

BEFORE THE ADDITIONAL FACILITY OF THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTE (ICSID)

BETWEEN:

MERCER INTERNATIONAL INC.

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

ICSID CASE NO. ARB(AF)/12/3

WITNESS STATEMENT OF JON O'RIORDAN

25 March 2015

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I, Jon O’Riordan, declare as follows:

1. I was born on [REDACTED]. I presently reside at [REDACTED].
2. I am currently Adjunct Professor, School of Community and Regional Planning, University of British Columbia. I am also an Advisor at the POLIS Institute on Ecological Governance at the University of Victoria and Research Director for Simon Fraser University’s Adaptation to Climate Change Team.
3. I have a PHD in Geography (UBC, 1969), and two Masters’ Degrees in Geography (UBC, 1966), (Edinburgh, 1964). My post-graduate studies focussed on water resource management.
4. From 1969 until 1973, I was a Water Resource Planner, Federal Department of Energy, Mines, and Resources. From 1973 until 1978, I was Director, Resource Management, Environment and Land Use Secretariat, Province of British Columbia.
5. I held several senior Director positions with the BC Ministry of Environment through the 1980s including the Director of Environment Assessment.
6. I was Assistant Deputy Minister, Environmental Programs, BC Ministry of Environment, Lands and Parks from 1989 until 1994.
7. I was Assistant Deputy Minister, Regional Operations, BC Ministry of Environment, Lands and Parks from 1994 until 2001.
8. I was Deputy Minister, Ministry of Sustainable Resource Management from 2001-2004.
9. I attach my *curriculum vitae* as Appendix A.
10. In this witness statement, I will address submissions and positions that the management and representatives of the Celgar pulp mill took in two related proceedings involving the Ministry of Environment in 1990: first, B.C.’s Major Project Review Process, and then a Stage II Review before a joint Federal-Provincial Celgar Expansion

Review Panel. I will also discuss concurrent submissions that the Celgar mill owners made in respect of an application for an Energy Project Certificate, which required review and concurrence between the Minister of Energy and the Minister of Environment.

11. At the relevant time, I was Assistant Deputy Minister, Environmental Programs for the Ministry of the Environment (“Environment”). I had several Ministry Directors reporting to me, including Doug Dryden, Director of Environmental Assessment Branch. I had direct reporting responsibility to the Environment Minister during this time, first John Reynolds, then Cliff Serwa, and then as of April 15, 1991, Dave Mercier.

12. Mr. Dryden was the senior Ministry staff advisor overseeing environmental issues at the Celgar mill. He was a Co-Chair of the Major Project Steering Committee overseeing the proposed Celgar mill expansion. Mr. Dryden was also the drafter of the memorandum I ultimately signed recommending to Minister Mercier that the Ministers’ Order be signed, discussed below.¹

13. My role at the time Celgar applied for an Energy Project Certificate was to advise the Environment Minister of all applicable environmental standards with respect to the Celgar Expansion Project. As Assistant Deputy Minister, I was the most senior person in the Ministry with technical understanding of environmental standards. I had direct contact with the Environment Ministers of the time and met or spoke with them several times per week on the full range of policies under my direct responsibility.

14. I have personal knowledge of the matters described in this witness statement, except where based on information and belief, in which case I indicate the source of the information and my belief that it is true.

15. I have reviewed the documents attached for purposes of preparing this witness statement. I also discussed the matters addressed in my witness statement with Doug Dryden and provided him a copy of the witness statement for his review. His recollection

¹ British Columbia Ministry of the Environment, BC Environment Briefing Note, Application for Energy Project Certificate for the Celgar Pulp Mill Expansion, 16 May 1991, **R-99**.

of events accords with this witness statement. I am a fact witness in this NAFTA arbitration.

A. EXPANSION PROJECT REVIEW

16. By the mid-1980s the Celgar mill had been operating for nearly three decades. Due to age and repair, the mill failed to achieve provincially-mandated effluent and air discharge standards under the *Waste Management Act*. Environment issued a Variance Order to the mill owner in 1986, enabling the mill to discharge waste emissions in excess of permitted requirements on a time limited basis.

17. I will briefly explain Variance Orders. Being subject to a Variance Order is, in essence, like being put on probation. It is negative. It attracts public scrutiny. Only the Minister could grant such an order. For a company, it is a warning that their environmental performance is being closely watched and that they need to develop a plan to come into compliance, thereby ending the need for the Variance Order.

18. The Celgar mill was a prominent polluter in a time period when industrial polluters were attracting public and government attention. As well, the Kootenay region, where the mill is located, has a long local history of community environmental activism. These were the circumstances facing the Celgar mill in the mid-1980s.

19. Celgar's Variance Order was issued in 1986 and was transferred to the new owners of the mill shortly thereafter. The new owners thereafter launched a modernization program that required the company to meet current environmental standards and thus terminate the Variance Order.²

20. In 1990, Environment proposed reductions for discharge of AOX (chlorinated organics) for all pulp mills. Organic chlorines are an extremely toxic by-product of the pulping process. The Celgar mill, like other mills of the time, discharged this hazardous substance into a waterway. The Celgar mill discharged chlorinated organics into the Columbia River, a major fish bearing waterway shared by both Canada and the United

² B.C. Ministry of Environment and Ministry of Regional and Economic Development, Review of Prospectus for Celgar Pulp Mill Expansion, July 1990, p. 2, **R-327**.

States. The Celgar mill would not be able to meet these new requirements without a major upgrade.³

21. The proposal to add a new boiler in the mill upgrade had much promise as Celgar's old bee-hive burner was responsible for a significant amount of air particulate; which was one of the causes requiring Celgar to seek a Variance Order. Instead of burning hog fuel (chips, bark and wood fibre) in the bee-hive, that fuel could be used to generate power and eliminate pollutants under a controlled emission reduction technology: a win- win solution.

22. Celgar representatives advised Environment that there would be little or no economic return from an environmental upgrade alone. As a result, instead Celgar proposed a major capacity expansion in tandem with the environmental upgrade.⁴

B. MILL EXPANSION PROSPECTUS

23. In December 1989, Celgar presented the British Columbia government with a mill expansion Prospectus including environmental and socio-economic impact reports.⁵ The proposed project was subject to what was then called a Major Project Review Process ("MPRP"), administered by a Major Project Steering Committee ("MPSC"). The MPSC was co-chaired by Environment and the Ministry of Regional and Economic Development ("Economic Development"). These two Ministries were supported by representation from several other Federal and Provincial agencies and Ministries including the BC Ministry of Energy, Mines and Petroleum Resources ("Energy"). I was not a member of the MPSC but I was kept aware of the process by my staff, including Mr. Dryden, who was Co-Chair of the MPSC.

24. The idea of proceeding by way of a Prospectus was as follows. It was recognized that to carry out a full proposal for a major project at the outset would be hugely expensive for industry, particularly if the project was not approved and the outlay was not

³ See *Id.*, p. 2, **R-327**.

⁴ See *Id.*, p. 2, **R-327**.

⁵ *Id.*, p. ii and p. 2, **R-327**; and Celgar Expansion Review Panel, Final Report, February 1991, p. 4, **R-330**.

recovered. The Prospectus allowed a proponent, like Celgar, to canvass the major elements of its proposal at a lower expense, test reaction and if the proposal was neither accepted nor rejected, provide further more detailed information requested by the members of the Major Project Review Committee at the following stage (i.e. the so-called Stage II, addressed below).

25. Multiple federal and provincial government agencies were invited to review the Prospectus as were agencies in the United States, and the States of Oregon and Washington. The MPRP sought public input and Celgar hosted open houses in Castlegar and Nelson, BC.⁶

26. Celgar's Prospectus in a section describing kraft pulping as an "Environmental Process" indicated that:

The modernized mill will be up to 90% energy self-sufficient, compared to the existing mill which only provides 11% of its own power. [bold and italics in original]⁷

27. Similarly, the Environmental Impact Assessment that accompanied the Prospectus included the following statement:

The expanded mill will require 52 megawatts, though the mill will generate 47 megawatts, which is 90% self-sufficient for power requirements compared to the existing mill's capability to produce 11% of its requirements.⁸

28. As part of this broad review of the Prospectus by other agencies and ministries, Frank Blasetti of Economic Development requested comments from Energy. Mr. Blasetti was a Co-Chair of the MPSC with Mr. Dryden. Mr. Blasetti had a senior role for Economic Development in overseeing other large economic expansion projects (e.g., mines, ski hill developments, port expansions).

⁶ See B.C. Ministry of Environment and Ministry of Regional and Economic Development, Review of Prospectus for Celgar Pulp Mill Expansion, July 1990, p. ii, **R-327**.

⁷ Celgar Pulp Company, Proposed Modernization and Expansion Project, 1989, p. 7, **R-404**.

⁸ Celgar Pulp Company, Bleached Kraft Mill Expansion, Environmental Impact Assessment, December 1989, ss. 2.2.3, "Steam Production and Power Consumption", p. 13, **R-405**.

29. On January 15, 1990, Peter Ostergaard of Energy communicated Energy's comments to Economic Development, with Environment in copy.⁹ Mr. Ostergaard commented that pulp mill expansions had been identified as a very significant component of new electricity demand in British Columbia in the 1990s. Mr. Ostergaard recommended to Mr. Blasetti that Celgar address in detail the mill's existing and proposed energy requirements including: how much of the mills expanded energy requirement would be generated on site; how much energy would be purchased from West Kootenay Power; and at what cost.

C. MPSC PROSPECTUS REVIEW DECISION

30. The possible outcomes of the MPSC review were:

- project rejection;
- further project review; or
- project Approval-in-Principle.¹⁰

31. In April 1990, the MPSC review decision was announced: Celgar's proposed expansion project required further review before a decision could be made whether to accept or reject the project.¹¹

32. In view of public and agency concerns, the MPSC determined that Celgar needed to provide further information to a federal-provincial panel by way of a so-called "Stage II Report".¹²

33. A requirement that a project proponent move to Stage II was not uncommon. Stage II reviews occurred for a variety of major projects such as mines and ski hill developments. The concept of a Stage II process itself was an idea that as Director of Environmental Assessment for Environment, I helped define when I assisted with policy

⁹ Memorandum from Peter Ostergaard to Frank Blasetti, Proposed Celgar Pulp Mill Expansion, 15 January 1990, **R-101**.

¹⁰ B.C. Ministry of Environment and Ministry of Regional and Economic Development, Review of Prospectus for Celgar Pulp Mill Expansion, July 1990, p. 3, **R-327**.

¹¹ *Id.*, p. 6, **R-327**.

¹² *Id.*, pp. 6-7, **R-327**.

preparation for the 1982 *Utilities Commission Act*. For a project the size and importance of this mill expansion, it was a likely outcome that further due diligence would be required at the Stage II phase.

34. Representatives of Celgar, Economic Development, Environment and other stakeholders met and corresponded on Stage II submissions. See for instance two letters from Mr. Dryden and Mr. Blasetti to Celgar’s Wilf Sweeney dated July 9, 1990, referencing meetings between the parties of May 16, 1990.¹³ Such letters also set out detailed particulars of environmental requirements needing to be addressed in Celgar’s Stage II report.

35. On June 28, 1990, BC Environment and the Federal Environmental Assessment Office issued a joint news release appointing members to the federal-provincial panel. The news release explained that the “[e]stablishment of the review panel is in response to concerns expressed by residents of the area, as well as to meet the requirements of federal and provincial environmental agencies.”¹⁴

36. In July 1990, the MPSC produced a written Review of Prospectus for Celgar Mill Expansion (“Prospectus Review”).¹⁵

37. The Prospectus Review summarized issues and concerns that the public and the government agencies wished to see addressed in further detail in Celgar’s Stage II Report.¹⁶

38. Energy recommended “Approval-in-Principle subject to company agreeing to explore opportunities for power conservation and on-site power generation and company obtaining Energy Project Certificate if necessary.”¹⁷

¹³ *Id.*, Appendix A, **R-327**.

¹⁴ *Id.*, Appendix B, **R-327**.

¹⁵ *See Id.*, **R-327**.

¹⁶ *See Id.*, p. 8, **R-327**.

¹⁷ *Id.*, p.11, **R-327**.

39. “Electrical load displacement and energy conservation” was identified as a significant issue that came to the attention of the MPSC.¹⁸ The Prospectus Review summarized Energy’s request that the “company...forecast the expanded mill’s electricity generation and consumption, and to further explore opportunities for power conservation and on-site power generation.”¹⁹ The Prospectus Review contained the following recommendation:

IT IS RECOMMENDED THAT THE COMPANY BE REQUIRED TO SUBMIT THE REQUESTED INFORMATION TO THE MINISTRY OF ENERGY, MINES AND PETROLEUM RESOURCES AND OBTAIN AN ENERGY PROJECT CERTIFICATE, IF NECESSARY.²⁰
[capitals and bold in original]

D. CELGAR’S STAGE II REPORT

40. In July 1990, Celgar submitted its written Stage II Report in response to the requirements of the MPSC.²¹ In the Stage II Report, Celgar identified twelve “Special Issues and Public Concerns”:

Celgar’s Prospectus Report on its proposed modernization generated many comments and requests for additional information. After reviewing the submissions, the Major Project Steering Committee and the federal agencies identified the following matters as being of particular interest. Celgar’s responses accompany the questions.²²

41. One of the Special Interests / Public Concerns Celgar identified was energy. Celgar summarized the issue and provided its response:

3. The government seeks an Indication [sic] that energy alternatives, such as cogeneration, conservation and on-site wood-waste electrical generation, will be thoroughly explored.

Celgar Response

¹⁸ See *Id.*, p. 15 and p. 20, **R-327**.

¹⁹ See *Id.*, p. 20, **R-327**.

²⁰ See *Id.*, p. 20, **R-327**.

²¹ 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, pp. 1-3, **R-102**.

²² See *Id.*, pp. 35-40, **R-102**.

The modernized mill, as designed, will be 90% energy self-sufficient. This is a large improvement over the existing mill, that produces only 11% of the energy it requires. Only a small amount of electrical energy will be purchased to operate the modernized mill, in addition to stand-by power for start-up requirements. Natural gas will be purchased for the lime kiln and as supplementary fuel for the recovery boilers.

Celgar will continue to explore all energy alternatives that it believes will help it to achieve even more complete self-sufficiency in energy and to maximize the efficiency of its energy use.²³ [bold and italics in original]

42. After Celgar submitted its Stage II report to the B.C. government and the public, the Celgar Expansion Review Panel was appointed pursuant to both the British Columbia Major Project Review Process and the Federal Environmental Assessment and Review Process, as set out in the Review Panel Terms of Reference.²⁴ The panel scheduled public hearings to commence September 20, 1990, with technical hearings commencing October 18, 1990. I discuss this joint federal-provincial review of this project by the Celgar Expansion Review Panel further in Section F below.

43. Celgar continued to engage with government in the summer and early autumn of 1990.

44. On August 16, 1990 Celgar's Wilf Sweeney appeared at a MPSC meeting, and confirmed that the proposed energy cogeneration of the pulp mill expansion would be in the range of 48 MW.²⁵

E. CELGAR'S ENERGY PROJECT CERTIFICATE APPLICATION

45. On August 23, 1990, Peter Ostergaard provided Energy's comments on Celgar's Stage II Report.²⁶ Mr. Ostergaard commented that in addition to this joint federal-provincial review, it appeared that there was also a legal requirement that the energy generation aspect of Celgar's proposal would require approval under the *Utilities*

²³ See *Id.*, pp. 35-36, **R-102**.

²⁴ B.C. Ministry of Environment and Ministry of Regional and Economic Development, Review of Prospectus for Celgar Pulp Mill Expansion, July 1990, p. 3, **R-327**.

²⁵ Letter to Mr. R.C. Wigen, Assistant Project Manager, Celgar Pulp Expansion, 23 August 1990, p. 2, **R-96**.

²⁶ See *Id.*, p. 2, **R-96**.

Commission Act, due to the size of the project (i.e. a thermal electric power plant greater than 20 MW). Mr. Ostergaard explained that Celgar would need to submit an Energy Project Certificate Application (“EPCA”), which would then be disposed of by Energy in concurrence with Environment.

46. Mr. Ostergaard suggested the Celgar supplement its Stage II Report and then submit such information as an EPCA.²⁷ Ostergaard attached a copy of the applicable regulation, a “Guide to the Energy Project Review Process”, and the *Utilities Commission Act*.²⁸

47. I will briefly discuss the *Utilities Commission Act*. I was involved in the policy development of this legislation at the beginning of the 1980s. I assisted with the formulation of the “two green light” system of approvals found in section 19, which necessitated approval of both the Minister of Energy and the Minister of the Environment when exemptions were granted under the *Act*.

48. The *Act* established a review process for major energy projects including thermal power plants of 20 MW or higher. Applications for approval of major energy projects were made to Energy. Applicants were to describe the project and include project rationale that would “outline the purpose of the project, the general implications for energy supply and demand, and the benefits to the Province of the proposed project including “the overall benefits and costs to the Province, and the potential effects upon energy resources and energy use.”²⁹

49. Environment was necessarily involved in the review procedures with Energy under the provisions of the *Utilities Commission Act*. Joint concurrence of the Ministers

²⁷ See *Id.*, p. 2, **R-96**.

²⁸ British Columbia Ministry of Energy, Mines and Petroleum Resources, Guide to the Energy Project Review Process (Queen’s Printer for British Columbia, 1982), **R-95**; *Utilities Commission Act*, S.B.C. 1980, c. 60, **R-93**.

²⁹ See *Id.*, pp. 10 and 13, **R-95**.

of Energy and Environment was required if an exemption was granted under section 19(1)(c) of the Act.³⁰

50. Mr. Ostergaard provided Mr. Dryden and me a copy of his August 23, 1990 letter to Celgar.³¹

51. Mr. Dryden met with representatives of Energy, including Ms. Denise Mullen, in an Energy Project Coordination Committee meeting on August 29, 1990 to discuss multiple projects, including Celgar.³² The meeting notes record Energy's request for additional information on power generation and the likelihood that a supplement to the Stage II information request will cover any concerns about the cogeneration portion of the project.

52. On September 11, 1990, Celgar provided Energy with a draft EPCA for deficiency review.³³ The draft EPCA included extracts of the Project Description prepared several months earlier by Celgar as part of Prospectus, including the following:

The expanded mill will require 52 megawatts, though the mill will generate 47 megawatts, which is 90% self-sufficient for power requirements compared to the existing mill's capability to produce 11% of its requirements.³⁴

53. Celgar's draft EPCA also provided a "Project Justification" section, which explained the opportunity to make the mill more energy self-sufficient:

The present mill relies on West Kootenay Power for the majority of its electrical power requirements - approximately 22 MVA. The existing mill operates a 2.5 MW extraction/condensing turbogenerator which supplies the balance. The modernized mill will require approximately 54 MVA. The new turbogenerator will be capable of producing 48 MVA and the balance (estimated at 4-6 MVA) will be purchased from West Kootenay Power. An additional tie-transformer (20 MVA) is proposed to allow the purchase of the

³⁰ See *Id.*, p. 2, **R-93**; p. 6, **R-95**.

³¹ Letter to Celgar Pulp Mill Review Panel from Peter Ostergaard, 23 August 1990, **R-406**; See Letter to Mr. R.C. Wigen, Assistant Project Manager, Celgar Pulp Expansion, 23 August 1990, p. 2, **R-96**.

³² Energy Project Coordinating Committee Meeting Notes/Action Points, 29 August 1990, **R-407**.

³³ Letter from R.C. Wigen to Peter Ostergaard enclosing Draft Energy Project Certificate, 11 September 1990, **R-408**.

³⁴ See *Id.*, p. 13, **R-408**.

additional power requirements necessary to run the modernized mill during the infrequent, but essential, outages of the 48 MW turbogenerator.³⁵

54. On September 13, 1990, Energy circulated the draft EPCA to Mr. Dryden and a representative of the Ministry of Forests. In a covering memo, with Celgar in closed copy, Energy summarized the proposed expansion and noted as follows:

The expanded mill is also designed to be 90% energy self-sufficient, up from the present 11% energy requirements. A 48 MW cogeneration plant will be built as part of the mill expansion to produce this energy.³⁶

55. On October 1, 1990, Mr. Dryden responded to Energy with Environment's reaction to Celgar's draft EPCA indicating that Environment supported the principle of cogeneration of Celgar's electricity and was satisfied that any environmental impacts resulting from cogeneration would be reduced to acceptable levels.³⁷ On October 3, 1990, Peter Ostergaard wrote to R.C. Wigen, the Assistant Project Manager for Celgar Pulp Modernization Project, and advised that Celgar's draft EPCA had been reviewed by selected government agencies³⁸ Mr. Ostergaard's letter to Mr. Wigen attached written responses from several ministries, including the October 1, 1990 memorandum from Environment's Dryden, addressed above. Mr. Ostergaard informed Mr. Wigen that the draft EPCA did not adequately address some of the application requirements and identified specific application information requirements under the *Utilities Commission Act*, Regulation 388/80, including ss. 1(1)(c)(ii). That regulatory subsection concerns "*Project Justification*", "a study estimating the value of all the project's costs and benefits and their distribution...".³⁹ On October 12, 1990 Celgar submitted its EPCA.⁴⁰

³⁵ See *Id.*, p. 7, **R-408**.

³⁶ Memorandum re Celgar Pulp Company Draft Energy Project Certificate Application, 13 September 1990, **R-409**.

³⁷ Memorandum re Celgar Pulp Company Draft Energy Project Certificate Application, 1 October 1990, **R-410**.

³⁸ Letter from Peter Ostergaard to R.C. Wigen, Draft Energy Certificate Application, Celgar Pulp Expansion Thermal Electric Generation Project, Government Review Agency Comments, 3 October 1990, **R-411**.

³⁹ BC Reg. 388/80, **R-412**.

⁴⁰ 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, **R-97**.

In the EPCA, Celgar described steam and electricity generation under the sub-heading “Chemical Recovery” in the following manner:

The existing recovery boiler will be shut down. **The heavy black liquor, which contains the lignin and spent cooking chemicals from the digester, will be burned in a new recovery boiler (27).** The recovery boiler will burn the organic material (i.e., lignin) in the heavy black liquor and converts the inorganic chemicals primarily to sodium carbonate and sodium sulphide. The inorganic chemicals will be removed as molten smelt. **The heat generated in burning the black liquor will be used to produce steam. This steam, when passed through a turbo-generator, will under normal conditions supply 100% of the modernized mill’s electrical power requirements.** [bold in original]⁴¹

56. Celgar’s EPCA also indicated with respect to pulp mill’s Power Requirements that:

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.⁴² [bold in original]

57. On my review of the EPCA, apart from the section headings, these are the only statements in the Application that Celgar elected to emphasize with bolded print.

58. Celgar then confirmed under the heading “Project Justification” that:

This fuel, combined with a larger, higher pressure and more efficient recovery boiler affords the opportunity to increase the power generating potential and make the mill more energy self-sufficient. The present mill relies on West Kootenay Power for the majority of its electrical power requirements – approximately 22 MVA. The existing mill operates a 2.5 MW extraction/condensing turbogenerator which supplies the balance. The modernized mill will require approximately 50 megawatts of power. The new turbogenerator will be capable of producing 50 megawatts. An additional tie-transformer (20MVA) is proposed to allow the purchase of the additional power requirements necessary to run the modernized mill during the infrequent, but essential, outages of the 50 [sic] megawatts turbogenerator.⁴³

⁴¹ See *Id.*, R-97.

⁴² See *Id.*, R-97.

⁴³ See *Id.*, R-97.

59. The Project Justification therefore indicated that the purpose of the project was to “make the mill more energy self-sufficient.” The Project Justification then set out the technical details of how the pulp mill would use its electricity to remain self-sufficient in practice.

60. Finally, the EPCA also included a letter response to Peter Ostergaard’s October 3, 1990 request for additional information. Lorne Parnell, a Vice-President of a Celgar parent company, Power Consolidated (China) Pulp Inc., responded to Ostergaard with comments on the plant expansion project:

Additionally, the pulp mill will be essentially self-sufficient in energy as purchased power will be significantly reduced after the implementation of the electric power project.

The pulp mill modernization project has been designed to incorporate the most modern technology for the control of environmental pollution from the pulp mill. The benefits to the community and region derived from environmental improvements and economic stability will be very significant.

I hope this information satisfies the requirements of the energy project permitting process.⁴⁴

F. CELGAR EXPANSION REVIEW PANEL

61. As mentioned above, at the time Celgar submitted the draft EPCA and subsequently submitted the actual EPCA, the public and technical hearings to consider Celgar’s Stage II Report were proceeding before the Celgar Expansion Review Panel (“CERP”).

62. In its Closing Statement of November 9, 1990, to the CERP Celgar provided the following summary:

Mill Design – State-of-the Art Facility

...

Written evidence and oral testimony presented to the Panel indicates that the new equipment and facilities to be installed under the modernization plan

⁴⁴ See *Id.*, R-97.

incorporates the best available proved technology. The Panel was presented with the following specific examples of state-of-the-art, but proven, technology that will be used in the modernized mill: ...

(viii) a turbo generator will be installed which will allow the mill to produce up to 90 percent of its electrical power requirements from by-product steam. The existing mill produces only 11% of its electrical energy requirements. (TH, Vol. 4, p.1041)⁴⁵

63. Celgar also listed further specific examples of new mill technology and explained the benefits such as a new effluent treatment system to remove suspended solids from effluent prior to discharge and a new recovery boiler, “eliminating the main source of odour from the Celgar mill.”⁴⁶

64. In February 1991, the CERP released its Final Report to the Federal Minister of Fisheries, the Federal Minister of the Environment and to BC’s Minister of Environment, Cliff Serwa.⁴⁷

65. The CERP found that Celgar’s proposal was acceptable in principle and then set out a summary of nine considerations that it termed “key” / “pivotal” for its approval. Included in this list was:

- the 90% energy self-sufficiency of the proposed mill;
- the need to reduce Celgar’s continued pollution levels, with the current mill allowed to exceed even today’s government standards.⁴⁸

66. The CERP made 50 recommendations. Recommendation 3 was as follows:

The Panel recommends that the provincial Ministry of Energy, Mines and Petroleum Resources and Ministry of Environment undertake an evaluation of options for the use of hog fuel from Westar’s saw mill made surplus by the

⁴⁵ Celgar Pulp Company, Proposed Modernization of Bleached Softwood Kraft Mill, Castlegar, B.C., Closing Statement, 9 November 1990, pp. 42, 46, **R-413**. I understand that Canada has searched for but been unable to locate the transcripts for the CERP hearing.

⁴⁶ *See Id.*, pp. 43, 46, **R-413**.

⁴⁷ Celgar Expansion Review Panel, Final Report, February 1991, **R-330**.

⁴⁸ *See Id.*, pp. vii-viii, **R-330**.

proposed Celgar modernization, and the opportunities for energy production from this resource.⁴⁹

67. At Chapter 5 of its Final Report, the CERP considered “Pulp Mill Process Issues”, including “5.7 Energy Production and Consumption”:

Co-generation of electrical energy alongside pulp production has significant energy conservation benefits for the company and the province. The present mill relies on West Kootenay Power for the majority of its electrical power requirements – approximately 22 megavolt amperes. This will no longer be needed. Hog fuel from the adjacent Westar sawmill will also no longer be required for power generation. The implications of this are discussed in Section 3.6.⁵⁰

68. Section 3.6 of the Final Report in turn explained that “[t]he recovery boiler in the proposed pulp mill will have a sufficient capacity to drive a large turbine and generate most of the steam required in the pulping process. The mill would be 90% energy self-sufficient.”⁵¹

69. Section 5.7 of the Final Report concluded:

The proposed mill is subject to the provisions of the Utilities Commission Act which require that projects obtain approval from the Province prior to construction. Celgar applied for this approval. In reviewing their application, the Ministry of the Environment stated that it ‘is satisfied that any environmental impacts due to cogeneration will be reduced to acceptable levels.’ No objections or concerns were expressed to the panel regarding the energy co-generation aspects of the project. Indeed, the energy efficiencies gained from the proposed mill are an important benefit from the project.”⁵²

70. The CERP expressly relied on the previously mentioned October 1, 1990 memo in which Mr. Dryden explained Environment’s view of the impacts of cogeneration.⁵³ Following the CERP Final Report, the EPCA remained pending before the responsible Ministries, Energy and Environment.

⁴⁹ See *Id.*, p. ix, **R-330**.

⁵⁰ See *Id.*, p. 43, **R-330**.

⁵¹ See *Id.*, p. 14, **R-330**.

⁵² See *Id.*, p. 43, **R-330**.

⁵³ See *Id.*, p. 43 and footnote 44 therein, **R-330**.

G. EPCA APPROVAL / MINISTERS' ORDER

71. On April 15, 1991, Dave Mercier replaced Cliff Serwa as Environment Minister.

72. On April 24, 1991 Mr. Dryden prepared a Priority Issue note which I signed for a meeting between the Premier and the U.S. Consul General the next day. The note explained to the Premier's office that the Celgar mill had been incapable of meeting the terms of its environmental permits and that CERP had recently granted Celgar approval to rebuild the mill.⁵⁴

73. On May 16, 1991, Mr. Dryden prepared a Briefing Note that I signed and provided to the newly appointed Environment Minister, setting out background and recommendations with respect to Celgar's application for an Energy Project Certificate.⁵⁵

74. In terms of background, I noted the requirement under the *Utilities Commission Act* that the Minister of Environment and the Minister of Energy concur in the disposition of an Energy Project Certificate. I informed the Minister that the Province and the Federal Government had given approval-in-principle to Celgar's Expansion Project, based on the recommendation for approval of the CERP. I therefore recommended to the Minister that:

- The Ministry should support his application for an Energy Project Certificate since it will provide the pulp mill with near energy self-sufficiency.
- The Ministry has concluded that environmental impacts due to cogeneration will be reduced to acceptable levels.⁵⁶

75. I met with the new Minister to discuss the recommended approval. The fact that Celgar had emphasized that it would use its self-generation to serve its own load which would result in it being at least 90% self-sufficient was a "selling point" for me and for Mr. Dryden. However, my main brief to the Minister was that the modernized mill

⁵⁴ BC Energy Priority Issue Note, Celgar Pulp Mill Liquid Effluent Discharge, 24 April 1991, **R-414**.

⁵⁵ British Columbia Ministry of the Environment, BC Environment Briefing Note, Application for Energy Project Certificate for the Celgar Pulp Mill Expansion, 16 May 1991, **R-99**.

⁵⁶ *See Id*, **R-99**.

would meet all applicable environmental standards and thus bring to an end its Variance Order. We saw it as a real bonus to endorse a solution that provided both energy and environmental benefits. I brought all of these benefits directly to the Minister's attention. The Minister agreed.

76. On May 23, 1991, Minister Weisgerber of Energy and Minister Mercier of Environment signed the Ministers' Order authorizing construction and operation of the Celgar Pulp Mill Expansion Thermal Electrical Generation Project. The recent change of Environment Ministers can be seen in the signature block, which includes a type over of the name of the former Minister, "Clifford Serwa". Designated officers of Celgar parent companies had signed and agreed to the terms of the Ministers' Order several weeks earlier on April 18, 1991.⁵⁷

77. The Ministers' Order provided "that the construction and operation of the Project may proceed, subject to conditions which are considered to be in the public interest".⁵⁸ The Ministers' Order incorporated as subject terms, Celgar's Application and Celgar's undertakings in the Stage II Report and at the CERP hearings.⁵⁹ Celgar's response concerning energy that indicates that it would be 90 % self-sufficient in the section entitled "Special Issues and Public Concerns" in its Stage II Report is an undertaking in the context of the Major Project Review Process.

H. THE CLAIMANT'S COMPARISON OF THE EPCA TO REGULATION UNDER THE WASTE MANAGEMENT ACT

78. Since 1967, under the original *Pollution Control Act*, it has been provincial policy that authorization is required before an entity is permitted to discharge waste.⁶⁰ In 1982, the province enacted the *Waste Management Act* to replace the *Pollution Control Act*. According to section 3 of the *Waste Management Act*, "[s]ubject to subsection (3), no person shall introduce or cause to allow to be introduced into the environment waste

⁵⁷ 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, **R-100**.

⁵⁸ See *Id.*, p. 1, **R-100**.

⁵⁹ See *Id.*, pp. 1-2, **R-100**.

⁶⁰ *An Act Respecting Pollution Control*, SBC 1967, c 34, s.5(1), **R-415**.

produced by all the conduct of (a) an industry, trade or business [...]”. Subsection (3) held that “[n]othing in this section or in a regulation made for the purpose of subsection (1)(b) prohibits (a) the disposition of waste in compliance with a permit, approval, order or the regulations, or with a waste management plan approved by the minister.”

Therefore, if a person intended to introduce waste into the environment, they required a permit.⁶¹ Permits were issued by regional Waste Managers, a delegated authority under the *Act*. These permits became known as Waste Management Permits.⁶²

79. The policy rationale behind Waste Management Permits is that waste may contain contaminants that are damaging to public health and to the environment; therefore, waste is tightly regulated. The strict compliance and monitoring that occurs under waste management permits reflects the concern for human and environmental health that is created by disposal of potentially hazardous waste.⁶³

80. Keeping to the policy framework described above, the *Waste Management Act* provided that permits could contain requirements necessary for the protection of the environment. According to the *Waste Management Act*, a permit could:

- (a) require the permittee to repair, improve or add to works or to construct new works, and to submit plans and specifications for works specified in the permit,
- (b) require the permittee to give security in the amount and form and subject to conditions the manager specifies,
- (c) require the permittee to monitor in the way specified by the manager the waste, the method of handling, treating, transporting, discharging and storing of the waste and the places and things that the manager considers

⁶¹ *Waste Management Regulation*, BC Reg 432/82, section 2, lists what was required in an application for a permit, **R-416**.

⁶² The *Waste Management Act* was repealed in 2003 by the *Environmental Management Act*. The *Environmental Management Act* still requires permits for waste disposal. These permits are now known as Environmental Management Permits. *Environmental Management Act*, SBC 2003, c 53 section 142, **R-417**.

⁶³ Under a waste management permit, waste disposal would only be allowed where the waste met a prescribed standard, so as to ensure that it would not be damaging to public health or the environment.

will be affected by the discharge of the waste or the handling, treatment, transportation or storage of the waste;

- (d) require the permittee to conduct studies and to report information specified by the manager in the manner specified by him,
- (e) specify procedures or requirements respecting the handling, treatment, transportation, discharge or storage of waste that the holder of the permit must fulfil, and
- (f) require the permittee to recycle certain wastes, and to recover certain reusable resources, including energy from potential wastes.⁶⁴

81. Regional Waste Managers were consulted as part of the Energy Project Review Process. However, these individuals were not directly involved in the decision making. If a proposed energy project was likely to introduce waste into the environment, the regional Waste Manager would be consulted. Coordination between the Energy Project Review Committee and the regional Waste Manager was important to ensure that if an EPC was granted, a corresponding Waste Management Permit would also be granted. To do otherwise might mean that a project would be approved and subject to certain environmental conditions under its EPC, yet subject to different requirements under its Waste Management Permit.⁶⁵

82. It is my understanding that the policy framework surrounding EPC's was different from that of Waste Management Permits. As discussed in other witness statements, since at least the 1990s, the province was interested in energy efficiency, energy security, clean energy, and energy for the economy. In the Energy Project Review Process, the province was also concerned about the environmental and socio-economic impacts of proposed projects. Policy commitments that were made under the Energy Project Review Process were as a result frequently less specific than the prescriptive requirements of the Waste Management Act.

⁶⁴ *Waste Management Act*, SBC 1982, C 41, s.8, **R-418**.

⁶⁵ See e.g., Minister's 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, 4, **R-100**.

83. Given the different policy priorities behind Waste Management Permits and EPCs, it makes sense that they would have different reporting and compliance requirements. It does not mean that one is more or less enforceable than the other. Furthermore, both could be enforced under their originating statutes.⁶⁶

84. I affirm that the information provided above is true and correct.

85. I affirm this witness statement in support of Canada's Rejoinder Memorial in the *Mercer International Inc. v. Government of Canada* NAFTA arbitration and for no improper purpose.

AFFIRMED BEFORE ME)
at the City of Victoria)
in the Province of British Columbia,)
this 24 day of March, 2015.)
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A Commissioner for taking Affidavits for)
British Columbia.)

Jon O'Riordan
Jon O'Riordan

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Barrister & Solicitor
Ministry of Attorney General
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⁶⁶ *Utilities Commission Act*, S.B.C. 1980, chapter 60, as amended, ss. 124(1)(g) and 124.1, R-504.