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Before the

ADDITIONAL FACILITY OF THE  
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Mercer International Inc.,**

*Claimant,*

v.

**Government of Canada,**

*Respondent.*

ICSID Case No. ARB(AF)/12/3

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**WITNESS STATEMENT OF JAMES MCLAREN, P. ENG.**

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I, James McLaren, hereby declare as follows:

**I. PROFESSIONAL EXPERIENCE**

1. My date of birth is [REDACTED], and I reside at [REDACTED].

2. I graduated from the University of Waterloo with a Bachelor of Science in Chemistry (with honors) in 1969. I then obtained a Master of Science in Civil Engineering, also from the University of Waterloo, in 1972. I have been a Professional Engineer licensed in British Columbia for more than thirty (30) years.

3. For nearly twenty (20) years, I worked as a government pollution regulator in Canada. From 1972 through 1975, I worked as the Supervisor of Pollution Control for the Department of Indian and Northern Affairs in Yellowknife, Northwest Territories. After that, I worked for approximately seventeen (17) years in different roles at the British Columbia Ministry of the Environment (the “Ministry”), for the Kootenay Region. This region is home to the Celgar Mill, located in Castlegar (the “Celgar Mill” or “Mill”). From 1975 until 1981, I served in the Ministry as the Assistant Regional Manager of Pollution Control, which later became known as “Waste Management.” In this capacity, I supervised engineers, biologists, and other technicians who monitored any qualifying entity that discharged waste product into rivers, air or lands. Essentially, we supervised all entities that required a pollution control permit for their operations. One of my principal responsibilities was to assist in the prosecution of entities that violated the emissions conditions established in their respective pollution control permits. I am not an attorney; I was responsible for the technical elements of prosecutions, which were coordinated by an attorney for the British Columbia government.

4. In 1982, I left my position as Assistant Regional Manager for Waste Management, and became the Regional Public Health Engineer & Community Water Supply Section Head at the Ministry. I served in that capacity for approximately five years—until 1987, when I became the Regional Manager for Waste Management in the Kootenay Region. I served in this latter capacity until December 1991, when I resigned from the Ministry. I then became the Celgar Mill's Environment Manager, and held various other positions at the Mill, such as Technical Services Manager, Utilities Manager, Strategic Projects Manager, and Energy Coordinator, until my retirement in 2011. During my two decades of employment at the Celgar Mill, with the exception of a two-year period (2005 to 2007), I retained overall responsibility for all environmental programs at the Mill.

5. I currently provide independent consulting services to Mercer regarding environmental and energy matters. I have prepared natural gas usage reports required under Celgar's 2009 BC Hydro Electricity Purchase Agreement. Since 2011 to the present, I also have prepared requests to the British Columbia Ministry of Environment on behalf of local landowners who wish to utilize Celgar pulp mill by-products as soil amendment on their properties. By having viable off-site utilization of these by-products, Celgar avoids having to incinerate these materials (with attendant reductions in energy generation). In 2012, I was retained in 2012 by the Neucel pulp mill on Vancouver Island to evaluate options for utilizing their by-products as soil amendment. Neucel opted to continue their historical practice of incinerating their by-products.

## **II. INVOLVEMENT IN CELGAR APPLICATION REVIEW PROCESS**

6. As I recall, and based on my review of the pertinent exhibits submitted by Canada in this arbitration, in August 1989, Celgar initiated a provincial permit application process with the B.C. Ministry of the Environment to allow the company to expand its pulp mill facility in

Castlegar, and to add a large steam turbine electric generator.<sup>1</sup> In order to evaluate the proposed expansion, the B.C. Government instituted a “Major Project Review Process,” which brought together interested Canadian federal and provincial authorities. These authorities composed a review group, which was under the supervision of a Steering Committee.

7. Shortly after the Ministry of the Environment launched the Major Project Review Process, Celgar submitted a prospectus for the proposed expansion, which the review group distributed widely across interested government agencies. I recall my office receiving a copy of such prospectus for my review from a waste management perspective. In April 1990, the Steering Committee directed Celgar to submit a “Stage II” report containing detailed information about the Mill expansion and modernization proposal.

8. In October 1990, Celgar formally applied to the Minister of Energy, pursuant to the Utilities Commission Act (“UCA”), for an Energy Project Certificate to permit it to install additional generating capacity at the Mill (the “Application”) in the form of a 52 MW non-condensing steam turbine. The Application focused heavily on the Mill’s environmental issues, which had become the subject of extensive regulation, oversight, and negative publicity, in the months leading up to the proposal. A simple way to think about this Energy Project Certificate is, in essence, as a building permit; it would allow Celgar to construct the facility it sought to build, but would not govern the operation of the facility itself. Particular restrictions on the use of the facility (such as the precise environmental restrictions that my office sought) would need to be addressed by the BC Ministry of Environment outside of the context of the Energy Project Certificate.

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<sup>1</sup> R-327, B.C. Ministry of Environment and Ministry of Regional and Economic Development, Review of Prospectus for Celgar Pulp Mill Expansion, July 1990, s. III, at 5.

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9. The Celgar Expansion Review Panel, before which my office testified in relation to Celgar's Application, recommended the approval of Celgar's expansion and modernization project in February 1991. Most of the Panel's recommendations were accepted and became legally binding obligations on Celgar when BC Government Ministers issued an Order-in-Council in June 1991.

10. As Regional Manager of Waste Management, from 1987 through the end of 1991, I was an official of the Ministry of the Environment when Celgar filed its Application to expand and modernize the pulp mill. As the most senior Waste Management officer at the Ministry in the Kootenay Region, I ensured that my staff was prepared technically and available to support the Celgar Expansion Review Panel convened to review the Celgar expansion and modernization project.

11. From my perspective, the expansion and modernization of the Mill was necessary to reduce the levels of pollution that the Mill was producing at the time. Pollution by the Mill had been a long-standing problem that I had dealt with for years, including initiation of legal enforcement actions relating to Celgar's operations before its expansion and modernization. Indeed, the reduction of polluting emissions at the Mill and elsewhere was an objective of foremost importance for regulators across the entire Province of British Columbia.

12. Given that improving the Mill's environmental performance and reducing pollution was our explicit goal, my office staff provided useful testimony during the technical hearings held in Castlegar, BC by the Celgar Expansion Review Panel in 1990. Our goal was to make sure that, if approved, the proposed expansion featured clear limits on permissible effluent and air emissions, and was subject to specific reporting and monitoring of compliance in relation to such discharge limitations. As Regional Waste Manager, I had a staff of 22 engineers,

biologists, and technicians devoted to ensuring permit compliance for precisely these types of discharge limitations on all industrial and municipal waste discharges in the Kootenay Region of British Columbia.

13. In response to Celgar's Energy Project Certificate Application, the Energy and Environment Ministers issued an order ,on 23 May 1991, authorizing installation of the 52 MW steam turbine (the "Ministers' Order"). Because the turbine installation was part of the overall pulp mill expansion, but the BC Government had not yet issued the Order-in-Council, which would make the accepted Expansion Review Panel's recommendations binding legal requirements, the Ministers' Order referenced the need for Celgar to comply with future environmental permit requirements and other Water Act and Health Act requirements. BC Government Ministers issued an Order-in-Council on 28 June 1991, accepting most of the Panel's environmental recommendations and incorporating the accepted recommendations into Waste Management Permit Amendments.<sup>2</sup> This Order-in-Council transformed the pulp mill discharge recommendations of the joint Environmental Assessment Review Process-Major Project Review Process Panel into binding legal requirements. The requirements included appropriate mechanisms for monitoring and monthly reporting of compliance with the obligations that were being undertaken by Celgar in connection with the amended environmental permits.

### **III. COMMITMENTS IN THE MINISTERS' ORDER**

14. Counsel for Mercer has alerted me that Canada has argued in the present arbitration that estimates contained in Celgar's Energy Project Certificate Application regarding the Mill's expected levels of electricity generation, usage, and energy self-sufficiency under the

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<sup>2</sup> C-307, BC Environment Briefing Note (10 July 1991).

proposed expansion and modernization project were incorporated into the Ministers' Order as a binding obligation through the Order's general reference to such Application. I am also informed that, according to Canada, this reference in the Ministers' Order to Celgar's Application created upon Celgar an ongoing commitment to energy self-sufficiency.

15. All of this is notwithstanding the fact that, as I recalled the Order (and having reviewed it again for purposes of this witness statement), the Order contains no reporting, monitoring, or compliance mechanisms with regard to such a commitment, and, indeed, stated nothing about the supposed self-sufficiency commitment, except by providing that "Celgar shall, subject to this Order, cause the Project to be designed, located, constructed and operated in accordance with (a) the Application . . . ." In fact, even re-reading the document in the context of this arbitration, it is evident to me that nothing in the Application uses commitment language — at least not of the type that I was used to seeing as an environmental regulator who insisted on specific, measurable commitments. The statement in Celgar's Application is, at best, an expression of the company's desire to generate enough energy to match its needs. But, there is not a pulp mill in the world that can be one hundred percent self-sufficient all of the time. I am astonished that Canada would suggest that the Order's reference to an Application containing such an expression could properly establish a binding regulatory commitment.

16. Frankly, Canada's argument is surprising to me both as the most senior regulatory compliance officer at the Celgar Mill in the period immediately after the issuance of the Order, as well as a senior Provincial regulator at the time the Order was issued. As I explained previously, for nearly 20 years beginning at the end of 1991, I was the most senior regulatory compliance officer at the Celgar Mill — and served through the years as the Mill's Environment Manager, Technical Services Manager, Utilities Manager, Strategic Projects Manager, and

Energy Coordinator. In these capacities, I was the primary point of contact between Celgar (and subsequently Mercer) and the B.C. regulatory authorities on all issues relating to the Mill's environmental and energy permits, waste management processes and procedures, and compliance with any operating restrictions on the Mill imposed by the British Columbia government, including environmental restrictions.

17. During this period, I was in regular (sometimes daily) contact with the Provincial Ministry of Environment. I would provide the Ministry with frequent reports on waste, pollution, and emissions issues.<sup>3</sup> I do not recall a single occasion where any regulator from the Province ever made any reference to any energy self-sufficiency commitment, or requested any data pertaining to any such commitment. As the Mill's primary point of contact on regulatory and compliance matters and liaison on regulatory issues with the government of British Columbia, any communication on such an issue — including any monitoring, compliance, or reporting requests — would have come directly to me.

18. As a former Provincial regulator who was intimately involved in every environmental aspect of the Celgar Application review process, I am equally perplexed at Canada's argument about an ongoing energy self-sufficiency commitment. If the Order intended to create a specific energy self-sufficiency commitment in the manner that Canada appears to suggest in this arbitration, it would have included specific reporting, monitoring, and compliance requirements in relation to such commitment, analogous to the specific environmental

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<sup>3</sup> By way of example, one type of report I prepared was the "Effluent and Emissions Data Report," which we submitted on a monthly basis. One such report from October 1993 explained: "ClO<sub>2</sub> emissions from the Chlorine Dioxide Generator ranged from 51.9 ppm to 172.2 ppm for tests performed in October. Efforts continue to optimize the ClO<sub>2</sub> scrubber efficiency. If successful, these changes should also reduce Cl<sub>2</sub> concentrations which exceeded the permit level of 4 ppm on 4 days in October." This is an example of the degree of reporting and detail that the Canadian authorities required when they had an actual, measurable commitment from a private enterprise.

commitments that were imposed on the Mill through the Order. No such requirements were imposed. In fact, Provincial monitoring of the Mill's energy situation was so lacking that, as far as I recall, the Provincial authorities never so much as confirmed that the Mill in fact had installed the generator that was at issue in the Celgar Application—much less monitored its performance.

19. In my experience as a Provincial regulator, there can be no legal commitment of the kind that Canada has alleged in this arbitration without specific reporting, monitoring, and compliance requirements. And the Province imposed no such requirements on the Celgar Mill.

20. I would also add that, from an environmental perspective, a mill's commitment to being energy "self-sufficient" can mean more than merely generating enough electricity to meet its electric load. Another key dimension to energy self-sufficiency is whether a pulp mill is consuming or otherwise managing enough of its wood waste. A pulp mill that produces excess waste can cause significant environmental problems. Celgar's expansion and modernization project proposed to make Celgar significantly more self-sufficient in terms of the utilization of its waste to generate energy, and, as a consequence, the larger of its two wood waste-fired boilers would be shutdown. As my office was reviewing and providing feedback on Celgar's Application, we concluded that Celgar's increased waste self-sufficiency was one of the expansion and modernization project's important improvements. At the same time, however, this improvement caused an environmental problem for the neighboring Westar sawmill. Because Celgar would be decommissioning one of its wood waste-fired boilers, Celgar would no longer be able to accept wood waste from the Westar sawmill. This was a major concern from an environmental perspective, because the Westar sawmill was Celgar's largest raw material (wood chip) supplier — it was vital then that the sawmill find a new use for its wood waste or

else it would have to shut down. My office voiced this concern repeatedly during its consideration of the Celgar expansion and modernization project.

21. For these reasons, from a waste management (environmental) perspective, the issue of “self-sufficiency” was a question of how much of a mill’s waste would either pollute the environment or be used to generate electricity. A mill that utilized as much of its waste as best available technology would allow for energy generation was, from an environmental perspective, energy self-sufficient — regardless of whether that energy in the form of electricity generation was sufficient to meet a mill’s electrical load.

22. Several of the documents that Canada has provided in this arbitration confirm my recollection. For instance, in a 7 March 1991 Briefing Note, titled “Wood Waste to Energy at Castlegar an Urgent Requirement,” which I prepared for Assistant Deputy Ministers of the Environment Jon O’Riordan and Sheila Wynn, I explained that the “{t}he Federal and Provincial Governments have granted approval in principle for Celgar’s \$650 million pulp mill expansion project in Castlegar, which will enable the company to double production, as well as become energy self-sufficient.”<sup>4</sup> The entire Briefing Note focuses on the impact of the proposed expansion on fuel sources and the potential for resulting pollution. In the Briefing Note, I explained that in light of the proposed expansion, and Celgar’s plan to be self-sufficient in terms of using its own waste for electricity generation: “Hog fuel from Westar Timber’s adjacent 1 million board feet per day sawmill, which is currently helping to supply the energy needs of the

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<sup>4</sup> C-308, Inter-office Memorandum from Niall McMillan to Peter Ostergaard re: Celgar Pulp Mill Expansion Panel Recommendations, Westar Hog Fuel Options Study, attaching BC Environment Briefing Note from March 7, 1991 (30 April 1991), at Canada Bates163876.

pulp mill and was the largest wood chip supplier, will no longer be required after mid 1993.”<sup>5</sup>

Indeed, the Celgar Expansion Review Panel had recommended that the BC Government “undertake an evaluation of options for the use or disposal of hog fuel made surplus by the proposed Celgar modernization. . . .”<sup>6</sup>

23. My understanding that energy “self-sufficiency” related to the use of the mill’s own waste to generate electricity (instead of generating pollution), remained the same when I retired from the government and began work for Celgar. Indeed, in a 1 February 1995 meeting of the Celgar Environmental Advisory Group,<sup>7</sup> I presented a report comparing Celgar’s actions proposed during the 1990 Major Review Process to what had been accomplished by 1994. The document, titled “Modernization Environmental Objectives,” has a “proposed” column, and a “delivered” column. Under the proposed column, I noted that Celgar had proposed “{p}ulp cooking processes to recover much of the organic material, which was historically discharged into the Columbia River, as a ‘fuel’ for steam generation of electricity.”<sup>8</sup> In the corresponding “delivered” column, it states: “The Promise of mill electrical energy self-sufficiency has been kept! Under normal conditions, Celgar exports a small amount of electricity into West Kootenay

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<sup>5</sup> C-308, Inter-office Memorandum from Niall McMillan to Peter Ostergaard re: Celgar Pulp Mill Expansion Panel Recommendations, Westar Hog Fuel Options Study, attaching BC Environment Briefing Note from March 7, 1991 (30 April 1991), at Canada Bates 163876.

<sup>6</sup> C-308, Inter-office Memorandum from Niall McMillan to Peter Ostergaard re: Celgar Pulp Mill Expansion Panel Recommendations, Westar Hog Fuel Options Study, attaching BC Environment Briefing Note from March 7, 1991 (30 April 1991), at Canada Bates 163876.

<sup>7</sup> The Celgar Environmental Advisory Group, in accordance with the Expansion Review Panel’s Recommendation number 47, was a group of local citizens tasked with monitoring how well Celgar was fulfilling commitments made during the 1990 public hearings held by the Celgar Expansion Review Panel.

<sup>8</sup> C-309, “Modernization Environmental Objectives,” Celgar Environmental Advisory Group Meeting (1 February 1995), at Canada Bates 164392.

Power's grid."<sup>9</sup> Even the title of the document, "Modernization *Environmental Objectives*," (emphasis added), confirms that when I was speaking about energy self-sufficiency, it was from the environmental perspective. Simply, I was referring to how much of the wood waste or organic material would be devoted to energy generation, as opposed to merely becoming pollution-creating waste.

24. I would also note that aside from the monitoring element of the alleged commitment, I was also involved in the negotiation of Mercer's 2009 Energy Purchase Agreement ("EPA") with BC Hydro. There, too, I do not recall BC Hydro or any Canadian authorities, including the British Columbia Utilities Commission or the Ministry of Energy, making any reference to the existence of an energy self-sufficiency commitment through the Ministers' Order.

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The foregoing statement is truthful and accurate to the best of my knowledge and belief.  
Executed in Nelson, British Columbia, on the 12 day of December, 2014.

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James McLaren, P. Eng.

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<sup>9</sup> C-309, "Modernization Environmental Objectives," Celgar Environmental Advisory Group Meeting (1 February 1995), at Canada Bates 164392.