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Assigned To / Assigné à:

PLS-ADM Carolyn Kobernick  
ACTION

Asgn Date /  
Date assigné:  
16/04/2009

BF Date /  
Date rappel:

Ret. Date /  
Date de retour:

Synopsis / Précis: CHRISTOPHER O. LACICH AND NANCY L. LACICH V. THE GOVERNMENT OF CANADA - NAFTA

REQUEST BRIEFING NOTE	<input type="checkbox"/>	DEMANDER NOTE DE SYNTHÈSE
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Additional Comments / Remarques additionnelles:

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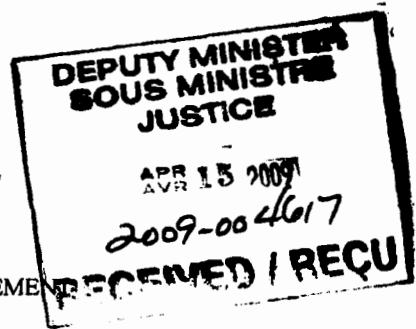
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NOTICE OF INTENT  
TO SUBMIT A CLAIM TO ARBITRATION  
UNDER SECTION B OF CHAPTER 11 OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT



**CHRISTOPHER P. LACICH AND NANCY L. LACICH**

INVESTORS

v.

THE GOVERNMENT OF CANADA ("CANADA")

PARTY

Pursuant to Articles 1116 and 1119 of the North American Free Trade Agreement ("NAFTA"), the Investors serve this Notice of Intent to Submit a Claim to Arbitration for breach of Canada's obligation under the NAFTA.

**I. NAME AND ADDRESS OF THE DISPUTING INVESTORS**

The following investors are referred to as “Lacich” or the “Investors”:

Christopher P. Lacich

Nancy L. Lacich

All located at:

1459 Doncaster Drive

Youngstown, Ohio 44511

USA

**II. BREACH OF OBLIGATIONS**

1. The Investor alleges that Canada has breached its obligations under Section A of Chapter 11 of the NAFTA, under the following provisions:

- (a) Article 1102 – National Treatment;
- (b) Article 1103 – Most-Favored-Nation Treatment;
- (c) Article 1105 – Fair and Equitable Treatment; and
- (d) Article 1110 – Expropriation.

2. The applicable provisions of the NAFTA are as follows:

**Article 1102: National Treatment**

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale of other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale of other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

**Article 1103: Most-Favored-Nation Treatment**

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition,

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

**Article 1105: Minimum Standard of Treatment**

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

**Article 1110: Expropriation and Compensation**

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.

### **III. FACTUAL BASIS FOR THE CLAIM**

#### **Broken Trust**

3. On October 31, 2006, the Government of Canada caused massive destruction to the investment holdings of thousand of individual American investors when it announced its change in the tax treatment of Canadian income trusts in the energy sector. These arbitrary and discriminatory actions of the Government have effectively eliminated the income trust model for investments in the energy sector in Canada.
4. It has been estimated that all investors in Canadian income trusts have experienced unprecedented capital losses on the order of \$28 to \$37 Billion. The losses in the energy sector alone are considered to be half or more of these totals. The losses to non-resident, mostly U.S. based, investors in energy trusts is conservatively estimated as being over \$5 Billion. These unjustifiable measures to eliminate income trusts in the energy sector were sadly carried out by a Government that had repeatedly promised to be the protector of these same investors.
5. One of the individual American investors who experienced these losses is Christopher P. Lacich of Youngstown, Ohio, (along with his spouse, Nancy L. Lacich) a U.S. national who widely invested in Canada's energy sector including income trusts (as listed hereinbelow) in reliance upon the various institutional and political promises made by the Government of Canada about the future treatment that such investors and their investments could expect. Mr. Lacich and his wife Nancy submit this Notice of Intent to Submit a Claim to Arbitration ("Notice of Intent") because their trust in the Government of Canada was broken on October 31, 2006. The actions of the Government on that date and following also resulted in Canada's breach of its NAFTA obligations as alleged in Section II above.
6. The Investors' trust was broken because they took the Canadian Government at its word and relied upon its reputation as the Government of an advanced, industrial economy supported by a predictable and transparent tax and regulatory regime. Until October 31, 2006, Canada had one of the best reputations in the world for being a stable, reliable and safe place to invest. "Fairness and certainty" has been the mantra of Canadian Governments. One of the fundamental objectives of the NAFTA itself is "to ensure a predictable commercial framework for business planning and investment."

7. High investor confidence was instilled by years of policy stability fostered by successive Canadian governments that genuinely reflected these values and objectives. The Canadian Government has in years past been trusted and thought to understand what is needed to attract investors to capital-intensive industries, such as the investments made by the Investor through the income trust vehicle to develop the mature basins of Western Canada's traditional oil and gas fields.
8. The trust of the Investors was broken because repeated public promises were made by two successive Canadian Governments to maintain the taxation regime on income trusts that existed prior to October 31, 2006. The Investors' trust was broken because they were enticed to invest using the income trust vehicle through the promise of an effective withholding tax rate contained within a longstanding Tax Treaty. Expectations were created, promises were made and relied upon. These expectations were not met, and these promises were not kept.
9. Finally, this is a claim about the unjustifiable destruction of a successful business model that allowed the intermediate segment of the Canadian energy sector to thrive and provide thousands of Canadian and American investors with reliable equity growth and a steady flow of returns on their investments. The income trust model was particularly well-suited to this segment of the energy sector. Despite the success of the trust model in Canada's intermediate oil and gas sector, the Government of Canada effectively banned the use for the sector on October 31, 2006. This is a claim about the violation by Canada of its international obligations pursuant to the NAFTA, but ultimately it is a simple case of a broken trust.

**The Investors and their Investments**

10. The Investors are nationals or enterprises of the United States that have made investments into the Canadian energy sector in Canadian business entities broadly referred to as "energy trusts".
11. Christopher Lacich has been active in international corporate affairs since 1992. Mr. Lacich is an experienced investor and has created an investment portfolio for himself and his family. This portfolio was constructed in part, as a long-term investment specifically designed to maintain a certain income level, and an allocation to Canadian energy trusts was made based upon the assurances from the Government of Canada that the trust sector would not be taxed.

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**NAFTA Notice of Intent**

12. With his many contacts and investment experience with Canada over the years, he had gained a great deal of confidence in Canada and Canadians. As a result, he invested widely in Canada, and in particular he invested in Canadian energy stocks, including energy income trusts in the energy sector. The recent actions of the Government of Canada on October 31, 2006 created a deep sense of betrayal in Mr. Lacich because of the broken promises and expectations described above.
13. As of October 31, 2006, Mr. Lacich owned publicly-traded units in certain Canadian energy trusts and investments that included energy trust unit holdings, as follows:
  1. 400 units of CANADIAN OIL SANDS TRUST  
2500 First Canadian Centre  
350-7<sup>th</sup> Avenue SW  
Calgary, Alberta, Canada T2P 3N9  
With an end of the day value on October 31, 2006 of \$12,052.00 (CDN).
14. The energy trust mechanism has been used by investors in Canada's intermediate energy sector, in substantially the same form, for the past 20 years. Also known as a "flow-through-entity" (FTE), use of the energy trust was permitted under Canada's *Income Tax Act* and related regulations, policies and practices. Each of the energy trusts listed above, and related corporate entities, were "enterprises" organized under the laws of Canada and/or Alberta, as defined under NAFTA Article 201 and enterprises are defined as a form of protected "investment" under NAFTA Article 1139. Units held by U.S. and Mexican Investors in these enterprises also may constitute investments as defined under NAFTA Article 1139. In those instances in which an investor is entitled to share in income or profits of the energy trust in which it has invested by way of a regular distribution or other form of return, such interest also qualifies as an "investment" pursuant to NAFTA Article 1129.

**Promises Made, Promises Not Kept**

15. During the Canadian Federal Election of late 2005 and early 2006, Conservative Party Leader (and current Prime Minister), the Rt. Hon. Stephen Harper, ran under the slogan of "Promises Made, Promises Kept". This slogan was constantly repeated by Conservative Party candidates, especially Mr. Harper, in order to emphasize the message that a new Conservative Government would not break its promises, as he alleged the outgoing Liberal Government had done.



16. One of the defining issues in the election campaign involved the Liberal Government's handling of the income trust file. In the fall of 2005, then Liberal Finance Minister, the Hon. Ralph Goodale, initiated a wide-ranging consultation process concerning the use and regulation of the income trust vehicle. During the election campaign, the Conservative Party attacked the Liberal Party's mere attempt to consult upon the income trust issue as:

**“. . . an inexcusable policy blunder that [had] destroyed the retirement savings of Canadians invested in income trusts.”**[Emphasis added.]
17. This campaign rhetoric obscured the fact that the Liberal Finance Minister had actually announced on November 23, 2005, which was prior to the election that after detailed consultations the Liberal Government had decided not to make any changes to tax policy supporting the income trust model. This was a position that was strongly endorsed by the income Conservative Government, whose election platform stated:

**“A Conservative government will: . . . preserve income trusts by not imposing any new taxes on them.”**[Emphasis added.]
18. In summary, after a brief but detailed review and consultation of tax policy related to income trusts in the fall of 2005, both the outgoing and incoming Governments of Canada made numerous official statements unambiguously affirming tax policy supporting use of the income trust model by domestic and foreign investors.
19. On January 23, 2006, the Conservative Party formed the Government of Canada. At that time, the income trust issue was widely considered by commentators and professionals to have been definitively put to rest in Canada. The outgoing Government had announced that the issue was settled, and the incoming Government had aggressively denounced any future efforts to change taxation related to the income trusts, including the energy trust investments of the Investors. By any reasonable assessment, the promises made by the highest officials of two Governments of Canada could be relied upon by foreign investors, as they were clearly intended by these Governments to be relied upon by investors in the energy trust sector.
20. The capital markets took great reassurance from the election of a Conservative Party Government because of the unambiguous guarantees it provided that the interests of income trusts and their unit holder investors would not be harmed, much less radically, arbitrarily and without notice. In other words, it was

reasonable for all energy trust investors to hold strong expectations that this new Government would not abruptly change the income trust tax regime, and certainly not alter or eliminate the entire economic model upon which the sector had been built.

21. Following the election of the Conservative Government, many investors, including Lacich, made additional investments in energy trusts, and continued to maintain existing investments in these trusts, in reliance upon these most reasonable of expectations.
22. These Investors' expectations were strengthened by the long-standing promise of the Government of Canada, found in Article XXII:2 the Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital (the "Canada-US Tax Treaty"), and returns on investments made by them in Canada through a trust vehicle – i.e. income distributed by such trusts – would be taxed at an effective rate of no more than 15%. Under the NAFTA, all of the promises made by Canada to the Investors under a tax convention are paramount, prevailing to the extent of any inconsistency with NAFTA provisions that might otherwise be relied upon to escape responsibility for measures taken in breach of such promises.
23. In 2006, almost half of the market value of the income trust investment holdings in Canada was related to investments made in the energy sector. The income trust investment model, as supported by Canadian tax policy that had existed for twenty years prior to October 31, 2006, was particularly well suited for supporting and capitalizing a chronically under-funded segment of the energy industry: the intermediate segment, which specializes in redevelopment and management of maturing natural resources assets.
24. For foreign investors, investments in energy trusts were particularly attractive because the income trust model, supported by Canada's tax regime and its international tax treaty obligations, provided these investors with an opportunity to invest directly in Canadian oil and gas assets that generated income that flows, through regular distributions, directly to unit holders.
25. The Government of Canada's long-standing support for the income trust model, and the promises of Mr. Harper to leave it intact, abruptly and dramatically ended on October 31, 2006. On that date, the current Canadian Finance Minister, the Hon. Jim Flaherty, made a surprise announcement that the Government would impose a significant, new tax on the distributions of most trust enterprises designed to force investors to abandon the model altogether.

26. In announcing and defendant the new measure, Minister Flaherty stated that the Government's primary justification for the measure was to eliminate tax leakage, but it has become clear that the objective of the Government has been to target foreign investors, and predominantly American investors, whose investments were particularly focused on the trusts in the intermediate energy sector.
27. The October 31<sup>st</sup> announcement was made without any warning to the public or consultation with stakeholders. The announced measures have effectively eliminated the income trust investment vehicle in all economic sectors, excepting Canadian real estate investment trusts (REITs), and investors using the income trust model to make investments in the Canadian real estate sector, have thereby received more favorable treatment than energy trusts and energy trust investors because REITs remain subject to the previous tax regime, including the effective 15% withholding tax rate for favored foreign investors. By contrast, under the so-called new 'Tax Fairness Plan', energy trusts are to be subjected to economically unsustainable tax rates that are intended – by design – to eliminate them as an investment vehicle, and includes abrogation of the 15% effective tax rate promised to United States investors, such as Lacich. Under these measures, NAFTA investors in energy trusts have been substantially deprived of all or most of the benefits of their investments in the energy sector, unlike investors in the real estate sector.
28. The measures to eliminate the income trust regime have had a substantial, permanent and detrimental impact on the energy trusts themselves and upon investors who used the trust vehicle to make their investments in Canada's energy sector including Lacich. The Investors were entitled to rely upon the Government of Canada's promised support for the income trust model, as well as Canada's commitment not to change its tax regime in a manner inconsistent with its international obligations, or otherwise in violation of established standards of non-discrimination or fair and equitable treatment.
29. As a result of Canada's actions, income trust investments in the intermediate energy sector have been substantially devalued. This devaluation effectively reflects the present-day value of the elimination of the energy trust model for each individual investment.
30. Since concluding the NAFTA in 1993, Canada has extended the right to seek compensation from an international tribunal for the measures and obligations described above to investors from certain other countries in like circumstances,

including the Investors as nationals of the United States of America. As the energy sector was not excluded by Canada from such extension of obligation, the Investors and their investments are entitled to receive the most-favored treatment.

**IV. ISSUES**

31. Has the Government of Canada taken measures inconsistent with its obligations under NAFTA Articles 1102, 1103, 1105 or 1110?
32. If the answer to this question is yes, what is the quantum of compensation to be paid to the Investors as a result of the failure of the Government of Canada to comply with its obligations arising under Chapter 11 of NAFTA?

**V. RELIEF SOUGHT AND DAMAGES CLAIMED**

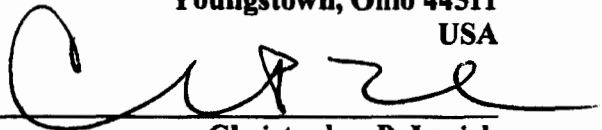
33. The Investors claim damages for the following:
  - (a) Damages of not less than US \$1,178.14 or \$1,204.00 CDN as compensation for the losses caused by, or arising out of Canada's measures which are inconsistent with its obligations contained within Part A of NAFTA Chapter 11; all as evidenced by the attached Exhibit "A".
  - (b) Costs associated with these proceedings, including all professional fees and disbursements;
  - (c) Fees and expenses incurred to oppose the promulgation of the infringing measures;
  - (d) Pre-award and post-award interest at a rate to be fixed by the Tribunal;
  - (e) Payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and
  - (f) Such further relief as counsel may advise and that this Tribunal may deem appropriate.

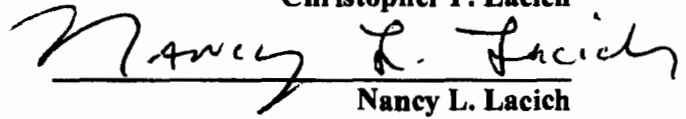
**Lacich, et al. v. Government of Canada  
NAFTA Notice of Intent**

**DATE OF ISSUE: April 2<sup>ND</sup>, 2009**

**INVESTORS**

**Christopher P. Lacich  
Nancy L. Lacich  
1459 Doncaster Drive  
Youngstown, Ohio 44511  
USA**

  
\_\_\_\_\_  
**Christopher P. Lacich**

  
\_\_\_\_\_  
**Nancy L. Lacich**

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