NOTICE OF ARBITRATION
UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND
THE NORTH AMERICAN FREE TRADE AGREEMENT

ST. MARYS VCNA, LLC

Investor

v.

GOVERNMENT OF CANADA

Party

September 14, 2011

Pursuant to Article 3 of the United Nations Commission on International Trade Law ("UNCITRAL") Rules of Arbitration and Articles 1116 and 1120 of the North American Free Trade Agreement ("NAFTA"), the Investor, **ST. MARYS VCNA, LLC**, initiate recourse to arbitration under the UNCITRAL Rules of Arbitration (Resolution 31/98 Adopted by the General Assembly on December 15, 1976).

A. DEMAND THAT THE DISPUTE BE REFERRED TO ARBITRATION

Pursuant to Article 1120(1)(c) of the NAFTA, the Investor hereby demands that the dispute between it and the Government of Canada ("Canada") be referred to arbitration under the UNCITRAL Arbitration Rules.

Pursuant to Article 1119 of the NAFTA, the Investor delivered a Notice of Intent to Submit a Claim to Arbitration to Canada on May 13, 2011, more than ninety days prior to the submission of this claim.

Pursuant to Article 1121 of the NAFTA, the Investor consents to arbitration in accordance with the procedures set out in the NAFTA. The Investor hereby waives its right to initiate or continue before any administrative tribunal or any court, or any other dispute settlement procedures, any proceedings with respect to the measures outlined herein, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving payment of damages, before an administrative tribunal or court under the laws of Canada. The Investor's executed consents and waivers are attached to this Notice of Arbitration. The Investment, St. Marys Cement Inc. (Canada), has also executed a waiver as required by NAFTA Article 1121(1)(b).[1]

B. NAMES AND ADDRESSES OF THE PARTIES

The Investor is:

St. Marys VCNA, LLC
Suite 200236
871 Coronado Center Drive
Henderson, NV, 89052
United States

[1] Consent and Waiver of St. Marys VCNA LLC, attached as Exhibit 1. The waiver of St. Marys Cement (Canada) Inc. is attached as Exhibit 2.

The Government of Canada is a Party to this arbitration. It is represented by:

Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8
Canada

C. ARBITRATION CLAUSE OR SEPARATE ARBITRATION AGREEMENT INVOKED

The Investor invokes Section B of Chapter 11 of the NAFTA, and specifically Articles 1116, 1120 and 1122 of the NAFTA, as authority for this arbitration. Section B of Chapter 11 of the NAFTA sets out the provisions concerning the settlement of disputes between a Party and an investor of another Party.

D. CONTRACT OUT OF OR IN RELATION TO WHICH THE DISPUTE ARISES

The dispute is in relation to the Investor's investment in Canada and the damages that have arisen out of Canada's breach of its obligations under Section A of Chapter 11 of the NAFTA.

E. THE GENERAL NATURE OF THE CLAIM

I. THE INVESTMENT

1. This claim arises from basic unfairness and abuse of the land use planning and licensing approval process by self-interested political insiders who applied unfair, non-transparent and secret regulatory procedures to circumvent the standard approval process and then prevent their victim from being able to obtain any meaningful independent review of outrageous governmental measures.

2. The victim of this unfair behavior was St. Marys Cement Inc. (Canada)[2] ("SMC", "St. Marys", or the "Investment"), a Canadian Investment that is owned and controlled by St. Marys VCNA, LLC,[3] a Delaware company, who is the Investor in this claim.

3. St. Marys was founded in 1912 and has been in operation in Canada for nearly one hundred years. St. Marys owns a variety of US cement, aggregate and concrete supply companies with operations located in ten US states.

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[2] St. Marys Cement Inc. (Canada) Articles of Amalgamation (Schedule of Documents at Tab 1).

[3] State of Delaware Certificate of Formation (Schedule of Documents at Tab 2).

4. The Votorantim Cement North America Group of Companies ("VCNA"), which includes both the Investor and Investment, have more than 1200 employees in Canada and another 1850 in the United States. It is well-known that the Investment (and the Investor) is ultimately owned by a foreign entity and is part of the Votorantim Group of Brazil.

5. On June 20, 2006, SMC took over an aggregate quarry permitting application already underway for lands it had acquired located at the 11th Concession Road East at Milburough Line in the City of Hamilton (the former Township of East Flamborough) (the "Quarry Site") with a view to commence quarrying for supply to the Southern Ontario market and potentially other locations. The proposed St. Marys quarry would have employed approximately 110 full-time positions. The Quarry Site comprises 158 hectares, with quarrying operations on approximately 67 hectares, leaving over 60% of the total area undisturbed.[4] The proposed quarry contains dolostone rock of the Amabel formation which is recognized as one of the highest quality resources for crushed stone in Ontario.

6. A number of aggregate quarries operate in close proximity to the Quarry Site, with the total area licensed for extraction noted by the City of Hamilton as 668 hectares.[5] The local Official Plan for the Quarry Site identified the area as containing significant mineral resources[6] and includes a "Mineral Aggregate Area" overlay on parts of the Quarry Site. The Official Plan had been approved by the Government of Ontario.[7] The City of Hamilton zoning bylaws permitted a property owner in this location to seek an amendment of zoning from agricultural use to extractive industrial use.[8]

7. St. Marys followed the process to obtain approval for its new quarry in Flamborough. St. Marys required the following before it could obtain approval for its quarry:

    a. A *Permit to Take Water* under the Ontario *Water Resources Act*;

    b. A License under the Ontario *Aggregates Resources Act*; and

    c. Approval to change the use of the land from agricultural to extractive industrial use, and consideration of the Haul Route Study.

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[4] St. Marys Flamborough Presentation May 25, 2009 (Schedule of Documents Tab 3).

[5] City of Hamilton, The Rural Hamilton Profile, January 2006, at 8 (Schedule of Documents at Tab 4).

[6] City of Hamilton Official Plan, "Appendix C, Non-Renewable Resources", August 25, 2009 (Schedule of Documents at Tab 5).

[7] Hamilton-Wentworth Official Plan, June 2005 (Schedule of Documents at Tab 6).

[8] Hamilton-Wentworth Official Plan, June 2005 (Schedule of Documents at Tab 6).

8. Applications for planning approvals for the Quarry Site were initiated in September 2004 by Lowndes Holdings Corp.[9] St. Marys took over responsibility for the planning application in June 2006.

9. St. Marys voluntarily held a series of local open houses and community meetings and provided citizens with detailed plans and access to technical experts on how it would deal with the development of a quarry in a sustainable manner. St. Marys encouraged dialogue with the local agencies and hosted several tours of the Quarry Site.

10. From 2006 onwards, concerns were raised over the effect of the planned quarry on water quality by the City of Hamilton, the Regional Municipality of Halton, and Conservation Halton.[10] The Investment provided written response to these concerns, and proposed further field testing in response to these concerns.

II. THE PERMIT TO TAKE WATER APPLICATION

11. On September 28, 2006, the Investment applied to the Ministry of the Environment ("MOE") for a Category 3 temporary Permit to Take Water ("*PTTW*") to conduct three phases of pumping tests on the subject property.[11] This type of testing is routinely required for quarry applications.

12. During this time period an opposition group to the quarry, self-described as Friends of Rural Communities and the Environment ("FORCE"), requested that the Ontario Ministry of Natural Resources ("MNR") and the Ministry of Municipal Affairs and Housing ("MMAH") intervene to prevent St. Marys from quarrying. This demand was rejected by the MMAH on May 2, 2007,[12] and by the MNR, stating that the public interest does not warrant a review of the approvals mechanism relating to aggregate developments.

13. Throughout March and April, 2008, the Investment took proactive steps by convening community meetings to discuss the *PTTW* application with local residents.[13]

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[9] Application for Planning Document Amendment: Official Plan, September 16, 2004 (Schedule of Documents at Tab 7).

[10] Briefing Note prepared for Minister of Municipal Affairs and Housing, April 14, 2010 [Bates No. 190-1] (Schedule of Documents Tab 50).

[11] Letter from Gartner Lee to Ministry of Environment, September 28, 2006 (Schedule of Documents at Tab 10).

[12] Letter from Ministry of Municipal Affairs and Housing to Mark Rudolph and Graham Flint, Chairman of FORCE, May 2, 2007 (Schedule of Documents at Tab 11).

[13] St. Marys CBM Flamborough Quarry, Community Newsletter Issue No. 8, Spring 2008 (Schedule of Documents at Tab 12).

14. On July 8, 2008, nearly two years after the *PTTW* application had been made, the MOE permitted the Investment to commence pumping tests using a phased approach.[14]

15. The Investment provided the Phase 1 pumping results to the MOE on August 27, 2008, which clearly demonstrated that there were no adverse impacts on the quality or quantity of local water resources.[15] On September 24, 2008, the Investment requested that the MOE allow it to proceed to Phase 2 test pumping.[16]

16. On September 29, 2008, quarry opponents began lobbying the MOE to deny the Investment Phase 2 of test pumping simply due to above-average levels of rain fall during Phase 1 test pumping.[17] Accordingly, on October 30, 2008, the MOE refused permission to St. Marys to commence Phase 2 pumping without providing St. Marys with any meaningful opportunity to respond.[18]

17. In light of not providing St. Marys with an opportunity to respond, the Investment sought to discuss with the MOE how to proceed with the regulatory process.[19] The MOE demanded that the Investment re-commence Phase 1 test pumping.

18. After the MOE threatened to revoke the *PTTW,* St. Marys requested the MOE to provide adequate assessment criteria. The opportunity to provide further data to the MOE was denied.

19. On June 30, 2009, the *PTTW* expired without any further testing having occurred.[20]

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[14] Ministry of Environment Permit to Take Water No. 8461-7CFLG5, July 8, 2008 (Schedule of Documents at Tab 13).

[15] Phase 1 Pumping Test Report prepared by Gartner Lee, August 27, 2008 (Schedule of Documents at Tab 14).

[16] Letter from Jennifer Tuck (SMC) to Carl Slater (MOE), September 24, 2008 at 1 (Schedule of Documents at Tab 15).

[17] Letter from FORCE to Ministry of Environment, September 29, 2008 (Schedule of Documents at Tab 16); INTERA Engineering Ltd., Review of GRS Phase 1 Pumping Test Report for FORCE, September 28, 2008 (Schedule of Documents at Tab 17).

[18] Letter from Ministry of Environment to St. Marys Cement Inc. (Canada), October 30, 2008 (Schedule of Documents at Tab 18).

[19] Letter from St. Marys Cement to Ministry of Environment, January 22, 2009 (Schedule of Documents at Tab 19).

[20] Briefing Note prepared for Minister of Municipal Affairs and Housing, April 14, 2010 [Bates no. 000193] (Schedule of Documents Tab 50).

20. Despite the lapse of the first *PTTW*, St. Marys and the MOE eventually established a new testing program, which led to a new *PTTW* application filed on May 25, 2010 by St. Marys.[22] However, on June 3, 2010, the MOE arbitrarily refused to consider this new *PTTW* application.[23]

21. In February 2011, St. Marys submitted another application for a *PTTW* to allow additional aquifer testing.[24] The MOE again wrongfully refused St. Marys' February 2011 application due to the Minister's Zoning Order ("MZO") issued by the Minister of Municipal Affairs and Housing.[25] The MOE refused this application without performing a technical review of the *PTTW* application.

22. During this timeframe, the MOE acted in a discriminatory and arbitrary manner by issuing *PTTW*s to other applicants for pumping tests in quarry applications, in similar circumstances.

III. THE *AGGREGATE RESOURCES ACT* APPLICATION

23. On January 22, 2009, the Investment formally submitted an *Aggregate Resources Act* application ("*ARA* Application") to the Ministry of Natural Resources, after having informed the MOE and the City of Hamilton on the same day of its intention to file an *ARA* Application.[26]

24. On March 3, 2009, MNR deemed St. Marys' *ARA* Application complete, allowing St. Marys to proceed to a notification and consultation phase and a forty-five day comment period could begin.[27]

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[22] Permit to Take Water Application prepared by Golder Associates Ltd., May 25, 2010 (Schedule of Documents at Tab 21).

[23] Letter of Ministry of Environment to St. Marys Cement Inc., June 3, 2010, at 3 (Schedule of Documents at Tab 23).

[24] Permit to Take Water Application prepared by Golder Associates Ltd., February 23, 2011 (Schedule of Documents at Tab 22).

[25] Letter of Ministry of Environment to St. Marys Cement Inc., April 8, 2011 (Schedule of Documents at Tab 24).

[26] St. Marys CBM Press Release "St. Marys Begins Licensing Process Under Aggregate Resources Act", January 30, 2009 (Schedule of Documents at Tab 25).

[27] Letter of Ministry of Natural Resources to St. Marys Cement Inc. (Canada) March 3, 2009 (Schedule of Documents at Tab 26).

25. The City of Hamilton Council passed a resolution on April 15, 2009, that called for the rejection of St. Marys' *ARA* Application.[28] The resolution was laced with inaccurate and defamatory portrayals of St. Marys' actions during the permit review process. For instance, the resolution erroneously stated that St. Marys had a "complete disregard for the... community."[29] St. Marys wrote to the City of Hamilton protesting the arbitrary, discriminatory and unfair depictions of the company.[30] The City of Hamilton's resolution also had the effect prejudicing the permit applications of St. Marys by perpetuating falsehoods in the local community.

26. The City of Hamilton informed St. Marys on May 20, 2009 that it would object to St. Marys *ARA* Application.[31] Hamilton objected despite the fact that approval of the *ARA* Application was singularly within the domain of the MNR.

27. One of the reasons raised by the City of Hamilton was the lack of completion of a Haul Route Study, even though a Haul Route Study is not a requirement of an Application under the *Aggregate Resources Act*.[32] The Haul Route Study was requested by the City of Hamilton as part of the *Planning Act* application for rezoning.

28. On May 21, 2009, the objection period for the *ARA* Application lapsed. On that date, the MOE wrote to the Investment stating that it objected to the Investment's *ARA* Application.[33]

29. Also on May 21, 2009, the MNR officially informed St. Marys that it would not support St. Marys' *ARA* Application until further information was provided about the impacts of the quarry on groundwater and natural features in the area.[34]

30. On December 18, 2009, St. Marys submitted an application for a *PTTW* to carry out a field test to verify the proposed mitigation strategy of a ground recirculation system.[35]

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[28] Hamilton City Council Minutes, April 15, 2009, at 9 (Schedule of Documents at Tab 27).

[29] Hamilton City Council Minutes, April 15, 2009, at 9 (Schedule of Documents at Tab 27).

[30] Letter from John Moroz (St. Marys) to Alexandra Rawlings (City of Hamilton), June 24, 2009, at 1 (Schedule of Documents at Tab 28).

[31] Letter from Elizabeth Richardson (City of Hamilton) to Melanie Horton (St. Marys), May 20, 2009, at 1 (Schedule of Documents at Tab 29).

[32] *Aggregate Resources Act*, R.S.O. 1990, c.A8 (Schedule of Documents at Tab 30).

[33] Briefing Note prepared for Minister of Municipal Affairs and Housing, April 14, 2010 [Bates No. 193] (Schedule of Documents Tab 50).

[34] Ministry of Natural Resources to St. Marys Cement Inc. (Canada) May 21, 2009 (Schedule of Documents at Tab 32).

31. On December 19, 2009, the MOE's Regional Director contacted the Investment asking it to withdraw the application, and directed it to carry out a series of consultations with technical stakeholders. Those meetings commenced on December 21, 2009 and continued until March 2010. MOE wrongfully terminated the consultations due to the issuance of the MZO in April 2010.

32. Throughout the *ARA* Application process, St. Marys invested more than $20 million dollars in the project to thoroughly comply with the regulatory requirements in good faith, and at all times expected that the *ARA* Application would be judged on its technical merits. However, the arbitrary and unreasonable requirements and restrictions imposed by the MOE during this four-year time period, and the unfounded and discriminatory objections of the City of Hamilton and the Regional Municipality of Halton before the issuance of the MZO prevented St. Marys from obtaining the required approvals to operate the proposed quarry.

IV. POLITICAL OPPOSITION

33. FORCE, the opponent organization, was established with a specific mandate to "Stop the Quarry". Prominent political insiders of the governing Ontario Liberal Party were leaders of this opposition group. These included Mark Rudolph, the former Executive Assistant to Minister of the Environment Jim Bradley and Mr. Rudolph's partner, Jan Whitelaw, a former senior Environmental Policy Advisor to former Ontario Premier David Peterson. Ms. Whitelaw is also currently Chair of the Board of Directors of the Greenbelt Foundation and has been a director since its founding in June 2005. Mr. Rudolph and his partner, Ms. Whitelaw, live adjacent to the Quarry Site.

34. Rather than allow the quarry to be impartially assessed through the ordinary approval process, these prominent Liberal advisors were able to convince Ministers of the governing Ontario Liberal Party and Premier's and Ministers' staff members to use unprecedented unilateral Ministerial powers targeting only lands owned by St. Marys and interfering with St. Marys' vested property rights. These measures were taken without any consultation, or any advance notice, to St. Marys.

35. The opponents of the quarry admitted to the existence of personal financial interests in stopping the quarry and the use of these extraordinary government powers conveyed financial benefit to the local opponents and loss to St. Marys.

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[35] Technical Support Document GRS Proof of Concept Testing Program prepared by Golder Associates Ltd., May 20, 2010 at 5 (Schedule of Documents at Tab 33).

36. In a *Hamilton Spectator* newspaper article on October 21, 2009, Mr. Rudolph was quoted discussing the difficulty in raising funds to fight St. Marys' quarry application. The newspaper reported Mr. Rudolph as stating that:

> Knowing we'd need to raise $600,000 to $900,000 over eight to 10 years, we figured the average estate home in the area might be worth half a million dollars, and that it would drop by at least 10 per cent with the proposal in play.[36]

37. Any mechanism that reduces St. Marys' effective legal remedies resulted in direct benefit to the politically advantaged local insiders. The opponents of the quarry had a vested personal financial interest in finding ways to reduce the need for legal intervention related to the proposal, as well as an interest in stopping SMC's proposed quarry in its entirety.

38. The Greenbelt Foundation emerged from the Provincial *Greenbelt Act*[37] on February 24, 2005 and received $25 million from Premier McGuinty's government to support the Foundation's operational activities.[38] Jan Whitelaw was appointed by the Ontario Liberal government as a director of the Greenbelt Foundation at the time of its founding.[39]

39. The Greenbelt Foundation provided over $1.3 million in funding to Environmental Defence Canada: $600,000 on June 23, 2008 and another $750,000 a mere two days later.[40] Environmental Defence Canada has directly funded more than $350,000 to FORCE since 2006,[41] the group led in part by Ms. Whitelaw and Mr. Rudolph, to fight against the proposed quarry application.

40. At no time do the official Greenbelt Foundation Board minutes indicate that Director Jan Whitelaw disclosed the close existing relationship between FORCE and Environmental Defence Canada. Neither did Ms. Whitelaw, at any time, declare a conflict of interest, or recuse herself from the meetings discussing the use of provincially provided funds.[42]

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[36] "A FORCE to be reckoned with", *The Hamilton Spectator*, October 21, 2009 at 2 (Schedule of Documents at Tab 34).

[37] *Greenbelt Act*, 2005, S.O. 2005, Chapter 1 (Schedule of Documents Tab 35).

[38] Greenbelt Foundation History, at 1 (Schedule of Documents Tab 36).

[39] Ministry of Municipal Affairs & Housing, News Release June 16, 2005 (Schedule of Documents Tab 37).

[40] Greenbelt Foundation Grants, Environmental Defence, June 25, 2008 <http://www.greenbelt.ca/node/1121> (Schedule of Documents Tab 38).

[41] Audited Financial Statements of Friends of Rural Communities and the Environment (FORCE) for years ending 2006-2010 (Schedule of Documents Tab 39-43).

[42] Friends of the Greenbelt Foundation, Board Meeting Minutes, June 25, 2008, at 2 (Schedule of Documents Tab 44).

41. Politically connected Ontario Liberal Party insiders, opposed to the proposed quarry, used their links to government and its agencies to oppose St. Marys' proposed project. At the very same time, the same government purported to impartially assess the permit applications of the proposed quarry on a technical basis.

V. MINISTER'S ZONING ORDER

42. The Minister of Municipal Affairs and Housing has the authority to issue a Minister's Zoning Order ("MZO") through a delegation of authority under Section 47(1) of the *Planning Act* of Ontario. An MZO controls the use of land by setting "specific requirements for new development".[43] It prevails over inconsistent municipal by-laws.[44]

43. The *Planning Act* specifically contemplates independent judicial review of an MZO. It provides that the Minister must, on the request of any person or public body, refer a hearing to the Ontario Municipal Board as to whether the MZO should be amended or revoked in whole or in part and specifically permits an appeal of an MZO to the Ontario Municipal Board.[45] The Ontario Municipal Board has the statutory power to either amend or revoke an MZO in whole or in part, and the decision of the Board is binding on government.[46]

44. On April 12, 2010, then-Municipal Affairs and Housing Minister Jim Bradley issued a Minister's Zoning Order freezing the current land use designation of the Quarry Site.[47] This was the same Jim Bradley who previously employed Mr. Rudolph when Minister Bradley was the Minister of the Environment. Other lands that exist in the local area were unaffected by the MZO. No notice was given to St. Marys of this action which had the effect of freezing the agricultural zoning of the Investment's Quarry Site. Minister's Zoning Orders are rarely used and had never previously been used in connection with an aggregate quarry.

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[43] Application Guide: Applying to amend or revoke a Ministerial Zoning Order Frequently Asked Questions, Ministry of Municipal Affairs and Housing (Schedule of Documents Tab 45).

[44] *Planning Act*, R.S.O. 1990, Chapter P. 13, s. 47 (2) (Schedule of Documents Tab 46).

[45] *Planning Act*, R.S.O. 1990, Chapter P. 13, s. 47 (2) (Schedule of Documents Tab 46); Pursuant to s. 47(11) of the *Planning Act*, the Minister may refuse such a request if the request does not disclose any apparent land use planning ground, is not brought in good faith or is frivolous or vexatious, or the request is made only for the purpose of delay.

[46] *Planning Act*, R.S.O. 1990, Chapter P. 13, s. 47 (2) (Schedule of Documents Tab 46).

[47] O Reg 138/10, April 13, 2011 (Schedule of Documents Tab 47).

45. St. Marys commenced an application to the Ontario Municipal Board to revoke or amend the MZO in the belief that this unprecedented unilateral action would be overturned by the Board.[48]

46. The exercise of these extraordinary powers was also for the political gain of the governing Ontario Liberal Party, which sought to obtain the political support of the local quarry opponents in the next provincial election on October 6, 2011.

47. The local riding where the Quarry Site is situated is Ancaster-Dundas-Flamborough-Westdale. The local MPP, Ted McMeekin, won this seat for the Liberal Party in 2007 by a razor thin 6.7% percent. Mr. McMeekin served as Minister of Government Services and also as Minister of Consumer Services in the current Ontario Liberal Government. At the time of the MZO, Mr. McMeekin had been demoted from the Cabinet but continued in the executive branch of government as the Parliamentary Assistant to the Minister of Training, Colleges and Universities. He continues in this position.

48. St. Marys was able to obtain numerous documents relating to the Ontario Government's actions against St. Marys' proposed quarry under the *Freedom of Information Act*. One document shows that on the eve of the MZO announcement, Joe Kim, the Press Secretary to then-Minister of Municipal Affairs and Housing Jim Bradley counseled Mr. McMeekin, to "trumpet your success" at the local level.[49] He told Mr. McMeekin to do a multi-day celebration to get "the most media bang for our buck." He further suggested a victory party complete with "a giant cake, some music, etc."[50]

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[48] Request to Amend or Revoke Minister's Zoning Order Ontario Regulation 546/06, April 23, 2010 (Schedule of Documents Tab 48).

[49] Email from Joe Kim (MMAH) to Andrew Mitchell (MMAH), March 31, 2010, at 1 (Schedule of Documents Tab 49).

[50] Email from Joe Kim (MMAH) to Andrew Mitchell (MMAH), March 31, 2010, at 1 (Schedule of Documents Tab 49).

49. Another document obtained was a private briefing note prepared on April 14, 2010 for the Minister of Municipal Affairs and Housing about his powers to use the MZO.[51] These internal government documents indicated that the Minister could keep the MZO process secret and could even keep the decision of the MZO secret from the affected company for up to 30 days.[52] The briefing note also discloses that the effect of an MZO did not prevent applications related to the quarry from being processed by the provincial or municipal governments.[53]

50. The April 14, 2010 briefing note stated that the effect of an MZO was that:

- An MZO prevails over local zoning bylaws and controls the **use** of land (whether restricting or permitting uses).
- The MZO does not control **activities** carried on with respect to the land or stop the processing of other regulatory approvals.[54]

51. Despite the fact that the MZO did not freeze the processing of permits while it was under appeal, local governments, including the City of Hamilton and the Regional Municipality of Halton, and the Ontario Government, through MOE, simply and unlawfully refused to continue processing necessary permit applications for St. Marys. The company's lawyers wrote to the relevant departments and ministries advising that such action was unlawful, but the various governmental bodies simply refused to carry out any service to St. Marys.[55]

52. The MOE took the unlawful position that the current zoning of the land in light of the MZO, which was an issue wholly divorced from the requirements of test pumping for the purposes of a *PTTW* application, did not permit quarrying.[56] In doing so, the MOE relied on irrelevant considerations in making such a decision.

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[51] Briefing Note prepared for Minister of Municipal Affairs and Housing, April 14, 2010 [Bates No. 3120] (Schedule of Documents Tab 50).

[52] Briefing Note prepared for Minister of Municipal Affairs and Housing, April 14, 2010 [Bates No. 3121] (Schedule of Documents Tab 50).

[53] Briefing Note prepared for Minister of Municipal Affairs and Housing, April 14, 2010 [Bates No. 3121] (Schedule of Documents Tab 50).

[54] Briefing Note prepared for Minister of Municipal Affairs and Housing, April 14, 2010 [Bates No. 3120] (Schedule of Documents Tab 50).

[55] Letter from John Buhlman (St. Marys) to Carl Slater, Ministry of Environment, and the Secretary of the Environmental Review Tribunal, June 11, 2010, at 3-4 (Schedule of Documents Tab 51).

[56] Letter of Ministry of Environment to St. Marys Cement Inc., June 3, 2010, at 3 (Schedule of Documents Tab 23).

VI. DECLARATION OF PROVINCIAL INTEREST

53. The Minister of Municipal Affairs and Housing may notify the Ontario Municipal Board through a Declaration of Provincial Interest ("DPI") if he or she is of the opinion that a matter of provincial interest is, or is likely to be, adversely affected by a requested amendment or revocation of an MZO. [57] A DPI removes the binding review authority of the Ontario Municipal Board. It leaves the Ontario Cabinet as the only body with the authority to review the appropriateness of the conduct of one of its members.

54. On April 20, 2011, the Minister of Municipal Affairs and Housing took another unilateral regulatory step that removed permanently St. Marys' right to obtain any independent binding review of the MZO. This was accomplished by the issuance of a Declaration of Provincial Interest by the Minister of Municipal Affairs and Housing.[58] The Declaration of Provincial Interest was issued without consultation or prior notice of any kind to St. Marys. Like the MZO, the Declaration only had impact on SMC and not to any other landowner in the same area.

55. The purported grounds for the Declaration of Provincial Interest ("DPI") were:

(a) the protection of ecological systems, including natural areas, features and functions;

(b) the supply, efficient use and conservation of water;

(c) the resolution of planning conflicts involving public and private interests;

(d) the protection of public health and safety; and

(e) the appropriate location of growth and development.[59]

56. No specific reasoning for the issuance of the DPI was provided nor any evidence of any good faith nexus to any of these public policy grounds. The DPI merely restated the same list of potential grounds set out in the Minister's April 14, 2010 briefing note.

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[57] *Planning Act*, R.S.O. 1990, Chapter P. 13, s. 47 (13.1) (Schedule of Documents Tab 46).

[58] Declaration of Provincial Interest, Hon. Rick Bartolucci (MMAH) to Patrick Hennessy (Ontario Municipal Board), April 20, 2011 (Schedule of Documents at Tab 52).

[59] Declaration of Provincial Interest, Hon. Rick Bartolucci (MMAH) to Patrick Hennessy (Ontario Municipal Board), April 20, 2011, at 1 (Schedule of Documents at Tab 52).

57. The effect of the DPI is that the decision of the OMB is no longer binding and the final decision rests solely with the Government of Ontario.[60] While St. Marys could continue its appeal before the OMB, once the DPI was issued, there would be no force or effect to any decision taken by the OMB. Any decision would be irrelevant as the only decision maker would be the Minister of Municipal Affairs and Housing and Cabinet of the Ontario government.

58. The DPI, like the MZO, was made without any notice or warning to St. Marys, despite the serious prejudice the DPI would cause to the proposed quarry. By failing to reasonably provide St. Marys with notice of the impending MZO and DPI, St. Marys was denied the opportunity to present its position prior to the taking of final administrative action that affected St. Marys and its Investment. St. Marys was also denied a secure legal environment.

VII. THE HAUL ROUTE STUDY

59. The Investment was required to complete a Haul Route Study to assess transport options for aggregate from the quarry to market that was part of the application process for rezoning the proposed quarry.[61] The Haul Route Study also required the Investment to adhere to onerous Terms of Reference, unprecedented in the required level of detail and analysis.

60. Following the issuance of the MZO, the relevant municipalities willfully neglected their duties and halted communications with the Investment's agent on the Haul Route Study. Soon after the Investment filed the draft Haul Route Study on August 27, 2010, Halton Region took a position that it would not be reviewing any applications for the Haul Route Study in light of the provincial MZO.[62]

61. In October of 2010, the Town of Milton and Conservation Halton, who were also responsible for the review of the Haul Route Study, took the position that they would not be proceeding with their review in light of the MZO.[63]

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[60] Declaration of Provincial Interest, Hon. Rick Bartolucci (MMAH) to Patrick Hennessy (Ontario Municipal Board), April 20, 2011, at 1 (Schedule of Documents at Tab 52).

[61] Planning and Development Report, *City of Hamilton,* September 3, 2004 [Bates No. 7281] (Schedule of Documents at Tab 53).

[62] Letter from Ron Glenn (Region of Halton) to Steve Robichaud (City of Hamilton), September 30, 2010 [Bates No. 193] (Schedule of Documents at Tab 54).

[63] Letter from W. F. Mann (Town of Milton) to Steve Robichaud (City of Hamilton), October 6, 2010, at 1 (Schedule of Documents at Tab 55); Letter from Robert Edmundson (Conservation Halton) to Steve Robichaud (City of Hamilton), October 21, 2010 [Bates 3114] (Schedule of Documents at Tab 58).

62. The Investment informed the municipalities that the MZO does not preclude the processing of these regulatory approvals and requested that they resume their review of the draft Haul Route Study to no avail.[64]

63. The municipal governments have refused to carry out their duty to consider the Haul Route Study.

F. BREACH OF OBLIGATIONS

64. The Investor claims that Canada has violated at least the following provisions of Section A of NAFTA Chapter 11:

Article 1102 – National Treatment

Article 1103 – Most Favored Nation Treatment

Article 1105 – International Law Standards of Treatment

Article 1110 – Expropriation

These breaches have resulted in damage to the Investor.

National Treatment

65. NAFTA Article 1102 obliges the NAFTA Parties to treat investors from other NAFTA Parties and their investments as favorably as it treats domestic investors and their investments operating in like circumstances.

66. Canada treated the Investor and its Investment less favorably than domestic investors operating in like circumstances. The issuance of the Ministerial Zoning Order, only affected the Investor's property. No other investor or investment in like circumstances was treated with such undesirable treatment. Furthermore, the Declaration of Provincial Interest, which was also specifically made against the Investor's property, made the damage permanent but did not provide the same poor treatment against a domestic investor or investment in like circumstances.

[64] Letter from John Buhlman (St. Marys) to Robert Edmondson (Conservation Halton), March 1, 2011 (Schedule of Documents at Tab 56); Letter from John Buhlman (St. Marys) to Ron Glenn (Region of Halton), March 1, 2011 (Schedule of Documents at Tab 57); Letters from John Buhlman (St. Marys) to Stephen Robichaud (City of Hamilton), March 1, 2011 (Schedule of Documents at Tab 8); Letters from John Buhlman (St. Marys) to W.F. Mann (Town of Milton), March 1, 2011 (Schedule of Documents at Tab 20).

67. Each of the ways in which Canada and Ontario treated the Investor and its Investment less favorably than other Canadian investors and investments in like circumstances constitutes a violation of NAFTA Article 1102.

Most Favored Nation Treatment

68. Under NAFTA Article 1103, Canada must provide St. Marys with treatment no less favorable than that provided to foreign investors or investments under other international agreements to which Canada is a party. Canada has failed to meet this obligation. Article 1103 entitles St. Marys and its investment to receive the best level of treatment available to any foreign investors or investments in Ontario.

69. Canada afforded treatment less favorable to the Investors than non-NAFTA Party investors in like circumstances, as no other non-NAFTA party investors were subjected to the exercise of unilateral Ministerial orders such as the Ministerial Zoning Order or the Declaration of Provincial Interest. Through the use of these Ministerial orders, Canada treated the Investment less favorable than investments of investors from other NAFTA Parties and from non-NAFTA Parties.

International Law Standard of Treatment

70. NAFTA Article 1105 sets out the international law standard of treatment that a NAFTA Party is obliged to accord investments of another NAFTA Party. Canada must ensure that the Investment receives treatment in accordance with the international law standard of treatment, including fair and equitable treatment, freedom from discrimination and full protection and security.

71. The rejection of the Investor's project constituted a continuing course of arbitrariness, discrimination, procedural unfairness. These measures constituted a failure to provide fair and equitable treatment to the Investment. Canada has violated its Article 1105 obligation through the Government of Ontario's unfair, arbitrary and discriminatory actions. These include, but are not necessarily limited to, the following:

    a. Throughout all of the following regulatory processes, St. Marys was denied the opportunity of a fair and impartial hearing of its case, in addition to the denial of a secure legal environment. The process by which governmental authorities conducted themselves was *ad hoc*, non-transparent, and in numerous respects violated rules, regulations, procedures and guidelines governing land use planning. By consequence, the overall process was highly irregular and unduly time-consuming.

Permit to Take Water

b. The Ministry of Environment unilaterally expanded the terms and conditions of the *PTTW*, unduly stalled tests on the quarry site, established unreasonable conditions, and set arbitrary and unfounded criteria for the approval of tests.

c. The Ministry of Environment unreasonably and arbitrarily refused permission to the Investor to commence Phase 2 of the pumping tests.

d. Ministry of Environment officials unilaterally demanded that the Investment re-commence Phase 1 test pumping, failing which the Ministry threatened the revocation of the *Permit to Take Water*.

e. Following the lapse of the first *Permit to Take Water*, St. Marys reapplied to the Ministry of Environment, but it willfully refused to carry out its duties to evaluate the new application.

Aggregate Resources Act Application

f. The City of Hamilton, the Ministry of Environment and Ministry of Natural Resources took steps to unfairly interfere with the processing of St. Marys' quarry application during the permit review process.

Haul Route Study

g. The arbitrary refusal of the City of Hamilton, Halton Region, the Town of Milton, and Conservation Halton to consider the Investment's Haul Route Study.

Minister's Zoning Order

h. The issuance, without notice, of an extraordinary Ministerial Zoning Order that had the effect of freezing the land use designation of the Investment's property. Local governments and the Ministry of the Environment then relied on the order and willfully refused to carry out their duties to process project related permits.

Declaration of Provincial Interest

i. The issuance of the Declaration of Provincial Interest converted the temporary effect of the MZO into a permanent freeze by removing St. Marys' right to obtain an independent review of the Ministerial Zoning Order. The declaration was issued without consultation or prior notice of any kind to the Investment and the declaration affected the Investor's property only. Furthermore, no specific reasoning for the issuance of the Declaration of Provincial Interest was provided, nor evidence of any good faith nexus to these policy grounds.

72. Each of the ways in which the governments treated the Investment in an unfair, arbitrary and discriminatory way constitutes a violation of NAFTA Article 1105.

Expropriation

73. NAFTA Article 1110 requires the immediate payment of fair market compensation upon the taking of governmental acts that substantially deprive an Investor of its property. Governmental actions have substantially deprived St. Marys Cement of its rights to utilize its Investment. Such actions include the permanent deprivation of rights to vary its land use designation, the unfair and contrived denial of its planning applications, and the issuance of the Minister's Zoning Order and Declaration of Provincial Interest issued by the Minister of Municipal Affairs and Housing.

74. On April 20, 2011, the government's issuance of the Declaration of Provincial Interest has transformed the temporary effect of the Minister's Zoning Order, which was subject to independent review by the Ontario Municipal Board, to have permanent depravatory effect. This unilateral ministerial action removed any independent right of appeal by the Investor from a decision to the Ontario Municipal Board, which strictly deals with planning and zoning issues.

G. ISSUES RAISED

75. Has Canada taken measures inconsistent with its obligations under Section A of the NAFTA, including Articles 1102, 1103, 1105 and 1110 of Chapter 11 of the NAFTA? If so, then what amount of compensation is to be paid to the Investment as a result of Canada's failure to comply with its obligations under the NAFTA?

H. RELIEF SOUGHT AND APPROXIMATE AMOUNT OF DAMAGES CLAIMED

76. The effect of the various measures has caused loss and damage to St. Marys and to the Investor's related business operations.

77. These losses include the substantial deprivation of its interest in the Quarry Site, including consequential losses arising there from and arising from the interference with its establishment, acquisition, expansion, management, conduct, operation or sale of its investment. The Investor and Investment have suffered loss arising from governmental unfair and arbitrary actions as well as from the lack of the most basic procedural fairness protections to follow the rule of law. In addition, the Investment has suffered loss and damage arising from Canada's failure to comply with its NAFTA Chapter 11 obligations.

78. The measures which have resulted in this damage are related to the effect of:

a. The Declaration of Provincial Interest made by the Minister of Municipal Affairs and Housing on April 20, 2011, which gave permanent effect to the Minister's Zoning Order made by the Minister of Municipal Affairs and Housing on April 12, 2010;

b. The arbitrary, unfair and vexatious refusal of the Ontario Ministry of the Environment to issue a *Permit to Take Water* to allow the Investment to commence the second phase of pumping tests that the Ministry considers necessary, in complete disregard of the rule of law and due process;

c. The arbitrary refusal of the City of Hamilton as well as the governments of Halton and Milton, as well as other government agencies, to proceed with review of the Investment's *Planning Act* applications, in disregard of the rule of law and due process; and

d. The unilateral and unfair refusal to review St Marys' application for the Haul Route Study, without any reason nor an opportunity to respond to that decision, in total disregard to due process.

79. The Investor respectfully claims:

a. Damages of not less than US$275 million in compensation for the loss, harm, injury, loss of reputation and damage caused by or resulting from Canada's breach of its obligations under Part A of Chapter 11 of the NAFTA;

b. The reasonable loss of contribution from the lost sale of aggregates from SMC to the members of the VCNA corporate family, including its American subsidiaries;

c. Costs that were needlessly thrown away in pursuit of the unfair regulatory process including legal and other costs associated to advise governments of the wrongfulness of their actions;

d. The payment of the Fair Market Value as of the date of April 20, 2011 to compensate for the difference in the fair market value between the quarry lands which were capable of having their zoning changed, and the fair market value of lands frozen in their agricultural and conservation management zoning;

e. Damages caused to the reputation and good will of SMC in governmental and public venues as a result of the abuse of government measures;

f. Professional legal and arbitration costs associated with the gross misconduct of the government which resulted in the seeking of a remedy under Chapter 11 of the NAFTA and also before the courts of Ontario;

g. The costs of this arbitration including arbitration fees, filing fees, disbursements, and associated fees;

h. Pre-award and post-award interest at a rate to be fixed by the Tribunal; and

i. Such further relief as counsel may advise and the Tribunal may deem appropriate.

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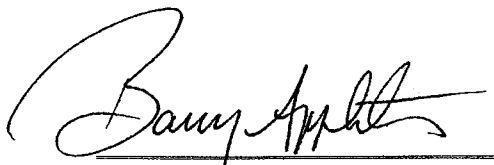

BARRY APPLETON
Counsel for the Investor

SERVED TO: Office of the Deputy Attorney General of Canada
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Ottawa, ON K1A 0H8, Canada

EXHIBIT 1

VCNA
Votorantim Cement North America

Phone: (702) 952-2866

St. Marys VCNA, LLC
871 Coronado Center Dr.
Suite 200-236
Henderson, Nevada 89052

September 9, 2011

Government of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H3
Canada

Dear Sir/Madam:

Re: NAFTA Investor-State Claim by St. Marys VCNA, LLC

Pursuant to Article 1121(1)(a) of the North American Free Trade Agreement, St. Marys VCNA, LLC consents to arbitration in accordance with the procedures set out in the NAFTA; and Pursuant to Article 1121(1)(b), St. Marys VCNA, LLC waives its right to initiate or continue before any administrative tribunal or court under the law of any Party to the NAFTA, or other dispute settlement procedures, any proceedings with respect to all measures, including any laws, regulations, procedures, requirements or practices, taken by the Government of Canada in any measure that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages (except the costs of the action), before an administrative tribunal or court under the laws of Canada.

Yours Very Truly,

C. Allen Rook

Allen Rook
Manager
St. Marys VCNA, LLC

EXHIBIT 2

ST. MARYS CEMENT INC. (CANADA)

St. Marys Cement Inc. (Canada)
55 Industrial Street
Toronto, Ontario
M4G 3W9

(416) 696-4411

September 9, 2011

Government of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H3
Canada

Dear Sir/Madam:

Re: NAFTA Investor-State Claim by St. Marys VCNA, LLC

Pursuant to Article 1121(1)(a) of the North American Free Trade Agreement, St. Marys Cement Inc. (Canada) consents to arbitration in accordance with the procedures set out in the NAFTA; and

Pursuant to Article 1121(1)(b), St. Marys Cement Inc. (Canada) waives its right to initiate or continue before any administrative tribunal or court under the law of any Party to the NAFTA, or other dispute settlement procedures, any proceedings with respect to all measures, including any laws, regulations, procedures, requirements or practices, taken by the Government of Canada in any measure that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages (except the costs of the action), before an administrative tribunal or court under the laws of Canada.

Yours Very Truly,

R. S. Olsen

Richard Olsen
Director
St. Marys Cement Inc. (Canada)