater Toronto Area. The privately controlled IC&I waste would be the primary customer for the Adams Mine waste disposal facility. IC&I waste constituted 2,300,000 tonnes or 64% of the 3,400,000 tonnes exported from the GTA to Michigan. By contrast, Toronto represented only 875,000 tonnes or 25% and York, Durham and Peel controlled only 406,000 tonnes.[319]

349. Deloitte identified that the only two waste disposal sites that could take private IC&I waste were the Adams Mine and the LaFleche landfill in Eastern Ontario. Lafleche had to reserve 90,000 tonnes of its 200,000 annual limit to waste generated in the Ottawa region. Deloitte calculates Adams Mine fair share on the following basis:[320]

Total GTA Waste	3,400,000 tonnes
La flèche Landfill	(110,000) tonnes
Remainder	3,290,000 tonnes
Adams Mine waste disposal	(1,341,600) tonnes
Exports required	1,948,400 tonnes

350. The amount available to the Adams Mine waste disposal site would still exceed its annual limit, even if the City of Toronto's waste was excluded from the calculation.

Total GTA Waste	3,400,000 tonnes
City of Toronto Waste	(875,000) tonnes
La Fleche landfill	(110,000) tonnes

[319] Deloitte Expert Report, page 54

[320] Deloitte Expert Report, page 57

Remainder	2,415,000 tonnes
Adams Mine waste disposal	(1,341,600) tonnes
Exports required	1,073,400 tonnes[321]

351. Deloitte further concludes that the Adams Mine waste disposal site would have been competitive on a price for tonne basis and thus, would have attracted its fair share of the excess waste that existed.[322] The total price to export to Michigan, including transportation to the transfer station and handling there, shipment to Michigan and the cost of disposal at the gate (or "tipping fee") is estimated at $75.00 per tonne. In contrast, Deloitte concludes that the total price for disposal at the Adams Mine waste disposal site would be $66.00 per tonne, or $9.00 less.[323]

352. It is Deloitte's conclusion that based on its waste market and pricing analysis that the Adams Mine waste disposal site would have been fully utilized.

6.C COMPARABLE SALES USED BY DELOITTE

353. Deloitte bases its sales comparison on the sale of four waste disposal sites including Green Lane and Ridge Landfills in Ontario, and Seneca Meadows in New York and Empire (Alliance) in Pennsylvania.

354. The fact that there are comparable sales of two landfill sites within the market area of the Adams Mine waste disposal site provides a high degree of confidence regarding the value of the site itself. The sale of the sites reflects Ontario's desperate need for permitted airspace and the total lack of supply to

[321] Deloitte Expert Report, page 57

[322] Deloitte Expert Report, page 68

[323] Deloitte Expert Report, pages 67-68

meet the demand created primarily by market conditions in the GTA is the driving force of the value behind these landfills.[324]

6.C.I. GREEN LANE

355. The details on the sale of the privately owned Green Lane to the City of Toronto are as follows:

Sale Date:	April 2, 2007
Purchase Price:	$220,310,000 CAD
Approx Remaining Capacity:	13,800,000 tonnes
Gate Tipping Fee	$62.00
Maximum Annual Permitted Capacity	1,100,000 tonnes
Estimated Remaining Life	12.6 years

356. The City of Toronto committed to the State of Michigan by letter in 2006, that it would terminate shipping MSW waste to Michigan by 2010 when the contract with Republic expires. As a result, the City of Toronto purchased the Green Lane landfill and modified the Certificate of Approval in order for the site to receive some of the waste from the GTA. In April 2004, Green Lane had an annual permitted capacity of 230,000 tonnes, which later was increased to 1,100,000 tonnes after the purchase by the City of Toronto was made and without an environmental assessment. However, even with the Green Lane facility in operation, there will still have to be substantial exports to the United States and the remaining excess privately-controlled IC&I waste will likely continue to be exported to Michigan.[325]

357. Similar to the Adams Mine, Green Lane is distant from the GTA and well outside of the primary market that it will serve. The Green Lane landfill is located

[324] Deloitte Expert Report, page 78

[325] Deloitte Expert Report, page84

more than 100 miles from Toronto and because of its reliance on trucking the transportation costs is actually estimated to be slightly higher than that of the Adams mine. This is due to the fact that Green Lane does not have the same access to rail haul. The two facilities are able to accept a comparable quantity of waste and, in fact, the Adams Mine and Green Lane are the only waste disposal facilities that held permits entitling them to accept in excess of 1 million tonnes of waste on an annual basis.[326]

6.C.II. RIDGE LANDFILL

358. The details relating to the sale of Ridge Landfill are as follows:

Sale Date:	January 4th, 2005
Purchase Price:	$110,000,000 CAD
Approx Remaining Capacity:	12,536,000 tonnes
Gate Tipping Fee	$54.00
Maximum Annual Permitted Capacity	680,000 tonnes
Estimated Remaining Life	18 years

359. The Ridge Landfill was purchased by BFI from Waste Management of Canada in 2005 for $110,000,000. The sale was ordered by the Canadian Competition Tribunal requiring Waste Management to divest itself of the landfill. At the time of purchase in 2005, the Ridge Landfill had the highest permitted annual tonnage in Ontario and that way only about one-half the intake permitted to the Adams Mine waste disposal site.[327]

360. The Ridge Landfill primarily serves the MSW needs of the local municipalities of Chatham-Kent and does not accept any MSW from the other Southern Ontario areas or the GTA. The landfill does receive a significant amount

[326] Deloitte Expert Report, page 84

[327] Deloitte Expert Report, pages 88 and 90

of IC&I from the GTA. It has been operating at or near its permitted maximum annual intake/capacity for several years.[328]

361. Similar to the Green Lane landfill, the sale of the Ridge Landfill is a very important and relevant transaction and would tend to show the lower limit of value for the much larger Adams Mine landfill (i.e., 1.341 million annual intake vs. 680,000 tonnes annual intake, rail serve for Adams Mine but not for Ridge, 23.5 million tonnes permitted airspace at Adams Mine vs. only 12.5 million tonnes of permitted airspace at Ridge, etc.). While Green Lane, after the City of Toronto permit modification, has 1.1 million tonnes of annual capacity and sold for about $220 million, the Ridge landfill has about half the capacity and sold for about half the price. The correlation between the annual capacity and value of the Green Lane and Ridge Landfill appears to be obvious. When compared to the Adams Mine waste disposal site, which had an annual capacity of 1.l341 million tonnes, these two Ontario landfill sales are a good valuation bracketed for the fair market value of the Adams Mine Landfill, prior to expropriation.[329]

6.C.III. SENECA MEADOWS LANDFILL, WATERLOO, N.Y.

362. The details of the sale of the Seneca Meadows Landfill are as follows:

Sale Date:	October 9th, 2003
Purchase Price:	$227,800,000 USD ($302,974,000 CAD)
Approx Remaining Capacity:	12,516,075 tonnes
Gate Tipping Fee	$50.00
Maximum Annual Permitted Capacity	Approximately 1,887,600 tonnes
Estimated Remaining Life	6.6 years

[328] Deloitte Expert Report, page 90

[329] Deloitte Expert Report, page 90

363. The Seneca Meadows landfill was purchased by IESI Corp., an American division of BFI Canada. Similar to the Adams Mine in Ontario, Seneca Meadows is the largest permitted landfill in New York State based on annual intake and similar in distance to a waste market that experiences annual excess waste demand of millions of tonnes. The scarcity of local airspace facing the Greater Toronto Area is very similar to the situation that New York has also faced after the closure of the Fresh Kills landfill on Staten Island in 2001.[330]

364. Seneca Meadows is located 300 miles (483 kms) north of New York City which is comparable in distance of the Adams Mine from the GTA. Adams Mine had an advantage over Seneca Meadows by having access via its two on-site rail spurs and two main rail lines direct rail access to the two major population/waste generation areas of Southern Ontario (GTA and Ottawa). Both the Adams Mine and Seneca Meadows provide capacity to undersupplied markets, and both are able to accept waste generated throughout the province/state.[331]

6.C.IV. EMPIRE SANITARY LANDFILL (ALLIANCE), LACKAWANNA COUNTY, PA

365. The details of the sale of the Empire Sanitary (Alliance) Landfill are as follows:

Sale Date:	December 12th, 1996
Purchase Price:	$131,943,182 USD ($179,442,728 CAD)
Approx Remaining Capacity:	7,723,379 Tonnes
Gate Tipping Fee	$62.00
Maximum Annual Permitted Capacity	Approximately 1,730,300
Estimated Remaining Life	4.6 years

[330] Deloitte Expert Report, page 96

[331] Deloitte Expert Report, page 96

366. The Empire landfill is located north of Philadelphia and west of New York City within 201 kms of the site. It was one of the largest landfills in Eastern Pennsylvania (1,730,000 metric tonnes per year) at the time of its sale. Empire does not accept waste-by-rail. The landfill is scheduled to close in 2021.

6.D. VALUATION OF THE ADAMS MINE WASTE DISPOSAL SITE

367. Deloitte compared each of the landfill's total system price (including both transportation cost and effective disposal fee) with that of the Adams Mine. The Adams Mine total system price was competitively positioned with respect to the comparable sales.[332]

368. Deloitte concluded that the two most comparable sales are the Green Lane and Ridge transactions and applied the greatest weight in estimating the weighted average price per tonne. Secondary sales, Seneca Meadows and Empire Sanitary landfills, are considered to be less relevant, although important indicators of typical market participant behaviour.[333]

369. On the basis of its comparison, Deloitte values the Adams Mine waste disposal site at $8.00 to $8.50 per tonne of remaining permitted disposal capacity. The calculation is then as follows:[334]

	LOW	HIGH
Concluded $ per Tonne Adjusted	$8.00	$8.50
Total Permitted Airspace – Tonnes	23,500,000	23,500,000
Indicated Value Range Assuming Facility is Operating	$188,000,000	$199,750,000
Deferment Factor	$184,941,364	$196,500,199
Cost to achieve stabilized intake	($11,166,400)	($11,166,400)
Estimated Cost of Improvements		

[332] Deloitte Expert Report, page 105

[333] Deloitte Expert Report, pages 106 - 108

[334] Deloitte Expert Report, page 109

to begin operations	($59,416,000)	($59,416,000)
Estimated Capital Investment for Rolling Stock/Equipment	($15,000,000)	($15,000,000)
Sales Approach Value:	$99,358,964	$110,917,799
Rounded	$99,000,000	$111,000,000
Concluded value	$105,000,000	$4.47/Tonne

370. An adjustment must be made for the fact that the infrastructure had not been built at the Adams Mine site. The estimate of $59,416,000.00 regarding the cost of improvements to begin operations is based on an analysis of the capital cost to complete the site, prepared by Dillon Consulting Limited. Dillon estimated all of the costs to build out the Adams Mine waste disposal site so that it could begin operations.

371. Secondary to the comparative sales approach to valuation, Deloitte also prepared a discounted cash flow analysis and cost-based valuation of the Adams Mine waste disposal site.[335] The discounted cash flow analysis was estimated at $100,000,000 and a cost-based valuation at $105,000,000.

372. On the basis of the valuation, Deloitte values the Adams Mine waste disposal site as of April 4, 2004 at $105,000,000.

373. In calculating damages, Deloitte did not calculate the value of the Adams Mine waste disposal site after the expropriation occurred. John Lang Appraisal Ltd. prepared a valuation of the site as of June 17th, 2004. The highest and best use of the land after the valuation was as vacant land. The valuation of the site was $80,750.00.[336]

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[335] Deloitte Expert Report, page 111.

[336] Deloitte Expert Report, page 122. The measure was introduced in the Legislature on April 5th, 2004 and passed into law on June 17th, 2004. The expropriation date can accordingly be established as June 17th, 2004, although for purposes of compliance with Article 1110(2), the fair market value of the investment can be established as of either April 5th, 2004 or June 17th, 2004. For purposes of valuation, the difference between these two dates is less than marginal.

374. As a result, the measure of damages is $104,920,000.00, which is the difference between the value of the site before expropriation ($105,000,000.00) and its value the day after expropriation ($80,750.00).[337]

[337] Deloitte Expert Report, page 123

PART 7
ADEQUATE REMUNERATION WAS NOT OFFERED OR PAID

375. NAFTA Article 1110(3) requires that compensation be paid "without delay and be fully realizable."

376. The Government of Ontario has failed to pay any compensation to 1532382 Ontario Inc. since passage of Bill 49 on June 17, 2004.

SECTION II:
THE NAFTA AND APPLICABLE INTERNATIONAL LAW

PART ONE: INTERPRETATION OF THE NAFTA

377. NAFTA Article 1131(1) provides that a tribunal shall decide issues in dispute accordance with the NAFTA and the applicable rules of international law. NAFTA Article 102(2) further provides that NAFTA provisions shall be interpreted and applied in accordance with the applicable rules of international law and in light of the objectives of the NAFTA set out in Article 102(1).

378. Construed within the context of Articles 102(2) and 1131(1), the term 'applicable rules of international law' includes the customary international law rules of treaty interpretation, as restated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[338] VCLT Article 31(1) memorializes the general rule of treaty interpretation, providing that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." This general rule of interpretation holds that the text of the treaty is presumed to be the authentic expression of the parties' intentions. The starting place for any exercise in interpretation must be the treaty text itself.[339]

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[338] Vienna Convention on the Law of Treaties, May 23 1969, 1155 U.N.T.S. 331. The Tribunal is not obliged to follow the determinations of past tribunals in making any of its findings, as NAFTA Article 1136(1) confirms: awards issued by a tribunal "shall have no binding force except between the disputing parties and in respect of the particular case." Nonetheless, both in respect of the findings of other NAFTA tribunals, and those of other international adjudicatory bodies, their findings may prove helpful to the Tribunal in executing its interpretative role. See e.g.: *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Final Award at para. 391 (14 July 2006). See also Ian Brownlie, *Principles of Public International Law,* 6th ed. (Oxford University Press 2003) at 602.

[339] *Suez, Sociedad General de Aguas de Barcelona S.A, and Interagua Servicios Integrales de Agua S.A and the Argentine Republic*, ICSID, ARB/03/17, Decision on Jurisdiction at para's 54-55 (16 May

379. The VCLT further provides that "any relevant rules of international law applicable in the relations between the parties" to a treaty "shall be taken into account, together with the context" of the treaty, including its text and preamble, in interpreting the obligations owed by a party to that treaty.[340] However, the ordinary meaning of the text will normally be conclusive of the obligations owed by a party to a treaty. Such meaning is also informed by the context in which the subject text appears and the object and purpose of the treaty in question. As indicated by the International Court of Justice:

> The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context that is an end of the matter.[341]

380. The object and purpose of a treaty provides interpreters with guidance as to how the ordinary meaning of its text should be interpreted in context.[342] NAFTA Article 102 explicitly sets forth its object and purpose:

> 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment and transparency, are to:

2006). See also: *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction at para. 54 (3 August 2006); *National Grid PLC v. Argentina*, UNCITRAL/BIT Arbitration, Jurisdictional Decision at para. 80 (20 June 2006); and *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (2002), WTO Doc. WT/DS213/AB/R and Corr.1 at para's 61-62.

340 Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23 1969, 1155 U.N.T.S. 331.

341 *Competence of the General Assembly For The Admission Of A State To The United Nations*, [1950] I.C.J. Rep. 4 at 8 (Advisory Opinion).

342 *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award at para. 52 (12 October 2005) [*Noble Ventures*].

> (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
> (b) promote conditions of fair competition in the free trade area;
> (c) increase substantially investment opportunities in the territories of the Parties;
> (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
> (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
> (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

381. NAFTA Tribunals have consistently applied the objectives found in Article 102(1) when interpreting substantive provisions of Chapter 11.[343] For example, the *Ethyl* Tribunal noted:

> Given the relevance under Article 31(1) of the Vienna Convention of NAFTA's "object and purpose," it is necessary to take note of NAFTA Article 102, particularly its (1)(c) and (e) [...] The Tribunal reads Article 102(2) as specifying that the "object and purpose" of NAFTA within the meaning of those terms in Article 31(1) of the Vienna Convention are to be found by the Tribunal in Article 102(1), and confirming the applicability of Articles 31 and 32 of the Vienna Convention.[344]

382. As the Tribunal in *Loewen* v. *USA* noted:

> A Tribunal established pursuant to NAFTA Chapter Eleven, Section B, must decide the issues in accordance with the provisions of [the] NAFTA and applicable rules of international law (Article 1131(1)). Further, as already noted, Article 102(2) provides that the Agreement must be interpreted in the light of its stated objectives and in accordance with applicable rules of international law. These objectives include the promotion of conditions of fair competition in the free trade area, the increase of investment

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343 See e.g.: *Pope & Talbot v. Canada*, NAFTA/UNCITRAL, Award on the Merits, Phase 2, (10 April 2001), at para. 115. See also: *United Parcel Service v. Canada*, Award, NAFTA/UNCITRAL (24 May 2007), at para's. 60-61,and *United States – In the Matter of Cross-Border Trucking Services*, Panel Report, USA-MEX-98-2008-01, 6 February 2001, at para. 222.

344 *Ethyl Corporation* v *Canada*, Award on Jurisdiction, 24 June 1988, 38 ILM 708, at para. 56.

> opportunities and the creation of effective procedures for the resolution of disputes (Article 102(1)(b), (c) and (e)).[345]

383. Interpretation of the objectives found in Article 102(1) can also be informed by text of the NAFTA preamble.[346] Preambular text provides the context within which the specific terms of such a provision should be interpreted. The preamble of the NAFTA provides further context, within which its provisions are to be interpreted pursuant to the applicable rules of treaty interpretation under the CVLT and customary international law. In particular, it provides that the Parties to the NAFTA have resolved to ensure that they provide: "a predictable commercial framework for business planning and investment... in a manner consistent with environmental protection and conservation."

384. Other tribunals have had recourse to preambular text, using it to ascertain the object and purpose of a treaty where explicit objectives were not included in its text.[347] For example, the *S.D. Myers* Tribunal has opined:

> The NAFTA provides internal guidance for its interpretation in a number of provisions. In the context of a Chapter 11 dispute, it is appropriate to begin with the Preamble to the treaty, which asserts that the Parties are resolved, inter alia, to ... ***Create an expanded and secure market for the goods and services produced in their countries... to ensure a predictable commercial framework for business planning and investment... and to do so in a manner***

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345 *Loewen Group Inc. & R. Loewen* v. *United States of America*, ICSID Case No. ARB/AF/98/3, Award on Jurisdiction, 9 January 2001, Authorities Tab 10, at para. 50.

346 VCLT Article 31(2) confirms that the preamble and annexes of a treaty are to be included in one's analysis of the context of treaty text.

347 See e.g.: *Siemens AG* v *Argentina*, Award, ICSID Case No ARB/02/8 (06 February 2007), at para. 81; *Continental Casualty Company. v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction at para. 80, (22 February 2006); *Azurix*, *supra* note 33 at para. 307; and *SGS Société Générale de Surveillance v. Republic of the Philippines*, ICSID Case N° ARB/02/6, Jurisdiction at para. 116 (29 January 2004). See also: *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc., WT/DS58/AB/R at para. 153 (Appellate Body Report).

> ***consistent with environmental protection and conservation*** [...][348]
> [emphasis in original]

385. And the Panel in *Cross-Border Trucking* has noted:

> The objectives develop the principal purpose of NAFTA, as proclaimed in its Preamble, wherein the Parties undertake, *inter alia*, to "create an expanded and secure market for the goods and services produced in their territories."[349]

386. In summary, the jurisprudence of NAFTA Chapter 11 is settled: provisions found in NAFTA Chapter 11 are to be construed in a broad and remedial manner consistent with the object and purpose of the NAFTA. As such, when interpreting the plain language of a provision, in context, if a tribunal is presented with two equally plausible meanings it should choose the one most in accord with the objectives of promoting investment and competitive opportunity as stated explicitly in Article 102(1) and the preambular language of the NAFTA.

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348 *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, NAFTA/UNCITRA, First Partial Award (13 November 2000) at para. 196 (13 November 2000).

349 *United States – In the Matter of Cross-Border Trucking Services*, Panel Report, USA-MEX-98-2008-01, 6 February 2001, at para. 219; citing: *In the Matter of Tariffs Applied by Canada to Certain United States Origin Agricultural Products*, CDA 95-2008-01, Final Panel at para. 122 (2 December 1996) [*Tariffs*].

PART TWO: THE LAW
JURISDICTIONAL BASIS FOR THE CLAIM

387. The Tribunal's jurisdiction to hear a claim under NAFTA Chapter 11 is established under Articles 1101, 1117 and 1122. Article 1117 permits a national of the United States or Mexico, as investor, to bring a claim against Canada on behalf of an enterprise, which he owns or controls, for loss or damages suffered by the enterprise arising out of a breach of Section A of NAFTA Chapter 11. Article 1122 provides that the NAFTA Parties proactively consent to arbitration of claims brought by investors of another Party under Article 1117.

388. NAFTA Article 1101 establishes the scope of application for NAFTA Chapter 11. As indicated above, like all NAFTA provisions its terms must be construed in light of the object and purpose of the NAFTA, which is intended to promote opportunities for investment and ensure fair competition in the territories of the NAFTA Parties. Article 1101 provides, in relevant part:

> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
> (a) investors of another Party;
> (b) investments of investors of another Party in the territory of the Party;

389. For purposes of the instant case, Article 1101 thus provides that Chapter 11 obligations broadly apply when these two elements are present: (1) a Party has adopted or maintained a measure; and (2) the measure relates to the investment of an investor of another Party in its territory. "Measure" is defined in NAFTA Article 201 to include "any law, regulation, procedure, requirement or practice." The *Adams Mine Lake Act* is obviously a law. It is uncontested that, under applicable rules of customary international law and NAFTA Article 105, the Government of Ontario represents a constituent element of Canada, as Party to the treaty.

390. For the purposes of alleging a breach of Section A of NAFTA Chapter 11, a measure ***relates to*** an investor, investment enterprise or other investment whenever it directly affects the investor or investments in a detrimental manner. The lack of any direct connection between a measure and the investor or investments negates application of the Chapter's obligations to a NAFTA Party.[350] Conversely, the presence of any direct connection between the measure and an investors or investments is positively determinative of the issue that Chapter 11 obligations apply to the Party responsible for the measure.[351]

391. In the past, the Respondent has attempted to avoid its obligations under NAFTA Chapter 11 by arguing for an unsustainably narrow interpretation of Article 1101. To date, no Tribunal has accepted Canada's arguments. As explained by the Tribunal in *UPS* v. *Canada*:

> Canada's argument that the conduct of Canada Customs is at most treatment of items and not the investment or the investor is not correct. That argument would essentially open an enormous hole in the protection of investments and investors.... Treatment is not only open to items but to enterprises.[352]

387 NAFTA Article 1139 provides that an investor of another Party includes a national of another NAFTA Party who has made, is making or seeks to make an investment. Under the same provision, 'investment' is defined as including both real and intangible property, an 'enterprise,' and a variety of other types of *chose in action.* Article 201 provides that 'enterprise' includes a corporation or partnership, joint venture or other association constituted or organized under the laws of a Party.

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350 *Methanex Corporation* v *United States*, Preliminary Award on Jurisdiction and Admissibility, Partial Award, IIC 166 (2002), Int'l. Tr. Rep., November 14, 2002, p.1965, 7th August 2002, Ad Hoc Tr (UNCITRAL), at para. 147

351 *See, e.g., S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, NAFTA/UNCITRAL Tribunal, First Partial Award (13 November 2000) at paras. 233-236.

352 *United Parcel Service v. Canada*, UNCITRAL/NAFTA, Award (24 May 2007), at para. 85.

388 Previous tribunals have recognized that the NAFTA definitions of 'investment' and 'enterprise' are to be construed broadly, reflecting the object and purpose of the NAFTA. For example, the Tribunal that was convened to decide the NAFTA proceeding *Feldman* v. *Mexico* observed:

> A threshold question is whether there is an "investment" that is covered by NAFTA. The term "investment" is defined in Article 1139, in exceedingly broad terms. It covers almost every type of financial interest, direct or indirect, except certain claims to money.[353]

389 Broad constructions of the term of 'investment' under the NAFTA are consistent with the application of international law in similar contexts. Thus, many investment treaty tribunals have construed the term 'investment,' found in treaties similar to the NAFTA, expansively.[354] For example, in *Bayinder* v *Pakistan*, the tribunal recognized that an investor's contribution of know-how, equipment and personnel constituted a kind of asset that was to be considered an 'investment' under Article I of the Turkey - Pakistan BIT.[355] Similarly, both the Tribunal and the Annulment Committee in *Mitchell* v. *Congo* determined that "movable property and any documents, like files, records and similar items, of [Mitchell's law] firm" and his "rights with respect to know-how and goodwill as well as the right to exercise his [legal services business]" all demonstrated the existence of an investment that fell "well within the scope of application" of the definition of 'investment' under Article I(c) of the BIT between the United States and the

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353 *Marvin Feldman* v *United Mexican States*, Award, ICSID Case No. ARB(AF)/99/1 (16 December 2002) at para. 96.

354 This is not an ICSID case, and therefore the jurisprudence of tribunals on the requirement of an 'investment dispute' pursuant to Article 25 of the New York Convention is not binding here. Nonetheless, there are persuasive examples from the case law demonstrating how other tribunals have applied a broad and remedial construction to investment definitions contained within other treaties.

355 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 (14 November 2005), at para's. 115-116.

Democratic Republic of the Congo, which is similar in scope to the definition of 'investment' in Article 1139 of the NAFTA.[356]

390 NAFTA Article 1117 states that an investor of a Party may bring a claim on behalf of an enterprise of another Party that the investor either owns or controls. Ownership and control are issues of fact to be determined based upon the evidence on the record. Ownership of a corporation is demonstrated by possession of a majority of the issued shares of a corporation, which constitutes an enterprise as defined above. The text of Article 1117 provides as follows:

> **Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise**
> 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.
>
> 3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

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356 *Patrick Mitchell v Democratic Republic of Congo*, Annulment Decision, ICSID Case No. ARB/99/7 (27 October 2006) at para. 35.

4. An investment may not make a claim under this Section.

391 The purpose of NAFTA Article 1117 is to permit a claim under NAFTA Chapter 11 that would not be permitted, under customary international law,[357] for espousal by NAFTA Parties, on behalf of their own investors.[358] It was specifically designed to permit a national of one NAFTA Party to bring a claim on behalf of an enterprise incorporated in the territory of the Host State.[359] As such, any damages awarded under NAFTA Chapter 11, Part B, must be received by the claimant enterprise itself rather than by the investor who brought it.[360] Under Article 1117, to be entitled to bring a claim on behalf of an investment enterprise, the claimant investor must prove that it she either owns or controls it.[361] And as provided in the explicit language of Article 1117, an investor of a NAFTA Party may demonstrate either its ownership or its control of the enterprise by direct means or by indirect means. An investor who does own at least 50% of an enterprise, or does not otherwise furnish proof of his exercise of control over it, must use NAFTA Article 1116, which allows him to submit a proportionate claim for his ownership interest in the investment enterprise, on his own behalf.[362]

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357 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports 1970, at 3.

358 D. Price, "Overview of the NAFTA Investment Chapter: Substantive Rules and Inverstor-State Dispute Settlement" 27 Int'l. L. 732 (1993) at 732.

359 I. Laird, "A Community of Destiny – the Barcelona Traction Case and the Development of Shareholder Rights to Bring Investment Claims" in: T. Weiler, ed., ***International Investment Law and Arbitration*** (Cameron May: London, 2005), at 86-88.

360 *Mondev International Ltd. v. United States of America*, Award, ICSID Case No. ARB(AF)/99/2 (11 October 2002), at para. 84.

361 *International Thunderbird Gaming Corp. v. United Mexican States*, Award, UNCITRAL Arbitration (26 January 2006),

362 *See, e.g.: Reineccius and ors v Bank for International Settlements, Partial Award*, ICGJ 375 (PCA 2002), (2006) XXIII RIAA 183, 22nd November 2002, PCA, at para's. 183-194; and Enron Corporation and Ponderosa Assets LP v Argentina, Award, ICSID Case No ARB/01/3, IIC 292 (2007), 15th May 2007, dispatched 22nd May 2007, ICSID, at para's. 33-36.

PART THREE: MERITS

(a). Article 1105: Treatment in Accordance with International Law

392 NAFTA Article 1105 reaffirms Canada's customary international law obligation to provide fair and equitable treatment and full protection and security to investments in its territory. Application of the standard is dependent upon a careful appraisal of the factual context within which the standard applies,[363] including both the consideration of legitimate expectations held in respect of the investment and consideration of how acts or omissions, attributable to the Host State, have impaired ownership, use or enjoyment of the investment. Compliance with the minimum standard requires respect for the right of a sovereign State to regulate in the best interests of its citizens,[364] but balanced against the obligations of good faith and fair dealing required under international law.[365]

393 In all cases, the fair and equitable treatment standard establishes a floor below which no State conduct shall be permitted to fall. It should not be construed as merely establishing a baseline or 'minimal' standard above which even arbitrary, discriminatory or inequitable treatment can be excused whenever it is subjectively deemed as being 'fair and equitable enough' in the circumstances. The standard is both informed by, and required under, customary international law. As summarized by the Tribunal in *Waste Management II*:

> The search here is for the Article 1105 standard of review, and it is not necessary to consider the specific results reached in the cases

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363 *Mondev International Limited v United States*, Award, ICSID Case No ARB(AF)/99/2, (2004) 6 ICSID Rep 192, IIC 173 (2002), (2003) 42 ILM 85, ICSID, at para. 118.

364 See, e.g.: *Eastern Sugar BV v Czech Republic*, Partial award and partial dissenting opinion, SCC Case No 088/2004, IIC 310 (2007), 27th March 2007, SCC (Stockholm), at para's. 272-274: "A violation of a BIT does not only occur through blatant and outrageous interference. However, a BIT may also not be invoked each time the law is flawed or not fully and properly implemented by a state. Some attempt to balance the interests of the various constituents within a country, some measure of inefficiency; a degree of trial and error; a modicum of human imperfection must be over-stepped before a party may complain of a violation of a BIT."

365 *Técnicas Medioambientales Tecmed SA v Mexico*, Award, ICSID Case No ARB(AF)/00/2, IIC 247 (2003), 10 ICSID Rep 130, (2004) 43 ILM 133, despatched 29th May 2003, ICSID, at para's. 155-158.

> discussed above. But as this survey shows, despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety - - as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[366]

394 As the *Siemens* Tribunal observed, after a long and careful review of the available jurisprudence, while evidence of bad faith, discriminatory intent or malice will be demonstrative of a violation of the fair and equitable treatment standard, it is not required to prove that the standard has been breached in a given case:

> It emerges from this review that, except for *Genin*, none of the recent awards under NAFTA and *Tecmed* require bad faith or malicious intention of the recipient State as a necessary element in the failure to treat investment fairly and equitably, and that, to the extent that it has been an issue, the tribunals concur in that customary international law has evolved. More recently in *CMS*, the tribunal confirmed the objective nature of this standard "unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard." That tribunal also understood that the conduct of the State has to be below international standards but not at their level in 1927 and that, as in *Tecmed* and *Waste Management II*, the current standard includes the frustration of expectations that the investor may have legitimately taken into account when it made the investment.[367]

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366 *Waste Management Incorporated v Mexico*, Award, ICSID Case No ARB(AF)/00/3, IIC 270 (2004), (2004) 43 ILM 967, despatched 30th April 2004, ICSID, at para. 98.

367 *Siemens AG v Argentina*, Award and Separate Opinion, ICSID Case No ARB/02/8, IIC 227 (2007), 6th February 2007, ICSID, at para's. 293 & 299.

395 The level of treatment that satisfies the fair and equitable treatment standard is neither static nor frozen in time. As confirmed in the NAFTA Free Trade Commission (FTC) statement on the interpretation of Article 1105, dated 1 July, 2001, and subsequently observed by the tribunal in *Mondev* v. *USA*:

> [Since the opening decades of the 20th century] ... both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms—had they been current at the time—might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.
>
> ... the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for 'fair and equitable' treatment of, and for 'full protection and security' for, the foreign investor and his investments.[368]

396 As such, the content of the fair and equitable treatment standard continues to evolve, as expectations reasonably held by the investors about the treatment to be accorded to foreign investment evolve in response to increasing rights and responsibilities recognised in the international and municipal practice of host states. It is submitted that, in agreeing to abide by NAFTA Article 1105, Canada has recommitted itself to providing investors from the United States and Mexico with the stable, transparent and predictable regulatory and business environment that is demanded of it under customary international law, including the obligation to ensure that foreign investments receive the benefit of both substantive and procedural due process in exercise of legislative, judicial or administrative authority by its officials and agents.

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[368] *Mondev International Limited v United States*, Award, ICSID Case No ARB(AF)/99/2, (2004) 6 ICSID Rep 192, IIC 173 (2002), (2003) 42 ILM 85, ICSID, at para's. 116 & 125.

397 Customary international law protections afforded to individuals, *vis-à-vis* the State, are similarly articulated in an array of international human rights instruments, including the *Universal Declaration of Human Rights*; the *American Declaration on the Rights and Duties of Man*; and the *American Convention on Human Rights*. The relationship between the rights articulated in these universal instruments and the universally applicable standard of fair and equitable treatment is customary international law. As the Tribunal in *MCI Power v. Ecuador* observed about the minimum standard provision contained within Respondent's BIT with Ecuador:

> The Tribunal notes that fair and equitable treatment conventionally obliges State parties to the BIT to respect the standards of treatment required by international law. The international law mentioned in Article II of the BIT refers to customary international law, i.e., the repeated, general, and constant practice of States, which they observe because they are aware that it is obligatory. Fair and equitable treatment, then, is an expression of a legal rule. Inequitable or unfair treatment, like arbitrary treatment, can be reasonably recognized by the Tribunal as an act contrary to law.[369]

(a) Transparent and Predictable Investment Environment

398 An investor is entitled to protection for its reasonable expectations arising from its reasoned and prudent assessment of "the state of the law and the totality of the business environment" at the time its investment decision was made.[370] Absent other applicable international obligations, no investor may reasonably expect that the circumstances prevailing at the time its original investment was made would

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369 *MCI Power Group LC and New Turbine Incorporated v Ecuador*, Award, ICSID Case No ARB/03/6, IIC 296 (2007), 26th July 2007, despatched 31st July 2007, ICSID at para. 369; citing *Técnicas Medioambientales Tecmed SA v Mexico*, Award, ICSID Case No ARB(AF)/00/2, IIC 247 (2003), 10 ICSID Rep 130, (2004) 43 ILM 133, despatched 29th May 2003, ICSID, at para. 102.

370 *PSEG Global Incorporated and Konya Ilgin Elektrik Üretim ve Ticaret Limited Širketi v Turkey*, Award and Annex, ICSID Case No ARB/02/5, IIC 198 (2007), despatched 19th January 2007, ICSID, at para. 255; citing *Saluka Investments BV v Czech Republic*, Partial Award, IIC 210 (2006), 17th March 2006, PCA, at para. 305.

remain totally unchanged. Nonetheless, it can still expect that the subsequent conduct of the host State will be fair and equitable, rather than arbitrary, discriminatory or non-transparent. The standard thus obliges a Host State to at all times treat the investment of a foreign national in a manner that "will not affect the basic expectations that were taken into account by foreign investor to make the investment."[371] An investor is entitled to protection for its reasonable expectations arising from its reasoned and prudent assessment of "the state of the law and the totality of the business environment" at the time its investment decision was made.[372] As Dolzer & Schreuer have explained:

> Transparency on the protection of the intestine's legitimate expectations are closely related.) In means that the legal framework of the investor's operations is readily apparent from that in decisions affecting the investor can be traced to the legal framework. Both the requirement of transparency and protection of legitimate expectations are by now firmly rooted in arbitral practice.
>
> The investor's legitimate expectations are based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host state. The legal framework on which the investor is entitled to a law will consist of legislation and treaties, of assurances contained in decrease, licenses and similar consecutive assurances as well as in contractual undertakings. A reversal of assurances by the host state that have led to legitimate expectations would violate the principle of fair and equitable treatment.[373]

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371 *Sempra Energy International v Argentina*, Award, ICSID Case No ARB/02/16, IIC 304 (2007), 18th September 2007, despatched 28th September 2007, ICSID, at para. 298; citing *Técnicas Medioambientales Tecmed SA v Mexico*, Award, ICSID Case No ARB(AF)/00/2, IIC 247 (2003), 10 ICSID Rep 130, (2004) 43 ILM 133, despatched 29th May 2003, ICSID, at para. 254.

372 *PSEG Global Incorporated and Konya Ilgin Elektrik Üretim ve Ticaret Limited Širketi v Turkey*, Award and Annex, ICSID Case No ARB/02/5, IIC 198 (2007), despatched 19th January 2007, ICSID, at para. 255; citing *Saluka Investments BV v Czech Republic*, Partial Award, IIC 210 (2006), 17th March 2006, PCA, at para. 305.

373 R. Dolzer & C. Shreuer, *Principles of International Investment Law*, (OUP, Oxford, 2008) at 133-134.

399 Recent NAFTA and investment treaty jurisprudence also supports application of the principle of good faith in defining the meaning of 'fair and equitable treatment.' As such, an investor who relies upon a legitimate expectation of treatment from a Party to his detriment is entitled to compensation for losses caused thereby.[374] As stated in this oft-cited passage from the award in *Tecmed* v. *Mexico*, the customary international law standard of fair and equitable treatment requires a Host State:

> ... to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the state to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[375]

400 Transparency and due process are, without question, also part and parcel of the legitimate expectations that can be reasonably held concerning the treatment of a

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374 *Siemens AG v Argentina*, Award and Separate Opinion, ICSID Case No ARB/02/8, IIC 227 (2007), 6th February 2007, ICSID, at para. 299.

375 *Técnicas Medioambientales Tecmed SA v Mexico*, Award, ICSID Case No ARB(AF)/00/2, IIC 247 (2003), 10 ICSID Rep 130, (2004) 43 ILM 133, despatched 29th May 2003, ICSID, at para. 154; approved in: *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, Award, ICSID Case No ARB/01/7, IIC 174 (2004), (2007) 12 ICSID Rep 6, (2005) 44 ILM 91, 25th May 2004, ICSID, at para's. 114-115.

foreign-owned investment. As observed in the UNCTAD study on the fair and equitable treatment standard:

> This interpretation suggests that where an investment treaty does not expressly provide for transparency, but does for fair and equitable treatment, then transparency is implicitly included in the treaty. Secondly, where a foreign investor wishes to establish whether or not a particular State action is fair and equitable, as a practical matter, the investor will need to ascertain the pertinent rules concerning the State action; the degree of transparency in the regulatory environment will therefore affect the ability of the investor to assess whether or not fair and equitable treatment has been made available in any given case.[376]

401 The Tribunal in *Rumeli Telekom* v. *Kazakhstan* recently summarized the bundle of rights that can be legitimately expected in the enjoyment and use of foreign investments under the fair and equitable treatment standard, which it referred to as encompassing "... *inter alia* the following concrete principles:"

> - the State must act in a transparent manner;
> - the State is obliged to act in good faith;
> - the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process;
> - the State must respect procedural propriety and due process.
>
> The case law also confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations.
>
> The concept "fair and equitable treatment" is not precisely defined. "It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interest. It is therefore a concept that depends on the interpretation of specific facts for its content." The precise scope of the standard is therefore left to the determination of the Tribunal, which "will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable."
>
> The only aspect on which the parties differ is that for Respondent, the concept does not raise the obligation upon Respondent beyond the

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376 UNCTAD, *Fair and Equitable Treatment* (United Nations: Geneva, 1999) at 51; UNCTAD, *Transparency* (United Nations: Geneva, 2004) at 71.

> international minimum standard of protection. The Arbitral Tribunal considers that this precision is more theoretical than real. It shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law.[377]

(b) Due Process and Access to Justice

> [The Host State must] provide an opportunity to the private party to seek a remedy for an alleged breach through a competent independent tribunal.[378]
>
> The failure to afford access to tribunals has traditionally been treated as a peculiar and particularly grave instance of State responsibility.[379]

402 Procedural fairness is a fundamental element of the customary international law standard of fair and equitable treatment,[380] including the requirement to afford due process, such as the right to be heard before measures are imposed that impair foreign-owned investment.[381] As Freeman observed, States must provide access to their courts in order to safeguard "personal and property rights so that the alien's

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377 *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, Award, ICSID Case No ARB/05/16, IIC 344 (2008), 21st July 2008, despatched 29th July 2008, ICSID, IIC 344 (2008), at para's. 609-611; citing: Peter Muchlinski, *Multinational enterprises and the law*, 1995, p. 625; F.A. Mann, British Treaties for the Promotion and Protection of. Investments, 52 (1982) BYIL 241 at 241–244; and *Azurix Corporation v Argentina, Award*, ICSID Case No ARB/01/12, IIC 24 (2006), 23rd June 2006, despatched 14th July 2006, ICSID, para. 361; and *CMS Gas Transmission Company v Argentina*, Award, ICSID Case No ARB/01/8, IIC 65 (2005), (2005) 44 ILM 1205, 25th April 2005, despatched 12th May 2005, ICSID, para. 284.

378 Oscar Schachter, *International Law in Theory and Practice* (Kluwer: New York, 1991) at 312.

379 Stephen Schwebel, *International Arbitration: Three Salient Problems* (Cambridge University Press: Cambridge, 1987) at 63.

380 See, e.g.: *International Thunderbird Gaming Corporation v Mexico*, Award, IIC 136 (2006), 26th January 2006, Ad Hoc Tr (UNCITRAL), at para's. 197-198; *Waste Management Incorporated v Mexico*, Award, ICSID Case No ARB(AF)/00/3, IIC 270 (2004), (2004) 43 ILM 967, despatched 30th April 2004, ICSID, at para. 98; *BG Group Public Limited Company v Argentina*, Final Award, IIC 321 (2007), 24th December 2007, Ad Hoc Tr (UNCITRAL), at para. 341; *Saluka Investments BV v Czech Republic*, Partial Award, IIC 210 (2006), 17th March 2006, PCA, at para. 308; *Loewen Group Incorporated and Loewen (Raymond L.) v United States*, Award, ICSID Case No ARB(AF)/98/3, IIC 254 (2003), (2005) 7 ICSID Rep 442, (2003) 42 ILM 811, 25th June 2003, despatched 26th June 2003, ICSID, at para. 132.

381 *American Manufacturing & Trading Incorporated v Zaire, Award and Separate Opinion*, ICSID Case No ARB/93/1, IIC 14 (1997), (2002) 5 ICSID Rep 14, (1997) 36 ILM 1531, 11th February 1997, despatched 21st February 1997, ICSID, at para. 7.18.

defense of these interests may be effectively raised."[382] And as the Tribunal in *ADC* v. *Hungary* observed:

> Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. ***If no legal procedure of such nature exists at all, the argument that "the actions are taken under due process of law" rings hollow.*** And that is exactly what the Tribunal finds in the present case.[383] [***emphasis added***]

403 The Tribunal in *Myers* v. *Canada* has explained how "Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, obligations of good faith and natural justice." In his treatise on denials of justice, Paulsson noted how the Tribunal in *Mondev* recognized that the NAFTA Article 1105 standard evolved out of the doctrine of denial of justice commonly found in early 20th Century decisions of mixed claims commissions.[384] Paulsson then cites Vatell's 1758 treatise for the proposition that the failure of a State to provide access to a forum for the adjudication of an alien's rights has always constituted a denial of justice that triggers State responsibility,[385] concluding:

> ***The right of access to courts is fundamental and uncontroversial; its refusal the most obvious form of denial of justice.*** Legal rights would be illusory if there were no entitlement to a procedural mechanism to give them effect.[386] [***emphasis added***]

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382 A.V. Freeman, *The International Responsibility of States for Denial of Justice*, (Kraus: New York, 1970), at 547.

383 *ADC Affiliate Limited and ADC & ADMC Management Limited v Hungary*, Final Award on Jurisdiction, Merits and Damages, ICSID Case No ARB/03/16, IIC 1 (2006), 27th September 2006, despatched 2nd October 2006, ICSID, at para. 435.

384 J. Paulsson, *Denials of Justice in International Law* (CUP: Cambridge, 2005) at 68; citing *Mondev International Limited v United States*, Award, ICSID Case No ARB(AF)/99/2, (2004) 6 ICSID Rep 192, IIC 173 (2002), (2003) 42 ILM 85, ICSID, at para. 99.

385 J. Paulsson, *Denials of Justice in International Law* (CUP: Cambridge, 2005) at 65 & 75.

386 J. Paulsson, *Denials of Justice in International Law* (CUP: Cambridge, 2005) at 134.

404 The right to have one's own day in court is a bedrock principle of international law, as demonstrated by its inclusion in a number of human rights conventions and declarations relevant to Respondent's conduct,[387] including the *American Convention on Human Rights*,[388] which provides, in relevant part:

> Article 8.
>
> 1. ***Every person has the right to a hearing***, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or ***for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.***
>
> Article 24.
>
> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law. [***emphasis added***]

405 There is no doubt that the customary international law Doctrine of Denial of Justice is applicable within the context of interpreting Article 1105(1) of the NAFTA.[389] This Doctrine constitutes one of the 'applicable rules of international law' referred to both in NAFTA Article 1131(1) and Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*. As Professor Bjorklund has observed: "The international minimum standard, as expressed through the doctrine of denial of justice, requires that aliens have access to impartial courts to vindicate certain

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387 See, also: Article II of the *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); and Article 3(l) of the *Charter of the Organization of American States* art. 106, 119 U.N.T.S. 3, entered into force 13 December 1951; amended by *Protocol of Buenos Aires*, 27 February 1967, 721 U.N.T.S. 324; amended by *Protocol of Cartagena*, approved 5 December 1985, 25 I.L.M. 527; amended by *Protocol of Washington*, approved 14 December 1992, 33 I.L.M. 1005; amended by *Protocol of Managua*, adopted 10 June 1993, 33 I.L.M. 1009.

388 American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (in force 18 July 1978).

389 See, e.g.: *Loewen Group Incorporated and Loewen (Raymond L.) v United States*, Award, ICSID Case No ARB(AF)/98/3, IIC 254 (2003), (2005) 7 ICSID Rep 442, (2003) 42 ILM 811, 25th June 2003, despatched 26th June 2003, ICSID; or Mondev International Limited v United States, Award, ICSID Case No ARB(AF)/99/2, (2004) 6 ICSID Rep 192, IIC 173 (2002), (2003) 42 ILM 85, ICSID.

fundamental rights. Access alone is not enough; national laws must give the alien some right of redress for certain wrongs."[390] This is not to say that the Tribunal should attempt to divine specific rules applicable to the Respondent's conduct from Denial of Justice Doctrine, in the first instance, but rather that customary international law doctrines are relevant for its construction of what "fair and equitable treatment" means within the circumstances of the present case.

406 Denial of justice includes, first and foremost, the inability of a foreigner to have his complaint heard, on a fair an equitable basis, by municipal tribunal.[391] Indeed, it has been long settled that the quintessential example of a denial of justice in customary international law is the denial of access, by a Host State to its municipal courts, to a foreign-owned enterprise, for the protection of its rights in the investment.[392] As found in the 1929 *Draft Convention on the Treatment of Foreigners*:

> A State is responsible as a result of the fact that, in a manner incompatible with the international obligations of the State, the foreigner has been hindered in the exercise of his rights by the judicial authorities, or has encountered in his proceedings unjustifiable obstacles or delays implying a refusal to do justice.[393]

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390 Andrea K. Bjorklund, "Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims" 45 (2005) Virginia J. Int'l. Law 810 at 837. In describing the elements of "security of justice" that even nascent international law has required for centuries, Professor Bjorklund observed, at 818, that it "...encompassed a number of obligations. Primary among them was the provision of certain protections of property and the person, and the establishment of a fair and functioning judicial system in which to vindicate those rights."

391 See, e.g. *Antoine Fabiani Case (France v Venezuela)* (31 July 1905) 10 RIAA 83; *Case of Cotesworth and Powell (Great Britain) and Columbia* (August, 1875) 2 (1898) Moore's 2050; *B. E. Chattin (United States.) v. United Mexican States*, (23 July 1927) 4 RIAA 282; *Rudloff Case (United States v. Venezuela)*, (1903-1905) 9 RIAA 255; *Claim of Company General of the Orinoco (France v. Venezuela), (31 July 1905)* 10 RIAA 184.

392 Eduardo Jimenez de Arechaga, "International Responsibility," in: M. Sorensen, ed., Manual of Public International Law (Macmillan: New York, 1968) at 554; quoting: Anzilotti, Corsodi diritto interneionale, Vol. I, at 171-3. See, also: Sir Ian Brownlie, "Principles of Public International Law," 6th ed., (OUP: Oxford, 2003) at 506.

393 League of Nations. Economic Committee, *Draft Convention on the Treatment of Foreigners*, Article 8, paragraph 2, 1928.II.14 (LON: Geneva: 1928), in: (1929) 23 AJIL Spec. Supp.

407 Even when contemporary publicists have articulated what they consider to be the most restrictive versions of the Denial of Justice Doctrine, denial of access to the municipal courts of a Host State remains front and centre:

> Thus, according to this view, once an alien is granted access to local courts, his case heard and judgment rendered, that is the end of the matter. The decision becomes just as rendered, not justice denied. It was also emphasized that access to local courts was to be granted to aliens in all conditions under which the nationals would be granted such access, thereby offering both the aliens and the nationals each quality of treatment.[394]

> At its most basic, a procedural denial of justice is a denial of access to a court. This definition commanded universal adherence during the codification attempts of the 1920s. Courts themselves may deny access, or what might be termed a failure of legislation may deny access: the legislative branch has either failed to pass a law that would permit redress or has passed a law that prevents or unduly limits access to the courts.[395]

> The extent of the doctrine of denial of justice in international law is contentious. But whatever difference of view there may be about the breadth of that concept, there is agreement that at the very least it includes the failure of a State to accord aliens access to its courts and to its system of the administration of justice.[396]

408 International law does not countenance legislative or executive acts of a Host State, which nullify or otherwise render meaningless the right of an alien investor to receive an independent and impartial hearing before municipal courts. For example, in the *Cotesworth & Powell* case the Host State's responsibility was engaged when amnesty legislation was enacted that effectively denied a foreigner investor access to a municipal bankruptcy court to vindicate its rights.[397] In the

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394 A.O. Adede, "A Fresh Look at the Meaning of the Doctrine of Denial of Justice Under International Law" 14 (1976) Cdn. Yrbk. Int'l. Law 73 at 78-79.

395 Andrea K. Bjorklund, "Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims" 45 (2005) Virginia J. Int'l. Law 810 at 843.

396 S. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge University Press: Cambridge, 1987) at 61-62.

397 *Case of Cotesworth and Powell (Great Britain) and Columbia* (August, 1875) 2 (1898) Moore's at 2050.

Shufeldt case, legislative and executive authority were both used to frustrate and invalidate property rights that lay in a validly granted agricultural concession to a foreigner, causing the Commission to conclude:

> ... it is perfectly competent for the Government of Guatemala to enact any decree they like and for any reasons they see fit, and such reasons are no concern of this Tribunal. But this Tribunal is only concerned where such a decree, passed even on the best of grounds, works injustice to an alien subject, in which case the Government ought to make compensation for the injury inflicted and cannot invoke any municipal law to justify their refusal to do so.[398]

409 Over the years, government officials have found various ways to frustrate access to justice. Municipal officials have ignored requests to deliver copies of documents that were formally necessary for a claimant to commence legal action.[399] Governments have issued laws that would fine or imprison alien plaintiffs if their evidence would be deemed as an embellishment of the extent of their injuries.[400] And more recently, governments have promulgated legislation preventing certain categories of claimants from directly commencing court proceedings.[401]

410 In his treatise on international arbitration law, Judge Schwebel cites two settled cases, before the Permanent Court of International Arbitration, wherein the claims

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398 *Shufeldt Claim (Guatemala, USA)*, (24 July 1930) 2 RIAA 1094 at 1095.

399 See, e.g.: *Ballistini* case, French-Venezuela Commission (1903-1905), 10 RIAA 18, p. 20.

400 A.V. Freeman, *The International Responsibility of States for Denial of Justice* (London: Longman, 1938) at 232.

401 See *Philis v. Greece* (1993), 16 E.H.R.R. 373. Considering the right of access under Article 6(1) of the European Convention of Human Rights ("ECHR"), this case involved a decree by Greek government which prevented engineers from directly instituting court actions for claims related to unpaid fees. Under the decree claimants were forced to request that a technical chamber initiate court proceedings on their behalf. After unsuccessfully attempting to commence his own court action, the plaintiff took his case to the European Court of Human Rights, alleging that he had been deprived of his right of access to a court. Siding with the claimant, the majority of the Court (8 of 9 judges) found that while the right of access under Article 6(1) of the ECHR was not absolute, the limitations imposed on such access must not be so great as to impair "the very essence of the right." On that basis, the Court reasoned that Philis right of access had been violated because he "was not able to institute proceedings directly and independently."

concerned denials of access to municipal tribunals.[402] In the El Triunfo case, the Host State Government issued executive decrees that cancelled the concession of the foreign-owned company and rendered meaningless its right to seek redress before municipal courts. And in the *Losinger & Co.* case (PCIJ Series C, No. 78), the Host State sought to rely upon general legislation governing litigation against the State that was enacted later in time than the contract with a foreign investor it subsequently tried to annul on the basis of that legislation. As Judge Schwebel observed, while the Host State did not admit that international law had been breached as part of the settlement, nowhere in its submissions did it deny that State Responsibility is engaged for "definitive repudiation by it of the arbitral remedy contained in the contract" it had earlier made with the foreign investor.[403]

411 In his recent treatise on denial of justice in international law, Paulsson has observed that "targeted legislation" falls squarely within the kind of State conduct that engages international responsibility:

> It is not unknown for states to trash the law to defeat the claims of unpopular foreigners. Hot-headed politicians may seek public favour by advancing narrow conceptions of the national interest by law or decree. If local courts defer to such laws or decrees, they may incur the international responsibility of their state on account of gross incompetence in failing to recognise either fundamental strictures on the retroactive application of laws, or evident acquired rights. But a more straightforward analysis may lead to the conclusion that the legislature itself has interfered in the judicial process to such an extent as to create a denial of justice.[404]

412 To be clear, targeted legislation, or executive acts, are bad enough when they place impediments before the foreign enterprise, in its pursuit of justice before municipal courts; specific targeting of an enterprise – with the design of barring access to municipal courts – is beyond the pale. The *Idler* case provides one such

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402 S. Schwebel, International Arbitration: Three Salient Problems (Cambridge University Press: Cambridge, 1987) at 72-73.

403 S. Schwebel, International Arbitration: Three Salient Problems (Cambridge University Press: Cambridge, 1987) at 73.

404 J. Paulsson, *Denials of Justice in International Law* (CUP: Cambridge, 2005) at 147.

example. In that case, the Host State Government took extraordinary executive and legislative action to prevent a foreign enterprise from successfully obtaining redress for breach of contract, by the Government itself, before its own courts. Rather than finally honouring its contract with the foreigner, who had supplied provisions to the Host State that were essential in waging its war for independence, the Government of Venezuela substituted an administrative mechanism, for its municipal courts, in order to determine whether any compensation was actually owed.[405] The Commission was scathing in its judgment of the Host State's conduct, stating:

> A foreign citizen in litigation with a sovereign before his own courts is entitled to no special favors; but ... 'ordinary justice' is his right in the eye of the public law. This Idler did not get. The justice' attempted to be meted out to him, whatever else could be said of it, was certainly not 'ordinary justice.'[406]

413 International tribunals are right to adopt a particularly jaundiced view of cases in which a Host State attempts to rely upon targeted legislation that has the effect of barring access to municipal courts, in order to avoid its obligations under contract with a foreigner. The plea that such measures fall within the sovereign prerogative is not uncommon, but it has almost always been unsuccessful. As Sir Hersch Lauterpacht stated many decades ago, in his celebrated Separate Opinion in the *Norwegian Loans* case:

> It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly out of a predatory character, in order to shelter it effectively from any control by international law. There may be little difference between a government breaking unlawfully contract with an alien and the government causing

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405 *Jacob Idler (United States) v. Venezuela, (1885),* 4 Moore's International Arbitration (Washington D.C.: US Government Printing Office, 1898) 3491.

406 *Jacob Idler (United States) v. Venezuela, (1885),* 4 Moore's International Arbitration (Washington D.C.: US Government Printing Office, 1898) 3491 at 3517.

> legislation to be enacted which makes it impossible for it to comply with the contract.[407]

414 In other words, a measure that purports both to strip a foreign enterprise of its contract and/or property rights, and to bar access to its municipal courts by that enterprise for redress, not only constitutes a denial of justice under customary international law, but also an abuse of right, which is also inconsistent with the Host State's duties under customary international law and with the general international law principle of good faith. Professor Cheng devoted an entire chapter of his renowned treatise on the principles of international law to the manner in which the doctrine of abuse of rights rises from the principle of good faith. He summarized his view of the doctrine as follows

> ... discretion must be exercised in good faith, and the law will intervene in all cases where this discretion is abused. ... Whenever, therefore, the owner of a right enjoys a certain discretionary power, this must be exercised in good faith, which means that is must be exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interest of others.[408]
>
> The exercise of a right – or a supposed right, since the right no longer exists – for the sole purpose of causing injury to another in thus prohibited. Every right is the legal protection of a legitimate interest. An alleged exercise of a right not in furtherance of such interest, but with the malicious purpose of injuring others can no longer claim protection of the law.[409]
>
> The principle of good faith requires every right to be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated. Such an exercise constitutes an abuse of the right, prohibited by law.[410]

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407 *Certain Norwegian Loans (France v. Norway)*, (6 July 1957) 9 ICJ Rep. 58 (sep. op. Lauterpacht, J.).

408 Bin Cheng, *General Principles of Law* (Grotius Press: 1987, Cambridge UK) at 132-134.

409 Bin Cheng, *General Principles of Law* (Grotius Press: 1987, Cambridge UK) at 122.

410 Bin Cheng, *General Principles of Law* (Grotius Press: 1987, Cambridge UK) at 123.

415 In summary, the "fair and equitable treatment" that Canada has promised to provide under NAFTA Article 1105, and which it owes to all foreign investors as a matter of customary international law, requires it to provide a transparent and predictable environment for investment, to provide equal and open access to impartial and independent municipal courts for the vindication of contract and property rights, and to refrain from imposing measures that have the effect of obviating rights owed to foreign investors.

(B). Article 1110: Compensation for Expropriation

416 NAFTA Article 1110 requires Respondent to pay compensation, equivalent to the fair market value (FMV) of an investment, when its measures substantially deprive an Investor or Investment Enterprise of the use or enjoyment of its investment. Such compensation must be paid regardless of whether the taking is for a public purpose, non-discriminatory or otherwise in accordance with due process and the minimum standard of treatment:[411] In relevant part, Article 1110 provides:

> 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.

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411 *Feldman v Mexico, Award and Dissenting Opinion, ICSID Case No ARB(AF)/99/1, IIC 157 (2002), (2003) 42 ILM 625, (2003) 42 ILM 673, (2005) 7 ICSID Rep 341, despatched 16th December 2002, ICSID* at 98.

> 2. Compensation 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. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
>
> 3. Compensation shall be paid without delay and be fully realizable.
>
> [***emphasis added***]

417 The language of Article 1110 demonstrates that the focus of an expropriation analysis should be on the extent of deprivation of the investor's ability to derive benefits from an "investment" in its territory. The term investment is defined under Article 1139 as including: "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes. The obligation to compensate arises regardless of whether the measure is imposed directly or indirectly. The plain and ordinary meaning of paragraph (1) demonstrates how the NAFTA Parties understood that whenever they engaged in a *de jure* or *de facto* taking of property, prompt, adequate, and effective compensation would be due its owners.

418 The *chapeau* to Article 1110(1) sets out the standard by which a measure can be determined to be an expropriation, explaining that everything from an outright nationalization to a measure that is tantamount to expropriation is caught within the ambit of the provision, regardless of whether its effect is direct or indirect. The four sub-paragraphs of Article 1110(1) set out the circumstances under which expropriations by a NAFTA Party must take place. As indicated above, the language employed by the Parties is conjunctory, imposing four positive requirements to which they must all adhere when implementing an expropriatory measure. International responsibility will therefore arise whenever a NAFTA Party expropriates an investment in a manner inconsistent with ***any*** of these four requirements.

419 Any other interpretation of Article 1110(1) would contradict the plain meaning of its terms and would be inconsistent with the object and purposes of the NAFTA, which include: increasing "substantially investment opportunities in the territories of the Parties" and ensuring "a predictable commercial framework for business planning and investment." A NAFTA Party may expropriate an investment in its territory so long as:

- the compensation offered is consistent with the terms set out in subparagraphs 2 to 6 [as per Article 1110(1)(d)];
- the expropriation has taken place in accordance with due process of law and in a manner consistent with the Party's obligations under Article 1105 [as per Article 1110(1)(c)];
- the expropriation has taken place on a non-discriminatory basis [as per Article 1110(1)(b)]; ***and***
- the expropriation was undertaken for a public purpose [as per Article 1110(1)(a)].

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.[412] The Tribunal in *S.D. Myers* v. *Canada* referred to the required level of impairment as amounting "... to a lasting removal of the ability of an owner to make use of its economic rights" in that investment.[413] Likewise, the Tribunal in *Metalclad* v. *Mexico* described regulatory expropriation as taking place under Article 1110 when imposition of the measure "has the effect of depriving the owner, in whole or in significant part, of the use or

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412 *Pope & Talbot, Inc.* v. *Canada*, Interim Merits Award, NAFTA/UNCITRAL Tribunal, 26 June 2000, at 102.

413 *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, NAFTA/UNCITRAL Tribunal, First Partial Award (13 November 2000) at 283 & 287.

reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[414]

421 Host State measures will be considered expropriatory regardless of whether they procure the annulment or transfer of municipal legal title to foreign-owned real estate or other investments. Again, the focus is on the degree of impairment occasioned by the measure, formulated by previous tribunals as a determination of whether: "... events demonstrate that the owner has been deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral."[415] The fundamental question of deprivation has been similarly described in commentary (g) to Section 712 of the *Third U.S. Restatement on International Law*:

> A state is responsible as for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory... A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory....[416]

422 Put in yet another way, expropriation occurs where an investor is "... radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto – such as the income or benefits related to the [investment] or to its exploitation – had ceased to exist. In other words, if due to the actions of the

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414 *Metalclad Corp.* v. *Mexico*, ICSID Case No. ARB(AF)/97/1, (2001) 16 ICSID Rev-FILJ 168, IIC 161 (2000), (2001) 40 ILM 36, at para. 103; cited by: *CME Czech Republic BV* v *Czech Republic*, Partial Award, UNCITRAL Arbitration (13 September 2001), at para. 606.

415 *Tippets, Abbett, McCarthy, Stratton* v. *TAMS-AFFA Consenting Engineers of Iran et al.*, Iran-U.S. Claims Tribunal, Award No. 141-7-2, June 22, 1984, at para. 225; *Wena Hotels Limited* v *Egypt*, Award, ICSID Case No ARB/98/4 (8 December 2000), at para. 99.

416 *Marvin Feldman* v *United Mexican States*, Award, ICSID Case No. ARB(AF)/99/1 (16 December 2002) at 105.

Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss."[417] As the Tribunal in *TECMED* observed:

> ... it is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that "...any form of exploitation thereof..." has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed. Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary. The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects.[418]

423 Article 1139 provides a long list of the sorts of asset, entity, right or entitlement that constitutes an investment for purposes of the treaty. The list is arguably much broader than the term "property," which has been customarily used in reference to expropriation by a Host State. What has never been in question is that property is a species of right in tangible things, such as chattel or real estate. In considering what "property" means in the international law context, Dame Higgins wrote:

> Let us begin by saying a few words about what is meant by "property". We necessarily draw on municipal law sources and on the general principles of law. The concept of "property" provides the owner thereof with the protection of the law in certain key respects. He may use it without requiring permission each time he does. He may use it as he wishes. And others who wish to use it will have to get his permission first to do SO. And, importantly, he has the sole right of

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[417] Técnicas Medioambientales, *TECMED S.A. v United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para. 113.

[418] Técnicas Medioambientales, *TECMED S.A. v United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para. 116.

> alienating it. If we attach that "bundle of rights" to something that we have frequently seen, the subject of contention in the case law - a factory in State A, owned by Mr. B - the elements of the definition become apparent. He may open his factory daily without the permission of the local police. He may use it to make shoes, or watches, or bread. Non-use does not deprive him of these rights. If his friend, Mr. C, wishes to turn an empty corner of the factory to his own use, he will still have to ask B for permission, and perhaps pay some rent for that privilege, and only he -- and not Mr. C or X, Y, or Z, may sell the factory or otherwise alienate it. In spite of the profound disagreements that we face over the desirability of private property rights, or the State's right to interfere with them, there is virtual consensus on the meaning of property. This consensus stretches back through time, and across different political and philosophical viewpoints.[419]

424 In order to properly evaluate whether impairment is substantial, it is accordingly necessary to properly characterise the investment that was the subject of the measure. It is not necessary for the entirety of a foreign investor's interests in the Host State to be affected. It is necessary to characterise the investment that has actually been subjected to the measure. As the Tribunal in *GAMI* v. *Mexico* observed:

> Should *Pope & Talbot* be understood to mean that property is taken only if it is so affected in its entirety? That question cannot be answered properly before asking: what property? The taking of 50 acres of a farm is equally expropriatory whether that is the whole farm or just a fraction. The notion must be understood as this: the affected property must be impaired to such an extent that it must be seen as "taken."[420]

425 In summary, a measure constitutes expropriation under Article 1110 when it substantially interferes with the investor's ability to derive the full economic benefit of its investment in the Host State. As per subparagraphs (a) to (d) of

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419 R. Higgins, "The Taking of Property by the State: Recent Developments in International Law", *Recueil des Cours*, Hague Academy in International Law, Vol. 176, 1982, at 270.

420 *GAMI Investments* v *Mexico*, Final Award, IIC 109 (2004), 15th November 2004, Ad Hoc Tr (UNCITRAL) at para. 126.

Article 1110(1), all expropriations must be undertaken for a public purpose; be non-discriminatory; be consistent with due process and Article 1105; ***and*** include compensation consistent with paragraphs (2) to (6) of the provision. Any measure of expropriation inconsistent with any of these four conditions breaches the terms of Article 1110, for which Canada is responsible under customary international law.

(C). Law of Damages

426 NAFTA Article 1135 provides that a Tribunal established under NAFTA Chapter 11 may order reparation for a breach of the provisions of Section A through an award of monetary damages or restitution, or a combination thereof.[421] This provision reflects the customary international law principle of restitution that an award must effectively place the wronged party back into the position it would have occupied, but for the act or omission from which the State's responsibility arose. This authority is consonant with the customary international law standard enunciated by the PCIJ in the *Chorzów Factory* case:

> [Reparation] must, so far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.[422]

427 Tribunals have thus also determined that compensation for any NAFTA breach must place a claimant back into the same position that it would have been 'but for' the occurrence of the international wrongful act that constitutes the breach.[423]

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421 This provision also allows Parties to elect to pay compensation in lieu of restitution, such that a Tribunal must determine an amount of monetary compensation in all cases.

422 *The Factory At Chorzów (Claim for Indemnity)*, Permanent Court of International Justice, Merits 1928, P.C.I.J. Series A. No. 17, 21 at 47.

423 *See* also: *SD Myers Inc v Canada*, First Partial Award and Separate Opinion, Ad hoc—UNCITRAL Arbitration Rules, IIC 249 (2000), signed 13 November 2000, at para. 315 "This Tribunal has recognized that the *Chorzow Factory* case supports the principle that '*compensation should undo the material harm inflicted by a breach of an international obligation*'".

Early ICSID tribunals, such as Amco Asia Corp. v. Indonesia, have adopted the same approach.[424] Regardless of which NAFTA provision is breached, however, full restitution value should be adopted as the standard by which all loss adequately connected to the breach is measured.[425] The object is to restore the wronged party by way of monetary compensation, for whatever harm has been proximately caused by an unlawful measure.

428 In other words, regardless of the breach, an appropriate quantum of monetary damages will always be the one that is "commensurate with the loss, so that the injured party may be made whole."[426] This approach to damages has been codified in Article 35 of the *International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts*, which constitute an authoritative statement on the applicable law of damages for reparation in investment treaty arbitrations. Article 36(2) of the Draft Articles on State Responsibility also affirms: "[the] State is under an obligation to compensate for the damage caused thereby... [and that compensation] ... shall cover all financially assessable damage including loss of profits insofar as it is established." And as observed by the Tribunal in *Siemens* v. *Argentina*:

> The key difference between compensation under the *Draft Articles* and the *Factory at Chorzów* case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account "all financially assessable damage" or "wipe out all the consequences of the illegal act" as opposed to compensation "equivalent to the value of the expropriated investment" under the Treaty.[427]

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424 *Amco Asia Corp., Pan American Development, Ltd. and PT Amco Indonesia v. Republic of Indonesia*, award in the resubmitted case, (5 June 1990), 1 ICSID Reports 569.

425 *Marvin Feldman* v *United Mexican States*, Award, ICSID Case No. ARB(AF)/99/1 (16 December 2002) at 194; cited by *LG&E Energy Corp and ors v Argentina*, Decision on Liability, ICSID Case No ARB 02/1; IIC 152 (2006); (2007) 46 ILM 36, signed 03 October 2006 at para. 44. See, also: *Petrobart Limited v Kyrgyzstan*, Award, SCC Case No 126/2003, IIC 184 (2005), 29th March 2005, SCC Arb Institute (Stockholm), at 77-78 (29 March 2005); and *SD Myers Inc v Canada*, Second Partial Award, Ad hoc—UNCITRAL Arbitration Rules, IIC 250 (2002), signed 21 October 2002 at para's. 169-174.

426 *Opinion in the Lusitania Cases*, (1 November 1923) 2 RIAA 32 at 39.

427 *Siemens AG v Argentina*, Award and Separate Opinion, ICSID Case No ARB/02/8, IIC 227 (2007), 6th February 2007, ICSID, at para. 352.

429 The NAFTA provides explicit direction as to how expropriations should be compensated, under Article 1110(2). It requires that payment be made for an expropriation that is equivalent to the fair market value of an investment, and it provides a non-exhaustive list of factors that may be taken into account in arriving at that figure. Depending upon the type of investment that has been subjected to the expropriatory measure, "valuation criteria shall include going concern value, asset value, including the declared asset value of tangible property, and other criteria, as appropriate, to determine fair market value." Similarly, under applicable international law, when a measure has been found to substantially impair one's use or enjoyment of an investment, the appropriate compensation is an award of damages equivalent to its fair market value.[428]

430 Fair market value is conventionally understood as representing the theoretical highest price that a buyer, willing but not compelled to buy, would pay, and the lowest price a seller, willing but not compelled to sell, would accept.[429] The method used to assess fair market value is dependent upon the nature of the investment at issue. Assets, or suitable comparators, that are freely traded on an open market are obviously more amenable to valuation generally. "In such cases, the choice and application of asset-based valuation methods based on market data and the physical properties of the assets is relatively unproblematic, apart from evidentiary difficulties associated with long outstanding claims."[430]

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428 J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: 2002), at 225.

429 See, e.g.: M. H. Mendelson, "Agora What Price Expropriation? Compensation for Expropriation: the Case Law"79 (1985) A.J.I.L. 414 at 416; C. F. Amerasinghe, "Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice" Int'l. Comp. L. Q. 41 (1992) 22 at __.

430 J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: 2002), at 226.

431 This general principle of valuation applies equally for all types of investment, including real property.[431] As Prof. Kantor has observed in his recent treatise on valuation:

> Market value is defined as the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing, wherein the parties had each acted knowledgeably, prudently and without compulsion. Particularly for real estate transactions, a fundamental aspect of a market valuation is the principle of "highest and best use," defined as the most probable use of a property that is physically possible, appropriately justified, legally permissible, financially feasible, and which results in the highest value of the property being valued.[432]

432 In addition to rendering an award of damages equivalent to the fair market value of commercial real estate, which has been the subject of substantial deprivation, application of the restitution principle also requires an award of interest to be provided to the successful claimant. To effectively return the owner to the position it would have occupied but for the breach, it is necessary for the payment of interest on the sum awarded – to be accrued from the date of the illegal act or omission and payable until the date upon which an award of damages has been satisfied. An award of interest recognizes the fact that the injured party has been unable to use or otherwise enjoy the property affected by conduct for which the State has been found responsible. Recent practice supports an award that includes compound interest, in order to adequately reflect modern economic realities.[433]

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[431] *Bernardus Henricus Funnekotter et al* v *Zimbabwe*, Award, ICSID Case No ARB/05/6, IIC 370 (2009), 15th April 2009, despatched 22nd April 2009, ICSID, at para. 130; *Waguih Elie George Siag and Clorinda Vecchi* v *Egypt*, Award, ICSID Case No ARB/05/15; IIC 374 (2009), at para's. 241-242; and *Compañía del Desarrollo de Santa Elena SA* v *Costa Rica*, Final Award, ICSID Case No ARB/96/1, IIC 73 (2000), (2000) 439 ILM 1317, dispatched 17th February 2000, ICSID, at para. 70.

[432] M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer: New York, 2008), at 35.

[433] See, e.g. *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1 Decision on Liability, (25 July 2007) at para. 55; *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, Award, ICSID Case No ARB/01/7, IIC 174 (2004), (2007) 12 ICSID Rep 6, (2005) 44 ILM 91, 25th May 2004, ICSID at para. 251; *Bernardus Henricus Funnekotter and ors v Zimbabwe*, Award, ICSID Case No ARB/05/6, IIC 370 (2009), signed 15 April 2009 despatched 22 April

433 The valuation of an investment is naturally dependent upon the nature of the asset whose use, or enterprise whose operation, has been impaired by a measure whose application was inconsistent with the Host State's obligations under international law. Kantor explains that a large number of valuation analyses exist, but which can be distilled into three basic approaches: an income-based approach, a market-based approach and an asset-based approach.[434] He stresses, however, that "valuation methods are not mutually exclusive," explaining:

> Valuation methods are often complementary. If the valuations reached by two methodologies are widely inconsistent with each other, that can be a strong signal that something is awry. If several valuation methods produce consistent results, arbitrators may take greater comfort from the valuations.[435]

434 Any of the three major types of valuation approach may be useful in determining the value of an asset, such as a piece of commercial real estate, zoned and/or licensed for a particular purpose and located in a particular place. Whereas income-based and market-based approaches are more common for the valuation of enterprises, market-based and asset-based approaches are more common for the valuation of tangible or intangible property. However, it is not at all uncommon for elements of a comparison-based approach to be utilised in an income-based analysis, and vice-versa. In other words, there is no bright line between the three general approaches to valuation, and ideally analyses drawn from all three approaches will inform the valuation of any investment. By way of example, Kantor writes:

2009, at para's. 101-106; *Siemens AG* v *Argentina*, Award, ICSID Case No ARB/02/8 (06 February 2007), at para's. 395-400; and *Waguih Elie George Siag and Clorinda Vecchi* v *Egypt*, Award, ICSID Case No ARB/05/15; IIC 374 (2009), at para. 595.

434 M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer: New York, 2008), at 7-9.

435 M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer: New York, 2008), at 27.

> The Adjusted Book Value (ABV) method (also known as the Adjusted Net Asset method), in which asset and liability values are adjusted to their fair market value, is one such Asset-Based-Method. For that purpose, valuation experts often employ the substitution principle, seeking to determine the replacement cost of the relevant asset. According to the International Private Equity Valuation Guidelines, the net asset value method:
>
> > Is likely to be appropriate for a business or value derives mainly from the underlying value of its assets rather than its earnings, such as property holding companies and investment businesses. This methodology may also be appropriate for a business is not making an adequate return on assets.
> > US tax authorities, too, have looked principally to earnings-based methods since the 1950s as a tool to value operating companies and to asset-based methods as a tool to value holding companies. "[P]rimary consideration is generally given to earnings in valuing operating companies while the greatest weight is given to the consideration of assets in valuing securities underlining the holding type of company."
>
> Holding companies, of course, serve as vehicles for pools of assets like securities or real estate assets. Those asset falls are themselves often valued by reference to the earnings potential. Consequently, the underpinning for an asset-based valuation of a holding company may itself be earnings-based values for the individual assets.[436]

435 In all cases, the goal of a proper valuation exercise is to aid the Tribunal in determining what monetary value can be assigned, in its award, in order to wipe out all deleterious effects arising from Host State action found to be inconsistent with its obligations under international law

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436 M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer: New York, 2008), at 12.

SECTION III:
APPLICATION OF THE LAW TO THE FACTS

PART ONE: JURISDICTION

436 Mr. Vito Gallo is a national of the United States of America. He therefore

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[499] Swanick statement, paragraph 31

qualifies as an investor of another Party with respect to Canada under Article 1139. Mr. Gallo owns 100% of the issued common shares of the Enterprise, 1532382 Ontario Limited. The Enterprise was constituted and is organized under the laws of Ontario. The Enterprise therefore qualifies as an investment in the territory of Canada, under Articles 201 and 1139 of the NAFTA. At all relevant times, the Enterprise has owned and controlled 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.

437 This claim has been brought by Mr. Gallo on behalf of the Enterprise, under NAFTA Article 1117, because the *Adams Lake Mine Act* gravely impaired use and enjoyment of the landfill site, of which the Enterprise was the 100% owner. All of the steps taken by the Government of Ontario, towards frustration and delay of the Enterprise's ability to establish a business based upon its use and enjoyment of an approved mega-landfill – including the Government's failure to honour its good faith obligation to transfer possession of the Borderlands to the Enterprise pursuant to the contract between them – were crystallized in the provisions of the *Adams Mine Lake Act.*

438 The *Adams Mine Lake Act* came into force on April 5th, 2004. The Claimant filed his Notice of Intent to Submit a Claim to Arbitration on October 12th, 2006. With his delivery of the Notice of Arbitration and simultaneous submission of the waiver documents stipulated under Article 1121(2), the arbitration was launched on March 30th, 2006. Accordingly, all of the timing requirements contained within Articles 1119 and 1117 have been satisfied and the jurisdiction of the Tribunal have been definitively established.

439 In its Statement of Defence, the Respondent intonated it plans to vigorously dispute Mr. Gallo's right, as 100% owner of the Enterprise, to bring a claim on its behalf under NAFTA Article 1117. In the period preceding the delivery of its Statement of Defence, the Respondent has attempted to construct a narrative upon

which it apparently hopes to dispute Mr. Gallo's standing under the NAFTA. This narrative appears to be focused upon confusing the obvious difference between parties planning to participate in the initial funding of a waste disposal business – which would have taken advantage of the approved landfill capacity for the Adams Mine site – and the actual owner of that site, the Enterprise. Its ultimate goal is obviously to contend that those who would have funded a business based upon the approved landfill capacity available at the Adams Mine site were actually its 'true owners in interest.'

440 As demonstrated in the considered opinion of Dame Higgins, cited above, there is no logical basis for confusing the actual owner of the Adams Mine site, the Enterprise, with the persons with whom it had planned to establish a business to take advantage of the bundle of rights that lay with the Site, principally including the landfill capacity for which it had been approved. No matter how earnestly the Respondent asserts that the funding partners selected by the Enterprise to help it exploit its property rights were its true owners, the fact remains that the Adams Mine Site was – and remains – deeded to the Enterprise alone. As Brent Swanick acknowledges in his witness statement, the Limited Partners had no ownership interest in the Adams Mine waste disposal site.[499] Equally, no matter how consistently the Respondent attempts to convert the Article 1117 claim made by Mr. Gallo, on behalf of the Enterprise, into an Article 1116 claim made on his own behalf, the arbitration remains about how the Adams Mine Lake Act impaired the use and enjoyment of the Adams Mine Site by its owner, the Enterprise.

441 Similar ploys have been attempted by respondents to claims brought by qualified investors on behalf of an investment enterprise established in the territory of the Host State. For example, in *Aguas del Tunari* v. *Bolivia*, the respondent attempted to prevent the claim from proceeding by alleging that the claimant had fraudulently misled the tribunal about the alleged identity of the 'the real owners in interest' of the investment at issue. Borrowing from the municipal law concept

of 'piercing the corporate veil,' it demanded that the claimant produce evidence, which it argued would prove the 'real identity' of the investor (obviously a person who would not have had standing to bring a claim under the applicable treaty). The following excerpt represents the core of that tribunal's cogent dismissal of the respondent's tactics in that case, which focused on the definition of "control":

> As to the context in which the phrase "controlled directly or indirectly" is found, the Tribunal notes that Article 1 in defining the concept of "national" not only defines the scope of persons and entities that are to be regarded as the beneficiaries of the substantive rights of the BIT but also defines those persons and entities to whom the offer of arbitration is directed and who thus are potential claimants. Given the context of defining the scope of eligible claimants, the word "controlled" is not intended as an alternative to ownership since control without an ownership interest would define a group of entities not necessarily possessing an interest which could be the subject of a claim. In this sense, "controlled" indicates a quality of the ownership interest.
>
> The question therefore is how the term "controlled" in Article 1(b)(iii) is meant to qualify "ownership." Claimant argues that "control" is a capacity that the ownership interest possesses. If one entity owns 100% of another entity, then the first entity, in Claimant's view, possesses the capacity to control the other entity and that entity is a "controlled' entity. For the Claimant, the word "control," rather than simply "ownership," is employed in the BIT to address the situation where a minority shareholder through, for example, voting rights possesses the capacity to control the other entity. Respondent argues that "control" is a capacity that the ownership interest must exercise. Moreover, Respondent appears to argue that that exercise of control must be done by the owning entity itself.
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> The Tribunal does not find Respondent's view to be persuasive for three reasons.
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> First, Claimant's view that "control" is a quality that accompanies ownership finds support generally in the law. An entity that owns 100% of the shares of another entity necessarily possesses the power to control the second entity. The first entity may decline to exercise its control, but that is its choice. Moreover, the first entity may be held responsible under various corporate law doctrines for the actions of its subsidiary, whether or not it actually exercised control over that subsidiary's actions. Respondent contends that IWT B.V. and IWH B.V. are mere "shells" which cannot even decline to exercise its possible control. Holding companies (if that is all IWT B.V. and IWH

B.V. are in this case) owning substantial assets (here the rights under the Concession) are, however, both a common and legal device for corporate organization and face the same legal obligations of corporations generally. The Tribunal acknowledges that the corporate form may be abused and that form may be set aside for fraud or on other grounds. As outlined in paragraph 331, infra, the Tribunal finds no such extraordinary grounds to be present on the evidence.

Second, Respondent's argument that "control" can be satisfied by only a certain level of actual control has not been defined by the Respondent with sufficient particularity. Rather, the concept is sufficiently vague as to be unmanageable. Respondent asserts that the phrase "controlled directly or indirectly" referred to the "ultimate controller" provides a defined standard, but as stated in paragraph 237, the Tribunal rejects this interpretation as inconsistent with the language "directly or indirectly." Once one admits of the possibility of several controllers, then the definition of what constitutes sufficient "actual" control for any particular controller, particularly when an entity may delegate such actual control, becomes problematic. This becomes apparent with Respondent's difficulty in offering the Tribunal the details of its "actual" control test. In response to a question of the Tribunal as to the details of an actual control test, counsel for Respondent stated that "[c]ontrol is not a — a objective — there is not an objective bright —line test for control in a corporate organization control sense. You have to know details." Indeed, Respondent's argument that "control" can be satisfied by only a certain level of actual control by one entity over another entity ignores the reality that such exercise of control may be delegated to a subsidiary or even to an independent subcontractor. Moreover, the many dimensions of actual control of a corporate entity range from day to day operations up to strategic decision–making. Would the minutes of one Board of Directors meeting delegating to a consulting firm the management of a majority owned company be evidence of actual control of that company? Would the minutes of one Board of Directors meeting delegating to a parent or subsidiary company management of a majority owned company be evidence of actual control of the company? Would the day to day direction by one company of the operations of a majority owned company not be sufficient evidence of actual control if a parent company dictated which business opportunities would be taken up by the majority owned company and which would not? The difficulty in articulating a test in the Tribunal's view reflects not only the fact that the Respondent did not provide such a test, but also the possibility that it is not practicable to do so and that, as discussed in the next paragraph, the resultant uncertainty would directly frustrate the object and purpose of the BIT.

> Third, the uncertainty inherent in Respondent's call for a test based on an uncertain level of actual control would not be consistent with the object and purpose of the BIT. The BIT is intended to stimulate investment by the provision of an agreement on how investments will be treated, that treatment including the possibility of arbitration before ICSID. If an investor cannot ascertain whether their ownership of a locally incorporated vehicle for the investment will qualify for protection, then the effort of the BIT to stimulate investment will be frustrated.[500]

442 The experience with NAFTA Article 1117 has been no different. For example, in a case where the claimant attempted to plead an investment enterprise claim under Article 1116, and the respondent sought to take advantage of the error by mischaracterising the function of Articles 1116 and 1117 as narrowing the scope of claims, a tribunal that included both Prof. Crawford and Judge Schwebel among its ranks set out the proper approach to claims made under the two provisions. It stated as follows:

> 79. The Tribunal notes that Chapter 11 specifically addresses issues of standing and scope of application through a series of detailed provisions, most notably the definitions of "enterprise", "investment", "investment of an investor of a Party" and "investor of a Party" in Article 1139. These terms are used with care throughout Chapter 11. NAFTA does not adopt the device commonly used in bilateral investment treaties ("BITs") to deal with the foreign investment interests held in local holding companies, namely, that of deeming the local company to have the nationality of the foreign investor which owns or controls it. On the contrary, it distinguishes between claims by investors on their own behalf (Article 1116) and claims by investors on behalf of an enterprise (Article 1117). Under Article 1116 the foreign investor can bring an action in its own name for the benefit of a local enterprise which it owns and controls; by contrast, in a case covered by Article 1117, the enterprise is expressly prohibited from bringing a claim on its own behalf (Article 1117(4)). Faced with this detailed scheme, there does not seem to be any room for the application of any rules of international law dealing with the piercing of the corporate veil or with derivative actions by foreign shareholders. ***The only question for NAFTA purposes is whether the claimant can bring its***

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500 *Aguas del Tunari* v *Bolivia*, Decision on Respondent's Objections to Jurisdiction, ICSID Case No ARB/02/3, IIC 8 (2005), (2005) 20 ICSID Rev-FILJ 450, 21st October 2005, ICSID, at para's. 242-247.

> ***interest within the scope of the relevant provisions and definitions.***[501] [***emphasis added***]

443 There can be no doubt that the Enterprise is the one and true owner of the Adams Mine Site, and that the Enterprise – and it alone – was legally entitled to make use of the approved landfill capacity that was granted for use of the Site under Ontario law. The right to make use of that capacity, as well as the right to seek compensation from an Ontario Court for the Government's concurrent attempt to frustrate such use – by reneging on its agreement to transfer possession of the Borderlands to the Enterprise – were specifically named and extinguished by the measure at issue in this case. Similarly, there is no legitimate question about whether Mr. Gallo actually held 100% of the shares of the Enterprise. Under the express terms of Article 1117, and the definitions of enterprise, investor and investment found in NAFTA Articles 201 and 1139, Mr. Gallo has perfect standing to pursue a claim under NAFTA Chapter 11, in order to vindicate the ownership rights of the Enterprise, of which he was the sole and controlling owner.

PART TWO: ARTICLE 1110

444 The Government of Canada is responsible under NAFTA Article 1110 and customary international law for measures imposed by the constituent elements of the Canadian State, including the Government of Ontario, when such measures substantially interfere with foreign-owned investments. The framework for analyzing application of an expropriation provision such as NAFTA Article 1110 is not complicated, as demonstrated in the following description provided by Jan Paulsson and Zachary Douglas:

> It is important to discern the stages that lead to an outcome that may properly be characterized as an expropriation. First, one must consider the nature and extent of the property interests of the investor as recognized by the *lex situs* (in the case of tangible property) and

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501 *Mondev International Ltd. v. United States of America*, Award, ICSID Case No. ARB(AF)/99/2 (11 October 2002), at para. 79.

> determine whether acts attributable to the Host State have interfered with these interests in such a manner as to constitute a taking. A wide definition of property interests should inform this first stage of the analysis. The second step is to determine whether, in accordance with the relevant treaty provision and the general rules of international law, the taking engages the international responsibility of the Host State as amounting to an expropriation. Third, depending upon the relevant treaty provision, the expropriation may nevertheless be lawful if it was for a public purpose, on a non-discriminatory basis, in accordance with due process of law and on payment of due compensation.[502]

445 Impairment that rises to the level of deprivation of the use or enjoyment of foreign-owned property constitutes an expropriation, for which compensation must be paid. It is not necessary for the measure at issue to have stripped its foreign owner of legal title to the asset in order for a finding of expropriation to be made.[503]

> To establish whether the Resolution is a measure equivalent to an expropriation . . . it must be first determined if the Claimant . . . was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto -- such as the income or benefits related to the Landfill or to its exploitation -- had ceased to exist. In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss.[504]

446 The first and most important issue to be determined in any expropriation claim is whether the alleged impairment of ownership rights in the targeted asset or enterprise is so substantial as to rise to the level of deprivation. By any honest measure, the Adams Mine Lake Act has substantially interfered with the Enterprise's use and enjoyment of the Adams Mine Site. It has specifically named and revoked the certification and approvals that allowed a retied mine site

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502 J. Paulsson & Z. Douglas, "Indirect Expropriation in Investment treaty Arbitration," in: N. Horn, ed., *Arbitrating Foreign Investment Disputes* (Kluwer: The Hague, 2004)157-158

503 *Metalclad Corp.* v. *Mexico*, ICSID Case No. ARB(AF)/97/1, (2001) 16 ICSID Rev-FILJ 168, IIC 161 (2000), (2001) 40 ILM 36, at para. 103; see, also: *Starrett Housing Corp.. v. Gov't of the Islamic Rep. of Iran,* 4 (1984) *IUSCT Rep. 122,* at sec. IV(b); and Petrolane v. Government of the Islamic Republic of Iran, 27 (1991) IUSCT Rep. 64 at 96.

504 *Técnicas Medioambientales, TECMED S.A.* v *United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para. 115.

to be transformed from a potential environmental and financial liability (due to ongoing remediation obligations accruing to its legal owner under Ontario law) into an extremely attractive commercial property. With the waste capacity crisis that existed when the measure was imposed in April 2004, and which continues to this day, there is no doubt that the Adams Mine Site was an extremely valuable asset, upon which any owner could have founded a very successful waste disposal limestone aggregate business.

447 The purpose and effect of the *Adams Mine Lake Act* was to totally deprive any owner of the Site of the right to operate it as a waste landfill facility. The AMLA also dramatically reduced the asset value of the Site to one-seventh of one percent of its value as of March 17, 2004,[505] if not a negative amount, given the ongoing costs associated with maintaining the Site, including potential liabilities under environmental legislation for its owner.

448 Given the targeted manner in which the *Adams Mine Lake Act* identified and annulled the valuable commercial rights of use associated with ownership of the Site, the question of whether the resulting deprivation should be regarded as a direct or indirect taking is little more than semantics. Nevertheless, it may be construed as an indirect taking because the legislation technically leaves ownership of the Site in the hands of the Enterprise. It is obvious that the measure was crafted in this manner to ensure that the Enterprise remained encumbered with responsibility for the Site, as its title holder, without leaving any of the benefits of ownership intact, each of which the measure was tailored to eliminate. The evidence on the record is not capable of a credible, alternative explanation. The *Adams Mine Lake Act* was designed to ensure that the Adams Mine Site was never going to be capable of the use for which it was approved: as a waste

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505 Deloitte Expert Report, at 109 & 123, recognizing that the median range for a comparative analysis, as well as the result of an income-based analysis, resulted in a valuation of approximately $105,000.000.00, which was reduced to an appraised value of $80,750.00 following implementation of the AMLA.

disposal site. In this regard there can be no doubt that the measure constitutes a measure tantamount to expropriation under NAFTA Article 1110.

449 Article 1110(1)(a) provides that a measure must be imposed for a public purpose. Bill 49 was not implemented for a public purpose because it was not a measure of general application and was issued contrary to the principles of economic efficiency and sustainable development. As described below, the public purpose alleged by the Respondent in its Statement of Defence has turned out to have been a sham excuse. The real reason for imposition of the measure was to follow through on a capricious political campaign promise in order to appease a powerful provincial politician, David Ramsay – who had made no secret of his personal animus against the lawful use of the Adams Mine Site as a waste landfill. REDACTED

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the Respondent has attempted to obscure the difference between satisfying a campaign promise and demonstrably pursuing a public purpose, as a matter of international law. If all that were required of a government – in order to establish that a public purpose was being pursued as a matter of international law – was to issue a fiat declaration such as the one made with introduction of the AMLA, no measure would ever fail to meet the standard. As explained below, the Respondent has boldly stated that the public purpose satisfied by passage of the AMLA was: the protection of ground water for human consumption.[508] RED
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508 Statement of Defence, at para's. 226-227.

REDACTED

451 Article 1110(1)(a) provides that a measure must not be discriminatory. Bill 49 is patently discriminatory because it was targeted specifically at the Enterprise and the investment, rather than at the waste industry generally. REDACTED

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452 NAFTA Article 1110(1)(c) provides that a measure must be imposed in accordance with due process of law. The AMLA presumptively eliminates all municipal damages claims arising under municipal law for its operation. It proactively precludes the admission or consideration of any evidence that might otherwise have been provided by relevant government officials before a municipal tribunal. The measure even identifies and nullifies the common law property and contract rights that formed the subject of a damages claim, brought by the Enterprise against the Government of Ontario, which was actually already before the courts at the time. When a measure is unambiguously intended to target and deprive an investor of all valuable legal rights exercised in relation to one's ownership of a particular parcel of land, it is manifest that such measure is an affront to due process rights that are owing to a foreign investor under applicable international law. By no stretch of imagination could the total and unadulterated annulment of fundamental rights of access to a municipal court be construed as being consistent with the principles of fairness and due process safeguarded under Articles 1105 and 1110 of the NAFTA.

453 Finally, in addition NAFTA Article 1110(1)(d) also provides that all expropriatory measures must be imposed only upon the payment of compensation in accordance with Article 1110(2). To be clear, Article 1110 provides that compensation must be paid regardless of whether the measure was taken for a

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public purpose, was not discriminatory or was in accordance with due process of law and Article 1105. The provision clearly states that compensation must be paid in the event of a finding of expropriation, whether direct or indirect. Article 1110(2) also establishes that valuation criteria shall include "going concern value," which obviously contemplates recognition of the full economic value of the property in question as determined by appropriate business valuation practices.

454 Not only does the Adams Mine Lake Act manifestly interfere with the use and enjoyment of the Site; it also establishes a compensation scheme that blatantly contradicts Canada's obligation to pay prompt, adequate and effective compensation, and which is contrary to the terms of Article 1110(2) and applicable rules of international law.

455 If there truly were any doubt as to the expropriatory character of the *Adams Mine Lake Act*, it would be eliminated upon reading section 5(9), which actually states – with no apparent hint of irony – that the measure "is not an expropriation" (presumably under the Province's municipal expropriation legislation). It might be noted that the *Ontario Expropriation Act*, is primarily concerned with prohibiting, or alternatively at providing adequate compensation for, *de facto* and *de jure* takings of real property. That the drafters of the very measure at issue obviously believed it was necessary to include a provision that artificially mandated a finding that it was not an expropriation speaks clearly to its intended and actual effects upon the Enterprise and its investment.

PART THREE: ARTICLE 1105

I. FRUSTRATION OF THE ENTERPRISE'S INTENDED USE FOR THE ADAMS MINE SITE

456 In accordance with the applicable rules of international law, the terms "fair and equitable treatment" must be construed in a manner that is consistent with the object and purpose of the NAFTA. Both NAFTA Article 201(1) and its preambular text are unambiguous in stating that one of the fundamental objectives of the treaty is: "to promote and increase cross-border investment opportunities and ensure the successful implementation of investment initiatives."[510] The object and purpose of the NAFTA, and of Chapter 11 in particular, is thus manifested in an interpretation of "fair and equitable treatment and full protection and security" that provides, at a minimum, that the Host State must maintain a transparent and predictable business and regulatory climate for foreign-owned investments. Governments may change and policy priorities shift, but the international rule of law demands that acquired rights are respected.

457 The obligation to observe this minimum standard is immutable, applying equally to decisions taken in good faith as those taken with malice. Any executive, administrative, legislative or judicial decision that brings about a change in the *status quo anti* for foreign-owned investment is potentially subject to scrutiny so as to ensure consistency with the standard. As the Tribunal in *CME v. Czech Republic* observed, the standard is supposed to operate to prevent "... the evisceration of the arrangements in reliance upon which the foreign investor was induced to invest."[511] Or as the *Sempra* Tribunal observed:

> The Tribunal finds the Respondent to be right in arguing that fair and equitable treatment is a standard that is none too clear and precise. This is because international law is itself not too clear or precise as

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510 *Metalclad Corporation v Mexico*, Award, ICSID Case No ARB(AF)/97/1, (2001) 16 ICSID Rev-FILJ 168, IIC 161 (2000), (2001) 40 ILM 36, (2002) 119 ILR 618, (2002) 5 ICSID Rep 212, (2001), 25th August 2000, despatched 30th August 2000, ICSID, at para's. 75-76.

511 CME Czech Republic BV v Czech Republic, Partial Award and Separate Opinion, Ad hoc – UNCITRAL Arbitration Rules, IIC 61 (2001) 13 September 2001, at para. 611.

> concerns the treatment due to foreign citizens, traders and investors. This is the case because the pertinent standards have gradually evolved over the centuries. Customary international law, treaties of friendship, commerce and navigation, and more recently bilateral investment treaties, have all contributed to this development. Not even in the case of rules which appear to have coalesced, such as denial of justice, is there today much certainty.
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> It follows that it would be wrong to believe that fair and equitable treatment is a kind of peripheral requirement. To the contrary, it ensures that even where there is no clear justification for making a finding of expropriation, as in the present case, there is still a standard which serves the purpose of justice and can of itself redress damage that is unlawful and that would otherwise pass unattended. Whether this result is achieved by the application of one or several standards is a determination to be made in the light of the facts of each dispute. What counts is that in the end the stability of the law and the observance of legal obligations are assured, thereby safeguarding the very object and purpose of the protection sought by the treaty.[512]

458 The necessity of an effective and universally-applicable minimum standard of fair and equitable treatment was explained by the late Professor Wälde, in his renowned Separate Opinion in the *Thunderbird* v. *Mexico* NAFTA case:

> Investors need to rely on the stability, clarity and predictability of the government's regulatory and administrative messages as they appear to the investor when conveyed – and without escape from such commitments by ambiguity and obfuscation inserted into the commitment identified subsequently and with hindsight. This applies not less, but more with respect to smaller, entrepreneurial investors who tend to be inexperienced but provide the entrepreneurial impetus for increased trade in services and investment which NAFTA aims to encourage. Taking into account the nature of the investor is not formulation of a different standard, but of adjusting the application of the standard to the particular facts of a specific situation.
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> ... under developed systems of administrative law, a citizen – even more so an investor - should be protected against unexpected and detrimental changes of policy if the investor has carried out significant investment with a reasonable, public-authority initiated assurance in the stability of such policy.... Such protection is, however, not un-conditional and ever-lasting. It leads to a balancing process between

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512 *Sempra Energy International v Argentina*, Award, ICSID Case No ARB/02/16, IIC 304 (2007), 18th September 2007, despatched 28th September 2007, ICSID at para's. 296-297 and 300.

> the needs for flexible public policy and the legitimate reliance on particular investment-backed expectations... The "fair and equitable standard" can not be derived from subjective personal or cultural sentiments; it must be anchored in objective rules and principles reflecting, in an authoritative and universal or at least widespread way, the contemporary attitude of modern national and international economic law. The wide acceptance of the "legitimate expectations" principle therefore supports the concept that it is indeed part of "fair and equitable treatment" as owed by governments to foreign investors under modern investment treaties and under Art. 1105 of the NAFTA.[513]

459 When the standard of fair and equitable treatment is being respected by a Host State, the foreign investment is not subjected to a "roller coaster effect" of regulatory change.[514] The stability and certainty provided by a functioning legal system, with full access to independent and impartial courts for the resolution of civil disputes, including disputes with the State itself, is not overthrown by targeted legislation, even if a political decision has been made that requires a change that will detrimentally impact upon foreign-owned investments.[515] And where such a decision is made, it is made in a fundamentally fair and transparent manner, rather than behind closed doors on the basis of tailor-made or cherry-picked evidence.

460 In the summer of 2002, after carefully and fully satisfying himself of the potential success for his investment in the Ontario waste industry, Mr. Gallo established an investment enterprise, 1532382 Ontario Inc.,[516] through which he would acquire ownership of a fully permitted, but undeveloped, mega-landfill site. Upon acquiring the Adams Mine Site, the Enterprise set about readying the site for

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513 *International Thunderbird Gaming Corporation v Mexico*, Award, IIC 136 (2006), 26th January 2006, Ad Hoc Tr (UNCITRAL), at para's 5 & 30.

514 *PSEG Global Incorporated and Konya Ilgin Elektrik Üretim ve Ticaret Limited Širketi v Turkey*, Award and Annex, ICSID Case No ARB/02/5, IIC 198 (2007), despatched 19th January 2007, ICSID, at para's. 248-250.

515 See, also: *Eureko BV v Poland*, Partial Award and Dissenting Opinion, IIC 98 (2005), 19th August 2005, Ad Hoc Tr (UNCITRAL), at para's. 235 and 242.

516 Swanick Statement, paras 18-19; Gallo Statement, paras 78-80

development, making no pretence about its plans.[517] At 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. Any investor in Mr. Gallo's position would have reasonably expected that his Investment Enterprise would be entitled to acquire property in land and develop that land for the use for which it had been permitted. It would not have been reasonable to expect that, within only two years, the Government of Ontario would revoke those permits by legislative fiat and prohibit the Enterprise from seeking compensation or other redress before its courts.

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462 The evidence is uncontested that the purpose of acquiring the Adams Mine Site was to establish and operate a waste disposal facility on it. The permits attached to the property, and its unique characteristics as a mega-landfill, were precisely what attracted Mr. Gallo to become its sole owner, indirectly through his ownership and control of the Enterprise.[519] The *Adams Mine Lake Act* arbitrarily deprived an American-owned Enterprise of its rights to enjoy property in land; by selectively targeting and stripping it of the landfill capacity for which it had been previously certified, as follows:

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517 McGuinty Statement, paras 92, 125-132

518 REDACTED

519 Gallo Statement, paras 57, 59, 72

Prohibition on disposal of waste at Adams Mine site
2. No person shall dispose of waste at the Adams Mine site. 2004, c. 6, s. 2.
Revocation of approvals related to Adams Mine site
3. (1) The following are revoked:
1. The approval dated August 13, 1998 that was issued to Notre Development Corporation under the Environmental **Assessment** Act, including any amendments made after that date.
2. Certificate of Approval No. A 612007, dated April 23, 1999, issued to Notre Development Corporation under Part V of the Environmental Protection Act, including any amendments made after that date.
3. Approval No. 3250-4NMPDN, dated July 9, 2001, issued to Notre Development Corporation under section 53 of the Ontario Water Resources Act, including any amendments made after that date.
4. Any permit that was issued under section 34 of the Ontario Water Resources Act before this Act comes into force in response to the application submitted by 1532382 Ontario Inc. for New Permit #4121-5SCN9N (00-P-6040) and described on the environmental registry established under the Environmental Bill of Rights, 1993 as EBR Registry Number XA03E0019. 2004, c. 6, s. 3 (1).
No permit for specified application
(2) No permit shall be issued under section 34 of the Ontario Water Resources Act after this Act comes into force in response to the application referred to in paragraph 4 of subsection (1). 2004, c. 6, s. 3 (2).

II. DELIBERATE EXTINGUISHMENT OF THE ENTERPRISE'S RIGHT TO SEEK SPECIFIC PERFORMANCE OR COMPENSATION FROM AN ONTARIO COURT FOR BREACH OF CONTRACT BY THE GOVERNMENT OF ONTARIO

463 Foreign investors are not only entitled to hold legitimate expectations in respect of vested rights, which require the Host State to provide a transparent and predictable climate for investment. They are entitled to receive fair and equitable treatment from public officials in the exercise of their legislative, executive or administrative authority, meaning that it does not lie for officials to exercise their authority in an arbitrary, discriminatory or otherwise capricious manner. Rather, it is expected that the government of a Host State will act in good faith. One of the fundamental rules of customary international law, including – but certainly not

limited to – the interpretation of treaties, is: *pacta sunt servanda.* As explained above, a Host State commits an abuse of right when it takes legislative or executive measures intended to permit one of its governments to escape obligations it has undertaken in contract with a foreign investor or foreign-owned enterprise.

464 Adoption of the *Adams Mine Lake Act* does just that: the AMLA purports 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.

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465 That a Host State could renege on a contractual promise to transfer possession of land, which is clearly vital to the purchaser's intended use of adjacent lands, even after valid consideration had been determined by the parties and provided by the Enterprise, is not excusable under international law. That the same Host State would additionally rush through a legislative measure specifically intended to

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520 REDACTED

prevent the purchaser from vindicating its rights under that contract before an independent and impartial municipal court, which would normally be responsible for hearing all contract claims against the Province of Ontario, is nothing short of shocking, outrageous and egregious. The lack of good faith demonstrated by the Government of Ontario, REDACTED REDACTED demands full restitution for the harm caused by such flagrant abuse of sovereign regulatory authority.

466 Indeed, it would be difficult to conceive of a more blatant example of a legislative measure that constitutes both an abuse of right and a *prima facie* denial of justice to a foreign investor in an economically advanced, liberal democratic State. The *Adams Mine Lake Act* was contrived by officials at the highest level to strip the Enterprise of the ability to put its land to the use for which it was acquired, and for which it was fully permitted, and to deny the Enterprise from having 'its day in court' for the Government's breach of a contractual obligation to transfer possession of the Border Lands for valid consideration paid. REDACTED REDACTED

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467 It is well-settled that denials of justice extend to claims of wrongdoing by a State's legislature and/or executive branch.[522] As scholars and publicists have

521 REDACTED

confirmed,[523] a State should never be able to escape responsibility for a denial of justice merely on the basis that it was caused by another branch of government.[524]

468 REDACTED

– arising from the Government's failure to honour a contract to sell the Border Lands to the Enterprise. REDACTED

was to selectively and comprehensively extinguish both the Enterprise's right to satisfaction of its contract with the Government of Ontario and its right to submit any claim to an Ontario Court to remedy this contractual breach. Again, the legislation provided:

> ***4. (1) An agreement entered into by Notre Development Corporation or 1532382 Ontario Inc. after December 31, 1988 and before this Act comes into force is of no force or effect if the agreement is with the Crown in right of Ontario and is in respect of,***
> ***(a) the purchase or sale of the lands described in Schedule 1 or any part of those lands;***
> (b) the granting of letters patent for the lands described in Schedule 1 or any part of those lands; or
> (c) any interest in, or any occupation or use of, the lands described in Schedule 1 or any part of those lands. 2004, c. 6, s. 4 (1).
> Letters patent
> (2) If any letters patent are issued to Notre Development Corporation or 1532382 Ontario Inc. before this Act comes into force or during the 60 days after this Act comes into force in respect of the lands described in Schedule 1, or any part of those lands,
> (a) the letters patent cease to have any force or effect on the coming into force of this Act or immediately after the letters patent are issued, whichever is later; and

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[522] See e.g. Commissioner Van Vollenhoven's opinion in *B. E. Chattin (United States.) v. United Mexican States,* (23 July 1927) 4 RIAA 282 at 312.

[523] See e.g. *Amco Asia Corp., Pan American Development, Ltd. and PT Amco Indonesia v. Republic of Indonesia*, award in the resubmitted case, (5 June 1990), 1 ICSID Reports 569 at para. 137.

[524] See J. Paulsson, *Denials of Justice in International Law* (CUP: Cambridge, 2005) at 46; Clyde Eagleton, "Denial of Justice in International Law" (1928) 22 A.J.I.L. 538 at 545; Sir Gerald Fitzmaurice, "Hersch Lauterpacht – The Scholar as Judge" (1961) 37 B.Y.I.L. 53 at 105.

(b) the lands described in Schedule 1 are vested in the Crown in right of Ontario on the coming into force of this Act or immediately after the letters patent are issued, whichever is later. 2004, c. 6, s. 4 (2).

Extinguishment of causes of action

*5. (1) **Any cause of action that exists on the day this Act comes into force against the Crown in right of Ontario, a member or former member of the Executive Council, or an employee or agent or former employee or agent of the Crown in right of Ontario in respect of the Adams Mine site or the lands described in Schedule 1 is hereby extinguished.*** 2004, c. 6, s. 5 (1).

Same

*(2) **No cause of action arises after this Act comes into force against a person referred to in subsection (1) in respect of the Adams Mine site or the lands described in Schedule 1 if the cause of action would arise, in whole or in part, from anything that occurred after December 31, 1988 and before this Act comes into force.*** 2004, c. 6, s. 5 (2).

Aboriginal or treaty rights

(3) Subsections (1) and (2) do not apply to a cause of action that arises from any aboriginal or treaty right that is recognized and affirmed by section 35 of the Constitution Act, 1982. 2004, c. 6, s. 5 (3).

Enactment of this Act

(4) Subject to section 6, ***no cause of action arises against a person referred to in subsection (1), and no compensation is payable by a person referred to in subsection (1), as a direct or indirect result of the enactment of any provision of this Act.*** 2004, c. 6, s. 5 (4).

Application

(5) Without limiting the generality of subsections (1), (2) and (4), those subsections apply to a cause of action in respect of any agreement, or in respect of any representation or other conduct, that is related to the Adams Mine site or the lands described in Schedule 1. 2004, c. 6, s. 5 (5).

Same

(6) Without limiting the generality of subsections (1), (2) and (4), those subsections ***apply to a cause of action arising in contract, tort, restitution, trust, fiduciary obligations or otherwise.*** 2004, c. 6, s. 5 (6).

Legal proceedings

(7) No action or other proceeding shall be commenced or continued by any person against a person referred to in subsection (1) in respect of a cause of action that is extinguished by subsection (1) or a cause of action that, pursuant to subsection (2) or (4), does not arise. 2004, c. 6, s. 5 (7).

> Same
> (8) Without limiting the generality of subsection (7), that subsection ***applies to an action or other proceeding claiming any remedy or relief, including specific performance, injunction, declaratory relief, any form of compensation or damages, or any other remedy or relief.*** 2004, c. 6, s. 5 (8).
> Same
> (9) Subsection (7) applies to actions and other proceedings commenced before or after this Act comes into force. 2004, c. 6, s. 5 (9).
> [***emphasis added***]

469 To be clear, what these provisions of the measure were designed to accomplish was distinct from the provisions that purported to strip the Adams Mine Site of its regulatory approvals and force its owner, the Enterprise, to accept compensation to be determined by the Government itself (rather than an impartial and independent, municipal court of general jurisdiction). These provisions eliminated the contractual rights held by the Enterprise with respect to the Border Lands, for which it had already paid valid consideration, and extinguished the cause of action the Enterprise held in order to vindicate its contractual rights. Legislative or executive acts that purport to extinguish vested rights (such as a government concession or license), and which additionally deny access to justice before an impartial and independent municipal court, are prohibited under international law as a denial of justice.[525]

470 In other words, the Enterprise did not just suffer substantial impairment of its investment in the Adams Mine – without the payment of fair market value pursuant to Article 1110(2) and in violation of its legitimate expectations under Article 1105(1). It also suffered the loss of its right to seek damages from an Ontario Court for breach of contract in respect of the Border Lands purchase agreement. Conscious attempts, by the executive or legislative branch of a Host

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[525] See, e.g. *Robert E. Brown (United States) v. Great Britain* (23 November 1923), 4 RIAA 120. The claim was dismissed on the jurisdictional ground that Great Britain was not responsible for acts of the Government of South Africa, but the Tribunal had no doubt that the act of rescinding an American's licensed right to operate a gold mine, and denial of access to justice before an impartial municipal judiciary, constituted a flagrant denial of justice – prohibited under international law.

State, to deliberately prevent a foreign-owned enterprise from asserting and enforcing its legitimate rights before an impartial and independent municipal court constitutes nothing less than a perversion of the administration of justice to which to aliens are entitled under any civilised system of law.[526]

471 At paragraphs 186-187 of its Statement of Defence, the Respondent claims that the AMLA did not, in fact, deny access to an Ontario Court to the Enterprise. It points out that the measure left open the possibility that an Ontario Court could be petitioned, under the measure, to make a determination of fact or law with respect to the compensation due ***under*** the legislation. The fact of the legislation or the provisions thereof, could not be challenged. The disingenuous character of the Respondent's argument, REDACTED

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472 Mr. Reuben Rosenblatt, one of the most highly respected authorities on real estate and property law in Ontario, has opined that – if the Enterprise had been able to maintain its claim against the Government of Ontario – the measure of damages would have been equivalent to the fair market value of the Site as a fully permitted, partially developed, waste landfill.[528] As stated by Mr. Rosenblatt, because the Government's breach of the Border Lands purchase agreement would have completely frustrated the Enterprise's plans to develop and operate the Adams Mine Site as a mega-landfill, the appropriate measure of damages – under

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526 *Petrobart Limited v Kyrgyzstan*, Award, SCC Case No 126/2003, IIC 184 (2005), 29th March 2005, SCC Arb Institute (Stockholm), at 28, 75-77.

527 REDACTED

528 Opinion of Reuben Rosenblatt, Minden Gross LLP, March 1 , 2010, page 11

Ontario law – would have been the fair market value of the Adams Mine Site itself.[529] The *Adams Mine Lake Act* deprived the Enterprise of its right to seek and collect those damages from an Ontario Court.

473 That customary international law prohibits such abuses of legislative authority is beyond doubt. Indeed, whether such measures were taken in good faith is practically beside the point, if the result is denial of access to justice before an impartial and independent municipal court. As demonstrated in both the *Ambatielos* and the *Idler* awards:

> ...[t]he foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorized by law; to deliver any pleading by way of defence, set-off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.[530]
>
> ***
>
> The government thus interpreted the judgments as taking the case out of the hands of the courts to be proceeded with in a nonjudicial – i.e. 'administrative and economic' – manner before its own accounting officers of the treasury, as it might be disposed to direct. That is, in effect, the government proposed to decide the Idler case itself.
>
> The litigation before the courts was put an end to, and thereby the contracts, in so far as they remained unfulfilled (if there were any), were for all practical purposes annulled; for the government's action and reiterated opinion left no room for question what it would do...
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> ...[The supreme court's] affirmance [sic] of the alleged superior court judgment annulling proceedings...could have had but one purpose – to switch the case from the lines of judicial

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529 Ibid.

530 *Ambatielos (Greece v. Great Britain)*, (6 March 1956), 23 I.L.R. 306 at 325; 22 RIIA 83 at p. 111.

> determination; in short to dismiss it. We have no hesitation in saying that the effect of these judgments was a denial of justice.[531]

474 That the Enterprise would have succeeded in its contract claim before an Ontario Court is not in doubt. REDACTED

Thus, even if the Tribunal were to rule that the Government of Ontario was somehow entitled, under international law, to strip the Adams Mine Site of its permits and approvals, it would nonetheless remain obliged to pay damages equivalent to the fair market value of the Adams Mine Site – because the same measure also 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 (which led to the same consequences as the Government's legislative taking).

III. Evidence of Bad Faith

475 It is well established that the customary law international minimum standard of treatment does not require proof of a lack of good faith, or of bad faith, in order for State Responsibility to be found. However, the existence of such evidence can be determinative of whether the standard has been breached.

> In other words, it is submitted that good faith is presumed here as elsewhere, and that bad faith need not be proved by the investor if he can establish a breach of the overriding objective duty of acting fairly, equitably and reasonably. If the authorities of the host country are found to be acting unfairly, inequitably or unreasonably they are in bad faith. The latter phrase at first sight carries a subjective connotation, and there may be occasions in the law when this **is** the correct interpretation. Rut on account of the

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531 *Jacob Idler (United States) v. Venezuela, (1885)*, 4 Moore's International Arbitration (Washington D.C.: US Government Printing Office, 1898) 3491 at 3516-3517.

532 REDACTED

> primary duties imposed on the host country this. it is submitted, is not one of them..[533]
>
> Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the Interpretation according to its terms.[534]

476 At paragraphs 138-142 of its Statement of Defence, the Respondent quotes the Ontario Government minister who introduced the measure in the legislature for the factual proposition that the Adams Mine Lake Act was implemented in response to a "tragedy" that took place in the year 2000 involving contaminated drinking water. It repeated the proposition at paragraphs 226-227, as follows:

> The AMLA was enacted for the public purpose of protecting water resources and the environment.
>
> Protecting water resources and ensuring safe drinking water were important government priorities, especially in light of the events in Walkerton, Ontario. The Government of Ontario was concerned that [the] Adams Mine could threaten the safety of local water resources in Timiskaming. The AMLA was linked to both of these priorities when it was introduced into the legislature.

477 The "Walkerton tragedy" was not only four years removed from the Adams Mine Lake Act; it took place approximately 600 kilometres away (i.e. a seven-hour drive) from the Adams Mine Site. Moreover, the contamination in that case came about as a result of the criminal incompetence and dishonesty of two town employees, who were responsible for running the town's local water treatment facility, and the contamination was caused primarily by cow manure run-off from

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533 F.A. Mann, "British Treaties for the Promotion and Protection of Investments" 52 (1981) Brit. Yrbk. Int'l. Law 241 at 245.

534 *Loewen Group Inc. & R. Loewen* v. *United States of America*, ICSID Case No. ARB/AF/98/3, Award on Jurisdiction, 9 January 2001, at para. 50

nearby farms.[535] REDACTED

478 REDACTED which amended section 27 of the Ontario *Environmental Protection Act* to operate a waste disposal site in a "lake" – defined to include essentially any large, man-made hole in the ground that fills with rainwater over time – REDACTED

REDACTED

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[535] Memorial Doc Tab __, See, e.g.: http://www.cbc.ca/news/background/walkerton/timeline.html, last visited 25 February 2010; and Memorial Doc Tab __, http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/walkerton/part1/, last visited 25 February 2010.

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REDACTED it is submitted that the Government of Ontario acted in bad faith when it implemented the *Adams Mine Lake Act*, attempting to generate, by subterfuge, a valid public policy reason for what was clearly an exclusively targeted measure that was required as a matter of political expediency.

536 REDACTED

480 REDACTED

making it more politically difficult for a future government to reinstate the permits granted in respect of the Adams Mine, as the Province's waste treatment crisis escalated in the years to come. Clearly this so-called legislative amendment was calculated to be meaningless in effect, should it ever come to pass that another landfill proposal that was actually favoured by Cabinet Members arose which might potentially run afoul of the new rule.

481 REDACTED

the Respondent nonetheless stated the following in paragraph 234 of its Statement of Defence:

> None of the provisions of the AMLA discriminate against investors of another NAFTA Party, nor does the AMLA contain provisions that refer to the nationality of parties involved in the development of the site. Rather, the AMLA accords the same treatment to proposals to develop domestic waste disposal sites regardless of whether those proposals are made by Canadian or U.S. companies. The AMLA amends section 27 of the Environmental Protection Act and states that no person shall use, operate, establish, alter, enlarge or extend a waste disposal site where waste is deposited in a lake. Indeed, this provision of the AMLA was subsequently applied to prevent an Ontario company, Inter Recycling Inc., from expanding [its] landfill.

482 Leaving aside the Respondent's strained construction of 'discrimination,' within the context of an expropriation, this argumentation appears tailored to mislead the Tribunal into believing that the measure truly was adopted by the Government of Ontario to address an environmental issue of general application and concern. Taken together with the Respondent's other claims about how the Ontario Government was allegedly motivated by the "Walkerton tragedy" to adopt the measure, it appear that the Respondent is not pleading its NAFTA case in good faith either.

PART FOUR: VALUATION OF LOSS

483 Under applicable rules of customary international law, a Host State must provide full restitution for its unlawful impairment of the use or enjoyment of foreign-owned investment. NAFTA Article 1117 extends such responsibility for measures that unlawfully impair investments owned or controlled by an Enterprise of a Party which is either owned or controlled by a national of another Party. Impairment that rises to the level of effective or *de facto* deprivation requires the payment of compensation equivalent to the fair market value of the investment immediately prior to the date upon which the unlawful impairment took place.[537]

484 In this case, there are three grounds for a finding of international responsibility on the part of the Host State, Canada: (1) failure to accord treatment to the Enterprise consistent with its reasonable and investment-backed expectations about the state of transparency and rule of international law in Ontario; (2) the indirect taking of the Enterprise's right to use the Adams Mine Site as a permitted mega-waste landfill; and (3) a denial of the Enterprise's fundamental right of access to municipal courts, in order to obtain a binding, judicial remedy for the Government of Ontario's breach of contract, for refusing to transfer possession of the borderlands to the Enterprise. Under all three grounds of responsibility, the damages analysis is the same.

485 The Government of Ontario engaged in a non-transparent and discriminatory process of adopting a law that was tailor-made to bar the Enterprise from using the Adams Mine Site as a waste landfill. By publicly proclaiming a policy rationale for the measure that REDACTED nothing more than a smoke screen calculated to withstand political and legal

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537 World Bank, Guidelines on the Treatment of Foreign Direct Investment, Article IV:3, in: World Bank, *Legal Framework for the Treatment of Foreign Investments*, vol. 2 (World Bank Group: Washington, D.C., 1991) at 41-42.

scrutiny, the Government of Ontario committed an abuse of right, as defined under customary international law doctrine. This conduct, and the Government's failure to provide the kind of transparent and reliable policy environment that any reasonable investor in the Enterprise's position would have expected, was the proximate cause of the Enterprise's inability to employ highly valuable, permitted commercial land at its highest and best use.

486 The Government of Ontario passed legislation that was tantamount to expropriation on its face. It renders what had been highly valuable, permitted commercial land effectively inutile, leaving the Enterprise with nothing more than ownership of five giant holes in the wilderness, along with the attendant risks and liabilities associated with a former open pit iron ore mine with no other practical, commercial use. Article 1101(2) provides that the Respondent must pay compensation equivalent to the fair market value of the land, as of the moment immediately prior to adoption of its measure. At that moment, the Enterprise held in its possession an ideal site for a mega waste landfill, with some basic infrastructure already in place and all of the essential permits already granted.

487 As noted above, the AMLA did not just provide for the *de facto* taking of the Adams Mine Site. It also named and definitively quashed the cause of action being pursued before its own court. REDACTED RE DA the reason for naming and eliminating both the contractual rights of the Enterprise to the Border Lands, and its rights to obtain satisfaction before an Ontario Court, REDACTED

[538] These provisions were the direct cause of the Enterprise's inability to obtain fair market value for the damages brought about by the Government's breach of contract – in failing to transfer title to the Enterprise for land. Without control of the Border Lands, the Enterprise would not have been

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538 REDACTED

able to put the Adams Mine Site to its highest and best use, as a waste landfill. The availability of these adjacent lands was a mandatory condition of the approval granted by the previous Government to proceed with the Site as a mega-waste landfill.

488 As a matter of Ontario law – which would have been applied by an Ontario Court had the measure not quashed the Enterprise's cause of action – because transfer of the Border Lands was an essential, regulatory requirement for operation of the Adams Mine Site as a mega-waste landfill, the Government's refusal to honour its contract with the Enterprise, for transfer of title in those lands to it, had the effect of denuding the Enterprise of all practical value of the Adams Mine Site itself. Under Ontario law, the available remedies were: specific performance and/or damages for the foreseeable losses stemming from the Government's breach of contract, at the election of the Plaintiff, 1532382 Ontario Inc. The deprivation of either of these remedies led to the same result: substantial impairment of the Enterprise's ability to put the Adams Mine Site to its highest and best use. Ontario law specifies that the appropriate damages award in such a case would have been equivalent to the fair market value of the Adams Mine Site, as a partially developed, but fully-permitted, mega-waste landfill site.[539]

489 The value of an asset cannot be divorced from the circumstances of its use. While the Respondent would prefer to regard the Adams Mine Site as nothing more than an abandoned mine with no modern waste treatment infrastructure and no prospect of receiving the necessary governmental approvals to be used as a mega-waste landfill, the facts belie a much different story. It should not be controversial that a governmental license or approval can affect the value of the asset whose use they govern. Indeed, the value of the license or approval itself can be determinative of the value of an asset or of the enterprise as license holder. For example, in the *Rumeli Telekom* case, the tribunal observed that the value of the

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investment enterprise it had been asked to assess was inextricably linked to, and dictated by, the fact of its holding a license to operate a mobile phone network.[540]

490 For the valuation of assets such as commercial real estate, which have been subjected to conduct tantamount to expropriation, compensation is reasonable if it represents the cash amount required to replace the asset as of the date of the taking. Assessment of the fair market value of real property involves the analysis of any arm's-length transactions in the relevant market involving either the asset itself or comparable assets.

491 As demonstrated in cases such as *Siag & Vecchi v. Egypt* and *Santa Elana* v. *Costa Rica*,[541] ascertaining the value of commercial real estate typically involves determining the highest and best use of the land at issue, in light of its physical characteristics and the legal rights of use associated with it. As Lillich and Christensen observed in 1962:

> [The claimant] may consider purchase price, age and condition of the property, appraisals by experts and by individuals having personal knowledge of the facts, as well as rental income and values determined for similar types of property in same or adjacent ones...
>
> Evidence probative of value includes contracts, deeds, vouchers and tax rolls showing the original value of the property plus the nature and cost of subsequent improvement; the amount of mortgages or encumbrances on the property; the amount the property has depreciated; appraisals by qualified experts who are familiar with the general market value of the property in the area; book value of business or corporate property; studies and reports by industrial engineers; the affidavits of persons with special knowledge of the property at the time of loss. Photographs, extracts from corporate books, accountants' reports, measurements and statistics of industrial capacity and physical plant, income derived from the property for several years previous, and other facts establishing

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[540] *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, Award, ICSID Case No ARB/05/16, IIC 344 (2008), 21st July 2008, despatched 29th July 2008, ICSID, IIC 344 (2008), at para 811.

[541] *Compañía del Desarrollo de Santa Elena SA* v *Costa Rica*, Final Award, ICSID Case No ARB/96/1, IIC 73 (2000), (2000) 439 ILM 1317, dispatched 17th February 2000, ICSID, at para. 70; and *Waguih Elie George Siag and Clorinda Vecchi* v *Egypt*, Award, ICSID Case No ARB/05/15; IIC 374 (2009), at para's. 574 & 580.

> special circumstances will corroborate an expert's estimate of the fair market value."[542]

492 The fair market value of the Adams Mine Site, as it existed on April 5th 2004, must accordingly be determined on the basis of the highest and best use of this land. Unquestionably, the highest and best use of the Adams Mine Site was as a high volume, waste-by-rail, landfill disposal facility. The value of the Site resided in the right of its owner to develop it as a waste disposal site that could accept as much waste material as the density of its "air space" would bear, as defined by its certificate of approval. The volume established by the Adams Mine Site certificate of approval was 1,341,600 tonnes per year. This amount constituted a "mega landfill" disposal facility, as the term is understood in the waste management industry.

493 In Ontario, both today and at all relevant times, demand for waste disposal has far exceeded supply.[543] Permitted mega landfill disposal facilities are certainly saleable and a market exists for them both in Ontario and throughout North America. Because high barriers to entry are a fundamental characteristic of the market for waste landfill facilities in North America, permitted air space is the *sine qua non* of valuation. The same is true in other industries, such as gaming, where the defining factor for the valuation of both new and existing facilities is whether a transferrable license exists to engage in that business at that location.

494 The introduction and subsequent passage of the *Adams Mine Lake Act* destroyed the fair market value of the permitted air space for the Adams Mine Site by cancelling the Certificates of Approval and all other permits that had been granted for its operation as a waste landfill facility. The measure did not provide for compensation to the Enterprise or the Investor. Instead, it statutorily barred the

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[542] R. Lillich and G. Christensen, *International Claims: Their Preparation and Presentation* (Syracuse University Press: New York, 1962) at 75-76.

[543] Deloitte Expert Report, at 27 to 49.

payment of just compensation on a timely basis and purported to remove all causes of action for such compensation under applicable domestic law.

495 Dating from the mid 19th to the early 20th centuries, mixed claims tribunals commonly awarding what today would be known as fair market value for unlawful deprivations of property based upon the commercial use to which that property had been put.[544] As a matter of elementary deduction, these arbitral awards all demonstrate, implicitly or explicitly, that to determine the value of commercial property in land, it is necessary to determine what its highest and best use was as at the time of taking. More recently, in the *Santa Elana* v. *Costa Rica* case, the principle of highest and best use was applied to determine the value of land expropriated by the Host State. Whereas the respondent argued that its highest and best use was agricultural, the claimant succeeded in demonstrating that its highest and best use was, in fact, touristic. As a general rule, one cannot assess the fair market value of any asset without taking into account its highest and best use, which involves appraising both the practical and the legal limits of such use.

496 Typically, the method of valuation used to determine the proper amount of compensation is context-specific. When the impairment relates to the investor's use or enjoyment of a chattel asset, one commonly examines its book value and its replacement value. For example, depreciating assets are typically assessed using book value. Professor Kantor explains, however, that non-depreciating assets would more likely be analysed using adjusted-book-value, given that accounting standards and practices often assign a book value to an asset that in no way reflects its value would be on the open market. [545] He stresses, however, that "valuation methods are not mutually exclusive," stating:

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544 See, e.g.: *Smith (U.S.)* v. *Mexico* April 11, 1893 Moore's Arb. 3374; *Monnot (U.S.)* v. *Venezuela*, February 7, 1903, RIAA vol. IX 232 at 233; *Barque Jones (U.S.)* v. *Great Britain*, Feb. 8, 1853, Moore's Arb. 3049; *Cheek (U.S.)* v. *Siam*, July 6, 1897, Moore's Arb. 1899 & 5086; and *Hammond (U.S.)* v. *Mexico*, April 11, 1839, Moore's Arb. 3241.

545 M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer: New York, 2008), at 7-9.

> Valuation methods are often complementary. If the valuations reached by two methodologies are widely inconsistent with each other, that can be a strong signal that something is awry. If several valuation methods produce consistent results, arbitrators may take greater comfort from the valuations.[546]

497 Book value is generally not preferred for the valuation of commercial real estate. As demonstrated in the Deloitte Report, valuation of land acquired for business purposes is normally best obtained through application of a comparative analysis.[547] In their treatise, Messer's McLachlan, Shore and Weininger note the use of this approach for valuation of the *de facto* taking of a finite, income-generating asset. The analysis is based upon determining the highest and best use of the asset, taking into account what is legally permissible; what is physically permissible; what is financially feasible; and what would be an optimal productive use of the asset.[548] McLachlan, Shore and Weininger note how the tribunal in *CME v. Czech Republic* adopted just such a comparative analysis, for a case in which substantial governmental interference impacted deleteriously upon an enterprise's use and enjoyment of a television broadcasting license.[549]

498 As Mr. Main, the author of the Deloitte Report, explains: a comparative analysis is particularly appropriate in the instant case because two transactions involving landfills have occurred since the Enterprise was deprived of its use and enjoyment of the Adams Mine Site as a landfill.[550] In addition, Mr. Main was able to identify two other contemporaneous sales transactions, both of which involved landfills with similar attributes as the Adams Mine Site South Pit,[551] including airspace

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546 M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer: New York, 2008), at 27.

547 Deliotte Expert Report, Addendum F, at 1. The comparative approach is explained at pages 75-78 of the Report.

548 Deloitte Expert Report, at 70-71.

549 C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration* (OUP: Oxford, 2007) at 322.

550 Deloitte Expert Report, at 78-94.

551 Adopting a prudent and conservative approach, the author of the Deloitte Report limited their valuation to the south pit alone, even though the waste crisis in Ontario has since led to a remarkably fast-tracked increase in airspace for the landfill acquired by the City of Toronto immediately thereafter. It was

capacity. [552] For such a special use parcel of land, having four relevant and contemporaneous comparators is an excellent basis for such an expert analysis.

499 In order to ensure the accuracy of his analysis, Mr. Main undertook an income-based analysis of the investment,[553] in addition to canvassing the relative applicability of a cost-based approach.[554] Both analyses confirmed the correctness of the results of Mr. Main's comparative analysis: that if the *Adams Mine Lake Act* not been enacted, at that time the Adams Mine Site would have had a value of between $99,000,000.00 to $111,000,000.00, because its highest and best use was as a permitted landfill with valuable infrastructure already *in situ*, ready for completion of its development – as a mega landfill in a region experiencing a chronic shortage of waste treatment capacity.[555] As the Lang Appraisal Report demonstrated, the highest and best use of the Adams Mine Site – after the *Adams Mine Lake Act* came into force – was as vacant land with no other use than as a speculative holding for potential, future patented mining claims and/or mineral rights. Its post-AMLA value was accordingly assessed as being no higher than $81,000.00.[556]

500 Implementation of the AMLA was direct cause of a dramatic reduction of value in the Enterprise's investment. Mr. Main has determined that the value of the Adams Mine Site, as of April 4th, 2004, was between $99,000,000.00 and $111,000,000.00, with a mean of $105,000,000.00. The passage of the AMLA reduced the investment to approximately one-seventh of one percent of its former value: approximately $81,000.00. There is no other conclusion one can reasonably draw about the impact of this measure than that it was expropriatory.

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therefore quite foreseeable that – but for the arbitrary animus shown by senior members of the Government of Ontario towards the Adams Mine Site's use as a landfill – the Enterprise could have obtained a similarly fast-tracked increase in its airspace, which could have been easily accommodated by putting one or both of the other two pits at the Site into service. See: Deloitte Expert Report, at 4.

552 Deloitte Expert Report, at 95-105.

553 Deloitte Expert Report, at 110-123.

554 Deloitte Expert Report, at Addendum F.

555 Deloitte Expert Report, at 109.

556 Deloitte Expert Report, at 121-123; citing the Lang Report, attached as Addendum C.

501 As the expert opinion of Mr. Rosenblatt demonstrates, the same result would have accrued but for inclusion of sections 4 and 5 in the AMLA, as implemented.[557] As described above, these provisions extinguished the Province of Ontario's obligations under the Border Lands contract, as well as the Enterprise's right to pursue a remedy for its breach before an Ontario court. But for their implementation, REDACTED

Upon succeeding in an Ontario Court, the Enterprise would have been entitled to receive compensation for the losses it suffered as a consequence of the contractual breach: i.e. a damages award for the fair market value of the Adams Mine Site's being employed in its highest and best use – as a mega landfill in a region experiencing a chronic shortage of waste treatment capacity. Mr. Main's damages analysis is accordingly as applicable to the Investor's Article 1105 claim as it is to the Article 1110 claim.

502 Finally, it is submitted that, in order to ensure that the Enterprise is made whole, an award of compound interest is required. An award of interest recognizes that the injured party could not use or enjoy the value of the property taken, or otherwise impaired, as of the date State Responsibility was incurred: April 5th, 2004. In order for 'full' reparation to be accorded, recent arbitral practice firmly supports an award that includes compound interest at prevailing market rates, rather than only simple interest. The choice of compound interest reflects, much more accurately, modern economic realities.[558] As explained by the Tribunal in *Santa Elena v Costa Rica*:

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557 Opinion of Reuben Rosenblatt, Minden Gross LLP, March 1st, 2010, page 3

558 *LG&E Energy Corporation et al v Argentina*, Decision on Liability, ICSID Case No ARB/02/1, IIC 152 (2006), (2007) 46 ILM 36, (2006) 21 ICSID Rev-FILJ 203, 3rd October 2006, ICSID, at para. 55 (25 July 2007); *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, Award, ICSID Case No ARB/01/7, IIC 174 (2004), (2007) 12 ICSID Rep 6, (2005) 44 ILM 91, 25th May 2004, ICSID, at para. 251; *Compañía del Desarrollo de Santa Elena SA* v *Costa Rica*, Final Award, ICSID Case No ARB/96/1, IIC 73 (2000), (2000) 439 ILM 1317, dispatched 17th February 2000, ICSID, at para's 101-106 (February 17, 2000); *Siemens AG v Argentina*, Award and Separate Opinion, ICSID Case No ARB/02/8, IIC 227 (2007), 6th February 2007, ICSID, at para's. 395-400.

> The amount of compensation should reflect, at least, in part, the additional sum that [the monetary equivalent of the property's value] would have earned, had it , and the income generated by it, been reinvested each year at generally prevailing rates of interest. [559]

503 It is accordingly submitted that interest awarded by the Tribunal should be compounded quarterly and payable at a rate of interest that reflects no less than the Government of Canada's benchmark yields for long-term bonds over the relevant period.

CONCLUSION

504 With its adoption of the *Adams Mine Lake Act*, the Government of Ontario has engaged in a self-serving, politically-motivated and capricious course of conduct that blatantly breaches the obligations owed by a Host State to investors, under both NAFTA Articles 1105 and 1110, and under customary international law. In order to make full reparation for the economically devastating effects of this illegal conduct, the Respondent should be ordered to pay an award of damages to the Enterprise that is equivalent to the fair market value of the *Adams Mine Lake Act* as of April 4, 2004, plus interest and costs as petitioned below.

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[559] *Compañía del Desarrollo de Santa Elena SA* v *Costa Rica*, Final Award, ICSID Case No. ARB/96/1, IIC 73 (2000), (2000) 439 ILM 1317, dispatched 17th February 2000, ICSID, at para. 104. See, also: *Wena Hotels Limited* v *Egypt*, Award, ICSID Case No ARB/98/4 (8 December 2000), at para. 136; and *Autopista Concesionada de Venezuela CA (Aucoven) v Venezuela*, Award, ICSID Case No ARB/00/5, IIC 20 (2003), despatched 23rd September 2003, ICSID, at para's. 393-395.

SECTION IV: RELIEF SOUGHT

505 As set out above, Claimants seek the following:

i. Damages of not less than C$104,919,250.00 for interference with the Enterprise's use and enjoyment of the Adams Mine Site, to the extent of its approved landfill capacity;

ii. Costs associated with these proceedings, including all professional fees and disbursements;

iii. An award of compound interest a rate to be fixed by the Tribunal, both on a pre-award, and on a post-award, basis;

iv. Payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and

v. Such further relief as counsel may advise and that the Tribunal deems appropriate.

All of which is respectfully submitted.

March 1st, 2010

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