

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

**GL FARMS LLC AND CARL ADAMS**

**Investors**

**v.**

**THE GOVERNMENT OF CANADA ("CANADA")**

**Party**

**Pursuant to Articles 1116, 1117 and 1119 of the North American Free Trade Agreement ("NAFTA"), the Investors, GL Farms LLC and Carl Adams, serve this Notice of Intent to Submit a Claim to Arbitration for breach of Canada's obligations under the NAFTA, on their own behalf and on behalf of their investment enterprises: Georgian Bay Milk Company, Ltd. and Great Lakes Farms Ltd. ("the Investment Enterprises").**

**I NAMES AND ADDRESSES OF THE INVESTORS**

**GL Farms LLC**

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## II BREACH OF OBLIGATIONS

The Investors allege that the Government of Canada ("Canada") has breached its obligations under Section A of Chapter 11 of the NAFTA, under the following provisions:

- i) Article 1102(3) (National Treatment); and
- ii) Article 1105(1) (Treatment in Accordance with International Law)
- iii) Article 1502(3)(a) (Conduct of Monopolies and State Enterprises)

The Investors further allege that the measures described herein will also result in Canada's breach of the following provision contained within Section A of Chapter 11 of the NAFTA:

- iv) Article 1110 (Full, Fair and Effective Compensation for Expropriation).

Six months after the measures described herein have had expropriatory effect upon the business of the Investment Enterprises in the territory of Canada, and appropriate compensation has not been provided by Canada, the Investors will seek to amend the claim, as appropriate, to include an allegation that NAFTA Article 1110 has been breached by Canada.

Canada should consider itself notified, pursuant to Article 1119 of the NAFTA, with respect to this additional, impending breach of NAFTA Article 1110. The State conduct that will give rise to the taking has already occurred; it is that same conduct which forms the measures described herein for the breaches of NAFTA Articles 1102 and 1105. If extraordinary relief for such conduct cannot be obtained by the Investment Enterprises before the Courts of Canada in respect of these measures, their inevitable effect will be the *de facto* taking of the business of the Investment Enterprises.

The applicable provisions of the NAFTA are:

### ***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 or 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 or 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 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.**

...

**Article 1502: Monopolies and State Enterprises**

**3. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately owned monopoly that it designates and any government monopoly that it maintains or designates:**

**(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges;**

...

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

1. GL Farms LLC (GLF-USA), is a company incorporated under the laws of Delaware. Great Lakes Farms Ltd. ("GLF") is a company established under the laws of Ontario. Georgian Bay Milk Company Ltd. ("GBMC") is a company established under the laws of Ontario.
2. GLF and GBMC are owned by GLF-USA through Dairy Farm Investments Ltd, a company incorporated under the laws of Ontario. GLF-USA wholly owns Dairy Farm Investments Ltd., which in turn is the sole owner of both GLF and GBMC. Through Dairy Farm Investments Ltd., GLF-USA controls GLF and GBMC, whose principal offices are located in Barrie, Ontario.
3. Carl Adams is a national of the United States of America. He owns a majority interest in, and serves as President of, GLF-USA.
4. The business of GLF and GBMC is the sale of milk and milk products for export to the United States, which entails the collection, sales, transport and distribution of dairy products in Ontario.
5. GLF and GBMC have two business streams. Under the first stream (the "direct stream"), GBMC purchases raw milk from Ontario dairy producers who do not participate in the monopoly quota regime imposed by the Provincial Government for the exclusive sale, distribution and consumption of milk and milk products within its territory (i.e. "non-quota holders"). Using its specially-permitted transport tankers, GBMC transports this milk for sale to processors located in the territory of the United States.
6. These exports are made possible through the participation of GLF in each transaction, as GLF holds permits issued by the Government of the United States for importation of the milk for such processing. As the vendor in these transactions, GLF receives payment from the US-based processors, transferring income from these sales back to GBMC. With this income, GBMC pays the dairy producers who supplied the raw milk exported by GBMC for sale by GLF in the United States. Net income generated from these transactions is realized by GBMC, pursuant to a transfer mechanism agreed upon between it and GLF.
7. Under the second stream (the "processor stream"), GBMC purchases raw milk from non-quota holders. This milk is sold to processors located in the territory of Ontario, who use it primarily in the production of cheese products. These cheese products are exclusively dedicated by GBMC's customers for export to the territory of the United States, where they will

be ultimately sold to U.S. consumers. No milk purchased from GBMC has ever been used in the production of products destined for the Ontario market. The Ontario market is served exclusively by producers who participate in the monopoly quota regime that has been mandated for the consumption of milk in Ontario by legislation described herein.

8. Starting early in 2002, GBMC and GLF began purchasing raw milk from a group of what would become approximately 100 non-quota holders. Today, only about 24 producers remain willing or able to supply the Investment Enterprises, largely because of the measures described herein.
9. There has never been any question as to whether the Investment Enterprises or their suppliers have been in compliance with all applicable health, safety or environmental regulations. All of the dairy producers who have sold their milk to GBMC have consistently maintained Grade-A licensed premises. Most have been supplying GBMC since it opened for business. Since its inception, the business of the Investment Enterprises has only been the sale of milk for ultimate consumption in the United States market, either through the direct stream or the processor stream. GBMC transacted its business through the use of a transportation fleet of licensed bulk tank graders, ensuring that at no time did milk produced by quota holders ever become mixed with milk supplied by GBMC's dedicated group of non-quota holders.
10. The reason that GBMC was scrupulous about ensuring that it did not use milk supplied by quota holders was that such milk was the subject of disputes initiated against Canada by the Governments of the United States and New Zealand, through the World Trade Organization ("WTO"). The basic premise of these WTO challenges was that the Government of Canada, in cooperation with each Provincial Government, has maintained a system of monopoly supply management that subsidizes milk that is later exported to compete illegally on world markets. Under Ontario's supply management scheme, government regulation artificially inflates the price paid for milk and milk products through regulatory restrictions on supply. Supply restrictions have been achieved by delegating to local milk producers the right to tightly control how much milk can be produced for consumption within the territory of the province annually.
11. The monopoly granted to producers in each province is enforced through a mandatory quota system: if farmers want to produce milk for consumption in a province, they must acquire the right to do so by purchasing quota held by other producers. There is a finite amount of quota available in any given year, which makes its acquisition by a new entrant prohibitively expensive. In the Province of Ontario, the body responsible for administering the monopoly quota system is a marketing

board known as the Dairy Farmers of Ontario (“DFO”). The DFO, whose membership is composed of existing quota holders, is empowered under laws and regulations promulgated by the Province of Ontario to operate a quota system of supply management for the consumption of milk in the province. The DFO has been delegated this and other marketing board functions by the Ontario Farm Products Marketing Commission (the “Commission”), which retains certain supervisory functions.

12. Related legislation provides an avenue of appeal from decisions made by these bodies to the Ontario Agriculture, Food and Rural Affairs Appeal Tribunal (“the Tribunal”). Decisions made by this independent, quasi-judicial body are considered final and binding, although they are subject – in rare circumstances – to being overturned or varied by a politician, namely the Ontario Minister of Agriculture and Food. Extraordinary relief may also be sought against the Tribunal’s decisions from the Courts of the Province of Ontario, through an application for judicial review.
13. Ontario’s monopoly supply management system for dairy products is supported by extremely high tariffs, of as much as 300%, on imports into Canada. These tariffs were agreed to by Canada as part of the most recent round of international trade negotiations that led to the establishment of the WTO. Without these tariffs, the monopoly quota system would fail, because less expensive imports would render the restraints of any mandatory quota system superfluous. With the quota system in place, dairy producers enjoy the economic rents that accrue from being the sole source provider of dairy products in the territory of their respective province. Consumers pay a much higher price for milk and other dairy products than they otherwise would in a free market system, and the incomes generated from those higher prices are enjoyed by anybody fortunate enough to hold quota to produce milk. Greater competition is eliminated because only quota-holders are entitled to supply consumers with milk and other dairy products.
14. Not content with enjoying the economic rents flowing from their participation in a monopoly supply management system, in the late 1990’s the participants in Ontario’s monopoly supply management system began exporting milk, primarily to the United States. These exports became the subject of a WTO complaint against Canada by the United States and New Zealand, which resulted in a May 1999 WTO Panel finding that such milk was being illegally-subsidized for export by provincial governments, contrary to Canada’s WTO obligations. The subsidies were found to have taken the form of higher prices obtained under the government-mandated monopoly supply management system.

15. The findings of the Panel Report were upheld by the WTO Appellate Body in December 1999, and the Federal and Provincial governments began to take steps to change how milk and other dairy products were exported, given the existence of monopoly supply management regimes in each province. Over the next three years, the export regimes put in place by the Federal and Provincial Governments were twice challenged before the original WTO panel hearing the case as being out of compliance with Canada's WTO obligations. By the end of those three years, while Canadian officials exhausted their appeals, exports of subsidized milk and other dairy products from Canada had exceeded limits agreed to by Canada under WTO rules by as much as 200%.
16. Canada's second attempt to continue to facilitate milk exports that were compliant with its WTO obligations involved the establishment of a Commercial Export Milk Mechanism. This mechanism allowed for the export of milk from Canada while also providing that Provincial Governments could operate, through their designated monopoly supply management marketing boards, autonomous commercial exchange mechanisms that would be open to both quota and non-quota holders alike. The Ontario version of this mechanism was known as the Export Contract Exchange ("ECE"). Befitting of its monopolistic history, the DFO attempted to coerce all non-quota holders to participate in the ECE on its terms, which included using only DFO transportation carriers – thus integrating the milk of quota- and non-quota holders. With its own segregated transportation system in place – and concerned about the potentially negative WTO consequences of co-mingling its non-subsidized milk with that of quota-holders – GBMC and GLF resisted this attempted coercion, taking legal action against the DFO's decision.
17. The reason for the DFO's heavy-handedness towards dairy enterprises unwilling to participate in the monopoly supply management system was not merely habitual. One of the strongest arguments that the Government of Canada hoped to make before WTO adjudicators was that its new export programs now provided – at the provincial level – for participation by both non-quota- and quota-holders. Canada's argument was to be that, while it might be true that some of its exports were subsidized through producer participation in a monopoly supply management system, other exports would be coming from producers who were not similarly benefiting from any domestic monopoly price-support mechanism (because if they did not hold any quota they were not at all entitled to sell their products for consumption in Ontario and thus could not obtain an artificially-high price for their products).
18. In part, Canada's arguments ultimately proved unsuccessful. In December 2002, the WTO Appellate Body concluded that the Commercial Export Milk Mechanism, implemented in each province, was being used to

export illegally-subsidized milk – because of participation by quota-holders in it. Thus the Appellate Body found that these exports were not in compliance with Canada's WTO obligations. Despite the forced participation of non-quota holders in the export mechanisms such as the ECE, the Appellate Body concluded that large quantities of illegally-subsidized milk and dairy products were, and would, still be exported from Canada, in contravention of WTO rules.<sup>1</sup>

19. However, the Appellate Body was also clear that it would not make a finding of non-compliance with respect to milk exports being made by non-quota holders. It addressed its findings only to the participation of monopoly quota-holders in the export mechanism. Accordingly, on several occasions after the Appellate Body issued its ruling – including an appearance by Canada's Chief WTO Negotiator on Agricultural Issues before the House of Commons Standing Committee on Agriculture – Federal Government officials confirmed that they did not view the final WTO ruling as having had any impact on exports being made by non-quota holders.
20. The report applied only to quota-holders, whom the WTO Dispute Settlement Body determined were exporting illegally-subsidized milk by virtue of their participation in the monopoly supply management system. Accordingly the business strategy of GBMC, which had been based upon the exclusive use of milk from non-quota holders, was vindicated – not only by the WTO Appellate Body (which could have made a finding of subsidy but did not do so), but also by Federal Government officials themselves.
21. Nonetheless, the position immediately adopted by the DFO in the wake of the Appellate Body report was that the only way to comply with the WTO Appellate Body Ruling was to completely ban any and all exports from Ontario to the United States – regardless of whether such exports would be made using milk from non-quota holders.
22. The reason for the DFO's position was elementary: GBMC provides a means whereby individuals can operate dairy farms without purchasing "quota" and participating in the monopoly supply management regime. Rather than producing milk for domestic consumption, these non-quota holders would produce milk for foreign consumption. Controlled by powerful milk producers with a strong vested interest in maintaining the *status quo ante*, the DFO's reaction was, and remains, effectively composed of equal parts of avarice (on the premise that if quota-holders and the DFO cannot export milk, nobody else should be able to do so

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<sup>1</sup> *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Second Recourse to Article 21.5 of the DSU by New Zealand and the United States, Appellate Body Report, 20 December 2002, WT/DS103/AB/RW2, WT/DS113/AB/RW2. Attached as Appendix I.

either) and self interest (on the premise that the success of non-quota holders in the export business demonstrates to policy-makers that there really is no need to maintain a supply management regime for domestic consumption either).

23. After the release of the WTO Appellate Body's report, the Commission held a meeting of "stakeholders", on 23 January 2003, at which the DFO and GBMC attended and made presentations. The Commission then asked the DFO to undertake further consultations with industry members and report back to the Commission on 15 February 2003. In the meantime, on 30 and 31 January 2003 the DFO issued an order requiring that any milk delivered to an Ontario processing plant on behalf of GBMC would have to be made through the milk transportation system authorized by the DFO (in which milk from quota- and non-quota holders would be mixed).
24. After undertaking perfunctory consultations with GBMC on 7 February 2003, the DFO informed the Commission that its plan for WTO compliance consisted of canceling the ECE as of 28 February 2003; amending the applicable regulations to prohibit all milk exports by quota-holders; and mandating that all dairy producers in Ontario must obtain quota by no later than 31 July 2003.
25. In other words, DFO's so-called plan for "WTO compliance" was to ensure that no dairy producer in Ontario would be able to produce milk for export (either directly or as the component of a dairy product destined for export) save and except for those quota holders who would do so under a scheme that ensured that exports of subsidized milk would not exceed the limited amounts provided for under WTO quota rules. There would be no place for non-quota holders (producing non-subsidized milk) under the new regime – even though the WTO Appellate Body specifically chose not to make a finding that the export of milk by non-quota holders would be inconsistent with Canada's WTO obligations.
26. The Commission's initial response to the DFO's proposed plan, as indicated in media comments made by its Chairman, was to indicate that it would be reflecting upon the issue until it received clarification from the Federal Government concerning what steps were required to achieve compliance. Within days, however, the DFO lobbied members of the governing party, claiming to have the support of the Minister of Agriculture. The next business day after its lobbying session was completed, the Commission stunningly reversed course and issued a statement giving its blanket approval for the DFO plan on 24 February 2003. It did so without ever having received the clarifications it was supposedly awaiting from the Federal Government.

27. Immediately thereafter, GBMC and its suppliers received correspondence from the DFO informing them that their export business would be eliminated – by virtue of the involuntary quota-purchase-requirement and new export prohibitions the DFO was imposing upon them. GBMC responded by requesting the DFO to reconsider its decision, proposing a plan for non-subsidized milk exports which would ensure its segregation from domestic milk produced through the monopoly supply management system, using GBMC's established business practices. This request was denied on 28 March 2003, whereupon GBMC sought an appeal of the DFO's decisions, as rubber-stamped by the Commission, before the Tribunal.
28. The appeal was heard by the Tribunal between 5 and 8 May 2003. The parties to the hearing were GBMC and the DFO. Two witnesses were heard from the DFO, one from GBMC, one from the Ontario Ministry of Agriculture and Food and two from dairy processing companies. DFO officials argued that WTO compliance necessitated the elimination of GBMC's business, which relied upon exports from non-quota holders. GBMC argued that WTO compliance did not require such action, and relied upon public statements made by Federal Government officials in support of its position. After carefully considering the parties' submissions, the Tribunal issued a 24-page decision and reasons on 6 June 2003 [attached as Appendix II].
29. The Tribunal ordered the DFO and the Commission to consult with GBMC about its proposal for an unsubsidized milk export program and to submit the proposal to Canada's [then] Department of Foreign Affairs and International Trade, seeking an opinion as to whether it would be compliant with Canada's trade treaty obligations, by no later than 1 August 2003. In addition, the Tribunal ordered the DFO to use its regulatory powers to exempt any non-quota holders who were shipping milk to GBMC, as of 15 May 2003, from the requirement to hold quota; from the requirement to hold quota in order to be eligible for export; and from the requirement for their milk production to be transported through the DFO's integrated (a.k.a. "fungible") milk supply.
30. In other words, the Tribunal ordered the DFO to implement the primary elements of GBMC's proposal for unsubsidized milk exports for its existing suppliers; and it ordered the DFO and the Commission to seek an opinion from the appropriate Federal Government officials about what actually constituted compliance with the WTO Appellate Body's decision of December 2002.
31. The Tribunal also specified, however, that GBMC's supply would be limited to the monthly average shipments made by those approximately 30 non-quota holders between 1 January 2003 and 30 April 2003. As such,

GBMC's supply was capped at its status as of the first quarter of 2003, No new producers could be solicited to supply milk to GBMC and existing producers were prohibited from increasing their production in order to meet greater demand being experienced by GBMC. This June 6<sup>th</sup> decision to "cap" the business of the Investment Enterprises caused considerable loss and damages to them.

32. On 9 May 2003, Canada and the United States and New Zealand finally and conclusively settled their WTO dispute. The language of the settlement was clear that because Canada, and its constituent provincial entities, had ceased the export of inappropriate quantities of milk subsidized through participation in monopoly supply management regimes, the United States and New Zealand were satisfied that compliance had been achieved. This settlement agreement presumptively ended the dispute, and eliminated the likelihood of retaliation being taken against Canadian goods by either of the two complaining parties.
33. Rather than complying with the Tribunal's decision, or seeking judicial review of it, the DFO filed an application to the Ontario Minister of Agriculture and Food, Helen Johns, asking her to overturn it. It did so on 11 June 2003, without providing any arguments, and simultaneously commenced a clandestine lobbying campaign that targeted the Minister, her caucus colleagues, and her staff in order to ensure its success. The Commission made no such application.
34. It was not until June 23<sup>rd</sup> that the DFO provided a rationalization for its application to the Minister, and when it did the DFO submitted new evidence of a dubious character that had not placed before the Tribunal. The Minister did not hold a public hearing, although media reports quoting DFO directors indicate that she may have entertained direct meetings with the DFO before making her decision.
35. On 23 July 2003, Minister Johns issued an order rescinding the Tribunal's decision [attached at Appendix III]. It was less than two pages long and merely stated that it was her opinion that the timetable for action proposed by the Tribunal in its decision would cause "anxiety and uncertainty in an industry that has just recently concluded a round of protracted trade challenges." Her letter contained a vague aspiration that some day a national export program might exist, and it requested the DFO to "allow those producers shipping through Georgian Bay Milk Company a transition period ending November 30, 2003 to make the necessary business decisions."
36. Between May 2003 and November 2003, GBMC continued to export milk into the United States without incident. In fact, during the entire tenure of

their business operations GBMC and GLF have never experienced any difficulties exporting milk into the United States.

37. Given the fact that there was no reason to suspect that GBMC's export activities could, or would, be the cause of a WTO complaint, the Minister's decision was obviously taken for purely political purposes – at the behest of a dominant producer group and to the detriment of two investment enterprises whose business model threatened to reveal that monopoly quota systems were not necessary to profitably sell non-subsidized milk in North America. Procedural due process and fairness were forsaken in the bargain, and GBMC and GLF have suffered considerable losses as a result.
38. At the end of November 2003, GBMC sought an appeal to the Tribunal from a DFO decision to deny GBMC's request for an extension of the grace period recommended by the Minister in her letter of 23 July 2003. The DFO was prepared to revoke the licenses of GBMC and its suppliers, but was forced to abstain while the Tribunal heard the matter. The Tribunal held hearings on 27 November and 4-5 December 2003, as well as on 18 February 2004. On 28 March 2004, the Tribunal decided that the DFO had the authority to revoke the licenses necessary to put GBMC out of business – rather than permitting it to operate under the existing supply cap until a national export program was implemented by the Federal Government, as had been mentioned in the Johns letter of July 2003.
39. In so doing, the Tribunal found that there was no evidence that the business of GBMC actually posed a threat to Ontario's monopoly supply management system, at least not at the hands of a WTO dispute settlement process, because the United States had always continued to accept exports from GBMC without incident. Nonetheless, the Tribunal also concluded that its hands were tied by the Minister's decision, to the extent that it was forced to regard its previous decision, and the reasoning supporting it, as being null and void. The Tribunal accordingly extended the cap on its milk supply until 31 July 2004, after which the DFO would be free to effectively shut it down. The cap extension was to be based upon the monthly averages of GBMC's 24 remaining suppliers, calculated from July 2003 until November 2003 (meaning that the cap was smaller than that which had originally been imposed in June 2003).
40. While the Investment Enterprises did not ask for it, the new Minister of Agriculture and Food, Steve Peters, nonetheless issued a statement on 13 May 2004 confirming the Tribunal's decision. In so doing, he repeating the baseless claim found in DFO lobbying materials that if he was to permit GBMC to continue exporting non-quota milk – even at its capped level of supply – he would somehow provoke a renewed WTO challenge from the United States. How such a challenge would be made, given the

fact that the USA had settled its case with Canada and that the WTO Appellate Body had refrained from making such a finding when previously asked to do so, the Minister did not explain.

41. With his decision, Minister Peters also appeared to be shifting responsibility for permitting exports completely to the Federal Government, even though the DFO claimed to be the body empowered to permit exports under existing Federal and Provincial legislation. In truth, the Minister's decision was obviously the result of further lobbying by the monopoly producers in control of the DFO, who simply did not want the competition that they saw manifested in the alternative being offered by GBMC to dairy producers in Ontario who were unable to participate in the DFO's exclusive, quota-based regime.
42. GBMC has continued to forestall the DFO's attempts to effectively expropriate its business – as directed by Minister Johns in July 2003 and confirmed by Minister Peters in May 2004 – through recourse to extraordinary relief from the Courts of Ontario. GBMC has not sought damages before these courts; only removal of the measures that have damaged its business – thus far by capping its existing milk supply and forbidding its growth – and which promise to result in its eventual taking (should all appeals be exhausted). GBMC will continue in business until its attempts to obtain extraordinary relief from domestic courts are complete, although it has suffered significant losses already by having its exports capped by the Tribunal (to be confirmed later by each Minister).
43. On the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 16<sup>th</sup> of February 2005, the Divisional Court of the Ontario Superior Court of Justice heard an application from GBMC and its suppliers for review of Minister John's decision and the DFO's regulation outlawing non-quota milk exports. The application was based upon Canadian constitutional and administrative law grounds. The application was dismissed on 19 July 2005 and an appeal to the Court of Appeal for Ontario is now pending.
44. Given the foregoing, there are two measures at issue for this notice of intent to submit a claim, both of which are the result of processes contemplated under section 7 of the Ontario *Milk Act* and sections 16 & 18 of the Ontario *Ministry of Agriculture, Food and Rural Affairs Act*.
45. The first measure is manifested in the decision-making process that started with the DFO's plan to effectively destroy GBMC's milk export business and its requirement that GBMC use its integrated milk transportation system; followed by the Commission's rubber-stamp decision; the DFO's refusal to vary its decision or use GBMC's export marketing plan; the Tribunal's decision to rescind the DFO's plan in favour of GBMC's plan (in addition to its imposition of a cap on GBMC's

business); and ultimately ended with the Minister's annulment of the Tribunal decision that restored the DFO's plan to destroy GBMC's business. The second measure is manifested in the decision-making process that started with the DFO's refusal to extend GBMC's capped exemption from its regulation against exports of non-quota milk; continued with the Tribunal's reluctant refusal to vary the DFO's decision and its imposition of a new, more narrow, cap; and ended with the new Minister's unilateral confirmation of these decisions.

46. The Claimants do not argue that the decision of the Divisional Court constitutes a breach of the NAFTA; their claims are focused on the measures described above, and on any measures to be taken by the DFO, the Commission, the Tribunal or the Minister in furtherance of the DFO's apparent objective of – or that result in – destruction or harm to the business of GBMC and GLF.
47. The effect of these measures on the business of the Investment Enterprises has been devastating and, if not varied or rescinded upon appeal, will soon result in an indirect expropriation. Also, the Investors have been, and will continue to be harmed, as a result. In addition to expending considerable sums in fighting these measures, the Investment enterprises have suffered revenue losses; they have incurred considerable expenses in terms of compliance costs; and they have lost any opportunity to grow what was once a very prosperous and promising business.

#### **IV ISSUES**

1. Do the decision-making processes that have thus far resulted in a cap on the Investment Enterprises' ability to generate income – and which will ultimately lead to an outright prohibition against GBMC's continuing its milk export business – provide more favourable treatment to competitive and commercial enterprises adverse in interest to the Investment Enterprises, namely the DFO and the dairy producers its monopoly practices benefit, in breach of Article 1102(3)?
2. Were the decisions of Ministers John and Peters made in accordance with the principles of good faith, transparency and fair and equitable treatment, as required under NAFTA Article 1105(1) and the customary international law minimum standard of treatment?
3. The DFO purported to exercise authority delegated to it under the Ontario *Milk Act* and associated regulations when it promulgated rules that would destroy GBMC's business and when it lobbied Ontario Government officials to ensure that its expropriatory plans prevailed. In so doing, did the DFO act in a manner contrary to NAFTA Articles 1102 and/or 1105,

thus breaching Canada's obligations under Article 1502(3)(a) of the NAFTA?

4. If the answer to any of the above questions is yes, what is the quantum of compensation that should be paid to the investor as a result of the inconsistency of the measure with Canada's obligations under the NAFTA?

## **V RELIEF SOUGHT AND DAMAGES CLAIMED**

The Investors claim damages for the following:

1. Damages of not less than \$78,000,000.00 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;
2. Costs associated with these proceedings, including all professional fees and disbursements;
3. Fees and expenses incurred to oppose the promulgation of the infringing measures;
4. Pre-award and post-award interest at a rate to be fixed by the Tribunal;
5. Payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and
6. Such further relief as counsel may advise and that this Tribunal may deem appropriate.

**DATE OF ISSUE: 28 FEBRUARY 2006**

**SIGNED IN THE ORIGINAL**

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