

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

BETWEEN:

LONE PINE RESOURCES INC.

Claimant

AND

GOVERNMENT OF CANADA

Respondent

CLAIMANT'S MEMORIAL

10 APRIL 2015

ARBITRAL TRIBUNAL:

**Mr. V.V. Veeder (President)
Professor Brigitte Stern
Mr. David Haigh**

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I. GLOSSARY

Term	Definition
2011 BAPE Report	The final BAPE report on the sustainable development of Quebec's shale gas industry, submitted to the Minister of Sustainable Development on 28 February 2011
Act	<i>An Act to limit oil and gas activities</i> , SQ 2011, c. 13
BAPE	The <i>Bureau d'audiences publiques sur l'environnement</i> , an independent provincial agency that reports to the Minister of Sustainable Development. The BAPE's function is to inquire into any question relating to the quality of the environment submitted to it by the Minister
Bécancour/Champlain Block	The area covered by the four Original Permits on four blocks of land in the St. Lawrence Lowlands
Bill 18	Bill 18 was enacted as <i>An Act to limit oil and gas activities</i> , 2nd Sess, 39th Leg (2011), which entered into force on June 13, 2011
Canada	Government of Canada
CCAA	<i>Companies' Creditors Arrangement Act</i> , RSC 1985, c. C-36
Civil Code	<i>Civil Code of Quebec</i> , CQLR c. C-1991
Commitment Period	The 18-month period under the Farmout Agreement within which Forest Oil exercised its option to earn a 100% interest in the Contract Area
Contract Area	The Original Permit and the River Permit areas, from the surface to to the top of Trenton/Black River formation (i.e. a depth of 743 meters in the Bécancour #2 wellbore). Forest Oil earned 100% of the working interest in the Contract Area
cores	Whole rock samples used to estimate the reservoir properties of hydrocarbon resources
ECHR	The European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	The European Court of Human Rights
Election Period	Under the Farmout Agreement, the six-month period within which Forest Oil could elect to exercise an option to earn a 100% interest in

Term	Definition
	the Contract Area. The Election Period was triggered by receipt of a core analysis from Junex
Enterprise	Canadian Forest Oil Ltd., a company incorporated under the laws of Alberta. Originally Forest Oil's Canadian subsidiary, but transferred to Lone Pine in May 2011 and renamed Lone Pine Resources Canada Ltd.
exploration permit	Petroleum and natural gas exploratory licence granted for a given territory. Under Quebec's <i>Mining Act</i> , any person seeking to explore for oil or gas must obtain a exploration permit from the QMNR
farmout / farmin agreements	Common in the oil and gas industry, "farmout" or "farmin" agreements allow the owners of projects to permit a partner to "earn-in" to an ownership share in a project, normally through the commitment of capital. The term used depends on the contract author: "farmout" agreements are drafted by the permit holder who is "farming-out" its rights to another. "Farmin" agreements are drafted by the company seeking to invest, because the investing company is "farming-in" to the permit rights by investing capital pursuant to the agreement
Farmout Agreement	5 June 2006 letter agreement between Forest Oil and Junex by which Forest Oil obtained an option to earn 100% of the working interest in the Original Permits
Forest Oil	Forest Oil Corporation, a company incorporated under the laws of Delaware. Predecessor and former parent company of Lone Pine
FTC	Free Trade Commission
hydraulic fracturing / "fracking"	A process used to access and extract hydrocarbon resources involving a combination of water, sand, and chemicals being pumped into a wellbore at sufficient pressure to widen naturally-occurring fissures in shale rock, enabling back-flow into the well for extraction
Industrial Park	The Bécancour Waterfront Industrial Park, industrial-zoned land located on the banks of the St. Lawrence River in the St. Lawrence Lowlands
IPO	Initial public offering
Junex	Junex Inc., a company incorporated under the laws of Quebec and a Canadian junior oil and gas company

Term	Definition
LNG	Liquefied natural gas
Lone Pine	Lone Pine Resources Inc., a company incorporated under the laws of Delaware. Originally named Forest Oil Operating Company, but renamed Lone Pine Resources Inc. on 7 December 2010
Mining Act	<i>Mining Act</i> , RSQ c. M-13.1 (version in force on 13 June 2011)
Mining Registry	Quebec's public register of real and immovable mining rights, created under the <i>Mining Act</i>
Minister of Sustainable Development	Quebec's Minister of Sustainable Development, Environment and the Fight Against Climate Change
NAFTA	North American Free Trade Agreement
Notice of Intent	Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the NAFTA submitted by Lone Pine on 8 November 2012
Original Permits	Permits 2006RS184 (formerly 1996PG950), 2009RS285 (formerly 2002PG597), 2009RS284 (formerly 2002PG596), and 2009RS286 (formerly 2004PG769), being exploration permits for areas within the Bécancour/Champlain Block
PCIJ	The Permanent Court of International Justice
Proved developed reserves	Reserves that have been assessed and determined to be capable of commercial production
PG906	Permit number provided to the Enterprise in September 2006 in respect of the River Permit Area (before the River Permit)
QMNR	Quebec Ministry of Natural Resources and Wildlife (as it was known on 13 June 2011)
QOGA	Quebec Oil and Gas Association
Quebec Strategy	<i>Using Energy to Build the Québec of Tomorrow: Québec Energy Strategy, 2006-2015</i> , a comprehensive energy strategy released by the Quebec government in 2006
Regulation	<i>Regulation respecting petroleum, natural gas and underground reservoirs</i> , RSQ, c. M-13.1, r. 1. The Regulation sets minimum spending and reporting requirements that must be met to retain a

Term	Definition
	valid exploration permit
Restructuring Proceedings	The restructuring of Lone Pine and its subsidiaries under the CCAA and Chapter 15 of the United States Bankruptcy Code, commenced in late 2013
River Permit	Permit P2009PG490, an exploration permit for an area within the St. Lawrence River in the St. Lawrence Lowlands. The River Permit is located in the Bécancour/Champlain Block
River Permit Agreement	Agreement between Forest Oil and Junex pursuant to which Forest Oil withdrew its application for an exploration permit for the River Permit Area in favour of Junex applying for the River Permit
River Permit Area	Area within the Bécancour/Champlain Block that is the subject of the River Permit. The River Permit Area is located within the St. Lawrence River
River Permit Rights	100% of the working interest in the Contract Area. Under the Farmout Agreement, Junex transferred the River Permit Rights to Forest Oil upon Forest Oil spending [REDACTED] on drilling and other work during the Commitment Period
SEA	Strategic Environmental Assessment
SEA-1	An SEA on the maritime Estuary and northwestern part of the Gulf of St. Lawrence. SEA-1 began in June 2009 and its preliminary report was published in July 2010
SEA-2	An SEA on the three eastern zones of the Gulf of St. Lawrence. SEA-2 began in February 2010 and its final report was published in September 2013
SEA-SG	An SEA on shale gas in Quebec. The SEA-SG began in May 2011 and its final report was published in February 2014
seismic survey	Seismic surveys are conducted to understand the structure and movement of the earth's crust and to detect and delineate potential commercial quantities of sub-sea oil and gas resources
shale gas	Natural gas present in shale rock
shale rock	Sedimentary deposit that generally consists of clay, silica, carbonate and organic material. Shale rock contains tiny pores in which natural gas or oil is trapped

Term	Definition
St. Lawrence Lowlands	The St. Lawrence Lowlands is a region of Quebec which begins at Quebec's southern border and extends northwards. The St. Lawrence Lowlands includes a 400 kilometer section of the freshwater St. Lawrence River
St. Lawrence River	The St. Lawrence River begins at the outflow of the Great Lakes, near the Quebec-US border. 550 kilometers downstream from the border, the River widens significantly and becomes the maritime St. Lawrence Estuary, which opens into the northwestern part of the Gulf of St. Lawrence
UNCITRAL Rules	2010 arbitration rules of the United Nations Commission on International Trade Law, as adopted in 2013
unconventional resources	Shale gas and oil are classified as unconventional resources because shale rock does not permit gas and oil to flow through it readily, whereas "conventional" gas and oil gather in pools. The term "unconventional" refers to the underlying resource base rather than techniques of exploration or production
Utica Shale	The Utica Shale is a formation located in southeastern Quebec and the northeastern United States
Vienna Convention	The <i>Vienna Convention on the Law of Treaties</i> , 27 January 1980, 1155 UNTS 331, 8 ILM 679
Wiser companies	Wiser Oil and Wiser Delaware, collectively
Wiser Delaware	Wiser Delaware LLC, a subsidiary of Lone Pine. Wiser Delaware was formed under the laws of Delaware, and dissolved and cancelled on 24 January 2014 in connection with the Restructuring Proceedings
Wiser Oil	Wiser Oil Delaware, LLC, a subsidiary of Lone Pine. Wiser Oil was dissolved and cancelled on 24 January 2014 in connection with the Restructuring Proceedings
working interest	In oil and gas deals, "working interest" is the concept whereby each partner in a joint venture is responsible for a share of costs and risks proportionate to its ownership

II. OVERVIEW

1. The Claimant, Lone Pine Resources Inc. ("Lone Pine") hereby respectfully submits this Memorial in support of its claims against the Respondent, the Government of Canada ("Canada") in accordance with Article 3 of the 2010 arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules") and the Tribunal's procedural order of 11 March 2015.
2. Lone Pine is an American oil and gas company that, together with its predecessor and former parent company, Forest Oil Corporation ("Forest Oil"), has significant experience developing unconventional shale gas resources, including through the use of hydraulic fracturing and directional and horizontal drilling techniques.
3. Following a joint venture invitation from the Canadian junior oil and gas company, Junex Inc. ("Junex"), Forest Oil entered the Canadian market to explore the Utica Shale gas basin. Together with Junex and other permit-holding partners, Forest Oil's (and then subsequently Lone Pine's) Canadian subsidiary (the "Enterprise") entered into a series of farmout agreements¹ in order to secure a land base for its shale gas activities in the province of Quebec, including an agreement for rights in Permit 2009PG490 (the "River Permit") located in the St. Lawrence Lowlands, near Trois-Rivières. Pursuant to these agreements, the Enterprise spent at least US\$11.6 million as part of the development plan

¹ "Farmout" and "farmin" agreements are common in the oil and gas industry as a means for permit holders to transfer rights to joint venture partners who are interested in exploring and developing oil and gas resources. The terms are functionally equivalent but reflect the position of the author of the contract: if drafted by the company that holds the permit rights, it will be a "farmout" agreement because the permit holder is "farming-out" its rights to another. If the company seeking to invest in the permit area authors the contract, it will be framed as a "farmin" agreement because the investing company is "farming-in" to the permit rights by investing capital pursuant to the agreement.

for the River Permit in keeping with its overall strategy for the Bécancour/Champlain Block (defined below).

4. In addition to the requirement to spend money on the development of the resource pursuant to the farmout agreements, the Quebec government also required those holding permits to spend certain amounts each year on developing the resource, failing which the permit rights would be lost. This ensures that companies do not "sit on" their permit rights. Lone Pine met and exceeded all such provincially mandated spending requirements.
5. The Quebec government encouraged the investment by the Claimant not just through its official policies which at the time supported oil and gas exploration in the Utica Shale, but also through direct approval of the specific investment project which was nullified by Bill 18.
6. In 2011, the National Assembly of Quebec passed Bill 18, *An Act to limit oil and gas activities*, revoking all mining rights – including Petroleum & Natural Gas Exploratory Licences ("exploration permits") pertaining to oil and gas resources beneath the St. Lawrence River, including the River Permit. The Bill further specified that no compensation would be paid to permit owners for this revocation.
7. Bill 18 breaches NAFTA Chapter Eleven in two ways:
 - (a) First, the revocation of the River Permit through Bill 18 constitutes an uncompensated expropriation that lacks a public purpose in violation of Article 1110 of the NAFTA.

- (b) Second, Bill 18 violates Canada's obligation to afford Lone Pine's investments treatment in accordance with the minimum standard guaranteed by NAFTA Article 1105.
8. Lone Pine recognizes that in recent years, shale gas exploration has been subject to considerable public debate. Indeed, Quebec's decision to initiate a commission of inquiry through the *Bureau d'audiences publiques sur l'environnement* ("BAPE") and begin a strategic environmental assessment ("SEA") of shale gas exploration was a response to and an engagement with this debate. However, contrary to the public purposes inherent in a SEA, Quebec chose to pre-empt the public regulatory process underway. Lacking any public purpose, Quebec passed a bill to revoke the River Permit without paying compensation. It did so before the SEA process was complete. This act both violated the NAFTA and removed any possibility that Lone Pine will see a return on the millions of dollars, time and resources it invested in Quebec from 2006 to 2011 to execute its development plan for the natural gas resources in the River Permit Area beneath the St. Lawrence River.
9. As a result of Quebec's actions, the Enterprise suffered damages at a minimum, in the amount equal to the fair market value of its expropriated investments, which the Claimant has determined to be in the amount of US\$118.9 million.

III. FACTS

A. The Parties

1. *The Claimant, its Enterprise in Canada and Related Companies*

10. As described in greater detail below, during the relevant period the Delaware-incorporated Claimant's business activities were carried out by an Alberta-incorporated affiliate, Canadian Forest Oil Ltd., which later changed its name to Lone Pine Resources Canada Ltd. (defined above as the "Enterprise"). Until May 2011, both the Enterprise and the Claimant were owned by the Delaware-incorporated public company, Forest Oil. In May 2011, the Enterprise became a wholly-owned subsidiary of the Claimant. Prior to the entry into force of Bill 18 in June 2011, the Claimant completed an initial public offering ("IPO") and in September 2011 was spun off from Forest Oil to become a standalone public US company.
11. Two years later, during the months after the Claimant's Notice of Arbitration was filed on 6 September 2013, the Claimant and its subsidiaries commenced restructuring proceedings under Chapter 15 of the United States Bankruptcy Code and the Canadian *Companies' Creditors Arrangement Act* ("CCAA") (the "Restructuring Proceedings"). As these matters occurred after the filing of the Notice of Arbitration in this case, they are not detailed further in this Memorial.
12. The following overview describes the entities involved in the Claimant's operations in Canada up to the filing of the Notice of Arbitration in September 2013.

a) The Investor and Claimant: Lone Pine Resources Inc.

13. The Claimant, Lone Pine, is an oil and gas exploration, development, and production company organized under the laws of the State of Delaware in the United States of America (the "US"). It was originally incorporated on 30 September 2010 under the name "Forest Oil Operating Company"² and was renamed "Lone Pine Resources Inc." on 7 December 2010.³
14. From its initial organization in 2010 to 1 June 2011, Lone Pine was a wholly-owned subsidiary of Forest Oil.⁴
15. On 1 June 2011 Forest Oil caused Lone Pine to complete an IPO in the US and in Canada of shares of common stock, which were listed on the New York Stock Exchange and Toronto Stock Exchange.⁵ The shares sold in the IPO represented approximately 17.7% of Lone Pine's then shares. Forest Oil retained the remaining approximately 82.3% of the outstanding Lone Pine shares until 30 September 2011, when it distributed all such shares

² Forest Oil Operating Company, Certificate of Incorporation, filed 30 September 2010 (C-087).

³ Lone Pine Resources Inc., Certificate of Amendment, filed 7 December 2010 (C-089).

⁴ Lone Pine Initial Public Offering News Releases (C-098): Forest Oil, "Forest Oil Announces Initial Public Offering of Its Canadian Operations", (13 December 2010), online: Business Wire <<http://www.businesswire.com>> (C-098A).

⁵ Lone Pine Initial Public Offering News Releases (C-098): Forest Oil, "Forest Oil Announces Initial Public Offering of Its Canadian Operations", (13 December 2010), online: Business Wire <<http://www.businesswire.com>> (C-098A); Forest Oil, "Forest Oil Announces Initial Public Offering of Lone Pine Resources Inc.", (11 May 2011), online: Business Wire <<http://www.businesswire.com>> (C-098B); and Forest Oil, "Forest Oil Announces Initial Public Offering of Its Canadian Operations", (26 May 2011), online: Business Wire <<http://www.businesswire.com>> (C-098C).

to its own public shareholders.⁶ Upon this distribution, Lone Pine became a standalone public company listed on the New York Stock Exchange and Toronto Stock Exchange.

16. Subsequent to the commencement of this arbitration and filing of the Notice of Arbitration on 6 September 2013, Lone Pine was delisted from both stock exchanges, effective 16 September 2013 for the New York Stock Exchange⁷ and 1 November 2013 for the Toronto Stock Exchange.⁸

b) The Enterprise: Lone Pine Resources Canada Inc.

17. All of Lone Pine's activities in Canada are operated through the Enterprise. Lone Pine's predecessor and former parent company, Forest Oil (discussed below) originally acquired the Enterprise in 1996 and transferred it to Lone Pine on 26 May 2011.
18. The Enterprise was incorporated in the Province of Alberta as "Canadian Forest Oil Ltd." and was renamed "Lone Pine Resources Canada Ltd." on 30 June 2011.⁹
19. Through the Enterprise, Lone Pine has carried out business activities in Alberta, British Columbia, Quebec, and the Northwest Territories. The Enterprise is active in the Deep

⁶ Lone Spin-Off Completion News Releases (C-097): Forest Oil, "Forest Oil Announces Spin-off of Lone Pine Resources Inc. and Special Stock Dividend to Shareholders", (6 September 2011), online: Business Wire <<http://www.businesswire.com>> (C-097A); Forest Oil, "Forest Oil Announces Final Distribution Ratio for Special Stock Dividend to Shareholders", (19 September 2011), online: Business Wire <<http://www.businesswire.com>> (C-097B); and Forest Oil, "Forest Oil Completes Spin-Off of Lone Pine Resources Inc.", (30 September 2011), online: Business Wire <<http://www.businesswire.com>> (C-097C).

⁷ New York Stock Exchange, "NYSE to Suspend Trading in Lone Pine Resources Inc. and Commence Delisting Proceedings", (11 September 2013), online: <www.nyse.com> (C-100).

⁸ Toronto Stock Exchange, "TSX Delisting Review – Lone Pine Resources Inc. (Symbol: LPR)", (1 October 2013), online: <www.newswire.com> (C-101).

⁹ Lone Pine Resources Canada Ltd., Certificate and Articles of Amalgamation, filed 27 May 2011 and Certificate and Articles of Amendment, filed 30 June 2011 (C-090).

Basin and Peace River Arch areas (northwestern Alberta and northeastern British Columbia), the Utica Shale (Quebec), and the Liard Basin (Northwest Territories), pursuing both conventional and unconventional plays, including developing light oil and natural gas resources through hydraulic fracturing and other methods.¹⁰ This experience is described further below.

(a) **Deep Basin:** As of 31 March 2011, the Enterprise held approximately 91,682 net acres in the Narraway/Ojay fields located in the Deep Basin area of Alberta and British Columbia, to which were attributed approximately 59 Bcfe of estimated proved developed reserves¹¹ and 28 gross (16 net)¹² proved undeveloped locations as of 31 December 2010. Exploration and development operations in the Narraway/Ojay fields primarily target natural gas and natural gas liquids production. The Enterprise's position in the Deep Basin on 31 March 2011 included:

(i) in the Narraway field, 139 gross (125 net) sections¹³ on which it has 27 gross (16 net) productive wells, including one horizontal multi-stage hydraulically-fractured well; and

¹⁰ D. Axani Witness Statement at para. 8 (CWS-001). In the oil and gas industry, a "play" is a three-dimensional space that is the target of oil and gas development. A play may be defined by a specific geological formation, surface above the geological formation or by reference to rock properties including geological and reservoir characteristics.

¹¹ Proved developed reserves are reserves that have been assessed and determined to be capable of commercial production.

¹² The net amount reflects the working interest position.

¹³ There are 640 acres in a "section".

- (ii) in the Ojay field, 63 gross (18 net) sections on which it has 9 gross (4 net) productive wells.
- (b) **Peace River Arch:** As of 31 March 2011, the Enterprise held approximately 41,062 net acres in and near the Evi field located in the Peace River Arch area of Northern Alberta, to which were attributed approximately 90 Bcfe of estimated proved reserves, of which 22 Bcfe are classified as proved developed reserves. Exploration and development operations in the Evi field primarily targets light oil production. Throughout the Evi field, the Enterprise has experience working near a variety of waterways, including lakes, streams and creeks. The Enterprise's acreage position in the Evi area consisted of 75 gross (64 net) sections, on which it had 74 gross (55 net) productive wells in the Slave Point formation. As of 31 December 2010 there were 107 gross (101 net) proved undeveloped horizontal drilling locations that utilize multi-stage hydraulically-fractured completion technology.
- (c) **Utica Shale:** The Enterprise holds a total of approximately 274,000 net acres of land in Quebec prospective for the Utica Shale gas play.¹⁴ The Bécancour/Champlain Block¹⁵ accounts for 172,892 acres of these holdings, of which the River Permit Area¹⁶ is 33,460 acres. To date, the Enterprise has acquired 112 miles of two-dimensional seismic data integrated with rock analysis

¹⁴ This means the acreage is held for the shale gas play.

¹⁵ The "Bécancour/Champlain Block" refers to the geographic area contiguous to the St. Lawrence River covered by the "Original Permits" (collectively, Permits 2006RS184 (formerly 1996PG950), 2010RS284 (formerly 2002PG596), 2010RS285 (formerly 2002PG597), and 2009RS286 (formerly 2004PG769).

¹⁶ The River Permit Area refers to the geographic area of the River Permit (defined herein).

and geological mapping, which led to the Enterprise participating in 10 well penetrations (vertical and horizontal).

- (d) **Liard River:** The Enterprise holds approximately 61,000 net acres in the Liard Basin in the Northwest Territories that are prospective for the Muskwa shale gas play. This is a newly-developing natural gas play adjacent to the Horn River Basin, which has been in commercial production since 2007. In 2013, based on the results of a single vertical well and evidence of comparable plays, the National Energy Board issued a Commercial Discovery Declaration¹⁷ to the Enterprise, which resulted in the Enterprise qualifying for and being granted a 21 year continuation lease to develop this play. With no hydraulically fracture stimulated horizontal production information directly on the permit (or located in the North West Territories as an analogue) the National Energy Board granted the Enterprise a Commercial Discovery Declaration with the use of analogous wells located more than 20 miles away.

¹⁷

A Commercial Discovery Declaration is a statutory mechanism for the National Energy Board to "make a written declaration of commercial discovery in relation to those frontier lands in respect of which there are reasonable grounds to believe that a commercial discovery may extend". *Canada Petroleum Resources Act* RSC, 1985, c. 36 (2nd Supp.) at s. 35(1) (C-008).

Pursuant to this Declaration, the Enterprise qualified for a 21 year lease continuance as provided for in section 62 of the *Canada Oil and Gas Land Regulations*. As of 1 May 2013, the Regulations provided:

62. An oil and gas lease shall, upon application by the lessee, be renewed for successive terms of 21 years if

(a) the area under the oil and gas lease is, in the opinion of the Minister, capable of producing oil or gas; and

(b) the lessee has complied with the terms of the oil and gas lease and with the provisions of these Regulations in force at the date on which the oil and gas lease was granted.

Canada Oil and Gas Land Regulations, CRC, c. 1518 at s. 62 (version in force since 2006) (C-009).

c) Other Related Companies

20. In addition to the Enterprise, the Claimant had other subsidiaries in both Canada and the US. None of these are operating companies but, at various times, they were present in the chain of ownership between Lone Pine (or its predecessor) and the Enterprise.¹⁸

(1) Wiser Oil Delaware, LLC

21. Wiser Oil Delaware, LLC ("Wiser Oil") was a limited liability company formed under the laws of Delaware on 13 April 2011 upon the conversion of a Delaware corporation that was originally incorporated on 13 December 1996 under the name "Wiser Oil Delaware Inc.".¹⁹ As of 6 September 2013, Lone Pine held a 100% ownership interest in Wiser Oil and Wiser Oil had no business operations. Wiser Oil was dissolved and cancelled on 24 January 2014 in connection with the Restructuring Proceedings.²⁰

(2) Wiser Delaware LLC

22. Wiser Delaware LLC ("Wiser Delaware") was a limited liability company formed under the laws of Delaware on 13 December 1996.²¹ As of 6 September 2013, Lone Pine held a 99% ownership interest in Wiser Delaware, and Wiser Oil held a 1% ownership interest.

¹⁸ Diagrams of Ownership and Control of Lone Pine and the Enterprise (C-085): Diagram A – Ownership and Control of Lone Pine and the Enterprise before 30 September 2010 (C-085A); Diagram B – Ownership and Control Lone Pine and the Enterprise on 30 September 2010 (C-085B); Diagram C – Ownership and Control of Lone Pine and the Enterprise on 26 May 2011 (C-085C); Diagram D – Ownership and Control of Lone Pine and the Enterprise on 1 June 2011. (C-085D); Diagram E – Ownership and Control of Lone Pine and the Enterprise on 30 September 2011 (C-085E).

¹⁹ Wiser Oil Certificate of Formation and Certificate of Conversion, filed 13 April 2011 (C-093).

²⁰ Wiser Oil Certificate of Cancellation, filed 24 January 2014 (C-094).

²¹ Wiser Delaware Certificate of Formation, filed 13 December 1996 and Certificate of Amendment thereto, filed 30 July 2004 (C-095).

Wiser Delaware had no business operations. Wiser Delaware was dissolved and cancelled on 24 January 2014 in connection with the Restructuring Proceedings.²²

23. Wiser Oil and Wiser Delaware are referred to collectively as the "Wiser companies."

d) Former Parent Company: Forest Oil Corporation

24. Until 2011, Lone Pine and the Enterprise were wholly-owned subsidiaries of Forest Oil,²³ a corporation organized under the laws of the State of New York in the US. Forest Oil is an intermediate oil and gas exploration, development, and production company, founded in 1916, incorporated in 1924, and publicly owned since 1969.²⁴ During the relevant period, Forest Oil was a publicly-traded company listed on the New York Stock Exchange.

25. Forest Oil was highly experienced in oil and gas exploration and development and had completed a variety of projects in technically challenging environments, including onshore and offshore in the Gulf of Mexico, Alaska, and Canada. Particular staff members within Forest Oil's "New Ventures" division had specific shale gas experience, including Roger Wiggins, who worked on the Barnett Shale (the first major commercial shale gas development play in North America) and who provided instruction and

²² Wiser Delaware Certificate of Cancellation, filed 24 January 2014 (C-096).

²³ Diagram A – Ownership and Control of Lone Pine and the Enterprise before 30 September 2010 (C-085A); Diagram B – Ownership and Control Lone Pine and the Enterprise on 30 September 2010 (C-085B).

²⁴ Forest Oil, 2013 Annual Report (as amended), US Securities and Exchange Commission Form 10-K/A, filed 1 October 2014 at 1 (C-088).

direction regarding Forest Oil's entry into the Quebec market and the Enterprise's activities in the Bécancour/Champlain Block.²⁵

e) Reorganization and Initial Public Offering

26. On 26 May 2011, Forest Oil transferred its entire ownership interest in the Enterprise to its then-subsiidiary Lone Pine.²⁶ Through this reorganization, the Enterprise became a wholly-owned subsidiary of Lone Pine, which held approximately 86.6% of the Enterprise directly, and the remainder indirectly through the Wisser companies.²⁷
27. Subsequently, on 1 June 2011, Lone Pine completed an IPO in which it sold 17.7% of its shares of common stock to the public in the US and in Canada. Lone Pine listed its shares of common stock on the New York Stock Exchange and Toronto Stock Exchange. The remaining 82.3% of Lone Pine's shares of common stock were retained by Forest Oil.²⁸

f) Forest Oil Divests Its Shares in Lone Pine

28. In September 2011, Forest Oil distributed its remaining 82.3% interest in Lone Pine *pro rata* to all Forest Oil shareholders.²⁹ As a result, as of 30 September 2011, Lone Pine

²⁵ D. Axani Witness Statement at para. 9 (CWS-001).

²⁶ Bill of Sale between Forest Oil and Lone Pine, dated 25 May 2011 (C-092).

²⁷ Diagram C – Ownership and Control of Lone Pine and the Enterprise on 26 May 2011 (C-085C).

²⁸ Diagram D – Ownership and Control of Lone Pine and the Enterprise on 1 June 2011. (C-085D).

²⁹ Lone Spin-Off Completion News Releases (C-097): Forest Oil, "Forest Oil Announces Spin-off of Lone Pine Resources Inc. and Special Stock Dividend to Shareholders", (6 September 2011), online: Business Wire <<http://www.businesswire.com>> (C-097A); Forest Oil, "Forest Oil Announces Final Distribution Ratio for Special Stock Dividend to Shareholders", (19 September 2011), online: Business Wire <<http://www.businesswire.com>> (C-097B); and Forest Oil, "Forest Oil Completes Spin-Off of Lone Pine Resources Inc.", (30 September 2011), online: Business Wire <<http://www.businesswire.com>> (C-097C).

became a standalone public company listed on the New York Stock Exchange and Toronto Stock Exchange, and primarily comprised of shareholders of Forest Oil.³⁰

2. *The Respondent*

a) The Government of Canada

29. Canada is a sovereign state and a party to the NAFTA. It is a federal state, with a central government, as well as local executive, judicial, and legislative branches of government in each of its ten provinces and three territories. The measure at issue in this arbitration was the action of one of these sub-federal units, namely the Province of Quebec.

³⁰ Diagram E – Ownership and Control of Lone Pine and the Enterprise on 30 September 2011 (C-085E).

B. Shale Gas Exploration and Development

1. Shale Gas and Hydraulic Fracturing

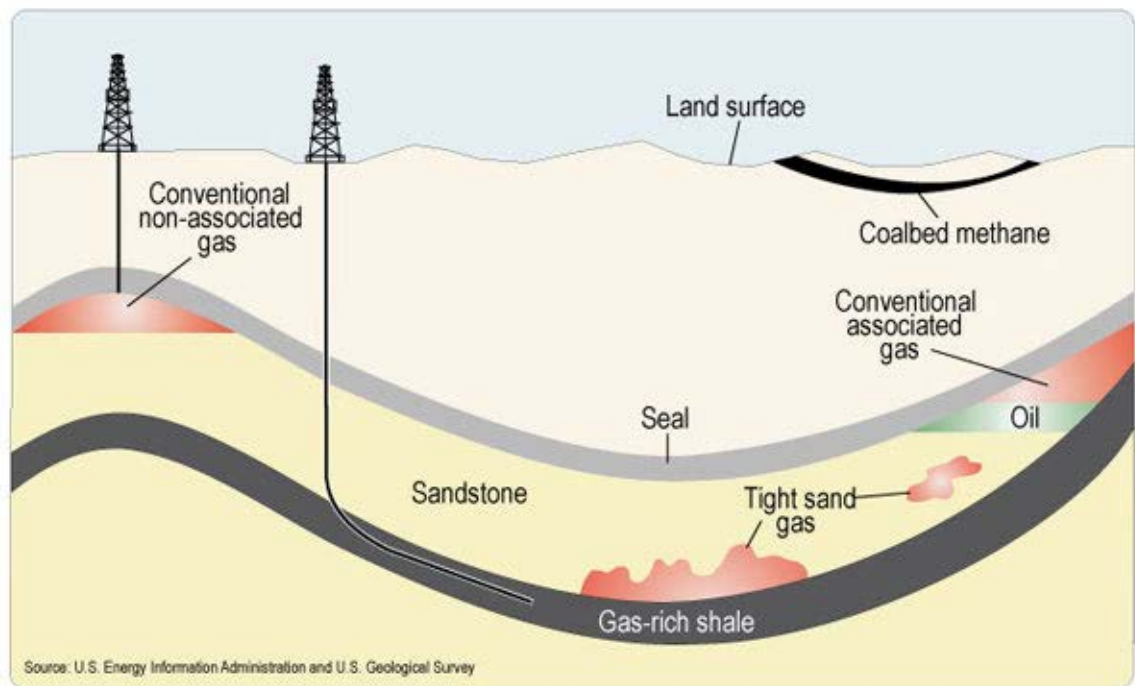
30. Shale rock is a sedimentary deposit that generally combines clay, silica (e.g. quartz), carbonate (e.g. calcite or dolomite) and organic material. Shale contains tiny pores in which natural gas or oil is trapped.³¹
31. Natural gas has been produced from shale formations since the 1800s, primarily from shallow vertical wells which rely on natural fracturing to produce low rates over a long time.³² Today, shale gas (or shale oil) can be accessed and extracted through a process involving a combination of hydraulic fracturing, commonly referred to as "fracking", and horizontal drilling.
32. Hydraulic fracturing has been a commonly used well stimulation technique in North America since the 1950s. It involves a combination of water, sand, and chemicals being pumped into a wellbore with sufficient pressure to widen naturally-occurring fissures in the rock, enabling the back-flow of gas, oil, salt water and the fracking fluid into the well for extraction. By drilling horizontally, the surface footprint of the drilling operation can be smaller and the productivity of the well can be increased by enabling a greater contact area within the shale deposit.
33. The combination of hydraulic fracturing and horizontal drilling was developed in the mid-2000s. Since that time, the use of these two techniques in combination has become a

³¹ Natural Energy Board, "A Primer for Understanding Canadian Shale Gas", (November 2009) at 2 (C-074).

³² Natural Energy Board, "A Primer for Understanding Canadian Shale Gas", (November 2009) at 3 (C-074).

standard way to extract natural gas from so-called "unconventional" resources.³³ In the oil and gas industry, the distinctions "conventional" and "unconventional" refer to differences in the underlying resource base (not to techniques of exploration or production). Shale gas and oil are classified as unconventional resources because the shale layer does not permit gas and oil to flow through it readily. By contrast "conventional" oil and gas are produced from "pools" in which they gather.

Figure 1: Schematic Geology of Natural Gas Resources³⁴

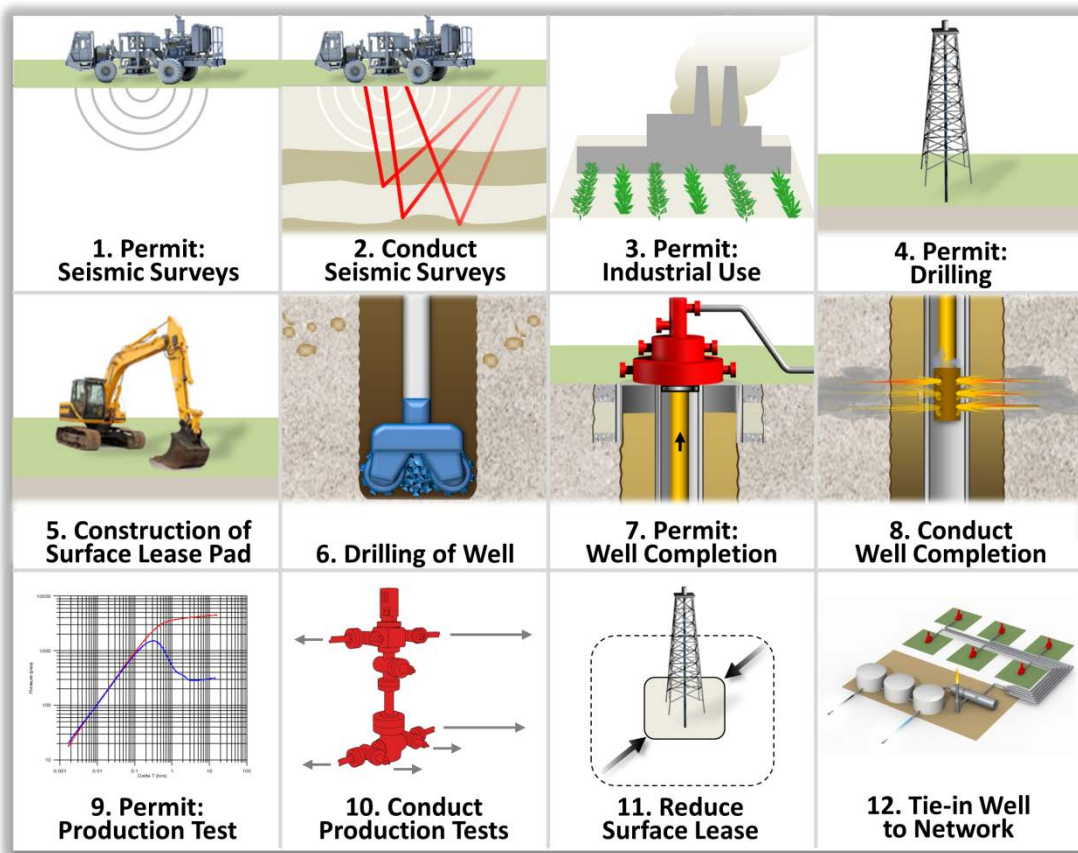


³³ The combination of hydraulic fracturing and horizontal drilling has become a standard industry practice in western Canada, with an increasing number of companies using this combination of technology to pursue primarily unconventional resources, although the combination is now also being used to pursue conventional plays. See the Enterprise, "Use of Horizontal Drilling and Hydraulic Fracturing, Western Canada, 2006 to 2013". This document was created by the Enterprise, based on public government data from geoScout, a software for oil and gas industry professionals. (C-081).

³⁴ US Energy Information Administration, "Nonrenewable Natural Gas", online: <http://www.eia.gov/kids/energy.cfm?page=natural_gas_home-basics> (C-083).

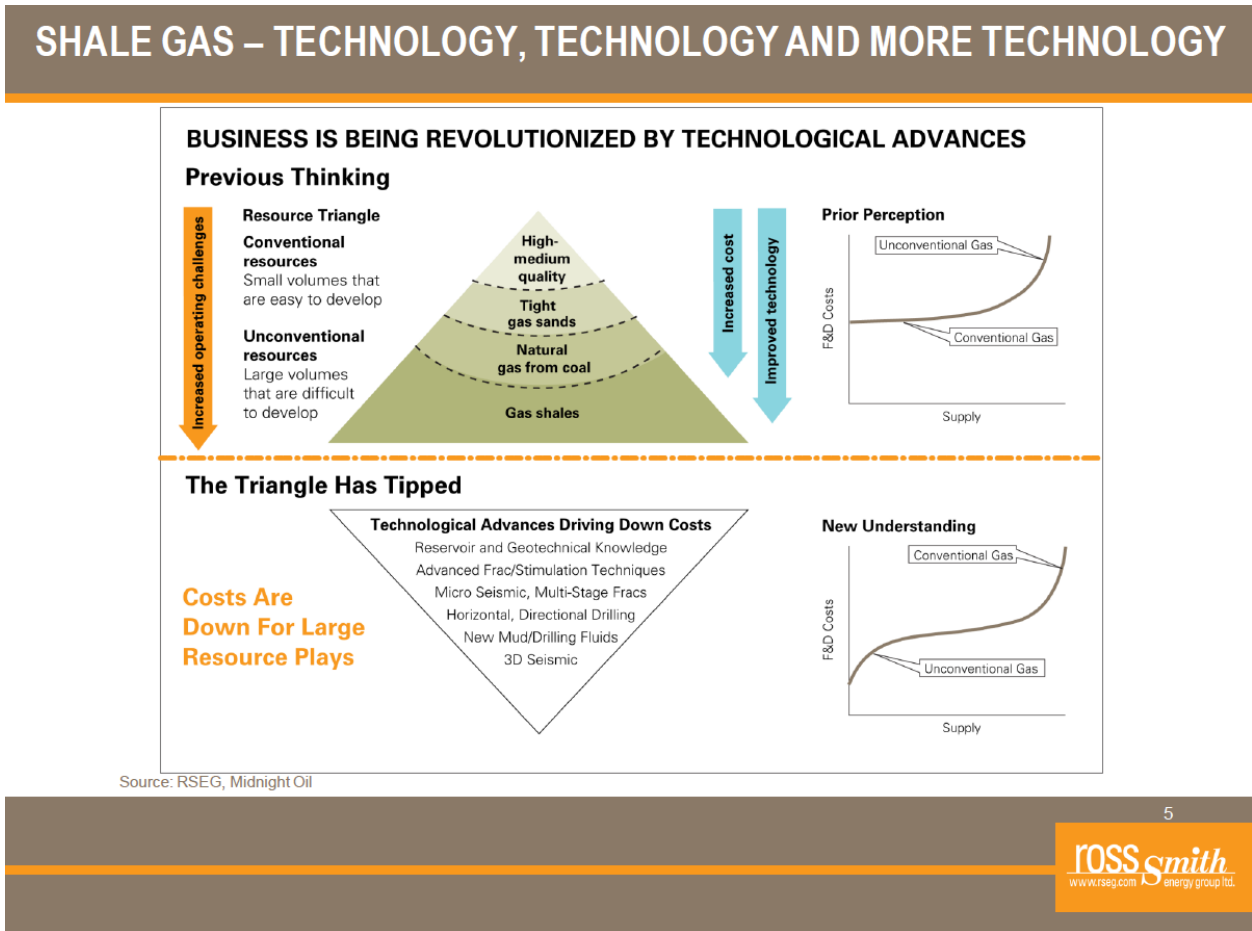
34. In this process, a vertical well is drilled to a predetermined depth above a shale gas or oil reservoir, and then drilled at an increasing angle until it meets the reservoir depth. Once it reaches that depth, a wellbore is drilled horizontally, sometimes up to 2,500 meters. The shale rock surrounding the wellbore is then fractured, either to intersect and open existing natural fractures in the shale, or to create new fractures. This creates pathways by which the natural gas and oil can flow in to the wellbore for extraction.

Figure 2: Steps in a Shale Gas Exploration and Development Project



35. For this reason, unconventional resources such as the natural gas and oil contained in shale rock have only become economically accessible for exploration and development through technological innovations.

Figure 3: Resource Triangle and the Relationship Between Conventional and Unconventional Resources³⁵



36. Shale rock containing natural gas can be found in most sedimentary basins throughout Canada. A large concentration lies within the Western Canada Sedimentary Basin, which extends from northeast British Columbia to southwest Manitoba. Other basins are located in the Arctic, the Northwest Territories, the Yukon, Quebec, Ontario, New Brunswick, and Nova Scotia.

³⁵ Trevor Sloan (Ross Smith Energy Group Ltd.), "Shale Plays: State of the Industry", Presentation to the Quebec Oil and Gas Association (undated), at 4 (C-076).

2. *Shale Gas in Quebec*

37. In Quebec, oil and gas exploration has occurred for the last 140 years, but has primarily consisted of conventional plays. The Utica Shale basin contains a particularly attractive shale gas deposit that is naturally fractured, porous, thick, normal to over-pressured, and has good brittleness.³⁶ It has been estimated that in this region alone, 100 to 300 trillion cubic feet of natural gas is trapped in the shale.³⁷ Between 22.4 and 47.4 trillion cubic feet of this reserve is technically recoverable.³⁸ To put these numbers into context, in 2009 Canada produced a total of just 5.2 trillion cubic feet and in 2010, 5.1 trillion cubic feet of marketable natural gas.³⁹ Accordingly, any party holding the right to extract natural gas from the Utica Shale basin would stand to generate considerable revenues.

a) *The 2006-2015 Quebec Energy Strategy*

38. In 2006, the same year that Forest Oil was contemplating pursuing projects in Quebec, the Quebec government released a comprehensive energy strategy called *Using Energy to Build the Québec of Tomorrow: Québec Energy Strategy, 2006–2015* (the "Quebec

³⁶ Irene Haas, "Utica Shale Play in Quebec – Forest Oil Announced New Trend", *Canaccord Adams* (8 April 2008) at 4 (C-025); D. Axani Witness Statement at para. 17-18 (CWS-001); R. Wiggin Witness Statement at para. 8 (CWS-002); Expert Report of GLJ Petroleum Consultants (7 April 2015) at 4, 11 (CER-001) [GLJ Report (2015)].

³⁷ An independent study from Université Laval estimated these figures based on publicly available information and studies: Yves Duchaine et al., "Potential en gaz naturel dans le Groupe d'Utica, Québec", Université Laval (14 September 2012) at 72 (C-079).

³⁸ Yves Duchaine et al., "Potential en gaz naturel dans le Groupe d'Utica, Québec", Université Laval (14 September 2012) at 72 (C-079).

³⁹ Statistics Canada, "Supply and disposition of natural gas", CANSIM Table 131-0001, online: <<http://www5.statcan.gc.ca/cansim>> (C-082). The total volume was calculated based on Statistics Canada data for 2009 and 2010, which was aggregated and converted from cubic meters to cubic feet.

Strategy")⁴⁰. The Quebec Strategy was the product of a consultation process initiated by the province of Quebec that began in November 2004. It set out six objectives for the energy sector in Quebec. One of these objectives was to "[c]onsolidate and [d]iversify sources of oil and natural gas supplies."⁴¹ The Quebec Strategy critically noted Quebec's reliance on extra provincial sources of natural gas (and oil) commenting that this reliance "creates a strategic dependency and has a direct impact on our balance of trade".⁴²

39. Of the three priority actions Quebec identified, two relate to natural gas:

(a) First, to "[c]reate the conditions required to develop Québec's oil and gas resources"; and

(b) Second, to "[d]iversify natural gas supply sources."⁴³

40. The Quebec Strategy observed that "all of [Quebec's supply of natural gas] comes from Western Canada via a single transportation system" and that the only gas reserves to which Quebec has direct access appear to have reached their peak and entered decline.⁴⁴ For this reason, the Quebec Strategy stated "[w]e must therefore diversify our [natural

⁴⁰ QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006–2015" (2006) (C-045).

⁴¹ QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006–2015" (2006) at 74 (C-045).

⁴² QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006–2015", (2006) at 74 (C-045).

⁴³ QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006–2015", (2006) at 74 (C-045).

⁴⁴ QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006–2015", (2006) at 74 (C-045).

gas] supply sources in order to strengthen our energy security in the longer term".⁴⁵

While the Quebec Strategy emphasized the importance of energy efficiency and new technology (wind, geothermal and solar, biodiesel, etc.), it explicitly recognized that these strategies alone "are insufficient and we must also work to develop the oil and natural gas assets available to us in Quebec".⁴⁶

41. To that end, the Quebec Strategy memorialized the government's intention to support fossil fuel exploration and development:

One of its most important assets is the existence of favourable geological conditions in Gaspésie, along the St. Lawrence Valley and in offshore areas of the Gulf and St. Lawrence Estuary. The context has never been more favourable to new and major investments in fossil fuel prospecting. ***The Government intends to encourage these investments by removing all the obstacles currently standing in their way.***⁴⁷ (emphasis added)

42. In discussing offshore oil and gas activity in the Estuary and Gulf of St. Lawrence, the Quebec Strategy specifically identified environmental concerns as one of three problems that must be resolved before potential offshore reserves can be exploited,⁴⁸ and outlined

⁴⁵ QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006–2015", (2006) at 74 (C-045).

⁴⁶ QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006–2015", (2006) at 75 (C-045).

⁴⁷ QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006–2015", (2006) at 87 (C-045).

⁴⁸ The other two problems being: (1) the high level of investment required for offshore projects (and the need to create an environment conducive to such investment), and; (2) a territorial dispute between the Canada federal and Quebec provincial governments about ownership of resources in the Gulf and Estuary. QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006–2015", (2006) at 81 (C-045).

government plans for an SEA of the Estuary and Gulf of St. Lawrence.⁴⁹ Similarly, the Quebec Strategy described environmental issues relating to proposed liquefied natural gas ("LNG") terminals in the province, and sets out the environmental assessment processes planned for these projects.⁵⁰

43. By contrast, the Quebec Strategy described "major onshore investments" in the St. Lawrence Lowlands and in Gaspésie without mentioning any environmental concerns in these areas.⁵¹

b) Special Case: Oil and Gas Development in the Estuary and Gulf of St. Lawrence

44. Significant offshore oil and gas reserves were discovered in the Estuary and Gulf of St. Lawrence in the 1990s. The Quebec Strategy, generally supportive of oil and gas development in the province, reiterated the Quebec government's hopes to develop these offshore resources, while also noting that offshore activity in the Estuary and Gulf of St. Lawrence faced unique challenges.⁵²

45. *First*, the Quebec and federal governments were in the midst of a dispute over the management of resources located in territorial seas in the Gulf of St. Lawrence. Although Quebec had issued exploration permits in the Gulf, the federal government refused to

⁴⁹ See e.g. AECOM Tecault Inc., "Évaluation environnementale stratégique de la mise en valeur des hydrocarbures dans le bassin de l'estuaire maritime et du nord-ouest du golfe du Saint-Laurent. Rapport préliminaire en appui aux consultations", (July 2010) at 1 (R-021).

⁵⁰ QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006–2015", (2006) at 84 (C-045).

⁵¹ QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006–2015", (2006) at 78 (C-045).

⁵² QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006–2015", (2006) at 81 (C-045).

recognize their validity as, in the federal government's view, Quebec did not have jurisdiction over those areas to grant permits.⁵³

46. In order to work towards a solution of joint federal and provincial management of the area, Quebec undertook legislative reform to bring its permit and environmental review system into conformity with federal practice.⁵⁴ While this process was underway, the Quebec government imposed a moratorium on the issuance of new exploration permits in marine environments (i.e. the Estuary and Gulf of St. Lawrence), to be lifted once an agreement was finalized between Quebec and Canada.⁵⁵ This moratorium, originally enacted in 1998, remains in place today in the absence of a binding agreement.⁵⁶
47. *Second*, offshore oil and gas activity faces specific environmental concerns relating to the use of seismic survey technology and its effect on marine life.⁵⁷ In 2004, the Quebec government had given the BAPE⁵⁸ a mandate to conduct an inquiry and hold public

⁵³ Hydro-Québec, *Plan d'exploration pétrole et gaz naturel au Québec 2002-2010* (Québec: Hydro-Québec, 2002) at 63-65 (C-044).

⁵⁴ Hydro-Québec, *Plan d'exploration pétrole et gaz naturel au Québec 2002-2010* (Québec: Hydro-Québec, 2002) at 66 (C-044). The Canadian federal government's permit allocation system is based on a call for bids system. Conversely, Quebec's system is based on the free mining principle, where the first applicant is granted exploration rights and a licence is delivered on a first-come, first-served basis.

⁵⁵ Hydro-Québec, *Plan d'exploration pétrole et gaz naturel au Québec 2002-2010* (Québec: Hydro-Québec, 2002) at 66 (C-044); *An Act to amend the Mining Act and the Act respecting lands in the public domain*, SQ 1998, c. 24 at s. 153. The amendments did not revoke permits already issued, but rather prohibited the award of new permits.

⁵⁶ Office of the Prime Minister, "Canada-Quebec Accord 2011", (14 October 2014), online: <<http://pm.gc.ca/eng/news/2014/10/14/canada-quebec-accord>> (C-080).

⁵⁷ Bureau d'audiences publiques sur l'environnement, "Rapport 193: Les enjeux liés aux levés sismiques dans l'estuaire et le golfe du Saint-Laurent", Rapport d'enquête et d'audience publique, (August 2004) at 1 (R-019).

⁵⁸ The *Bureau d'audiences publiques sur l'environnement* is an independent agency that reports to Quebec's Ministry of Sustainable Development, Environment and the Fight against Climate Change. The BAPE's function is to inquire into any question relating to the quality of the environment submitted to it by the

consultations regarding the environmental concerns raised by seismic surveys in the Estuary and Gulf of St. Lawrence.⁵⁹

48. The BAPE Report on seismic surveys in the Estuary and Gulf of St. Lawrence, published by the Quebec Minister of the Environment⁶⁰ in October 2004, recommended an SEA of hydrocarbon development in the Estuary and Gulf of St. Lawrence.⁶¹ In 2006, the Quebec government announced (in the Quebec Strategy) its intention to commission the recommended SEA of these areas,⁶² and in 2009 the Quebec government announced that it would undertake SEAs covering four geographic zones within the Estuary and Gulf of St. Lawrence.⁶³

Minister. The BAPE process involves providing information to the public, holding public consultations and public hearings, and reviewing memoranda submitted to it by the public. The BAPE provides a report of its findings, analysis, and recommendations to the Minister, who then releases the report to the public. See further discussion of the BAPE in Section III.E.2 below.

⁵⁹ Bureau d'audiences publiques sur l'environnement, "Rapport 193: Les enjeux liés aux levés sismiques dans l'estuaire et le golfe du Saint-Laurent", Rapport d'enquête et d'audience publique, (13 August 2004) at 91 (R-019).

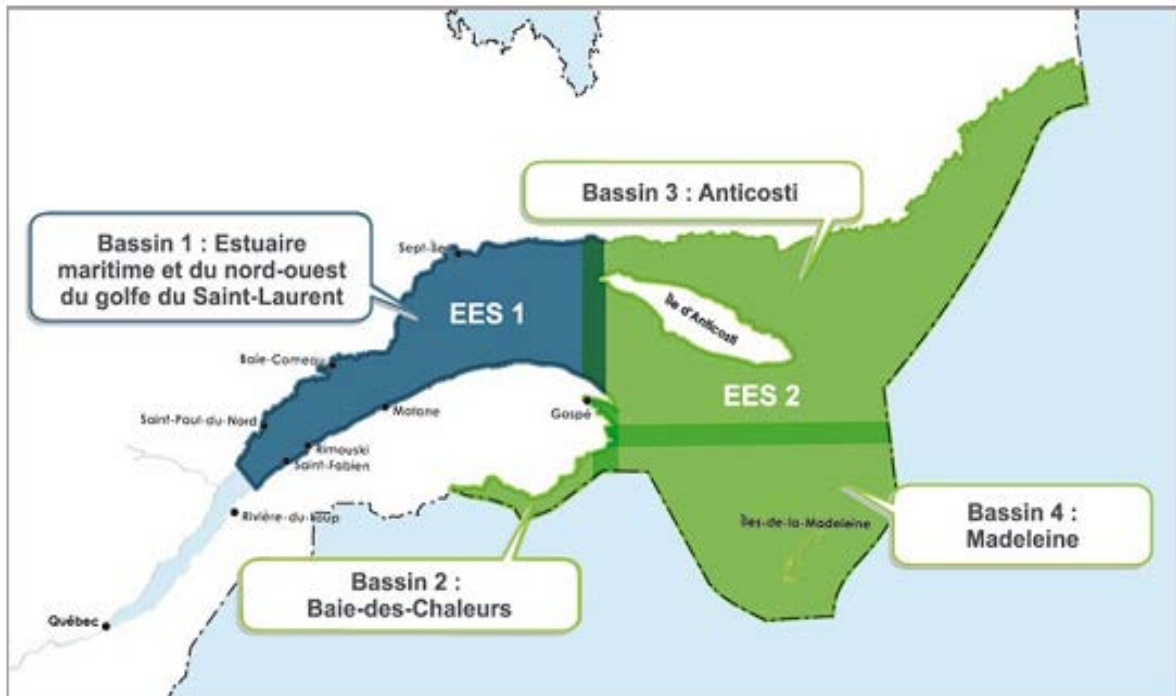
⁶⁰ Since 2004, the official designation and mandate of Quebec's Minister of the Environment has changed numerous times, to the Minister of Sustainable Development and Parks in February 2005, to the Minister of Sustainable Development, the Environment and Parks in March 2005, to the Minister of Sustainable Development, the Environment, Fauna and Parks in 2013, and finally to the Minister of Sustainable Development, the Environment and the Fight against Climate Change in 2014.

⁶¹ Bureau d'audiences publiques sur l'environnement, "Rapport 193: Les enjeux liés aux levés sismiques dans l'estuaire et le golfe du Saint-Laurent", Rapport d'enquête et d'audience publique, (13 August 2004) at 91 (R-019).

⁶² QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006-2015" (2006) at 82 (C-045); AECOM Tecault Inc., "Évaluation environnementale stratégique de la mise en valeur des hydrocarbures dans le bassin de l'estuaire maritime et du nord-ouest du golfe du Saint-Laurent – Rapport préliminaire en appui aux consultations" (July 2010) (R-021).

⁶³ Quebec, "L'EES en milieu marin", online: <<http://hydrocarbures.gouv.qc.ca/evaluations-environnementales-strategiques-milieu-marin.asp>> (C-071).

Figure 4: Map of SEAs Conducted, 1999 to Present⁶⁴



49. The SEA program began in June 2009, with an SEA on Zone 1, being the maritime Estuary and northwestern part of the Gulf of St. Lawrence ("SEA-1"). Three further SEAs were planned for the remaining zones of the Gulf and were completed in a consolidated fashion in 2013 ("SEA-2").⁶⁵

50. Accordingly, oil and gas exploration in the Estuary and Gulf of St. Lawrence have been subject to public debate and scrutiny for decades due to (i) the offshore nature of

⁶⁴ Québec, "L'EES en milieu marin", online: <<http://hydrocarbures.gouv.qc.ca/evaluations-environnementales-strategiques-milieu-marin.asp>> (C-071).

⁶⁵ QMNR, "Le Saint-Laurent, source de richesses - Programme d'évaluation d'évaluations environnementales stratégiques sur la mise en valeur des hydrocarbures en milieu marin", (2009) at 8 (C-046). Québec, "L'EES en milieu marin", online: <<http://hydrocarbures.gouv.qc.ca/evaluations-environnementales-strategiques-milieu-marin.asp>> (C-071).

operations required to explore for oil and gas in a marine environment,⁶⁶ and (ii) this area's unique ecological and political circumstances.

c) *2006-2010: Quebec Encourages Investment in the Oil and Gas Sector*

51. At the time Lone Pine entered the Quebec market, the Quebec government encouraged direct investment and was supportive of oil and gas activity, including specifically the development of natural gas resources. Indeed, it emphasized its goal of attracting investment, stating in the Quebec Strategy that the exploration and exploitation of Quebec's oil and gas resources:

will provide the Government with an excellent opportunity to confirm its intentions concerning exploration and production of hydrocarbons resources in Québec. It must be clear that, if economically viable reserves are found, *the Government will fully respect market and free enterprise rules, as well as rules concerning the environment.*⁶⁷

52. Following the publication of the Quebec Strategy, Quebec issued a number of exploration permits. From 2006 to 2010, a variety of industry players undertook exploration activity.⁶⁸ According to the Quebec Ministry of Natural Resources and Wildlife

⁶⁶ By contrast to the fluvial (river-based) environment in the St. Lawrence Lowlands, the Gulf of St. Lawrence is a true marine (i.e. salt water/open sea) environment. The Lower Estuary is also a true marine environment, whereas the upstream Upper Estuary contains brackish water and is an estuarine environment. Environment Canada, "Hydrography of the St. Lawrence River", online: Government of Canada <<https://www.ec.gc.ca>> (C-075).

⁶⁷ QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006–2015" (2006) at 83 (emphasis added) (C-045).

⁶⁸ In addition to the Enterprise, wells were drilled and (variously) cored, tested or completed by Talisman Energy, Questerre Energy, Cambrian Energy, Gastem Inc., and Junex on several permit areas within the Utica Shale. D. Axani Witness Statement at para. 19 (CWS-001).

("QMNR"), as of October 2010, 121 permits were issued to 12 companies, encompassing 2,064,259 ha of land, on which a total of 28 wells were drilled.⁶⁹

53. When speaking publicly about the industry, government officials and official publications stressed the government's support for the industry and the potential benefits the industry could bring to Quebec. For example, in March 2009 the QMNR issued a press release listing "[concrete actions]" the Quebec government was putting in place to "[to encourage companies to pursue their investments]" and "[stimulate gas exploration in Quebec]".⁷⁰

The measures referred to were further described in Quebec's 2009-2010 Budget Plan as follows:

[T]he government is acting to pursue exploration activity and increase the possibilities for production to come on-stream in the near future. To do so, the government is announcing:

- the implementation of a five-year royalty holiday of up to \$800,000 per well for wells put into production by the end of 2010;
- the participation of the *Société générale de financement du Québec* (SGF) to apply the tools at its disposal to support the development of the industry in Québec;
- implementation of a program for the acquisition of geoscientific knowledge;

⁶⁹ Jean-Yves Laliberté (QMNR) Presentation, "Le gaz naturel du Shale d'Utica" (4 October 2010) at 9-10 (C-053). Lone Pine is aware of at least two additional wells not accounted for in this tally, including its own St. Denis well which was drilled in Q4 2010 on one of its other projects (outside the Bécancour/Champlain Block).

⁷⁰ "Le ministre des Ressources naturelles et de la Faune et ministre responsable de la région du Bas-Saint-Laurent, M. Claude Béchar, a précisé les mesures, annoncées dans le budget 2009-2010, qui sont mises en place "afin de stimuler l'exploration gazière au Québec. Ainsi, par ses actions concrètes, le gouvernement du Québec incitera les sociétés à poursuivre leurs investissements". See QMNR, "Budget 2009-2010 – Le gouvernement du Québec annonce une série de mesures pour stimuler l'exploration gazière au Québec", (25 March 2009) online: <<http://www.mern.gouv.qc.ca/presse/communiqués.jsp?idSecteur=0>> (C-047). *Convenience translations of quotations originally in French are marked with [square brackets]. Where a translation has been included in the evidentiary record, the English text has been quoted directly with a reference to the relevant exhibit number.*

- implementation of a strategic environmental assessment program.⁷¹

54. The 2009-2010 Quebec Budget Plan also announced that an existing 30% refundable tax credit for labour force training in the manufacturing sector would be made available to the oil and gas sector.⁷²
55. In October 2009, then Minister of Natural Resources and Wildlife, Nathalie Normandeau, attended the first annual conference of the Quebec Oil and Gas Association ("QOGA"). At the conference, she pointed out that if a quarter of the estimated natural gas reserves in the St. Lawrence Lowlands could be extracted, Quebec's needs would be met for up to 200 years. She announced that given that prospect, "[we should encourage exploration companies to pursue their investments in oil and gas development activities, while doing so in a responsible way with respect to the environment and communities]".⁷³
56. In September 2010, the QMNR published a technical document on the development of shale gas in Quebec that emphasized the considerable investments that the natural gas industry had already made in the province at that time, and looked favorably towards

⁷¹ Finances Quebec, *2009-2010 Budget – Budget Plan* (Quebec: Government of Quebec, 2009) at F.74 (C-048).

⁷² Finances Quebec, *2009-2010 Budget – Budget Plan* (Quebec: Government of Quebec, 2009) at F. 42 (C-048).

⁷³ "Nous devons donc inciter les sociétés d'exploration à poursuivre leurs investissements dans des activités de mise en valeur du potentiel pétrolier et gazier, et ce, de façon respectueuse pour l'environnement et les communautés". QMNR, "Secteur pétrolier et gazier – Une modernisation du cadre législatif et règlementaire s'impose (19 October 2009), online: <<http://www.mern.gouv.qc.ca/presse/communiques.jsp?idSecteur=0>> (C-049).

future investment.⁷⁴ In particular, the Ministry noted that the quantum of industry investment would continue to grow as potential reserves were confirmed, and pointed out that the industry could bring thousands of jobs and training programs to the province.⁷⁵

57. Accordingly, throughout the 2006 to 2010 period, the Quebec government emphasized the significant economic benefits to Quebec of oil and gas activity. At no point did it suggest that potential investors in other areas of Quebec should infer from its stated concerns regarding offshore drilling in the Estuary and Gulf of St. Lawrence that investments in this sector are contingent, uncertain or otherwise open to revocation. To the contrary, the Government's consistent message was that it intended to encourage investment and that development of the sector could be undertaken within the bounds of Quebec's "rules concerning the environment".⁷⁶

⁷⁴ QMNR, "Le développement du gaz de schiste au Québec – Document technique" (15 September 2010) at 7-8 (C-052).

⁷⁵ QMNR, "Le développement du gaz de schiste au Québec – Document technique" (15 September 2010) at 8 (C-052).

⁷⁶ QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006-2015" (2006) at 83 (C-045).

C. The Regulation of Shale Gas Exploration and Development in Quebec

1. Exploration Permits Under the Mining Act

58. Shale gas exploration and development in Quebec is regulated by the provincial *Mining Act*.⁷⁷ Division XI of Chapter 3 of the *Mining Act* sets out the prerequisite that any person seeking to explore for oil or gas must obtain a licence (as defined above, referred to herein as an "exploration permit") from the Government of Quebec, specifically the QMNR.⁷⁸ Exploration permits are granted for a specific territory.
59. When Quebec's Bill 18 entered into force, the relevant provisions of Division XI were as follows:

DIVISION XI

**LICENCE TO EXPLORE FOR PETROLEUM, NATURAL GAS
AND UNDERGROUND RESERVOIRS**

165. No person may explore for petroleum, natural gas or underground reservoirs without holding a licence to explore for petroleum, natural gas and underground reservoirs issued by the Minister. 1987, c. 64, s. 165; 1998, c. 24, s. 77.

166. Except in the cases provided for in section 166.1, the fifth paragraph of section 207 and section 289, the Minister shall issue a licence in respect

⁷⁷ *Mining Act*, RSQ c. M-13.1 (version in force on 13 June 2011) [*Mining Act*] (C-004).

⁷⁸ As discussed in more detail in Section III.D.4 below, the Enterprise applied for a permit to explore the River Permit Area on 28 July 2006 (Letter Application from the Enterprise to QMNR, dated 28 July 2006 (C-018)). Email correspondence between Louise Levesque, Registrar for the QMNR and Roger Wiggin of Forest Oil confirm that the QMNR understood that Forest Oil/the Enterprise's intention was to drill from onshore locations to access the natural gas resources in the River Permit Area (defined below), and that the license was granted pending payment of the first year (see Email from R. Wiggin (Forest Oil) to L. Levesque (QMNR) re: application for exploration permit (26 September 2006), included in C-020). Forest Oil paid this fee, but withdrew its application after entering into the River Permit Agreement (defined below) with Junex, as the QMNR acknowledged in its letter dated 10 January 2007 when it also returned Forest Oil's cheque. (C-023).

of a given territory to any person who meets the requirements and pays the annual fee fixed by regulation. 1987, c. 64, s. 166; 1998, c. 24, s. 78.⁷⁹

60. Accordingly, but for limited circumstances relating primarily to situations where the Act contemplates a tendering process, the Minister is required to issue an exploration permit to a qualified prospective explorer. Provided the territory for which the license is sought is available and the minimum requirements of the *Regulation respecting petroleum, natural gas and underground reservoirs*⁸⁰ (the "Regulation") are met, any person may obtain an exploration permit.⁸¹

2. *Exploration Permits Grant Immovable Real Rights Under Quebec Civil Law*

61. In Canada, the provinces have jurisdiction over property and civil rights.⁸² Accordingly, determining the nature of the property right granted by an exploration permit as a factual matter requires the application of Quebec civil law, as laid out in both the *Mining Act* and the *Civil Code of Quebec* (the "Civil Code").⁸³

⁷⁹ *Mining Act* (2011) at s.165-166 (C-004). The exceptions referred to in s. 166 include situations where: (i) an applicant requests a licence for a marine environment which requires a call for tenders (s. 166.1); (ii) a license must be issued in the order established by a drawing of lots or a call for tenders (fifth paragraph of s. 207); the holder of a previously revoked licence is prevented from submitting a tender for mining rights (s. 289).

⁸⁰ *Regulation respecting petroleum, natural gas and underground reservoirs*, RSQ c. M-13.1, r. 1 (version in force on 13 June 2011) [*Regulation*] (C-005).

⁸¹ For example, the *Regulation* requires that an applicant submit a program of operations which projects the nature and extent of the exploration operations to take place. *Regulation* (2011) at s. 63 (C-005).

⁸² *Constitution Act, 1867* (UK), 30 & 31 Vict, c. 3 at s. 92(13), reprinted in RSC 1985, App II, No. 5 (C-001).

⁸³ *Civil Code of Quebec*, CQLR c. C-1991 [*CCQ*] (C-002).

62. Pursuant to section 899 of the *Civil Code*, whether tangible or intangible, all property is divided into two categories: immovables and moveables. Rights in relation to property are also divided into two categories: "personal rights" (equivalent to rights *in personam*) and "real rights" (equivalent to rights *in rem*).⁸⁴

- (a) A personal right is a relational right between two persons. Personal rights consist of three elements: a debtor, a creditor and an obligation.⁸⁵ An obligation may arise from a contractual undertaking or duties consequent to an extracontractual liability between the parties;⁸⁶ accordingly a personal right can only be enforced by the holder of the right against the other party.⁸⁷
- (b) By contrast, a real right creates a direct relationship between the right holder and the property.⁸⁸ Each type of real right has particular attributes which accord to

⁸⁴ Sylvio Normand, "Chapitre 2: Les droits réels et les droits peronnels", *Introduction au droit des biens*, 2 ed (Montréal: Wilson & Lafleur, 2014) at 33 (C-012).

⁸⁵ *CCQ* at Articles 1371-73 (C-002); Sylvio Normand, "Chapitre 2: Les droits réels et les droits peronnels", *Introduction au droit des biens*, 2 ed (Montréal: Wilson & Lafleur, 2014) at 43 (C-012).

⁸⁶ *CCQ* at Article 1372 (C-002); Sylvio Normand, "Chapitre 2: Les droits réels et les droits peronnels", *Introduction au droit des biens*, 2 ed (Montréal: Wilson & Lafleur, 2014) at 43 (C-012).

⁸⁷ Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations*, 7th ed (Montréal: Éditions Yvon Blais, 2013) at 6-7 (C-015).

⁸⁸ As the Supreme Court of Canada explained in *Sacchetti v. Lockheimer*: "A real right is a legal relationship between a person and a thing: it gives its holder a direct and immediate legal power over the thing, a power which he exercises without intermediary. If principal (the right of ownership and its components), it relates to the physical aspect of the thing; if accessory (such as a hypothec, pledge or privilege), it concerns the monetary value of the thing as a guarantee of the performance of a principal obligation. The attributes of the real right are the right of pursuit and the right of preference, as well as possession and the right of abandonment." *Sacchetti v. Lockheimer*, [1988] 1 SCR 1049 at 1056 (C-010). As explained by the Quebec Court of Appeal when quoting this passage in *Anglo Pacific Group plc c. Ernst & Young inc.*, 2013 QCCA 1323 at para. 61 [*Anglo Pacific*] (C-011), the Supreme Court used the word "thing" because according to Article 406 of the *Civil Code of Lower Canada*, ownership concerned a "thing". See also *Anglo Pacific* (2013) at para. 44.

it.⁸⁹ The holder of the real right of ownership, for example, has the right to benefit from and enjoy all the attributes of ownership, including the right to (i) use (the *usus*), (ii) enjoy (the *fructus*), and (iii) dispose (the *abusus*) of the property.⁹⁰ A real right is held *erga omnes*, meaning that the holder may take actions to have its rights in the property acknowledged.⁹¹ For example, the right of ownership allows a person to object to any encroachment that it does not authorize.⁹²

- (c) The *Civil Code* permits the holder of a real right to "dismember" the right, meaning that the rights holder may convey attributes of ownership to another person,⁹³ whether in the manners specifically contemplated by the *Civil Code*⁹⁴ (for example emphyteusis⁹⁵) or through *sui generis* contractual relationships (then an "innominate real right").⁹⁶ Dismembering a real right through a contract does

⁸⁹ For example, a servitude is a real right that confers on the holder the right of passage and the right to do necessary works: *CCQ* at Articles 1177, 1184 (C-002); Sylvio Normand, "Chapitre 2: Les droits réels et les droits peronnels", *Introduction au droit des biens*, 2 ed (Montréal: Wilson & Lafleur, 2014) at 291-92 (C-012).

⁹⁰ *CCQ* at Article 947 (C-002).

⁹¹ *CCQ* at Article 912 (C-002); Sylvio Normand, "Chapitre 2: Les droits réels et les droits peronnels", *Introduction au droit des biens*, 2 ed (Montréal: Wilson & Lafleur, 2014) at 39 (C-012).

⁹² *CCQ* at Article 953 (C-002).

⁹³ *CCQ* at Articles 947, 1119 (C-002); Sylvio Normand, "Chapitre 2: Les droits réels et les droits peronnels", *Introduction au droit des biens*, 2 ed (Montréal: Wilson & Lafleur, 2014) at 34 (C-012).

⁹⁴ *CCQ* at Article 119 (C-002).

⁹⁵ *CCQ* at Article 1195 (C-002).

⁹⁶ *Anglo Pacific* (2013) at para. 56 (C-011); Sylvio Normand, "Chapitre 10: "Les démembrements innommés", *Introduction au droit des biens*, 2 ed (Montréal: Wilson & Lafleur, 2014) at 302 (C-014).

not transform a real right into a personal right. Each such dismemberment constitutes a real right.⁹⁷

63. The rights conferred by an exploration permit are immovable real rights, as set out in section 8 of the *Mining Act*:

The mining rights conferred by the following titles are immovable real rights:

- claims;
- mining leases;
- mining concessions;
- leases to mine surface mineral substances;
- *licences to explore for petroleum, natural gas and underground reservoirs*;
- leases to produce petroleum and natural gas;
- authorizations to produce brine;
- leases to operate an underground reservoir.⁹⁸

64. Section 9 of the *Mining Act* provides that "[e]very real and immovable mining right constitutes a separate property."⁹⁹ While the *Mining Act* does not permit the transfer of some licenses, such as a licence for geographical surveying and licence for well

⁹⁷ *CCQ* at Article 1119 (C-002); Sylvio Normand, "Chapitre 10: Les démembrements innommés", *Introduction au droit des biens*, 2 ed (Montréal: Wilson & Lafleur, 2014) at 304 (C-014).

⁹⁸ *Mining Act* (2011) at s. 8 (emphasis added) (C-004).

⁹⁹ *Mining Act* (2011) at s. 9 (C-004).

drilling,¹⁰⁰ there is no such restriction on exploration permits and the immovable real rights they convey.

65. The Quebec Court of Appeal has confirmed that owner of mining rights can assign to a third party certain attributes of ownership—including the right to use and enjoy the property—that flow from these mining rights, while itself continuing to hold other attributes.

(a) In *Anglo Pacific*, the Court of Appeal considered whether a royalty agreement over mineral extraction and a related debenture note constituted real rights.¹⁰¹ It concluded that the agreements in that case did not constitute real rights because the royalties payable were not a direct right in the property, but were rather contingent on the debtor selling the extracted minerals.¹⁰²

(b) In its reasons, however, the Court of Appeal held that the mining rights under section 8 of the *Mining Act* are real rights.¹⁰³ These rights can be dismembered, meaning that different attributes of ownership in a single mining right, including the use, enjoyment and capacity to dispose of a mining right, can be held by different persons.¹⁰⁴ As the Court of Appeal explained:

¹⁰⁰ *Mining Act* (2011) at ss. 158, 161, respectively (C-004).

¹⁰¹ *Anglo Pacific* (2013) at para. 23 (C-011).

¹⁰² *Anglo Pacific* (2013) at paras. 78-80 (C-011).

¹⁰³ *Anglo Pacific* (2013) at para. 67 (C-011).

¹⁰⁴ *Anglo Pacific* (2013) at paras. 54, 56, 70 (C-011).

[70] Qu'en est-il du claim? Dans le contexte de la Loi sur les mines, le propriétaire du droit aux substances minérales est l'État. *C'est l'État qui démembre son droit de propriété en faveur d'une personne en lui attribuant un claim. Le titulaire de ce claim, qui est un droit réel immobilier distinct, peut-il, à son tour, démembrer sa propriété?* Le titulaire d'un claim minier peut certes exercer son droit conjointement avec une autre personne et celles-ci peuvent organiser l'exercice de leur droit par convention qui est susceptible d'être publiée. *Le claim minier confère à son titulaire le droit de se servir du bien et celui de faire de l'exploration pour trouver des gisements. Ces droits sont susceptibles d'être démembrés.* En revanche, le titulaire du claim minier n'a pas, à ce stade, un droit sur les substances minérales comme le détenteur du bail minier. Dans ce contexte, les débitrices avaient-elles la capacité de conférer à l'appelante un droit réel sur les substances minérales susceptibles d'être extraites advenant la découverte d'un gisement et l'octroi d'un bail minier?

[71] À mon avis, c'est le cas. Même si la loi est muette sur ce sujet précis, j'estime que les principes applicables à l'hypothèque consentie par un non-propriétaire doivent être adaptés à la situation du titulaire du claim qui confère un droit réel sur des substances minérales extraites dont il deviendra propriétaire après l'octroi d'un bail minier. Il faut se rappeler que sous l'emprise du Code civil du Bas-Canada, le droit frappait de nullité l'hypothèque du bien d'autrui sous réserve d'une bonification du titre insuffisant (art. 2043 C.c.B.-C.). Le Code civil du Québec permet l'hypothèque sur le bien d'autrui ou sur le bien futur, mais il précise que cette sûreté prend effet lorsque le constituant devient propriétaire du bien hypothéqué (art. 2670 C.c.Q.).¹⁰⁵

Translation:

[70] What about a claim? In the context of the Mining Act, the State is the owner of the right to the mineral substances. *It is the State that dismembers its ownership right in favour of a person by attributing a claim to that person. Can the holder of the claim, which is a separate immovable real right, in turn dismember its ownership?* The holder of a mining claim can, of course, exercise its right jointly with another person if they can organize the exercise of their right by means of an agreement that can be published. *A mining claim grants its holder the right to use the property and to explore for deposits. Those rights can be dismembered.* However, the holder of a mining claim does not, at

¹⁰⁵ *Anglo Pacific* (2013) at paras. 70-71 (C-011) (internal citations omitted).

that stage, have a right on the mineral substances as the holder of a mining lease does. In that context, did the debtors have the capacity to grant the appellant a real right on the mineral substances likely to be extracted, should a deposit be discovered and a mining lease granted?

[71] Yes, in my opinion. Although the law says nothing on that specific subject, I believe that the principles applicable to a hypothec granted by a non-owner must be adapted to the situation of a claim holder who grants a real right on extracted mineral substances of which it will become the owner after the granting of a mining lease. Bear in mind that, under the Civil Code of Lower Canada, the law declared null a hypothec on the property of another, subject to improvement of an insufficient title (art. 2043 C.C.L.C.). The Civil Code of Québec allows a hypothec on the property of another or on future property, but it specifies that the hypothec begins to affect the property only when the grantor acquires title to the hypothecated property (art. 2670 C.C.Q.).¹⁰⁶

66. Further, the *Mining Act* creates a public register of real and immovable mining rights, i.e. the Mining Registry.¹⁰⁷ Section 14 of the *Mining Act* specifies that "no such transfer or act, whether or not it is exempt from registration at the registry office of the registration division, may have effect against the State unless it has been registered in the public registry of real and immovable mining rights."¹⁰⁸

¹⁰⁶ *Anglo Pacific Group PLC v. Ernst & Young Inc.*, 2013 QCCA 1323, 2013 CanLII 48733 [English translation by CanLII] at paras. 70-71 [*Anglo Pacific* (2013) (English translation)] (C-011A) (emphasis added) (internal citations omitted)

¹⁰⁷ *Mining Act* (2011) at s. 11 (C-004).

¹⁰⁸ *Mining Act* (2011) at s 14 (C-004).

67. The Court of Appeal also confirmed that mining rights, their assignments and their dismemberments, are expressly opposable against the state, i.e. the province of Quebec, and specifically the Minister of Natural Resources.¹⁰⁹

[88] L'article 14 de la *Loi sur les mines* prévoit explicitement que, ***pour être opposable à l'État, le transfert d'un droit minier*** ou de l'acte visé au paragraphe 3 de l'article 13, qu'il soit exempt ou non de l'inscription au bureau de la publicité des droits, ***doit être publié au Registre minier.***¹¹⁰

Translation:

[88] Section 14 of the *Mining Act* provides explicitly that, ***to be enforceable against the State, the transfer of a mining right*** or the instrument to which paragraph 3 of section 13 applies, whether it is exempt or not from registration at the registry office, ***must be published in the mining register.***¹¹¹

3. *Obligations of a Permit Holder*

68. Once an applicant is issued an exploration permit and becomes a licensee, they must meet specific obligations imposed by both the *Mining Act* and the *Regulation*, including the payment of annual fees as set out in sections 64 and 65 of the *Regulation*. Section 177 of the *Mining Act* also imposes ongoing obligations on a licensee:¹¹²

¹⁰⁹ *Anglo Pacific* (2013) (English translation) at paras. 88, 94 (C-011A). See also *Mining Act* (2011) at s. 14 (C-004).

¹¹⁰ *Anglo Pacific* (2013) at para. 88 (C-011) (emphasis added).

¹¹¹ *Anglo Pacific* (2013) (English translation) at para. 88 (C-011A) (emphasis added).

¹¹² As discussed above, the Enterprise received several permits and authorizations in order to satisfy its regulatory obligations, including the required permits to use agricultural land for industrial purposes to permit the construction of lease pads for the Champlain 1H and St. Grégoire wells, drill the Champlain 1H well, and complete both the Champlain 1H and Bécancour #8 wells. (Junex had previously drilled the Bécancour #8 well for another use, and it was repurposed by Lone Pine pursuant to the River Permit Agreement (see the River Permit Agreement (C-022)).

- (a) First, a licensee is obligated to expend certain minimum costs on exploration activities in the licensed territory.¹¹³ The *Regulation* sets out minimum fees on a per hectare basis, with minimum thresholds set for each year of the life of the licence.¹¹⁴
- (b) Second, a licensee must submit a year-end report to the QMNR, describing the exploration work completed and outlining the money expended to complete the work.¹¹⁵
- (c) Third, a licensee must annually submit a program of operations outlining exploration activities scheduled for the upcoming year.¹¹⁶
69. An exploration permit has an initial term of five years, after which the licence is eligible for five annual renewals, permitting a total of ten years of exploration activity.¹¹⁷
70. The discovery of a resource deposit triggers a new set of obligations for the licensee. The licensee must notify the Minister in writing upon discovering a deposit of petroleum or natural gas; specifically the nature and location of the deposit.¹¹⁸ Upon notification, the

¹¹³ *Mining Act* (2011) at s. 177 (C-004).

¹¹⁴ *Regulation* (2011) at s. 67 (C-005).

¹¹⁵ *Regulation* (2011) at s. 68 (C-005).

¹¹⁶ *Regulation* (2011) at s. 66 (C-005).

¹¹⁷ *Mining Act* (2011) at s. 169 (C-004).

¹¹⁸ *Mining Act* (2011) at s. 176 (C-004). This would have been the next step in development once the St. Grégoire test well was completed, so that Lone Pine could fully report on its projected economics for the play; D. Axani Witness Statement at para. 41 (CWS-001).

Minister may request an economic assessment of the potential of the deposit.¹¹⁹ If the assessment confirms that an "economically workable" deposit exists, within six months of the date of the assessment, the licensee must apply for a lease to produce petroleum and natural gas.¹²⁰

¹¹⁹ *Mining Act* (2011) at s. 176 (C-004).

¹²⁰ *Mining Act* (2011) at s. 176 (C-004).

D. Lone Pine's Shale Gas Activity in Quebec

71. Given the attractiveness of the Utica Shale, numerous industry players were eager to start exploration activities in the St. Lawrence Lowlands. Following the publication of the Quebec Strategy in 2006, Lone Pine, along with other companies including Talisman Energy, Questerre Energy, Canbriam Energy, Gastem Inc., and Junex, began initiating exploration wells including drilling and coring various wells in their respective permit areas located in the Utica Shale.¹²¹

1. Forest Oil Enters the Quebec Market

72. Forest Oil entered the Quebec oil and gas market through its joint venture with the Quebec-based junior oil and gas company, Junex, in 2006. At the time, Junex's business model focused on acquiring a significant land base in Quebec. As described on the company's website:

At the time of the company's registration in stock exchange in 2001, oil and gas activities were practically non-existent in Québec and oil and gas companies had practically no interest in the province, which enabled Junex to quickly build a vast landspread of exploration licences.¹²²

73. Junex's plan was to acquire permit areas and pursue basic exploration work to develop credible geological models, after which it could market its holdings to other companies for possible joint ventures.¹²³ From 2002 to 2006 it focused on developing a land base in

¹²¹ D. Axani Witness Statement at para. 19 (CWS-001).

¹²² Junex Inc, *Creating Value While Minimizing Risks*, online: Junex <<http://www.junex.ca/business-model>> (C-039).

¹²³ Junex Inc, *Creating Value While Minimizing Risks*, online: Junex <<http://www.junex.ca/business-model>> (C-039).

the St. Lawrence Lowlands to market the Quebec shale gas opportunity to potential partners.¹²⁴

74. In February 2006, Junex attended the North American Prospect Expo (better known as NAPE) in Texas to find experienced partners able to invest in and develop Junex's Quebec Utica Shale holdings.
75. Among others, Junex held four exploration permits on four blocks of land in the Utica Shale basin covering a total of 57,772 hectares: Permit Numbers 1996PG950, 2002PG597, 2002PG596, and 2004PG769 (the "Original Permits").¹²⁵ These four permits are contiguous to the St. Lawrence River, and the geographic area they cover is referred to herein as the "Bécancour/Champlain Block".
76. When Junex attended NAPE, it marketed the Bécancour/Champlain Block opportunity to Forest Oil. Forest Oil was known in the industry to be a "first mover"¹²⁶ in numerous shale basins, with experienced personnel who had been at the forefront of shale gas production in North America.¹²⁷
77. Forest Oil was eager to explore the development potential of the shale gas existing underneath the St. Lawrence River particularly because the organic-rich Utica Shale was thermally mature, brittle, and over-pressured. The favourable pressure and rheological

¹²⁴ J.Y. Lavoie Witness Statement at para. 7 (CWS-004).

¹²⁵ During the relevant period, the Original Permits were renumbered. For ease of reference, see Overview of Original and River Permits (C-016).

¹²⁶ In the oil and gas industry, a "first mover" is a company that is at the forefront of using a certain technology in a specific basin. D. Axani Witness Statement at para. 11 (CWS-001).

¹²⁷ D. Axani Witness Statement at para. 10-11 (CWS-001).

configuration means that the Utica Shale is an excellent horizontal drilling candidate in which hydraulic fracture completion efforts would be effectively confined to the hydrocarbon-bearing Utica. In addition, such drilling under the St. Lawrence River could be effectively exploited from drill sites located on dry land at a safe setback distance from the river.¹²⁸

78. Forest Oil commonly enters into farmin/farmout arrangements with other oil and gas companies, depending on its assessment of the risk inherent in the play and the availability of permits. In the case of Quebec, most of the land in which Forest Oil was interested was already leased, therefore requiring Forest Oil to partner with an existing permit holder to develop the shale gas resource it suspected the Utica Shale contained.¹²⁹ In addition to the Enterprise's collaboration with Junex on the Bécancour/Champlain Block, the Enterprise "farmed-in" on the Yamaska Block with Gastem (2007), the North Richelieu Block with Junex (2008), and a further area in the vicinity of both of these blocks with Suncor, Canbriam and Gastem (2009).¹³⁰
79. In a shale gas exploration play, it is of considerable benefit for the developer to hold rights over continuous blocks of land. Doing so permits the developer to drill in multiple directions from a single surface well pad, thereby improving the economic model and expected rate of return of the well, in addition to decreasing the surface footprint and

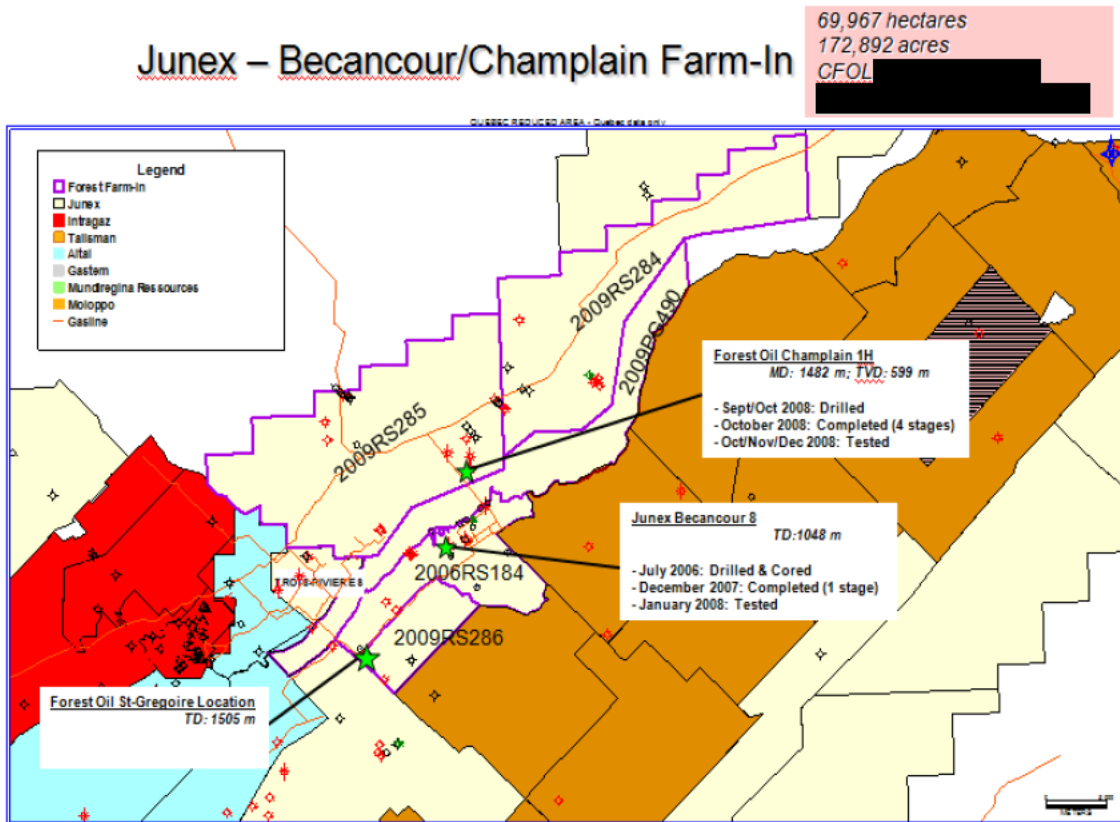
¹²⁸ R. Wiggin Witness Statement at para. 10 (CWS-002)

¹²⁹ D. Axani Witness Statement at para. 21 (CWS-001).

¹³⁰ Virginie Lavoie (the Enterprise), Presentation, "Canadian Forest Oil's Farm-In Areas in Quebec" (April 2010) (C-037).

therefore land use requirements of the project aboveground.¹³¹ For this reason, when Junex presented the Bécancour/Champlain Block opportunity to Forest Oil, Forest Oil was also very interested in the possibility of working underneath the St. Lawrence River as well.¹³²

Figure 5: The Original and River Permits in the Bécancour/Champlain Block as at April 2010¹³³



¹³¹ D. Axani Witness Statement at para. 26 (CWS-001).

¹³² The River Permit is in an area directly underneath the St. Lawrence River (the "River Permit Area") and is situated in the centre of the Bécancour/Champlain Block.

¹³³ Virginie Lavoie (the Enterprise), Presentation, "Canadian Forest Oil's Farm-In Areas in Quebec" (April 2010) at 3 (C-037).

80. In the oil and gas industry the entity in whose name an exploration permit is registered is often not the same entity that holds the rights. For example, it is frequently the case that permits are registered in the name of a broker, and that the actual oil and gas company undertaking the exploration and development work is not named on the permit although it is the owner of such rights pursuant to a commercial agreement.¹³⁴

(a) In such circumstances, when Lone Pine applies for permits or authorizations incidental to the exploration permit (such as permits relating to the construction, drilling or operation of a well), it will apply for such permits in its own name. Commonly, local government entities issuing the incidental permit will require the company to provide commercial evidence or have a letter from the registered permit holder.

(b) For example, as discussed further below, in Quebec, the Enterprise communicated directly with the Quebec government, and specifically the Quebec Minister of Natural Resources (the "QMNR"), in its own name.¹³⁵

81. These arrangements are commonplace in the oil and gas industry because of the emphasis that many companies place on secrecy: if a company has a reason to believe that a particular geographic area may contain valuable resources, it does not want to alert its competitors to this potential until it has secured a sufficient land base for itself. Securing a sufficient land base is particularly important for unconventional plays, where having continuous land blocks or working within a particular area helps improve the economic

¹³⁴ D. Axani Witness Statement at para. 15 (CWS-001).

¹³⁵ D. Axani Witness Statement at para. 15 (CWS-001).

recovery of each well through economies of scale and the ability to learn more about the resource with each well drilled.¹³⁶

82. When Forest Oil entered the Quebec market, most of the land in which Forest Oil was interested was already leased. Since resource plays require economies of scale to affect capital costs, the fact that such large acreage were still available through Junex and other prospective partners made investing in Quebec an attractive prospect for Forest Oil.¹³⁷ Other positive factors included the fact that there was a long standing history of natural gas "shows" in the Utica Shale basin, the Quebec Utica Shale had favourable geographic feature, the government of Quebec was seeking development in the industry and had a good royalty structure, and there was excellent access to new markets and premium priced product (e.g. Quebec consumers pay more for natural gas than Henry Hub estimates).¹³⁸

2. The River Permit and the Other Permits

83. The River Permit Area is of particular significance because it provides access to a large region of naturally fractured shale, providing a likelihood of enhanced gas recovery from the onshore drill pads. These resources are most economically accessible from onshore locations, thereby requiring anyone desiring to develop the resources in the River Permit Area to also have rights over the Bécancour/Champlain Block.

¹³⁶ D. Axani Witness Statement at para. 26 (CWS-001).

¹³⁷ D. Axani Witness Statement at para. 21 (CWS-001).

¹³⁸ D. Axani Witness Statement at para. 22 (CWS-001).

84. As discussed above, Forest Oil was experienced in safely accessing resource deposits underneath waterways using directional drilling from well locations that are set back from the riverbank.¹³⁹ For this reason, from the outset of its relationship with Junex, Forest Oil intended to obtain an exploration permit for the River Permit Area in order to effectively and economically develop the resources underneath the Bécancour/Champlain Block and River Permit Area.¹⁴⁰

3. *The Farmout Agreement*

85. On 5 June 2006, Forest Oil and Junex entered into a letter agreement (the "Farmout Agreement") by which Forest Oil obtained, among other things, an option to earn 100% of the working interest in the Original Permit areas from the surface to to the top of Trenton/Black River formation (i.e. a depth of 743 meters in the Bécancour #2 wellbore) (the "Contract Area").¹⁴¹ The salient terms of the Farmout Agreement are as follows:

- (a) Junex agreed to drill and core a well in the Contract Area, and provide a core analysis to Forest Oil, with [REDACTED]
- (b) Upon receipt of the core analysis, Forest Oil would have a period of six months to elect to exercise an option to earn an interest in the Contract Area (the "Election Period");

¹³⁹ D. Axani Witness Statement at paras. 28 (CWS-001).

¹⁴⁰ D. Axani Witness Statement at para. 26 (CWS-001).

¹⁴¹ Letter Agreement between Forest Oil and Junex, dated 5 June 2006 (C-017); Letter Application from the Enterprise to QMNR, dated 28 July 2006 (C-018); Email from L. Levesque (QMNR) to R. Wiggin (Forest Oil) re: application for exploration permit (25 September 2006) (C-019); Email from R. Wiggin (Forest Oil) to L. Levesque (QMNR) re: application for exploration permit (26 September 2006) (C-020); and Covering Letter from the Enterprise to QMNR re: payment of first year rental (13 October 2006) (C-021) (collectively, the "Farmout Agreement").

(c) If Forest Oil elected to exercise its option, it would then have a period of 18 months to spend, cause to be spent, or commit to spend a total sum of [REDACTED] on drilling, completions, re-completions, construction of facilities, pipelines, and gathering lines, or on geological and geophysical expenses, in order to earn 100% interest in the Contract Area (the "Commitment Period"); and

(d) Upon satisfaction of Forest Oil's obligation to spend the foregoing [REDACTED] during the Commitment Period, Junex would assign to Forest Oil 100% of the working interest in the Contract Area (the "River Permit Rights") and [REDACTED]. The Agreement also contemplated Junex having

86. The concept of "working interest" in oil and gas deals is that each partner in the joint venture is responsible for a share of costs and risks proportionate to its ownership. A working interest is distinct from other forms of interest in a play, for example a royalty right, which entitles a right holder to share in the benefits of the activity, but does not oblige it to participate in the costs or risks.¹⁴²

87. By Junex transferring 100% of the working interest in the River Permit to the Enterprise, the Enterprise was granted attributes of immovable real rights associated with the River

¹⁴² D. Axani Witness Statement at para. 14 (CWS-001).

Permit, including the right to use and enjoy the River Permit Rights, each constituting an immovable real right.¹⁴³

4. The River Permit and River Permit Agreement

88. In the course of developing Forest Oil's plans for Quebec as a whole, Forest Oil was in regular contact with the QMNR, including with Jean-Yves Laliberté who was then coordinator of oil and gas exploration for the QMNR. Forest Oil called Mr. Laliberté in July of 2006 to specifically discuss acquiring the land under the St. Lawrence River contiguous to the Bécancour/Champlain Block (ie. the River Permit Area).¹⁴⁴
89. The QMNR had previously been unwilling to grant exploration permits for resources under the river. Forest Oil clarified their intentions and specifically advised Mr. Laliberté that Forest Oil wanted to drill from onshore locations from the Bécancour/Champlain Block. Forest Oil explained the horizontal drilling plan in detail and explained that the plan included drilling vertically down to the required depth and then using a combination of directional and horizontal drilling to reach the relevant area, before stimulating the well using hydraulic fracturing.¹⁴⁵
90. Forest Oil explained that it was very common in the US to have a drilling penetration point on the surface of the permit area and thereafter conduct horizontal drilling to adjacent lands. Forest Oil explained that this manner of proceeding occurs all the time in

¹⁴³ CCQ at Article 1119 (C-002); *Anglo-Pacific* (2013) at para. 70 (C-011).

¹⁴⁴ R. Wiggin Witness Statement at para. 12 (CWS-002).

¹⁴⁵ R. Wiggin Witness Statement at paras. 11-13 (CWS-002).

the US and is arranged by way of obtaining a "surface occupancy and mineral lease" agreement in respect of the adjacent property.¹⁴⁶

91. Mr. Laliberté responded positively to this idea and appreciated the clarification that there would be no offshore drilling in the plan envisioned. At that time, he indicated that the QMNR would be willing to grant a permit for the resources under the river adjacent to the Bécancour/Champlain Block so that Forest Oil's objectives could be achieved.¹⁴⁷

92. Mr. Laliberté questioned whether granting the proposed river permit to Forest Oil would be acceptable to Junex and Forest Oil indicated that it believed at the time that Junex would be amenable.¹⁴⁸

93. The Enterprise applied for an exploration permit for the area underneath the St. Lawrence River adjacent the Bécancour/Champlain Block by way of a letter application to the QMNR on 28 July 2006.¹⁴⁹ Among other things, the Enterprise indicated to the QMNR that it planned "to test the shale gas potential of the Utica Formation through horizontal drilling and completion techniques" and that it would subsequently "apply for an Operating Lease and commence development of the project."¹⁵⁰ The application also clearly states that in Year One, the Enterprise would "[i]dentify drill sites on both the

¹⁴⁶ R. Wiggin Witness Statement at para. 14 (CWS-002).

¹⁴⁷ R. Wiggin Witness Statement at para. 15 (CWS-002).

¹⁴⁸ R. Wiggin Witness Statement at para. 16 (CWS-002).

¹⁴⁹ Letter Application from the Enterprise to QMNR, dated 28 July 2006 at 1 (C-018).

¹⁵⁰ Letter Application from the Enterprise to QMNR, dated 28 July 2006 at 2 (C-018).

north and south shore (and not inside the banks) of the St. Lawrence River such that all drilling will initiate from dry land locations."¹⁵¹

94. After this application, in September 2006 the QMNR Registrar provided written confirmation that the permit or "exploration licence" was being issued, provided a permit number (Permit 2006PG906) and advised that the permit covered 11570 hectares ("Permit PG906"). In addition the QMNR requested the standard rental fee.¹⁵²
95. However, because the boundaries of the permit did not exactly conform to the contours of the river banks, Forest Oil wanted to make sure that it would be able to perform the operation as intended. Roger Wiggin, then-Manager of New Ventures for Forest Oil, wrote to the QMNR Registrar in this regard, "[m]y biggest concern is whether Forest will be able to readily access certain areas under the license while drilling horizontally from onshore positions."¹⁵³ Subsequent to further discussions with the QMNR, in October 2006 Forest Oil sent in a cheque to the QMNR for the first year's rent for the first river permit ("PG906 Permit Cheque").¹⁵⁴
96. However, representatives of Junex were not aware of the fact that Forest Oil was in the process of being granted Permit PG906. In November 2006 Junex learned of Permit PG906. Subsequently, Mr. Laliberté sought out Mr. Wiggin of Forest Oil to advise of

¹⁵¹ Letter Application from the Enterprise to QMNR, dated 28 July 2006 at 1 (C-018).

¹⁵² Email from L. Levesque (QMNR) to R. Wiggin (Forest Oil) re: application for exploration permit (25 September 2006) (C-019).

¹⁵³ Email from R. Wiggin (Forest Oil) to L. Levesque (QMNR) re: application for exploration permit (26 September 2006) (C-020).

¹⁵⁴ R. Wiggin Witness Statement at para. 18 (CWS-002); Covering Letter from the Enterprise to the QMNR re: payment of first year rental (13 October 2006) (C-021).

Junex's disappointment that they had been denied the same permit which the QMNR had indicated they would issue for Forest Oil. Mr. Laliberté encouraged Forest Oil to discuss the issue with Junex and to reach a solution. Desirous to maintain the excellent relations that Forest Oil had established with Junex and the QMNR, Forest Oil elected to negotiate a solution with Junex.¹⁵⁵

97. Junex desired to have part of the economic benefits from the development of Permit PG906. It had previously applied for a lease for this acreage from the QMNR but the QMNR had denied this request. Given the existence of the Farmout Agreement and the necessary connection between the Original Permits and Forest Oil's ability to access the resources underneath the River Permit Area, Junex felt that it should not be excluded from benefitting from gas recovered from this area.¹⁵⁶

98. Forest Oil and Junex negotiated the issue of Permit PG906 and agreed that (i) Forest Oil would contribute all of the acreage of Permit PG906 to enlarge one of Junex's existing permits, (ii) Junex would submit an application to enlarge Junex's existing permits, and (iii) when granted, this enlarged permit area would be subject to the same primary terms as set out in the Farmout Agreement. These arrangements were negotiated and agreed upon between 29 November 2006 and 14 December 2006 (the "River Permit Agreement").¹⁵⁷

¹⁵⁵ R. Wiggin Witness Statement at paras. 19-20 (CWS-002).

¹⁵⁶ R. Wiggin Witness Statement at para. 19 (CWS-002); P. Dorrins Witness Statement at para. 11 (CWS-003); J.Y. Lavoie Witness Statement para. 15-16 (CWS-004).

¹⁵⁷ R. Wiggin Witness Statement at paras. 19-20 (CWS-002); Junex memorialized the initial terms in a letter agreement dated 29 November 2006. The parties then agreed to further terms, memorialized in a letter agreement dated 14 December 2006. See Letter Agreement between Forest Oil and Junex re: the River

99. After the parties notified the QMNR regarding the River Permit Agreement and the arrangement in respect of Permit PG906, on 10 January 2007 the QMNR wrote to the Enterprise stating that "[c]onsidering the agreement signed with Junex Inc., we are sending you back the documents regarding your request for an exploration license in the St. Lawrence River" and returned to Forest Oil the uncashed PG906 Permit Cheque.¹⁵⁸
100. Junex subsequently applied for rights to explore the River Permit Area (formerly Permit PG906) in accordance with the River Permit Agreement¹⁵⁹ and the area subject to the River Permit Agreement would later become subject to permit 2009PG490, ie. the River Permit, which permit was granted on 17 March 2009.

5. *Forest Oil Satisfies Its Obligations Under the Farmout Agreement*

101. Following the execution of the Farmout Agreement and the River Permit Agreement, Forest Oil expended considerable time, resources, and capital to explore for shale gas in the areas covered by these agreements.
102. Between June and November of 2006, Junex conducted the drilling and core analysis required by the Farmout Agreement, which cost was shared by Junex and Forest Oil. In

Permit Agreement, dated 29 November 2006 (C-022A); Email from Victor Luszcz (Forest Oil) to Junex re: terms of the River Permit Agreement undated, believed to be from on or around 5 December 2006 (C-022B); and Letter Agreement between Forest Oil and Junex re: amendments to the River Permit Agreement, dated 14 December 2006 (C-022C) (collectively, the River Permit Agreement).

¹⁵⁸ Letter from QMNR to the Enterprise re: return of exploration permit application (10 January 2007) (C-023).

¹⁵⁹ J.Y. Lavoie Witness Statement at paras. 15-16 (CWS-004); P. Dorrins Witness Statement at para. 11 (CWS-003).

this process, Forest Oil expended [REDACTED] on coring and related activities for the Junex Bécancour #8 well.¹⁶⁰

103. On 24 November 2006, Junex provided a final core analysis to Forest Oil, triggering the Election Period set forth in the Farmout Agreement.

104. On 10 May 2007, and well within the Election Period, Forest Oil elected to exercise its option to earn the interest defined in the Farmout Agreement, triggering the eighteen month Commitment Period.¹⁶¹

105. By 2009, and well within the Commitment Period, Forest Oil had notified Junex that it had expended greater than the [REDACTED] required under the Farmout Agreement, entitling Forest Oil to 100% interest in the Original Permits and the River Permit, when acquired, under the River Permit Agreement.¹⁶²

6. *Junex Acquires and Ultimately Transfers the River Permit to the Enterprise*

106. On 26 March 2009, the QMNR advised Junex that it had approved additional exploration permits on 17 March 2009: Permit Numbers 2009PG490 to 2009PG492.¹⁶³ It is the first of these permits — 2009PG490 — that was the subject of the River Permit Agreement between Junex and Forest Oil. Under the River Permit Agreement, Forest Oil was

¹⁶⁰ Expert Report of H. Rosen and C. Milburn, FTI Consulting Inc. (8 April 2015), Figure 6 at para. 5.21 [FTI Report (2015)] (CER-002).

¹⁶¹ Letter from the Enterprise to Junex re: exercise of Utica Shale Farmout Agreement (10 May 2007) (C-024).

¹⁶² J.Y. Lavoie Witness Statement at para. 22 (CWS-004).

¹⁶³ Letter from QMNR to Junex re: approval of exploration permits 2009PG490 to 2009PG492 (26 March 2009) (C-031).

entitled to 100% of the working interest in the River Permit by virtue of having satisfied its obligations under the Farmout Agreement (as defined above, the "River Permit Rights").

107. On 8 April 2009, Forest Oil and the Enterprise entered into an Assignment Agreement pursuant to which Forest Oil assigned all of its rights, duties, benefits, and obligations in the Farmout Agreement to the Enterprise, effective 1 October 2007.¹⁶⁴ On 23 April 2009, Forest Oil advised Junex of this fact, which memorialized and reflected the existing commercial relationships between the parties.¹⁶⁵
108. On 28 January 2010, Junex and the Enterprise entered into an Assignment Agreement under which Junex assigned its working interest in the River Permit to the Enterprise, effective 17 March 2009, when the River Permit was issued to Junex by the QMNR.¹⁶⁶ Junex and the Enterprise also entered into an Assignment Agreement under which Junex assigned the Enterprise its interest in the Original Permits, effective 19 August 2009.¹⁶⁷
109. On 19 April 2010, Junex applied to the QMNR to request that the River Permit Rights (in both the Original and River Permits) earned by the Enterprise under the Farmout and

¹⁶⁴ Assignment Agreement between Forest Oil and the Enterprise re: Farmout Agreement between Forest Oil and Junex, dated 8 April 2009 (C-032).

¹⁶⁵ Letter from Forest Oil to Junex re: assignment to the Enterprise of the Farmout Agreement (23 April 2009) (C-033).

¹⁶⁶ Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the River Permit, dated 28 January 2010 (C-034).

¹⁶⁷ Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the Original Permits, dated 28 January 2010 (C-035).

River Permit Agreement be transferred to the Enterprise. The River Permit Rights were received and registered with the QMNR.¹⁶⁸

110. On 21 April 2010, the QMNR acknowledged receipt of Junex's request¹⁶⁹ and on 27 May 2010, formally transferred those interests to the Enterprise and sent its Permit Detail description sheets for each permit to Junex reflecting this change.¹⁷⁰ In its covering letter, the QMNR characterized its correspondence as responding to Junex's "[request to transfer 100% of the interest]" in the defined portion of the River Permit to the Enterprise,¹⁷¹ and on its Permit Detail form, the QMNR described the change as a "[transfer of rights]".¹⁷²

7. Lone Pine's Vision for the Project and Plans to Develop the Asset

111. The River Permit Area is a promising source of shale gas, within the normal range of volumes for shale gas plays. Geological consultants GLJ estimate [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁶⁸ Virginie Lavoie (the Enterprise), Presentation, "Canadian Forest Oil's Farm-In Areas in Quebec" (April 2010) at 4 (C-037).

¹⁶⁹ Letter from QMNR to Junex re: confirming receipt of application for assignment of rights to the Enterprise (21 April 2010) (C-036).

¹⁷⁰ Letter from QMNR to Junex re: confirming assignment of rights to the Enterprise (27 May 2010) (C-038).

¹⁷¹ "[D]emande de transfert de 100% intérêts". Letter from QMNR to Junex re: confirming assignment of rights to the Enterprise (27 May 2010) (C-038).

¹⁷² "Transfert de droits". Letter from QMNR to Junex re: confirming assignment of rights to the Enterprise (27 May 2010) (C-038).

¹⁷³ GLJ Report (2015) at 4 (CER-001).

112. In addition to expectations of the underlying resource itself, the Bécancour/Champlain Block and River Permit Area were attractive to Forest Oil/Lone Pine for a number of reasons.
113. **Ability to Drill from Designated Industrial Land.** First, on the Bécancour side of the river, the Bécancour Waterfront Industrial Park (the "Industrial Park") was zoned as industrial land, reducing the administrative and regulatory burden on the Enterprise to obtain the authorizations that would otherwise be required, for example if it were proposing to drill on agricultural land.¹⁷⁵ The Industrial Park is almost 7,000 hectares large, with a deep water port and connections to significant energy infrastructure.¹⁷⁶

¹⁷⁴ GLJ Report (2015) at 39 (CER-001).

¹⁷⁵ D. Axani Witness Statement at para. 30 (CWS-001). On the Champlain side of the Bécancour/Champlain Block, the Enterprise applied for and obtained the required permits to use agricultural land for its industrial purposes. See Letter from Commission de Protection du Territoire Agricole du Québec to the Enterprise re: use of lands for drilling purposes (19 June 2008) (C-027).

¹⁷⁶ Société du parc industriel et portuaire de Bécancour, "Why Choose Bécancour: Top Reasons to Locate in Bécancour", online: Government of Quebec <<http://www.spipb.com/en/choose/locate/>> (C-040).

Figure 6: Bécancour Waterfront Industrial Park¹⁷⁷



114. **The Industrial Park Is a Significant Consumer of Natural Gas.** The Industrial Park is also a significant consumer of natural gas, requiring a supply of approximately 153 000 m³/hour.¹⁷⁸ The area also boasts significant potential consumers of natural gas such as the TransCanada Cogeneration Facility.

¹⁷⁷ Société du parc industriel et portuaire de Bécancour, "Why Choose Bécancour: Top Reasons to Locate in Bécancour", online: Government of Quebec <<http://www.spipb.com/en/choose/locate/>> (C-040).

¹⁷⁸ Société du parc industriel et portuaire de Bécancour, "The Park and its Facilities – Industrial Infrastructures", online: Government of Québec <http://www.spipb.com/park/industrial_infrastructures/> (C-041).

115. The TransCanada Cogeneration Facility at Bécancour consumes natural gas and supplies electricity to Hydro-Québec Distribution.¹⁷⁹ It came into service in September 2006 and was operating until January 2008, when TransCanada and Hydro-Québec entered into an agreement to suspend production, pursuant to which Hydro-Québec continues to make capacity payments similar to what TransCanada would have received under normal operations.¹⁸⁰

116. **Proximity to Distribution Networks and Market Infrastructure.** The Bécancour/Champlain Block and River Permit Area are also in close proximity to significant distribution networks through both Gaz Métro and the Trans Quebec & Maritimes ("TQM") Pipeline. Any gas produced that is not immediately consumed by the proximate Industrial Park can readily be piped into the existing distribution network to supply other areas in the province and beyond.¹⁸¹

¹⁷⁹ TransCanada Pipelines Limited, "Bécancour Cogeneration Plant", online: <http://www.transcanada.com/docs/Our_Businesses/becancour_eng.pdf> (C-042).

¹⁸⁰ TransCanada Pipelines Limited, "Bécancour Cogeneration Plant", online: <http://www.transcanada.com/docs/Our_Businesses/becancour_eng.pdf> (C-042).

¹⁸¹ See Gaz Métro, Map, "Natural Gas Transport and Supply System in Quebec" (C-043).

Figure 7: Proximity of the River Permit to Distribution Network and Local Consumers

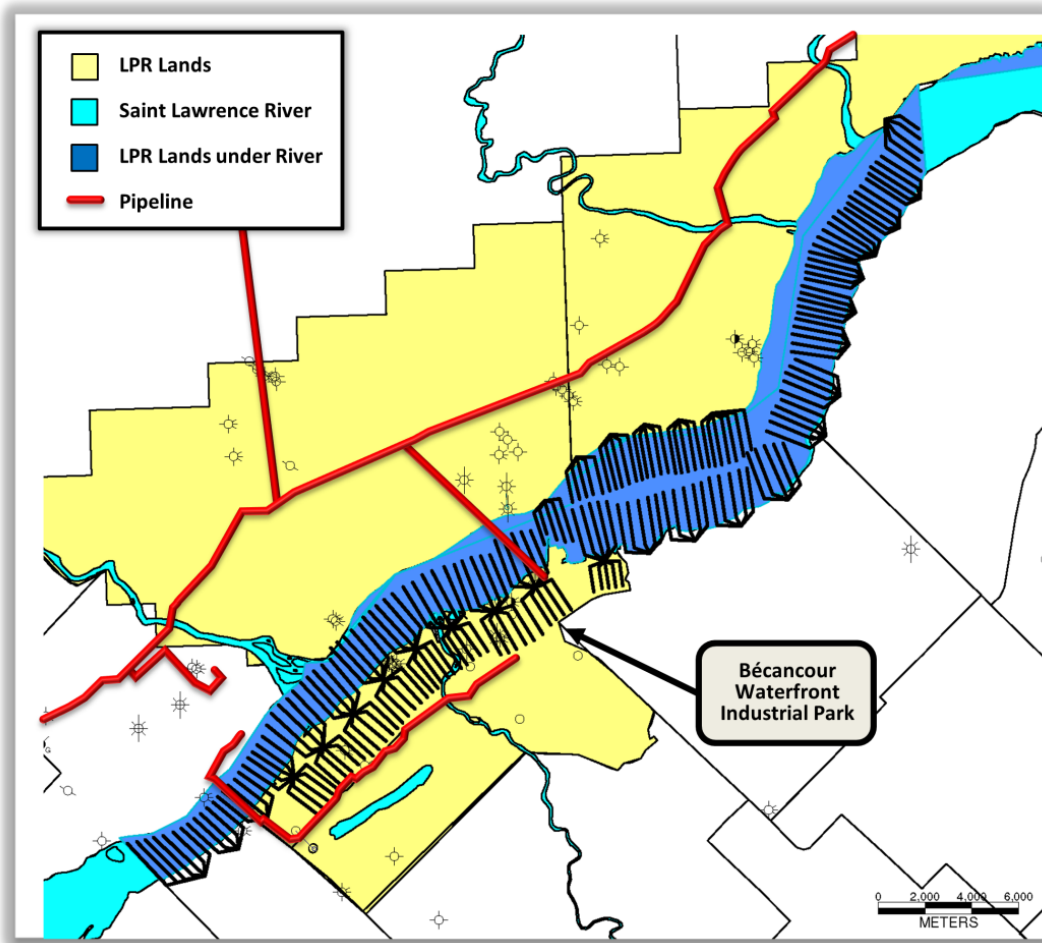
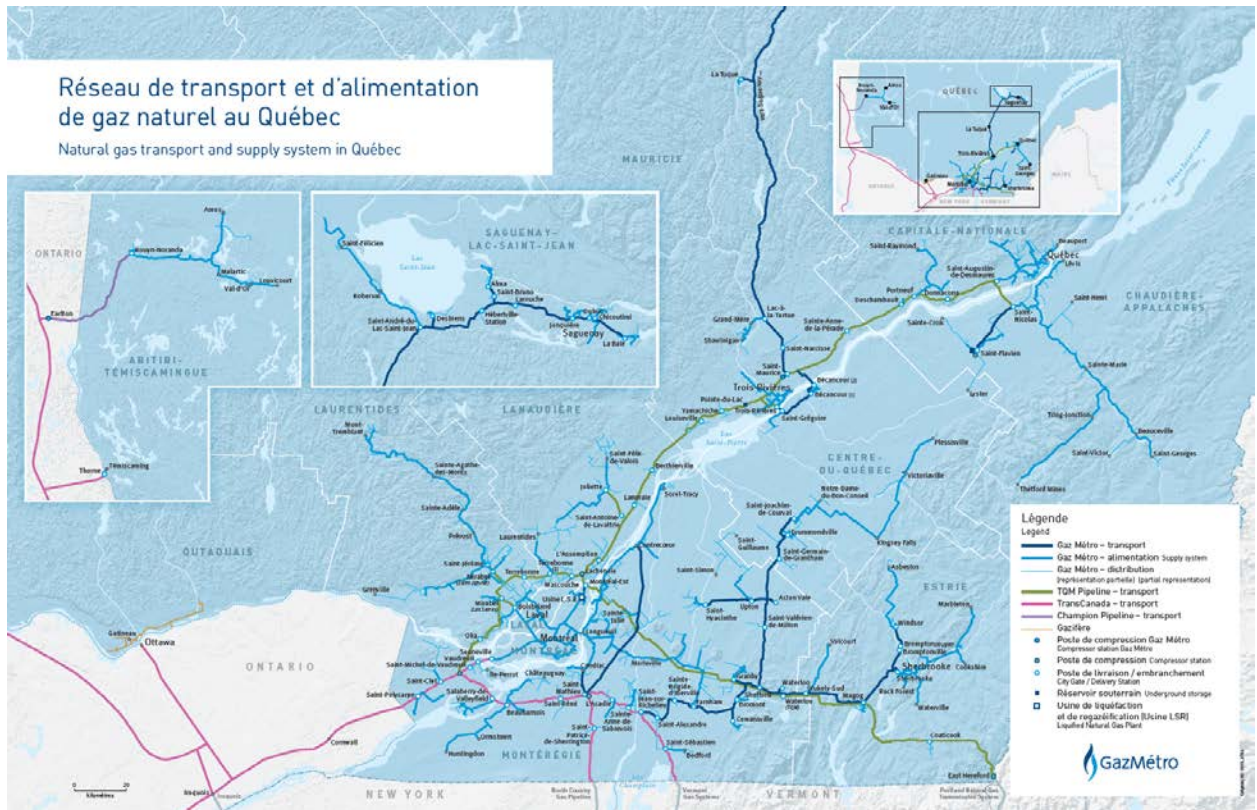


Figure 8: Local Pipeline System¹⁸²



8. Status of the Project Before Bill 18 Entered Into Force

117. Forest Oil first announced a significant discovery of a shale gas play in the Utica Shale on 1 April 2008, following the successful drilling and fracturing of the Bécancour #8 well in the Bécancour/Champlain Block with Junex.¹⁸³ Contemporary analysts' reports rated the Utica Shale play favourably, noting that it had "the right mineralogy, porosity, maturity and the shale is extensive."¹⁸⁴ Analysts also considered the Utica Shale play

¹⁸² See Gaz Métro, Map, "Natural Gas Transportation and Supply System in Quebec" (C-043).

¹⁸³ Forest Oil Corporation, form 8-K dated 1 April 2008 at 1, online: <http://www.sec.gov/edgar.shtml#.VQeBSzjwvcs> (C-086).

¹⁸⁴ Irene Haas, "Utica Shale Play in Quebec – Forest Oil Announced New Trend", *Canaccord Adams* (8 April 2008) at 3-4 (C-025).

"attractive" because of the potential for year-round drilling and access to pipelines for supply to nearby consumers and for export.¹⁸⁵

118. Other companies active in the area also confirmed the promising nature of the play. For example in 2010, Michael Binnion, President and Chief Executive Officer of Questerre explained:

The increased resources in the updated [NSAI Assessment] report reflect "the results from the vertical St. Edouard #1 well that tested at 700 Mcf/d from the middle Utica interval. With the even more recent stabilized flow rates of approximately 6 MMcf/d from the St. Edouard No. 1A horizontal well, we are increasingly confident in the prospects for our significant Utica resource."¹⁸⁶

119. The Enterprise had a five-year multi-stage development plan, which called for horizontal test pads placed to maximize geological knowledge of the reservoir which had been gathered from the first two well tests.¹⁸⁷ As of June 2011, the development plan anticipated that the Enterprise would have commenced commercial production for the Bécancour/Champlain Block on approximately 1 July 2013.¹⁸⁸

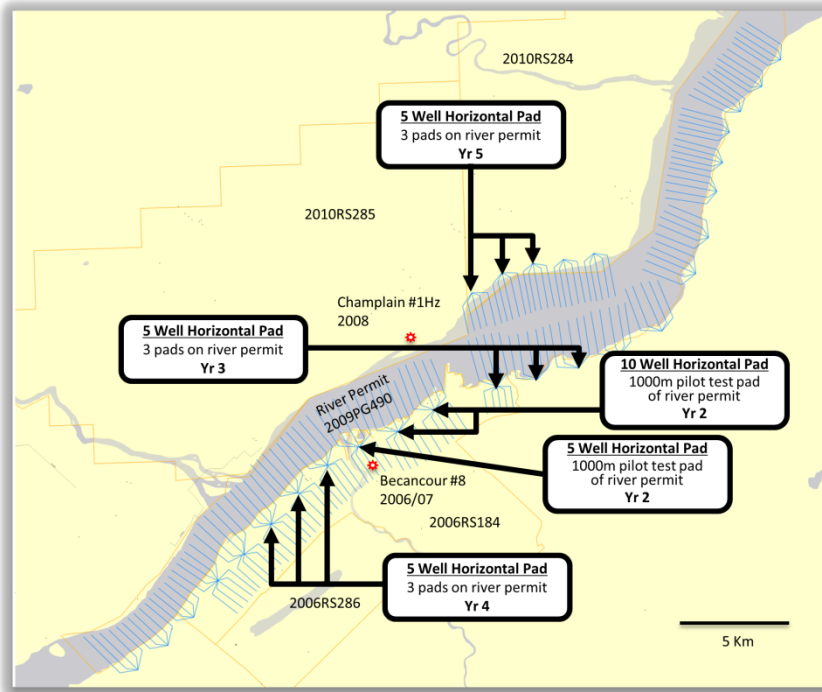
¹⁸⁵ Irene Haas, "Utica Shale Play in Quebec – Forest Oil Announced New Trend", *Canaccord Adams* (8 April 2008) at 3-4 (C-025).

¹⁸⁶ Questerre Energy, "Questerre updates Utica resources and conventional reserves" (1 March 2010), online: <www.questerre.com> (C-077).

¹⁸⁷ D. Axani Witness Statement at para. 40 (CWS-001); D. Roney Witness Statement at para. 10 (CWS-005).

¹⁸⁸ D. Axani Witness Statement at para. 40 (CWS-001); D. Roney Witness Statement at para. 10 (CWS-005)

Figure 9: Five Year Multi-Stage Development Plan



120. Prior to the introduction of Bill 18, the Enterprise had: completed the Bécancour #8 well, obtained industrial use permits for agricultural land for the Champlain 1H and St. Grégoire sites, drilled the Champlain 1H well, and completed the Bécancour #8 and Champlain 1H wells.

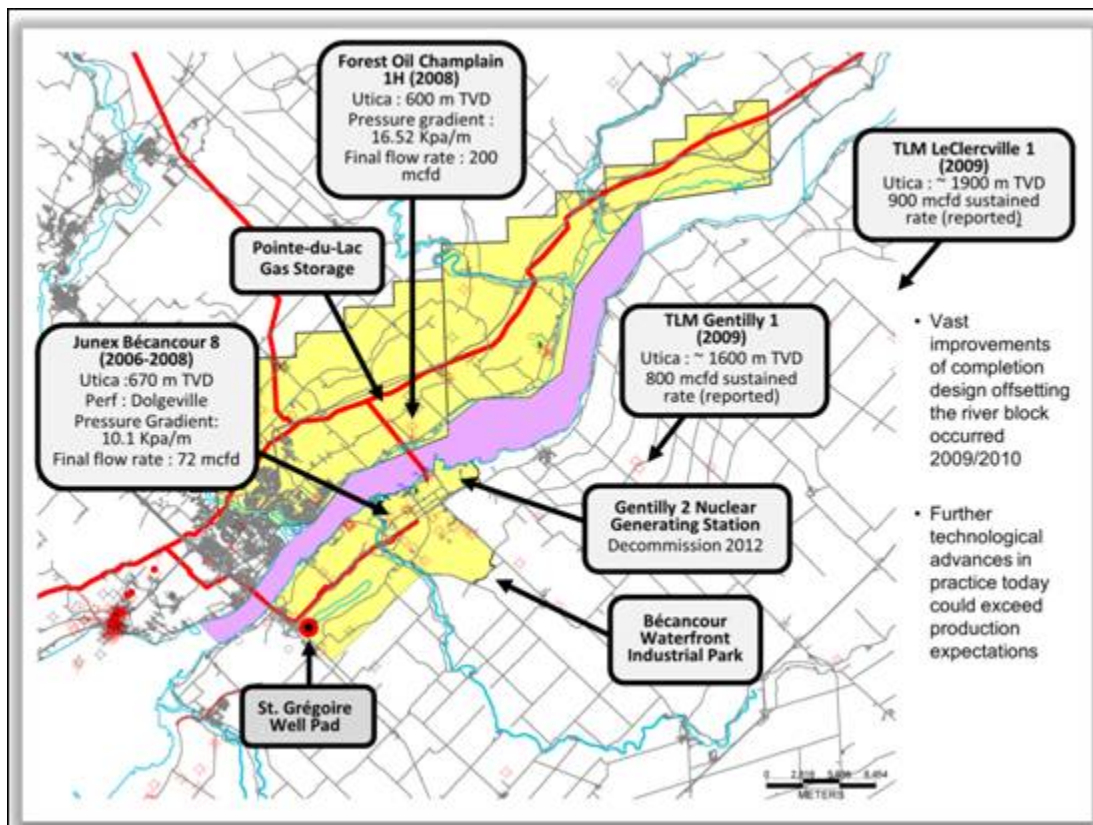
Figure 10: Exploration and Development Activity on the Bécancour/Champlain Block from 2006 to 2015

Year	Bécancour #8	Champlain 1H	St. Grégoire
2006	Junex constructed lease pad Junex applied for drilling permit		
2007	Core analysis performed by Junex		

REDACTED

Year	Bécancour #8	Champlain 1H	St. Grégoire
2008	<p>Enterprise cases and cements the well.</p> <p>Enterprise fracture stimulates the Utica formation in the well</p>	<p>Enterprise applied for permit to use agricultural land</p> <p>Enterprise applied for drilling permit</p> <p>Enterprise drilled the well</p> <p>Enterprise applied for authorization to undertake seismic surveys</p> <p>Enterprise applied for completion permit.</p> <p>Flare permit granted to Enterprise in the name of Enterprise</p> <p>Enterprise completes the well and tests it.</p>	<p>Enterprise constructed the site for six horizontal wells to be drilled on it. Two conductor pipes were installed for the first phase of wells.</p> <p>Enterprise builds frac water holding pits.</p>
2009 to 2010	Annual inspections, site maintenance and monitoring as required.		
2011		Enterprise initiated the surface padsize reduction and reclamation of majority of surface lease.	
2012		Enterprise performed annual inspection and performed wellsite maintenance items.	Enterprise removed the two conductor pipes that had been installed for the drilling rig blow out prevention system.
2013 to 2015	<p>Annual inspections, site maintenance and monitoring as required.</p> <p>No exploration or development activity.</p>		

Figure 11: Map of Exploration and Development Activity on the Bécancour/Champlain Block from 2006 to 2015



121. The Enterprise was granted a permit to use agricultural land by the Commission de Protection du Territoire Agricole du Québec,¹⁸⁹ received the drilling licence granted by the QMNR,¹⁹⁰ received permission to conduct a seismic survey,¹⁹¹ and was granted a flare permit.¹⁹² All of these permits were awarded in the Enterprise's own name.

¹⁸⁹ Letter from the Commission de Protection du Territoire Agricole du Québec to the Enterprise re: use of lands for drilling purposes (19 June 2008) (C-027).

¹⁹⁰ Letter from QMNR to the Enterprise re: drilling licence at Champlain No. 1-H well (12 September 2008) (C-028).

¹⁹¹ Letter from QMNR to the Enterprise re: geophysical licence for exploration permits (17 October 2008) (C-029).

¹⁹² Letter from QMNR to the Enterprise re: flare permit for Champlain No. 1 well (30 October 2008) (C-030).

122. If activity on the St. Grégoire site had continued, Forest Oil anticipated being able to convert the well to commercial production within the same year.¹⁹³ However, after completing the surface lease for the St. Grégoire well, Forest Oil directed the Enterprise to pause its development of the Bécancour/Champlain Block and devote more of its capital budget to the other Quebec lands.¹⁹⁴ This was in keeping with Forest Oil's strategy of spreading capital expenditures between the various Quebec farmin arrangements to earn into the maximum working interest in all of the available permit rights as efficiently as possible.¹⁹⁵

123. By doing so, the Enterprise maximized the land base it secured for its eventual commercial development of the Quebec Utica Shale play.¹⁹⁶ It secured an acreage position of over 100,000 acres in other parts of the Utica Shale play. [REDACTED]

[REDACTED]

[REDACTED]¹⁹⁷

124. Accordingly, Forest Oil has made other expenditures in Quebec in accordance with its exploration and development plan for the Utica Shale natural gas within its permit areas.

¹⁹³ Forest Oil, "Geological Prognosis/Start Memorandum, St. Grégoire 1/1-H Well", dated 10 June 2008 (C-026).

¹⁹⁴ D. Axani Witness Statement at para. 54 (CWS-001).

¹⁹⁵ D. Axani Witness Statement at para. 55 (CWS-001).

¹⁹⁶ D. Axani Witness Statement at para. 55 (CWS-001).

¹⁹⁷ D. Axani Witness Statement at para. 56-58 (CWS-001).

From 2006 to the present, Forest Oil/Lone Pine has spent a total of US\$34.9 million developing the Utica Shale gas play in Quebec.¹⁹⁸

¹⁹⁸ FTI Report (2015) at para. 5.21 (CER-002).

E. Opposition to Shale Gas in Quebec

1. Interest Groups in Quebec Exert Pressure

125. By mid-2010, a number of interest groups began putting pressure on the Quebec government to limit shale gas exploration and development activities in the province. Interest groups and opposition parties began pushing for a moratorium on shale gas exploration and exploitation activities in the fall of 2010.¹⁹⁹ In response, Minister Normandeau on behalf of the government repeatedly and emphatically stated that no moratorium would be imposed, stating that "[a moratorium is not an option, not an option]".²⁰⁰
126. During this time period, the Quebec government remained supportive of the shale gas industry generally and the benefits that the energy industry, natural gas and hydraulic fracturing could bring to Quebec.
- (a) The government stressed that Quebec traditionally spent CAN\$2 billion annually in order to secure its natural gas supply from sources in Western Canada, all while significant reserves were available on its own territory.²⁰¹

¹⁹⁹ Quebec, Bill 396, *An Act to put a temporary stop to shale gas exploration and development activities*, 1st Sess, 39th Leg (2010) (introduced on 27 October 2010) [Bill 396] (C-055) and Quebec, Bill 397, *An Act to impose a moratorium on shale gas exploration and development projects*, 1st Sess, 39th Leg (2010) (introduced on 27 October 2010) [Bill 397] (C-056).

²⁰⁰ "[L]e moratoire n'est pas une option, pas une option." Quebec, National Assembly, "Point de presse de M. Pierre Arcand, ministre du Développement durable, de l'Environnement et des Parcs et de Mme Nathalie Normandeau, ministre des Ressources naturelles et de la Faune" (27 October 2010) at 2 (C-054).

²⁰¹ QMNR, "Le développement du gaz de schiste au Québec – Document technique" (15 September 2010) at 7 (C-052); Quebec, National Assembly, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 1 (23 February 2011) (Inaugural Speech of Jean Charest) at 5 (C-059).

- (b) The government also pointed out that Quebec stood to gain from increased royalty payments and tax revenues.²⁰²
- (c) Finally, it noted that increased reliance on natural gas could work to lower greenhouse gas emissions given that natural gas is cleaner than certain other fuels used in Quebec.²⁰³
127. The government stated the importance of appropriate rules and regulations and repeated that shale gas development would have to be done in a sustainable way.²⁰⁴ However, the fundamental message was that with sufficient study and information to appropriately regulate the industry, these activities could be undertaken safely.²⁰⁵ In the government's view, scientific studies were needed to better understand shale gas activities and design appropriate regulatory controls, but ultimately, their message was that Quebec should have the opportunity to benefit from its own resource wealth.²⁰⁶

²⁰² QMNR, "Le développement du gaz de schiste au Québec – Document technique" (15 September 2010) at 16 (C-052); Quebec, National Assembly, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 1 (23 February 2011) (Inaugural Speech of Jean Charest) at 5 (C-059).

²⁰³ Quebec, National Assembly, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 1 (23 February 2011) (Inaugural Speech of Jean Charest) at 5 (C-059).

²⁰⁴ Quebec Ministry of Sustainable Development, "Mise en valeur des ressources gazières du Québec – le gouvernement du Québec annonce son plan d'action visant à encadrer l'industrie du gaz de schiste" (29 August 2010) (Minister Normandeau) at 1 (C-051).

²⁰⁵ Quebec Ministry of Sustainable Development, "Mise en valeur des ressources gazières du Québec – le gouvernement du Québec annonce son plan d'action visant à encadrer l'industrie du gaz de schiste" (29 August 2010) (Minister Normandeau) at 1 (C-051).

²⁰⁶ Quebec would "[confirm [its] position as a leader in matters of energy production, all while generating important economic and social benefits for Quebec and its regions]" ("En développant la filière de l'exploration et de l'exploitation de gaz naturel [...] nous confirmerons notre position de leaders en matière de production d'énergie, tout en générant d'importantes retombées économiques et sociales pour le Québec et ses régions") Quebec Ministry of Sustainable Development, "Mise en valeur des ressources gazières du Québec – le gouvernement du Québec annonce son plan d'action visant à encadrer l'industrie du gaz de schiste" (29 August 2010) (Minister Normandeau) at 2 (C-051). See also Quebec, National Assembly,

2. *The BAPE Process*

128. On 31 August 2010, the Government of Quebec tasked the BAPE with establishing a commission of inquiry and holding public hearings regarding the sustainable development of Quebec's shale gas industry.²⁰⁷
129. The BAPE is an independent agency that reports to the Minister of Sustainable Development, Environment and the Fight against Climate Change²⁰⁸ (the "Minister of Sustainable Development")²⁰⁹. The BAPE's function is to inquire into any question the Minister submits relating to the quality of the environment and to make a report of its analysis and findings.²¹⁰ The BAPE's role is purely advisory and it has no decision making power.
130. In carrying out its function, the BAPE provides information to the public, conducts inquiries, and holds public hearings.²¹¹ The BAPE's central purpose is not to conduct

"Point de presse de M. Pierre Arcand, ministre du Développement durable, de l'Environnement et des Parcs et de Mme Nathalie Normandeau, ministre des Ressources naturelles et de la Faune" (27 October 2010) at 4 (C-054).

²⁰⁷ Bureau d'audiences publiques sur l'environnement, "Rapport 273: Développement durable de l'industrie des gaz de schiste au Québec", Rapport d'enquête et d'audience publique, (28 February 2011) at 1 (R-024).

²⁰⁸ Previously called the Minister of the Environment, until February 2005.

²⁰⁹ Bureau d'audiences publiques sur l'environnement, "Rapport annuel de gestion 2013-2014" (September 2014) at 2 (C-070). Bureau d'audiences publiques sur l'environnement, "La foire aux questions", online: <<http://www.bape.gouv.qc.ca/sections/faq/#qcq>> (C-084).

²¹⁰ *Environment Quality Act*, RSQ c. Q-2 (version in force on 13 June 2011) at s. 6.3 (C-007).

²¹¹ Bureau d'audiences publiques sur l'environnement, "La foire aux questions", online: <<http://www.bape.gouv.qc.ca/sections/faq/#qcq>> (C-084).

scientific studies or come to scientific conclusions, but rather to provide for and solicit public consultation and participation in matters of environmental concern.²¹²

131. In September 2010, at the request of the Minister of Sustainable Development, the BAPE formally established a commission of inquiry with a five month mandate to hold public consultations on the sustainable development of Quebec's shale gas industry.²¹³ The inquiry involved 13 public hearings in three administrative regions of Quebec in which shale gas potential was significant: the Chaudière Appalaches region, the Centre-du-Quebec region, and the Montérégie Est region.²¹⁴
132. Over the course of the inquiry the BAPE received just over 200 submissions from hearing attendees and others. The BAPE submitted its final report to the Minister on 28 February 2011 (the "2011 BAPE Report").²¹⁵

3. Results of the BAPE Hearing Process and 2010 Recommendations

133. The 2011 BAPE Report made a number of recommendations to the Quebec government, including the creation of a Strategic Environmental Assessment Committee on shale gas (the "Committee"), composed of representatives from government and municipal

²¹² Bureau d'audiences publiques sur l'environnement, "La foire aux questions", online: <<http://www.bape.gouv.qc.ca/sections/faq/#qcq>> (C-084).

²¹³ Bureau d'audiences publiques sur l'environnement, "Rapport 273: Développement durable de l'industrie des gaz de schiste au Québec", Rapport d'enquête et d'audience publique, (28 February 2011) at 1 (R-024); The Bécancour/Champlain Block (including River Permit Area) fall within the Centre-de-Québec region.

²¹⁴ Bureau d'audiences publiques sur l'environnement, "Rapport 273: Développement durable de l'industrie des gaz de schiste au Québec", Rapport d'enquête et d'audience publique, (28 February 2011) at 1 (R-024).

²¹⁵ Bureau d'audiences publiques sur l'environnement, "Rapport 273: Développement durable de l'industrie des gaz de schiste au Québec", Rapport d'enquête et d'audience publique, (28 February 2011) at 1 (R-024).

authorities, universities, the private sector, and civil society.²¹⁶ The Committee would be tasked with implementing and overseeing a strategic environmental assessment of Quebec's shale gas industry ("SEA-SG").²¹⁷ The BAPE report also recommended that during the SEA-SG process, hydraulic fracturing activities only be authorized for work related directly to the SEA-SG and that although exploration work could otherwise continue, it must do so without the use of fracking.²¹⁸

134. On 8 March 2011, the date on which the Minister made public the BAPE 's report, the Minister of Sustainable Development announced that he was adopting the report's recommendation to create the SEA-SG Committee.²¹⁹ On 12 May 2011,²²⁰ the Minister of Sustainable Development formally constituted the Committee and gave it the mandate of establishing parameters and timelines for an SEA-SG on the Quebec shale gas industry, and overseeing the SEA-SG's completion.²²¹ The Committee was given an 18 to

²¹⁶ Bureau d'audiences publiques sur l'environnement, "Rapport 273: Développement durable de l'industrie des gaz de schiste au Québec", Rapport d'enquête et d'audience publique, (28 February 2011) at 224-25, 245 (R-024).

²¹⁷ Bureau d'audiences publiques sur l'environnement, "Rapport 273: Développement durable de l'industrie des gaz de schiste au Québec", Rapport d'enquête et d'audience publique, (28 February 2011) at 224-25, 245 (R-024).

²¹⁸ Bureau d'audiences publiques sur l'environnement, "Rapport 273: Développement durable de l'industrie des gaz de schiste au Québec", Rapport d'enquête et d'audience publique, (28 February 2011) at 226 (R-024).

²¹⁹ Quebec Ministry of Sustainable Development, "Gaz de schiste – les activités de l'industrie seront assujetties au développement de connaissances scientifiques" (8 March 2011), online: <<http://www.mddelcc.gouv.qc.ca/Infuseur/index.asp>> (C-060). The BAPE report was submitted to the Minister on 28 February 2011 but was publicly released on 8 March 2011: Bureau d'audiences publiques sur l'environnement, "Rapport 273: Développement durable de l'industrie des gaz de schiste au Québec", Rapport d'enquête et d'audience publique, (28 February 2011) at 1 (R-024).

²²⁰ 12 May 2011 is the same day in which the impugned Bill 18 was introduced into the Quebec National Assembly.

²²¹ Quebec Ministry of Sustainable Development, "Composition du comité de l'Évaluation environnementale stratégique" (12 May 2011), <<http://www.mddelcc.gouv.qc.ca/Infuseur/index.asp>> (C-062).

30 month mandate and was instructed to submit status reports on May 1st of each year.²²²

The SEA-SG's completion date was initially left open, to be specified in the anticipated May 2012 annual status report once the scope of the SEA-SG was better known.²²³

135. The Committee was also instructed that, upon completion of the SEA-SG, two reports would be required: a first report on the SEA-SG itself, and a second report on how best to improve the legislative and regulatory framework governing the oil and gas industry in Quebec.²²⁴

136. The SEA-SG's initial completion date (as specified in the 1 May 2012 status report) was scheduled for 29 November 2013,²²⁵ however, the final SEA-SG report was not released until January 2014.²²⁶

4. Political Considerations and the Proposed Moratoria

137. Despite having launched a BAPE process on 31 August 2010, the Quebec government faced considerable political pressure to be seen to be taking a stronger stance on shale gas exploration in particular and oil and gas development in general. When elected in 2008,

²²² Quebec Ministry of Sustainable Development, "Composition du comité de l'Évaluation environnementale stratégique" (12 May 2011), <<http://www.mddelcc.gouv.qc.ca/Infuseur/index.asp>> (C-062).

²²³ Quebec Ministry of Sustainable Development, "Composition du comité de l'Évaluation environnementale stratégique" (12 May 2011), <<http://www.mddelcc.gouv.qc.ca/Infuseur/index.asp>> (C-062).

²²⁴ Quebec Ministry of Sustainable Development, "Composition du comité de l'Évaluation environnementale stratégique" (12 May 2011), <<http://www.mddelcc.gouv.qc.ca/Infuseur/index.asp>> (C-062).

²²⁵ Comité de l'évaluation environnementale stratégique sur le gas de schiste, "Rapport administratif sur les travaux du comité au 1^{er} mai 2012" (2012) at 15 (C-069).

²²⁶ The final SEAC report included both the SEA-SG report and the second report on improving Quebec's legislative and regulatory framework. The publication date was delayed because of changes to the SEA-SG mandate. On 25 April 2012, the Minister of Sustainable Development expanded its mandate to include the study of the onshore oil and gas industry generally. Then, on February 2013, the Minister specified that the SEA-SG was only required to examine the natural gas industry.

the Liberals enjoyed a 15 seat lead over the Parti Québécois (the official opposition party) in Quebec's National Assembly.²²⁷ By June 2010, the Liberal government of Quebec was trailing by 11% in provincial polls.²²⁸ Both the Parti Québécois and Quebec Solidaire advocated for a total moratorium on shale gas exploration and exploitation in the fall of 2010 introducing such draft legislation in the National Assembly.²²⁹

138. The Liberal government did not want to ban exploration altogether; the government remained staunchly opposed to a general moratorium on shale gas activities. The Parti Québécois and Quebec Solidaire both introduced draft legislation to effect a total moratorium on shale gas activities. In response Minister of Natural Resources, Nathalie Normandeau repeated, "[f]or our part, obviously, a moratorium is not an option, is not an option. Is not an option [...]".²³⁰ Minister Normandeau considered that a moratorium would deprive the government of important information regarding the potential of the industry, and that shale gas exploration was well regulated.²³¹

139. However, less than a month after the BAPE received its mandate to begin work, Minister Normandeau, began to speak publicly about the possibility of a moratorium on oil and

²²⁷ As of 8 December 2008, the Quebec Liberal Party held 66 seats, while the Parti Québécois held 51 seats, in a National Assembly composed of 125 seats.

²²⁸ Léger Marketing, "La politique provinciale et fédérale au Québec, Rapport de sondage", (11 June 2010) (C-050).

²²⁹ *Bill 396* (C-055) and *Bill 397* (C-056).

²³⁰ "Alors, de notre côté, évidemment vous aurez compris que le moratoire n'est pas une option, n'est pas une option. N'est pas une option [...]" Quebec, National Assembly, "Point de presse de M. Pierre Arcand, ministre du Développement durable, de l'Environnement et des Parcs et de Mme Nataalie Normandeau, ministre de Ressources naturelles et de la Faune" (27 October 2010) at 2 (C-054).

²³¹ Quebec, National Assembly, "Point de presse de M. Pierre Arcand, ministre du Développement durable, de l'Environnement et des Parcs et de Mme Nathalie Normandeau, ministre des Ressources naturelles et de la Faune" (27 October 2010) at (C-054).

gas activities in particular areas. On 27 September 2010, Minister Normandeau announced that following the publication of the preliminary findings of SEA-1, the Quebec government had decided to prohibit all oil and gas exploration and exploitation activities in the maritime Estuary and northwestern Gulf of St. Lawrence.²³² The proposed moratorium applied to the marine area which had been the subject of SEA-1 in the Estuary and Gulf of St. Lawrence.²³³

140. The full SEA-1 had not yet been completed and no public consultations had taken place. The publication of the full report was scheduled for June 2011.²³⁴ The SEA-1 did not study the St. Lawrence Lowlands, the river upstream from the Estuary, or the effect of drilling (at depth) beneath waterbeds from onshore location.
141. Subsequently, on 9 November 2010, Minister Normandeau announced to local media that the proposed prohibition on oil and gas activity in the Estuary and Gulf would also apply to the St. Lawrence River, extending the prohibition into the St. Lawrence Lowlands, approximately 550 km outside the boundaries of SEA-1.²³⁵ The Minister's extension of the proposed moratorium would ban exploration and development not only in marine and

²³² QMNR "Première évaluation environnementale stratégique: secteur de l'estuaire – Le gouvernement du Québec est à l'écoute et interdit les activités d'exploration et d'exploitation dans l'estuaire du Saint-Laurent" (27 September 2010), online: <[http://www fil-information.gouv.qc.ca/](http://www.fil-information.gouv.qc.ca/)> (R-029).

²³³ QMNR "Première évaluation environnementale stratégique: secteur de l'estuaire – Le gouvernement du Québec est à l'écoute et interdit les activités d'exploration et d'exploitation dans l'estuaire du Saint-Laurent" (27 September 2010), online: <<http://www fil-information.gouv.qc.ca/>> (R-021).

²³⁴ AECOM Tecault Inc., "Évaluation environnementale stratégique de la mise en valeur des hydrocarbures dans le bassin de l'estuaire maritime et du nord-ouest du golfe du Saint-Laurent – Rapport préliminaire en appui aux consultations" (July 2010) at 1-2 (R-021).

²³⁵ Monique Beaudin, "Oil, gas development in St. Lawrence is frozen to Ontario border", *The Gazette* (10 November 2010) (C-057).

estuarian environments, but also in the fluvial system, which differs in many respects from the Estuary and Gulf of St. Lawrence.²³⁶

142. The Enterprise and Junex learned of the proposed extension of the moratorium from an article published in the Montreal Gazette on 10 November 2010²³⁷ and did not receive any notice, nor were they consulted prior to this announcement.

5. *Industry Responds to the Proposed Moratorium*

143. In response to the proposed extension of the moratorium to the St. Lawrence Lowlands, representatives of the Enterprise and Junex met with the Deputy Minister of the QMNR, Robert Sauvé, and the QMNR's Manager of Exploration, Jean-Yves Laliberté, on 12 January 2011 in Quebec City. A purpose of this meeting was to clarify if the extension would prevent the exploration and development of the Bécancour/Champlain Block, given the Enterprise's intention of drilling from onshore locations.²³⁸
144. At this meeting, the Enterprise and Junex reiterated that their exploration and development plans for permit areas within the River did not entail any drilling offshore, from locations within the St. Lawrence River.²³⁹ Rather, drilling would take place

²³⁶ Environment Canada, "Hydrography of the St. Lawrence River" online: Government of Canada <<https://www.ec.gc.ca>>. (C-075).

²³⁷ Monique Beaudin, "Oil, gas development in St. Lawrence is frozen to Ontario border", *The Gazette* (10 November 2010) (C-057); P. Dorrins Witness Statement at para. 16 (CWS-003).

²³⁸ P. Dorrins Witness Statement at para. 20 (CWS-003).

²³⁹ P. Dorrins Witness Statement at para. 21 (CWS-003).

onshore; the wellbore would be drilled vertically onshore, and then directionally/horizontally at great depth, hundreds of meters below the riverbed.²⁴⁰

145. These comments made by the Enterprise and Junex appeared to be well-received by Messrs. Sauvé and Laliberté. At no point was there any suggestion that revocation of permits was a possible outcome.²⁴¹ Messrs. Sauvé and Laliberté gave the impression that the resources contained in the River Permit would be accessible to the Enterprise and Junex in the future.²⁴² Additionally, Mr. Sauvé assured the Enterprise and Junex that he would revert to them in short order.²⁴³

146. Subsequently, the Enterprise was unable to reach Mr. Sauvé and never heard back from him or anyone else at the QMNR regarding the River Permit or any other matter connected with Bill 18.²⁴⁴

6. *Bill 18 and the Revocation of the River Permit*

147. On 12 May 2011²⁴⁵ the Government of Quebec introduced Bill 18 in the Quebec National Assembly. Going far beyond the proposed moratorium on oil and gas activities in the St. Lawrence River announced in November 2010, the Bill proposed to revoke all mining rights – including exploration permits – for a stretch of the St. Lawrence River including

²⁴⁰ P. Dorrins Witness Statement at para. 21 (CWS-003); D. Axani Witness Statement at para. 28 (CWS-001).

²⁴¹ P. Dorrins Witness Statement at para. 22 (CWS-003).

²⁴² P. Dorrins Witness Statement at para. 22 (CWS-003).

²⁴³ P. Dorrins Witness Statement at para. 22 (CWS-003).

²⁴⁴ P. Dorrins Witness Statement at para. 23 (CWS-003).

²⁴⁵ The SEAC tasked with overseeing an SEA on shale gas was also established on 12 May 2011.

the area covered by the River Permit.²⁴⁶ Moreover, Bill 18 proposed to revoke these rights without offering any compensation whatsoever.²⁴⁷

148. On 31 May 2011, representatives of the QOGA attended committee hearings on Bill 18 conducted by the Committee on Agriculture, Fisheries, Energy and Natural Resources of the Quebec National Assembly. Industry representatives raised concerns about the impact of politically-driven permit revocations on investment in the province.²⁴⁸ In response, Minister Normandeau observed, "the arguments that you are making from a legal perspective are quite justified. From our side, we are making more political, rather than legal arguments".²⁴⁹
149. In further describing the government's justification for the uncompensated revocation, Minister Normandeau made clear that nothing could be done to change this aspect of the bill and that a firm decision had been made at a political level:

Alors, je n'anticipe pas de problème en particulier compte tenu que je décode de la part de nos collègues du Parti québécois leur désir de travailler avec nous à l'avancement de ce projet de loi. Par contre, M. le Président, sur la dimension liée aux compensations, parce que c'est un des messages qui a été véhiculé par l'Association gazière et pétrolière ce matin, notre position demeure la même, notre gouvernement n'a pas l'intention, M. le Président, d'offrir une quelconque indemnité à l'industrie,

²⁴⁶ Quebec, Bill 18, *An Act to limit oil and gas activities*, 2d Sess, 39th Leg (2011) (introduced on 12 May 2011) [*Draft Bill 18*] (C-063).

²⁴⁷ *Draft Bill 18* (C-063).

²⁴⁸ Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (L. Bouchard) at 11-12 (R-037). See also Translation of excerpt (C-066).

²⁴⁹ Translation of Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 11 (C-066).

puis je souhaite revenir sur ce que j'ai dit ce matin. Il y a deux arguments, ou trois arguments qui militent en faveur de cette position que nous avons choisi d'adopter. La première, c'est qu'on est extrêmement sensibles aux préoccupations des citoyens, également l'état d'esprit dans lequel les gens que nous représentons se situe concernant tout l'enjeu qui a émergé sur la filière gazière, en particulier dans les schistes, M. le Président. **Deuxièmement, c'est une décision politique que nous assumons totalement.** Troisièmement, on pense qu'il y a un bel équilibre dans le projet de loi pour ce qui est de la reconnaissance de la contribution de l'industrie à l'économie du Québec. Et j'oserais dire, quatrièmement, il faut se rappeler que le gouvernement du Québec va, à ses frais, aux frais des contribuables québécois, investir, je disais 6 millions ce matin, c'est 7 millions de dollars qui vont nous permettre de faire l'acquisition de connaissances dans le cadre de certains travaux qui seront autorisés, des travaux qui seront faits -- M. Bouchard l'a confirmé ce matin -- en concertation avec l'industrie. Il nous a dit: On est prêts à travailler avec le gouvernement pour qu'on puisse effectivement améliorer nos connaissances.²⁵⁰ (emphasis added)

Translation:

So, I do not anticipate any particular problems, considering that I have detected from our colleagues in the Parti Québécois their desire to work with us on the progress of this bill. On the other hand, Mr. Chairman, on the aspect related to compensation, because it is a message that was conveyed by the Oil and Gas Association this morning, our position remains the same: our government does not intend, Mr. Chairman, to offer any compensation to the industry, and I would like to go back to what I said this morning. There are two arguments, or three arguments, in favor of this position we have chosen to adopt. The first is that we are extremely sensitive to the concerns of citizens, also to the state of mind of the people we represent about the challenge that has emerged in the gas sector, particularly in shale, Mr. Chairman. **Second, it is a political decision for which we assume complete responsibility.** Third, it is believed that there is a good balance in the bill in terms of the recognition of the contribution of industry to the economy of Quebec. And, I dare say, fourth, it must be remembered that the government of Quebec will, at its expense, at the expense of taxpayers from Quebec, invest, I said 6 million this morning, it is 7 million dollars, which will allow us to acquire knowledge in certain work that will be allowed, the work to be done – Mr. Bouchard confirmed it this morning – in consultation with the industry. He said: we are ready

²⁵⁰

Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 16 (R-037).

to work with the government so that we can actually improve our knowledge.²⁵¹ (emphasis added)

150. On 10 June 2011, less than a month after it had been introduced into the National Assembly, Bill 18 was quickly passed in the National Assembly and became law as *An Act to limit oil and gas activities* (the "Act"). The Act entered into force on 13 June 2011.²⁵²

a) *Quebec's Justification of the Revocation of the River Permit is Based on SEAs in the Estuary and Gulf of St. Lawrence*

151. The Quebec government consistently justified its revocation of the River Permit by reference to a wholly different geographic area. From Minister Normandeau's first announcement on 27 September 2010, the Quebec government specifically stated that its decision to prohibit activity was made in light of the findings of the SEA-1 on the Estuary and Gulf of St. Lawrence.²⁵³

152. During legislative debates of Bill 18 on 19 May 2011, the Quebec government reiterated that its decision to revoke permits and prohibit all oil and gas activity in the St. Lawrence River and Estuary was made "[following the analysis of the results of the first strategic environmental assessment]" and that it was "[precisely following the conclusions reached

²⁵¹ Translation of Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, Journal des débats, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 16 (C-066).

²⁵² *An Act to limit oil and gas activities*, SQ 2011, c. 13 [Bill 18] at s. 5 (C-063).

²⁵³ Portail Quebec, "Première évaluation environnementale stratégique: secteur de l'estuaire – Le gouvernement du Québec est à l'écoute et interdit les activités d'exploration et d'exploitation dans l'estuaire du Saint-Laurent" (27 September 2010), online: <[http://www fil-information.gouv.qc.ca](http://www.fil-information.gouv.qc.ca)> (R-029).

by the environmental assessment that [they] have made this decision to prohibit all [oil and gas] activity in the St. Lawrence River and Estuary".²⁵⁴

153. In Committee hearings on Bill 18, Minister Normandeau affirmed that Bill 18 was "[directly linked]" to the SEA-1 on the Estuary and Gulf of St. Lawrence.²⁵⁵

154. Although the government purported to justify Bill 18 based on the findings of the SEA-1, the territorial application of Bill 18's permit revocation extended far beyond the geographic limits of SEA-1, hundreds of kilometers upstream, into the freshwater section of the St. Lawrence River. Bill 18 revoked permits located in the St. Lawrence Lowlands, an environment entirely different from the marine environment under study in SEA-1. In the areas studied by the SEA-1, oil and gas exploration and development could only be undertaken through offshore testing and drilling in the water, which is significantly riskier in both economic and environmental terms than the process contemplated for the St. Lawrence Lowlands.²⁵⁶ Neither the St. Lawrence Lowlands nor the technology used in shale gas exploration and extraction, were studied by the SEA-1.

²⁵⁴ "Cette décision fait suite à l'analyse des résultats de la première évaluation environnementale stratégique que nous avons commandée en juillet 2011, résultat obtenu, M. le Président, en 2010. Et c'est précisément suite aux conclusions apportées par l'évaluation environnementale que nous avons pris cette décision donc d'interdire toute activité d'exploitation et d'exploration pétrolière et gazière dans le fleuve Saint-Laurent et dans son estuaire." Quebec, National Assembly, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 29 (19 May 2011) (Minister Normandeau) at 2032 (C-064).

²⁵⁵ "[P]rojet de loi, est directement liée à un processus d'évaluation environnementale que nous avons mené, annoncé en 2009". Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) (Minister Normandeau) at 1 (C-065).

²⁵⁶ D. Axani Witness Statement at para. 29 (CWS-001).

b) *The Government did not Extend the Revocation Because of an Ongoing SEA*

155. Although the government extended the territorial application of Bill 18 far upstream, beyond the southwest boundary of SEA-1, the government refused to extend the revocation downstream, outside the SEA-1's northeast boundary into the Gulf.
156. During committee hearings on Bill 18, interest groups pushed the government to extend the territorial application of Bill 18 downstream of the area studied in SEA-1 into the Gulf of St. Lawrence.²⁵⁷
157. In response, Minister Normandeau stated that the request to extend the permit revocation into areas outside the eastern limits on SEA-1 was "[hasty]", given that in the Gulf to the east of SEA-1's boundaries, "[there [was] an SEA process in progress]".²⁵⁸ The Minister's comments referred to the SEA underway in the remaining zones of the Gulf of St. Lawrence ("SEA-2"). Minister Normandeau explained that, before SEA-2 was complete, public consultation processes would be held, further reports would be submitted, and that "[at the time [those reports] are made public, we will likely, as a society, have another debate on the pertinence of oil and gas development in the Gulf]",²⁵⁹ indicating the government's view that a prohibition on oil and gas activity would be premature before

²⁵⁷ Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) (S. Archambault) at 4-5 (C-065).

²⁵⁸ "Votre demande est trop hâtive [...] dans la mesure où il y a un processus, là, d'évaluation environnementale qui est en cours." Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) (Minister Normandeau) at 10 (C-065).

²⁵⁹ "Lorsque des conclusions finales nous seront livrées, on les rendra publiques, et, à ce moment-là, on aura probablement, comme société, un autre débat sur la pertinence ou non, donc, de mettre en valeur le potentiel gazier et pétrolier du golfe." Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) (Minister Normandeau) at 6 (C-065).

an SEA has concluded. Minister Normandeau specifically asked of her detractors, "[why, at this stage, demand a moratorium on the Gulf, while we are in the process of an SEA?]"²⁶⁰

c) *Yet, Despite an Ongoing SEA, the Government Extended the Revocation into the St. Lawrence River*

158. At the time that Bill 18 was being debated, two SEAs were in progress. In addition to SEA-2, an SEA on shale gas ("SEA-SG") was in the process of being implemented, as announced by the Minister of Sustainable Development on 8 March 2011.²⁶¹ The territory studied in the SEA-SG included the St. Lawrence Lowlands, where the River Permit was located. It also included the specific technologies and activities associated with shale gas exploration and exploitation.²⁶²

159. Accordingly, similar to the Gulf of St. Lawrence, the St. Lawrence Lowlands were the subject of an SEA in progress when Bill 18 was enacted. Despite this fact, and in full contradiction to their position on extending permit revocations into the Gulf of St. Lawrence, the government revoked the River Permit and other permits located within the river in the St. Lawrence Lowlands.

²⁶⁰ "Pourquoi, à ce stade-ci, demander un moratoire sur le golfe, alors qu'on est en évaluation environnementale stratégique?" Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) (Minister Normandeau) at 6 (C-065).

²⁶¹ Quebec Ministry of Sustainable Development, "Gaz de schiste – les activités de l'industrie seront assujetties au développement de connaissances scientifiques", (8 March 2011), online: <<http://www.mddelcc.gouv.qc.ca/Infuseur/index.asp>> (C-060).

²⁶² Comité de l'évaluation environnementale stratégique sur le gaz de schiste, "Implementation Plan for the Strategic Environmental Assessment on Shale Gas", (April 2012) at 11 (C-068).

d) *The Government Did Not Compensate Due to Political Pressure*

160. Bill 18 revoked permits, including the River Permit, without offering any compensation. Bill 18 was explicit on this point notwithstanding the government's acknowledgement that the Bill affected property rights held by industry. However, the government was also clear that its decision was not motivated by a consideration of what is right in law, but what is politically palatable and popular with Quebeckers.
161. For example, during committee hearings on Bill 18, Minister Normandeau explained Bill 18's lack of compensation by observing "in the current context, let's say it frankly, I do not think that the citizens would have appreciated us compensating gas companies in the extremely highly emotional context that has occupied us in recent months, in recent weeks."²⁶³
162. While Minister Normandeau recognized the validity of arguments in favour of paying compensation from a legal perspective, she concluded that "from a political perspective, the government has communicated a very different message".²⁶⁴
163. Minister Normandeau noted that the government would look closely at the issue of compensation, but she confirmed that "politically, this message and this decision that was

²⁶³ "[D]ans le contexte actuel, disons-nous les choses franchement, je ne crois pas que les citoyens auraient apprécié qu'on puisse compenser des entreprises gazières dans le context extrêmement, hautement émotif qui nous a occupés au cours des deniers mois, des dernières semaines." Translation of Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 12 (C-066); Quebec National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 12 (R-037)

²⁶⁴ "[S]ur le plan politique, le gouvernement a porté un tout autre message." Translation of Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 12 (C-066); Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 12 (R-037).

made, Mr. Chairman, is one that also allows us to take into account the state of mind our citizens are in at the point of emergence of the oil and gas sector."²⁶⁵

F. Conclusion

164. Forest Oil and its successor company, Lone Pine, carried out exploration activities in the St. Lawrence Lowlands via the Enterprise in good faith, using the latest technology and developments in mining practice available to them in order to explore and bring to commercial production the unconventional natural gas resources contained in the Quebec Utica Shale.
165. Forest Oil, Lone Pine and the Enterprise consistently articulated their plan to develop the resource from onshore locations from Forest Oil's earliest communications with the QMNR. At no point did Forest Oil, Lone Pine or the Enterprise intend or represent that the Enterprise would be drilling offshore within the St. Lawrence River. Instead, at all times they have clearly explained that the Enterprise must access the resources contained in the River Permit Area from onshore locations, including from locations within the designated industrial area of the Bécancour Waterfront Industrial Park. Such designated industrial areas are in no way comparable to ecologically sensitive or protected areas as may exist further downstream, or elsewhere along the St. Lawrence River.

²⁶⁵ "[S]ur le plan politique, ce message, et cette décision qui a été prise, M. le Président, ... en est un qui nous permet de tenir compte aussi de l'état d'esprit dans lequel se situent nos citoyens à l'endroit de l'émergence de cette filière gazière et pétrolière." Translation of Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 12 (C-066); Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 12 [R-037].

166. Accordingly, in addition to the St. Lawrence Lowlands being geographically and ecologically distinct from the Estuary and Gulf of St. Lawrence, onshore drilling was not examined or evaluated in any of the previous SEAs in marine environments where offshore drilling is the only option.
167. Quebec justified the revocation of the River Permit, including the termination of Lone Pine's River Permit Rights, on the basis of the SEA-1. However, SEA-1 was conducted on a different geographical area (the Estuary and Gulf of St. Lawrence) with radically different environmental conditions where exploration and production could only be undertaken using radically different technology and processes.
168. Quebec's decision to deny compensation for the revocation of these permits and attendant loss of property rights was justified by the Minister responsible for the Bill on the grounds of public unpopularity.
169. The BAPE, whose mandate does not include scientific study but instead is geared towards public consultation, made clear in its February 2011 report that certain Quebecers and interest groups opposed shale gas development and particularly the use of hydraulic fracturing.
170. To allow for the SEA-SG and legislative amendments to be completed, Bill 18 also included a temporary suspension of all existing oil and gas exploration and exploitation permits in Quebec. However, rather than allow the SEA-SG relevant to the permit areas within the banks of the St. Lawrence River to conclude, Quebec revoked these permits, including the River Permit, barely a month into the work of the relevant SEA-SG. The SEA-SG ultimately took three years to conclude, rendering its report in January 2014,

two and a half years after the Enterprise was deprived of the River Permit Rights. Quebec has still to pass its anticipated law on hydrocarbons.

171. Accordingly, at the time Bill 18 entered into force, neither the River Permit Area nor the shale gas resources contained therein, nor the technology used by the Claimant had been subject to an environmental assessment to determine the benefits and drawbacks of the contemplated development. While all other property rights were preserved pending the outcome of the SEA-SG and eventual reform and modernization of Quebec's hydrocarbon laws, Lone Pine's rights were terminated without compensation and for no public purpose.

172. As is set out below, this treatment constitutes a wrongful expropriation under Article 1110, and also specifically violates the minimum standard of treatment guaranteed by Article 1105.

IV. JURISDICTION

173. Lone Pine has submitted its claim pursuant to NAFTA Article 1117, which permits an investor of a Party to submit to arbitration a claim that another Party has breached its obligations under Section A of Chapter 11. Unlike Article 1116, under which an investor's claim is based on harm the investor has suffered directly, Article 1117 authorizes an investor to submit the claim on behalf of its enterprise in the host country that has suffered loss or damage by reason of, or arising out of, the alleged breach, so long as the investor (directly or indirectly) owns or controls the enterprise.

174. In the present case, Lone Pine's claim under Article 1117 is grounded in the loss or damage suffered by its Canadian subsidiary, the Enterprise, due to Canada's breaches of the NAFTA.

175. NAFTA Chapter 11 places limits on this Tribunal's jurisdiction. NAFTA Article 1101(1) sets out the scope of the substantive protections of NAFTA Chapter 11 and, together with the requirements of Articles 1116 to 1121, establishes the Tribunal's jurisdiction to arbitrate claims brought under NAFTA Chapter 11. As the Claimant, Lone Pine bears the burden of proving that this dispute satisfies the procedural and substantive jurisdictional requirements of the NAFTA.

176. Article 1101(1) provides:

1. This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) investors of another Party;
- (b) investments of investors of another Party in the territory of the Party; and

- (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

177. Accordingly, to establish the Tribunal's jurisdiction in this case, Lone Pine must show:

- (a) Lone Pine is an investor of another Party – in this case, the US;
- (b) The impugned action is a "measure adopted or maintained" by Canada; and
- (c) The impugned measure relates to Lone Pine or an investment made by Lone Pine in Canada.

178. Lone Pine must also show that it has satisfied the procedural conditions set out in Articles 1118 to 1121.

A. The Claim Satisfies the Jurisdictional Requirements of Article 1101(1)

1. Lone Pine is a US Investor

179. NAFTA Article 1139 defines an "investor of a Party" as including an enterprise of a Party that seeks to make, is making, or has made an investment.

180. An enterprise is defined in Article 201 as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association." According to the definition of the phrase "enterprise

of a Party" in Article 1139, the nationality of the enterprise is determined by the place where the enterprise was constituted or organized.²⁶⁶

181. As a result, a corporation will be an investor for the purposes of NAFTA Chapter 11 if it (a) has the requisite nationality by being constituted or organized under the law of a Party and (b) owns or controls an investment, either directly or indirectly.²⁶⁷

(a) As described in Section III.A.1 above, Lone Pine is an enterprise incorporated under the laws of the State of Delaware in the US and therefore has the requisite US nationality to raise a claim against Canada.

(b) Lone Pine owns and controls an investment, first and foremost in the form of the Enterprise.²⁶⁸ NAFTA Article 1139 specifies that "an enterprise" as defined in Article 201 may itself qualify as an investment. In the present case, the Enterprise is a company organized under the laws of the province of Alberta. It was first indirectly owned and controlled by Forest Oil (a US corporation), and then by Lone Pine (a US corporation). At the time of the impugned measure, the

²⁶⁶ Article 1139 specifies that an "enterprise of a Party" means "an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there" (CLA-001).

²⁶⁷ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) at para. 79 [*Mondev*] (CLA-049); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) at para. 80 [*Waste Management II*] (CLA-064).

²⁶⁸ The Claimant does not allege that the Enterprise is the investment expropriated by Canada and treated with less than the minimum standard of treatment required by Article 1105. The analysis of the *rationae personae* (does the Tribunal have jurisdiction over the parties) is analytically distinct from the analysis of the *ratione materiae* (does the Tribunal have jurisdiction over the subject matter of the dispute). The Claimant refers to the Enterprise here in the jurisdictional analysis to assert that Lone Pine has standing as a NAFTA-qualified investor. The investment that is the object of Canada's NAFTA breaches is the River Permit Rights, both as intangible property rights (Article 1139(g)) and as "interests arising from the commitment of capital or other such resources in the territory of a Party to economic activity in such territory" (Article 1139(h)), as is discussed in greater detail in Section IV.A.3 below.

Enterprise was wholly-owned by Lone Pine through a combination of direct and indirect shareholdings. As a result, the Enterprise qualifies as an "enterprise" and an "investment" within the NAFTA's definitions of those terms.

182. Lone Pine is therefore a US investor and satisfies this branch of Article 1101(1)'s jurisdictional requirements.

2. *Bill 18 is a Measure Adopted or Maintained by Canada*

183. NAFTA Article 201 defines a "measure" as including "any law, regulation, procedure, requirement or practice". Bill 18 was passed by the Quebec National Assembly on 10 June 2011 and entered into force on 13 June 2011.²⁶⁹

184. Although the impugned measure emanated from a sub-federal entity, namely the National Assembly of Quebec, it is attributable to Canada. Article 4 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts²⁷⁰ codifies the conditions under which, at customary international law, the actions of an organ of the State will be attributed to the State:

The conduct of any State organ shall be considered an act of that State under international law, whether the 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.²⁷¹

²⁶⁹ *Bill 18* (2011) at s. 5 (C-063).

²⁷⁰ United Nations, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) [*ILC Draft Articles*] (CLA-005).

²⁷¹ *ILC Draft Articles* (2001) at Article 4(1) (CLA-005).

185. The ILC Articles go on to clarify that an organ "includes any person or entity which has that status in accordance with the internal law of the State."²⁷²
186. The impugned measure, Bill 18, was a legislative act of the National Assembly of Quebec, which is Quebec's provincial elected house of representatives. As the commentary to the ILC Articles explains, Article 4 makes clear that the concept of a State organ "includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State".²⁷³ Accordingly, the impugned measure is attributable to Canada.

3. *Bill 18 Relates to Lone Pine or an Investment of Lone Pine in Canada*

a) Overview

187. Bill 18 terminated Lone Pine's River Permit Rights by revoking "[a]ny mining right" that had been issued "for the part of the St. Lawrence River west of longitude 64°31'27" in the NAD83 geodetic reference system or for the islands situated in that part of the river."²⁷⁴
188. The River Permit is a discrete asset and qualifies as an investment as defined by the NAFTA: until they were revoked by Bill 18, the River Permit Rights were owned by the Enterprise and therefore indirectly owned and controlled by Lone Pine.²⁷⁵ Accordingly,

²⁷² *ILC Draft Articles* (2001) at Article 4(1) (CLA-005).

²⁷³ *ILC Draft Articles* (2001) at Article 4, Commentary at para. 1 (CLA-005).

²⁷⁴ *Bill 18* (2011) at ss. 1, 2 (C-063).

²⁷⁵ *NAFTA* at Article 1139 defines "investment of an investor of a Party" as "an investment owned or controlled directly or indirectly by an investor of such Party" (CLA-001).

there is a "legally significant connection"²⁷⁶ between Bill 18 and Lone Pine's investment in Canada to ground the Tribunal's jurisdiction, as required by Article 1101(1).

b) *The Meaning of the Phrase "relating to"*

189. In keeping with Article 31(1) of the *Vienna Convention on the Law of Treaties* (the "Vienna Convention"), the starting point for the interpretation of any treaty provision is the ordinary meaning of the text, its context within the treaty, and the object or purpose of the treaty.²⁷⁷

190. The Tribunal in *Methanex* considered each of these factors, and set out a course of reasoning that has also been adopted by other NAFTA Tribunals.²⁷⁸ The Tribunal determined that the threshold required by Article 1101(1) is not merely a measure "affecting" an investment, since "an interpretation imposing a limit is required to give effect to the object and purpose of Chapter 11."²⁷⁹ Instead, the NAFTA requires a "legally significant connection between the measure and the investor or the investment."²⁸⁰

²⁷⁶ *Methanex Corporation v. United States of America*, Partial Award (7 August 2002), UNCITRAL at para. 147 [*Methanex*] (CLA-046).

²⁷⁷ Article 31(1) of the *Vienna Convention on the Law of Treaties* (27 January 1980) 1155 UNTS 331, 8 ILM 679 [*Vienna Convention*] provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (CLA-003).

²⁷⁸ See, for example, *Clayton/Bilcon v. Government of Canada*, Award on Jurisdiction and Liability (17 March 2015), PCA No. 2009-04, 1 at 240 (CLA-031). See also *Bayview Irrigation District et al v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award (19 June 2007) at para. 101 (CLA-026); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) at para. 174 (CLA-027).

²⁷⁹ *Methanex* (2002) Partial Award at paras. 139, 147 (CLA-046).

²⁸⁰ *Methanex* (2002) Partial Award at paras. 139, 147 (CLA-046).

191. In the present case, Lone Pine's River Permit Rights are an investment under both Articles 1139 (g) and (h). The effect of Bill 18 was the revocation of the River Permit, i.e. a termination of Lone Pine's River Permit Rights. The measure directly nullifies Lone Pine's investment, thereby satisfying the threshold that there be a legally significant connection between the measure and the Claimant's investment.

c) Lone Pine's River Permit Rights are an Investment

192. Article 1139 provides several definitions of qualifying investments, including:

- (a) *Article 1139, subparagraph (g):* intangible property, acquired in the expectation or used for the purpose of economic benefit or other business purposes;²⁸¹ and
- (b) *Article 1139, subparagraph (h):* interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory.²⁸² This definition of investment under the NAFTA specifically includes interests that arise under "contracts involving the presence of the investor's property in the territory of the Party, including turnkey or construction contracts, or concessions".

193. Lone Pine's River Permit Rights, held by the Enterprise, satisfy both of these definitions of an "investment."

²⁸¹ Article 1139(g) defines "investment" to mean "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes" (CLA-001).

²⁸² Article 1139(h) defines "investment" to mean 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" (CLA-001).

(1) The River Permit Rights are Intangible Property Rights

194. Lone Pine's ownership interest in the River Permit is an investment within the meaning of Article 1139 (g), which states that an investment is:

real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes²⁸³

195. The phrase "property, tangible or intangible" is not otherwise defined in the NAFTA, however NAFTA Article 1131 instructs that disputes under Chapter 11 are to be decided "in accordance with this Agreement and applicable rules of international law."²⁸⁴ Accordingly, the tribunal may look to the greater body of international law to determine if the River Permit Rights constitute "property, tangible or intangible."

196. In the *Apotex* case,²⁸⁵ the Claimants provided an overview of state practice and arbitral awards that confirm "property" is interpreted broadly, which submissions Lone Pine adopts:

355. The term "property, tangible or intangible" is not defined in the NAFTA and has not given rise to significant discussion to date in NAFTA jurisprudence. Whether one considers State practice and arbitral awards

²⁸³ NAFTA at Article 1139(g) (CLA-001).

²⁸⁴ NAFTA at Article 1131 (CLA-001). Article 1131 provides:

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section. (CLA-001).

²⁸⁵ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Memorial of Claimants Apotex Holdings Inc. and Apotex Inc. (30 July 2012) [*Apotex*] (internal citations omitted) (CLA-023).

construing similar treaty language or the law of the NAFTA Parties, however, "property" has a broad connotation.

356. For example, Article 9(c) of the OECD Draft Convention on the Protection of Foreign Property (widely viewed as a precursor to the modern investment treaty) defines property as "all property, rights and interests, whether held directly or indirectly, including the interest which a member of a company is deemed to have in the property of the company." The notes and comments to this provision observe that the definition "is in conformity with international judicial practice [and] shows that *it is meant to be used in its widest sense* which includes, but is not limited to, investments.

357. The Iran-US Claims Tribunal likewise adopted a broad interpretation of the term "property" in the Algiers Accords and has confirmed that it includes shareholder rights, contractual rights and other immaterial rights. In construing the related term "possessions" in Article 1 of Protocol No. 1 to the European Convention on Human Rights, the Strasbourg Court has found it to cover a wide range of proprietary interests, such as "movable or immovable property, tangible or intangible interests, such as shares, partents, an arbitration award, the entitlement to a pension, a landlord's entitlement to rent, the economic interests connected with the running of a business, the right to exercise a profession, a legitimate expectation that a certain state of affairs will apply, a legal claim, and the clientele of a cinema."

358. Thus, property and related terms have been given expansive content in international practice. This position is entirely consistent with the approach to the subject taken in the law of each of the NAFTA Parties.

359. **US Law.** The Supreme Court of the United States has held that the term "property" reaches "every species of right or interest protected by law and having an exchangeable value." The term "property" thus includes a particular physical object but also extends to a "bundle of property rights" associated with that object.

360. The courts of the United States have developed a three-prong test to determine whether a property right exists: "first, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity." By way of illustration, a domain name was held to constitute intangible property because it satisfied this three-prong test for the existence of a property right. Similarly, other forms of intangible property, such as copyrights, patents, trade secrets, confidential business information, causes of action, corporate stock, contracts, and other "things of value" are entitled to the same broad legal protection as tangible property.

361. Furthermore, courts view government-issued permits and licenses as property of the licensees. In discussing the effects of government-issued licenses and permits, the United States Supreme Court noted that video poker licensees may have property interests in their licenses. In a similar fashion, the US Court of Appeals for the Sixth Circuit stated that a certificate of registration of a bingo license may be property in the hands of the licensee, once issued to it. Similarly, the US Court of Appeals for the Eighth Circuit has held in *dicta* that a governmental permit may be property of the person who receives it. More recently, the US Court of Appeals for the Fifth Circuit reaffirmed that a business owner had a property interest in permits issued by the city's planning and zoning board, especially since these permits allowed that person to operate her business "in the pursuit of a livelihood."

362. **Canadian Law.** Intangible property is a broad concept under Canadian law. For instance, the Supreme Court of Canada held that goodwill, although intangible in character, is part of the property of a business just as much as the premises, machinery and equipment of that business. Similarly, the bundle of rights associated with a fishing license was found sufficient to qualify it as property for purposes of federal and provincial statutes. The courts of Ontario have also held that intellectual property, including domain names, constitute intangible property.

363. **Mexican Law.** The Federal Civil Code of Mexico similarly provides a very broad definition of property. Under Mexican law "all things not excluded from trade" may be owned. Those excluded from trade are limited to those "that cannot be possessed by any individual exclusively, and by law, those that the law declares incapable of individual ownership."

364. Mexican law explicitly recognizes a wide variety of intangible property rights, such as "copyrights," "shares held by each partner in partnerships or companies" or "natural fruits or fruits of industry." It further holds to be moveable property in general "all other [rights] not considered by the law to be immovable ... property." Similarly, the Constitution of Mexico protects the work of artists, inventors, or creators of an improvement in any branch of the industry.

365. The courts of Mexico have thus afforded legal protection to various kinds of intangible property, such as trademarks, copyrights or brands. The Supreme Court also held that the right to sue for moral damages in a breach of contract case constituted an intangible property right.

366. To sum up, the concept of intangible property is broadly defined in international law, as well as under the law of the three NAFTA Parties.²⁸⁶

197. In addition to state practice and the practice of other arbitral tribunals, as noted by Dame Rosalyn Higgins, to understand the concept of property "[w]e necessarily draw on municipal law sources and on the general principles of law." She then goes on to describe the attributes of property:

The concept of "property" provides the owner thereof with the protection of the law in certain key respects. He may use it without requiring permission each time he does so. He may use it as he wishes. And others who wish to use it will have to get his permission first to do so. And, importantly, he has the sole right of alienating it.²⁸⁷

198. Dame Higgins' description of property is an apt summary of the concept of real rights under Canadian municipal law, specifically the Quebec Civil Code, as described in Section III.C.2 above. The real right of ownership, which includes the ownership of intangible property,²⁸⁸ encompasses the right to use, enjoy, and dispose of one's property, all of which Forest Oil, Lone Pine and the Enterprise have done with respect to the River Permit Rights.

199. As described in Section III.C.1 above, the River Permit is a licence to explore for petroleum, natural gas and underground reservoirs in a specified territory, as

²⁸⁶ *Apotex*, Memorial of the Claimants (2012) at paras. 355-366 (CLA-023).

²⁸⁷ Rosalyn Higgins, "The Taking of Property by the State" (1982) 176 *Rec. des Cours* 259 at 270 (CLA-016).

²⁸⁸ *CCQ* at Articles 899, 947 (C-002).

contemplated by the *Mining Act*.²⁸⁹ It is an immovable real right²⁹⁰ that can be dismembered and transferred or assigned as such to another party, including through contractual agreements. The Quebec Court of Appeal confirmed this principle when it observed that Quebec's civil law permits the holder of a mining claim to grant a real right to another "not only on the claim" but also on derivative goods that will be produced from the permit area in the future:

Le droit civil comporte suffisamment de souplesse pour permettre au titulaire d'un claim minier—un propriétaire potentiel des substances minérales extraites—de conférer un droit réel non seulement sur le claim, mais aussi sur les substances minérales extraites à l'égard desquelles il aura obtenu un droit de propriété, après l'octroi d'un bail minier.²⁹¹

Translation:

Civil law is sufficiently flexible to allow the holder of a mining claim—a potential owner of extracted mineral substances—to grant a real right, not only on the claim, but also on the extracted mineral substances over which the holder will obtain an ownership right after a mining lease has been granted.²⁹²

200. The River Permit Agreement and Assignment Agreement conferred on the Enterprise 100% of the Working Interest in the area defined under these agreements and registered

²⁸⁹ *Mining Act* (2011) at s. 8 (C-004).

²⁹⁰ *Mining Act* (2011) at s. 8 (C-004).

²⁹¹ *Anglo Pacific* (2013) at para. 74 (C-011). In *Anglo Pacific*, the Quebec Court of Appeal determined that the royalty rights transferred in favor of the appellant did not constitute a real right under Quebec civil law, because the transfer did not contain any of the characteristics of real rights. These characteristics include the attributes of the right of ownership (the right to use, enjoy and dispose of the property and the right to follow and abandon it). The royalty rights in that case only transferred a contractual entitlement to profits deriving from the exercise of the mining right. *Anglo Pacific* (2013) at paras. 77, 80 (C-011).

²⁹² *Anglo Pacific* (2013) (English Translation) at para. 74 (C-011A).

in the Quebec Mining Registry.²⁹³ As evidenced by the conduct of Junex, Forest Oil, Lone Pine and the Enterprise, the 100% Working Interest that Forest Oil earned and that Junex transferred to the Enterprise and registered with the QMNR in the Mining Registry was intended by the commercial parties to be a dismemberment of real rights in the River Permit. Specifically, the Enterprise's River Permit Rights include:

- (a) The entitlement to use and enjoy the property, including by undertaking a variety of exploration activity for which the Enterprise obtained permits and authorizations in its own name from Quebec government entities; and
- (b) The ability for Forest Oil to assign the River Permit Rights to the Enterprise and relinquish its ownership interest in the River Permit in favour of the Enterprise.²⁹⁴

201. Junex did not enjoy any particular rights of participation in or control over the Enterprise's activities, and relinquished its ownership of the River Permit Rights entirely to the Enterprise with the transfer of 100% of the Working Interest in the River Permit as defined.

²⁹³ Junex memorialized the initial terms in a letter agreement, dated 29 November 2006. The parties then agreed to further terms, memorialized in a letter agreement dated 14 December 2006. See Letter Agreement between Forest Oil and Junex re: the River Permit Agreement, dated 29 November 2006 (C-022A); Email from Victor Luszcz (Forest Oil) to Junex re: terms of the River Permit Agreement undated, believed to be from on or around 5 December 2006 (C-022B); and Letter Agreement between Forest Oil and Junex, re amendments to River Permit Agreement, dated 14 December 2006 (C-022) (collectively, the River Permit Agreement); Assignment Agreement between Forest Oil and the Enterprise re: Farmout Agreement between Forest Oil and Junex, dated 8 April 2009 (C-032); Letter from Forest Oil to Junex re: assignment to the Enterprise of the Farmout Agreement (23 April 2009) (C-033); Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the Reiver Permit, dated 28 January 2010 (C-034); Letter from QMNR to Junex re: confirming receipt of application for assignment of rights to the Enterprise (21 April 2010) (C-036).

²⁹⁴ Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the River Permit, dated 28 January 2010 (C-034).

202. Indeed, Lone Pine and the Enterprise enjoyed autonomy over the River Permit Area: if they had chosen to take no further step to develop the property, but for the QMNR minimum expenditure requirements, no one (including Junex) would have been entitled to require the Enterprise to undertake work, which underscores the exclusive nature of the property right in question.
203. The definition of "investment" in Article 1139 also requires that the intangible property rights were "acquired in the expectation or used for the purpose of economic benefit or other business purposes".²⁹⁵ The River Permit Rights were acquired by the Enterprise pursuant to the River Permit Agreement for a business purpose, namely to enable the exploration and development of the shale gas resources contained in the River Permit Area.
204. Lone Pine continued to devote resources to developing its shale gas activities in the Utica Shale basin, pursuing its plan to strategically allocate its capital to earn into as many permit areas as possible with its various partners in order to secure the greatest possible land base.
205. Nonetheless, the record clearly establishes that Lone Pine invested in acquiring the River Permit Rights for commercial purposes and in order to develop the shale gas opportunity it perceived in Quebec's Utica Shale basin, thereby satisfying the definition of investment in Article 1139(g).

²⁹⁵ *NAFTA* at Article 1139(g) (CLA-001).

(2) The River Permit Rights are Interests Arising from the Commitment of Capital Pursuant to a Contract

206. The River Permit is also an investment within the meaning of Article 1139(h), which defines an investment as:

(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

207. However, Article 1139 further specifies that an investment does not mean:

(i) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) through (h)²⁹⁶

208. The record clearly establishes that Lone Pine's River Permit Rights are the kind of investment contemplated by Article 1139(h).

²⁹⁶ NAFTA Article 1139(i), (j) (CLA-001).

209. *First*, the Farmout and River Permit Agreements required the Enterprise to spend certain amounts of money on undertaking exploration activity on the permit areas held in Junex's name, in exchange for an ownership interest in the River Permit Area and rights under the River Permit.²⁹⁷ These expenditures also satisfied the Quebec government's requirement that permit holders undertake activity on their permit areas in order to maintain their permit rights.²⁹⁸
210. *Second*, in accordance with the commercial agreements entered into by the Enterprise and Junex, from 2006 to the present the Enterprise committed capital and other resources through its expenditures on and undertaking of drilling, completions, re-completions, construction of facilities, pipelines and gathering lines and other geological and geophysical activities on the Bécancour/Champlain Block.²⁹⁹ These expenditures and activities gave rise to the Enterprise earning 100% of the working interest in the Original and River Permits, pursuant to the Farmout and River Permit Agreements, as acknowledged by the Enterprise and Junex in correspondence dated 10 May 2007 and 28 January 2010, respectively.³⁰⁰

²⁹⁷ Letter Agreement between Forest Oil and Junex, dated 5 June 2006 (the "Farmout Agreement") at clauses 2, 4 (C-017).

²⁹⁸ The *Mining Act* requires exploration permit holders to perform "work of the nature and for the minimum cost determined by regulation", which includes geological studies, geophysical studies, drilling and assessments. *Mining Act* (2011) at ss. 166, 177 (C-004) and *Regulation* at s. 67 (C-005).

²⁹⁹ Letter Agreement between Forest Oil and Junex, dated 5 June 2006 (the "Farmout Agreement") at clauses 2, 4 (C-017).

³⁰⁰ Letter from the Enterprise to Junex re: exercise of Utica Shale Farmout Agreement (10 May 2007) (C-024); Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the River Permit, dated 28 January 2010 (C-034); and Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the Original Permits, dated 28 January 2010 (C-035).

211. In the NAFTA case *Mondev v. United States*, the Canadian investor alleged that contracts entered into by its wholly-owned US limited partnership gave it rights to develop large parcels of property in downtown Boston. The *Mondev* tribunal concluded that, through the rights acquired in these contracts, "Mondev's claims involved 'interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory'" and accordingly fell within the definition of investment under NAFTA Article 1139(h).³⁰¹

212. Similarly, Lone Pine's expenditures, via the Enterprise and pursuant to the Farmout and River Permit Agreements, gave it the right to explore for shale gas within the River Permit Area, and the Enterprise undertook this activity as it earned into its rights, beginning in 2006. Having satisfied the requirements of the Farmout and River Permit Agreements, the Enterprise held the River Permit Rights outright. Accordingly, its interests falls within the definition of investment under Article 1139(h).

d) Bill 18 Relates to Lone Pine's Investment

213. Bill 18's revocation of the River Permit thereby directly and immediately impacts—ultimately eliminating—the interests that the Enterprise earned through the relevant expenditures and activities, and thus the ownership rights held by Lone Pine via the Enterprise.

³⁰¹ *Mondev* (2002) Award at para. 80 (CLA-049).

B. The Claim Satisfies the Procedural Conditions of Chapter 11

214. Chapter 11 sets out a number of procedural conditions for Lone Pine's claim to be validly constituted under NAFTA. In particular:

- (a) Articles 1116 and 1117 require that the investor's claim be brought within three years of when the investor first acquired, or should have acquired, knowledge that the investor (for claims brought under Article 1116) or the investor's enterprise (for claims brought under Article 1117) has incurred loss or damages arising out of the alleged breach;
- (b) Article 1118 requires the disputing parties to settle the claim through consultation or negotiation;
- (c) Article 1119 requires the disputing investor to deliver to the proposed Respondent a notice of intention to submit a claim to arbitration at least 90 days before the submission of a claim;
- (d) Article 1120 requires that an investor may only submit a claim to arbitration if at least six months have elapsed from the time of the events giving rise to the claim; and
- (e) Articles 1121(2) sets out the condition precedent that a disputing investor may only submit a claim pursuant to Article 1117 (as Lone Pine has) if both the investor and its enterprise consent to arbitration and waive their right to initiate or continue before any administrative tribunal or court under the laws of any Party, or other dispute settlement procedures, any proceedings with respect to the

impugned measures, except for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the laws of Canada.

215. Lone Pine has satisfied these temporal and formal requirements. Specifically:

- (a) Lone Pine acquired knowledge of the Enterprise's loss or damage when Bill 18 entered into force and revoked the River Permit on 13 June 2011.³⁰²
- (b) Lone Pine engaged in efforts to settle the claim through consultation. Between 31 October 2011 and 25 October 2012, representatives of Lone Pine consulted with representatives of both the federal and Quebec governments in order to seek a resolution to this dispute.
- (c) None of these efforts resulted in settlement of the dispute. Accordingly, on 8 November 2012, Lone Pine served Canada with a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the NAFTA (the "Notice of Intent") in accordance with Article 1119.³⁰³
- (d) On 6 September 2013, more than six months after the events giving rise to Lone Pine's claim, Lone Pine served Canada with its Notice of Arbitration, thereby commencing the arbitration in accordance with Article 1120(1)(c) and Article 3 of the UNCITRAL Rules.

³⁰² *Bill 18* (2011) at s. 5. (C-063)

³⁰³ Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement, *Lone Pine Resources Inc. v. The Government of Canada*, 8 November 2012 (C-102).

- (e) The Notice of Arbitration included both Lone Pine and the Enterprise's consent and waiver, in accordance with the requirements of Article 1121(2).

216. Accordingly, Lone Pine has satisfied the procedural conditions of NAFTA Chapter 11.

V. NAFTA VIOLATIONS

A. Canada Violated the Article 1110 Protections Against Wrongful Expropriation

1. *Introduction to the Claimant's Position*

217. NAFTA Article 1110 prohibits a State from expropriating (whether directly or indirectly) an "investment of an investor of another Party in its territory or [taking] a measure tantamount to [...] expropriation of such an investment" unless four conditions are met. Accordingly, to prove that Canada has breached its obligations under Article 1110, the Claimant must demonstrate that:

- (a) Its investment was, whether directly or indirectly, expropriated (or subject to a measure tantamount to expropriation); and
- (b) At least one of the four conditions for a lawful expropriation specified in NAFTA Article 1110(1)(a) to (d) has not been satisfied.

218. While NAFTA Article 1110(2) specifies that a lawful expropriation may be compensated by payment of the fair market value of the expropriated investment immediately before the expropriation took place (i.e. the "expropriation date"), if one of the required conditions is absent, the expropriation is wrongful. Any increase in value since the date of expropriation must be to the benefit of the Claimant, and any decrease in value cannot be used by the Respondent to discount the fair market value of the investment.³⁰⁴

³⁰⁴

Case concerning the Factory at Chorzów (Germany v. Poland), Judgment (13 September 1928), PCIJ (Series A) No. 17 at 47 [*Chorzów Factory 1928*] (CLA-029); *Amoco International Finance Corporation v. Government of Islamic Republic of Iran*, Award (17 July 1987), Award No. 310-56-3, 15 Iran-USCT 189, para. 192; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal (2 October 2006) at para. 481 (CLA-020); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) at para. 352 (CLA-059).

219. Canada's measure, Bill 18, expropriated the River Permit Rights by revoking the River Permit. This action lacked public purpose and no compensation has been paid to the Enterprise for this taking. The quantum of damages owed to Lone Pine is discussed in detail in Section VI, below.

2. *The River Permit Was Expropriated*

220. NAFTA Article 1110 sets out the protection from expropriation afforded to NAFTA investors:

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
 - (a) for a public purpose;
 - (b) on a non-discriminatory basis;
 - (c) in accordance with due process of law and Article 1105(1); and
 - (d) on payment of compensation in accordance with paragraphs 2 through 6.
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 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.
7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).
8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

221. Accordingly, Article 1110 protects investments of investors from expropriation,³⁰⁵ whether achieved directly or indirectly. In the present arbitration, the Claimant submits that Bill 18's revocation of the River Permit is an expropriation of the River Permit Rights in two alternative ways:

- (a) *First*, the Claimant's investment under Article 1139(g), namely its intangible property rights that were duly registered in the Mining Registry and are enforceable against the state, were *directly* expropriated, or subject to measures tantamount thereto, by Bill 18's revocation of the River Permit; and
- (b) *Second*, the Claimant's investment under Article 1139(h), namely its interests arising from its commitment of capital pursuant to the Farmout and River Permit

³⁰⁵ Article 1110(1) defines the term "expropriation" as including the act of directly or indirectly nationalizing, expropriating or taking measures tantamount to expropriation or nationalization. *NAFTA* at Article 1110(1) (CLA-001).

Agreements, were *indirectly* expropriated, or subject to measures tantamount thereto, through Bill 18's revocation of the River Permit.

a) *Background: Interpreting Article 1110(1)*

222. The NAFTA defines the term "expropriation" in Article 1110(1) as including explicit nationalizations or expropriations as well as measures tantamount thereto.
223. Although the NAFTA does not provide further detail of the legal test to be applied to determine if an expropriation has taken place, the concept of expropriation is well-known at international law and has been examined by both NAFTA and non-NAFTA tribunals. As described by Professor Ian Brownlie, "[t]he essence of the matter is the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control."³⁰⁶
224. In the context of the NAFTA, tribunals have been clear that the term "tantamount" in the phrase "tantamount to expropriation" should be interpreted as "equivalent".³⁰⁷
225. Accordingly, whether an "expropriation" or a "measure tantamount to expropriation", the test is the same: it is based on the effect of the impugned measure. Either there must be an outright transfer of title away from the investor or, in cases where there is no explicit change in title, the crucial question is whether the state's interference with the investor's business activities is sufficiently restrictive to support a conclusion that the investment

³⁰⁶ Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003) at 508-9 [Brownlie] (CLA-011).

³⁰⁷ *Pope & Talbot v. Canada*, Interim Award (26 June 2000), UNCITRAL, at para. 104 [*Pope & Talbot*] (CLA-053); *S.D. Myers, Inc. v. Government of Canada*, Partial Award (13 November 2000), UNCITRAL at para. 286 (CLA-058).

has been "taken" from the owner.³⁰⁸ Some tribunals have described this as requiring a "substantial deprivation".³⁰⁹

226. Thus in order to assess the effects of the impugned measure, the Tribunal must consider if:

(a) The object of the alleged expropriation falls within the scope of treaty-protected property rights (i.e. is capable of being the object of a taking); and

(b) The measure—either directly or indirectly—resulted in a taking or substantial deprivation of the protected property rights.

227. The River Permit Rights are an investment as defined in the NAFTA under Article 1139 and protected by Article 1110(1), whether they are understood as real and immovable intangible property rights (Article 1139(g)) or as interests arising through the commitment of capital under a contract (Article 1139(h)). The River Permit Rights are capable of being the object of a taking and fall within the scope of property rights protected by NAFTA. Bill 18 revoked the River Permit, extinguishing the Enterprise's ownership of the River Permit Rights. By revoking the River Permit itself, Bill 18 nullified the interests that the Enterprise gained by "farming-in" on the River Permit.

³⁰⁸ *Pope & Talbot* (2000) Interim Award at para. 102 (CLA-053).

³⁰⁹ *Pope & Talbot* (2000) Interim Award at para. 102 (CLA-053); *Firemans' Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (17 July 2006) at para. 176(c) (CLA-038); *Glamis Gold, Ltd. v. United States of America*, Award (8 June 2009), UNCITRAL at para. 357 (CLA-039).

b) *The River Permit Rights Fall within the Scope of Property Rights Protected by Article 1110(1)*

228. The River Permit Rights fall within the scope of property protected by Article 1110. The legal determination of whether the protections of Article 1110 apply is a question of treaty interpretation and application of international law,³¹⁰ including customary international law.³¹¹ The decisions of other international tribunals may also be used as a "subsidiary means for the determination of rules of law".³¹²
229. The scope of property rights protected by Article 1110(1) is broad. In keeping with the widely accepted view that "[p]roperty that may be expropriated by states thus comprises immaterial rights and interests, including in particular contractual rights",³¹³ NAFTA Article 1139 sets out the scope of the protected property rights through its definition of "investment", which includes:

³¹⁰ NAFTA Article 1131 provides:

"1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section." NAFTA at Article 1131 (CLA-001).

³¹¹ *Statute of the International Court of Justice* (1945) at Article 38(1)(b) [ICJ Statute] (CLA-004); Customary international law is part of the applicable rules of international law; *Methanex Corporation v. United States of America*, Final Award (3 August 2005), UNCITRAL, Part II, Chapter B at para. 3 [*Methanex*] (CLA-045); *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (17 July 2006) at para. 171 (CLA-038).

³¹² *ICJ Statute* (1945) at Article 38; *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Administered Case, Award (31 March 2010) at para 184 (CLA-043).

³¹³ A. Reinisch, "Expropriation" in P. Muchlinski, F. Ortino and C. Schreuer, eds., *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) at 410 [Reinisch] (CLA-006); R. Higgins, "The Taking of Property by the State: Recent Developments in International Law" (1982) 176 *Recueil des Cours* 259 at 271 (CLA-016): "[T]he notion of "property" is not restricted to chattels. Sometimes rights that might seem more naturally to fall under the category of contract rights are treated as property"; G. Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection" (1997) 269 *Recueil des Cours* 251, 381 (CLA-010): "All rights and interests have an economic content come into play, including immaterial and contractual rights".

- (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 enterprise³¹⁴

230. The text of the NAFTA specifies that Article 1110(1) applies to any "investments" of an investor. Unless the "investment" is the enterprise as a whole, there is no requirement in the NAFTA for a Claimant to demonstrate that its entire enterprise was taken or that it has no other business activities left in order to prove that the Claimant (or its Enterprise) has suffered an expropriation. Instead, the Claimant must show that the object of the alleged expropriation satisfies one of the definitions of "investment" in Article 1139.

(1) The River Permit Rights are Protected Investments

231. The River Permit Rights arose out of the contractual relationship between Junex and Forest Oil/the Enterprise. Under Quebec law, pursuant to the *Mining Act* and the registration of the transfer between Junex and the Enterprise in the Mining Registry, the River Permit Rights are real immovable rights that are tied to the River Permit and specific to the River Permit Area. They are also interests arising out of the Farmout and River Permit Agreements, pursuant to which the Enterprise spent millions of dollars to pursue its development plans.

³¹⁴ NAFTA at Article 1139(g) and (h) (CLA-001).

232. As discussed in Section IV.A.3 above, Lone Pine's River Permit Rights satisfy the definition of an investment under Article 1139(g) and alternatively (h), and therefore benefit from the protections of Article 1110.

233. For concision, those arguments are not repeated here, but form the Claimant's first submission on this point.

(2) The River Permit Rights are also Capable of Being the Object of a Taking at International Law

234. In the context of an expropriation claim, the breadth of the NAFTA's definition of an "investment" is reflective of how other international courts and tribunals have interpreted the scope of both treaty based and customary protections against wrongful expropriation. Indeed, the protection against expropriation in the NAFTA reflects the prohibition of expropriation without compensation under customary international law.³¹⁵

235. Intangible rights, and specifically contractual rights, have been recognized by other international courts and tribunals as species of property that fall within the scope of foreign property protected against wrongful expropriation at international law.³¹⁶

³¹⁵ *Norwegian Shipowners' Claims (Norway v. U.S.A.)*, Award (13 October 1922) 1 RIAA 307 at 332 (CLA-050) [*Norwegian Shipowners' Claims*]: "Those who ought not to take property without making just compensation at the time or at least without due process of law must pay the penalty of their action" (CLA-050); *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt v. Hungary*, ICSID Case No. ARB/12//3, Decision on Respondent's Objection Under Arbitration Rule 41(5) (16 January 2013) at para. 68 (CLA-019): "Expropriation has been and is now part of international law, and the change from dispute resolution under the system of diplomatic protection to investor-state arbitration has not modified that").

³¹⁶ *Rudloff Case*, US-Venezuelan Claims Commission, Interlocutory Decision, (1903) 9 RIAA 244 at 250 (CLA-056) "The taking away or destruction of rights acquired, transmitted, and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property"; *Case Concerning Certain German Interests in Polish Upper Silesia*, Judgment (25 May 1926), PCIJ Series A No. 7 at 44 [*Chorzow Factory 1926*]; Reinisch (2008) at 411 (CLA-028).

- (a) **PCIJ:** In the seminal *Chorzow Factory* case, the Permanent Court of International Justice ("PCIJ") considered the effect of Polish measures on a German company's contractual rights to manage and operate the nitrate plant (Chorzow Factory) at issue. The Court found that both the titular owner of the factory and the company holding the contractual rights had property expropriated:

[...] it is clear that the rights of the Bayerische to the exploitation of the factory and to the remuneration fixed by the contract for the management of the exploitation and for the use of its patents, licences, experiments, etc., have been directly prejudiced by the taking over of the factory by Poland. As these rights related to the Chorzow factory and were, so to speak, concentrated in that factory, the prohibition contained in the last sentence of Article 6 of the Geneva Convention applies in all respects to them.³¹⁷

- (b) **Iran-US Claims Tribunal:** Intangible property may be subject to expropriation. In *Starrett Housing*, the tribunal recognized that "rights of a contractual nature closely related to the physical property" may be caught by expropriatory measures aimed at the physical property.³¹⁸ In *Amoco*, the tribunal determined that "[e]xpropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction".³¹⁹

³¹⁷ *Chorzow Factory 1926* (1926) at 44 (CLA-028). Article 6 of Part III of the relevant Geneva Convention, which established Poland's right to expropriate in Polish Upper Silesia certain property of German nationals or of companies controlled by them, under certain conditions, as cited in *Chorzow Factory 1926*: "Except as provided in these clauses, the property, rights and interests of German nationals may not be liquidated in Polish Upper Silesia."

³¹⁸ *Starrett Housing Corp. v. Government of the Islamic Republic of Iran* (1983) 4 Iran-US CTR 122 at 24 (CLA-060).

³¹⁹ *Amoco International Finance Corp v. Iran*, Iran-US Claims Tribunal, Partial Award, IUSCT Case No. 56 (14 July 1987) at para. 108 (CLA-022).

(c) **ECtHR:** Article 1 of the Additional Protocol 1 to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the "ECHR") entitles every natural or legal person to the: "peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and by the general principles of international law". The European Court of Human Rights ("ECtHR") has interpreted the term "possessions" to include both tangible and intangible property, including licenses to engage in certain activity for a business purpose.³²⁰

236. The River Permit Rights are a discrete asset, capable of being the object of independent commercial transactions. This factual proposition is confirmed by the conduct of Forest Oil, Junex, the Enterprise, and Lone Pine, each of which engaged in specific negotiations and concluded agreements which recognized the River Permit Rights as separate and distinct asset.

237. In this regard, the fact that the River Permit Rights arose pursuant to the Enterprise's contracts with Junex and were the object of commercial transactions support the Claimant's submission that the River Permit Rights are capable of being the object of a taking and fall within the intended scope of NAFTA Article 1110(1).³²¹

³²⁰ *Tre Traktörer Aktiebolag v. Sweden*, Judgment (7 July 1989), ECTHR (Series A) No. 159 at para. 53 (CLA-063): A license to serve alcoholic beverages was a protected economic interest.

³²¹ In the relevant international case law, there is no suggestion that only state contracts qualify for protection from wrongful expropriation. For example, to the contrary, the contracts in the *Chorzow Factory 1926* case were between private individuals; the state's direct expropriation of the underlying property to which the contract relates *indirectly* expropriated the contractual rights as well.

c) *The Measure Had the Effect of a Taking*

238. In order for an expropriation to have occurred, the investor must be "radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto [...] had ceased to exist."³²² The deprivation need not necessarily result in a benefit to the state.³²³ Ultimately, it is the effects of the host state's measure that is dispositive, not the state's underlying intent.³²⁴
239. The effect of the measure may be direct or indirect; however, this is a separate question than considering if the impugned act is a measure tantamount to expropriation.³²⁵ The distinction is this: determining if a measure is tantamount to expropriation is a question of assessing the measure's effect; determining whether it was direct or indirect is a question of the taking's efficient cause.³²⁶ Accordingly, in the present case the Enterprise was,

³²² *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) at para. 115 (CLA-061). The ILC Draft Articles articulate this principle as requiring interference that would "justify an inference that the owner [...] will not be able to use, enjoy, or dispose of the property". ILC Draft Articles at Article 10(3) (CLA-005).

³²³ *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) at para. 103 (CLA-044).

³²⁴ *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (17 July 2006) at para. 176(f) (CLA-038); *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (15 January 2008) at para 87(f) (CLA-034).

³²⁵ *Waste Management II* Award (2004) at para. 143 (CLA-064).

³²⁶ The metaphor of Aristotelian causality may be helpful to understand the distinction between a direct and indirect measure. In Aristotle's view, the efficient cause is the "primary source of the change or coming to rest." It is what moves the thing moved. In that sense, a direct expropriation changes the investment itself. An indirect expropriation by contrast, is where the change occurs to something else, which in turn changes the investment. By analogy, both are versions of an efficient cause. In the context of NAFTA Article 1110, the "change" in question is either a transfer of title/outright taking (i.e. an expropriation), or other activity, less than an outright taking, which nonetheless results in a substantial deprivation (i.e. a measure tantamount to expropriation). Aristotle, *Physics*, R.P. Hardie and R.K. Gaye, trans., online: The Internet Classics Archive, <http://classics.mit.edu/Aristotle/physics.2.ii.html> at Book II.3 (CLA-008).

either directly or indirectly, entirely deprived of the River Permit Rights. This is not an act of regulation in the normal course, but an outright destruction of intangible property.

240. In the *Metalclad* case, the tribunal described a broad range of measures capable of having the effect of a taking, including so-called "regulatory expropriation":

[E]xpropriation 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.³²⁷

241. In *Pope & Talbot*, the tribunal assessed the effect of the impugned export licensing fee and found that a mere reduction in profit did not qualify as an expropriation.

(a) Contrary to the present case, where the River Permit Rights are themselves real rights under Quebec law, in *Pope & Talbot* the export licenses themselves were not "investments" per se but were characterized as "a very important part of the "business" of the Investment."³²⁸

(b) Ultimately the tribunal determined that no expropriation had occurred: Canada's interference reduced the investor's profits, but did not prevent the investor from continuing to export substantial quantities.³²⁹

³²⁷ *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) at para. 103 (CLA-044). See also *Waste Management II* (2004) Award at para. 153 (CLA-064) (referring to and quoting the *Metalclad* definition of expropriation).

³²⁸ *Pope & Talbot* (2000) at para. 98 (CLA-053).

³²⁹ *Pope & Talbot* (2000) at para. 101 (CLA-053).

242. Nonetheless, the tribunal rejected Canada's argument that regulatory conduct is immune to Article 1110, observing that there is no blanket exemption for regulatory activity by the state.³³⁰ To the contrary, a measure may be expropriatory even if it is a non-discriminatory regulation.³³¹

243. The tribunal in *Methanex* described circumstances in which a state may undertake regulation without that activity rising to the level of an expropriation:

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.³³² (emphasis added)

244. In *Methanex*, as in many cases where regulatory measures are challenged, the impugned conduct did not result in an outright transfer of title or loss of property.³³³ On this basis among others, the present case is distinguishable from the facts in *Methanex* and other regulatory expropriation cases:

- (a) *First*, Bill 18 revoked the River Permit, directly resulting in the extinguishment of real, immovable rights that were registered in the Quebec mining registry.

³³⁰ *Pope & Talbot* (2000) at para. 99 (CLA-053).

³³¹ *Pope & Talbot* (2000) at para. 99 (CLA-053).

³³² *Methanex* (2005), Final Award at IV.D. para. 4 (CLA-045).

³³³ *Methanex* (2005) Final Award at IV.D. para.6 (CLA-045).

(b) *Second*, by revoking Bill 18, Quebec destroyed the property in which the Enterprise had earned an interest through its commitment of capital pursuant to the Farmount and River Permit Agreements.

245. In neither of these alternative views can the effect of the measure on the Claimant's investment be characterized as merely "affect[ing]" it. Bill 18 completely nullified the River Permit Rights.

246. In addition, some tribunals have considered an investor's ability to use the property to be a central determinant of whether an expropriation has taken place. An expropriation is "a lasting removal of the ability of an owner to make use of its economic rights."³³⁴ At the other end of the spectrum, other tribunals have emphasized the loss of control over the investment, noting that in order for a regulatory interference to be an expropriation it must be "sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner."³³⁵ Applying this standard in *Pope & Talbot*, the tribunal found that no expropriation occurred because the company remained in control of its investment, able to direct the day to day operations and continued to export and earn substantial profits.³³⁶

³³⁴ *S.D. Myers, Inc. v. Government of Canada*, Partial Award (13 November 2000) at para. 283 (CLA-058); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) at para. 245 (CLA-035).

³³⁵ *Pope & Talbot* (2000) Interim Award at para. 102 (CLA-053). See also *Glamis Gold, Ltd. v. The United States of America*, Final Award (8 June 2009) UNCITRAL at para. 357 (CLA-039); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) at para. 246 (CLA-035).

³³⁶ *Pope & Talbot* (2000) Interim Award at para. 100 (CLA-053).

247. In the present case, the object of the taking is a discrete intangible asset that has been the object of negotiations,³³⁷ contracts,³³⁸ investment,³³⁹ and communications with the QMNR.³⁴⁰ It therefore meets the broader and narrow interpretive thresholds for a "taking".
248. Bill 18 directly revoked the River Permit, removing any entitlement of the Enterprise to continue its exploration and development activity. As a result, the Enterprise lost the River Permit Rights that it had registered in the Mining Registry, which were intangible property rights and an investment under Article 1139(g).
249. Bill 18 also indirectly revoked the River Permit Rights if understood as those interests arising from the Enterprise's commitment of capital pursuant to the Farmout and River Permit Agreements. By revoking the River Permit, Quebec severed the connection between the Enterprise and the River Permit Area, nullifying the 100% working interest that the Enterprise earned by farming-in on the project with Junex, which is an investment under Article 1139(h).
250. In short, whether directly or indirectly, Quebec's legislative act has entirely deprived the Enterprise of the River Permit Rights.

³³⁷ The River Permit Agreement (C-022).

³³⁸ The River Permit Agreement (C-022); Assignment Agreement between Forest Oil and the Enterprise re: Farmout Agreement between Forest Oil and Junex, dated 8 April 2009 (C-032); Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the River Permit, dated 28 January 2010 (C-034); Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the Original Permits, dated 28 January 2010.

³³⁹ FTI Report (2015) at para. 5.21 (CER-002).

³⁴⁰ Letter from QMNR to Junex re: confirming assignment of rights to the Enterprise (27 May 2010).

3. *Canada's Expropriation of the River Permit Rights was Wrongful*

251. Under international law and the NAFTA specifically, states retain the power to expropriate the property of aliens. However, the treaty provides strict limits on the circumstances under which an expropriation may be lawful.

252. The prohibition against state interference with property rights is deeply grounded in international law. Writing almost thirty years ago, the tribunal in the *Amoco* case discussed the *Chorzow Factory* case and observed:

as reflected in [*Chorzow Factory*], the principles of international law generally accepted some sixty years ago in regard to the treatment of foreigners recognized very few exceptions to the principle of respect for vested rights.³⁴¹

253. Similarly, the NAFTA's tolerance of the state's power to expropriate is not unlimited. Article 1110(1) sets out four conditions that must be satisfied in order for an expropriation to be lawful. An expropriation must be:

- (i) enacted for a public purpose;
- (ii) applied on a non-discriminatory basis;
- (iii) in accordance with due process of law and Article 1105(1); and
- (iv) accompanied by the payment of compensation.

254. In the present case, Bill 18 violated two of the Article 1110 requirements:

- (a) It was not justified by a public purpose; and
- (b) It explicitly denied permit holders any compensation for the taking.

³⁴¹ *Amoco* (1987) Partial Award at para. 113 (CLA-022).

a) *The Taking Is Not Justified By a Public Purpose*

255. The requirement that any expropriation be for a public purpose is found in both the text of the NAFTA and customary international law. Indeed, the existence of a *bona fide* public purpose is foundational to the state's ability to take or destroy private property, insofar as this power represents a derogation from the normal principle of respect for private rights. In the words of Bin Cheng, "[s]uch derogation is, however, conditional upon the presence of a genuine public need, and is governed by the principle of good faith."³⁴²

256. Canada's objective to enable hydrocarbon exploration through environmentally and scientifically sound projects may be a legitimate public policy objective. However, the decision to select these particular permits and revoke them is arbitrary, without a legitimate purpose or rational explanation:

- (a) *First*, any justification of the revocation on grounds of the protection of the St. Lawrence River is disingenuous;
- (b) *Second*, previous studies in the Estuary and Gulf of St. Lawrence do not justify revoking permits in the St. Lawrence Lowlands; and
- (c) *Third*, Bill 18 preemptively revoked the River Permit before the SEA-SG concluded.

³⁴² Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 2006) at 40 (CLA-009).

257. The requirement that a state only extinguish private property rights for a public purpose is not a self-judging standard. It is not enough for a state to simply assert that it has a public purpose for its actions. As the tribunal in *ADC v. Hungary* described:

a 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.³⁴³

258. Accordingly, Canada's expropriation of the River Permit was wrongful as it lacked a public purpose.

(1) Canada's Concern for the St. Lawrence River in the Vicinity of the River Permit Area is Disingenuous

259. Given the location of the River Permit, Canada's purported concerns for the St. Lawrence River are disingenuous. *First*, the St. Lawrence River runs through highly industrialized areas of the St. Lawrence Valley where the Quebec government continues to allow industrial and commercial development. *Second*, if the revocation was genuinely motivated by concern for the St. Lawrence River, the revocation would have also applied to the major tributaries which feed the St. Lawrence.

260. The River Permit is located adjacent an industrial area, partially zoned as industrial land. Quebec built the Bécancour Waterfront Industrial Park contiguous to the St. Lawrence River and River Permit Area, on the Bécancour side of the Bécancour/Champlain Block.

³⁴³ *ADC* (2006) Award at para. 432 (CLA-020).

- The Industrial Park advertises itself as providing an "almost unlimited availability of industrial water," and a conveniently located deep water port.³⁴⁴
261. Quebec has a longstanding practice of using the St. Lawrence River as an overflow waste disposal site, including in densely-populated areas such as Montreal.³⁴⁵ A mere 150 km upriver from the River Permit Area, municipally-managed public infrastructure results in periodic pollution of the River.³⁴⁶
262. As presented in committee hearings on Bill 18, the hydrographic system of the St. Lawrence is much broader than the territorial application of Bill 18. Interest groups pointed out during committee hearings that seven exploration permits had been issued covering the Rivière des Prairies and the Rivière des Mille Îles, two important waterways that feed directly into the St. Lawrence River near Montreal.³⁴⁷ Bill 18 did not revoke such permits.
263. Further, Lac St-Jean, which feeds into the St. Lawrence River through the Saguenay-St. Lawrence Marine Park,³⁴⁸ remains subject to multiple exploration permits.³⁴⁹

³⁴⁴ Société du parc industriel et portuaire de Bécancour, "Why Choose Bécancour: Top Reasons to Locate in Bécancour", online: Government of Quebec <<http://www.spipb.com/en/choose/locate/>> (C-040).

³⁴⁵ CBC News, "Montreal sewage waste dumped directly into rivers", (25 August 2014) online: <www.cbc.ca/news> (C-073).

³⁴⁶ CBC News, "Montreal sewage waste dumped directly into rivers", (25 August 2014) online: <www.cbc.ca/news> (C-073).

³⁴⁷ Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) at 4 (S. Archembault, representing the Coalition Saint-Laurent) (C-065).

³⁴⁸ The Saguenay-St. Lawrence Marine Park is a National Marine Conservation Area located where the Saguenay River meets the St. Lawrence River.

264. Legislation genuinely aimed at protecting the St. Lawrence River would have to address these areas, which one speaker at Bill 18 committee hearings called "[zones which have a strong influence, not only from a hydric point of view, but on the water resource of the St. Lawrence and therefore on its ecosystems, habitats, etc.]"³⁵⁰
265. Given that the Quebec government continues to allow highly industrialized and commercial activity along the banks of the St. Lawrence River, and failed to also prohibit activity or revoke permits elsewhere within the St. Lawrence hydrographic system, it is disingenuous for Canada to defend its selective expropriation of only a handful of permits, including the River Permit on the basis of its purported concern for the St. Lawrence River.

(2) Previous Studies in the Estuary and Gulf of St. Lawrence do not Justify Revoking Permits in the St. Lawrence Lowlands

266. The Quebec explicitly justified the revocation of permits in the St. Lawrence River based on the work of the SEA-1 relating to the Estuary and Gulf of St. Lawrence. After detailed study, the SEA-1 concluded that these areas have unique environmental characteristics, including a great diversity and concentration of wildlife, making them unsuitable for oil and gas activity.³⁵¹ As affirmed by Minister Normandeau in press releases,³⁵² government

³⁴⁹ QMNR, "Cartes des permis de recherché – Toutes les régions", online: <<http://www.mern.gouv.qc.ca/cartes/index.jsp>> (C-072).

³⁵⁰ "Ce sont des zones qui ont une forte influence, ne serait-ce-que du point de vue hydrique, sur la ressource eau du Saint-Laurent et donc sur les écosystèmes, les habitats, etc." Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) at 30 (J.E. Turcotte, Stratégies Saint-Laurent) (C-065).

³⁵¹ AECOM Tecault Inc., "Évaluation environnementale stratégique de la mise en valeur des hydrocarbures dans le bassin de l'estuaire maritime et du nord-ouest du golfe du Saint-Laurent – Rapport préliminaire en appui aux consultations" (July 2010) at 13-20 – 13-30 (R-021).

debates,³⁵³ and committee hearings,³⁵⁴ the government decided to prohibit oil and gas activities in the St. Lawrence River and its Estuary precisely because of the SEA-1's conclusions.³⁵⁵

267. However, the SEA-1's conclusions were not relevant to the revocation of permits in the St. Lawrence River located in the St. Lawrence Lowlands, for the following reasons:

(a) The area under study in the SEA-1 had specifically delineated territorial boundaries. The St. Lawrence River extends far outside of these boundaries, by more than 550 km, into the St. Lawrence Lowlands.

³⁵² "Mme Nathalie Normandeau, a annoncé ce matin qu'à la suite de l'analyse des résultats de la première évaluation environnementale stratégique (EES-1), le gouvernement du Québec a pris la décision qu'aucune activité d'exploration ou d'exploitation pétrolière ou gazière dans le bassin de l'estuaire maritime et du nord-ouest du golfe du Saint-Laurent". QMNR, "Première évaluation environnementale stratégique: secteur de l'estuaire – Le gouvernement du Québec est à l'écoute et interdit les activités d'exploration et d'exploitation dan l'estuaire du Saint-Laurent" (27 September 2010) (R-029).

³⁵³ "Cette decision fait suite à l'analyse des résultats de la première évaluation environnementale stratégique [...] [e]t c'est précisément suite aux conclusions apportées par l'évaluation environnementale que nous avons pris cette décision". Quebec, National Assembly, *Journal des débats*, 2nd Sess 39th Leg, Vol. 42 No. 29 (19 May 2011) at 2032 (Minister Normandeau) (C-064); see also Translation of Quebec, National Assembly, *Journal des débats*, 2nd Sess, 39th Leg, Vol 42 No. 29 (19 May 2011) at 2032 (C-064A).

³⁵⁴ "[Projet de loi no. 18] est directement liée à un processus d'évaluation environnementale que nous avons mené, annoncé en 2009". Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg. Vol. 42 No. 11 (26 May 2011) at 1 (Minister Normandeau) (C-065).

³⁵⁵ QMNR, "Première évaluation environnementale stratégique: secteur de l'estuaire – Le gouvernement du Québec est à l'écoute et interdit les activités d'exploration et d'exploitation dans l'estuaire du Saint-Laurent" (27 September 2010) (R-029); Quebec, National Assembly, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 29 (19 May 2011) at 2032 (Minister Normandeau) (C-064); See also Translation of Quebec, National Assembly, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 29 (19 May 2011) at 2032 (C-064A); Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol 42 No. 11 (26 May 2011) at 1 (Minister Normandeau) (C-065).

- (b) The SEA-1's assessment had focused on offshore oil and gas activity in the marine environment of the Estuary and Gulf. The St. Lawrence River located in the Lowlands is not a marine environment.³⁵⁶
- (c) The SEA-1 did not assess the impacts or risks of onshore drilling, instead focusing on the offshore technology that is inherently more intrusive in its impact on the marine environment.
- (d) By contrast, in the St. Lawrence Lowlands, offshore drilling technology would be grossly inefficient and unnecessary. Instead, directional and horizontal drilling would be used to access resources hundreds of metres underneath the River from onshore drill sites (as was planned in the River Permit Area).
- (e) The SEA-1 included a single descriptive paragraph on horizontal drilling from onshore locations, stating simply that "[its primary advantage is in avoiding all contact with the marine environment]."³⁵⁷ SEA-1 makes no mention of hydraulic fracturing or of shale gas.
- (f) Accordingly, the SEA-1 neither focused on the type of operation or resource play that is relevant to the River Permit Area.

268. The SEA-1 report was understandably silent on the potential impacts of oil and gas activity in the St. Lawrence Lowlands and this section of St. Lawrence River, since these

³⁵⁶ Environment Canada, "Hydrography of the St. Lawrence River" online: Government of Canada <<https://www.ec.gc.ca>> (C-075).

³⁵⁷ AECOM Tecault Inc., "Évaluation environnementale stratégique de la mise en valeur des hydrocarbures dans le bassin de l'estuaire maritime et du nord-ouest du golfe du Saint-Laurent – Rapport préliminaire en appui aux consultations" (July 2010) at 5-14 (R-021).

areas are well outside the SEA-1's territorial scope. Accordingly, the Quebec government cannot justify its revocation of the River Permit on the grounds of the studies conducted on the Estuary and Gulf of St. Lawrence.

(3) The Revocation of the River Permit Preempted the Public Purposes Inherent in the SEA on Shale Gas

269. *Third*, the revocation of the River Permit preempted the work of a relevant SEA, i.e. the SEA-SG. The Quebec government did not hesitate to revoke the handful of permits under the St. Lawrence River, despite an environmental assessment of shale gas in the Lowlands being underway. In so doing, the Quebec government preempted its own process and failed to make a reasoned, evidence-based decision.

270. Environmental assessments are intended to improve the government's understanding of potential environmental effects of given activity and also propose prevention or mitigation measures, with the aim of reducing or eliminating potential negative effects of a given project.³⁵⁸ Environmental assessments would thus provide the Quebec government with key information required to make appropriate legislative decisions about how to best regulate oil and gas activity.

271. At the time Bill 18 was being debated, the Quebec government was awaiting the results of two environmental assessments, the SEA-SG and SEA-2 on the Gulf of St. Lawrence.

³⁵⁸ QMNR, "Le Saint-Laurent, source de richesses – Programme d'évaluation d'évaluations environnementales stratégiques sur la mise en valeur des hydrocarbures en milieu marin" at 6 (2009) (C-046).

The purpose of these studies was to provide the Quebec government with the scientific and evidentiary foundation to engage in law reform.³⁵⁹

272. The government itself seemed to acknowledge the role it had given to these SEAs. When challenged as to whether the scope of Bill 18 should be broader, the government stated that it did not want to impose a total moratorium before receiving the results of these studies.

(a) In Bill 18 debates, some participants recommended implementing a complete moratorium on all shale gas in Quebec.³⁶⁰

(b) Minister Normandeau responded by pointing to both the ongoing SEA-SG as well as additional work required before drafting the new hydrocarbon law. She explained that a permanent moratorium at that stage would "[go against the SEA on land areas, and, in addition, we would be seen as only partially completing our work with respect to the hydrocarbon law that we wish to eventually submit [...] we do not want to do the work in half measures]".³⁶¹

³⁵⁹ See discussion in Section III.E.3, above.

³⁶⁰ "Nous avons pendant longtemps proposé, et nous proposons toujours, un moratoire sur l'exploration et l'exploitation du gaz de schiste au Québec." Québec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) at 33 (D. Neuman) (C-065).

³⁶¹ "[I]l y en a qui vont à l'encontre de l'EES en milieu terrestre, mais, au-delà de ça, on se ferait taxer de ne faire le travail que partiellement par rapport à la loi sur les hydrocarbures qu'on souhaite déposer éventuellement [...] on ne veut pas faire, là, le travail à moitié." Québec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) (Minister Normandeau) at 35 (C-065).

273. For all of these reasons, the revocation of permits in Bill 18 was not justified by the public purposes claimed by the Quebec government, and was therefore a wrongful expropriation in violation of Article 1110(1).

b) The Taking Specifically Denied Permit Holders Any Compensation

274. Section 4 of Bill 18 explicitly denied permit holders any compensation for the revocation, notwithstanding that the requirement to pay compensation is fundamental for a lawful expropriation.

275. On its face the NAFTA presents the four conditions in Article 1110 as four equal conditions each of which must be met. However, international law on expropriation particularly emphasizes the centrality of the compensation requirement.

(a) As described by Professor Brownlie, "[i]n principle, therefore, expropriation, as an exercise of territorial competence, is lawful, but the compensation rule (in this version) makes the legality conditional."³⁶² While justifications articulated for it may vary, the compensation rule "has received considerable support from state practice and the jurisprudence of international tribunals."³⁶³

(b) The US Restatement of the Law of Foreign Relations indicates that compensation is the central requirement. Indeed, as the *Feldman* tribunal noted, the US Restatement goes so far as to suggest "that if proper compensation is paid for an

³⁶² Brownlie (2003) at 509-10 (CLA-011).

³⁶³ Brownlie (2003) at 510 (CLA-011).

expropriation, the fact that the taking was not for a public purpose and was discriminatory, 'might not in fact be successfully challenged'.³⁶⁴

- (c) NAFTA Tribunals have confirmed that compensation is required even if the impugned measure satisfies the other conditions of Article 1110(1).³⁶⁵ As the tribunal in *Feldman* explicitly confirmed, "[i]f there is a finding of expropriation, compensation is required even if the taking is for a public purpose, non-discriminatory and in accordance with due process of law and Article 1105(1)."

276. Tribunals interpreting BITs have also reached a similar conclusion. For example, while having a public purpose is a necessary condition of a lawful expropriation, the presence of a public purpose will not excuse an expropriation that is uncompensated. As the tribunal in *Vivendi II* explained, "[i]f public purpose automatically immunises the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose."³⁶⁶

277. In the *Santa Elena* case, the tribunal determined that even a legitimate expropriation that can be classified as a taking for public purposes should not be uncompensated. The tribunal specifically observed "the purpose of protecting the environment for which the

³⁶⁴ *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) at para. 99 (CLA-042), citing *Restatement of the Law (Third), Foreign Relations Law of the United States* § 712 (1987) Part 7, Chapter 2(f).

³⁶⁵ *Feldman* (2002) Award at para. 98 (CLA-042).

³⁶⁶ *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) at para. 7.5.21 [*Vivendi II*] (CLA-032).

Property was taken does not alter the legal character of the taking for which adequate compensation must be paid."³⁶⁷

278. The Quebec government was well aware that its actions were revoking property rights belonging to private actors who had invested in their permit areas (as required under Quebec law) in the expectation of being permitted to undertake the projects described in their permit applications. Nonetheless, Bill 18 specifically provides that no compensation will be paid for the revocation of permits.

c) Conclusion

279. Lacking a public purpose and unaccompanied by compensation, Canada's measure wrongfully expropriated the River Permit Rights. In doing so, Canada's actions violated the protections offered by NAFTA Article 1110(1).

³⁶⁷ *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award (17 February 2000) at para. 71 (CLA-033).

B. Canada Failed to Provide the Minimum Standard of Treatment Required by Article 1105

1. Introduction to the Claimant's Position

280. Article 1105(1) requires NAFTA parties to provide treatment in accordance with the minimum standard of treatment. In the present case, Quebec's revocation of the River Permit and denial of any compensation for the intangible property that it has extinguished violate the protections of Article 1105.

281. *First*, the revocation of the River Permit is arbitrary, idiosyncratic, unfair and inequitable. Having granted an exploration permit in keeping with the *Mining Act*, Quebec's revocation of the River Permit and decision to deny compensation for the reasons stated during the legislative process are neither rationally connected nor necessary to serve the stated purposes of environmental protection and preservation of the St. Lawrence River.

282. *Second*, the Claimant had a legitimate expectation that it would be subject to regulation in the normal course and that, so long as it discharged its obligations to comply with applicable regulations and pay the required annual fee, it would be permitted to pursue its development plan through to commercial production. The revocation of the River Permit, including the nullification of the River Permit Rights, entirely undermines the framework for investment in the oil and gas sector in Quebec. A revocation of the nature effected by Bill 18 is not provided for in the *Mining Act* and is not within the QMNR's normal regulatory activity.

283. *Third*, Quebec's decision to deny compensation was explicitly politically motivated and blatantly ignored any meaningful consideration of investors' legal rights. The Minister responsible for the Bill justified her and her government's decision to deny compensation

to companies affected by the revocation on the grounds that paying compensation would be unpopular with the Quebec population and not in keeping with the message the government wanted to send politically.³⁶⁸

284. In these circumstances, the uncompensated revocation of the River Permit and concomitant destruction of the River Permit Rights falls below the minimum standard of treatment required by Article 1105(1).

2. *The Minimum Standard of Treatment Guaranteed by Article 1105(1)*

285. Article 1105 of the NAFTA provides that:

1. 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.
2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strike.
3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

286. On 31 July 2001, the Free Trade Commission ("FTC") issued the following interpretation of Article 1105(1):

B. Minimum Standard of Treatment in Accordance with International Law

³⁶⁸ Translation of pages 11-12 and 16-17 of Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 11 (C-066).

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).³⁶⁹

287. Pursuant to NAFTA Article 1131(2), the FTC Interpretive Note is binding on NAFTA Chapter 11 tribunals.³⁷⁰

288. NAFTA tribunals have engaged in significant debate about the content of the customary international law minimum standard of treatment resulting in, as one tribunal described, "a broad and unsettled discussion."³⁷¹ Questions have included whether the international minimum standard of treatment has evolved since the 1926 *Neer* case,³⁷² what source materials are capable of identifying a shift in customary international law,³⁷³ and the relevance of jurisprudence interpreting a so-called "autonomous" fair and equitable

³⁶⁹ NAFTA Free Trade Commission, "North American Free Trade Agreement – Notes of Interpretation of Certain Chapter 11 Provisions" (31 July 2011) (CLA-002).

³⁷⁰ An interpretation by the FTC of a provisions of the NAFTA "shall be binding" on a Chapter 11 Tribunal. *NAFTA* at Article 1131(2) (CLA-001).

³⁷¹ *Merrill & Ring Forestry L.P. v. Canada*, ICSID Administered, Award (31 March 2010) at para. 182 [*Merrill & Ring*] (CLA-043).

³⁷² *Mondev* (2002) Award at paras. 115-117 (CLA-049); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003) at para. 17 [*ADF*] (CLA-021); *Pope & Talbot Inc. v. Canada*, Award in Respect of Damages (31 May 2002) at paras. 58-65 (CLA-052); OECD, "Fair and Equitable Treatment Standard in International Investment Law" (2004) Working Paper No. 2004/3 [OECD Working Paper] at 40 (CLA-014); *L.F. Neer v. Mexico*, US-Mexico Mixed Claims Commission Opinion (15 October 1926) 4 IRAA 60 (CLA-041).

³⁷³ *Mondev* (2002) Award at paras. 120-125 (CLA-049); *ADF* (2003) Award at paras. 113, 182-83 (CLA-021).

treatment standard.³⁷⁴ Few tribunals have considered the related question of whether general principles of law may also offer methods to identify when the standard has been breached in particular factual circumstances.³⁷⁵

289. In the present case, the impugned measure is Bill 18, an act of the Quebec National Assembly. Previous NAFTA tribunals accord significant deference to domestic adjudicators acting in their *bona fide* role as interpreters of domestic laws.³⁷⁶ For this reason, tribunals have required that there be an outright denial of justice for there to be a breach of Article 1105(1).

290. However, it would be inappropriate to apply the same standard of deference to the actions of a legislature, which, as a political and elected body making law, may be persuaded by popular sentiment and electoral concerns rather than respect for vested property rights and treaty protections. The potential for a domestic politician or political party to be more persuaded by political popularity than legal entitlements is at the heart of why international protections such as those provided for in the NAFTA are needed.

a) Analysis of a Breach of Article 1105 is Fact-Specific

291. Unlike other treaty protections such as most favoured nation treatment or national treatment, the minimum standard of treatment is a protection that extends to each investor

³⁷⁴ *ADF* (2003) Award at paras. 183-84 (CLA-021); *Cargill* (2009) Award at paras. 278-80 (CLA-027).

³⁷⁵ *Merrill & Ring* (2010) Award at paras. 184, 187 (CLA-043).

³⁷⁶ *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (1 November 1999) at paras. 102-103 (CLA-055); *Mondev* (2002) Award at paras. 126-127 (CLA-049); *Waste Management II* (2004 Award) at paras. 129-130 (CLA-064); *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Final Award (26 June 2003) at para. 132 [*Loewen*] (CLA-062); *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment (20 July 1989), ICJ Reports 1989 15 at para. 128 [*ELSI*] (CLA-036).

individually, regardless of how others are treated. Determining whether Article 1105(1) has been violated is a highly fact and context-specific assessment.³⁷⁷ As one commentator has described, treaty standards of this nature are "factually based yardsticks."³⁷⁸ In *Mondev* the tribunal observed that "judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case."³⁷⁹

292. In the present case, the following facts are relevant to this determination:

- (a) The Enterprise carried out its activities in Quebec in good faith, complying with all regulatory requirements of the Quebec mining regime and registering its rights in the River Permit with the Quebec government;
- (b) The Claimant's investment in Quebec was specifically induced by the Quebec government: In addition to an official policy of encouraging oil and gas activity communicated in statements about the government's commitment to respect market and free enterprise rules (in addition to environmental rules),³⁸⁰ the QMNR had extensive and specific discussions with Forest Oil in 2006 concerning Forest Oil's proposed project and project site;

³⁷⁷ *Mondev* (2002) Award at para. 118 (CLA-049) ("judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case"); *Waste Management II* (2004) Award at para. 99 (CLA-062) ("the standard is to some extent a flexible one which must be adapted to the circumstances of each case"); *Chemtura* (2010) Award at para. 123 (CLA-030) ("the Tribunal is of the opinion that the assessment of the facts is an integral part of its review under Article 1105").

³⁷⁸ Alexandra Diehl, *The Core Standard of International Investment Protection* (AH Alphen aan den Rijn: Kluwer Law International, 2012) at 329 (CLA-007).

³⁷⁹ *Mondev* (2002) Award at para. 118 (CLA-049).

³⁸⁰ QMNR, "Using Energy to Build the Quebec of Tomorrow: Quebec Energy Strategy 2006-2015" (2006) at 83 (C-045).

- (c) The QMNR made specific representations that the Enterprise would be able to develop the shale gas located in River Permit Area so long as they complied with the requirements of Quebec regulation;
- (d) The aspect of Bill 18 that is impugned in the present case is Quebec's outright revocation of the River Permit and denial of any compensation for said revocation;
- (e) The revocation of the River Permit completely disentitles the Claimant to engage in any activity related to the resources within the River Permit Area, thereby nullifying the River Permit Rights as real immovable rights registered in the Mining Registry, and as contractual rights pursuant to which the Enterprise invested millions of dollars;
- (f) The revocation was justified on the basis of opinion and evidence gathered with respect to a different geographic area, with dramatically different environmental characteristics and political circumstances, and where different forms of exploration activity occur;
- (g) Activities such as those undertaken by the Enterprise were the subject of the SEA-SG, which was barely underway; and
- (h) The Minister responsible for Bill 18 stated during the legislative debates and committee hearings that compensation would not be paid to companies whose permits were being revoked because it would be unpopular with public sentiment in Quebec for the province to compensate oil and gas companies.

293. In these circumstances, the revocation of the River Permit and concomitant uncompensated destruction of the River Permit Rights falls below the minimum standard of treatment required by Article 1105(1).
294. *First*, it is arbitrary, idiosyncratic, unfair and inequitable treatment. Having granted an exploration permit in keeping with the *Mining Act*, Quebec's revocation of the River Permit and decision to deny compensation for the reasons stated in the lead up to the bill's passage are neither rationally connected nor necessary to serve the purposes of environmental protection and preservation of the St. Lawrence River. The geographic boundaries of the permit revocation are arbitrary and unfair.
295. *Second*, the Claimant had a legitimate expectation that it would be afforded the opportunity to explore for shale gas and pursue its commercial development plans, complying with all applicable laws and regulations. In no sense is the permit revocation effected by Bill 18 within the normal regulation of the industry or provided for by the *Mining Act*. Before Forest Oil applied for the original River Permit (PG906), it had specific discussions with QMNR officials about its plans and was encouraged to proceed with its investment and ultimately to enter into a partnership with Junex with respect to the River Permit Area.³⁸¹
296. *Third*, Quebec's decision to deny compensation was explicitly politically motivated. While acknowledging during the legislative process that companies whose permit rights were being destroyed might have a strong case in law for compensation, the government

³⁸¹ R. Wiggins Witness Statement at paras. 13-20 (CWS-002); Letter Application from the Enterprise to QMNR, dated 28 July 2006 (C-018).

admitted that it was unwilling to pay compensation for the revocation due to the political unpopularity of compensating oil and gas companies.

3. *The Revocation of the River Permit was Arbitrary, Idiosyncratic, Unfair and Inequitable*

297. The tribunal in *Waste Management* set out the most often-quoted interpretations of Article 1105(1):

[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.³⁸²

298. Importantly, there is no requirement in the NAFTA or the relevant tribunal jurisprudence that a State must act in bad faith to violate Article 1105. Instead, as observed by the tribunal in *Loewen*, "[n]either State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment".³⁸³

299. Conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic" reflects situations where a decision-maker acts without legitimate reasons or adequate basis. Various definitions of this concept are available from both tribunals and commentators.

³⁸² *Waste Management II* (2004) Award at para. 98 (CLA-064).

³⁸³ *Loewen* (2003) at para. 132 (CLA-062); *Mondev* (2002) Award at para. 116 (CLA-049).

300. In the seminal *ELSI* case, the majority of the ICJ Chamber found that illegality under local law was not sufficient to constitute arbitrariness, resulting in the oft-quoted dictum, "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law."³⁸⁴ While dissenting from the majority's disposition of the case on the facts, Judge Schwebel's elaboration of the treaty's specific protection against arbitrary measures is noteworthy. The treaty protection in question concerned not simply the government's conduct, but the result of government conduct.³⁸⁵ Judge Schwebel determined that the local mayor's requisition of a factory was arbitrary because, among other things, the requisition was issued to assuage public opinion and was incapable of achieving its stated purpose:

The requisition order may well also have been designed to give an understandably concerned and critical public opinion the impression that the Mayor was attempting "to do something", or, as the Prefect put it, "to intervene in one way or another" so as to show the Mayor's intent "to face the problem", to take "a step aimed more than anything else at bringing out his intention to tackle the problem just the same". But those are hardly justifications which show that the act was reasonable rather than unreasonable, judicious rather than capricious.³⁸⁶

301. In a related vein to Judge Schwebel's reasoning, the commentary to the US Restatement suggests that the term "arbitrary" refers to "an act that is unfair and unreasonable, and

³⁸⁴ *ELSI* (1989) at para. 128 (CLA-036).

³⁸⁵ *Elettronica Sicula S.p.A (ELSI) (United States of America v. Italy)*, Judgment (20 July 1989) (Dissenting Opinion of Judge Schwebel) at 117 [*ELSI Schwebel Dissent*] (CLA-037).

³⁸⁶ *ELSI Schwebel Dissent* (1989) at 113 (CLA-037).

inflicts serious injury to established rights of foreign nationals, though falling short of an act that would constitute an expropriation."³⁸⁷

302. In this light, Bill 18's revocation of the River Permit was arbitrary and idiosyncratic, in the sense of being without rational foundation or necessity. It completely extinguished the Claimant's rights without any compensation, resulting in unfair and inequitable treatment.

(1) The Permit Revocation is Arbitrary

303. *First*, for the reasons discussed with respect to Quebec's purported public policy rationale above,³⁸⁸ Bill 18's revocation of permits is not rationally connected to its stated basis. Quebec justified its extreme interference with the Claimant's investment on the grounds of preliminary studies done in a marine environment and concerning offshore drilling technology to justify its revocation of permits in the fluvial St. Lawrence Lowlands where the Enterprise would only access the resource beneath the river from onshore locations and at significant depth.

(2) The Permit Revocation is Unnecessary

304. *Second*, the Permit Revocation was an unnecessary deprivation of rights. Oil and gas activities in Quebec were and are governed by a regulatory framework that protected all rivers, riverbanks and other wetlands in Quebec. As Minister Normandeau explained in committee hearings on Bill 18, for all Quebec's waterways "[there is a whole series of

³⁸⁷ *Restatement of the Law (Third) Foreign Relations Law* §712 (1987) Part 7, Chapter 11 [US Restatement] (CLA-015).

³⁸⁸ See Section V.A.3.a, above.

provisions that already protect waterways in the Environment Quality Act, the requirement of an authorization certificate.]"³⁸⁹

305. Accordingly, Quebec had effective mechanisms at its disposal to regulate oil and gas activity, without having to take the drastic step of revoking permits and expropriating property rights. The Quebec government was already curtailing oil and gas activity until environmental assessments and legislative reform of the industry were complete, through tightened regulatory controls and new authorization certificate requirements for shale gas projects.

306. In fact, Minister Normandeau considered these regulations sufficient to protect all other rivers and watercourses in Quebec. When challenged by environmental groups that the Bill 18 revocations did not go far enough to protect other waterways, including those that are part of the St. Lawrence hydrographic system, the Minister used the existing regulations to refute environmentalist concerns. In her words, "[if a developer wishes to complete work in these rivers, it would not be able to proceed without first acquiring an authorization certificate. And, I will say, sincerely, the coefficient of difficulty will be extremely high, if not impossible, to do this type of work]".³⁹⁰

³⁸⁹ "Il y a toute une série de dispositions qui protègent déjà les cours d'eau dans la Loi sur la qualité de l'environnement, l'exigence de certificats d'autorisation." Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) at 34 (Minister Normandeau) (C-065).

³⁹⁰ "[I]l ne pourrait pas le faire sans obtenir au préalable un certificat d'autorisation du ministère de l'Environnement. Puis, je vous le dis, là, sincèrement, le coefficient de difficulté va être extrêmement élevé, voire impossible, de faire ce type de travaux". Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) (Minister Normandeau) at 9 (C-065).

(3) The Boundaries of the Permit Revocation are Idiosyncratic

307. *Third*, Bill 18's territorial boundaries are irrational from an environmental point of view. Many environmental groups contended that Bill 18's revocation literally did not go far enough: Bill 18's eastern boundary cuts through the Gulf of St. Lawrence at a specified longitude of meridian (rather than on any environmental or ecological basis) and does not revoke permits to the east of that administrative line.
308. In committee hearings, environmental groups criticized the government's placement of Bill 18's eastern boundary. One group protested that Bill 18's wording did not reflect the government's original announcement on 27 September 2010 that all oil and gas activity would be prohibited within the boundaries of the SEA-1.³⁹¹ The group requested that the government amend the language of Bill 18 "[for the sake of consistency with the ministerial engagement of 27 September 2010]", asking it to revert to the boundary as originally announced, which traced SEA-1's area of study.³⁹²
309. Minister Normandeau's response to this request exemplifies the government's inconsistent and unreasoned rationale for Bill 18's territorial boundaries. According to Normandeau, the eastern boundary shift "[is explained simply by the fact that we cut it where we cut it.

³⁹¹ "Or, l'article 1 du projet de loi n° 18 établit que la limite de protection va plutôt s'établir à 60° 51' 22", environ 20...19 km plus à l'ouest de ce qui avait été promis." Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) at 4 (S. Archambault, Coalition Saint-Laurent) (C-065).

³⁹² "Par souci de cohérence avec l'engagement ministériel du 27 septembre 2010, la Coalition Saint-Laurent propose donc d'amender l'article 1 pour y inscrire plutôt le méridien 64° 35' comme limite est." Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) (S. Archambeault) at 4 (C-065).

There is no reason...Because SEA-2 encompasses 9 km portion that you wish us to encompass in the...in any case, the zone will be studied.]"³⁹³

310. Some environmental groups asked that Bill 18 extend even further east, to revoke permits within the entirety of the Gulf. However, Minister Normandeau replied that this extension request was "[hasty]"³⁹⁴. Again, Minister Normandeau pointed to the SEA-2 underway in the Gulf, and explained that the government would not extend Bill 18's revocation eastward because that area was currently under study.
311. While the Quebec government preferred to wait until a thorough environmental assessment of the area had been completed, along with public consultation and legislative debate, before it would make the drastic decision to permanently prohibit oil and gas activity in the Gulf of St. Lawrence, no such consideration was afforded to holders of permits in the St. Lawrence River.

(4) The Permit Revocation was Unfair

312. *Fourth*, there was an SEA on shale gas underway that had yet to report its findings. Indeed, the work of the SEA had barely begun. Yet, without any coherent justification, Quebec decided to extend the western boundary of the permit revocation to cover areas and specific project that fall under the mandate of the SEA-SG.

³⁹³ "Alors, c'est ce qui explique simplement le fait qu'on a tranché là ou on a tranché. Il n'y a pas de raison... Parce que l'EES2, là, embrasse la portion du 9 km que vous souhaitez qu'on embrasse dans le... Alors, de tout façon, la zone sera étudiée." Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) (S. Archambeault) at 5 (C-065).

³⁹⁴ "Je comprends en même temps votre demande d'étendre le moratoire à tout le golfe. Votre demande est trop hâtive, si je peux le dire comme ça, dans la mesure où il y a un processus, là, d'évaluation environnementale qui est en cours." Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 11 (26 May 2011) at 6 (Minister Normandeau) (C-065).

313. The SEA-SG was in the nascent stages of a comprehensive study of the particular environment affected and technologies used in shale gas development in the St. Lawrence Lowlands. This SEA-SG was directly relevant to the development of the River Permit Area, the specific technologies that would be used to extract resources located underneath the River, and the possible environmental effects and risks involved.
314. Rather than wait for the results of the SEA-SG, the Quebec government preempted its own public process in direct contradiction of its articulation of the purpose of an SEA.
315. For all of these reasons, it is clear that the government's drastic step of completely extinguishing the Enterprise's property rights by revoking the River Permit was arbitrary, grossly unfair, unjust and idiosyncratic. It was neither rationally connected nor necessary to achieve the stated objectives of the bill, and was arbitrary and idiosyncratic in its scope and application.

4. *The Revocation of the River Permit Violated the Claimant's Legitimate Expectations*

316. In its formulation of the international minimum standard of treatment, the *Waste Management II* tribunal stated that "[i]n 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."³⁹⁵ Discussing this interpretation, the tribunal in *Clayton/Bilcon* observed:

The formulation also recognises the requirement for tribunals to be sensitive to the facts of each case, the potential relevance of reasonably

³⁹⁵ *Waste Management II* (2004) Award at para. 98 (CLA-064).

relied-on representations by a host state, and a recognition that injustice in either procedures or outcomes can constitute a breach.³⁹⁶

317. In *Clayton/Bilcon*, the the province of Nova Scotia denied approval of the claimant's proposed basalt quarry and marine terminal on the Bay of Fundy. The project was the subject of public debate and opposition, ultimately leading to the concept of "community core values" being factored into an environmental review process (in that case, a Joint Review Panel ("JRP") specifically examining the investor's project). The majority of the tribunal ultimately found that the investor had relied on having a fair assessment process, and that the JRP's consideration of community core values was outside of its mandate and was considered with insufficient notice to the investor.³⁹⁷
318. When Forest Oil entered the Quebec market, ensuring that it could access the resources under the river was an important consideration. In Forest Oil's dealings in 2006 with the QMNR, it specifically described and explained its onshore drilling plans, taking care to ensure that their project was understood and supported by the QMNR, who communicated through phone calls, emails and undertook site visits with Junex to the Bécancour/Champlain Block.
319. Having received confirmation that these plans were acceptable, first through discussions concerning the original River Permit (PG906) and then through the issuance of the River

³⁹⁶ *Clayton/Bilcon v. Canada*, Award on Jurisdiction and Liability, PCA No. 2009-04 (17 March 2015) at para. 444 [*Clayton/Bilcon*] (CLA-031).

³⁹⁷ *Clayton/Bilcon* (2015) Award on Jurisdiction and Liability at para. 591 (CLA-031).

Permit itself, the Enterprise pursued its multi-stage development plan, investing more than US\$11.6 million.

320. Having granted an exploration permit for the River Permit Area under the *Mining Act*, in the normal course Quebec would have very limited grounds to refuse to grant a lease to produce natural gas once the Enterprise disclosed it had a commercially viable deposit.³⁹⁸ Unlike incidental permits obtained in the course of a project, an exploration permit conveys real immovable rights. A revocation of the nature effected by Bill 18 is not provided for in the *Mining Act* and is not within the QMNR's normal regulatory activity.
321. Once the QMNR issued the River Permit, and additionally, once it registered the transfer of rights to the Enterprise, it provided assurance to the Enterprise that it would be able to undertake permitted activities so long as the Enterprise complied with applicable law, including environmental regulations.
322. By purchasing Junex's working interest and entering into contractual relations with Junex (including with respect to the River Permit) in 2006, registering these rights in the Quebec Mining Registry in 2010, continuing to execute its development plan as that plan was explained and accepted by the QMNR, and compensating the government by way of an annual fee, the Claimant and its Enterprise had an objective and reasonable expectation that its pursuit of exploration and development of this play would not be summarily extinguished by an extraordinary measure.

³⁹⁸ As reflected by the words "shall grant" in section 194, *Mining Act* (2011) at s. 194 (C-004).

5. *Quebec's Denial of Required Compensation Because it Would be Unpopular is Shocking and Grossly Unfair*

323. Even using a narrower interpretation of the minimum standard of treatment, Canada's actions constitute a breach of Article 1105(1). Quebec's decision to revoke property rights and blatantly avoid paying compensation because it would be politically unpopular is shocking and unfair.
324. The tribunal in *Glamis Gold* described the protection offered by Article 1105 as a floor below which conduct is not accepted by the international community.³⁹⁹ Relying on cases such as the 1926 *Neer* case concerning the protection of physical persons, some tribunals have interpreted the minimum standard as requiring conduct which is "egregious behaviour."⁴⁰⁰ As noted in the recent case, *Clayton/Bilcon*, "NAFTA tribunals have, however, tended to move away from the position more recently expressed in *Glamis*."⁴⁰¹
325. Nonetheless, Bill 18 expropriated the Claimant's property and expressly denied the Claimant any compensation. In doing so, the Quebec government was motivated by political considerations and acted in knowing disregard of its obligations. This is conduct that is shocking.
326. The legislative debates and committee hearings in May and June 2011 reveal that its decision to revoke the River Permit and explicitly refuse to compensate the owners of those rights was driven by public opinion and animus towards oil and gas companies.

³⁹⁹ *Glamis Gold, Ltd. v. United States of America*, Final Award (8 June 2009) at para. 615 [*Glamis Gold*] (CLA-039).

⁴⁰⁰ *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Quantum (22 May 2012) at paras. 138-153 [*Mobil*] (CLA-047).

⁴⁰¹ *Clayton/Bilcon* (2015) at para. 435 (CLA-031).

327. In justifying the decision to not compensate Minister Normandeau pointed to the "extremely highly emotional context" of debates around shale gas and openly stated her view that Quebec citizens would disapprove of compensation for oil and gas companies.⁴⁰²
328. Accordingly, the Quebec government explicitly chose to deny compensation to permit holders not because of any belief that companies were not entitled to compensation or that the revocation of permit rights were not compensable takings, because compensating oil and gas companies would be unpopular among Quebec citizens. In Minister Normandeau's own words:

Pour ce qui est des compensations, M. Bouchard, dans le contexte actuel, disons-nous les choses franchement, je ne crois pas que les citoyens auraient apprécié qu'on puisse compenser des entreprises gazières dans le contexte extrêmement, hautement émotif qui nous a occupés au cours des derniers mois, des dernières semaines. Ceci étant, M. le Président, je reconnais la validité de vos arguments sur le plan juridique. Mais, sur le plan politique, le gouvernement a porté un tout autre message⁴⁰³

Translation:

In terms of compensation, Mr. Bouchard, in the current context, let's say it frankly, I do not think that the citizens would have appreciated us compensating gas companies in the extremely highly emotional context that has occupied us in recent months, in recent weeks. That said, Mr. Chairman, I recognize the validity of your arguments from a legal

⁴⁰² Translation of Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 12 (C-066); National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 12 (R-037).

⁴⁰³ Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) at 12 (R-037).

perspective. But from a political perspective, the government has communicated a very different message.⁴⁰⁴

329. Quebec's decision to not compensate for its revocation of permits was not based on justified legal arguments, but rather on political considerations. At the committee hearings on Bill 18, QOGA representative Lucien Bouchard articulated several concerns of private sector companies affected by the revocation, including the potential message sent to investors that when "there are political reasons, in some cases, you can cancel rights without compensation".⁴⁰⁵
330. Minister Normandeau admitted to Mr. Bourchard in the committee hearings that "the arguments that you are making from a legal perspective are quite justified. From our side, we are making more political, rather than legal arguments."⁴⁰⁶
331. Some members of the National Assembly remained concerned that the government may have a obligation to compensate when it extinguishes property rights through a permit revocation. In the final debate of Bill 18, one member asked Minister Normandeau:

⁴⁰⁴ Translation of Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 12 (C-066).

⁴⁰⁵ Translation of Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (L. Bouchard) at 12 (C-066).

⁴⁰⁶ Translation of Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 11 (C-066); Quebec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 12 (31 May 2011) (Minister Normandeau) at 12 (R-037).

"[Have there been legal opinions on the part of the minister or other ministers?]"⁴⁰⁷

Members asked repeatedly if the government had verified whether international precedents or case law existed to support expropriation without compensation, given QOGA's position that such acts were unusual.⁴⁰⁸

332. Minister Normandeau's response to these questions makes clear that Bill 18 was enacted in blatant disregard for international law. Following assembly members' questions about international law precedents, Minister Normandeau responded that "[in all transparency, there was no verification done]"⁴⁰⁹ Although she pointed to a handful of Quebec statutes which she contended had similar provisions, Minister Normandeau made it clear that the Quebec government had not assessed whether Bill 18, and specifically its lack of compensation, was compliant with international law.

6. Conclusion

333. In the present case, Canada chose to deprive an investor of its ability to make productive use of the capital it committed in order to fulfill its obligations under the Farmout Agreement, River Permit Agreement, and the applicable Quebec laws and regulations. Canada also chose to combine that treatment with zero compensation, even though the Enterprise was also deprived of its real intangible property rights as a result of Quebec's change of heart regarding the River Permit.

⁴⁰⁷ Quebec, National Assembly, Detailed study of Bill 18, an Act to limit oil and gas activities, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 14 (7 June 2011) (Minister Normandeau) at 33 (C-067).

⁴⁰⁸ Quebec, National Assembly, Detailed study of Bill 18, an Act to limit oil and gas activities, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 14 (7 June 2011) (Minister Normandeau) at 33 (C-067).

⁴⁰⁹ "En toute transparence, il n'y a pas de vérification qui a été faite." Quebec, National Assembly, Detailed study of Bill 18, an Act to limit oil and gas activities, *Journal des débats*, 2nd Sess, 39th Leg, Vol. 42 No. 14 (7 June 2011) (Minister Normandeau) at 33 (C-067).

334. The choice to revoke these particular permits was arbitrary and idiosyncratic, leading to treatment that was neither fair nor equitable as required by the minimum standard of treatment and NAFTA Article 1105(1).
335. In these circumstances, the revocation of the River Permit and concomitant destruction of River Permit Rights falls below the minimum standard of treatment required by Article 1105(1). It is arbitrary, unfair and inequitable treatment. Having granted an exploration permit in keeping with the *Mining Act*, Quebec's revocation of the River Permit and decision to deny compensation for the reasons stated in the lead up to the bill's passage are neither rationally connected nor necessary to serve the purposes of environmental protection and preservation of the St. Lawrence River. Accordingly, Canada has failed to respect the Claimant's vested rights as the NAFTA requires and in keeping with the investor's legitimate, investment-backed expectations.

VI. DAMAGES

A. Overview

336. When Quebec passed Bill 18, it destroyed the economic potential of the Claimant's investment in the River Permit Area. After expending significant dollar amounts toward the acquisition of the River Permit Rights, Lone Pine was deprived of the ability to reap any economic benefit from its investment.
337. Lone Pine submits its claim pursuant to Article 1117, i.e. on behalf of the Enterprise. The Enterprise has suffered damages as a direct consequence of the actions taken by Canada. Such actions constitute breaches of Article 1105 and Article 1110.
338. Article 1110(1) of the NAFTA provides, *inter alia*, that no party may directly or indirectly expropriate an investment of an investor in its territory *except*: for a public purpose, on a non-discriminatory basis; in accordance with due process of law and Article 1105(1); and on payment of compensation in accordance with Article 1110(2) to 1110(6).
339. Article 1110 specifically provides for a fair market value calculation for lawful expropriations. However, the NAFTA is silent with respect to the standard of compensation for wrongful expropriations and breaches of the minimum standard of treatment (Article 1105). The Claimant submits that, at a minimum, the Tribunal's starting point to calculate damages for a wrongful expropriation, should be fair market value.
340. In addition to reliance on Article 1110(2), the Tribunal can also rely on customary international law, the ILC Draft Articles and guidance from well-known international

arbitration scholars. Each of these sources supports the use of a full reparation standard. According to customary international law full reparation requires something more than fair market value, in the present case it warrants consequential damages as well.

341. Fair market value and the standard of full reparation, are consistently and widely used. According to Professor James Crawford, "[c]ompensation reflecting the capital value of property taken or destroyed as a result of an internationally wrongful act is generally assessed on the basis of a 'fair market value' of the property lost."⁴¹⁰ This view is shared by Mark Kantor who has highlighted that international arbitral tribunals regularly use fair market value as the benchmark from which to calculate compensation.⁴¹¹

342. Further, the ILC Draft Articles and the seminal *Chorzow Factory* case, as discussed below, explicitly recognize that treaty breaches ought to be compensated on the basis of full reparation.

343. The Claimant seeks the following damages:

- (a) The fair market value of the expropriated asset (the River Permit Rights) as quantified by Claimant's damages experts ("FTI");
 - (b) Consequential losses and incidental costs, including damages arising from a reduction in economic efficiency of the wells in the Bécancour/Champlain Block;
- and

⁴¹⁰ James Crawford, "Part Two, Chapter II: Reparation for Injury", *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at 225 (CLA-012).

⁴¹¹ Mark Kantor, "Chapter 2: Basic Valuation Approaches" *Valuation for Arbitration* (Kluwer Law International, 2008) at 34 [*Kantor*] (CLA-013).

- (c) Costs of this arbitration including legal, translation and related fees.

344. In the remainder of this section we discuss the following issues:

- (a) Quantum of damages

- (i) The economic viability of the resources within the River Permit Area, as set out by the Claimant's petroleum experts ("GLJ"), in their report dated 10 April 2015 ("GLJ Report");

- (ii) The quantum of damages as calculated through a fair market value analysis by FTI in their report dated 10 April 2015 ("FTI Report");

- (b) The law as it relates to the standard of compensation and the method of calculating such compensation;

- (c) Particulars regarding the causal link between Canada's actions and the damages suffered by the Enterprise; and

- (d) In the event that the tribunal does not accept the fair market value approach, an alternative approach of compensation for "out-of-pocket" expenses as they relate to the River Permit Rights.

B. Quantum of Damages

345. The quantification of the losses caused to the Enterprise as a result of Canada's unlawful conduct is set out in detail in the FTI Report. FTI's valuation relates only to the River Permit Rights. The calculations therein set out the fair market value of the River Permit

Rights, on 12 June 2011, the date immediately preceding the date of the wrongful expropriation.

346. FTI relied on the findings of the Claimant's petroleum expert, GLJ. In summary, as detailed below, the GLJ Report found that there was sufficient data to confirm the presence of extractable shale gas that could support a commercially viable play.

347. After analyzing GLJ's conclusions, FTI thereafter used an income based approach with a discounted cash flow ("DCF") methodology. In its analysis, FTI utilized a market based approach to test the reasonableness of its DCF method results.

1. The Gas in Place: The GLJ Report

348. Lone Pine provided GLJ with a data set for six wells proximate to the River Permit Area. Core data measurements from these wells included porosity, water saturation, bulk and grain density, total organic carbon ("TOC"), x-ray diffraction and adsorption isotherms. GLJ undertook a detailed petrophysical analysis of the data to provide a conservative estimate of in-place volumes of hydrocarbons (specifically, natural gas). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Accordingly, GLJ estimated the resource conservatively by narrowing the scope of their review.

349. GLJ assumed [REDACTED]
[REDACTED]⁴¹² These estimates were all considered by GLJ to fall within a reasonable range of expected recoveries. GLJ also provided a summary of the economic parameters used in their evaluation. These included product pricing, operating costs and capital expenditures. GLJ also stated that the estimated gas production start date of 1 July 2013 is reasonable in light of the date available.⁴¹³

350. GLJ provided [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

351. GLJ applied [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

⁴¹² GLJ Report (2015) at 17 (CER-001).

⁴¹³ GLJ Report (2015) at 17 (CER-001); See also D. Axani Witness Statement at para. 40 (CWS-001); D. Roney Witness Statement at para. 10 (CWS-005).

⁴¹⁴ GLJ Report (2015) at 39 (CER-001).

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352. The GLJ Report thus provided a solid foundation from which FTI could then assess the resource from a commercial valuation perspective.

2. The Calculation of Damages: The FTI Report

353. Depending on the information available, a tribunal may choose to calculate fair market value using one of three different approaches: (i) an "income-based approach"; (ii) a "market-based approach" or (iii) an "asset-based approach".⁴¹⁶

354. A DCF methodology is the most widely used method under an income based approach to value. In simple terms, the DCF methodology estimates the incoming and outgoing future cash flows and discounts such cash flows by a risk adjusted rate of return in order to determine value as at the valuation date.

355. FTI relied upon multiple factors in its DCF analysis of the River Permit Rights and used an effective date of 1 April 2015⁴¹⁷ and a valuation date of 12 June 2011.⁴¹⁸ FTI reviewed the GLJ █ previously held by Lone Pine under the River Permit area and considered the key elements required to estimate the future cash flows that would have accrued to Lone Pine by virtue of their investment in the River Permit, absent Canada's NAFTA breaches. In this regard, FTI relied on █

⁴¹⁵ GLJ Report (2015) at 39 (CER-001).

⁴¹⁶ *Kantor* (2008) at 9 (CLA-013).

⁴¹⁷ FTI Report (2015) at para. 6.28 (CER-002).

⁴¹⁸ FTI Report (2015) at para. 2.1 (CER-002).

█ [REDACTED]

[REDACTED]

[REDACTED]

- (b) A heating value of 1138 btu/scf;
- (c) Pricing adjustments including a premium from the US Gulf Coast at Henry Hub of \$0.90/mmbtu and transportation costs of \$0.25/mmbtu; and
- (d) Estimated operating expenditures and capital expenditures to be incurred over the life of the project.⁴¹⁹

356. Separate from the GLJ Report, FTI relied on the following economic and financial estimates and assumptions:

- (a) Expected future gas prices applicable to the projected gas production;
- (b) Financial and economic assumptions including applicable royalty rates, foreign exchange rates, and inflation rates; and
- (c) A risk adjusted discount rate of 11% to convert future cash flows to the valuation date of 12 June 2011.

357. FTI used a valuation date of 12 June 2011, which is the date immediately preceding the date of the impugned measure (the Royal Assent of Bill 18). In analyzing the data and

⁴¹⁹ FTI Report (2015) at paras. 6.37-6.39 (CER-002).

information available to it, FTI determined that the River Permit Rights have a value of US\$109,800,000. The following table provides a breakdown of this total.

Figure 12: Summary of FMV Conclusion Under the DCF Approach (USD 000's)⁴²⁰

Total Production Volume (MMcf)		
Revenue		
Operating Expense		
Total Operating Income		
Less: Royalties (at 10% to 12%)		
Operating Income After Royalties		
Less: Capital Expenditures		
Net Pre-Tax Cashflow		
Discounted Pre-Tax Cashflow		\$109,764
Rounded		\$109,800

358. FTI also calculated pre-award interest to an effective date of April 10, 2015 to be in the amount of US\$9,100,000 which results in a total damages amount of US\$118,900,000.00.⁴²¹

359. FTI also used a comparable project analysis to test the reasonableness of the DCF conclusion. FTI thereby "assessed prices that have been paid in the open market between willing arm's length parties for shale assets with similar characteristics as the River Permit Area, and determined a common basis on which to apply this market transaction information to the River Permit to obtain the fair market value thereof."⁴²²

⁴²⁰ FTI Report (2015) at Figure 10, para. 6.42 (CER-002).

⁴²¹ FTI Report (2015) at para. 6.73 (CER-002).

⁴²² FTI Report (2015) at para. 6.46 (CER-002).

360. FTI specifically looked at seven transactions from the Horn River shale formation spanning from June 2009 to June 2010 (pre-valuation date) and eight other comparable transactions spanning from late 2011 to May of 2013 (post-valuation date).⁴²³
361. FTI's analysis of these other transactions confirmed that the conclusions reached based on the DCF analysis were indeed reasonable.⁴²⁴

C. The Claimant is Entitled to Full Reparation for Canada's NAFTA Violations

362. The breach of an investment treaty is an "internationally wrongful act" that triggers the obligation to make "full reparation" for injury caused.⁴²⁵ In this case, Canada has breached NAFTA Articles 1110 and 1105 and the Claimant is entitled to full reparation which includes the fair market value of the River Permit Rights along with consequential losses, incidentals and legal and arbitration-related fees.

1. Full Reparation is a Widely Accepted Standard of Compensation

363. The *Chorzow Factory* case has been recognized by NAFTA tribunals as authoritative on the matter of reparation:

The essential principle contained in the actual notion of an illegal act is that reparation must, as far *as possible, wipe-out all the consequences of the illegal act and reestablish 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

⁴²³ FTI Report (2015) at paras. 6.51, 6.56 (CER-002).

⁴²⁴ FTI Report (2015) at para. 6.59 (CER-002).

⁴²⁵ *Archer Daniels* (2007) Award at para. 275 (CLA-024).

to determine the amount of compensation for an act contrary to international law.⁴²⁶ (emphasis added)

364. The standard of compensation articulated in *Chorzow Factory* has been utilized by various international tribunals, including in *Amoco* and *S.D. Myers*.⁴²⁷ As adopted by the tribunal in *S.D. Myers*, the compensation approach taken should reflect the general principle of international law that compensation should "undo the material harm inflicted by a breach of an international obligation."⁴²⁸

365. The principles articulated in the ILC Draft Articles are also relevant and applicable support for the concept of full reparation. As noted above, the ILC Draft Articles characterize a state's breach of an international obligation (including a treaty breach) as an "international wrongful act"⁴²⁹ that requires "full reparation"⁴³⁰ for any injury caused. Specifically, Article 36 of the ILC Draft Articles, a codification of customary international law, addresses principles of compensation by stating:

1. The 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.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.⁴³¹

⁴²⁶ *Chorzów Factory 1928* at 47 (CLA-029).

⁴²⁷ *S.D. Myers* (2000) Partial Award at para. 311 (CLA-058); *Amoco* (1987) Partial Award at para. 191 (CLA-022).

⁴²⁸ *S.D. Myers* (2000) Partial Award at para. 315 (CLA-058).

⁴²⁹ *ILC Draft Articles (2001)* Article 2 (CLA-005).

⁴³⁰ *ILC Draft Articles (2001)* Article 31 (CLA-005).

⁴³¹ *ILC Draft Articles (2001)* Article 36 (CLA-005).

366. In this case, the material harm suffered by the Enterprise consists of a complete inability to develop and ultimately reap the financial benefit from the shale gas in the River Permit Area. The Enterprise spent millions of dollars and expended corporate resources in pursuit of future financial benefits in connection with the River Permit. The Claimant made such expenditures within a regulatory regime designed to encourage investment and in the context of specific encouragement by government officials and the laws of Canada.

367. In light of the customary international law support for the concept of full reparation, the Claimant submits that it is entitled to full reparation if the Tribunal finds that there was:

- (a) An otherwise lawful but uncompensated expropriation;
- (b) A wrongful expropriation; or
- (c) A breach of the minimum standard of treatment.

2. *Full Reparation includes, inter alia, the Fair Market Value of the Claimant's Investment and loss of future profits*

368. Article 1110(2) of the NAFTA expressly provides the basic principle governing the award of compensation for an expropriation of an investment:

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.

369. The compensation standard set out in Article 1110(2) relates to lawful expropriations. It is therefore logical and reasonable for this to be the minimum starting point for the assessment of the Claimant's damages arising from wrongful expropriation. The valuation criteria should therefore, at a minimum, include the items enumerated in Article 1110(2).
370. The fair market value standard also applies to a finding of a breach of Article 1105. Notably, the NAFTA itself permits broad recovery, including recovery for the "overall economic losses" that flow from a host state's interference.⁴³² Further, the NAFTA tribunal in *S.D. Myers* articulated that tribunals may decide to adopt the fair market value standard in non-expropriation cases where it deems appropriate.⁴³³
371. The fair market value is also adopted outside of the NAFTA context, particularly where a breach has the effect of a taking.⁴³⁴ Further, as found by the tribunal in *Santa Elena v. Costa Rica*, the fair market value of a property should be assessed "according to its 'highest and best use.'"⁴³⁵
372. Use of the fair market value standard in damage assessments is also supported by its ubiquitous use in business valuations. The tribunal in *Lemire* acknowledged that those

⁴³² *S.D. Myers, Inc. v. Canada*, Second Partial Award (21 October 2002) at para. 122 [*S.D. Myers Damages*] (CLA-057).

⁴³³ *S.D. Myers* (2000) Partial Award at para. 309 (CLA-058).

⁴³⁴ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006) at para. 424 (CLA-025).

⁴³⁵ *Santa Elena* (2000) Final Award at para. 70 (CLA-033).

who value businesses do so on the basis of all relevant circumstances, including likely future earnings.⁴³⁶

373. Future earnings or loss of future profit, is the principle factor assessed within the DCF method. Since the DCF method is the most widely used method for valuation calculations in the oil and gas context, it is the most appropriate methodology to be applied in this case. Indeed, in *Occidental Petroleum v. Ecuador*, the tribunal projected future cash flows using a DCF model and confirmed that it "is the most widely used and generally accepted method in the oil and gas industry for valuing sales or acquisitions."⁴³⁷ In that case the tribunal calculated the present value of future cash flows that the claimant "would have reasonably been expected to earn" but for the host state's unlawful interference.⁴³⁸

374. The tribunal in *Occidental* also engaged in an analysis of each step of the calculation by considering, *inter alia*, whether the adjustments and discounts for risk were supported by the data and the facts. The tribunal's analysis in *Occidental* exemplifies the reasonableness and practical benefits of using the DCF method since it permits adjustments based on risks and contingencies.

⁴³⁶ See *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011) at para. 248 [*Lemire*] (CLA-040).

⁴³⁷ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012) at para. 779 [*Occidental*] (CLA-051).

⁴³⁸ *Occidental* (2012) Award at para. 708 (CLA-051).

375. The DCF method and its incorporation of future or prospective damages is not foreign to NAFTA tribunals even where the investor's project was not a going-concern.⁴³⁹ In *Mobil Investments*, the tribunal clarified that future or prospective damages are within the scope of recovery defined by the NAFTA.⁴⁴⁰

376. In the non-NAFTA context, tribunals have also recognized that lost profits are compensable, even where an investment project is not yet. In *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, an oil and gas case, the tribunal stated:

The determination of the future cash flow from the exploitation of hydrocarbon reserves need not depend on a past record of profitability. There are numerous hydrocarbon reserves around the world, and sufficient data allowing for future cash flow projections should be available to allow a DCF-calculation.⁴⁴¹

377. The fact that the Enterprise's project was at an early stage has been addressed in the damages methodology employed by FTI. For that reason, the early stage of the project is no bar to recovery.

378. *First*, the GLJ Report confirms the existence of an extractable resource and has estimated the value of such resources.⁴⁴²

⁴³⁹ *Vivendi* (2007) Award at para. 8.3.4 (CLA-032).

⁴⁴⁰ *Mobil* (2012) Decision on Liability and on Principles of Quantum at para. 427 (CLA-047).

⁴⁴¹ *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, Final Award (8 June 2010) SCC Case No. V064/2008 at para. 75 [*Al-Bahloul*] (CLA-048).

⁴⁴² GLJ Report (2015) at 23 (CER-001).

379. *Second*, GLJ has appropriately applied a discounted "recovery factor" of the resource to reflect the risk on the deliverability of the resource in light of the limited test data available to it.⁴⁴³
380. *Third*, the FTI Report uses a rational and widely recognized method of evaluation that already provides a discount for future income streams and items specifically related to the early stage of the project.
381. *Fourth*, oil and gas projects are inherently future-oriented ventures and multiple early stage plays directly comparable to the River Permit Area have been bought and sold. The FTI Report identified fifteen transactions involving comparable shale gas plays, with most of these transactions involving "undeveloped land on which no significant exploration had been performed".⁴⁴⁴ This demonstrates that participants in this sector confer real value on early stage projects.
382. GLJ and FTI's analysis take into consideration the early stage of the Enterprise's project and nonetheless confirm that as of the date immediately preceding the date of the expropriation, the investment of the Claimant had significant value. As stated by FTI:

The lack of historical production data should not preclude the application of the DCF approach since oil and gas start-up operations are not classified as a new business, they are typically new projects initiated by large multinational organizations which have multiple years of profitable operations behind them. Generally, it is possible to estimate the expenses

⁴⁴³ GLJ Report (2015) at 39 (CER-001).

⁴⁴⁴ FTI Report (2015) at para. 6.53 (CER-002).

and time required to extract the oil or gas in an efficient way. (internal citations omitted)⁴⁴⁵

383. As with the tribunal in *Occidental Petroleum*, the FTI Report provides this Tribunal with objective and reasonable calculations that will allow it to reach a compensation amount that is fair, just and reasonable. The fact that future profits are based on estimations is no reason to exclude such losses from a damages calculation.

3. Damages Can be Established with a Sufficient Degree of Certainty and are Based on Reasonable Estimates

384. Regardless of the methodology applied, a claimant who has met the burden of proof that there has been a breach for which it is entitled to damages, is not required to prove the extent of loss with absolute certainty; a sufficient degree of certainty or probability is sufficient.⁴⁴⁶

385. Both NAFTA and non-NAFTA tribunals have explicitly recognized that the assessment of damages is "not always a precise science."⁴⁴⁷ In *Joseph C. Lemire v. Ukraine*, the tribunal stated: "the best a tribunal can do is make an informed and conscientious evaluation, not unlike that made by anyone who assesses the value of a business on the basis of its likely future earnings."⁴⁴⁸

⁴⁴⁵ FTI Report (2015) at para. 6.21 (CER-002).

⁴⁴⁶ *Mobil* (2012) Decision on Liability and on Principles of Quantum at para. 437 (CLA-047); *Vivendi* (2007) Award at para. 8.3.4 (CLA-032).

⁴⁴⁷ *S.D. Myers Damages* (2002) Second Partial Award at para. 141 (CLA-057); *Lemire* (2011) Award at para. 248 (CLA-040).

⁴⁴⁸ *Lemire* (2011) Award at para. 248 (CLA-040).

386. This approach affirms that a damages assessment should be based on a reasonable estimation and not on any higher standard of certainty than that used by individuals making practical business decisions. As stated by FTI:

For most businesses not involved in the resource extraction industry it would generally be necessary to establish historical sales and profits in order to quantify a loss of opportunity or reduction in value resulting from a wrongful act with a sufficient degree of precision (especially under an income based approach). The exploration and exploitation of oil and natural gas resources is somewhat different than non-extractive businesses as *the practices employed to assess these mineral resources are well established, the time and costs required to develop and process the resources can be estimated with a reasonable degree of precision, and perhaps most importantly, well developed markets exist for natural gas products that will absorb 100% of a project's entire production with certainty.*⁴⁴⁹ (emphasis added)

387. Facts supporting the sufficient degree of certainty and the reasonableness of the estimates used by both FTI and GLJ include the following:

- (a) GLJ relied on extensive well testing and also considered the two months of sustained flow from a well in the Quebec Utica Shale called the "Edouard well".
- (b) Leading up to Bill 18 the shale gas industry in Quebec was "ramping up".⁴⁵⁰
- (c) Oil and gas companies make decisions to invest in shale plays using the same technical and economic criteria as those used by GLJ and FTI.
- (d) There is and continues to be a market for natural gas derived from shale.

⁴⁴⁹ FTI Report (2015) at para. 6.3 (CER-002).

⁴⁵⁰ D. Axani Witness Statement at para. 43 (CWS-001).

(e) Existing distribution infrastructure running through the Bécancour/Champlain Block adjacent to the River Permit Area provides the Enterprise with ready access to markets.

a) *Comparable Projects Confirm the Reasonableness of the DCF Calculation*

388. FTI also conducted a comprehensive market based calculation in order to test and compare the results of their DCF methodology. This consisted of comparing sales transactions within a reasonable date range of similar shale plays. This test corroborated the reasonableness of their DCF method calculations and also provides the Tribunal with the opportunity to compare and consider two methodologies, which ultimately support damage amounts within close range of each other.

4. Consequential Losses and Incidental Expenses

389. The Claimant is entitled to full reparation which goes beyond compensating for fair market value and also includes compensation for additional heads damages such as consequential losses and incidental expenses.

390. The commentary to the ILC Draft Articles addresses the issue of incidental expenses where it states the following:

it is well-established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach. Such expenses may be associated for example with the displacement of staff or the need to store or sell undelivered products at a loss.⁴⁵¹

⁴⁵¹ See *ILC Draft Articles* (2001) Article 36 Commentary at para. 34 (CLA-005); Sergey Ripinsky and Kevin Williams, "Chapter 7: Heads of Damages", *Damages in International Investment Law* (London: British Institute of International and Comparative law, 2008) at 299 [*Ripinsky and Williams Ch. 7*] (CLA-018).

391. While Lone Pine retains the hope that Quebec will regulate and permit shale gas exploration, thereby enabling Lone Pine to develop the resources contained in the Bécancour/Champlain Block, the loss of the River Permit has rendered the Original Permits less economic to develop. Lone Pine can no longer "get the most" out of its remaining assets, thus resulting in a consequential loss to the Original Permits.

392. In addition to this consequential loss, Lone Pine has suffered a loss of incidental expenses for which it ought to be compensated.

D. In the final Alternative, the Claimant is Entitled to Compensation for Amounts Invested Prior to the Enactment of Bill 18

393. The Tribunal has discretion to award compensation for the actual amounts invested by a claimant.⁴⁵² We note that FTI accounted for out-of-pocket expenses within the DCF method calculation. Accordingly, the claim for out-of-pockets expenses is in the alternative.

1. Tribunals Commonly Award Compensation for the Actual Amounts Invested by a Claimant

394. Tribunals have held that actual investment amounts invested by a claimant or "out-of-pockets" are compensable. As noted by Sergey Ripinsky and Kevin Williams, arbitral tribunals have principally employed investment expenditures as: (i) a head of damage in some non-expropriatory treaty cases; (ii) *damnum emergens* (or direct loss) in contractual cases or; (iii) a proxy to determine the "fair market value "of an investment.⁴⁵³ The

⁴⁵² See generally *Metalclad* (2000) Award (CLA-044).

⁴⁵³ *Ripinsky and Williams Ch. 7* (2008) at 264 (CLA-018).

eligibility an investment expense may depend on factors such as: whether they are linked to the investor's investment; whether they are supported by sufficient evidence; whether they are linked to the investor; and whether they are not manifestly unreasonable.⁴⁵⁴

395. The following types of expenses have been awarded in past decisions:

- (a) Personnel, insurance, travel, telephone, accounting and legal, consultants, office, property, plant and equipment.⁴⁵⁵
- (b) Equity contributed by shareholders and loans to finance the purchase of property or the operation.⁴⁵⁶
- (c) Expenses relating to project preparation, e.g., financing, permits, corporate structure, preparations for implementing and drafting and negotiations of commercial terms, and technical and environmental studies.⁴⁵⁷

396. Lone Pine has invested approximately \$34.9 million on exploration activities in Quebec from 2008 to 2011. Of that amount the Claimant has spent \$11.6 million on the development of the River Permit Area.⁴⁵⁸

⁴⁵⁴ *Ripinsky and Williams Ch. 7* (2008) at 266 (CLA-018).

⁴⁵⁵ See e.g. *Metalclad* (2000) Award at para. 123 (CLA-044)

⁴⁵⁶ See e.g. *Vivendi* (2007) Award at para. 8.3.18 (CLA-032).

⁴⁵⁷ See e.g. *PSEG Global, Inc et al v. Republic of Turkey* ICSID Case No. ARB/02/5, Award (19 January 2007) at para. 318 (CLA-054).

⁴⁵⁸ FTI Report (2015) at para. 6.53 (CER-002).

397. As identified in the FTI Report, the actual investment amounts are detailed as follows:

Figure 13: Direct Investment Costs⁴⁵⁹

Item Description	Costs Incurred to Date (US\$000's)
Junex Bécancour #8 Core Analysis & Survey Costs	
Junex Bécancour #8 Completion Costs	
Champlain 1-H Utica Well Drilling Costs	
Champlain #1H Completion Costs	
Bécancour Seismic Data	
Total	\$ 11,607

398. The Claimant has put forward evidence that includes a breakdown of the expenditures with respect to the development on the Becancour/Champlain Block related to the River Permit Area. Further, the GLJ Report has confirmed that these expenditures were reasonable and FTI has confirmed the existence of the expenditure amounts.

399. The amounts identified by the Claimant are linked to the investment and the Enterprise, they are not manifestly unreasonable and they are supported by sufficient evidence.

400. Accordingly, in the alternative to the amount claimed pursuant to the DCF method described above, the Claimant should be entitled to its actual investment amounts in the amount of \$11,607,000.

⁴⁵⁹ FTI Report (2015) at Figure 6, para. 5.21 (CER-002).

E. Causation

401. International treaties generally do not provide for any specific test of causation in any detail.⁴⁶⁰
402. In particular, NAFTA Articles 1116 and 1117 simply provide that an investor directly or on behalf of its investment can claim for "loss or damage *by reason of, or arising out of* [...] a breach of a section of Chapter 11" (emphasis added). This provision, while requiring causation as a condition for the recovery of damages, does not define a specific causation test. In this regard, Ripinsky and Williams note that "unsurprisingly, the criteria employed by some of arbitral tribunal's to define the required causal link includes adjectives such as 'foreseeable', 'proximate', 'remote', 'direct', 'sufficient', 'adequate' etc."⁴⁶¹
403. The NAFTA tribunal in *SD Myers* determined that "damages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision in the law sustained by the investor."⁴⁶² The tribunal also noted that "the harm must not be too remote or that the breach of the specific provision must be the proximate cause of the harm".⁴⁶³

⁴⁶⁰ Sergey Ripinsky and Kevin Williams, "Chapter 5: Cross-cutting Issues", *Damages in International Investment Law* (London: British Institute of International and Comparative law, 2008) at 138 [*Ripinsky and Williams Ch. 5*] (CLA-017).

⁴⁶¹ *Ripinsky and Williams Ch. 5* (2008) at 138 (CLA-017).

⁴⁶² *S.D. Myers Damages* (2002) Second Partial Award at para. 140 (CLA-057).

⁴⁶³ *S.D. Myers Damages* (2002) Second Partial Award at para. 140 (CLA-057).

404. In keeping with the provisions of the NAFTA (quoted above) related to causation, and with customary international law, including the tribunal's comments in cases such as *Myers*, remoteness and proximate cause are among the guiding principles to be considered in this Tribunal's causation analysis.
405. There is a direct causal link between Canada's unlawful conduct and the damages suffered by the Enterprise. These damages are a result of Canada's actions and in no way remote. Key factors in this regard include, *inter alia*:
- (a) Canada issued a permit for the development of the resource, namely the River Permit;
 - (b) The Enterprise relied on the contractual and registered rights it held in the River Permit;
 - (c) Pursuant to regulations by which the River Permit was granted, the Enterprise was required to and did commit capital to the development of the River Permit Area;
 - (d) The Enterprise invested capital and corporate resources in a regulatory process to develop the River Permit Area;
 - (e) The Claimant began implementing its development plan for the resource by, *inter alia*, completing test wells and undertaking other activities relating to the development of the River Permit Area;
 - (f) Canada adopted a measure that extinguished the River Permit Rights for no public purpose and with no compensation; and

- (g) As a result of this measure, the Enterprise and the Claimant conclusively lost the opportunity to develop the River Permit Area and therefore suffered damages directly as a result of the impugned measure.

406. In this case, it was reasonable for the Claimant to rely on the expectation that it could continue in the ordinary course of the regulatory framework established for the development of the resource. By expropriating the River Permit without compensation, Quebec directly infringed upon the Enterprise's rights, and removed the Enterprise's opportunity to continue developing the resource. In doing so, thereby caused damage to the Enterprise.

F. Conclusion Regarding Damages

407. Canada's revocation of the River Permit is an internationally wrongful act which entitles the Claimant to full reparation. Full reparation requires the inclusion of the fair market value of the River Permit determined by a DCF calculation of future profits.

VII. RELIEF SOUGHT AND DAMAGES CLAIMED

408. As a result of Canada's breaches of Chapter Eleven of NAFTA described above, the Enterprise has suffered significant loss and damage for which the Claimant requests the following relief pursuant to NAFTA Article 1117:

- (a) A declaration that Canada has breached its obligations under Article 1110(1) and Article 1105(1) of NAFTA and is liable to the Claimant therefore;
- (b) An award of compensatory damages in an amount to be proven at the hearing but which the Claimant currently estimates to be US\$118,900,000 inclusive of pre-award interest;
- (c) An award of the full costs associated with this arbitration, including professional and legal fees and disbursements, as well as the fees and disbursements of the Tribunal and the Administrative Authority;
- (d) An award of pre-award (as included in compensatory damages) and post-award interest at a rate to be fixed by the Tribunal;
- (e) An award of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and
- (f) An award of any such further relief that the Tribunal may deem just and appropriate.

Date: 10 April 2015

Respectfully submitted,

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VIII. CHRONOLOGY

Date	Event
2006	
4 May 2006	Quebec government releases <i>Using Energy to Build the Québec of Tomorrow: Québec Energy Strategy, 2006-2015</i>
5 June 2006	Junex and Forest Oil enter into Farmout Agreement regarding the Original Permits
28 July 2006	Enterprise applies to QMNR for River Permit Area exploration permit
13 October 2006	Enterprise provides payment to QMNR for first year of the River Permit Area exploration permit
24 November 2006	Junex triggers the Election Period set out in the Farmout Agreement
29 November 2006	Junex and Forest Oil enter into River Permit Agreement
2007	
10 January 2007	QMNR writes to the Enterprise and returns documents regarding the Enterprise' application for the River Permit Area exploration permit
10 May 2007	Forest Oil elects to exercise its option under the Farmout Agreement to earn 100% working interest in Original Permits and River Permit, triggering eighteen month Commitment Period
2008	
10 November 2008	Forest Oil completes capital investment to earn 100% working interest in the Original Permits and River Permit
1 April 2008	Forest Oil first announces significant discovery of a shale gas play in the Utica Shale following successful drilling and fracturing in the Bécancour/Champlain Block
2009	
26 March 2009	QMNR approves additional Junex exploration permits, including the River Permit
8 April 2009	Under Assignment Agreement between Forest Oil and the Enterprise, Forest Oil assigns all rights, duties, benefits and obligations in the Farmout Agreement to the Enterprise

Date	Event
23 April 2009	Forest Oil advises Junex of the Assignment Agreement
June 2009	SEA-1 program begins with SEA-1 on hydrocarbon extraction in the maritime Estuary and northwestern part of the Gulf of St. Lawrence
19 October 2009	QMNR attends QOGA conference and encourages oil and gas development activities
2010	
28 January 2010	Under two Assignment Agreements between Junex and the Enterprise, Junex assigns its working interest in the River Permit and Other Permits to the Enterprise
25 February 2010	SEA-2 begins on hydrocarbon extraction in the three eastern zones of the Gulf of St. Lawrence
19 April 2010	Junex applies to QMNR to request the transfer of the Original Permits and River Permit to the Enterprise
21 April 2010	QMNR acknowledges receipt of Junex's request to transfer 100% of the interest in the Original Permits and River Permits to the Enterprise
27 May 2010	QMNR formally transfers the Original Permits and River Permit to the Enterprise
July 2010	Preliminary findings of SEA-1 on the maritime Estuary and northwestern part of the Gulf of St. Lawrence are published
31 August 2010	Quebec government tasks the BAPE with establishing a commission of inquiry regarding the sustainable development of Quebec's shale gas industry
27 September 2010	Quebec government proposes moratorium on all oil and gas exploration and exploitation activities in the maritime Estuary and northwestern Gulf of St. Lawrence
30 September 2010	Lone Pine is incorporated under the laws of the State of Delaware as a subsidiary of Forest Oil
9 November 2010	Quebec government announces that the proposed moratorium on all oil and gas exploration and exploitation activities in the maritime Estuary and northwestern Gulf of St. Lawrence also extends to the St. Lawrence River

Date	Event
10 November 2010	Junex and the Enterprise learn of moratorium through article published in Montreal Gazette
2011	
12 January 2011	Junex and the Enterprise meet with QMNR to discuss moratorium
28 February 2011	BAPE final report on the sustainable development of Quebec's shale gas industry is submitted to the Minister of Sustainable Development
8 March 2011	BAPE final report on the sustainable development of Quebec's shale gas industry is released to the public
8 March 2011	Quebec government announces that SEA-SG on shale gas in Quebec will be implemented
12 May 2011	A committee to oversee SEA-SG on shale gas in Quebec is constituted by Minister of Sustainable Development
12 May 2011	Bill 18 introduced by Quebec government
26 May 2011	Forest Oil transfers ownership of the Enterprise to Lone Pine
31 May 2011	QOGA attends committee hearings on Bill 18
1 June 2011	Lone Pine completes an IPO in Canada and the US
10 June 2011	Bill 18 passes in National Assembly
13 June 2011	Bill 18 receives Royal Assent
30 September 2011	Lone Pine becomes a standalone public company
2012	
2013	
6 September 2013	Claimant files Notice of Arbitration
11 September 2013	Final SEA-2 report on the Gulf of St. Lawrence released
2014	
17 February 2014	Final SEA-SG report on shale gas in Quebec released

Date	Event
31 March 2014	BAPE begins public consultation regarding SEA-SG
28 November 2014	BAPE final report regarding SEA-SG released