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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

EXPERT REPORT OF DAVID AUSTIN, ESQ.

15 December 2014

I. PERSONAL BACKGROUND AND QUALIFICATIONS AS EXPERT

1. I am a Canadian lawyer with over thirty years of legal experience. My current position is Associate Counsel to Clark Wilson LLP, a Canadian law firm located in Vancouver, British Columbia. I received my law degree in 1976 from the University of British Columbia and have been a member of the Law Society of British Columbia since 1979, and am a Member of the Canadian Bar Association. My *curriculum vitae*, which details my professional background, is attached.

2. I am a member of the Energy and Natural Resources and Infrastructure, Construction and Procurement Groups at Clark Wilson LLP. I specialize in the field of energy, and electricity in particular, and structuring private public partnership infrastructure projects, such as roads, bridges, water, and wastewater plants.

3. I have appeared frequently before Canadian and British Columbia regulatory bodies on energy matters. I have been counsel before the British Columbia Utilities Commission (the "BCUC"), and have represented clients as counsel on matters with the Ministry of Energy and Mines (the "Ministry of Energy") and the Ministry of Environment. I also have extensive experience with energy project development, such as corporate structures, project finance, intertie access and formation of government policy. I advised on the development of B.C.'s first independent power project and wind farm.

4. In addition to my energy and electricity practice in British Columbia, from 1986 to 1989, I practiced law in London, England, advising on international capital market and banking transactions, including direct debt and debt/equity issues, commercial paper programs, swaps and equipment leasing. I very actively participated in the development of the first securitizations in the London market.

5. I write and speak frequently on issues related to the regulation of energy and electricity. I am also a speaker at numerous energy-related conferences in the U.S. and Canada and a regular contributor to print and broadcast media in my areas of expertise. In 2010, I was awarded a lifetime achievement award by the Clean Energy Association of British Columbia. I was a member of the British Columbia Task Force on Electricity Market Reform, and am a former Director of the Independent Power Association of British Columbia.

II. OVERVIEW OF THE EXPERT REPORT

6. I have been asked by counsel for Mercer to provide an independent expert report regarding whether a Ministers' Order signed on 23 May 1991 by British Columbia Minister of Energy, Mines and Petroleum Resources, Jack Weisgerber and British Columbia Minister of Environment Dave Mercier (the "Ministers' Order" or "Order") imposed obligations on the Celgar Pulp Company ("Celgar") and Mercer as its successor in interest, to be energy self-sufficient. The Ministers' Order approved a 12 October 1990 application for an Energy Project Certificate (the "Application") by Celgar to construct and operate a thermal electric power plant, as a part of a proposed expansion of the Celgar Pulp Mill at Castlegar (the "Mill").

7. In my view, the Order did not impose any obligations on Celgar with respect to energy self-sufficiency, including as to either the generation or use of electricity.¹ Canadian law requires that when the government seeks to impose regulatory obligations, it must use "clear language," which simply is not the case here. The record here consists of multiple vague references by Celgar to terms like "energy," "power," and "self-sufficiency" as applied to the

¹ In this expert report the term "energy" includes the generation and use of electricity. Because the Ministers' Order under discussion in this report is so vague as to what it is that is supposedly being regulated, *e.g.*, energy in its broadest sense, the use of energy at the Mill, or the electricity produced or provided by the thermal electric power plant, the report doesn't continuously repeat the phrase "energy self-sufficiency, including the generation or use of electricity." Instead, the terms "self-sufficiency" or "energy self-sufficiency" are often used where the context permits.

thermal electric power plant specifically, or the Mill generally. Celgar's statements about anticipated self-sufficiency, which vary from "up to 90%" to "100%," are in the form of estimates. The Order does not clarify Celgar's vague terminology and internally inconsistent numbers, nor does the Order impose clear, defined energy-related obligations upon Celgar.

8. The following are the key conclusions of this report:
 - a. Celgar never made any commitment to self-supply a particular level of electricity by either using its self-generated electricity in a specific fashion, or by generating a particular amount of electricity.
 - b. The Ministers' Order imposes no requirement on Celgar of energy production, self-sufficiency, or use.
 - c. Assuming *arguendo* that British Columbia ("BC" or the "Province") had intended to impose a self-sufficiency commitment in 1991, the relevant regulatory framework and market conditions have changed in the intervening years, such that any commitment would no longer be effective. Nothing in the Application or the Order suggests that Celgar agreed to be treated differently than other pulp mills with regard to access to embedded cost utility electricity, self-generation levels, or the use of its self-generated electricity, once competitor pulp mills were allowed to sell self-generated electricity at market prices.
 - d. Canada's arguments regarding the purported commitment are at odds with the positions that the Province has taken elsewhere regarding restrictions on the ability of a self-generator to sell its self-generated electricity.
 - e. As a matter of Canadian law, the Ministers lacked the authority to impose any energy self-sufficiency requirement on a thermal electric power plant.

III. THE RELEVANT LEGAL FRAMEWORK FOR CELGAR'S APPLICATION AND THE MINISTERS' ORDER

9. The version of the Utilities Commission Act of British Columbia (1980) ("UCA") applicable in 1991, provided, among other things, for a review and certification process for "regulated projects."² These included both "thermal electric power plants," such as Celgar's proposed 50 MW expansion project, and much larger "energy use projects" that were subject to a greater degree of regulation, such as the regulation of energy produced and used at the facility.³

10. Regulation 388/80, which was issued by the Minister of Energy under power delegated to that Minister under the UCA, determined the legally-required content of an application for an Energy Project Certificate ("EPC").⁴ To enable regulators to understand the context of an application, Regulation 388/80 required applicants to submit "a description of the project, its purpose and cost, including all ancillary or related facilities that are proposed to be constructed, owned or operated by the applicant."⁵

² R-95, British Columbia Ministry of Energy, Mines and Petroleum Resources, Guide to the Energy Project Review Process (1982) ("Guide to the Energy Project Review Process"). Appendix 1 to this Guide includes the relevant sections of the UCA and B.C. Regulation 388/30, which is entitled "Application Requirements Under Section 18 of the Utilities Commission Act." One of the UCA sections outlined in the Guide to the Energy Project Review Process is Section 17(1), which provides: "No person shall, except to the extent that he is authorized to do so under section 19, construct or operate a regulated project except in accordance with any energy project certificate or energy operation certificate."

³ R-95, "Guide to the Energy Project Review Process." Appendix 1UCA Section 16 and 16(f) provides that a "regulated project" includes: "a thermal electric power plant that has a capacity of 20 MW or more of electricity." Section 16 defines an "energy use project" as one that uses, converts, or processes an energy resource (such as electricity and natural gas) at a rate of more than 3 petajoules ("PJ") a year.

⁴ R-95, "Guide to the Energy Project Review Process," Appendix 1, B.C. Regulation 388/30, entitled "Application Requirements."

⁵ *Id.*, Appendix 1, B.C. Regulation 388/30, Section 1(b)(i).

11. When considering an application for an EPC, the Minister of Energy had three options under then-Article 19 of the UCA: (1) refer the matter to the BCUC for review, (2) address the application as one seeking a certificate of public convenience and necessity, or (3) with the concurrence of the Minister of Environment, exempt, through issuance of a ministerial order, the construction and operation of such power plant from provisions of the UCA.⁶ The Minister of Energy also had the authority to impose conditions on the relevant project that were in the public interest.⁷

IV. CELGAR'S APPLICATION FOR AN ENERGY PROJECT CERTIFICATE AND THE MINISTERS' ORDER

12. Prior to submitting the Application, Celgar participated in two review processes. The first was a "Major Project Review Process," which was conducted by the provincial government to "provide a comprehensive assessment of both the environmental and socio-economic effects of the proposed expansion."⁸ The other was a joint federal and provincial review of the proposed Mill expansion and modernization plan by the Celgar Expansion Review Panel, which essentially replaced the Major Project Review Process⁹. Canadian authorities launched the joint review to reduce the duplication of effort arising from the constitutional split in jurisdiction over environmental matters in Canada between the federal and provincial governments. Canadian authorities did not delegate any decision-making authority to the reviewers in either process. Pursuant to the Ministers' mandate, the role of the reviewers was

⁶ *Id.*, Appendix 1, Article 19(1).

⁷ *Id.*, Appendix 1, Article 19(3).

⁸ Counter-Memorial, ¶ 173.

⁹ C-341, B.C. Ministry of Environment, News Release: Ministers Name Panel to Review Celgar Pulp Mill Expansion (28 June 1990).

limited to providing advice to the federal and provincial governments.¹⁰ Both review processes focused on the environmental and socio-economic effects of modernization and expansion plan.

13. Celgar then applied for an EPC on 12 October 1990, in accordance with the requirements of Section 18 of the UCA and Regulation 388/80. The Application notes that Celgar's critical objectives for the proposed expansion were environmental:

This project was developed to solve the pollution problems with the existing mill. In order to resolve these problems effectively it was deemed necessary to replace a major part of the plant. The cost of this resulted in an uneconomic plant in terms of being competitive in the world market. Consequently the decision was made to design a mill that would use the economically available fibre, meet the current known and expected environmental standards and result in an economically viable operation for now and in the future.¹¹

14. I have reviewed Celgar's Application carefully. Most of the material that the company included in the Application concerned environmental issues or the pulp making process. The Application also included several imprecise references to "energy" related matters, but the Application offers no details on energy self-sufficiency. In the few details that Celgar provided, it noted that it planned to shut down the existing recovery boiler and install a new recovery boiler to burn the black liquor produced at the plant, and that the steam produced by the boiler would be passed through a turbo-generator to make electricity. After describing some of its processes, Celgar projected that the new generator "will under normal conditions supply 100% of the

¹⁰ C-340, Federal and Provincial Government Responses to Recommendations of the Celgar Expansion Review Panel (December 1992), at Canada Bates 163641-163643.

¹¹ R-97, Affidavit of the General Manager of Celgar, Robert W. Sweeney, October 12, 1990 and Application for an Energy Project Certificate (E.P.C.A.) under section 18 of the Utilities Commission Act, Celgar Pulp Company ("Celgar 1990 Energy Project Certificate Application"), at 19.

modernized mill's electrical power requirements.”¹² Celgar also stated: “It is estimated that the expanded mill will require approximately 50 megawatts of power and will be capable of generating 50 megawatts, which will make the mill 100% self-sufficient under normal operating conditions. A tie line to the local utility will still be retained.”¹³

15. Celgar similarly did not make a commitment to energy self-sufficiency, much less a commitment in perpetuity, as part of the Major Project Review or the Celgar Expansion Review processes, nor did the federal or provincial regulators impose such a condition. In describing the “mill's electrical power requirements,” Celgar provided the following estimate, which was at least 10 percentage points lower than the 100 percent projection it provided in its separate Application soon thereafter: “A turbo-generator (31) will be installed to provide up to 90% of the mill's electrical power requirements. The remaining power will be drawn through a tie-line to the local utility.”¹⁴

16. The Minister of Energy, with the concurrence of the Minister of Environment, approved Celgar's Application by issuing the Ministers' Order on 23 May 1991.¹⁵ The Order included several conditions. Notably, the Order provided that Celgar was to “...cause the project to be designed, located, constructed and operated in accordance with: (a) the Application, (b) undertakings made by or on behalf of Celgar set forth in the Celgar Pulp Mill Expansion Stage II reports, dated July 1990, in compliance with the British Columbia Major Project Review Process

¹² R-97, Celgar 1990 Energy Project Certificate Application, at 12.

¹³ *Id.*, at 13 (emphasis added).

¹⁴ R-102, Celgar Pulp Company, Proposed Modernization of Bleached Softwood Kraft Pulp Mill Castlegar, B.C, Stage II Report, Volume 1, Overview and Environmental Summary, July 1990, s. III.3, at 17. In a later part of the same submission, Celgar includes the estimate of 90% without the “up to” formulation. *Id.*, at 35. Celgar does not explain why in one section it included “up to 90%” and in another “90%.”

¹⁵ R-100, Ministers' Order, In the Matter of an Application by Celgar Pulp Company for an Energy Project Certificate for the Celgar Pulp Mill Expansion (23 May 1991), at 1–2.

and the federal Environment Assessment and Review Process,” and (c) material submitted during the 1990 hearings on the project.¹⁶ The Order also required Celgar to, among other things, obtain and comply with all applicable licenses, permits and regulations, as well as to comply with the final recommendations of the Celgar Expansion Review Panel, and the provisions in the Waste Management Act, the Water Act, the Health Act, and the by-laws of the Central Kootenay Regional District and the City of Castlegar. The aforementioned recommendations were attached to the Order but did not contain any references to energy self-sufficiency.¹⁷

V. ANALYSIS OF CANADA’S CLAIMS OF AN OBLIGATION OF SELF-SUFFICIENCY

A. Celgar Made No Self-Sufficiency Commitment In Its Application And The Ministers Did Not Impose Any Such Commitment

17. Importantly, Celgar’s Application used — but did not define — terms such as “power,” “self-sufficient,” “requirements,” or “normal operating conditions.”¹⁸ It did not tie such terms to statutes, regulations, orders, energy industry documents, or even to the specifics of its own expansion plan. With no context or definitions, it is *impossible* to know what Celgar intended or what the Ministers actually might have considered to be the company’s undertakings, if any. In my experience as an energy industry lawyer, the term “energy” includes not only electricity, but also other energy sources such as natural gas, which I understand was frequently used at the Mill. The Application does not discuss any of these nuances and the use of these terms is not consistent with generally accepted utility and regulatory practice. The Application is

¹⁶ *Id.*, at 2.

¹⁷ The language in the Ministers’ Order which mandated the “design{ }, locat{ation}, construct{ion} and operat{ion}” of the thermal electric power plant in accordance with Celgar’s Application and its undertakings elsewhere was included to make clear what material the Ministers’ Order was addressing. These words did not transform Celgar’s estimates and projections into commitments either at the time of the Order or at later times after the regulatory environment had shifted.

¹⁸ R-97, Celgar 1990 Energy Project Certificate Application, s. (b).

unclear on fundamental issues such as the relevant type of energy, and its source — whether the thermal electric generating plant, the pulping process, or some combination.

18. On its face, the Ministers' Order does not clarify any of these issues which Celgar's Application did not address. The Order does not even mention energy or electricity issues, clarify or expressly impose any energy-related obligations, nor does it create any system of measurement, reporting, or oversight over electricity or energy issues. For example, the Order did not require Celgar to provide the provincial authorities with documentation that showed how much electricity Celgar received from its utility West Kootenay Power and Light (now FortisBC), nor the corollary requirement to provide the provincial government with documentation about Celgar's energy or electricity generation or use. There also is nothing in the Ministers' Order pertaining to the Ministry of the Energy's right to inspect the thermal electric power plant. By contrast when the provincial government really wanted to regulate Celgar it was very clear and concise and established a monitoring and reporting network. The amended permits issued to Celgar under the Waste Management Act are examples of the way in which the provincial government actually regulates.¹⁹

19. While Canada contends broadly that Celgar committed to be energy self-sufficient, Canada itself nowhere defines what it believes that such a commitment implies. Does Canada contend that Celgar committed to achieve a specific level of generation, and, if so, what is that level? Alternatively, does it contend that Celgar committed to maintaining its electric load at a specific level, and if so, what level? Does it contend that Celgar committed always to use its self-generated electricity first for self-supply? Does it contend Celgar agreed to give up access to FortisBC embedded cost power to some extent? Does it contend that Celgar agreed to be treated

¹⁹ C-295, May 1991 Environment Ministry Permit for Celgar Mill (May 1991).

differently than other pulp mills if the regulatory environment for self-generation shifted, as it did? Canada's Counter-Memorial answers none of these questions, because neither Celgar's Application nor the Ministers' Order answers them. All are questions that necessarily would have to have been answered if there was any energy-related obligation committed to or imposed, and the fact they were never addressed buttresses my conclusion that Celgar is under no generation or usage obligation.

20. Indeed, far from specifically defining any obligation, the Ministers' Order introduced even more confusion into the issue of the supposed self-sufficiency commitment, because it mentioned not only the Application but also the Stage II reports where Celgar used estimates other than those used in the Application itself.²⁰ In the Stage II reports, Celgar stated that "{a} turbo-generator will be installed to provide up to 90% of the mill's electrical power requirements."²¹ This estimate is different from that which Celgar provided in the Application (90 percent versus 100 percent), and is not even a set figure — the estimate is "up to" 90 percent.²² This "up to" language leaves entirely open what the actual level of commitment to self-sufficiency might be, and thereby makes any effort to identify actual ministerial intent total

²⁰ R-100, Ministers' Order, In the Matter of an Application by Celgar Pulp Company for an Energy Project Certificate for the Celgar Pulp Mill Expansion (23 May 1991).

²¹ R-102, Celgar Pulp Company, Proposed Modernization of Bleached Softwood Kraft Pulp Mill Castlegar, B.C, Stage II Report, Volume 1, Overview and Environmental Summary, July 1990, s. III.3, at 17.

²² The Stage II reports also say: "{t}he hog fuel will be burned in the power boiler (32) to produce steam and electrical power." See R-102, Celgar Pulp Company, Proposed Modernization of Bleached Softwood Kraft Pulp Mill Castlegar, B.C, Stage II Report, Volume 1, Overview and Environmental Summary, July 1990, s. III.3, at 13. This is in conflict with the "...under normal conditions supply 100% of the modernized mill's electrical power requirements" assertion in the Application under the heading "Chemical Recovery". R-97, Celgar 1990 Energy Project Certificate Application.

guesswork.²³ The Order's references to documents which make contradictory estimates make it *even less likely* that there is a binding commitment of self-sufficiency. The varying estimates simply cannot be reconciled with one another, making it impossible to conclude that any commitment was intended. Notably, the Celgar Expansion Review Panel developed fifty recommendations that the Ministers' Order included as an attachment.²⁴ These were focused on environmental issues. None mentioned any energy-related commitments, much less a self-supply commitment.²⁵

²³ Celgar then went on to estimate the energy self-sufficiency of the modernized mill as distinct from the very vague statement about the thermal electric plant as follows:

3. The government seeks an indication that energy alternatives such as cogeneration, conservation and on-site woodwaste electrical generation will be thoroughly explored.

The modernized mill, as designed, will be 90% energy self-sufficient Only a small amount of electrical energy will be purchased to operate the modernized mill, in addition to the stand-by power for start-up requirements. Natural gas will be purchased for the lime kiln and as supplementary fuel for the power and recovery boilers. Celgar will continue to explore all energy alternatives that it believes will help it to achieve more complete self-sufficiency in energy and to maximize the efficiency of its energy usage.

R-102, Celgar Pulp Company, Proposed Modernization of Bleached Softwood Kraft Pulp Mill Castlegar, B.C., Stage II Report, Volume 1, Overview and Environmental Summary (July 1990), s. III.3, at 35 (emphasis in original)

²⁴ R-100, Ministers' Order, In the Matter of an Application by Celgar Pulp Company for an Energy Project Certificate for the Celgar Pulp Mill Expansion (23 May 1991).

²⁵ As a separate matter, I note that representatives from Celgar countersigned the Ministers' Order. See R-100, Ministers' Order, In the Matter of an Application by Celgar Pulp Company for an Energy Project Certificate for the Celgar Pulp Mill Expansion (23 May 1991). Such signatures have no legal significance and does not change any of my conclusions in this expert report. The Ministers had the discretion to issue the Order whether Celgar agreed with it or not. There is no provision in the UCA or Regulation 388/80 that pertains to Celgar's execution of the Order. Moreover, the signatures do not change the fact that Celgar expressed no clear, measurable self-sufficiency commitment in the underlying Application and Stage II reports, and that the Ministers did not impose any such commitment through their Order.

B. Canadian Law Requires Clarity When Regulating the Private Sector

21. The general and vague language used by Celgar, and the broad, non-specific language in the Ministers' Order upon which Canada relies, simply are insufficient under Canadian law to create any binding obligation.

22. Under Canadian law, government regulators have limited authority to restrict private sector rights. The Supreme Court of Canada has explained: “[E]xplicit statutory language is required to divest persons of rights they otherwise enjoy at all.”²⁶ Indeed, the Supreme Court of Canada has discussed the relevant principles as follows:

In more modern terminology the courts require that, in order to adversely affect a citizen's right, whether as a taxpayer or otherwise, the Legislature must do so expressly. Truncation of such rights may be legislatively unintended or even accidental, but the courts must look for express language in the statute before concluding that these rights have been reduced. This principle of construction becomes even more important and more generally operative in modern times because the Legislature is guided and assisted by a well-staffed and ordinarily very articulate Executive. The resources at hand in the preparation and enactment of legislation are such that a court must be slow to presume oversight or inarticulate intentions when the rights of the citizen are involved. The Legislature has complete control of the process of legislation, and when it has not for any reason clearly expressed itself, it has all the resources available to correct that inadequacy of expression. This is more true today than ever before in our history of parliamentary rule.²⁷

23. Under Canadian law, the Ministers' Order is treated no differently than a statute for purposes of these requirements, because it was issued under the express authority of the UCA and Regulation 388/80. Sections 1 and 41 of the Interpretation Act of British Columbia make clear that any execution of a power conferred under an Act (which would include the provincial

²⁶ C-335, *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, at 61.

²⁷ C-336, *Morguard Properties Ltd. v. City of Winnipeg*, {1983} 2 SCR 493, at 509.

Order) has the force of law, and is therefore subject to judicial oversight and review in the same way as a statute.²⁸

24. The Supreme Court of Canada has held that there is a presumption that the legislature does not intend to confiscate property, or encroach upon rights, unless the objects of an act clearly imply or express that intention.²⁹ When legislative or regulatory language, construed literally, would trigger unjust consequences, the courts, in the absence of express words of intention, will take the view that the legislature could not have intended such consequences. If one construction will do injustice and another will avoid the injustice, the courts will adopt the latter in preference to the former.³⁰

25. The Canadian courts have also made it clear that electricity is private property that can be bought and sold. The British Columbia Court of Appeal, B.C.'s highest court, recently dealt with this issue in a case involving the Aluminum Company of Canada's ("Alcan") right to sell its self-generated electricity.³¹ In this important case that is directly relevant to this arbitration, Alcan and the Province of British Columbia entered into an agreement in 1950 under which the Province provided Alcan with economic access to public water resources, and Alcan agreed to build a hydro-electricity project, which ultimately had 900 megawatts of generation, and an aluminum smelter, at Kitimat, an industrial town in British Columbia. Litigation ensued years later when the town sought to restrict Alcan's ability to sell its self-generated electricity, at

²⁸ C-322, *Interpretation Act* {RSBC 1996} c.238, ss. 1 & 41(2).

²⁹ C-323, *Lamontagne v. Quebec Railway, Light & Power Co.* (1914), 1914 CarswellQue 17.

³⁰ C-337, *Shell Canada Ltd. v. Burnaby/New Westminster Assessor, Area No. 10* (1989), 64 D.L.R. (4th) 227 (B.C.C.A.).

³¹ C-324, *Kitimat (District) v. British Columbia (Minister of Energy & Mines)* ("Alcan"), BCCA 81, 2008 Carswell BC 316.

a time when Alcan no longer operated the aluminum facility at full capacity, and cutbacks at the plant had led to job losses in the town.

26. The Province sided with Alcan, arguing that a restriction on Alcan's sales of electricity could arise from the Agreement only based on "clear language" and "mandatory language such as 'shall' and 'will'" ³² The British Columbia Court of Appeal agreed with the Province's argument that precision was a necessary element to any commitment, and concluded that Alcan was free to sell its self-generated electricity to third parties of Alcan's choosing. The Court of Appeal also ruled that "it is obvious that when the Agreement was made in 1950 there was no foreseeable use for the power that could be generated from the watershed except for the production of aluminum, as the preamble records. Any sale of power contemplated then could only have been localized."³³ The Court of Appeal explained:

It may be that, had there been at the time a foreseeable use for the power Alcan was to be licensed to generate apart from the production of aluminum, some restrictions on the sale of the power may have been sought and negotiated. The sale of power could perhaps have been tied to the economics of aluminum production at the Kitimat smelter. But in 1950 that was not a consideration. Alcan was not then and is not now precluded from selling its power rather than using it to operate the smelter.³⁴

27. The position taken by Canada in the *Alcan* litigation in support of the necessity of clarity, transparency, and certainty in identifying a restriction on the sale of self-generated electricity is directly at odds with Canada's construction of the Ministers' Order in this arbitration. If Celgar (or, for that matter, the Province) actually had intended the statements in the

³² C-304, Factum of the Respondents Minister of Energy and Mines and the Attorney General of British Columbia (30 November 2007) ("BC's Factum"), ¶ 87.

³³ C-324, *Alcan*, ¶ 35.

³⁴ *Id.*, ¶ 37.

Application and the Stage II reports regarding self-sufficiency to create a commitment for Celgar to self-supply its energy needs in perpetuity, it should have, as the Province expressly argued in *Alcan*, employed “clear language” and used clear mandatory language regarding the particular requirements.³⁵

28. The Application utilized language that was on its face, as the Province argued in *Alcan*, “more in the nature of an expectation or anticipation than a restriction”³⁶ rather than a commitment, and therefore Canada may not actually consider such language to create a commitment.

29. The same conclusion about the need for clarity can be drawn from principles of Canadian contract law, which provides that obligations must be “clear and certain,”³⁷ and Canadian courts have held that obligations must be “stated with reasonable specificity.”³⁸ As a matter of basic contractual interpretation, vague material terms will preclude the finding of an enforceable commitment.³⁹

30. With regard to the Application, there was no “clear language”⁴⁰ regarding the single most material element of such a commitment: the amount of energy or electricity that

³⁵ BC’s Factum, ¶ 87.

³⁶ *Id.*, ¶ 88.

³⁷ C-338, *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2010 MBQB 44, aff’d 2011 MBCA 80, ¶ 35.

³⁸ *Id.*

³⁹ See, e.g., C-339, 304498 *British Columbia Ltd. v. Garibaldi Whistler Development Co.* (1989), 39 B.C.L.R. (2d) 328 (C.A). *Garibaldi* was an appeal from a judgment that dismissed an action for specific performance of an agreement for the purchase and sale of land. The appeal was dismissed as the B.C. Court of Appeal would have had to strain, if necessary by implying terms, to give effect to the bargain. The court declined to enforce, by way of a decree of specific performance, an apparent bargain when the parties’ intentions were so inartistically expressed that their respective obligations under a wholly executory instrument were unclear.

⁴⁰ BC’s Factum, ¶ 87.

Celgar would be required to self-supply, and the conditions under which it would be required to do so. The Order left basic questions unanswered, such as: Was the Mill committing to a generation requirement or a usage requirement? How much electricity — exactly — is the thermal electric power plant supposed to generate? How much is Celgar's self-supply obligation? What would be the consequences for failing to meet self-use obligations? If Celgar had intended the statements in the Application to constitute a commitment to self-sufficiency, the very material terms described above would have needed to be addressed either in the Application or in the Ministers' Order.

C. Even if the Ministers' Order Imposed An Obligation In 1991, The Obligation Would No Longer Be Effective As A Result of Ensuing Regulatory and Market Developments

31. The Application and Ministers' Order also must be construed in the context of the regulatory framework in place at the time they were written. At the time of the Ministers' Order, Celgar had no commercially viable option for its self-generated electricity other than to use it to serve the Mill's load. Celgar could not sell its self-generated electricity into the market, because there was no open access to transmission lines in western Canada and the United States, and Celgar did not own any such lines. The only potential buyer for Celgar's electricity at the time was the electric utility to which Celgar was interconnected, West Kootenay Power (now FortisBC). But West Kootenay was under no obligation to purchase electricity from Celgar or to let Celgar use its transmission network to make deliveries to third parties. At the time, there were no electricity brokers, renewable electricity portfolio standards, or targets for the reduction of greenhouse gas emissions. Utilities conducted almost all of the electricity trading on a utility-to-utility basis; Celgar's generation was effectively stranded. Celgar had no recourse to open market sales of the electricity it generated as would be the case today.

32. Similarly, nothing in the Application or the Order suggests that Celgar agreed to be treated differently than other pulp mills if the regulatory regime changed. Thus, as to the subjects of the arbitration, Celgar was not agreeing to be discriminated against with regard to access to embedded cost utility electricity, self-generation levels, or the use of its self-generated electricity, once competitor pulp mills were allowed by the Province to sell a portion of their self-generated electricity at market prices.

33. But given the changes in technology and the regulatory environment, including the opening of access to transmission in 1996,⁴¹ restrictions over activities that were once practically impossible do not make sense absent clear policy reasons and actual regulation by government agencies responsible for the restrictions. In this regard, the BC Court of Appeal's decision in *Alcan* is very instructive when it concluded: “[I]t was obvious that when the Agreement was made in 1950 there was no foreseeable use for the power that could be generated from the watershed except for the production of aluminum, as the preamble records. Any sale of power contemplated then could only have been localized”⁴² The Court of Appeal went on to explain that change in circumstances needed to be taken into account in evaluating obligations undertaken and rejected Kitimat's effort to limit Alcan's sales of electricity.⁴³

34. In the years since the Order was issued in 1991, the electricity sector has changed dramatically. Changes such as open access transmission in western Canada and the United States, the advent of power marketers or aggregators or brokers such as BC Hydro's export subsidiary Powerex, and the introduction of green or renewable electrical generation portfolio

⁴¹ R-314, BCUC, Order G-67-96 and Decision, in the Matter of an Application by BC Hydro for Approval of Wholesale Transmission Services, 25 June 1996.

⁴² C-324, *Alcan*, ¶ 35.

⁴³ See C-324, *Alcan*, ¶ 35.

standards in states such as California, have greatly changed the landscape of the electricity industry. Moreover, since the time of the Order, the BCUC has regulated extensively in the area of the production of energy from self-generators through BCUC Orders such as Order G-38-01 and G-48-09, which establish entirely new regulatory frameworks regarding the sale of self-generated electricity.

35. Importantly, in the *Alcan* case the highest court in British Columbia accepted the vigorous arguments of the Government of British Columbia that changes in circumstances must be taken into account when seeking to interpret an alleged earlier obligation, particularly when the alleged obligation is vague or subject to debate. It is ironic in the wake of *Alcan* that British Columbia would now be endorsing an argument that a 1991 Order, which is at best vague, should be used to restrict the sale of electricity in the context of an entirely different regulatory regime. In any event, nothing in the Application or the Order suggests that Celgar agreed to be treated differently than other pulp mills with regard to access to embedded cost utility electricity, self-generation levels, or the use of its self-generated electricity, once competitor pulp mills were allowed to sell self-generated electricity at market prices.

D. A Ministers' Order Imposing Self-Sufficiency Requirements On The Mill Would Have Been Outside Of The Scope Of Their Regulatory Authority Under The UCA, And As Such, Could Not Have Created Any Commitments

36. Canada's argument regarding the existence of a self-supply commitment also fails because it is inconsistent with the law of British Columbia applicable in 1991, which granted the Environment and Energy Ministers the authority to review Celgar's proposed thermal energy power plant. The UCA provided for the regulation of public utilities and the review and certification process for new or expanded generation or projects that used large quantities of

various forms of energy, including electricity.⁴⁴ Through its Application, Celgar was seeking the Minister of Energy’s approval for a “thermal electric power plant” with a capacity of 20 MW or more of electricity.⁴⁵ The UCA did not provide the Ministers any authority to regulate the Mill’s *use* of the electricity generated by this kind of power plant.

37. If Celgar’s proposed project had been much larger, pursuant to the terms of the UCA, it would have qualified as an “energy use project,” which would have been subject to oversight and regulation regarding the energy such a project produces and uses.⁴⁶ Per the standard in the UCA, an energy use project would use, convert, or process an energy resource (such as electricity or natural gas) at a rate of more than 3 petajoules (“PJ”) a year.⁴⁷ For context, this is over twice the energy consumption at the Celgar Mill, as it currently stands — after several expansions and revitalization initiatives.

38. Thus, the *only* portion of the Mill modernization project that was subject to regulation under the UCA was the thermal electric power plant. With a proposed capacity of approximately 50 megawatts, its size exceeded the 20 megawatt threshold for regulation specified in the UCA. The Mill’s pulp making process, however, was too small to consume the threshold 3 PJ of energy resources annually in order to qualify for regulation as an energy use project. If the Province had wanted the Mill’s energy *use* to be regulated, for example, by requiring it to be

⁴⁴ R-95, “Guide to the Energy Project Review Process,” Appendix 1, Article 16 (definition of “energy use project”).

⁴⁵ To put this into perspective, at the time, the largest electric utility in British Columbia owned about 10,000 MW of generation.

⁴⁶ R-95, “Guide to the Energy Project Review Process,” Appendix 1, Article 16 (definitions of “energy use project” and “regulated project”) and Article 17(1).

⁴⁷ R-95, “Guide to the Energy Project Review Process,” Appendix 1, Article 16 (definition of “energy use project”).

energy self-sufficient, the Province would have had to have set in the UCA a threshold for “energy use projects” much lower than 3 PJ.

39. In this respect, despite Canada’s arguments, the term “energy self-sufficiency” has no meaning when applied to a thermal energy power plant, which was the only matter before the Ministers. This generating plant supplied and produced electricity, an energy resource consumed in the pulp making process. The Ministers thus were not regulating the pulp making process, and in fact lacked the authority to do so because of the small size of the project presented by Celgar.

40. I have also been asked to comment on Canada’s suggestion that BC Hydro should have < [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] >⁴⁹

VI. CONCLUSION

41. For the reasons stated herein, in my view, the 1991 Ministers’ Order did not impose any obligations on Celgar with respect to energy self-sufficiency including the generation or use of electricity.

⁴⁸ Counter-Memorial, ¶¶ 256-260.

⁴⁹ My opinion is based on my review of C-221, the electricity purchase agreement between BC Hydro and Zelstoff Celgar Limited Partnership dated January 27, 2009 and C-46, FortisBC, Electric Tariff BCUC No. 2 for Service in the West Kootenay and Okanagan Areas: Terms and Conditions and Rate Schedules.

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The foregoing statement is truthful and accurate to the best of my knowledge and belief.

Executed in Vancouver, British Columbia, on the 15 day of December, 2014.

David Austin, Esq.