

Before the
ADDITIONAL FACILITY OF THE
INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

Mercer International Inc.,

Claimant,

v.

Government of Canada,

Respondent.

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

WITNESS STATEMENT OF JOHN ALLAN

I, John Allan, hereby declare as follows:

1. I am a former senior official of the Government of British Columbia, having served four times as Deputy Minister, including Acting Deputy Minister (1990) and Deputy Minister of Energy, Mines and Petroleum Resources from 1990-1993 and Deputy Minister, Environmental Assessment Office (1993-1996) and Land Use Coordination Office (1995-1996), Deputy Minister, Ministry of Environment, Lands and Parks (1996-1997), and Deputy Minister, Ministry of Forests (1997-1999), in each case reporting to the Premier's Office. I am currently a private consultant to government and industry on forest sector issues with my own consulting

firm, John Allan Consulting, Ltd. My date of birth is [REDACTED] and I reside at [REDACTED].

2. While Energy Deputy Minister, I supervised Assistant Deputy Minister Peter Ostergaard, who is a witness for Canada in this proceeding and on whose testimony Canada relies in significant part to argue the legal consequences of a May 1991 Ministers' Order approving an initial expansion of the power generating capability of Celgar's industrial plant in Castlegar, British Columbia. As a former Energy Deputy Minister and in my other senior positions, I became very familiar with the manner in which British Columbia regulated the natural resource sector. Based on this and my other expertise discussed below, I am in a position to express views on whether the May 1991 Ministers' Order was intended to create a perpetual, binding obligation on Celgar to be energy self-sufficient in its power consumption. In my view, and for the reasons described below, the Order did not create such an obligation.

3. My testimony is organized as follows: I first provide background on my education and professional career. I elaborate on my role and responsibilities as British Columbia's Deputy Minister of Energy, Mines and Petroleum Resources from 1990-1993. I then discuss the 1991 Ministers' Order issued by British Columbia's Minister of Energy, Mines and Petroleum Resources and Minister of Environment, and Canada's claim that this Order directed Celgar to be energy self-sufficient in its power consumption.

4. While preparing this statement, I have reviewed several documents relevant to my testimony, including redacted versions of Mercer's Memorial dated 31 March 2014 and Canada's Corrected Counter-Memorial dated 28 August 2014.

I. Education

5. I earned a Bachelor's Degree in Economics with Honours from the University of Winnipeg in 1970. I then earned a Master's Degree in Economics in 1971 and pursued additional graduate studies in Economics, both at Queen's University in Ontario.

II. Professional Career

6. I spent my professional career from 1973 through 1999 serving as an official in several Canadian provincial governments. My first position, in 1973, was policy analyst in the Premier's Office for the Government of Newfoundland and Labrador. From 1974 through 1984, I served in a series of other analyst and economist positions for the Governments of Manitoba and British Columbia. From 1985 through 1988, I was a Director in the Energy Resources Division, Ministry of Energy, Mines and Petroleum Resources for the British Columbia government. From 1988 through to mid-1990, I served as Assistant Deputy Minister, Ministry of Energy, Mines and Petroleum Resources for the British Columbia government and as Acting Deputy Minister, Ministry of Energy, Mines and Petroleum Resources from June 1990 to late 1990.

7. From late 1990 through 1999, I served in four different capacities as a Deputy Minister of the British Columbia government. The rank of Deputy Minister is the most senior civil or public servant position in the British Columbia government. Appointments to this senior rank are made by Order-in-Council and approved by the Premier.

8. I served as Deputy Minister of the: Ministry of Energy, Mines and Petroleum Resources (1990-1993); Environmental Assessment Office (1993-96) and concurrently Land Use

Coordination Office (1995-1996); Ministry of Environment, Lands and Parks (1996-1997); and, Ministry of Forests (1997-1999).

9. Starting in 1999 and through the present, I have been an independent consultant based out of Victoria, British Columbia. I have been a consultant to several major companies in Western Canada, including the Canadian integrated forest products company Canfor, and have served as a leader of major industry and trade associations in British Columbia, including the BC Lumber Trade Council and the Council of Forest Industries (“COFI”). A representative of Mercer International, David Gandossi, is one of the 14 Board Members of COFI, where I served as President and Chief Executive Officer from 2003-2013. Mercer is one of 17 Corporate Members of COFI. Before agreeing to be a witness in this arbitration, I had no direct business relationship with Mercer, apart from the above general industry association relationship which includes many of the major wood products companies in British Columbia.

III. *Discussion of Senior Responsibilities at Energy Ministry from 1988-1993*

10. As the Energy Ministry’s Assistant Deputy Minister (1988-1990) and particularly as Deputy Minister (1990-1993), I was responsible for, or played a role in, the development, management and implementation of all major provincial policy and program initiatives relevant to the energy sector. As Deputy Minister, I was the lead public official responsible for implementing direction from the Premier, Cabinet and the Minister, and for supervising and coordinating provincial energy policy and programs. I am very familiar with the policy and regulatory framework relevant at the time with respect to Energy Project Certificates, exemptions from the 1980 *Utilities Commission Act* (“UCA”), the Province’s growing interest in encouraging increased energy self-sufficiency among power generators capable of doing so, the

regulatory framework relevant to the construction and operation of major facilities that would generate electricity, and the expectations of provincial officials regarding the operation of those facilities.

11. As Assistant Deputy Minister from 1988 to 1990, and Deputy Minister commencing in 1990, most if not all matters requiring senior official, Ministerial or Cabinet approval would have gone through my office for review. This would have included applications for Energy Project Certificates and their appropriate disposition. I largely coordinated the drafting, review and approval of the Province's formal policy statements relating to energy issues during this period, including the 1990 publication "British Columbia Energy Policy: New Directions for the 1990s" cited by Canada in its Counter-Memorial and included as Exhibit R-97 (the "BC Energy Policy Statement").

IV. *Discussion of Ministers' Order*

12. I have carefully reviewed the Order signed by Energy Minister Weisgerber and Environment Minister Mercier in May 1991 (the "Ministers' Order") relating to the proposed expansion of Celgar's pulp mill facility at Castlegar, BC, and the related material that Canada has introduced in support of its interpretation of the meaning and consequence of this Order. I do not have a specific recollection of the Order but can offer the following observations based on my experience and responsibilities, my knowledge and expertise of the relevant policy and regulatory structure, and my personal knowledge of the expectations of policy makers and regulators all at the time of the Order and also in the years before and after 1991.

13. I have carefully reviewed the Ostergaard Statement and Canada's Counter-Memorial with respect to the Ministers' Order and its supposed consequences today for Celgar's

energy-related commitments, including the purported perpetual energy self-sufficiency requirement. In this connection, I note that Mr. Ostergaard reported to me at all times relevant to the information he presents in this proceeding. He was Manager, Regulated Projects, Ministry of Energy, when I was Assistant Deputy Minister, and then he became Acting Assistant Deputy Minister in 1990 and Assistant Deputy Minister in 1991, both respectively after I was appointed as Acting Deputy Minister and then Deputy Minister of Energy. I am familiar with his role and positions, and overall provincial policy at these relevant times. As Mr. Ostergaard's direct supervisor, I can place his statements, initiatives and writings in their relevant context.

14. In 1990 and 1991, increased energy self-sufficiency in plants capable of self-generating power had emerged as a general Energy Ministry policy goal of that period. Provincial officials were aware that demands from industrial consumers of energy were increasing. Officials also were aware that facilities such as pulp mills were intensive users of electricity and that some were capable, or were becoming capable in varying degrees, of electricity self-generation. In light of increased user demand for electricity, the British Columbia government welcomed the development of increased potential generating capacity from industrial facilities like the one being proposed by Celgar at that time.

15. It was in the context of these policy developments that the Energy Ministry created documents along the lines of the BC Energy Policy Statement.¹ On page 14 of that document, for example, the concept of "Putting Waste to Work" was promoted and it was noted that "{w}aste is already an important energy source in British Columbia."² Similarly noted on

¹ See R-98, British Columbia Ministry of Energy, Mines and Petroleum Resources, British Columbia Energy Policy: New Directions for the 1990s (November 1990).

² See R-98, British Columbia Ministry of Energy, Mines and Petroleum Resources, British Columbia Energy Policy: New Directions for the 1990s (November 1990), at 14.

the same page of the document was the statement that wood waste in BC is “a potential power resource similar in scale to a major new hydroelectric dam.”³

16. Some other contemporaneous policy documents would have recorded the same general goal mentioned in the BC Energy Policy Statement: that is, to encourage self-generation over time so as to increase the sources of power available in the Province, and reduce dependency on existing and other projected power generation facilities.

17. For example, I have carefully reviewed Mr. Ostergaard’s non-public memorandum to Mr. Frank Blasetti of the Ministry of Regional and Economic Development dated 5 January 1990, referring to a preliminary phase of government’s consideration of the Celgar expansion proposal. This Ostergaard-Blasetti memorandum was included by Canada as Exhibit R-101 to its Counter-Memorial. In that memorandum, Mr. Ostergaard says, quite correctly, that “pulp mill expansions have been identified as a very significant component of new electricity demand in British Columbia in the 1990s.” He goes on to say that: “The Ministry wants to ensure that load displacement (e.g., through conservation, energy efficiency measures, self-generation and cogeneration) is thoroughly explored before utilities are forced to build new generation resources to serve expanded industrial loads.” Mr. Ostergaard then recommended that the Ministry of Regional and Economic Development pose several questions to Celgar in connection with the exploration of these energy capacity issues.

18. Mr. Ostergaard’s memorandum is consistent with the policy position that the Energy Ministry spelled out in the BC Energy Policy Statement: that it was in the overall interest of the Province to increase the electricity self-generation capacity at industrial plants so as to increase sources of energy in the Province and minimize the need to construct expensive

³ R-98, British Columbia Ministry of Energy, Mines and Petroleum Resources, British Columbia Energy Policy: New Directions for the 1990s (November 1990).

new generation assets. This is consistent not only with the concern about the existing power base but also a desire not elaborated in Mr. Ostergaard's memorandum which was to increase power generation in the Province so as reduce current and future dependence on foreign oil, and improve the economic base of the Province including through job creation.

19. I have carefully reviewed Celgar's 1990 Application for an Energy Project Certificate and the subsequent 1991 Ministers' Order. I am not a lawyer and leave to others the legal issues in this case. However, as a senior public official in various ministries over a lengthy period of time and as someone familiar with energy and economic development policy for almost 35 years, and for the reasons I set forth below including a complete lack of specificity, I do not believe that the British Columbia government would have considered Celgar's stated general expectations in its Application relating to self-sufficiency or the Ministers' generally stated Order, as creating or leading to a perpetual, enforceable commitment.

20. If the British Columbia government had intended to impose a self-sufficiency obligation on Celgar intended to extend well into the future, I would have expected the Order to do so (i) explicitly, (ii) with specific and identified metrics for what was expected of Celgar, (iii) with information for Celgar on what government agency would monitor compliance, and (iv) with detail on how and when Celgar would report and be evaluated. None of this was done. Especially given the vast amounts of regulation in the Province in later years on issues related to self-sufficiency, including Ministerial and British Columbia Utilities Commission (BCUC) decisions and orders on this issue involving BC Hydro, FortisBC and Celgar itself (and substantive submissions by the Ministry of Energy), I think it is extremely unlikely that British Columbia authorities would actually view Celgar as operating under a binding commitment of

electricity self-sufficiency for over 23 years, with no mention of such an obligation at any time between 1991 and 2014 by any government authority.

21. I also note that Celgar's statements in its submissions to BC authorities regarding its Application and in the Expansion Review Panel proceeding were very general and did not contain the kind of detail that would be required for the Province's regulation of commitments by the private sector. The commitment by Celgar in its Application for an Energy Project Certificate was by way of its *prediction* that once the plant was expanded "under normal conditions" (an undefined phrase), it would supply 100% of the mill's electrical power requirement (also not defined).⁴ Separately, Celgar had stated in its "Stage II Report" to the Celgar Expansion Review Panel that it anticipated the mill would provide up to 90% of the Mill's electrical power requirements.⁵ These projections were never explored by government, never put in measurable terms in an implementing order, and never used by any authority to measure compliance by Celgar with its governmental permits.

22. British Columbia knew how to create and enforce continuing specific regulatory obligations when it chose to do so. By contrast to the self-sufficiency commitment that Mr. Ostergaard and Canada state exist in perpetuity, the Ministers' Order in other conditions expressly discusses oversight and specific permitting under the *Waste Management Act* and the *Water Act*. The Ministers' Order cites no analogous oversight laws or regulatory mechanisms, or measurable standards, for self-generation. The Order does not address basic questions that the Province would have needed to ask in order to create a mechanism for regulation, such as the

⁴ R-97, Celgar 1990 Energy Project Certificate Application.

⁵ 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), and p. 17.

specific level of electricity generation to which Celgar would be committing or what mixture of fuel, such as natural gas and black liquor, would be used for the production of energy, and what would happen if fuel prices changed dramatically.

23. It is not plausible based on my experience as a senior public official, including nine years as a Deputy Minister, that the government would have implicitly mandated that Celgar maintain a perpetual level of energy production and consumption, without specifically quantifying their expected levels and creating a mechanism for accountability. Regular reporting and transparency in connection with a commitment on energy self-sufficiency would be consistent with the Province's approach on similar issues across government.

24. Where the British Columbia government chose to regulate in the energy sector, it would do so in a transparent way, with measurement of production, reporting requirements and consequences for non-compliance. For example, the Energy Ministry was responsible for the oversight of the production of natural gas and oil in the Province, and put systems in place to monitor producing companies, in what amounts and in what time periods, and the resource royalties that would be owed to the government as a result of the production. Another example would be the oversight of the production of hydro electricity, where the Environment Ministry would ensure that the owners of hydroelectric facilities reported accurately and in specified time periods the quantities of power production so that appropriate water rentals would be paid to the government. Government knew how to regulate the energy sector when regulation was the objective.

25. My perspective on the Ministers' Order is consistent with the manner in which the 1991 Celgar Expansion Review Panel's 50 specific recommendations were implemented by the Province and discussed in the Ministers' Order. The Panel's recommendations were

accepted by the Province, and formed the foundation of the subsequent very specific air and effluent permit amendments that were approved by Order-in-Council in early 1991. These environmental controls, and predictable and transparent oversight, are the way the Government of British Columbia regulates industry -- with clear expectations set in advance, a particular component of government identified for monitoring, compliance reports provided on a schedule, and consequences for non-compliance. I do not see how the Province could have obligated a private company to maintain self-generation usage in perpetuity without this kind of legal framework.

26. My conclusion here is bolstered by the fact that the very first time this issue was raised with Celgar appears to have been on 22 August 2014, in Canada's Counter-Memorial, well over 23 years since the Ministers' Order was signed and only in the context of litigation filed by Celgar about irregularities in the way the British Columbia government has treated Celgar. In those 23 years, (i) countless orders and regulations have been issued by the Energy Ministry, other Ministries, and BCUC, (ii) energy policies on this and other issues have been developed and adopted, and (iii) self-generation has been the subject of much discussion and new regulation while technology and capacity have developed throughout the Province.

27. BC Hydro, FortisBC and Celgar itself were heavily regulated through the years by BCUC on the very issue of energy generation, consumption and sales. In this respect, BCUC issued Order G-48-09 on 6 May 2009 regulating the access of self-generators in the FortisBC territory to embedded cost utility power while selling their self-generated electricity (restricting them to net-of-load access to embedded cost utility power). My review of Mercer's Memorial and Canada's Counter-Memorial in this case confirms my understanding that Celgar's facility and capacity for electricity self-generation and sales, along with other facilities, were the types of

projects that were not only relevant but also central to BCUC's review of these issues. If the Province actually had the view that Celgar had made a self-sufficiency commitment in 1991 that survived in perpetuity, surely the Ministry of Energy would have so advised BCUC, and BCUC would have taken this into account during the development of Order G-48-09.

28. Similarly, if there was such a commitment, it should have been raised and addressed by the Ministry of Energy, BCUC and BC Hydro in years of dealing with Celgar on the very issues that are the subject of this arbitration. The fact that the self-sufficiency obligation was never raised by Canada or BC until this proceeding, despite the regulation of the same issue for years by the Province, makes it highly improbable that regulators actually believed there was such a commitment.

29. As noted above, I have no specific recollection of the May 1991 Ministers' Order that Canada has placed at issue in this case, which makes me reflect that it was viewed at the time as unexceptional and was not making any major policy shift toward a new and unprecedented type of regulation. As background, I became Acting Energy Deputy Minister in mid-1990 and Deputy Minister by year-end. In the fall of 1990, I began to discharge many of the duties of Energy Minister Jack Davis because he became very ill. Minister Davis died on 27 March 1991, about eight weeks before the Ministers' Order was signed on 21 May 1991. Jack Weisgerber became Energy Minister in April 1991 and signed the Order in his new capacity. Because of Minister Davis's illness, I was effectively discharging most of the management and oversight duties of the Energy Minister for several months prior to the Order being issued and was also focused on briefing Minister Jack Weisgerber. I was therefore integrally involved in all major policy decisions at the time. Thus I would have been directly involved in any consideration of a major change in the Ministry's posture from (i) expressing a general policy

goal of increased self-sufficiency to (ii) requiring a specific pulp mill to develop and maintain electrical production to meet set self-sufficiency goals in perpetuity and (iii) and notification to Celgar of the specific requirements. This would have required extensive deliberation within the Ministry and a policy change at the highest levels, along with the imposition on Celgar of specific production requirements and accompanying reporting, none of which occurred.

30. Apart from this, I also think it important to read Celgar's Application and references to energy self-sufficiency in the context of the regulatory and policy regime in place at the time. In the early 1990s, there was no open access to transmission service in British Columbia. Thus, a self-generator essentially would have had no other option but to use any self-generated electricity to meet its own load and increase its own energy self-sufficiency. Celgar's statement that if it achieved its estimated generation and load levels, it would be energy self-sufficient was a simple statement of fact. I do not see how it can be read as precluding Celgar from later selling some or all of its self-generated electricity once the regulatory and economic environment changed, and such sales were permitted for other self-generators in BC. By approving Celgar's exemption from UCA regulation in 1991, the Ministers did not purport to decide that the British Columbia government would regulate Celgar differently than others with respect to self-supply obligations or make any decisions about Celgar's ability to sell some or all of its self-generated electricity. There is nothing to indicate that Celgar had agreed to be treated differently than other self-generators in the event that the regulatory environment changed.

31. In addition to these considerations, and in the course of preparing this statement, I have thought further about other key economic issues that were likely informing the decisions of provincial regulators at the time and would have been relevant to the Province's consideration of the Celgar expansion proposal. In the last half of the 1980s, BC Hydro had a

large amount of surplus power. The government decided to make this surplus power available to encourage industrial economic growth — and even gave price discounts to actual and potential users to encourage them to make investments in BC’s manufacturing infrastructure.

Approximately ten years later in the late 1990s, a similar program of supplying low-cost power to users was introduced to encourage job creation.

32. In the middle of this ten-year period in the early 1990s, a focus on self-sufficiency was introduced by the Energy Ministry, in part because of certain anticipated industrial demand for power that eventually did not materialize, at least not in the way anticipated during that period. Given this history of variations of power demand and evolving provincial policies, I do not understand why Canada now argues that the British Columbia government intended for Celgar to commit to 100 percent energy self-sufficiency and that such commitment would remain unchanged for all time. Although the “self-sufficiency” statement in Celgar’s Application may have indirectly captured policy direction at the time of the Application, the Order’s general reference to the Application as a whole cannot be expected to have elevated a statement in the Application into a commitment that would apply in perpetuity — particularly in light of the ongoing and anticipated changes in policy, technology, markets and regulation.

33. Furthermore, the issue of energy use and self-generation was one of many relevant to the Celgar mill but was by no means the most important. Environmental and public health issues were also key at the time, given Celgar’s history of pollution discharges in nearby waters. Job growth in Castlegar and nearby areas also was a prime consideration, as were concerns about traffic that would accompany the expansion. Thus when viewed as a whole, the issue of energy self-sufficiency was not central to the decision to issue the Ministers’ Order, as

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reflected by the fact that it was not mentioned for 23 years or regulated (or even noticed) in any way by any official of the British Columbia government.

The information furnished above is faithful and true in its entirety and was developed on the basis of my best knowledge.

In Victoria, British Columbia, this 11 day of December, 2014.

John Allan