NOTICE OF INTENT
TO SUBMIT A CLAIM TO ARBITRATION
UNDER NAFTA CHAPTER 11

OMNITRAX ENTERPRISES INC., MARINE INVESTMENT COMPANY, OMNITRAX CANADA FREIGHT INVESTMENT COMPANY, HUDSON BAY INVESTMENT COMPANY, NORTHERN MANITOBA INVESTMENT COMPANY

Investors/Claimants

v.

GOVERNMENT OF CANADA

Respondent

Dentons Canada LLP
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto, Ontario
M5K 0A1 Canada

Dentons Europe, *Association d'Avocats à Responsabilité Professionnelle Individuelle*
5 Boulevard Malesherbes
Paris, 75008
France

Counsel for OmniTRAX Enterprises Inc., Marine Investment Company, OmniTRAX Canada Freight Investment Company, Hudson Bay Investment ~~Company, Churchill Investment~~ Company, Northern Manitoba Investment Company

14 November 2017

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SERVICE OF A TRUE COPY HEREOF
SIGNIFICATION DE COPIE CONFORME
Admitted the / Acceptée le 14 day / jour
of / de Nov 20 17
for / pour
Me Nathalie G. Drouin, Ad.E.
Deputy Minister of Justice
and Deputy Attorney General of Canada
Sous-Ministre de la Justice
et Sous-procureure générale du Canada

I. NOTICE OF INTENT AND REQUEST FOR CONSULTATIONS

1. In accordance with Part B and, in particular, Articles 1118 and 1119 of the North American Free Trade Agreement (the "NAFTA"), and with a view toward resolving this dispute amicably through consultation and negotiation, the Investors OmniTRAX Enterprises Inc., Marine Investment Company, OmniTRAX Canada Freight Investment Company, Hudson Bay Investment Company, Northern Manitoba Investment Company (collectively, "OmniTRAX") respectfully provide to the Government of Canada this written notice of their intention to submit a claim to arbitration under NAFTA Chapter 11.

2. OmniTRAX also requests that Canada and the Government of Manitoba begin formal consultations and negotiations as contemplated by NAFTA Article 1118 in an effort to amicably resolve this dispute.

II. NAMES AND ADDRESSES OF THE INVESTORS AND THEIR ENTERPRISES

3. OmniTRAX Enterprises Inc. is a corporation organized under the laws of the State of Colorado in the United States of America, with its registered head office at 252 Clayton Street, 4th Floor, Denver, CO 80206. OmniTRAX Enterprises Inc. is part of a corporate group that is an active investor in railroads, rail-driven development assets and supply chain services, including rail and terminal services, logistics, proppant delivery, railway car storage and repair and other related industries.

4. Marine Investment Company, OmniTRAX Canada Freight Investment Company, Hudson Bay Investment Company, and Northern Manitoba Investment Company are all wholly-owned subsidiaries of OmniTRAX Enterprise Inc and are all United States incorporated corporations having registered head offices at the same address as OmniTRAX Enterprises Inc provided at paragraph 3, above.

5. OmniTRAX submits this Notice of Intent under Article 1116 of the NAFTA on its own behalf and under Article 1117 on behalf of its wholly owned Canadian subsidiaries Churchill Marine Tank Farm Company, OmniTRAX Canada Freight Services Company,

Hudson Bay Railway Company, and Hudson Bay Port Company. These wholly-owned Canadian subsidiaries are Canadian incorporated corporations (under the laws of Nova Scotia) that own and operate the assets which are the subject of this Notice of Intent, as described in detail below. The registered head office of all these Canadian enterprises is:

1300– 1969 Upper Water Street
1301Purdy's Wharf, Tower II
Halifax, NS
Canada B3J 3R7

III. PROVISIONS OF NAFTA CHAPTER 11 BREACHED

6. The Investors claim that Canada has, through acts of both the Government of Canada and the Government of Manitoba, breached its obligations under Section A of Chapter 11 of NAFTA, including but not limited to the following provisions:

   (a) Article 1102 — National Treatment;

   (b) Article 1105 — Minimum Standard of Treatment; and

   (c) Article 1110 — Expropriation and Compensation.

IV. ISSUES AND FACTUAL BASIS FOR THE CLAIM

a. The Hudson Bay Railway and its Reliance on the Canadian Wheat Board

7. The Hudson Bay Railway ("HBR") is a short line railway operating approximately 1,300 kilometres (810 miles) of track in Manitoba, extending from The Pas to Churchill, on the Hudson Bay. An iconic piece of Canadian infrastructure, the HBR was originally completed to the Port of Churchill on Hudson Bay in 1929 and the first grain shipment was in 1931. Since then, the HBR has provided a vital shipping link to the communities located along the line who depend upon it for the supply of goods, including fuel and food.

8. The HBR passes through extremely challenging terrain marked by muskeg, wetlands and discontinuous permafrost. Maintaining operations requires significant annual

maintenance and regular capital improvements. Climate change has also had a significant adverse effect on the line because the increase in temperatures in Northern Manitoba has meant the ground melts sooner in the spring and freeze does not occur until later in the fall. These changes mean the permafrost problem is exacerbated with maintenance and repair costs soaring.

9. From an economic perspective, the HBR's main line of business has always been the transportation of grain harvested in Canada's Western Provinces to the Port of Churchill. It was for this purpose that the HBR was designed, and it is primarily for this purpose that it has been maintained and operated for the past 85 years.

10. The HBR's position as a conduit for grain shipments was sustained by the Canadian Wheat Board (the "CWB"), which for decades ensured that sufficient volumes of grain would be shipped over the HBR's lines to the Port of Churchill each year. This was achieved by means of a monopsony over wheat and barley operated by the CWB since its establishment in 1935.

11. The CWB's monopsony, known as the "Single Desk", effectively made the CWB the only authorized buyer of wheat and barley harvested in its area of jurisdiction. The CWB exercised direct control over flows of Western grain, determining over which railways and through which ports wheat and barley harvested in its catchment area would be shipped.

12. Economically, wheat has always been by far the most important commodity shipped on the HBR and through the Port of Churchill. Without the wheat business, there is not, and never has been, any reasonable prospect of operating the HBR on a cost recovery basis (let alone a profitable one).

b. OmniTRAX's Acquisition of the HBR and Port of Churchill

13. OmniTRAX purchased the HBR from the Canadian National Railway Company ("CN") in 1997. Over the past two decades of engagement in Northern Manitoba, OmniTRAX has contributed immeasurably to the communities in which it operates. OmniTRAX is very proud of its track record of commitment and community engagement in Northern

Manitoba. It is proceeding with this Notice of Intent as a last resort, after having attempted numerous times to find a viable long-term solution to the challenges faced by the HBR, the Churchill Tank Farm and the Port of Churchill. Unfortunately, the unreasonable conduct of the Government of Canada and of the Government of Manitoba have left it no choice but to rely on its NAFTA rights for the protection of its investments.

14. The 1997 acquisition by OmniTRAX was actively supported and encouraged by the Government of Canada. At the time, in addition to the purchase price paid by OmniTRAX to CN (approximately $11,000,000), the Government of Canada contributed approximately $24,000,000 to CN as an inducement to sell the HBR, rather than discontinue and liquidate it.

15. In concert with OmniTRAX's purchase of the HBR, the Government of Canada also authorized the sale to OmniTRAX of the Port of Churchill by the Canada Ports Corporation (a Government of Canada agency). The Port was sold to OmniTRAX for $10, with the Government of Canada contributing approximately $4,000,000 to rehabilitate the Churchill Tank Farm and approximately $24,000,000 to rehabilitate the Port (including dredging, concrete repairs and window replacement, among other things).

16. The Government of Canada's sale of the Port of Churchill to OmniTRAX was intended to facilitate OmniTRAX's establishment of the full infrastructure required to support the transport of grain shipments through Churchill, as directed by the CWB. The sale of the Port of Churchill also served to encourage further investment by OmniTRAX in the HBR and related assets (such as the Churchill Tank Farm).

17. At the time of these acquisitions, OmniTRAX had every reason to expect that the Government of Canada's decades-long support for the HBR, the Port of Churchill, and the economic sustainability of the community of Churchill itself would continue, in the form of the CWB's maintenance of historical volumes of grain shipments over the HBR and through the Port of Churchill.

18. Given the vital importance of grain shipments, the continued operation of the Single Desk was a critical and necessary factor in OmniTRAX's assessment of the viability of its investment in the HBR, the Port of Churchill and related assets (such as the Churchill Tank Farm).

19. Since OmniTRAX acquired the HBR it has never generated net profit from this investment, despite having invested over $100 million in capital contributions over the past 20 years.

c. Contribution Agreements

20. Over the course of OmniTRAX's ownership of the HBR and the Port of Churchill, the Government of Canada and the Government of Manitoba have entered into successive "Contribution Agreements". These Agreements essentially provided for financial contributions by the governments and by OmniTRAX relating to needed capital improvements to the HBR, the Port of Churchill, and related assets. The Contribution Agreements encouraged and induced OmniTRAX to make significant incremental additional investments into the HBR and the Port of Churchill. OmniTRAX would not have entered into these Contribution Agreements and would not have made the related investments but for its reasonable expectation that the Government of Canada and the Government of Manitoba would continue to support the railway and the Port and its use as a conduit for exports of Western grain.

21. However, the most recent Contribution Agreements have resulted in disputes between the parties. For example, the most recent Contribution Agreement with the Government of Manitoba has resulted in a lawsuit by certain OmniTRAX Canadian subsidiaries against the Government of Manitoba for violations of a related non-disclosure agreement (Statement of Claim dated April 15, 2016, Manitoba Queen's Bench, Court File No. 16-01-01536). The Statement of Claim in this action details the acts of the Government of Manitoba that violated the non-disclosure agreement and which harmed the commercial interests of OmniTRAX.

22. The most recent Contribution Agreement with the Government of Canada, entered into in July 2008, has likewise been plagued with disagreement. In that Contribution Agreement, the Government of Canada promised to provide $20,000,000 in funding for various improvements to the HBR and the Port of Churchill. Some, but not all, of these federal funds were provided and were matched by the Government of Manitoba (through a companion Contribution Agreement) and by OmniTRAX.

23. However, on October 13, 2017, the Government of Canada served OmniTRAX with a spurious Notice of Default in relation to the July 2008 Contribution Agreement, alleging that OmniTRAX had failed to fulfill its obligations pursuant to it. The Notice of Default makes the impossible demand that OmniTRAX complete all of the required repairs to the HBR within 30 days, failing which the Government of Canada will commence a lawsuit against OmniTRAX. As explained below, this claim is without merit and only serves to further undermine and sabotage efforts of OmniTRAX to divest itself of the relevant assets.

24. The Contribution Agreements are part of a continuum of behaviour by the Government of Canada and the Government of Manitoba whereby they lured OmniTRAX into believing in their commitment to the HBR, the Port and the community of Churchill and enticed OmniTRAX into sinking further investments into the assets. Following these promising agreements, the pattern that emerged was of government conduct that persistently undermined, instead of developing, the potential of the assets.

25. As an early illustration of this undermining course of conduct, OmniTRAX sought unsuccessfully in or around 2007 to purchase a fleet of 2,500 light aluminum rail cars that was owned by the Grain Transportation Agency ("GTA") and that had been designed and built for use on the HBR. The lighter cars presented advantages over heavier rail cars, particularly given the terrain travelled by the HBR. If HBR could have acquired these cars, it would have been able to establish a transloading facility in The Pas whereby producers could truck the grain to The Pas and use augurs to load the cars to move to the Port. Producers in the Churchill catchment area fully supported this idea. The GTA,

unfortunately, never authorized the transfer of the cars to OmniTRAX. This opportunity was squandered by the Government of Canada and the cars were eventually scrapped.

d. Termination of the Single Desk

26. The Single Desk was terminated by the Government of Canada effective August 1, 2012, pursuant to the passing of Bill C-18, known as the *Marketing Freedom for Grain Farmers Act*. Bill C-18 also instituted a timeline for the eventual privatization of the CWB, and on April 15, 2015, a 50.1% majority stake in the CWB was acquired by private investors.

27. Until the termination of the Single Desk, the CWB was by far the most important customer of the HBR. The Single Desk, and the Single Desk alone, ensured that sufficient volumes of grain were shipped through Churchill.

28. Specifically, the CWB had until 2012 maintained a program of shipping grain through Churchill via the HBR that paid OmniTRAX a reasonable shipping charge for transporting the grain to Churchill and for loading the ships at the Port. When OmniTRAX purchased the HBR, it reasonably expected that this program (which had been in place for generations) would continue. To be clear, OmniTRAX would not have purchased the HBR or the Port of Churchill but for the expected continuation of the CWB business.

29. Notwithstanding its heavy reliance on the CWB and the anticipated devastating impact of the termination of the Single Desk on OmniTRAX, the Government of Canada did not give appropriate consideration to these factors in the termination of the Single Desk or the subsequent privatization of the CWB in 2015.

30. As is established more fully below, the Government of Canada's termination of the Single Desk, privatization of the CWB, and subsequent course of conduct constituted violations of its obligations pursuant to the NAFTA.

e. Impact of the Termination of the CWB Single Desk

31. The Government of Canada was acutely aware of the devastating impact that the abolition of the Single Desk would have on the economic viability of OmniTRAX's investments.

32. That the Government of Canada recognized the degree to which the HBR and the Port of Churchill would be adversely affected by the elimination of the Single Desk is borne out by certain failed attempts it made to mitigate the ensuing harm.

i. Failure to Implement Recommendations of an Interdepartmental Committee

33. In 2011, even before the Single Desk was officially terminated, the Government of Canada took the step of establishing an interdepartmental committee tasked with identifying initiatives that federal departments could implement as a means of shoring up the economic viability of the HBR and the Port of Churchill.

34. The interdepartmental committee eventually produced a suite of 7 recommended initiatives to be considered for implementation. These initiatives involved, among other things, a combination of financial contributions to the maintenance and operation of the HBR and the Port of Churchill and incentives to encourage the transportation of various commodities through Churchill.

35. Notwithstanding the recommendations of the interdepartmental committee, to date none of the initiatives it proposed have been implemented. Instead, as explained in greater detail below, the Government of Canada has arbitrarily stalled, obfuscated or ultimately sabotaged actions that would have assisted the HBR and the Port of Churchill.

ii. Federal Provincial Task Force

36. Further underscoring the fact that the Government of Canada understood the disastrous impact that the end of the Single Desk would have, in 2012, in conjunction with the Government of Manitoba, it established a task force (the "Task Force"), whose mandate

was to "...submit a report on commercially-viable, short-, medium-, and long-term economic opportunities that could benefit the community of Churchill."[1]

37. The Task Force published a Final Report in January of 2013 (the "Final Report"). In the Final Report, the Task Force identified "heavy reliance on grain" and "reliability and efficiency of supply chain" as weaknesses associated with the Port of Churchill's commercial viability, confirming the Government of Canada's recognition of the HBR and Port's historical reliance on the CWB.[2]

38. The Final Report proposed a number of initiatives that the Task Force viewed as having the potential to bolster the economic sustainability of the Port of Churchill and its related infrastructure (including the HBR). Implicit in the Government of Canada's decision to create the Task Force, and explicit in the Task Force's mandate, is the acknowledgment that the elimination of the CWB had significantly undermined the economic basis underpinning the operation of the HBR and the Port of Churchill.

39. In the Final Report, the Task Force also reaffirmed an $8 million federal contribution (initially announced in 2007) to facilitate incremental infrastructure improvements to ultimately "...allow larger volumes of grain to be cleaned and exported as well as expand the Port's service offerings to include canola." Part of these funds were advanced but the program was ultimately withdrawn before meaningful improvements could be made to the OmniTRAX assets.

40. While the Government of Canada recognized the harm that the abolition of the Single Desk had inflicted on the HBR and the Port of Churchill, and attempted to explore (through the Task Force) means of mitigating this harm, it ultimately failed to take any meaningful steps to institute effective measures to sustain and support the economic viability of OmniTRAX's investments. In short, notwithstanding repeated promises of support at the most senior levels, the Government of Canada has abandoned the Port and the HBR and reneged on its decades long commitments to sustain them.

[1] Final Report of the Federal-Provincial Task Force on the Future of Churchill, section 1.0: https://www.gov.mb.ca/mit/transpolicy/tpsd/pdf/future_churchill.pdf

[2] *Ibid*, at section 5.1.

iii. Failed Churchill Port Utilization Program

41. As further confirmation of the Government of Canada's knowledge of the devastating impact that the CWB's elimination would have on the HBR and the Port of Churchill, the Government of Canada made a commitment to OmniTRAX that it would sustain historical volumes of grain shipments through Churchill for a period of five years (through the 2016 shipping season).[3]

42. This commitment was implemented through a 5-year subsidy program for shipping grain to the Port of Churchill via the HBR, known as the Churchill Port Utilization Program ("CPUP").

43. The CPUP, established in 2012, invited grain producers to apply for and receive a per-metric tonne subsidy in relation to grain transported to Churchill by the HBR and exported from the Port of Churchill. In short, the CPUP was intended to subsidize grain shipments to Churchill through the 2012 to 2016 shipping seasons.

44. The practical reality was that the CPUP was woefully inadequate and the Government of Canada did not fulfill its commitment to maintaining historical grain shipment volumes. While shipments in 2013 and 2014 remained relatively aligned with historical levels, shipments in 2015 collapsed by over 50% compared to the previous year and by 2016 grain shipments were insufficient to justify operating the grain elevators at the Port of Churchill or offering a shipment program via the HBR. In short, contrary to the commitment of the Government of Canada, in 2015, grain shipments up the HBR collapsed and in 2016 they disappeared altogether.

f. Sabotage of Diversification Efforts

45. While the CPUP was still in operation, OmniTRAX made every effort to diversify the HBR and Port of Churchill's businesses and reduce economic reliance on grain. These efforts were concentrated through the Churchill Gateway Development Corporation ("CGDC") which had been established in or around 2003 as a public-private partnership with the function of diversifying opportunities beyond the grain industry. The CGDC

[3] *Ibid*, at section 5.1.

included representation from the Government of Canada, the Government of Manitoba, and OmniTRAX.

46. OmniTRAX and the CGDC considered other possibilities including moving outbound shipments of potash, wood pellets and copper concentrate, increasing freight movements to Nunavut, moving oversized equipment and exploring possibilities related to a coal mine, all of which were ultimately unsuccessful in bolstering the HBR in a meaningful and sustainable way.

47. While there was some initial success in pursuing diversified opportunities with respect to the transportation of crude oil, these efforts were stymied by the unilateral termination of the CGDC in March 2015 by the Government of Canada and the Government of Manitoba and their withdrawal of funding commitments necessary to carry out capital improvements at the Port. The Government of Canada took this step despite the fact that it was fully aware that OmniTRAX was close to securing a potentially lucrative opportunity to transport crude oil by rail.

48. Officials of the Government of Manitoba had also actively been opposing Omnitrax's crude-by-rail opportunity. By way of illustration, in a meeting in Winnipeg in the Summer of 2014, a member of the Provincial Cabinet threatened to disrupt OmniTRAX's operations if it attempted to ship crude through Churchill.

49. By terminating the CGDC and withdrawing funding commitments without notice to OmniTRAX, the Government of Canada acted in an arbitrary and capricious manner that sabotaged OmniTRAX's plans for mitigating the losses flowing directly from the Government of Canada's abolition of the Single Desk. In other words, the Government of Canada and the Government of Manitoba pulled their support for the CGDC (and related funding) at a crucial time, just as OmniTRAX was on the verge of achieving some success on the crude-by-rail opportunity. This government pull-out ultimately doomed the crude-by-rail project.

50. The termination of the Single Desk set in motion predictable economic forces that devastated the HBR and the Port of Churchill. With the end of the CWB monopsony, the

Western Canadian grain market has seen the bulk of grain purchasing consolidated into a few large companies. The business model of these companies is based on maximum possible control of the entire grain "pipeline", from the farm door to the ocean vessel. These large agricultural trading companies own their own grain elevators either on the Great Lakes or the West Coast and, naturally, aim to maximize the utilization (and revenue generation) from all of these assets. They have no incentive to ship through Churchill, even with a shipping subsidy at the levels offered by the CPUP.

51. When it ended the Single Desk, the Government of Canada was acutely aware of the economic forces it would unleash and of the devastating impact on the HBR and the Port of Churchill. The CPUP grain subsidy program was presented as a way to alleviate this devastation but the Government of Canada knew, or should have known, that it was entirely inadequate. The temporary (five-year) nature of the CPUP subsidy paid to grain shippers left them uncertain as to the future viability of shipments to Churchill and they predictably looked for other outlets for their grain. The damage caused to the HBR and the Port of Churchill first became apparent to OmniTRAX in the 2015 shipping season, when grain shipments plummeted compared to historical levels, and was confirmed in 2016 when they vanished altogether.

52. Compounding the damage done by the elimination of the Single Desk, the actions of the Government of Canada since the end of the Single Desk have either been entirely inadequate to mitigate the harm to Omnitrax's investments or have actively aggravated the harm inflicted.

g. Spring 2017 Floods and Related Statements by Canada

53. In the Spring of 2017, the portion of the HBR running from Amery to Churchill suffered extensive and devastating damage as a result of catastrophic floods. This flooding was exacerbated by the redirection of water flow by Manitoba Hydro into the watershed. The line has not operated since the flooding. As a consequence, the community of Churchill and other communities along the HBR North of Thomson, Manitoba, are inaccessible by land.

54. Through the Spring and Summer of 2017, officials of the Government of Canada made numerous public statements indicating their support for Churchill and its rail link. For example, Canada's Minister of Natural Resources Jim Carr stated that "The commitment is unwavering, to the people of Churchill, their future and the future of the transportation links that are essential for the growth of that very important Manitoba region."[4]

55. Despite these public appearances and pronouncements, not only has the Government of Canada taken no action to assist with the remediation of the damaged HBR line but, in fact, has impeded efforts to arrive at reasonable arrangements providing for the repair and sale of the HBR and the Port.

h. Impeding Sale of OmniTRAX Investments

56. When it became evident that the Government of Canada had no intention of living up to decades-long commitments of support for the HBR and the Port, OmniTRAX exerted concerted efforts to partner with various stakeholders in an arrangement that would allow it to sell the railway. These stakeholders included local First Nations, the Government of Manitoba, and various arms of the Government of Canada.

57. To this end, a Memorandum of Agreement (the "MOU") was executed between OmniTRAX and Missinippi Rail LP (made up of a group of Northern Manitoba communities and First Nations). The MOU provides for the transfer of the HBR, the Port of Churchill and related assets, and that OmniTRAX would be released of any liabilities. The MOU contemplates that funding for the acquisition of the HBR would be provided, directly or indirectly, by the Government of Canada.

58. The MOU presents the best opportunity developed so far to ensure the repair of the HBR, the resumption of its activities and the prompt and smooth transition of the HBR, the Port and related assets to a new, local ownership group.

59. The Government of Canada has failed or refused to support this unique opportunity to ensure the long-term viability of the HBR and its service to Northern Manitoba

[4] See: https://www.winnipegfreepress.com/local/trudeau-liberals-trying-to-get-churchill-rail-repairs-back-on-track-445866553.html

communities and to allow OmniTRAX to partially mitigate some of the damages it has suffered as a result of the end of the Single Desk. Instead, the behaviour of the Government of Canada in the period since the devastation of the Spring 2017 floods has been to publicly promise support while sabotaging the best opportunities at repairing the line and allowing OmniTRAX to transfer its distressed assets.

60. This behaviour has involved active interference in discussions around the federal financial contribution, interference in the discussions with Missinippi Rail LP and other possible acquirers, making false statements about the actual liquidation value of the HBR and related assets, repeatedly changing the persons representing the Government of Canada on this matter, making false and discriminatory statements disparaging Missinippi Rail LP's capability to run the HBR and related assets (notwithstanding the fact that members of the consortium already operate another railroad and an airline) and causing unnecessary delays, among other actions.

61. By way of illustration, OmniTRAX contacted officials at Canada's Department of Western Economic Diversification in or around March of 2017 about operating a grain shipping season in the coming Summer. OmniTRAX had contacted major grain shippers and had commitments for 350,000 Metric tonnes of grain to be exported via the Port of Churchill. Western Economic Diversification initially strung OmniTRAX along, stating that the Department was working to support the shipping subsidy and a grain season. It was not until May of 2017 that Western Diversification informed OmniTRAX that there would be no grain shipping support and thus no grain shipping season in 2017. Instead of supporting the HBR and the Port (and the economic activity and jobs associated with having a grain season), Western Diversification announce that it would provide other economic development support to the town of Churchill. In other words, funds were available for some Canadian-owned Churchill-related projects but denied to its historic (but U.S.-owned) economic engine, the HBR and the Port.

62. Canada's discriminatory, impeding and sabotaging behaviour culminated on October 13, 2017, with the Government of Canada serving OmniTRAX with a spurious Notice of Default in relation to the July 2008 Contribution Agreement, alleging that OmniTRAX

had failed to fulfill its obligations pursuant to it. The Notice of Default further demanded that OmniTRAX complete all of the required repairs to the HBR within 30 days, failing which the Government of Canada will commence a lawsuit against OmniTRAX.

63. As the Government of Canada knows full well, this demand is impossible to meet. Weather conditions in Churchill in the Fall are such that to complete repairs to the HBR line is simply not feasible within the time frame imposed. The demands that the Government of Canada has made in the Notice of Default constitute a further continuation of its high-handed, arbitrary, unreasonable and obstructionist dealings with OmniTRAX.

64. Notwithstanding its stated desire to find a solution that ensures rail service for the communities along the HBR, the Government of Canada and its representatives have in fact actively undermined OmniTRAX's efforts to do just that. Representatives of the Government of Canada have, on several occasions, made unfounded and inaccurate statements with respect to the value of the HBR and its infrastructure. These comments have implied – and in some instances expressly stated – that the HBR is now devoid of any value whatsoever. Such statements constitute an attempt to discredit the MOU and undermine OmniTRAX's efforts to transfer ownership of the HBR to local stakeholders.

V. LEGAL CLAIMS

65. The Government of Canada, through its own actions and those of the Government of Manitoba, is responsible for measures inconsistent with its commitments under NAFTA Chapter 11. The measures described in this Notice of Intent breach Canada's obligations under Article 1102, 1105 and 1110.

66. By reason of Canada's breach of its obligations, OmniTRAX, an investor of a Party as defined in Section C of NAFTA Chapter 11, has incurred damages in relation to the HBR, the Port of Churchill and related assets. OmniTRAX is entitled to be compensated for Canada's failure to comply with its obligations arising under NAFTA Chapter 11.

a. Canada has Violated OmniTRAX's Right Not to be Subject to Discrimination (Article 1102)

67. Article 1102 of the NAFTA requires that Canada provide to investors or investments of the other NAFTA Parties treatment that is "no less favourable" than it provides to its own investors and investments who are in like circumstances.

68. Canada has failed to comply with its obligations under Article 1102. By engaging in a course of conduct that introduced instability and uncertainty into the operation of the HBR, the Government of Canada diverted valuable grain transportation business from OmniTRAX to its competitors in the rail transport industry (and ports of export) – all of which are Canadian-owned entities.

69. In this respect, OmniTRAX's Canadian railway competitors have been the passive beneficiaries of the Government of Canada's erosion of the economic viability of the HBR. These similarly situated Canadian railways are now carrying to other ports the volumes of grain that were historically transported by the HBR, and are now earning the tariffs that were once paid by grain exporters to OmniTRAX.

70. Through the steps it has taken to undercut the HBR and its market position relative to Canadian-owned railways, the Government of Canada has *de facto* discriminated against OmniTRAX to the benefit of its Canadian competitors, so as to provide OmniTRAX with treatment less favourable than that accorded to Canadian-owned enterprises in like circumstances.

b. Canada has Violated OmniTRAX's Right to Fair and Equitable Treatment (Article 1105)

71. Pursuant to Article 1105(1) of the NAFTA, Canada is obliged to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

72. The course of conduct pursued by the Government of Canada and the Government of Manitoba, as described more fully above, violates the principle of fair and equitable treatment under Article 1105.

73. Specifically, the actions of the Government of Canada constitute a continuum of measures or pattern of behaviour which, taken together, fail to comply with the minimum standard of treatment to which OmniTRAX, as a NAFTA investor, was entitled.

74. This continuum had its inception in the Government of Canada's active encouragement of OmniTRAX's acquisition of the HBR, which was incentivized, among other things, by the Government of Canada's sale of the Port of Churchill to OmniTRAX. OmniTRAX's initial investment in the HBR, and its subsequent investments in the refurbishment and upgrade of both the HBR and the Port, were made on the basis of a reasonable expectation that historical volumes of grain shipments through Churchill (which were directly controlled by the Government of Canada by means of the WBC) would be maintained in the future.

75. The Contribution Agreements were instances where the Government of Canada and the Government of Manitoba induced OmniTRAX to further invest in the HBR and the Port of Churchill again on the reasonable expectation of continued support for the land transportation link to Churchill, including maintaining historical levels of grain shipments.

76. Having induced OmniTRAX to invest in the HBR, the Government of Canada then took steps to terminate the Single Desk and privatize the CWB. This measure was taken in the absence of any consultation with OmniTRAX whatsoever as to the inevitable impact this would have on the economic viability of the HBR and the Port of Churchill. In short, the

Government of Canada effectively pulled the rug out from under OmniTRAX's investment.

77. The Government of Canada continued to induce OmniTRAX to maintain its investment in the HBR and the Port by temporarily and partially mitigating the economic harm resulting from the elimination of the CWB through the establishment of the CPUP. The inadequacy of this program to alleviate the harm inflicted on OmniTRAX became apparent in 2015, when grain shipments to Churchill plummeted, and was confirmed in 2016 when they evaporated entirely.

78. Simply put, the termination of the Single Desk and the privatization of the CWB exposed the HBR to devastating and irreparable harm, which became apparent in 2015 and 2016 when Canada failed to live up to its commitment to maintain historical grain shipment levels.

79. The pattern of behaviour pursued by the Government of Canada is symptomatic of its increasingly arbitrary and capricious treatment of OmniTRAX and its investment. The Government of Canada has continued to make public statements with respect to the value and importance of the HBR and Port of Churchill, while actively undermining the economic basis for their commercial viability and making false statements downplaying the value of the assets. In other words, the Government of Canada has been saying one thing publicly, while doing another.

80. This course of conduct is reflective of the Government of Canada's high-handed dealings with OmniTRAX which have been neither fair nor equitable. Furthermore, the elimination of the CWB violated OmniTRAX's legitimate expectation of a stable economic base upon which to grow its investment in the HBR and the Port of Churchill. OmniTRAX was induced to expend substantial capital in acquiring, improving and maintaining the HBR and related assets, only to have the Government of Canada engage in a systematic series of actions that undercut and ultimately annihilated their economic viability.

c. Canada has Unlawfully Expropriated OmniTRAX's Investment (Article 1110)

81. Article 1110 of the NAFTA prohibits Canada from directly or indirectly nationalizing or expropriating the investments of a U.S. investor in its territory, or taking measures tantamount to nationalization or expropriation of such investments, except: (a) for a public purpose, (b) on a non-discriminatory basis, (c) in accordance with due process of law and the minimum standard of treatment under international law, and (d) on payment of compensation.

82. The Government of Canada's conduct fails to comply with the conditions for lawful expropriation provided under NAFTA Article 1110 in a number of crucial respects. Most notably, the expropriation was discriminatory in that the Government of Canada targeted the HBR and Port of Churchill as foreign-owned investments, the expropriation has been taken without regard for international standards of due process (as evidenced by the high-handed and unilateral nature of the Government of Canada's actions), and finally, OmniTRAX has received no compensation for the loss of its investments in the HBR and the Port of Churchill (on the contrary, its attempts to extract some value from the assets have been undermined and sabotaged by the Government of Canada).

83. When OmniTRAX acquired the HBR and the Port of Churchill, it was led by the Government of Canada to expect that the railway would continue to carry historical levels of grain, as it had for the past several decades. This was to form the economic base for the viability of OmniTRAX's investment, upon which OmniTRAX could build by diversifying and expanding the range of goods that were transported through Churchill.

84. By eliminating the Single Desk and privatizing the CWB, the Government of Canada set in motion a series of economic forces which, predictably and inevitably, wiped out the economic foundations on which the commercial viability of the HBR and the Port of Churchill rested.

85. Not only did the Government of Canada deal that initial blow to the HBR and Port of Churchill, it continued to engage in conduct that resulted in the progressive destruction of OmniTRAX's investment value, including by adopting an inadequate mitigation program

(CPUP) which induced OmniTRAX to invest further resources into efforts to make the assets viable, then reneging on its promise to sustain historical levels of grain shipments for 5 years, pulling promised funding, impeding and delaying efforts to repair and transfer the HBR, Port and related assets and failing to take reasonable actions to protect the value of the HBR or the Port of Churchill.

86. This pattern of behaviour has occurred in the background of a perverse incentive underlying the Government of Canada's actions. By taking steps that have effectively devalued OmniTRAX's investment, the Government of Canada has provided itself with an opportunity to eventually acquire the HBR and the Port of Churchill (or fund their acquisition by a third party) at a lower price.

87. The effect of the Government of Canada's actions has been to deprive OmniTRAX of the value of its investments in the HBR, the Port of Churchill and the related assets. Furthermore, given the possibility that the Government of Canada will ultimately fund the acquisition of the HBR and the Port of Churchill (and related assets), it has a perverse incentive to minimize their value. The conduct of the Government of Canada outlined in this Notice of Intent suggests that it is exercising its powers to force OmniTRAX into a "fire sale" of its investments and to acquire them at the lowest possible price.

VI. RELIEF REQUESTED

88. OmniTRAX seeks, through consultations with the Government of Canada, a reasonable arrangement to repair and transfer the HBR, Port of Churchill and related assets to a third party or to the Government of Canada. If the consultations are unsuccessful, OmniTRAX will submit, in its own right and on behalf of the other listed claimants, a claim in arbitration seeking the following relief:

(a) damages in an amount to be proven in arbitration proceedings, currently estimated to be in excess of CAD $150,000,000;

(b) The full costs associated with any arbitration proceedings, including all professional and legal fees and disbursements of the arbitral tribunal and any administering institution;

(c) pre- and post-award interest at a rate to be fixed by an arbitral tribunal;

(d) payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and

(e) such further relief as an arbitral tribunal may consider appropriate.

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Respectfully submitted on behalf of the Claimants by

Paul M. Lalonde
Neil Rabinovitch
Carmen Francis
Brenna Evans
Dentons Canada LLP
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto, Ontario
M5K 0A1 Canada
T: 1 416 361 2372
E: paul.lalonde@dentons.com

Bart Legum
Anne-Sophie Dufêtre
Dentons Europe, *Association d'Avocats à Responsabilité Professionnelle Individuelle*
5 Boulevard Malesherbes
Paris, 75008
France
T: 33 1 42 68 48 70
E: bart.legum@dentons.com