

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

BETWEEN:

VITO G. GALLO

Claimant/Investor

AND:

GOVERNMENT OF CANADA

Respondent/Party

GOVERNMENT OF CANADA

**POST-HEARING SUBMISSION
ON JURISDICTION**

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TABLE OF ABBREVIATIONS

ABBREVIATION	DEFINITION
Enterprise	1532382 Ontario Inc.
<i>AMLA</i>	<i>Adams Mine Lake Act</i>
Limited Partnership	1532382 Limited Partnership
CCPC	Canadian Controlled Private Corporation
Cortellucci Group	Cortellucci Group of Companies
CWS	Canadian Waste Services Inc.
<i>OBCA</i>	<i>Business Corporations Act (Ontario), R.S.O. 1990, c. B. 16.</i>
ABH	Canada's Authority Brief for Hearing
WSB	Canada's Witness Statement Book
CDB	Canada's Comprehensive Document Brief

I. INTRODUCTION

1. The Claimant has failed to prove both that he owned 1532382 Ontario Inc. (“Enterprise”) before the introduction of the *Adams Mine Lake Act* (“*AMLA*”) into the Ontario Legislature, and that he was an investor protected by the NAFTA. Accordingly, this Tribunal lacks jurisdiction, and this claim must be dismissed.
2. The Claimant has produced none of the contemporaneous documents that an investor would have: no emails, no correspondence, no facsimiles, no memoranda, no notes, no invoices or other documents that mention his ownership of the Enterprise, or even his involvement in the project. In fact, the only record that the Claimant ultimately relied on to corroborate his claim that he owned the Enterprise is a single handwritten line on a one-page “Shareholders Register” in an unreliable corporate Minute Book. The Claimant and his witnesses attempted to deify this document, calling it not only “REDACTED”¹ but “REDACTED”². However, this assertion is legally baseless. Moreover, it ignores the overwhelming amount of evidence that suggests the Claimant was not the owner of the Enterprise prior to the introduction of the *AMLA*.
3. In particular, the Claimant did not act as the owner of the Enterprise. He did not hold himself out as the Enterprise’s owner to his friends and family, including his cousin, Mr. Saverio Montemarano, who helped purchase Adams Mine as a Limited Partner in 1532382 Limited Partnership (“Limited Partnership”). He was oblivious to the risks of owning Adams Mine. He never did the due diligence an owner would have done – he did not even review the Provisional Certificate of Approval to understand the conditions that needed to be fulfilled before a waste disposal site could be constructed at Adams Mine. He was also indifferent to the rewards that ownership of the Enterprise might bring, remaining uninformed even of the amount for which his alleged agent, Mr. Cortellucci, was attempting to sell the Site.
4. Further, the other individuals involved with the project, including Mario Cortellucci and the Limited Partners, did not treat the Claimant like he owned the

¹ Hearing Transcript, Day 1, page 38, lines 5-12 (Claimant’s Opening); Day 2, page 152, line 19 to page 153, line 9 (Mr. Swanick).

² Hearing Transcript, Day 2, page 299, lines 6-13 (Mr. Swanick).

Enterprise. No one sent the critical documents to the Claimant in Pennsylvania. No one sought or believed that his approval was needed for actions involving the Enterprise. No one involved him in important decisions concerning the Enterprise. No one indicated the Claimant's ownership on regulatory filings until months after the *AMLA* had been enacted.

5. In fact, Mr. Cortellucci and the Limited Partners acted as the owners of the Enterprise. Mr. Cortellucci organized, negotiated and assumed all the risks of purchasing Adams Mine. He then secured the involvement of his friends and family as other Limited Partners. The Limited Partners, through the Limited Partnership, then undertook the financial risks associated with the purchase of Adams Mine and the failure of the business. In particular, they REDACTED of the Adams Mine and the REDACTED REDACTED they made directly to the Enterprise. The Limited Partners also REDACTED and even signed an agreement in an effort to sell the Site. There is no reliable evidence that any of this was done in consultation with the Claimant.

6. Where an alleged owner has no reliable documentary evidence to prove that he is the owner, where he does not act like the owner, and where he is not treated like the owner, then, the Tribunal can reach only one conclusion: there is insufficient evidence to establish that he is, in fact, the owner.

II. THE CLAIMANT HAS THE BURDEN OF PROVING TO THIS TRIBUNAL THAT HE OWNED AN INVESTMENT PROTECTED BY THE NAFTA

7. The Claimant has brought this claim on behalf of the Enterprise under NAFTA Article 1117. Therefore, he has the burden of proving to this Tribunal that he owned an investment protected by NAFTA before the introduction of the *AMLA*.³ The failure to discharge this burden must result in the dismissal of his claim.

8. The Claimant has asserted that this Tribunal has no jurisdiction to decide issues of ownership with respect to Ontario business corporations. This assertion is meritless. The

³ See Canada's Submission on Jurisdiction at ¶¶ 7-14, 123-127. See also *Ibid.* ¶¶ 128-131.

ownership of an investment is one of the fundamental issues investment tribunals – under the NAFTA or otherwise – are required to decide in accordance with international law and the principle of *compétence de la compétence*.

9. Even under domestic law, there is no requirement that a court in another Canadian jurisdiction stay its proceeding to wait for an Ontario court to decide the ownership of a corporation in a separate rectification procedure. The Claimant’s witness, Professor Welling was unable to identify domestic precedent to support his testimony.⁴ In fact, non-Ontario courts can and do address issues of the ownership of Ontario corporations to the extent such issues arise during the course of their proceedings.⁵ As the Tax Court of Canada stated, failure to do so would hoist the Court’s case load into a “judicial never-never land”.⁶

III. THE CLAIMANT MUST PRODUCE RELIABLE EVIDENCE TO PROVE THAT HE OWNED AN INVESTMENT PROTECTED BY THE NAFTA

10. NAFTA Article 1131(1) sets out the applicable law for arbitral tribunals under NAFTA Chapter 11. It provides that a tribunal “shall decide the issues in dispute in accordance with this Agreement and *applicable rules of international law*.” This language requires arbitral tribunals to apply international law to decide the issues before them, including issues with respect to burden of proof and the weight of particular evidence.⁷ Even Professor Welling admitted that he could not say whether his evidence concerning domestic law was relevant to this arbitration.⁸

⁴ Hearing Transcript, Day 2, page 61, line 21 to page 63 line 23 (Prof. Welling).

⁵ See eg. *Stern v. Canada*, 2004 TCC 461. [TAB-001, CAN-474]

⁶ *Ibid.*, ¶ 30. [TAB-001, CAN-474]

⁷ Outside of the NAFTA context, arbitral tribunals have also adopted a similar approach. See e.g., *Hussein Nuaman Soufraki v. The United Arab Emirates* (ICSID Case No. ARB/02/7), Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki (June 5, 2007), ¶ 105 (holding that an international tribunal “is not required to use the national law’s approaches to the burden of proof and rules of evidence.”) [BOA-152].

⁸ See Expert Witness Statement of Bruce Welling (October 25, 2010), ¶ 39 (“I cannot comment on what rules bind the Arbitration Tribunal in this case, which I am informed is governed under the North American Free Trade Agreement and applicable rules of international law.”) Hearing Transcript, Day 2, page 53, lines 10-15 (Prof. Welling).

11. International arbitral tribunals have found that proving a particular fact requires reliable and contemporaneous documentary evidence.⁹ The uncorroborated assertions of witnesses are insufficient to establish jurisdiction.¹⁰ Moreover, arbitral tribunals have refused to hold any single document to be determinative of an issue without looking at all other relevant evidence. The Claimant offers no international law authority to the contrary because there is none. All of the relevant authority supports the position that the Claimant's evidence is insufficient.¹¹

12. For example, in *Soufraki v. UAE*, the tribunal determined that an Italian passport and certificates of nationality were not sufficient, in and of themselves, to establish that the claimant was Italian and entitled to the protection of the Italy-UAE bilateral investment treaty.¹² The tribunal found that, based on an evaluation of all the evidence on the record, it had no jurisdiction because the evidence taken in its entirety failed to prove Italian nationality.¹³

13. The evidence necessary to prove a fact is no different under Ontario law. In particular, the Ontario *Business Corporations Act*¹⁴ requires a court to look beyond the Shareholders Register and consider any evidence to the contrary.¹⁵ Professor Welling, at the hearing on jurisdiction, suggested for the first time that such evidence would have to

⁹ See Canada's Submission on Jurisdiction, ¶¶ 15-21.

¹⁰ See *Ibid.*, ¶ 16.

¹¹ See *Ibid.*, ¶¶ 15-21.

¹² *Hussein Nuaman Soufraki v. The United Arab Emirates* (ICSID Case No. ARB027) Decision on Jurisdiction (July 7, 2004) ¶¶ 53, 68 and 81 [BOA-136].

¹³ *Ibid.*, ¶¶ 81 and 84 [BOA-136]; *Hussein Nuaman Soufraki v. The United Arab Emirates* (ICSID Case No. ARB/02/7), Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki (June 5, 2007), ¶ 109. [BOA-152].

¹⁴ *Business Corporations Act* (Ontario), R.S.O. 1990, c. B. 16. ("OBCA")

¹⁵ Hearing Transcript, Day 2, page 50, line 18 to page 51, line 15 (Prof. Welling). See *OBCA*, Subsection 139(3) [ABH, Tab 6]. This provision, and other provisions like it in similar Canadian statutes, originated as an exception to rule against hearsay evidence. These provisions permitted a corporation to rely on corporate documents as evidence in a court without being introduced by a witness. See *Dominion Trust Co. v. Royal Bank of Canada* [1921] 1 W.W.R. 90 (B.C.S.C.) ¶ 14 [TAB-002, CAN-475]. This decision concerned the federal *Companies Act* R.S.C., 1906, ch. 79 s. 175; and *Page v. Austin* (1884), 10 S.C.R. 132 pp. 57-58 [TAB-003, CAN-476].

be documentary evidence because of the “REDACTED”¹⁶ However, Professor Welling was not able to provide any authority to support his suggestion.

14. In fact, the parol evidence rule is a misnomer as it is *not* a rule of evidence. Rather, it is a rule of the law of contracts pursuant to which “extrinsic evidence is inadmissible to modify a contract that has been reduced to writing.”¹⁷ Canadian courts have strictly limited its application to this context.¹⁸ In contrast, Canadian courts will generally consider both documentary evidence and witness testimony, and may also rely exclusively on oral evidence,¹⁹ to conclude that a corporate minute book – including a shareholders register – is inaccurate.²⁰

IV. THE CLAIMANT HAS FAILED TO PRODUCE RELIABLE EVIDENCE TO PROVE THAT HE OWNED THE ENTERPRISE AND WAS AN INVESTOR UNDER THE NAFTA PRIOR TO THE INTRODUCTION OF THE AMLA

15. In 2002, the Claimant was a 33-year-old government employee who had only recently become a Senior Policy Director in the Governor’s Policy Office.²¹ He was soon

¹⁶ Hearing Transcript, Day 2, page 10, lines 1-23 (Prof. Welling).

¹⁷ S.M. Waddams, *The Law of Contracts*, 4th Ed. (Toronto: Canada Law Book, 1999), at ¶¶ 318-320. [TAB-004, CAN-477] See also *Crowe v. Saskatchewan Indian Gaming Authority Inc.*, 2006 SKQB 27, 276 Sask. R. 218, ¶¶ 38-39 [TAB-005, CAN-478]

¹⁸ *Paddock v. Paddock*, 2009 ONCA 264, [2009] W.D.F.L. 1968 (Ont. C.A.), at ¶ 3. (“..the trial judge made no error in declining to apply the parol evidence rule... the presenting issue was the ownership of property and not simply the interpretation of a contract. Although the unanimous shareholders’ agreement and other corporate records are relevant to determining the ownership of the property in question, they do not govern the ownership issue.”) [TAB-006, CAN-479].

¹⁹ *Dunham v. Apollo Tours Ltd.*, (February 23, 1978), 3 B.L.R. 257, 20 O.R. (2d), 86 D.L.R. (3d) ed 573, ¶¶14-16. [TAB-007, CAN-480] This decision concerned s. 156(3) of the *OBCA* which was the predecessor of s. 139(3) of the *OBCA*.

²⁰See *Cooper v. Cayzor Athabaska Mines Ltd.* [1960] O.J. No. 186 (Ont.C.A.) ¶¶ 26-27, 32 [TAB-008, CAN-481].

²¹ See e.g. Hearing Transcript, Day 1, page 207, line 10 to page 208, line 16 (Mr. Gallo).

to be unemployed.²² He had never built or operated a waste management site and he had no experience in the waste management industry.²³

16. At this moment, if the Claimant's story is to be believed, he stumbled upon a "jackpot" – a business opportunity in which he would become the owner of a partially permitted waste disposal site at an abandoned mine in Northern Ontario allegedly worth tens of millions of dollars or more,²⁴ and which would not require him to put anything at risk or offer any sort of security.²⁵

17. This story is not credible, and ultimately, it is not supported by any reliable evidence. First, there are no reliable contemporaneous business documents to support it. Second, at no time did the Claimant behave like he was the owner of the Enterprise. Third, Mario Cortellucci and the Limited Partners acted as the owners of the Enterprise and Adams Mine.

A. There is No Reliable Contemporaneous Documentary Evidence that the Claimant Owned the Enterprise Prior to the Introduction of the *AMLA*

1. The Claimant Has None of the Documents that a Sole Shareholder Should Have

18. As explained in Canada's Counter-Memorial and its Submission on Jurisdiction, reliable contemporaneous business documents that reflect the Claimant as the sole shareholder of the Enterprise prior to the introduction of the *AMLA* should exist. There are none. In particular, there is no documentary evidence that the Claimant was involved in: the negotiations to purchase Adams Mine;²⁶ the organization and establishment of the

²² Supplementary Witness Statement of Vito G. Gallo (October 25, 2010), ¶¶ 6-7 [WSB, Tab 2]; Witness Statement of Barry Drew (October 18, 2010), ¶ 15 [WSB, Tab 14]; Witness Statement of Michael Wolf (November 5, 2010), ¶¶ 2-4 [WSB, Tab 6]; Hearing Transcript, Day 1, page 271, lines 2-4 (Mr. Gallo).

²³ Hearing Transcript, Day 1, page 231, line 17 to page 232, line 6 (Mr. Gallo).

²⁴ Hearing Transcript, Day 4, page 251, line 3 to page 255, line 17 (Mr. Cortellucci).

²⁵ Hearing Transcript, Day 1, page 247, lines 5-12; page 319, lines 7-24 (Mr. Gallo).

²⁶ Canada's Counter-Memorial, ¶¶ 218, 250; Canada's Submission on Jurisdiction, ¶¶ 28-34.

Enterprise;²⁷ the Enterprise's acquisition of Adams Mine;²⁸ the business operations of the Enterprise;²⁹ the efforts to sell Adams Mine;³⁰ raising funds to develop Adams Mine;³¹ the lawsuits brought by or against the Enterprise;³² or the negotiations with respect to the compensation made available to the Enterprise under the *AMLA*.³³

19. At the hearing, the Claimant had the opportunity to provide a reasonable explanation for his failure to introduce such documentary evidence. He did not do so. Instead, he confirmed that no documents evidencing his involvement prior to the introduction of the *AMLA* exist.

20. There are no emails, correspondence, facsimiles, memoranda, or notes among the Claimant and his alleged REDACTED, his alleged agent (Mr. Cortellucci), his alleged REDACTED, or the manager of the Site (Mr. McGuinty).³⁴ There are no emails, correspondence, legal bills, time dockets, legal memoranda, notes to file, or reporting letters prepared by REDACTED, that refer to the Claimant.³⁵ There are no contracts between the Claimant and any consultants who could have assisted in due diligence on the Site.³⁶ There are no bank records, invoices, bills, or cheques that

²⁷ Canada's Counter-Memorial, ¶ 244; Canada's Submission on Jurisdiction, ¶¶ 35-41.

²⁸ Canada's Counter-Memorial, ¶¶ 218-219, 244; Canada's Submission on Jurisdiction, ¶¶ 42-45.

²⁹ Canada's Counter-Memorial, ¶¶ 218-219, 241-242, 250; Canada's Submission on Jurisdiction, ¶¶ 46-53.

³⁰ *Ibid.*, ¶¶ 54-58.

³¹ Canada's Counter-Memorial, ¶¶ 219, 250; Canada's Submission on Jurisdiction, ¶¶ 59-67.

³² Canada's Counter-Memorial, ¶¶ 245, 250; Canada's Submission on Jurisdiction, ¶¶ 68-71.

³³ Canada's Submission on Jurisdiction, ¶¶ 72-74.

³⁴ See e.g. Hearing Transcript, Day 1, page 203, lines 3-13; page 231, lines 7-14; page 239, line 11 to page 240, line 13; page 246, line 14 to page 248, line 1; page 249, line 23 to page 250, line 15, page 295, lines 2-22 (Mr. Gallo); Hearing Transcript, Day 2, page 92, line 24 to page 93, line 9; Day 2, page 233, line 17 to page 234, line 15 (Mr. Swanick); Day 4, page 130, lines 7-19; page 133, line 17 to page 138, line 19; page 139, line 16 to page 140, line 20 (Mr. Cortellucci). The Claimant asserted for the first time at the hearing that Mr. Cortellucci sent him a presentation. See Hearing Transcript, Day 1, page 187, line 1-7; page 225, line 2 to page 231 line 14 (Mr. Gallo). However, his assertion that he received this document is not credible for the reasons discussed below. See *infra* section B.3(c), ¶¶ 79-81.

³⁵ Hearing Transcript, Day 1, page 248, line 10 to page 250, line 15 (Mr. Gallo); Hearing Transcript, Day 2, page 175, line 14 to page 176, line 24; page 180, lines 3-14; page 181, line 2 to page 183, line 3; page 183 line 8 to page 187, line 18 (Mr. Swanick).

³⁶ Hearing Transcript, Day 1, page 232, lines 7-17 (Mr. Gallo).

mention the Claimant.³⁷ Finally, there are no contemporaneous regulatory filings made prior to the introduction of the *AMLA* by the Claimant, the Enterprise or the Limited Partnership that mention the Claimant.³⁸

2. The Enterprise's Tax Returns Are Not Contemporaneous Evidence that the Claimant Owned the Enterprise Prior to the Introduction of the *AMLA*

21. Against this overwhelming lack of documentary evidence, the Claimant initially relied on the Enterprise's 2002 and 2003 tax returns to prove that he owned the Enterprise prior to the introduction of the *AMLA*. However, the Claimant has now conceded that they were not filed until October 2004, months after the *AMLA* was enacted. Moreover, the Enterprise's returns indicate that it was a Canadian Controlled Private Corporation ("CCPC") with **REDACTED** of its shares owned by Canadian residents.³⁹ Mr. Peri, who prepared the returns,⁴⁰ and Mr. Swanick, who certified them,⁴¹ have failed to provide a credible explanation reconciling this designation and certification with their allegation that the Claimant, a U.S. resident, was the Enterprise's sole shareholder.

22. With respect to the designation of the Enterprise as a CCPC, Mr. Peri asserted that he **REDACTED**

³⁷ See Supplemental Witness Statement of Franck Peri (October 25, 2010), Exhibits A, B and E. [WSB, Tab 11A, 11B and 11E]

REDACTED
REDACTED
REDACTED Hearing Transcript, Day 1, page 236, line 6 to page 239, line 7 (Mr. Gallo); Day 2, page 211, lines 2-20 (Mr. Swanick); Day 4, page 271, lines 17-24 (Mr. Peri).

³⁹ See generally Canada's Submission on Jurisdiction, ¶¶ 86-97.

⁴⁰ Hearing Transcript, Day 4, page 268, lines 2-22 (Mr. Peri); See also Witness Statement of Frank Peri (July 14, 2010) ¶ 4 [WSB, Tab 10]; Mr. Peri is employed as an accountant by Mario Cortellucci and has a long-standing personal relationship with him. See Hearing Transcript, Day 4, page 196, lines 7-17 (Mr. Cortellucci).

⁴¹ [Second] Supplementary Witness Statement of Brent Swanick (October 19, 2010) ¶¶ 8-9 [WSB, Tab 9]; Hearing Transcript, Day 2, page 158, line 19 to page 164, line 15; page 166, line 1 to page 170, line 14 (Mr. Swanick).

REDACTED This assertion was characterized by Canada's accounting expert, Mr. Truster, as REDACTED and by the Claimant's accounting expert, Mr. Kutner, as REDACTED⁴⁴ because REDACTED REDACTED REDACTED REDACTED⁴⁵ The only explanation that Mr. Kutner could offer was that the designation was accidental⁴⁶ but this was not Mr. Peri's explanation.⁴⁷

23. With respect to the representation that REDACTED of the Enterprise's shares were owned by Canadian residents, Mr. Peri's only explanation was that he did so out of habit.⁴⁸ Essentially, his explanation is that, even though he allegedly knew that the Claimant was a U.S. resident and the sole shareholder of the Enterprise, when he was preparing the provincial tax return, he manually typed REDACTED to describe the percentage of shares owned by Canadian residents instead of R⁴⁹. This explanation becomes even less credible considering that he made a similar designation indicating that the Enterprise had REDACTED on its federal tax returns.⁵⁰

⁴² Witness Statement of Frank Peri (July 14, 2010), ¶ 7. [WSB, Tab 10].

⁴³ Truster, Zweig, LLP, Re: V.G. Gallo v. Canada (December 17, 2010), p. 4 ("Truster Report"). The definition of a CCPC is also described immediately beside the box that an accountant must select on the provincial income tax returns in order to designate the corporation a CCPC. This description indicates that a CCPC is "Generally a private corporation of which 50% or more shares are owned by Canadian residents." See Hearing Transcript, Day 4, page 277, lines 16-25

⁴⁴ Hearing Transcript, Day 4, page 360, line 15 to page 361, line 15 (Mr. Kutner).

⁴⁵ Hearing Transcript, Day 4, page 361, lines 8-11 (Mr. Kutner).

⁴⁶ Deloitte & Touche LLP, Re: Vito G. Gallo v. Government of Canada (January 21, 2011), Section B, p. 3 ("Kutner Report").

⁴⁷ Witness Statement of Frank Peri (July 14, 2010), ¶ 7. [WSB, Tab 10].

⁴⁸ Hearing Transcript, Day 4, page 261, line 23 to page 262, line 9 (Mr. Peri).

⁴⁹ Hearing Transcript, Day 4, page 279, line 8 to page 280, line 10 (Mr. Peri).

⁵⁰ Truster Report, p. 4.

24. Mr. Swanick now concedes that he signed the Enterprise's federal and provincial tax returns.⁵¹ He has offered no explanation for the designation of the Enterprise as owned by Canadians except that he did not notice them before the returns were filed.⁵² Mr. Swanick,⁵³ and Mr. Kutner,⁵⁴ attempted to explain this lack of care on the grounds that nothing turned on the designation of the Enterprise as a CCPC. This is not accurate. As Mr. Truster explained, particularly with respect to initial returns, care is taken even with nil returns to ensure that mistakes are not replicated by the tax preparation software in later returns where the mistakes could be meaningful in the computation of the corporation's tax liability.⁵⁵ In this case, to the extent that profits from the sale or operation of Adams Mine remained with the Enterprise, or if compensation pursuant to the *AMLA* was paid to the Enterprise,⁵⁶ the Enterprise would have been able to claim a lower rate of taxation through the small business deduction given to a CCPC.⁵⁷

3. The Minute Book and the Shareholders Register Are Not Reliable and Contemporaneous Evidence that the Claimant Owned the Enterprise Prior to the Introduction of the *AMLA*

25. The Claimant also relied on the Minute Book, and in particular, the Shareholders Register as evidence that he owned the Enterprise before the introduction of the *AMLA*. However, the Minute Book was prepared and maintained by Mr. Swanick who admitted that the Shareholders Register would not necessarily reflect other agreements regarding

⁵¹ Supplementary Witness Statement of Brent Swanick (July 14, 2010) ¶ 3 [WSB, Tab 8]; [Second] Supplementary Witness Statement of Brent Swanick (October 19, 2010) ¶¶ 7-9 [WSB, Tab 9].

⁵² Canada's Submission on Jurisdiction, ¶¶ 95-96; Second Supplementary Witness Statement of Brent Swanick (October 19, 2010), ¶ 19 [WSB, Tab 9]; Hearing Transcript, Day 2, page 166, line 12 to page 170, line 14 (Mr. Swanick).

⁵³ Witness Statement of Brent William Swanick (February 26, 2010) ¶ 38 [WSB, Tab 7]; Hearing Transcript, Day 2, page 141, lines 4-16 (Mr. Swanick).

⁵⁴ Kutner Report, Section B, p. 3.

⁵⁵ Hearing Transcript, Day 4, page 299, line 2 to page 300, line 22 (Mr. Truster).

⁵⁶ Mr. Swanick testified that the Enterprise filed its tax returns after October, 2004 so that they could be up-to-date when it filed its compensation submission pursuant to the *AMLA*. See [Second] Supplementary Witness Statement of Brent Swanick (October 19, 2010) ¶ 10 [WSB, Tab 9].

⁵⁷ Hearing Transcript, Day 4, page 299, line 2 to page 300, line 22 (Mr. Truster).

ownership that were not disclosed to him.⁵⁸

26. Moreover, Mr. Swanick kept the Minute Book in his offices.⁵⁹ At no time prior to Canada's request in this arbitration had any of these documents relating to ownership been reviewed by any third party.⁶⁰ These documents were never filed with any regulatory authority and the information contained therein has never been verified or certified by any independent person. Accordingly, neither the Minute Book nor the Shareholders Register is sufficient proof of the Claimant's ownership of the Enterprise prior to the introduction of the *AMLA*.

27. Finally, as shown below, the testimony both from the fact witnesses and the forensic experts at the hearing established that the Minute Book is inherently unreliable evidence that should be given little weight in this arbitration. The Claimant's witnesses did not offer credible evidence as to when the documents in the Minute Book referring to the Claimant were prepared and executed. Further, both the testimony of the Minute Book manufacturer and the evidence of the forensic experts suggests that documents from the Minute Book have been removed and replaced.

a) The Witnesses Did Not Recall the Date the Minute Book was Prepared

28. The only documents in the Minute Book which the Claimant and his witnesses could date with any certainty were the Shareholder's Resolutions, which are the only documents in the *entire* record signed by the Claimant, and the Director's Resolutions. While these Resolutions were dated as if they were signed in the relevant year from 2003 through to 2008, the Claimant admitted that they were created in 2008 for the purposes of this arbitration.⁶¹

⁵⁸ Hearing Transcript, Day 2, pages 282, line 8 to page 283, line 25 (Mr. Swanick).

⁵⁹ Hearing Transcript, Day 2, page 107, lines 4-10 (Mr. Swanick).

⁶⁰ Hearing Transcript, Day 2, page 111, line 4 to page 112, line 4 (Mr. Swanick). The Minute Book contains the Articles of Incorporation and the Master Business Licence which are both filed with the Government of Ontario. However, these documents do not describe the ownership of the Enterprise.

⁶¹ Hearing Transcript, Day 1, page 282, line 5 to page 283, line 7 (Mr. Gallo) (REDACTED)
REDACTED

29. With respect to the preparation of the other documents in the Minute Book, the Claimant provided evidence from Mr. Swanick⁶² and Ms. Viggers.⁶³ Neither of these witnesses is independent or disinterested.⁶⁴ Nor could either recall exactly when these other documents were prepared or signed.⁶⁵ Ms. Viggers also admitted that she never met or even spoken to the Claimant.⁶⁶ Mr. Swanick and Ms. Viggers also failed to provide consistent or credible evidence concerning their practice of preparing corporate documents.

30. Mr. Swanick initially relied on what he claimed was his practice to assert that each of the relevant documents in the Minute Book was prepared and signed within 60 days after the date indicated thereon—either June 26, 2002 or September 9, 2002.⁶⁷ Then, after forensic examination showed that this could not be true,⁶⁸ the Claimant obtained a witness statement from Ms. Viggers, Mr. Swanick’s former assistant. In that witness statement, she claimed that her practice was to organize a minute book after she sent a

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The Claimant’s admission reveals that Mr. Swanick’s testimony that he asked the Claimant to sign the Shareholder’s Resolutions in 2008 simply to bring the Minute Book up to date, and not for the purposes of this arbitration was not credible. Hearing Transcript, Day 2, page 143, lines 16-24; and page 157, lines 4-17 (Mr. Swanick).

⁶² Mr. Swanick incorporated the Enterprise and was responsible for the maintenance of the minute book. See Hearing Transcript, Day 2, page 205, lines 2-5 (Mr. Swanick).

⁶³ Ms. Viggers prepared the organizational documents in the Minute Book. See Hearing Transcript, Day 5, page 6, line 23 to page 7, line 10; page 11, line 25 to page 12, line 2; and page 16 (Ms. Viggers)

⁶⁴ Mr. Swanick is allegedly the sole Officer and Director of the Enterprise and has worked as a REDACTED See Witness Statement of Brent William Swanick (February 26, 2010) ¶¶ 1, 4, 5, 8 [WSB, Tab 7]; Supplementary Witness Statement of Brent William Swanick (July 14, 2010), ¶¶ 14-16 [WSB, Tab 8]. Ms. Viggers was Mr. Swanick’s assistant for approximately 17 years and currently works at another law firm that does real estate work for Mr. Cortellucci. See Hearing Transcript, Day 5, page 6, lines 23-25 and page 47, lines 4-12 (Ms. Viggers).

⁶⁵ See, for Mr. Swanick, Hearing Transcript, Day 2, pages 109, lines 2-4 and page 204, lines 5-24 (Mr. Swanick). Mr. Swanick testified that he could not even recall who the principals of the Enterprise were when the *AMLA* was introduced into the Provincial Legislature in April 2004. Hearing Transcript, Day 2, pages 215, line 2 to page 216, line 3 (Mr. Swanick). See, for Ms. Viggers, Hearing Transcript, Day 5, page 22, line 25 to page 23, line 16, and page 36, lines 2-16 (Ms. Viggers).

⁶⁶ Hearing Transcript, Day 5, page 42, line 23 to page 43, line 2 (Ms. Viggers).

⁶⁷ Supplementary Witness Statement of Brent Swanick (July 14, 2010), ¶ 16 [WSB, Tab 8]

⁶⁸ See Document Examination Consultants Inc. Forensic Report (December 17, 2010) pp. 10, 17 and Charts 5(a)-(c) (“Lindblom Report”).

“Form 1” to the Ontario Ministry of Consumer and Corporate Affairs.⁶⁹ According to Ms. Viggers’ witness statement, this meant that *all* of the documents in the Enterprise’s Minute Book were signed at some point after mid-September and before mid-October 2002.⁷⁰

31. At the hearing, Mr. Swanick changed his evidence concerning his practice so that it was consistent with the witness statement of Ms. Viggers.⁷¹ However, Ms. Viggers changed her evidence at the hearing, testifying instead that she actually organized the Minute Book a [REDACTED] after the incorporation of the Enterprise on June 26, 2002,⁷² and that the share certificates were probably completed and signed on the [REDACTED] [REDACTED] on their face.⁷³ This evidence is difficult to reconcile with the fact that she received instructions to change the date on the Claimant’s share certificate from September 2 to September 9, 2002.⁷⁴

32. Ultimately, Ms. Viggers admitted that she had no precise recollection of when she made the relevant entries in the Minute Book.⁷⁵ Her belief that the Minute Book was organized a month after the date of incorporation was based on her [REDACTED],⁷⁶ She explained that her practice did not include the [REDACTED] documents,⁷⁷ which she had earlier described as altering a document to say something different from what it

⁶⁹Witness Statement of Anna Viggers (January 20, 2011), ¶ 5.

⁷⁰ *Ibid.*

⁷¹ Hearing Transcript, Day 2, page 110, line 8 to page 111, line 11 and page 190, line 22 to page 191, line 7 (Mr. Swanick).

⁷² Hearing Transcript, Day 5, page 16, lines 11-16 (Ms. Viggers).

⁷³ Hearing Transcript, Day 5, page 19, lines 17-23 (Ms. Viggers).

⁷⁴ Hearing Transcript, Day 5, page 18, lines 14-23 and page 19, lines 13-23 (Ms. Viggers) Ms. Viggers’ evidence changed again in re-direct examination when she was prompted to confirm that paragraph five of her witness statement was accurate—the same paragraph that indicated that she organized the Minute Book after mid-September and before mid-October 2002. Her response was [REDACTED]. See Hearing Transcript, Day 5, page 37, line 12 (Ms. Viggers).

⁷⁵ Hearing Transcript, Day 5, page 22, line 25 to page 23, line 6 and page 36, lines 10-16 (Ms. Viggers).

⁷⁶ Hearing Transcript, Day 5, page 16, lines 11-25 (Ms. Viggers).

⁷⁷ Hearing Transcript, Day 5, page 50, lines 1-3 (Ms. Viggers).

originally said.⁷⁸ However, Ms. Viggers admitted that often, including in this case, she took instructions from Mr. Swanick, and others in his office, to prepare documents to reflect past events and dated such documents not on the date of preparation, but the date on which she was told the event had occurred.⁷⁹ Moreover, she testified that she was not aware of the *AMLA*⁸⁰ and, thus, an instruction to record the Claimant's ownership of the Enterprise "as of" an earlier date, even if such an instruction was given after the *AMLA*, would not have necessarily seemed unusual. Therefore her practice of backdating but not **REDACTED** documents is consistent with the possibility that she included the Claimant's name in the Shareholders Register after the *AMLA*.

b) The Evidence Suggests that Certain Documents in the Minute Book Have Been Removed and Replaced

(1) The Minute Book Manufacturer Confirmed that the Documents in the Minute Book have Been Removed and Replaced

33. Mr. Robert Bain, a manager at the company responsible for the design of the Minute Book,⁸¹ testified not only that a number of documents had been removed from the Minute Book, but also that some had been replaced. In particular, the Share Transfer Register which is required by the *OBCA* is missing from the Minute Book,⁸² and the Officer's Register and the Director's Register are not the same as the originals provided by the manufacturer.⁸³ Ms. Viggers' explanation in her witness statement for the Officers' and Directors' Registers was that she probably printed different Registers from a computer program, because they were missing from the Minute Book when she

⁷⁸ Hearing Transcript, Day 5, page 26, lines 6-21 (Ms. Viggers).

⁷⁹ Hearing Transcript, Day 5, page 48, line 16 to page 49, line 15. (Ms. Viggers).

⁸⁰ Hearing Transcript, Day 5, page 47, lines 13-16 (Ms. Viggers).

⁸¹ Hearing Transcript, Day 1, page 150, lines 22-25 (Mr. Bain).

⁸² Hearing Transcript, Day 1, page 154, line 20 to page 155, line 3 (Mr. Bain). The only explanation provided for the absence of this Register was Ms. Vigger's assertion in her witness statement that it was supposedly too much work to maintain it. This is not a credible explanation for the failure to maintain a statutorily required Register. See Witness Statement of Anna Viggers (January 20, 2011), ¶ 9.

⁸³ Hearing Transcript, Day 1, pages 152, line 2 to 154, line 15 (Mr. Bain).

received it from the supplier.⁸⁴ At the hearing, Ms. Viggers changed her testimony as to the source of the Directors' Register and Officers' Register in the Minute Book. She testified that the ones in the Minute Book were simply copies of extra registers that she had around the office.⁸⁵

34. Her claim that the Minute Book must have been missing documents when it was delivered is not credible. At the hearing, Mr. Bain explained that, because of the way the Minute Book was assembled, it is REDACTED that it would have been delivered missing only the Officers' and Directors' registers.⁸⁶

35. The anomalies related to these Registers suggest the possibility that there were, at some point, other directors or officers of the Enterprise that were listed on Registers that have been removed from the Minute Book and replaced. This possibility is reinforced by other evidence at the hearing.

36. First, there are signatures on the Enterprise's REDACTED for both the REDACTED

However, as confirmed by forensic expert Mr. Lindblom, on the basis of his examination of 56 signatures of Mr. Swanick, the signature of the Secretary of the Enterprise on the REDACTED bears nor resemblance to Mr. Swanick's.⁸⁷

37. Second, Mr. Swanick did not behave as the Enterprise's sole officer and director throughout the Enterprise's existence. In particular, he testified that, if he was the director of a corporation that became involved in litigation, he would normally have reviewed the information in its corporate minute book.⁸⁸ The Enterprise was involved in two significant litigations in 2003. However, according to Mr. Swanick, the first time he

⁸⁴ Witness Statement of Ms. Viggers (January 20, 2011), ¶ 11.

⁸⁵ Hearing Transcript, Day 5, page 8, line 12 to page 9, line 7 (Ms. Viggers).

⁸⁶ Hearing Transcript, Day 1, page 155, line 7 to page 156, line 20 (Mr. Bain).

⁸⁷ See Hearing Transcript, Day 3, page 38, lines 1-18 and page 47, line 23 to page 48, line 20 (Mr. Lindblom). Mr. Lindblom also testified that it was extremely unusual to have two signatures from the same person, side-by-side, that are so different. See Hearing Transcript, Day 3, page 38, line 19 to page 39, line 2 (Mr. Lindblom). Mr. Gallo also did not believe that Mr. Swanick signed the document as Secretary as he did not recognize the signature as being Mr. Swanick's. See Hearing Transcript, Day 1, page 285, line 14 to page 286, line 12 (Mr. Gallo). Similarly, Mr. Cortellucci equivocated over whether this signature was from Mr. Swanick. See Hearing Transcript, Day 4, page 193, line 16 to page 194, line 17 (Mr. Cortellucci).

⁸⁸ Hearing Transcript, Day 2, page 218, line 14 to page 219, line 8 (Mr. Swanick).

reviewed the Enterprise's Minute Book, after its incorporation, was when the *AMLA* was introduced into the Ontario Legislature in April 2004.⁸⁹

38. Finally, Mr. Lindblom's forensic examination of the documents in the Minute Book identified the indentation of an unidentified signature, which was not Mr. Swanick's, [REDACTED]. The alignment and position of this unidentified and unsourced signature overlaps the indentation of the director's signature [REDACTED] [REDACTED]⁹⁰ This suggests that another [REDACTED] was signed by a different individual acting as the Enterprise's Director.

(2) The Forensic Indentation Analysis Suggests Documents in the Minute Book have Been Removed and Replaced

39. Mr. Lindblom explained in his report that he found indentations on documents in the Minute Book which, from their location and alignment, indicate that other documents were once present and signed in the Minute Book, but have since been removed. In particular, the indentations that Mr. Lindblom identified suggest that at one point there was at least one other [REDACTED] that a document may have been removed from the section of the Minute Book containing documents issuing and transferring the share,⁹² and, most importantly, that at one point there was another signed share certificate in the Minute Book.⁹³ These results are inconsistent with the Claimant's earlier assertion that there were no documents missing from the Minute Book.⁹⁴

⁸⁹ Hearing Transcript, Day 2, page 212, line 7 to page 214, line 7 (Mr. Swanick).

⁹⁰ Hearing Transcript, Day 3, page 52, line 6 to page 59, line 9 (Mr. Lindblom). Also see Lindblom Report, p. 7, and Charts 2(a) and 2(b).

⁹¹ Hearing Transcript, Day 3, page 55, line 25 to page 56, line 10 (Mr. Lindblom) Also see Lindblom Report, p. 7, and Charts 2(a) and 2(b).

⁹² See Lindblom Report, p. 8 and Charts 6(a) and 6(b).

⁹³ Hearing Transcript, Day 3, page 41, lines 7-23 (Mr. Lindblom); Lindblom Report, p. 11, and Charts 7(a) and 7(c).

⁹⁴ Canada's Submission on Jurisdiction, ¶¶ 108-109. Letter from C. Gastle to M. Owen (October 4, 2010) [CDB, Tab 58]

40. To explain these unsourced indentations, Ms. Viggers, in her witness statement,⁹⁵ and Mr. Swanick, in his testimony at the hearing,⁹⁶ claimed that Ms. Viggers would provide Mr. Swanick with the signature pages from many different corporations together, and that these unsourced indentations could have come from signatures on documents of other corporations.

41. However, in her oral testimony, Ms. Viggers confirmed several times that when she provided minute book documents, including share certificates, to Mr. Swanick for signature, she kept the documents for each corporation separate.⁹⁷ The documents on which Mr. Lindblom found unsourced indentations were located in the middle of the Minute Book, and therefore, no document from another corporation would have been on top of any of these documents when signed.

42. When asked how such indentations occurred on documents in the middle of the Minute Book, Ms. Viggers suggested that the unsourced signatures in the Minute Book might be from other documents, such as cheques.⁹⁸ However, this does not account for how, on Mr. Swanick's chaotic and disorganized desk,⁹⁹ those signature indentations were perfectly aligned with the signature lines of the existing documents.¹⁰⁰

43. Finally, the indentations found by Mr. Lindblom suggest that while certain documents were signed while fastened in the Minute Book, others were signed outside of it and inserted later. In particular, the lack of an indentation from the signature on the

REDACTED

where Mr. Swanick signed as the Enterprise's director, REDACTED

REDACTED

REDACTED

was not in the Minute Book when the REDACTED

⁹⁵ Witness Statement of Anna Viggers (January 20, 2011) ¶¶ 1, 14-15.

⁹⁶ Hearing Transcript, Day 2, page 106, lines 2-21 (Mr. Swanick).

⁹⁷ Ms. Viggers was clear about this point on a number of occasions in her testimony. Hearing Transcript, Day 5, page 17, lines 4-18, page 20, line 24 to page 22, line 5 (Ms. Viggers).

⁹⁸ Hearing Transcript, Day 5, page 38 line 19 to page 39 line 7 (Ms. Viggers).

⁹⁹ Hearing Transcript, Day 5, page 9, lines 8-21 (Ms. Viggers); Day 2, page 265, line 22 to page 267, line 8 (Mr. Swanick).

¹⁰⁰ Hearing Transcript, Day 3, page 40, line 6 to page 44, line 4; page 55, line 14 to page 59, line 9 (Mr. Lindblom).

was signed.¹⁰¹ Moreover, the fact that the signature on the second page of [REDACTED] is indented, in perfect alignment, onto the divider that follows it suggests that it was later inserted and signed in the Minute Book.¹⁰²

44. Further, the absence of indentations on certain documents in the middle of the Minute Book, including the document [REDACTED],¹⁰³ is consistent with those documents not being in the Minute Book when signed.

45. Finally, the alignment of the indentations on the documents that transfer the share to the Claimant, is also consistent with those documents not being in the Minute Book when Mr. Swanick started signing them, but then, at some point during the signing process, being reordered and added to the Minute Book.¹⁰⁴

46. The dates that the documents described above were removed from, or added to, the Minute Book cannot be determined by the forensic indentation analysis.¹⁰⁵ However, Mr. Swanick's testimony, that after the Minute Book was originally prepared he did not open it again until after the *AMLA* had been introduced, is consistent with these modifications occurring in 2004.¹⁰⁶

¹⁰¹ Hearing Transcript, Day 3, page 59, line 10 to page 61, line 14 (Mr. Lindblom). See Lindblom Report, pp. 9-10 and Charts 3(a), 4(a), 4(b) and 4(c).

¹⁰² See Lindblom Report, p. 10 and Charts 4(a) and 4(c).

¹⁰³ See Lindblom Report, p. 7 and Documents 6(1) and 6(2).

¹⁰⁴ See Lindblom Report, p. 10 and Charts 5(d), 6(a) and 6(c). Hearing Transcript, Day 3, page 33, line 1 to page 35, line 1 (Mr. Lindblom). In particular, Documents 8, 9 and 10 appear to have been outside of the Minute Book when Document 8 was signed. However, Document 10 appears to have been fastened back into the Minute Book when it was signed based on the alignment and positioning of this document when compared to Divider D4. See Lindblom Report, Chart 6(c).

¹⁰⁵ Mr. Lindblom confirmed that while his forensic tests showed that the dates on some of documents in the Minute Book were not reliable, the scientific limitations of the available forensic tests meant that none of the experts could definitively say when the documents were signed. See Hearing Transcript, Day 3, page 63, lines 1-7 (Mr. Lindblom). See also Hearing Transcript, Day 4, page 59 (Dr. Aginsky).

¹⁰⁶ Hearing Transcript, Day 2, page 212, line 7 to page 214, line 7 (Mr. Swanick).

(3) The Forensic Ink Analysis is Consistent With Documents in the Minute Book Having Been Removed and Replaced

47. Mr. Lindblom explained in his report that Mr. Swanick used a total of five different inks to sign the documents in the Minute Book.¹⁰⁷ At the hearing, Mr. Lindblom confirmed that it is highly unusual for documents to be signed at the same time with so many different inks.¹⁰⁸ These results are therefore consistent with the documents now found in the Minute Book being prepared and signed at different times.

48. Mr. Swanick – and Ms. Viggers – attempted to explain away the number of inks on these documents by claiming that Mr. Swanick normally had five or six different pens out on his desk and that he was often interrupted when signing documents.¹⁰⁹ However, if Mr. Swanick’s testimony is believed, he was presented with all of the organizational documents at one time, and even though he gave these documents only a cursory review,¹¹⁰ he must have been interrupted at least nine times during the signing process and picked up a different pen after each interruption.¹¹¹ The more logical conclusion is that the Minute Book includes documents that have replaced others and were added at some other date, possibly after the *AMLA*.

B. The Claimant Did Not Act As the Owner of the Enterprise

49. The lack of reliable contemporaneous documentary evidence mentioning the Claimant’s involvement with Adams Mine is inconsistent with his claim that he was the

¹⁰⁷ Lindblom Report, pp. 12-15. The ink on document 9 was distinguished using a Video Spectral Comparator. The other seven inks were identified using a Thin Layer Chromatography test. See also Hearing Transcript, Day 3, page 25, line 1 to page 28, line 2 (Mr. Lindblom). The number of inks referred to above excludes the Articles of Incorporation and the Director’s Resolutions, which were signed in 2008.

¹⁰⁸ Hearing Transcript, Day 3, page 25, line 1 to page 28, line 2 (Mr. Lindblom).

¹⁰⁹ Hearing Transcript, Day 2, page 108, lines 12-22; page 114 line 12 to page 115, line 21 (Mr. Swanick); and Day 5, page 28, line 10 to page 29 line 6, and page 31, lines 7-11 (Ms. Viggers).

¹¹⁰ Hearing Transcript, Day 2, page 268, lines 4-8 (Mr. Swanick).

¹¹¹ Hearing Transcript, Day 2, page 108, lines 12-18 and page 115, lines 3-21 (Mr. Swanick) See also Hearing Transcript, Day 5, page 9, lines 22-25; page 20, lines 18-23; and page 28, line 10 to page 29, line 6 (Ms. Viggers). Mr. Swanick would have to have been interrupted nine times in light of the number and order of the organizational documents found in the Lindblom Report (see Lindblom Report, documents listed under D2, D3 and D6 in Appendix 2, combined with the ink analysis on page 14 and 15 of this report).

owner of the Enterprise, as is his behaviour prior to the introduction of the *AMLA*. At no time did the Claimant act like he was the owner of the Enterprise. He made no contribution to the Enterprise. He did not hold himself out as the owner of the Enterprise to management, his friends, his family or even the tax authorities. He was even disinterested in the most basic issues that would concern an owner, namely, the risks and rewards of ownership.

1. The Claimant Made No Economic or Other Contribution to the Enterprise

50. The Claimant contributed nothing to the Enterprise. He admitted that he did not contribute any capital to the Enterprise, either initially to fund the purchase of the Adams Mine Site by the Enterprise,¹¹² or at any point thereafter.¹¹³ Further, as shown below, the testimony revealed that the Claimant also put no time or effort into the managing or even understanding the operations of the business he allegedly owned.

51. The only source of REDACTED for the Enterprise was REDACTED¹¹⁴. However, the Claimant never knew and never cared to find out who the Limited Partners were (other than Mr. Cortellucci),¹¹⁵ did not know that the individual Limited Partners had REDACTED¹¹⁶ and had never seen the Limited Partnership Agreement,¹¹⁷ despite the fact the Enterprise was the general partner of the Limited Partnership.¹¹⁸ Further, while the Limited Partners allegedly

¹¹² Hearing Transcript, Day 1, page 251, lines 11-20 (Mr. Gallo).

¹¹³ Hearing Transcript, Day 1, page 319, lines 13-24 (Mr. Gallo).

¹¹⁴ Hearing Transcript, Day 1, page 260, lines 8-22 (Mr. Gallo).

¹¹⁵ Hearing Transcript, Day 1, page 252, line 10 to page 253, line 15 and page 278, line 11 to page 280, line 25 (Mr. Gallo). In fact, at one point he seemed to indicate that his understanding was that Mr. McGuinty was a Limited Partner as well. Hearing Transcript, Day 1, page 261, lines 4-12 (Mr. Gallo).

¹¹⁶ Hearing Transcript, Day 1, page 281, lines 1-23 (Mr. Gallo).

¹¹⁷ Hearing Transcript, Day 1, page 274, lines 12 to page 275, line 1 and page 276, lines 11-20 (Mr. Gallo).

¹¹⁸ Limited Partnership Agreement, [CDB, Tab 21]. The Enterprise as the general partner of the Limited Partnership would also have unlimited liability for the actions of the Limited Partnership when it managed the site. However, the Claimant did not seem to have any understanding of this critical fact, instead testifying that Limited Partners are called REDACTED

REDACTE Hearing Transcript, Day 1, page 268, lines 7-10 (Mr. Gallo).

REDACTED the Enterprise only pursuant to an alleged Loan Agreement,¹¹⁹ the Claimant did not know when the Loan Agreement was signed,¹²⁰ did not know the interest rate on the loan,¹²¹ and never saw the actual Loan Agreement.¹²²

52. The Claimant also admitted that he was unfamiliar with the Enterprise's purported management arrangements. In particular, the Claimant testified at the hearing that he did not know that the **REDACTED** the Enterprise.¹²³ He believed that the only person retained to manage the Site was Mr. McGuinty.¹²⁴

53. According to the Claimant, his ignorance of these basic matters stems from the fact that his role in the Enterprise was to raise money for the development of the Adams Mine,¹²⁵ and that he left management to his alleged agent, Mr. Cortellucci.¹²⁶ However, Mr. Cortellucci testified that he was not managing the Enterprise, and that he was leaving all of the decisions to the Claimant.¹²⁷

54. Moreover, the testimony revealed that the Claimant was also not making any efforts to raise money for the Enterprise. The Claimant not only failed to recall the venture capitalists and individuals in the Pennsylvania waste industry that he allegedly

¹¹⁹ Hearing Transcript, Day 1, page 260, lines 8-22 (Mr. Gallo); Day 4, page 149, lines 15-25 (Mr. Cortellucci)

¹²⁰ Hearing Transcript, Day 1, page 253, line 16 to page 255, line 10 (Mr. Gallo).

¹²¹ Hearing Transcript, Day 1, page 257, line 17 to page 259, line 5 (Mr. Gallo).

¹²² Hearing Transcript, Day 1, page 275, line 16 to page 276, line 3 (Mr. Gallo).

¹²³ Hearing Transcript, Day 1, page 260, line 23 to page 265, line 13 (Mr. Gallo). In light of the Claimant's admission, Mr. Swanick's testimony, Hearing Transcript, Day 2, page 228, line 11-25, and Mr. Cortellucci's testimony, Day 4, page 151, line 24 to page 154, line 18 (Mr. Cortellucci), that the Claimant was aware of this alleged agreement is not credible.

¹²⁴ Hearing Transcript, Day 1, page 260, line 23 to page 265, line 13 (Mr. Gallo).

¹²⁵ Witness Statement of Vito Gallo (February 26, 2010), ¶ 71 **[WSB, Tab 1]**; Hearing Transcript, Day 1, page 52, line 17-24 (Claimant's Opening); Day 1, page 272, line 18 to page 274, line 11 (Mr. Gallo).

¹²⁶ Hearing Transcript, Day 1, page 192, lines 12-20; page 196, lines 2-12; page 233, lines 9-17; page 249, line 12 to page 250, line 15; page 269, line 17-page 270, line 5; and page 278, lines 10-23 (Mr. Gallo)

¹²⁷ Hearing Transcript, Day 4, page 105, lines 2-9; page 130, lines 7-10; page 134, line 19 to page 136, line 10; page 172, line 18-page 173, line 11; and page 227, lines 1-9 (Mr. Cortellucci).

contacted,¹²⁸ but the two friends he did speak with, Mr. Noto and Mr. Belardi, both affirmed his inactivity.

55. Mr. Noto testified that the Claimant never provided him with a single document with respect to the Adams Mine,¹²⁹ that the Claimant provided him with no details about the size or permitted capacity of the Adams Mine (details crucial to any potential investor),¹³⁰ and that, indeed, the Claimant never even mentioned the name of the site to him.¹³¹ Mr. Noto also admitted that his “REDACTED” with his contacts about this unidentified site were limited to no more than updates to say that he had no other information.¹³²

56. Similarly, there is no credible evidence that the Claimant discussed fundraising with Mr. Belardi. At the hearing, Mr. Belardi testified that “REDACTED”, the owner of the “REDACTED”, was excited about the project and “REDACTED” “REDACTED”.¹³³ However, this is inconsistent with his own witness statement, where he was explicit that he never even mentioned the Adams Mine to “REDACTED”.¹³⁴ It was also inconsistent with most of his other testimony at the hearing. For example, he testified that he never got a “REDACTED” from the Claimant that he could use to approach “REDACTED”,¹³⁵ that there was never a deal “REDACTED”,¹³⁶ and that “REDACTED” had shifted his focus to a casino project by 2004.¹³⁷ Furthermore, Mr. Belardi testified that it would be “REDACTED” for an investor to acquire a former mine without doing environmental

¹²⁸ Hearing Transcript, Day 1, page 212, line 25 to page 214, line 25 (Mr. Gallo).

¹²⁹ Hearing Transcript, Day 4, page 80, lines 17-21 (Mr. Noto).

¹³⁰ Hearing Transcript, Day 4, page 78, lines 17-24; page 87, line 12 to page 88, line 3; and page 89, lines 6-16 (Mr. Noto).

¹³¹ Hearing Transcript, Day 4, page 76, lines 3-14 (Mr. Noto).

¹³² Hearing Transcript, Day 4, page 92, line 25 to page 93 line 14 (Mr. Noto).

¹³³ Hearing Transcript, Day 1, page 124, lines 8-12, and page 143, lines 16-18 (Mr. Belardi).

¹³⁴ Witness Statement of Jeffrey Belardi (October 25, 2010), ¶ 15 [WSB, Tab 5].

¹³⁵ Hearing Transcript, Day 1, page 142, lines 2-14 (Mr. Belardi).

¹³⁶ Hearing Transcript, Day 1, page 123, lines 21-25 and page 138, lines 11-15 (Mr. Belardi).

¹³⁷ Hearing Transcript, Day 1, page 114, line 18 to page 115, line 4 (Mr. Belardi).

due diligence.¹³⁸ Yet, there is no evidence that he had ever begun any due diligence on behalf of his client.

57. The Claimant's failure to make any effort to raise funds for the development of Adams Mine into a waste disposal site is not surprising in light of documents confirming that Mr. McGuinty was trying to sell the Adams Mine undeveloped.¹³⁹ Documents also confirm that Mr. Cortellucci was trying to sell the Site and that he had retained Mr.

REDACT to assist him in doing so.¹⁴⁰ In fact, Mr. Cortellucci also confirmed that the Limited Partners had not committed **REDACT** to take even the initial steps to develop the Site,¹⁴¹ and that they did not intend to do so.¹⁴²

58. Selling Adams Mine undeveloped made perfect sense as a business strategy for Mr. Cortellucci. He was a successful multi-millionaire businessman with nearly 40 years of experience purchasing and developing land in Ontario.¹⁴³ He also had political connections as he was one of the largest donors to the political party in power in the provincial government in 2002.¹⁴⁴ In short, he had the experience purchasing, promoting and selling land; he had the financial resources to purchase and market the Site; and he

¹³⁸ Hearing Transcript, Day 1, page 147, line 19 to page 148, line 4 and page 127, line 23 to page 18, line 17 (Mr. Belardi).

¹³⁹ **REDACTED**

REDACTED

REDACTED

At the hearing, Mr. Cortellucci testified that Mr. McGuinty was making such efforts because it was in his financial interest to see the Site sold. Hearing Transcript, Day 4, page 237, line 7-20 (Mr. Cortellucci). The only reason why Mr. McGuinty would want a sale was if the Enterprise never planned to develop Adams Mine, since he could only collect the royalties due to Notre if the site was built and operating. See Agreement of Purchase and Sale between Notre Development Corporation and Cortellucci Group of Companies, in trust and Gordon E. McGuinty, in trust (May 10, 2002), at Bates Number 00607. **(CDB, Tab 9)**

¹⁴⁰ Agreement among 1532382 Limited Partnership, **REDACTED** and 1532382 Ontario Inc. (April 1, 2003) page 2 **(CDB, Tab 34)**;

¹⁴¹ Hearing Transcript, Day 4, page 208, line 17 to page 211, line 10 (Mr. Cortellucci).

¹⁴² Hearing Transcript, Day 4, page 149, line 5 to page 150, line 5, page 210, lines 14-25, page 211, lines 1-10 (Mr. Cortellucci).

¹⁴³ Hearing Transcript, Day 4, page 125, line 20 to page 126, line 6. (Mr. Cortellucci).

¹⁴⁴ See Canada's Submission on Jurisdiction, ¶ 29.

had the political connections to effectively lobby provincial and municipal officials to endorse or even purchase the Site.

2. The Claimant Did Not Hold Himself Out as the Owner of the Enterprise

a) The Claimant Did Not Hold Himself Out as the Owner of the Enterprise to the Enterprise's Own Manager

59. The Claimant admitted that he has never spoken to Mr. McGuinty, the managing director of the Enterprise:¹⁴⁵ not prior to allegedly instructing that Mr. McGuinty be retained on an unconditional five year, million dollar contract; not at any time during the attempts to acquire the permits still required by the Enterprise; not about the efforts to obtain the required lands surrounding the Adams Mine; and not about any of Mr. McGuinty's efforts to sell the Site.

60. The explanations that the Claimant has offered for this lack of communication have varied considerably over the course of this arbitration. He testified in his witness statements that he kept his involvement secret because he was worried that Mr. McGuinty might raise the purchase price if he knew of the Claimant's involvement and that his involvement in the project could embarrass the Pennsylvania's Governor's office.¹⁴⁶ Yet, as the Claimant admitted at the hearing, he also did not speak to Mr. McGuinty after the transaction had closed, or after he had left government.¹⁴⁷

61. The Claimant also testified that there was no need for him to speak to Mr. McGuinty prior to retaining him because he was confident in Mr. McGuinty's ability to run the business.¹⁴⁸ Given that the Claimant never met Mr. McGuinty, his only source of confidence about Mr. McGuinty's abilities was Mr. Cortellucci.¹⁴⁹ However, the

¹⁴⁵ Hearing Transcript, Day 1, page 233, lines 18-23 and page 269, lines 13 to page 270, line 5 (Mr. Gallo).

¹⁴⁶ Witness Statement of Vito Gallo (February 26, 2010), ¶¶ 64-65. [WSB, Tab 1].

¹⁴⁷ Hearing Transcript, Day 1, page 270, line 10 to page 271, line 7 (Mr. Gallo)

¹⁴⁸ Hearing Transcript, Day 1, page 269, lines 13-20 (Mr. Gallo).

¹⁴⁹ Hearing Transcript, Day 1, page 26, line 21 to page 270, line 5 (Mr. Gallo).

Claimant had only just met Mr. Cortellucci,¹⁵⁰ and one of the only things that he knew about him was that Mr. Cortellucci had no experience in the waste disposal industry.¹⁵¹ Consequently, there would have been no justifiable reason for the Claimant to trust Mr. Cortellucci's ability to assess the qualifications of a manager of a waste management project.

62. The Claimant then testified that he kept his identity secret from Mr. McGuinty because his new employer, Lehigh University, had a policy prohibiting outside employment.¹⁵² However, he failed to submit any evidence to support this testimony despite the fact that this policy is publicly available.¹⁵³

63. The Claimant also testified that he was not willing to disclose his identity to Mr. McGuinty because he was concerned that Mr. McGuinty would disclose it to the press and that he would have to endure the resulting public relations issues associated with ownership of a controversial waste disposal site.¹⁵⁴ Keeping the Claimant's identity from Mr. McGuinty, however, forced Mr. Cortellucci to deal with these issues.¹⁵⁵ It is not credible that Mr. Cortellucci, an Ontario residential developer, would willingly be associated with a waste disposal site – with the attendant public relations issues – so that a resident of Pennsylvania, with no business or other interests in Ontario, could avoid such issues. In fact, it was Mr. Cortellucci himself who explained that residential developers do not want their names associated with waste disposal sites.¹⁵⁶

¹⁵⁰ They had spoken once at a social event and only a couple of times on the phone before Mr. Cortellucci agreed to Mr. McGuinty's terms and conditions in the Agreement of Purchase and Sale that Mr. Cortellucci signed in May 2002. Hearing Transcript, Day 1, page 208, line 17 to page 210, line 18 (Mr. Gallo).

¹⁵¹ Hearing Transcript, Day 1, page 209, lines 22-25 (Mr. Gallo).

¹⁵² Hearing Transcript, Day 1, page 271, line 19 to page 272, line 11 (Mr. Gallo).

¹⁵³ Lehigh University Conflict of Interest Policy (October 11, 2002) is publicly available at http://www.lehigh.edu/~policy/documents/coi_policy-updated_11-6-08.pdf.

¹⁵⁴ Hearing Transcript, Day 1, page 271, lines 8-11 (Mr. Gallo).

¹⁵⁵ Hearing Transcript, Day 4, page 235, line 24 to page 236, line 21 (Mr. Cortellucci).

¹⁵⁶ Hearing Transcript, Day 4, page 255, lines 11-16 (Mr. Cortellucci)

b) The Claimant Did Not Hold Himself Out as the Owner of the Enterprise to His Cousin Who was an Investor in the Enterprise

64. For the first time at the hearing, the Claimant acknowledged that he is a cousin of Mr. Saverio Montemarano.¹⁵⁷ Mr. Montemarano is one of Mr. Cortellucci's oldest business associates and his partner in numerous ventures¹⁵⁸— including the Limited Partnership that [REDACTED] the Enterprise.¹⁵⁹ According to the bank records of the Enterprise, [REDACTED], [REDACTED].¹⁶⁰

65. The Claimant testified that he traveled to Toronto in late September 2002.¹⁶¹ During this trip, he visited the CN Tower with his cousin, Mr. Montemarano.¹⁶² On this same trip, the Claimant allegedly visited Mr. Cortellucci to review the status of Adams Mine.¹⁶³ Yet, the Claimant testified that he did not know Mr. Montemarano was a Limited Partner in the project.¹⁶⁴ This means that, when they were together, two weeks after Mr. Montemarano had made his [REDACTED], ten days after the Enterprise acquired title to Adams Mine, and within days of the Claimant's alleged visit to review the status of the project, they never discussed the business in which they were allegedly both involved.

¹⁵⁷ Hearing Transcript, Day 1, page 314, line 21 to page 315, line 15 (Mr. Gallo).

¹⁵⁸ Hearing Transcript, Day 4, page 145, line 23 to page 146, line 10 (Mr. Cortellucci). See also Day 1, page 315, line 24 to page 316, line 1 (Mr. Gallo). Vito Gallo knew that Mr. Montemarano was a close associated of Mr. Cortellucci.

¹⁵⁹ Hearing Transcript, Day 4, page 145, line 23 to page 146, line 4 (Mr. Cortellucci).

¹⁶⁰ Business Deposit Slips (September 5, 2002), Deposit from 813253 Ontario Corporation (Claimant's Bates Number 03994) (Exhibit "B" to the Affidavit of Frank Peri dated October 25, 2010) [WSB, Tab 11B]; According to publicly available records, 813253 Ontario Corp., is Mr. Montemarano's corporation. Corporation Profile Report for 813253 Ontario Corp. [CDB, Tab 74].

¹⁶¹ Hearing Transcript, Day 1, page 250, line 21 to page 251, line 1 (Mr. Gallo); Supplementary Witness Statement of Vito Gallo (October 25, 2010), ¶ 18 [WSB, Tab 2].

¹⁶² Hearing Transcript, Day 1, page 314, line 21 to page 318, line 15 (Mr. Gallo); Supplementary Witness Statement of Vito Gallo (October 25, 2010), ¶ 19.

¹⁶³ Supplementary Witness Statement of Vito Gallo (October 25, 2010), ¶ 18 [WSB, Tab 2]

¹⁶⁴ Hearing Transcript, Day 1, page 314, line 21 to page 318, line 15, and page 318, lines 10-21 (Mr. Gallo).

c) The Claimant Did Not Hold Himself Out as the Owner of the Enterprise to Friends Who Were Involved with the Project

66. In his opening statement, the Claimant pointed to the testimony of three allegedly independent witnesses – Mr. Wolf, Mr. Noto and Mr. Belardi – as evidence that he was the owner of the Enterprise prior to the introduction of the *AMLA*.¹⁶⁵ All three individuals are his friends,¹⁶⁶ and yet, far from supporting the Claimant’s allegations, both Mr. Wolf and Mr. Noto testified at that hearing that the Claimant had never once told them that he was the owner of the Adams Mine.

67. Mr. Wolf has been the Claimant’s friend for nearly twenty years.¹⁶⁷ According to Mr. Wolf, he discussed the Claimant’s possible involvement in the waste management industry in Canada with the Claimant prior to 2003,¹⁶⁸ and according to the Claimant, it was in part because of Mr. Wolf’s advice that he got involved with the project.¹⁶⁹ Mr. Wolf also testified that the Claimant and he still see each other frequently because of their respective jobs.¹⁷⁰ Not once in the nearly 10 years since he allegedly acquired it, however, did the Claimant ever mention to his friend and advisor that he was the owner of Adams Mine.¹⁷¹

68. Similarly, Mr. Noto has been the Claimant’s friend for over a decade.¹⁷² In fact, Mr. Noto was the former business partner of the Claimant and his wife immediately after Mr. Noto left government employment in 2004.¹⁷³ Further, Mr. Noto testified that

¹⁶⁵ Hearing Transcript, Day 1, page 23, lines 5-19 (Claimant’s Opening).

¹⁶⁶ Hearing Transcript, Day 3, page 184, line 21 to page 185, line 6 (Mr. Wolf); Day 4, page 70, lines 3-23 (Mr. Noto); Day 1, page 112, lines 20-25 (Mr. Belardi).

¹⁶⁷ Hearing Transcript, Day 3, page 184, line 21 to page 185, line 6 (Mr. Wolf).

¹⁶⁸ Witness Statement of Michael Wolf (November 5, 2010), ¶ 9 [WSB, Tab 6]; Hearing Transcript, Day 3, page 177, lines 22-24, page 180, lines 10-18, page 181, line 25 to page 183, line 14; and page 189, lines 4-18 (Mr. Wolf).

¹⁶⁹ Hearing Transcript, Day 1, page 182, line 1 to page 183, line 17 (Mr. Gallo).

¹⁷⁰ Hearing Transcript, Day 3, page 190, line 19 to page 191, line 2 (Mr. Wolf).

¹⁷¹ Hearing Transcript Day 3, page 191, lines 3-7 (Mr. Wolf).

¹⁷² Hearing Transcript, Day 4, page 70, lines 3-23 (Mr. Noto).

¹⁷³ Hearing Transcript, Day 4, page 71, lines 10-19 (Mr. Noto); Witness Statement of Philip Noto (February 26, 2010) ¶¶ 3-4 [WSB, Tab 3].

between 2002 and 2004 he discussed with the Claimant opportunities in the waste management industry¹⁷⁴ and that he was in contact with the **REDACTED** on behalf of the Claimant, with respect to their possibly becoming involved in an Ontario waste disposal project.¹⁷⁵ Despite this, Mr. Noto admitted that he could not recall a single instance when the Claimant told him that he was the owner of Adams Mine.¹⁷⁶

69. The only witness who testified that Mr. Gallo actually said he owned the Adams Mine was Mr. Belardi. However, Mr. Belardi's testimony is not credible. His testimony was both internally inconsistent, and contradicted by the testimony of the Claimant and Mr. Cortellucci.

70. Mr. Belardi testified that the Claimant sought his advice about whether to purchase the Adams Mine¹⁷⁷ and sent him a draft purchase agreement to review.¹⁷⁸ However, Mr. Belardi never mentioned this conversation in his direct examination, or in his witness statement, where he was explicit that the Claimant only spoke to him before the Claimant had supposedly identified a site and then after Adams Mine had been purchased.¹⁷⁹

71. Nor did Mr. Belardi mention in his witness statement that he received a draft purchase agreement.¹⁸⁰ Further, he did not know the names Mario Cortellucci and Gordon McGuinty¹⁸¹ even though the parties to the Agreement of Purchase and Sale include the Cortellucci Group of Companies ("Cortellucci Group") and Mr. McGuinty. Mr. Belardi's testimony in this regard was further discredited when Mr. Cortellucci confirmed that he never sent the Claimant a draft agreement.¹⁸²

¹⁷⁴ Hearing Transcript, Day 3, page 74, line 8 to page 76, line 19 (Mr. Noto).

¹⁷⁵ Hearing Transcript, Day 3, page 76, line 20 to page 80, line 16 (Mr. Noto).

¹⁷⁶ Hearing Transcript, Day 3, page 76, lines 15-19 (Mr. Noto).

¹⁷⁷ Hearing Transcript, Day 1 page 132, lines 3-6 (Mr. Belardi).

¹⁷⁸ Hearing Transcript, Day 1, page 132, lines 7-16 (Mr. Belardi).

¹⁷⁹ Witness Statement of Jeffrey Belardi (October 25, 2010), ¶¶ 12-13 [WSB, Tab 5]; Hearing Transcript, Day 1, page 132, line 3 to page 134, line 25 (Mr. Belardi).

¹⁸⁰ Hearing Transcript, Day 1, page 135, line 1-12 (Mr. Belardi).

¹⁸¹ Hearing Transcript, Day 1, page 145, line 19 to page 146, line 15 (Mr. Belardi).

¹⁸² Hearing Transcript, Day 4, page 138, lines 7-19 (Mr. Cortellucci).

d) The Claimant Did Not Claim to be the Owner of the Enterprise on His U.S. Income Tax Returns

72. As explained in Canada's previous submissions, if the Claimant was the sole shareholder of the Enterprise, he had an obligation to make certain filings with the U.S. tax authorities.¹⁸³ It is undisputed that he made no filings until 2008, and in fact, there is still no evidence in the record that he has made all the required filings.¹⁸⁴

73. The Claimant's explanation that it never crossed his mind that, as a U.S. resident, he might have to inform U.S. tax authorities that he was the sole shareholder of a corporation that held an asset supposedly worth tens, if not hundreds, of millions of dollars, is not credible. Despite confirming that he had an accountant prepare his U.S. tax returns,¹⁸⁵ the Claimant admitted that he did not believe that he mentioned his ownership of the Enterprise to this accountant,¹⁸⁶ and that he did not consult any U.S. tax advisors about any tax implications or reporting obligations related to his ownership of the Enterprise.¹⁸⁷ According to the Claimant, the only person he spoke to concerning any U.S. tax obligations was Mr. Swanick, whom he knew was not qualified to give him such advice.¹⁸⁸ Moreover, at the hearing, the Claimant confirmed, several times, that the first time that he received U.S. tax advice from Mr. Swanick was in 2008 – long after both the *AMLA* and the initiation of this arbitration.¹⁸⁹

¹⁸³ Canada's Submission on Jurisdiction, ¶ 77.

¹⁸⁴ Canada's Submission on Jurisdiction, ¶ 79.

¹⁸⁵ Hearing Transcript, Day 1, page 236, lines 6-8 (Mr. Gallo).

¹⁸⁶ Hearing Transcript, Day 1, page 236, lines 6-25 (Mr. Gallo).

¹⁸⁷ Hearing Transcript, Day 1, page 235, line 23 to page 237, line 22 (Mr. Gallo).

¹⁸⁸ Hearing Transcript, Day 1, page 237, lines 1-19 (Mr. Gallo).

¹⁸⁹ Hearing Transcript, Day 1, page 237, line 23 to page 239, line 8 (Mr. Gallo). The Claimant's admission shows that Mr. Swanick's claim that he provided tax advice to the Claimant in 2002 is not credible. See *Ibid.* and Day 2, page 173, line 4 to page 174, line 3 (Mr. Swanick).

3. The Claimant Was Uninformed of, and Showed No Interest in, the Risks or Rewards of Ownership of the Enterprise

a) The Claimant Did Not Do, Request or Review, Any Due Diligence on the Title to the Site

74. The Claimant has alleged that he is the owner of an Enterprise which came with millions of dollars of liabilities and only one asset: title to Adams Mine.¹⁹⁰ As such, one would expect the Claimant to have been interested in ensuring that the title that was acquired was good and valid. Yet, the Claimant has admitted that not only was the due diligence report on the title never sent to him, he did not even know such a report had been done.¹⁹¹ Nor does he appear to have been aware that Canadian Waste Services Inc. (“CWS”)¹⁹² held a right of first refusal on the Site.¹⁹³

75. His remarkable disinterest in the quality of the title persisted even when that title was challenged in a lawsuit filed by CWS in February 2003. If the lawsuit was successful, the Claimant’s alleged investment would be worthless. Yet, the Claimant admitted he was unaware of the details of the case¹⁹⁴ and never once requested or received a report from the counsel that Mr. Cortellucci retained to defend the action.¹⁹⁵

b) The Claimant Did Not Do, Request, or Review, Any Environmental Due Diligence on Adams Mine

76. According to Mr. Belardi, who testified that he had an extensive background in the waste management business, any potential owner does environmental due diligence prior to purchasing a waste management site.¹⁹⁶ Indeed, Mr. Belardi explained that the

¹⁹⁰ Hearing Transcript, Day 1, page 244, line 12 to page 245, line 17 (Mr. Gallo).

¹⁹¹ Hearing Transcript, Day 1, page 249, line 3 to page 250, line 16 (Mr. Gallo).

¹⁹² CWS was a former partner of Mr. McGuinty in his efforts to develop Adams Mine into a waste disposal facility.

¹⁹³ Hearing Transcript, Day 1, page 245, line 18 to page 246, line 13 (Mr. Gallo).

¹⁹⁴ Hearing Transcript, Day 1, page 246, line 14 to page 248, line 1 (Mr. Gallo).

¹⁹⁵ Hearing Transcript, Day 1, page 247, line 22 to page 248, line 1 (Mr. Gallo).

¹⁹⁶ Hearing Transcript, Day 1, page 127, line 23 to page 128, line 17 (Mr. Belardi).

potential environmental liabilities associated with old industrial activities are so large that they can financially bury an investor.¹⁹⁷

77. The Claimant never did any environmental due diligence on Adams Mine. He did not travel to Adams Mine even once,¹⁹⁸ and he did not retain experts – no engineers or environmental consultants – to do any due diligence on his behalf.¹⁹⁹ According to the Claimant, he relied on the Provisional Certificate of Approval issued for the Site – which he testified was the [REDACTED],²⁰⁰ However, the Claimant admitted that he had never seen the Provisional Certificate of Approval for the Adams Mine Site,²⁰¹ let alone asked an engineer or anyone to review it on his behalf.²⁰²

c) The Claimant Did Not Do, Request, or Review, Any Business Due Diligence

78. The Claimant testified that the Enterprise intended to develop and then operate Adams Mine as a waste disposal facility.²⁰³ However, the Claimant never did any due diligence as to whether Adams Mine could be developed, how much this would cost or whether it could be operated profitably.²⁰⁴

79. Indeed, as Canada has previously explained, there is no documentary evidence that the Claimant received any information on Adams Mine prior to the signing of the

¹⁹⁷ Hearing Transcript, Day 1, page 126, line 20 to page 127, line 11 (Mr. Belardi).

¹⁹⁸ Hearing Transcript, Day 1, page 232, lines 18-20 (Mr. Gallo).

¹⁹⁹ Hearing Transcript, Day 1, page 232, line 7 to page 232, line 23; page 233, lines 3-17; and page 235, lines 19-22 (Mr. Gallo).

²⁰⁰ Hearing Transcript, Day 1, page 309, line 21 to page 310, line 8 (Mr. Gallo).

²⁰¹ Hearing Transcript, Day 1, page 231, line 23 to page 235, line 22 (Mr. Gallo). The Claimant's admission in this regard shows that Mr. Cortellucci's testimony that the Claimant had reviewed the Provisional Certificate of Approval is not credible. See Hearing Transcript, Day 4, page 135, line 23 to page 136, line 20 (Mr. Cortellucci).

²⁰² Hearing Transcript, Day 1, page 233, lines 3-17 (Mr. Gallo).

²⁰³ Hearing Transcript, Day 1, page 196, lines 2-7 (Mr. Gallo); Day 4, page 134, lines 19-22 (Mr. Cortellucci).

²⁰⁴ Hearing Transcript, Day 1, page 231, line 23 to page 232, line 6; page 232, line 12 to page 233, line 1 (Mr. Gallo).

Agreement of Purchase and Sale.²⁰⁵ It is not credible that an investor would become involved in a business, especially one that he knew was controversial and unpopular,²⁰⁶ without reviewing detailed information.

80. Perhaps recognizing this, the Claimant alleged, for the first time at the hearing, that a presentation had, in fact, been mailed to him by Mr. Cortellucci. Neither the Claimant nor Mr. Cortellucci could explain why they had failed to mention this fact in their witness statements.²⁰⁷ Moreover, the Claimant's evidence about receiving this document was inconsistent. He initially stated that he did not keep a copy of the document,²⁰⁸ then later stated that he did, but had subsequently lost it.²⁰⁹ He also claimed that he forwarded the presentation to Mr. Belardi (although he did not mention forwarding it to Mr. Noto who was also allegedly in contact with potential investors), but Mr. Belardi had no recollection of receiving it.²¹⁰ Finally, the Claimant testified that he had never heard of CWS²¹¹ even though the presentation that he claims to have received and reviewed refers to CWS *five times*. In particular, the presentation compared Notre's offer to Mr. Cortellucci with the option that CWS had to purchase the Site as part of the Rail Cycle North consortium, indicated that CWS was a potential market competitor and indicated that CWS had a right of first refusal on Adams Mine.²¹²

81. Moreover, even if the Claimant's testimony that he received the presentation is to be believed, it is not credible that the presentation is all that he would have wanted to

²⁰⁵ Hearing Transcript, Day 1, page 225, lines 2-14; page 227, line 2 to page 228, line 9 (Mr. Gallo).

²⁰⁶ Hearing Transcript, Day 1, page 186, lines 4-10 (Mr. Gallo).

²⁰⁷ Hearing Transcript, Day 1, page 225, line 23 to page 227, line 1 (Mr. Gallo); and Day 4, page 132, line 21 to page 133, line 16 (Mr. Cortellucci).

²⁰⁸ Hearing Transcript, Day 1, page 225, lines 2-8 (Mr. Gallo).

²⁰⁹ Hearing Transcript, Day 1, page 227, lines 20-24 (Mr. Gallo).

²¹⁰ Hearing Transcript, Day 1, page 126, lines 20-24; page 127, lines 17-22; page 132, lines 9-11; and page 135, lines 1-12 (Mr. Belardi); Day 1, page 202, lines 8-18 (Mr. Gallo).

²¹¹ Hearing Transcript, Day 1, page 245, line 18 to page 246, line 13 (Mr. Gallo)

REDACTED

REDACTED

²¹² Witness Statement of Mario Cortellucci (February 26, 2010), Exhibit A, Bates Numbers 00474, 00481-00483 and 00487. [WSB, Tab 12A]

review if he was the owner of the Enterprise. While the Claimant first alleged that the presentation was **REDACTED**,²¹³ it is, in fact, a short Powerpoint presentation that describes the project only in general terms. It does not include detailed engineering designs, cost estimates, market analyses, or a strategic development plan. Such detailed documents do exist, and were in fact provided to Mr. Cortellucci at the same time as the presentation in question.²¹⁴ However, the Claimant never asked to see such information, and Mr. Cortellucci never sent it to him.²¹⁵

82. Finally, the evidence revealed that the Claimant never did any market due diligence with respect to the Ontario waste industry.²¹⁶ While he testified that he had done such due diligence,²¹⁷ and that he had in fact corresponded with an office in Ontario that was under the supervision of Mr. Wolf in this regard,²¹⁸ Mr. Wolf testified that the Claimant never made such contact with his office.²¹⁹ Further, as noted above, the Claimant admitted that he was unfamiliar with the company, CWS,²²⁰ the largest waste management company in Ontario. Any potential owner of a waste disposal company in Ontario who did even a little market due diligence would inevitably identify CWS as a primary competitor.

d) The Claimant Exhibited No Concern over the Contractual Risks of the Purchase of Adams Mine

83. The Agreement of Purchase and Sale signed with Mr. McGuinty for the acquisition of the Adams Mine Site contains \$3.25 million in unconditional payment

²¹³ Hearing Transcript, Day 1, page 187, lines 1-7 (Mr. Gallo).

²¹⁴ Hearing Transcript, Day 4, page 130, lines 20-23; page 134, line 8 to page 136, line 15; and page 137, line 8 to page 138, line 1 (Mr. Cortellucci). Witness Statement of Mario Cortellucci (February 26, 2010), Exhibits C and D. **[WSB, Tabs 12C and 12D]**

²¹⁵ Hearing Transcript, Day 1, page 230, line 20 to page 231, line 14 (Mr. Gallo); Day 4, page 132, lines 7-20; page 134, lines 8-18; and page 137, line 14 to page 138, line 1 (Mr. Cortellucci).

²¹⁶ Hearing Transcript, Day 1, page 231, line 23 to page 232, line 6; page 232, line 12 to page 233, line 1 (Mr. Gallo).

²¹⁷ Hearing Transcript, Day 1, page 184, line 17 to page 185, line 1; page 187, line 23 to page 188, line 1; page 198, line 18 to page 199, line 1 (Mr. Gallo).

²¹⁸ Hearing Transcript, Day 1, page 184, line 17 to page 185, line 1 (Mr. Gallo).

²¹⁹ Hearing Transcript, Day 3, page 189, lines 16-22 (Mr. Wolf).

²²⁰ Hearing Transcript, Day 1, page 246, lines 5-13 (Mr. Gallo).

obligations.²²¹ According to the Claimant, he entrusted the negotiation of the complex, multi-million dollar terms and conditions of the Agreement of Purchase and Sale to Mr. Cortellucci – a man to whom he had been introduced for the first time a few months earlier at a social event;²²² a man with whom he did not recall a single conversation between the time of that initial meeting and when he allegedly asked him to act as his agent;²²³ a man with whom he had no agency contract;²²⁴ and a man to whom he never provided any written instructions.²²⁵

84. Moreover, the evidence at the hearing ultimately revealed that he never even reviewed the Agreement of Purchase and Sale. Initially, the Claimant testified that he reviewed the Agreement before it was signed.²²⁶ However, Mr. Cortellucci admitted that he neither sent the Claimant drafts of the Agreement²²⁷ nor a copy of it before Mr. Cortellucci signed it.²²⁸

e) The Claimant was Unaware that the Enterprise Had Exhausted Its Funds

85. While the Claimant admitted that he had no idea of the cost to dewater the pit,²²⁹ he testified that the Limited Partnership had **REDACTED**

REDACTED

²²¹ Hearing Transcript, Day 1, page 244, line 18 to page 245, line 17 (Mr. Gallo).

²²² Hearing Transcript, Day 1, page 183, lines 18-22 (Mr. Gallo).

²²³ Hearing Transcript, Day 1, page 210, lines 1-12 (Mr. Gallo).

²²⁴ Hearing Transcript, Day 1, page 239, line 16 to page 240, line 13 (Mr. Gallo); Day 4, page 130, lines 7-19 (Mr. Cortellucci).

²²⁵ Hearing Transcript, Day 1, page 240, lines 7-13 (Mr. Gallo); Day 4, page 130, lines 7-19; and page 140, lines 1-20 (Mr. Cortellucci).

²²⁶ Hearing Transcript, Day 1, page 242, lines 10-12 (Mr. Gallo).

²²⁷ Hearing Transcript, Day 4, page 138, lines 7-19 (Mr. Cortellucci).

²²⁸ Hearing Transcript, Day 4, page 138, line 20 to page 139, line 25 (Mr. Cortellucci).

²²⁹ Hearing Transcript, Day 1, page 273, line 19 to page 274, line 11 (Mr. Gallo).

²³⁰ Hearing Transcript, Day 1, page 251, line 21 to page 252, line 9 (Mr. Gallo); Witness Statement of Vito Gallo (February 26, 2010) ¶¶ 71, 84 **REDACTED**

REDACTED

REDACTED²³¹ and Mr. Cortellucci confirmed that the
REDACTED²³² Further, as
admitted by Mr. Cortellucci, this REDACTED
ED was not enough to do everything that the
Claimant apparently thought it would.²³³ Indeed, Mr. Cortellucci confirmed that the
Limited Partners had not REDACTED

86. The Claimant's misconceptions about the state of the Enterprise's finances are hardly surprising since he was uninformed about, and uninterested in, how the Enterprise was spending its funds. Indeed, he had never asked for audited financial statements from the Enterprise despite his right to do so as the sole shareholder.²³⁵ He did not have access to the Enterprise's bank account, and had never seen, had never instructed Mr. Swanick to prepare, and did not know of, the REDACTED
REDACTED Finally, he admitted that: he was unaware of who paid the costs associated with the closing of the purchase transaction in September 2002;²³⁷ he had no idea how the Enterprise was doing financially and whether it had the funds necessary for its functioning;²³⁸ and he had no idea about the transactions that Mr. Cortellucci was entering into with the Enterprise's money.²³⁹

²³¹ Hearing Transcript, Day 2, page 136, lines 1-10 (Mr. Swanick); Day 4, page 150, lines 2-14 (Mr. Cortellucci).

²³² Hearing Transcript, Day 4, page 149, line 5 to page 150, line 5; page 210, line 14 to page 211, line 10 (Mr. Cortellucci).

²³³ Hearing Transcript, Day 4, page 211, line 3 to page 211, line 10 (Mr. Cortellucci).

²³⁴ Hearing Transcript, Day 4, page 210, line 4 to page 211, line 10 (Mr. Cortellucci).

²³⁵ Hearing Transcript, Day 1, page 287, line 10 to page 288, line 24 (Mr. Gallo).

²³⁶ Hearing Transcript, Day 1, page 283, line 24 to page 285, line 2 (Mr. Gallo); Day 2, page 94, lines 16-19 (Mr. Swanick); Day 4, page 115, lines 2-8 (Mr. Cortellucci).

²³⁷ Hearing Transcript, Day 1, page 251, line 11 to page 253, line 15 (Mr. Gallo).

²³⁸ Hearing Transcript, Day 1, page 273, line 24 to page 274, line 1 (Mr. Gallo).

²³⁹ Hearing Transcript, Day 1, page 289, line 14 to page 295, line 1 (Mr. Gallo). This admission showed that Mr. Cortellucci's testimony that he consulted with the Claimant on all budget issues is not credible. Hearing Transcript, Day 4, page 191, lines 4-14 (Mr. Cortellucci).

f) The Claimant Was Unaware of His Potential Return on Successful Sale of the Site

87. An investor invests to make money, and as a result, should have an interest in the returns that his investment will generate. All of the Claimant's witnesses testified that the Claimant's share of the profits from the operation or sale of Adams Mine would be **REDACTED**.²⁴⁰ The Claimant has alleged that his plan was to trade away part of this share to raise the significant funds needed to develop the Site.²⁴¹ However, if the Site could be sold prior to development, then there would be no need to raise such funds and the Claimant would receive a massive payout even though he did nothing. Accordingly, one would expect that the Claimant would have been particularly interested in any efforts to sell the Site prior to development, and in particular, in the price sought.

88. The evidence shows that Mr. Cortellucci was trying to sell the Site.²⁴² He signed a contract, on behalf of the Enterprise and the Limited Partnership, retaining **REDACTED** **REDACTED** to sell the Site for \$30 million or more, plus an annual royalty. The Claimant was unaware of any of the details of this contract with **REDACTED**²⁴³ and had never seen it before.²⁴⁴ The Claimant also stated that Mr. Cortellucci never discussed with him either the sale price, or the royalty amounts, that were the basis of **REDACTED** efforts.²⁴⁵

²⁴⁰ Hearing Transcript, Day 1, page 267, line 3 to page 268, line 10 (Mr. Gallo); Day 4, page 249, line 1 to page 252, line 17 (Mr. Cortellucci); Witness Statement of Brent Swanick (February 26, 2010) ¶ 31 [WSB, Tab 7].

²⁴¹ Claimant's Memorial, ¶ 214.

²⁴² Hearing Transcript, Day 1, page 295, line 6 to page 298, line 7 (Mr. Gallo). **REDACTED**
REDACTED
REDACTED Agreement among 1532382 Limited Partnership, **REDACTED** and 1532382 Ontario Inc. (April 1, 2003) page 2 [CDB, Tab 34]; **REDACTED**
REDACTED

²⁴³ Hearing Transcript, Day 1, page 295, line 19-22; page 297, line 19 to page 298, line 11; and page 304, line 12 to page 307, line 2 (Mr. Gallo).

²⁴⁴ Hearing Transcript, Day 1, page 295, lines 6-14 (Mr. Gallo).

²⁴⁵ Hearing Transcript, Day 1, page 304, line 12 to page 307, line 2 (Mr. Gallo).

89. Despite being the alleged sole shareholder with millions of dollars potentially at stake, the Claimant apparently did not even ask Mr. Cortellucci about the listing price when Mr. Cortellucci told him that [REDACTED] had been retained.²⁴⁶

C. Mr. Cortellucci and the Limited Partners Acted as if They Owned the Enterprise

90. The Claimant was not the only one whose actions are inconsistent with his ownership of the Enterprise. It was Mr. Cortellucci who assumed all the risk of purchasing Adams Mine. He then formed the Limited Partnership to share that risk with the other Limited Partners. The Limited Partners [REDACTED] to the Enterprise and controlled it through Mr. Cortellucci. On its regulatory filings, the Enterprise held itself out as owned by Canadian residents. Finally, the Limited Partnership [REDACTED] the Enterprise in a manner consistent with the Limited Partners owning the Enterprise.

1. Mr. Cortellucci Assumed all the Risk of Purchasing Adams Mine

91. Mr. Cortellucci, and his company, the Cortellucci Group, incurred *all* of the risk of entering the Agreement of Purchase and Sale with Notre to purchase Adams Mine.²⁴⁷ It was the Cortellucci Group that was obliged by that Agreement to take on \$3.25 million in unconditional payment obligations.²⁴⁸ The Cortellucci Group also knowingly assumed

²⁴⁶ Hearing Transcript, Day 1, page 305, line 17 to page 307, line 2 (Mr. Gallo) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Claimant's admission showed that Mr. Cortellucci's testimony that he did discuss the price with the Claimant is not credible. Hearing Transcript, Day 4, page 222, line 24 to page 223, line 7 (Mr. Cortellucci).

[REDACTED]

[REDACTED]

²⁴⁸ Hearing Transcript, Day 4, page 171, line 19 to page 172, line 23 (Mr. Cortellucci), and Day 4 page 174, lines 16-24 (Mr. Cortellucci); Hearing Transcript, Day 1, page 245, lines 10-17 (Mr. Gallo).

the risk of a lawsuit by CWS over Notre's failure to provide a right of first refusal to purchase the Site.²⁴⁹

92. Mr. Cortellucci testified that he was unconcerned with assuming such risks because the Cortellucci Group allegedly purchased the Adams Mine "in trust" for the Claimant.²⁵⁰ The evidence on the record is not clear that this purchase was, in fact, in trust. The words "in trust" were added by hand and were not initialed by Mr. McGuinty.²⁵¹ While Mr. Swanick testified that Mr. McGuinty was present when the Agreement was signed and this change was made,²⁵² Mr. Cortellucci testified that Mr. McGuinty was not.²⁵³

93. Moreover, even if Mr. Cortellucci's company did purchase Adams Mine "in trust", this would not excuse the Cortellucci Group from the obligation to pay the \$3.25 million pursuant to the Agreement of Purchase and Sale, or from the potential liability arising from a lawsuit brought by CWS. However, Mr. Cortellucci admitted that he agreed to these risks without any security or guarantee from the Claimant.²⁵⁴ He testified that he was willing to do so without security because he trusted the Claimant²⁵⁵ and believed the Claimant was an expert in the waste management business.²⁵⁶ However, the reality is that Mr. Cortellucci barely knew the Claimant, having only met him once at a

²⁴⁹ Hearing Transcript, Day 4, page 179, line 25 to page 180, line 10 (Mr. Cortellucci).

²⁵⁰ Hearing Transcript, page 171, line 16 to page 172, line 3 (Mr. Cortellucci).

REDACTED

²⁵² Hearing Transcript, Day 2, page 291, line 19 to page 292, line 5 (Mr. Swanick).

²⁵³ Hearing Transcript, Day 4, page 141, lines 16-23 (Mr. Cortellucci).

²⁵⁴ Hearing Transcript, Day 4, page 179, line 25 to page 180, line 4 (Mr. Cortellucci).

²⁵⁵ Hearing Transcript, Day 4, page 171, line 16 to page 172, line 3; and page 184, line 17 to page 185, line 13 (Mr. Cortellucci).

²⁵⁶ Hearing Transcript, Day 4, page 173, line 7 to page 173, line 11 (Mr. Cortellucci).

social event²⁵⁷ and that the Claimant in fact had no experience developing a waste disposal site.²⁵⁸

94. In his testimony, Mr. Cortellucci also suggested that he was unconcerned about the risks because the Claimant's alleged U.S. investors could have covered the millions of dollars of losses if they materialized.²⁵⁹ However, Mr. Cortellucci did not know who these potential investors were, let alone have any reason to believe that they would cover any losses when they had no legal obligation to do so.²⁶⁰

2. The Limited Partnership **REDACTED** the Enterprise

95. After assuming all of the risk of purchasing the Site, Mr. Cortellucci brought in his relatives and business associates to share that risk as Limited Partners.²⁶¹ These Limited Partners, including Mr. Cortellucci, **REDACTED**

REDACTED They also advanced all of the funds for the Enterprise's operating expenses²⁶³ and continue to **REDACTED**

96. Mr. Cortellucci and the other Limited Partners **REDACTED**
REDACTED

²⁵⁷ Hearing Transcript, Day 1, page 208, line 17-page 210, line 14 (Mr. Gallo); and, Hearing Transcript, Day 4, page 127, line 21-page 128, line 8 (Mr. Cortellucci)

²⁵⁸ Hearing Transcript, Day 1, page 231, line 23 to page 232, line 6 (Mr. Gallo).

²⁵⁹ Hearing Transcript, Day 4, page 186, lines 1 -12 (Mr. Cortellucci).

²⁶⁰ Hearing Transcript, Day 4, page 186, lines 18-25 (Mr. Cortellucci).

²⁶¹ See Canada's Counter-Memorial, ¶ 97.

²⁶² Hearing Transcript, Day 4, page 145, lines 4-13; and page 149, line 11 to page 150, line 8 (Mr. Cortellucci). See also Grid Promissory Note (September 9, 2002), at Claimant's Bates Range 9896-9897 [CDB, Tab 20].

²⁶³ Witness Statement of Brent W. Swanick (February 26, 2010), ¶ 32 [WSB, Tab 7].

²⁶⁴ Agreement between 1532382 Ontario Inc. and 1532382 Limited Partnership (October 15, 2010) [CDB, Tab 60].

²⁶⁵ Supplementary Witness Statement of Frank Peri (October 25, 2010), Exhibit E [WSB, Tab 11E].

²⁶⁶ Supplementary Witness Statement of Frank Peri (October 25, 2010), Exhibit B, Bates Number 03994 and Exhibit D. [WSB, Tabs 11A and 11D] **REDACTED**
REDACTED

REDACTED

3. The Limited Partnership Controlled the Enterprise through Mr. Cortellucci

97. The Limited Partnership also controlled the Enterprise through the individual who introduced them to this venture, Mr. Cortellucci. From the beginning, it was Mr. Cortellucci who received reports from [REDACTED]—not the Claimant.²⁶⁹ It was Mr. Cortellucci with whom Mr. Swanick spent time on the phone discussing the real estate transaction and the threat of a potential lawsuit by CWS—not the Claimant.²⁷⁰ It was Mr. Cortellucci who reviewed and had an understanding of the Provisional Certificate of Approval for the Site²⁷¹—not the Claimant.²⁷² It was Mr. Cortellucci who visited the Adams Mine (twice)²⁷³—not the Claimant.²⁷⁴ It was also Mr. Cortellucci who engaged Mr. McGuinty to manage the Site and required Mr. McGuinty to report to him²⁷⁵—not the Claimant.

²⁶⁷ Supplementary Witness Statement of Frank Peri (October 25, 2010), Exhibit D [WSB, Tab 11].

²⁶⁸ Hearing Transcript, Day 1, page 247, lines 5-12 (Mr. Gallo); Day 4, page 179, line 25 to page 180, line 4. (Mr. Cortellucci); Parcel Register, Parcel 19616 (CAN-327).

²⁶⁹ Hearing Transcript, Day 1, page 249, line 12-page 250, line 15 (Mr. Gallo). See also Claimant's Privilege Log (March 3, 2009), entry for 10/07/2002 [CDB, Tab 47].

²⁷⁰ Hearing Transcript, Day 2, page 99, lines 10-16 and page 100, line 14 to page 101, line 2 (Mr. Swanick).

²⁷¹ Hearing Transcript, Day 4, page 174, line 24 to page 176, line 5 (Mr. Cortellucci)

²⁷² Hearing Transcript, Day 1, page 233, lines 3-17 (Mr. Gallo).

²⁷³ Hearing Transcript, Day 4, page 248, lines 20-21 (Mr. Cortellucci)

²⁷⁴ Hearing Transcript, Day 1, page 232, lines 18-20 (Mr. Gallo).

²⁷⁵ Witness Statement of Gordon McGuinty (February 27, 2010), ¶ 91; Witness Statement of Mario Cortellucci (February 26, 2010), ¶¶ 19, 25, 30, 34 [WSB, Tab 12].

98. As previously noted, Mr. Cortellucci also had exclusive access to the Enterprise's bank account.²⁷⁶ Mr. Cortellucci and Mr. Swanick asserted that the Claimant authorized this arrangement.²⁷⁷ However, the Claimant clearly had no knowledge of the relevant Banking Resolution. He testified that he spoke *only* to Mr. Cortellucci and that he did not direct Mr. Swanick to give Mr. Cortellucci the banking authority.²⁷⁸

99. Using this authority, Mr. Cortellucci spent the Enterprise's funds without consulting the Claimant. The Claimant confirmed that Mr. Cortellucci did not talk to him before signing cheques²⁷⁹ and that the Claimant was not aware of any transactions related to the bank account.²⁸⁰ For example, he was not aware of a cheque Mr. Cortellucci issued

REDACTED²⁸¹ Nor was he aware of a cheque for REDACTED to

REDACTED

Although Mr. Cortellucci owns an agricultural export business, Maple Four Seeds Inc.,²⁸² Mr. Cortellucci insisted that the invoice reflected business related to the Enterprise, suggesting that Mr. Nickerson was exploring the possibility of exporting compost materials from Adams Mine.²⁸³ Mr. Cortellucci's explanation was inconsistent with that of the Claimant's counsel who said that Mr. Nickerson was, in fact, looking at the possibility of establishing a fish farm at Adams Mine.²⁸⁴

100. Finally, it was Mr. Cortellucci who discussed the Enterprise's business plans with Mr. McGuinty,²⁸⁵ including the plan to sell the Site undeveloped.²⁸⁶ In fact, it was Mr.

²⁷⁶ Hearing Transcript, Day 2, page 94, lines 5 -10 (Mr. Swanick).

²⁷⁷ Hearing Transcript, Day 2, page 94, lines 16-19 (Mr. Swanick); Day 4, page 115, lines 6-8 (Mr. Cortellucci).

²⁷⁸ Hearing Testimony, Day 1, page 284, line 14 to page 285, line 2 (Mr. Gallo).

²⁷⁹ Hearing Transcript, Day 1, page 290, lines 14-16 (Mr. Gallo).

²⁸⁰ Hearing Transcript, Day 1, page 288, line 25 to page 291, line 20 (Mr. Gallo).

²⁸¹ Hearing Transcript, Day 1, page 291, lines 15-20 (Mr. Gallo).

²⁸² Hearing Transcript, Day 4, page 127, lines 8-16 (Mr. Cortellucci).

²⁸³ Hearing Transcript, Day 4, page 118, line 26 to page 119, line 4 (Mr. Cortellucci).

²⁸⁴ Hearing Transcript, Day 1, page 33, lines 8-18 (Claimant's Opening).

²⁸⁵ Hearing Transcript, Day 4, page 189, lines 9-25 (Mr. Cortellucci).

²⁸⁶ Hearing Transcript, Day 2, page 211, line 16 to page 217, line 22 (Mr. Swanick) and Hearing Transcript, Day 1, page 295, line 6- page 308, line 6 (Mr. Gallo). REDACTED

Cortellucci – not the Claimant – who hired [REDACTED] to sell the Site undeveloped,²⁸⁷ pursuant to an agreement which contemplated all of the profits and royalties from any sale flowing to the Limited Partnership and not the Enterprise.²⁸⁸ Mr. Cortellucci testified that he believed that he had the authority to sign the [REDACTED] Agreement²⁸⁹ and, indeed, he signed as an “ASO,” or “Authorized Signing Officer.”²⁹⁰ However, according to the story told by the Claimant, the sole officer and director of the Enterprise was Mr. Swanick and Mr. Swanick confirmed that he was unaware of the Agreement with [REDACTED] until the week before the hearing.²⁹¹

101. Mr. Cortellucci tried to explain his control of the Enterprise on the grounds that he was acting as the Claimant’s agent.²⁹² This assertion is not credible in light of the evidence on the record. The Claimant and Mr. Cortellucci had only just met, and the Claimant never provided any written instructions to Mr. Cortellucci. Nor are there any letters or other documents confirming this agency arrangement.²⁹³

4. The Limited Partners [REDACTED] Controlled the Enterprise As If They Owned It

102. As shown above, the Limited Partnership behaved as if the Limited Partnership owned the Enterprise, both [REDACTED] controlling it. The Claimant has asserted that the Limited Partnership did not own the Enterprise, but rather contracted with it to provide [REDACTED]. However, the

[REDACTED]

²⁸⁷ Hearing Transcript, Day 4, page 217, lines 1-12 (Mr. Cortellucci).

²⁸⁸ Agreement among 1532382 Limited Partnership, [REDACTED] and 1532382 Ontario Inc. (April 1, 2003) page 2 [CDB, Tab 34].

²⁸⁹ Hearing Transcript, Day 4, page 227, lines 1-2 (Mr. Cortellucci).

²⁹⁰ Agreement among 1532382 Limited Partnership, [REDACTED] and 1532382 Ontario Inc. (April 1, 2003) [CDB, Tab 34].

²⁹¹ Hearing Transcript, Day 2, page 263, lines 1-21 (Mr. Swanick).

²⁹² Witness Statement of Mario Cortellucci (February 26, 2010), ¶ 31 [WSB, Tab 12].

²⁹³ Hearing Transcript, Day 2, page 240, lines 4-13 (Mr. Swanick).

evidence suggests that these Agreements did not exist prior to the introduction of the *AMLA*.

a) **The Evidence is Inconsistent with the Existence of the Loan Agreement Prior to the Introduction of the *AMLA***

103. The Claimant has asserted that the Limited Partnership provided **REDACTED** to the Enterprise under a Loan Agreement and a Grid Promissory Note.²⁹⁴ However, the existence of this Loan Agreement is inconsistent with the contemporaneous business records and the actions of the Limited Partnership.

104. The Enterprise's contemporaneous business records reflect that the Limited Partnership **REDACTED** **REDACTED** Mr. Nalli, an employee of the Cortellucci Group and the consultant responsible for maintaining the Enterprise's financial records,²⁹⁵ made **REDACTED** **REDACTED** On one instance, Mr. Nalli described a deposit of **REDACTED** **REDACTED** **REDACTED**²⁹⁶ Mr. Cortellucci had denied making any equity contributions to the Enterprise,²⁹⁷ and thus, he asserted that the **REDACTED** **REDACTED**²⁹⁸ — an assertion that is plainly inconsistent with the words on the document. In other instances, **REDACTED** **REDACTED**²⁹⁹ While in some cases **REDACTED**³⁰⁰ Mr.

²⁹⁴ Hearing Transcript, Day 4, page 145, lines 4-13; page 149, line 11-page 150, line 8 (Mr. Cortellucci). See also Grid Promissory Note (September 9, 2002), at Claimant's Bates Range 9896-9897.

²⁹⁵ Hearing Transcript, Day 4, page 192, line 13-20 (Mr. Cortellucci); Consulting Agreement between 1532382 Ontario Inc. and Nalro Inc. (September 1, 2002) [**CDB, Tab 17**].

²⁹⁶ Hearing Transcript, Day 4, page 204, line 4 to page 205, line 12 (Mr. Cortellucci).

²⁹⁷ Hearing Transcript, Day 4, page 150, lines 9-11; page 195, lines 3-6; and page 255, lines 1-17 (Mr. Cortellucci).

²⁹⁸ Hearing Transcript, Day 4, page 205, lines 1-3 (Mr. Cortellucci).

²⁹⁹ See Supplemental Witness Statement of Frank Peri (October 25, 2010), Exhibit B, Bates Number 04058 [**WSB, Tab 11B**] **REDACTED** **REDACTED**

³⁰⁰ Supplemental Witness Statement of Frank Peri (October 25, 2010), Exhibit B, Bates Number 03997. **REDACTED** Mr. Cortellucci subsequently confirmed that this was a separate short term loan in his testimony. Hearing Transcript, Day

Cortellucci testified that such loans were *not* advanced pursuant to any loan agreement, but rather were informally provided to ensure the Enterprise had sufficient funds.³⁰¹

105. The only business records which suggest that a loan agreement did exist are the financial statements of the Enterprise and Limited Partnership. However, Mr. Swanick admitted that these financial statements were not prepared until sometime after the *AMLA* was introduced in April 2004,³⁰² and hence they are not contemporaneous evidence.³⁰³

106. REDACTED

Enterprise existed. First, Mr. Cortellucci and his relatives and business associates, who would later form the Limited Partnership, REDACTED directly into the

Enterprise's REDACTED

REDACTED

4, page 199, line 25-page 203, line 4 (Mr. Cortellucci). See also Supplemental Witness Statement of Frank Peri (October 25, 2010), Exhibit B, Bates Number 04025.

³⁰¹ Hearing Transcript, Day 4, page 199, line 20 to page 203, line 1 (Mr. Cortellucci).

REDACTED

³⁰³ In light of Mr. Swanick's testimony, Mr. Peri's testimony that these financial statements were done prior to the introduction of the *AMLA* is not credible. See Supplementary Witness Statement of Frank Peri (October 25, 2010), ¶ 9 [WSB, Tab 11]; Hearing Transcript, Day 4, page 274, lines 18-25, page 275,

REDACTED

³⁰⁴ Loan Agreement between 1532382 Ontario Inc. and 1532382 Limited Partnership (September 9, 2002) [CDB, Tab 19] The Limited Partnership was not registered with the Government of Ontario until the day after the Enterprise and the Limited Partnership supposedly entered into the Loan Agreement (*i.e.*, September 10, 2002). The Limited Partnership Agreement is also dated September 10, 2002. Mr. Swanick's explanation for this inconsistency was that he had "screwed-up" the dates. See Hearing Transcript, Day 2, page 236, lines 3-16 (Mr. Swanick)

³⁰⁵ Supplementary Witness Statement of Frank Peri (October 25, 2010), Exhibit E [WSB, Tab 11E].

REDACTED Fourth, the Limited Partnership did not take a mortgage or any other form of security for their alleged loan to the Enterprise.³⁰⁷ Fifth, the Limited Partners agreed in the Limited Partnership Agreement that the Limited Partnership was REDACTED to the Enterprise.³⁰⁸

b) The Evidence is Inconsistent with the Existence of the Management Agreement Prior to the Introduction of the AMLA

107. As shown above, the Limited Partners REDACTED

REDACTED

³⁰⁶ Grid Promissory Note (dated “as of” September 9, 2002), at Bates Number 9895 [CDB, Tab

20] REDACTED

REDACTED

REDACTED

See 1532382 Limited Partnership Financial Statements

[CDB, Tab 27] REDACTED

REDACTED

See Supplementary Witness Statement of Frank

Peri (October 25, 2010), Exhibit C [WSB, Tab 11C]

³⁰⁷ Hearing Transcript, Day 1, page 247, lines 8-13 (Mr. Gallo).

³⁰⁸ 1532382 Limited Partnership, Limited Partnership Agreement (September 10, 2002), Section 3.08 (CDB, Tab 21) REDACTED

REDACTED

REDACTED

Mr. Swanick’s assertion that this provision does not apply is not credible. Hearing Transcript, Day 2, page 237, line 5 – page 243, line 18 (Mr. Swanick)

³⁰⁹ Hearing Transcript, Day 2, page 246, lines 13-17, page 247, lines 2-10, page 248, lines 19-25, page 249, lines 1-5, page 283, lines 9-23 (Mr. Swanick); Supplementary Witness Statement of Frank Peri (October 25, 2010), Exhibit E [WSB, Tab 11E].

³¹⁰ Hearing Transcript, Day 4, page 145, lines 4-13; page 149, line 11-page 150, line 8 (Mr. Cortellucci). See also Grid Promissory Note (September 9, 2002), at Claimant’s Bates Range 9896-9897 [CDB, Tab 20].

³¹¹ Hearing Transcript, Day 2, page 131, line 18-page 132, line 11 (Mr. Swanick).

³¹ REDACTED

REDACTED

See Hearing Transcript, Day 2, page 130, line 10-page 133, line 9 (Mr. Swanick).

REDACTED

108. The Claimant has alleged that the Limited Partnership did not own the Enterprise. Instead, he claims that the expenses associated with the operation of the Enterprise were

REDACTED

of the alleged Management

Agreement. However, the evidence is inconsistent with the existence of the alleged Management Agreement prior to the introduction of the *AMLA*.

109. First, the Claimant was unaware of this alleged Management Agreement between the Enterprise and the Limited Partnership. He testified that the only management agreement of which he was aware was the one with Mr. McGuinty.³¹³

110. Second, the alleged Management Agreement REDACTED

REDACTED and accordingly, could not have come into existence before the alleged Loan Agreement did. However, as shown above, the evidence is not consistent with the existence of the alleged Loan Agreement prior to the introduction of the *AMLA*.

111. Third, documents show that it was the Enterprise – not the Limited Partnership acting as the REDACTED

REDACTED

³¹³ Hearing Transcript, Day 1, page 260, lines 23-25, page 261, lines 1-12, page 263, page 264, lines 1-12 (Mr. Gallo).

³¹⁴ Agreement among 1532382 Ontario Inc. and 1532382 Limited Partnership (September 9, 2002), section 4 [CDB, Tab 18].

³¹⁵ Consulting Agreement between 1532382 Ontario Inc. and Nalro Inc. (September 1, 2002) [CDB, Tab 17].

³¹⁶ Witness Statement of Gordon McGuinty (February 27, 2010), ¶ 90; Letter from Brent W. Swanick to Mr. Gordon McGuinty, Re: Adams Mine (September 10, 2002); Agreement between 1532382 Limited Partnership, Christopher Gordon Associates Ltd., and 1532382 Ontario Inc. (September 10, 2002) [CDB, Tab 23].

³¹⁷ Hearing Transcript, Day 4, page 156, lines 5-12 (Mr. Cortellucci); Consulting agreement between 1532382 Ontario Inc. and Nalro Inc. (September 1, 2002).

³¹⁸ Hearing Transcript, Day 2, page 260, lines 15-19 (Mr. Swanick).

112. Further, the evidence also indicates that Mr. McGuinty was retained by the Enterprise, *not* the Limited Partnership. In Mr. McGuinty's witness statement, he quotes from a section of his retainer agreement that confirms that it was the Enterprise which retained him.³¹⁹ This is consistent with a letter sent by Mr. Swanick to Mr. McGuinty that also confirms that it is the Enterprise that retained Mr. McGuinty.³²⁰ The Claimant attempted to explain both Mr. McGuinty's testimony and the letter sent by Mr. Swanick as errors.³²¹ The only document he could offer in support of his claim that it was the Limited Partnership that retained Mr. McGuinty is an agreement that Mr. McGuinty never even signed.³²² This is not credible evidence, especially in light of Mr. McGuinty's testimony. The Limited Partnership recorded the **REDACTED**

REDACTED

113. Finally, when Mr. Cortellucci retained **REDACTED** to assist in the sale of the Site, he executed the agreement for both the Enterprise and the Limited Partnership, even though he had no authority to do so.³²⁴ On its face, the terms of the Agreement with **IRE** **REDACTE** contemplate the Limited Partnership earning all of the revenue associated with the sale of the Adams Mine and being entitled to the whole royalty that any new owner might agree to pay.³²⁵ These terms are, thus, inconsistent with **REDACTED**

REDACTED

114. Accordingly, there is no insufficient evidence supporting the Claimant's assertion that the Limited Partnership **REDA** **CTED** and controlled the Enterprise pursuant to arms-length contracts that made it the **REDACTED**. Rather, the

³¹⁹ Witness Statement of Gordon McGuinty (February 27, 2010), ¶ 90.

³²⁰ Letter from Brent W. Swanick to Mr. Gordon McGuinty, Re: Adams Mine (September 10, 2002). **[CDB, Tab 24]**.

³²¹ Hearing Transcript, Day 2, page 260, lines 7-10 (Mr. Swanick).

³²² Witness Statement of Gordon McGuinty (February 27, 2010), Exhibit S.

³²³ Hearing Transcript, Day 2, page 260, lines 15-19 (Mr. Swanick).

³²⁴ Agreement between 1532382 Limited Partnership, **REDACTED**, and 1532382 Ontario Inc. (April 1, 2003) **[CDB, Tab 34]**.

³²⁵ *Ibid.*, page 2, clause 2 ("Retention of **REDACTED**) **[CDB, Tab 34]**. ("Should **REDACTED** find a buyer for the Site ... and LP generates gross revenue or not less than: A) \$30 million ... plus a minimum net royalty of ...") See also *Ibid.*, subsection (d) ("the royalties to **REDACTED** will be paid only as long as royalties are paid to the LP")

evidence is consistent with the Limited Partnership funding and controlling the Enterprise as its owner.

V. CONCLUSION

115. For the foregoing reasons, Canada respectfully requests that the Tribunal dismiss the claim with prejudice, order that the Claimant bear the costs of this arbitration including Canada's costs for legal representation and assistance,³²⁶ and grant any further relief it deems just and necessary.

Dated: April 8, 2011

*Respectfully submitted
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³²⁶ Canada expressly reserves its right to make a submission on the costs to which it is entitled.