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

STATEMENT OF DEFENCE

September 15, 2008

PUBLIC VERSION

Departments of Justice and of
Foreign Affairs & International
Trade - Trade Law Bureau
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
K1A 0G2
CANADA

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TABLE OF ABBREVIATIONS

DEFINITION	ABBREVIATION
1532382 Ontario Inc.	The Enterprise
1532382 Limited Partnership	Limited Partnership
An Act to Prevent the Disposal of Waste at the Adams Mine Site and to Amend the Environmental Protection Act in Respect of the Disposal of Waste in Lakes	*AMLA*
Aecon Construction Group	Aecon
Browning-Ferris Industries Ltd.	Browning-Ferris
Canadian Environmental Assessment Agency	CEAA
Canadian National Railway Company	Canadian National
Canadian Waste Services	CWS
Chevron Company of California	Chevron
Cortellucci Group of Companies Inc.	CGC
Dofasco Inc.	Dofasco
Environmental Assessment Board	EAB
Municipality of Metropolitan Toronto	Metro Toronto
National Water Research Institute	NWRI
Notre Development Corporation	Notre
Ontario Ministry of the Environment	MOE
Ontario Ministry of Natural Resources	MNR
Permit to Take Water	PTTW
Provisional Certificate of Approval	Provisional Certificate
Rail Cycle North	RCN
Republic Services of Canada Inc.	Republic

I. INTRODUCTION

1. The proposal to develop the Adams Mine Lake site ("Adams Mine") into a large-scale waste disposal site for the City of Toronto was nothing more than a failed project when it was purchased by 1532382 Ontario Inc. ("the Enterprise") in September 2002. In acquiring Adams Mine from Notre Development Corporation ("Notre"), the Enterprise, along with 1532382 Limited Partnership ("Limited Partnership"), embarked on a speculative and high risk scheme to revive this project.

2. Adams Mine required several additional regulatory certificates and permits before it could operate as a waste disposal site. It had repeatedly been rejected as a potential waste disposal site by the City of Toronto and held no other waste disposal contracts. No infrastructure had been built at the site since the mine closed in early 1990. A former partner had commenced a legal action against the Enterprise over its purchase of Adams Mine and Aboriginal communities intended to make land claims on adjacent Crown lands that were needed to proceed with the project. This project had virtually no chance of success.

3. Adams Mine was one of several proposals for waste disposal sites that had been touted for over a decade as solutions to the waste disposal needs of the City of Toronto and some of its surrounding regional municipalities. Adams Mine was an unusual "solution" to these waste disposal needs. To be successful it would require a million tonnes of garbage annually to be loaded onto specially designed rail cars and shipped north, more than 600 kilometres to the site. No similar waste system is in operation in Ontario today.

4. Adams Mine also had an atypical waste disposal site design. It depended on the water flow in the surrounding bedrock and continuous pumping of contaminated water to a treatment plant for at least 100 years to ensure that contaminated water did not escape into the natural environment. If contaminated water escaped, it could have made its way into the nearby Misema River and from there to Lake Timiskaming, which supplies drinking water to many local communities. Adams Mine had capacity to receive

approximately 20 million tonnes of garbage over its lifespan, which would continue to produce contaminants for a millennium.

5. Adams Mine required at least seven regulatory permits before it could receive waste. The Enterprise never held more than three of these permits. Moreover, these permits were contingent on numerous conditions, many of which were never fulfilled.

6. The design and the long distance over which garbage had to be shipped meant that the Adams Mine project needed the large volume of garbage generated by the City of Toronto and the surrounding regional municipalities to be economically viable. The City of Toronto, however, rejected Adams Mine as a waste disposal site on two separate occasions in the 1990s. A third attempt to promote Adams Mine to the City of Toronto in 2000 led to contract negotiations which collapsed over environmental concerns and a dispute concerning liability for regulatory changes affecting the site. After the collapse of these negotiations, the City of Toronto entered into a long-term contract with another company to ship its garbage to Michigan. Toronto City Council passed a resolution a few months later vowing that the City of Toronto would never ship its waste to Adams Mine and condemning the project as a "dark ages" concept.

7. By 2002, all of the public and private sector partners interested in financing, developing and operating Adams Mine as a waste disposal site had abandoned the project, including Metro Toronto, Browning-Ferris Industries Ltd., Canadian Waste Services, and Aecon Construction Group. This left Notre in the unenviable position of REDACTED one of which also held a right of first refusal to purchase the site.

8. After the last of these partners decided not to develop Adams Mine, Notre reached further afield to Mario Cortellucci, a residential real estate developer in Toronto. In September 2002, Notre sold Adams Mine to the Enterprise. At the same time, the Limited Partnership was registered as an Ontario limited partnership by counsel who was also the President and sole Director of the Enterprise. The Limited Partnership provided

the capital to purchase Adams Mine and would be responsible for REDACTED REDACTED

9. The Enterprise was the general partner of the Limited Partnership. Only one share was issued for the Enterprise. That was a common share, given for no consideration, to Vito Gallo, the U.S. citizen who now brings this claim on behalf of the Enterprise. Mr. Gallo was unknown to all of the government officials who had worked on the certificates and permits for Adams Mine. Nor were government officials that developed the subsequent legislation familiar with Mr. Gallo.

10. By 2004, when the Ontario Legislature enacted *An Act to Prevent the Disposal of Waste at the Adams Mine Site and to Amend the Environmental Protection Act in Respect of the Disposal of Waste in Lakes* ("*AMLA*"), the Limited Partnership and the Enterprise had:

- not obtained four of at least seven certificates and permits that were necessary to operate Adams Mine as a waste disposal site;
- not fulfilled many of the conditions attached to existing certificates and permits;
- not secured waste disposal contracts, including a critical contract with the City of Toronto;
- not built any infrastructure and had allowed the existing buildings and infrastructure at Adams Mine to fall into disrepair;
- not identified a waste management company to develop and operate Adams Mine;
- not secured clear title to Adams Mine as a former partner had commenced an action to reverse the sale of the site to the Enterprise; and
- not secured title to government lands adjacent to Adams Mine that were necessary for the project because of unresolved Aboriginal land claims.

11. In short, at the time of the *AMLA,* Adams Mine remained a high risk and speculative venture, which was no closer to being an operational landfill than it had been when the Limited Partnership and the Enterprise acquired the site in 2002.

12. The *AMLA* was one of a number of measures taken at around the same time to protect the environment and water resources. It prevented the dumping of garbage in the Adams Mine Lake, or any other lake in Ontario. The Government of Ontario enacted these measures after seven people died and 2,300 people fell seriously ill from contaminated drinking water in the town of Walkerton, Ontario.

13. The *AMLA* was enacted pursuant to the usual public process for Ontario legislation. Officials of Notre and the Enterprise participated in this process. Moreover, the *AMLA* incorporated changes that were proposed by Notre and the Enterprise.

14. The *AMLA* also required the Government of Ontario to compensate Notre and the Enterprise for expenses incurred in their attempt to establish Adams Mine as a waste disposal site and permitted those companies to challenge the amount of compensation due under the formula in the *AMLA* in Canadian courts.

15. Notre entered into negotiations with the Government of Ontario, agreed on the amount of compensation, and received payment shortly thereafter. However, the Enterprise did not avail itself of the compensation offered under the *AMLA* and instead, Mr. Gallo brought this NAFTA claim on behalf of the Enterprise.

16. Canada states that the Investor's claim is beyond the jurisdiction conferred on this Tribunal by NAFTA. *First*, the Claimant does not have standing to claim under NAFTA. The actual investors in Adams Mine all appear to be Canadian. Both the NAFTA and general principles of international law prevent such a claim by Canadians against their own State. *Second*, the Claimant paid no consideration for his share in the Enterprise and has not "made an investment" as required by NAFTA Article 1117. *Third*, the Claimant has no standing to advance a claim on behalf of the Limited Partnership for its share in any future profits—had this landfill ever become viable. *Fourth*, the claims which

challenge acts that occurred more than three years before the Notice of Arbitration was filed are time-barred.

17. Canada further states that the Claim has no merit. *First*, the Claimant misstates the content of the minimum standard of treatment for aliens at customary international law. Nor has it met its burden to prove that the *AMLA* amounts to a denial of justice. To the contrary, the measures at issue were enacted in a transparent, public and democratic manner and comply with the minimum standard of treatment required under NAFTA Article 1105. *Second,* Canada did not expropriate the Claimant's alleged investment. The Enterprise never had an existing or future right to use Adams Mine as a landfill. Consequently, the Enterprise did not have any intangible property which could be expropriated. Further, the site itself was not expropriated because the Enterprise remains the owner and retains the same rights in the site that it had before the *AMLA*. Alternatively, if the *AMLA* did amount to an expropriation, that expropriation was a lawful expropriation consistent with the requirements of NAFTA Article 1110(1)(a) through (d).

18. Finally even if a breach could be established, the measures complained of did not cause the loss alleged and the Claimant is not entitled to damages. *Further*, the damages claimed are grossly inflated and unjustified.

II. FACTUAL BACKGROUND

19. Adams Mine is located in Boston and McElroy Township in the District of Timiskaming, a remote area of northern Ontario, over 600 kilometres north of Toronto.[1] Adams Mine lies at one of the highest elevations in the local watershed near the Misema and Blanche Rivers which flow into Lake Timiskaming. The location of Adams Mine is shown in Figure 1.

[1] The distance from the Vaughan waste transfer station near Toronto to Adams Mine is approximately 600 km.

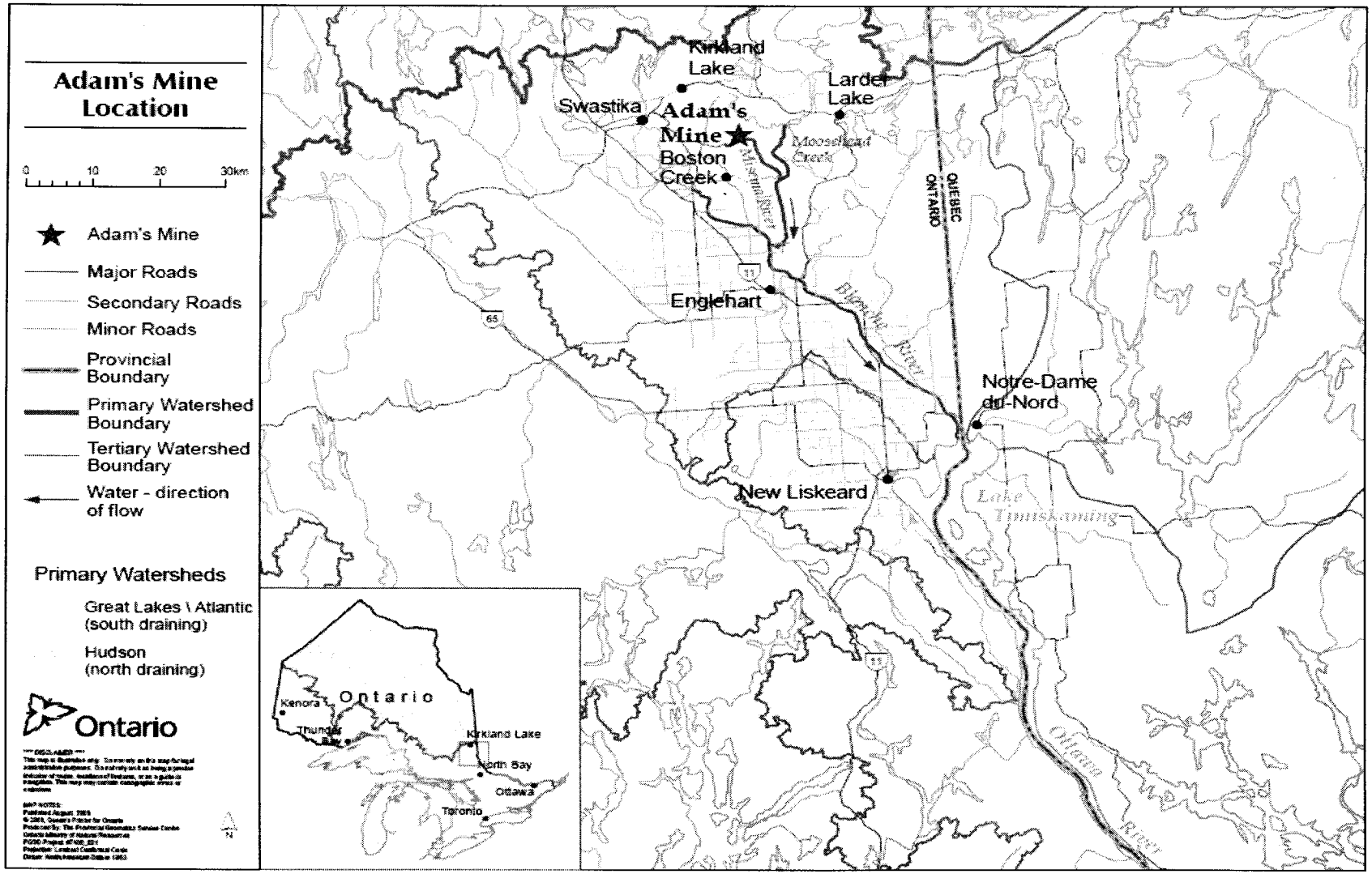
Adam's Mine Location
0 10 20 30km
Adam's Mine
Major Roads
Secondary Roads
Minor Roads
Provincial Boundary
Primary Watershed Boundary
Tertiary Watershed Boundary
Water - direction of flow
Primary Watersheds
Great Lakes \ Atlantic (south draining)
Hudson (north draining)
Ontario
Kirkland Lake
Swastika
Adam's Mine
Boston Creek
Larder Lake
Englehart
New Liskeard
Notre-Dame du-Nord
QUEBEC
ONTARIO
Lake Timiskaming
Ottawa River
Kenora
Thunder Bay
North Bay
Ottawa
Toronto

Figure 1

20. In 1963, Dofasco Inc. ("Dofasco") and Gulf Agriculture Resources, a division of the Chevron Company of California ("Chevron"), began operating Adams Mine as an open-pit iron ore mine. The site was closed by Dofasco in 1990.

21. The Adams Mine site consists of several open-pit mines, with the three largest being the South Pit, the Central Pit, and the Peria Pit. The South Pit is approximately 200 metres deep and was capable of receiving approximately 20 million tonnes of garbage. After closing, the South Pit filled with water and was sometimes referred to as the Adams Mine Lake.

A. A Decade of Failure: Notre and Gordon McGuinty Fail to Finance and Develop Adams Mine as a Waste Disposal Site Between 1989 and 2001

1. Gordon McGuinty Promotes Adams Mine as a Potential Waste Disposal Site Using Hydraulic Containment

22. Gordon McGuinty, a Canadian businessman, identified Adams Mine as a potential waste disposal site in the late 1980s. In November 1989, Mr. McGuinty incorporated Notre Development Corporation ("Notre") in Ontario[2] to purchase Adams Mine from Chevron and Dofasco.[3] Notre then began promoting Adams Mine as a landfill.

23. Notre proposed developing Adams Mine as a landfill using the hydraulic containment method to prevent leachate from escaping from the site.[4] Leachate is

[2] Mr. McGuinty was the President and a Director of Notre. The initial shareholders of Notre were Mr. McGuinty, Gordon Acton, and Maurice LaMarche.

[3] *Canadian Waste Services Inc. v. Notre Development Corporation et al.*, Court File No. 03-CV-244717CM2 (20 May 2003) (Amended Statement of Defence, ¶¶ 3-4) (Ont. Sup. Ct.) **(CDA-1)**. REDACT
REDACTED

[4] Mr. McGuinty had already unsuccessfully attempted to obtain approval for a hydraulic containment landfill. In 1977, Mr. McGuinty and his business partner, Maurice LaMarche attempted to develop the Hilton Mine in Bristol, Quebec as a landfill for waste shipped by rail from Montreal. A decade later, Mr. McGuinty attempted to revive this project. Bristol refused to allow the project to proceed due to changes in its local by-laws. Mr. McGuinty unsuccessfully challenged Bristol's decision in 1992. See *LaMarche McGuinty, Inc. v. La Corporation Municipale du Comté de Bristol,* No. 500-09-000281-899 (5 March 1992)[translated] **(CDA-2)**.

contaminated water produced when water comes into contact with waste (as precipitation, groundwater or surface water). Waste itself also contains water which produces additional leachate. If not properly managed and treated, leachate can threaten the natural environment and contaminate surface and ground water, including drinking water.

24. Landfills that rely on hydraulic containment typically are dependent on the low permeability of surrounding soil and pressure from the water table to force groundwater inwards towards the pit. Consequently, these sites must operate at significantly lower depths than the water table, and must continually pump leachate from the base of the pit. This ensures that the level of water inside the pit is always lower than the water table surrounding it. Hydraulic containment landfills are sometimes constructed with plastic liners. Such liners can help prevent leachate from seeping out of the site if hydraulic containment fails.[5]

25. Notre's proposal to use hydraulic containment at Adams Mine was unusual because it contemplated an unlined hydraulic containment landfill and because it was located in low permeability bedrock—as opposed to soil. No landfill using hydraulic containment in these conditions has ever been approved in Ontario.

26. Hydraulic containment landfills normally require continuous pumping of leachate which is then treated and discharged into the local environment. It was estimated that the landfill at Adams Mine would produce over 83 billion litres of leachate over 1000 years.[6] Notre proposed pumping leachate for only the first 100 of the 1000 years in which leachate would be produced.[7] After 100 years, Notre proposed using a "passive drain system" which would allow the South Pit to fill with water to dilute the leachate and then drain the leachate from the pit into the tailings area. After reaching the tailings area, this

[5] One example of a doubly safeguarded system is the hydraulic containment landfill in Halton, Ontario. Other examples of hydraulic containment landfills in Ontario include those at Grimsby, Essex-Windsor and North Simcoe.

[6] Golder Associates Ltd., Adams Mine Environmental Assessment, Technical Appendix B, Design and Operations - South Pit (1996), at B.6-21 **(CDA-3)**.

[7] *Notre Development Corporation (Adams Mine Site)* (19 June 1998) EA-97-01 (EAB), Section 3.1.1, at 17 (Cl. Ex. 16) **(CDA-4)**.

leachate would be treated by natural processes as it drained through the artificial wetlands and the tailing area. No hydraulic containment landfill in Ontario uses this type of passive drain system. As explained further in Section C.4 below, concerns about the hydraulic containment system at Adams Mine contributed to the failure of the proposal to develop this site.

2. Notre Fails to Sell Adams Mine to Metro Toronto in 1995

27. As part of its long-term waste management strategy, the Municipality of Metropolitan Toronto ("Metro Toronto") sought to identify potential alternative landfills for its waste in the late 1980s. As a result of this process, Metro Toronto entered into an option agreement with Notre for Adams Mine REDACTED [8].

28. In 1992, a little over a year after Metro Toronto entered into this option, the Government of Ontario created a provincial agency known as the Interim Waste Authority ("IWA"). The IWA was charged with identifying three long-term waste disposal sites located in the Greater Toronto Area[9] for Metro Toronto and the surrounding regional municipalities.[10] Officials at the Ontario Ministry of the Environment ("MOE") explained to Mr. McGuinty that the focus on local long-term waste disposal sites would likely affect the viability of Adams Mine as a waste disposal site for Metro Toronto garbage.[11] Nevertheless, Mr. McGuinty continued to promote Adams Mine.

[8] REDACTED
REDACTED

[9] The Greater Toronto Area is a metropolitan provincial planning area that is comprised of the City of Toronto and the regional municipalities of York, Halton, Peel and Durham. The IWA's mandate did not include the regional municipality of Halton which had sufficient waste disposal capacity.

[10] *Waste Management Act*, S.O. 1992, c.1, s. 13.1 **(CDA-6)**.

[11] See Letter from Derek Doyle, Director, Environmental Assessment Branch, Ministry of the Environment and Energy to Gordon McGuinty, President, Notre Development Corporation (30 June 1993) **(CDA-7)**. MOE advised Mr. McGuinty that: "Notre's proposal … raises a number of questions … related to Ministry policy. … On the issue of Ministry policy, please be advised that [the Ministry of the Environment and Energy] has a strong preference for local disposal and is currently considering options for

29. In 1995, a new Progressive Conservative government was elected in Ontario which returned power to municipalities in the Greater Toronto Area to determine their own waste management strategy.

30. Metro Toronto continued to consider using Adams Mine as a landfill as a contingency in the event that the IWA failed to identify waste disposal sites in the Greater Toronto Area. Accordingly, Metro Toronto revisited its option on Adams Mine in 1995.[12]

31. Metro Toronto issued a Request for Proposal to privately operated waste disposal facilities to determine the cost of using these sites and whether they had the capacity to absorb Metro Toronto's waste. Metro Toronto then directed its officials to compare the cost of purchasing and developing Adams Mine with the cost of sending waste to privately owned landfills.[13]

32. Following this comparison, in December 1995, Metro Toronto Council decided to allow its option to purchase Adams Mine to expire because of the availability of alternative landfill capacity in Michigan, the cost of developing the site and environmental concerns.[14] Metro Toronto subsequently began considering private sector proposals for its waste disposal.[15]

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its implementation. Since this is an active area of policy development, the final approach may impact on the viability of your proposal."

[12] REDACTED

REDACTED

[13] The Municipality of Metropolitan Toronto, Financial Priorities Committee, Report No. 30, For Consideration by The Council of The Municipality of Metropolitan Toronto (18 December 1996), at 22 **(CDA-9)**.

[14] The Municipality of Metropolitan Toronto, Report from M.A. Price to the Works and Utilities Committee, Long-Term Solid Waste Disposal Planning (29 January 1998) **(CDA-10)**.

[15] *Ibid.* **(CDA-10)**.

3. The Rail Cycle North Consortium Fails to Conclude a Contract with Metro Toronto in 1996

33. After Metro Toronto decided not to exercise its option to purchase Adams Mine, Notre fell back on a confidential agreement it had previously reached with Browning-Ferris Industries Ltd. ("Browning-Ferris"). REDACTED

REDACTED

34. Browning-Ferris and Notre joined with the Canadian National Railway Company ("Canadian National") and Ontario Northland Transportation Commission to form a private sector consortium known as Rail Cycle North ("RCN").[17] This consortium would submit two proposals in response to Metro Toronto's Request for Proposals for private sector waste solutions that Metro Toronto would consider in late 1996.[18]

35. First, RCN proposed transporting Metro Toronto's garbage to landfills located in the United States and operated by Browning-Ferris. After RCN secured the required environmental and regulatory approvals for Adams Mine, RCN would then shift Metro Toronto's waste stream from Browning-Ferris' U.S. sites to Adams Mine. Metro Toronto short listed this proposal "on the operational and financial strength of Browning-Ferris."[19]

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[16] REDACTED

REDACTED

[17] REDACTED

REDACTED

[18] The Municipality of Metropolitan Toronto, Financial Priorities Committee, Report No. 30, For Consideration by The Council of The Municipality of Metropolitan Toronto (18 December 1996), at 22 **(CDA-9)**.

[19] *Ibid.*, at 29 **(CDA-9)**.

36. Second, RCN proposed, for a second time, that Metro Toronto enter into a private-public partnership with RCN to develop and operate Adams Mine.[20]

37. Metro Toronto rejected both RCN proposals. Instead, on December 18, 1996, Metro Toronto awarded a five-year contract, commencing on January 1, 1998, to Browning-Ferris alone for the Arbor Hills landfill in Michigan.[21] Browning-Ferris appears to have abandoned the proposal to develop Adams Mine and to have withdrawn from the RCN consortium at this time.

4. The RCN Consortium Fails to Conclude a Contract with the City of Toronto in 2000

38. After Metro Toronto rejected RCN's proposals and agreed to ship waste to Browning-Ferris' site in Michigan, Notre made a third attempt to promote Adams Mine as a waste disposal site. This time it entered into negotiations with Canadian Waste Services ("CWS") to finance, develop and operate Adams Mine.[22]

39. In late May, 1997, Notre and CWS entered into three related agreements. The main features of these agreements were:

- CWS would loan Notre funds to conduct an environmental assessment and to secure the necessary certificates and permits for Adams Mine to operate as a waste disposal site;[23]
- CWS' loan to Notre became payable if Metro Toronto were to enter into a separate long-term contract with a third party for the disposal of more than one million tonnes of garbage per year;[24]

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[20] *Ibid.*, at 25 **(CDA-9)**.

[21] The Municipality of Metropolitan Toronto, Report from M.A. Price to the Works and Utilities Committee, Long-Term Solid Waste Disposal Planning (29 January 1998) **(CDA-10)**.

[22] CWS was known as Waste Management of Canada Inc. at this time.

[23] REDACTED
REDACTED

[24] REDACTED
REDACTED

REDACTED

- CWS held a right of first refusal on any offer to purchase Adams Mine;[27] and
- Notre was required to repay the CWS loan from any proceeds it received from the sale of Adams Mine to a third party that exceeded $1.8 million.[28]

40. CWS joined the RCN consortium at the same time. CWS would loan Notre approximately $4.6 million over the next several years under the loan agreement[29] while providing Notre with the money and technical expertise necessary to apply for an environmental assessment of Adams Mine. Notre later acknowledged that it "... would not have been in a position to tender on the Toronto contract without the landfill experience of CWS."[30]

a) Notre Seeks Environmental Permits for Adams Mine

41. Notre's proposal to convert Adams Mine into a waste disposal site required at least seven permits under provincial environmental legislation. The initial permits that Notre required were: (1) a Notice of Approval to Proceed with an Undertaking under the *Environmental Assessment Act*;[31] and (2) a Provisional Certificate of Approval ("Provisional Certificate") under the *Environmental Protection Act*.[32]

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[25] All dollar amounts are in Canadian funds unless indicated otherwise.

[26] REDACTED
REDACTED

[27] REDACTED
REDACTED

[28] REDACTED

[29] *Canadian Waste Services Inc. v. Notre Development Corporation et al.*, Court File No. 03-CV-244717CM2 (28 February 2003) (Statement of Claim, ¶ 21) (Ont. Sup. Ct.) **(CDA-16)**.

[30] Adams Mine Community Liaison Committee, Minutes (20 September 1999), at 3 **(CDA-17)**.

[31] *Environmental Assessment Act,* R.S.O. 1990, c. E18 **(CDA-18)**. Section 5(1) of the *Environmental Assessment Act* provides: "Every proponent who wishes to proceed with an undertaking

42. In early 1997, the Progressive Conservative Government of Ontario amended regulations under the *Environmental Protection Act* [33] to eliminate the requirement for an independent hearing concerning applications for waste disposal sites that were also subject to review under the *Environmental Assessment Act*. The Government of Ontario also amended the *Environmental Assessment Act* to allow the Minister of the Environment to restrict the scope of an environmental assessment hearing.[34]

43. Notre filed its applications for an environmental assessment on December 20, 1996, immediately after the RCN bids were rejected. In response, the Minister of the Environment referred a single aspect of the Adams Mine proposal for review to the Environmental Assessment Board ("EAB"). The EAB is a quasi-judicial body whose primary role is to adjudicate applications and appeals under provincial environmental and planning legislation. The EAB review of Adams Mine was limited to the issue of whether hydraulic containment was an effective solution for the containment and collection of leachate.[35]

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shall apply to the Minister for approval to do so." Section 1 defines an "undertaking" as "a major commercial or business enterprise or activity or a proposal, plan or program in respect of a major commercial or business enterprise or activity of a person or persons ... that is designated by the regulations." See O. Reg. 221/97 **(CDA-19)**. This regulation provides that: "Any enterprise or activity by Notre Development Corporation of disposing of waste at Adams Mine ... is defined as a major commercial or business enterprise or activity and is designated as an undertaking to which the Act applies."

[32] *Environmental Protection Act,* R.S.O. 1990, c. E19 **(CDA-20)**. Section 27(1) of the *Environmental Protection Act* provides: "No person shall use, operate, establish, alter, enlarge or extend, (a) a waste management system, or (b) a waste disposal site, unless a certificate of approval or provisional certificate of approval therefore has been issued by the Director and except in accordance with any conditions set out in such certificate."

[33] O. Reg. 206/97 **(CDA-21)**. This Regulation provides that: "(1) A waste disposal site or waste management system is exempt from sections 30 and 32 of the *Environmental Protection Act* if it is or forms part of an undertaking that, (a) is subject to section 5 of *the Environmental Assessment Act*; or (b) is exempt from section 5 of the *Environmental Assessment Act* under section 15.1 of that Act." Adams Mine was such an undertaking.

[34] *Environmental Assessment and Consultation Improvement Act*, S.O. 1996 c. 27, s. 9.2(2). The *Environmental Assessment and Consultation Improvement Act* modified the requirements of the *Environmental Assessment Act* by providing that: "The Minister may give such directions or impose such conditions on the referral as the Minister considers appropriate ..." **(CDA-22)**.

[35] Ministry of the Environment, Notice Requiring the Board to Hold a Hearing Under Section 9.2 of *Environmental Assessment Act* (16 December 1997) **(CDA-23)**. ("Questions: (1) Is the proposed 'hydraulic containment' design an effective solution for the containment and collection of leachate that will

44. On June 19, 1998, two of three EAB members found, on a balance of probabilities, that hydraulic containment would be an effective containment system. However, these two EAB members characterized their decision to recommend approval of hydraulic containment as a "qualified yes"[36] and imposed 26 conditions on the proposal to develop Adams Mine as a waste disposal site.[37] One member of the three-member board dissented primarily over his concern that the evidence failed to establish that hydraulic containment would work throughout the 1000 years that Adams Mine would generate leachate.[38]

b) A Provisional Certificate of Approval is Issued Subject to 66 Conditions

45. On August 13, 1998, the Minister of the Environment recommended the approval of the development of Adams Mine as a landfill under the *Environmental Assessment Act,* subject to 37 conditions.[39] This recommendation was accepted by the Government of Ontario.[40] The Minister of the Environment subsequently issued the Notice of Approval on August 20, 1998, subject to these 37 conditions.[41]

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be generated at the proposed site? (2) If the answer to Question 1 is 'No', is there an alternative method that would be an effective solution for the containment and collection of leachate that will be generated at the proposed site? (3) If the answer to Question 1 or 2 is 'Yes', are the attached draft Conditions of Approval set out in Schedule A-1 appropriate? (4) If the answer to Question 3 is 'No', in whole or in part, what changes to the draft Conditions in Schedule A-1, or additional Conditions, would you impose?")

[36] *Notre Development Corporation (Adams Mine Site)* (19 June 1998) EA-97-01 (EAB), Section Section 4.1.3, at 36 (Cl. Ex. 16) **(CDA-4)**. The Statement of Claim incorrectly states that the EAB approved Notre's application. See Statement of Claim, ¶ 24. Only the Government of Ontario has power to approve applications under the *Environmental Assessment Act*. The Board only has power to recommend an approval.

[37] *Notre Development Corporation (Adams Mine Site)* (19 June 1998) EA-97-01 (EAB), Section Section 4.2.1, at 41-54 (Cl. Ex. 16) **(CDA-4)**.

[38] *Ibid.*, Section 4.1.3 at 56-64 (Cl. Ex. 16) **(CDA-4)**.

[39] The EAB recommended 26 of these conditions. The Minister attached a further 11 conditions on this provisional certificate. Ministry of the Environment, Notice of Approval to Proceed with the Undertaking (20 August 1998) **(CDA-24)**.

[40] Order-in-Council, 1887/98 **(CDA-25)**.

[41] Notice of Approval to Proceed with the Undertaking (20 August 1998) **(CDA-24)**.

46. On April 22, 1999, the Ontario Divisional Court dismissed a motion by several public interest groups, which were opposed to the project for environmental reasons, for an interim injunction to prevent the project from moving forward.[42] A subsequent application for judicial review was also dismissed on July 20, 1999.[43] Neither the motion, nor the judicial review considered whether hydraulic containment would be effective.

47. On April 23, 1999, Notre received a Provisional Certificate Approval under the *Environmental Protection Act* to develop and operate Adams Mine as a waste disposal site.[44] The Provisional Certificate of Approval required Notre to comply with 66 conditions: the 37 conditions listed in the approval under the *Environmental Assessment Act* together with an additional 29 conditions imposed by MOE. The Statement of Claim fails to mention the existence of 40 of these conditions.[45]

48. The 66 conditions in the Provisional Certificate included:

- Condition 10 requiring Notre to acquire legal access to the Crown lands which formerly were mining tailings areas and which were to be used for the discharge of surface water and treated effluent;
- Conditions 16 and 17 requiring the approval of a final detailed design and site operations manual prior to the receipt of any waste;
- Condition 19 requiring Notre to review the elevation of the perimeter collection system;[46]

[42] The public interest groups filed a motion for a stay of the recommendation of the EAB, the decision of the Minister, and Cabinet's Order in Council approval of the Environmental Assessment, or in the alternative, an interim stay of the issuance of the Provisional Certificate of Approval and Condition 10 of the Environmental Assessment.

[43] *Adams Mine Intervention Coalition v. Ontario (Environmental Assessment Board)* [1999] O.J. No. 2886 (On. Div. Ct.) (Cl. Ex. 18) **(CDA-26)**; *Adams Mine Intervention Coalition v. Ontario (Environmental Assessment Board)* [1999] O.J. No. 2701 (On. Div. Ct.) (Cl. Ex. 19) **(CDA-27)**.

[44] Provisional Certificate of Approval for a Waste Disposal Site, No. A612007 (23 April 1999) **(CDA-28)**.

[45] Statement of Claim, ¶ 29.

[46] The perimeter collection system was part of the "passive drain system," which would drain leachate after pumping stopped. The perimeter collection system would have funnelled leachate through two declining pipes to a tunnel, which would drain the leachate into the tailings area.

- Condition 22 requiring the approval of surface water triggers and remedial action contingency plans;[47]
- Condition 24 requiring Notre to install six additional wells to monitor groundwater;
- Condition 28 requiring Notre to obtain several other certificates and permits[48] before beginning construction, including:
    - a Certificate of Approval under Section 53 of the *Ontario Water Resources Act* for an on-site leachate treatment plant and constructed wetlands,[49]
    - a Certificate of Approval under Section 53 of the *Ontario Water Resources Act* for stormwater management facilities,[50]
    - a Permit to Take Water ("PTTW") under Section 34 of the *Ontario Water Resources Act* for dewatering the South Pit, and
    - a Certificate of Approval under Section 9 of the *Environmental Protection Act* for the landfill gas control plant and flares;[51]
- Condition 31 requiring the submission of a Site Preparation Report; and
- Condition 57 requiring Notre to provide ongoing financial assurance to pay for compliance with, and performance of, actions specified in the Certificate of Approval.[52]

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

[48] Although not listed in Condition 28 of the provisional certificate, Notre also would have had to apply for a long term Permit to Take Water to pump leachate from the South Pit under Section 34 of the *Ontario Water Resources Act* and an additional certificate of approval under Section 53 of the *Ontario Water Resources Act* for the installation of pumps, a pump station, a pad and other works necessary to drain the South Pit. See *Ontario Water Resources Act*, R.S.O. 1990, c. O.40 **(CDA-29)**

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

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

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

[52] Provisional Certificate of Approval for a Waste Disposal Site, No. A612007 (23 April 1999), at 4-14 **(CDA-28)**. Condition 57 of the Provisional Certificate provides that: "Financial assurance shall be provided by the Owner to the Director in a form and manner acceptable to the Director and in an amount that is sufficient to pay for compliance with and performance of any action specified in this Certificate of

49. Of the conditions listed above, *only one* was fulfilled by Notre in October 2000 when Notre obtained a short-term PTTW. Notre allowed the short-term PTTW to expire a year later without ever taking any water.

c) The City of Toronto Rejects Adams Mine as a "Dark Ages Concept"

50. As the closure of its existing Keele Valley landfill approached in 2002, Metro Toronto, now known as the City of Toronto, again sought to identify disposal sites for its garbage. It initiated Toronto's Integrated Solid Waste Resource Management ("TIRM") process. Under the TIRM process, the City of Toronto sought to identify sites for long-term waste disposal for the City of Toronto and the regional municipalities of York, Peel and Durham.

51. On October 5, 1999, the City of Toronto issued a Request for Proposals. Seven companies submitted proposals, including the RCN consortium, , which the City of Toronto reviewed in early 2000.[53] By this time, the RCN consortium consisted of CWS, Notre, Miller Waste Systems, Canadian National, and Ontario Northland.[54]

52. After reviewing all proposals, City of Toronto staff rejected Adams Mine and recommended to its Works Committee that a reduced amount of waste continue to be sent to the Keele Valley landfill, with the remainder going to three other sites over the next six

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Approval, including the closure and post-closure care of the Site and contingency plans for the Site, as required in Reg. 232, Section 17 and 18."

[53] City of Toronto, Staff Report to Works Committee, Toronto Integrated Solid Waste Resource Management ("TIRM") Process Stage 4, Due Diligence (13 March 2000) **(CDA-30)**.

[54] Miller Waste Systems was to provide local waste collection services and transfer station facilities. A transfer station is a facility where waste collection vehicles deposit waste before it is loaded onto larger vehicles to transport it to a waste disposal site. Canadian National and Ontario Northland were to provide rail transportation from Toronto to the Adams Mine Landfill. REDACTED

REDACTED

REDACTED Ontario Northland still required a certificate before it could haul garbage as freight between North Bay and Adams Mine.

years—the Green Lane landfill, the Essex-Kent Municipal landfill and the Arbor Hills landfill in Michigan.[55]

53. The City of Toronto Council preferred not to extend the life of the Keele Valley landfill and, instead, chose to pursue contracts with RCN and another company, Republic Services of Canada Inc. ("Republic").[56] The regional municipalities of Durham and York supported the plan to contract with RCN and Republic, subject to further negotiations and legal due diligence.[57] However, Peel Region decided not to endorse the Adams Mine proposal until it was satisfied that Adams Mine was environmentally safe.[58] Consequently, the Statement of Claim is incorrect when it asserts that "Peel Region ... selected the Adams Mine site for their waste."[59]

54. The Statement of Claim also incorrectly alleges that "political interference" prevented the "Toronto contract from going forward."[60] In fact, as explained below, the Toronto contract negotiations fell apart over a disagreement as to allocation of liability for changes in the law regulating the project. Notre admitted this fact in domestic litigation that followed the collapse of the contract negotiations.[61]

55. The draft contract prepared by the City of Toronto staff and RCN included the following terms:

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[55] City of Toronto, Staff Report, Toronto Integrated Solid Waste Resource Management ("TIRM") Process Category 2 Proven Disposal Capacity Residual Solid Waste Disposal Capacity Options (19 June 2000), at 14-19 **(CDA-101)**.

[56] City of Toronto, Minutes of the Council of the City of Toronto August 1, August 2, August 3 and August 4, 2000 (August 2000) at 145 **(CDA-32)**.

[57] City of Toronto, Staff Report from Barry Gutteridge, Commissioner of Works and Emergency Services to Toronto City Council, Toronto Integrated Solid Waste Resource Management ("TIRM") Process Category 2, Proven Disposal Capacity Response to Requests for Information (3 October 2000) Appendix C at 18 **(CDA-33)**.

[58] *Ibid.* at 19 **(CDA-33)**.

[59] Statement of Claim, ¶ 43.

[60] *Ibid.*

[61] *Canadian Waste Services Inc. v. Notre Development Corporation et al.*, Court File No. 03-CV-244717CM2 (20 May 2003) (Amended Statement of Defence, ¶¶16-17) (Ont. Sup. Ct.) ("Toronto City Council...refused to approve the contract as a result of the changes having been inserted.") **(CDA-1)**.

- the parties to the contract were the City of Toronto, CWS, Waste Management Inc. (the U.S. parent of CWS), and RCN;[62]

- any party could terminate the agreement if the Canadian Federal Minister of the Environment ordered a federal environmental assessment of Adams Mine;[63]

- RCN was required to conclude waste disposal contracts with the regional municipalities of York and Durham;[64]

- the parties were to agree on sites in Michigan if waste could not be delivered to Adams Mine. Contingency sites were critical as the City of Toronto was concerned that unforeseen problems could prevent the transportation of waste to Adams Mine; and

- the City of Toronto would be "liable to pay any of the unavoidable increased costs incurred as a result of any change in law affecting the project."[65]

56. Toronto City Council voted to approve the draft contract, conditional on the removal of the provision making the City of Toronto liable for unavoidable increased costs incurred as a result of any change in the law affecting the Adams Mine proposal. In addition, Toronto City Council required confirmation by February 15, 2001 that the federal Government of Canada would not initiate an environmental assessment. A federal environmental assessment could have delayed or prevented the project from moving forward and is described below.

57. CWS, which led the contract negotiations on behalf of RCN, refused to remove the liability provision.[66] CWS insisted on this provision as it was concerned that any

[62] City of Toronto, Staff Report from Barry Gutteridge, Commissioner of Works and Emergency Services to Toronto City Council, Toronto Integrated Solid Waste Resource Management ("TIRM") Process Category 2, Proven Disposal Capacity Response to Requests for Information (3 October 2000), at 11 **(CDA-33)**.

[63] *Ibid.* at 11 **(CDA-33)**.

[64] *Ibid.* at 11 **(CDA-33)**. This condition was inserted at the request of RCN and could be waived in its "sole discretion."

[65] *Ibid.* at 14 **(CDA-33)**.

[66] Jack Lakey, "Trash deal dead and buried-Rail Cycle North Balks at Contract, Garbage Heads for 2 Michigan Sites" *Toronto Star* (21 October 2000) **(CDA-194)**; Don Wanagas, "Toronto Trash Plans Scrapped by Liability Clause: Michigan to Get Contract: Garbage Will Not Go to Adams Mine" *National Post* (21 October 2000) **(CDA-195)**.

further regulatory changes over the 20-year term of the contract could make Adams Mine uneconomical. Accordingly, CWS insisted on allocating almost all liability for such increased cost, should it ever arise, to the City of Toronto.

58. The City of Toronto refused to sign the contract with this liability provision,[67] and negotiations ended by October 2000.[68]

59. The City of Toronto proceeded to sign contracts with Republic Services of Canada Inc. for the disposal of solid waste at the Carleton Farms landfill in Michigan.[69] Toronto publicly announced that any deal to dispose of its waste at Adams Mine was "dead."[70]

60. Consistent with this announcement, on January 31, 2001, the Toronto City Council passed a motion that formally rejected current and future use of Adams Mine as a landfill. Among other things, the motion characterized the project as a "…'dark ages' concept of dumping our trash in an abandoned mine".[71] Peel Region also passed a resolution indicating that it would not send waste to Adams Mine.[72]

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[67] City of Toronto, Minutes of the Council of the City of Toronto January 30, January 31 and February 1, 2001 (6 March 2001), at 87 **(CDA-34)** ("…the proponent, Rail Cycle North, refused to agree with the removal of certain liability clauses from the contract and therefore the proposal failed.").

[68] Letter from Barry H. Gutteridge, Commissioner of Works and Emergency Services to Mayor Mel Lastman and Members of Council, Re: TIRM Waste Disposal RFP – Agreement with the Rail Cycle North Consortium (20 October 2000) **(CDA-35)**.

[69] *Ibid.* **(CDA-35)**.

[70] City of Toronto, Press Release, "City of Toronto Confirms RCN Deal is Dead" (6 November 2000) **(CDA-36)**.

[71] City of Toronto, Minutes of the Council of the City of Toronto, January 30, January 31 and February 1, 2001 (6 March 2001), at 87-88 **(CDA-34)**.

[72] See *e.g.*, Regional Municipality of Peel, News Release, "Region of Peel Will Not Send Waste to Adams Mine Site" (19 October 2000) **(CDA-37)**; see also The Regional Municipality of Peel, General Committee, Minutes, GC-2000-12 (19 October 2000) **(CDA-38)**.

61. In light of the City of Toronto's decision, the surrounding regional municipalities decided not to use Adams Mine and signed contracts with other waste disposal companies.[73]

d) The Federal Government Considers Initiating an Environmental Review of Adams Mine

62. Even if the City of Toronto and CWS had been able to agree on the terms of their contract, the proposal to develop Adams Mine could have been frustrated due to a separate federal environmental assessment. As noted above, at paragraph 56, the City of Toronto had made the draft contract conditional on confirmation, by February 15, 2001, that no federal environmental assessment was necessary.

63. During the contract negotiations with the City of Toronto, Timiskaming First Nation, an Aboriginal community located downstream from Adams Mine, had written to the Canadian federal Minister of Indian Affairs and Northern Development to request a federal environmental assessment.[74] This request was referred to the Canadian Minister of the Environment and the Canadian Environmental Assessment Agency ("CEAA").

64. In Canada, jurisdiction over the environment is shared between the federal and provincial governments. The *Canadian Environmental Assessment Act* gives the federal Minister of the Environment discretion to refer a project for independent review if the project may cause significant adverse environmental effects in another province,[75] or on

[73] York and Durham did not pass a formal resolution but decided not to use Adams Mine because of the City of Toronto's decision. Darlene Wroe, "Toronto Regions looking for waste management proposals" *Timiskaming Speaker* (8 November 2000) **(CDA-39)**; see also Regional Municipality of Durham, Report to the Joint Works Committee, No. 2007-J-09, The Annual Solid Waste Management Servicing and Financing Study and Proposed 2007 Business Plans, Budgets and Related Financing (20 March 2007), at Section 3.4.13 **(CDA-40)**.

[74] Letter from Carol McBride, Chief, Timiskaming First Nation, to Hon. Robert D. Nault, Minister of Indian and Northern Affairs (16 March 2000) **(CDA-41)**.

[75] *Canadian Environmental Assessment Act*, S.C. 1992, c.37, ss. 29(1)(a)(ii), 33(1), 46(1) and 46(3)(b) **(CDA-42)**.

an Indian reserve.[76] If that independent review concludes that the project is likely to have such effects, the Minister may issue an order preventing the project from proceeding.[77]

65. On March 16, 2000, Timiskaming First Nation requested federal environmental review on the basis that groundwater contamination from waste at the Adams Mine site could affect its reserve. After receiving this request, CEAA initiated internal consultations to determine whether the Minister had legal authority to refer Adams Mine to a federal environmental assessment.

66. On September 1, 2000, Timiskaming First Nation submitted a formal petition to the Canadian Minister of the Environment to supplement its original request for a federal environmental assessment of Adams Mine.[78] A public interest group, known as the Campaign Against Adams Mine, also filed a petition for a federal environmental review.[79] These petitions highlighted the potential environmental effect of the Adams Mine proposal on Aboriginal reserves and land in the province of Quebec.[80]

67. In response to these petitions, CEAA contacted Environment Canada and Natural Resources Canada to request a scientific review of RCN's proposal to develop Adams Mine.[81] As part of this review, hydrogeologists at Environment Canada's National Water

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[76] *Ibid.*, ss. 29(1)(a)(ii), 33(1), 48(1)(a), (b) and (e) and 48(4)(b) **(CDA-42)**.

[77] *Ibid.*, s. 50(2) **(CDA-42)**.

[78] Letter from Rheal Thivierge, Vice-Chief, Timiskaming Firms Nation to the Hon. David Anderson, Minister of the Environment, Re: Adams Mine/Timiskaming First Nation (1 September 2000) **(CDA-43)**, enclosing Petition to Federal Minister of the Environment Requesting a Federal Environmental Assessment of RailCycle North's Proposal for the Adams Mine Site (1 September 2000) **(CDA-44)**.

[79] The Campaign Against Adams Mine submitted its petition on behalf of itself and the following public interest groups & municipalities: Comité de la Sauvegarde du lac Témiscamingue, Muncipalités régionales du Comité de Témiscamingue, Timiskaming Federation of Agriculture, Northwatch, Great Lakes United, and Municipalities of Timiskaming. See Pierre Belanger, Campaign Against Adams Mine to Hon. David Anderson, Minister of Environment (20 September 2000) **(CDA-45)**; see also Petition for a Federal Environmental Assessment of a Proposed Landfill at the Adams Mine – Supporting Brief, submitted by Campaign Against Adams Mine (21 September 2000) **(CDA-46)**.

[80] *Ibid.* **(CDA-46)**.

[81] Letter from Louise Knox, Regional Director, Canadian Environmental Assessment Agency to Rob Dobos, Head, Environmental Assessment, Environment Canada, Re: Adams Mine Landfill Project (25 September 2000) **(CDA-47)**; Letter from Louise Knox, Regional Director, Canadian Environmental

Research Institute ("NWRI") examined whether the consultants retained by Notre to demonstrate hydraulic containment used appropriate models and data and whether the groundwater contaminants from Adams Mine could reach Lake Timiskaming and Timiskaming First Nation.[82]

68. A preliminary NWRI report found that the two-dimensional model used to predict groundwater flow was inappropriate for the fractured bedrock at Adams Mine.[83] It concluded that the two-dimensional model also contained assumptions which would skew the calculations concerning hydraulic containment.[84] The NWRI was also concerned that the consultants only collected critical data from the deep-angled boreholes once rather than monitoring the hydraulic pressure over a longer period of time.[85] Finally, these hydrogeologists found that there was a high probability that groundwater contaminants from the Adams Mine landfill could reach the reserve if they were discharged into the Misema River.[86]

69. NWRI communicated these preliminary findings to CEAA on November 20, 2000, and to MOE on July 23, 2001.[87]

70. When the contract negotiations with the City of Toronto failed, the Canadian Minister of the Environment suspended CEAA's review of whether a federal

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Assessment Agency to Rennie Tupper, Environmental Assessment, Natural Resources Canada, Re: Adams Mine Landfill Project (25 September 2000) **(CDA-48)**.

[82] Memorandum from Allan Crowe, Project Chief and Pat Lapcevic, Hydrogeologist, National Water Research Institute to Rod Allan, Associate Executive Director, National Water Research Institute, Re: Federal Review of Adams Mine Landfill Proposal DRAFT (20 November 2000), at Questions 4 and 5, at 2-4 **(CDA-49)**.

[83] *Ibid.*, Question 5(a), at 3 **(CDA-49)**.

[84] *Ibid.*, Question 5(b), at 4 **(CDA-49)**.

[85] *Ibid.*, Question 5(a), at 3 **(CDA-49)**.

[86] *Ibid.*, Question 4(d), at 3 **(CDA-49)**. The NWRI also expressed concern that the water discharged from the leachate treatment plant and flowing through the tailings area would become acidic and contaminate the local watershed.

[87] *Ibid.* **(CDA-49)**; Email from Pat Lapcevic, Hydrogeologist, National Water Resources Institute, to Rob Dobos, Environment Canada and Dave Stasseff, Ministry of the Environment (23 July 2001) **(CDA-50)**.

environmental assessment should examine the Adams Mine proposal.[88] This decision did not prevent consideration of future petitions on new proposals for the Adams Mine site.

5. Notre Fails to Convince Aecon Construction Group to Develop Adams Mine in 2001

71. The RCN consortium fell apart in February 2001, shortly after the collapse of the contract negotiations, as Adams Mine was uneconomical without the volume of garbage produced by the City of Toronto.[89] Notre blamed CWS for the failure of these negotiations because of its insistence on allocating liability for future regulatory changes to the City of Toronto.[90]

72. REDACTED

REDACTED

[88] See *e.g.*, Letter from Hon. David Anderson, Minister of the Environment, to Carol McBride, Chief, Timiskaming First Nation (20 January 2001) **(CDA-51)**; see also Letter from Hon. David Anderson, Minister of the Environment, to Pierre Bélanger & Pierre-Alexandre Ayotte, Campaign Against the Adams Mine & Comité de la Sauvegarde du lac Témiscamingue (26 January 2001) **(CDA-52)**.

[89] *Adams Mine Intervention Coalition v. Ontario (Environmental Assessment Board)* [1999] O.J. No. 2886 (On. Div. Ct.) (Supplementary Affidavit of Michael McGuinty, ¶ 3) **(CDA-53)**. ("Notre requires large contracts for the landfilling of waste (from a source of the general size of the City of Toronto) in order to justify the cost of developing the Adams Mine site for use as a landfill. Without such contracts, Notre will be unable to continue carrying on business or develop the landfill."); see also The Regional Municipality of York, Solid Waste Management Public Liaison Committee, Minutes (13 September 2000) **(CDA-54)**. ("This decision [by Toronto on the 2000 contract] was conditional upon Durham, Peel and York also participating in the Rail Cycle North proposal because at the price negotiated, Rail Cycle North needs the volume of waste generated in the GTA rather than that simply out of Toronto.")

[90] *Canadian Waste Services Inc. v. Notre Development Corporation et al.*, Court File No. 03-CV-244717CM2 (20 May 2003) (Amended Statement of Defence, ¶¶ 16-17) (Ont. Sup. Ct.) **(CDA-1)**.

[91] REDACTED

REDACTED

[92] REDACTED

REDACTED

REDACTED

73. For the fourth time in 12 years, Notre began to search for a partner that was capable of financing, developing and operating Adams Mine. CWS had taken over Browning-Ferris in Canada in 2000 and few other large waste disposal companies operate in Ontario. Accordingly, in April 2001, Notre approached BFC Construction Group, later renamed Aecon Construction Group ("Aecon").

REDACTED

[93] REDACTED

REDACTED

[94] REDACTED

REDACTED

[95] REDACTED

REDACTED

[96] REDACTED

REDACTED

6. Notre's Efforts to Develop Adams Mine End in Failure in 2001

76. Following the collapse of the Toronto negotiations in 2000, Notre made no progress promoting the project to the City of Toronto and suspended its efforts to develop Adams Mine.

77. Gordon McGuinty repeatedly failed to convince the City of Toronto to change its mind concerning Adams Mine during this period. The Chair of the Works Committee appears to have met once with Gordon McGuinty as a "courtesy" and explained to him that the City of Toronto was no longer interested in Adams Mine as a waste disposal site.[98] Moreover, the Manager of Strategic Planning for Solid Waste Management also indicated that Adams Mine was "no longer an option" for Toronto's garbage.[99]

78. A few days after the collapse of the negotiations with the City of Toronto, Notre delayed the purchase of the Crown lands adjacent to Adams Mine, which Dofasco had used to deposit the mine tailings (the "tailings area"). A condition of the project's Provisional Certificate required Notre to secure legal access to the tailings area so that treated leachate could be discharged through the tailings area into the Misema River. Notre contacted the Ontario Ministry of Natural Resources ("MNR") District Office in Kirkland Lake to ask them to "hold off" on the land transfer.[100] MNR sent a letter

[97] REDACTED
REDACTED

[98] Paul Moloney and Bruce DeMara, "Disero trashes Adams Mine pitch" *Toronto Star* (27 August 2001) ("Councillor Betty Disero (Ward 17, Davenport), Chair of the Works Committee, said a plan floated Friday by Kirkland Lake Mayor Bill Enouy is not under consideration …[Councillor] Disero said she met with Enouy and Adams Mine principal Gordon McGuinty last week only as a courtesy ….") **(CDA-60)**.

[99] "Adams Mine group makes new bid for trash: Will drop clause that scuttled Toronto deal" *National Post* (14 November 2001) **(CDA-61)**.

[100] Record of Verbal Transaction with Mike McGuinty (24 October 2000) **(CDA-62)**.

offering to sell Notre the tailings area a month later for $102,720.[101] MNR has no record of Notre or Mr. McGuinty showing renewed interest in purchasing this land until almost two years later in October 2002.[102]

79. Notre also requested repeated extensions of the certificates and permits it had received from MOE. On April 4, 2001, MOE amended the Provisional Certificate to extend the date for a review of Notre's financial assurance for the project until March 31, 2002.[103] MOE later issued further amendments extending this review until March 31, 2004.[104]

80. On October 18, 2000, just prior to the collapse of the Toronto negotiations, Notre had received a short-term PTTW.[105] The unused PTTW expired on October 30, 2001. On January 4, 2002, Mr. McGuinty wrote David Hollinger, the Supervisor of the Northern Region Water Resources Unit and the Director responsible for issuing PTTWs, to request an "amendment" to the expired short-term PTTW.[106] Mr. McGuinty asked Mr. Hollinger to issue a new short-term PTTW for five years although no date had been set to

[101] Letter from Lane LaCarte, Kirkland Lake/Claybelt Area Manager, Ministry of Natural Resources to Mike McGuinty, Notre Development Corporation (1 December 2000) **(CDA-63)**.

[102] Letter from Gordon McGuinty, President, Notre Development Corporation to Ivan Cragg, Ministry of Natural Resources (30 October 2002) **(CDA-64)**.

[103] Ministry of Environment, Amendment to Provisional Certificate of Approval, Waste Disposal Site, No. A612007, Notice No.1 (4 April 2001) **(CDA-65)**.

[104] Ministry of Environment, Amendment to Provisional Certificate of Approval, Waste Disposal Site, No. A612007, Notice No.2 (13 March 2002) **(CDA-66)**.

[105] Ministry of Environment, Permit to Take Water, No. 00-P-6040 (18 October 2000) **(CDA-68)**. The MOE also issued Notre a Certificate of Approval on July 9, 2001 to install pumps and equipment to temporarily de-water the South Pit of Adams Mine in response to a request made before the Toronto negotiations collapsed. See Ministry of Environment, Certificate of Approval, Municipal and Private Sewage Works, No. 3250-4NMPDN (9 July 2001) **(CDA-67)**. This certificate and the related short-term PTTW allowed Notre to temporarily de-water the South Pit by installing four submersible pumps on a barge which would connect high pressure hose pipes and steel piping to an intermediate pumping station which would then send the water to a discharge or splash pad. This certificate and the short term PTTW did not authorize the pumping of leachate or the construction of the infrastructure necessary to de-water the South Pit on a long-term basis.

[106] Letter from Gordon McGuinty, President, Notre Development Corporation to Dave Hollinger, Supervisor, Northern Region Water Resources Unit, Ministry of Environment (4 January 2002) **(CDA-69)**.

commence dewatering. Mr. McGuinty explained that he required this longer timeframe because the "...[o]pening of the facility depends on the waste stream we can attract".[107]

81. Mr. Hollinger wrote to Mr. McGuinty on January 15, 2002 indicating that he could not issue a short-term PTTW, but offering to retain Notre's application on file. Mr. Hollinger also indicated that once Notre had a specific requirement to de-water the South Pit, MOE would issue a new short-term PTTW promptly, provided that the details of the water taking and its use of the local environment remained unchanged.[108]

B. Notre and Gordon McGuinty Restructure the Ownership of Adams Mine in 2002

1. Notre Transfers Adams Mine to the Cortellucci Group of Companies, the Limited Partnership and the Enterprise

82. After the arrangement with Aecon collapsed, Gordon McGuinty renewed his search, for a fifth time, for a partner to finance, develop and operate Adams Mine. Notre now reached further afield to a residential real estate developer named Mario Cortellucci. The Cortellucci Group of Companies Inc. ("CGC") had the financial resources to develop Adams Mine, but had no experience developing or operating a waste disposal site.

83. Notre entered into an Agreement of Purchase and Sale on May 10, 2002 to sell Adams Mine to the CGC "in trust"[109] and REDACTED

REDACTED That Agreement also required the CGC to:

- pay Notre $1.8 million;

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[107] *Ibid.* **(CDA-69)**.

[108] Letter from Dave Hollinger, Supervisor, Northern Region Water Resources Unit, Ministry of Environment to Gordon McGuinty, President of Notre Development Corporation (15 January 2002) **(CDA-70)**.

[109] REDACTED

REDACTED

- pay Notre's outstanding provincial realty and school board taxes of approximately $270,000;
- pay Dofasco and Chevron, the previous owners of Adams Mine, $5 million in royalties if Adams Mine became an operational landfill;
- pay the City of Toronto $3.5 million if the Adams Mine site became an operational landfill;

REDACTED

- pay Notre a royalty of $1 per tonne for waste disposed of at Adams Mine;
- pay Notre a penalty of $2.50 per tonne for any contracts entered into after 2005 to dispose of waste from the Greater Toronto Area at any other waste disposal site in Ontario or the United States;

REDACTED

- pay Gordon McGuinty "in trust" $0.50 per tonne of processed aggregates[110] used on the site; and

REDACTED

84. In exchange, Notre agreed to:

[110] Processed aggregates refer to gravel and other stone which would be used on the Adams Mine site.

[111] REDACTED

REDACTED

- transfer all of its rights, title and interest in the Adams Mine site to the CGC;

REDACTED

85. On June 26, 2002, the Enterprise was registered as an Ontario business corporation by Brent Swanick, a solicitor, who was also President, Secretary and sole Director of the corporation.[113] Mr. Swanick's law offices were listed as the business address of the Enterprise.[114] Gordon McGuinty publicly represented himself as Managing Director of the Enterprise.

86. On September 9, 2002, Notre transferred the title for Adams Mine to the Enterprise.[115] In a resolution dated "as of September 9, 2002," Brent Swanick transferred the single common share in the Enterprise to Mr. Vito Gallo, apparently for no consideration.[116] At a point in time unknown to Canada, Swanick also signed a declaration stating that he held one common share in trust for Mr. Gallo "as of" June 26, 2002.

87. The Enterprise has no other common shares or shareholders, nor does it have any other class of shares or shareholders.

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[112] REDACTED

[113] Ontario Ministry of Consumer and Business Services, Corporation Profile Report, 1532382 Ontario Inc. (25 October 2004) **(CDA-71)**. 1532382 Ontario Inc. was later registered under the business name "Adams Mine Railhaul". Ontario Ministry of Consumer and Business Services, List of Current Business Names Registered by Corporation, 1532382 Ontario Inc. (26 April 2007) **(CDA-72)**.

[114] Ontario Ministry of Consumer and Business Services, Corporation Profile Report, 1532382 Ontario Inc. (25 October 2004) **(CDA-71)**.

[115] Transfer/Deed of Land between Notre Development Corporation and 1532382 Ontario Inc., (6 September 2002) **(CDA-73)**; see also Parcel Register for Adams Mine (15 April 2004) **(CDA-74)**.

[116] Certificate for Shares in 1532382 Ontario Inc. (26 June 2002) (Cl. Ex. 5) **(CDA-196)**. On the share certificate issued to Vito Gallo the phrase "for value received" has been crossed out.

88. REDACTED
REDACTED
Mr. Gallo was unknown to government officials familiar with the Adams Mine project or the *AMLA* until he submitted his claim under NAFTA Chapter 11.

89. On September 10, 2002, 1532382 Limited Partnership was registered in Ontario.[118] The Limited Partnership was formed to finance the acquisition of Adams Mine REDACTED

90. The Enterprise was listed as the general partner of the Limited Partnership, and contributed $1 to the Limited Partnership.[121] REDACTED
REDACTED The Limited Partnership later expanded to ten limited partners.[122] At a time unknown to Canada, these partners were replaced with a single limited partner, 919841 Ontario Inc.[123]

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[117] REDACTED
REDACTED

[118] 1532382 Limited Partnership Registration Documents (10 September 2002) **(CDA-76)**. A limited partnership is comprised of one or more general partners that control the business and one or more limited partners that contribute capital and are prohibited from actively participating in the business. See *Limited Partnership Act*, R.S.O. 1990, c. L.16, ss. 7 and 8 **(CDA-77)**. Limited partners are entitled to a share in the profits and are liable for an amount equivalent to their contribution to the limited partnership. *Ibid.*, ss. 9 and 11. See generally, *Kucor Construction & Development & Associates* v. *Canada Life Assurance Company* (1998), 41 O.R. (3d) 577 (C.A.), at 587-590 **(CDA-78)**.

[119] REDACTED
REDACTED

[120] REDACTED
REDACTED

[121] 1532382 Limited Partnership Registration Documents (10 September 2002) **(CDA-76)**; see also Letter from Brent W. Swanick, Swanick & Associates to Meg Kinnear, Senior General Counsel and Director-General, Trade Law Bureau "Re 1532382 Limited Partnership" (5 February 2008) **(CDA-82)**.

[122] Rick Owen, "Adams Mine Controversy Heats up Once Again" *Northern Daily News* (17 June 2003) ("Notre sold the Adams Mine landfill to a new limited partnership group in 2002 a full two years after the agreement to sell the property was made with MNR. Mario Cortellucci does not own the Adams Mine. He has a company that is only one of ten new investors in the project and has only a minority interest.") **(CDA-81)**.

[123] Letter from Brent W. Swanick, Swanick & Associates to Meg Kinnear, Senior General Counsel and Director-General, Trade Law Bureau "Re 1532382 Limited Partnership" (5 February 2008) **(CDA-82)**.

91. The relationship between the Limited Partnership and the Enterprise is established partially in a REDACTED

REDACTED

REDACTED

This letter indicates that 919841 Ontario Inc. contributed $3,226,769 to the partnership as the limited partner.

[124] REDACTED

REDACTED

[125] REDACTED

REDACTED

[126] REDACTED

[127] REDACTED

[128] REDACTED

REDACTED

[129] Statement of Claim, ¶ 11.

[130] REDACTED

REDACTED

REDACTED

93. The Limited Partnership retained Gordon McGuinty, through his consulting firm Christopher Gordon Associates Ltd., an Ontario corporation, to manage the Adams Mine site.[133] However, Notre appears to have remained involved in the plans to develop Adams Mine as a waste disposal site and publicly described itself as the developer.[134]

94. Canada has set out its current understanding of the relationship between the Limited Partnership and the Enterprise in Figure 2.[135] The Limited Partnership is shown in the red shaded area on the left hand side of Figure 2 and includes the Enterprise acting as the general partner. On the right hand side of Figure 2, the Enterprise is shown in a green shaded area acting as a corporation which holds Adams Mine. The lines between the Enterprise acting as a general partner and the Enterprise acting as a corporation represent REDACTED Figure 2 also shows the relationship of the Limited Partnership and the Enterprise to Christopher Gordon Associates Ltd, Notre, Gordon McGuinty and Vito Gallo.

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[131] REDACTED
REDACTED

[132] REDACTED
REDACTED

[133] Statement of Claim, fn 11; REDACTED
REDACTED Ontario Ministry of Consumer and Business Services, Corporation Profile Report, Christopher Gordon Associates Ltd. (9 October 2007) **(CDA-84)**. Gordon McGuinty is the President and a Director of this corporation.

[134] Letter from Elizabeth Fournier, Director of Communications, Adams Mine Rail Haul to Dave Hollinger, Supervisor, Water Resources Unit, Northern Region, Ministry of the Environment (10 October 2003) **(CDA-85)**. ("Ms McSherry questions Notre's right to begin construction. Notre indeed can, and will begin construction on the site while awaiting the PTTW and resolution of access to the MNR lands. The Adams Mine Landfill has a valid Certificate of Approval and the proponent is in charge of the development of the Adams Mine subject to all conditions being met prior to landfilling.")

[135] REDACTED
REDACTED

1532382 LIMITED PARTNERSHIP AND 1532382 ONTARIO INC.
(September 2002 – April 2004)

REDACTED

2. CWS Challenges the Enterprise's Acquisition of Adams Mine

95. Notre notified CWS that it had entered into an Agreement of Purchase and Sale with the CGC on May 10, 2002.[136] Notre alleged that it was entitled to retain the $1.8 million proceeds from the sale of Adams Mine to the Enterprise.[137]

96. CWS objected to the sale of Adams Mine on the ground that it frustrated CWS' contractual right of first refusal to purchase the site.[138] In 2003, CWS brought a lawsuit against the CGC, Notre and the Enterprise, seeking a declaration that the Agreement of Purchase and Sale was void, and an order expunging from title the transfer of Adams Mine from Notre to the Enterprise.[139] In the alternative, CWS requested $5 million for the lost opportunity of developing Adams Mine.[140]

C. Attempts to Restart the Adams Mine Project were Slow and Undermined by Additional External Problems

1. Adams Mine Was Not Viable without Toronto's Waste

97. Adams Mine was not economically viable without the volume of municipal solid waste generated by the City of Toronto and the regional municipalities of York and Durham. This waste was no longer available to the Enterprise in September 2002. REDACTED

REDACTED

[136] *Canadian Waste Services Inc. v. Notre Development Corporation et al.*, Court File No. 03-CV-244717CM2 (20 May 2003) (Amended Statement of Defence, ¶¶ 25-26) (Ont. Sup. Ct.) **(CDA-1)**.

[137] *Ibid.* **(CDA-1)**.

[138] *Canadian Waste Services Inc. v. Notre Development Corporation et al.*, Court File No. 03-CV-244717CM2 (28 February 2003) (Statement of Claim, ¶¶ 12-15) (Ont. Sup. Ct.) **(CDA-16)**. REDACTED

REDACTED

[139] *Canadian Waste Services Inc. v. Notre Development Corporation et al.*, Court File No. 03-CV-244717CM2 (28 February 2003) (Statement of Claim, ¶¶ 2, 18) (Ont. Sup. Ct.) **(CDA-16)**.

[140] *Ibid.* at ¶ 28 **(CDA-16)**.

REDACTED

99. In 2003, the City of Toronto produced 621,322 tonnes of municipal solid waste after recycling and other forms of diversion.[146] In the same year, the regional

[141] REDACTED
REDACTED

[142] REDACTED

[143] REDACTED
REDACTED

[144] REDACTED
REDACTED

[145] REDACTED
REDACTED

[146] City of Toronto, Year over Year Comparison of Residential Diversion **(CDA-92)**.

municipalities of York and Durham produced approximately 350,000 tonnes.[147] Without municipal solid waste from the City of Toronto and York and Durham regions, Adams Mine would not have been profitable. Indeed, Notre had previously acknowledged this fact.[148]

2. Economic Conditions in the Ontario Waste Disposal Market Did Not Favour the Development of Adams Mine

100. In the late 1990s, large waste disposal sites in Michigan started offering their excess capacity to the Greater Toronto Area. Michigan was the second or third largest importer of solid waste in the United States.[149] Capacity in Michigan was so great that private sector waste disposal sites in Michigan were the most economical option for waste disposal for garbage from the Greater Toronto Area.[150] These waste disposal sites effectively set the market price for waste disposal in Ontario:[151] once transportation costs

[147] In 2003, Durham region generated 144,937 tonnes of waste after diversion. See Regional Municipality of Durham, 2003 Waste Management Annual Report (10 March 2004), at 2 **(CDA-93)**. In 2004, York region generated 228,698 tonnes of waste after diversion. Durham-York Residual Waste Study, Background Document 2-1, Purpose and Need for the Undertaking (16 December 2005), at 13 **(CDA-94)**. An official figure for York region was not available for 2003.

[148] *Adams Mine Intervention Coalition v. Ontario (Environmental Assessment Board)* [1999] O.J. No. 2886 (On. Div. Ct.) (Supplementary Affidavit of Michael McGuinty, ¶ 3) **(CDA-53)**. ("Notre requires large contracts for the landfilling of waste (from a source of the general size of the City of Toronto) in order to justify the cost of developing the Adams Mine site for use as a landfill. Without such contracts, Notre will be unable to continue carrying on business or develop the landfill"); see also The Regional Municipality of York, Solid Waste Management Public Liaison Committee, Minutes (13 September 2000) ("This decision [by Toronto on the RCN contract] was conditional upon Durham, Peel and York also participating in the Rail Cycle North proposal because at the price negotiated, Rail Cycle North needs the volume of waste generated in the GTA rather than that simply out of Toronto.") **(CDA-54)**.

[149] See Suzanne Lowe, Senate Fiscal Agency, Disposal of Solid Waste in Michigan Landfills: Imported Waste and Environmental Concerns (January 2005), at 1 **(CDA-95)**.

[150] See City of Toronto, Staff Report to the Works Committee (20 June 2003), at 6 (Cl. Ex. 24) **(CDA-96)**.

[151] Michigan had such a large surplus of waste disposal capacity for two reasons. First, Michigan had enacted a solid waste management program that required its counties to ensure that they had 20 years of waste disposal capacity (this was later amended to require 10 years of capacity). This requirement encouraged counties to develop large scale landfills creating an abundance of waste disposal capacity and lower prices. Second, most waste disposal sites in Michigan did not have a maximum daily waste disposal volume that could be received at these sites. See Suzanne Lowe, Senate Fiscal Agency, Disposal of Solid Waste in Michigan Landfills: Imported Waste and Environmental Concerns (January 2005), at 1-2 **(CDA-95)**.

were accounted for, a waste disposal site in Ontario could not set its price higher than the market price for waste disposal in Michigan.

101. The City of Toronto and surrounding regional municipalities had considered the possibility of the Michigan border closing to shipments of waste as part of their review of contracts with Republic and other U.S. waste disposal sites. Although the City of Toronto had some concerns over the possibility of a short term border closure, it concluded that a contract with waste disposal sites in Michigan made sense despite this risk.[152] The City of Toronto was less concerned with the possibility of long-term border closure as the Michigan state legislature did not have the constitutional power to prohibit imports of garbage, and its efforts to do so were unsuccessful.[153]

102. Even with the possibility of a border closure, the City of Toronto made it clear that it had no appetite to reconsider the proposal to develop Adams Mine. In November 2003, the new mayor-elect, David Miller, said that "I can't imagine anything would change my mind" Adams Mine is not "a good solution for Toronto."[154]

103. Finally, the City of Toronto and the regional municipalities had other alternatives for the disposal of their waste, which did not involve Adams Mine.[155] In 2003, municipal officials had identified the Ridge Landfill in Chatham, Ontario as a potential "solution"

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[152] City of Toronto, Staff Report to the Works Committee (20 June 2003), at 3-4 (Cl. Ex. 24) **(CDA-96)**.

[153] In 1992, the U.S. Supreme Court found that waste was an article of commerce and that restricting the import of waste was inconsistent with the commerce clause in the U.S. constitution. *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Department of Natural Resources*, 504 U.S. 353 **(CDA-97)**.

[154] Dana Borcea, "Miller remains opposed to Adams Mine: Toronto's trash" *National Post* (19 November 2003) **(CDA-99)**.

[155] The Statement of Claim ¶ 55 refers to an alleged shortfall of waste disposal capacity in the Greater Ottawa Region and the Greater Windsor Area. In fact, Ottawa had existing capacity in 2004 and was in the process of completing an environmental assessment for the expansion of the Trail landfill. That expansion would have added an additional 10-40 years of capacity at the Trail landfill, depending on the rate of waste diversion. The expansion was approved on June 1, 2005. Windsor also had, and still has, excess waste disposal capacity at the Essex-Windsor landfill. Moreover, the Essex-Windsor landfill was one of the landfills seeking to acquire waste from the Greater Toronto Area at the same time as Adams Mine. At the time of the enactment of the *AMLA*, Essex-Windsor had over 30 years of remaining waste disposal capacity.

as the site had capacity.[156] Green Lane landfill in St. Thomas, Ontario, approximately 200 kilometers from Toronto, was also identified as a site with large capacity and growth potential.[157] Green Lane would later be purchased in April 2007 for this exact purpose.[158]

104. In short, the Enterprise acquired Adams Mine at a time when alternatives in Michigan and Ontario were either more economically or more environmentally attractive.

3. Aboriginal Consultations Delay the Sale of the Tailings Area

105. As explained above at paragraph 78, the Provisional Certificate required the proponent (a role assumed by the Enterprise and Limited Partnership in September 2002) to secure access to the tailings area. The MNR District Office in Kirkland Lake was responsible for requesting Letters Patent to dispose of Crown lands.[159]

106. On October 29, 2002, Gordon McGuinty met with MNR's Area Supervisor and the Senior Lands Technician for the District Office.[160] The MNR officials indicated that, in order to transfer the tailings area, Mr. McGuinty would have to submit a new

[156] Kate Harries, "City Eyes Chatham Area Landfill Site" *Toronto Star* (31 May 2003) **(CDA-98)**.

[157] Earth Tech Canada Inc., Summary Report: Availability of Landfill Space in Ontario (January 2004) section 4 (Cl. Ex. 23) **(CDA-100)**; see also City of Toronto, Staff Report, Toronto Integrated Solid Waste Resource Management ("TIRM") Process Category 2 Proven Disposal Capacity Residual Solid Waste Disposal Capacity Options (19 June 2000), at 3, 14-19 **(CDA-101)**.

[158] On September 19, 2006 Toronto agreed to purchase Green Lane. See City of Toronto, Staff Report to City Council, Long Term Waste Disposal Capacity (18 September 2006) **(CDA-102)**; see also City of Toronto, Green Lane Landfill- Intent to Purchase Term Sheet (18 September 2006) **(CDA-103)**. Green Lane has a capacity of 15 million tonnes and will accept waste from the City of Toronto for at least 17 years, beginning in 2010. Toronto acquired Green Lane on April 2, 2007. See City of Toronto, News Release "City of Toronto acquires Green Lane Landfill" (3 April 2007) **(CDA-104)**. In addition, York and Durham regions have announced that they will build a waste incinerator that will be operational by 2011.

[159] The Government of Ontario has legislative powers over public property that enables it to dispose of the province's property. The actual conveyance of Crown land is authorized by the issuance of Letters Patent, which requires the recommendation of the responsible Minister and the signature of the Lieutenant Governor in Council. The land is conveyed upon the signature of the Lieutenant Governor. The conveyance is complete once the Letters Patent are issued, and the Crown in Right of Ontario is no longer the proprietor of the land in question. See *Public Lands Act*, R.S.O. 1990, c. P.43, ss. 2, 5(1) and 16 **(CDA-105)**.

[160] Email from Ivan Cragg, Ministry of Natural Resources to Eleanor Moro, Ministry of Natural Resources *et al.*, Adams Mine – Disp of Crown Land (29 October 2002) **(CDA-106)**.

application on behalf of the Enterprise with a map of the area it wanted to purchase.[161] Mr. McGuinty was also required to complete an indemnity agreement which would transfer legal responsibility for the tailings area to the Enterprise.

107. MNR officials also advised that they intended to conduct another review of the disposition of the tailings area to ensure that it did not conflict with environmental or other public interests.[162] In addition, they reminded Mr. McGuinty that Timiskaming First Nation had indicated that it intended to file an Aboriginal land claim in this area.[163]

108. On November 18, 2002, MNR District Office staff initiated their review of the disposition of the tailings area. The staff concluded that the disposition of the land would have "... [n]o impact on currently identified aboriginal values."[164] The staff also needed to consult the Timiskaming Forest Alliance Inc. (the "Alliance") which held a Sustainable Forest Licence to harvest trees on the land. After consulting the Alliance, MNR determined that the purchase price for the tailings area should be reduced from $102,700 to $51,360 to reflect the fact that the land transfer did not include the right to harvest trees. The MNR District Office completed its review on February 11, 2003.[165]

109. On March 10, 2003, MNR District Office staff delivered a letter to the Enterprise asking it to submit the following documents within three months:

- a completed application for Crown land for the tailings area;

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[161] *Ibid.* **(CDA-106)**.

[162] *Ibid.* **(CDA-106)** MNR reviews the disposition of Crown lands under the provisions of Exemption Order 26/7 which set out the conditions for environmental screening and public consultations.

[163] Craig Greenwood had previously notified Michael McGuinty of Notre that Timiskaming First Nation had indicated that it intended to file a land claim in late 2000. See Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Mike McGuinty, Project Manager, Notre Development Corporation (7 September 2000) **(CDA-107)**; see also Letter from Beverly Chevrier-Polson, Vice Chief, Algonquin Nation Programs & Services Secretariat to Hon. Jerry Ouellette, Minister of Natural Resources (22 April 2003) **(CDA-108)** ("The waters 'Mamowedewin' (Adams Mine Lakes) are subject to 6000 years of unextinguished Aboriginal title.").

[164] Ministry of Natural Resources, 26/7 Review, Disp of 971.37 Ha of Crown Land to Notre Development (13 February 2003) **(CDA-109)**.

[165] *Ibid.* **(CDA-109)**.

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

The letter did not include a closing date or provide any assurances as to the length of time it would take to issue Letters Patent.

110. On April 14, 2003, MNR received the completed application and other documentation from the Enterprise, including a cheque for $51,360 signed by Mario Cortellucci (a limited partner in the Limited Partnership).[166]

111. Around the same time, the MNR District Office received complaints from local Aboriginal communities claiming that they had not been properly consulted and that the proposed transfer of land would infringe their Aboriginal rights.[167]

112. The MNR District Office was advised that recent court decisions had expanded the legal obligation on the Crown to consult with Aboriginal peoples.[168] The Crown's failure to consult before taking an action affecting established or asserted Aboriginal rights had resulted in the courts delaying or striking down the action in various

[166] Mr. McGuinty's letter is dated April 10, 2003 and is marked received April 14, 2003. See Letter and attachments from Gordon McGuinty, Adams Mine Rail Haul to Craig Greenwood, District Manager, Ministry of Natural Resources (10 April 2003) **(CDA-110)**. The attached cheque is signed by Mario Cortellucci on behalf of the Enterprise.

[167] Letter from Mary Batise for Fabian Batise, Band Manager, Matachewan First Nation to Hon. Jerry Ouellette, Minister of Natural Resources (14 April 2003) **(CDA-111)**; Letter from Chief Roy Meaniss, Beaverhouse First Nation Community to Hon. Jerry Ouellette, Minister of Natural Resources (15 April 2003) **(CDA-112)**; Email from Rob Galloway, Regional Director, Northeast Region, Ministry of Natural Resources to Eric Doidge, Ministry of Natural Resources, Wabun Tribal Council & Adams Mine (15 April 2003) **(CDA-113)**; Wabun Tribal Council, Media Release, "First Nations Oppose Adams Mine Dump Proposal For Lack of Consultation" (15 April 2003) **(CDA-114)**; Letter from Beverly Chevrier-Polson, Vice Chief, Algonquin Nation Programs & Services Secretariat to Hon. Jerry Ouellette, Minister of Natural Resources (22 April 2003) **(CDA-115)**; Letter from Stan Beardy, Grand Chief, Nishnawbe Aski Nation to Hon. Jerry Ouellette (20 June 2003) **(CDA-116)**.

[168] *Haida Nation v. British Columbia (Minister of Forests)*, 216 D.L.R. (4th) 1 (B.C.C.A.) (20 March 2003) **(CDA-117)**, aff'd *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 **(CDA-119)**; see also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 211 D.L.R. (4th) 89 (B.C.C.A.) (14 November 2002) **(CDA-118)**, aff'd *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 **(CDA-120)**.

circumstances.[169] In light of this developing case law, MNR decided to delay the transfer of the tailings area to the Enterprise to ensure it had fulfilled its duty to consult with the relevant Aboriginal communities.

113. On April 29, 2003, MNR staff advised Mr. McGuinty that MNR had to conduct further consultations with Aboriginal communities before transferring the tailings area.[170]

114. On May 28, 2003, the Enterprise threatened to commence legal proceedings if the tailings area was not immediately transferred to it.[171] The MNR District Office advised Mr. McGuinty on June 5, 2003 that the transaction was still under review. The Enterprise subsequently filed a formal notice of intent to make a claim against the Crown in the amount of $50 million.[172]

115. On October 9, 2003, the Enterprise filed a Statement of Claim against the Minister of Natural Resources in the Ontario Superior Court of Justice. The Enterprise requested a permanent declaration that it was entitled to the tailings area[173] or, in the alternative, damages which it now claimed amounted to $301 million.[174] The Enterprise

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[169] See *e.g.*, *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666 (B.C.C.A.) **(CDA-121)**. In *Halfway River First Nation* v. *British Colombia (Ministry of Forests)*, the court quashed a provincial government decision, in part, on the basis of a failure to consult; see also *Westbank v. B.C. (Minister of Forests) and Wenger* (2000), 191 D.L.R. (4th) 180 (B.C.S.C.) **(CDA-122)**. The court did not overturn the contract on the basis of a failure of the duty to consult in this case. However, the judicial review delayed the contract, which was overturned by the court on other grounds.

[170] Email from Craig Greenwood, District Manager, Ministry of Natural Resources to Ivan Cragg, Ministry of Natural Resources and Rick Tapley, Ministry of Natural Resources, Adams Mine – Gord McGuinty (1 May 2003) **(CDA-123)**.

[171] Letter from Gordon Acton, Wishart Law Firm to Craig Greenwood, District Manager, Ministry of Natural Resources, Re: Adams Mine Site (28 May 2003) **(CDA-124)**.

[172] IN THE MATTER OF AN AGREEMENT ENTERED INTO BETWEEN 1532382 ONTARIO INC. carrying on business as Adams Mine Rail Haul and Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources, Notice of Claim (28 July 2003), ¶ 1 **(CDA-125)**.

[173] *1532382 Ontario Inc. v. Minister of Natural Resources*, Court File No. 22368/A3 (9 October 2003) (Statement of Claim, ¶ 1) (Ont. Sup. Ct.) **(CDA-126)**. Under Ontario law, the Government of Ontario cannot be compelled by a court to transfer ownership of Crown land. See *Mosher v. Ontario*, 48 R.P.R. (3d) 151 (Ont. Sup. Ct.) **(CDA-127)**.

[174] *1532382 Ontario Inc. v. Minister of Natural Resources*, Court File No. 22368/A3 (9 October 2003) (Statement of Claim, ¶ 1) (Ont. Sup. Ct.) **(CDA-126)**.

brought a motion for summary judgment that was scheduled to be heard by Ontario's Superior Court of Justice on April 22, 2004. Following the introduction of the *AMLA* into the legislature, the Enterprise consented to the adjournment of this motion.[175]

116. At the same time, MNR had its Northeast Region Native Liaison Officer prepare a plan to consult local Aboriginal communities. These communities included Timiskaming First Nation, Mattagami First Nation, Temagami First Nation, Beaverhouse community, Wahgoshig First Nation, and Matachewan First Nation.[176] The Liaison Officer prepared a plan which envisaged meeting two or three times with each Aboriginal community concerning the sale of the tailings area. On August 26, 2003 MNR invited local Aboriginal communities to attend the planned consultations.[177]

117. MNR's Liaison Officer was unable to schedule the first round of these meetings until early November because of hunting season, which is of great cultural and economic importance to Aboriginal communities in northern Ontario. Consultations would

[175] Gordon Acton confirmed in an April 27, 2004 letter to counsel for the Government of Ontario that he "... agreed to an adjournment of the Motion set for the 22nd of April in Toronto to the 5th of July." See Letter from Gordon Acton, Wishart Law Firm to James Kendrik and Dennis Brown, Ministry of the Attorney General, Re: 1532382 Ontario Inc. c.o.b. Adams Mine Rail Haul v. Her Majesty the Queen – Ministry of Natural Resources (27 April 2004) **(CDA-128)**. On July 2, 2004, Gordon Acton submitted a request to the Superior Court to adjourn the July 5 motion on consent of both parties. See *1532382 Ontario Inc. v. Ministry of Natural Resources*, Court File 03CT022368/A3 (2 July 2004) (Civil Motion Application) (Ont. Sup. Ct.) **(CDA-129)**.

[176] *1532382 Ontario Inc. v. Minister of Natural Resources*, Court File No. 22368/A3 (1 April 2004) (Affidavit of Bob Johnson, ¶ 15) (Ont. Sup. Ct.) **(CDA-130)**.

[177] Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Roy Meaniss, Chief, Beaverhouse First Nation Community (27 August 2003) **(CDA-131)**; Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Chief Elenor Hendrix and Council, Matachewan First Nation (27 August 2003) **(CDA-132)**; Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Chad Boisonneau, Chief, Mattagami First Nation (27 August 2003) **(CDA-133)**; Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Alex Paul, Chief, Temagami First Nation (27 August 2003) **(CDA-134)**; Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Doug MacKenzie, Chief, Teme-Augama Anishnabai (27 August 2003) **(CDA-135)**; Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Beverly Chevrier-Polson, Band Administrator, Timiskaming First Nation (27 August 2003) **(CDA-136)**; Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Shawn Batise, Executive Director, Wabun Tribal Council (27 August 2003) **(CDA-137)**; Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Paul MacKenzie, Chief, Waghoshig First Nation (27 August 2003) **(CDA-138)**; Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Carol McBride, Grand Chief, Algonquin Nation Secretariat (28 August 2003) **(CDA-139)**.

ultimately stretch into the spring of 2004. MNR repeatedly contacted Mr. McGuinty and the Enterprise throughout the Aboriginal consultation process to keep them informed of their progress.[178]

118. On April 1, 2004, the Liaison Officer estimated that these consultations would be complete by no later than June. The MNR District Manager would then have been in a position to determine whether he should proceed with the sale of the tailings area to the Enterprise. The enactment of the *AMLA* in June 2004 ended the work of the Liaison Officer before the Aboriginal consultations could be completed. All the decisions concerning the need to consult were made solely be MNR officials, without political direction, and without prior knowledge of the *AMLA*.

4. Additional Concerns are Raised Over Hydraulic Containment at Adams Mine

a) Dr. Ken Howard Releases a Report Identifying Problems with the Evidence Supporting Hydraulic Containment at Adams Mine

119. On May 26, 2003, the Timiskaming Federation of Agriculture, a group representing Timiskaming farmers, announced that they had retained Dr. Ken Howard, a Professor of Hydrogeology in the Groundwater Research Group at the University of Toronto, to review the assessment of hydraulic containment conducted by Notre for Adams Mine.

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[178] See *e.g.*, Email from Rick Tapley, Ministry of Natural Resources to Craig Greenwood, District Manager, Ministry of Natural Resources, Adams Consultation (3 September 2003) **(CDA-140)**; Letter from Craig Greenwood, District Manager, Ministry of Natural Resources to Gordon McGuinty, President, Notre Development Corporation, First Nations Consultations, Adams Mine (4 September 2003) **(CDA-141)**; Email from Craig Greenwood, District Manager, Ministry of Natural Resources to Rob Galloway *et. al*, Adams Mine – Voicemail from Gord McGuinty (10 October 2003) **(CDA-142)**; Email from Craig Greenwood, District Manager, Ministry of Natural Resources to Peter Richard, *et. al*, Adams Mine – Call With Mr. McGuinty (14 October 2003) **(CDA-143)**; Letter Craig Greenwood, District Manager, Ministry of Natural Resources to Gordon McGuinty, Managing Director, Adams Mine Rail Haul, Land Transfer – Adams Mine Site (14 November 2003) **(CDA-144)**; Email Chris Mahar, Deputy Director, Negotiations, Ontario Native Affairs Secretariat to Gordon McGuinty, Managing Director, Adams Mine Rail Haul, Tour of Adams Mine Site (26 September 2003) **(CDA-145)**.

120. Dr. Howard released a public summary of his expert report on the hydrogeological conditions at Adams Mine on August 12, 2003.[179] A presentation and a copy of the full report were provided to MOE officials on December 2, 2003.[180] Dr. Howard explained in his report that:

- data collected from two of the three deep boreholes was not sufficient to demonstrate that the hydraulic containment system would work effectively;[181]
- the two-dimensional computer model relied on to demonstrate the effectiveness of hydraulic containment was not suitable to model the flow of groundwater in fractured bedrock;[182]
- the calibration of the two-dimensional computer model was improper;[183]
- an assumed value in the two-dimensional computer model skewed the calculation such that the model would always demonstrate that hydraulic containment was effective;[184] and
- an additional deep-angle borehole needed to be drilled on the south side of the pit where data was lacking.185

121. Dr. Howard concluded that the decision to issue the Provisional Certificate was premature and advocated additional testing of the site before it was used for waste disposal.[186]

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[179] Dr. Ken Howard, The Adams Mine Landfill Proposal, An Independent Review and Critical Analysis of Hydrogeological Investigations and Recent Monitoring Data, Executive Summary (12 August 2003) **(CDA-146)**.

[180] Dr. Ken Howard, The Adams Mine Landfill Proposal, An Independent Review and Critical Analysis of Hydrogeological Investigations and Recent Monitoring Data, Summary Presentation to the Ontario Ministry of the Environment (2 December 2003) **(CDA-147)**; Dr. Ken Howard, An Independent Review and Critical Analysis of Hydrogeological Investigations and Recent Monitoring Data (12 August 2003) **(CDA-148)**.

[181] *Ibid.* at 8-9 **(CDA-148)**.

[182] *Ibid.* at 11-12 **(CDA-148)**.

[183] *Ibid.* at 13-14 **(CDA-148)**.

[184] *Ibid.* at 14-15 **(CDA-148)**.

[185] *Ibid.* at 17-18 **(CDA-148)**.

[186] *Ibid.* at 20-21 **(CDA-148)**.

b) The Enterprise Fails to Provide Critical Data with its Request for a Short Term PTTW

122. On July 7, 2003, the Enterprise filed another request with MOE for a short term PTTW, which included a report on the water levels in the South Pit.[187] Pursuant to the January 2002 exchange of correspondence between Mr. McGuinty, and Mr. Hollinger, the Director responsible for issuing PTTWs, MOE promptly initiated a review of this new request. Under the then-applicable Ontario regulation,[188] the Director was required to consider, among other things, the "protection of the natural functions of the ecosystem."[189] In addition, he had the authority to consider "[w]hether it is in the public interest to grant the permit" and "[s]uch other matters as [he] considers relevant."[190]

123. MOE found that the Enterprise provided insufficient information for it to conduct the required technical review of the application.[191] Accordingly, MOE wrote to the Enterprise to request all of the water elevation measurements from the South Pit taken over the last three years. It also requested a detailed assessment of whether the water level in the South Pit, the measurements from the deep angled bore holes and the eleven monitoring wells matched the predicted measurements.[192]

124. MOE requested this information as it could affect the proposed water-taking rate and duration.[193] This raw data would be important as the original short-term PTTW had

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[187] Letter from Steven Usher, Gartner Lee Ltd. to Dave Hollinger, Supervisor, Water Resources Unit Northern Region, Ministry of the Environment and Gordon McGuinty, 1532382 Ontario Inc., Re: GLL 23-481 – Adams Mine Landfill – South Pit Dewatering. Application for Temporary Permit to Take Water (4 July 2003) **(CDA-149)**. This report is dated July 4, 2003, but the application was filed on July 7, 2003.

[188] O. Reg. 285/99 **(CDA-150)**.

[189] *Ibid.*, s. 2(1)(1) **(CDA-150)**.

[190] *Ibid.*, ss. 2(3)(6-7) **(CDA-150)**.

[191] Letter from Perry Sarvas, Hydrogeologist, Ministry of Environment and Energy to Gordon McGuinty, Managing Director, Adams Mine Rail Haul, Re: Adams Mine Landfill – Permit to Take Water, South Pit Dewatering (17 July 2003) **(CDA-151)**.

[192] *Ibid.* **(CDA-151)**.

[193] *Ibid.* **(CDA-151)**.

contemplated taking measurements during the de-watering to confirm whether hydraulic containment would be effective.[194]

125. The Enterprise indicated a few days later that it had measured the water level in the South Pit only once in the last three years.[195] It also stated that no water measurements had been taken from any of the monitoring wells since the collapse of the City of Toronto negotiations in October 2000.[196]

126. On July 30, 2003, MOE asked the Enterprise to provide it with the model and underlying calculations that had been used to estimate the water level in the South Pit.[197] MOE received no response to this request and reiterated it less than a month later.[198] The Enterprise did not respond to these requests until September 10, 2003.

127. As of September 2, 2003, MOE estimated that comprehensive review of the application for a short-term PTTW, which would include review of public comments, would take at least five to six months.[199]

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[194] Email from Perry Sarvas, Hydrogeologist, Ministry of Environment to Dave Hollinger, Supervisor, Water Resources Unit Northern Region, Ministry of the Environment, Adams Mine PTTW Application (14 July 2003) **(CDA-152)**. MOE hydrogeologists intended to use the de-watering of the South Pit as a pump test to confirm that hydraulic containment was effective. A pump test is conducted by pumping water and measuring the decrease in water pressure in observation wells. Hydrogeologists use these measurements to gain additional information on the properties of the body of water including groundwater flow.

[195] Letter from Steven Usher, Senior Hydrogeologist, Gartner Lee Ltd. to Perry Sarvas, Hydrogeologist, Ministry of Environment, Re: 23-481 Adams Mine Dewatering, Additional Water Level Information (19 July 2003) **(CDA-153)**. Gartner Lee indicated that the last time it had measured the water levels in the South Pit before the measurements taken for this application was on 25 September 2000.

[196] *Ibid.* **(CDA-153)**.

[197] Letter from Perry Sarvas, Hydrogeologist, Ministry of Environment and Energy to Gordon McGuinty, Managing Director, Adams Mine Rail Haul, Re: Adams Mine Landfill – Permit to Take Water, South Pit Dewatering (30 July 2003) **(CDA-154)**.

[198] Letter from Perry Sarvas, Hydrogeologist, Ministry of Environment and Energy to Gordon McGuinty, Managing Director, Adams Mine Rail Haul, Adams Mine Landfill – Permit to Take Water, South Pit Dewatering, (26 August 2003) **(CDA-155)**.

[199] Ministry of the Environment, Adams Mine Landfill Proposal Permits and Approvals (2 September 2003) **(CDA-156)**.

128. On November 14, 2003, MOE posted a draft PTTW on the Environmental Bill of Rights Registry for public comment.[200] The Statement of Claim incorrectly asserts that "[o]n November 14, 2003...the Minister of Environment issued a Permit to Take Water."[201] The posted version of the draft PTTW is clearly marked as a "draft."[202] The holder of a draft PTTW is not authorized to start taking water.

129. On December 2, 2003, MOE received a complete copy of the expert report prepared by Dr. Howard. An MOE hydrogeologist reviewing the report agreed with Dr. Howard that the two-dimensional modelling relied on by the Enterprise was insufficient and that a three-dimensional model was preferable to demonstrate whether hydraulic containment would be effective.[203] He also agreed with Dr. Howard's criticism that an assumption in the model ensured that it would always demonstrate that hydraulic containment was effective.[204]

130. MOE received more than 23,000 submissions concerning the draft PTTW on the Environmental Bill of Rights Registry by the end of the posting period on January 5, 2004.[205] Almost all of these comments expressed strong objections to the proposal.

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[200] Information Notice, Adams Mine Permit to Take Water, EBR Registry Number XA03E0019 (14 November 2003) **(CDA-157)**.

[201] Statement of Claim, ¶ 66. The Statement of Claim repeats this error at paragraph 78 where it states that: "... the Enterprise's Permit to Take Water was issued by the Ministry of Environment on November 14, 2003." Compare Notice of Arbitration, ¶ 32. ("On November 14, 2003, the Ministry of the Environment issued a Draft Permit To Take Water")

[202] Ministry of the Environment, Permit to Take Water (Draft), Ground Water, No. 4121-5SCN9N **(CDA-158)**.

[203] Mark Puumala, Dr. Ken Howard Report Re Adams Mine, Notes (December 2003) **(CDA-159)**. The date on these notes refers to the date of the Howard Report rather than the date they were taken.

[204] *Ibid.* **(CDA-159)**.

[205] Information Notice, Written Submissions on the Draft Permit to Take Water for Adams Mine, EBR Registry Number XA04E0002 (30 January 2004) **(CDA-160)**. Most of these submissions were form letters organized by opponents of Adams Mine. MOE staff identified approximately 100 substantive comments on the draft PTTW.

c) Environmental Consultants Retained by MOE Confirm the Concerns Raised in the Howard Report

131. After receiving public comments on the draft PTTW and the Howard Report, the MOE assembled a technical review committee comprised of hydrogeological experts. This expert committee was to review the Howard Report and provide recommendations to the PTTW Director. In February 2004, the committee retained environmental consultants from Franz Environmental Ltd., Intera Engineering Ltd, and later, Azimuth Environmental.

132. These environmental consultants delivered their preliminary findings to MOE in a conference call in March 2004.[206] The consultants found that the measurements taken by Notre in 1995 showing a strong inward flow of water into the South Pit were unreliable because its consultants had used the wrong procedure. The consultants also agreed with Dr. Howard that the computer modelling used by the Enterprise was inappropriate. Finally, the consultants agreed that another borehole should be drilled on the south side of the pit to take additional measurements. It was further recommended that this additional borehole intersect with a geological formation known as a diabase dyke.[207] The consultants had raised the dyke as a concern because no data on groundwater flows had been collected near the dyke, which provided a potential route through which leachate might escape to a wetland southeast of the South Pit.

133. A final report prepared by the consultants in May 2004 made the following recommendations:

- groundwater monitoring equipment should be installed in the three existing deep-angle boreholes to measure conditions for a period of at least 6 months before de-watering the South Pit;

[206] Mark Puumala, Adams Mine Groundwater Group T.C., Notes (23 March 2004) **(CDA-161)**.

[207] A diabase dyke is a sheet of dark-coloured intrusive rock that cuts across layering or bedding in the surrounding bedrock.

- another deep angle borehole should be drilled through the diabase dyke so that groundwater monitoring equipment could be installed and monitored for 6 months;
- a three-dimensional groundwater flow model should be constructed to reassess the groundwater conditions; and
- the three-dimensional model should use known actual values for groundwater flow as much as possible.[208]

134. The enactment of the *AMLA* in June 2004 ended the work of the technical review committee before it completed its review of the short term PTTW and consideration of appropriate conditions for issuing the PTTW. None of the responsible MOE officials considering whether to issue a short term PTTW had any knowledge of the *AMLA* until it was introduced into the Ontario Legislature. All of the decisions concerning the need for further information and additional technical studies were made solely by those officials, without political direction.

5. The Enterprise and the Limited Partnership Fail to Maintain the Infrastructure at Adams Mine

135. By 2004, the Enterprise and the Limited Partnership had permitted the buildings and infrastructure at Adams Mine to fall into disrepair. A few months after the enactment of the *AMLA*, REDACTED

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[208] Franz Environmental Inc. and Intera Engineering Ltd, Recommendations Based on a Hydrogeological Review of the Permit to Take Water Application for the Dewatering of South Pit, Former Adams Mine near Kirkland Lake, Ontario (May 2004) **(CDA-162)**.

[209] REDACTED

REDACTED .

[210] REDACTED

REDACTED

136. The Enterprise also appears to have invested none of the $52.8 million in infrastructure it estimated was required to operate Adams Mine as a waste disposal site.[214]

D. The Ontario Government Passes the *AMLA* as Part of Broad Environmental Reforms

1. A New Government is Elected in October 2003

137. After winning the provincial election on October 2, 2003, the Liberal Party enacted new measures to protect the environment and to ensure the availability of safe drinking water in Ontario.

138. The Liberal Party was concerned with the potential contamination of drinking water, especially in the wake of the Walkerton tragedy. In May, 2000 the drinking water of Walkerton, Ontario became contaminated with O157:H7, a deadly strain of *E. coli* bacteria.[215] As a result of this outbreak, seven people died and more than 2,300 became

[211] REDACTED

[212]

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[214] Adams Mine Community Liaison Committee, Minutes of Meeting (11 September 2003), at 4-5 **(CDA-164)**.

[215] Walkerton Commission of Inquiry, *Report of the Walkerton Inquiry: The Events of May 2000 and Related Issues, Part One* (Toronto: Publications Ontario, 2002), Chapter 3: Overview, at 56 **(CDA-165)**.

seriously ill.[216] A public inquiry into the Walkerton tragedy determined that landfill leachate contains chemicals which pose a chronic risk to drinking water in Ontario.[217]

139. The new government introduced a number of measures to protect drinking water. It introduced a moratorium on issuing new PTTWs under the *Taking and Use of Water Regulation*.[218] This Regulation was subsequently replaced by the *Water Taking Regulation*, which required a stringent assessment of the effect of taking water on the quality of drinking water before a PTTW would be issued.[219] The new government also issued a discussion paper,[220] which led to the subsequent enactment of the *Clean Water Act*.[221]

2. The Government Introduces Bill 49 the *AMLA*

140. On April 5, 2004, Leona Dombrowsky, the Minister of the Environment, introduced Bill 49, the *AMLA*, into the Ontario Legislative Assembly.[222] In introducing Bill 49, Minister Dombrowsky noted:

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

[216] *Ibid.* at 102 **(CDA-165)**.

[217] Walkerton Commission of Inquiry, *Report of the Walkerton Inquiry: A Strategy for Safe Drinking Water, Part Two* (Toronto: Publications Ontario, 2002), Chapter 5: Drinking Water Quality Standards, at 165 **(CDA-166)**.

[218] O. Reg. 434/03 **(CDA-167)**.

[219] O. Reg. 387/04 **(CDA-168)**.

[220] Strategic Policy Branch, Ministry of Environment, White Paper on Watershed-Based Sourced Protection Planning (February 2004) **(CDA-169)**.

[221] *Clean Water Act*, 2006, S.O. 2006, c. 22 **(CDA-170)**.

[222] The short title of this Act is the *Adams Mine Lake Act, 2004*, and the full title is *An Act to Prevent the Disposal of Waste at the Adams Mine Site and to Amend the Environmental Protection Act in Respect of the Disposal of Waste in Lakes*. The Statement of Claim, ¶ 80 incorrectly states that Bill 49 was entitled "*An Act to Prevent the Disposal of Waste at the Adams Mine Site.*"

> commitment. This is about protecting our environment and respecting our communities. [223]

141. Accordingly, Bill 49 prohibited the disposal of waste at the Adams Mine site and revoked any certificates and permits acquired by the Enterprise.

142. Bill 49 also prohibited the use of all similar sites by modifying section 27 of the *Environmental Protection Act* to prohibit waste disposal sites on land covered by a body of water or a lake. Since the enactment of the *AMLA*, this amendment has prevented the expansion of a waste disposal site in Sarnia, Ontario proposed by Inter-Recycling Systems Inc., a Canadian company. [224]

143. Bill 49 foreclosed existing and future causes of action against the Government of Ontario concerning the Adams Mine site. The Bill also stated that the *AMLA* was not an expropriation for the purposes of the Ontario *Expropriations Act*. This is consistent with the law of Ontario, which provides that an action affecting property is not an expropriation if the action does not transfer the property to the province.[225] Similar provisions have been used frequently in other land use and regulatory legislation in Ontario.[226]

144. Finally, Bill 49 required the Government of Ontario to compensate the Enterprise for its attempts to promote Adams Mine as a waste disposal site.

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[223] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 26A (5 April 2004), at 1246-1247 **(CDA-171)**.

[224] Letter from Ian Parrott, Supervisor, Waste Approvals, Ministry of Environment to Bryan Farley, Director of Environment, Health and Safety, Inter-Recycling Systems Inc., Re: Provisional Certificate of Approval A032014 Inter-Recycling Systems Inc. Landfill (22 December 2004) **(CDA-172)**.

[225] *A&L Investments Limited v. Ontario* (1997) 36 O.R. (3d) 127 (C.A.), ¶¶ 27-28 **(CDA-173)**.

[226] See, *e.g.*, *Clean Water Act, 2006,* S.O. 2006, c. 22, ss. 98-99 **(CDA-170)**; *Community Care Access Corporations Act, 2001*, S.O. 2001, c. 33, s. 16.2 **(CDA-174)**; *Duffins Rouge Agricultural Preserve Act, 2005,* S.O. 2005, c. 30, s. 3 **(CDA-175)**; *Electricity Pricing, Conservation and Supply Act, 2002,* S.O. 2002, c. 23, s. 6 **(CDA-176)**; *Greenbelt Act, 2005,* S.O. 2005, c. 1, s. 19 **(CDA-177)**; *Long-Term Care Homes Act, 2007*, S.O. 2007, c. 8, s. 193 **(CDA-178)**; *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2, s. 30 **(CDA-179)**; *Oak Ridges Moraine Conservation Act, 2001*, S.O. 2001, c. 31., s. 20 **(CDA-180)**; *Oak Ridges Moraine Protection Act, 2001,*S.O. 2001, c..3, s. 9 **(CDA-181)**; *Ontario Heritage Act*, R.S.O. 1990, c. O.18, s. 68.3 **(CDA-182)**; *Places to Grow Act, 2005*, S.O. 2005, c. 13, s. 15 **(CDA-183)**; *SkyDome Act (Bus Parking), 2002*, S.O. 2002, c. 8, Sched. K, s. 5 **(CDA-184)**.

145. Bill 49 was published on the Legislature of Ontario's public website following Introduction and First Reading.

3. The Government Incorporates Amendments to Bill 49 Requested by the Enterprise

146. Following the introduction of Bill 49, Gordon Acton, counsel for the Enterprise, requested amendments to the compensation provisions, including:

- providing compensation to Notre;[227]
- providing compensation for expenses incurred but not paid by the Enterprise and Notre before April 5, 2004;[228] and
- increasing the maximum amount of compensation available for expenses incurred but not paid.[229]

These requests were accepted by the government and incorporated into the final legislation.

147. The Ontario Standing Committee on the Legislative Assembly also conducted public hearings to seek input on the proposed legislation. Mr. McGuinty made a presentation to the Standing Committee as the Managing Director of the Enterprise and President of Notre.[230]

148. Contrary to the assertion in the Statement of Claim,[231] the Ontario *Environmental Bill of Rights* does not require the Minister of the Environment to post a proposed Bill on

[227] Letter from Gordon Acton, Wishart Law Firm LLP to James Kendrik and Dennis Brown, Ministry of the Attorney General, Re: 1532382 Ontario Inc., c.o.b. Adams Mine Rail Haul v. Her Majesty the Queen—Ministry of Natural Resources (7 April 2004) **(CDA-185)**.

[228] Letter from Gordon Acton, Wishart Law Firm LLP to James Kendrik and Dennis Brown, Ministry of the Attorney General, Re: 1532382 Ontario Inc., c.o.b. Adams Mine Rail Haul v. Her Majesty the Queen—Ministry of Natural Resources (13 April 2004) **(CDA-186)**.

[229] Email from Gordon Acton, Wishart Law Firm LLP to LeoFitzpatrick, Counsel, Ministry of the Environment, Re Bill 49 (6 May 2004) **(CDA-187)**.

[230] Legislative Assembly of Ontario, Standing Committee of the Legislative Assembly (21 May 2004), at 0940-1020 **(CDA-188)**.

[231] Statement of Claim, ¶ 81.

the Registry 30 days before it is introduced into the legislature. Rather, the Minister is obliged to post proposed legislation 30 days before the proposed legislation comes into force.[232] In this case, the Minister of the Environment complied by posting the draft legislation on May 6, 2004 for public comment on the Environmental Bill of Rights Registry and issuing a Notice for Decision on the Registry explaining the actions taken in response to the comments it received on the *AMLA*.

149. On June 17, 2004, Bill 49 received Royal Assent and the *AMLA* came into force.

E. The Enterprise Fails to Avail itself of Compensation under the *AMLA*

150. Pursuant to section 6(4) of the *AMLA*, the Enterprise submitted a claim for REDACTED Similarly, Notre claimed REDACTED REDACTED in compensation.

REDACTED

REDACTED Figure 3 below set out the expenses submitted by the Enterprise to the Government of Ontario for compensation under the *AMLA*:[233]

[232] *Environmental Bill of Rights*, S.O. 1993, c.28, s. 15(1) **(CDA-189)** ("If a Minister considers that a proposal under consideration in his or her Ministry for a policy or Act could, if implemented, have a significant effect on the environment, and the Minister considers that the public should have an opportunity to comment on the proposal before implementation, the Minister shall do everything in his or her power to give notice of the proposal to the public at least thirty days before the proposal is implemented.") [emphasis added].

[233] REDACTED
REDACTED

1532382 Ontario Inc. - Expenses

REDACTED

Figure 3

152. The Government of Ontario retained Navigant Consulting, an accounting firm, to audit the claims submitted by Notre and the Enterprise. Counsel for the Enterprise refused to identify its shareholders to Navigant.[234]

153. REDACTED Notre and the Government of Ontario agreed on compensation REDACTED

REDACTED

154. The Government of Ontario was also required to provide compensation to the Enterprise in accordance with section 6 of the *AMLA*. However, the Enterprise did not

[234] Letter from Murdoch Martyn, Barrister & Solicitor to Laura Vanags, Counsel, Ministry of the Environment, Re 15323282 Ontario Inc., Adams Mine Lake Act, 2004 (7 March 2005) **(CDA-191)**.

avail itself of this compensation.[235] Canada intends to provide additional information and documents concerning the compensation available under the *AMLA*.

155. On October 30, 2006, Vito Gallo, a U.S. citizen, filed a Notice of Intent to Submit a Claim to Arbitration on behalf of the Enterprise pursuant to Article 1117(1) of NAFTA. No government employee who worked on the proposed development of the Adams Mine site or the *AMLA* had ever met with or heard of Mr. Gallo until the NAFTA Chapter 11 Notice of Intent was filed.

III. INTERPRETATION OF THE NAFTA

156. Article 1131 of NAFTA requires this Tribunal to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law... [and any] interpretation by the [Free Trade Commission]."[236] The applicable rules of international law include the rules of interpretation set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*.[237]

157. The starting point for interpreting any provision of the NAFTA is the ordinary meaning of the text itself. Further, that text must be interpreted in the appropriate context, in light of the object and purpose of NAFTA.

158. The text, object and purpose of NAFTA do not require Chapter 11 "to be construed in a broad and remedial manner," as the Claimant alleges.[238] The *Vienna Convention* calls neither for a broad nor a narrow interpretation of the NAFTA but rather an interpretation based on "the actual language of the provision being interpreted."[239]

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[236] NAFTA, Art. 1131(1) and (2).

[237] See *e.g.*, *Fireman's Fund Insurance Company* v. *United Mexican States* (ICSID Case No. ARB(AF)/02/01) Award (17 July 2006), ¶136 **(CDA AUTH-1)**.

[238] Statement of Claim, ¶ 98.

[239] *ADF Group Inc v United States of America* (ICSID Case No. ARB(AF)/00/1) Award (9 January 2003), ¶ 147 **(CDA AUTH-2)**.

159. As the Preamble makes clear, the NAFTA represents a balance struck by the Parties: promoting trade and economic development while protecting the public interest and welfare. The Preamble notes the resolution of the NAFTA parties to:

> ENSURE a predictable commercial framework for business planning and investment;
>
> ...
>
> UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;
>
> PRESERVE their flexibility to safeguard the public welfare;
>
> PROMOTE sustainable development;
>
> STRENGTHEN the development and enforcement of environmental laws and regulations;
>
> ...

The NAFTA does not require every regulatory action of the government to benefit an investor and does not allow an investor to recover damages every time it is disappointed in its dealings with public authorities.[240]

IV. THE TRIBUNAL HAS NO JURISDICTION TO HEAR THE CLAIM

160. The Tribunal has no jurisdiction to hear this claim. *First*, this is effectively a claim by Canadians against their own government. *Second*, the Claimant has failed to demonstrate that he meets the requirements of Article 1117(1). *Third*, the Claimant has no standing to claim on behalf of the Limited Partnership. *Fourth*, elements of the claim are time-barred.

[240] *Azinian v Mexico* (ICSID Case No. ARB(AF)/97/2) Final Award (1 November 1999), ¶ 83 **(CDA AUTH-3)**; *Feldman v. Mexico* (ICSID Case No. ARB (AF)/99/1) Award (16 December 2002), ¶¶ 103, 112 **(CDA AUTH-4)**.

A. The Tribunal Has No Jurisdiction to Hear a Claim by Canadians against Their Own Government

161. General principles of international law prohibit a tribunal from hearing a claim that is brought by nationals against their own State. According to its preference for substance over form, international law prevents a national from avoiding this rule by claiming through a nominal foreign claimant. Tribunals have consistently interpreted the NAFTA as reinforcing this rule.[241]

162. This claim is effectively brought by Canadians against Canada. Mr. Gallo is a U.S. national. The Statement of Claim indicates that his only connection with the Adams Mine proposal is that at some undetermined time, he was assigned one share in the Canadian Enterprise that owns the site. It appears that the Claimant paid no consideration for that share.[242] The Claimant has not even alleged that he invested any capital in the Enterprise, is entitled to receive any of the profits from the operation of Adams Mine as a waste disposal site, has participated in any way in the Enterprise, or that he otherwise shares any risk or benefit from the investment. To the contrary, the Limited Partnership, Notre, and all of the financiers,[243] managers[244] and beneficiaries[245] who invested in, or were involved with Adams Mine, are Canadian.

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[241] See, *e.g.*, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award (26 June 2003), ¶ 223 **(CDA AUTH-5)**.

[242] Certificate for Shares in 1532382 Ontario Inc. (26 June 2002) (Cl. Ex. 5) **(CDA-198)**. On the share certificate issued to Vito Gallo the phrase "for value received" has been crossed out.

[243] REDACTED
REDACTED
REDACTED Statement of Claim, ¶ 11.

[244] *1532382 Ontario Inc. v. Minister of Natural Resources*, Court File No. 22368/A3 (9 October 2003) (Statement of Claim,¶ 1) (Ont. Sup. Ct.) **(CDA-126)**;REDACTED
REDACTED
REDACTED Corporate Profile Report of Christopher Gordon Associates Ltd. (9 October 2007) **(CDA-84)**; Statement of Claim, ¶ 2, fn 11.

[245] REDACTED
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B. The Claimant Has Failed to Demonstrate that He Meets the Requirements of Article 1117(1)

163. The Claimant asserts that he has standing to make a claim on behalf of the Enterprise under NAFTA Article 1117(1) as an "investor of a Party." NAFTA Article 1117(1) provides that:

> An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises),
>
> ...
>
> and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

164. NAFTA Article 1139 provides that an "investor of a Party" is:

> a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making, or has made an investment.

165. The Claimant has the burden of demonstrating that he "made an investment," or sought to do so, as required by Articles 1117(1) and 1139. He has failed to discharge this burden.

166. The ordinary meaning of the phrase "made an investment" requires an investor to have caused or brought about that investment. This ordinary meaning is confirmed by the context provided in NAFTA Chapter Eleven and the object and purpose of NAFTA, which includes the promotion of cross-border investment.

167. Article 1131(1) of NAFTA also requires "made an investment" to be interpreted in the light of customary international law, which prohibits a national from using a nominal foreign investor to make a claim against its own State.

168. The Claimant has offered no evidence that he caused, brought about, or even participated in the purported investment. As the evidence attached to the Statement of Claim makes clear, he has no stake in the success of the Enterprise. Consequently, the Claimant has failed to meet his burden of proving that he made an investment, as required by NAFTA Article 1117(1).

C. The Claimant Has No Standing to Claim on Behalf of the Limited Partnership

169. Mr. Gallo claims the entire fair market value of Adams Mine on behalf of the Enterprise,[246] including the present value of all future profits. REDACTED

REDACTED

170. The Claimant has no standing to claim on behalf of the Limited Partnership under NAFTA. Article 1117(1) allows claims on behalf of an enterprise "that is a juridical person." A limited partnership is not a juridical person[248] and, consequently, the Claimant has no standing under Article 1117 to claim on its behalf.

171. NAFTA Article 1117(1) is consistent with customary international law which prohibits one partner from claiming on behalf of the entire partnership when the other partners have the nationality of the respondent state. In such cases, the partner bringing the claim is only entitled to recover its *pro rata* share. Thus, the Claimant has no

[246] Statement of Claim, ¶ 109 ("... the only appropriate compensation for total deprivation of one's enjoyment of the intended use of an investment is payment of fair market value of that investment ..."); *Ibid.* ¶ 127 ("The estimated fair market value of the investment, as of the moment immediately before the measure was announced, is US$355,100,000.00"); *Ibid.* ¶ 129 ("The Investor claims damages on behalf of the Enterprise for the following: Payment of not less than US$355,100,000.00 as compensation ...").

[247] Statement of Claim, ¶ 11.

[248] *Kucor Construction & Development & Associates* v. *Canada Life Assurance Company* (1998), 41 O.R. (3d) 577, at 587-589 (C.A.) **(CDA-78)**.

standing to claim loss or damage suffered by the Limited Partnership and not the Enterprise.

D. Elements of the Claim are Time-Barred

172. The jurisdiction of the Tribunal is also limited by Article 1117(2), which provides:

> An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

173. The Claimant filed its Notice of Arbitration on March 30, 2007. Pursuant to Article 1117(2), the Claimant cannot make a claim based on a measure with respect to which he first acquired knowledge of the breach and resultant loss before March 30, 2004. In this case, the Claimant challenges the "failure to transfer the Borderlands" as a breach of NAFTA.[249] However, the Enterprise commenced an action in Ontario courts on October 9, 2003 challenging this alleged failure and claiming damages. It is therefore clear that, by this time, the Enterprise had acquired knowledge of the alleged breach and any damage that it caused. Consequently, the Claimant cannot maintain its claim based on failure to transfer the Borderlands.[250]

174. The Claimant also alleges that "obfuscation and delay" impaired the Enterprise's ability to obtain redress before the courts prior to the enactment of the *AMLA*.[251] However, the Claimant fails to identify any measures or damages that occurred after March 30, 2004.

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[249] Statement of Claim, ¶¶ 111, 116.

[250] IN THE MATTER OF AN AGREEMENT ENTERED INTO BETWEEN 1532382 ONTARIO INC. carrying on business as Adams Mine Rail Haul and Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources, Notice of Claim (28 July 2003), ¶ 1 **(CDA-125)**.

[251] Statement of Claim, ¶ 115.

E. Canada Reserves the Right to Raise Further Jurisdictional Objections and to Request Bifurcation

175. The Claimant chose not to attach to the Statement of Claim several documents which could affect the jurisdiction of the Tribunal.[252] Canada respectfully reserves the right to raise further jurisdictional objections, and to request a preliminary hearing on jurisdiction, after the Claimant has produced relevant documents.

V. CANADA HAS NOT BREACHED NAFTA CHAPTER 11

176. A Claimant bears the burden of proving its claims, including both the facts and the law on which it relies.[253] NAFTA tribunals have consistently applied this principle.[254]

A. The Claimant Has Failed to Demonstrate a Breach of NAFTA Article 1105

177. The Claimant fails to demonstrate a breach of Article 1105. *First*, the Claimant has not proved either the content of the customary international law standard of treatment on which it relies, nor its breach. *Second*, the Claimant has failed to prove a denial of justice. *Third*, none of the other "obligations" identified by the Claimant are obligations under the customary international law minimum standard of treatment.

1. The Claimant Has the Burden of Demonstrating the Content of and a Violation of the Minimum Standard of Treatment under Customary International Law

178. NAFTA Article 1105(1) provides that:

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[252] For example, the Claimant did not attach the Promissory Note which is referred to in the Loan Agreement, and that sets out the Enterprise's promise to pay money to the Limited Partnership.

[253] *Tradex Hellas S.A. v Albania* (ICSID Case No. ARB/94/2), Award, (24 December 1996), ¶ 74. **(CDA AUTH-6)** ("[It] can be considered as a general principle of international procedure – and probably also of virtually all national civil procedural laws -...that it is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim").

[254] See *e.g. International Thunderbird Gaming Corp. v, Mexico* (UNCITRAL) Award, (26 January 2006), ¶95 **(CDA AUTH-7)**.

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

179. The NAFTA Free Trade Commission's binding Note of Interpretation confirms that Article 1105(1) requires the NAFTA Parties to provide the minimum standard of treatment under customary international law.[255] Consequently, Article 1105(1) requires a NAFTA Party to provide to investments of another Party the minimum standard of treatment for aliens under customary international law.

180. A Claimant who alleges a breach of Article 1105(1) must first demonstrate the existence of a relevant rule of customary international law and that it forms part of the minimum standard of treatment of aliens. If this is established, the Claimant must then demonstrate that the measure in issue breached this rule of customary international law.

181. To demonstrate the existence of a rule of customary international law, a Claimant must establish the existence of a general and consistent practice of States and a manifestation of the belief by States that such practice is required by law ("*opinio juris*").

182. The threshold for a breach of Article 1105 is only reached when the government treats an investment in a manner so manifestly arbitrary or unfair that the treatment rises to a level that is unacceptable from an international perspective.[256]

183. The Claimant does not even attempt to demonstrate state practice coupled with *opinio juris* demonstrating the existence of a customary international law rule upon which it bases its claim for a breach of Article 1105.

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[255] Note of Interpretation of Certain Chapter 11 Provisions, (NAFTA Free Trade Commission, July 31, 2001) **(CDA AUTH-8)**; see also NAFTA Article 1131(2) which indicates that a Free Trade Commission Note of Interpretation is binding on tribunals constituted under NAFTA Chapter 11. This Note has been applied by NAFTA tribunals (see *e.g.*, *Mondev v. United States* (ICSID No. ARB(AF/99/2)) Award (11 October 2002), ¶ 120) **(CDA AUTH-9)**.

[256] *International Thunderbird Gaming Corp. v, Mexico* (UNCITRAL) Award (26 January 2006), ¶ 197 **(CDA AUTH-7)**.

2. The Claimant Has Failed to Prove a Denial of Justice

a) Denial of Justice

184. The Statement of Claim alleges that the provisions of the *AMLA* restricting recourse to the courts amount to a denial of justice in breach of Article 1105.[257] However, as a first step, the Claimant has not even addressed whether a denial of justice is a rule of customary international law that falls within the minimum standard of treatment of aliens. Neither has the Claimant alleged that States customarily provide unrestricted access to the courts in circumstances similar to this case, nor that States do so out of a sense of legal obligation.

185. In considering whether there has been a denial of justice, the Tribunal must take into account all of the circumstances to determine whether due process has been accorded by Canada. This mandates consideration of the process followed by the executive, legislative, and judicial branches, including the compensation offered to the Enterprise. Canada states that there has been no breach of the minimum standard of treatment and no denial of justice in the circumstances of this case.

b) The Government of Ontario Provided Partial Recourse to the Courts

186. Section 6(6) of the *AMLA* provides recourse to domestic courts on an issue of fact or law related to the compensation available to the Enterprise. It provides that:

> Application to Superior Court of Justice
>
> (6) 1532382 Ontario Inc., Notre Development Corporation or the Crown in right of Ontario may apply to the Superior Court of Justice to determine any issue of fact or law related to this section that is in dispute.

187. Thus, contrary to what the Claimant alleges, the *AMLA* does not deny the Enterprise access to domestic courts.[258] Rather, the *AMLA* provides partial recourse to

[257] Statement of Claim, ¶ 112.

[258] See Statement of Claim, ¶ 112; see also Notice of Arbitration, ¶ 47.

domestic courts, giving the Enterprise a right to challenge the Government of Ontario's evaluation of reasonably compensable expenses in the Ontario Superior Court of Justice.

c) The Government of Ontario Also Provided Legislative Due Process

188. Not only did the Government of Ontario provide partial recourse to the domestic courts, it also accorded the Enterprise legislative due process. This legislative process was consistent with customary parliamentary practices in Canada and those found in other Commonwealth democracies.

189. The Government of Ontario introduced the *AMLA* into the Legislative Assembly as Government Bill 49 on April 5, 2004. Introducing Bill 49 onto the agenda in this manner is known as First Reading. At this stage, the Government of Ontario supplied background information to the opposition parties and Bill 49 was printed, publicly distributed, and posted in its entirety on the website of the Legislative Assembly.

190. Bill 49 then passed Second Reading on May 6, 2004, which included full parliamentary debate and the opportunity for the Minister and members of provincial parliament to make speeches before the House, some of which are quoted in the Statement of Claim.[259] All of these debates were open to the public. Bill 49 was then subject to a vote and referred to committee for a thorough review of each provision on a clause-by-clause basis. This committee held public hearings and actively sought public comment on the Bill.

191. At the same time, the Government of Ontario provided further public notice by posting Bill 49 on the Environmental Bill of Rights Registry for public comment.[260]

[259] Statement of Claim, ¶¶ 83-84.

[260] The Ontario Ministry of the Environment posted Bill 49 on May 6, 2004 and a Notice of Decision for Bill 49 (Adams Mine Lake Act) on the Environmental Bill of Rights Registry on August 22, 2004.

Contrary to the Claimant's allegation,[261] this posting was consistent with the notification requirements in the Ontario *Environmental Bill of Rights*.[262]

192. Having passed through Second Reading, on June 17, 2004 Bill 49 was submitted to the House for a Third Reading, which was open to the public, and it was put to a final vote. After Bill 49 successfully passed through these stages, it was granted Royal Assent and the Bill became law on June 17, 2004.

193. Notre and the Enterprise actively participated in this process, and cannot now complain about a denial of justice. In particular:

- Gordon McGuinty, as the Managing Director of the Enterprise, spoke at the legislation's public hearings before the Standing Committee on the Legislative Assembly;[263]
- the Enterprise commented on and suggested amendments to the *AMLA* following the introduction of Bill 49;[264]
- the Government of Ontario made several modifications to the legislation as a result of the comments offered by counsel to the Enterprise, including two key changes:

[261] Statement of Claim, ¶ 81.

[262] *Environmental Bill of Rights*, S.O. 1993, c.28, s. 15(1) **(CDA-189)** ("If a Minister considers that a proposal under consideration in his or her Ministry for a policy or Act could, if implemented, have a significant effect on the environment, and the Minister considers that the public should have an opportunity to comment on the proposal before implementation, the Minister shall do everything in his or her power to give notice of the proposal to the public at least thirty days before the proposal is implemented.") [emphasis added]; see also above at paragraph 148.

[263] Legislative Assembly of Ontario, Standing Committee on the Legislative Assembly (21 May 2004), at 0940-1020 **(CDA-188)**. Mr. McGuinty also appeared before the Standing Committee as the President of Notre Development Corporation.

[264] Letter from Gordon Acton, Wishart Law Firm LLP to James Kendrik and Dennis Brown, Ministry of the Attorney General, Re: 1532382 Ontario Inc., c.o.b. Adams Mine Rail Haul v. Her Majesty the Queen—Ministry of Natural Resources (7 April 2004) **(CDA-185)**; see also Letter from Gordon Acton, Wishart Law Firm LLP to James Kendrik and Dennis Brown, Ministry of the Attorney General, Re: 1532382 Ontario Inc., c.o.b. Adams Mine Rail Haul v. Her Majesty the Queen—Ministry of Natural Resources (13 April 2004) **(CDA-186)**; Letter from Dennis W. Brown, Q.C., General Counsel, Ministry of the Attorney General to Gordon Acton, Wishart Law Firm (22 April 2004) **(CDA-192)**.

- permitting Notre to make a compensation claim under section 6(1) of the *AMLA* whereas the original draft legislation had permitted a compensation claim by the Enterprise only; and
- modifying the compensation provision to allow both Notre and the Enterprise to claim compensation for expenses reasonably incurred but not yet paid.

194. The legislation was therefore enacted in an open and transparent process that included public comment, parliamentary debate and a vote in the Legislative Assembly.

d) The Government of Ontario's Conduct Does Not Amount to a Denial of Justice

195. The Government of Ontario provided partial recourse to the courts to allow independent judicial review of the compensation offered under the *AMLA*. It also provided the Enterprise with legislative due process. The Claimant has provided no evidence that the measures taken by the Government of Ontario rise to the level considered unacceptable at international law. Consequently, the Claimant has failed to prove that the conduct of the Government of Ontario amounted to a denial of justice.[265]

3. The Claimant Asserts Novel Article 1105 Obligations And Fails to Establish They Are Part of the Minimum Standard of Treatment

196. The Claimant also alleges violations of several "obligations" that do not form part of the customary international law minimum standard of treatment, including: good faith, legitimate expectations, transparency, and an obligation to provide a stable and predictable regulatory and business environment.[266]

197. The Claimant makes no attempt to demonstrate *opinio juris* or state practice with respect to any of these obligations. None exists. This Tribunal should resist the

[265] *International Thunderbird Gaming Corp. v, Mexico* (UNCITRAL) Award (26 January 2006), ¶ 197 **(CDA AUTH-7)**.

[266] Statement of Claim, ¶¶ 105, 113-116.

Claimant's improper attempt to introduce new obligations into both customary international law and NAFTA.

198. In any event, the *AMLA* was enacted in good faith, in a fully transparent legislative process. The *AMLA* did not create an unstable or unpredictable business and regulatory environment. The Enterprise was provided with several opportunities to comment prior to the *AMLA*'s enactment and was eligible for compensation under the *AMLA*. Nor did any action of the Government of Ontario frustrate the Claimant's legitimate expectations. There can be no legitimate expectation that an abandoned mine which had never operated as a waste disposal site and had no waste disposal contracts would become a multi-million dollar waste management business.

199. As one NAFTA Chapter 11 Tribunal stated:

> It is a fact of life everywhere that individuals may be disappointed in their dealings with national authorities, and disappointed yet again when national courts reject their complaints ... NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.[267]

200. The Enterprise was obviously disappointed that the Adams Mine project never succeeded; but this failure was not due to government action and the Government of Canada cannot be expected to compensate for failed multi-million dollar aspirations.

B. The Claimant Has Failed to Demonstrate a Breach of Article 1110

201. The Claimant has not proved that the *AMLA* breaches Article 1110(1). *First*, certificates, permits and related causes of action in domestic courts are not investments. The Enterprise never had a right to operate Adams Mine as a waste disposal site as the certificates and permits at issue were contingent. *Second*, the Enterprise remains the owner of the Adams Mine site and preventing its future speculative use as a waste disposal site does not amount to an expropriation. *Third*, even if an expropriation did

[267] *Azinian v Mexico* (ICSID Case No. ARB(AF)/97/2) Final Award (1 November 1999), ¶ 83 **(CDA AUTH-3)**.

occur, the expropriation is lawful as the measures taken complied with the conditions in Article 1110(1)(a) through (d).

1. NAFTA Article 1110 - Expropriation

202. NAFTA Article 1110 is entitled "Expropriation and Compensation." It provides, in relevant part, that:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.

203. Article 1110(1) does not define the term "expropriation." Pursuant to NAFTA Article 1131(1), "expropriation" must be interpreted in accordance with customary international law. Article 1110(1) also refers to "measure[s] tantamount to ... expropriation" which means measures that are equivalent to expropriation.[268]

204. A NAFTA Chapter 11 tribunal applying Article 1110(1) should first determine whether there is an investment that could be expropriated.[269] If so, it must then decide whether the measure expropriates that investment.

205. If a tribunal were to find an expropriation, then it must also determine whether the expropriation is a lawful expropriation.[270] A lawful expropriation for the purposes of

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[268] See *e.g.*, *Pope & Talbot Inc v Canada* (UNCITRAL) Interim Award (26 June 2000), ¶ 104 **(CDA AUTH-10)**; *Feldman v. Mexico* (ICSID Case No. ARB (AF)/99/1) Award, (16 December 2002), ¶ 100 [*Feldman*] **(CDA AUTH-4)**.

[269] *Feldman*, *ibid.* ¶ 96 **(CDA AUTH-4)**.

[270] *Fireman's Fund Insurance Company* v. *Mexico* (ICSID Case No. ARB(AF)/02/01) Award (17 July 2006), ¶174 **(CDA AUTH-1)**.

NAFTA Chapter 11 is a taking that is consistent with the conditions in Article 1110(1)(a) through (d).[271]

2. Contingent Rights and Causes of Action Are Not Investments under the NAFTA

206. The Claimant alleges that the expropriated investment was the real property that the Enterprise intended to use as a waste disposal site, and intangible property which included permits and any cause of action arising from their revocation.[272]

207. Canada does not contest that real property can constitute an investment. However, the certificates and permits at issue and related causes of action in domestic court are not investments for the purpose of NAFTA Chapter 11.

208. Article 1110(1) refers to the expropriation of an "investment." Article 1139 defines "investment" as including: "real estate, or other property, tangible or intangible." The NAFTA does not define "property."

209. At international law, "property" consists of a bundle of rights including the right to use, the right to enjoy and the right to destroy or dispose of the property (*i.e., usus, fructus, abusus*). These rights cannot be remote, uncertain or contingent.

210. Applied to the present proceeding, the Claimant has not demonstrated that the certificates and permits at issue, particularly the Provisional Certificate, constituted property. The Enterprise never had vested rights in the permits at issue.[273] Rather, the certificates and permits provided permissions that were contingent on the fulfilment of numerous conditions—most of which were never fulfilled. Such contingent permissions are not vested rights and cannot constitute property under international law. Moreover,

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[271] *Ibid.* ¶174.

[272] Statement of Claim, ¶ 4, fn 2.

[273] *Fireman's Fund Insurance Company* v. *Mexico* (ICSID Case No. ARB(AF)/02/01) Award (17 July 2006), ¶ 208 **(CDA AUTH-1)**.

these certificates and permits provided permissions which remained revocable, and therefore, were inherently uncertain.

211. As explained in Section A.4 of the factual background, the Provisional Certificate contained 66 conditions, many of which had to be fulfilled before Notre – or later the Enterprise – could begin construction of the waste disposal site. Notre and the Enterprise failed to complete most of these conditions.

212. One of the most critical conditions attached to the Provisional Certificate was a requirement that the owner obtain additional certificates and permits, including:

- Certificate of Approval under the *Ontario Water Resources Act* for a leachate treatment plant;
- Certificate of Approval under the *Ontario Water Resources Act* for storm water management facilities;
- PTTW under the *Ontario Water Resources Act* for dewatering the South Pit;
- Certificate of Approval under the *Environmental Protection Act* for construction and operation of a landfill gas control plant and flares.[274]

213. Although Notre obtained a PTTW, it subsequently allowed it to expire in October 2001. Contrary to the Claimant's assertions,[275] the remaining certificates and permits were never obtained.

214. Additional certificates and permits that are not listed in the Provisional Certificate would have also been required. In particular, the Enterprise would have required a long-term PTTW for the continual pumping of leachate from Adams Mine. Moreover, Ontario Northland required a regulatory certificate to haul garbage as freight between North Bay and Adams Mine. It is clear that none of the certificates or permits at issue constituted investments as defined by NAFTA Article 1139.

[274] Provisional Certificate, Condition 28, at 8 **(CDA-28)**.

[275] Statement of Claim, ¶ 19. The Claimant appears to conflate certificate 3250-4NMPDN issued on July 9, 2001 for the installation of pumps and other temporary equipment to dewater the South Pit with separate certificates it required for a leachate treatment plant and storm water management infrastructure.

215. Similarly, the Claimant's assertion that its "investment" includes a "cause of action" is without merit. Nothing in the definition of "investment" in Article 1139 suggests that a cause of action can constitute an "investment." Rather, the plain language and context of Article 1139 provides the opposite, as "investment" is defined as excluding "claims to money."

216. In conclusion, the Claimant's alleged "right" to operate a waste disposal site and its "cause of action" do not constitute investments. It follows that neither can be expropriated under Article 1110(1).

3. The Adams Mine Site Was Not Expropriated

217. At international law it is widely recognized that an expropriation requires a total or substantial deprivation of fundamental rights of ownership in an investment. No substantial deprivation of the rights of ownership ever occurred in this case. The Enterprise remains the full legal owner of the Adams Mine site.

218. As explained above in paragraphs 209-210, the Claimant's argument rests on the incorrect premise that the Enterprise had an existing and vested right to use Adams Mine as a waste disposal site. The Enterprise, however, never had such a right. Adams Mine has the same present uses that it had when it was purchased by the Enterprise before the enactment of the *AMLA*.

219. Nor did the Enterprise have a right to use Adams Mine as a waste disposal site in the future. Future speculative uses of property are not entitled to protection under international law. The investor bears the risk of regulatory change that might foreclose a future use of the property, absent any undertaking or promise by the State to the contrary. No such promise was made in this case.

220. In this case, the Enterprise and the Limited Partnership became involved in a high risk and speculative business venture when the Enterprise purchased Adams Mine in September 2002. Any basic due diligence performed before this purchase would have shown that the Adams Mine project had repeatedly failed to get off the ground since

1990, and that the project had a number of significant challenges to overcome. The assertion that the Enterprise was deprived of the future use of Adams Mine as a waste disposal site is premised on numerous unrealistic assumptions including assumptions that the Enterprise would have prevailed in the CWS lawsuit, would have received all of the necessary certificates, and would have received a contract with the City of Toronto. These assumptions are based on hope, not facts.

221. At a more practical level, the Enterprise's attempt to secure a right to use Adams Mine as a waste disposal site in the future faced several further problems:

- The City of Toronto had passed a resolution *never* to use the Adams Mine as a waste disposal site and had signed contracts with Republic to dispose of its waste in Michigan. The surrounding regional municipalities had also signed contracts with other companies;[276]
- No infrastructure had been built on the site since its acquisition in 1990;
- The Enterprise and Limited Partnership lacked the expertise and operational capacity to develop Adams Mine and no waste management company had been identified to run the site;
- Aboriginal communities had indicated that they would file a land claim in the vicinity of Adams Mine;
- Aboriginal communities were also in a position to request a federal environmental assessment, which could have prevented Adams Mine from being developed as a waste disposal site; and
- Concerns over the environmental safety of hydraulic containment at Adams Mine had been raised by a number of independent experts during the review of the application for the short term PTTW.

222. None of these circumstances had changed by the time the *AMLA* was enacted in 2004.

223. In conclusion, the Claimant purchased a derelict mine site filled with water, some technical studies and test data, a disused rail line, and four buildings that for the most part

[276] City of Toronto, Minutes of the Council of the City of Toronto, January 30, January 31 and February 1, 2001 (6 March 2001), at 87-88 **(CDA-34)**.

remained unoccupied since 1990. The Claimant still has what it purchased and Canada has not expropriated the investment.

4. The *AMLA* Meets the Conditions for a Lawful Expropriation

224. Even if the *AMLA* could be considered an expropriation, which Canada denies, the *AMLA* meets the conditions for a lawful expropriation required by NAFTA Articles 1110(1)(a) through (d). The *AMLA* is consistent with NAFTA Article 1110(1) because it:

- was enacted for a public purpose;
- was non-discriminatory;
- provided due process of law consistent with the minimum standard of treatment; and
- required the Government to offer compensation that, in this case, exceeded the fair market value of Adams Mine.

a) The Public Purpose of the *AMLA* was to Protect Public Health and the Environment

225. Article 1110(1)(a) requires a lawful expropriation to be for a "public purpose." No definition of "public purpose" is provided by the NAFTA. At international law, States are afforded extensive discretion to determine whether a measure is taken for a "public purpose" or is in the "public interest."

226. The *AMLA* was enacted for the public purpose of protecting water resources and the environment.

227. Protecting water resources and ensuring safe drinking water were important government priorities, especially in the light of the events in Walkerton, Ontario. The Government of Ontario was concerned that Adams Mine could threaten the safety of local water resources in Timiskaming. The *AMLA* was linked to both of these priorities when it was introduced into the legislature.

228. Similar steps to protect water resources and the environment were taken after the *AMLA* was enacted, such as the enactment of the *Water Taking Regulation*[277] and the *Clean Water Act.*[278]

229. Accordingly, the *AMLA* is a *bona fide* measure taken for the public good and complies with Article 1110(1)(a).

230. The Claimant incorrectly asserts that: (1) only measures of general application have a public purpose; and (2) a public purpose is not legitimate if it competes with other public purposes.[279] Neither of these assertions has a basis in logic, or the text of NAFTA Article 1110(1).

231. First, at international law, "public purpose" has a broad meaning and is not restricted to measures of general application. Moreover, a State is afforded considerable discretion in its assessment of whether a measure is required for a public purpose. Measures of specific or limited application may have a public purpose.

232. Second, arbitral tribunals should not second guess the legitimacy of a public purpose by weighing it against other competing public purposes. It is not unusual for public purposes to compete; however, it is for elected governments to determine whether a particular measure is in the public interest and to weigh the merits of competing public purposes.

b) The *AMLA* Was Non-Discriminatory

233. Article 1110(1)(b) requires a lawful expropriation to be made on a "non-discriminatory basis." Non-discrimination in Article 1110(1)(b) refers to discrimination

[277] O. Reg. 387/04 **(CDA-168)**.

[278] *Clean Water Act*, 2006, S.O. 2006, c. 22 **(CDA-170)**.

[279] Statement of Claim, ¶ 120. The Claimant also fails to explain how the development of a "mega" landfill at Adams Mine would be consistent with the principle of sustainable development—a principle that is usually considered to be consistent with waste diversion rather than landfilling.

on the basis of nationality.[280] An expropriation that treats investors of another NAFTA Party differently than domestic investors on the basis of nationality is discriminatory if there is no reasonable basis for this difference in treatment.

234. None of the provisions of the *AMLA* discriminate against investors of another NAFTA Party, nor does the *AMLA* contain provisions that refer to the nationality of parties involved in development of the site.[281] Rather, the *AMLA* accords the same treatment to proposals to develop domestic waste disposal sites regardless of whether those proposals are made by Canadian or U.S. companies. The *AMLA* amends section 27 of the *Environmental Protection Act* and states that no person shall use, operate, establish, alter, enlarge or extend a waste disposal site where waste is deposited in a lake.[282] Indeed, this provision of the *AMLA* was subsequently applied to prevent an Ontario company, Inter Recycling Inc., from expanding their landfill.[283]

235. The Claimant's assertion that Article 1110(1)(b) should be interpreted in a broad manner to prohibit measures that discriminate against a specific investment is illogical.[284] The Claimant's interpretation of this provision would mean that a State could never lawfully expropriate a specific piece of land owned by a foreign national. Such an interpretation of this provision would prevent States from lawfully expropriating particular foreign owned properties and could severely constrain their ability to regulate for a public purpose.

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[280] *Feldman v. Mexico* (ICSID Case No. ARB (AF)/99/1) Award (16 December 2002), ¶ 137, fn 26 **(CDA AUTH-4)**; see also *Third Restatement of the Foreign Relations Law of the United States*, § 712 **(CDA AUTH-11)**.

[281] In fact, the Government of Ontario was not aware that the alleged owner of the Enterprise was a U.S. citizen, and only knew of Canadian citizens being associated with the Enterprise.

[282] *Adams Mine Lake Act, 2004*, S.O. 2004, c. 6, s. 7(1) **(CDA-193)**.

[283] Letter from Ian Parrott, Supervisor, Waste Approvals, Ministry of Environment to Bryan Farley, Director of Environment, Health and Safety, Inter-Recycling Systems Inc., Re: Provisional Certificate of Approval A032014 Inter-Recycling Systems Inc. Landfill (22 December 2004) **(CDA-172)**.

[284] Statement of Claim, ¶ 120.

c) The *AMLA* Provided Due Process

236. Article 1110(1)(c) requires that an expropriation take place in accordance with "due process of law" and Article 1105.

237. Due process of law must be consistent with general principles of international law. A State has extensive discretion at international law to determine the manner in which it expropriates an investment, including how it will ensure "due process of law" for affected investors. "[D]ue process of law" does not require a NAFTA Party to employ specific domestic legal procedures.

238. Article 1110(1)(c) also requires an expropriation to conform to the minimum standard of treatment under customary international law. A denial of justice in the context of an expropriation only arises as a consequence of grave procedural irregularities. The state is under no obligation to expropriate an investment using a particular method or procedure.

239. As explained in Canada's analysis of NAFTA Article 1105(1), the Government of Ontario ensured that the investment was accorded due process of law by providing partial recourse to domestic courts under the *AMLA* for issues relating to compensation, and by following a transparent and democratic legislative process.

240. The Claimant alleges that it was deprived of due process because the *AMLA* eliminated "... all claims for damages that might lie for the Enterprise..."[285] However, NAFTA Article 1110 explicitly requires a NAFTA Party to offer compensation equivalent to the fair market value of the investment. Requiring a State to provide both compensation and the right to claim damages in domestic courts would encourage double recovery. Accordingly, this interpretation of due process of law must be rejected.

[285] Statement of Claim, ¶ 121.

241. As a consequence, the *AMLA* is consistent with both the requirement to provide due process of law and the minimum standard of treatment under customary international law.

d) The *AMLA* Provided For Compensation that Exceeded the Fair Market Value of Adams Mine

242. Article 1110(1)(d) imposes a final requirement for lawful expropriation: the NAFTA Party must pay compensation in accordance with Article 1110(2) through (6). Article 1110(2) requires compensation to be equivalent to the fair market value of the expropriated asset at the time of the expropriation.

243. Section 6(2) of the *AMLA* required the Government of Ontario to compensate the Enterprise for expenses:

- incurred and paid by the Enterprise associated with the development of Adams Mine as a waste disposal site;
- incurred but not paid by the Enterprise associated with the development of Adams Mine as a waste disposal site (limited to a maximum of $500,000); and
- for legal fees and disbursements related to advice provided with respect to the *AMLA*.

244. In this case the legislative formula resulted in compensation that exceeded the fair market value of the Adams Mine site immediately prior to the enactment of the *AMLA*. The *AMLA* did not provide compensation for future profits and goodwill as the high risk and speculative proposal to develop Adams Mine never advanced beyond the initial planning stage and the Enterprise never became a going concern.

245. The Government of Ontario was required to provide the Enterprise with compensation in accordance with section 6 of the *AMLA*. However, the Enterprise did not avail itself of this compensation.

246. Article 1110(1)(d) is satisfied by evidence that the State made compensation available in accordance with Articles 1110(2) through (6) and remains ready, willing and

able to pay such compensation. Article 1110(1)(d) does not require a State to force payment on an investor.

247. For this reason, the Claimant's assertion that the Government of Ontario failed to pay compensation is irrelevant for purposes of Article 1110(1)(d).[286] The Government of Ontario is still required to provide compensation to the Enterprise under the *AMLA* and is willing to do so. This statutory obligation fulfills the requirement in Article 1110(1)(d).

VI. THE ENTERPRISE IS NOT ENTITLED TO DAMAGES

248. In light of all of the above factors, Canada denies that the Enterprise has suffered any compensable damages caused by a breach of NAFTA and denies that it is entitled to interest on such damages or costs. *First*, the alleged breaches of NAFTA did not cause any damages to the Enterprise. *Second*, even if the Claimant could show that the alleged breaches of NAFTA caused the Enterprise damage, those damages do not amount to U.S. $355.1 million. For the reasons explained below, Canada puts the Claimant to strict proof of these alleged damages.

A. The Alleged Breaches of NAFTA Did Not Cause Any Damage to the Enterprise

249. At international law, a claimant must prove a sufficient causal link that is not too remote between the alleged breach and the alleged damages suffered as a result of that breach.[287] The Claimant is unable to show such a causal link here. The Enterprise's loss is attributable to business failures beginning in the 1990s and to the speculative nature of its investment. Whatever loss the Enterprise suffered was not caused by any of the alleged breaches of NAFTA.

250. Indeed, Adams Mine had lost all prospect of becoming a waste disposal site before any of the alleged wrongful measures in this case occurred. In particular, at the

[286] Statement of Claim, ¶ 92.

[287] *S.D. Myers v. Canada* (UNCITRAL) First Partial Award (13 November 2000), ¶ 316 **(CDA AUTH-12)**.

time of the alleged breaches of NAFTA, the Enterprise and the Limited Partnership had already failed to:

- secure a single waste disposal contract;
- secure the multiple environmental certificates and permits necessary to operate a waste disposal site;
- enter into an arrangement with a company capable of operating Adams Mine as a waste disposal site;
- invest a single dollar to rehabilitate the dilapidated facilities at Adams Mine;[288] or
- invest in any of the necessary capital improvements to the site.

251. It was these business failures that caused the losses alleged by the Claimant, not any of the measures at issue here. Consequently, even if the measures in question breached Article 1105 or 1110 of NAFTA, which Canada denies, these measures were not the actual and proximate cause of the losses suffered by the Enterprise.

B. The Enterprise Has Not Suffered U.S. $355.1 Million in Damages

252. Even if the Claimant could establish that the alleged breaches of NAFTA caused damage to its Enterprise, it certainly cannot justify its extraordinary claim for U.S. $355.1 million.[289] As illustrated in Figure 4 below, despite the ever mounting business failures that eliminated all economic prospects for Adams Mine as a waste disposal site, the Claimant has consistently and unreasonably inflated the value of its enterprise until it has reached the extraordinary sum that it claims as damages here. There is no support in law or in fact for such a massive inflation. The chart below demonstrates that the prices that parties were willing to pay to purchase and/or operate Adams Mine equal but a tiny

[288] REDACTED
REDACTED

[289] Moreover, the Claimant has not demonstrated, or even alleged, that the Enterprise has attempted to mitigate its damages by investigating and pursuing alternative uses for the Adams Mine site.

fraction of the amount the Enterprise has claimed the site is worth. This relationship holds true even if the various royalty payments to which various partners may have been entitled are added to the values displayed below.

Figure 4

Adams Mine—Independent and Market Valuations Versus the Enterprise's Litigation Valuation

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1. The Alleged Breach of Article 1105 Cannot Justify an Award of U.S. $355.1 Million

253. A breach of Article 1105 entitles a claimant to compensation in the amount necessary to counteract the consequences of the illegal act that breaches the minimum standard of treatment and re-establish the situation which would have existed but for that illegal act.[290] However, if such a breach does not deprive an investor or enterprise of the entire value of its investment, then the damages will not equal the entire fair market value of the investment.[291] Any such recovery would constitute a windfall to a claimant because the claimant retains ownership of the investment. Such a windfall is exactly what the Claimant seeks in this case.

254. Contrary to the Claimant's assertion, even if the measures here are found to be a breach of Article 1105, the Enterprise's inability to pursue a domestic legal action does not entitle it to recover the fair market value of the Enterprise. Rather, the Claimant is only entitled to compensation for whatever value a domestic cause of action may have had. The Claimant cannot show that its Enterprise had any reasonable prospect of succeeding in a domestic action, let alone being awarded the extraordinary sums claimed as damages here.

2. The Alleged Breach of Article 1110 Cannot Justify an Award of U.S. $355.1 Million

255. As the Claimant alleges,[292] if the *AMLA* is found to constitute a breach of Article 1110, the Claimant would be entitled to damages in accordance with subsections (2) through (6) of that Article. Those subsections require compensation equal to the fair market value of the Enterprise immediately prior to the expropriation. However, the

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[290] *Case Concerning the Factory at Chorzow* (1928) Judgment No. 13, P.C.I.J. (Ser. A) No. 17 at 47 **(CDA AUTH-13)**.

[291] *Feldman v. Mexico* (ICSID Case No. ARB (AF)/99/1) Award (16 December 2002), ¶ 194 **(CDA AUTH-4)**.

[292] Statement of Claim, ¶¶ 109, 122.

Claimant here has not attempted to make even a *prima facie* case that the Enterprise's alleged investment ever had a fair market value of U.S. $355.1 million.

256. The fair market value of an investment does not include lost profits, good will or lost business opportunity if a project has no proven record of success.[293] The Enterprise has admitted that it had not even begun to develop or operate Adams Mine as a waste disposal site.

257. The Enterprise had a hole in the ground and an idea, but little more. Furthermore, because of the CWS lawsuit, even its ownership of that hole in the ground was in question.

258. Allowing the Claimant to recover hundreds of millions of dollars for lost profits would require speculation at every level. Such speculation has no place in calculating the damages due for a violation of international law. The Claimant has not alleged a single event since the Enterprise's purchase of the Adams Mine site that could justify awarding the Enterprise any return on its investment, let alone a return of nearly 20,000%.[294]

3. The Claimant May Not Recover Lost Profits on Behalf of the Limited Partnership

259. The Claimant seeks damages on behalf of the Enterprise for the entire fair market value of the proposed investment, including all of the alleged lost profits.[295] Even if the Enterprise was entitled to recover some lost profits, which it is not, the amount claimed here is unjustifiable as a matter of law and fact.

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[293] *Metalclad Corp. v. Mexico* (ICSID Case No. ARB/AF/97/1) Award (30 August 2000), ¶¶ 120-121**(CDA AUTH-14)**.

[294] The Enterprise purchased the assets at the Adams Mine site in 2002 for $1.8 million, less than 1% of the U.S.$355.1 million the Claimant now alleges that the investment is worth. The amount that the Enterprise paid was likely dictated by the agreement between Notre, the seller, and CWS, one of Notre's previous partners in the plan to develop the Adams Mine site. As explained above, *supra* ¶ 39, Notre was only entitled to keep the first $1.8 million of any sale and then any amount over $5.8 million. If, in fact, this had been an arms-length transaction, and if Notre had valued the business opportunity of developing Adams Mine at more than $5.8 million, it would have sold the site to the Enterprise for that amount.

[295] Statement of Claim, ¶ 129.

260. According to the Statement of Claim, by the time of the enactment of the *AMLA*,

REDACTED

REDACTED

There is no evidence that either the Claimant, or the Enterprise, had these funds.

[296] Statement of Claim, ¶ 11.

[297] REDACTED

REDACTED

VII. AWARD SOUGHT BY CANADA

262. For the reasons outlined above, Canada respectfully requests that:

- The Tribunal dismiss Mr. Vito G. Gallo's claim for lack of jurisdiction;
- If the Tribunal determines that it has jurisdiction, that it dismiss Mr. Gallo's claims in their entirety;
- pursuant to NAFTA Article 1135(1) and Article 40 of the UNCITRAL Arbitration Rules, the Tribunal require the Claimant to bear all costs of the arbitration, including Canada's costs of legal assistance and representation; and
- the Tribunal grant any other relief it deems appropriate.

September 15, 2008

Respectfully submitted
on behalf of Canada,

Meg Kinnear

Michael Owen

Reuben East

Nick Gallus

Shane Spelliscy

Department of Foreign Affairs and
International Trade
Trade Law Bureau
125 Sussex Drive
Ottawa, Ontario
CANADA K1A 0G2
Tel: 613-943-2803

CHRONOLOGY OF KEY EVENTS

DATE	EVENT
November 20, 1989	Gordon McGuinty incorporates Notre to purchase Adams Mine
REDACTED	REDACTED
April 1992	Interim Waste Authority created to identify locations for landfills near Toronto
REDACTED	REDACTED
October 1995	Toronto requests for bids from privately owned landfills to dispose of Toronto's waste
November 1995	Browning-Ferris, Canadian National Railway Company, Notre and Ontario Northland Transportation Commission form the first Rail Cycle North consortium to bid to dispose of Toronto's waste at Adams Mine
December 1995	Toronto City Council decides not to purchase Adams Mine
December 18, 1996	Toronto rejects Rail Cycle North's bid to dispose of Toronto's waste at Adams Mine and awards a five-year contract to a landfill in Michigan
December 20, 1996	Notre applies for permits to dispose of waste at Adams Mine
May 31, 1997	Notre and CWS enter into a series of agreements to finance, develop and operate Adams Mine. CWS joins Rail Cycle North
April 23, 1999	MOE issues a Provisional Certificate of Approval that is subject to 66 conditions
October 5, 1999	Toronto again requests for bids from privately owned landfills to dispose of Toronto's waste
Early 2000	Rail Cycle North submits another bid to dispose of Toronto's waste at Adams Mine
May 2000	The death of seven people in the town of Walkerton prompts a provincial government inquiry into potential threats to drinking water
October 2000	Toronto again rejects Rail Cycle North's bid to dispose of Toronto's waste at Adams Mine and awards a contract to a landfill in Michigan

DATE	EVENT
January 31, 2001	Toronto City Council passes a motion to reject the current and future use of Adams Mine as a landfill, characterizing Adams Mine as a "dark ages concept"
REDACTED	REDACTED
REDACTED	REDACTED
October 24, 2001	Notre delays the purchase of the tailings area
October 30, 2001	Notre allows its short-term Permit to Take Water to expire, unused
May 10, 2002	Notre sells Adams Mine to the CGC "in trust" REDACTED REDACTED
June 26, 2002	Brent Swanick registers the Enterprise
June 26, 2002	Mr. Swanick signs a declaration stating that he holds one common share in trust for Mr. Vito Gallo "as of" June 26, 2002
September 9, 2002	Mr. Swanick transfers the single common share in the Enterprise to Vito Gallo in a resolution dated "as of September 9, 2002"
September 9, 2002	Notre transfers Adams Mine title to the Enterprise
REDACTED	The Limited Partnership is formed to finance the acquisition of Adams Mine REDACTED
October 29, 2002	Gordon McGuinty renews interest in purchasing tailings area. MNR reminds Mr. McGuinty of existing aboriginal land and rights claims
February 28, 2003	CWS files lawsuit seeking a reversal of the sale of Adams Mine to the Enterprise
April 14, 2003	Aboriginal communities complain to MNR that the proposed transfer of the tailings area would infringe upon their aboriginal rights and request that the Crown fulfill its fiduciary duty to consult
April 14, 2003	The Enterprise applies to purchase the tailings area
April 29, 2003	MNR advises Gordon McGuinty that it is required to consult further with

DATE	EVENT
	aboriginal communities before it can transfer the tailings area
July 4, 2003	The Enterprise requests a PTTW
August 26, 2003	MNR invites local aboriginal communities to attend consultations
October 9, 2003	The Enterprise files a lawsuit over the failure to transfer the tailings area
December 2, 2003	Expert hydrogeologist, Dr. Ken Howard, submits a report to MOE identifying flaws in the evidence supporting hydraulic containment
March 2004	Technical Consultants retained by MOE to review the request for the PTTW confirm Dr. Howard's concerns
April 5, 2004	Government of Ontario introduces Bill 49, the *Adams Mine Lake Act, 2004*
April 7 & 13, 2004	Counsel for the Enterprise requests amendments to Bill 49, which are incorporated
May 21, 2004	Gordon McGuinty appears before the Ontario Standing Committee on the Legislative Assembly concerning Bill 49
June 17, 2004	*AMLA* comes into force
REDACTED	Notre submits a claim for compensation pursuant to the *AMLA* for REDACTED
REDACTED	REDACTED
REDACTED	REDACTED
October 30, 2006	Vito Gallo files a Notice of Intent pursuant to Article 1117(1) of NAFTA.