

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

KOCH INDUSTRIES, INC. AND KOCH SUPPLY & TRADING, LP

Claimants

v.

CANADA

Respondent

(ICSID Case No. ARB/20/52)

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MEMORIAL ON JURISDICTION AND THE MERITS

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1. Koch Industries, Inc. (**Koch**) and Koch Supply & Trading, LP (**KS&T**) (collectively, the **Claimants**), submit this Memorial on Jurisdiction and the Merits in this arbitration proceeding against the Government of Canada (the **Respondent** or **Canada**) pursuant to Articles 1116(1) and 1120 of the North American Free Trade Agreement (**NAFTA**) and Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the **ICSID Convention**), and in accordance with Procedural Order No. 1, dated 29 June 2021.

## I. INTRODUCTION

2. This claim arises out of summary and arbitrary measures by the Province of Ontario (**Ontario**) that had the effect of wiping out KS&T's carbon allowances trading business in the Province and arbitrarily and illegally stripped KS&T of millions of dollars in inventory without any compensation.
3. Ontario's measures first effectively killed KS&T's ability to pursue its business as an Ontario carbon market participant and froze and liquidated the value of millions of carbon allowances<sup>1</sup> that KS&T had acquired in June 2018 through participation in an Ontario-sponsored public allowances auction at the cost of USD 30,158,240.95 (the **Purchase Price**).<sup>2</sup> Ontario then proceeded to annul all allowances in KS&T's Ontario carbon allowances account against no compensation, and to expressly deny it any access to domestic courts to defend and uphold its right to lawful compensation. Ontario's measures were motivated by the sole purpose of seeking illegally to minimize the financial impact of cancelling the Ontario Cap and Trade Program, in service of the incoming Conservative Government's political interests. The cancellation of Cap and Trade itself served no public purpose, as it prompted the virtually immediate introduction of an equivalent federal program that imposed higher costs. Ontario ultimately confirmed the uncompensated expropriation with no regard to due process. These measures, for which Canada is responsible under the NAFTA and international law, violated Koch and KS&T's rights under NAFTA Chapter Eleven, giving rise to this claim and to a right to damages.
4. Koch is a U.S. (Kansas) privately held company, with its principal registered place of business at 4111 East 37th Street North, Wichita, KS 67220. Koch was founded in 1940. Through its subsidiaries, Koch is involved in the manufacturing, refining and distribution of petroleum, chemicals, energy, fibers, intermediates and polymers, minerals, fertilizers, pulp and paper and chemical technology equipment, as well as in ranching, finance and commodities trading and investing.
5. KS&T is organized under the laws of Delaware and is a wholly-owned subsidiary of Koch. KS&T's business initially focused on the purchase and sale of energy products, before expanding into trading in a broad variety of commodity markets, including cap and trade emissions allowances. KS&T's role within the Koch enterprise is to engage on a for-profit basis in the specialist business of energy and related market trading, and

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<sup>1</sup> References to "carbon allowances" or to "allowances" in this Memorial refer to a right under the Regulation (or other applicable program, as the context requires) to emit one tonne of carbon dioxide (or the carbon dioxide equivalent of other GHGs).

<sup>2</sup> All monetary references in this document are to United States dollars, unless otherwise indicated.

also contracts with other Koch companies with corresponding emissions and other compliance obligations. KS&T seeks to ensure that relevant Koch companies meet their compliance obligations [REDACTED]

[REDACTED]. KS&T's principal place of business is also 4111 East 37th Street North, Wichita, KS 67220.

6. In 2016, Ontario adopted the Climate Change Mitigation and Low-Carbon Economy Act (the **Cap and Trade Act**) and the related Cap and Trade Program Regulation (the **Cap and Trade Regulation**) (collectively also referred to as the **Cap and Trade Program**). The Act and Regulation sought to lower greenhouse gas (**GHG**) emissions by imposing mandatory limits, or “caps,” on GHG emissions produced by designated classes of industrial emitters and enforcing monetary penalties where the caps were exceeded. The Act and Regulation created carbon allowances that gave participants the right to emit GHGs and provided that the pool of allowances would be reduced over time.
7. The Cap and Trade Act and Regulation mandated public auctions to sell allowances and specifically contemplated and implemented a secondary market for allowances that was essential to harnessing market mechanisms to achieve the Cap and Trade Program's objectives at the lowest overall cost. Ontario notably provided for a designated category of participants —defined as “market participants”— mandated under the Program to engage in the business of buying and selling allowances, thereby creating a secondary market. This in turn provided market liquidity to all participants and established transparent prices for all participants through the forces of supply and demand.
8. Ontario also structured the Cap and Trade Program in this way in anticipation of an agreement that came into effect on 1 January 2018, linking its Program to equivalent programs in Québec and California, both of which also provided for market participants. The goal was to enhance the Ontario market for allowances by linking Ontario's Program to a broader cross-jurisdictional market and, through this, promote its viability. Ontario envisaged its Cap and Trade Program operating for over a decade, with declining caps set on total emissions from the covered sectors for 2017 to 2030.
9. To assist Koch affiliates with emissions cap obligations and provide specialized access to the market, as of 2016 KS&T registered in the Ontario Cap and Trade Program as a market participant, establishing itself in the business of trading emissions allowances in Ontario and establishing an Ontario registered Compliance Instrument Tracking System Service (**CITSS**) account. In pursuit of this plan, KS&T took part in four public allowances auctions in Ontario in 2017, and again in the first public allowances auction organised in 2018. Through these auctions KS&T [REDACTED] of carbon allowances, held in its Ontario CITSS account, [REDACTED] in exchange. With its Ontario inventory of carbon allowances KS&T engaged in multiple primary and secondary markets trades, generating a profit.
10. On 15 May 2018, KS&T took part in the second of the four public allowances auctions planned for that year, purchasing [REDACTED] allowances (the **Purchased Allowances**) for the Purchase Price. KS&T paid these funds in full as directed by Ontario. The Purchased Allowances were deposited into KS&T's Ontario CITSS account on 11 June 2018.

11. Under the terms of the Regulation, on 15 June 2018 Ontario was to announce the number and vintage of allowances it would release in the next scheduled public allowances auction of 15 August 2018.<sup>3</sup> As of that date, while the Ontario Conservatives had recently won a majority in the provincial elections, they had not yet been sworn in, and the incumbent Liberal government remained in power. Despite this, at the direction of the as-yet-sworn-in Ontario Conservatives, Ontario officials failed to issue the notice required under the Regulation. Moreover, on that same day Premier-designate Doug Ford, seizing Government authority, abruptly announced that the Province would “cancel” the cap and trade program and immediately withdraw from future allowance auctions. His declaration had the predictable outcome of prompting immediate suspension of emission allowance transfers between Ontario and both Québec and California and ending the possibility of Ontario participants taking part in further public auctions. The uncertainty the announcement generated also led to the effective freeze of any intra-Ontario trades. Overall, the measure of 15 June 2018 effectively stranded all carbon allowances in Ontario CITSS accounts as of that date, precluding any trading of Ontario CITSS account allowances either within or outside Ontario, and effectively destroyed their value.
12. On 3 July 2018, Ontario promulgated Ontario Regulation 386/18 (**Regulation 386/18**), repealing the Regulation. Regulation 386/18 expressly prohibited Ontario Cap and Trade participants in any category from engaging in any kind of purchasing, selling, trading or otherwise dealing in emission allowances held in their Ontario CITSS accounts.
13. On 25 July 2018, Ontario introduced Bill 4 (**Bill 4**), the Cap and Trade Cancellation Act (the **Cancellation Act**), which went on to receive Royal Assent on 31 October 2018. The Cancellation Act repealed the Act and thereby formally ended Ontario’s Cap and Trade Program.<sup>4</sup> Further, the Cancellation Act denied compensation to all Ontario market participants for any allowances held in their Ontario CITSS accounts, unilaterally declaring all such allowances to be “annulled”. The Cancellation Act barred related legal proceedings before the Ontario Courts, with retroactive effect, and summarily declared that any action taken pursuant to the Cancellation Act did not constitute an expropriation.
14. In response to public comments questioning Ontario market participants’ exclusion from compensation under the Cancellation Act, Ontario responded that “...market participants without a compliance obligation chose to take risks as market traders and speculators,”<sup>5</sup> and therefore merited no compensation for the allowances they held that were summarily cancelled by the Province.

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<sup>3</sup> Ontario Regulation 144/16, Section 60, **CL-6**.

<sup>4</sup> *An Act respecting the preparation of a climate change plan, providing for the wind down of the cap and trade program and repealing the Climate Change Mitigation and Low-carbon Economy Act, 2016* (“Cap and Trade Cancellation Act, 2018”), 1st Sess, 42nd Leg, Ontario, 2018 (first reading July 25, 2018), **Exhibit CL-1**.

<sup>5</sup> MOECC, Bill 4, Cap and Trade Cancellation Act, 2018, Environmental Registry of Ontario (15 November 2018), **Exh. C-12**



15. In November 2018, Ontario implemented a compensation procedure for eligible participants.
16. In February 2019, KS&T filed for compensation in accordance with the Ontario procedure.
17. Through a letter dated 14 March 2019, Ontario denied KS&T's claim for compensation on the basis that KS&T was not entitled to compensation for the [REDACTED] of allowances it had held in its CITSS account as of 15 June 2018, and which Ontario had purported to "annul", because it was a market participant.
18. On 14 May 2020, Koch and KS&T held formal consultations with Canada under NAFTA Article 1118 regarding the damages they have suffered as a result of Ontario's measures in breach of NAFTA Chapter Eleven. These consultations failed to result in a mutually agreeable resolution of the claim. Accordingly, on 7 December 2020 Koch and KS&T filed their Request for Arbitration, seeking compensation in full for all damages, costs and other related losses both entities have incurred as a result of Ontario's measures in breach of NAFTA investment protections, for which Canada is responsible pursuant to NAFTA Article 105 and international law. Further to the procedural calendar established by the Tribunal in Procedural Order N°1, the Claimants now submit this Memorial on Jurisdiction and the Merits.
19. Ontario's conduct as described above breached Canada's obligations to Koch and to KS&T under Article 1105(1) of the NAFTA (Minimum Standard of Treatment of Investors).
20. Moreover, the effect of the measure as of 15 June 2018 was to indirectly expropriate the investment, and the effect of the Cancellation Act adopted into law on 31 October 2018 was to directly expropriate the investment. Neither of these expropriations were for a public purpose or accompanied by compensation. In the circumstances, Canada breached its obligations to Koch, to KS&T and to their investment under Article 1110 of the NAFTA (Expropriation).
21. In terms of quantum, the losses suffered by Koch and by KS&T are not less than USD 31,322,474.62.
22. Together with this Memorial, Koch and KS&T submit the following witness statements:
  - a. Witness statement of Michael Berends, signed 5 October 2021 (CWS-1)
  - b. Witness statement of Graeme Martin, signed 4 October 2021 (CWS-2)
  - c. Witness statement of Paul Brown, signed 5 October 2021 (CWS-3)
  - d. Witness statement of Frank King, signed 6 October 2021 (CWS-4)
23. Koch further submits the Expert Report of Dr. Robert Stavins, Professor of Energy & Economic Development at Harvard University, dated 5 October 2021 (CER-1).
24. This Memorial is further accompanied by Exhibits C-12 to C-175 and by legal authorities CL-22 to CL-138.

## II. FACTUAL BACKGROUND

### A. Ontario's Cap and Trade Program

#### 1. The Purpose of Cap and Trade Programs

25. Before considering the structure and operations of Ontario's Cap and Trade Program specifically, including the circumstances of its ultimate cancellation, it is useful first to examine the general function and purpose of cap and trade emissions control programs.
26. Carbon emissions are chemical substances (generally referred to as **GHGs**) that are released into the atmosphere as a result of industrial activities and development (such as, for example, manufacturing, transport, extraction and refinement activities *etc.*).
27. Cap and trade programs are an example of a broader class of regulatory instruments called emissions trading systems that seek to lower various types of emissions, including GHGs, at the lowest social cost.<sup>6</sup> As Dr. Robert Stavins, Professor of Energy & Economic Development at Harvard University, explains, cap and trade programs establish an aggregate limit (or "cap") on emissions of a given type that is lowered over time to achieve the targeted reduction, and then create a tradable commodity (typically called "allowances") representing the right to emit individual units of the targeted emission.<sup>7</sup> As a result of lowering the cap, the price of emissions allowances is expected to increase over time, raising the costs of non-compliance and, in theory, influencing the behaviour of emitters in a manner that contributes to continuing reductions in GHG emissions in the most cost-efficient way.<sup>8</sup>
28. Emissions allowances are created up to the cap, and allocated to entities subject to the cap ("compliance entities" or "capped entities"). Emission allowances may be allocated using several different mechanisms. In the initial stages of cap and trade programs, some portion of allowances are typically distributed for free by the government to certain sectors or facilities to facilitate their transition into the program, often in a manner reflecting their historic emissions and/or other factors.<sup>9</sup> Allowances may also be purchased from the government at auctions, which may generate significant revenue for the government, or from other participants in the cap and trade system.<sup>10</sup>
29. Capped entities must surrender allowances to the cap and trade program regulator corresponding to the emissions generated during the compliance period. The compliance period is typically set for a period of no less than one year but may be as

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<sup>6</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 5, **CER-1**.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Id.*, para. 26.

<sup>9</sup> *Id.*, para. 46.

<sup>10</sup> *Id.*, para. 47.

(continued)

long as three to four years. Capped entities are typically allowed to come into compliance over a multi-month, true-up period after the end of the compliance period.<sup>11</sup>

30. Because a capped entity's actual emissions may in practice be under or over its respective allocation depending on its behaviour, some capped entities will have to seek out allowances beyond their allocation to satisfy their compliance obligations, while others may have excess allocations available to sell. Allowances thus effectively become a tradeable property right that provides participants with the flexibility necessary to manage their investment and compliance strategies efficiently.<sup>12</sup>
31. Allowance holders can include capped entities as well as traders and other entities that do not (directly or indirectly) generate any emissions or otherwise have compliance obligations, but who are allowed to buy, sell and hold allowances in the system to promote its economic efficiency and environmental effectiveness.<sup>13</sup> Under the Ontario Cap and Trade Program, such entities without compliance obligations were termed "market participants."<sup>14</sup>
32. By allowing participants to trade emissions allowances amongst themselves, a secondary market is formed. Secondary markets ensure that there is an efficient, liquid market for emission allowances between the period of allowance auctions, if any. As Dr. Stavins explains, secondary markets are critical to the ability of cap and trade programs to achieve emission reductions cost-effectively, as they ensure that new information on the demand for (and supply of) allowances is incorporated into market prices efficiently and quickly.<sup>15</sup> Moreover, they are essential to the ability of compliance entities to have a way to buy or sell allowances given unexpected (or expected) changes in their business circumstances.<sup>16</sup>
33. In lieu of providing emission allowances, some cap and trade systems allow capped entities to meet some portion of their emission obligation with emission offsets. Offsets are generated when emission sources are credited for actions taken to reduce emissions beyond what is required by existing regulatory requirements. Offsets are often limited to particular types of activities in particular locations.<sup>17</sup>

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<sup>11</sup> *Id.*, para. 42.

<sup>12</sup> *See, e.g., Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10, [2013] Ch 156 (Ch), p. 12, **CL-22** (finding that "an EUA [European Union Allowance] is 'property' at common law. It is definable, as being the sum total of rights and entitlements conferred on the holder pursuant to the ETS. It is identifiable by third parties; it has a unique reference number. It is capable of assumption by third parties, as under the ETS, an EUA is transferable. It has permanence and stability, since it continues to exist in a registry account until it is transferred out either for submission or sale and is capable of subsisting from year to year.").

<sup>13</sup> Expert Report of Dr. Robert Stavins (5 October 2021), paras. 41, 43, **CER-1**.

<sup>14</sup> Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 1(1), **CL-5**; Ontario Regulation 144/16, Section 36(1), **CL-6**.

<sup>15</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 48, **CER-1**.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Id.*, para. 41.

(continued)

34. Under some cap and trade systems, participants may also trade in products derived from allowances and offsets on the secondary market: for example, futures contracts that allow a participant to purchase a certain quantity of emissions allowances from another participant, to be sold at predetermined prices and delivered on a specified date. Dr. Stavins notes that derivative products provide ways for capped entities (and market participants) to manage financial risks associated with regulatory compliance and/or participation in emission trading markets.<sup>18</sup> The key financial exchange for carbon trading in North America is the InterContinental Exchange (**ICE**), a listing and trading venue for commodities markets.
35. Cap and trade programs set up by individual jurisdictions may be joined together through a process referred to as “linkage.” Dr. Stavins notes that linkage provides participants a number of benefits, including access to a larger pool of allowances, facilitating lower costs of compliance; greater liquidity and price stability in auctions and secondary market trading; and simplified administration, especially for entities operating in multiple jurisdictions.<sup>19</sup> Following linkage, entities from participating jurisdictions can exchange and use allowances across systems. Linkage may necessitate certain amendments to existing regulations, such as amendments to ensure the recognition of allowances across jurisdictions, but it does not require each participating jurisdiction’s program to be identical.<sup>20</sup>
36. The perceived benefits of cap and trade programs have made them attractive to governments around the world looking to reduce GHG emissions through market-based mechanisms. The first cap and trade program for GHG emissions was introduced in 2005 in the European Union (**EU**). Cap and trade programs have spread rapidly since then and new programs continue to be proposed and adopted. As of 2016, when Ontario enacted its Cap and Trade Program, 20 emission trading programs covering nine percent of global emissions had been implemented or were scheduled for implementation. Since that time, adoption of emission trading has expanded. At present, 29 emission trading programs covering 16 percent of global GHG emissions have been implemented or are scheduled for implementation. Including carbon tax policies, there are 64 carbon-pricing policies covering 22 percent of global GHG emissions. Thus, the use of carbon-pricing policies – and emission trading programs in particular – is widespread.<sup>21</sup>

## 2. The Western Climate Initiative

37. The Western Climate Initiative (**WCI**) is one example of global emissions trading schemes. It is specifically relevant to the present case given that Ontario was a signatory to the WCI and modelled its Cap and Trade Program along the lines set down by this scheme, with some variations.

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<sup>18</sup> *Id.*, para. 50.

<sup>19</sup> *Id.*, paras. 58, 83.

<sup>20</sup> *Id.*, para. 84.

<sup>21</sup> *Id.*, para. 29.

(continued)

38. The WCI is a collaboration between independent jurisdictions in the Western United States and Canada to “identify, evaluate, and implement” emission trading systems to reduce GHG emissions.<sup>22</sup> The WCI was established in 2007 when the governors of Arizona, California, New Mexico, Oregon, and Washington in the United States signed an agreement to develop a regional target for reducing GHG emissions, participate in a multi-state registry to track and manage GHG emissions in the WCI region, and develop a market-based program to reach their GHG reduction target. The Canadian Premiers of British Columbia, Manitoba, Ontario, and Québec, and the U.S. Governors of Montana and Utah joined WCI during 2007-2008 (together, we refer to these jurisdictions as the **WCI Partners**).<sup>23</sup>
39. The WCI participating jurisdictions, including Ontario, collaborated in developing several sets of recommendations relating to the design and operation of cap and trade programs, notably the “2008 Design Recommendations for the WCI Regional Cap and Trade Program” (**2008 WCI Recommendations**),<sup>24</sup> as well as the “2010 Design for the WCI Regional Program” (**2010 WCI Design**).<sup>25</sup>
40. In the 2008 WCI Recommendations, the WCI participating jurisdictions proposed “a design for a broad cap-and-trade program as part of a comprehensive regional effort to reduce emissions of global warming pollution to achieve the WCI 2020 regional goal.”<sup>26</sup> Each jurisdiction would have an annual allowance budget that together would form a declining regional cap. Allowances, defined as “the tradable permit to emit one metric ton of GHG emissions in CO<sub>2</sub>e,”<sup>27</sup> would ultimately be distributed through a “coordinated regional auction process by which each participating WCI Partner jurisdiction will auction allowances throughout the WCI region and receive their proceeds from the auction.”<sup>28</sup> Each jurisdiction would “recognize within their own jurisdictions allowances issued by other WCI Partner jurisdictions so that all WCI allowances are of equivalent use and fungible throughout the WCI region, regardless of which WCI Partner jurisdiction issues the allowances.”<sup>29</sup> Critically, the 2008 WCI Recommendations contemplated participation by entities both with and without compliance obligations. In other words, the 2008 WCI Recommendations foresaw a class of “market participants”, who play the role of pure buyers and sellers of allowances, as specialised enterprises.<sup>30</sup> The role of market participants was to ensure

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<sup>22</sup> *Id.*, para. 31.

<sup>23</sup> WCI, History (Archived), **Exh. C-13**.

<sup>24</sup> WCI, Design Recommendations for the WCI Regional Cap-and-Trade Program (23 September 2008), **Exh. C-14**.

<sup>25</sup> WCI, Design for the WCI Regional Program (2010), **Exh. C-15**.

<sup>26</sup> WCI, Design Recommendations for the WCI Regional Cap-and-Trade Program (23 September 2008), **Exh. C-14**.

<sup>27</sup> *Id.*, n. 4.

<sup>28</sup> *Id.*, p 8.

<sup>29</sup> *Id.*, p. 6.

<sup>30</sup> *Id.*, p. 9 (“*Purchasers and covered entities or facilities, and parties who otherwise obtain allowances, will be allowed to bank allowances without limitation, except to the extent that*

(continued)

liquidity, to support effective pricing and, overall, to maximize the efficiency of GHG markets.

41. The 2010 WCI Design built on the 2008 WCI Recommendations, providing a detailed roadmap for the WCI participating jurisdictions to draw upon in developing their own cap and trade programs. In this way it sought to ensure compatibility between programs established in different WCI jurisdictions and the corresponding ability to “link” different programs across North America. The 2010 WCI Design sought “to ensure fair and equal access to the market, transparent operations and timely public disclosure of critical information to maintain public confidence, and a market free of manipulation so that prices reflect supply and demand conditions”,<sup>31</sup> and to provide support for “continued cooperation in the design and implementation of individual Partner-level components of the program” in order to create a common market.<sup>32</sup> In other words, the creation of a functional market in allowances was fundamental to the WCI Design. At the same time, the 2010 WCI Design acknowledges and respects the particular objectives and legislative environments of each participating jurisdiction, by making clear that it is not intended to serve as a “model rule,” and emphasizing that “each Partner jurisdiction is subject to its own legislative and administrative processes”<sup>33</sup> and “maintains sovereignty in the administration of its program”.<sup>34</sup>

### 3. Ontario’s Cap and Trade Program

42. Following on predecessor jurisdictions including California and Québec (whose respective systems both were adopted and established as of 2012), Ontario opted for a cap and trade program based upon WCI principles. Ontario’s 2015 climate change strategy set Province-wide GHG emissions reduction targets to achieve total emissions of 15 percent below 1990 levels by 2020, 37 percent below 1990 levels by 2030, and 80 percent below 1990 levels by 2050. As Dr. Stavins notes, the establishment of a cap and trade program was a “cornerstone” of the strategy to achieve Ontario’s targets.<sup>35</sup>
43. Ontario introduced its Cap and Trade Program in 2016, under the Cap and Trade Act and the related Cap and Trade Regulation.<sup>36</sup> The Cap and Trade Program formally

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restrictions on the number of allowances any one party may hold are necessary to prevent market manipulation.”) (emphasis added).

<sup>31</sup> WCI, Design for the WCI Regional Program (2010), p. 20, **Exh. C-15**. See also Expert Report of Dr. Robert Stavins (5 October 2021), para. 56, **CER-1**.

<sup>32</sup> WCI, Design for the WCI Regional Program (2010), p. DD-2, **Exh. C-15**.

<sup>33</sup> *Id.*, p. DD-2.

<sup>34</sup> *Id.*, p. 24.

<sup>35</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 65, **CER-1**.

<sup>36</sup> Climate Change Mitigation and Low-carbon Economy Act, 2016, **CL-5**; Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, **CL-6**. The Act codified Ontario’s greenhouse gas reduction targets of 15% below 1990 levels by 2020, 37% below 1990 levels by 2030 and 80% below 1990 levels by 2050. The Regulation contains detailed rules and obligations for participating businesses, as well as compliance and enforcement provisions. In November 2017, the Regulation was amended to provide for linking with the Québec and California cap and trade programs, effective 1 January 2018.

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commenced on 1 January 2017. It covered emissions from large industrial and institutional emission sources, and liquid fuel emissions associated with the transportation, electric power, commercial, and heating sectors representing 82 percent of Ontario’s overall GHG emissions.<sup>37</sup> Further to the WCI Design, it also provided for a distinct category of “market participants”. The latter were not compliance entities, but instead played the role of “market makers”.<sup>38</sup> The Cap and Trade Program was designed and administered by the Ontario Ministry of the Environment and Climate Change (MOECC).<sup>39</sup>

44. Annual reduction in emissions caps under the Cap and Trade Program meant that barring changes in their industrial processes leading to GHG emissions reductions, Ontario mandatory participants would increasingly need to resort to public auctions or to the secondary market to obtain sufficient allowances.
45. Ontario envisaged its Cap and Trade Program operating for over a decade, with declining caps set on total emissions from the covered sectors for 2017 to 2030. The first compliance period was set to run from 1 January 2017 through to 31 December 2020, with three-year compliance periods thereafter.<sup>40</sup> In accordance with WCI rules, a “compliance period” refers to the tranches of time during which mandatory participants are required to track their GHG emissions and set them off with an equivalent amount of allowances, either distributed to them under the Program or acquired through public auctions or the secondary market. Ontario’s initial four-year period was expressly established so that its market would align with equivalent compliance periods in California and in Québec, facilitating linkage between the jurisdictions.<sup>41</sup> While the Cap and Trade Regulation as initially promulgated did not establish emission targets for future compliance periods, further cap reductions were envisioned. Subsequent amendments to the Regulation in November 2017 specified annual reductions in the emission cap of approximately 2.9 percent per year from 2021 to 2030, to ensure that the 2030 cap would achieve total emissions consistent with Ontario’s province-wide 2030 emissions reduction target.<sup>42</sup>
46. Participants in Ontario’s Cap and Trade Program consisted of capped participants, which included both “mandatory participants” and “voluntary participants,” as well as market participants. Mandatory participants included entities with emissions above

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<sup>37</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 67, **CER-1**.

<sup>38</sup> *Id.*, paras. 70-71.

<sup>39</sup> Pursuant to the change of government in Ontario in June 2018, the name of MOECC was changed to “Ministry of the Environment, Conservation and Parks”.

<sup>40</sup> *See* Expert Report of Dr. Robert Stavins (5 October 2021), para. 68, **CER-1**.

<sup>41</sup> The first compliance period was set to four years (2017 to 2020) to meet the twin goals of (i) establishing the program with minimal delay, and (ii) aligning the end of Ontario’s first compliance cycle with the end of one of California’s and Québec’s three-year compliance cycles (2020). *Id.*, (citing Ontario Ministry of the Environment, Conservation and Parks, “Cap and Trade Program Design Options,” November 2015, p. 6; Environmental Commissioner of Ontario, “Introduction to Cap and Trade in Ontario,” Appendix A to the ECO’s Greenhouse Gas Progress Report 2016, November 2016, p. 14).

<sup>42</sup> *Id.*, para. 69.

(continued)

certain emission thresholds: for example, one Koch enterprise in Ontario, INVISTA, was required to participate as mandatory participant in the Ontario market.<sup>43</sup> Voluntary participants included enterprises with emissions below the regulated threshold but that chose to take on the same compliance obligations as mandatory participants.<sup>44</sup> Mandatory and voluntary participants both were capped entities with obligations to surrender allowances corresponding to their emissions during the compliance period. The third category, market participants, broadly included any entities other than capped entities that registered to participate in carbon allowance auctions or secondary market transactions in carbon allowances, offset credits, or related financial derivatives.<sup>45</sup> We discuss the importance of market participants to the Ontario Cap and Trade Program and more generally in paras. 68 to 117 below.

47. Under the Program, Ontario allocated carbon allowances to participants through two mechanisms: distributions free of charge; and public auctions, held four times each year.<sup>46</sup> Distributions free of charge were made to capped entities to assist in their compliance transition, in light of the potential competitive disadvantage arising from internalization of their emissions costs compared with enterprises in non-participating jurisdictions. Both capped entities and market participants, including KS&T (as detailed in paras. 68 to 117 below) could otherwise register to participate in public auctions and bid for allowances, in this way meeting either compliance or (for market participants) enterprise needs. Auctions were single-round, sealed-bid auctions. Each auction cleared at a uniform auction price set at the lowest submitted bid price needed to clear the supply offered, as long as prices exceeded a pre-announced minimum price floor. At the completion of any given auction, allowances were transferred to winning bidders' accounts, and funds transferred to Ontario to pay for the allowances awarded based on the uniform clearing price.<sup>47</sup>
48. At the end of each compliance period, the Regulation required capped participants to surrender carbon allowances in the amount of their emissions during that same compliance period. Once surrendered, the Ontario government retired those allowances. Beyond the retirement of allowances surrendered for compliance, the

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<sup>43</sup> Witness Statement of Graeme Martin (4 October 2021), para. 16, **CWS-2**.

<sup>44</sup> For industrial and institutional sources, the threshold was 25,000 tons of carbon dioxide equivalent emissions per year. Likewise, for natural gas distributors, the threshold was 25,000 tons of carbon dioxide equivalent emissions arising from end-use consumption of the distributed volume of natural gas. For transportation fuel distributors, the threshold was the level of carbon dioxide equivalent emissions arising from end-use consumption of 200 liters of the distributed fuels. Voluntary participants were entities with carbon dioxide equivalent emissions from industrial or institutional sources between 10,000 and 25,000 tons per year. *See* Expert Report of Dr. Robert Stavins (5 October 2021), n. 102, **CER-1**. An entity might choose to participate in the Cap and Trade Program voluntarily where doing so might prove commercially advantageous. For example, an entity that would be eligible receive a free allowance allocation might prefer to opt into the program if its operations were more efficient than other entities in the sector such that it would receive more allowances than required for it to achieve compliance and could sell its excess allowances for profit.

<sup>45</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 71, **CER-1**.

<sup>46</sup> *Id.*, para. 73.

<sup>47</sup> *Id.*, para. 75.

(continued)



Regulation specified few instances in which the government could remove allowances from participants' accounts or otherwise cancel or retire allowances.<sup>48</sup> A notable instance was when a capped participant failed to surrender sufficient allowances to cover its emissions. In such cases, Ontario could remove allowances from that participant's account to cover the shortfall.<sup>49</sup>

49. Public allowances auctions under the Program generated significant revenue for the Province of Ontario. In 2017 alone, the province raised CAD 1.9 billion in revenue through its sale of allowances through four public auctions.<sup>50</sup> By the end of the second public auction in 2018, the Province had raised at total of CAD 2.9 billion in revenue.<sup>51</sup> In accordance with the Cap and Trade Act, Ontario was to deposit these funds into a bespoke Greenhouse Gas Reduction Account (**GGRA**), earmarked to fund GHG-reduction initiatives in the Province.<sup>52</sup>

#### 4. Ontario's Linkage with California and Québec

50. From the earliest discussions of the potential implementation of a cap and trade program in Ontario, the Ontario government emphasized the importance of ultimate linkage with California and Québec. Already in 2008, the Ontario and Québec governments had signed a Memorandum of Understanding (**2008 MOU**) regarding a provincial and territorial cap and trade initiative.<sup>53</sup> The 2008 MOU anticipated linkages to other GHG cap and trade programs, noting that such linkages could "provide greenhouse gas emission reductions at lower cost, allow for larger trading volumes and improved liquidity, and improve the pace of innovation".<sup>54</sup>
51. The Ontario government subsequently passed the *Environmental Protection Amendment Act (Greenhouse Gas Emissions Trading), 2009*, which established legislative authority to implement a cap and trade program.<sup>55</sup> It acknowledged in this context that linking with California and Québec would ensure greater liquidity in Ontario's system and lower costs of compliance.<sup>56</sup>

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<sup>48</sup> *Id.*, para. 82.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Id.*, para. 76.

<sup>51</sup> *Id.*, para. 88.

<sup>52</sup> *Id.*, para. 76.

<sup>53</sup> *Id.*, para. 54.

<sup>54</sup> Memorandum of Understanding between the Government of Ontario and the Government of Québec (2 June 2008), **CL-23**.

<sup>55</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 54, **CER-1**.

<sup>56</sup> Environmental Protection Amendment Act (Greenhouse Gas Emissions Trading), 2009, S.O. 2009, c. 27 – Bill 185, Preamble, **CL-24**.

(continued)

52. Consistent with WCI design principles,<sup>57</sup> linkage was also a central objective of the California and Québec programs. Under California’s Global Warming Solutions Act of 2006 (**AB 32**), the California Air Resources Board (**CARB**) was required to develop and implement a plan to reduce GHG emissions to 1990 levels by 2020. CARB adopted a plan to implement AB 32 in December of 2008 that included a cap and trade program that would link with other WCI Partner jurisdictions.<sup>58</sup> The California cap and trade program regulations were subsequently finalized and the program launched in 2012, with compliance obligations enforced as of 2013 for covered sectors.<sup>59</sup>
53. Québec also set up its own cap and trade system that entered into force in 2012 (with compliance obligations commencing in 2013) as the “centrepiece” of Québec’s 2013-2020 Climate Change Action Plan.<sup>60</sup> Similarly to California, through its cap and trade program Québec sought to achieve by 2020 a reduction of 20 percent below the 1990 level of Québec’s GHG emissions. Aware that the size of Québec’s economy would not provide its carbon market with the degree of fluidity it needed to be efficient in the long term, Québec adopted an amendment to its cap and trade regulation in December 2012 allowing for linkage with the California cap and trade program and, eventually, with those of other WCI Partners.<sup>61</sup>
54. California and Québec went on to reach agreement to link their two cap and trade programs. Following collaboration between their two governments to harmonize their respective regulations,<sup>62</sup> in September 2013, CARB and the Québec government signed a linkage agreement.<sup>63</sup> Pursuant to this agreement, the two parties confirmed, *inter alia*, that they would “provide for the equivalence and interchangeability of compliance instruments issued by the Parties for the purpose of compliance with their respective cap-and-trade programs” and “permit the transfer and exchange of compliance instruments between entities registered with the Parties’ respective cap-and-trade programs using a common secure registry ...” Linkage came into effect for the Québec and California programs in January 2014.<sup>64</sup> As a result, participants in those programs could exchange allowances and GHG emitters covered by either program could use allowances obtained under either program to comply with their obligations.

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<sup>57</sup> See WCI, Design for the WCI Regional Program (2010), p. 22, **Exh. C-15** (“Accordingly, the WCI program recommendations are designed to facilitate linking among the WCI Partner jurisdictions as well as linking with jurisdictions participating in other programs.”).

<sup>58</sup> California Air Resources Board, Climate Change Scoping Plan (December 2008), pp. ES-3, 30, **Exh. C-16**. See also *id.*, p. 30.

<sup>59</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 34, **CER-1**.

<sup>60</sup> Québec, Québec Cap-and-Trade System for Greenhouse Gas Emission Allowances (C&T): Historical Overview, p. 5, **Exh. C-17**.

<sup>61</sup> *Id.*, p. 7.

<sup>62</sup> *Id.*, p. 8.

<sup>63</sup> Agreement between the California Air Resources Board and The Gouvernement du Québec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions (25 September 2013), **CL-25**.

<sup>64</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 34, **CER-1**.

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55. Through the linkage process, California and Québec formed a regional carbon market that included market participants, provided for in both of their respective implementing regulations. It was this regional market that Ontario set out to join when it began developing its own cap and trade program.
56. In its February 2015 Climate Change Discussion Paper, the Ontario Environment Ministry introduced the idea of a carbon pricing mechanism. Putting a price on carbon was identified as a “climate critical-policy area” that would help Ontario reach its short term 2020 target.<sup>65</sup> On 13 April 2015, the Ontario government announced its intention to set up a cap and trade program and link it to the Québec and California programs:
- “Ontario is joining other jurisdictions, including Québec and California, by imposing a hard ceiling on the pollution allowed in each sector of the economy. Known as cap and trade, this system effectively reduces the amount of greenhouse gas pollution in our atmosphere by setting a limit on emissions, rewarding innovative companies, providing certainty for industries and creating more opportunities for investment in Ontario.
- Ontario intends to join the cap and trade system under the Western Climate Initiative. Under the cap and trade system, businesses will have their own greenhouse gas quota and will then be able to sell it if they don’t need it because of their own efficiency.”*<sup>66</sup>
57. In October 2015, Ontario signed another MOU on the environment and climate change with Québec to collaborate on market-based mechanisms to address climate change, including a cap and trade system based on the WCI design.<sup>67</sup>
58. In November 2015, MOECC published the “Cap and Trade Program Design Options” paper (**2015 Design Options Paper**). MOECC explained that Ontario was moving ahead with putting a limit on GHG emissions through a cap and trade program and that this program would be the “primary tool” for achieving Ontario’s 2020 target.<sup>68</sup> The 2015 Design Options Paper explained that Ontario’s proposed options were informed by the cap and trade experiences of Québec and California. Furthermore, the Paper identified linking with “other emissions reduction programs of similar rigour” as one of its “overarching design principles,”<sup>69</sup> elaborated on the benefits of linkage,<sup>70</sup> and

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<sup>65</sup> MOECC, Ontario’s Climate Change Discussion Paper (February 2015), pp. 25-26, **Exh. C-18**.

<sup>66</sup> Ontario Government, Cap and Trade System to Limit Greenhouse Gas Pollution in Ontario (13 April 2015), **Exh. C-19**. (emphasis added).

<sup>67</sup> Memorandum of Understanding Between the Government of Ontario and the Government of Québec Concerning Concerted Climate Change Actions and Market-Based Mechanisms 2015 (5 October 2015), **CL-26**.

<sup>68</sup> MOECC, Cap and Trade Program Design Options (16 November 2015), p. 1, **Exh. C-20**.

<sup>69</sup> *Id.*, p 3.

<sup>70</sup> *Id.*, p. 4.

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confirmed that Ontario’s intention was to link with the Québec and California systems.<sup>71</sup>

59. Linkage was subsequently acknowledged as a central objective of Ontario’s Cap and Trade Program in the Cap and Trade Act itself. As stated in the preamble to the Act: “A cap and trade program in Ontario will allow Ontario to link to other regional cap and trade markets as part of the international, national and interprovincial responses to reduce greenhouse gas.”<sup>72</sup>
60. Ontario, Québec and California subsequently signed a linkage agreement on 22 September 2017: the “Agreement on the Harmonization and Integration of Cap-and-Trade Programs For Reducing Greenhouse Gas Emissions” (the **OQC Agreement**).<sup>73</sup> The OQC Agreement replaced and therefore terminated the 2013 linkage agreement between the Québec government and CARB.
61. Pursuant to Article 1 of the OQC Agreement, the Parties agreed, *inter alia*, that:

“The intended outcome of the harmonization and integration is to enable each Party under its own statutory and regulatory authority to:

...

(b) provide for the equivalence and interchangeability of compliance instruments issued by the Parties for the purpose of compliance with their respective cap-and-trade programs;

...

(d) permit the transfer and exchange of compliance instruments between participants registered with the Parties’ respective cap and-trade programs using a common secure registry;

(e) develop compatible market requirements that are applied and enforced for all participants registered in the Parties’ respective cap-and-trade programs;

(f) allow for planning and holding joint auctions of compliance instruments; ...”

62. Under the OQC Agreement, the parties also agreed: that “mutual recognition of the Parties’ compliance instruments shall occur as provided for under their respective cap-and-trade program regulations”;<sup>74</sup> to hold joint auctions in accordance with harmonized procedures;<sup>75</sup> and to use a common registry system and auction platform (which in

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<sup>71</sup> *Id.*, p. 5.

<sup>72</sup> Climate Change Mitigation and Low-carbon Economy Act, 2016, Preamble, **CL-5**.

<sup>73</sup> Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec (22 September 2017), **CL-8**.

<sup>74</sup> *Id.*, Article 6.

<sup>75</sup> *Id.*, Article 9.

(continued)

practice meant auction participants could take part in joint sales through a CITSS account registered in any one of the three jurisdictions). The parties further affirmed and clarified that the OQC Agreement “not modify any existing statutes and regulations” in force in their respective jurisdictions.<sup>76</sup>

63. Finally, the OQC Agreement expressly set out a withdrawal procedure, requiring any party deciding to withdraw from the Agreement to endeavour to provide 12 months’ notice of intent to withdraw to the other Parties, and to match the effective date of withdrawal with the end of a compliance period:

“A Party may withdraw from this Agreement by giving written notice of intent to withdraw to the other Parties. A Party that intends to withdraw from this Agreement shall endeavour to give 12 months notice of intent to withdraw to the other Parties. A Party that intends to withdraw from this Agreement shall endeavor to match the effective date of withdrawal with the end of a compliance period.

Withdrawal from this Agreement does not end a Party’s obligations under article 15 regarding confidentiality of information which continue to remain in effect.

If a Party withdraws, the Agreement shall remain in force for the remaining Parties.”<sup>77</sup>

64. At the time of signature of the OQC Agreement in September 2017, the end of the next compliance period fell at the end of 2020. Thus, by entering into the OQC Agreement each of the three jurisdictions was committing in principle to remain within the linked system for at least that initial three year period, and more generally made a good faith public undertaking to transition away from the Agreement, if at all, in an orderly manner.
65. Prior to linkage occurring between the three jurisdictions, California and Québec asked first to be provided evidence of the effective functioning of Ontario’s Cap and Trade Program. Ontario therefore conducted four public allowances auctions over the course of 2017, which were successful. In light of these results linkage of the Ontario, Québec and California programs occurred on 1 January 2018. The first allowances auction involving all three jurisdictions occurred on 21 February 2018.
66. Certain amendments to Ontario’s Cap and Trade Regulations were required before full linkage could be implemented: while linkage did not require each jurisdiction’s program to be identical, the programs did need to be harmonized. Of these, the most important amendment was the recognition of California and Québec allowances under the Cap and Trade Regulation. Prior to linkage, Ontario capped participants could fulfill their compliance obligations only by surrendering allowances or offset credits originally emitted by Ontario. After linkage, Ontario, California, and Québec carbon allowances and offsets were “fungible” in that capped participants could use allowances

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<sup>76</sup> *Id.*, Article 14.

<sup>77</sup> *Id.*, Article 17.

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from any jurisdiction to fulfill their compliance obligations in their home jurisdiction.<sup>78</sup> As Dr. Stavins explains, “[a]ccount holders could not identify the system of origin for individual allowances and the WCI, Inc., the CITSS administrator, selected the allowances to transfer when bilateral market trades were executed, thus standardizing the allowance product in the context of the trading markets.”<sup>79</sup> The Regulation as amended specified the instruments recognized for use in the Ontario Program, and stipulated that these were “to be treated as” the corresponding domestic instrument, as designated in an accompanying table.<sup>80</sup>

67. Prior to linkage, other provisions were already consistent across the three jurisdictions’ respective programs. For example, each jurisdiction provided for registration of participation through a CITSS account set up in that jurisdiction, which in turn provided the platform in that jurisdiction through which to administer distribution, holdings, transfers, and retirements of allowances and offset credits. Since all participants in the individual programs were required to register for a CITSS account in their respective jurisdictions, and the systems were then linked, this meant that for participants no registration in a different administrative system was necessary once linkage occurred. Linked functions (such as trading of allowances between participants registered in different jurisdictions) instead could be accomplished through the same jurisdiction-specific systems that participants had employed prior to linkage.<sup>81</sup>

#### 5. The Importance of Market Participants in Cap and Trade Programs

68. As noted above, an important feature of cap and trade programs, including Ontario’s Cap and Trade Program, and the linked Ontario-California-Québec programs, is the inclusion of market participants. KS&T acted as a market participant in the Ontario Cap and Trade Program. In what follows, the Claimants will demonstrate that market participants are widely recognized as critical to functioning cap and trade programs, and that the inclusion of market participants in the WCI was deliberate and important. California and Québec expressly incorporated market participants in their respective legislations, as did Ontario, and the three parties reiterated the importance of market participants in linking their markets through the OQC Agreement.

##### (a) Market Participants Are Widely Recognized as Critical to Functioning Cap and Trade Programs

69. As explained above, cap and trade programs may provide for the participation of entities without compliance obligations, *i.e.*, “market participants”. While cap and

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<sup>78</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 84, **CER-1**.

<sup>79</sup> *Id.*, para. 87, n. 133 (explaining that “[w]hile allowances were identified in CITSS by unique serial numbers, those serial numbers could not be viewed or accessed by account holders”). See also Québec Government, *The Québec Cap-and-Trade System for Greenhouse Gas Emission Allowances, FAQs* (July 2017), p. 13, **Exh. C-21** (responding in the negative to the question, “[a]re emission units differentiated on the basis of provenance?” and explaining that “[e]mission units are fully fungible among linked cap-and-trade systems. There is no differentiation, and market pricing is identical.”).

<sup>80</sup> Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, **CL-6**, s. 10(1). See also Expert Report of Dr. Robert Stavins (5 October 2021), para. 84, **CER-1**.

<sup>81</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 86, n. 131, **CER-1**.

trade programs in theory could function only through public auctions and direct trades between mandatory participants, in practice, the participation of market participants ensures a much more effectively functioning market. As explained by Dr. Stavins, market participants contribute to efficient price discovery; improve market liquidity; lower transaction costs; and provide valuable services to compliance entities and other market participants, including with respect to managing compliance and financial risks.

70. Market participants contribute to efficient price discovery by increasing the number of traders actively involved in trading, which facilitates the revelation of the relative values of different commodities or financial instruments based on publicly available information (*i.e.*, “price discovery”). Participation of a greater number of traders can accelerate the aggregation process and the achievement of efficiency. In addition, market participants that actively participate in markets develop specialized knowledge about the available market products, as well as market conditions that affect market prices, helping to ensure that market prices accurately reflect economic fundamentals.<sup>82</sup>
71. Market participants also improve market liquidity and lower transaction costs by increasing the number of willing counterparties in the market.<sup>83</sup> Compliance entities are often very inactive (*e.g.*, trading once or a few times per year). This behaviour reflects both the free distribution of allowances, which may provide these entities with sufficient allowances to fulfil their compliance obligations as initially estimated, as well as their tendency to bank any excess allowances for future compliance periods rather than attempting to sell them because of inexperience with trading and a desire to avoid transaction costs.<sup>84</sup> Indeed, compliance entities do not typically employ internal staff with specialized expertise and knowledge in trading allowances and related risk-management strategies. In light of their limited internal capacity and incentive to engage actively in trading allowances, it is common for compliance entities to rely on various external service providers to support aspects of cap-and-trade compliance, including allowance sourcing, compliance monitoring and reporting, and risk management.<sup>85</sup>
72. By contrast, market participants, particularly commodity trading companies, are typically active participants, monitoring and trading every day, with specialized expertise and knowledge not readily available to individual compliance entities obtained through the scope of their market activity and their interactions with other compliance entities. Through their active participation, market participants provide compliance entities with a more liquid market, lower search costs associated with finding willing counterparties, and lower transaction execution fees, including during periods immediately after compliance cycles when demand for compliance purposes may be high. Thus, compliance entities benefit from their ability to rely on market participants for a ready source of supply of allowances in the event that they need to

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<sup>82</sup> *Id.*, paras. 96-99.

<sup>83</sup> *Id.*, paras. 100-103.

<sup>84</sup> *Id.*, para. 95.

<sup>85</sup> *Id.*, paras. 104, 109.

(continued)

adjust their allowance holdings to align with the expected quantity of allowances needed for compliance.<sup>86</sup>

73. Market participants, in turn, benefit financially from participating in emission markets through positive expected returns earned in the course of trading or providing services for participants in the market.<sup>87</sup> Within emission trading markets such as cap and trade programs (and other commodity markets, more generally), the participation of market participants is well established, as are the significant benefits of that participation to the functioning of the markets.<sup>88</sup>
74. As Mr. Michael Berends, Managing Director of ClearBlue Markets, an advisory firm specializing in carbon pricing and market analysis, explains:

[M]arket participants further play a critical role in price discovery and price-setting. Market participants generate more liquidity by affording all participants the chance to enter into price-setting transactions more easily and regularly. These additional transactions help mandatory participants determine whether they are best off either: (i) implementing emission reduction measures of their own; or (ii) buying emission allowances on the market to ensure compliance, with such purchases helping finance emission reduction measures of other entities. If there wasn't an active market, which is what market participants provide on a daily basis, there would only be four price-setting mechanisms each year, i.e., the quarterly emission allowance auctions. . . .

[M]any market participants are sophisticated intermediaries with useful financial market expertise that can assist smaller participants in particular. The fact is, in cap and trade markets, it is very uncommon for two emitters to face each other in a transaction. They are not set up to trade in allowances and do not have either the documentation or the network to do so. For example, steel companies barely speak to food companies. Thus, it is important to have additional entities involved in a cap and trade market, i.e., market participants, that facilitate the buying or selling of emission allowances. Market participants contributed to the dissemination of transactional documentation and fast payment facilities used in emission allowance trades.<sup>89</sup>

75. This was in fact the case in Ontario, as noted by Mr. Graeme Martin, former Vice President of Global Renewables at KS&T:

“Market participants were crucial to the success of the Cap and Trade Program in a number of ways. For example, by building inventory, market participants created an emission allowance spot market (*i.e.* a secondary market for direct purchases of title in carbon allowances)

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<sup>86</sup> *Id.*, paras. 97-104.

<sup>87</sup> *Id.*, para. 43.

<sup>88</sup> *Id.*, paras. 14, 91-95.

<sup>89</sup> Witness Statement of Michael Berends (5 October 2021), paras. 42-43, **CWS-1**.

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and provided essential liquidity to other participants by acting as a ready source of supply. Perhaps even more importantly, market participants provided more contractual flexibility to mandatory participants than the quarterly auctions (being able to offer *e.g.*, specific delivery dates for allowances, unique pricing structures, etc.).”<sup>90</sup>

76. A well-functioning market facilitated by market participants is therefore critical to the ability of cap and trade programs to be able to achieve emission targets cost-effectively. For compliance entities to make efficient production decisions with respect to emissions, it is necessary that the market(s) in which they are operating provide accurate allowance prices and sufficient liquidity, allowing compliance entities to buy and sell allowances at these prices when needed and with limited transaction costs. Opening up participation to market participants is important to achieving these beneficial market outcomes.
77. Given the benefits they bring, market participants are integral to cap and trade programs around the world. All of the major established cap and trade programs, such as the EU Emissions Trading System (ETS),<sup>91</sup> the California and Québec cap and trade programs,<sup>92</sup> and the Regional Greenhouse Gas Initiative (or **RGGI**, a linked cap and trade program across eleven states in the Northeast and Mid-Atlantic regions of the United States),<sup>93</sup> allow trading by market participants. The EU ETS, for example, has allowed from its outset in 2005 for any legal or natural person to open a registry account to hold and transfer allowances, effectively enabling them to buy or sell these in the secondary market.<sup>94</sup> In a formal assessment of the market oversight provisions in the EU ETS, the European Commission – as central administrator of the EU ETS – identified important advantages resulting from this broad approach to market access, stating that:

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<sup>90</sup> Witness Statement of Graeme Martin (4 October 2021), para. 16, **CWS-2**.

<sup>91</sup> Expert Report of Dr. Robert Stavins (5 October 2021), paras. 93-94, **CER-1**.

<sup>92</sup> See Section 5(c), *infra*.

<sup>93</sup> See 2021-04-06 RGGI, CO2 Allowance Auctions, Frequently Asked Questions, p. 1,

**Exh. C-22.**

<sup>94</sup> Article 3(3) of the Registry Regulation clarifies that ‘account holders’ include “any natural or legal person that holds an account in the Union Registry”, and Article 16 sets out the process for opening of a trading account, making it conditional on the provision of information set out in an Annex to the Regulation as well as limited other requirements. See Commission Delegated Regulation (EU) 2019/1122 supplementing Directive 2003/87/EC of the European Parliament and of the Council as regards the functioning of the Union Registry, Articles 3 and 16, O.J. (L 177), 3, **CL-27**. Access to the primary market is governed by Article 18 of the Auctioning Regulation, which allows compliance entities (“operators”) including parent companies, subsidiaries and affiliates bidding on their own account to participate, as well as investment firms, credit institutions, and “business groupings” of operators bidding on their own account or on behalf of clients or their members. See Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a system for greenhouse gas emission allowances trading within the Union, art. 18, O.J. (L 302), 1, **CL-28**.

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“A salient feature of the EU ETS is the active participation by financial intermediaries that have facilitated trading among installations and developed derivative products, such as futures, options and swaps, to help participating firms manage risk. *The resulting broader participation in the carbon market increases its liquidity and contributes to the emergence of a reliable price signal.* The intermediation provided by financial firms is particularly important for small and medium-sized companies and for operators of individual installations who may not have adequate resources or expertise themselves, or whose compliance needs are too small to justify continuous direct presence on the carbon market.”<sup>95</sup>

78. In light of the benefits that market participants bring to cap and trade programs and their widespread incorporation into such programs globally, it is unsurprising that the WCI and, ultimately, Ontario, decided to include market participants in its cap and trade program design.

(b) The WCI Expressly Provided for Market Participants

79. As Dr. Stavins explains, WCI design recommendations and draft provisions for regional cap and trade programs released from 2008-2010 provided for open access to the market for compliance entities as well as market participants, and recognized that such broad participation would be beneficial for emission trading markets because, *inter alia*, market participants would improve liquidity and provide services to capped participants. Through its early contributions to the WCI design principles, and by modelling its cap and trade program on those principles, Ontario recognized the importance of allowing participation by market participants (*e.g.*, improving liquidity and providing services to other participants and the market more broadly).<sup>96</sup>
80. The 2010 WCI Design accordingly explicitly contemplates participation by entities with and without compliance obligations, and states:

*“There is no restriction on who can own emission allowances—they can be sold between and among covered entities or third parties. Entities that reduce their emissions below the number of allowances they hold can sell their excess allowances or hold them for later use. Selling excess allowances allows entities to recoup some of their emissions reduction costs, while holding allowances for later use will lessen future compliance costs. This “trading” of emission allowances keeps compliance costs lower than would otherwise be the case because it provides flexibility in how and when reductions are made. It also puts a price on the emissions, which provides an incentive to innovate and find new ways to reduce emissions.”*<sup>97</sup>

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<sup>95</sup> European Commission, Communication from the Commission to the European Parliament and the Council: Towards an enhanced market oversight framework for the EU Emissions Trading Scheme, COM (2010) 796 final (21 December 2010), 3, **Exh. C-23**.

<sup>96</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 71, **CER-1**.

<sup>97</sup> WCI, Design for the WCI Regional Program (2010), Figure 2, **Exh. C-15**. (emphasis added). *See also id.*, pp. 28 (defining owners of units to be, *inter alia*, “[w]ith respect to any general

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81. The WCI participants' recommendation that market participants be allowed to own and sell allowances, as opposed to limiting participation to entities with compliance obligations, reflects analysis contained in other documents prepared in developing the 2010 WCI Design, notably WCI's 2010 Auction Design White Paper<sup>98</sup> and a set of draft recommendations prepared by a WCI advisory committee, the WCI Markets Committee (**WCI Market Oversight Draft Recommendations**).<sup>99</sup>
82. The Auction Design White Paper explores the issue of "participant access" to cap and trade programs. Among its "design principles" is the principle of "fairness", which it defines as: "[a]ll market participants, including compliance entities, should have fair and equal access to allowance auctions."<sup>100</sup> The Paper considers the implications of restricting cap and trade program participants to entities with compliance obligations versus allowing any entity to participate and confirms that "restricted participation is not typical of other schemes."<sup>101</sup> In addition, having examined common features of auctions in other jurisdictions, the Paper finds that a "characteristic that is common to all the auction designs reviewed is that they are open to all qualifying bidders. *They are not restricted to compliance entities alone.*"<sup>102</sup>
83. The WCI Market Oversight Draft Recommendations also address the issue of participation by "non-compliance entities" (*i.e.*, market participants). The Markets Committee considered concerns expressed by stakeholders, including that participation by non-compliance entities might: (1) increase the price of allowances; (2) increase the chances of market manipulation; and (3) limit access to allowances.<sup>103</sup>
84. The WCI Markets Committee did not find any of these concerns grounds to exclude participation by market participants, stating:

"The first concern may be related to questions regarding the role of speculation in markets. Investors can play important roles in competitive markets by increasing liquidity. A healthy market is "liquid," meaning there is a sufficient number of buyers and sellers in the marketplace to allow trading to take place. Larger numbers of market participants make it more likely that there will be counterparty (*i.e.*, another party willing to participate in a trade). A market with less liquidity may be subject to more price volatility and it may be more difficult for entities needing to buy compliance instruments to locate willing sellers. Unlike a traditional commodity market, a compliance

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account, any person who has an ownership interest with respect to the compliance instruments held in the general account and who is subject to the binding agreement for the authorized account representative to represent that person's ownership interest with respect to the compliance instruments."), DD-31 ("Any person may apply to open a general account for the purpose of holding and transferring compliance instruments").

<sup>98</sup> WCI, Auction Design White Paper (2010), **Exh. C-24**.

<sup>99</sup> WCI Market Oversight Draft Recommendations (1 April 2010), p. 23, **Exh. C-25**.

<sup>100</sup> WCI, Auction Design White Paper (2010), p. 2, **Exh. C-24**.

<sup>101</sup> *Id.*, pp. 13-14.

<sup>102</sup> *Id.*, p. 19. (emphasis added)

<sup>103</sup> WCI Market Oversight Draft Recommendations (1 April 2010), p. 23, **Exh. C-25**.

instrument market will not have natural sellers outside of the primary market. Consequently, *concerns about potential “excess” speculation by investors must be weighed against these benefits of allowing investors access to the carbon market. ...*

The second concern implies either that more market participants increases the ease or risk of manipulation, or that non-compliance entities might attempt market manipulation while compliance entities would not. However, *a larger number of market participants would most likely make manipulation more difficult, not less, by increasing liquidity and making control of a significant proportion of compliance instruments by one or a few persons harder.*

The third concern is that non-compliance entities may hold compliance instruments for some period of time, making them unavailable to compliance entities that may need them for compliance. There are many possible non-compliance reasons to hold compliance instruments; the auction design recommendation report commissioned by RGGI identifies five: speculation; allowance market manipulation; electricity market interference; competitive advantage; and external compliance. *In none of these cases would market risks be reduced by restricting the market to compliance entities, save potentially external compliance. When restricting a market reduces liquidity, in fact, the risks are increased.* Though this risk might be enhanced by allowing non-compliance entities to participate, it is nevertheless very small, as it has not been proposed by the existing GHG cap-and-trade programs, RGGI and the EU ETS.<sup>104</sup>

85. The WCI Markets Committee ultimately recommended that:

*“[B]oth compliance and non-compliance entities be allowed to participate in the secondary compliance instrument market. Broad participation would be beneficial, and narrow participation harmful, to a compliance instrument market, especially in its early stages. Limiting participation to compliance entities would not be an effective policy to reduce the potential for market manipulation.”<sup>105</sup>*

86. The 2010 WCI Design follows the majority approach identified and assessed in the Auction Design White Paper and recommended by the WCI Markets Committee. Section 9 of the 2010 WCI Design, “Designing a Fair and Transparent Auction”, explains that auctions should be accessible to anyone that satisfies the qualification requirements:

*“The WCI Partner jurisdictions plan to auction emission allowances in a regionally coordinated manner to ensure fairness and transparency, maximize efficiency, and ensure consistent application of state and provincial laws. To accomplish these objectives, the WCI Partner*

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<sup>104</sup> *Id.*, pp. 23-24. (emphasis added).

<sup>105</sup> *Id.*, § 4.2.2.5. (emphasis added).

(continued)

jurisdictions recommend the following for the design of a regionally coordinated auction: ...

Participant access and financial assurance: An auction that is open to anyone with an account in the tracking system and able to meet pre-qualification financial assurance requirements will ensure fairness.”<sup>106</sup>

87. In short, having considered carefully the benefits and drawbacks of restricted versus unrestricted participation in auctions, the WCI participating jurisdictions—including Ontario—concluded that auctions should be open to anyone, including market participants. Thus, long before designing its own cap and trade program, Ontario had collaborated with the other WCI participating jurisdictions to develop principles that could inform the development of each jurisdiction’s implementing regulation, within the boundaries of their respective legislative and administrative processes. These principles included allowing market participants to trade and hold emissions allowances.

(c) California and Québec Expressly Included Market Participants as a Core Component in their Cap and Trade Programs

88. Both California and Québec designed their programs to include market participants, in line with best practice and WCI design recommendations. Their decision simply emphasized the good sense of Ontario doing the same, in order to enhance the compatibility of systems required to achieve linkage.

89. Under the Regulation for the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms the California Code of Regulations (the **California Regulation**), participants other than capped entities can register to become a “voluntarily associated entity” in order to purchase, hold, sell, or retire allowances and offset credits.<sup>107</sup> Thus, under the California Regulation, voluntarily associated entities can participate in the primary market, subject to approval of their auction eligibility.<sup>108</sup> To hold units and conduct transactions in the market, “voluntarily associated entities” have to open an account in the emissions allowance registry and tracking system, CITSS, provided by WCI through third-party service providers to support the participating jurisdiction’s programs.<sup>109</sup>

90. Similarly, Québec offers expansive market access for participants other than compliance entities. The Québec cap and trade regulation provides that any “natural person domiciled in Canada or another person or municipality having an establishment in Canada may register with the Minister as a participant in the system in order to

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<sup>106</sup> WCI, Design for the WCI Regional Program (2010), p. 19, **Exh. C-15**.

<sup>107</sup> Cal. Code Regs. tit. 17, §§ 95830 and 95821, **CL-29**.

<sup>108</sup> *Id.*, § 95912(d)(2).

<sup>109</sup> According to its website, CITSS tracks allowances and other compliance instruments “from the point of issuance by jurisdictional governments, to ownership, transfer by regulated greenhouse gas emitters and other voluntary or general market participants, and to final compliance retirement.” CITSS, Homepage, **Exh. C-26**. As explained below in paras. 106-107, CITSS was also used to track the issuance and transfer of allowances in the Ontario cap and trade program.

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acquire emission allowances.”<sup>110</sup> The Québec government has also stated that it “allows any legal entity or natural person who is domiciled or owns a facility in Canada to register as a participant in the cap-and-trade system and participate in the carbon market.”<sup>111</sup> As under the California program, the Québec cap and trade regulation provides that upon application, the Québec program regulator will open “for each emitter or participant, a general account” in CITSS “in which the emission allowances that may be traded are recorded.”<sup>112</sup> Market participants thus registered can trade emissions in the secondary market,<sup>113</sup> and may take part in auctions of emission units.<sup>114</sup>

91. When California and Québec linked their programs in 2014, market participants were incorporated as participants in the harmonized cap and trade program.<sup>115</sup>

(d) Ontario Expressly Included Market Participants as a Core Component in its Cap and Trade Program

92. Given the policy history leading up to the launch of its own Cap and Trade Program, Ontario from the start envisaged that its Program would include market participants. The Cap and Trade Program was founded on the basis of the principles of the WCI, as discussed above, and Ontario designed its program to allow for linkage to the cap and trade programs of Québec and California, both WCI Partner jurisdictions whose programs include market participants. As a result, market participants were expressly provided for in the Cap and Trade Act. The importance of market participants in the Ontario Cap and Trade Program was further highlighted by the Ontario government’s repeated and specific encouragement of participation of market participants in the allowances market.

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<sup>110</sup> Québec Government, Regulation respecting a cap-and-trade system for greenhouse gas emission allowances (31 December 2020), Chapter II, Article 8, **CL-30**. See also Québec Government, Types of Participants in the GHG Emission Allowance Cap-and-Trade System, **Exh. C-27** (where Québec provided an overview of its cap and trade program procedures, explaining that the activities encompass emitters as well as other participants).

<sup>111</sup> Québec Government, The Québec Cap-and-Trade System for Greenhouse Gas Emission Allowances, FAQs (July 2017), p. 4, **Exh. C-21**.

<sup>112</sup> Québec Government, Regulation respecting a cap-and-trade system for greenhouse gas emission allowances (31 December 2020), §14(1), **CL-30**.

<sup>113</sup> *Id.*, § 24.

<sup>114</sup> *Id.*, § 46.

<sup>115</sup> Agreement between the California Air Resources Board and The Gouvernement du Québec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions (25 September 2013), Article 2, **CL-25** (“‘Participant’ or ‘voluntarily associated entities’ means a person or an entity, other than a covered entity or an emitter, who is registered in the program registry and participates in one of the respective cap-and-trade program (*sic*) for reducing greenhouse gas emissions”).

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(1) Ontario Legislative Materials Confirm the Importance of Market Participants in the Cap and Trade Program

93. In light of Ontario’s prior engagement in the WCI policy design process, and explicit intention to link its Cap and Trade Program with those of Québec and California—both of which included market participants—the various stages of Ontario’s cap and trade legislation and regulation all contemplated the inclusion of market participants.
94. In the 2016 consultation draft of the Act released for public comment by the MOECC (**Consultation Draft**), market participants were explicitly included:

**“Market participants**

16. A person who is not an employee of a mandatory or voluntary participant may apply to the Director for registration as a market participant in the cap and trade program under subsection 17 (1) of the Act.”<sup>116</sup>

95. In order to ensure orderly and effective engagement of market participants in the Ontario market, the Consultation Draft also imposed certain conditions of registration on market participants; defined the circumstances in which registration could be cancelled;<sup>117</sup> and imposed purchase limits on the number of allowances available at auction on market participants and groups of related market participants.<sup>118</sup> The former limits ensured that market participants could provide the necessary liquidity; the latter limits expressly recognized that some market participants might be part of a group of companies, and sought to ensure that they could only take part in the market as a collective entity. As shall be noted further at paras. 118 to 124 below, the latter was the case for KS&T as part of the Koch group of companies.
96. In the final version of the Cap and Trade Act, market participants were therefore specifically provided for, as follows:

““market participant” means a person who is registered as a market participant under section 17; (“participant au marché”)[.]”<sup>119</sup>

“Market participants: registration: A person who satisfies such eligibility criteria as may be prescribed may apply to the Director in accordance with the regulations for registration as a market participant in the cap and trade program under this Act.”<sup>120</sup>

97. The Cap and Trade Regulation went on to set out registration requirements for market participants:

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<sup>116</sup> Ontario Government, Consultation Draft of Ontario Regulation proposed to be made under the Proposed Climate Change Mitigation and Low-carbon Economy Act, 2016 (Bill 172) (2016), Article 16, **Exh. C-28**.

<sup>117</sup> *Id.*, Articles 18, 19.

<sup>118</sup> *Id.*, Article 48.

<sup>119</sup> Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 1(1), **CL-5**.

<sup>120</sup> *Id.*, Section 17(1).

**“Registration**

36. (1) A person that is not an owner, operator or employee of a mandatory or voluntary participant may apply to the Director for registration as a market participant under subsection 17 (1) of the Act if,

(a) the person is an individual and the person resides in Canada; or

(b) the person is not an individual and the person has an establishment in Canada. O. Reg. 473/16, s. 14.

(2) A person applying to register as a market participant must give the Director the information set out in Schedule 1 of this Regulation. . . .”<sup>121</sup>

98. The Regulation also confirmed that corporate groups would participate in the Cap and Trade Program, including those whose members included market participants, in the form of specific disclosure requirements regarding related entities and purchase and holding limits for “purchase groups”.<sup>122</sup>
99. Registration in Ontario’s Cap and Trade Program indeed required disclosure of corporate relationships among participants. On the basis of this information, Ontario grouped related entities together, and adjusted holding limits to cover these “purchase groups” collectively. For example, under the Regulation, “[a] registered participant that is a member of a purchase group shall ensure that the purchase limit [of 25 percent of allowances available in a given auction pertaining to capped participants] is allocated among the members of the purchase group,” while, “[i]f the purchase group . . . includes a market participant, the allocation . . . must be carried out in such a manner as to . . . ensure that . . . the purchase limit [of 4 percent of allowances available in a given auction pertaining to market participants] is allocated among all [market participant members of the group].”<sup>123</sup> Thus, the Regulation acknowledges that for “purchase groups” composed of a mix of market participants and capped participants, some of the allowances obtained by the purchase group through the bids of the market participant members may, for example, be intended by the purchase group to fulfil the compliance obligations of the capped participant members.<sup>124</sup>
100. These consistent, explicit references to market participants confirm that Ontario viewed such participants as an integral part of the Cap and Trade Program.

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<sup>121</sup> *Id.*, Section 36.

<sup>122</sup> *Id.*; Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, Section 69, **CL-6**. *See also* Ontario Government, Business Relationship Disclosure Form, **Exh. C-29**.

<sup>123</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 81, **CER-1**; Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, Section 69(1)-(3), **CL-6**.

<sup>124</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 81, **CER-1**.

(continued)



101. In fact, had Ontario decided *not* to allow market participants to participate in its Cap and Trade Program, it would not have enjoyed the full benefits of linkage with the Québec and California programs.<sup>125</sup> As noted above, California and Québec had included market participants in their individual programs, and in their linkage agreements. Ultimately, this approach was mirrored in the OQC Agreement, which included the following specific definition for the term “market participants” in Article 2:
- “**Market participant**” means a person or an entity who does not report greenhouse gas emissions and is registered in the program registry and participates in one of the respective cap and trade programs for reducing greenhouse gas emissions[.]”<sup>126</sup>
102. Through the linked systems, allowances purchased in Ontario and held in Ontario accounts could be transferred to one of the other jurisdictions and held or sold there, thereby increasing liquidity and driving down prices for Ontario participants. Had Ontario excluded market participants from its Program, the benefits of linkage with the Québec and California programs would have been diminished.
103. As Dr. Stavins explains, a key benefit of linkage discussed in the WCI design principles was “[e]nlarging the market for emission allowances and offsets,” which was expected to “improve market liquidity, reduce volatility,” and “improve cost-effectiveness.”<sup>127</sup> Thus, allowing open participation in individual systems and pursuing system linkages share a common rationale of improving market outcomes. From this perspective, allowing participation by market participants would be expected to allow individual systems to realize the full benefits of linkage, while linkage would similarly be expected to reinforce and supplement the benefits of open participation in individual programs.
104. Thus, as envisaged from the outset, Ontario’s Cap and Trade Program included market participants and became linked with programs that did the same, such that market participants in all three jurisdictions could purchase allowances to sell to capped entities with compliance obligations in any of the three jurisdictions.

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<sup>125</sup> *Id.*, paras. 58, 86.

<sup>126</sup> As explained above, the 2013 linkage agreement between Québec and California includes a different definition incorporating market participants, reflecting the language of the parties’ respective regulations, which refer to “[v]oluntarily associated entities and other registered participants” (California) and “emitters” and “participants” (Québec).

*See* Agreement between the California Air Resources Board and The Gouvernement du Québec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions (25 September 2013), Article 2 **CL-25**. The OQC Agreement thus reflects the language of Ontario’s cap and trade regulation specifically.

<sup>127</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 58, **CER-1**; WCI, Design for the WCI Regional Program (2010), p. 22, **Exh. C-15**.

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(2) Ontario Explicitly Invited and Encouraged Market Participants to Play an Integral Role in its Cap and Trade Program

105. Further confirming Ontario’s view of market participants as integral to the Cap and Trade Program, the Ontario government actively invited and encouraged market participants to take part in the Program, including in its published announcements and guidance documents concerning the Cap and Trade Program.

106. For example, on 2 June 2016 the Ontario government published a webpage entitled, “What you need to know about Ontario’s carbon market using a cap and trade program, including how it works and who is required to participate.”<sup>128</sup> The webpage explained that “businesses covered under cap and trade” included “market participants” and stated that:

“Even if your company doesn’t have emissions to report, you can still participate in the auction as a market participant.

Market participants can include individuals, not-for-profit organizations and companies without compliance obligations.”<sup>129</sup>

107. Ontario also expressly invited market participants to register for an Ontario CITSS account, which was a requirement to participate in Ontario’s Cap and Trade Program. Ontario confirmed in this regard that the purpose of the CITSS account was to:

- “Register Participants in Ontario’s cap and trade program.
- Track emissions allowances and credits belonging to program Participants
- Transfer and record emission allowances and credits
- Track compliance obligations
- Support market oversight.”<sup>130</sup>

108. In essence, an Ontario CITSS account was a centralized electronic site in which each Ontario participant was required to register in order to participate in the Ontario Cap and Trade Program (including bidding in auctions), as well as a “home” for carbon allowances and credits and a place to and from which any allowances transfers involving that participant might occur.

109. On 20 July 2016, the Ontario government announced that CITSS registration had opened for participants and invited participants to register to use CITSS, including

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<sup>128</sup> Ontario Government, “What you need to know about Ontario’s carbon market using a cap and trade program, including how it works and who is required to participate” (2 June 2016), **Exh. C-30**.

<sup>129</sup> *Ibid.*

<sup>130</sup> Ontario Government, “Cap and Trade CITSS Registration”, **Exh. C-31**.

(continued)

market participants. The announcement specified that “[m]arket participants can apply any time for CITSS registration”,<sup>131</sup> and provide express guidance on how to register.

110. Beyond this, beginning in July 2016, the Ontario government offered training sessions to help the industry learn about CITSS registration. Ontario offered the training in three modules covering user registration, account application, and requirements to disclose corporate information. The Greenhouse Gas Emissions Reduction Office of the MOECC sent KS&T an invitation to participate in the training sessions on 13 June 2016. Further to Ontario’s invitation, KS&T participated in the training session held 9-11 August 2016.<sup>132</sup>
111. Ontario also actively “chased” potential participants inciting them to register, including potential market participant. On 30 September 2016, the MOECC Cap and Trade Help Desk sent an email reminding “cap and trade program stakeholders” of the cap and trade registration deadline. The MOECC “highly recommend[ed]” that recipients complete registration “as early as possible” and provided detailed instructions on the registration process. Among the instructions for Participant Registration was the reminder that “[a]n approved agent with a valid CITSS User ID must submit the Participant Registration (PR) application on behalf of a mandatory, voluntary, *or market participant*.”<sup>133</sup>
112. On 31 October 2016, the Ontario government went on to publish a webpage entitled “Cap and trade: auction of allowances [...] Learn how to register and participate in a cap and trade auction,” explaining the auction process. The government confirmed that an entity “must be registered and approved in the Compliance Instrument Tracking System Service (CITSS) as a mandatory, voluntary *or market participant* of Ontario’s cap and trade program before you can participate in an auction.”<sup>134</sup>
113. On 9 January 2017, the Ontario government published a further guidance document (subsequently updated on 26 January 2018) entitled, “Detailed Auction Requirements and Instructions California Cap-and-Trade Program [...] Québec Cap-and-Trade System, and Ontario Cap-and-Trade Program Joint Auction of Greenhouse Gas Allowances.” In this guidance, market participants are specifically defined with respect to the Ontario, Québec and California cap and trade programs:

““General Market Participant” refers to entities that do not have a compliance obligation and are registered under the California Regulation as a voluntary associated entity, under the Québec Regulation as a Participant, or under the Ontario Regulation as a Market Participant. A General Market Participant may include a

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<sup>131</sup> Ontario Government, “Cap and Trade: Register and Participate in CITSS” (20 July 2016), **Exh. C-32**.

<sup>132</sup> Email from MOECC to Koch Supply & Trading (28 July 2016), **Exh. C-33**.

<sup>133</sup> Email from MOECC, “Ontario Cap and Trade Registration Deadline” (30 September 2016), **Exh. C-34**. (emphasis added)

<sup>134</sup> Ontario Government, “Cap and Trade: Auction of Allowances” (31 October 2016), **Exh. C-35**. (emphasis added)

(continued)

General Market Participant – Organization or General Market Participant – Individual.”<sup>135</sup>

114. Prior to its first public auction in March 2017, the Ontario government published an auction notice stating application requirements and instructions. The notice confirmed that: “Ontario capped participants (mandatory and voluntary), *and market participants* that have approved accounts in CITSS are eligible to apply to participate in an auction.”<sup>136</sup>
115. On 28 July 2017, the Ontario government published specific guidance relating to auction registration entitled, “Ontario’s Cap and Trade Program Participant Training Guide: Auction Registration in the Compliance Instrument Tracking System Service (CITSS).”<sup>137</sup> The guide noted the involvement of market participants as “[p]articipants that do not have a compliance obligation and that are not an owner, operator, or employee of a Capped Participant and meet the criteria set out in subsection 36(1) (a) or (b) of the Regulation.”<sup>138</sup> The guide further explained that the joint auctions to be held by Ontario, Québec, and California were intended to allow mandatory, voluntary and market participants to acquire GHG emission allowances,<sup>139</sup> reiterating that “Capped Participants and Market Participants are eligible to participate in auctions.”<sup>140</sup> It further explained the purchase limits assigned to market participants specifically.<sup>141</sup>
116. When it began taking part in joint auctions with Québec and California in January 2018 pursuant to the Linkage Agreement, Ontario published joint auction notices that again reiterated the eligibility of market participants to apply to participate in the joint auctions.<sup>142</sup>

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<sup>135</sup> Detailed Auction Requirements and Instructions (updated 26 January 2018), **Exh. C-36**.

<sup>136</sup> Ontario Government, Auction Notice: Ontario Cap and Trade Program – Auction of Greenhouse Gas Allowances on March 22, 2017 (20 January 2017), **Exh. C-37**. (emphasis added). *See also* Ontario Government, Auction Notice: Ontario Cap and Trade Program – Auction of Greenhouse Gas Allowances on June 6, 2017 (7 April 2017), **Exh. C-38**; Ontario Government, Auction Notice: Ontario Cap and Trade Program – Auction of Greenhouse Gas Allowances on September 6, 2017 (6 July 2017), **Exh. C-39**; Ontario Government, Auction Notice: Ontario Cap and Trade Program – Auction of Greenhouse Gas Allowances on November 29, 2017 (29 September 2017), **Exh. C-40**.

<sup>137</sup> This guide was subsequently updated in January 2018. *See* Ontario Government, Ontario’s Cap and Trade Program Participant Training Guide: Auction Registration in the Compliance Instrument Tracking System Service (CITSS) (January 2018), **Exh. C-41**.

<sup>138</sup> Ontario Government, Ontario’s Cap and Trade Program Participant Training Guide: Auction Registration in the Compliance Instrument Tracking System Service (CITSS) (January 2018), p. 4, **Exh. C-41**.

<sup>139</sup> *Id.*, p. 5.

<sup>140</sup> *Id.*, p. 7.

<sup>141</sup> *Id.*, p. 12.

<sup>142</sup> Ontario Government, Joint Auction of Greenhouse Gas Allowances on February 21, 2018 (10 January 2018), **Exh. C-42**; Ontario Government, Joint Auction of Greenhouse Gas Allowances on May 15, 2018 (16 March 2018), **Exh. C-43**.

(continued)

117. Overall, Ontario’s Cap and Trade Program was carefully developed to incorporate best practice design principles, including market participants. From the outset, Ontario intended to link with California and Québec, and ensured that it benefitted from aligning its regulatory regime with those jurisdictions. Ontario expressly included market participants as a core component of the Cap and Trade Program and encouraged market participants to register and participate in the Ontario market.

#### **B. The Claimants’ Participation in Ontario’s Cap and Trade Program**

118. As outlined above, the Ontario Cap and Trade Act provided for three categories of participants, each with their specific part to play: mandatory participants (*i.e.* industrial actors with emissions over 25,000 units per annum, who were the primary target for emissions reduction); voluntary participants (*i.e.* industrial actors whose emissions fell below the mandatory threshold, but who opted nonetheless to participate in the program); and market participants (*i.e.* participants who had no compliance obligations, but who engaged in the purchase and sale of allowances, acting as a source of market liquidity, helping to set prices, and bringing to the program their specialised market skills). Koch entities took part in the Ontario Cap and Trade Program both as a mandatory participant and as a market participant.
119. First, one Koch enterprise, INVISTA, was required in light of its industrial profile to participate as mandatory participant under the Ontario Cap and Trade Program in the Ontario market.<sup>143</sup> INVISTA is a Koch subsidiary that produces chemicals, polymers, fabrics and fibres in two factories in Ontario (Maitland and Kingston).<sup>144</sup> At the time the Cap and Trade Program was introduced, its Ontario-based enterprises employed approximately [REDACTED] people in the Province.
120. In parallel with its engagement through mandatory participant INVISTA, Koch also took the step of engaging in the Ontario Cap and Trade Program through its specialised energy and environmental trading subsidiary, KS&T.
121. As explained by Mr. Graeme Martin, former Vice President of Global Renewables at KS&T, KS&T engaged in the Cap and Trade Program as a market participant to “help Koch affiliates efficiently comply with their regulatory obligations under the Cap and Trade Act and Regulations by deploying KS&T’s specialised knowledge and expertise in environmental markets trading, and in the process sought to generate a return for KS&T”.<sup>145</sup>
122. For KS&T, participating as a market participant in Ontario’s Cap and Trade Program was a natural expansion of its business strategy in investing in global energy markets. KS&T had participated in North American environmental market programs as of their inception, including in RGGI and the California cap and trade program. By focusing on environmental energy trading in North America over many years, KS&T had built up specialized expertise to navigate environmental compliance markets. In this way, KS&T established itself as a reliable specialist both for other companies in the Koch

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<sup>143</sup> Witness Statement of Graeme Martin (4 October 2021), para. 16, CWS-2.

<sup>144</sup> *Id.*, para. 16.

<sup>145</sup> *Id.*, para. 17.

(continued)

Group, and for third party mandatory participants that lacked the specialized in-house capacity to participate in cap and trade programs and who wanted to delegate this engagement.<sup>146</sup> Cap and trade programs were new to industrial actors, whose focus and capacities lay elsewhere. By stepping in as specialised energy market players, KS&T could help both Koch group and third-party companies meet their compliance obligations in an efficient, cost-effective manner.<sup>147</sup>

123. KS&T had built up its specific knowledge and practice within WCI jurisdictions from early on, [REDACTED]

[REDACTED]<sup>148</sup>

124. All of this meant that by the time Ontario announced its intention to introduce a cap and trade program in 2016, and to ultimately link with California and Québec, KS&T was well-situated (in terms of knowledge and expertise in trading carbon allowances and carbon offsets in cap and trade programs) to take advantage of the new opportunity.

### C. The Claimants' Investments in the Ontario Cap and Trade Program

1. Early Efforts to Establish KS&T as a Market Participant in Ontario (2016-2017)

(a) The Claimants Identified Business Opportunities in Ontario

125. As outlined in Part A.4 above, Ontario had been contemplating launching a carbon cap and trade program since about 2008, and began in earnest to lay the groundwork for its Cap and Trade Program in 2016. Soon after, KS&T began tracking potential investment opportunities in Ontario, including consideration of the financial potential of entering the market in the long- and short-term.

126. KS&T understood that there would be sustained and continued future growth in the environmental markets sector in North America and worldwide. At that time, KS&T estimated that participation in the North American environmental markets had the capacity to consistently contribute [REDACTED] of net income, with greater than [REDACTED] percent return on cost of capital.<sup>149</sup> Ontario's proposed Cap and Trade Program was expected to continue for at least a decade, until 2030.<sup>150</sup> For KS&T, a long-term business strategy in the Ontario market therefore made financial sense: KS&T could commit capital in Ontario over many years, with the expectation of profit over the longer term. At the core of its business strategy [REDACTED]

<sup>146</sup> See *id.*, para. 17.

<sup>147</sup> Expert Report of Dr. Robert Stavins (5 October 2021), paras. 109-110, CER-1.

<sup>148</sup> Witness Statement of Frank King (6 October 2021), para. 10, CWS-4.

<sup>149</sup> Koch Supply & Trading, Internal Briefing: [REDACTED], Executive Summary, Exh. C-44.

<sup>150</sup> See Witness Statement of Michael Berends (5 November 2021), paras. 47, 49, CWS-1.

[REDACTED]

127. KS&T also had identified a [REDACTED].  
[REDACTED].  
In his former employment at Shell, Graeme Martin had been responsible for that company's entry into the Québec cap and trade program. Based on this experience, Mr. Martin and his team at KS&T understood that [REDACTED]. As he explains:

“Based on my prior experience with Shell when the Québec market was established, I knew that there was a potential opportunity for KS&T to profit from [REDACTED].

[REDACTED]

Therefore, this seemed an effective strategy for KS&T to begin investing in the Ontario market. Investing in Ontario in this [REDACTED], in that it was not absolutely guaranteed in 2016/2017 that Ontario would achieve linkage with California and Québec, in terms of the timing or at all. This meant that carbon allowances purchased in Ontario's initial stand-alone auctions might not ultimately be useable in California and Québec.

[REDACTED]”<sup>151</sup>

128. KS&T also saw a specific opportunity in acting as subject matter experts for Koch affiliates with compliance obligations. As outlined above, INVISTA had mandatory obligations under Ontario's Cap and Trade Act. Koch entities also had mandatory obligations under the equivalent California program (notably, Flint Hill Resources (FHR) and Guardian Industries), for whom KS&T could provide necessary expertise. As Mr. Martin explains:

“One of KS&T's key objectives in registering in the Ontario market was to continue to build on its position as a leading player in North American environmental credits trading. Koch as a group had compliance obligations in various parts of the North American market, and it considered that it was better to have internal expertise to navigate and manage these commitments. KS&T therefore fulfilled that role on behalf of the group. But KS&T is a stand-alone entity within the Koch group, and – as a trading company – it is the

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<sup>151</sup> Witness Statement of Graeme Martin (4 October 2021), para. 36, CWS-2.

(continued)

company's business to trade environmental credits whilst seeking an appropriate rate of return."<sup>152</sup>

129. As noted above, Under Ontario's Cap and Trade Program (and more broadly in the WCI-linked market), related entities within a group of companies could not take part in the program independently: instead, they needed to declare their relationships and were subject to an overall group allocation of carbon allowances.<sup>153</sup> The design of the Ontario Cap and Trade Program therefore required interrelated corporate groups (such as the various companies making up the Koch group) to be registered as a "corporate group" in Ontario, that collectively could not exceed a specific amount of carbon allowances.
130. The Cap and Trade Regulations subjected affiliated companies to holding limits, as determined and allocated by the Province.<sup>154</sup> Because of this collective cap imposed by Ontario on KS&T and Koch entities, KS&T was required to engage with Koch affiliates in developing its overall strategy as a market participant. Paul Brown, KS&T's primary account representative in Ontario, participated in strategy calls with Koch-affiliate companies for this purpose, and recalls:

"Often, the consensus on these calls was that KS&T should retain emission allowances in priority over other group members. The rationale for this decision was clear: [REDACTED]

[REDACTED] In fact, the [Government of Ontario] actively recruited and encouraged businesses like Koch's affiliate companies to participate in the Ontario Cap and Trade Program, as a broader, and more open free market would increase the liquidity of carbon allowances and lower overall costs of emission reductions."<sup>155</sup>

(b) KS&T Made Substantial Efforts to Comply with Ontario Registration Requirements

131. For all of these reasons, as soon as the Cap and Trade Act and Regulations were enacted in May 2016, KS&T launched the process to register as a market participant in Ontario. Graeme Martin took on primary responsibility for ensuring that KS&T had complied

<sup>152</sup> Witness Statement of Graeme Martin (4 October 2021), para. 26, CWS-2.

<sup>153</sup> See para. 99, *supra*.

<sup>154</sup> See Ontario, Tip Sheet #4, Holding Limits & Purchase Limits for Ontario's Cap and Trade Market, p. 4, **Exh. C-45**. This cap on carbon allowances was calculated by the following formula set out in Ontario's Regulations:  $L = 2,500,000 + 0.025 \times (C - 25,000,000)$  where L = the limit, and C = the number of emission allowances created for the year, both in Ontario and in designated jurisdictions. See O. Reg. 450/17, Section 40(3), **CL-31**.

<sup>155</sup> Witness Statement of Paul Brown (5 October 2021), para. 29, CWS-3.

(continued)



with all requirements imposed by Ontario, as required by a number of guides published by the Province and communicated in multiple public training sessions held by the MOECC.<sup>156</sup> The process to comply with Ontario’s registration requirements was lengthy and involved.

132. First, KS&T was required to appoint an Ontario-based “primary account representative” (or **PAR**), who was authorized by KS&T to register for a CITSS account. KS&T identified a longstanding Koch employee based in Ontario, Paul Brown, as the best candidate to fill this role. Mr. Brown at the time was the Government Affairs Adviser for Koch in Canada, and therefore had significant government-facing experience, as well as being familiar with tracking regulatory and political developments in Canada on Koch’s behalf.<sup>157</sup>
133. KS&T, through Mr. Martin, first approached Mr. Brown as early as June 2016 to ascertain his willingness and availability to take on the role of PAR, and to ensure that KS&T was ready to register in Ontario as soon as possible.<sup>158</sup> To register in Ontario, KS&T had to provide to Ontario evidence of Mr. Brown’s residence and identity (attested by an Ontario lawyer),<sup>159</sup> and a notarized letter of authorization from the President of KS&T authorizing Mr. Brown to be KS&T’s PAR for Ontario’s Cap and Trade Program.<sup>160</sup> On 4 November 2016, after over four months of administrative steps, Ontario finally confirmed Mr. Brown as KS&T’s PAR.<sup>161</sup> Mr. Brown retained that role for the duration of the Ontario Cap and Trade Program.<sup>162</sup>
134. Second, to ensure KS&T’s registration in Ontario’s Cap and Trade Program, KS&T carefully followed the guidance published by Ontario for completing the user registration process to establish an Ontario CITSS account.<sup>163</sup> As explained above, the

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<sup>156</sup> See, e.g., Ontario Government, “Cap and trade: register and participate in CITSS”, **Exh. C-32**; Ontario Government, “Cap and trade CITSS registration: Recognition as an Account Agent”, **Exh. C-31**; Ontario Government, Ontario Climate Change Action Plan, Module #2: CITSS Participant Registration and Updates (Account Application and Updates), **Exh. C-46**.

<sup>157</sup> Mr. Brown reports directly to Koch Companies Public Sector, LLC. He worked for various entities within the Koch group since 2006, primarily in public affairs-related positions. Witness Statement of Paul Brown (5 October 2021), paras. 6-7, **CWS-3**.

<sup>158</sup> Witness Statement of Graeme Martin (4 October 2021), para. 23, **CWS-2**.

<sup>159</sup> Witness Statement of Paul Brown (5 October 2021), para. 21, **CWS-3**.

<sup>160</sup> Letter of Authorization from KS&T to Ontario, designating Paul Brown as Primary Account Representative (4 October 2016), **Exh. C-47**.

<sup>161</sup> Services Agreement between KS&T and Koch Companies Public Sector, LLC (4 October 2016), **Exh. C-48**.

<sup>162</sup> Witness Statement of Paul Brown (5 October 2021), para. 7, **CWS-3**.

<sup>163</sup> See, e.g., Ontario Government, “Cap and trade CITSS registration: Recognition as an Account Agent”, **Exh. C-31**; Ontario Government, Ontario Climate Change Action Plan, Module #2: CITSS Participant Registration and Updates (Account Application and Updates), **Exh. C-46**; Ontario Government, “Cap and Trade: Register and Participate in CITSS” (20 July 2016), **Exh. C-32**.

(continued)

CITSS account was the electronic “home” for allowances purchased in Ontario public auctions or otherwise purchased on the Ontario secondary market.

135. To establish an Ontario CITSS account, KS&T had to submit electronic and hard copy applications to Ontario, with signed copies of forms and supporting documentation. Through Mr. Brown, KS&T was in contact with the Ontario government on a number of occasions, seeking clarification about registration requirements, and to ensure that the myriad requirements were indeed met through the steps it was taking.<sup>164</sup> After several months, Ontario finally confirmed that KS&T’s Ontario CITSS account had been formally registered (with Mr. Brown as PAR) on 4 November 2016.<sup>165</sup>
136. Third, and as part of the CITSS account registration process, KS&T had to provide detailed information about its business relationships with other Koch entities already participating in auctions. As noted above, Ontario required the disclosure of this information, because the Cap and Trade Act expressly obliged organizations such as the Koch group to register as a single corporate entity.<sup>166</sup> As a result, KS&T submitted a “Business Relationship Disclosure” form on 29 November 2016, and Ontario thereafter that the business was to be joined with Koch’s compliance group entities.<sup>167</sup>
137. Finally, after several months of time and effort, Ontario finally approved and registered KS&T as a market participant in Ontario’s Cap and Trade Program as of November 2016.<sup>168</sup> This meant that KS&T now was an approved CITSS account holder in Ontario.<sup>169</sup> Registration in Ontario also allowed KS&T to apply to take part in public carbon allowances auctions as an Ontario market participant.<sup>170</sup>

2. KS&T’s Participation in Year 1 of the Ontario Cap and Trade Program (2017)

(a) KS&T’s Early Marketing Efforts

138. In parallel with its registration efforts, KS&T in 2016 began engaging in a variety of business development activities in Ontario. At this time, KS&T was focused on cultivating potential business relationships for its purchase and trading services, with a view to building its reputation. By the time Ontario’s Cap and Trade Program was

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<sup>164</sup> Witness Statement of Graeme Martin (4 October 2021), para. 24, **CWS-2**.

<sup>165</sup> Email from Graeme Martin to Sam Porter and John Wingate, “CITSS User Application Approved” (4 November 2016), **Exh. C-49**.

<sup>166</sup> Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 22(1), **CL-5**; Ontario Government, Ontario Climate Change Action Plan, Module #3: Business Relationship Disclosures (Corporate Association Disclosures), **Exh. C-50**.

<sup>167</sup> KS&T, Ontario Business Relationship Disclosure Form (29 November 2016), **Exh. C-51**.

<sup>168</sup> Witness Statement of Graeme Martin (4 October 2021), para. 25, **CWS-2**.

<sup>169</sup> Ontario Government, “Cap and trade CITSS registration: Recognition as an Account Agent”, **Exh. C-31**.

<sup>170</sup> See, e.g., Ontario’s Cap and Trade Program Participant Training Guide: Auction Registration in the Compliance Instrument Tracking System Service (CITSS) (January 2018), **Exh. C-41**.

(continued)

formally introduced, KS&T sought to have established strong foundations to grow its business.<sup>171</sup>

139. With respect to carbon allowances, KS&T engaged in trading on the secondary market, to develop business opportunities to supply Ontario entities. In particular, KS&T frequently made bids and offers through ICE's Ontario Carbon Allowances (OCA) contract. The OCA, as KS&T's environmental trader Frank King explains, "was a 'futures contract' listed by the ICE, where buyers and sellers can transact a standardized contract for Ontario carbon allowances for which the ICE anonymously 'matches' up net buyers with net sellers at the contract's settlement to arrange physical delivery." Mr. King further explains:

[REDACTED]

While the Ontario cap and trade program was operational in 2017 and 2018, we had over [REDACTED] trades in the Ontario market and the linked markets including California and Québec (*i.e.* on the secondary market), and purchased over [REDACTED] during this period from the auction process (*i.e.* the primary market).<sup>172</sup>

140. In addition, KS&T was also focused on developing KS&T's business in the secondary market for the supply of offset credits (*i.e.*, credits generated through a broad variety of projects aiming to reduce or remove carbon emissions from the atmosphere, such as improved forestry or destroying methane from dairy livestock).<sup>173</sup> At that time, Ontario, California and Québec all allowed project-based offset credits for between 8 to 10 percent of their total emissions. For compliance entities, buying offset credits for compliance made sense, given that offset credits typically cost less than carbon allowances (at the time, roughly 80-90 percent of a carbon allowance cost, or a 10-20 percent discount). For KS&T, the business opportunity with carbon offsets arose [REDACTED]

<sup>174</sup> As Mr. Martin explains:

"I was one of only a handful of people who sold and traded offset credits in the WCI markets at the time, and so I was very focused on making connections to build up personal relationships with potential buyers in Ontario. For this reason, I attended several conferences, set up personal networking events with potential customers, and actively participated in the International Emissions Trading Association (IETA) Canadian Working Group. In addition, I engaged in constant monitoring and analysis of emissions offsets programs and activities,

<sup>171</sup> Witness Statement of Graeme Martin (4 October 2021), paras. 18-20, CWS-2.

<sup>172</sup> Witness Statement of Frank King (6 October 2021), paras. 11-12, CWS-4.

<sup>173</sup> Witness Statement of Graeme Martin (4 October 2021), para. 15, CWS-2.

<sup>174</sup> *Id.*, paras. 17, 33 and 45.

(continued)

so as to maintain KS&T's leading edge in this particular trading area."<sup>175</sup>

141. The purpose of these early efforts to build up business in Ontario was to develop KS&T's business in Ontario's primary and secondary markets. As explained by Mr. Martin, KS&T was marketing the company – both internally and externally – as leaders in the field.<sup>176</sup> As a result of these efforts, KS&T's business activities in Ontario during 2017 were profitable,<sup>177</sup> and would likely have continued to be so over the full lifetime of the Program.<sup>178</sup>

(b) KS&T's Participation in the 2017 Public Auctions

142. To support the marketing of allowances to Ontario compliance entities, and to permit trading of allowances in the secondary futures market developed by ICE, KS&T also participated from the start in Ontario's public auctions of allowances, first launched in early 2017.

143.



144. Prompted by these strategies, KS&T participated in each of the Ontario-only auctions in 2017, building up its purchases of allowances throughout the course of the year. The process for each of the auctions took approximately three months in total, and entailed the following steps:

- a. at least two months in advance of each auction, under the Regulation Ontario was required to publish an "Auction Notice", and open up auction registration through a dedicated website run by the Ontario government.<sup>180</sup> Ordinarily, the auction application period started at least sixty days prior to each auction with

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<sup>175</sup> *Id.*, para. 33 [redacted] **Exh. C-52;** [redacted] **Exh. C-53;** [redacted] **Exh. C-54).**

<sup>176</sup> *Id.*, para. 34.

<sup>177</sup> Witness Statement of Frank King (6 October 2021), para. 20, **CWS-4** ("Overall, KS&T gradually built up its inventory over the course of 2017 through participating in the first four Ontario-sponsored auctions. [redacted] .

<sup>178</sup> Witness Statement of Graeme Martin (4 October 2021), para. 34, **CWS-2**.

<sup>179</sup> *Id.*, paras. 35 and 36.

<sup>180</sup> Ontario Regulation 144/16, Section 60, **CL-6**.

(continued)

the release of the Auction Notice, and ended no later than thirty days prior to the auction.<sup>181</sup>

- b. Participants could then register with Ontario to participate in the auction. To register, Ontario obliged participants to provide financial assurances (such as cash, bonds, or letters of credit), that covered the full value of a bid.<sup>182</sup> This meant that each time KS&T took part in a public auction in Ontario, it had to submit a financial guarantee in the maximum amount of the allowances it would seek to purchase, simply to qualify to take part and with no guarantee its bids would be successful.<sup>183</sup>
  - c. On the date of the auction, participants had to submit various bids, based on volume and price. For example, a participant might submit a bid at Price 1 for a certain number of allowances. At Price 2, however, a participant might only be willing to purchase fewer allowances. Because the auction was a sealed bid, single round, uniform price (lowest winning bid) auction, the final price depended on the number of participants and the nature of the bids. Determining an optimal auction strategy in light of the range of potential factors was exactly the kind of high-value-added, specialised knowledge that KS&T brought to the table, and that ensured its effective engagement in its environmental trading enterprise.
  - d. Approximately a week after the pre-deposit of bids, Ontario would release the results of the auctions, with instructions to deposit the final payment amount into a designated account via a specified banking authority, noting payment details as “WCI Auction FBO Ontario.”<sup>184</sup>
  - e. Once Ontario had received these funds, Ontario would transfer the purchased allowances into participants’ Ontario CITSS accounts.
145. Overall, the process of participating in Ontario’s Cap and Trade auctions was lengthy; called upon specialist expertise; involved the commitment of substantial capital; and entailed the undertaking of risk. KS&T had to submit a financial guarantee (usually in the form of a letter of credit) to cover its participation in the auction; engage in risk assessment to determine the price to invest in Ontario through the auctions in order to be successful and profitable; and commit capital to Ontario in exchange for the carbon allowances ultimately purchased. KS&T underwent this process in each of the Ontario-

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<sup>181</sup> Detailed Auction Requirements and Instructions (updated 26 January 2018), p. 15, **Exh. C-36**.

<sup>182</sup> *See, e.g., id.*, p. 14, **Exh. C-36**. (“After an auction application has been submitted, each participant that wishes to participate in an auction must submit a bid guarantee (in CAD) directly to the Financial Services Administrator. The Financial Services Administrator will receive and administer all bid guarantees submitted as financial security.”).

<sup>183</sup> *See* Witness Statement of Graeme Martin (4 October 2021), para. 36, **CWS-2**; Witness Statement of Frank King (6 October 2021), para. 13, **CWS-4**.

<sup>184</sup> *See, e.g.,* [REDACTED], **Exh. C-55**.

(continued)

only auctions, committing in excess of [REDACTED] of capital in Ontario during the course of 2017. Further details in this regard are set out in what follows.

146. Ontario held its first auction on 22 March 2017, after providing public notice of the auction two months before, on 20 January 2017. At the auction, [REDACTED]
147. Ontario released the results of the auction on 3 April 2017, and provided wiring instructions to deposit the full amount into Ontario's CITSS account.<sup>188</sup> On 10 April 2017, KS&T paid [REDACTED] directly to Ontario through a designated Deutsche Bank account,<sup>189</sup> and then received the allowances on 20 April 2017 from Ontario.<sup>190</sup>
148. The second auction was announced by Ontario on 7 April 2017,<sup>191</sup> and held on 6 June 2017.<sup>192</sup> KS&T again registered to participate in the auction, and submitted a financial guarantee in the amount of [REDACTED]

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<sup>185</sup> See *ibid* [REDACTED]

<sup>186</sup> Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances March 2017 Ontario Auction #1 (22 March 2017), **Exh. C-56**.

<sup>187</sup> [REDACTED]  
[REDACTED] See also Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances March 2017 Ontario Auction #1 (22 March 2017), **Exh. C-56**.

<sup>188</sup> See [REDACTED]  
**Exh. C-55**.

<sup>189</sup> See [REDACTED].

<sup>190</sup> [REDACTED].

<sup>191</sup> Ontario Government, Auction Notice: Ontario Cap and Trade Program – Auction of Greenhouse Gas Allowances on June 6, 2017 (7 April 2017), **Exh. C-60**.

<sup>192</sup> *Ibid*; Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances June 2017 Ontario Auction #2, **Exh. C-61**.

<sup>193</sup> See [REDACTED]

(continued)

[REDACTED]

149. Ontario announced its third auction on 6 July 2017,<sup>196</sup> to be held on 6 September 2017.<sup>197</sup> KS&T duly submitted a financial guarantee in the amount of [REDACTED] and registered to participate in the auction.<sup>198</sup> [REDACTED]

KS&T paid this amount directly to Ontario through its designated authority Deutsche Bank, on 20 September 2017,<sup>200</sup> and then received the allowances into its Ontario CITSS account on 28 September 2017.<sup>201</sup>

150. [REDACTED]

151. [REDACTED]

[REDACTED] By the terms of Ontario’s Cap and Trade Program, a “current vintage” could be used immediately, while a “future vintage” could not be used until the year it was designated.<sup>203</sup> For example, if KS&T purchased allowances with a 2017 vintage in 2017, they could be used for compliance immediately, because compliance entities could use them to offset their emissions for that year. As a result, there was less risk in terms of a long-term investment. By contrast, “future vintage”

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<sup>194</sup> See WCI Inc, Results from Ontario Auction #2, KS&T Financial Statement (13 June 2017), **Exh. C-65**. [REDACTED]

[REDACTED] *See id.*

<sup>195</sup> Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances June 2017 Ontario Auction #2, **Exh. C-61**. The Ontario Auction Reserve Price was CAD 18.30, or around CAD 0.47 lower than the settlement price. *See id.*

<sup>196</sup> Ontario Government, Auction Notice: Ontario Cap and Trade Program – Auction of Greenhouse Gas Allowances on September 6, 2017 (6 July 2017), **Exh. C-39**.

<sup>197</sup> Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances September 2017 Ontario Auction #3, **Exh. C-66**.

<sup>198</sup> [REDACTED]  
**Exh. C-67**.

<sup>199</sup> *Ibid.*

<sup>200</sup> [REDACTED] **Exh. C-68**.

<sup>201</sup> Witness Statement of Frank King (6 October 2021), para. 18, **CWS-4**.

<sup>202</sup> Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances November 2017 Ontario Auction #4, **Exh. C-69**.

<sup>203</sup> *See, e.g.*, Ontario Government, Detailed Auction Requirements and Instructions (updated 6 July 2017), p. 27, **Exh. C-70**.

(continued)

were those allowances that might have been sold in 2017, but could not be used for compliance until 2020.<sup>204</sup>

152. KS&T therefore registered for Ontario’s final auction of 2017, and again paid [REDACTED] to register to participate.<sup>205</sup> [REDACTED] which KS&T paid to Ontario, through its designated authority Deutsche Bank, on 13 December 2017.<sup>208</sup> Ontario then transferred those allowances into KS&T’s Ontario CITSS account on 21 December 2017.<sup>209</sup>

153. On each occasion, KS&T [REDACTED]. As Frank King, environmental trader for KS&T notes:

“Overall, KS&T gradually built up its bids and inventory over the course of the year through participating in the Ontario-only auctions.

[REDACTED]<sup>210</sup>

154. Through its investment activity KS&T not only profited from being an [REDACTED] which it was able to trade at a profit over the short- and long-term.

155. Overall, by the time Ontario linked its Cap and Trade Program with California and Québec on 1 January 2018, KS&T was in a strong and stable position. The company had spent [REDACTED] as well as building up its reputation and business in the Ontario market.

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<sup>204</sup> Witness Statement of Frank King (6 October 2021), para. 14, CWS-4.

<sup>205</sup> [REDACTED] Exh. C-71.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

<sup>208</sup> *See* [REDACTED] Exh. C-72.

<sup>209</sup> Witness Statement of Frank King (6 October 2021), para. 19, CWS-4.

<sup>210</sup> *Id.*, para. 19, CWS-4.

(continued)



3. KS&T's Participation in the Linked Cap and Trade Program as an Ontario Market Participant (2018)

(a) The Importance of the OQC Agreement

156. As outlined above, on 22 September 2017, Ontario signed an agreement with California and Québec to harmonize and integrate the cap and trade programs of the three jurisdictions. The OQC Agreement came into effect on 1 January 2018,<sup>211</sup> and had a number of important implications for KS&T's Ontario allowance trading business.
157. First, compliance instruments in each of the jurisdictions became “fungible”, meaning that each jurisdiction would accept and recognize allowances purchased in each other jurisdiction. For KS&T this was important. The linkage meant that allowances purchased in Ontario could be used to fulfil compliance obligations owed by, for example, Californian companies. Not only did this expand KS&T's opportunities to profit from trading in Ontario, but it also gave KS&T a path to trade across North America and to support the pan-American compliance obligations of other Koch group entities. In essence, it was akin to an Ontario-based manufacturing business suddenly confirming a major new market for its products in the largest U.S. State.
158. Second, the participating jurisdictions agreed to hold joint quarterly auctions of allowances, in accordance with harmonized procedures.<sup>212</sup> In connection with this, the three parties decided to use a common registry and auction platform, managed through each jurisdiction's respective CITSS accounts. This meant that KS&T could continue to use its Ontario CITSS account to buy and receive allowances when participating in the joint auctions.
159. Third, as discussed above, the arrangement enhanced KS&T's framework for rational business management and predictability, by providing for orderly withdrawal from the joint program, in case of future policy change in any of the three jurisdictions.<sup>213</sup> In this respect, the OQC Agreement provided an obligation that any party that decided to withdraw from the agreement do so in an orderly manner, endeavouring to provide twelve-months' notice and to seek to exit (if at all) only at the end of a compliance period (which as of 2018 meant late 2020).
160. Fourth, the parties to the OQC Agreement clarified that the Agreement would “not modify any existing statutes and regulations” in force in their jurisdictions.<sup>214</sup> This guaranteed that the basic rules applicable to allowances in each of the respective jurisdictions would continue to be applied by that jurisdiction, providing another layer of stability and assurance to Program participants.

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<sup>211</sup> Detailed Auction Requirements and Instructions (updated 26 January 2018), p. 1, **Exh. C-36**.

<sup>212</sup> *Ibid.*

<sup>213</sup> Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec (22 September 2017), Article 17, **CL-8**.

<sup>214</sup> *Id.*, Article 14.

161. In sum, from 1 January 2018, the Ontario allowances market was formally “linked” with that of California and Québec. This meant that Ontario participants like KS&T could transfer Ontario allowances (including those purchased in the Ontario auctions of 2017) to California or Québec CITSS accounts. The OQC Agreement pointed to a stable commitment on the part of Ontario and an obligation to act in good faith to ensure an orderly exit, should the province ever seek to withdraw. On the basis of all of these representations and commitments, KS&T as of 2018 continued to invest in the Ontario market as it had for the previous year – by building up business and trading in the secondary market, and participating in public allowances auctions.

(b) KS&T’s Continued Investments in Trading in the Secondary Market

162. KS&T continued to grow its business in 2018 as a trusted supplier of allowances by committing to the long-term supply of allowances in the joint market as early as possible. This strategy was driven by the Koch group’s overall efforts to comply in the most cost-efficient manner possible with its obligations under various environmental compliance programs, but expanded beyond this to take part in other profit-generating activities linked to KS&T’s market participation.

(1) KS&T’s Arms-Length Transactions with Koch Entities

163. Once the markets were linked in early 2018, KS&T could use the allowances it purchased in Ontario to assist in the fulfilment of obligations owed by mandatory participant Koch entities both in Ontario and California (and also in theory in Québec, though at the time Koch lacked any compliance obligations in that jurisdiction). One of the concerned Koch entities was FHR, a U.S. company active in California that produces a diverse range of fuels and chemical building blocks that make up many household goods. Through FHR, Koch had ongoing compliance obligations under the California cap and trade program. In accordance with practice within the Koch group of companies, [REDACTED]

164. [REDACTED]

165. [REDACTED] In simple terms, this meant that KS&T would

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<sup>215</sup> See [REDACTED]

<sup>216</sup> *Id.*, Article 1.

<sup>217</sup> *Ibid.*

(continued)

[REDACTED]  
as permitted under the linked WCI program.<sup>218</sup>

166. [REDACTED] annual emissions in California under the WCI cap and trade program fluctuated between [REDACTED] between 2015 and 2017.<sup>219</sup> [REDACTED]

(2) KS&T's Third-Party Contractual Obligations

167. In addition to the intra-Koch arm's-length transactions KS&T entered into for the supply of allowances, KS&T also pursued a number of other agreements for the sale of allowances and offsets in the early part of 2018.

168. [REDACTED]<sup>221</sup>

169. In addition, as a result of KS&T's early business development efforts in 2016 and 2017, in early 2018 [REDACTED]

[REDACTED] For example, KS&T entered into a contract for [REDACTED] At that time, the company needed [REDACTED] in anticipation of its long-term compliance obligations.<sup>223</sup> [REDACTED]

170. As of spring 2018 KS&T was also in the process of negotiating [REDACTED]

<sup>218</sup> Witness Statement of Graeme Martin (4 October 2021), para. 43, CWS-2.

<sup>219</sup> *Id.*, para. 44.

<sup>220</sup> *Ibid.*

<sup>221</sup> [REDACTED]

<sup>222</sup> [REDACTED]

Due to existing confidentiality obligations, the Claimants have provided an excerpt of the Agreement, and have removed identifying information, but are contractually obliged not to disclose the name of KS&T's counterpart to the Agreement.

<sup>223</sup> See Witness Statement of Graeme Martin (4 October 2021), para. 45, CWS-2.

<sup>224</sup> See, e.g., [REDACTED]

(continued)

However, both companies pulled out of contract negotiations with KS&T upon the announcement of Ontario's abrupt plan to cancel the Cap and Trade Program, as discussed in paras. 185-212 below.<sup>225</sup>

(c) KS&T's Participation in the Joint Auctions as an Ontario Market Participant

171. To continue to support its growing business in the secondary market, KS&T also participated in the joint allowances auctions held in February and May 2018 (*i.e.* the two joint auctions Ontario participated in before its abrupt withdrawal from the Cap and Trade Program).
172. The process for joint auctions was largely similar to that undertaken in the 2017 auctions, as discussed above. KS&T, as an Ontario market participant, continued to use its Ontario CITSS account to trade.<sup>226</sup> Ontario continued to provide advice on requirements and eligibility,<sup>227</sup> and to circulate auction notices, requirements, and results.<sup>228</sup> Any allowances KS&T obtained in the joint auctions were deposited into its Ontario CITSS account and subject to Ontario jurisdiction rules. The only difference was that upon receipt of these allowances, KS&T would now be able to sell them on to potential customers in the other two linked jurisdictions, notably in California. This in effect meant that, as anticipated, as of 2018 KS&T's onward sales opportunities multiplied.

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<sup>225</sup> See, e.g., Email on [REDACTED] (18 June 2018), **Exh. C-79**. See also Witness Statement of Graeme Martin (4 October 2021), para. 46, **CWS-2**.

<sup>226</sup> See Email from MOECC, February 2018 Joint Auction #14 – Bid Guarantee Deadline (7 February 2018), **Exh. C-80**. (“Note also that if you represent other entities registered in either California or Quebec that have also applied to participate in the February 2018 Joint Auction #14, a separate bid guarantee must be submitted for each entity that has applied to participate.”).

<sup>227</sup> See, e.g., Email from MOECC, February 21, 2018 Joint Auction Notice (21 December 2017), **Exh. C-81** (providing notice of the joint auction and additional information on regulatory requirements); Email from MOECC, Reminder to Submit Bid Guarantees (26 January 2018), **Exh. C-82** (providing an example letter of credit for bid guarantees and directing participants to the Ontario Cap and Trade website); Email from MOECC to Sam Porter, KS&T's Business Disclosure Requirements (9 January 2018), **Exh. C-83** (providing advice that KS&T was required to “disclose its business relationships with registered participants in Quebec and/or California by January 12, 2018, to ensure its eligibility, and the eligibility of all related persons, to participate in the first joint auction in 2018 using the attached Business Relationship Disclosure Form.”); Ontario, Participant Training Guide for CITSS (January 2018), **Exh. C-36**; Email from MOECC, Joint Auction Training Session (18 December 2017), **Exh. C-84**.

<sup>228</sup> Email from MOECC, February 21, 2018 Joint Auction Summary Results (28 February 2018), **Exh. C-85** (attaching Joint Summary Results (February 2018), **Exh. C-86**).

(continued)

## (1) KS&amp;T's Participation in the February 2018 Joint Auction

173. The first joint auction between Ontario, California and Québec was held in February 2018. Even before the jurisdictions were formally linked, on 21 December 2017, in accordance with the Regulations, Ontario released the auction notice for "February 2018 Joint Auction #14", scheduled to take place on 21 February 2018.<sup>229</sup>

174. [REDACTED]<sup>230</sup> The joint auction took place on 21 February 2018,<sup>231</sup> and Ontario circulated the auction results on 23 February 2018.<sup>232</sup> [REDACTED]<sup>233</sup>

175. KS&T deposited this amount into the Deutsche Bank auction settlements account as directed by Ontario on 8 March 2018.<sup>234</sup> [REDACTED]

## (2) KS&amp;T's Participation in the May 2018 Joint Auction

176. On 16 March 2018, in accordance with the Regulations, Ontario released an auction notice for the second joint auction, to be held on 15 May 2018.<sup>237</sup> The notice stated that "Ontario mandatory, voluntary, and market participants (ON entities) are eligible to apply to participate in a joint auction."<sup>238</sup> Ontario also provided information on the allowances offered for sale, breaking the figure down by vintage, and recalled that the Annual Auction Reserve Price (*i.e.* the minimum prices set) was released by Ontario

<sup>229</sup> Ontario Government, Joint Auction of Greenhouse Gas Allowances on February 21, 2018 (10 January 2018), **Exh. C-42**.

<sup>230</sup> Email from Ashely Mullin to Sam Porter, February 2018 Joint Auction #14 – Bid Guarantee Deadline (7 February 2018), **Exh. C-87**.

<sup>231</sup> Email from MOECC, February 21, 2018 Joint Auction Summary Results (28 February 2018), **Exh. C-85** (attaching Joint Summary Results (February 2018), **Exh. C-86**).

<sup>232</sup> Summary Results Report: Joint Auction #14 (23 February 2018) **Exh. C-88**.

<sup>233</sup> [REDACTED]

<sup>234</sup> See Witness Statement of Frank King (6 October 2021), para. 23, **CWS-4**; [REDACTED]

<sup>235</sup> Witness Statement of Frank King (6 October 2021), para. 23, **CWS-4**.

<sup>236</sup> *Ibid.*

<sup>237</sup> Ontario Government, Joint Auction of Greenhouse Gas Allowances on May 15, 2018 (16 March 2018), **Exh. C-43**.

<sup>238</sup> *Ibid.*

(continued)

annually pursuant to Section 71(4) and 71(5) of the Ontario Cap and Trade Regulation. Ontario further confirmed that the Auction Exchange Rate between U.S. and Canadian dollars would be published by the Bank of Canada, and directed participants to the “Detailed Auction Requirements and Instructions” document, published on the MOECC website.<sup>239</sup> Ontario further provided specific information with respect to the auction schedule, procedures for conducting the auction, the form and manner for submitting bids and links to auction participant training materials.<sup>240</sup> In the auction schedule, Ontario noted that the deadline for entities intending to participate in the joint auction was 16 April 2018, and that all bid guarantees were due to the Financial Services Administrator by 3 May 2018.<sup>241</sup> Ontario confirmed that the transfer of allowances into participants’ CITSS accounts would take place on 11 June 2018, some 26 days after the auction was held.<sup>242</sup> Ontario sent multiple follow up reminders to Ontario participants between 23 March and 26 April 2018.<sup>243</sup>

177. KS&T abided by the schedule and instructions Ontario provided and, as in all prior auctions, completed and submitted its application in CITSS to participate in the May 2018 auction. The auction application process required KS&T to: (a) confirm the auction in which it intended to participate; (b) provide information on the form of the bid guarantee to be submitted, as well as return instructions for any unused portion of the bid guarantee; and (c) complete the attestation response in CITSS and submit the auction application.<sup>244</sup>
178. In the lead up to the deadline for registering KS&T’s participation in the May 2018 auction, KS&T conducted an analysis of its existing obligations to provide allowances under both its contractual obligations and futures obligations on ICE, to determine its bid strategy. As explained by KS&T environmental trader Mr. King:

“As is common in the ongoing management of a position in cap and trade markets, in the lead up to the deadline for registering KS&T’s participation in the auction, we conducted an analysis of our existing obligations to provide carbon allowances through contracts and on ICE.

For example, we had an existing range of long-term obligations to supply carbon allowances with compliance entities. One such agreement was with Koch affiliate Flint Hill Resources (**FHR**), which is based in the United States, and engaged in the business of energy

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<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*

<sup>243</sup> *See, e.g.*, Email from MOECC, Reminder #1, April 5 deadline for auction applicants (23 March 2018), **Exh. C-91**; Email from MOECC, Reminder #5, Confirm submission of an auction application (13 April 2018), **Exh. C-92**; Email from MOECC, Reminder #7, May 3 deadline to submit bid guarantees (26 April 2018), **Exh. C-93**.

<sup>244</sup> Detailed Auction Requirements and Instructions (updated 26 January 2018), p. 15, **Exh. C-36**.

(continued)

delivery (notably, oil and gas via pipeline). The premise of our agreement with FHR was to provide them allowances [REDACTED]

[REDACTED] At the time of the May 2018 joint auction, we estimated that KS&T would need at least [REDACTED] of carbon allowance credits to [REDACTED]

[REDACTED] In addition, we also anticipated needing [REDACTED] of carbon allowance credits to meet customer needs and obligations to third parties on ICE.”<sup>246</sup>

179. On 30 April 2018, KS&T arranged for a letter of credit in the amount of [REDACTED] to be supplied to Deutsche Bank, acting on the authority of the MOECC, to secure its participation in the auction through the mandated bid guarantee requirement.<sup>247</sup> On 3 May 2018, Deutsche Bank confirmed receipt of the letter of credit as KS&T’s bid guarantee.<sup>248</sup>

180. On 15 May 2018, KS&T participated in the auction.<sup>249</sup> The auction had a minimum bid price of USD 14.53, and spot market prices were [REDACTED].<sup>250</sup> Because KS&T needed to [REDACTED]

[REDACTED]

<sup>251</sup>

<sup>245</sup> [REDACTED]

<sup>246</sup> Witness Statement of Frank King (6 October 2021), paras. 24-25, CWS-4.

<sup>247</sup> [REDACTED]

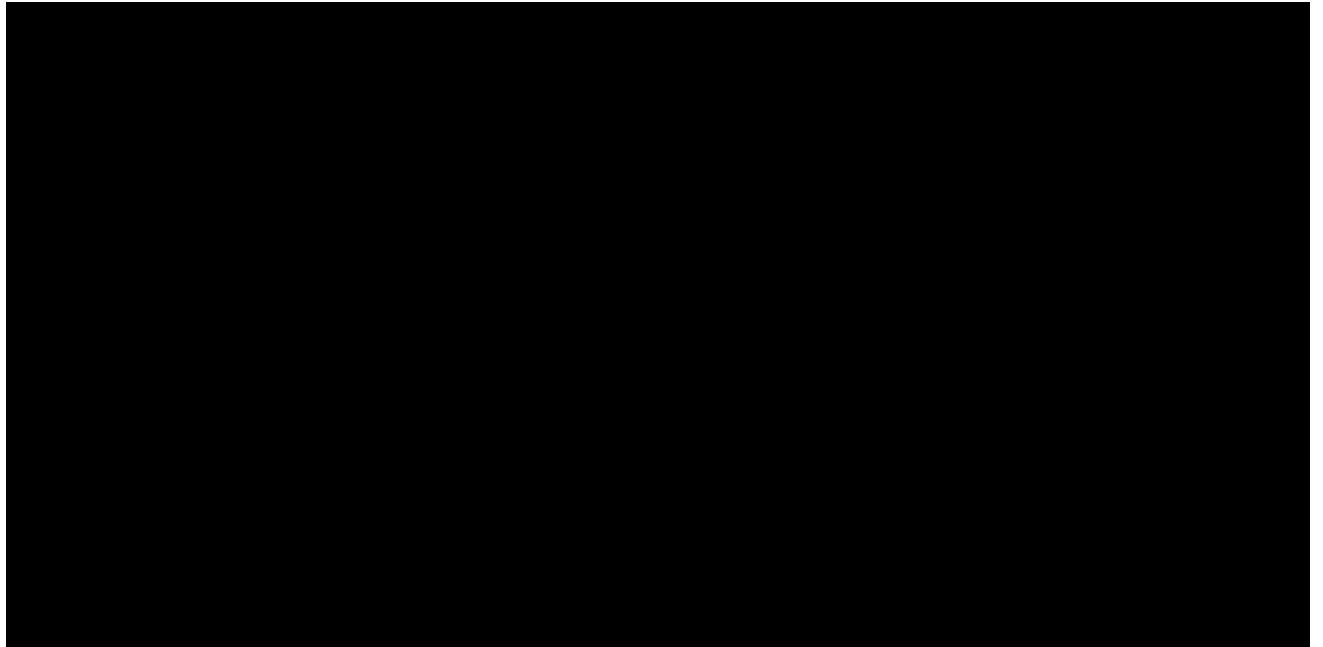
<sup>248</sup> [REDACTED]

<sup>249</sup> [REDACTED]

<sup>250</sup> Witness Statement of Frank King (6 October 2021), para. 27, CWS-4.

<sup>251</sup> See *id.*, para. 28, CWS-4. See also [REDACTED]

Exh. C-97.



181. Ultimately, the auction cleared at bid price USD 14.65, [REDACTED] USD 30,158,240.95.<sup>252</sup>

182. On 25 May 2018, KS&T deposited USD 30,158,240.95 into the Deutsche Bank auction settlements account as directed by Ontario.<sup>253</sup> Given the OQC Agreement had linked the market, Ontario provided participants with an option to transfer either by CAD or USD.<sup>254</sup> To minimize risks to KS&T as a U.S. company, KS&T chose to pay via USD. On 11 June 2018, [REDACTED] allowances, corresponding to KS&T's payment were registered in KS&T's Ontario CITSS account.<sup>255</sup>

4. KS&T Made Significant Investments in Ontario Overall

183. KS&T therefore made significant investments in Ontario over a two-year period. Through its participation in the six auctions Ontario administered, KS&T invested a cumulative total of [REDACTED] through the purchase of Ontario allowances.<sup>256</sup>

<sup>252</sup> See, e.g., [REDACTED] **Exh. C-96.** See also Witness Statement of Frank King (6 October 2021), para. 29, CWS-4.

<sup>253</sup> See [REDACTED] **Exh. C-98; See also [REDACTED] Exh. C-99.**

<sup>254</sup> **Exh. C-96** [REDACTED]

<sup>255</sup> Witness Statement of Frank King (6 October 2021), para. 30, CWS-4.

<sup>256</sup> This calculation is based on CAD converted to USD using the exchange rate on the final date of transfer from KS&T, on [REDACTED]. This figure encompasses [REDACTED] for 2017 and [REDACTED] for 2018. The exchange rate used has been taken from <https://www1.oanda.com/currency/converter/>: see **Exh. C-100.**



Combined with the significant amount of time and effort KS&T put into developing its business on the secondary market, KS&T's investment in Ontario was substantial.

184. As of 11 June 2018, just days before the Ontario Premier-elect abruptly cancelled Ontario's Cap and Trade Program, KS&T had paid USD 30,158,240.95 into bank settlements accounts as directed by Ontario, and received [REDACTED] allowances for this payment. These [REDACTED] allowances, and their financial worth, were held in KS&T's Ontario CITSS account, and were ready to be transferred to fulfil KS&T's contractual and futures obligations.

#### **D. Ontario's Abrupt Cancellation of the Cap and Trade Program**

1. The Abrupt Announcement of the Premier-Elect on 15 June 2018 and its Immediate Negative Impact on the Market

185. On 7 June 2018 – that is, after KS&T had purchased allowances in the May 2018 auction, but before Ontario had delivered them – Doug Ford was elected as Premier of Ontario. Doug Ford represented the Ontario Conservative Party, which had historically and in the most recent campaign had been opposed to the Cap and Trade Program.
186. While KS&T was conscious of the election and of the Conservative Party's platform, KS&T – like other participants in the Ontario market<sup>257</sup> – concluded that even if the Conservative Party were to take power, and potentially change the course of Ontario cap and trade policy, this should not preclude participation in the May 2018 allowances auction.
187. First, the auction was held *prior* to the election (as noted above, held on 7 June 2018). Even if the Ontario Conservative Party were elected, the formal swearing in of the new government was not until 29 June 2018: a caretaker Liberal government would remain in power until the end of June, and no substantial policy change legally could be enacted until then.<sup>258</sup> KS&T would therefore be able to participate in the May 2018 auction before the election, and to trade in the allowances it purchased in that auction before the Ford government (if elected) could legally take any further steps.
188. Second, under the terms of the OQC Agreement, Ontario had committed in good faith to endeavour to provide no less than 12 months' notice if it decided to withdraw from the Agreement, and to have its withdrawal coincide with the end of a compliance period (which as of June 2018 meant the end of 2020).<sup>259</sup> Given Ontario's legal commitments under the Agreement, KS&T reasonably understood that any change of policy by a newly elected government would be at least over a year away.

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<sup>257</sup> See Witness Statement of Michael Berends (5 October 2021), para. 76, **CWS-1**.

<sup>258</sup> See, e.g., Witness Statement of Graeme Martin (4 October 2021), para. 49, **CWS-2**; Witness Statement of Frank King (6 October 2021), paras. 32-33, **CWS-4**; Witness Statement of Paul Brown (5 October 2021), para. 35, **CWS-3**.

<sup>259</sup> Agreement between the California Air Resources Board and The Gouvernement du Québec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions (25 September 2013), Article 17, **CL-25**.

(continued)

189. In this understanding, KS&T was joined by the entire cap and trade industry.<sup>260</sup> As Michael Berends, Managing Director of ClearBlue Markets, recalls:

“[I]n April 2018 all Ontario-based carbon market experts and industrial representatives (myself included) assembled for the 2<sup>nd</sup> Annual Ontario Cap and Trade Forum. In my many discussions with dozens of participants over the course of this multi-day meeting, not one person raised the spectre of the immediate termination of Ontario’s Cap and Trade Program. Even though there was a possibility, in light of the PC party’s election platform, that the Ontario Cap and Trade Program might be wound down, and we were sensing that that might be coming, everyone expected that there would at least be an orderly withdrawal. By “orderly withdrawal”, I mean a phase-out that would ensure Ontario participants were able to rationally exit the program without suffering any economic harm. As I mentioned earlier, this general expectation was based in the specific terms of the OQC Agreement.”

[ . . . ]

The extent to which such de-linkage took everyone by surprise is heightened by the fact that to my knowledge, no one involved in the carbon market industry had any form of “de-linkage” risk on their radar. To my knowledge, no one was hedging against any de-linkage risk, nor was it being factored into transactions or futures contracts in any way. Had sudden de-linkage been contemplated ever so slightly by participants involved in the Ontario Cap and Trade Program, one can be sure that such risk would have had repercussions on pricing and contractual obligations. I am aware of no such adjustments being implemented in practice or even of such de-linkage risk adjustments being discussed.<sup>261</sup>

190. What KS&T, and many others, did not expect was that – before he was even formally sworn in as Premier – Premier-elect Ford would abruptly and without notice cancel Ontario’s Cap and Trade Program, acting *ultra vires* when he was not yet even sworn into office. Yet this is precisely what happened, with devastating results.
191. Under the Regulations, on 15 June 2018 Ontario was to announce the number of allowances it would be releasing in the next (mid-August 2018) public auction. Section 60 of the Cap and Trade Regulation required “the Minister” [of MOECC] to confirm the number and vintage of allowances it would be releasing into public auctions at least 60 days in advance.<sup>262</sup> The strongly-held expectation shared by all involved in the carbon market industry was that the Ontario Government would continue to participate in the 14 August 2018 joint auction, even if in the context of an “orderly” transition out of the Cap and Trade Program.<sup>263</sup> The anticipated announcement, required under the

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<sup>260</sup> See Witness Statement of Michael Berends (5 October 2021), para. 79, CWS-1.

<sup>261</sup> See *id.*, paras. 79, 95.

<sup>262</sup> Ontario Regulation 144/16, Section 60, CL-6.

<sup>263</sup> Witness Statement of Michael Berends (5 October 2021), para. 86, CWS-1.

(continued)

Regulations, would have confirmed the continued operation of the Ontario Cap and Trade Program and its continued linking with California and Québec’s cap and trade programs, at least until an orderly wind-down could be arranged.<sup>264</sup>

192. Despite this, on 15 June 2018 relevant Ontario Government officials failed to make the announcement required under the Regulation. This was despite that the policy of the Ontario Liberal Government, which was still officially in power until 29 June 2018,<sup>265</sup> was to remain engaged in the Cap and Trade Program.
193. Notwithstanding the fact that the Liberal Government remained in power on 15 June 2018, the Premier-elect – who had been elected but not yet formally sworn in – suddenly released a statement announcing Ontario’s intention to cancel the Cap and Trade Program, and in connection with this confirmed that Ontario would not be taking part in the next joint auction, in August 2018.<sup>266</sup> The media release announcing this change stated in full:

Premier-designate Doug Ford today announced that his cabinet’s first act following the swearing-in of his government will be to cancel Ontario’s current cap-and-trade scheme, and challenge the federal government’s authority to impose a carbon tax on the people of Ontario. “I made a promise to the people that we would take immediate action to scrap the cap-and-trade carbon tax and bring their gas prices down,” said Ford. “Today, I want to confirm that as a first step to lowering taxes in Ontario, the carbon tax’s days are numbered.”

Ford also announced that Ontario would be serving notice of its withdrawal from the joint agreement linking Ontario, Quebec and California’s cap-and-trade markets as well as the pro-carbon tax Western Climate Initiative. *The Premier-designate confirmed that he has directed officials to immediately take steps to withdraw Ontario from future auctions for cap-and-trade credits.* The government will provide clear rules for the orderly wind down of the cap-and-trade program.

Finally, Ford announced that he will be issuing specific directions to his incoming attorney general to use all available resources at the disposal of the government to challenge the federal government’s authority to arbitrarily impose a carbon tax on Ontario families.

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<sup>264</sup> *Ibid.*

<sup>265</sup> While the Conservative Party of Ontario won the election on 7 June 2018, the Liberal Government remained in power up until 11:00am on 29 June 2018, just prior to the Conservative Party’s swearing in to power. Ontario Media Advisory, “UPDATED: Doug Ford and New Government to be Sworn-in by Lieutenant Governor” (28 June 2018), **Exh. C-101**. See Ontario News Release, “Doug Ford to Become Ontario’s 26<sup>th</sup> Premier” (8 June 2018), **Exh. C-102** (“Premier-designate Doug Ford has selected a transition team and has already begun briefings on government activities and the decisions necessary to choose his Cabinet. The Premier and the Premier-designate have agreed that the transition of power will take place on June 29, 2018.”).

<sup>266</sup> Office of the Premier-designate, News Release, “Premier-Designate Doug Ford Announces an End to Ontario’s Cap-and-Trade Carbon Tax” (15 June 2018), **Exh. C-7**

(continued)

“Eliminating the carbon tax and cap-and-trade is the right thing to do and is a key component in our plan to bring your gas prices down by 10 cents per litre,” said Ford. “It also sends a clear message that things are now different. No longer will Ontario’s government answer to insiders, special interests and elites. Instead, we will now have a government for the people. Help is here.”<sup>267</sup>

194. The Premier-elect therefore implicitly recognized that he did not have authority to take action until he was sworn in as Premier on 29 June, but nonetheless confirmed that he had “directed officials to immediately take steps to withdraw Ontario from future auctions”. He then affirmed without detail that Ontario’s pull-out would be done in an “orderly” manner, a statement flatly contradicted by his own shocking admission that he had *ultra vires* directed officials to “immediately” take steps to withdraw from the joint auctions.
195. The suddenness of the Premier-elect’s announcement came as a shock to all involved in the carbon market industry.<sup>268</sup> The fact that no one involved in the carbon market industry was factoring any form of “de-linking” risk in their emission allowance transactions further illustrates the unexpectedness of Ontario’s decision,<sup>269</sup> including – it seems – from Ontario’s WCI partners. As Mr. Berends notes:

“Ontario’s sudden and unexpected announcement that it would pull the plug on the Cap and Trade Program without any transition period came as a shock to everyone in the industry. To my knowledge, California and Québec were not consulted by Ontario on its plans to withdraw. My impression was that California and Québec regulators were taken by surprise, just as all other stakeholders were. It took three partners to create linked cap and trade programs in three jurisdictions. It would also have taken three partners to manage one jurisdiction leaving. Nothing in the manner of Ontario’s departure suggested that such prior cooperation had taken place.”<sup>270</sup>

196. In response to Ontario’s effective immediate withdrawal from further WCI auctions, at 8.25pm Central Time on Friday 15 June 2018 California and Québec released a “Market Notice”,<sup>271</sup> responding to Ontario’s abrupt, and clearly unexpected announcement. The Market Notice explained that, to protect market integrity, California and Québec were preventing “transfers of compliance instruments between entities registered in Ontario and entities registered in either California or Québec”, and stated:<sup>272</sup>

“The Premier-designate of Ontario announced on Friday, June 15, 2018, his intention to end Ontario’s greenhouse gas Cap-and-Trade

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<sup>267</sup> Office of the Premier-designate, News Release, “Premier-Designate Doug Ford Announces an End to Ontario’s Cap-and-Trade Carbon Tax” (15 June 2018), **Exh. C-7**. (emphasis added)

<sup>268</sup> Witness Statement of Michael Berends (5 October 2021), paras. 88-95, **CWS-1**.

<sup>269</sup> *Id.*, para. 95.

<sup>270</sup> *Id.*, para. 88.

<sup>271</sup> Email from CACITSSHelpdesk (15 June 2018), **Exh. C-103**.

<sup>272</sup> California Air Resources Board, Market Notice (15 June 2018), **Exh. C-104**.

Program. California and Québec are working together to ensure that the environmental integrity and stringency of our cap-and-trade program and market is maintained. Our goals are to make certain that the program continues to reduce emissions of climate-changing gases as a crucial part of our efforts to combat the existential threat of climate change, while also continuing the smooth operation and integrity of our joint carbon market. To achieve these objectives, the Compliance Instrument Tracking System Service (CITSS) has been modified to prevent transfers of compliance instruments between entities registered in Ontario and entities registered in either California or Québec. As new information becomes available, we will issue additional notices with as much detail and advance notice as possible to ensure all market participants receive the information at the same time.”<sup>273</sup>

197. As Mr. Martin recalls:

“Later that day, in response to the announcement, California and Québec delinked registries with Ontario. I understand that this was done to protect the integrity of those carbon markets: there was a risk that Ontario might let its mandatory participants off the hook for their compliance obligations, and the California and Québec market would suddenly be flooded with unused carbon allowances. Flooding the market meant that carbon emitters could too easily fulfil their obligations, which would wholly eliminate the intended behaviour-modifying effect of the cap and trade programs.

As a result of these preventative moves by California and Québec, the market for Ontario-held carbon allowances was essentially frozen as of 15 June 2018.”<sup>274</sup>

198. Clearly, California and Québec were just as blindsided by Ontario’s actions as the general public and scrambled to respond to Ontario’s abrupt (and illegal) announcement in the hours that followed.
199. California and Québec’s joint decision to de-link their respective cap and trade programs from the Ontario Cap and Trade Program was an inevitable and entirely predictable consequence of the Premier-elect’s ill-considered, precipitous and illegal announcement, a clear response to protect their own systems from the disruption that would have arisen from large transfers of emission allowances by holders of Ontario CITSS accounts into California and/or Québec CITSS accounts.<sup>275</sup>
200. Ontario’s announcement on 15 June 2018 further signalled, for the first time, that the wind-down of the Ontario Cap and Trade Program was happening much faster and much more abruptly than anyone had anticipated.<sup>276</sup> The announcement triggered

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<sup>273</sup> *Ibid.*

<sup>274</sup> See Witness Statement of Graeme Martin (4 October 2021), paras. 51 and 52, **CWS-2**.

<sup>275</sup> Witness Statement of Michael Berends (5 October 2021), para. 94, **CWS-1**.

<sup>276</sup> *Id.*, para. 84.

(continued)

immediate consequences that raised a large number of unanswered questions, including whether or not emissions reduction obligations for Cap and Trade Program participants in Ontario would continue to apply; whether Ontario allowances could be transferred henceforth either to California or Québec; and whether compensation would be paid by Ontario to participants that had purchased emission allowances in good faith and suffered losses as a result of the Premier-Elect's measure.<sup>277</sup> Ontario failed to answer or even consider any of these questions were answered in the 15 June 2018 announcement. At best Ontario suggested that the wind-down would be "orderly" and that "clear rules" would be provided, although no date or other information as to the release of these "clear rules" was announced.<sup>278</sup>

201. Notwithstanding these unanswered questions, the announcement on 15 June 2018 that Ontario would no longer take part in any future WCI auctions in effect immediately barred any Ontario Cap and Trade registrants, including KS&T, from participating in any future WCI auctions.<sup>279</sup> Thus, as of 15 June 2018, Ontario's actions had effectively devastated KS&T's business model.

2. Impact of Ontario's Abrupt Cancellation of the Cap and Trade Program on KS&T

(a) Ontario's Actions Effectively Rendered KS&T's Ontario Allowances Worthless

202. On Monday 18 June 2018, the next business day after the Premier-elect's announcement, in an effort to salvage as much as it could from the situation KS&T attempted to transfer its Ontario-held carbon allowances out of its Ontario CITSS account. In response, KS&T received a note stating that the Ontario account had been delinked from the WCI jurisdictions, and therefore that transfers out of the account were accordingly disallowed.<sup>280</sup> This was confirmed by a notice issued by ICE on the same day, which stated:

"As Ontario registered accounts can no longer transfer carbon allowances to or from the California or integrated CITSS, participants with such accounts will not be able to receive or deliver in accordance with the terms of the Contracts and are advised to take appropriate action..."<sup>281</sup>

203. Both KS&T's failed transfer attempt and the official announcement that followed confirmed that the Ontario-sparked suspension of the linkage between Ontario, Québec and California had stranded all allowances held in Ontario, and moreover, had made it impossible for Ontario registered participants like KS&T to take part in any future allowance auctions. For enterprises like KS&T whose business strategy depended on

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<sup>277</sup> *Id.*, para. 89.

<sup>278</sup> Office of the Premier-designate, News Release, "Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax" (15 June 2018), **Exh. C-7**.

<sup>279</sup> Witness Statement of Graeme Martin (4 October 2021), para. 52, **CWS-2**.

<sup>280</sup> *Id.*, para. 52.

<sup>281</sup> ICE, Notice: California Carbon Allowances Futures Contracts – Changes to Deliverable Allowances in the Compliance Instrument Tracking System Service (18 June 2018), **Exh. C-105**.

buying allowances at auction and selling them across the linked jurisdictions, and whose level of participation in the May 2018 auction had been premised on that linkage, the news was devastating and the loss was suffered clear and immediate.

204. As Mr. Martin notes, KS&T likewise found it impossible to trade its Ontario allowances within the Ontario market itself:

“Given the unexpected developments, I reached out to a number of counterparties with Ontario CITSS accounts to discuss a possible sale and transfer of our stranded Ontario allowances. But with so much uncertainty around how Ontario would unwind its program, there was no interest on anyone’s part in concluding any transaction until the incoming government provided more clarity. For all intents and purposes, trade even within Ontario was effectively frozen. No one in Ontario was interested in buying carbon allowances without knowing what would become of existing compliance obligations, or how Ontario would exit the program.”<sup>282</sup>

205. In this way, intra-Ontario trades were *de facto* frozen in light of widespread uncertainty about the manner of winding down of Ontario’s program.<sup>283</sup>

206. For all of these reasons, the ██████████ in allowances KS&T had received only days before the Premier-elect’s announcement of 15 June 2018, for which it had only on 11 June 2018 paid USD 30,158,240.95 into Ontario public coffers, had effectively become worthless as a direct result of the Premier-elect’s rash, illegal and irresponsible measure.

(b) KS&T Had to Scramble to Meet Its Existing Obligations and Mitigate Its Substantial Damage

207. Ontario’s unilateral decision to abruptly cancel its Cap and Trade Program did not, however, likewise relieve KS&T of its existing contractual and futures obligations. Instead, KS&T had to take immediate steps to replace the allowances stranded in its Ontario CITSS account, in order to fulfil its obligations.

208. KS&T notably had planned to dedicate approximately ██████████ of the allowances purchased from Ontario in May 2018 to fulfil its contractual ██████████ Agreement. To meet its contractual obligations despite Ontario’s measure, KS&T was forced to replace all of the now-unusable allowances with allowances newly purchased at a higher price ██████████. Consequently, as explained in further detail at paras. 495-499 below, whereas KS&T would have made a profit on its sale obligations to ██████████, it actually made a loss. Overall, KS&T lost ██████████ as compared to the situation it would have been in had the transaction gone to plan.<sup>284</sup>

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<sup>282</sup> Witness Statement of Graeme Martin (4 October 2021), para. 53, CWS-2.

<sup>283</sup> Witness Statement of Paul Brown (5 October 2021), para. 38, CWS-3.

<sup>284</sup> Witness Statement of Frank King (6 October 2021), para. 39, CWS-4.

(continued)

209. KS&T also had additional obligations to fulfill, through [REDACTED]. As of 2018, the likely lifetime of the program was anticipated to run past 2030,<sup>285</sup> and so many of KS&T's [REDACTED].<sup>286</sup> However, as a result of Ontario's announcement and the effective (and soon official) freezing of allowances held in KS&T's Ontario CITSS account, KS&T likewise had to replace the allowances that had been earmarked [REDACTED] at a cost of approximately [REDACTED].<sup>287</sup>
210. Finally, KS&T also had a number of negotiations in progress which were never completed or executed as a direct result of the cancellation of Ontario's Cap and Trade Program. KS&T notably was due to establish an [REDACTED]. The [REDACTED] agreement would have provided for [REDACTED], over the full course of the Program going forward.<sup>289</sup> As of spring 2018, a similar agreement was in the process of being finalized between KS&T and [REDACTED].<sup>290</sup>
211. Following Ontario's abrupt cancellation of the Cap and Trade Program, the prospects for finalizing these agreements were destroyed. On 18 June 2018, the next business day after the announcement of Premier-elect Ford, [REDACTED] sent an email to KS&T explaining that:

“[G]iven the recent Ontario announcement on Cap-and-Trade and the following action to restrict Ontario entities from transactions with others in the CITSS system, [REDACTED] is placing all of its current [REDACTED] negotiations on hold until further notice. In the event there is

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<sup>285</sup> Witness Statement of Michael Berends (5 October 2021), paras. 47, 49, **CWS-1**.

<sup>286</sup> See, e.g., KS&T's trade with [REDACTED], which had a delivery obligation of no later than [REDACTED] **Exh. C-106**.

<sup>287</sup> Witness Statement of Frank King (6 October 2021), para. 41, **CWS-4** (“I say ‘approximately’ because the nature of these trades was complex, such that it is rather complicated and long-winded to identify and explain the actual figure with precision.”).

<sup>288</sup> See Ontario Emissions Trading Master Agreement for Linked Jurisdictions between KS&T and [REDACTED] [unexecuted] (24 April 2018), **Exh. C-78**.

<sup>289</sup> See *ibid.*

<sup>290</sup> See, e.g., Email from [REDACTED] to KS&T (23 January 2018), **Exh. C-76** [REDACTED]

[REDACTED] and KS&T (6 June 2018), **Exh. C-77**.

(continued)



indication that we will all again be allowed to transact, we will pick this up where we left off.”<sup>291</sup>

212. The approach of ██████████ was indicative of all participants in the Ontario market, and demonstrates the significant consequences to the market of Ontario’s actions. As a result, this agreement, and the agreement with ██████████ were frustrated, causing KS&T to sustain additional loss over the long term.

**E. Ontario Acted in an Arbitrary Manner in Introducing the Cancellation Act**

1. Ontario Hastily Introduced the Cancellation Act and Confirmed its Intention Not to Compensate Market Participants

213. The Ontario Government’s *de facto* freeze on all trades and transfers of emission allowances held in Ontario CITSS accounts soon became a *de jure* freeze. On 3 July 2018, Ontario formally introduced Regulation 386/18, which officially froze all Ontario CITSS accounts, legally forbidding participants like KS&T from undertaking any purchase, sale, trade or transfer carbon allowances held in Ontario CITSS accounts, effectively immediately.<sup>292</sup> On that same day, entities with Ontario CITSS accounts received a notification by email that the status of their CITSS accounts had been changed to restricted, and that they no longer had the ability to transfer or receive emission allowances into or out of this account.<sup>293</sup>
214. As Mr. Martin notes, however, “the introduction of Regulation 386/18 had little practical effect, since any transfers or trades in Ontario allowances had been effectively frozen since 15 June 2018.”<sup>294</sup> Even as of 3 July, and notwithstanding the chaos already imposed as of 15 June, Ontario officially maintained that its approach to exiting the WCI arrangement was to ensure an “orderly exit”.<sup>295</sup> This alleged goal, flatly

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<sup>291</sup> Email from Graeme Martin to ██████████ (18 June 2018), **Exh. C-79**.

<sup>292</sup> Office of the Premier, Premier Doug Ford Announces the End of the Cap-and-Trade Carbon Tax Era in Ontario (3 July 2018), **Exh. C-107**. See also Ontario Regulation 386/18: Prohibition Against the Purchase, Sale and Other Dealings with Emission Allowances and Credits filed 3 July 2018 Under the Climate Change Mitigation and Low-carbon Economy Act, 2016, S.O. 2016, C. 7, **CL-9**. Email from MOECC, Notice: Ontario’s Cap and Trade Program (3 July 2018), **Exh. C-108** (“As a result, the status of the general account in the Compliance Instrument Tracking System Service (CITSS) belonging to each participant registered in Ontario’s cap and trade program will be changed to “Restricted: Cannot Transfer or Receive”. This means that all Ontario participants will be prevented from both transferring and receiving instruments (including emissions allowances and credits) in their general account in CITSS.”).

<sup>293</sup> Cap and Trade Help (MOECC), Email Notice: Ontario’s Cap and Trade Program (3 July 2018), **Exh. C-108**. See also Witness Statement of Michael Berends (5 October 2021), para. 101, **CWS-1**.

<sup>294</sup> Witness Statement of Graeme Martin (4 October 2021), para. 56, **CWS-2**.

<sup>295</sup> See, e.g., Office of the Premier-designate, News Release, “Premier-Designate Doug Ford Announces an End to Ontario’s Cap-and-Trade Carbon Tax” (15 June 2018), **Exh. C-7**; Email from MOECC, Notice: Ontario’s Cap and Trade Program (3 July 2018), **Exh. C-108** (“The Province is

(continued)

contradicted by their actions to date, was reiterated by a number of Ontario Conservative Party representatives.<sup>296</sup>

215. Putting to the lie this promised “orderly exit”, on 25 July 2018, Ontario put before the Ontario Legislature a draft Cap and Trade Cancellation Act, 2018 (known as **Bill 4**).<sup>297</sup> To the great shock of KS&T and many others in the market, Bill 4 and its accompanying press release expressly confirmed that market participants would be deprived of any compensation for all unused allowances that they held in their CITSS accounts.<sup>298</sup> To this end, section 8(4) of Bill 4 stated specifically that:

“Unless otherwise provided by a regulation made under paragraph 4 of subsection 15(2), no compensation shall be paid to the following participants:

(1) A participant that was registered as a market participant within the meaning of the *Climate Change Mitigation and Low-carbon Economy Act, 2016*. . . .”<sup>299</sup>

216. That is, despite the fact that the Cap and Trade Act and Regulations had expressly mandated market participants to trade in allowances as an integral and essential building-block of the Ontario Cap and Trade Program, and Ontario had actively encouraged their participation, Bill 4 proposed that no compensation should be provided to those same participants, including KS&T.

217. Section 9 of Bill 4 (entitled “No Compensation”) went on to confirm that:

“Except as set out in section 8, no person is entitled to any compensation or damage in respect of the value of cap and trade

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committed to an orderly wind down of the Cap and Trade Program. In the coming weeks, more details will be shared to support the orderly wind down.”).

<sup>296</sup> See, e.g., New Release, Ontario Closes the Book on Cap and Trade Carbon Tax Era (25 March 2019), **Exh. C-109** (Rod Phillips, Minister of the Environment, Conservation and Parks, stating “While some cited that the wind down of cap and trade would cost taxpayers billions of dollars, we are delivering on our commitment to an orderly and transparent wind down of the cap and trade program that respects taxpayers.”).

<sup>297</sup> Bill 4, An Act respecting the preparation of a climate change plan, providing for the wind down of the cap and trade program and repealing the Climate Change Mitigation and Low-carbon Economy Act, 2016 (25 July 2018), **CL-32**. See also Ontario Government, Stakeholder Briefing Questions and Answers (July 25 and 27, 2018), **Exh. C-110**.

<sup>298</sup> See Ontario Government, Stakeholder Briefing Questions and Answers (July 25 and 27, 2018), **Exh. C-110**; Ontario Government News Release, Ontario Introduces Legislation to End Cap and Trade Carbon Tax Era in Ontario (25 July 2018), **Exh. C-111**; Ontario Government News Release, Cap and Trade Cancellation Act (26 July 2018), **Exh. C-112** (“Participants who were required to participate in the cap and trade program, participants whose accumulated costs are currently above and beyond their assessed emissions, and participants who did not pass program costs down to consumers are the only entities eligible for compensation.”).

<sup>299</sup> Bill 4, An Act respecting the preparation of a climate change plan, providing for the wind down of the cap and trade program and repealing the Climate Change Mitigation and Low-carbon Economy Act, 2016 (25 July 2018), Section 8(4), **CL-32**. See also Ontario Government, Stakeholder Briefing Questions and Answers (July 25 and 27, 2018), **Exh. C-110**.

instruments retired or cancelled under this Act or for any other loss, including loss of revenues or loss of profits, related, directly or indirectly, to the enactment of this Act, the making or revocation of any regulation under this Act, the repeal of the *Climate Change Mitigation and Low-carbon Economy Act, 2016* or the making or revocation of any regulation under that Act.”

218. Finally, Section 10 of Bill 4 proposed to bar *any* domestic claims and access to the courts. Section 10 proposed sweeping denial of access to Ontario’s and Canada’s system of justice, with both retroactive and forward-looking effect, providing as follows:

**“No cause of action**

(1) No cause of action arises against the Crown or any current or former member of the Executive Council or any current or former employee or agent of or advisor to the Crown as a direct or indirect result of,

(a) the enactment, operation, administration or repeal of any provision of this Act or the enactment, operation, administration or repeal of the *Climate Change Mitigation and Low-carbon Economy Act, 2016*;

(b) the making or revocation of any provision of a regulation made under this Act or made under the *Climate Change Mitigation and Low-carbon Economy Act, 2016*;

(c) anything done in accordance with or under this Act, or a regulation made under this Act or anything not done in accordance with this Act or a regulation made under this Act, including any decision related to participants’ eligibility to receive compensation or the amount of such compensation;

(d) the retirement or cancellation of any cap and trade instrument in accordance with this Act; or

(e) any act or omission related to the wind down of the cap and trade program established under the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, including the decision to have no further distribution of cap and trade instruments by auction.

**Proceedings barred**

(2) No proceeding, including but not limited to any proceeding for a remedy in contract, restitution, tort, misfeasance, bad faith, trust or fiduciary obligation, and any remedy under any statute, that is directly or indirectly based on or related to anything referred to in subsection (1) may be brought or maintained against the Crown or any current or former member of the Executive Council or any current or former employee or agent of or advisor to the Crown.

**Application**

(3) *Subsection (2) applies to any 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, and includes a proceeding to enforce a judgment or order made by a court or tribunal outside of Canada.*

**Retrospective effect**

(4) Subsections (2) and (3) apply regardless of whether the cause of action on which the proceeding is purportedly based arose before, on or after the day this subsection comes into force.

**Proceedings set aside**

(5) Any proceeding referred to in subsection (2) or (3) commenced before the day this subsection comes into force shall be deemed to have been dismissed, without costs, on the day this subsection comes into force.

**No expropriation or injurious affection**

(6) *Nothing done or not done in accordance with this Act or the Climate Change Mitigation and Low-carbon Economy Act, 2016, or any regulation under this Act or the Climate Change Mitigation and Low-carbon Economy Act, 2016, constitutes an expropriation or injurious affection for the purposes of the Expropriations Act or otherwise at law.”<sup>300</sup>*

219. In short, Bill 4:

- removed any ability to apply for damages or equitable relief from any court arising from the Cancellation Act or the wind down of the Cap and Trade Act and associated regulations;
- barred proceedings of any kind; purported to prohibit any proceeding to enforce a judgment or order made by a court or tribunal outside of Canada (presumably including – impermissibly – this Tribunal);
- purported to prohibit any claim of expropriation under any law; and
- operated with retroactive effect.

220. Ontario’s desire to avoid paying any just compensation for the direct and indirect effects of its actions was clear, and obviously motivated by the intent to downplay the implications of its irresponsible measures in the eyes of the voting public. Ontario’s newly-elected Conservative government publicly proclaimed on multiple occasions

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<sup>300</sup> Bill 4, An Act respecting the preparation of a climate change plan, providing for the wind down of the cap and trade program and repealing the Climate Change Mitigation and Low-carbon Economy Act, 2016 (25 July 2018), Section 10, **CL-32**.

*(continued)*

that any compensation it would need to pay to participants in the Cap and Trade Program would be “minimal”<sup>301</sup> and limited to CAD 5 million.<sup>302</sup> However, Ontario was in effect admitting at the same time that its measures were likely to give rise to (legitimate) legal action: the press release accompanying Bill 4 noted that “[t]he Cap and Trade Cancellation Act, as the legislation is termed, *insulates Ontario from any legal liability in the cancellation of the cap and trade program*”.<sup>303</sup> While that may have been true as a matter of domestic Ontario law, it is not true from the perspective of international law. Regardless, the statement simply confirmed the Ontario Conservative Government’s express intention to act with impunity, in a blatantly unlawful and inequitable manner.

2. Ontario Ignored the Claimants’ Good Faith Attempt to Engage on Substantive Issues During the Passage of the Cancellation Act

221. In reliance on Ontario’s repeated refrain that any exit from the Cap and Trade Program would be “orderly”, KS&T worked with Koch Companies Public Sector (**KCPS**), Koch’s shared service company that provides legal, government and public affairs services to Koch entities, to promote approaches ensuring Ontario’s apparently desired “orderly exit” over the next 12-month period.<sup>304</sup> Together with KPSC and Koch, KS&T notably sought to address and resolve the key deficiencies of Bill 4 during the public consultation process, to no avail.

(a) KS&T’s Meetings with Numerous Ontario Officials

222. Following introduction of Bill 4 in the Legislature, KS&T immediately reached out to Ontario representatives to discuss potential solutions to the issues created by the Bill, notably its unfair, inequitable and manifestly arbitrary approach to compensation.

223. On 25 July 2018, the same day Bill 4 was introduced, Mr. King, Mr. Martin and Mr. Brown met with Mitch Davidson (Executive Director of Policy for the Ontario Premier) and Brock Vandrick (the Premier’s Director of Stakeholder Relationships).<sup>305</sup> Mr. Brown recalls this meeting as follows:

“The meeting took place with Frank in person, while Graeme and I participated on the phone. During the first half of the conversation, both Brock and Mitch explained the nuts and bolts of Bill 4. However, later on in the conversation, once they had learned that KS&T was a market participant, they commented that KS&T will likely not be compensated, but that there were other ways of compensating KS&T. During this same conversation, they used the term “speculators” to

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<sup>301</sup> See, e.g., Ontario Government News Release, Cap and Trade Cancellation Act (26 July 2018), **Exh. C-112**.

<sup>302</sup> Ontario Government, Stakeholder Briefing Questions and Answers (July 25 and 27, 2018), **Exh. C-110**.

<sup>303</sup> Ontario Government News Release, Cap and Trade Cancellation Act (26 July 2018), **Exh. C-112**. (emphasis added).

<sup>304</sup> Witness Statement of Graeme Martin (4 October 2021), para. 56, **CWS-2**.

<sup>305</sup> Witness Statement of Paul Brown (5 October 2021), para. 46, **CWS-3**.

(continued)

describe KS&T as opposed to “market participants”. *Mitch Davidson then went on to say that, “this is likely to turn into a North American Free Trade Agreement (NAFTA) claim, and will be on the Federal Government.” In fact, Mitch Davidson continually suggested that Koch pursue its rights as a foreign corporation conducting business in Canada on multiple occasions.*<sup>306</sup>

224. In other words, the Ontario Conservative Government from the start understood that its measure violated international law, but cynically calculated that responsibility to pay for the resulting damages would in that instance fall to Canada’s Federal Government, as the official respondent in any NAFTA Chapter Eleven claim.
225. On 15-16 August 2018, KS&T had separate meetings with Jenni Byrne, Premier Ford’s Principal Secretary, and Rick Roth, then-Chief of Staff to the Minister of the Environment.<sup>307</sup> At both meetings, KS&T presented its case for compensation and insisted on the need for reimbursement of its capital invested in the Ontario Cap and Trade Program but unfairly taken by Ontario. Ms. Byrne felt that there was potential for a solution and encouraged KS&T to submit amendments to the legislation that would reflect its position. Moreover, Mr. Roth explained that he would take the case back to the Minister of the Environment.<sup>308</sup> KS&T heard nothing back from either Ms. Byrne or Mr. Roth.
226. On 5 September 2018, KS&T also met with Monte McNaughton, the Minister for Infrastructure.<sup>309</sup> Minister McNaughton supported KS&T’s case but explained that he could not take matters any further himself without support from Cabinet and the Finance Minister.<sup>310</sup> Minister McNaughton’s strategy was to push for a Cabinet vote on this issue. Unfortunately, that vote never materialised and this matter never progressed beyond this point.
227. On 19 September 2018, and on the basis of Minister McNaughton’s comments, Paul Brown, on behalf of KS&T, met with Ontario’s Finance Minister, Vic Fedeli. Minister Fedeli asked KS&T why the company was trading when it should have known that the incoming government had planned to cancel the Ontario Cap and Trade Program.<sup>311</sup> Mr. Brown responded as follows:

“I explained that we had complied with the laws and regulations that existed at the time and had traded accordingly. KS&T was authorized to engage in the final auction on 15 May 2018 and I had acted as instructed, in accordance with the law [...] Moreover, KS&T had always operated under the legitimate expectation that any withdrawal from the Ontario Cap and Trade Program would be orderly and

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<sup>306</sup> *Ibid.* (emphasis added)

<sup>307</sup> *Id.*, para. 48.

<sup>308</sup> *Ibid.*

<sup>309</sup> *Id.*, para. 49.

<sup>310</sup> *Ibid.*

<sup>311</sup> *Id.*, para. 50.

(continued)

equitable, regardless of whether KS&T participated in the final auction or not. This understanding was consistent both with the statements of the GOO itself and with the terms of the OQC Agreement with California and Québec, which provided that any party would endeavour to withdraw from the joint program only over the course of 12 months, and at the end of a compliance period”<sup>312</sup>

228. Minister Fedeli made no comment on these statements, but did confirm to KS&T that the proceeds of Ontario’s cap and trade auctions had been deposited into Ontario’s general revenue account.<sup>313</sup> KS&T then made a direct request to Minister Fedeli that Ontario return the funds that it had essentially expropriated from KS&T, but received no response.<sup>314</sup>

(b) KS&T Wrote Several, Unanswered Letters to Ontario

229. In addition to these substantial lobbying efforts, KS&T formulated comments and recommendations on the proposed application of Bill 4 to provide to Ontario, as encouraged by Premier Ford’s Principal Secretary and others during the meetings described above.
230. KS&T provided official comments to the Environmental Registry in relation to Bill 4, highlighting several key issues, and offering potential solutions to address these issues in the Bill before it was passed. In particular, KS&T highlighted that Koch’s overall participation in the WCI program was not voluntary, and that KS&T itself had been supporting members of the Koch group’s efforts fulfil their mandatory obligations. While under the Program rules KS&T had been treated as part of a single corporate group, for purposes of compensation Ontario was now arbitrarily singling it out:

“Bill 4, as currently written, will create arbitrary and unjustified distinctions, and create winners and losers through the proposed compensation scheme. Bill 4, as it presently reads, will disadvantage entities that diligently met their “mandatory participant” compliance obligations through multi-national corporate compliance entity that is registered as a “market participant,” as such terms are defined in the CT Law. In contrast, companies that did not meet their compliance obligations in a timely manner will be unfairly rewarded in a manner that is entirely antithetical to the purpose and intent of the statutory scheme and any other legitimate purpose. Specifically, entities that did not promptly purchase compliance instruments to meet their expected compliance obligations under the cap and trade program are no longer expected to true up their accounts, while companies, like Koch, that purchased emission allowances to meet their compliance obligations are unduly and significantly penalized. Whether a company wins or loses in relation to Bill 4 may be decided simply by

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<sup>312</sup> *Ibid.* See also Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec, 22 September 2017, Article 22, **CL-8**.

<sup>313</sup> Witness Statement of Paul Brown (5 October 2021), para. 50, **CWS-3**.

<sup>314</sup> *Ibid.*

(continued)

the jurisdiction in which the company happened to hold its compliance instruments.”<sup>315</sup>

231. The unjustified distinction between entities, as highlighted by KS&T, was unfair and resulted in an arbitrary designation of “winners and losers” from the Ontario Cap and Trade Program.<sup>316</sup> As Dr. Stavins explains, industrial facilities that had failed to procure allowances to meet their compliance obligations, while the Program lasted, were freed from any obligation to true up their holdings when the Program was cancelled, putting them at a competitive advantage compared with their peers that *did* procure allowances in compliance with the law in force at the time. In addition, mandatory participants, essentially Ontario-based industrial manufacturers, most of whom were Canadian entities, were suddenly relieved from any compliance obligations, at all. Ontario fuel providers that procured allowances in the WCI auctions through California (and who passed on these costs to Ontario tax payers through their fuel sales) received large windfalls, since the Cancellation Act did not require them to make up for any shortfall. Allowances such entities held in a California registry account that were in surplus (because of Ontario’s sudden cancellation of the Program) could be sold for a profit in the WCI market, which outside of Ontario continued to exist. Similarly, Ontario industrial facilities that had used their free allocations to secure collateralized loans saw the possibility of significant windfall gains.<sup>317</sup> And while fuel and natural gas distributors were not directly eligible for compensation under the Cancellation Act, they effectively received compensation (and in some instances a considerable windfall) through other means: until mid-September 2018 (fuel distributors) and 1 October 2018 (natural gas distributors), they were allowed to continue charging prices at the retail level that covered deemed allowance costs, despite having been relieved of any requirement to procure allowances since July 2018.<sup>318</sup> Worst of all treated were the market participants who unfairly were singled out for no compensation whatsoever, through Ontario’s annulment without payment of all allowances they held in their Ontario CITSS account: and this, despite the key role market participants had played to ensure the success of the Program, and despite the

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<sup>315</sup> Koch, Comments to Ontario Environmental Registry on Bill 4 (11 August 2018), **Exh. C-113**. See also Letter from KS&T to the Attorney General of Ontario (24 October 2018), **Exh. C-114**; Letter from KS&T to the Premier’s Office (24 October 2018), **Exh. C-115**.

<sup>316</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 112, **CER-1**.

<sup>317</sup> See Witness Statement of Michael Berends (5 October 2021), para. 107, **CWS-1** (explaining that “fuel and natural gas distributors were more than made whole following the cancellation of the Cap and Trade Program: (i) the fuel and natural gas distributors that had bought enough emission allowances to cover for their emissions up to June 2018 were made whole (and may have received a partial windfall) by being allowed to charge the emission allowance-related excess as part of their prices at the retail level until mid-September (fuel distributors) or October 2018 (natural gas distributors); and (ii) the fuel and natural gas distributors that had not bought enough emission allowances to cover for their emissions up to June 2018 received a potentially non-negligible windfall by being allowed to charge the emission allowance-related excess in their prices at the retail level until mid-September (fuel distributors) or October 2018 (natural gas distributors), even though they did not need to be compensated for any emission allowance-related cost incurred.”).

<sup>318</sup> See Witness Statement of Michael Berends (5 October 2021), paras. 106-107, **CWS-1**.

(continued)



millions of dollars Ontario had received in return from participants like KS&T, through the auction process.<sup>319</sup>

232. In these circumstances, KS&T in its comments on Bill 4 highlighted the serious financial losses KS&T would incur, including the loss of all allowances in its Ontario CITSS account being annulled without compensation, as well as the costs of replacing these allowances to meet its outstanding compliance obligations.<sup>320</sup>
233. In these comments, and in subsequent letters to the Government of Ontario, KS&T also provided tangible amendments to Bill 4 that would have had the effect of allowing Ontario to compensate stakeholders like KS&T.<sup>321</sup> For example, on 24 October 2018, KS&T wrote to the Attorney General of Ontario and the Premier, proposing amendments to just two provisions in Bill 4 that would have compensated KS&T for its losses (proposed amendments in red text):<sup>322</sup>

**Proposed Amendments:**

**Section 6(2) Retirement**

Eligible instruments of a participant are retired as follows:

1. If the number of eligible instruments of the participant is equal to or greater than that aggregate amount of all greenhouse gas emissions attributed to the participant in respect of the prescribed time period, the number of eligible instruments equivalent to that aggregate amount shall be retired.
2. If the number of eligible instruments of the participant is less than the aggregate amount of all greenhouse gas emissions attributed to the participant in respect of the prescribed time period, all of the eligible instruments shall be retired, and the participant shall procure for retirement from a pool of instruments assembled by the Minister additional eligible instruments equal to the difference between the quantity of greenhouse gas emissions attributed to the participant and the number of eligible instruments retired by the participant pursuant to Section 6(2)1, such purchases to be made in accordance with and at a rate no lower than a minimum price of CAD\$18.72/tonne established by the regulations.

**Section 8(4) No compensation, specified participants**

1. A participant that was registered as a market participant within the meaning of the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, excluding any market participant related to and acting for, on behalf of, or in relation to a mandatory participant pursuant to section 14(1)(1) of the *Climate Change Mitigation and Low-carbon Economy Act, 2016* and section 2 of *Ontario Regulation 144/16*.

234. In that letter, KS&T explained that:

“As drafted, Koch’s proposed amendments would allow for a simple true-up of the former cap and trade program. The proposed amendments would require firms who are short (having not yet purchased sufficient allowances to meet their compliance obligations under the program) to pay an amount to the Government of Ontario

<sup>319</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 126, **CER-1**.

<sup>320</sup> Koch, Comments to Ontario Environmental Registry on Bill 4 (11 August 2018), **Exh. C-113**. See also Letter from KS&T to the Attorney General of Ontario (24 October 2018), **Exh. C-114**; Letter from KS&T to the Premier’s Office (24 October 2018), **Exh. C-115**.

<sup>321</sup> Letter from KS&T to the Attorney General of Ontario (24 October 2018), **Exh. C-114**; Letter from KS&T to the Premier’s Office (24 October 2018), **Exh. C-115**.

<sup>322</sup> *Ibid.*

equal to the number of allowances of their shortfall times \$18.72 (the clearing price of the most recent allowance auction). In turn, the Government of Ontario would then use those proceeds to compensate stakeholders like Koch, who have their compliance allowances stranded in Ontario. In lieu of our proposed amendments, the Government of Ontario also has the ability to compensate participants like Koch per section 15 of Bill 4 by Order in Council.

Time is of the essence in this matter, as I believe Bill 4 Committee on General Government is conducting a line-by-line review today. Koch is presently offering a non-adversarial solution to a significant problem, and it is our hope that with your intervention, this matter can be resolved for the ultimate benefit of the people of Ontario.”<sup>323</sup>

235. These pleas fell on deaf ears. KS&T received only a holding response from Premier Doug Ford on 5 November 2018 (that is, *after* the Cancellation Act was enacted on 31 October 2018) simply stating that he was forwarding a copy of KS&T’s correspondence of 24 October 2018 to the Minister of the Environment.<sup>324</sup>
236. Environment Minister Rod Phillips finally responded to KS&T’s letter on Bill 4 on 18 February 2019, nearly four months after KS&T’s correspondence of 24 October 2018 and well after Bill 4 had been enacted.<sup>325</sup> In his one page letter, Minister Phillips thanked KS&T for sharing its concerns and then summarily stated that “it remains the view of this government” that KS&T did not meet the criteria under the Cancellation Act and was therefore not eligible for compensation.<sup>326</sup>

3. Ontario Pushed Through the Cancellation Act Without Due Consideration and in Violation of Its Own Requirements at Law

(a) Ontario’s Introduction of the Cancellation Act Violated Its Own Law

237. In its precipitous effort to see Bill 4 enacted into law, Ontario also illegally sought to avoid engaging in the public consultations mandated under the *Environmental Bill of Rights, 1993*, (**EBR**). The EBR most notably:
- imposed obligations on certain prescribed Ontario government ministries, including the Ontario Environment Ministry, designed to improve environmental protection and ensure “a process of meaningful public

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<sup>323</sup> *Ibid.*

<sup>324</sup> *See, e.g.*, Letter from Premier Doug Ford to Koch Industries (5 November 2018), **Exh. C-116**.

<sup>325</sup> Letter from Minister Rod Philips to Koch Industries (18 February 2019), **Exh. C-117**.

<sup>326</sup> *Ibid.*

(continued)

consultation respecting government actions that may be significant for the environment.”<sup>327</sup>

- required the Environment Ministry “to publish prior notice of the *Cancelling Regulation* in the *Environmental Registry*, consult with Ontarians by inviting them to submit comments on the proposed regulation, consider any comments made by the public as a result of this process, and advise publicly of the effect, if any, public participation had on the government’s decision-making on the proposal.”<sup>328</sup>

238. After introducing Bill 4 on 25 July 2018 – a Bill which clearly fell within the scope of the EBR – Ontario’s newly elected Conservative Government refused to pursue public consultations in respect of the Bill, despite that such consultations were mandated by Ontario law. In light of this illegal refusal, on 11 September 2018 (*i.e.* prior to the enactment of the Cancellation Act), Greenpeace Canada launched a legal challenge against Bill 4 under the EBR.<sup>329</sup> In its application, Greenpeace alleged, *inter alia*, that the Ford Government had unlawfully failed to engage in public consultations over the cancelling of the program, making the enactment of the regulation revoking the Cap and Trade Program on 29 June 2018 *ultra vires*.<sup>330</sup> Ontario argued in response, among other things, that no public consultation over Bill 4 was required because the Government’s to kill Cap and Trade Program allegedly fell within the scope of one of the exemptions to the EBR’s requirements.<sup>331</sup> Ontario specifically took the position

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<sup>327</sup> *Greenpeace Canada v. Minister of the Environment (Ontario)*, 2019 ONSC 5629, para. 1, **CL-33**.

<sup>328</sup> *Id.* para. 11 (citing to sections 15, 16, 27, 35 and 36(4) of the *EBR*).

<sup>329</sup> Hours after the challenge was initiated, the Ontario government announced that it was initiating public consultations on the Cancellation Act. Consultations were held from September 11, 2018 to October 11, 2018. See *The Globe and Mail*, “Ontario government promises public consultations on cap and trade after facing legal action” (12 September 2018), **Exh. C-118**. See also MOECC, Bill 4, Cap and Trade Cancellation Act, 2018, Environmental Registry of Ontario (15 November 2018), **Exh. C-12**.

<sup>330</sup> *Greenpeace Canada v. Minister of the Environment (Ontario)*, 2019 ONSC 5629, paras. 10-14, **CL-33** (citing to *Prohibition Against the Purchase, Sale, and Other Dealings with the Emission Allowance and Credits Regulation*, O. Reg. 386/18).

<sup>331</sup> The Environment Ministry took the position that no such steps were required because the decision to revoke the Cap and Trade Program fell within the scope of one of the exemptions to the EBR’s requirements. Under the EBR, a ministry can forgo consulting the public on a proposal in the normal manner if the Environment Minister holds the opinion that “the environmentally significant aspects of a proposal for a policy, Act, regulation or instrument ... have already been considered in a process of public participation, under this Act, under another Act or otherwise, that was substantially equivalent to the process required in relation to the proposal under this Act.” A notice must be published informing the public of the decision to forgo consultations and explaining the basis for the decision that a “substantially equivalent” process of public participation has already taken place. See *EBR*, S. 30(1)(a) and 30(2), **CL-24**. According to the notice published by the Environment Ministry, “...the Minister was of the opinion that the recent Ontario election was a process of public participation that was substantially equivalent to the process required” under the EBR “and that the environmentally significant aspects of the regulation were considered during that process because the government made a clear election platform commitment to end the cap and trade program.”

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that its anti-Cap and Trade position in the recent Ontario provincial elections should be deemed to constitute “public consultation”. This was despite the fact that none of the inequitable elements of the Ontario Government’s actual plan to immediately cancel Cap and Trade had been disclosed to the public during the election campaign.

239. As set out below, the new Ontario Government hastily backed down from its initial position and reluctantly proceeded to summary public consultations. Greenpeace’s suit was thus ultimately dismissed as moot in 2019, in light of the enactment by that time of the Cancellation Act, and the resulting lack of efficacy of the declaratory relief sought by Greenpeace. Regardless, the majority of the justices found that the Ontario Government in initially refusing public consultations had acted unlawfully under the EBR.<sup>332</sup>
240. In the decision ultimately issued on 11 October 2019, Justice Corbett held that “[t]here is no argument that the general election gave notice to the electorate of terms of the *Cancelling Regulation*, which, on the record before this court, did not come into existence until after the general election”;<sup>333</sup> and “no argument that the general election afforded Ontarians the opportunity of public participation prescribed in the EBR,”<sup>334</sup> and that in any event, “a general election is in no way ‘substantially equivalent’ to the process of public participation prescribed in the *EBR*.”<sup>335</sup>
241. Concluding that the “[t]he government’s clear breach of the EBR, its unlawful reliance on the exemption clause, and its apparent efforts to avoid judicial review of this conduct raises serious concerns – not about whether the government had the lawful authority to repeal the Cap and Trade Act, but of its respect for the Rule of Law and the role of the courts, as a branch of government,”<sup>336</sup> Justice Corbett declared unlawful the Minister’s decision that the general election was “substantially equivalent” to the process required under the EBR. Justice Mew similarly held that “the government failed to comply with its legal obligations” when it sought to justify its actions “on the basis that the recent general election amounted to a ‘substantially equivalent process’ and, hence, obviated the need to follow the process prescribed by the *EBR*.”<sup>337</sup>

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<sup>332</sup> In addition to the action initiated by Greenpeace seeking judicial review, a petition for review of O. Reg. 386/18 (Prohibition Against the Purchase, Sale and Other Dealings with Emissions Allowances and Credits) was filed on July 18, 2018 by representatives of the Canadian Environmental Law Association on several grounds, including that the Environment Ministry had failed to comply with its obligations under the *EBR*. The Association’s application for review was denied by the Environment Ministry on September 21, 2018 based on its conclusion that the review process would be duplicative of the consultation process that had subsequently commenced for the *Cap and Trade Cancellation Act*. See Ontario Auditor General – 2019 Annual Report – Vol. 2- Ch.2 – Environmental Bill of Rights & Cancelling C&T Program, pp. 103-105 **CL-34**.

<sup>333</sup> *Greenpeace Canada v. Minister of the Environment (Ontario)*, 2019 ONSC 5629, para. 59, **CL-33**.

<sup>334</sup> *Id.*, para. 60.

<sup>335</sup> *Id.*, para. 38.

<sup>336</sup> *Id.*, para. 75. (emphasis added)

<sup>337</sup> *Id.*, paras. 84.

(continued)

(b) Ontario's Public Consultation Process Served Only to Highlight the Arbitrariness of Ontario's Actions

242. Hours after the challenge by Greenpeace was initiated on 11 September 2018, Ontario hastily announced that it was initiating public consultations on the Cancellation Act.<sup>338</sup>
243. The arbitrary manner in which Ontario engaged with KS&T, and its requirements under the EBR, was also true of Ontario's broader engagement in the public consultation process. None of the recommendations made during that process were considered in good faith by Ontario: Bill 4 was ultimately enacted into law on 31 October 2018, with virtually no amendments. In fact, the consultation process only served to confirm that the Ontario Government had no intention of developing a fair compensation structure encompassing all participants in the Cap and Trade Program. The Ontario government instead selected winners and losers arbitrarily, despite the risks identified by multiple stakeholders in pursuing this approach.<sup>339</sup>
244. During the consultations on the Cancellation Act, stakeholders notably "expressed concerns that market participants are ineligible to receive compensation."<sup>340</sup> For example, a comment submitted by the International Emissions Trading Association (IETA) states:
- "It is of paramount importance that the Ontario government recognize carbon instruments purchased in good faith by participating entities as both compliance and financial instruments – instruments that still hold economic value. The proposed compensation formula and framework language – found in Sections 8 and 9 of Bill 4 – fail to reflect the true circumstances and costs incurred by a host of program participants who purchased instruments and should be entitled to compensation. ...
- We strongly oppose the exclusion of market participants from the compensation framework, as stated in Section 8(4)(1). These participants, in good faith, provided market liquidity and significant capital in many cases to support the functioning of the market. Punishing such entities for investments and business behavior that, other than being in the cap and trade system, runs wholly counter to Ontario being "open for business..."<sup>341</sup>
245. The Ontario government's official response confirmed the lack of coherence of their compensation framework:

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<sup>338</sup> See The Globe and Mail, "Ontario government promises public consultations on cap and trade after facing legal action" (12 September 2018), **Exh. C-118**. See also MOECC, Bill 4, Cap and Trade Cancellation Act, 2018, Environmental Registry of Ontario (15 November 2018), **Exh. C-12**.

<sup>339</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 112, **CER-1**.

<sup>340</sup> MOECC, Bill 4, Cap and Trade Cancellation Act, 2018, Environmental Registry of Ontario (15 November 2018), **Exh. C-12**.

<sup>341</sup> IETA, Comment re Cap and Trade Cancellation Act ID 10893 (11 October 2018), **Exh. C-119** (emphasis added).

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“The compensation approach recognizes that regulated participants may have purchased allowances to comply with the regulation whereas market participants without a compliance obligation *chose to take risks as market traders and speculators.*”<sup>342</sup>

246. In suggesting that market participants had voluntarily undertaken the risk of an illegal expropriation of their investment, the new Ontario Conservative Government displayed its profound and wilful ignorance about the role played by market participants in cap and trade programs generally and in Ontario’s Cap and Trade Program specifically. As summarized above, market participants play a critical role in ensuring that markets provide accurate allowance prices and that markets are liquid, allowing compliance entities to buy and sell allowances at these prices when needed and with limited transaction costs. By choosing to participate in the Cap and Trade Program as a market participant, KS&T had provided significant benefits to the Ontario carbon market generally, on its own and as linked to the California and Québec markets, and to Koch entities and third parties individually.<sup>343</sup>
247. During the public consultation process and legislative debates held on the Cancellation Act, the Ontario Government had no shortage of input from cap and trade experts criticising its approach to compensation to market participants. Testifying before the Standing Committee on General Government, Katie Sullivan of IETA explained:

“Our government continues to stress that Ontario is open for business. IETA applauds and supports this sentiment, but, in recent months, how the province has moved in dismantling the cap-and-trade and related programs and communicating this has been perceived as rushed and challenging. Some of these actions have already undermined confidence in Ontario as being “open for business” across industry, investors and trade partners. ... These are important decisions to make on Bill 4: how things are cancelled, the type of compensation approaches, the transition plans. We hope that the process seizes the options in the future and happens in a fair, transitional way. ...

The proposed compensation formula and framework language in sections 7, 8 and 9 fails to reflect the true circumstances and costs incurred by a range of program participants who purchased instruments in good faith. ... Buying instruments in advance of the CP1, the compliance first deadline of November 2021, were prudent decisions by certain companies. Reality does not mean that companies were ‘playing’ the market; in fact, the opposite was true. These companies were behaving as market participants should and do, [] via planning and hedging, which, again, is what we see daily across commodity markets. We strongly oppose the exclusion of market participants from receiving compensation.”<sup>344</sup>

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<sup>342</sup> MOECC, Bill 4, Cap and Trade Cancellation Act, 2018, Environmental Registry of Ontario (15 November 2018), **Exh. C-12**. (emphasis added)

<sup>343</sup> Expert Report of Dr. Robert Stavins (5 October 2021), paras. 108-111, **CER-1**.

<sup>344</sup> Committee Transcript, Standing Committee on General Government – Cap and Trade Cancellation Act, 2018 (15 October 2018), p. G-8, **Exh. C-120**.

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248. Ontario Conservative Party member Andrea Khanjin refused to engage substantively with these critiques, putting forward an essentially circular and empty defense:

“I know that when the winddown was first announced it was made very clear that those people who would qualify for the wind-down and not, in terms of different sectors—speculators would not qualify ... That was made very, very clear by the minister when he did make the announcement.”<sup>345</sup>

249. Industry representatives similarly emphasized the issues with the proposed compensation plan, explaining the costs that their companies would incur as a result of the Ontario Government’s arbitrary approach to compensation. Speaking on behalf of Canadian Manufacturers and Exporters, Mr. Alex Greco explained:

“During our consultations, some members expressed concerns to us that investments may not be kept whole and recovered appropriately, resulting in unintended consequences and some manufacturers accumulating additional costs.

Sections 6, 7 and 8 of the bill as it is written disallow any allowances purchased in auction or through a third party. If these sections of the bill remain as is, it will penalize certain subsectors of manufacturing, such as the steel and agri-food industries, who acted in good faith at the time the cap-and-trade rules were written. These industries will have no way to recover these costs. We recommend that sections 6, 7 and 8 of Bill 4 be amended to ensure that those participants in the program can be fairly reimbursed for allowances purchased in the first compliance period.”<sup>346</sup>

250. Rather than acknowledge the serious implications of its proposed compensation framework, the Ontario Government took the position during legislative debates on the Cancellation Act that market participants had no right to compensation, because they had time to divest themselves of their purchased emissions allowances. This was either wilfully ignorant of the facts, or a flat untruth. For example, during a meeting of the Standing Committee on General Government concerning the Cancellation Act held on 22 October 2018, Mr. Mike Schreiner, member of the Green Party of Ontario, proposed an amendment to the compensation framework to include market participants. Mr. Schreiner explained his rationale for doing so as follows:

“I move that paragraph 1 of subsection 8(4) of the bill be struck out and the following substituted:

“1. A participant that was registered as a market participant within the meaning of the Climate Change Mitigation and Low-carbon Economy Act, 2016, other than a market participant related to and acting for, on behalf of, or in relation to a mandatory participant within the meaning of that act.”

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<sup>345</sup> *Id.*, pp. G-7 to G-8, **Exh. C-120**.

<sup>346</sup> Committee Transcript, Standing Committee on General Government – Cap and Trade Cancellation Act, 2018 (17 October 2018), p. G-42, **Exh. C-121**.

Again, this amendment came in response to some of the witnesses who testified here, raising concerns about the fairness of the way in which compensation is designed. There were entities that incorporated and performed functions for mandatory market participants, bought emission allowances for those mandatory market participants, not in a speculative way but in a way that was just so those participants could be in compliance with the act.

It's my understanding, reading the current act, that it would not make those entities eligible for compensation. So this is designed, again, for fairness. It enables that all mandatory purchasers be eligible for compensation. I think, again, this will help protect the province from potential litigation. This essentially allows those people who were in a related company—they bought credits for a mandatory participant to comply with the allowance requirements—to be eligible for compensation. ...<sup>347</sup>

251. Progressive Conservative member Andrea Khanjin responded as follows:

“Ms. Andrea Khanjin: I would just make a comment that the individuals that MPP Schreiner is talking about would have had time to divest themselves. Therefore, the amendment doesn't speak to what it's really trying to do, *because they would have had time to divest themselves.*

The Chair (Mr. Dave Smith): Any other comments? Mr. Schreiner.

Mr. Mike Schreiner: Could you elaborate on that? I've had some of those participants come to me with this exact concern. If they had time to divest themselves, clearly, they either didn't feel they had sufficient time to divest themselves or weren't aware of the fact that they could divest themselves.

The Chair (Mr. Dave Smith): Ms. Khanjin.

Ms. Andrea Khanjin: Right. If I'm reading your proposed amendment correctly, then I would say that the approach we're recommending through the cap-and-trade bill—the participants who purchased the allowances to comply with the regulations, because they purchased them in order to help market participants. But the particular purchasers who helped the participants didn't have a compliance obligation. They actually chose to take the risk and trade, so the way that they're treated here is as speculators. *They would have had ample time, with the notification, to have divested themselves and to make themselves whole.*<sup>348</sup>

252. In fact, as explained in paras. 202 to 206, KS&T had no time to divest itself of allowances held in its Ontario CITSS account, given the freeze on trades out of Ontario accounts to other WCI jurisdictions as of 15 June 2018, resulting directly from the Premier-elect's illegal declaration of that date. Nor was there any warning to

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<sup>347</sup> Committee Transcript, Standing Committee on General Government – Cap and Trade Cancellation Act (22 October 2018), p. G-97, **Exh. C-122**.

<sup>348</sup> *Id.*, pp. G-97 to G-98.



participants from Ontario prior to that date that their allowances were at risk of being suddenly rendered worthless. Since Ontario failed to respect the phase-out commitments of the OQC Agreement, entities holding allowances in Ontario, including KS&T, lacked sufficient time to move allowances to accounts outside of Ontario, where they would retain value for compliance purposes.<sup>349</sup> As Dr. Stavins explains, Ontario's failure to provide sufficient time to program participants to adjust to avoid serious adverse market consequences contrasts sharply with the approaches adopted by other jurisdictions that have cancelled cap-and-trade programs.<sup>350</sup>

253. During the legislative debates on the Cancellation Act, other Members voiced concerns regarding the Ontario government's proposed compensation plan, including the risk of litigation from affected participants. New Democratic Member Ms. Jennifer K. French highlighted this issue in her comments:

“The act retroactively terminates crown liability to pay compensation for breach of contract. This is unusual. It basically means the government is giving themselves the right to expropriate private property without compensation. Now, using this power undermines confidence in doing business with the government. ...

There is so much that's unclear about this bill. We don't know whether Ontario is opening itself up to challenges by Quebec and California. We have no idea. Universities and hospitals were also participants in the cap-and-trade program, but we don't know how this is going to affect them.

... There are 21 market participants. Market participants are companies or groups that opted into this program, that decided to be a part of it for various reasons. There's no compensation for them. They're being penalized for participating voluntarily. I'm just going to let that sink in. Imagine that you have an environmental responsibility program. The polluters have to be a part of it, but you can be a part of it too if you want to be environmentally responsible and be part of a cleaner, greener, brighter, better future. I'm oversimplifying here; I don't know what their motivation was for participating. But no compensation for you. “Oh, well. Sorry. You don't get any money back. You shouldn't have volunteered to be a part of a cleaner, greener initiative. No compensation for you.” So no good deed goes unpunished is another piece to that.

I'm going to read something here from an article, “Ontario Cap-and-Trade Repeal Bill Sees Compliance Obligations, Few Refunds for Purchase Allowances,” from July 25:

“It is outrageous not to compensate the market participants”—side note, that's who I was just talking about, the market participants that chose to participate that didn't have to—“while also limiting the government's civil liability. How can this government be credible when it is acting like a

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<sup>349</sup> Expert Report of Dr. Robert Stavins (5 October 2021), paras. 120-121, **CER-1**.

<sup>350</sup> *Id.*, paras. 135-137.

thug? Why would anybody want to do business in Ontario?’ another observer said.

“‘It doesn’t sound like [the government] knows what they’re doing or have thought about implications of their actions. Completely irresponsible ... What will it do with the money collected and not reimbursed rightly to those who bought those allowances in good faith. That is theft!’”

If this is the language being used in conversations in business circles, I think this government is in trouble. If it isn’t doing its homework and its math on these programs, it probably should.”<sup>351</sup>

254. None of the concerns raised by industry stakeholders or the political opposition were taken into account by Ontario in finalizing the Cancellation Act.

(c) The Cancellation Act Was Enacted with Virtually No Changes

255. Instead, the Cancellation Act was enacted on 31 October 2018 with virtually no changes to the proposals set out in Bill 4.

256. Importantly, the Cancellation Act still:

- Annulled cap and trade instruments held in Ontario CITSS accounts, so that all instruments created under the Cap and Trade Act were deemed to be “never distributed.”<sup>352</sup>
- Expressly denied compensation to “[a] participant that was registered as a market participant within the meaning of the Climate Change Mitigation and Low-carbon Economy Act, 2016.”<sup>353</sup>
- Generally denied compensation or damages “in respect of the value of cap and trade instruments retired or cancelled under this Act or for any other loss, including loss of revenues or loss of profits, related, directly or indirectly, to the enactment of this Act, the making or revocation of any regulation under this Act, the repeal of the Climate Change Mitigation and Low-carbon Economy Act, 2016 or the making or revocation of any regulation under that Act.”<sup>354</sup>
- Enacted sweeping measures that restricted access to any system of justice, including access to the courts (whether an action for damages or equitable relief); prohibited the possibility of enforcing judgments or orders made by courts or tribunals outside

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<sup>351</sup> Hansard Transcript, Legislative Assembly of Ontario – Resuming debate on Second Reading of Bill 4 (7 August 2018), pp. 627-629. **Exh. C-123.**

<sup>352</sup> *Cap and Trade Cancellation Act, 2018*, Section 7, **CL-1.**

<sup>353</sup> *Id.*, Section 8(5)(1).

<sup>354</sup> *Id.*, Section 9.

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of Canada; prohibited any claims for expropriation under domestic law or “otherwise”; and applied with retroactive effect.<sup>355</sup>

257. The “consultation process” associated with Bill 4 – when it finally took place at all – was therefore nothing more than lip service to the requirements under Ontario law, undertaken only grudgingly, further to a legal challenge. Ontario clearly did not take any comments from stakeholders into account, and had pre-determined that it would enact the law precisely as drafted, notwithstanding the important and serious concerns raised by key stakeholders.<sup>356</sup>

#### 4. Ultimately, Ontario’s Cancellation of the Cap and Trade Program Served No Purpose

258. The cancellation of Ontario’s Cap and Trade Program was not only structured in an unfair and inequitable manner that arbitrarily picked winners and losers and relied on denial of justice, but it was entirely political and served no ultimate public purpose.

259. As the Ontario Government was well aware would be the case, cancelling the Cap and Trade Program simply led to the entry into force of the Canadian federal backstop carbon pollution pricing system. The federal backstop system was established by the Greenhouse Gas Pollution Pricing Act (**GGPPA**), which was enacted on 21 June 2018. Provincial and territorial governments as of that time were already well aware of the general design principles behind the system, as the federal government had released a report in October 2016 (the “Pan-Canadian Approach to Pricing Carbon Pollution”) outlining its key policy levers.<sup>357</sup>

260. Canada’s federal GHG backstop system includes two distinct regulatory mechanisms: a carbon levy imposing fees on certain fuels,<sup>358</sup> and an alternative system based on emissions intensity, the Output-Based Pricing System (**OBPS**),<sup>359</sup> applying to certain

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<sup>355</sup> *Id.*, Section 10.

<sup>356</sup> See Part II.E, *supra*.

<sup>357</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 138, **CER-1**.

<sup>358</sup> The carbon levy provision of the federal backstop system imposes fees on certain fossil fuels, including gasoline, natural gas, and coal. The fuel-specific fees are applied to fossil fuels used within the province in question, although they are generally collected and remitted to the government by the fuel distributor or wholesaler rather than the end-user, regardless of where the distributor or wholesaler is located. The ultimate burden is expected to be shared at all points in the supply chain through, for example, higher wholesale and retail gasoline prices. The fuel-specific fees are set base on (1) the GHG emissions associated with each fuel, on a carbon dioxide equivalent (or “CO<sub>2</sub>e”) basis, accounting for carbon dioxide, methane (CH<sub>4</sub>) and nitrous oxide (N<sub>2</sub>O) emissions, and (2) the carbon levy, set at a dollar per metric tonne (MT) CO<sub>2</sub>e basis. See Expert Report of Dr. Robert Stavins (5 October 2021), paras. 140-141, **CER-1**.

<sup>359</sup> The OBPS applies to large industrial fossil fuel users in lieu of the carbon levy, instead establishing a set of emissions-intensity standards by sector and type of activity. Specifically, for a given facility, the OBPS sets a benchmark level of emissions per unit of output, where that facility’s annual total emissions limit is then calculated as the benchmark (in tons of CO<sub>2</sub>e emissions per unit of output) multiplied by the facility’s total output. A facility that emits more than its total emissions limit in a compliance year generates an allowance deficit, while facilities emitting less than its

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larger emitting facilities. The GGPA applies to provinces and territories that lack a provincially-organised carbon pricing plans, or whose plan fails to satisfy federal standards.<sup>360</sup>

261. The GGPA therefore applies only in provinces or territories where rules to regulate carbon emissions either do not exist, or fail to meet minimum federal stringency standards. The federal backstop system either applies in full in such provinces or territories, or “tops up” existing programs that fail to meet national standards.<sup>361</sup>
262. Almost immediately following on the enactment of the Cancellation Act on 31 October 2018, the GGPA therefore stepped in to replace Ontario’s Cap and Trade Program with a carbon pricing system very similar in scope, and similar, if not greater, in stringency. Its provisions remain in effect.<sup>362</sup>
263. Despite being fully aware of that the cancellation of the Cap and Trade Program would simply trigger the federal backstop and the imposition of a carbon levy on fossil fuels, the Ontario government sought to characterize the cancellation of the program as bringing an end to carbon pricing for Ontario and lowering costs for tax payers.
264. In his announcements regarding the cancellation of the Ontario Cap and Trade Program, Premier Ford, either wilfully ignorant or deliberately misleading, wrongly characterized the Program as a “carbon tax”. As Dr. Stavins explains, there are two types of carbon-pricing instruments: carbon taxes and emission trading systems. Carbon taxes fix the price of carbon and allow the resulting emissions to vary, while emission trading systems such as the Ontario Cap and Trade Program fix total emissions and allow the resulting emission price to vary.<sup>363</sup> Nevertheless, Premier Ford asserted that his government was cancelling the Ontario Cap and Trade Program in order to “get[] Ontario out of the carbon tax business.”<sup>364</sup> Upon introducing the

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emissions limit generate an allowance credit. Facilities with an allowance deficit can remedy the deficit by (1) paying a direct carbon price equal to the federal carbon levy amount (e.g., \$40/ton of CO<sub>2</sub>e emissions in 2021) on each unit of emissions in excess of the limit; (2) purchasing credits from other facilities that earned those credits by emitting less than the total emissions limit implied by their benchmarks (or similarly, banking credits they earn for below-limit emissions in a given year for up to five years, and using them to cover excess emissions in later years); and (3) using carbon offsets obtained by undertaking certain voluntary activities to reduce carbon emissions. See Expert Report of Dr. Robert Stavins (5 October 2021), paras. 143-144, **CER-1**.

<sup>360</sup> *Id.*, para. 138.

<sup>361</sup> *Id.*, para. 146.

<sup>362</sup> In Ontario, the OBPS provision of the federal backstop system took effect in January 2019, and the carbon levy provision of the federal backstop system took effect in April 2019. In August 2018, the Ford administration announced it would be pursuing a legal challenge on the constitutionality of the federal backstop program. This challenge ultimately failed, as the Supreme Court ruled that the federal backstop program was constitutional in March 2021. *Id.*, paras. 117, 147.

<sup>363</sup> *Id.* para. 24.

<sup>364</sup> Announcement, Premier Doug Ford Announces the End of the Cap-and-Trade Carbon Tax Era in Ontario (3 July 2018), **Exh. C-107** (“‘I made a promise to the people that we would take immediate action to scrap the cap-and-trade carbon tax and bring their gas prices down,’ said Ford.

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Cancellation Act, Minister of Environment, Conservation and Parks Rod Phillips reiterated that the government was “looking forward to moving past the previous Liberal government’s propensity to just raise taxes and instead focusing on an environmental plan that works.”<sup>365</sup> In announcing the passing of the Cancellation Act, the Ontario government characterized its action as follows:

“The elimination of the cap and trade carbon tax will reduce gas prices, save the average family \$260 per year, and remove a costly burden from Ontario businesses, allowing them to grow, create jobs and compete around the world.”<sup>366</sup>

265. In short, the Ontario government claimed repeatedly to be cancelling the Cap and Trade Program in order to eliminate a “carbon tax”. Yet by doing so, that same Government virtually guaranteed the imposition of a higher carbon price under the federal backstop carbon pricing system, which includes fees on certain fossil fuels based on the GHG emissions associated with each fuel.
266. The irony of the Government’s characterization of the Cancellation Act and the ultimate effect of its measure was not lost of members of the Ontario legislature. In a debate on the second reading of Cancellation Act, Bill 4, held on 31 July 2018, New Democratic Member Mr. Peter Tabuns commented as follows:

“Speaker, we know that any government that doesn’t have in place its own carbon plan—carbon pricing—is going to be subject to the federal backstop, and that is going to be higher than what we’re paying now. So what you’ve done here is that you’ve ensured that people will be paying more on January 1. I think your voters need to understand that.”<sup>367</sup>

267. In fall 2018, the Financial Accountability Office of Ontario (**FAO**) published a financial review of the decision to cancel the Ontario Cap and Trade Program. The purpose of the FAO’s review was to estimate the budgetary impact to Ontario from ending the Cap and Trade Program and to compare the financial impact on households and businesses of Ontario’s Program against the federal government’s proposed carbon pricing plan. The FAO estimated that the federal backstop would impose a larger carbon price than Ontario’s cancelled Cap and Trade Program. In 2019, the federal backstop carbon price (*i.e.*, the level of the carbon levy) was set at CAD 20 per ton. Thereafter, carbon prices under the federal backstop system are scheduled to increase by CAD 10 per year until 2022, when the carbon price will be CAD 50 per ton. On the other hand, the FAO has projected that had Ontario’s cap-and-trade program remained in effect, the carbon price in Ontario (*i.e.*, the price of allowances) would have risen

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‘Today, I want to confirm that as a first step to lowering taxes in Ontario, the carbon tax’s days are numbered.’”).

<sup>365</sup> National Observer, “Ontario legislature adjourns without adopting Ford government bill to cancel cap and trade” (15 August 2018), **Exh. C-124**.

<sup>366</sup> Ontario Government, “Relief on the Way: Ontario Passes Legislation to End Cap and Trade Carbon Tax” (31 October 2018), **Exh. C-125**.

<sup>367</sup> Hansard Transcript, Legislative Assembly of Ontario (31 July 2018), p. 498, **Exh. C-175**.

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from CAD 20 per ton to just CAD 24 per ton on average over the same period. Therefore, while carbon prices were expected to be the same under the federal backstop system and Ontario’s cap-and-trade program in 2019, by 2022, the carbon price under the federal backstop system was expected to be more than double the carbon price in Ontario if its Cap and Trade Program had not been cancelled.<sup>368</sup>

268. In sum, the abrupt decision to cancel Ontario’s Cap and Trade Program was not a rational step to eliminate a “carbon tax.” Rather, as the Ford government knew well at the time, its decision merely ensured that Ontario would be subject to a different carbon pricing regime—one that was very similar in scope, and similar, if not greater in stringency.<sup>369</sup> The only difference was that the Federal Government rather than the Ontario Government would “wear it” – indeed, as the Federal Government would be left “wearing” the international consequences of Ontario’s illegal measures under the NAFTA.

#### **F. Ontario Arbitrarily Denied KS&T Compensation**

1. Ontario Ignored KS&T’s Request to Exercise Discretion Under the Cancellation Act to Provide Compensation

269. Once enacted, Section 7 of the Cancellation Act provided for the cancellation of the allowances held in KS&T’s Ontario CITSS account:

##### **“Cancellation of instruments**

The following cap and trade instruments are cancelled:

1. All cap and trade instruments held in the cap and trade accounts of participants on July 3, 2018, other than any number of cap and trade instruments in the accounts that are retired under section 6.

2. *All cap and trade instruments that were created under the Climate Change Mitigation and Low-carbon Economy Act, 2016 and were never distributed.*<sup>370</sup>

270. Moreover, and as described above, Section 8(5) of the Cancellation Act confirmed that “market participants” like KS&T would receive no compensation for its allowances, while Section 10 denied any mechanism of judicial redress or due process.
271. However, Section 15 of the Cancellation Act did provide Ontario with the discretion to compensate prescribed participants such as KS&T. Section 15(2) of the Cancellation Act provided in this respect:

“The Lieutenant Governor in Council may make regulations governing compensation required to be paid to participants under section 8, including but not limited to the following:

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<sup>368</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 153, **CER-1**.

<sup>369</sup> *Id.*, para. 155.

<sup>370</sup> Cap and Trade Cancellation Act 2018, Section 7, **CL-1**.

1. Prescribing the amount of compensation to be paid to a participant or class of participants in respect of each cap and trade instrument, which may include prescribing different amounts for different types of cap and trade instruments, or prescribing a procedure for determining such amounts.
  2. Prescribing criteria that must be met or circumstances that must apply in order for compensation to be paid.
  3. Prescribing the circumstances in which the Minister is required to make adjustments to the amount of compensation that would otherwise be required to be paid to a participant or class of participants, which may include requiring the Minister to decrease the amount or prohibiting the Minister from paying any amount.
  4. Governing adjustments mentioned in paragraph 3.
  5. Authorizing, despite subsection 8(5), compensation to be paid to a prescribed participant or class of participants.
  6. Limiting the compensation authorized to be paid under paragraph 5, which may include,
    - i. limits that apply in prescribed circumstances, and
    - ii. limits in respect of a prescribed number of cap and trade instruments or a number of cap and trade instruments determined in accordance with a prescribed method.”
272. Thus, Section 15(2) of the Cancellation Act gave Ontario broad discretion to provide compensation to particular participants or classes of participants, by action of the Lieutenant Governor in Council (effectively, the Ontario Provincial Cabinet). On this basis, on 14 November 2018, KS&T wrote to Premier Ford, this time requesting that the government “promptly implement a mechanism to compensate Koch for its required allowance purchases under the discretion and authority granted in Section 15 of the Act.”<sup>371</sup>
273. In making this request, KS&T reiterated that Koch was “required by the [Cap and Trade Act and Regulations] to purchase allowances for its subsidiaries and related parties”, and did so through its own “compensation-excluded market participant [*i.e.* KS&T] in order to comply with the purchase and holding limit provisions.”<sup>372</sup> As in its correspondence prior to the enactment of the Cancellation Act, KS&T highlighted the manifest unfairness of Ontario requiring all Koch entities to be treated as one under the Cap and Trade Act and Regulations, while then splitting the entities for the purposes of providing compensation under the Cancellation Act.
274. KS&T never received a response to this letter, and Ontario simply ignored its request despite the clear provisions in the legislation.

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<sup>371</sup> Letter from KS&T to the Attorney General of Ontario (14 November 2018), **Exh. C-126**.

<sup>372</sup> *Ibid.*

## 2. Ontario Summarily Denied KS&amp;T's Application for Compensation

275. The Cancellation Act provided for formulas to calculate compensation for participants who, *inter alia*, held instruments that were distributed free of charge and exceeded aggregate emissions. Section 8(4) of the Cancellation Act provides:

“If the number of instruments that were distributed free of charge to the participant under the Climate Change Mitigation and Low-carbon Economy Act, 2016 is greater than the aggregate amount of all greenhouse gas emissions attributed to the participant in respect of the prescribed time period, the maximum number of cap and trade instruments in respect of which compensation may be paid to a participant shall be determined by applying the following formula:  $A = (B - C) - (D - E)$ .

where,

A = the maximum number of cap and trade instruments in respect of which compensation may be paid to the participant,

B = the number of cap and trade instruments held in the participant's cap and trade accounts that are cancelled under paragraph 1 of section 7,

C = the number of the participant's cap and trade instruments referred to in “B” that are classified with or assigned a vintage year of 2021,

D = the number of cap and trade instruments that were distributed free of charge to the participant, and

E = the aggregate amount of all greenhouse gas emissions attributed to the participant in respect of the prescribed time period.”<sup>373</sup>

276. Because Ontario had required KS&T to be grouped together with Koch entities for the purposes of distributing carbon allowances, KS&T fulfilled this category. In addition, and as described above, Section 15(2) of the Cancellation Act also provides discretion to compensate market participants.

277. As a result, and because Ontario had removed KS&T's ability to access the Ontario courts to pursue its rights, KS&T formally applied for compensation under Section 8 of the Cancellation Act. As Mr. Martin explains, this application followed a meeting with the Premier's office to discuss KS&T's options for compensation, and KS&T “thought it was at least worth attempting this route” to obtain some compensation.<sup>374</sup>

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<sup>373</sup> Cap and Trade Cancellation Act 2018, Section 8(4), CL-1.

<sup>374</sup> Witness Statement of Graeme Martin (4 October 2021), para. 69, CWS-2.

(continued)



278. KS&T submitted its application on 14 February 2019, using the form prescribed by Regulation 9/19, which included specific reports on GHG, and a verification statement prepared by an accredited verification body in respect of each GHG report.<sup>375</sup>
279. In the cover letter to that application, KS&T reiterated that KS&T’s intention was not “to receive special treatment, but only to be made whole”, and again suggested potential avenues for the government to reach this goal.<sup>376</sup>
280. On 4 March 2019, Ontario sent a “Proposed Determination” to KS&T, rejecting the compensation application in four conclusory paragraphs:

“You are receiving this notice in pursuant to the *Cap and Trade Cancellation Act, 2018* (CTCA) and O. Reg. 9/19 - *Compensation* (“the Regulation”), and in response to your application for compensation received on February 14, 2019.

I have reviewed your application and determined in accordance with the provisions in the CTCA and the Regulation that Koch Supply & Trading, LP is not eligible to receive compensation. Koch Supply & Trading, LP was registered under the cap and trade program as a market participant within the meaning of the *Climate Change Mitigation and Low-carbon Economy Act, 2016*. Subsection 8(5) of the CTCA lists the types of participants that are not eligible to receive compensation. In particular, subparagraph 1 of subsection 8(5) specifically states that entities that were registered as a market participant under the cap and trade program are not eligible to receive compensation.

If you have any questions or comments in response to this notification, you may submit those by email to [CTapplications@ontario.ca](mailto:CTapplications@ontario.ca) no later than **Monday, March 11th, 2019 at 11:59pm Eastern Time**.

I will consider any comments received from applicants prior to the date and time specified above, before a final notice is issued. You are encouraged to submit comments as soon as possible.”<sup>377</sup>

281. In accordance with the deadline specified in the Proposed Determination, KS&T submitted comments in reply on 11 March 2019.<sup>378</sup> KS&T submitted that continuing to deny it compensation would be arbitrary, discriminatory and improper in light of the goals of the original Cap and Trade Act and Regulations. KS&T highlighted the negative impact of Ontario’s position on KS&T and its affiliates, and asked Ontario to

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<sup>375</sup> . Reg. 9/19: Compensation (made under the Cap and Trade Cancellation Act, 2018), Section 9, **CL-35**; KS&T Compensation Application Form (14 February 2019), **Exh. C-127**.

<sup>376</sup> KS&T Compensation Application Form (14 February 2019), **Exh. C-127**.

<sup>377</sup> Letter from the Ministry of the Environment, Conservation and Parks to KS&T (4 March 2019), **Exh. C-128** (emphasis in original).

<sup>378</sup> Ministry of the Environment, Conservation and Parks, Email Confirmation of Correspondence (11 March 2019), **Exh. C-129**; Letter from KS&T to Ministry of the Environment, Conservation and Parks (11 March 2019), **Exh. C-130**.

(continued)

reconsider its Proposed Determination and compensate KS&T for the full volume of carbon allowances procured in the May 2018 joint auction.

282. Just three days later, on 14 March 2019, Ontario issued its “Final Determination.”<sup>379</sup> In this two-paragraph letter, Ontario reiterated its determination that KS&T was not eligible to receive compensation under Section 8(5) of the Cancellation Act:

“You are receiving this final Determination Notice pursuant to the *Cap and Trade Cancellation Act, 2018* (CTCA) and O. Reg. 9/19 – *Compensation* (“the Regulation”) and in response to your application for compensation received on February 14th, 2019.

A notice of proposed compensation was sent to you on March 4, 2019 and comments in respect of the proposal notice were received by the Ministry on March 11, 2019. It has been determined after considering these comments and in accordance with the provisions of the *Cap and Trade Cancellation Act, 2018* (CTCA) and the Regulation that Koch Supply & Trading, LP is not eligible to receive compensation. Koch Supply & Trading, LP was registered under the Cap and Trade program as a market participant within the meaning of the *Climate Change Mitigation and Low-carbon Economy Act, 2016*. Subsection 8(5) of the CTCA lists the types of participants that are not eligible to receive compensation. In particular, subparagraph 1 of subsection 8(5) specifically states that entities that were registered as a market participant under the Cap and Trade program are not eligible to receive compensation.”

283. The Final Determination, like the Proposed Determination, was signed by Jeff Hurdman, Director, Financial Instruments Branch, Climate Change and Resiliency Division, Ministry of the Environment, Conservation and Parks. Pursuant to Regulation 9/19, this decision should have been taken by the “Minister”,<sup>380</sup> defined in the Cancellation Act as “the Minister of the Environment, Conservation and Parks or such other member of the Executive Council as may be assigned the administration of this Act under the Executive Council Act.”<sup>381</sup> Presumably, Mr. Hurdman was acting under properly delegated authority from the Minister, though it is unclear what internal processes or checks did or did not occur in assessing applications for compensation.
284. Moreover, although Mr. Hurdman stated that he had “consider[ed]” KS&T’s comments, the time period of just three days between when KS&T sent its letter and when Mr. Hurdman responded clearly suggests otherwise. The letter provided no particular response to the comments of KS&T, nor did it address KS&T’s concerns. The letter was simply a *pro forma* rejection. As Mr. Martin aptly notes, “the letter felt

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<sup>379</sup> Letter from the Ministry of the Environment, Conservation and Parks to KS&T (14 March 2019), **Exh. C-10**.

<sup>380</sup> O. Reg. 9/19: Compensation (made under the Cap and Trade Cancellation Act, 2018), Section 9, **CL-35**.

<sup>381</sup> Cap and Trade Cancellation Act, 2018, Section 1, **CL-1**.

(continued)

wholly pre-determined, and that our efforts in making comments to the Proposed Determination had simply been a box-checking exercise.”<sup>382</sup>

285. Following Ontario’s summary rejection at the Departmental level, KS&T nonetheless continued to try and engage with Ontario to obtain compensation. Among other things, KS&T asked then-U.S. ambassador to Canada, Kelly Kraft, to approach Ontario. On 17 April 2019, Ambassador Kraft met with the Ontario Premier and the Chief of the Staff to the Premier, but no progress was made.<sup>383</sup>
286. KS&T engaged in a final meeting with the new Chief of Staff to the Ontario Premier, Jamie Wallace, and senior policy advisor to the premier, Mark Lawson, on 23 August 2019.<sup>384</sup> KS&T once again gave a presentation to Ontario, asking for KS&T to be fairly reimbursed. Despite Mr. Lawson stating that he would follow up,<sup>385</sup> Koch and KS&T have had no more meetings with Ontario since that date.

### **G. The Claimants Suffered Loss as a Direct Result of Ontario’s Actions**

287. In sum, KS&T and through it, Koch itself, invested significant amounts of capital and time and energy in Ontario’s Cap and Trade Program. Over the course of two years, the Claimants invested over ██████████ in Ontario sponsored public allowances auctions under the Program. In June 2018 in further pursuit of its investment KS&T paid for and received delivery of ██████████ of carbon allowances into its Ontario CITTS account, which Ontario only days later rendered worthless and then purported to annul without compensation, under its Cancellation Act.
288. Ontario’s abrupt and arbitrary cancellation of the Cap and Trade Program, a measure illegally adopted before the Premier-elect was even sworn into office, flatly contradicted the Ontario Conservative Government’s assertion of an “orderly” wind down. The effects of Ontario’s actions were swift and devastating, and caused the Claimants loss of 30,158,240.95.
289. Ontario hastily passed the Cancellation Act despite serious concerns from a broad range of stakeholders, including KS&T, apparently to serve solely political ends: notably, to reduce the amount of compensation paid to participants overall, and in that way to maintain the popularity of its precipitous measures with the electorate. Thereafter, Ontario arbitrarily and unreasonably denied KS&T compensation, by failing to exercise its discretion as specifically provided for in the Cancellation Act and by failing to provide due process in considering KS&T’s application for compensation. Moreover, Ontario expressly denied any access to the courts for any cause of action, and prohibited any other avenue for relief.

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<sup>382</sup> Witness Statement of Graeme Martin (4 October 2021), para. 72, **CWS-2**.

<sup>383</sup> Witness Statement of Paul Brown (5 October 2021), para. 57, **CWS-3**. Ambassador Kraft was subsequently transferred to the United Nations on 2 May 2019. *See id.*

<sup>384</sup> *Id.*, para. 59.

<sup>385</sup> *Id.*, para. 59.

(continued)

290. Ontario effectively picked “winners and losers” in cancelling the program, unfairly and arbitrarily targeting market participants for no compensation, despite having invited companies like KS&T to take part in the Cap and Trade Program in the first place.
291. At the same time, Ontario profited in a substantial way from KS&T’s investment, and other investments like it in the Ontario Cap and Trade Program. Over the course of Ontario’s Cap and Trade Program, Ontario received – by its own account – CAD 2,873,158,143.54 in revenues from the auction of carbon allowances.<sup>386</sup> Of this, Ontario received CAD 472,138,014.12 from the May 2018 joint auction alone.<sup>387</sup> Under the Cap and Trade Act, Ontario had established the GGRA as a designated depository for the proceeds from the sale of Ontario carbon allowances.<sup>388</sup> Under the legislation Ontario was supposed to deposit all money received from the public auctions into the GGRA, and – pursuant to the Cap and Trade Act – was supposed to apply these funds to re-invest in so-called “green projects” as listed in Schedule 1 to the Act.<sup>389</sup>
292. In the end, by the time of its sudden cancellation of Cap and Trade, Ontario had invested a little over half of these funds into green energy projects. Between November 2015 and July 2018, the Ontario Government had spent approximately CAD 1.9 billion to fund GGRA-related projects.<sup>390</sup> Adding the GGRA balance of CAD 553 million for the 2017/2018 fiscal year to the revenues from the May 2018 auction, the GGRA (which Bill 4, the Cap and Trade Cancellation Act, renamed as the “Cap and Trade Wind Down Account”) had a balance of just over CAD 1 billion as of September 2018.<sup>391</sup> According to Finance Minister Fedeli, the proceeds of Ontario’s cap and trade auctions simply went into Ontario’s general revenue account.<sup>392</sup>
293. Emphasizing the arbitrary and pointless nature of its measures, the cancellation of Ontario’s Cap and Trade Program simply led to the entry into force of the federal backstop carbon pricing system. On 1 April 2019, the federal backstop effectively

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<sup>386</sup> See Ontario Post-Auction Public Proceeds Report (May 2018, Joint Auction #15)

**Exh. C-136.** After each single and joint auction, Ontario published a “Post-Auction Public Proceeds Report”, reporting on the proceeds to the Province of Ontario from the sale of allowances. See Ontario Post-Auction Public Proceeds Report (March 2017, Ontario Auction #1) **Exh. C-131**; Ontario Post-Auction Public Proceeds Report (June 2017, Ontario Auction #2) **Exh. C-132**; Ontario Post-Auction Public Proceeds Report (September 2017, Ontario Auction #3) **Exh. C-133**; Ontario Post-Auction Public Proceeds Report (November 2017, Ontario Auction #4) **Exh. C-134**; Ontario Post-Auction Public Proceeds Report (February 2018, Joint Auction #14) **Exh. C-135**; Ontario Post-Auction Public Proceeds Report (May 2018, Joint Auction #15) **Exh. C-136**.

<sup>387</sup> See Ontario Post-Auction Public Proceeds Report (May 2018, Joint Auction #15)

**Exh. C-136.**

<sup>388</sup> Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 71(1), **CL-5**.

<sup>389</sup> Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 71(2)(2), **CL-5**.

<sup>390</sup> See Environmental Commissioner of Ontario, Climate Action in Ontario: What’s Next?, 2018 Greenhouse Gas Report, pp. 212, 214, **Exh. C-137**.

<sup>391</sup> See *id.* pp. 212-213, **Exh. C-137**; see also Financial Accountability Office of Ontario (FAO), Cap and Trade – A Financial Review of the Decision to Cancel the Cap and Trade Program (fall 2018), p. 17, **Exh. C-138**.

<sup>392</sup> Witness Statement of Paul Brown (5 October 2021), para. 50, **CWS-3**.

(continued)

replaced Ontario's Cap and Trade Program, cancelled just months earlier, with a carbon pricing system very similar in scope, and similar, if not greater, in stringency.<sup>393</sup>

294. Therefore, the Claimants suffered significant loss as a direct result of Ontario's arbitrary actions that served no public purpose. Meanwhile, Ontario profited from its decision to deny compensation to participants like KS&T, using the expropriated funds for general expenditure in the Province.

### III. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE

295. This Tribunal has jurisdiction over this dispute, as the requirements of the NAFTA, the United States-Mexico-Canada Agreement (USMCA) and Article 25 of the ICSID Convention have been met. Article 25(1) of the ICSID Convention states:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

296. The requirements of jurisdiction *ratione voluntatis*, *ratione temporis*, *ratione persone*, and *ratione materiae* set out in Article 25(1) of the ICSID Convention have all been fulfilled, as demonstrated in the following sections.

#### A. The Parties Have Consented to Arbitration (Jurisdiction *Ratione Voluntatis*)

297. Chapter Eleven of the NAFTA establishes a framework to promote and protect investment in Canada and the United States, including consent by the Parties to submit to arbitration claimed violations of substantive obligations afforded to NAFTA investors under that Chapter.

298. The Claimants have consented to the submission of this dispute to the jurisdiction of ICSID by the filing of its Request for Arbitration.<sup>394</sup> The Respondent's consent arises through the text of the NAFTA, and the operation of the USMCA.

##### 1. Consent Under the NAFTA

299. First, Article 1122(1) provides Canada's written consent to arbitration as a Party of the NAFTA to "the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." Under Articles 1116 and 1117 of the NAFTA, this consent to arbitration extends to allegations of breach under Section A of Chapter Eleven, insofar as the investor has incurred loss or damage by reason of, or arising out of, such breaches. The dispute between the Claimants and the Respondent satisfies those requirements, as detailed in Part IV of this Memorial.

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<sup>393</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 155, CER-1.

<sup>394</sup> Request for Arbitration (7 December 2020).

300. Second, Article 1122(2) provides that the “consent given by paragraph 1 and the submission by a disputing investor of claim to arbitration shall satisfy the requirement of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) ... for written consent of the parties”. As noted above, Article 25 of the ICSID Convention requires, *inter alia*, that a dispute exist between a “Contracting State” and “a national of another Contracting State”, which “the parties to the dispute consent in writing to submit to the Centre.”
301. Canada is a “Contracting State” for these purposes. Canada signed the ICSID Convention on 15 December 2006, deposited its instrument of ratification on 1 November 2013, and the Convention entered into force for Canada on 1 December 2013.<sup>395</sup> Likewise, the Claimants are a “national of another Contracting State”. As detailed below, the Claimants are enterprises organized under the laws of the United States. The United States is a Contracting State to the ICSID Convention, and has been since 14 October 1996.<sup>396</sup>

## 2. Consent Under the Transitional Provisions of the USMCA

302. The NAFTA entered into force in 1994 and was terminated on 1 July 2020.<sup>397</sup> However, pursuant to Annex 14-C of the USMCA, Canada consented to submit to arbitration claims under Chapter Eleven of the NAFTA with regard to “legacy investments” until 1 July 2023.<sup>398</sup> The USMCA remains in force between the United States and Canada.<sup>399</sup>
303. Annex 14-C of the USMCA defines “legacy investment” as “an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement.”<sup>400</sup> The Claimants hold “legacy investments” for the purposes of the USMCA, as described in paras. 325 to 327, below.
304. Annex 14-C provides consent to arbitration for legacy investments through the following provisions, each of which is satisfied.
- a. Article 1(a) of Annex 14-C specifically provides that: “[e]ach Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under: (a) Section A of Chapter 11

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<sup>395</sup> List of Contracting States and Other Signatories of the Convention (as of 9 June 2020), ICSID, **Exh. C-6**.

<sup>396</sup> *Ibid.*

<sup>397</sup> See North American Free Trade Agreement (1994), Chapter Eleven, **Exh. CL-2**; Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada (30 November 2018), **Exh. CL-3**.

<sup>398</sup> United States-Mexico-Canada Agreement, Annex 14-C, **Exh. CL-4**. The USMCA allows claims to continue to be brought under NAFTA Chapter Eleven with regard to “legacy investments” for a period of three years after the coming into force of the USMCA, which occurred on 1 July 2020.

<sup>399</sup> Government of Canada, Treaties (Excerpt), **Exh. C-1**.

<sup>400</sup> United States-Mexico-Canada Agreement, Annex 14-C, Section 6(a), **Exh. CL-4**.

(Investment) of NAFTA 1994”. As noted above with respect to the NAFTA, these provisions apply.

- b. Article 2(a) further confirms that “[t]he consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre)”. Likewise, as above, these provisions have been satisfied in this dispute.

305. Accordingly, the conditions for consent to arbitration under the NAFTA and the USMCA have both been fulfilled.

**B. The Claimants Fall Under the Application of the NAFTA (Jurisdiction *Ratione Temporis*)**

306. The NAFTA sets out a number of temporal requirements, all of which are satisfied in this dispute.

307. First, in accordance with Article 1118 of NAFTA, the disputing parties unsuccessfully engaged in consultations on 14 May 2020.<sup>401</sup> These consultations failed to result in a mutually agreeable resolution of the claim.

308. Second, Article 1119 of the NAFTA requires a claimant to deliver “written notice of its intention to submit the claim to arbitration” at least 90 days before submitting any claim to arbitration.<sup>402</sup> The Claimants filed their notice of intent on 20 February 2020,<sup>403</sup> 291 days before submitting their Request for Arbitration on 7 December 2020.<sup>404</sup> Thus, the Claimants have fulfilled the requirements of Article 1119.<sup>405</sup>

309. Third, Article 1120(1) requires that “six months have elapsed since the events giving rise to the claim” and the submission of a claim to arbitration. The first Ontario measures at issue in this claim were adopted as of 15 June 2018, and continued through to March 2019. These events occurred more than six months before the Claimants submitted their claim to arbitration on 7 December 2020.

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<sup>401</sup> Request for Arbitration (7 December 2020), para. 14.

<sup>402</sup> *Ibid.*

<sup>403</sup> Notice of Intent to Submit a Claim to Arbitration under Chapter Eleven of the North American Free Trade Agreement, 20 February 2020, **Exh. C-2**. *See also* Letter from Shendra Melia (Global Affairs Canada) to Claimants’ counsel, 23 March 2020, **Exh. C-3** (“This letter confirms receipt by the Government of Canada, on February 20, 2020, of a Notice of Intent to Submit a Claim to Arbitration ... under Section B of Chapter Eleven of the North American Free Trade Agreement ... served on behalf of Koch Industries Inc. and Koch Supply & Trading, LP.”).

<sup>404</sup> Request for Arbitration (7 December 2020).

<sup>405</sup> In addition, the condition precedent to submission of a claim to arbitration, as provided for in Article 1121 of the NAFTA, has also been satisfied. The Claimants have provided the requisite consent to arbitration and waiver in the form contemplated by NAFTA Article 1121. *See* Request for Arbitration (7 December 2020).

(continued)

310. Fourth, Articles 1116(2) and 1117(2) prohibits investors from bringing a claim if more than three years have elapsed from the date on which the Claimants first acquired knowledge of the alleged breaches and loss. As outlined in paras. 185 to 212, the announcement of the Premier-elect on 15 June 2018 was the moment of breach when the Claimants first began incurring loss and had immediate knowledge thereof. The Claimants filed their Request for Arbitration within the three-year period, on 7 December 2020.
311. Therefore, the requirements under the NAFTA have been fulfilled. In addition, the Claimants have also complied with the temporal requirements of Annex 14-C of the USMCA. In particular, Article 3 of Annex 14-C of the USMCA establishes that: “[a] Party’s consent under paragraph 1 shall expire three years after the termination of NAFTA 1994”. The Claimants’ Request for Arbitration has been filed within three years of the termination of NAFTA 1994.<sup>406</sup>
312. As a result, the requirements of jurisdiction *ratione temporis* have been met in these proceedings.

**C. The Claimants Are Covered Investors under the NAFTA and the ICSID Convention (Jurisdiction *Ratione Personae*)**

313. The Claimants satisfy the requirements of jurisdiction *ratione personae* under both the NAFTA and Article 25 of the ICSID Convention.
314. Under the NAFTA, an “investor of a Party” is defined in Article 1139 as an enterprise of such Party that seeks to make, is making or has made an investment, while an “enterprise of a Party” is an enterprise constituted or organized under the law of a Party.<sup>407</sup>
315. Likewise, Article 25(1) of the ICSID Convention requires that the non-State party to the dispute be “a national of another Contracting State” to the Convention. Article 25(2)(b) defines a “national of another Contracting State” to include “any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to ... arbitration”.
316. Both Koch and KS&T are, and have been at all material times, companies established under the laws of the United States. Koch is a corporation organized in the State of Kansas and KS&T is a limited partnership formed under the laws of the State of Delaware.<sup>408</sup> Therefore, both qualify as enterprises of the United States under the definitions set out in Article 1139 of the NAFTA, and Article 25(1) of the ICSID Convention.

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<sup>406</sup> Request for Arbitration (7 December 2020).

<sup>407</sup> See also North American Free Trade Agreement (1994), Article 201, **Exh. CL-36** (definition of an “enterprise of a Party”).

<sup>408</sup> Koch Supply & Trading, LP, Certificate of Good Standing (1 December 2020), **Exh. C-4**; Koch Industries Inc., Certificate of Good Standing (1 December 2020), **Exh. C-5**.



317. Furthermore, and as explained in greater detail below, both of the Claimants have made investments in the Respondent's territory. Therefore, they both qualify as covered investors under the definition of "investor of a Party" under Article 1139 of the NAFTA.

**D. The Claimants Have Qualifying Investments under the NAFTA, the USMCA and the ICSID Convention (*Jurisdiction Ratione Materiae*)**

318. The Claimants satisfy the requirements for jurisdiction *ratione materiae* under the NAFTA, the USMCA, and the terms of Article 25(1) of the ICSID Convention.

1. The Claimants Have Made Qualifying Investments Under the NAFTA

319. As noted above, Article 1139 requires that investors have "made an investment", while Article 1101 is clear that the protections set out in NAFTA Chapter Eleven relate to, *inter alia*, "investments of investors of another Party."

320. Article 1139 of the NAFTA defines "investment" as:

- (a) an enterprise;
- (b) an equity security of an enterprise;
- (c) a debt security of an enterprise
  - (i) where the enterprise is an affiliate of the investor, or
  - (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;
- (d) a loan to an enterprise
  - (i) where the enterprise is an affiliate of the investor, or
  - (ii) where the original maturity of the loan is at least three years,  
but does not include a loan, regardless of original maturity, to a state enterprise;
- (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
- (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
- (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

321. The Claimants, together and separately, hold investments of the type encompassed by Article 1139 of the NAFTA.

322. Koch holds the following investments in Canada:

- a. its 100 percent shareholding in KS&T and INVISTA;<sup>409</sup>
- b. interests in enterprises entitling Koch to the income or profits of these enterprises;<sup>410</sup> and
- c. real estate or other property, tangible or intangible, that was acquired in the expectation or used for the purpose of economic benefit or other business purposes.<sup>411</sup> For example, Koch held a range of other bricks-and-mortar investments in Ontario,<sup>412</sup> as well as intangible investments.

323. KS&T also made multiple investments, and held interests arising from the commitment of capital and other resources in Canada, including:

- a. business development, marketing and trading activities, which amounted to a commitment of resources to economic activities in Ontario's territory that led to the creation of goodwill [REDACTED]<sup>413</sup> In particular, this included KS&T's broader carbon trading business, and the efforts on the part of KS&T to build an enterprise of trading in Ontario emission allowances over the course of several years as part of a sustained, long-term business plan;

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<sup>409</sup> See North American Free Trade Agreement (1994), Chapter Eleven, Article 1139, **Exh. CL-2** (definition of "investment", item (a)). As outlined in para. 119 above, INVISTA was a mandatory participant in the Ontario Cap and Trade Program.

<sup>410</sup> See *id.* (definition of "investment", item (e)).

<sup>411</sup> See *id.* (definition of "investment", item (g)).

<sup>412</sup> These include, but are not limited to, Koch subsidiaries INVISTA and Georgia Pacific. In particular, INVISTA participated in the Cap and Trade Program as a mandatory participant.

<sup>413</sup> See North American Free Trade Agreement (1994), Chapter Eleven, Article 1139, **Exh. CL-2** (definition of "investment", item (h)).

(continued)

- b. commitment of capital through the purchases of carbon allowances from public auctions through KS&T's Ontario CITSS accounts.<sup>414</sup> Over a two-year period, KS&T invested a cumulative total of [REDACTED]; and
- c. intangible property rights “acquired with the expectation or used for the purpose of economic benefit or other business purposes” through carbon allowances issued by Ontario.<sup>415</sup> The carbon allowances that KS&T held were tradeable property rights, both as commodities and under futures contracts, and were capital assets.<sup>416</sup> KS&T used the carbon allowances to generate a return while ultimately assisting the relevant Koch companies to efficiently comply with their emissions-related compliance obligations. At the time of the breach on 15 June 2018, KS&T held [REDACTED] tonnes of carbon allowances as an intangible property rights in its Ontario CITSS account.
324. The Respondent has taken “measures” “relating to” these investments within the meaning of Articles 201 and 1101 of the NAFTA.<sup>417</sup> The Cap and Trade Program, and the actions taken by Ontario in cancelling that program, relate to the Claimants’ specific investments through KS&T, but also to Koch’s broader interests in Ontario, including those of compliance entities such as INVISTA, whose participation in Cap and Trade were one of the incentives for KS&T’s own investment activity. Therefore, the Claimants hold covered investments under the terms of the NAFTA.

## 2. The Claimants Hold “Legacy Investments” Under the USMCA

325. In addition, Annex 14-C of the USMCA defines “legacy investment” as “an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement.”<sup>418</sup> The Claimants likewise fulfil these requirements.

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<sup>414</sup> See *id.* (definition of “investment”, item (h)).

<sup>415</sup> See *id.* (definition of “investment”, item (g)).

<sup>416</sup> See Expert Report of Dr. Robert Stavins (5 October 2021), para. 44, **CER-1**. As capital assets, the emission allowances of the sort that KS&T purchased could also be used as collateral and help secure access to financing. See, e.g., Email from Ontario Finance Minister Charles Sousa to Michael Berends (6 April 2018), **Exh. C-139**. See also *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10, [2013] Ch 156 (Ch), p. 12, **CL-22** (finding that “an EUA [European Union Allowance] is ‘property’ at common law. It is definable, as being the sum total of rights and entitlements conferred on the holder pursuant to the ETS. It is identifiable by third parties; it has a unique reference number. It is capable of assumption by third parties, as under the ETS, an EUA is transferable. It has permanence and stability, since it continues to exist in a registry account until it is transferred out either for submission or sale and is capable of subsisting from year to year.”).

<sup>417</sup> North American Free Trade Agreement (1994), Article 201, **CL-36** (defining a “measure” as including “any law, regulation, procedure, requirement or practice”).

<sup>418</sup> United States-Mexico-Canada Agreement, Annex 14-C, Section 6(a), **Exh. CL-4**.

326. First, the Claimants' investments were established and/or acquired between 1 January 1994 and 1 July 2020 (the date of termination of the NAFTA).
327. Second, the Claimants' investments remained in existence on the date of entry into force of the USMCA. Koch still owns the two factories and global research and development centre located in Ontario through its wholly-owned subsidiaries INVISTA and Georgia Pacific. For its part, KS&T still holds certificates of ownership of its emission allowances, despite their unlawful purported termination by Ontario. Ontario continues to hold the USD 30,158,240.95 that KS&T paid to it in June 2018 for the [REDACTED] carbon allowances Ontario almost immediately made worthless and then purported to cancel through its measures in violation of NAFTA Chapter Eleven.

### 3. The ICSID Convention

328. Finally, the Claimants also fulfil the requirement of an "investment" under Article 25(1) of the ICSID Convention, which states:

The jurisdiction of the Centre shall extend to any legal dispute *arising directly out of an investment*, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. . . . (emphasis added)

329. While the term "investment" is not defined in the Convention,<sup>419</sup> it is widely accepted that jurisdiction will be presumed to exist if a claimant has an "investment" within the meaning of that term under the applicable investment treaty or other legal instrument under which a claim is brought.<sup>420</sup> As outlined above, the requirements of the NAFTA and the USMCA have been fulfilled.
330. Furthermore, the Claimants' economic activity and contributions in Canada equally fulfil commonly-accepted requirements for an "investment" under the ICSID Convention, notably (1) contribution of money or assets; (2) of a certain duration; (3) an element of risk; and (4) a contribution to the economic development of the host State.<sup>421</sup>

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<sup>419</sup> Report of the Executive Directors on The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, para. 27, **Exh. C-140** ("No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).").

<sup>420</sup> See, e.g., *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award (3 November 2008), para. 83, **CL-37**; *Patrick H. Mitchell v. The Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Excerpts of Award (9 February 2004), paras. 43-44, **CL-38**.

<sup>421</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001), para. 52, **CL-39**. See also *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006), paras. 90-106, **CL-40**; *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August

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331. *First*, ICSID tribunals have interpreted the criterion of contribution broadly, to encompass not only payments of money, but also other kinds of non-pecuniary contributions of value, such as “materials, works, or services”.<sup>422</sup> As outlined in para. 287, the Claimants have committed in excess of ██████████ in investing in Ontario’s Cap and Trade Program, in addition to its vital contributions to the effective functioning of the Program as a market participant.
332. *Second*, ICSID tribunals have recognized that “[duration] is a very flexible term ... [and] could be anything from a couple of months to many years.”<sup>423</sup> The Claimants falls into the latter category, having spent several years investing in Ontario’s Cap and Trade Program from 2016 to 2018. The “duration” criterion is thus clearly satisfied in this case.
333. *Third*, ICSID tribunals have been clear that an element of risk is inherent in any long-term investment.<sup>424</sup> The Claimants exposed themselves to financial risk in order to develop KS&T as a profitable enterprise in Ontario over the long-term, including participating in auctions and on the secondary market, while seeking to develop business and turn a profit.

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2004), para. 53, **CL-41**; *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010), paras. 95-114, **CL-42**.

<sup>422</sup> *LESI, S.p.A. and Astaldi, S.p.A. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (12 July 2006), para. 73(i), **CL-43** (original in French: “S’agissant de l’apport: Il ne peut y avoir d’ «investissement» que si une partie fait dans le pays concerne des apports ayant une valeur économique. Sans doute peut-il s’agir au premier chef d’engagements financiers, mais ce serait privilégier une interprétation par trop restrictive que de ne pas admettre d’autres types d’engagements. Ces apports peuvent donc consister en prêts, en matériaux, en travaux, en services, pour autant qu’ils aient une valeur économique. En d’autres termes, il faut que le contractant ait engagé des dépenses, sous quelque forme que ce soit, afin de poursuivre un objectif économique.” Translated: “[T]here can be no investment unless a portion of the contribution is made in the country concerned and brings with it economic value. This would presumably involve financial commitments, in the first place, but it would be too restrictive an interpretation not to admit other sacrifices. These contributions could, then, consist of loans, materials, works, or services, provided they have an economic value.”)

<sup>423</sup> *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012), para. 303, **CL-44**.

<sup>424</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001), para. 56, **CL-39** (“A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor”); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), para. 136, **CL-45** (“Besides the inherent risk in long-term contracts, the Tribunal considers that the very existence of a defect liability period of one year and of a maintenance period of four years against payment, creates an obvious risk for Bayindir.”); *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), para. 109, **CL-46** (“In the present case, the undisputed stopping of the works which took place... and the necessity to renegotiate the completion date constitute examples of inherent risks in long-term contracts”).

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334. *Fourth*, and finally, while the contribution to the host State’s economic development is arguably implicit in the criteria of contribution, duration and risk, and therefore need not be established separately,<sup>425</sup> the Claimants have nonetheless contributed substantially to Canada’s economic development. Most notably, investments like KS&T’s raised a total of CAD 2.9 billion for Ontario, money which was deposited in the GGRA, and was supposed to be re-invested in so-called “green projects” by Ontario.<sup>426</sup>

#### E. Conclusion with Respect to the Tribunal’s Jurisdiction in this Dispute

335. Therefore, the conditions of jurisdiction *ratione voluntatis*, *ratione temporis*, *ratione personae*, and *ratione materiae* have all been met: Canada has consented to jurisdiction through the NAFTA and USMCA, which applies to the breaches by the Respondent of the investment protection therein; all temporal requirements and conditions precedent have been met; and the Claimants qualify as foreign investors with covered investments under the NAFTA, USMCA and the ICSID Convention. The Tribunal thus has jurisdiction to hear this dispute.

#### IV. CANADA IS LIABLE FOR BREACHES OF NAFTA CHAPTER ELEVEN

336. The Respondent has taken “measures” within the meaning of Articles 201 and 1101 of the NAFTA.<sup>427</sup> In particular, the measures in issue include:

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<sup>425</sup> See, e.g., *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case no. ARB/06/5, Award (15 April 2009), para. 85, **CL-47** (“[T]he contribution of an international investment to the *development* of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes “development.” A less ambitious approach should therefore be adopted, centred on the contribution of an international investment to the *economy* of the host State, which is indeed *normally inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk*, and should therefore in principle be presumed.” (emphasis in original)); *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010), para. 111, **CL-42** (“[W]hile the preamble refers to the “*need for international cooperation for economic development*,” it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording... [The] objective is not in and of itself an independent criterion for the definition of an investment. The promotion and protection of investments in host States is expected to contribute to their economic development. Such development is an expected consequence, not a separate requirement, of the investment projects”. (emphasis in original)); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012), para. 220, **CL-48** (“[S]uch contribution may well be the consequence of a successful investment, it does not appear as a requirement.”); *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 October 2013), para. 171, **CL-49** [S]uch contribution may well be the consequence of a successful investment. However, if the investment fails, and thus makes no contribution at all to the host State’s economy, that cannot mean that there has been no investment.”).

<sup>426</sup> Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 71(2)(2), **CL-5**.

<sup>427</sup> North American Free Trade Agreement (1994), Article 201, **Exh. CL-36** (defining a “measure” as including “any law, regulation, procedure, requirement or practice”).

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- a. The Premier-elect’s announcement of 15 June 2018.<sup>428</sup>
  - b. Ontario Regulation 386/18 of 3 July 2018.<sup>429</sup>
  - c. Bill 4 submitted to the Ontario Legislature on 25 July 2018,<sup>430</sup> and adopted as the Cap and Trade Cancellation Act, 2018 (enacted on 31 October 2018).<sup>431</sup>
  - d. Ontario’s formal denial of compensation on 14 March 2019.<sup>432</sup>
337. Through these measures, the Respondent has breached NAFTA Chapter Eleven obligations to provide fair and equitable treatment to NAFTA investors (Article 1105(1)) and to protect such investors against unlawful expropriation (Article 1110). As a result of these breaches, the Respondent is liable for the unlawful expropriation (first indirect, and then direct) of the Claimants’ investment and for its violation of substantive protections under Article 1105(1).

**A. Canada is Responsible for Ontario’s Measures Pursuant to NAFTA Article 105 and International Law of Responsibility**

338. Canada is responsible for the actions taken by Ontario pursuant to both the NAFTA and international law of State responsibility.
339. Article 105 of the NAFTA states:

“The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.”

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<sup>428</sup> Office of the Premier-designate, News Release, “Premier-Designate Doug Ford Announces an End to Ontario’s Cap-and-Trade Carbon Tax” (15 June 2018), **Exh. C-7**.

<sup>429</sup> Office of the Premier, Premier Doug Ford Announces the End of the Cap-and-Trade Carbon Tax Era in Ontario (3 July 2018), **Exh. C-107**. *See also* Ontario Regulation 386/18: Prohibition Against the Purchase, Sale and Other Dealings with Emission Allowances and Credits filed 3 July 2018 Under the Climate Change Mitigation and Low-carbon Economy Act, 2016, S.O. 2016, C. 7, **CL-9**. Email from MOECC, Notice: Ontario’s Cap and Trade Program (3 July 2018), **Exh. C-108** (“As a result, the status of the general account in the Compliance Instrument Tracking System Service (CITSS) belonging to each participant registered in Ontario’s cap and trade program will be changed to “Restricted: Cannot Transfer or Receive”. This means that all Ontario participants will be prevented from both transferring and receiving instruments (including emissions allowances and credits) in their general account in CITSS.”).

<sup>430</sup> Bill 4, An Act respecting the preparation of a climate change plan, providing for the wind down of the cap and trade program and repealing the Climate Change Mitigation and Low-carbon Economy Act, 2016 (25 July 2018), **CCL-32**. *See also* Ontario Government, Stakeholder Briefing Questions and Answers (July 25 and 27, 2018), **Exh. C-110**.

<sup>431</sup> Cap and Trade Cancellation Act 2018, Section 8(4), 31 October 2018, **CL-1**.

<sup>432</sup> Letter from the Ministry of the Environment, Conservation and Parks to KS&T (4 March 2019), **Exh. C-128** (emphasis in original).

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340. Pursuant to this provision, Canada must ensure that each Canadian provincial government act in conformity with Canada’s obligations under the NAFTA.<sup>433</sup>

341. To the same effect, the International Law Commission’s (ILC) Articles on State Responsibility provides at Article 4 that:

“1. The conduct of any State organ shall be considered an act of that State under international law, whether that organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”<sup>434</sup>

342. The ILC Commentary to Article 4 further confirms that:

“Thus, the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs.

[ . . . ]

It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State’s international obligations.”<sup>435</sup>

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<sup>433</sup> *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility (13 July 2018), para. 134, **CL-50**; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 73, **CL-16**.

<sup>434</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Article 4, **CL-51**. Notably, Article 7 of the ILC Articles also make clear that unauthorized or *ultra vires* acts of State organs or entities are attributable to the State. *See id.*, Article 7 and Commentary.

<sup>435</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Art. 4, paras. 6 and 9, pp. 40, 41, **CL-51**. *See generally William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015), para. 306, **CL-52**; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006), n 1, **CL-53**.

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343. Ontario, as a province in Canada, is clearly a State organ in these circumstances. Accordingly, Canada is responsible for any measures adopted by Ontario that are in breach of Canada's obligations under the NAFTA.

**B. The Measures Amount to a Breach of NAFTA Article 1105(1)**

1. The Requirement to Grant Fair and Equitable Treatment under NAFTA Article 1105(1)

344. Article 1105(1) of the NAFTA provides that:

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

345. In 2001, the NAFTA Free Trade Commission (FTC) stated in a Note of Interpretation that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.”<sup>436</sup>

346. The standard to be protected under Article 1105(1), as elaborated by the FTC, has been the subject of significant consideration by NAFTA tribunals.<sup>437</sup> The modern content

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<sup>436</sup> NAFTA Free Trade Commission, Note of Interpretation of Certain Chapter 11 Provisions (31 July 2001), **CL-36**.

<sup>437</sup> Some tribunals have relied upon the standard evoked in the U.S.-Mexico Claims Commission's decision in *F.H. Neer and Pauline E. Neer (United States) v. Mexico*. See, e.g., *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), para. 616, **CL-18**; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), para. 286, **CL-54**; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), paras. 152-153, **CL-55**. Others have further emphasized that *Neer* did not deal with investment protection, and therefore the standard to be applied in investment arbitration is not limited to that articulated in *Neer*. See, e.g., *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), para. 115, **CL-56** (due to this dissimilarity in circumstances, “there is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA [...] are confined to the *Neer* standard of outrageous treatment...”); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003), para. 181, **CL-57** (“There appears no logical necessity and no concordant state practice to support the view that the *Neer* formulation is automatically extendible to the contemporary context of foreign investors and their investments by a host or recipient State.”); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability (17 March 2015), para. 433, **CL-52** (“NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states that is outrageous. The contemporary minimum international standard involves a more significant measure of protection.”); *Eco Oro Minerals Corp. v. The Republic of Columbia* (ICSID Case No. ARB/16/41), Award (9 September 2021), para. 744, **CL-58** (“[T]he Tribunal does not accept that the meaning of MST under customary international law must remain static. The meaning must be permitted to evolve as indeed international customary law itself evolves; it should be understood today to include today's notions of what comprises minimum standards of treatment under customary international law. Colombia correctly accepts that the Tribunal is not rigidly bound by the

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of fair and equitable treatment under the customary international law minimum standard was notably explained by the tribunal in *Waste Management v. Mexico*, and endorsed by many others, in the following terms:

“[T]he 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.”<sup>438</sup>

347. Likewise, the tribunal in *Mobil Investments v. Canada* confirmed:

“(1) the minimum standard of treatment guaranteed by Article 1105 is that which is reflected in customary international law on the treatment of aliens;

(2) the fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.

(3) in determining whether that standard has been violated it will be a relevant factor if the treatment is made against the background of

(i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and

(ii) were, by reference to an objective standard, reasonably relied on by the investor, and

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standard set out in *Neer* and it is the Tribunal’s view that the standard today is broader than that defined in the *Neer* case.”).

<sup>438</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-12**. See also *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability (17 March 2015), paras. 442-444, **CL-52**; *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award (24 March 2016), para. 501, **CL-59** (“Having considered the Parties’ positions and the authorities cited by them, the Tribunal is of the opinion that the decision in *Waste Management II* correctly identifies the content of the customary international law minimum standard of treatment found in Article 1105.”).

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(iii) were subsequently repudiated by the NAFTA host State.”<sup>439</sup>

348. The fundamental protections contained in the minimum standard therefore include protection against denial of justice, a fundamental breach of due process, manifest arbitrariness, targeted discrimination, or the abusive treatment of investors.<sup>440</sup> In addition, whether a responding State has violated an investor’s legitimate expectations will be a “relevant factor” in assessing whether a measure amounts to a breach of the fair and equitable treatment standard.<sup>441</sup>
349. Canada has violated the fair and equitable treatment standard as set out under Article 1105(1) of the NAFTA with respect to its treatment of the Claimants and their investments. As described in the following section, Canada’s actions are manifestly arbitrary and discriminatory, include an express denial of justice, and violate the Claimants’ legitimate expectations.

## 2. Canada Breached the Claimants’ Right to Fair and Equitable Treatment under NAFTA Article 1105(1)

350. In determining whether the fair and equitable treatment standard has been violated in this case, the Tribunal must consider the specific circumstances in issue,<sup>442</sup> and how the standard applies to these facts.<sup>443</sup> As the tribunal in *Windstream v. Canada* most recently stated, “just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts.”<sup>444</sup>
351. Here, the facts undeniably point to a violation of the fair and equitable treatment standard. As elaborated in Parts II.D to II.G above, Ontario abruptly and arbitrarily cancelled the Cap and Trade Program, and cancelled all carbon allowances held in Ontario CITSS accounts. Ontario then provided for compensation in an arbitrary and discriminatory manner, and expressly denied participants in the Cap and Trade Program access to justice. This conduct amounts to a manifest breach of the fair and equitable

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<sup>439</sup> *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), para. 152, **CL-55**. See also *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), para. 454, **CL-15**.

<sup>440</sup> See, e.g., Canada’s Model Foreign Investment Promotion and Protection Agreement (2021) (“FIPA”), Article 8, **CL-60**; Canada-European Union Comprehensive Economic and Trade Agreement, Article 8.10, **CL-61**.

<sup>441</sup> See, e.g., *Windstream Energy, LLC v. Government of Canada*, UNCITRAL, Government of Canada, Rejoinder Memorial (6 November 2015), paras. 208-209, **CL-62**.

<sup>442</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), para. 118, **CL-56**. *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), paras. 98-99, **CL-12**.

<sup>443</sup> *Windstream Energy LLC v. Government of Canada*, UNCITRAL, Award (27 September 2016), para. 362, **CL-63**.

<sup>444</sup> *Ibid.*

(continued)

treatment standard to the detriment of the Claimants, as discussed in the remainder of this Part.

(a) Canada's Measures are Manifestly Arbitrary and Discriminatory

(1) Canada's Measures are Manifestly Arbitrary

352. Canada's measures are manifestly arbitrary, and thus are a breach of NAFTA Article 1105(1).<sup>445</sup> A measure will be "manifestly arbitrary" when it is "evident that the measure is not rationally connected to a legitimate policy objective, such as when a measure is based on prejudice or bias rather than on reason or fact."<sup>446</sup> According to the tribunal in *Cargill v. Mexico*, this includes conduct that moves "beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive."<sup>447</sup>
353. In addition, NAFTA tribunals have also recognized that Article 1105(1) encompasses a State's obligation to ensure regulatory fairness and predictability to investors, which includes the need to avoid sudden and arbitrary modifications of the legal environment of the investment. In *Chemtura v. Canada*, the tribunal found that "Article 1105 of NAFTA seeks to ensure that investors from NAFTA member states benefit from regulatory fairness."<sup>448</sup> Similarly, the tribunal in *Merrill & Ring v. Canada* confirmed "state practice and jurisprudence have consistently supported such a requirement in order to avoid sudden and arbitrary alterations of the legal framework governing the

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<sup>445</sup> *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), para. 152, **CL-55**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-12**; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para. 263, **CL-64**; *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL (ICSID Administered Case), Award (31 March 2010), para. 187, **CL-19**; *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004), para. 94, **CL-65**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), para. 454, **CL-15**. See also Christophe Schreuer, *THE FUTURE OF INVESTMENT ARBITRATION* (C.A. Rogers, R.P. Alford eds, 2009), p. 190, **CL-66** ("In a number of cases, Tribunals have dealt with the prohibition of unreasonable or arbitrary measures in close conjunction with the fair and equitable treatment standard. This tendency is particularly pronounced with Tribunals applying the NAFTA. It may be explained, at least in part, by the fact that the NAFTA does not contain a separate provision on arbitrary or discriminatory treatment.").

<sup>446</sup> Canada's FIPA, Article 8, footnote 1, **CL-60**.

<sup>447</sup> *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), paras. 291, 293, **CL-54**.

<sup>448</sup> *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 August 2010), para. 179, **CL-67**.

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investment.”<sup>449</sup> The tribunal adopted a contextual analysis and held that what matters is the abruptness of the change in the legal environment.<sup>450</sup> And in *Mobil Investments v. Canada*, the tribunal accepted that Article 1105 may protect investors from regulatory changes if those changes are arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard.<sup>451</sup> Most recently, in *Eco Oro v. Colombia*, the tribunal noted it was “satisfied that FET encompassing concepts of non-arbitrariness, transparency and fairness are recognised elements of customary international law”.<sup>452</sup>

354. The measures instituted by Ontario, and attributable to Canada, are manifestly arbitrary, grossly unfair and amount to a breach of Article 1105(1) of the NAFTA.
355. *First*, the measures are manifestly arbitrary because they are not rationally connected to any legitimate policy objective, and are based on prejudice and bias rather than on reason or fact. In particular, the Claimants recall that the Cap and Trade Act specifically provided for the inclusion of market participants in its Cap and Trade Program, in line with best practice and the design recommendations of the WCI. Due to the significant advantages that market participants provide in the efficient functioning of cap and trade programs, Ontario provided for their participation for its own benefit in establishing its Cap and Trade Program.<sup>453</sup> As Dr. Stavins highlights, the inclusion of market participants in cap and trade programs provides important benefits, including the promotion of efficient price discovery, improved market liquidity, lowered transaction costs, and other valuable services.<sup>454</sup> For these reasons, Ontario incorporated market participants in the heart of its Cap and Trade Program, but then arbitrarily targeted them when the program was shutdown.
356. Moreover, Ontario required KS&T to be linked with Koch compliance entities in that market, by mandating that organizations such as the Koch group be regulated as a single corporate entity (based on Ontario’s assessment of information disclosure by participants), in order to promote optimal functioning of the cap and trade market.<sup>455</sup> Then, when dismantling the Cap and Trade Program, Ontario suddenly and completely arbitrarily distinguished between the same entities it had itself grouped together.

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<sup>449</sup> *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL (ICSID Administered Case), Award (31 March 2010), para. 232, **CL-19**.

<sup>450</sup> *Ibid.* See also *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 99, **CL-16**.

<sup>451</sup> *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), para. 153, **CL-55**. See also *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), para. 290, **CL-54** (where the tribunal recognized that an obligation to provide a stable business framework could be protected under Article 1105 where such expectations “arise from a contract or quasi-contractual basis.”).

<sup>452</sup> *Eco Oro Minerals Corp. v. The Republic of Columbia*, ICSID Case No. ARB/16/41, Award (9 September 2021), para. 752, **CL-58**.

<sup>453</sup> See Part II.A.5, *supra*.

<sup>454</sup> See Expert Report of Dr. Robert Stavins (5 October 2021), paras. 92-103, **CER-1**.

<sup>455</sup> See Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 22(1), **CL-5**.

Ontario, for purposes of compensation, arbitrarily disaggregated participants simply in order to deny entities like KS&T, which were engaged to assist compliance entities within its corporate group, from receiving any compensation.

357. Therefore, in a manifestly arbitrary fashion, Ontario suddenly labelled market participants such as KS&T, whose participation Ontario had encouraged and incited to ensure optimal functioning of the program, as “mere speculators” not worthy of compensation. According to Ontario, market participants in deciding to take part in the program has allegedly simply “taken the risk” of suffering losses flowing from Ontario’s arbitrary and illegal behaviour. This is utterly absurd and unworthy of any society that purports to function on the rule of law.
358. To the contrary, when KS&T entered the Ontario Cap and Trade Program, it took on the risks any ordinary trader takes on, that of earning or losing money depending on the skill and knowledge it deployed in its trading activities. KS&T (and any market trader) did not take on the risk of the Ontario Government acting in flagrant violation of its international responsibilities, which is in fact what occurred. In short, seeking to trade for a profit in a government-created and government-sponsored market, at the invitation of that same government, does not suddenly make one a willing target for government-sponsored theft of the valuable commodities (here, carbon allowances) traded in that marketplace. Asserting to the contrary, as Ontario did in 2018, stripping KS&T of its rights, is manifestly absurd and falls far below the minimum standard of treatment of investors on any account. This distinction was not based on reason or fact, and is not rationally connected to any legitimate policy objective.
359. Instead, the true explanation behind Ontario’s approach was purely political: the incoming Ford government had promised that cancelling the Cap and Trade Program would only result in “minimal” compensation costs, as a way to garner support for its measure.<sup>456</sup> In fact, Ontario publicly proclaimed that any compensation it would need to pay to participants in the Cap and Trade Program would be limited to CAD 5 million.<sup>457</sup> Tellingly, Ontario claimed that the Cancellation Act “insulates Ontario from any legal liability in the cancellation of the cap and trade program”.<sup>458</sup> In this way, the measure grossly subverts any purported policy purpose for an ulterior motive: Ontario was determined to limit the amount of compensation by any means, to justify the abrupt cancellation of the program and withdrawal from Cap and Trade.
360. Further supporting this conclusion, the cancellation of the Cap and Trade Act ultimately served no public purpose. While Ontario claimed that the measure was a rational step to eliminate a “carbon tax”,<sup>459</sup> this claim was purely political and unsubstantiated. As

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<sup>456</sup> See, e.g., Ontario Government News Release, Cap and Trade Cancellation Act (26 July 2018), **Exh. C-112**.

<sup>457</sup> See, e.g., Ontario Government, Stakeholder Briefing Questions and Answers (July 25 and 27, 2018) **Exh. C-110**.

<sup>458</sup> See, e.g., Ontario Government News Release, Cap and Trade Cancellation Act (26 July 2018), **Exh. C-112**.

<sup>459</sup> See, e.g., Ontario, Premier Doug Ford Announces the End of the Cap-and-Trade Carbon Tax Era in Ontario (4 July 2018), **Exh. C-107** (“‘I made a promise to the people that we would take immediate action to scrap the cap-and-trade carbon tax and bring their gas prices down,’ said Ford.

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the Ford government knew well at the time, its decision to cancel the Cap and Trade Program merely ensured that Ontario would be subject to a different carbon pricing regime through the federal backstop system.<sup>460</sup> By the calculations of the Financial Accountability Office of Ontario, the carbon price under the federal backstop system was expected to be more than double in Ontario than if its Cap and Trade Program had not been cancelled.<sup>461</sup>

361. Clearly, then, Ontario’s distinction between some entities and not others was arbitrary and served only to further the Ford government’s political goals. The measures taken by the Ontario government in cancelling the Cap and Trade Program served no purpose except to arbitrarily deny compensation to some entities but not others for no real purpose.
362. *Second*, the measures also constitute a sudden and arbitrary alteration of the legal framework governing the Claimants’ investment. The OQC Agreement signed and entered into by Ontario, California and Québec expressly provided for a 12-month period of notice for any party that wished to withdraw from the linkage agreement.<sup>462</sup> The Agreement also provided that any withdrawal from the linkage arrangement would come, as much as possible, at the end of a compliance period, again allowing for a rational winding-down of participation should such a pull-out ever occur.
363. The language incorporated in the OQC Agreement clearly signalled to participants in the Cap and Trade Program Ontario’s good faith intention to ensure a rational transition from the program. The legal framework of the OQC Agreement was, however, suddenly and arbitrarily altered by Ontario’s unexpected and immediate withdrawal from the Program on 15 June 2018. Ontario, in suddenly announcing its pull-out from the program, did not even attempt to justify its failure to respect the transitional provisions. Ontario’s manifest bad faith in flagrantly throwing over the obligations towards Québec and California it had entered into less than a year before, in reckless disregard of the impact of its actions on all participants in the market, only further emphasize the breach of the minimum standard of treatment that occurred here. As a result of Ontario’s actions, which had immediate and negative effects on the market and on KS&T specifically, the legal framework governing the Claimants’ investments were altered in a manifestly arbitrary way.
364. In addition, Ontario’s actions violated its own law, only further reinforcing the arbitrariness of its conduct. Section 60 of the Cap and Trade Regulation required “the Minister” [of MOECC] to confirm the number and vintage of allowances it would be releasing into public auctions at least 60 days in advance.<sup>463</sup> While the Conservative

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‘Today, I want to confirm that as a first step to lowering taxes in Ontario, the carbon tax's days are numbered.’”).

<sup>460</sup> See, e.g., Expert Report of Dr. Robert Stavins (5 October 2021), para. 116, **CER-1**.

<sup>461</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 153, **CER-1**.

<sup>462</sup> Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec (22 September 2017), Article 17, **CL-8**.

<sup>463</sup> Ontario Regulation 144/16, Section 60, **CL-6**.

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Party of Ontario won the election on 7 June 2018, the Liberal Government remained in power up until 11:00am on 29 June 2018, just prior to the Conservative Party’s swearing in to power.<sup>464</sup> Indeed, the Premier and the Premier-elect agreed that the transition of power would not occur until the precise time of the swearing in.<sup>465</sup>

365. Therefore, on 15 June 2018, the current Minister of MOECC (*i.e.* the incumbent government of Ontario) was required to issue a notice confirming the allowances it would be releasing for the public auction scheduled for 15 August 2018. This notice was never issued by the government in power on 15 June 2018, the Liberal Government under Premier Kathleen Wynne, in breach of the Regulation.
366. Instead, the Premier-elect – who had been elected but not yet formally sworn in – simply announced Ontario’s withdrawal from the Cap and Trade system. The Ontario Premier-elect had no basis to implement this policy as of 15 June 2018 and, in so doing, acted in flagrant disregard of statutory authority and the arrangements for the transition of power on 29 June 2018.

## (2) Canada’s Measures are Discriminatory

367. In addition to being manifestly arbitrary, Ontario’s conduct was not based on legal standards, but on discretion and prejudice.<sup>466</sup> As the tribunal in *Waste Management* noted, “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 discriminatory and exposes the claimant to sectional or racial prejudice.”<sup>467</sup> The tribunal in *Nelson v. Mexico* recently noted that “[s]ubsequent NAFTA tribunals have

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<sup>464</sup> Ontario Media Advisory, “UPDATED: Doug Ford and New Government to be Sworn-in by Lieutenant Governor” (28 June 2018), **Exh. C-101**.

<sup>465</sup> See Ontario News Release, “Doug Ford to Become Ontario’s 26<sup>th</sup> Premier” (8 June 2018), **Exh. C-102** (“Premier-designate Doug Ford has selected a transition team and has already begun briefings on government activities and the decisions necessary to choose his Cabinet. The Premier and the Premier-designate have agreed that the transition of power will take place on June 29, 2018.”).

<sup>466</sup> *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), para. 152, **CL-55**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-12**; *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004), para. 94, **CL-65**; *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL (ICSID Administered Case), Award (31 March 2010), para. 187, **CL-18**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), para. 454, **CL-15**; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para. 263, **CL-CL-64**; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), para. 156, **CL-56**; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), para. 135, **CL-68**; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 August 2010), para. 215 *et seq.*, **CL-67**.

<sup>467</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-12**.

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found, under this standard, that discrimination exists if the State wilfully targets the investor.”<sup>468</sup> For example, in *Cargill v. Mexico*, the tribunal noted that:

“With respect to Article 1105, the Tribunal finds that Respondent, in an attempt to further its goals regarding United States trade policy, targeted a few suppliers of HFCS [high fructose corn syrup], all but annihilating a series of investments for the time that the permit requirement was in place. The Tribunal finds this willful targeting to breach the obligation to afford Claimant fair and equitable treatment.”<sup>469</sup>

368. The conclusion that the fair and equitable treatment provision covers certain forms of “discrimination” (*other* than nationality-based), including targeted discrimination, is echoed by the findings of scholars and the United Nations Conference on Trade and Development (UNCTAD).<sup>470</sup> As the UNCTAD study concludes:

“Tribunals have held that the FET standard prohibits discriminatory treatment of foreign investors and their investments. The non-discrimination standard that forms part of the FET standard should not be confused with the treaty obligation to grant the most favourable treatment to the investor and its investment. While the national treatment and MFN standards deal with nationality-based discrimination, the non-discrimination requirement as part of the FET standard appears to prohibit discrimination in the sense of specific targeting of a foreign investor on other manifestly wrongful grounds such as gender, race or religious belief, or the types of conduct that

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<sup>468</sup> *Joshua Dean Nelson and Jorge Blanco v. United Mexican States*, ICSID Case No. UNCT/17/1, Award (5 June 2020), para. 351, **CL-69**

<sup>469</sup> *Cargill Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, (18 September 2009), para. 2, **CL-54**. See also *id.*, paras. 300, 303, 387, 550. Note that the tribunal in *Glamis Gold v. United States* also made the following distinction between different types of discrimination: “The Tribunal notes that, as exhibited under the NAFTA, there are two types of discrimination: nationality-based discrimination and discrimination that is founded on the targeting of a particular investor or investment”. See *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), n. 1087, **CL-18**. While the *Glamis* tribunal mentioned that nationality-based discrimination “falls under the purview” of the national treatment provision (NAFTA Article 1102), its reasoning suggests that targeted discrimination is covered by Article 1105. See *id.*, paras. 22, 24, 616, 627, 762, 765, 776, 779, 788, 824, 828 616. The tribunal also explained the reasons why it examined this discrimination-related allegation in the context of arbitrariness. See *id.*, para. 559 and nn. 1087 and 1128.

<sup>470</sup> See, e.g., Andrew Newcombe & Luis Paradell, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* (Kluwer 2009), pp. 289-291, **CL-70**; Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice* (2000) 70 *BRITISH YIL* 137, p. 133, **CL-71** (“if there is discrimination on arbitrary grounds, or if the investment has been subject to arbitrary or capricious treatment by the host State, then the fair and equitable standard has been violated”); Barnali Choudhury, *Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law* (2005) 6(2) *J. WORLD INVEST. & TRADE* 297, pp. 313-314, **CL-72**; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Second Edition, Oxford University Press 2017), § 7.221, **CL-73**.

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amount to a “deliberate conspiracy [...] to destroy or frustrate the investment”. A measure is likely to be found to violate the FET standard if it evidently singles out (*de jure* or *de facto*) the claimant and there is no legitimate justification for the measure.”<sup>471</sup>

369. Therefore, to identify whether the State has wilfully targeted the investor, tribunals have considered whether a measure singles out (*de jure* or *de facto*) the claimant, and then then whether a State has any “legitimate justification” for such targeting.<sup>472</sup>
370. Here, Ontario clearly arbitrarily targeted a specific class of investors. As outlined above, Ontario expressly encouraged and benefited from the participation of market participants in its Cap and Trade Program. However, in the Cancellation Act, Ontario discriminated between different classes of participants in the Program. For example, while Ontario required KS&T to be linked with Koch compliance entities in that market during the life of the Cap and Trade Program, Ontario suddenly discriminated between these same entities it had itself grouped together for the purposes of compensation.
371. These actions by Ontario effectively picked “winners and losers” amongst entities participating in the Cap and Trade Program.<sup>473</sup> For example, industrial facilities that did not procure allowances in order to ensure their full compliance with the Program did not have to true up their holdings. Ironically, this put them at a competitive advantage compared with their peers that had procured allowances in an effort to comply with the Program. In addition, mandatory participants, essentially Ontario-based industrial manufacturers, most of whom were Canadian-owned entities, were suddenly relieved from any compliance obligations. Ontario fuel providers that procured allowances in the WCI auctions through California (and who passed on these costs to Ontario tax payers through their fuel sales) received substantial windfalls, as the Cancellation did not require them to make up any shortfall. By contrast, fuel providers that hedged future fuel sales by buying additional allowances were ineligible for compensation, even though they were not able to recoup the costs of these purchases through fuel sales yet to be made. Worst of all treated were the market participants who were unfairly singled out for non-compensation and annulment without payment of their allowances.
372. As Dr. Stavins explains:

“In developing its compensation scheme, Ontario adopted an approach with uneven treatment across participants in the market, creating winners and losers through arbitrary terms of compensation for purchased allowances. This compensation scheme was expected to result in compensation for only 1 percent of allowance holders and pay out just C\$5 million (compared to, for example, the C\$3.9 billion value of all allowances held by participants in the Ontario program at the

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<sup>471</sup> UNCTAD, *Fair and Equitable Treatment 7* (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012), p. 82, **CL-74** (internal citations omitted).

<sup>472</sup> *Joshua Dean Nelson and Jorge Blanco v. United Mexican States*, ICSID Case No. UNCT/17/1, Award (5 June 2020), para. 352, **CL-69**.

<sup>473</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 18, **CER-1**. See also Witness Statement of Michael Berends (5 October 2021), paras. 102-113, **CWS-1**.

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time). Market participants, notably, were ineligible for any compensation.”<sup>474</sup>

373. Moreover, Ontario had no legitimate justification for such targeting, as explained in detail above and as noted by Dr. Stavins:

“Without any justification, Ontario stated that it withheld compensation to market participants because ‘market participants without a compliance obligation chose to take risks as market traders and speculators.’ Not only does this statement provide no clear foundation or justification for the decision, but there is not any obvious foundation or justification for the decision from the standpoint of economics or finance.

Moreover, the failure to recognize market participants’ financial losses was inconsistent with the principles Ontario embraced through its contributions to the WCI design rules, which provided for fair and open access to allowance markets, recognized the benefits of market participants, and served as the foundation for Ontario’s program.”<sup>475</sup>

374. In abruptly and arbitrarily withdrawing from the Cap and Trade Program, Ontario’s conduct constituted an unexpected and shocking repudiation of the goals and legal framework of the Cap and Trade Program. This action was taken for an ulterior motive, to serve the political interests of the Ontario Conservative Party, and arbitrarily created “winners and losers” amongst entities that Ontario had originally specifically established as entities of equal rights and participation value in the Cap and Trade Program. Such actions undoubtedly rise to the level of manifest arbitrariness and discriminatory treatment under Article 1105(1) of the NAFTA.

(b) Canada’s Measures Amount to a Denial of Justice

375. Under the minimum standard of treatment set out under Article 1105(1), Canada has an obligation not to deny justice, and to afford due process of law.<sup>476</sup>
376. A denial of justice will arise where a national legal system fails to provide minimum standards of administration of justice, including – fundamentally – a denial of access to the courts.<sup>477</sup> As recently stated by the NAFTA tribunal in *Lion v. Mexico*, this category

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<sup>474</sup> Expert Report of Dr. Robert Stavins (5 October 2021), para. 18, **CER-1**.

<sup>475</sup> *Id.*, paras. 19-20.

<sup>476</sup> See, e.g., *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-12**.

<sup>477</sup> Andrew Newcombe and Lluís Paradell, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* (Kluwer Law International 2009), pp. 240-241, **CL-70**; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *INTERNATIONAL INVESTMENT ARBITRATION*, **CL-73** (citing Harvard Draft on the Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners (1929), 23 *AJIL Special Supp* 173, Article 9 (“Denial of justice exists when there is a denial, unwarranted delay, or obstruction of access to courts”).).

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of procedural denial of justice is “uncontroversial”.<sup>478</sup> The *Lion* tribunal quotes Professor Paparinskis in explaining:

“The easiest case, accepted as uncontroversially wrongful under the Hague Conference, was a discriminatory denial of access to court, described in the Hague Texts as the situation where “the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies.”<sup>479</sup>

377. The *Lion* tribunal also referred to the judgment in *Ambatielos* as offering “insight into the basic right of foreigners to access local courts in pursuit of justice”, quoting:

“Thus, when “free access to the Courts” is covenanted by a State in favour of the subjects or citizens of another State, the covenant is that the foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights...”<sup>480</sup>

378. As noted by the tribunal in *Grand River v. United States*:

“[A] denial of justice in international law [involves] the failure of a national judicial system, taken as a whole, to render due process to aliens. The concept therefore involves a duty to “create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, or is corrected.” Brownlie likewise sees the concept as relating to the role of courts, taking the broader definition of the Harvard Research draft as “probably” the best guide to the term’s meaning in international law.

Denial of justice exists when there is a denial, unwarranted delay or *obstruction of access to courts*, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.”<sup>481</sup>

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<sup>478</sup> *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (20 September 2021), para. 221, **CL-75**.

<sup>479</sup> *Ibid.*, (citing M. Paparinskis, “The International Minimum Standard and Fair and Equitable Treatment” (2013), Oxford Monographs in International Law, p. 190).

<sup>480</sup> *Id.*, para. 225.

<sup>481</sup> *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Award (12 January 2011), para. 223, **CL-20**. (emphases added). In this respect, NAFTA tribunals have referred to “manifest injustice” such as a lack of due process that leads to an outcome which “offends a sense of judicial propriety”, or where the conduct in question was “arbitrary, grossly unfair, unjust or idiosyncratic”. See *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), para. 132, **CL-68**; and *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-12**.

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379. The obligation to provide a “system of justice” falls to State’s courts, legislative or executive branches,<sup>482</sup> and international law protects the institution of adjudication, a fundamental concept of the rule of law.<sup>483</sup> In finding that Mexico had breached the minimum standard of treatment under the NAFTA, the *Lion* tribunal summed up:

“In conclusion, the test is an objective one: denial of justice requires a finding of an improper and egregious procedural conduct by the local courts (whether intentional or not), which does not meet the basic internationally accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety.”<sup>484</sup>

380. Therefore, the relevant question for the Tribunal to determine is whether Canada has adequately provided access to its courts and a system of justice which affords fair, equitable and non-discriminatory treatment.

381. In circumstances where the Claimants have been denied the opportunity to assert claims and to obtain remedies in Canada’s justice system for the damages sustained by Ontario’s actions, the Claimants have clearly been denied justice and Canada has violated the fair and equitable treatment standard required under Article 1105(1) of the NAFTA.

382. *First*, the Cancellation Act specifically denied the Claimants access to the courts.<sup>485</sup> In so doing, Ontario prohibited *any* proceeding for *any* remedy or relief (including equitable remedies and damages) across a broad range of legal avenues, including laws protecting against expropriation, contract, restitution, tort, misfeasance, bad faith, trust or fiduciary obligation, any remedy under any statute, and “any other remedy or

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<sup>482</sup> Notably, NAFTA Chapter Eleven does not distinguish among executive, legislative, or judicial actions. To the contrary, under NAFTA Article 201, a “measure” includes “any law, regulation, procedure, requirement or practice”. Likewise, as stated in Article 4 of the ILC Draft Articles on State Responsibility: “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercise legislative, executive, judicial or other functions.” *See* Responsibility of States for Internationally Wrongful Acts, Article 4(1), **CL-125**.

<sup>483</sup> For example, the concept of denial of justice has found concrete expression in international human rights law. Article 8 of the Universal Declaration of Human Rights 1948 provides: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Article 10 adds: “Everyone is entitled in fully equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations.” *See* Universal Declaration of Human Rights (10 December 1948) GA Res UN Doc. A/811, Articles 8 and 10, **CL-76**. Likewise, Article 14(1) of the International Covenant on Civil and Political Rights provides: “All persons shall be equal before the courts and tribunals. In the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. *See* International Covenant on Civil and Political Rights (ICCPR) (signed 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 14(1), **CL-77**.

<sup>484</sup> *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (20 September 2021), para. 299, **CL-75**.

<sup>485</sup> Cap and Trade Cancellation Act, 2018, Section 10, **CL-1**.

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relief.”<sup>486</sup> Moreover, the Cancellation Act purported to deny the Claimants access to *any* system of justice, including a prohibition on enforcing judgments or orders made by courts or tribunals outside of Canada. Such sweeping prohibitions of the rule of law is the very definition of a denial of justice under international law.<sup>487</sup>

383. *Second*, the measures instituted by Ontario pursuant to the Cancellation Act have resulted in gross unfairness to the Claimants. Canada failed to provide guarantees generally considered to be indispensable to the proper administration of justice as a whole including, as noted above, access to courts or even a process for administrative review of the decision to deny the Claimants compensation. For example, the Final Determination to deny compensation to KS&T was made by a Mr. Jeff Hurdman, Director, Financial Instruments Branch, Climate Change and Resiliency Division within the Ministry of the Environment, Conservation and Parks.<sup>488</sup> The Final Determination provided no avenue to appeal Mr. Hurdman’s decision even within his own Division or Ministry, let alone access to a broader system of judicial review.
384. Instead, Ontario chose to limit the fundamental right of review and access to justice of participants like the Claimants in favour of fulfilling political promises that the cancellation of the Cap and Trade Program would not give rise to significant compensation by the newly-elected government, as outlined above.
385. *Finally*, the denial of justice perpetuated by Canada is only further confirmed by the substantive lack of due process in Ontario’s passage of the Cancellation Act and its treatment of the Claimants’ applications and correspondence requesting compensation. As outlined at paras. 237 to 254 above, Ontario pushed through the enactment of the Cancellation Act without due process and in violation of its own requirements at domestic law. In seeking to hastily enact Bill 4, Ontario illegally sought to avoid engaging in the public consultations mandated under the EBR, as confirmed by the Ontario Supreme Court. Only in reaction to a filed lawsuit on these issues did the new Ontario Government back down from its initial position and reluctantly proceeded to summary public consultations.
386. Furthermore, Ontario’s treatment of the Claimants’ applications for compensation demonstrate a clear lack of due process on the part of the Government. The Claimants made significant efforts to meet with the Province of Ontario to explore ways in which they could be compensated,<sup>489</sup> complete the mandated application form, and draft thoughtful and extensive comments on the Ministry’s Preliminary Determination

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<sup>486</sup> *Ibid.*

<sup>487</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), para. 151 (“circumstances can be envisaged where the conferral of a general immunity from suit for conduct of a public authority affecting a NAFTA investment could amount to a breach of Article 1105 of NAFTA.”).

<sup>488</sup> Letter from the Ministry of the Environment, Conservation and Parks to KS&T (14 March 2019), **Exh. C-10**.

<sup>489</sup> *See* Part II.E.2, *supra*. *See also* Letter from KS&T to the Attorney General of Ontario (24 October 2018), **Exh. C-114**; Letter from KS&T to the Premier’s Office (24 October 2018), **Exh. C-115**; Letter from KS&T to the Attorney General of Ontario (14 November 2018), **Exh. C-126**.

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denying them compensation.<sup>490</sup> By contrast, on most occasions the correspondence sent to the Ontario government was ignored, and the Claimants received no response.<sup>491</sup> When the Claimants *did* receive a response, it was in the form of just a few paragraphs, dismissing the Claimants' requests for compensation out of hand without any sound reasons, justification or engagement with the Claimants' comments and concerns.<sup>492</sup>

387. Ontario's measures in denying any access to courts or administrative review under the Cancellation Act, and its failure to accord both procedural and substantive due process to the Claimants, clearly violates Article 1105(1) of the NAFTA.

(c) Canada Violated the Claimants' Legitimate Expectations

388. In addition to the manifestly arbitrary nature of Canada's measures, and the complete denial of justice thrust upon the Claimants, it is relevant that Canada also violated the Claimants' legitimate expectations, further demonstrating Canada's violation of Article 1105(1) of the NAFTA.<sup>493</sup>

389. As set out above, the tribunal in *Mobil Investments v. Canada* noted that a State's breach of representations made to an investor that were reasonably relied on by the investor and subsequently repudiated could amount to a breach of Article 1105.<sup>494</sup> Similarly, in *Waste Management v. Mexico*, the tribunal noted that "[i]n applying [the fair and equitable treatment standard under Article 1105] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."<sup>495</sup> In *BG Group v. Argentina*, the tribunal adopted the reasoning of the *Waste Management* tribunal in concluding that "commitments to the investor are relevant to the application of the minimum standard of protection under international law."<sup>496</sup> Similarly, the tribunal in *Glamis Gold v. United States* held that a breach of an investor's legitimate expectations could constitute a breach of Article 1105(1) "where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct. In this way,

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<sup>490</sup> See Letter from KS&T to the Premier's Office (14 February 2019), **Exh. C-141**; Letter from KS&T to Ministry of the Environment, Conservation and Parks (11 March 2019), **Exh. C-130**.

<sup>491</sup> See Part II.E.2(b), *supra*.

<sup>492</sup> See Part II.F, *supra*. See also Letter from the Ministry of the Environment, Conservation and Parks to KS&T (14 March 2019), **Exh. C-117**.

<sup>493</sup> See, e.g., *Windstream Energy, LLC v. Government of Canada*, UNCITRAL, Government of Canada, Rejoinder Memorial (6 November 2015), paras. 208-209, **CL-62**.

<sup>494</sup> *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), paras. 152, 154, **CL-55b**

<sup>495</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-12**.

<sup>496</sup> *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award (24 December 2007), para. 294, **CL-78**. While the claimant in this dispute argued that the treaty in question provided a "more generous independent standard of protection", the *BG Group* tribunal did not consider it necessary to address in light of the facts in issue, and therefore was focusing its remarks specifically on the international minimum standard. See *id.*, para. 291.

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a State may be tied to the objective expectations that it creates in order to induce investment.”<sup>497</sup>

390. The decisions of the tribunals in *Thunderbird v. Mexico* and *Bilcon v. Canada* further demonstrates that legitimate expectations are integral to the fair and equitable treatment standard under customary international law.<sup>498</sup> As the *Thunderbird* tribunal observed:

“Having considered recent investment case law and the good faith principle of international customary law, the concept of “legitimate expectations” relates, within the context of the NAFTA framework, to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.”<sup>499</sup>

391. Ontario’s conduct undoubtedly created reasonable and justifiable expectations on the part of the Claimants, who acted in reliance of this conduct and suffered significant damages as a result.
392. *First*, the Claimants had legitimate expectations that their position within the structure of the Cap and Trade Program would be respected, even in the case of a withdrawal, and that they would not be the subject of unfair targeting (as in fact occurred), because Ontario had for years acknowledged and promoted the role of market participants in Cap and Trade. As explained in detail in paras. 50 to 78 above, Ontario had worked to promote WCI principles as far back as 2008, including the key role of market participants, and deliberately incorporated these principles into the structure of its Cap and Trade Program in 2016.<sup>500</sup> Indeed, Ontario designed its program to allow for linkage to the cap and trade programs of Québec and California, both WCI Partner jurisdictions whose programs include market participants. As a result, market participants were expressly provided for in the Cap and Trade Act. The importance of market participants in the Ontario Cap and Trade Program was further highlighted by

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<sup>497</sup> *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), para. 621, **CL-18**, citing *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), para. 147, **CL-17**.

<sup>498</sup> *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), para. 147, **CL-17**; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability (17 March 2015), paras. 444-454, **CL-52**.

<sup>499</sup> *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), para. 147, **CL-17**. See also *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability (17 March 2015), paras. 444-454, **CL-52** (confirming that host State representations, assurances or promises aimed at persuading an investor to make an investment commitment may give rise to reasonable expectations that can result in, or at least serve as starting point for a breach of the international minimum standard of treatment).

<sup>500</sup> See Part II.A, *supra*.

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the Ontario government's repeated and specific encouragement of participation of market participants in the market.<sup>501</sup>

393. All of these actions created an expectation that Ontario understood, valued and respected the role market participants like KS&T played in ensuring the success of the Cap and Trade Program. This is precisely the expectation that the Claimants reasonably held, particularly in light of Ontario's explicit invitation and encouragement of market participants in the Cap and Trade Program. Yet as of June 2018, the Ontario Government's actions fundamentally repudiated its previous position and suddenly arbitrarily targeted market participants like KS&T as "mere speculators", to serve the illegal political goal of seeking to minimize compensation arising out of the cancellation at all costs.
394. *Second*, the Claimants had legitimate expectations based on the express written commitments entered into by Ontario, Québec and California on 22 September 2017 through the OQC Agreement. In that Agreement, the parties expressly agreed that if any of its parties sought to withdraw from the arrangement, they would endeavour to provide at least a year's notice.<sup>502</sup> By linking by formal agreement with WCI jurisdictions, Ontario created reasonable and justifiable expectations on the part of the Claimants that it would act in good faith to ensure that any exit from the Cap and Trade Program would be long term and orderly.
395. On this basis, at the time the Claimants invested USD 30,158,240.95 in Ontario for the May 2018 joint auction, the Claimants had the legitimate and eminently reasonable expectation that Ontario would act in good faith under the OQC Agreement and make best efforts to adhere to the 12 month notice period of its intention to withdraw from the joint program. This expectation was widely held by the industry, and therefore was clearly reasonable.<sup>503</sup>
396. However, Ontario made no effort to comply with these commitments, and abruptly announced its intention to withdraw from the Cap and Trade Program on 15 June 2018, as well as announcing that it would no longer participate in the joint auctions – effective immediately. Thus, the Claimants' legitimate expectations that Ontario would act in good faith in accordance with its commitments under the OQC Agreement were breached.
397. Nonetheless, however, the Claimants maintained the legitimate expectation that Ontario would wind down the Cap and Trade Program in an "orderly" manner, arising

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<sup>501</sup> See Part II.A, *supra*.

<sup>502</sup> Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec, 22 September 2017, Article 17 (Withdrawal Procedure), **CL-8**. ("A Party may withdraw from this Agreement by giving written notice of intent to withdraw to the other Parties. A Party that intends to withdraw from this Agreement shall endeavor to give 12 months notice of intent to withdraw to the other Parties. A Party that intends to withdraw from this Agreement shall endeavor to match the effective date of withdrawal with the end of a compliance period.").

<sup>503</sup> See also Witness Statement of Michael Berends (5 October 2021), para. 80, **CWS-1**.

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from Ontario's repeated refrain.<sup>504</sup> For example, in abruptly announcing the cancellation of the Program on 15 June 2018, the Office of the Premier-elect stated:

“The Premier-designate confirmed that he has directed officials to immediately take steps to withdraw Ontario from future auctions for cap-and-trade credits. The government *will provide clear rules for the orderly wind down* of the cap-and-trade program.”<sup>505</sup>

398. As explained by Graeme Martin, KS&T relied on these statements, and engaged with Ontario in good faith to promote approaches ensuring an “orderly exit” from the Cap and Trade Program.<sup>506</sup> However, Ontario's exit from the Cap and Trade Program was anything but orderly. The following month, Ontario obliterated these expectations by introducing Bill 4, which confirmed Ontario's sudden and arbitrary alteration of the legal framework governing the investment, and its intention to deny any compensation to the Claimants. In so doing, Ontario failed to honour the Claimants' expectations, and caused the Claimants to suffer significant damages.
399. Canada, through the actions of Ontario, has therefore breached Article 1105(1) of the NAFTA. As demonstrated in the preceding sections, Ontario's measures were manifestly arbitrary and amounted to discriminatory targeting of KS&T as an investor and, through it, Koch itself. Moreover, Ontario's measures amounted to a clear denial of justice, and violated the Claimants' legitimate expectations. These breaches give rise to compensation obligations, discussed in Part V (“Relief Requested”).

### **C. The Measures Amount to an Expropriation of the Claimants' Investment Contrary to NAFTA Article 1110**

400. Article 1110 of the NAFTA prohibits the NAFTA Parties from expropriating the investments of investors without compensation, and states in relevant part:

“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;

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<sup>504</sup> See, e.g., Office of the Premier-designate, News Release, “Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax,” 15 June 2018, **Exh. C-7**; Email from MOECC, Notice: Ontario's Cap and Trade Program (3 July 2018), **Exh. C-142** (“The Province is committed to an orderly wind down of the Cap and Trade Program. In the coming weeks, more details will be shared to support the orderly wind down.”); News Release, Ontario Closes the Book on Cap and Trade Carbon Tax Era (25 March 2019), **Exh. C-109**.

<sup>505</sup> Office of the Premier-designate, News Release, “Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax,” 15 June 2018, **Exh. C-7**.

<sup>506</sup> Witness State of Graeme Martin (4 October 2021), para. 56, **CWS-2**. See also Witness Statement of Michael Berends (5 October 2021), para. 79, **CWS-1**.

(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...”

401. As described in the following sections, Canada has both indirectly and directly expropriated the Claimants’ investments in violation of Article 1110 of the NAFTA. The announcement of the Premier-elect on 15 June 2018, and the subsequent introduction of Regulation 386/18 on 3 July 2018 amounted to an indirect expropriation (Part IV.C.1). In addition, the enactment of the Cancellation Act on 31 October 2018 (following the introduction of Bill 4 on 25 July 2018) amounted to a direct expropriation through the purported nullification of the rights KS&T held in the carbon allowances purchased on 15 May 2018 (Part IV.C.2). These actions are unlawful under Article 1110(a) to (d) (Part IV.C.3).
402. The effect of Ontario’s actions was not only such as to expropriate the carbon allowances held in KS&T’s Ontario CITSS account as of 15 June 2018, but also to destroy KS&T’s broader carbon trading business in Ontario.

1. Canada Indirectly Expropriated the Claimants’ Investments

(a) Indirect Expropriation Under NAFTA Article 1110

403. Article 1110 contemplates both direct and indirect expropriation. Under this provision, an indirect expropriation will occur where the investor is substantially deprived of the value of its investment by measures attributable to the NAFTA Party. In *Metalclad v. Mexico*, the tribunal described expropriation under Article 1110 as follows:

“Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”<sup>507</sup>

404. The tribunal in *S.D. Myers v. Canada* similarly found that State action that deprives an investor of the economic benefits of its investment amounts to expropriation.<sup>508</sup> Likewise, in *Waste Management v. Mexico*, the tribunal considered that:

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<sup>507</sup> *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 103, **CL-16**.

<sup>508</sup> *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para. 283, **CL-64**. See also *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award (21 November 2007), para. 244, **CL-79** (“As to the intensity of the measure, a first indication is whether the investor lost control of the investment by losing rights of ownership or management, even if the legal title was not disturbed.”).

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“Article 1110(1) distinguishes between direct or indirect expropriation on the one hand and measures tantamount to an expropriation on the other. An indirect expropriation is still a taking of property. By contrast where a measure tantamount to an expropriation is alleged, there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant.”<sup>509</sup>

405. A finding of indirect expropriation is not conditional on the investor no longer controlling the investment, but rather turns on whether the governmental measures have deprived the owner of substantially all of the benefits of its vested property rights.<sup>510</sup> For example, tribunals have found that a substantial deprivation amounting to expropriation occurs where: the investor has lost, in whole or in significant part, the use or reasonably-to-be expected economic benefit of the investment;<sup>511</sup> the most economically optimal use of the investment has been rendered useless;<sup>512</sup> or the investment’s economic value has been neutralized or destroyed, as if the rights related thereto had ceased to exist.<sup>513</sup>

406. In approaching claims of indirect expropriation under the NAFTA, the tribunal in *Windstream v. Canada* stated that:

“NAFTA tribunals have generally taken the view that under Article 1110 of NAFTA the determination of whether an indirect expropriation has taken place is in the first place a matter of evidence,

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<sup>509</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 143, **CL-12**.

<sup>510</sup> See *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para. 604, **CL-80** (“measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims. This is undisputed under international law”. (internal citations omitted)); *Phelps Dodge Corp. v. Islamic Republic of Iran* (Award No. 217-99-2), 10 Iran-US CTR 121 (19 March 1986), para. 22, **CL-81** (“A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected”); *Petrolane Inc. and Ors. v. Islamic Republic of Iran and Ors.*, 27 Iran-US CTR 64 (27 September 1991), para. 96, **CL-82** (prevention of exportation of excess equipment “deprived the Claimant of the effective use, benefit, and control of the equipment . . . in breach of contract, as well as constituting an expropriation”).

<sup>511</sup> *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 103, **CL-16**; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/05, Award (21 November 2007), para. 240, **CL-79**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007), paras. 7.5.11-7.5.16, **CL-83**.

<sup>512</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/05, Award (21 November 2007), para. 246, **CL-79**.

<sup>513</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 115, **CL-84**; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), para. 6.62, **CL-85**; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para. 604, **CL-80**.

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that is, a factual determination of whether an effective or *de facto* taking of property that is attributable to the State has taken place, even if there has been no formal transfer of title, and even if the host State has not obtained any economic benefit. If it is determined that such a *de facto* taking has indeed taken place, the issue arises as to whether the taking is lawful, and what the appropriate form and level of relief should be. In certain circumstances, the question may also arise as to whether the alleged taking is excused by a justification provided under international law, such as the police powers doctrine.”<sup>514</sup>

(b) Canada Has Indirectly Expropriated the Claimants’ Investment

407. Therefore, an indirect expropriation will exist when the *de facto* taking of property has amounted to a substantial deprivation of an investor’s investments, as considered on a case-by-case, fact-based inquiry.<sup>515</sup> In considering whether an indirect expropriation has occurred, the Tribunal should consider both the objective impact of the measure on the economic benefit to the Claimants’ investment, as well as the relative impact of the measure on the Claimants’ reasonably held expectations.<sup>516</sup> Here, Ontario’s actions

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<sup>514</sup> *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award (27 September 2016), para. 284, **CL-63**. See also *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award (8 June 2009), para. 357, **CL-18** (“Several NAFTA tribunals agree on the extent of interference that must occur for the finding of an expropriation, phrasing the test in one instance as, “the affected property must be impaired to such an extent that it must be seen as ‘taken’”; and in another instance as, “the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been ‘taken’ from the owner.” Therefore, a panel’s analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: “[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto ... had ceased to exist.” The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures “substantially impair[ed] the investor’s economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.”).

<sup>515</sup> See *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 August 2010), para. 249, **CL-67** (“The determination of whether there has been a “substantial deprivation” is a fact-sensitive exercise to be conducted in the light of the circumstances of each case. . . . One important feature of fact-sensitive assessments is that they cannot be conducted on the basis of rigid binary rules. It would make little sense to state a percentage or a threshold that would have to be met for a deprivation to be “substantial” as such *modus operandi* may not always be appropriate. For instance, one could think of cases where one specific asset (a building, a piece of land, a line of business) which represents a part of the value of all the different assets held by a foreign investor in the host State has been entirely expropriated. In such case, applying a percentage or threshold approach to the overall assets held by the investor in the host State would preclude the deprivation from being “substantial”, whereas applying the same assessment to the specific asset in question would lead to the opposite conclusion. Given the diversity of situations that may arise in practice, it is preferable to examine each situation in the light of its own specific circumstances.”).

<sup>516</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), paras. 149-150, **CL-84**.

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amounted to an indirect expropriation based on these tests, and there is no legitimate justification for these actions under any theory of police power under international law.

408. *First*, the announcement of 15 June 2018 amounted to a *de facto* taking of the Claimants' property. The economic impact of the Premier-elect's announcement amounted to the substantial deprivation of the economic value of the Claimants' investment in Canada.<sup>517</sup> The manner in which Ontario abruptly withdrew from the Cap and Trade Program *de facto* stranded all of the Claimants' Ontario-held carbon allowances immediately. In this way, KS&T was not able to use, enjoy or dispose of its investment,<sup>518</sup> and the taking amounted to a "total impairment."<sup>519</sup> This *de facto* taking was only confirmed by the introduction of Regulation 386/18, which officially froze all Ontario CITSS accounts, officially forbidding participants like KS&T from undertaking any purchase, sale, trade or transfer of carbon allowances held in Ontario CITSS accounts, effectively immediately.<sup>520</sup> As a result of these *de facto* and *de jure* actions, KS&T has been substantially deprived of the ownership rights held in its investments in Canada and has suffered significant loss as a result. These actions were ultimately made permanent, and constitute a "lasting removal" of the use of the economic rights to the investments.<sup>521</sup>

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<sup>517</sup> *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award (26 June 2000), para. 102, **CL-86** ("[...] under international law, expropriation requires a 'substantial deprivation[']"); *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, Award (31 March 2010), para. 145, **CL-19** ("The standard of substantial deprivation identified in *Pope & Talbot*, and followed by many other decisions, both in the context of NAFTA and other investment protection agreements, is the appropriate measure of the requisite degree of interference."); *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Award (12 January 2011), para. 148, **CL-20**; *Glamis Gold, Ltd., v. United States of America*, UNCITRAL, Award (8 June 2009), para. 357, **CL-18**.

<sup>518</sup> *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award (26 June 2000), para. 102, **CL-86** (citing *Harvard Draft Convention on the International Responsibility of States for Injury to Aliens*, Article 10(3) and the American Law Institute, *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (1986), § 712, Comment (e)).

<sup>519</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 262, cited by Canada in *Windstream Energy, LLC v. Government of Canada*, UNCITRAL, Government of Canada, Counter-Memorial (20 January 2015), para. 477, **CL-87**.

<sup>520</sup> Office of the Premier, Premier Doug Ford Announces the End of the Cap-and-Trade Carbon Tax Era in Ontario (3 July 2018), **Exh. C-107**. See also Ontario Regulation 386/18: Prohibition Against the Purchase, Sale and Other Dealings with Emission Allowances and Credits filed 3 July 2018 Under the Climate Change Mitigation and Low-carbon Economy Act, 2016, S.O. 2016, C. 7, **CL-9**. Email from MOECC, Notice: Ontario's Cap and Trade Program (3 July 2018), **Exh. C-108** ("As a result, the status of the general account in the Compliance Instrument Tracking System Service (CITSS) belonging to each participant registered in Ontario's cap and trade program will be changed to "Restricted: Cannot Transfer or Receive". This means that all Ontario participants will be prevented from both transferring and receiving instruments (including emissions allowances and credits) in their general account in CITSS.").

<sup>521</sup> *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para. 283, **CL-64**. See also *Fireman's Fund Insurance Company v. The United States*, ICSID

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409. In addition, and as described in paras. 125 to 184 above, KS&T had established a carbon trading business in Ontario both to service other Koch entities (on an arm's length, for-profit basis) and to transact with third parties. Ontario's announcement on 15 June 2018 not only indirectly expropriated the carbon allowances held in KS&T's Ontario CITSS account as of that date, but effectively destroyed KS&T's broader carbon trading business in Ontario. In particular, the Premier-elect's *ultra vires* action to "direct[] officials to immediately take steps to withdraw Ontario from future auctions" in effect immediately barred any Ontario Cap and Trade registrants, including KS&T, from participating in any future WCI auctions.<sup>522</sup> In this way, the actions of the new Conservative Government effectively and permanently devastated KS&T's business model in Ontario.
410. Furthermore, the actions taken by Ontario interfered with the Claimants' distinct, reasonable investment-backed expectations.<sup>523</sup> As outlined in detail above, the Claimants invested USD 30,158,240.95 in Ontario for the May 2018 joint auction based on long-term, reasonably held expectations. These expectations arose from the structure of Ontario's Cap and Trade Program, including:
- Ontario's long-held acknowledgement and promotion of the role and importance of market participants.
  - Ontario's express written commitments in the OQC Agreement,<sup>524</sup> by which it created reasonable and justifiable expectations on the part of the Claimants that Ontario would act in good faith to ensure that any exit from the cap and trade program would be long term and orderly.
  - Ontario's obligation to act in a legal manner even as a matter of domestic law, including with respect to the agreed upon process for the transition of power between two parties of the government, and the obligation of an incoming Premier-elect not to act *ultra vires* before he was officially sworn in.

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Case No. ARB(AF)/02/1, Award (17 July 2006), para. 176(d), **CL-88**; *Glamis Gold, Ltd., v. United States of America*, UNCITRAL, Award (8 June 2009), para. 360, **CL-18**.

<sup>522</sup> Witness Statement of Graeme Martin (4 October 2021), para. 52, **CWS-2**.

<sup>523</sup> See, e.g., *Glamis Gold, Ltd., v. United States of America*, UNCITRAL, Award (8 June 2009), para. 356, **CL-18**.

<sup>524</sup> Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec, 22 September 2017, Article 17 (Withdrawal Procedure), **CL-8**. ("A Party may withdraw from this Agreement by giving written notice of intent to withdraw to the other Parties. A Party that intends to withdraw from this Agreement shall endeavor to give 12 months notice of intent to withdraw to the other Parties. A Party that intends to withdraw from this Agreement shall endeavor to match the effective date of withdrawal with the end of a compliance period.").

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411. However, the result of the actions taken by Ontario interfered with these distinct, reasonable investment-backed expectations, and substantially deprived the Claimants' of their investment, to their detriment.<sup>525</sup>

412. *Second*, this taking is not justified under the police powers doctrine at international law. The police powers doctrine applies to measures adopted by States to protect "public order, health or morality",<sup>526</sup> but its application is subject to certain limitations. As the tribunal in *Methanex v. Mexico* described:

"[A] non-discriminatory regulation for a public purpose, which is enacted in accordance with due process, and which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."<sup>527</sup>

413. As Canada itself explained in 2015:

"[A] non-discriminatory measure, designed to protect legitimate public welfare objectives such as health, safety and the environment, is not an indirect expropriation except in the rare circumstance where its impacts are so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith. Such a principle is also reflected in the police powers doctrine which applies to expropriations which are carried out by States to protect public health and the environment."<sup>528</sup>

414. Here, the actions taken by Ontario fail to meet these requirements. The measures taken by Ontario were not designed to protect legitimate public welfare objectives such as health, safety and the environment, and did not amount to reasonable governmental regulation for the public interest. In fact, Ontario's actions were taken for an ulterior motive, to serve the political interests of the Conservative Party of Canada by ostensibly minimizing the amount of compensation the government would need to pay as a result of its measures. Furthermore, the Ontario Cap and Trade Program was swiftly replaced by the Federal backstop program, something the Ontario government expressly contemplated when making its announcement on 15 June 2018 and introducing

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<sup>525</sup> See, e.g., *Glamis Gold, Ltd., v. United States of America*, UNCITRAL, Award (8 June 2009), para. 356, **CL-18**.

<sup>526</sup> See, e.g., *Harvard Draft Convention on the International Responsibility of States for Injury to Aliens*, Article 10(3), **CL-119**.

<sup>527</sup> *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (3 August 2005), Part IV, Chapter D, para. 4, **CL-89**, cited by the Government of Canada in describing the operation of police powers in 2008. See *Chemtura Corporation v. Government of Canada*, UNCITRAL, Government of Canada's Counter-Memorial (20 October 2008), para. 586, **CL-90**.

<sup>528</sup> *Windstream Energy, LLC v. Government of Canada*, UNCITRAL, Government of Canada, Counter-Memorial (20 January 2015), para. 495, **CL-87**.

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Regulation 386/18. In this way, the actions taken by Ontario were clearly not adopted in good faith.

415. Even if the measures *were* introduced for a legitimate public purpose (*quod non*), the actions in dispute were not a valid exercise of Canada’s police power. In considering whether the police powers doctrine described by the *Methanex* tribunal has been validly applied, Canada has acknowledged that “[f]actors to be considered in this context include whether the measure is arbitrary, discriminatory, excessive, and whether it was adopted in good faith.”<sup>529</sup> A consideration of these factors demonstrates that Ontario’s measures were not justifiable, even on Canada’s own test. As outlined in detail in paras. 185 to 206 and 213 to 220, the announcement of 15 June 2018 and the enactment of Regulation 386/18 was manifestly arbitrary and discriminatory. The measure was also “excessive”, because – in Canada’s own terms – the measure was “so out of bounds as to compel the inference that an expropriation had occurred.”<sup>530</sup> The actions of the Premier-elect on 15 June 2018, before even being formally sworn into office, were clearly out of bounds as a matter of law. Finally, and as noted above, the actions taken by Ontario were not in good faith, but rather were taken for political reasons.
416. Finally, the Claimants note that in recent years, Canada has espoused a more detailed formulation of the test to be applied in determining the existence of an indirect expropriation. For example, Canada has relied on “interpretative annexes” set out in subsequent Canadian and U.S. investment treaties, as “useful guidance” for NAFTA tribunals.<sup>531</sup> These annexes incorporate language similar to that included in Article 9(3) of Canada’s most recent Model Foreign Investment Promotion and Protection Agreement (2021), which provides:

“The determination of whether a measure or a series of measures of a Party has an effect equivalent to direct expropriation requires a case-by-case, fact-based inquiry that shall consider:

- (a) the economic impact of the measure or the series of measures, although the sole fact that a measure or a series of measures of a Party has an adverse effect on the economic value of a covered investment does not establish that an indirect expropriation has occurred;
- (b) the duration of the measure or series of measures of a Party;
- (c) the extent to which the measure or the series of measures interferes with distinct, reasonable investment-backed expectations; and

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<sup>529</sup> *Chemtura Corporation v. Government of Canada*, UNCITRAL, Government of Canada’s Counter-Memorial (20 October 2008), para. 594, **CL-90**.

<sup>530</sup> *Chemtura Corporation v. Government of Canada*, UNCITRAL, Government of Canada’s Counter-Memorial (20 October 2008), para. 623, **CL-90**.

<sup>531</sup> *See, e.g., Windstream Energy, LLC v. Government of Canada*, UNCITRAL, Government of Canada, Counter-Memorial (20 January 2015), para. 475, **CL-87**.

(d) the character of the measure or the series of measures.”

417. The Claimants do not concede that Canada’s later stated approaches should take precedence over the actual language of the treaty in issue in this dispute. However, even under Canada’s own articulation of the considerations relevant to determining an indirect expropriation, the Claimants clearly meet this standard for the reasons set out above.
418. Plainly, Ontario’s actions on 15 June 2018 and its subsequent introduction of Regulation 386/18 on 3 July 2018 amounted to an indirect expropriation of the carbon allowances held in KS&T’s Ontario CITSS account, as well as the destruction of KS&T’s ability to trade more broadly in the carbon market in Ontario. The measures amounted to a permanent, substantial deprivation of the Claimants’ economic interest in their investment, contrary to their reasonable investment-backed expectations. The character of the measures taken by Ontario are not justifiable under the police powers doctrine: there was no legitimate public purpose for Ontario’s measures, and the measures not taken in good faith in accordance with due process. The measures amount to a breach of NAFTA Article 1110, on any test. Moreover, the indirect expropriation was unlawful, as outlined in paras. 422 to 445 below, and Canada is thus liable for compensation.

2. Canada Directly Expropriated the Claimants’ Investments, in a Manner that was Unlawful

419. Article 1110 also expressly protects against direct expropriation. Direct expropriation or taking of property by a State occurs when it takes a measure aimed at depriving the investor of the value of its investment.<sup>532</sup> The tribunal in *Metalclad v. Mexico* described certain characteristics of direct expropriation, including the “open, deliberate, and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State”.<sup>533</sup> Direct expropriations have been found

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<sup>532</sup> See, e.g., *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA No. 2012-2, Award (15 March 2016), paras 6.58–6.59, **CL-91**.

<sup>533</sup> *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 103, **CL-16**. See also *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009), para. 355, **CL-18**.

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following the issuance of government decrees resulting in a takeover of an investment,<sup>534</sup> or a “compulsory transfer of property rights.”<sup>535</sup>

420. Here, Ontario’s measures have directly expropriated the Claimants’ investment, for the benefit of Canada as the host State. The Cancellation Act outright cancelled the carbon allowances held in KS&T’s Ontario CITSS account.<sup>536</sup> The Cancellation Act specifically provided that these allowances were deemed by Ontario to have been “never distributed” in the first place.<sup>537</sup> Thus, the Claimants were wholly and permanently deprived of the value of their investments as of 31 October 2018.
421. Moreover, the permanent and irreversible cancellation of the Claimants’ rights in their investments were for the benefit of the State. Ontario profited in a substantial way from these investments, and investments like it in the Ontario market. Over the course of Ontario’s Cap and Trade Program, the Province received – by its own account – CAD 2,873,158,143.54.<sup>538</sup> Of this, CAD 472,138,014.12 was received from the May 2018 joint auction.<sup>539</sup> Ontario deposited the money received from the public auctions in the GGRA, and – pursuant to the Cap and Trade Act – was supposed to use these funds to re-invest in so-called “green projects” as listed in Schedule 1 to the Act.<sup>540</sup> In the end, by the time of its sudden cancellation of the Cap and Trade Program, Ontario had invested a little over half of these funds (i.e., CAD 1.9 billion out of CAD 2.9 billion)

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<sup>534</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), **CL-92** (the Tribunal found direct expropriation existed following the issuance of a decree by the Minister of Transport of Hungary, resulting in a takeover of all the activities related to the operation of the claimants’ investment.); *Waguïh Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009), para. 465, **CL-93** (the Tribunal upheld the claimants’ claims of both direct and indirect expropriation, with respect to a series of acts and omissions by the respondent, including the issuance of a ministerial resolution cancelling the project’s contract and the physical seizure of the property on two occasions.); *Bernardus Henricus Funnekotter and Others v Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (22 April 2009), paras. 96-107, **CL-94** (the Tribunal held that Zimbabwe had expropriated the claimants’ investments in commercial farms by means of a government land acquisition programme, as well as by means of actual physical invasions.); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award (22 August 2017), paras. 641-650, **CL-95**.

<sup>535</sup> *Amoco International Finance Corp v Iran* (1987) 15 Iran-USCTR 189, 220., **CL-96**.

<sup>536</sup> *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V(064/2008, Partial Award on Jurisdiction and Liability (2 September 2009), para. 281, **CL-97**. *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 116, **CL-84**.

<sup>537</sup> Cap and Trade Cancellation Act 2018, Section 7, **CL-1**.

<sup>538</sup> See Ontario Post-Auction Public Proceeds Report (May 2018, Joint Auction #15)

**Exh. C-143.**

<sup>539</sup> See *ibid.*

<sup>540</sup> Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 71(2)(2), **CL-5**.

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into green energy projects.<sup>541</sup> According to Finance Minister Fedeli, the proceeds of Ontario’s cap and trade auctions simply went into Ontario’s general revenue account.<sup>542</sup>

### 3. Canada’s Expropriation of the Claimants’ Investment Was Unlawful

422. Canada’s actions constituted an unlawful indirect and direct expropriation, in that it failed to undertake its measures in conformity with the NAFTA and customary international law. In particular, an expropriation is an unlawful breach of Article 1110 of the NAFTA unless it meets the following criteria:
- a. it is for a public purpose;
  - b. it was conducted on a non-discriminatory basis;
  - c. it was conducted in accordance with due process of law and Article 1105(1); and
  - d. compensation was paid in accordance with Articles 1110(2) to (6).
423. These four conditions are cumulative, meaning that if any one of those conditions is not met, there is a breach and therefore the expropriation is unlawful.<sup>543</sup>
424. Canada has failed to fulfil at least three of these conditions,<sup>544</sup> and thus the expropriation of the Claimants’ investment is unlawful under the NAFTA, giving rise to a compensation obligation.

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<sup>541</sup> See Environmental Commissioner of Ontario, *Climate Action in Ontario: What’s Next?*, 2018 Greenhouse Gas Report, pp. 212-214, **Exh. C-137**; see also Financial Accountability Office of Ontario (FAO), *Cap and Trade – A Financial Review of the Decision to Cancel the Cap and Trade Program* (fall 2018), p. 17, **Exh. C-138**.

<sup>542</sup> Witness Statement of Paul Brown (5 October 2021), para. 50, **CWS-3**.

<sup>543</sup> See UNCTAD *International Investment Agreements: Key Issues*, Volume 1 (2004), pp. 239-240, **CL-98**. *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*, Award (Merits) (10 October 1973), 53 ILR 297, p. 32, **CL-99** (non-discriminatory); Muthucumaraswamy Sornarajah, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (2nd ed. 2004), p. 395, **CL-100** (public purpose, non-discriminatory, compensation); Irmgard Marboe, *CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW* (Oxford University Press 2009), para. 3.05, **CL-101** (public purpose, non-discriminatory, compensation, due process); Bin Cheng, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL TRIBUNALS* (1953, republished 2006), pp. 49-51, **CL-102** (non-discriminatory). See also *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (22 April 2009), para. 98, **CL-94**; *Waguieh Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009), para. 428, **CL-93**; *Bernhard von Pezold and others v. The Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015), paras. 491-503, **CL-103**.

<sup>544</sup> For the avoidance of any doubt, the Claimants also deny that the expropriation fulfilled the criteria of being “non-discriminatory”, in that actions by Ontario effectively picked “winners and losers” amongst entities participating in the Cap and Trade Program. For example, industrial facilities that did not procure allowances did not have to true up their holdings, putting them at a competitive advantage compared with their peers that did procure allowances. In addition, mandatory

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## (a) Canada's Expropriation Was Not for a Public Purpose

425. Article 1105(1)(a) requires that NAFTA Parties not expropriate any asset of an investor except for a public purpose. As stated by the ILC:

“[T]he power to expropriate should be exercised only when expropriation is necessary and is justified by a genuinely public purpose or reason. If this *raison d'être* is plainly absent, the measure of expropriation is “arbitrary” and therefore involves the international responsibility of the state.”<sup>545</sup>

426. While the NAFTA does not define “public purpose”, whether or not an expropriation is for a public purpose is to be determined by the Tribunal, and not the State. As noted by Professor Bin Cheng in his classic work, “General Principles of Law as Applied by International Tribunals”:

“In case of a dispute, according to the Permanent Court of Arbitration, an international tribunal is competent to, and should, decide whether the “taking” is justified by public needs.”<sup>546</sup>

427. Professor Bin Cheng emphasised that a tribunal does not enquire into the merits of the public purpose – that is a matter for the State. Rather, a tribunal’s task is to consider the facts as to whether the expropriation is for a public purpose.<sup>547</sup> It is not merely enough for the State to declare a public purpose, it must be genuine.<sup>548</sup>

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participants, essentially Ontario-based industrial manufacturers, most of whom were Canadian entities, were suddenly relieved from any compliance obligations. Ontario fuel providers that procured allowances in the WCI auctions through California (and who passed on these costs to Ontario tax payers through their fuel sales) received large windfalls, as the Cancellation did not require them to make up any shortfall. By contrast, fuel providers that hedged future fuel sales by buying additional allowances were ineligible for compensation, even though they were not able to recoup the costs of these purchases through fuel sales yet to be made. Worst of all treated were the market participants who were unfairly singled out for non-compensation and annulment without payment of their allowances. However, given that Canada also failed the other three criteria of legality, it is those we focus on here for the sake of brevity.

<sup>545</sup> International Law Commission, Documents of the Eleventh Session: Report of the Commission to the General Assembly on State Responsibility, Fourth Report by F.V. Garcia Amador, UN Doc. A/CN.4/119 (1959), **CL-104**.

<sup>546</sup> Bin Cheng, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL TRIBUNALS* (1953, republished 2006), p. 38, **CL-102** (citing from *Norwegian Shipowners' Claims (Norway v USA)*, Award (13 October 1922), 309, at p. 332).

<sup>547</sup> *Id.*, p. 39

<sup>548</sup> See *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), para. 432, **CL-92** (“treaty requirement for ‘public interest’ requires some genuine interest of the public. If mere reference to ‘public interest’ can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.”).

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428. The commentary to the OECD Draft Convention on the Protection of Foreign Property (1967) further notes that a mere ostensible public purpose is not enough to constitute a lawful expropriation. In particular, it states that:

“Thus seizure undertaken ostensibly for public purposes but, in fact, to be used by persons connected therewith solely for private gain is unlawful and gives rise to a claim for damages.”<sup>549</sup>

429. In *Tecmed v. Mexico*, the tribunal accepted that deference ought to be given to a State for policies in the public interest, but ultimately found that there was no nexus between the declared public purpose and the relevant circumstances. At the outset of its assessment, the tribunal stated:

“[T]he Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality. Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State in light of Article 5(1) of the Agreement to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.”<sup>550</sup>

430. Where an expropriation is challenged for lacking a legitimate public purpose, the respondent must explain the public purpose for which the expropriation was undertaken and also satisfy a *prima facie* burden of proving that the acquisition of the particular

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<sup>549</sup> Commentary on Article 3, OECD 1967 “Draft Convention on the Protection of Foreign Property”, p. 19, **CL-105** (also relying, as Professor Cheng did, on *Walter F. Smith Case* (1929)).

<sup>550</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 122, **CL-84**. See also *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award (15 April 2016), para. 296, **CL-106** (“The Tribunal must also assess whether the impugned expropriatory measure was “for” the public purpose as Article 5(1) of the BIT requires. In doing so, it must consider all the relevant circumstances, including the government’s post-expropriation conduct. While the objective is not to review the effectiveness of the measures, the government’s failure to advance a declared purpose may serve as evidence that the measure was not taken in furtherance of such purpose. Thus, the idea is to determine whether the measure had a reasonable nexus with the declared public purpose or in other words, was at least capable of furthering that purpose.”).

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property was reasonably related to the fulfilment of that purpose.<sup>551</sup> Canada in this case is unable to meet this test.

431. *First*, there is no evidence to suggest that Ontario – in compensating some entities but not others – was acting for a public purpose. The cancellation of the Cap and Trade Program was not designed to protect legitimate public welfare objectives such as health, safety and the environment.<sup>552</sup> Rather, it was the result of political posturing on the part of the Ford government, which explicitly stated that it was seeking to minimize compensation payable to participants in the Cap and Trade Program. Moreover, the ultimate effect of the cancellation of the Cap and Trade Program served no purpose: the Province is simply now subject to a similar and equally stringent carbon pricing regime, through the federal backstop program.
432. *Second*, even if the cancellation of the Cap and Trade Program was to serve a legitimate public welfare objective (*quod non*), there is no nexus between that objective and the discriminatory provision of compensation between entities as distinguished by Ontario under the Cap and Trade Act. As noted by the tribunal in *Tecmed*, the Tribunal must determine whether there is a “reasonable relationship of proportionality” between the expropriatory measures and any alleged public purpose.<sup>553</sup> Here, the impacts of the cancellation of the Cap and Trade Program were so severe that the measure cannot reasonably be viewed as having been adopted and applied in proportion to any stated public purpose objective. The actions taken by Ontario effectively picked “winners and losers”, and unfairly singled out market participants for non-compensation, despite the fact that Ontario expressly invited companies like KS&T to take part in the program in the first place. There is no plausible – let alone reasonable – nexus between Ontario’s actions and any legitimate public welfare objective. This is especially the case where the effect of the expropriatory measure was a direct economic benefit to Canada,<sup>554</sup> as outlined above.
433. As a result of these factors, Article 1110(1)(a) is clearly unsatisfied. On this basis alone, the expropriation is unlawful and gives rise to a compensation obligation on the part of the Respondent.

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<sup>551</sup> *British Caribbean Bank Limited (Turks & Caicos) v. Belize*, PCA Case No. 2010-18 (UNCITRAL), Award (19 December 2014), para. 241, **CL-107**.

<sup>552</sup> *Cf. Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 August 2010), para. 266, **CL-67**; *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (3 August 2005), Part IV, Chapter D, p. 4, para. 15, **CL-89**.

<sup>553</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 122, **CL-84**. *See also Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award (15 April 2016), para. 296, **CL-106**.

<sup>554</sup> Heiskanen V., “The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal” (2007) 8:2 *JOURNAL OF WORLD INVESTMENT & TRADE* 215, p. 230, **CL-108** (emphasis added); *see also Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012), para. 524, **CL-44**.

## (b) Canada's Expropriation Was Not Conducted in Accordance with Due Process and Article 1105 of the NAFTA

434. Article 1110(1)(c) of the NAFTA requires that – in order to be lawful – an expropriation must be conducted in accordance with due process and Article 1105 of the NAFTA.
435. As described in detail in Part IV.B, Canada has failed to act in accordance with Article 1105 of the NAFTA. Rather, the measures are manifestly arbitrary, amount to a denial of justice, and violate the Claimants' legitimate expectations. As a result, Article 1110(1)(c) has been breached.
436. Moreover, Canada also failed to accord due process to the Claimants. The Commentary to the OECD Draft Convention on the Protection of Foreign Property (1967) explains what due process encompasses, in the expropriation context:

“(a) In essence, the contents of the notion of due process of law make it akin to the requirements of the ‘Rule of Law’, an Anglo-Saxon notion, or of the ‘Rechtsstaat’, as understood in continental law. Used in an international agreement, the content of this notion is not exhausted by a reference to the national law of the Parties concerned. The ‘due process of law’ of each of them must correspond to the principles of international law.

(b) ... On analysis, this term ... implies that whenever a State seizes property, the measures taken must be free from arbitrariness. Safeguards existing in its Constitution or other laws or established by judicial precedent must be fully observed; administrative or judicial machinery used or available must correspond at least to the minimum standard required by international law. Thus, the term contains both substantive and procedural elements.”<sup>555</sup>

437. The need for due process to include a meaningful process by which the State's decision to expropriate can be independently reviewed has been accepted by numerous investment treaty tribunals. For example, the tribunal in *ADC v. Hungary* considered that due process of law requires:

“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.”<sup>556</sup>

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<sup>555</sup> See Commentary on Article 3, OECD 1967 “Draft Convention on the Protection of Foreign Property”, pp. 19-20, para. 5, **CL-105** (emphasis omitted).

<sup>556</sup> *ADC Affiliate Limited and ADC & ADMC Management Ltd v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), para. 435, **CL-92**.



438. This reasoning was endorsed by the tribunal in *Kardassopoulos and Fuchs v. Georgia*:

“The Tribunal agrees with the reasoning of the *ADC* tribunal and, in particular, with the proposition that whatever the legal mechanism or procedure put in to place, it ‘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 it is to be found to have been carried out under due process of law. As in *ADC*, the Respondent in the present case failed to ensure that there was a procedure or mechanism in place, either before the taking or thereafter, which allowed Mr. Kardassopoulos, within a reasonable period of time, to have his claims heard.”<sup>557</sup>

439. These basic legal mechanisms were not afforded to the Claimants. Ontario expressly eliminated any legal procedure for review of its decision to deny the Claimants compensation, and thereby failed to afford a fair hearing by an “unbiased and impartial adjudicator to assess the actions in dispute.”<sup>558</sup>

440. In addition to this denial of justice, there was no administrative review process to assess the decisions made by a single government employee, Mr. Jeff Hurdman. Mr. Hurdman signed both the Proposed Determination and the Final Determination denying KS&T compensation, both of which were conclusory and unreasoned. The Final Determination provided no avenue for appeal of Mr. Hurdman’s decision,<sup>559</sup> and no information as to what internal processes or checks had been undertaken in accessing the application for compensation.

441. Moreover, although Mr. Hurdman stated that he had “consider[ed]” KS&T’s comments, the time period of just three days between when KS&T sent its comments and when Mr. Hurdman issued the formal Final Determination denying KS&T compensation belies this statement. In fact, the Final Determination provided no response to the comments of KS&T, nor did it address any of the concerns raised by KS&T with respect to the inequality of treatment of joint compliance entities. The letter was simply a pro forma rejection.

442. These actions, combined with the denial of access to the courts or any system of justice, clearly fail to meet the standard required in Article 1110(1)(c) of due process and fair and equitable treatment.

(c) Canada Has Not Paid Any Compensation to the Claimants for Its Expropriation

443. Finally, the fact that Canada has not paid any compensation to the Claimants is sufficient to render the expropriation unlawful. An expropriation may only be lawful

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<sup>557</sup> *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (3 March 2010), para. 396, **CL-109** (emphasis added)

<sup>558</sup> *ADC Affiliate Limited and ADC & ADMC Management Ltd v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), para. 435, **CL-92**.

<sup>559</sup> Letter from the Ministry of the Environment, Conservation and Parks to KS&T (14 March 2019), **Exh. C-10**.

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under Article 1110 if it is accompanied by payment of compensation in accordance with Articles 1110(2) to (6). This is true even if the expropriation is for a public purpose, not discriminatory and completed in accordance with due process.<sup>560</sup> Compensation must be equivalent to the fair market value of the expropriated investment as of the date of the expropriation, and shall be made without delay and be fully realizable.

444. There is no dispute that Canada has not paid any compensation to the Claimants, let alone fair market value compensation, in violation of Article 1110(1)(d) of the NAFTA. Therefore, the expropriation is clearly *prima facie* unlawful under the scope of Article 1110(1)(d), as discussed further in Part V (“Relief Requested”).
445. Therefore, Canada has unlawfully expropriated the Claimants’ investments, in breach of Article 1110 of the NAFTA.

## V. RELIEF REQUESTED

### A. Introduction

446. Canada’s breaches of international law as pleaded in this Memorial have caused the Claimants to suffer loss and damage.
447. This section addresses the measures sought by the Claimants in order to remedy that loss and damage. In particular, it covers: an overview of the Claimants’ case on remedies (Part V.B); the legal principles (Part V.C); the Claimants’ position as to quantum (Part V.D); and the claims for interest (Part V.E), declaratory relief (Part V.F) and costs (Part V.G).

### B. Overview

448. As regards the expropriation claim, the Claimants’ primary case is that the expropriation was *unlawful*. The NAFTA does not purport to establish a *lex specialis* governing the standards for damages for unlawful expropriations. Therefore, the applicable standard is that as established in customary international law.<sup>561</sup> Thus, compensation must be such that it “wipe[s] out all the consequences of the illegal act[s]”, per the *Chorzów Factory* standard.<sup>562</sup> In the alternative, in the event that the Tribunal rules that the expropriation is *lawful*, the applicable standard of compensation is established by the NAFTA.<sup>563</sup> However, in the circumstances of this case, there is no material difference between the standard under the NAFTA and that under customary international law.<sup>564</sup> Irrespective of the legality of the expropriation, the

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<sup>560</sup> NAFTA, Art. 1110(1); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para. 308, **CL-64**.

<sup>561</sup> See paras. 470 to 485 *infra*.

<sup>562</sup> See *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits)*, Judgment No. 13, PCIJ (1928) Ser A, No.17, p. 47, **CL-110**.

<sup>563</sup> See paras. 449 to 486 *infra*.

<sup>564</sup> It has been observed that the distinction between lawful and unlawful expropriations is relevant to two issues: whether restitution can be awarded and whether compensation can be awarded on a current-date valuation basis (to account for any increase in value between the expropriation and

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Claimants are entitled to and claim compensation/damages corresponding to the fair market value of the expropriated investments as at 14 June 2018, plus interest.

449. As regards the non-expropriatory claim (*i.e.* for breach of Article 1105), again, the BIT does not purport to establish a *lex specialis* governing the standards for damages for such treaty breach. Consequently, customary international law applies. Since the Claimants' investments were destroyed by reason of Canada's Article 1105 breaches, that standard entails an assessment by reference to the investments' fair market value, *i.e.* the same test as that which applies to the expropriation claim.
450. In summary, the Claimants claim USD 31,322,474.62 in damages, plus interest, declaratory relief and costs.

### C. Compensation Principles

#### 1. Compensation Pursuant to the NAFTA for Lawful Expropriation

##### (a) Introduction

451. For the reasons stated in Part IV.C, Canada's expropriation of the Claimants' investments was unlawful – the Claimants' loss should be valued on that basis.<sup>565</sup> Nevertheless, it is convenient to first address the compensation principles pursuant to the NAFTA for *lawful* expropriation.
452. In the event that the Tribunal rules that the expropriation is lawful (which it should not), the applicable standard of compensation is that established by Article 1110 of the NAFTA. That standard is elaborated in the following terms:

“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.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency

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the award). *See, e.g., Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (22 April 2009), para.111-112, **CL-94**; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007), para 352, **CL-111**. However, the Claimants do not seek restitution. Further, at this time, the Claimants have elected to pursue a valuation as of the time of expropriation: *see* para. 481 below. Consequently, neither issue is pertinent at this time.

<sup>565</sup> *See* paras. 487 to 511 *infra*.

at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

6. On payment, compensation shall be freely transferable as provided in Article 1109.”

453. The components comprising this provision are addressed in further detail below. In short, based on the standard established by Article 1110, the Claimants request an award of compensation pursuant corresponding to the fair market value of the expropriated investments as at 14 June 2018, plus interest.

(b) The Standard of Compensation for Lawful Expropriation

454. Starting with the standard of compensation, Article 1110(2) of the NAFTA expressly requires that compensation “be equivalent to the fair market value of the expropriated investment”. It further elaborates that “[v]aluation 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”.

455. As to the meaning of the term “fair market value”, tribunals have frequently adopted the American Society of Appraisers’ definition:

“The price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm’s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.”<sup>566</sup>

456. This definition is consistent with the term “market value” as defined by the International Valuation Standards Committee.<sup>567</sup>

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<sup>566</sup> See American Society of Appraisers, ASA Business Valuation Standards, ASA website, as cited in *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 402, **CL-112**; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006), para. 424, **CL-113**; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007), para. 405, **CL-114**; and *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award (4 April 2016), paras. 851-852, **CL-115**.

<sup>567</sup> See Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (BIICL 2008), p. 184, fn 11, **CL-116**, where the authors observe that the International Valuation Standards Committee definition of “market value” is “along the lines very similar” to the American Society of Appraisers’ definition of “fair market value”. They quote the International Valuation Standards Committee definition as follows: “Market Value is the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an

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457. In assessing fair market value, the valuation is to be based on the principle of highest and best use. As Borzu Sabahi puts it, “[f]air market value is not a measure of the value of the asset *as it has been used*, but it should be a measure of the value of the asset if the asset *is put to the most valuable use it can be put to*”.<sup>568</sup> This principle was applied in *Santa Elena. v. Costa Rica*.<sup>569</sup>

(c) The Valuation Date for Lawful Expropriation

458. Article 1110(2) of the NAFTA states that the date of valuation of the expropriated investment shall be the day “immediately before the expropriation took place (‘date of expropriation’)” but “shall not reflect any change in value occurring because the intended expropriation had become known earlier”.
459. As explained in paras. 402-416 above, the Claimants’ primary case is that their investments were indirectly expropriated on 15 June 2018 (following Premier-elect Ford’s announcement), and then directly expropriated on 31 October 2018 (upon the enactment of the Cancellation Act). Since the latter merely made *de jure* that which was already the case *de facto*, the overall “date of expropriation” is 15 June 2018 and thus the valuation date on this analysis is 14 June 2018. As such, no adjustments are required to take into account any prior change in value, because the expropriation had not become known earlier than that date.
460. The Claimants’ alternative case is that their investments were expropriated directly only, on 31 October 2018. On that analysis, the valuation date is 30 October 2018. However, the intended expropriation had become known earlier, namely on 15 June 2018 when Premier-elect Ford announced Ontario’s intention to cancel the Cap and Trade Program. As such, although the valuation date is 30 October 2018, it is necessary to disregard any change in value occurring between 14 June and 31 October by reason of the expropriation having become known. Therefore, in practical terms, the valuation would have to be as at 14 June 2018. Consequently, the effective valuation date is the same on the Claimants’ secondary case as it is for their primary case.

(d) Matters to be Disregarded When Assessing Compensation

461. In any event, whatever the valuation date, the expropriated property’s value is assessed in a hypothetical context, one of the effects of which is that, in the valuation process, no account is taken of the measures that breach international law. The Commentary to the OECD’s 1967 Draft Convention on the Protection of Foreign Property, in the context of expropriation, states this principle in the following terms:

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arm’s-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion.”

<sup>568</sup> See Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (OUP 2011), p. 108, **CL-117**.

<sup>569</sup> See *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000), paras. 70 and 94, **CL-118**. See also Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (2<sup>nd</sup> edn, OUP 2017), para. 4.41, **CL-101**.

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“[C]ompensation should represent [...] the ‘genuine value of the property affected’ at the moment of deprivation. As a rule, this will correspond to the fair market value of the property without reduction in that value due to the method by which the payment is calculated: to the manner in which it is made; or to any special tax or charges levied on it. Furthermore, the value must remain unaffected by artificial factors such as deterioration due to the prospect of the very seizure which ultimately occurs, similar seizures by the Party concerned or the general conduct of that Party towards property of aliens which makes such seizures likely.”<sup>570</sup>

462. The principle has been followed by the Iran-US Claims Tribunal and by investment treaty tribunals. For example, in *INA Corp v. Iran*, the Iran-US Claims Tribunal commented that:

“‘Fair Market Value’ may be stated as the amount which a willing buyer would have paid a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalisation itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value of the shares.”<sup>571</sup>

463. Similarly, the tribunal in *Azurix v. Argentina* stated:

“The Iran-U.S. Claims Tribunal, in one of its awards, decided that ‘where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of property’, the date of the expropriation is ‘the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events.’ It has been sometimes argued that applying this formula would lead to an inequitable situation where the investment’s value would be assessed at the time when the cumulative actions of the State would have led to a dramatic devaluation of the investment. However, such a view does not consider that, *in assessing fair market value, a tribunal would establish that value in a hypothetical context where the State would not have resorted to such manoeuvres but would have fully respected the provisions of the treaty and the contract concerned.*”<sup>572</sup>

464. This approach was further considered by the tribunal in *von Pezold v. Zimbabwe*. It assessed compensation (in the event that the expropriated property was not returned as ordered) on a “but for” basis, which it described in the following terms: “The ‘but for’

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<sup>570</sup> See OECD, “1967 Draft Convention on the Protection of Foreign Property: Text with Notes and Commentary”, p. 21, para. 8(a) of the commentary on Article 3, **CL-105**. See also the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961), Article 10(2)(b) (p. 553) and commentary thereon (p. 558), **CL-119**.

<sup>571</sup> See *INA Corporation v. The Government of the Islamic Republic of Iran*, 8 I.U.S.C.T.R 373, Award (August 1985), p. 5, **CL-120**.

<sup>572</sup> See *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006), para. 417, **CL-113**. (emphasis added)

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value [...] is a hypothetical value; it is the value of the Estates which would have existed had the Respondent not acted unlawfully. This approach is conceptually consistent with providing full compensation under the *Chorzów Factory* principle.”<sup>573</sup> Indeed, the *Chorzów Factory* standard requires that a State that commits an internationally wrongful act must make full reparation, which “must, as 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”.<sup>574</sup>

465. The same principle (which, as noted, follows from the *Chorzów Factory* standard) applies with respect to breaches of international law other than expropriation: damages due to an investor by reason of a State’s unlawful conduct should not be reduced on account of such unlawful conduct. The same is equally the case with respect to lawful expropriations.
466. Indeed, the “but for” approach is essentially an application of the general principle of international law that a State may not profit from its own wrongdoing.<sup>575</sup>
467. The effect of this rule in the circumstance of these proceedings is that the valuation must ignore: (i) the fact that the Claimants’ investments were indirectly expropriated on 15 June 2018 and any changes to the investments subsequent to that date; and (ii) further or alternatively, the fact that the Claimants’ investments were directly expropriated on 31 October 2018 and the preceding threat of their expropriation from 15 June 2018. If the Tribunal adopts 14 June 2018 as the valuation date, these matters will essentially be disregarded by that determination. However, to the extent, if any, that the valuation date does not have the effect of discounting such matters, they must in any event be disregarded to ensure that Canada does not benefit from its own unlawful conduct.
- (e) The Period by which the Compensation Must be Paid for Lawful Expropriation
468. Article 1110(3) of the NAFTA requires that compensation be paid “without delay”.
- (f) The Interest to be Paid on Compensation for Lawful Expropriation
469. Article 1110 of the NAFTA requires that compensation for lawful expropriation shall include interest. This is addressed in further detail in paras. 512-533.

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<sup>573</sup> See *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015), paras. 766 and 802, **CL-103**.

<sup>574</sup> See *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits)*, Judgment No. 13, PCIJ (1928) Ser A, No.17, p. 47, **CL-110**.

<sup>575</sup> As to which, see Charles Kotuby and Luke Sobota, *General Principles of Law and International Due Process* (OUP 2017), pp. 138-139, **CL-121**; and *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA and Ors*, 6- I.U.S.C.T.R.219, Award No. 141-7-2 (June 1984), p. 5, **CL-122**. It is a well recognized principle in many municipal systems and in international law that no one should be allowed to reap advantages from their own wrong ...”).

(g) The Currency in which the Compensation must be Paid for Lawful Expropriation

470. Article 1110 of the NAFTA does not specify which currency compensation should be paid in. However, it does require that compensation be “fully realizable” and “freely transferable as provided in Article 1109”. Further, in circumstances where payment is made in a currency other than a G7 currency, Article 1110(5) applies so as to protect the investor from currency fluctuations between the date of expropriation and the date of payment – more specifically, it requires that “the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date ...”.
471. KS&T paid in USD for those carbon allowances it purchased via the joint auctions.<sup>576</sup> As such, the Claimants request that compensation be paid in USD.

2. Damages Pursuant to Customary International Law for Unlawful Expropriation and for Non-Expropriatory Breaches

(a) Introduction

472. For the reasons stated in Part IV Canada’s expropriation of the Claimants’ investments was unlawful and Canada also breached Article 1105(1) of the NAFTA. The Claimants’ losses should be valued on that basis, *i.e.* that Canada has acted in breach of international law. Accordingly, the Claimants’ primary case is that they should be awarded damages pursuant to customary international law corresponding to the fair market value of the expropriated investments as at 14 June 2018, plus interest.

(b) The Standard for Damages for Unlawful Expropriation and Non-Expropriatory Breaches

473. Article 1110 of the NAFTA – like most investment treaties – only establishes the standard of compensation for lawful expropriations. It does not establish a *lex specialis* standard for damages for unlawful expropriations, nor does it do so for other breaches of the treaty; NAFTA is silent on those matters. In such circumstances, the Tribunal is required to apply the default standard for the assessment of damages established under customary international law. This has been confirmed by numerous tribunals.
474. For example, the tribunal in *ADC v. Hungary* held as follows:

“The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation. ... Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful

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<sup>576</sup> See paras. 174, 181 *supra*.

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expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case.”<sup>577</sup>

This approach has been taken both in the context of unlawful expropriations<sup>578</sup> and for non-expropriatory breaches.<sup>579</sup>

475. The standard for the assessment of damages under customary international law is as follows: a State that commits an internationally wrongful act must make “full reparation” so as to “wipe out all the consequences” of the State’s wrongful act. This principle was affirmed by the Permanent Court of International Justice in the *Chorzów Factory Case*, where it held:

“It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.”<sup>580</sup>

476. This was subsequently elaborated by the Court in the following oft-cited terms:

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<sup>577</sup> See *ADC Affiliate Ltd & ADC & ADMC Management Ltd v. Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), paras. 481 and 483, **CL-92**. See also James Crawford, *The International Law Commission’s Articles on State Responsibility* (CUP 2002), p. 218, para. 2, **CL-123** (“It is ... well established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.”).

<sup>578</sup> See, e.g., *ADC Affiliate Ltd & ADC & ADMC Management Ltd v. Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), paras. 481-483, **CL-92**; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007), paras. 349-352, **CL-111**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (Vivendi II) v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007), paras. 8.2.1-8.2.11, **CL-83**; *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (3 March 2010), paras. 501-505, 517, 532-534 and 537, **CL-109**; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015), paras. 755-761, **CL-103**; and *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award (4 April 2016), paras. 841-853, **CL-115**.

<sup>579</sup> See, e.g., *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007), paras. 349-352, **CL-111** (re: unlawful expropriation, fair and equitable treatment, full protection and security, and arbitrary measures); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (Vivendi II) v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007), paras. 8.2.1-8.2.11, **CL-83** (re: unlawful expropriation, and fair and equitable treatment); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (3 March 2010), paras. 501-505, 517, 532-534 and 537, **CL-109** (re: unlawful expropriation, and fair and equitable treatment); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005), paras. 399-402 and 409-410 **CL-112** (re: fair and equitable treatment, and an umbrella clause); and *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award (4 April 2016), paras. 841-853, **CL-115** (re: unlawful expropriation, and fair and equitable treatment).

<sup>580</sup> See *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction)*, Judgment No. 8, PCIJ (1927) Ser A, No.9, p. 21, **CL-124**.

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“The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as 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; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”<sup>581</sup>

477. The *Chorzów Factory* standard has been affirmed by numerous tribunals.<sup>582</sup> For example, the tribunal in *ADC Affiliate v. Hungary* held that the customary international law standard for the assessment of damages resulting from an unlawful act is as set out in *Chorzów Factory*,<sup>583</sup> commenting that “there can be no doubt about the present vitality of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice”.<sup>584</sup>
478. The *Chorzów Factory* standard is also reflected in the ILC Articles on State Responsibility. In particular,

Article 31 states:

- “1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”

Article 34 states:

“Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination ...”

and Article 36(1) states:

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<sup>581</sup> See *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits)*, Judgment No. 13, PCIJ (1928) Ser A, No.17, p. 47, **CL-110**.

<sup>582</sup> See the cases cited at footnotes 578 and 579 above.

<sup>583</sup> See *ADC Affiliate Ltd & ADC & ADMC Management Ltd v. Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), paras. 484-494, **CL-92**.

<sup>584</sup> *Ibid*, para. 493.

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“A State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.”<sup>585</sup>

479. The full reparation requirement applies to both treaty and non-treaty violations.<sup>586</sup>
480. In the investment treaty context, the *Chorzów Factory* standard means that the investor must be put in the position it would have been in if the investment had been made but the unlawful act(s) of the State had not occurred. Where the investment concerned has been destroyed, whether through unlawful expropriation<sup>587</sup> or non-expropriatory breaches of the BIT,<sup>588</sup> the basis of assessment is the fair market value of the investment rights lost. This is consistent with Judge Crawford’s commentary on Article 36 of the ILC Articles, which observes that “[c]ompensation reflecting the capital value of

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<sup>585</sup> See the ILC Articles on State Responsibility, **CL-125**.

<sup>586</sup> The *Chorzów Factory* judgment requires reparation for “breach of an engagement”. Meanwhile, the ILC Articles require full reparation for injury caused by an “internationally wrongful act” (Article 31(1)), which is defined by Article 2 as an act attributable to a State and which “constitutes a breach of an international obligation of the State” (ILC Articles, **CL-125**). Judge Crawford observes that the term “breach of an international obligation ... is used to cover both treaty and non-treaty obligations” and has “essentially the same meaning” as that used in *Chorzów Factory*. See James Crawford, *The International Law Commission’s Articles on State Responsibility* (CUP 2002), p. 83, para. 7, **CL-123**.

<sup>587</sup> See, e.g., *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi II)*, ICSID Case No. ARB/97/3, Award (20 August 2007), paras 8.2.1-8.2.11, **CL-83**; *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (3 March 2010), paras. 501-505 and 517, **CL-109**; and *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award (4 April 2016), paras. 841-853, **CL-115**.

<sup>588</sup> See, e.g., *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 410, **CL-112** (re: fair and equitable treatment, and an umbrella clause; the tribunal considered fair market value the appropriate standard where the effect of the breach “results in important long-term losses”); *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006), paras. 419-424, **CL-113** (re: fair and equitable treatment, arbitrary treatment, and full protection and security; the tribunal considered fair market value the appropriate standard particularly because the concession had been taken over); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi II)*, ICSID Case No. ARB/97/3, Award (20 August 2007), paras. 8.2.1-8.2.11, **CL-83** (re: unlawful expropriation, and fair and equitable treatment; in adopting the fair market value standard for the FET breach, the tribunal considered the determining factor to be whether the investment had “merely been impaired or destroyed”, and found that here such breach had caused “more or less equivalent harm” as the unlawful expropriation – see para. 8.2.8); and *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (3 March 2010), paras. 501-505, 517, 532-534 and 537, **CL-109** (re: unlawful expropriation, and fair and equitable treatment; the tribunal agreed with *Vivendi II* and adopted the fair market value standard for both breaches, commenting that both had resulted in the investments being “irretrievably and entirely lost”); and *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award (4 April 2016), paras. 841-853, **CL-115** (re: unlawful expropriation, and fair and equitable treatment; the tribunal adopted the fair market value standard for both breaches, commenting that the FET breach had caused the investments “to become worthless”).

(continued)

property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the ‘fair market value’ of the property lost’.<sup>589</sup>

481. As to the definition of fair market value, see paras. 453 to 454 above.
482. In addition to the standard for damages, the following issues are also relevant to the payment of damages under customary international law: **(i)** the valuation date; **(ii)** the matters to be disregarded; **(iii)** the period by which the damages must be paid; **(iv)** the interest payable; and **(v)** the currency in which the damages must be paid. Each of these issues is addressed in turn below.

(c) The Valuation Date for Unlawful Expropriation and Non-Expropriatory Breaches, and the Claimants’ Election Thereon

483. Under customary international law, the claimant is entitled not just to the value of its property as of the date of expropriation/breach, but also to any greater value that property has gained up to the date of the award. Therefore, in circumstances where the expropriation is unlawful, the claimant can elect between the following valuation dates: **(i)** the value of the expropriated property as it was on the date immediately before the expropriation, or the date that the impending expropriation became publicly known, whichever is earlier; or **(ii)** a current date valuation.<sup>590</sup> The same is equally applicable for those other breaches based on the same wrongful conduct as forms the basis of the unlawful expropriation claim or otherwise involve a destruction of the investment.<sup>591</sup>
484. As will be seen, the primary component of the Claimants’ losses is the value of the expropriated carbon allowances. Since those allowances were purchased very shortly before the date of expropriation, their value as at that date is readily ascertainable without the need for expert evidence. Accordingly, in the interests of seeking an efficient and cost-effective resolution of this dispute, the Claimants have elected to pursue their claims on the basis of that valuation date. However, in the event that Canada disputes the Claimants’ valuation of the expropriated carbon allowances so as to require the engagement of an expert witness, the Claimants reserve their right to amend their claim so as to include a claim based on a current date valuation.

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<sup>589</sup> See James Crawford, *The International Law Commission’s Articles on State Responsibility* (CUP 2002), p. 225, para. 22, **CL-123**.

<sup>590</sup> See *ADC Affiliate Ltd & ADC & ADMC Management Ltd v. Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), paras. 495-499, **CL-92**; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8 (Award 6 February 2007), para. 352, **CL-111**; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015), paras. 761-663, **CL-103**. This approach is also apparent from the questions posed by the PCIJ to the valuation experts in the *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits)*, Judgment No. 13, PCIJ (1928) Ser A, No.17, pp. 51-52, **CL-110**; see also p. 47.

<sup>591</sup> As discussed at para. 477 above, the standard of compensation and basis of assessment under customary international law is the same for unlawful expropriations as it is for non-expropriatory breaches resulting in the destruction of the investment. Logically, the valuation date must also be the same. See also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi II)*, ICSID Case No. ARB/97/3, Award (20 August 2007), paras. 8.2.5 and 8.2.7, **CL-83**.

(d) Matters to be Disregarded When Assessing Damages

485. The matters stated in paras. 458 to 464 above are equally applicable in instances of unlawful expropriation and non-expropriatory breaches of the NAFTA.

(e) The period by which the damages must be paid for unlawful expropriation and non-expropriatory breaches

486. In order to “wipe out” the consequences of Canada’s wrongful acts and ensure full reparation, damages must be paid promptly.

(f) The Interest to be Paid on Damages for Unlawful Expropriation and Non-Expropriatory Breaches

487. In order to “wipe out” the consequences of the Canada’s wrongful acts and ensure full reparation, damages must include interest on the principal. This is addressed in further detail in paras. 512-533.

(g) The Currency in which the Damages Must be Paid for Unlawful Expropriation and Non-Expropriatory Breaches.

488. In order to “wipe out” the consequences of the Canada’s wrongful acts and ensure full reparation, damages must be paid in a G7 currency for the following reasons. First, it is the usual practice of international tribunals to provide for payment in a convertible currency, which includes US dollars.<sup>592</sup> Second, as discussed at para. 467 above, the NAFTA requires payment of compensation upon lawful expropriation to be either in a G7 currency or, if in another currency, to disregard fluctuations in that other currency. Logically, the conditions for payment of damages should be no less favourable. Indeed, the *Vivendi II* tribunal agreed with the principle from the *Lighthouses Arbitration* that a party ought not to be prejudiced by the effects of a devaluation that takes place between the date of the wrongful act and the determination of the amount of damages, which is consistent with Article 1110(5) of the NAFTA (discussed above).<sup>593</sup>

## D. Valuation

### 1. Introduction

489. For the reasons stated, in the circumstance of this case, the key principles governing valuation are essentially the same under the NAFTA and customary international law: the Claimants are entitled to and claim compensation/damages corresponding to the fair market value of the expropriated investments as at 14 June 2018, plus interest thereon. The same approach is applicable as regards the non-expropriatory claims.

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<sup>592</sup> See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi II)*, ICSID Case No. ARB/97/3, Award (20 August 2007), para. 8.4.5 on p. 256, **CL-83**; See also *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007), para. 361, **CL-111**.

<sup>593</sup> See, e.g., *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi II)*, ICSID Case No. ARB/97/3, Award (20 August 2007), para. 8.4.5 on p. 256, **CL-83**.

490. The Claimants' losses arising from Canada's breaches of the NAFTA can be categorised as follows: **(i)** the loss of KS&T's Ontario emissions trading business, including its future profits arising therefrom; **(ii)** the loss of the carbon allowances held in KS&T's Ontario CITSS account as at the date of expropriation; **(iii)** the cost of obtaining additional carbon allowances from alternative sources in order to meet KS&T's existing contractual obligations; **(iv)** the costs associated with taking remedial action. Each will be addressed in turn. In summary, the Claimants value their losses at USD 31,322,474.62 in damages, plus interest and costs.

## 2. The Loss of KS&T's Ontario Emissions Trading Business

491. As explained in paras. 117-184 KS&T established a carbon trading business in Ontario both to service other Koch entities (on an arm's length, for-profit basis) and to transact with third parties. The effect of Ontario's actions was not only such as to expropriate the carbon allowances held in KS&T's Ontario CITSS account as of 15 June 2018, but also to destroy KS&T's broader carbon trading business in Ontario. Thus, in principle, in order to wipe out the consequences of Canada's unlawful conduct, the Claimants should be paid damages corresponding to the fair market value of that lost business. That analysis would entail an income-based valuation taking into account KS&T's future profits. This would require expert evidence, and would significantly increase the costs of these proceedings.

492. By contrast, the value of the expropriated carbon allowances held in KS&T's Ontario CITSS account is substantial and readily ascertainable without the need for expert evidence, since those allowances were purchased very shortly before the date of expropriation (see below); likewise for the Claimants' further losses as set out below. Accordingly, in the interests of seeking an efficient and cost-effective resolution of this dispute, the Claimants have elected to pursue their claims on the basis of their most immediate losses alone. Nevertheless, it is important to note that this approach is inherently conservative in nature, which is relevant to the Tribunal's exercise of its discretion in assessing damages. Further, in the event that Canada disputes the Claimants' valuation of the expropriated carbon allowances so as to require the engagement of an expert witness, the Claimants reserve their right to amend their claim so as to include a claim for KS&T's lost business.

## 3. The Loss of the Carbon Allowances Held in KS&T's Ontario CITSS Account

493. As at the date of expropriation, KS&T held [REDACTED] carbon allowances in its Ontario CITSS account, which were expropriated on 15 June 2018 following Premier-elect Ford's announcement (or alternatively on 31 October 2018 upon the enactment of the Cancellation Act). Therefore, in order to wipe out the consequences of Canada's breach in connection with this loss, Canada must pay damages corresponding to the fair market value of the carbon allowances as of the date immediately before the expropriation, i.e. 14 June 2018 (or alternatively 30 October 2018).

494. As explained in para.182, KS&T paid Ontario USD 30,158,240.95 for the carbon allowances on 25 May 2018, and received the allowances on 11 June 2018. In the circumstances, the price actually paid for the allowances by KS&T just three weeks prior to their expropriation is a strong indication of their fair market value as of the valuation date. Not only was that an actual purchase between a willing and able buyer

and a willing and able seller acting at arm's length, the sale was conducted by public auction, so clearly represents the market value.

495. Nevertheless, whereas the Claimants had paid a unit price of USD of 14.65 for the allowances, the market price for such allowances had in fact risen to [REDACTED] by 14 June 2018.<sup>594</sup> Accordingly, the fair market value of the [REDACTED] allowances immediately prior to their expropriation was USD 30,528,785.89. The Claimants claim on that basis, or alternatively based on the actual purchase price paid.

#### 4. The Cost of Obtaining Additional Carbon Allowances from Alternative Sources

496. As explained in para. 178, KS&T had planned to use at least [REDACTED] of the carbon allowances it purchased in the May 2018 joint auction to meet its existing contractual obligations to [REDACTED]. By reason of Canada's actions, KS&T was unable to trade its Ontario carbon allowances from 15 June 2018 – yet, KS&T's obligations remains in force. As such, it had to replace the expropriated Ontario carbon allowances by purchasing replacement allowances on the secondary market. As will be seen, this caused the Claimants further losses.

##### (a) Losses arising from the [REDACTED] sale

497. In particular, KS&T still needed to deliver [REDACTED] carbon allowances to [REDACTED] [REDACTED]<sup>595</sup> under its contractual arrangement with that company. Because KS&T had purchased all of these allowances from [REDACTED], it needed to replace them by purchasing further allowances [REDACTED].<sup>596</sup>

498. More specifically, in order to meet its obligations to [REDACTED], KS&T entered into a [REDACTED] [REDACTED] carbon allowances at [REDACTED] per allowance, for a total price of [REDACTED].<sup>597</sup> It then sold [REDACTED] of those allowances to [REDACTED], at a total price of [REDACTED].<sup>598</sup> Given that

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<sup>594</sup> See Witness Statement of Frank King (6 October 2021), para. 31, **CWS-4**. See also Extract from ICE's ICEXL Excel Addin, **Exh. C-144** and Argus Air Daily for 14 June 2018, p. 2, **Exh. C-145**. As Mr King explains, strictly, these sources refer to the value of California carbon allowances. However, at that time, such value also reflected the value of Ontario allowances: this is because, as a linked market, the products traded liquidly under the California Allowance ICE contract (listed in USD) and participants would not have offered or bid the Ontario allowances at a better or worse price than the California allowances.

<sup>595</sup> Ultimately, [REDACTED]

<sup>596</sup> See Witness Statement of Frank King (6 October 2021), para. 36, **CWS-4**.

<sup>597</sup> See *id.* para. 37, which references **Exh. C-146** as evidence for this trade. As Mr King explains at footnote 34 of his statement, that exhibit contains an extract of the raw data which the Claimants have downloaded from their CITSS accounts and from Symphony (their internal records system).

<sup>598</sup> See Witness Statement of Frank King (6 October 2021), para. 37, **CWS-4**, which references **Exh. C-145** as evidence for this trade. As Mr King explains at footnote 34 of his statement, that exhibit contains an extract of the raw data which the Claimants have downloaded from their CITSS accounts and from Symphony (their internal records system). Additional calculations to

(continued)

those allowances had cost [REDACTED] to replace (*i.e.* [REDACTED]), KS&T made a loss of [REDACTED] on this transaction. This is the “as is” position.

499. By contrast, if Canada had not acted as it did and KS&T had been able to meet its obligations to [REDACTED] through the allowances it had purchased in the May 2018 joint auction, it would have made a reasonable profit. To recall, KS&T paid USD 14.65 [REDACTED]

[REDACTED] Therefore, the [REDACTED] allowances owed to [REDACTED] had cost [REDACTED]. The sale price [REDACTED] would have paid was the same as above, *i.e.* [REDACTED].<sup>599</sup> As such, KS&T would have made a profit of [REDACTED] had things gone as planned. This is the “but for” position.

500. To restate the above in table form:

<b>“As Is” Position:</b>		
Allowances involved		[REDACTED]
Replacement cost	(per allowance)	[REDACTED]
Price paid by [REDACTED]	(per allowance)	[REDACTED]
Profit/loss	(per allowance)	[REDACTED]
Profit/loss	(total)	[REDACTED]
<b>“But For” Position:</b>		
Allowances involved		[REDACTED]
Original cost	(per allowance)	[REDACTED]
Price paid by [REDACTED]	(per allowance)	[REDACTED]
Profit/loss	(per allowance)	[REDACTED]
Profit/loss	(total)	[REDACTED]
<b>“But For” – “As Is”:</b>		[REDACTED]

501. In sum, whereas KS&T would have made a profit on this transaction, it actually made a loss. Overall, KS&T lost [REDACTED] as compared to the situation it would have been in had the transaction gone to plan.

(b) Loss on the ICE Transactions

502. KS&T also had additional obligations that needed to be fulfilled, through [REDACTED]. Mr King’s evidence is that [REDACTED], such that the ultimate additional loss incurred in replacing allowances [REDACTED].<sup>600</sup> Given the complexity inherent in establishing that relatively modest loss, the Claimants have elected not to claim it.

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demonstrate the total allowances transferred and total price paid can be found in a separate tab in that exhibit.

<sup>599</sup> See Witness Statement of Frank King (6 October 2021), para. 38, CWS-4.

<sup>600</sup> See *id.*, para. 41, CWS-4.



## 5. The Costs Associated with Taking Remedial Action

503. By reason of Canada's breaches of the NAFTA, the Claimants have incurred significant management, administrative, overhead and legal costs in the course of their attempts to take remedial steps and to obtain relief. In particular, at this time, the Claimants claim for the following costs:
- a. The costs of the Claimants' external consultant<sup>601</sup> incurred in connection with the Claimants' efforts to lobby the Ontario Government to revise the bill which became the Cancellation Act.
  - b. The legal costs incurred by the Claimants' external Canadian counsel<sup>602</sup> in connection with: **(i)** the Claimants' efforts to lobby the Ontario Government to revise the bill which became the Cancellation Act; **(ii)** the Claimants' efforts to seek compensation under the Cancellation Act; **(iii)** the Claimants' assessment of their legal rights in relation to the Cancellation Act; **(iv)** the provision of advice on various matters of Canadian law in relation to the passage and implementation of the Cancellation Act; and **(v)** the preparation of the Notice of Intent and the unsuccessful consultations with the Canadian Government.
  - c. The legal costs incurred by the Claimants' initial legal counsel in connection with: **(i)** initial fact gathering; and **(ii)** preparation of the Notice of Intent under the NAFTA, along with associated provision of advice.
504. (The Claimants also intend to claim for their legal and other costs incurred in the course of this arbitration. They will do so in the post-hearing phase, in the usual manner.)
505. The above-mentioned costs are as follows:

No.	Date	Invoice	Exh.	Cost (CAD)	Rate <sup>603</sup>	Cost (USD)
<b>External Lobbying Consultant</b>						
1			C-155			
2			C-156			
3			C-157			
4			C-158			
5			C-159			
6			C-160			

<sup>601</sup> The Claimants have redacted the name of the lobbyist which it had engaged, at the lobbyist's request. Such detail is irrelevant to the point under discussion. Rather, all that matters is that the Claimants engaged such professional and paid for their services. The invoices identified in the table below establish that. Further, we note that the lobbyist's invoices are addressed to [REDACTED] – nevertheless, the Claimants confirm that KS&T was ultimately responsible for payment of these costs.

<sup>602</sup> The preceding footnote is repeated as regards the Claimants' external Canadian counsel.

<sup>603</sup> Those expenses which were incurred in CAD have been converted to USD using the exchange rate prevailing on the date of the respective invoice. The exchange rates used have been taken from <<https://www1.oanda.com/currency/converter/>>: see **Exh. C-100**.

No.	Date	Invoice	Exh.	Cost (CAD)	Rate <sup>603</sup>	Cost (USD)
7			C-161			
8			C-162			
9			C-163			
10			C-164			
11			C-165			
12			C-166			
13			C-167			
14			C-168			
<b>External Canadian Counsel Legal Costs</b>						
15			C-169			
16			C-170			
17			C-171			
18			C-172			
19			C-173			
20			C-174			
<b>Initial NAFTA Counsel Legal Costs</b>						
21			C-175			
22			C-176			

506. Such losses are properly recoverable under the *Chorzów Factory* standard. More specifically, in order to “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”, it is necessary that the Claimants be awarded damages corresponding to the value of these expenditures.
507. Indeed, in *Siag v. Egypt*, the tribunal recognised as recoverable certain costs incurred in seeking to prevent or mitigate a treaty violation. There, the claimants had brought domestic court proceedings to fight a series of expropriatory measures taken by Egyptian officials over a span of several years. Despite various domestic rulings in favour of the claimants, Egypt was not deterred from seizing the claimants’ property. Having found such action to amount to an unlawful expropriation (as well as finding other treaty breaches), the tribunal awarded the claimants damages for *inter alia* the cost of legal expenses incurred in bringing the domestic proceedings that had sought to contest the expropriatory measures at issue.<sup>604</sup>
508. Similarly, in *Swisslion v. Macedonia*, the tribunal had found a minor FET breach on the basis of a series of measures taken by Macedonia which collectively amounted to a

<sup>604</sup> See *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009), para. 593, CL-93.

composite breach. This included the authorities' delay in determining whether, in their view, Swisslion had met certain contractual commitments under a share purchase agreement; the institution of administrative proceedings against the investor at the Macedonian SEC, which were not notified to Swisslion and which were later ruled by the Constitutional Court to be beyond the power of the SEC; and the fact that the authorities had widely publicised news that criminal proceedings had been instituted against Swisslion, while failing to publicise a subsequent decision to drop the case.<sup>605</sup> The tribunal observed that Swisslion had prepared various reports and sets of documents in the course of its engagement with the government, had been subjected to heightened controls, and that the effect of the unfounded SEC and criminal investigations was to "further divert[] management's time and attention".<sup>606</sup> Consequently, the tribunal awarded Swisslion damages in respect of *inter alia* (i) its legal fees incurred contesting the SEC and criminal investigation measures and (ii) "the diversion of management's time in responding to the heightened controls whilst the Ministry of Economy caused investigations to be conducted without advising Swisslion that its contractual performance was a potential legal dispute".<sup>607</sup> As such, this decision recognises that "full reparation" goes beyond legal expenses arising from the treaty breach, and extends also to other consequential costs.

509. Thus, the Claimants' consequential expenditures as set out above are properly recoverable so as to ensure "full reparation".

#### 6. Valuation Summary

510. [REDACTED] USD 30,528,785.89 ([REDACTED], USD 30,158,240.95)

511. As such, the Claimants claim damages in the amount of USD 31,322,474.62 plus interest and arbitration costs.

512. The Claimants request that the Tribunal expressly order that they are each jointly entitled to the entirety of these damages, save that there cannot be double-recovery between them.

#### 7. Reservation of Rights

513. As explained above, the Claimants' position as to quantum is premised on the basis of its position that there has been an expropriation of its investments and/or an Article 1105 breach which has resulted in those investments being rendered worthless. If, however, the Tribunal ultimately finds a lesser violation of the NAFTA, it will be necessary to receive additional submissions as to quantum once that violation has been defined by the Tribunal – this approach is necessary as it would be difficult and highly inefficient for the parties to seek to define every possible permutation and the different

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<sup>605</sup> See *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award (6 July 2012), paras. 275-276, 292-296 and 300, **CL-126**.

<sup>606</sup> *Id.*, paras. 346-348.

<sup>607</sup> *Id.*, para. 350.

losses that correspond to every such breach. Accordingly, the Claimants reserve their position in that regard.

#### **E. Interest**

514. The Claimants claim interest on their losses. This section addresses the principles under the NAFTA and customary international law in turn. In short, the Claimants claim interest at a rate of 5%, compounded annually, from the date of breach (15 June 2018) until the date of payment.

##### 1. Interest re Lawful Expropriation

515. For the reasons stated in Part IV, Canada's expropriation of the Claimants' investments was unlawful – the claim for interest should be addressed on that basis (as to which, see below). Nevertheless, it is convenient to first address the position as regards interest owing under the NAFTA as regards lawful expropriations. In particular, Article 1110(4) and (5) of the NAFTA require that compensation shall include interest “at a commercially reasonable rate ... from the date of expropriation until the date of actual payment”. As will be seen, interest under customary international law is assessed on essentially the same basis in order to reflect a claimant's lost investment opportunity; as such, the analysis of the interest due pursuant to the NAFTA and customary law may proceed as one.

##### 2. Interest re Customary International Law Claims – Unlawful Expropriation and Non-Expropriatory Breaches

516. Although the NAFTA provides for payment of interest in the case of a lawful expropriation, it does not establish a *lex specialis* for the payment of interest in the case of an unlawful expropriation or other non-expropriatory breaches of the treaty. Accordingly, this matter is governed by customary international law, which requires as follows.

##### 3. Customary International Law Requires Payment of Interest on Damages

517. Absent anything to the contrary in the applicable law (which is not the case here), it is an accepted legal principle that the State in breach must pay interest on the damages awarded to the injured party.<sup>608</sup> This is so that the injured party is restored to the position it would have enjoyed had the breach not occurred. In other words, interest is payable in order to ensure that full reparation is made. This is recognised by Article 38 of the ILC Articles on State Responsibility, which states:

“1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

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<sup>608</sup> See, e.g., *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi II)*, ICSID Case No. ARB/97/3, Award (20 August 2007), paras. 9.2.1-9.2.2, **CL-83**.

(continued)

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.”<sup>609</sup>

518. Article 38 was characterised as “an expression of customary international law” by the tribunal in *Siemens v. Argentina*, which considered that in determining the applicable interest rate, the guiding principle was to ensure “full reparation for the injury suffered as a result of the internationally wrongful act”.<sup>610</sup>

519. As the tribunal in *Continental Casualty v. Argentina* put it:

“As a general principle, almost invariably, justice requires that the wrongdoer who has deliberately failed to pay compensation should pay interest for the period during it has withheld that compensation unlawfully. The claimant, in addition to suffering from the wrongdoing giving rise to compensation, has suffered a further loss from non-payment of that compensation when it should have been paid by the wrongdoer. Moreover, a wrongdoer withholding payment may be unjustly enriched by its deliberate non-payment of such compensation, at the expense of the claimant. In these circumstances, therefore, full reparation will include an order for interest.”<sup>611</sup>

520. Likewise, the tribunal in *Santa Elena v. Costa Rica* held:

“[Claimant] is entitled to the full present value of the compensation that it should have received at the time of the taking. Conversely, the taking state is not entitled unjustly to enrich itself by reason of the fact that the payment of compensation has been long delayed.”<sup>612</sup>

“[T]he amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest.”<sup>613</sup>

521. Similarly, the tribunal in *Vivendi II v. Argentina* held that:

“The object of an award of interest is to compensate the damage resulting from the fact that, during the period of non-payment by the

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<sup>609</sup> See ILC Articles on the Responsibility of States, Article 38, **CL-125**.

<sup>610</sup> See *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007), paras. 395-396, **CL-111**.

<sup>611</sup> See *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008), para. 308, **CL-127**.

<sup>612</sup> See *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000), para. 101, **CL-118**.

<sup>613</sup> *Id.*, para. 104.

(continued)

debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive.”<sup>614</sup>

522. Further, in *Sunlodges v. Tanzania*, having decided to award interest at a rate of 7% compounded annually, the tribunal observed that:

“This rate strikes an appropriate balance between the two policy purposes of an interest claim – compensating the claimant for the temporary withholding of money due to it, and precluding the respondent’s unjust enrichment from the use of the claimant’s funds.”<sup>615</sup>

523. These decisions identify two important functions of interest, namely: **(i)** compensating the claimant for the temporary withholding of money due to it; and **(ii)** preventing the respondent’s unjust enrichment, arising from the fact that it has had use of the money.<sup>616</sup> As to the second element, the prohibition on unjust enrichment is recognised as a general principle of international law, and itself reflects the broader principle that a party may not profit from its own wrongdoing.<sup>617</sup> An additional function as regards interest post-award is **(iii)** to ensure prompt payment of the award debt.<sup>618</sup>

#### 4. Compound Interest

524. Compound interest is frequently awarded by tribunals in investment treaty cases. It reflects the commercial reality in that a company which has been denied money has been denied the use of that money.

525. As was stated by the tribunal in *Santa Elena v. Costa Rica*:

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<sup>614</sup> See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi II)*, ICSID Case No. ARB/97/3, Award (20 August 2007), para. 9.2.3, **CL-83**.

<sup>615</sup> See *Sunlodges Ltd and Sunlodges (T) Limited v. The United Republic of Tanzania*, PCA Case No. 2018-9, Award (20 December 2019), para. 502, **CL-137**.

<sup>616</sup> See Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (2<sup>nd</sup> edn, OUP 2017), paras. 6.09-6.39, **CL-101**.

<sup>617</sup> See Charles Kotuby and Luke Sobota, *General Principles of Law and International Due Process* (OUP 2017), pp. 138-139, **CL-121**; and *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA and Ors*, 6- I.U.S.C.T.R.219, Award No. 141-7-2 (June 1984), p. 5, **CL-122** (“It is a well-recognized principle in many municipal systems and in international law that no one should be allowed to reap advantages from their own wrong ...”).

<sup>618</sup> See Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (2<sup>nd</sup> edn, OUP 2017), paras. 6.35-6.39, **CL-101**. The ICJ referred to the “importance of prompt compliance” when setting post-award interest in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Compensation Judgment (19 June 2012), p. 20, **CL-128**.

Importantly, as Prof Marboe notes, post-award interest will only encourage prompt payment if the interest rate chosen is not less than the borrowing rates available to the State from other sources. Put simply, if post-award interest is set at a rate such that it is cheaper for the State to avoid paying the award debt than it is to borrow money from the market, post-award interest will not meet the objective of encouraging prompt payment.

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“[W]here an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.”<sup>619</sup>

526. The tribunal in *Continental Casualty v. Argentina* added that:

“[C]ompound interest reflects economic reality in modern times ... The time value of money in free market economies is measured in compound interest; simple interest cannot be relied upon to produce full reparation for a claimant’s loss occasioned by delay in payment ... This discretionary approach to the award of compound interest under international law may now represent a form of ‘*jurisprudence constante*’ in ICSID awards.”<sup>620</sup>

527. Compound interest has been awarded both in cases where the investment treaty expressly referred to the provision of interest (without expressly stating that compound interest was to apply) and also in cases where the investment treaty made no reference to the payment of interest at all.<sup>621</sup>

528. Accordingly, the Tribunal is empowered to award interest on a compound basis and should do so in order to ensure full reparation to the Claimants. Compounding is also a necessary component of the “commercially reasonable rate” required by the NAFTA, for the same reasons as established in the above-quoted cases.

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<sup>619</sup> See *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000), para. 104, **CL-118**. For examples of decisions endorsing this view, see *ADC Affiliate Ltd & ADC & ADMC Management Ltd v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), para. 522, **CL-92**; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008), para. 312, **CL-127**; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8; Award (6 February 2007), para. 399, **CL-111**; *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (22 April 2009), para. 146, **CL-94**.

<sup>620</sup> See *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008), paras. 309-312, **CL-127**.

<sup>621</sup> See, e.g., *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (22 April 2009), paras. 96 and 146, **CL-94**; (where the treaty made no reference to the payment of interest); and *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (12 April 2002), paras. 104 and 174-175, **CL-129** (where the treaty provided that compensation upon expropriation “shall include interest until the date of payment”).

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## 5. Period for Interest

529. If the valuation date is taken as the day immediately before the date of expropriation, interest accrues from the date of breach until the date of payment.<sup>622</sup> However, if the valuation date is taken as the current date, interest is not paid between the date of breach and the date of the award, but is payable thereafter (i.e. from the date of the award until the date of payment).<sup>623</sup>

## 6. The Applicable Interest Rate

530. As stated, the object of awarding interest is: **(i)** to compensate the claimant for the temporary withholding of money due to it; **(ii)** to prevent the respondent's unjust enrichment, arising from the fact that it has had use of the money; and **(iii)** as regards interest post-award, to ensure prompt payment of the award debt.

531. Therefore, the question is: what would the Claimants have earned on the compensation owed if they had received it on or promptly after the date of expropriation, i.e. 15 June 2018? The best evidence for this rate lies in KS&T's historical performance. In the years 2014-2017, [REDACTED].<sup>624</sup> This rate represents the likely minimum returns that the Claimants could have generated had compensation been paid on time. Nevertheless, in the interests of narrowing the potential issues in dispute, the Claimants are willing to accept a rate of 5% – notably, this corresponds to Canada's own statutory rate, which it has previously argued should be applied by NAFTA tribunals (see below).

532. The rate claimed (5%) is well-supported by investment treaty tribunals and international courts. See e.g. the tribunal decisions in *Santa Elena v. Costa Rica*, *ADC v. Hungary*, *Vivendi II v. Argentina* (all 6%), *Sunlodges v. Tanzania* (7%), *Funnekotter v. Zimbabwe* (10%), *Tenaris v. Venezuela* (9%), the PCIJ's decision in the *Wimbledon* case (6%), various Iran-US Claims Tribunal decisions (7.5% to 10%), and the ICJ's decision in *Ahmadou Sadio Diallo* (6%).<sup>625</sup>

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<sup>622</sup> See *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007), para. 397, **CL-111** ("For purposes of erasing the effects of the expropriation, interest should accrue from the date the Tribunal has found that expropriation occurred ..."). See also e.g. *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008), paras. 264-266 (breach) and 314-315 (interest period), **CL-127**; *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (22 April 2009), paras. 116 (date of breach) and 148(3) (interest period), **CL-94** and *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award (29 January 2016), paras. 571 (date of breach) and 594-595 (interest period), **CL-130**. See also the ILC Articles on State Responsibility, Article 38(2), **CL-125**.

<sup>623</sup> See, e.g., *ADC Affiliate Ltd & ADC & ADMC Management Ltd v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), paras. 520 and 522, **CL-92**.

<sup>624</sup> See Koch Supply & Trading, Internal Briefing: U.S. Environmental Markets (23 November 2018), p. 4, **Exh. C-44**.

<sup>625</sup> For tribunal decisions, see, e.g., *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000), paras. 104-107 and 111(3), **CL-118** (and Prof Marboe's explanation thereon – see citation below); *ADC Affiliate Ltd &*

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533. Further, where NAFTA claims have been upheld against Canada, it has typically been ordered to pay compound interest at a rate in the region of 5-6%:

- In *Pope & Talbot*, Canada was ordered to pay interest at the rate of 5%, compounded quarterly. Notably, Canada had argued for interest to be fixed at 5% on a simple basis by reference to *inter alia* the Canadian Interest Act and Federal Court Act, albeit accepting that the tribunal was not bound by domestic law and referring instead to the Canadian legal rate as a “helpful benchmark”. The tribunal agreed that it was not bound by that rate, and chose instead to award interest on a compound basis.<sup>626</sup>
- In *S.D. Myers*, Canada was ordered to pay interest at the Canadian prime rate plus 1%, compounded annually. Notably, again, Canada had argued for interest to be fixed at 5% on a simple basis by reference to *inter alia* the Canadian Interest Act and Federal Court Act.<sup>627</sup> (For reference, the Canadian prime rate plus 1% totalled: 5.5% at the time of the award; and 3.45% at present.<sup>628</sup>)

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*ADC & ADMC Management Ltd v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), paras. 520, 522 and 543, **CL-92**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi II)*, ICSID Case No. ARB/97/3, Award (20 August 2007), paras. 9.2.8 and 11.1(vi), **CL-83**. Various other examples are cited at Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (2<sup>nd</sup> edn, OUP 2017), paras. 6.164 and 6.167-6.168, **CL-101**. For examples of higher rates awarded, see e.g. *Sunlodges Ltd and Sunlodges (T) Limited v. The United Republic of Tanzania*, PCA Case No. 2018-9, Award (20 December 2019), para. 502, **CL-137** (awarding interest at 7%); *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (22 April 2009), paras. 143-146, **CL-94** (awarding interest at 10%); and *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award (29 January 2016), paras. 586-587 and 594-595, **CL-130** (awarding interest at 9%).

For international court decisions, see, e.g., Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (2<sup>nd</sup> edn, OUP 2017), paras. 6.162-6.163, 6.166 and 6.170-6.171, **CL-101**, referring to the PCIJ’s decision in the *Wimbledon* case (6%) and Iran-US Claims Tribunal decisions (7.5% to 10%); and the ICJ’s award of interest at 6% in *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of Congo), Compensation Judgment (19 June 2012), p. 20, **CL-128**.

<sup>626</sup> See *Pope & Talbot Inc. v. Government of Canada*, NAFTA, Award in Respect of Damages (31 May 2002), paras. 88-90 and 91, **CL-131**; and Canada’s Statement of Defence (18 August 2001), paras. 145-149 **CL-132**.

Similarly, the tribunal in *Sunlodges v. Tanzania* had regard to the respondent’s internal judgment interest rate in setting the rate due under the award: see *Sunlodges Ltd and Sunlodges (T) Limited v. The United Republic of Tanzania*, PCA Case No. 2018-9, Award (20 December 2019), para. 502, **CL-137**.

<sup>627</sup> See *S.D. Myers, Inc. v. Government of Canada*, NAFTA, Second Partial Award (21 October 2002), paras. 306-307 and 312, **CL-133**; and Canada’s Counter-Memorial (Damages Phase) (7 June 2001), paras. 199-209, **CL-134**.

<sup>628</sup> For the Canadian prime rate in October 2002 (4.5%) and October 2021 (2.45%), see screenshots from the Bank of Canada’s website at **Exhs. C-147** and **C-148**.

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- In *Mobil*, Canada was ordered to pay interest at the 12-month Canadian Dollar LIBOR rate plus 4%, compounded monthly.<sup>629</sup> (For reference, that rate totalled approximately 6% when proposed by the claimants in July 2012 – it is not possible to state the current value as this LIBOR rate was discontinued in 2013, prior to the *Mobil* tribunal’s award.<sup>630</sup>)
  - In *Windstream*, the tribunal found that pre-award interest was inapplicable since the loss was valued as at the date of the award. However, it is notable that Canada agreed with the claimants that a rate of 3%, compounded annually, would be appropriate if pre-award interest was applicable. As to post-award interest, the tribunal rejected the claim for this on the basis that it “cannot contemplate that the Respondent will not comply”.<sup>631</sup> That approach to post-award interest is contrary to the *Chorzów Factory* standard and the usual practice of tribunals, and is misguided – indeed, whereas the *Windstream* tribunal’s approach could result in substantial prejudice to the claimant if the supposedly ‘unthinkable’ outcome does ultimately transpire, an order for post-award interest will not prejudice the State at all if it complies promptly (i.e. the balance of harm lies clearly in favour of ordering post-award interest).
  - In *Bilcon*, Canada was ordered to pay interest at the rate of the average one-year U.S. Treasury bill yield for the corresponding calendar year, compounded annually. For reference, that rate (which is regarded as risk-free) totalled approximately 2% at the time of the award; and 0.1% at present.<sup>632</sup> While this rate is lower than the others awarded against Canada, this can be explained by the fact that the claimants were the ones to have proposed this interest basis.<sup>633</sup> A risk-free rate such as this is an inappropriate basis for awarding interest.
534. By way of further support for the claimed rate, the Claimants refer the Tribunal to the Wall Street Journal Prime Rate. This rate is an aggregate average of the various prime rates that ten of the largest banks in the United States charge to their highest credit quality customers for loans with relatively short-term maturities.<sup>634</sup> It thus represents a “commercially reasonable rate”. In fact, the tribunal in *Bridgestone v. Panama*

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<sup>629</sup> See *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, NAFTA, ICSID Case No. ARB(AF)/07/4, Award (20 February 2015), paras. 170 and 178(a), **CL-135**.

<sup>630</sup> For the 12-month Canadian Dollar LIBOR rate in July 2012 (2%) and the date of discontinuance, see the printout from <<https://www.global-rates.com>> at **Exh. C-149**.

<sup>631</sup> See *Windstream Energy LLC v. Government of Canada*, NAFTA, PCA Case No. 2013-22, Award (27 September 2016), paras. 472, 486 and 515(f), **CL-63**.

<sup>632</sup> For the average one-year U.S. Treasury bill yields, see the level chart on the printout from <<https://ycharts.com>> at **Exh. C-150**.

<sup>633</sup> See *Bilcon of Delaware et al v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Damages (10 January 2019), paras. 318, 321 and 400(b), **CL-136**.

<sup>634</sup> See Investopedia, “Wall Street Journal Prime Rate” (10 August 2021), available online at <<https://www.investopedia.com/terms/w/wall-street-journal-prime-rate.asp>>, **Exh. C-152**.

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recently ordered interest on Panama's costs award at the WSJ Prime Rate *plus 2%*.<sup>635</sup> At the date of expropriation here (15 June 2018), the WSJ Prime Rate was 5%.<sup>636</sup>

535. Consequently, the Claimants claim interest at a rate of 5%, compounded annually, from the date of breach (15 June 2018) until the date of payment.

#### **F. Declaratory Relief**

536. As particularised in further detail below, the Claimants request declarations that Canada has breached the NAFTA. Declarations in respect of wrongful conduct as a form of relief are common practice in international arbitral tribunals.<sup>637</sup>

#### **G. Costs**

537. The Claimants request that the Tribunal, pursuant to Article 61(2) of the ICSID Convention, order Canada: **(i)** to pay the Claimants all of their legal and other costs and expenses in respect of the arbitration, plus compound interest thereon at the same rate and interval as on the damages; and **(ii)** to bear in full (a) the costs of the Tribunal and (b) ICSID's costs, including by ordering Canada to pay to the Claimants any share paid in advance by them in respect of such costs, plus compound interest thereon. Such orders are necessary to ensure full reparation. The Claimants will brief the issue of such costs more fully in the post-hearing phase, in the usual manner.

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<sup>635</sup> See *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Award (14 August 2020), paras. 576 and 589-590, **CL-138**.

<sup>636</sup> See Wikipedia, "Wall Street Journal prime rate": "Historical Data", available online at <[https://en.wikipedia.org/wiki/Wall\\_Street\\_Journal\\_prime\\_rate](https://en.wikipedia.org/wiki/Wall_Street_Journal_prime_rate)>, **Exh. C-151**.

<sup>637</sup> See James Crawford, *The International Law Commission's Articles on State Responsibility* (CUP 2002), p. 233, para. 6, **CL-123**. See also e.g. *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015), paras. 955, 957 and 1012-1019, **CL-103**.

538. For the reasons stated, the Claimants respectfully request that the Tribunal render an Award:
- a. Declaring Canada in breach of Articles 1105(1) and 1110 of NAFTA in light of the impugned measures;
  - b. Awarding monetary damages to Koch and to KS&T pursuant to Article 1116 in the amount of USD 31,322,474.62 for all injuries and losses by reason of, or arising out of, Canada's breaches of Articles 1105(1) and 1110 of NAFTA;
  - c. Awarding pre- and post-Award compound interest on the amount of damages awarded, at a rate of 5%, compounded annually;
  - d. Awarding compensation to Koch and to KS&T for all of their costs of the arbitration and costs of legal representation, plus compound interest thereon at the same rate and interval as on the damages; and
  - e. Granting such other relief as the Arbitral Tribunal may deem just.

Dated: 6 October 2021  
London, UK

Respectfully submitted,



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Christophe Bondy