

Before the Additional Facility of the  
**INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES (ICSID)**

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**MERCER INTERNATIONAL INC.,**  
*Claimant,*

v.

**GOVERNMENT OF CANADA,**  
*Respondent.*

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

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**CLAIMANT'S REPLY**

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**16 December 2014**

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## **I. INTRODUCTION**

### **A. Overview Of Reply**

#### **1. Mercer's Case In A Nutshell**

1. This case is about discriminatory, unfair, and inequitable actions taken by the British Columbia Utilities Commission (“BCUC” or “Commission”) and BC Hydro to force Celgar to continue to subsidize other ratepayers, without compensation. The BCUC and BC Hydro require Celgar — unlike other British Columbia pulp mills — to use *all* of its below-load self-generated electricity to serve its own load. Celgar’s load displacement benefits other ratepayers, because it enables BC Hydro and FortisBC to avoid the high marginal costs of having to acquire the electricity they otherwise would need to purchase to supply Celgar, thereby lowering their average costs and rates.

2. BC Hydro contracted other pulp mills, like Canfor and Howe Sound, to provide load displacement, and paid them each tens of millions of dollars in exchange for committing to provide that valuable service. Canada explains that neither BC Hydro nor FortisBC wanted to pay Celgar for load displacement, so BC took from Celgar through regulatory action that which it paid others to provide.

3. Celgar never promised to self-supply its own electricity needs at the time it sought approval to modernize and expand its Mill 24 years ago. It provided regulators at the time estimates of its expected electricity generation and usage levels — and labeled them as “estimates” — but Celgar never committed to meet either target, much less to use its self-generated electricity for self-supply in perpetuity, as Canada now contends, for the first time ever. Canada relies on BC Ministry of Energy official Peter Ostergaard to argue that an obligation was created through common, boilerplate language used in a Ministers’ Order that itself nowhere

refers to any self-sufficiency obligation. It is telling, however, that Mr. Ostergaard's boss at the time, Deputy Energy Minister John Allan, disagrees completely. So too does the Celgar official who purportedly made the commitment, Mr. Sweeney, as well as BC Ministry of Environment official James McLaren, who was responsible for environmental regulation in the region containing the Celgar Mill at the time.

4. Not only did the BCUC hold Celgar to a "net-of-load" access standard that it applied to no other BC pulp mill, but also BC Hydro established a generator baseline ("GBL") for Celgar in a manner inconsistent with the "current normal operating conditions" standard it purports to have applied consistently. Canada thereby afforded Celgar far less favorable treatment than other pulp mills, including Tembec and Howe Sound, and less favorable than the Tolko sawmill to which Canada wants to compare Celgar.

5. The "current normal" standard requires an assessment of the level of self-generation used by the self-generator to meet its own load ("generation-to-load"). Consistent with the net-of-load standard adopted by the BCUC for Celgar, but not this "current normal" standard, BC Hydro used a formula in computing Celgar's GBL that it only used for Celgar and no other pulp mill. Because a self-generator can use its self-generated electricity either to meet its own load or to sell, and it can meet its own load through a combination of self-generation and electricity purchases, there are two equivalent formulae for measuring generation-to-load: (1)  $\text{Load} - \text{Purchases}$ , and (2)  $\text{Generation} - \text{Sales}$ . BC Hydro used  $\ll \text{[REDACTED]} \gg$  in computing Howe Sound's GBL in 2010, as the straightforward spreadsheet it used for Howe Sound's GBL calculation reveals.<sup>1</sup> Yet for Celgar, BC Hydro measured  $\ll \text{[REDACTED]} \gg$ ,

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<sup>1</sup> See Memorial, ¶ 572 and Figure 18.

for a 12-month baseline, << [REDACTED] >>, and thus used neither formula. This fact alone is sufficient to establish discriminatory treatment in establishing Celgar's GBL.

6. BC Hydro's treatment of Tembec is perhaps the most egregious in comparison to Celgar. For Tembec, << [REDACTED] >>, under the pretext that it was << [REDACTED] [REDACTED] >>. BC Hydro (and Canada's witnesses) ignored the fact that Tembec itself << [REDACTED] [REDACTED] >>. BC Hydro (and Canada's witnesses) also ignored the fact that, in the months before BC Hydro signed its 2009 EPA with Tembec, the mill had resumed operations, << [REDACTED] [REDACTED] >> indicated by the exceedingly low, permissive 14 MW GBL BC Hydro set.

7. In establishing GBLs, the BCUC and BC Hydro exercised considerable discretion, case-by-case, and used no consistent arithmetic, used no consistent baseline duration, applied different standards, and considered different factors for different mills in the context of a non-transparent regulatory regime that was devoid of written regulations, rules, or standards. Indeed, the "current normal" GBL standard Canada contends BC applied since 2001 does not even exist in any written document until June 2012.<sup>2</sup> The British Columbia self-generator and GBL regime

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<sup>2</sup> Indeed, the *post hoc* "current normal" standard Canada now touts as its gold standard of consistent treatment is subjective, not objective. "Normal" is hardly self-defining, and the conditions under which pulp mills operate and affect generation levels — including pulp prices, wood chip prices, hog fuel prices, utility electricity prices, green energy prices, costs of capital, assets deployed, etc. — all are dynamic and not static. This is why the generation levels of all pulp mills are never consistent over time. At bottom, what is "normal" is what BC Hydro says is normal — nothing more and nothing less.

not only allowed for Celgar’s discriminatory treatment of Celgar in comparison to Canadian-owned and third-country-owned pulp mills, but also it engendered Celgar’s non-transparent and arbitrary treatment in violation of the minimum standard.

8. Canada has no justification for its discriminatory, non-transparent, and arbitrary actions. While it peppers its Counter-Memorial with assorted policy rationales, such as BC Hydro’s professed desire to incentivize only new and incremental generation, or its desire to prevent harm to other ratepayers, or economic-efficiency, none of these rationales withstands scrutiny. *First*, the asserted policy of avoiding “harmful arbitrage” requires that a self-generator not be afforded *increased* access to embedded cost power to meet its own load. Necessarily then, the GBL must be set based on the levels of generation historically used to meet load. BC did not do so for Celgar, Tembec, or Tolko. BC Hydro, with the approval of the BCUC, *reduced* Celgar’s ability to access embedded cost power to meet its load, instead of maintaining it at *status-quo ante* levels, as the “harmful arbitrage” policy contemplates. In contrast, BC Hydro increased Tembec’s access significantly, and the BCUC increased Tolko’s.

9. *Second*, the restrictions imposed upon Celgar cannot be justified by the professed BC policy of incentivizing only new and incremental generation (which policy too, by the way, BC Hydro has not consistently applied.)<sup>3</sup> BC and BC Hydro could have subsidized new and

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<sup>3</sup> For example, BC Hydro’s Standing Offer Program, begun in 2008, under which BC Hydro agreed to purchase green power from small energy projects at pre-determined prices, in amounts up to 10 MW (raised to 15 MW in 2011), was open to existing generation. *See* C-72, BC Hydro, Standing Offer Program: Program Rules (Version 2.3, October 2013) § 2.2 (defining “Eligible Energy” as including “an existing generator”) and § 2.5 (also including “existing generators”). It was not until November 26, 2014, after Canada filed its Counter-Memorial, that BC Hydro amended the program to make existing generation ineligible. C-305, E-mail from BC Hydro Standing Offer (26 November 2014) (“BC Hydro is making existing generation ineligible for the Standing Offer Program. . . . The Program Rules and Application Form have been revised

[FOOTNOTE CONTINUED ON NEXT PAGE]

incremental generation all they wanted, without restricting Celgar's ability to sell its self-generated electricity.

10. *Third*, as economist Dr. Peter Fox-Penner explains, BC's self-generator policies had nothing whatsoever to do with improving economic efficiency. To the contrary, BC's policy stands in the way of an increase in overall resource efficiency — greater output of electricity at lower costs. It certainly is not designed to enhance economic efficiency, and, in fact, it has the opposite effect. It favors inefficient producers, by rewarding them with load displacement incentives and EPA contracts, and penalizes the most efficient producers, by requiring them to self-supply to a greater degree.

11. BCUC and BC Hydro policies instead were directed at a much narrower objective, minimizing the cost of electric service to BC Hydro customers other than self-generators. This is a cost minimization objective, not an efficiency objective, and explains why the BCUC and BC Hydro discriminated against Celgar — to preserve for BC Hydro and other ratepayers the benefits of Celgar's load displacement that they were used to getting for free.

## **2. Canada's Counter-Factual Tale**

12. Canada, for its part, tells in its introduction a fanciful tale of an aggressive Claimant who failed at trying to sell back to BC Hydro its own electricity, or that of FortisBC, using "arbitrage," "notional" power flows, and mere "accounting transactions," who has no claim for discrimination under a made-up "Below Load Access Percentage" measurement, because all self-generators in BC had their GBLs set under a uniform, consistently applied, "current normal

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accordingly.”).

operating conditions” standard. But the story Canada tells in the introduction is woefully incomplete and inaccurate. Indeed, is not even consistent with the remainder of the Counter-Memorial. It is as if someone determined that Canada needed a hard-hitting introduction, and wrote one without regard to the actual facts. Canada’s overall approach is to obfuscate rather than to inform and clarify. It kicks up a lot of dust in an effort to distract.

13. **Celgar Wished Only to Sell its Own Below-Load Self-Generated Electricity, As Others Were Allowed to Do.** Canada’s arguments regarding Mercer’s intentions and power flows are grossly misleading. Sales of below-load self-generated electricity by Celgar to third-parties, or even to BC Hydro, involve electricity *generated by Celgar*, in its steam turbine generators, and not by BC Hydro or FortisBC. To be sure, under the laws of physics, below-load electricity generated by Celgar physically would likely flow from Celgar’s generators to Celgar’s own load nearby, as electricity follows the path of least resistance. But this is equally true for every single self-generator that BC has allowed to sell below-load self-generated electricity. Tembec, Howe Sound, Canfor and others all are permitted to sell below-load electricity, *and BC Hydro purchases it, pursuant to “energy purchase agreements.”* That electricity never physically leaves those mills; it too flows to meet each mill’s own load.

14. These arrangements, like Celgar’s desired sales of below-load self-generated electricity, do not require BC Hydro to pay “something for nothing,”<sup>4</sup> or BC Hydro would not have agreed to them. To the contrary, they involve legitimate transactions in which BC Hydro and other utilities routinely engage, because, in the absence of such self-generation, BC Hydro would itself have to generate or purchase electricity to meet that load. Indeed, outside of its

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<sup>4</sup> See Counter-Memorial, ¶ 175.

Introduction, Canada concedes that “{a}ny increase in self-generation reduces the demand that BC Hydro must serve and thereby helps close the gap between electricity supply and demand. In other words, for BC Hydro to benefit from this additional generation, it is not necessary that the electricity be net of the self-generator’s load.”<sup>5</sup>

15. In the absence of Tembec’s below-load self-generation, electricity would flow from BC Hydro’s Generator A to Tembec’s load. With such self-generation, that electricity can instead flow from Generator A to meet another BC Hydro’s customer’s load. As noted above, every MWh of self-generated electricity produced by a self-generator is one less MWh of electricity BC Hydro has to produce or purchase at its high marginal cost, or one more MWh it can sell to someone else. This has value to BC Hydro, and it routinely pays for such services. In the case of Celgar’s sales to third parties, BC Hydro would not reduce its electricity generation, and, all other things being equal, Celgar’s electricity would flow to the purchaser *from the system as a whole*, if not directly from Celgar. All power purchase and sale agreements are in fact based on these type of contractual, notional power flows, precisely because the parties have no control over the actual flow of electricity. Canada’s arguments regarding Celgar’s power flows highlight the discrimination instead of answering Celgar’s claim.

16. **Restrictions, Not Procurement.** Canada also premises its tale on a blatant mischaracterization, seeking to portray this case as involving only BC Hydro’s power purchasing policies and economics.<sup>6</sup> But Mercer makes no claim that BC Hydro was required to procure its

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<sup>5</sup> Counter-Memorial, ¶ 48. The only point Canada fails to acknowledge is that *all* load-displacing self-generation provides equal benefits to BC Hydro, whether “additional” or pre-existing. Both equally reduce “the demand BC Hydro must serve.”

<sup>6</sup> See, e.g., Counter-Memorial, ¶¶ 18–21; see also Counter-Memorial, ¶ 362 (accusing Mercer of

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below-load self-generated electricity, and no claim for any “retroactive” BC Hydro load displacement subsidy or other BC Hydro incentives. Mercer’s claims thus do not involve any BC Hydro procurement.

17. Mercer’s claims instead are tied to the direct and indirect restrictions BC Hydro and the BCUC placed on Celgar’s ability to sell Celgar’s below-load self-generated electricity *to third-parties*, and to obtain replacement electricity from Celgar’s utility, FortisBC, at embedded cost rates, while Celgar was selling its self-generated power.<sup>7</sup> The BCUC’s Order G-48-09, applying a net-of-load standard to Celgar, had nothing to do with BC Hydro procuring energy, nor does the provision in Section 7.4(b) of Celgar’s 2009 EPA with BC Hydro precluding Celgar from selling below-GBL electricity — *which BC Hydro had declined to purchase* — to a third-party.

18. **Damages**. But for the challenged measures, Celgar would have had the opportunity to sell its below-load, green electricity at market prices. BC Hydro admitted as much when it went to the BCUC in 2008, and argued that it would cost its own ratepayers C\$ 15.4 million annually if Celgar were permitted to sell its below-load self-generated electricity.<sup>8</sup> The

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avoiding “all of the real issues that confront its case, namely the economic and regulatory principles that govern BC Hydro’s procurement of electricity”).

<sup>7</sup> See Memorial, ¶¶ 427–28 (“Mercer makes no claim with respect to government procurement. It does not claim, for example, that it was improperly denied an EPA with BC Hydro. . . . Indeed, Mercer is not even claiming that BC Hydro was required to have purchased more energy from Mercer in the 2009 EPA. At issue in this case are the regulatory measures imposed by BC Hydro and the BCUC that, since 2009, have eliminated Mercer’s access to embedded cost utility power while it is selling power not net of its 2007 load, and thereby eliminated its ability to sell its below-load self-generated energy to anyone (and not simply to a ‘Party or a state enterprise’).”).

<sup>8</sup> C-281, BC Hydro Responses to BCUC Information Request No. 1, *In Matter of British*  
[FOOTNOTE CONTINUED ON NEXT PAGE]

Commission staff had FortisBC perform an alternative calculation, which yielded an annual cost of C\$ 11.4 million.<sup>9</sup> Based on this evidence, the BCUC stated that it was “persuaded that if the City of Nelson and Zellstoff Celgar are permitted to sell all of their respective total generation capacity into the available markets, there would be some fairly large negative impact on BC Hydro.”<sup>10</sup> The Commission then relied upon this “fairly large negative impact” as a justification for imposing the net-of-load restriction on Order G-48-09 here at issue. But, if Celgar truly had nothing to sell, or nothing a purchaser would want to buy, or there was no market for Celgar’s electricity, as Canada now contends, then how could there have been any impact on BC Hydro’s ratepayers, much less a C\$ 11.4–15.4 million/year “large” impact? Canada’s arguments about (1) harm to other ratepayers, and (2) Mercer’s lack of damages are mutually contradictory.

19. The problem is not, as Canada would have it, that Mercer was trying to get BC Hydro to pay “something for nothing.”<sup>11</sup> Rather, it is that BC and BC Hydro wanted the benefit

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*Columbia Hydro and Power Authority, An Application to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement* (30 October 2008), Section 8.0, Response to Request 1.8.1.1. Canada in its Counter-Memorial uses a figure of \$16.7 million, but this figure includes both Celgar and the City of Nelson. See Counter-Memorial, ¶ 433.

<sup>9</sup> This cost represented FortisBC’s calculation of FortisBC’s price for non-firm energy instead of BC Hydro’s price. This calculation resulted in a C\$ 11.4 million cost to provide incremental supply to Celgar of. C-282, FortisBC Responses to BCUC Information Request No. 3, *In Matter of British Columbia Hydro and Power Authority, An Application to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement* (31 December 2008), Response to Request 1.8.1. Again, Canada provides a slightly higher figure in its Counter-Memorial of C\$ 12.3 million (Counter-Memorial, ¶ 433), because Canada’s figure includes costs for both Celgar and Nelson. See also C-7, BCUC, Order Number G-48-09 (6 May 2009), § 5.3, at 27 (referring to the C\$ 12.3 million figure as a BCUC staff estimate) (“BCUC Order G-48-09”).

<sup>10</sup> C-8, BCUC, Decision Accompanying Order Number G-48-09 (6 May 2009), at 27 (“G-48-09 Decision”).

<sup>11</sup> Counter-Memorial, ¶ 403.

of Celgar’s self-generation displacing load (so that BC Hydro would not have to procure expensive incremental electricity to supply Celgar’s load through the 1993 PPA) — the very same type of load displacement it paid Howe Sound, Canfor, and others to provide — without any corresponding compensation. It is BC Hydro that wanted to pay nothing for something.

20. **Below-Load Access/Arbitrage Percentages.** Canada’s response to Mercer’s other discrimination claims likewise are incomplete and inaccurate. Canada simply avoids key facts and arguments that contradict its narrative. Mercer has made *de facto* discrimination claims, one element of which is the existence of a discriminatory impact. As Mercer claims it was afforded less access to embedded cost utility electricity while selling below-load electricity than any other pulp mill in British Columbia, Mercer’s expert, Mr. Switlishoff, logically devised the “Below Load Access Percentage” as an objective measure of the degree of below-load access afforded to Celgar and to others. Indeed, it is nothing more than a metric allowing comparison of different GBLs that BC has set.

21. Canada inconsistently objects to Mercer’s measurement standard, which in substance is a measure of the extent each comparator is permitted to engage in arbitrage, while continuing to assert that its self-generator policy is aimed at preventing arbitrage. (Oddly, Canada never actually defines in its Counter-Memorial what it means by “arbitrage.”)<sup>12</sup> Canada appears to use the term “arbitrage” to mean the simultaneous purchase by a self-generator of embedded cost utility power while it is selling its self-generated electricity. Mr. Switlishoff has measured

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<sup>12</sup> It is remarkable that Canada uses the term “arbitrage” 21 times in its Introduction alone without ever defining the term, or acknowledging that BC permits Howe Sound, Tembec, Canfor, and virtually all self-generators other than Celgar to engage in some degree of arbitrage by selling self-generated electricity at market prices while simultaneously purchasing lower, embedded cost utility electricity.

the differing extents to which BC actually has precluded such “arbitrage.” It is understandable that Canada does not want to acknowledge the existence of these differences, which would become apparent if Canada had paused to define the term arbitrage. But in the end, Canada offers no real substantive criticism, and, more importantly, offers no alternative objective measure of the impact of the challenged measures.

22. **The Post Hoc “Current Normal” Standard.** With regard to Canada’s purported justification and the “current normal” standard it purports to have applied to everyone all the time, one of multiple problems for Canada is that this standard was nowhere articulated at any relevant time. BC Hydro uses the concept in a written document for the first time in June 2012 — years after it had set all the GBLs at issue — and even then phrased it somewhat differently. Before 2012, the only consistency in BC Hydro’s description of its purported standard was BC Hydro’s inconsistency, as BC Hydro articulated its standard differently at different times. In 2002, for example, BC Hydro stated it was assessing generation for GBL purposes under “*long-term* normal operating conditions,” for which it required “a minimum of 3 years” of operating data.<sup>13</sup> This is wide off the mark of its current depiction of a standard that utilizes a “snapshot” only of “current” normal operating conditions.<sup>14</sup>

23. “Current normal” remains entirely a *post hoc* rationalization. It certainly is not contained in the BCUC’s Order G-38-01<sup>15</sup> — or in any Commission order — and is in fact

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<sup>13</sup> C-134, Compendium of GBL Documents, 2002 CBG Generator Baseline (GBL) Application, at 020190 (emphasis added). *See also* Counter-Memorial, ¶ 135.

<sup>14</sup> *See* Scouras Witness Statement, ¶ 26.

<sup>15</sup> Lester Dyck’s testimony that the BCUC Staff Report accompanying Order G-38-01 refers to the standard, Dyck Witness Statement, ¶ 37, simply is not true. The phrase “current normal operating conditions,” or its analog, nowhere appears in that Order or the accompanying Staff

[FOOTNOTE CONTINUED ON NEXT PAGE]

inconsistent with the standard based on “historical” consumption or “historical” generation the Commission actually adopted in 2001 to preserve the *status quo*.<sup>16</sup> The Commission’s standard was retrospective, and required a backwards look at actual “historical” data. The Commission in its Order twice used the word “historical,” which means “in accordance with history”<sup>17</sup> and “having once existed.”<sup>18</sup>

24. In contrast, the *post hoc* “current normal” standard is prospective and predictive, based on how the generator would be expected to operate in the future under current conditions *at the time it applied for an EPA*, and thus not necessarily based on any generation-to-load pattern that ever “historically” occurred. The Commission’s standard did not require the self-generator to have an EPA with BC Hydro as a condition to obtaining a GBL; the “current normal standard,” by its terms, applies only when one negotiates an EPA with BC Hydro. The *post hoc* “current normal” standard also provides allowances for prior electricity contracts. The BCUC Order nowhere provides for such allowances.

25. **BC Hydro Co-Opts Order G-38-01 to Serve its Own Ends.** It appears that BC Hydro changed the historical baseline standard the Commission articulated in 2001, “to preserve the status quo,” by substituting a different standard that would serve its own, narrower, energy procurement purposes. In certain of its power calls, as Canada describes, BC Hydro has sought to purchase (“to incentivize” in Canada’s terminology) only “new or incremental” electricity, and

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

Report.

<sup>16</sup> C-21, *Kelowna Decision*, at 7.

<sup>17</sup> C-287, “Historical,” OXFORD ENGLISH DICTIONARY, (3d Online Edition March 2012), <http://www.oed.com/view/Entry/87299?redirectedFrom=historical#eid>.

<sup>18</sup> C-325, “Historical,” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY (2001 ed.), at 907.

not existing generation, a distinction it characterizes here as motivated by a desire not “to incentivize” electricity already on its system.

26. This standard may have been useful as a demarcation point for the amount of power BC Hydro would purchase, in light of the eligibility conditions in *those* specific power tenders, and the professed desire to purchase only new generation capacity, but the standard was completely inappropriate to determine the total amount of power a self-generator could sell *to a third-party*, to implement the non-procurement related purpose of Order G-38-01. Additionally, the GBL standard BC Hydro implemented in its EPAs also created a situation where BC Hydro and Powerex would not have to compete against BC self-generators in export markets, because the new GBL standard precluded sales to third-parties. The Commission never intended Order G-38-01 to facilitate this anticompetitive result.

27. BC Hydro co-opted provincial self-generator policy in favor of BC Hydro’s own power acquisition goals, which also had the effect of reducing BC Hydro’s power acquisition costs and maximizing its power export revenues. This shift transformed the GBL concept BC Hydro advertised at the beginning of Bioenergy Phase I, which functioned as an eligibility condition to sell electricity to BC Hydro, into the regulatory measure at issue here, which functions to prohibit below-GBL sales to third parties.

28. In short, Canada hangs its hat on a “current normal” standard never articulated at the time it set GBLs for Celgar and its comparators, never approved by the BCUC (and inconsistent on its face with the standard the Commission did articulate and its purpose), never communicated to Celgar when Celgar’s GBL was being determined, and never mentioned in the GBL determinations here at issue. This standard could never, in any sense, have controlled or

bound anyone because it was never written down, much less incorporated in any written procedure or legally binding statute, regulation, or order.<sup>19</sup>

29. Not only did BC treat Celgar in a manner inconsistent with the *post-hoc* “current normal standard,” but also it treated just about everyone else in a manner inconsistent with the standard as well. The evidence shows that the supposed provincial policy of preventing increased arbitrage to the detriment of other ratepayers was little more than an empty slogan, as BC allowed Celgar *less* access to embedded cost electricity while selling electricity under its EPA than it had previously, and its comparators *more*.

**B. Identification Of Reply Witness Statements And Expert Reports**

30. To establish these and other points, in addition to its argument below, Mercer presents the following statements of its reply witnesses and experts:

1. **Peter Fox-Penner**, Expert Report. Dr. Fox-Penner is an economist and Director of The Brattle Group. He evaluates the economic rationales provided by Canada for the challenged Measures, and concludes that BC’s actions were inconsistent with its rationales, and were unreasonably discriminatory and arbitrary. Dr. Fox-Penner also unmasks Canada’s “harm to other ratepayers” argument, which he reveals as nothing more than an argument to minimize BC Hydro’s costs in the short-term.
2. **John Allan**, Witness Statement. Mr. Allan was BC’s Deputy Energy Minister at the time of the May 1991 Ministers’ Order identified by Canada. Canada’s witness, Peter Ostergaard, reported to Mr. Allan. Mr. Allan explains why the

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<sup>19</sup> Because BC Hydro never provided public notice of the “current normal” standard, or accurately or fully described the standard to Celgar during Celgar’s GBL negotiations, Celgar could not have known what data to present or what arguments to make so as to assure a proper GBL result under BC Hydro’s undisclosed methodology. Put another way, because there was no written standard or application guidelines, or even a list of factors BC Hydro would consider, no common data set was gathered for each self-generator, and BC Hydro considered different factors for different companies.

Order cannot be viewed as creating any binding obligation on Celgar to be electricity self-sufficient.

3. **Robert Sweeney**, Witness Statement. Mr. Sweeney was the General Manager of Celgar's 1992–94 Modernization and Expansion Project, and the signer of the regulatory application Canada contends committed Celgar to energy self-sufficiency in perpetuity. Mr. Sweeney explains that Celgar made no such commitment, providing instead only estimates of expected electricity production and usage under the regulatory environment at the time, which did not permit self-generators to use their electricity for anything other than self-supply.
4. **James McLaren**, Witness Statement. Mr. McLaren served as the Regional Manager for Waste Management at BC's Ministry of Environment at the time Celgar underwent the Environment Ministry's Major Project Review Process for its Modernization and Expansion Project and when the 1991 Ministers' Order was issued. Upon leaving the Ministry of Environment, Mr. McLaren became Celgar's Environmental Manager, and, until his retirement in 2011, was responsible for regulatory compliance matters at Celgar. Mr. McLaren explains that the 1991 Ministers' Order did not create any binding obligation on Celgar to be energy self-sufficient, and that the relevant regulatory authorities never once sought to enforce any supposed self-sufficiency commitment.
5. **David Austin**, Expert Report. Mr. Austin is a practicing lawyer in BC and an expert on energy regulation. He explains that the Ministers' Order created no legally binding obligation on Celgar to be energy self-sufficient.
6. **Elroy Switlishoff**, Reply Expert Statement. Mr. Switlishoff evaluates the professed "current normal operating conditions" GBL standard and demonstrates that it was not applied consistently in BC
7. **Brian Merwin**, Second Witness Statement. Mr. Merwin is Mercer's Vice-President for Strategic Initiatives, and has been responsible for Celgar's efforts to access embedded cost utility electricity and sell its self-generated electricity, and negotiated the 2009 EPA with BC Hydro. He recounts his dealings with BC Hydro, and his discussions with its energy broker, NorthPoint, about selling Celgar's below-load self-generated electricity to third-parties.
8. **Robert Friesen**, Witness Statement. Mr. Friesen was Director of Energy Trading at NorthPoint over the period 2001-10, and was responsible for identifying and scheduling sales and transmission access for exports of Celgar's self-generated electricity under the 2006 brokerage agreement. He testifies about the availability in 2008 of market opportunities for Celgar's below-load self-generated electricity, and the availability of transmission access.

9. **Brent Kaczmarek**, Second Expert Damages Report. Mr. Kaczmarek updates his earlier damages analysis, and responds to Dr. Rosenzweig's critique.

## II. THE NATURE OF MERCER'S CLAIMS

### A. The BCUC and BC Hydro Imposed Restrictions on Celgar

31. Contrary to Canada's characterizations, none of Mercer's claims concerns BC Hydro procurement policy, BC Hydro's asserted desire to incentivize only future new and incremental generation, or requests for retroactive load displacement subsidies.<sup>20</sup>

32. Mercer's discrimination claim is that BC Hydro and the BCUC have imposed more severe restrictions on Celgar than on any other pulp mill in BC with regard to the Mill's ability to purchase embedded cost utility power while selling its own below-load self-generated power, and thereby, both directly and indirectly, also restricting Celgar's ability to sell its below-load self-generated electricity to *any* third-party at market prices.

33. Mercer contends first that BCUC Order G-48-09 imposes a net-of-load access standard on Celgar, by effectively preventing FortisBC from selling Celgar any embedded cost electricity from Fortis' pre-existing resource stack while Celgar is selling electricity. This direct restriction on FortisBC indirectly restricts Celgar. Without access to utility electricity to meet its pulp mill load, Celgar has no practical choice but to self-supply its own load.

34. Mercer contends secondly that the GBL and related exclusivity provisions in Section 7.4(b) of Celgar's 2009 EPA with BC Hydro directly prevent Celgar from selling any power it generates below its 2007 load, again, not to BC Hydro but to any third party.

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<sup>20</sup> See, e.g., Counter-Memorial, ¶¶ 17-19, 21, 24, 418, 472.

35. One measure (BCUC Order G-48-09) restricts Celgar’s access to embedded cost utility electricity; the other measure (BC Hydro’s GBL and related contractual exclusivity provisions) restricts Celgar sales of below-load self-generated electricity. Both have the same practical effect — Celgar must self-supply all electricity below the level of its 2007 load of 349 GWh/year, Celgar cannot sell any of this below-load electricity *to BC Hydro or a third-party*, and Celgar has no access to FortisBC embedded cost electricity while selling electricity.

36. Mercer makes no claim that BC Hydro was required to purchase Celgar’s below-load electricity, although, as discussed in the damages section below (Section VI.C.2), it is highly likely BC Hydro would have done so rather than let that energy leave the Province.<sup>21</sup> While Celgar did offer BC Hydro its below-load electricity as one of two proposals presented in response to BC Hydro’s Bioenergy Phase I Request for Proposals (“RFP”),<sup>22</sup> BC Hydro explained that such energy was not eligible under the terms of the RFP,<sup>23</sup> and Mercer does not contend that BC Hydro nonetheless was legally obligated to buy it. Mercer takes issue instead with the restriction BC Hydro placed on Celgar’s sales of its below-GBL energy *to third parties*,

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<sup>21</sup> BC Hydro benefits from Celgar’s load-displacing, below-GBL, self-generation output, because it reduces the amount of power BC Hydro otherwise would have to supply to FortisBC. BC Hydro just does not want to pay for a benefit Celgar has provided for years at Celgar’s sole expense using Celgar’s own investment dollars. However, to the extent the Tribunal rules that the measures requiring Celgar to meet its 2007 load before it can sell electricity were discriminatory, or violated the minimum standard of treatment, and that Celgar should have been permitted in 2009 to sell some or all of this below-load energy, then BC Hydro would have been faced with the choice of purchasing that electricity from Celgar or losing it entirely. In *those* circumstances, it is highly likely BC Hydro would have purchased the power, consistent with the Province’s 2007 Energy Plan and consistent with BC Hydro’s own stated goal of “incentivizing” self-generated electricity it would not otherwise obtain.

<sup>22</sup> Memorial, ¶ 297; Merwin Witness Statement, ¶ 81. Mercer referred to this proposal as its “Biomass Realization Project.”

<sup>23</sup> Memorial, ¶ 297; Merwin Witness Statement, ¶ 81.

effectuated through the GBL and related exclusivity provisions in Section 7.4(b) of the 2009 EPA.<sup>24</sup>

37. It is disingenuous of Canada to contend that the GBL set by BC Hydro “delineates the amount of electricity it will be willing to purchase.”<sup>25</sup> That is at best a half-truth, resulting only from the manner in which BC Hydro has implemented the BCUC’s mandate in Order G-38-01. The purpose of the GBL, as set out by the BCUC in Order G-38-01, was to define the self-supply obligation of the self-generator. As the BCUC itself has stated, “the notion of a GBL, represent{s} in its most basic form, the load a self-generator must serve . . . .”<sup>26</sup>

38. The GBL-related terms in Celgar’s 2009 EPA thus do far more than demarcate what BC Hydro will purchase. Indeed, during its negotiations with BC Hydro, Celgar attempted to limit its GBL to that purpose alone, and to avoid any restriction on below-GBL sales to third parties, as Mr. Merwin described and documented.<sup>27</sup> However, BC Hydro rebuffed Celgar.<sup>28</sup>

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<sup>24</sup> Section 7.4 contains the “exclusivity” provisions of the EPA. C-221, 2009 Celgar EPA, and reviewed in the Memorial, ¶¶ 327–28. Section 7.4(b) prevents Celgar from selling below-GBL energy to any person other than BC Hydro except that portion of below-load energy that also is greater than the Mill Load. This means that only if Celgar’s mill load drops below its GBL, it can make sales, but only of the difference between its load and its GBL. As long as Celgar’s load remains at or greater than its GBL, which it has in every year to date, no below-load third-party sales are possible. *See also* Merwin Witness Statement, ¶ 104 (attesting that “[t]he amendment {embodied in the Final EPA} prohibited below-GBL sales to any person, except on a net-of-load basis.”). Canada, in its Counter-Memorial, does not dispute Mercer’s interpretation of these provisions as precluding below-GBL sales to third-parties.

<sup>25</sup> Counter-Memorial, ¶ 21.

<sup>26</sup> C-21, *Kelowna Decision*, at 20.

<sup>27</sup> Merwin Witness Statement, ¶ 103; C-209, Electricity Purchase Agreement between BC Hydro and Celgar (Draft, 4 November 2008), § 7.4(b).

<sup>28</sup> Mr. Scouras’ testimony that “BC Hydro never accepted Celgar’s suggestion that it could sell energy below its GBL to third parties,” Scouras Witness Statement, ¶ 53, is demonstrably incorrect, and reflects Mr. Scouras’ lack of first-hand knowledge concerning the negotiations.

[FOOTNOTE CONTINUED ON NEXT PAGE]

Instead, Celgar's GBL precludes below-GBL sales *to third-parties*. This latter restriction is the one at issue in this case, and it has nothing to do with BC Hydro's procurement of electricity.

39. When BC Hydro at the eleventh hour during the negotiations over Celgar's EPA, in early November 2008, changed the previously-agreed text, < [REDACTED]

[REDACTED] > BC Hydro fundamentally altered the nature and impact of the GBL it had determined for Celgar.<sup>29</sup> In the prior draft, < [REDACTED] >, transmitted by BC Hydro's Mr.

Kincade to Mercer's Brian Merwin by e-mail dated October 28,<sup>30</sup> the GBL did, in fact, only <

[REDACTED] ><sup>31</sup> After the change, however, the GBL also imposed a < [REDACTED]

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

Mr. Merwin negotiated the EPA for Celgar, primarily with Martin Kincade for BC Hydro, and not with Mr. Scouras. Merwin Second Witness Statement, ¶¶ 11-12. (Curiously, Mr. Scouras does not disclose in his testimony that he was not the principal negotiator, and thus would not have been aware of all exchanges between the parties.) Attached as Exhibit C-283 is the October 28, 2008 e-mail from Martin Kincade of BC Hydro to Brian Merwin, transmitting Version 7 of the draft EPA. C-283, E-mail from Martin Kincade to Brian Merwin re Celgar EPA (28 October 2008, 4:40 pm). Mr. Kincade did not copy Mr. Scouras on the e-mail. < [REDACTED]

[REDACTED] > C-209, Electricity Purchase Agreement between BC Hydro and Celgar (Draft, Version 7), § 7.4(b).

<sup>29</sup> See Merwin Second Witness Statement, ¶¶ 7, et seq.

<sup>30</sup> C-283, E-mail from Martin Kincade to Brian Merwin re Celgar EPA (28 October 2008, 4:40 pm) (with attachments).

<sup>31</sup> Mercer presented Version 7 in its Memorial, at Exhibit C-209. See Memorial, ¶ 326. Canada cannot explain its existence, or reconcile it with its narrative, so Mr. Scouras and Canada ignore it.

[REDACTED] >.<sup>32</sup> Canada refuses to acknowledge either the existence or the import of this change, refusing even to address the existence or content of < [REDACTED] >.

40. More broadly, Canada fails to acknowledge that BC Hydro could have purchased from Celgar the quantity of energy BC Hydro deemed eligible under the RFP without also restricting Celgar from selling its remaining self-generated energy to a third-party. There is no necessary connection between the two. Indeed, a persistent flaw throughout Canada's argument is Canada's refusal to allow for the possibility that a BC self-generator could sell its self-generated electricity to anyone other than BC Hydro.<sup>33</sup> Canada conflates BC Hydro purchasing criteria with BC self-generation policy, such that it assumes that once BC Hydro determines not to purchase some portion of a self-generator's electricity, that electricity necessarily cannot be sold to anyone else and must be used for self-supply. Canada is wrong, as the BCUC's 2001 Order G-38-01 was intended expressly to allow self-generators to sell new or idle generation into the then high-priced California market, *i.e.*, to third-parties.

41. BC Hydro purchased no good or service from Celgar that required or even permitted it to restrict Celgar's sales of electricity to a third party. The GBL-based requirement compelling Celgar to self-supply is a regulatory measure, which BC Hydro imposed based on its interpretation of authority the BCUC delegated to it in Order G-38-01 and its progeny. It is not a procurement measure.

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<sup>32</sup> See *supra* n. 24.

<sup>33</sup> BC Hydro appears to share this view as well. As will be discussed *infra*, a key feature of the "current normal" EPA-based GBL standard is that it precludes the self-generator from selling energy to any third-party, and thus protects BC Hydro and Powerex from home grown competition in export markets.

**B. The Measures Adversely Impacted Celgar's Competitive Position As A Kraft Pulp Mill**

42. Indeed, the regulatory measures at issue affect far more than Celgar's attempts to sell its below-load electricity; they also affect Celgar's competitive position as a pulp mill. As Brian Merwin explained in his original witness statement, "Celgar's inability to maximize its energy revenues has a severe impact on the economics of the Celgar Mill's overall operation."<sup>34</sup>

43. Mr. Merwin presented two sets of cost curve estimates for all of BC's kraft pulp mills to illustrate the relative competitiveness of the different mills.<sup>35</sup> In one, he does not consider revenues from below-load sales of self-generated electricity. In the second, he considers the impact of such sales, by treating the additional revenue earned through arbitrage (net of the cost of replacement electricity) as an offset to costs.<sup>36</sup>

44. In the first scenario, Celgar is the lowest cost mill in British Columbia.<sup>37</sup> In the second scenario, reflecting conditions under the Measures, Celgar is the fifth highest cost mill of 11.<sup>38</sup> BC's discriminatory actions in allowing all BC pulp mills to sell more below-load self-generated electricity than Celgar has shifted the relative competitive positions of the mills, to

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<sup>34</sup> Merwin Witness Statement, ¶ 149.

<sup>35</sup> Mercer utilizes cost benchmarking models using the FisherSolve Platform, a comprehensive database and system that covers each grade of pulp and every mill in the global pulp and paper industry. Merwin Witness Statement, ¶ 151.

<sup>36</sup> Revenues from the sales of above-load electricity, the sale of which BC does not restrict, are treated as an offset to costs in both scenarios. Merwin Witness Statement, ¶ 151 n. 66.

<sup>37</sup> Merwin Witness Statement, ¶ 151.

<sup>38</sup> Merwin Witness Statement, ¶ 155.

Celgar's detriment. This shift has real-world consequences for Celgar, impacting both the prices it must pay for inputs and the prices it receives for pulp, particularly during market downturns.<sup>39</sup>

45. As Mr. Merwin explained, "{a}ll else being equal, a pulp mill with higher relative below-load electricity revenues can afford to pay more for wood chips, which will likely drive up prices that Celgar and other mills pay for those chips over the long term. The electricity revenues act as a buffer for the less efficient mills, sheltering them from low pulp prices by providing an alternative revenue stream."<sup>40</sup> In the last pulp cycle downturn, from around June 2012 to December 2012, mills that shutdown in previous downturns because they were less efficient did not shut down.<sup>41</sup>

**C. The Nature Of Power Sales Agreements, Load Displacement Agreements, And Canada's "Buying Nothing For Something" Myth**

46. In its Introduction, but nowhere else, Canada makes the argument that Celgar's desire to sell its below-GBL self-generated energy involved nothing more than an "accounting transaction," in which it sought to have BC Hydro pay "without receiving anything in return."<sup>42</sup> According to Canada, Celgar "planned to buy . . . low cost-electricity from FortisBC and sell it

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<sup>39</sup> See Second Kaczmarek Expert Report, ¶ 32 ("{T}he Measures imposed by BC Hydro and the BCUC have effectively allowed competing mills to offset more of their costs with profits from the sale of their electricity, changing those mills' shutdown points. Mills that ordinarily would shut down in periods of falling NBSK pulp prices or increasing fiber (i.e., raw materials) costs are able to remain in operation longer. As pulp and fiber are commodities, when mills that would be uneconomic but-for the Measures remain in operation, it has the knock-on effect of an oversupply of pulp (depressing pulp prices) or an undersupply of fiber (increasing raw materials costs)."); Fox-Penner Expert Report, ¶ 135 ("If Celgar was treated in a discriminatory fashion, then this treatment rationally will discourage its next decision to invest in BC.").

<sup>40</sup> Merwin Witness Statement, ¶ 156.

<sup>41</sup> Merwin Witness Statement, ¶ 157.

<sup>42</sup> Counter-Memorial, ¶¶ 1-2.

back, for more than three times the price, to BC Hydro as if it were the Claimant's own self-generated electricity."<sup>43</sup> This argument does not make it into the body of Canada's argument, or the testimony of its witnesses, because these witnesses with power sales experience know better.

47. Canada's argument fails to recognize Celgar's self-generated electricity. As Mr. Switlishoff explains, "{t}o be clear, Celgar would have no electricity to sell if its generators were not generating electricity, and it is this electricity that Celgar has sought to sell. At no time did Celgar propose to sell any electricity that was not physically being generated by its own generators. Rather, Celgar has sought to sell its below-load self-generated electricity, while purchasing power from FortisBC to meet the electrical load of its pulp mill, similar to the arrangements between BC Hydro and self-generators such as Tembec, Howe Sound, and others that are allowed to sell below-load self-generated electricity."<sup>44</sup>

48. There is nothing wrong or even unusual with the type of transaction Celgar had proposed to Fortis BC. Indeed, BC Hydro agreed to precisely this type of arrangement with Tembec, in Tembec's 1997 EPA. To reiterate, in that EPA BC Hydro purchased from Tembec the << [REDACTED] >> 10.8 MW of electricity generated by Tembec at << [REDACTED]

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<sup>43</sup> Counter-Memorial, ¶ 3.

<sup>44</sup> Second Expert Statement of Elroy Switlishoff, P.Eng., M.Eng (10 December 2014), ¶ 8 (hereinafter "Switlishoff Second Expert Statement"). *See also* Merwin Second Witness Statement, ¶ 3 ("The Arbitrage Project that I was exploring for Celgar in 2007 and 2008 in no way contemplated selling FortisBC's energy to BC Hydro (or other third parties) as if it were Celgar's own self-generated electricity. The Arbitrage Project did examine the possible sale of Celgar's own self-generated electricity to third parties, while simultaneously purchasing electricity from Celgar's utility (Fortis BC) to meet the pulp mill's electricity needs. Canada's suggestion that Celgar had orchestrated a scheme to sell FortisBC's electricity as its own is not only false, it also betrays a fundamental misunderstanding and misrepresentation of the modern electricity market and distribution system.").

[REDACTED] >>, and sold Tembec 10.8 MW of power to meet the needs of Tembec's pulp mill at a lower, embedded cost price (then around C\$ 25.99/MWh).<sup>45</sup>

49. As Mr. Switlishoff explains, << [REDACTED]

[REDACTED]  
[REDACTED] >> None would flow to BC Hydro's transmission system."<sup>46</sup> As Mercer noted in its Memorial, as Mr. Switlishoff confirms, and as Canada does not dispute:

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<sup>45</sup> See Memorial, ¶ 201.

<sup>46</sup> Switlishoff Second Expert Statement, ¶ 4.



put it, <<

>><sup>49</sup> It also

understood that it had agreed contractually to purchase Tembec's self-generated electricity, and never characterized the arrangement as BC Hydro purchasing back its own electricity, as Canada now erroneously characterizes Celgar's attempts to sell its below-load-electricity.

51. This is equally true for *every single* self-generator BC has allowed to sell below-load self-generated electricity. Tembec, Howe Sound, Canfor, and others all are permitted to sell below-load electricity, *and BC Hydro purchases it, pursuant to "energy purchase agreements."* Such electricity never physically leaves those mills; it too flows to meet each mill's own load. And BC Hydro buys that electricity.

52. As Mr. Switlishoff explains

These arrangements, like Celgar's desired sales of below-load self-generated electricity, do not require BC Hydro to pay "something for nothing," or BC Hydro would not have agreed to them. To the contrary, they involve legitimate transactions in which BC Hydro and other utilities routinely engage, because, in the absence of such self-generation, BC Hydro would itself have to generate or purchase electricity to meet that load. . . . All power purchase and sale agreements are in fact based on this type of contractual, notional power flows, precisely because the parties have no control over the actual flow of electrons.<sup>50</sup>

53. Canada's witnesses agree, and rebut Canada's own argument. Mr. Dyck acknowledges: "*In most cases*, even though an EPA is for the sale of electricity, some or all of the self-generated electricity is consumed by the self-generator's mill load and is not physically

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

Expert Statement, ¶ 147.

<sup>49</sup> C-34, Email from Lester Dyck to Leon Cender, Judy Baum, and Matt Steele (15 September 2009).

<sup>50</sup> Switlishoff Second Expert Statement, ¶¶ 9-10.

delivered to BC Hydro. The EPA approach deems the electricity to be delivered to BC Hydro, but *in most cases* the transaction does not reflect the actual flows of electricity.”<sup>51</sup>

54. The person writing Canada’s “something for nothing” argument in its Introduction must not have read Canada’s witness statements. There is just no other explanation for Canada’s disingenuous attempt to criticize Celgar for seeking to do that which BC Hydro’s existing EPAs legitimately and expressly provide for, to varying extents, in the words of Canada’s own witness, “in most cases.”<sup>52</sup>

### **III. CELGAR HAS NO OBLIGATION TO SELF-SUPPLY ITS MILL’S ENERGY NEEDS**

55. Celgar never committed to self-supply all of its energy needs at the Celgar Mill, nor did the Province in 1991 direct Celgar to do so, despite an unfounded new argument to this effect in Canada’s Counter-Memorial.<sup>53</sup> Canada bases its argument on a 1991 Ministers’ Order that approved a thermal electric power plant at the Mill, and on the testimony of a former BC Energy Ministry official, Peter Ostergaard, who claims to have knowledge of the Provincial government’s latent intent.<sup>54</sup> But then-Deputy Minister of Energy John Allan, Mr. Ostergaard’s boss at the time, disagrees completely with Mr. Ostergaard’s tale, as does one of Mr. Ostergaard’s

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<sup>51</sup> Dyck Witness Statement, ¶ 29 (emphasis added). *See also* Rosenzweig Expert Report, ¶ 54 n. 70 (acknowledging the difference between contractual and physical power flows in BC Hydro EPAs, and acknowledging that BC Hydro is paying for electricity it does not receive because “the incentive paid in relation to this clean energy is lower than the cost of acquiring long-term clean energy from other sources.”)

<sup>52</sup> Dyck Witness Statement, ¶ 29.

<sup>53</sup> *See* Counter-Memorial, ¶¶ 173–87.

<sup>54</sup> *See, e.g.*, Counter-Memorial, ¶ 185; Ostergaard Witness Statement, ¶¶ 9–12.

counterparts at the BC Ministry of Environment, James McLaren.<sup>55</sup> Canada lacks any factual or legal basis for this claim, which it is asserting in this arbitration despite *never* having made it in over 23 years of administrative oversight of the Celgar Mill and in numerous communications with Claimant for many years regarding the use and sale of electricity produced at the Celgar Mill — the very subjects of this arbitration.

56. Indeed, Canada cannot even articulate with any precision the commitment it contends that Celgar made. Does Canada contend that Celgar committed to generate sufficient electricity to meet the Mill’s load, or does it contend that Celgar committed to use all the electricity it generated first to meet its load? The former is a *generation* requirement, whereas the latter is a *usage* requirement. These are very different obligations, yet it is totally unclear which of these Canada contends is in place, or whether Celgar’s purported obligation is something entirely different. The reason Canada cannot specify what commitment exists is because neither Celgar nor BC used any language in the documents on which Canada relies that actually embodies any specific commitment.

57. Canada’s argument fails for many other independent reasons. Most importantly, Celgar provided projections but no commitment about expected generation levels and the way it would use the electricity it anticipated producing at the power plant. The Ministers who approved the Celgar Mill’s new power plant did not purport to impose any requirements in that 1991 Order on the levels or use of that electricity. Indeed, Canadian law requires that when the government seeks to impose regulatory obligations, it must use clear language. The Order lacked any clear

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<sup>55</sup> Witness Statement of John Allan (11 December 2014) (“Allan Witness Statement”), ¶¶ 12–33; Witness Statement of James McLaren (12 December 2014) (“James McLaren Witness Statement”), ¶¶ 6–24.

and certain terms or specific measurements for what Canada now claims is a regulatory self-sufficiency obligation. In contrast, where Canada actually regulated the Celgar Mill — such as in environmental matters — it did so explicitly, with clear metrics, and monitoring on an ongoing basis.

58. Even assuming *arguendo* that the Ministers had imposed in 1991 some kind of self-sufficiency obligation on Celgar covering the electrical generation equipment that Celgar was planning to install at that time, both the Celgar Mill itself and the legal and regulatory framework for the sale of electricity have changed so fundamentally in the years following the Order, that these developments would have superseded any purported obligation.

59. Finally, as a matter of law, the BC government lacked authority to regulate the use of energy at pulp mills that were the size of the Celgar Mill.

60. The Tribunal should also reject Canada's argument because Canada never asserted the existence of any electricity self-sufficiency commitment in the 23 years following the Order, during which time it regulated the Celgar Mill, including regulation of Celgar's use of the electricity it produced at the thermal electric power plant. Arbitral tribunals repeatedly have rejected such after-the-fact claims by governments, formulated only for international proceedings, which are at odds with the government's domestic conduct in dealing with the relevant investors.

**A. The Ministers' Order Did Not Commit Celgar To Electricity Self-Sufficiency**

**1. Celgar Made No Self-Sufficiency Commitment In Its Application For An Energy Project Certificate**

61. In the early 1990s, Celgar decided to expand and modernize its Mill, including by expanding its capacity to generate electricity on-site. The electrical generating capacity that

Celgar proposed to add was large enough to make the modernization project a “regulated project” under the then-applicable section of the BC Utilities Commission Act. As a result, the expansion required the Minister of Energy’s prior approval.<sup>56</sup> On 12 October 1990, Celgar therefore applied for an Energy Project Certificate (“EPC”) to construct and operate a new thermal electric power plant as part of its pulp mill.<sup>57</sup>

62. BC Regulation 388/30 governed applications for EPCs, and required Celgar to submit detailed information about the proposed expansion, so that regulators would understand the context of the proposal.<sup>58</sup> Regulation 388/30 required Celgar to include “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.”<sup>59</sup>

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<sup>56</sup> R-95, British Columbia Ministry of Energy, Mines and Petroleum Resources, Guide to the Energy Project Review Process (Queen’s Printer for British Columbia, 1982) (“Guide to the Energy Project Review Process”). R-95 includes in Appendix 1 the relevant sections of the UCA and B.C. Regulation 388/30, entitled “Application Requirements. Under section 18 of the Utilities Commission Act.” UCA Section 17(1) 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.” UCA § 16 (definition of a “regulated project” includes adding or installing a thermal electric power plant with a capacity of 20 megawatts or more). Celgar’s proposed generator was a “thermal electric power plant,” defined as “a facility for the generation of electricity from the combustion of natural gas, oil, petroleum products, coal, wood or plant products or from the use of geothermal energy, and includes all associated structures, machinery, appliances, fixtures and equipment, and storage and handling facilities{.}”

<sup>57</sup> R-97, Affidavit of the General Manager of Celgar, Robert W. Sweeney (12 October 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”).

<sup>58</sup> R-95, “Guide to the Energy Project Review Process,” at app. 1.

<sup>59</sup> R-95, “Guide to the Energy Project Review Process,” at app. 1, BC Regulation 388/30, Section 1(b)(1).

63. When presented with an application for an Energy Project Certificate, the Minister of Energy had three options under then-Article 19 of the UCA, namely: (1) referring the matter to the BCUC for review; (2) addressing the application as seeking a certificate of public convenience and necessity; or (3) with the concurrence of the Minister of Environment, exempting the construction and operation of the power plant from provisions of the UCA.<sup>60</sup> In the case of the Celgar’s Application, the Minister of Energy chose the third option and — jointly with the Minister of Environment — ordered that the construction and operation of the thermal electric power plant be exempt from provisions of the UCA specified in the Order. The Minister of Energy also had the authority to impose conditions in the Order that were in the public interest.<sup>61</sup>

64. In a joint order dated 23 May 1991, Minister of Energy Jack Weisgerber and Minister of Environment Dave Mercier, in accordance with UCA Article 19(1)(c) quoted above, approved the construction and operation of Celgar’s thermal electric power plant as exempt from the relevant UCA provisions.<sup>62</sup>

65. The Ministers’ Order included several conditions. Celgar was to cause the project to be designed, located, constructed and operated in accordance with its Application, any

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<sup>60</sup> R-95, “Guide to the Energy Project Review Process,” at app. 1, Art. 19 (1).

<sup>61</sup> R-95, “Guide to the Energy Project Review Process,” at app. 1, Art. 19(3).

<sup>62</sup> 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). As British Columbia energy law expert David Austin explains in his expert report, “representatives from Celgar countersigned the Ministers’ Order. . . . Such signatures have no legal significance . . . {and they} . . . do not change the fact that Celgar expressed no clear, measurable self-sufficiency commitment in the underlying Application, and that the Ministers did not impose any such commitment through their Order.” Expert Report of David Austin (14 December 2014) (“Austin Expert Report”), ¶ 20, n.25.

undertakings made by or on its behalf in the July 1990 Celgar Pulp Mill Expansion Stage II reports, in compliance with the British Columbia Major Project Review Process and the federal Environment Assessment and Review Process, and material submitted during the 1990 hearings on the project. Celgar was also to obtain and comply with all applicable licenses, regulations, etc., including final recommendations from the Celgar Expansion Review Panel, 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.<sup>63</sup>

66. In light of the history of environmental problems at the existing pulp mill, Celgar's Application had focused on the environmental improvements that Celgar anticipated would result from its modernization of the Mill. As Celgar noted in the Application:

{The Celgar Mill's} 1950's design preceded requirements for modern environmental control policies. By the mid-1980's the mill needed significant capital expenditures for modernization in order to meet government environmental standards and remain internationally competitive.<sup>64</sup>

67. Celgar explained its anticipated operations in detail, including such factors as: the sources of its wood supply, the processing of wood and its bleaching, cleaning, drying, and finishing, and various environmental controls that Celgar was putting into place. None of these operational projections specifically related to the proposed thermal electric power plant. As to

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<sup>63</sup> 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), at 2-3.

<sup>64</sup> R-97, Celgar 1990 Energy Project Certificate Application. Celgar also noted: "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." R-97, Celgar 1990 Energy Project Certificate Application, at 19.

energy production, Celgar explained that it planned to shut down its existing recovery boiler, and install a new recovery boiler, to burn the heavy black liquor produced at the Celgar Mill. Celgar also offered a projection of its anticipated energy use at the modernized facility: **“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.”**<sup>65</sup> Celgar also noted: **“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 be retained.”**<sup>66</sup>

68. Celgar provided no additional detail on the precise levels (or balances) of electricity and/or other energy that it would generate or use, what would happen during outages, or if prices for fuel sources increased, or how electricity generation and use would be measured or monitored. The Application used — but did not define — terms such as “power,” “energy” usage and “self-sufficiency.” For their part, the Ministers did not ask Celgar to submit additional information on these estimates, including how they might be quantified or managed by the Mill in a modernized facility.

69. The language Celgar used in the Application reflects that the company was not making a commitment. Celgar wrote solely in terms of an “estimate” of electricity levels that the mill would require and generate.<sup>67</sup> It did not commit to either a particular generation level or

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<sup>65</sup> R-97, Celgar 1990 Energy Project Certificate Application, § (b) (emphasis in original).

<sup>66</sup> R-97, Celgar 1990 Energy Project Certificate Application, § (b) (emphasis in original).

<sup>67</sup> R-97, Celgar 1990 Energy Project Certificate Application, § (b).

load. As to the 50 megawatt figure, Celgar was simply pointing out its estimate that the expanded mill “will require approximately 50 megawatts of power and will be capable of generating 50 megawatts,” and that if those two “estimates” were accurate, the mill would be 100% self-sufficient under normal operating conditions. Celgar was just doing the arithmetic, and observing that, if its estimates were correct, the mill would be able to generate all the electricity it estimated it would need.

70. Celgar used no language that can be construed as making any independent commitment to be electricity self-sufficient. It only made an “if” and “then” observation. Indeed, Celgar’s statements have to be understood in the context of the regulatory environment in place at the time they were made. Under the regulatory strictures then in place, which did not allow self-generators access to transmission to sell their electricity, Celgar had no choice but to use its self-generated electricity to meet the Mill’s own load. This was the *only* use possible. Because Celgar could not use its self-generation at that time for anything other than meeting its own load, the fact that Celgar’s expected generation would equal its load *necessarily* meant that the Celgar Mill would be electricity self-sufficient, at least when the plant and generator both were fully operational.

71. Moreover, as reflected in the attached report by British Columbia energy law expert David Austin, the term “energy” includes not only electricity, but also other energy sources frequently used at the Celgar Mill, including natural gas.<sup>68</sup> Mr. Austin further notes that Celgar never used any language of commitment. He notes that the Application consisted only of good

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<sup>68</sup> Austin Expert Report, ¶ 17 (“The Application is 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.”).

faith projections that were not precise, never defined what “normal operating conditions” meant, and were not made in language clearly stating a commitment, or using appropriate and specific technical terminology relating to energy or electricity.<sup>69</sup>

72. In this respect, there was nothing remarkable about Celgar providing estimates of anticipated energy usage in the context of an EPC application submitted under the broad requirements of BC Regulation 388/80. Statements like Celgar’s were routine at the time. In a 1990 application, Weyerhaeuser (the predecessor to Domtar) included an observation that “{t}he purpose of the self-generation project as Kamloops is to: achieve electrical energy self-sufficiency.”<sup>70</sup> Similarly, in its 1995 application relating to the expansion of its Intercontinental Pulp Mill (“Intercon”), Canfor projected that “{t}he incremental 37.5 MW of electrical power generated by the Intercon project will, however, be consumed internally at Canfor’s existing pulp and paper mill complex in Prince George.”<sup>71</sup> As in the case of Celgar, these statements were not binding commitments, and certainly would not have been considered commitments in perpetuity. Mercer understands, however, that neither of these other two expansions proceeded, primarily due to project financing issues.

73. A key contemporary witness for Mercer confirms the lack of any intent on

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<sup>69</sup> Austin Expert Report, ¶¶ 15–19. Mr. Austin methodically analyzes the language of the Application and ensuing Ministers’ Order and confirms that “Celgar did not make a commitment to energy self-sufficiency, much less a commitment in perpetuity, as part of either proceeding, nor did the federal or provincial regulators impose such a condition.” Austin Expert Report, ¶ 15.

<sup>70</sup> C-292, Weyerhaeuser Wood Waste Cogeneration Proposal (July 1990), at Canada Bates 164435.

<sup>71</sup> C-291, Canadian Forest Products Ltd. Prince George Pulp and Paper Mills Division, Application for an Energy Project Certificate (March 1995), at Canada Bates 164720.

Celgar's part to commit to energy self-sufficiency. Mr. Robert Sweeney, the General Manager of the expansion and modernization project at the time, *and the Mill official who signed the Application*, explains that:

the statement in the Application that the Mill would be 100% self-sufficient for electrical power would have been a projection based upon the consulting engineers' best assessment of the information they had at the time. This estimate would have been made in good faith, but would not have been intended to express any sort of commitment by Celgar with respect to electrical power self-sufficiency.<sup>72</sup>

Mr. Sweeney further states that “[i]f any of us had believed there would have been such a requirement {of self-sufficiency}, we would have had numerous questions about the specific requirements and obligations we would be undertaking.”<sup>73</sup>

74. As Mr. Sweeney details, it would be inadvisable from a business perspective, and inappropriate from a technical perspective, for any kraft pulp mill to make a self-sufficiency commitment — let alone one continuing in perpetuity, as Canada suggests. He states:

If Celgar had in fact wanted to commit to self-sufficiency, it would have needed significantly to over-design the capability of the generation assets in the Mill. And that is only with respect to electricity self-sufficiency. But even over-designing the capability of the assets would not have been enough. There are some things that you simply cannot control: if you operate a pulp mill (like the Celgar Mill) without a natural wood source, what assurances do you have as to where the wood is going to come from? We also know from experience that black liquor production volumes vary depending on the kind of wood you are getting. How would it be possible to control for that in advance? This is of course not to mention possible changes in the marketplace, particularly the price of natural gas (in light of our design, which relied heavily on natural gas), which could make generation and steam for other pulp making processes uneconomical. No reasonable mill operator would blindly commit to self-sufficiency in light of

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<sup>72</sup> Witness Statement of Robert Sweeney (4 December 2014) (“Sweeney Witness Statement”), ¶ 6.

<sup>73</sup> Sweeney Witness Statement, ¶ 7.

these variables.<sup>74</sup>

75. Former Deputy Energy Minister John Allan, who was the top civil servant at the Ministry of Energy at the time of Celgar's Application (and Peter Ostergaard's boss), and is another contemporaneous witness for Mercer, similarly observes that Celgar's statements upon which Canada relies were solely in the nature of projections:

I also note that Celgar's statements in its submissions to BC authorities regarding its Application . . . 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).<sup>75</sup>

76. Lastly, James McLaren, who managed much of the BC Ministry of the Environment's review of Celgar's Application, and now also is a witness for Mercer, observes that nothing in Celgar's 12 October 1990 Application "uses commitment language — at least not of the type that I was used to seeing as an environmental regulator who insisted on specific, measurable commitments. The statement in Celgar's Application is, at best, an expression of the company's desire to generate enough energy to match its needs."<sup>76</sup>

## **2. The Ministers' Order Did Not Impose A Self-Sufficiency Requirement**

77. The Ministers' Order does not mention the issue of energy self-sufficiency, much less purport to impose a commitment in perpetuity. The conduct of Canadian authorities after

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<sup>74</sup> Sweeney Witness Statement, ¶ 8.

<sup>75</sup> Allan Witness Statement, ¶ 21.

<sup>76</sup> James McLaren Witness Statement, ¶ 15.

issuing the Ministers' Order confirms that the government did not view the Order as compelling electricity self-sufficiency.

78. In the years following the approval and the construction of Celgar's new generation capability, British Columbia subjected Celgar to extensive regulation, including in all areas of environmental controls and pollution, and under the various provincial statutes (including the Waste Management Act, Water Act, and Health Act) mentioned in the Ministers' Order. For example, the Ministry of Environment has required Celgar to submit monthly reports containing effluents and emissions data, under the Mill's air effluent permits. These reports contain an extraordinary amount of detail. By way of example, one such report, from October 1993, explained: "ClO<sub>2</sub> emissions from the Chlorine Dioxide Generator ranged from 51.9 ppm to 172.2 ppm for tests performed in October. Efforts continue to optimize the ClO<sub>2</sub> scrubber efficiency. If successful, these changes should also reduce Cl<sub>2</sub> concentrations which exceeded the permit limit of 4 ppm on 4 days in October."<sup>77</sup> In contrast to this detail and transparency, British Columbia imposed no reporting requirements or other oversight on Celgar's electricity generation or use.

79. Canada suggests that the reference to Celgar's Application in the Ministers' Order to the effect that Celgar "shall, subject to this Order, cause the Project to be designed, located, constructed and operated in accordance with: (a) the Application . . ."<sup>78</sup> somehow elevated the statements in the Application into obligations, despite their vague and non-committal wording.

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<sup>77</sup> C-293, Celgar Pulp Company Effluent and Emissions Data Report for October 1993 (22 November 1993).

<sup>78</sup> 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 2.

Canada's theory is unclear, and makes little sense. A Ministers' Order would of course refer to the Application it was approving, or else the Order would have no context. Indeed, several other disposition orders or ministerial orders, issued in relation to other mills' energy project certificate applications at the time, similarly make reference to the application to which such orders relate, using nearly identical, common, language.<sup>79</sup> But simply requiring an applicant generally to “design{ }, locate{ } construct{ } and operate{ }” its project in accordance with its application, does not magically transform every estimate or sentence in the application into a binding legal obligation, or otherwise alter the meaning of words used in the submissions made to government officials.<sup>80</sup>

80. For instance, in its Application, Celgar estimated that “{t}he costs {for the modernization project} will be in excess of \$ 650 Million (CDN).”<sup>81</sup> But just as it was under no legal obligation to achieve its “estimated” generation target of 50 MW, or its expected load of 50 MW, Celgar was under no legal obligation to construct the project in accordance with its cost

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<sup>79</sup> See, e.g., C-321, Howe Sound Disposition Order (14 June 1990), at Canada Bates 163662 (“HSPP shall, subject to this Disposition Order, cause the Project to be designed, located, constructed and operated in accordance with (a) the Application, as amended by the supplementary information . . .”); C-326, NW Energy (Williams Lake) Corp. Disposition Order (14 November 1990), at Canada Bates 164420 (“NWE shall, subject to this Disposition Order, cause the Project to be designed, located, constructed and operated in accordance with: (a) the Application. . . .”); C-327, MEMPR, Westcoast Energy Inc. and CU Power Ministers' Order (27 May 1991), at Canada Bates 164443 (“WESUP shall, subject to this Order, cause the Project to be designed, located, constructed and operated in accordance with: (a) the Application . . .”); and C-328, Canfor Disposition Order (30 June 1995), at Canada Bates 164447 (“Canfor shall, subject to this Disposition Order, cause the Project to be designed, located, constructed and operated in accordance with the Application. . .”).

<sup>80</sup> As Mr. Austin explains, “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.” Austin Expert Report, ¶ 16, n. 17.

<sup>81</sup> R-97, Celgar 1990 Energy Project Certificate Application, at 6.

estimate. What if, instead of costing the projected C\$650 million, Celgar was able to complete the project for less than that? In such circumstances, it would be illogical for Canada to argue that Celgar had an *obligation* to spend at least C\$ 650 million.<sup>82</sup> The language upon which Canada now relies to purport to create a unique electricity self-sufficiency obligation for Celgar, applicable to no other pulp mill in British Columbia, is mere boilerplate.

### **3. The Review Processes Mentioned In The Ministers' Order Do Not Create An Energy Self-Sufficiency Commitment**

81. As noted above, the Ministers' Order also mentions the British Columbia Major Project Review Process and the federal Environment Assessment and Review Process.<sup>83</sup> Neither of these processes purport to mandate energy self-sufficiency in the modernized Celgar Mill. However, as Canada seeks to draw conclusions from these review processes in its discussion of the Ministers' Order in the Counter-Memorial,<sup>84</sup> Mercer will explain them here briefly so that the Tribunal will have appropriate context.

82. As explained by British Columbia energy law expert David Austin, Celgar participated in two Canadian administrative review proceedings between 1989 and 1991 in which

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<sup>82</sup> Indeed, the Application contained numerous estimates that Celgar never intended as commitments, and which also would be improper for Canada later to construe as commitments. For instance, Celgar estimated that “{t}o meet the expected production level of 420 ADt of pulp, approximately 2.4 million cubic meters of wood annually will be required.” Similarly, it projected that “{t}he new mill will operate 350 days per year. . . .” Under Canada’s proposed construction of the Order, these estimates — as well as every other estimate included in the Application — would be converted into legally binding commitments despite their tone and context. Such a construction is as unworkable as it is unrealistic and unfair. *See* R-97, Celgar 1990 Energy Project Certificate Application, at 6, 8.

<sup>83</sup> 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 2.

<sup>84</sup> Counter-Memorial, ¶¶ 173–80.

it sought favorable recommendations for its expansion and modernization plan for the Celgar Mill.<sup>85</sup> The first proceeding was the provincial Major Project Review Process. The second was undertaken by the Celgar Expansion Review Panel, which effectively supplanted the Major Project Review Process, and was appointed jointly by the federal and provincial governments. Both review proceedings focused on the environmental and socio-economic effects of modernization and expansion plan. In neither process did Celgar make a commitment of electricity self-sufficiency at the Mill, much less a commitment in perpetuity, nor did BC regulators impose such a condition.

83. The Celgar Expansion Review Panel's mandate focused on environmental issues.<sup>86</sup> In its submission to the Panel — called a “Stage II Report” submission because it provided more detail than the previous submissions — Celgar explained the numerous new environmental controls it was including, and the ways it would mitigate any remaining concerns about air and water pollution.<sup>87</sup>

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<sup>85</sup> Austin Expert Report, ¶ 12.

<sup>86</sup> See R-330, Celgar Expansion Review Panel, Final Report (February 1991), at 80 (“The Mandate of the Panel is to conduct a public review of the environmental and associated social effects of the proposed Celgar Pulp Expansion Project, including any effects that are external to Canadian territory. The primary concerns which have emerged from the project review to date have been connected with the protection of ambient air and water quality, including fish and fish habitat, the availability of surplus wood chips and the impact of additional truck traffic resulting from the transportation of additional wood chips to the mill. The Panel shall focus its review on these concerns.”).

<sup>87</sup> R-102, Celgar Pulp Company, Proposed Modernization of Bleached Softwood Kraft Pulp Mill Castlegar, BC, Stage II Report, Volume 1, Overview and Environmental Summary (July 1990), at 35. Celgar also addressed concerns on issues including its wood chip supply, impacts on fish and wildlife, and community concerns about increased truck traffic in the area. R-102, Celgar Pulp Company, Proposed Modernization of Bleached Softwood Kraft Pulp Mill Castlegar, BC, Stage II Report, Volume 1, Overview and Environmental Summary (July 1990), at 35.

84. With respect to 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 EPC application three months later:

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.<sup>88</sup>

85. Celgar's inclusion of the words "up to" confirms that the steam turbine generator could supply anywhere from zero (0) to ninety (90) percent of the Mill's electrical power requirements — a facially broad and imprecise estimate. Celgar then went on to estimate the expected energy self-sufficiency of the modernized mill 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 even more complete self-sufficiency in energy and to maximize the efficiency of its energy usage.<sup>89</sup>

86. Like the estimate provided with the EPC, this information was nothing more than Celgar's projection at the time. It is inconsistent with the 100 percent projection included in the Application, but, under Canada's theory, both are incorporated

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<sup>88</sup> R-102, Celgar Pulp Company, Proposed Modernization of Bleached Softwood Kraft Pulp Mill Castlegar, BC, Stage II Report, Volume 1, Overview and Environmental Summary, July 1990, § III.3, at 35–36.

<sup>89</sup> R-102, Celgar Pulp Company, Proposed Modernization of Bleached Softwood Kraft Pulp Mill Castlegar, BC, Stage II Report, Volume 1, Overview and Environmental Summary (July 1990), § III.3, at 6 (emphasis in original).

into the Ministers' Order. Which one does Canada contend governs? The varying estimates in two documents cited in the Ministers' Order simply cannot be reconciled, making it impossible from a regulatory perspective to know what the Ministers may have been addressing.<sup>90</sup>

87. Even if the figures had been consistent, they were not firm undertakings, much less commitments in perpetuity. The lack of rigor also was reflected in the observations of the Government of British Columbia including in the Review Panel report, which explained the Province's straightforward goal that Celgar explore energy alternatives, and mentioned nothing about a binding commitment.<sup>91</sup>

88. Focusing on environmental and socio-economic issues, in keeping with its

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<sup>90</sup> Austin Expert Report, ¶ 20. Mr. Austin notes that "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. . . . The varying estimates in documents cited in the Ministers' Order simply cannot be reconciled with one another, making it impossible to conclude that any commitment was intended." Austin Expert Report, ¶ 20.

<sup>91</sup> R-102, Celgar Pulp Company, Proposed Modernization of Bleached Softwood Kraft Pulp Mill Castlegar, BC, Stage II Report, Volume 1, Overview and Environmental Summary (July 1990). In its Executive Summary of the Terms of Reference of the provincial Major Project Steering Committee, dated 20 April 1990, the British Columbia government explained its goals and summarized Celgar's response:

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

The company has made a commitment to explore all energy alternatives with an ultimate objective of achieving self-sufficiency.

R-102, Celgar Pulp Company, Proposed Modernization of Bleached Softwood Kraft Pulp Mill Castlegar, BC, Stage II Report, Volume 1, Overview and Environmental Summary (July 1990), app. 1, at 4 (emphasis in original).

mandate “to conduct a public review of the environmental and associated social effects of proposed Celgar Pulp Expansion Project, including any effects that are external to Canadian territory,”<sup>92</sup> the Celgar Expansion Review Panel recommended the approval of Celgar’s expansion project in February 1991. The Panel commented favorably on Celgar’s projection of 90 percent “energy self-sufficiency,” and stated in one section of the Report that Celgar’s self-sufficiency projection was a “pivotal” consideration in its review.<sup>93</sup> The Panel did not, however, analyze the 90 percent projection, nor did it recommend that regulators should impose any specific electricity generation or usage requirements on Celgar. Indeed, the Review Panel did not even mention the issue of Celgar’s energy usage in any of its 50 specific recommendations, which were the substantive parts of the Review Panel report that the ensuing Ministers’ Order discussed below explicitly incorporated.<sup>94</sup>

#### **4. Canada Never Directed The Mill To Be Energy Self-Sufficient**

89. In contrast to the ongoing monitoring of compliance with environmental requirements, in the over 23 years since the Order was issued, Canada *never* has claimed in any of the many government oversight proceedings relating to the Mill, that the energy use estimates that Celgar provided in its 1990 EPC Application or the Stage II reports created a binding commitment to any kind of electricity self-sufficiency. Similarly, Canada never mentioned the

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<sup>92</sup> R-330, Celgar Expansion Review Panel, Final Report, at app. 1, at 80.

<sup>93</sup> R-330, Celgar Expansion Review Panel, Final Report, February 1991, at vii–viii.

<sup>94</sup> 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), at 2–3. As Mr. Austin notes, all fifty Review Panel recommendations “were focused on environmental issues. None mentioned any energy-related commitments, much less a self-supply commitment.” Austin Expert Report, ¶ 20.

commitments in perpetuity, which it now alleges exist, during the many years of proceedings before Canadian regulatory bodies considering the issue of Mercer's access to embedded cost utility power while selling self-generated electricity — *the very subject of this arbitration*.

Canada simply has concocted a new defensive theory in this international proceeding that it has never invoked against Mercer domestically in Canada.

**B. Regulation Of Energy Use With No Measurable Standards  
Is Inconsistent With Canadian Law And Policy**

90. Celgar did not present the statements in its Application (or in any other submission to the Provincial authorities) in a precise manner such as one would in making an undertaking that the government would regulate in the area of electricity or energy regulation. Celgar's submissions used terms such as "normal operating conditions," "energy," and "energy alternatives," without elaboration or definition. If the Ministers' Order had transformed the conditional expectations communicated by Celgar into firm obligations, it would have had to clarify the meaning of these conditions and terms to precisely define the obligation it imposed. But it did not do so.

91. According to Canada's newly-developed theory, the Ministers' Order incorporated the relevant projections in Celgar's 1990 Application and in Volume 1 of the Stage II Report by reference, and *sub silentio* transformed Celgar's projections into legally-binding commitments by including the following provision in such Order: "Celgar shall, subject to this Order, cause the Project to be designed, located, constructed and operated in accordance with (a) the Application . . . {and} undertakings . . . set forth in the Celgar Pulp Mill Expansion Stage II reports."<sup>95</sup> As

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<sup>95</sup> Counter-Memorial, ¶ 184.

explained previously, this kind of provision is boilerplate in disposition orders and ministerial orders relating to energy project certificate applications.<sup>96</sup>

92. The vagueness inherent in both the estimate that Celgar provided, and in the reference made in the Ministers' Order, open a series of *fundamental* questions. For instance: 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 if the thermal electric power plant fails to meet its generation estimate — as it in fact did for more than 10 years after it was installed?<sup>97</sup> What is the relationship of the electricity estimates to the natural gas that Celgar also was using as a fuel to produce steam for the electric generator at the facility? What would be the impact on the Mill's obligation if it became uneconomical to burn natural gas as a supplemental source for steam, as it did after 2000? What would be the consequences for failing to meet self-use obligations? What would happen to the purported commitment when Celgar had to shut the Celgar Mill down for either scheduled maintenance, or due to unforeseen outages?

93. None of these questions can be answered through reference to the Application or the Ministers' Order. Because there are no answers to these fundamental questions, one can only conclude that the Ministers did not impose *any* requirements, expectations, oversight, or metrics on Celgar on the issues of electricity generation or usage. In fact, the Ministry had only a general

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<sup>96</sup> See, e.g., C-321, Howe Sound Disposition Order (14 June 1990), at Canada Bates 163661; C-326, NW Energy (Williams Lake) Corp. Disposition Order (14 November 1990), at Canada Bates 164420; C-327, MEMPR, Westcoast Energy Inc. and CU Power Ministers' Order (27 May 1991), at Canada Bates 164443; and C-328, Canfor Disposition Order (30 June 1995), at Canada Bates 164447.

<sup>97</sup> See Memorial, at Annex A.

policy goal and no specific requirements to impose. As former Deputy Minister Allan explains, by 1991 all the Ministry of Energy had developed was a general policy preference to the effect “. . . 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 new generation assets.”<sup>98</sup>

94. As British Columbia energy law expert David Austin explains in his expert report, under Canadian law government regulators have limited authority to restrict private sector rights and may do so only expressly and clearly.<sup>99</sup> He notes that in recent litigation the BC Government successfully took the position that regulation in the energy sector requires “clear language.”<sup>100</sup>

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<sup>98</sup> Allan Witness Statement, ¶¶ 18–19.

<sup>99</sup> Austin Expert Report, ¶¶ 22–24.

<sup>100</sup> Austin Expert Report, ¶¶ 7, 26.

95. As Mr. Austin further explains, the Ministers' Order was issued in accordance with the UCA and Regulation 388/80.<sup>101</sup> 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 Order) has the force of law, and is therefore subject to judicial oversight and review in the same way as a statute.<sup>102</sup>

96. In this case, even if one assumes *arguendo* that Celgar was making a commitment to some kind of electricity self-sufficiency, it made no clear statement regarding the single most material element of such a commitment: the amount of electricity that the Celgar Mill would be required to generate for self-supply, and the conditions under which it would be required to do so. Even assuming *arguendo* that Celgar had intended to make the supposed self-sufficiency commitment, the Ministers' Order does not provide adequate certainty for Celgar to know what the commitment might be.

97. As Mr. Austin explains in his expert report, in the case of ambiguity in the language of a statute or a regulation that aims to restrict private rights, Canadian courts consistently favor the preservation of private rights over an interpretation that would deprive an individual of such rights.<sup>103</sup> 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 applicable legislative act clearly implies or expresses that intention.<sup>104</sup> As explained above,

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<sup>101</sup> Austin Expert Report, ¶¶ 10, 13, 23.

<sup>102</sup> Austin Expert Report, ¶ 23 (citing C-322, *Interpretation Act* {RSBC 1996} c.238, §§ 1 & 41(2)).

<sup>103</sup> Austin Expert Report, ¶ 24.

<sup>104</sup> Austin Expert Report, ¶ 24 (citing C-323, *Lamontagne v. Quebec Railway, Light & Power*  
[FOOTNOTE CONTINUED ON NEXT PAGE])

pursuant to the Interpretation Act, regulations made under the authority of an enactment have the force of law and accordingly, such regulations must also therefore be transparent and clear.<sup>105</sup>

98. Indeed, contrary to its new position in this arbitration, Canada has adamantly argued in other proceedings that restrictions on an energy producer's sales of electricity require "clear language" that demonstrates a commitment to a particular restriction. As Mr. Austin details, the British Columbia Court of Appeal's<sup>106</sup> decision in the *Aluminum Company of Canada* ("*Alcan*") matter is instructive, both on the approach that British Columbia actually takes in energy cases, and more generally on the rights of which Canada is seeking to deprive Mercer in this arbitration.<sup>107</sup>

99. In brief, Alcan and 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, that ultimately had 900 megawatts of generation capacity, 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 electricity its self-generated electricity, at 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.

100. The government of British Columbia sided with Alcan, arguing that a restriction on Alcan's sale of electricity could be inferred from the Agreement only based on "clear

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

*Co.* (1914), 1914 CarswellQue 17).

<sup>105</sup> Austin Expert Report, ¶ 23.

<sup>106</sup> The British Columbia Court of Appeal is the highest-level court within the Province.

<sup>107</sup> C-324, *Kitimat (District) v. British Columbia (Minister of Energy & Mines)* ("*Alcan*"), BCCA 81, 2008 CarswellBC 316.

language” and “mandatory language such as ‘shall’ and ‘will’ . . . .”<sup>108</sup> The British Columbia Court of Appeal agreed with the BC Government’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.”<sup>109</sup> 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.<sup>110</sup>

101. The position taken by BC in the *Alcan* litigation in support of clarity, transparency, and certainty is directly at odds with the position Canada takes in this arbitration. If Celgar (or, for that matter, the Province) had meant the statements in the Application and Volume I of the Stage II Reports regarding energy and electricity generation and self-sufficiency to create a commitment on the company to self-supply its energy needs in perpetuity, Celgar would, as the BC government noted, have employed “clear language.” Instead, the statements in Celgar’s Application regarding electricity generation and use were, as the BC government argued in *Alcan*,

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<sup>108</sup> C-304, Factum of the Respondents Minister of Energy and Mines and the Attorney General of British Columbia (30 November 2007) (“BC’s Factum”).

<sup>109</sup> C-324, *Alcan*, ¶ 35.

<sup>110</sup> C-324, *Alcan*, ¶ 37.

“more in the nature of an expectation or anticipation than a restriction” rather than a commitment, and therefore would not actually be considered to be a commitment under BC law.

102. Moreover, just as it was not foreseeable in 1950 that Alcan would have a use for its self-generated electricity independent of its smelter, so too it was not foreseeable in 1990–91 that Celgar would have a use for its electricity independent of its pulp mill. The fact that Celgar has alternative options for its self-generated electricity now, that neither Celgar nor the Province foresaw back in 1990–91, is no reason to infer obligations not specifically agreed at that time. In neither Alcan’s case nor Celgar’s case did the Province *actually* impose restrictions on the sale of self-generated power.

103. As former BC Deputy Minister of Energy Allan explains, actual provincial regulation of energy in British Columbia is clear and measurable, subject to periodic oversight and reporting, and subject to enforcement for non-compliance.<sup>111</sup> Looking back to the relevant period in 1990–91 when Celgar applied for an EPC, Mr. Allan notes that while the Province (in part under Mr. Allan’s direction) had developed a general policy preference by the early 1990s for increased energy self-sufficiency for industrial projects, it had both formulated and announced this goal only at a general level, not as the subject of regulation of individual co-generation facilities:

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

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<sup>111</sup> Allan Witness Statement, ¶¶ 22–24.

welcomed the development of increased potential generating capacity from industrial facilities like the one being proposed by Celgar at that time.<sup>112</sup>

104. He further explains that he supervised Mr. Ostergaard, now a witness for Canada, and that he fundamentally disagrees with Mr. Ostergaard's arguments about the Ministers' Order creating for Celgar a self-sufficiency obligation. To the contrary, Mr. Allan explains, the Ministry of Energy would not have viewed Celgar's projections as a binding commitment or imposed such a commitment in the manner Canada now suggests:

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.<sup>113</sup>

105. Mr. Allan goes on to explain additional flaws in Canada's argument:

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 say 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. Nor does the Order address basic questions that the Province would have needed to ask in order to create a mechanism for regulation, such as the specific level of electricity generation to which Celgar would be committing or what mixture of sources of power, such as natural gas and the

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<sup>112</sup> Allan Witness Statement, ¶ 14.

<sup>113</sup> Allan Witness Statement, ¶ 20.

burning of black liquor, would be used for the power, and what would happen if fuel prices would change dramatically.<sup>114</sup>

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 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.<sup>115</sup>

106. Similarly, Mr. James McLaren, who served for nearly 20 years as a regulator in the Ministry of Environment, including as Regional Manager for Waste Management in the Kootenay Region (where the Celgar Mill is located), and who was intimately involved in every environmental aspect of the Celgar Application review process, confirms that in “[i]n [his] experience as a Provincial regulator, there can be no legal commitment of the kind that Canada has alleged in this arbitration without specific reporting, monitoring, and compliance requirements.”<sup>116</sup> Mr. McLaren explains: “If the Order intended to create a specific energy self-sufficiency commitment, it would have developed specific reporting, monitoring, and compliance requirements in relation to such commitment, analogous to the specific environmental commitments that were imposed on the Mill. No such requirements were imposed.”<sup>117</sup>

107. Mr. McLaren left the Energy Ministry in December 1991, and was then employed by Celgar for some 20 years, first as the Celgar Mill's Environment Manager, and then other positions at the Mill, such as Technical Services Manager, Utilities Manager, Strategic Projects

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<sup>114</sup> Allan Witness Statement, ¶ 22.

<sup>115</sup> Allan Witness Statement, ¶ 23.

<sup>116</sup> James McLaren Witness Statement, ¶ 19.

<sup>117</sup> James McLaren Witness Statement, ¶ 18.

Manager, and Energy Coordinator, until his retirement in 2011.<sup>118</sup> He confirms that at no point in his employment at Celgar did any Provincial authority ever contact the Mill at any time to monitor, review, or otherwise enforce any alleged electricity self-sufficiency commitment. Mr. McLaren states: “I was in regular (sometimes daily) contact with provincial authorities from all of the ministries overseeing the Mill’s operations. I do not recall a single occasion where any regulator from the Province ever made any reference to any energy self-sufficiency commitment. As the Mill’s primary point of contact on regulatory and compliance matters and liaison on regulatory issues with the provincial government, any communication on the matter — including any monitoring, compliance, or reporting requests — would have come directly to me.”<sup>119</sup>

108. In subsequent years, including from 2005 to the present (during Mercer’s ownership of the Celgar Mill), as Brian Merwin explains: “I have never understood that Celgar had committed itself to be, or was otherwise obligated to be energy self-sufficient, by virtue of any statements Celgar had made or under any order of the Ministries of Energy and Environment.”<sup>120</sup> To Mr. Merwin’s knowledge, “no one at Celgar has ever communicated to {him} any understanding that Celgar is bound by any Ministerial energy self-sufficiency commitment or requirement, and no regulatory authority has ever informed Celgar or Mercer that

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<sup>118</sup> James McLaren Witness Statement, ¶ 4.

<sup>119</sup> James McLaren Witness Statement, ¶ 17. Mr. McLaren also notes: “the monitoring of the Mill’s energy situation was so lacking that, as far as I recall, the Provincial authorities never so much as confirmed that the Mill in fact had installed the expanded turbine which was at issue in the Celgar Application — much less monitored its generation performance.” James McLaren Witness Statement, ¶ 18.

<sup>120</sup> Merwin Second Statement, ¶ 22.

such an energy self-sufficiency commitment exists.”<sup>121</sup>

109. But beyond the fact that Canada never raised the alleged commitment, Mr. Merwin explains that, to this day, Celgar and Mercer do not even understand what the purported commitment would have been. Indeed, he testifies: “even after reading Canada’s argument concerning this issue, I still am not clear on what specific commitment Canada believes Celgar made, or whether it believes we have met that commitment over the intervening 23 years.” In any event, Mr. Merwin explains, “I also cannot understand why no one at the Ministry of Energy has ever mentioned this supposed obligation over the past six years as we have been arguing over Celgar’s sales of self-generated electricity at the BCUC and before the Ministry itself. If any real obligation existed, I think they would have called it to our attention before now.”<sup>122</sup>

110. In this respect, while Celgar did install a 52 MW turbine generator, the Mill never generated as expected, due to steam and plant reliability issues. In fact, Celgar only generated about half as much electricity as the generator was capable of producing — averaging 249.7 GWh/year (an average of roughly 28 MW/hr) in the twelve years following the installation of the new generator and recovery boiler.<sup>123</sup> No governmental authority ever asked Celgar to report about this at any time, and Celgar has never submitted any such reports.

111. All of this is, of course, in contrast to the specific and measurable environmental and waste management obligations that the Mill undertook, and which BC monitored closely. As Mr. James McLaren explains, the Ministry of Environment contacted the Celgar Mill regularly to

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<sup>121</sup> Merwin Second Statement, ¶ 22.

<sup>122</sup> Merwin Second Statement, ¶ 22.

<sup>123</sup> See Memorial, at Annex A.

request data on the specified environmental metrics, and audited such data for compliance with the standards provided in Celgar's operating permits.<sup>124</sup> There were serious consequences for the Celgar Mill if it failed to meet such standards, including fines and even the possibility of the government shutting down operations to remedy any deficiencies.

**C. Even If An Obligation Had Been Imposed In 1991, The Obligation Would No Longer Be Effective As A Result Of Regulatory Changes**

112. Whatever projections or statements Celgar made in its Application, the Application cannot be construed as Celgar's consent to discriminatory treatment if, as occurred, the regulatory policies later changed to allow self-generators to sell some or all of their electricity at market prices.

113. As Mr. Austin explains, 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.<sup>125</sup> Celgar could not sell its self-generated electricity into the market, because there was no open access to transmission lines, and Celgar did not own any such lines.<sup>126</sup> Celgar's only potential buyer was the electric utility to which Celgar was interconnected, West Kootenay Power (now FortisBC). The utility, however, was under no obligation to purchase electricity from Celgar, or to let Celgar use its transmission network to make deliveries to third parties. Celgar's generation thus effectively was stranded. Celgar had no possibility to make open market sales of

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<sup>124</sup> James McLaren Witness Statement, ¶ 17.

<sup>125</sup> Austin Expert Report, ¶ 31.

<sup>126</sup> See Memorial, ¶¶ 160–62. The lack of open access to transmission changed in the mid-1990s, thus fundamentally changing the technical abilities and economics of electricity generation at mills such as Celgar's.

electricity that it generated — as would be the case today.<sup>127</sup>

114. The issues in this arbitration are about regulations, policies, and procedures directly stemming from this fundamental change. The policies at issue in this proceeding, dealing with the sale of self-generated electricity, result from open access to transmission. Open access did not occur in BC until 1996, and BC did not develop self-generation sales policies until 2001, all well *after* the Ministers' Order.<sup>128</sup> It was only ten years after the Ministers' Order was issued, and as the result of major shifts in the energy industry since 1991, that the BCUC in Order G-38-01 first made determinations on the issue of a self-generator that sought simultaneous access to power from its utility while attempting to sell its self-generated electricity to third parties.

115. Through Order G-48-09, about eight years later, the BCUC restricted FortisBC self-generators' access to embedded cost utility power, applying a more restrictive net-of-load standard, such that the self-generator could be afforded no access to embedded cost utility power while selling self-generated electricity.

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<sup>127</sup> As Mr. Austin explains: "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." Austin Expert Report, ¶ 31.

<sup>128</sup> 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.

116. These changes to the regulatory structure applicable to self-generators were profound, and, of course, were not known to the Ministers when they issued Celgar's Order in 1991. These changes effectively render implausible any suggestion of a static commitment to either a generation level or self-usage beginning in 1991 and lasting to the present day. Indeed, in light of these fundamental regulatory changes, Canada's new effort to hold only Celgar to a supposed electricity self-sufficiency commitment dating from 1991 — with no clear and certain standards ever announced or enforced — while allowing other pulp mills to sell a portion of their self-generated electricity, would be both unfair and discriminatory. In his statement, then-Deputy Minister of Energy, John Allan, highlights the evolution of technology and regulation over the years, and the absence of any clear Provincial directive compelling electricity self-sufficiency at the time of the Ministers' Order. Mr. Allan explains: "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."<sup>129</sup>

117. Finally, as explained in detail in Mercer's Memorial,<sup>130</sup> the Mill's power generating capacity that exists today is greater than that which was discussed in Celgar's 1990 Application and the ensuing Ministers' Order. As a result of regulatory changes, the facility can now transmit electricity for possible purchase and use by others, in addition to using on-site the

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<sup>129</sup> Allan Witness Statement, ¶ 32.

<sup>130</sup> See, e.g., Memorial, ¶¶ 287–88.

energy that it produces. Even, assuming *arguendo*, that the Ministers' Order had created requirements for the generation and self-use of electricity at the facility that had been proposed 24 years ago, that facility has been effectively overtaken by a mill with new technology and new generation capacity and — importantly — an entirely new regulatory framework.

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

118. As explained by British Columbia energy law expert Austin, Canada's argument also fails because it is inconsistent with the law of British Columbia that granted Ministers the authority to review the proposed thermal energy power plant at issue in the Application. The Ministers' Order, which was issued solely under the authority of the UCA (and its accompanying Regulation 388/80), cannot legally impose a self-sufficiency obligation on the Celgar Mill, as the Celgar Mill simply was not large enough for the regulation of the *use* of the energy it consumes.<sup>131</sup> Under the UCA, the Ministers may properly impose such a restriction only in relation to an "energy use project." The Mill's projected energy consumption was significantly less than the required statutory threshold to qualify as such a project.<sup>132</sup>

119. Specifically, the UCA provides 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. These projects were referred to in the UCA as

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<sup>131</sup> Austin Expert Report, ¶¶ 36–39.

<sup>132</sup> Austin Expert Report, ¶ 37.

“regulated projects.”<sup>133</sup> Of these regulated projects, two are of particular importance to the Ministers’ Order at issue here: thermal electric power plants, and energy use projects. Pursuant to the definitions in the UCA applicable at the time of the Application (but subsequently amended), a “thermal electric power plant” is a facility that has a capacity of 20 MW or more of electricity. To put this into perspective, at the time, the largest electric utility in British Columbia owned about 10,000 MW of generation. In the same vein, an “energy use project” is 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. For context, this is over twice the energy consumption at the Celgar Mill, as it currently stands — after several expansions and revitalization initiatives.<sup>134</sup>

120. As British Columbia energy law expert David Austin explains in his report, the *only* portion of the Celgar Mill modernization project that was subject to regulation under the UCA was the thermal electric power plant.<sup>135</sup> With a proposed capacity of approximately 50 megawatts, its size exceeded the 20 megawatt threshold for regulation specified in the UCA. Pulp production took place in the remainder of the Celgar Mill, which is where energy resources such as electricity, natural gas, and the black liquor byproduct of the pulping process was consumed. The Celgar Mill simply was not subject to energy usage regulation, including with respect to energy self-sufficiency, or other issues not directly relevant to the thermal electric power plant, such as the Celgar Mill’s use of natural gas.<sup>136</sup> The Celgar Mill’s pulp making process was too small to consume the threshold 3 PJ of energy resources annually. If the Province had wanted the

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<sup>133</sup> R-95, “Guide to the Energy Project Review Process,” at app. 1.

<sup>134</sup> See Memorial, at Annex A.

<sup>135</sup> Austin Expert Report, ¶ 39.

<sup>136</sup> Austin Expert Report, ¶¶ 37–40.

Celgar Mill's energy use to be regulated, for example, by requiring it to be 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.

121. The provincial government did provide for the regulation of thermal electric power plants that were 20 MW or larger, but the term "energy self-sufficiency" has no meaning when applied to a generation plant.<sup>137</sup> These generating plants provide and produce electricity, which is only one of the energy resources that were consumed in the pulp making process. It is only in the Celgar Mill's pulp making process where electricity is consumed and where any requirement of energy self-sufficiency would be relevant.

122. As British Columbia energy law expert David Austin explains, if, as Canada now asserts, the Ministers conditioned their Order on Celgar's energy self-sufficiency, then the Ministers ignored the distinction in the UCA between a thermal electric power plant and an energy use project.<sup>138</sup> The Ministers may have imposed energy self-sufficiency conditions on "energy use projects" such as pulp mills that are much larger than Celgar's, but not on Celgar.<sup>139</sup>

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<sup>137</sup> Austin Expert Report, ¶ 40.

<sup>138</sup> Austin Expert Report, ¶¶ 37–40.

<sup>139</sup> Austin Expert Report, ¶¶ 37–40

**E. It Would Be Contrary To Principles Of Fairness And Equity To Allow Canada To Seek Now To Have The Tribunal Impose An Obligation On Mercer That Canada Itself Has Not Asserted In Over Two Decades Of Regulation Of The Celgar Mill**

123. Canada's argument of a continuing obligation for electricity self-sufficiency at the Celgar Mill is baseless. In addition, the Tribunal should reject Canada's request for the Tribunal to impute electricity self-sufficiency requirements at this time, over 24 years later, because Canada (including the government of British Columbia) itself never asserted any such requirement until threatened with liability in this arbitration.

124. Numerous Canadian government agencies have broadly regulated Celgar's plant through the years, including under provisions of law actually mentioned in the Ministers' Order, such as environmental regulations that required direct and continuous oversight of the facility. The issue of Celgar's use of its self-generated electricity has of course been the subject of extensive regulatory proceedings and negotiations between Celgar and provincial authorities for years. (Indeed, the failure of such negotiations led to this arbitration.) Canada's silence through the years on an alleged electricity self-sufficiency commitment made by Celgar in 1991 reflects what must be its own view outside of this arbitration that no such commitment exists.

125. Notably, arbitral tribunals have rejected such after-the-fact claims by governments that are at odds with a government's own conduct in dealing with investors. In *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*,<sup>140</sup> for example, the tribunal rejected Hungary's attempts to unwind years of activity by an investor under the Cyprus-

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<sup>140</sup> CA-62, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16 (Award, 27 September 2006) (Brower, van der Berg, Kaplan) ("ADC").

Hungary bilateral investment treaty, noting that Hungary had not raised any objection to the investor's contracts with the government and had acted consistently with the terms of such contracts for years. The tribunal's analysis applies equally here:

Even if the Respondent was correct in any of its submissions . . . they would nevertheless fail on them simply because they have rested on their rights. These Agreements were entered into years ago and both parties have acted on the basis that all was in order. Whether one rests this conclusion on the doctrine of estoppel or a waiver it matters not. Almost all systems of law prevent parties from blowing hot and cold. If any of the suite of Agreements in this case were illegal or unenforceable under Hungarian law one might have expected the Hungarian Government or its entities to have declined to enter into such an agreement. However when, after receiving top class international legal advice, Hungary enters into and performs these agreements for years and takes the full benefit from them, it lies ill in the mouth of Hungary now to challenge the legality and/or enforceability of these Agreements. These submissions smack of desperation.<sup>141</sup>

126. In addition to the *ADC v. Hungary* tribunal, a CAFTA tribunal similarly has rejected state attempts to spare itself liability by raising an alleged defect in a claimant's conduct years after the alleged conduct had begun. In *RDC v. Guatemala*, a dispute arose, when, several years after the claimant had procured a railroad usufruct contract, the State initiated an administrative proceeding that contested the validity of such contract. In the ICSID arbitration that followed, the State argued that the same defects that prompted initiation of the administrative proceeding — chief among which was the failure to undergo a public tender process for the award of certain property related to the claimant's primary contract — signified that the claimant's investment had not been made in accordance with Guatemalan law.<sup>142</sup>

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<sup>141</sup> CA-62, *ADC*, ¶ 475 (emphasis added).

<sup>142</sup> CA-64, *Railroad Development Corporation v. Republic of Guatemala* (CAFTA-DR), ICSID Case No. ARB/07/23 (Second Decision on Jurisdiction, 18 May 2010), ¶¶ 72–77 (Sureda, Eizenstat, Crawford) (“*RDC*, Second Decision on Jurisdiction”).

127. In response, the claimant argued that the State should be estopped from objecting to the tribunal’s jurisdiction, not only because it represented to the claimant that the secondary contract was valid, but also because it had permitted (and benefitted from) performance of the secondary contract for several years.<sup>143</sup> Based on these considerations, the tribunal concluded that the State was “precluded from raising any objection to the Tribunal’s jurisdiction on the ground that Claimant’s investment is not a covered investment under the Treaty or the ICSID Convention.”<sup>144</sup>

128. The Tribunal similarly should reject the after-the-fact claims by the Canadian government here in the same way and for the same reasons that arbitral tribunals have rejected other states’ inequitable defenses. A government cannot, for its convenience, raise an objection or requirement in arbitration for the first time, if it has never raised the issues before, at any time and in any forum, if it has acted in contravention of the new argument, and where an investor has relied for years on the government’s silence while regulating the very same subject. Indeed, if Canada really believed that Celgar had actually undertaken obligations regarding energy self-sufficiency, including electricity, it would have said so many times over the past two decades. Canada is raising this issue out of the blue in this proceeding in a way that is at odds with its own conduct, and in a way that is a transparent attempt to prejudice the rights of an investor.

129. In summary, Celgar never committed to self-supply all of its energy needs at the Celgar Mill and the Province did not in 1991 direct it to do so, despite an unfounded new

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<sup>143</sup> CA-64, *RDC*, Second Decision on Jurisdiction, ¶¶ 82–83.

<sup>144</sup> CA-64, *RDC*, Second Decision on Jurisdiction, ¶ 147.

argument to this effect in Canada's Counter-Memorial. The Tribunal should reject this new argument.

**IV. CANADA HAS VIOLATED ITS OBLIGATIONS UNDER NAFTA ARTICLES 1102, 1103, AND 1503 BY ACCORDING MERCER LESS FAVORABLE TREATMENT THAN IT HAS AFFORDED CANADIAN INVESTORS AND THIRD-COUNTRY INVESTORS IN LIKE CIRCUMSTANCES**

**A. Canada Errs In Its Characterization Of The Legal Standard**

130. Mercer and Canada agree that NAFTA Articles 1102 and 1103 require that, to establish a *prima facie* violation, Mercer must prove three separate elements regarding its investment: (1) that the contracting State provided “treatment” with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments, (2) that the investment is in like circumstances to other investments within the territory of a contracting State, and (3) that such investment has received less favorable treatment than a comparable investment.<sup>145</sup>

131. Yet, no sooner does Canada concede that there only are three elements necessary to establish a violation, does it attempt, in its very next paragraph, to impose a fourth element — that the contracting State “intended” to discriminate based on nationality.<sup>146</sup> This additional intent element does not exist in the text of Article 1102 or 1103, or elsewhere, and the one case on which Canada relies actually does not support Canada's position.

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<sup>145</sup> Memorial, ¶ 448; Counter-Memorial, ¶¶ 357–59.

<sup>146</sup> Memorial, ¶ 360.

132. In addition, there is no merit to Canada’s narrow approach to identifying “like circumstances,” or its bizarre contention that less favorable treatment exists only when all U.S. investors are treated less favorably, or all Canadian investors treated more favorably. Canada’s unsupported arguments notwithstanding, explicit NAFTA text and the jurisprudence interpreting that text demonstrate that Mercer is entitled to “best in jurisdiction” treatment.

**1. Mercer Is Not Required To Prove Intent Or Nationality-Based Animus**

133. As Mercer notes in its Memorial, tribunals interpreting Articles 1102 and 1103 have held that an investor need not show nationality-based animus, or, indeed, any intent to discriminate, to succeed in its claim under these NAFTA provisions.<sup>147</sup> Canada fails to address or discuss any of the numerous authorities upon which Mercer relies.

134. Instead, Canada relies upon a single quotation from the *Methanex* award, in which the tribunal notes that, to succeed *on its particular claim* in which it expressly alleged that the

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<sup>147</sup> See Memorial, ¶ 452. CA-17, Kinnear, Meg N., *et al.*, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, Supplement No. 1 (Kluwer Law International 2006), at 1102–09. See generally CA-6, *Marvin Roy Feldman Karpa v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/99/1 (Award, 16 December 2002) (Kerameus, Covarrubias Bravo, Gantz) (“*Feldman* (NAFTA)”), ¶ 183; see also CA-15, *International Thunderbird Gaming Corp. v. Mexico* (NAFTA), UNCITRAL (Award, 26 January 2006) (van den Berg, Portal Ariosa, Wälde) (“*Thunderbird* (NAFTA)”), ¶¶ 176–77. See also CA-19, Weiler, T., “Treatment No Less Favourable and International Investment Law,” THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW: EQUALITY, DISCRIMINATION, AND MINIMUM STANDARDS OF TREATMENT IN HISTORICAL CONTEXT (Martinus Nijhoff Publishers, 2013), at 434 (explaining that in applying the standard of ‘treatment not less favorable’ under international investment law, “{t}here is not even so much as a hint in such texts that the aim or intent of the State responsible for the impugned measure should be relevant in the determination of *prima facie* compliance.”); CA-6, *Feldman* (NAFTA), ¶¶ 181–82 (finding that while Article 1102 does not contain a requirement that the claimant demonstrate a state’s discriminatory intent, and that “Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances,” in that case “there is evidence of a nexus between the discrimination and the Claimant’s status as a foreign investor”).

respondent had a “malign intent” to discriminate, the *Methanex* claimant had to show that the contracting state (the United States) “intended to favour domestic investors by discriminating against foreign investors.”<sup>148</sup> But Canada, beginning a pervasive pattern, reads that quotation completely out of context; the decision does not hold that intent is a necessary element of a NAFTA discrimination claim.

135. *Methanex* involved a challenge to California regulations banning MTBE as an additive to gasoline.<sup>149</sup> However, the claimant did not produce MTBE. Instead, it produced methanol, which is an input used to produce MTBE. The United States objected to the tribunal’s jurisdiction over the claim, arguing that the claim failed to meet the requirements of NAFTA Article 1101, which extends jurisdiction only to claims that “measures adopted or maintained by a Party *relating to*” investors or investments of another Party.”<sup>150</sup> Because the claimant did not produce MTBE, the United States argued that the claimant could not demonstrate that the MTBE ban “related to” its investment in methanol<sup>151</sup>

136. To overcome this jurisdictional hurdle, the claimant alleged that California, in deciding to ban MTBE, specifically *intended* to favor domestic ethanol producers (as ethanol was an input used in the production of a competing additive), and to harm producers of methanol,

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<sup>148</sup> Counter-Memorial, ¶ 360 (quoting CA-11, *Methanex Corporation v. United States of America* (UNCITRAL) Award on Jurisdictions and Merits, 3 August 2005, Part IV, Ch. B, ¶ 6) (“*Methanex*”).

<sup>149</sup> CA-11, *Methanex*, Part I, Preface, ¶ 41.

<sup>150</sup> C-1, NAFTA Art. 1101 (emphasis added).

<sup>151</sup> RA-27, *Methanex*, Part II, Ch. C, ¶ 3.

including the claimant. By alleging this additional element of intent, the claimant contended that the measure therefore “related to” the claimants’ investment, as required by Article 1101.<sup>152</sup>

137. Thus, in *Methanex*, the claimant placed the respondent’s intent directly at issue, relying on an alleged “malign intent” to support the threshold existence of a measure “relating to” an investment under Article 1101.<sup>153</sup> The claimant did not allege a *de facto* discrimination claim that other methanol producers were treated more favorably. As a result, when the *Methanex* tribunal turned to the claimant’s Article 1102 claim, it evaluated the claimant’s evidence of California’s “malign intent,” not because such intent is a necessary element of every Article 1102 or 1103 claim, but because it was a necessary element of the particular claim before the tribunal in light of the issues raised by the United States under Article 1101. Accordingly, when the Tribunal stated that the claimant had to show that California had “intended to favour domestic investors by discriminating against foreign investors,” it was only requiring the claimant to prove that which it had alleged to avoid a problem under Article 1101.

138. The tribunal made clear, however, that a showing of intent was *not required to prove discrimination under Articles 1102 and 1103*. It held expressly that “an affirmative finding under NAFTA Article 1102, . . . does not require the demonstration of the malign intent alleged

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<sup>152</sup> See CA-11, *Methanex*, Part II, Ch. E, ¶ 4 (“This part of the claim concerned an allegedly malign intent, as pleaded by Methanex, behind the US measures to favour the US ethanol industry and the major US ethanol producer, ADM, and to harm ‘foreign’ MTBE producers and ‘foreign’ methanol producers, such as Methanex.”).

<sup>153</sup> CA-11, *Methanex*, Part II, Ch. E, ¶ 8 (“In other words, it was not the Tribunal’s Partial Award, or the Tribunal’s interpretation of Article 1101(1) in the Partial Award, which led Methanex to advance its case based on California’s malign intent. That was a case which Methanex had itself already advanced earlier in order (inter alia) to meet the USA’s jurisdictional challenge under Article 1101 NAFTA.”).

by Methanex.”<sup>154</sup> The tribunal went on to distinguish between Article 1101, which the tribunal noted could require a showing of intent to prove that a facially neutral measure “related to” an investor’s investment, and Article 1102, which required no such showing of intent to prove that the investor had received treatment “less favourable.”<sup>155</sup> *Methanex* thus, in fact, clarifies that a claimant need not demonstrate an intent to discriminate based on nationality as a requirement to establish a violation of Article 1102.

139. Here, in contrast, Mercer has not alleged any intent to discriminate, and Canada has raised no issue under Article 1101, because Mercer’s investment was directly impacted by the challenged measures. Therefore, there is no issue under Article 1101. Intent to discriminate thus is not a necessary element of Mercer’s particular claims.

140. For related reasons, the award in *Loewen* also fails to support Canada’s intent argument. In that case, the claimant affirmatively had alleged bias on the part of the judge and jury at his trial to support his discrimination claim under Article 1102.<sup>156</sup> The tribunal found that the claimant had not presented sufficient evidence to demonstrate the bias he alleged.<sup>157</sup> It then concluded that, in the absence of such evidence, the claimant could not prevail on his bias-based discrimination claim under Article 1102.<sup>158</sup> To support this conclusion, the *Loewen* tribunal noted

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<sup>154</sup> CA-11, *Methanex*, Part IV, Ch. B, ¶ 1.

<sup>155</sup> See CA-11, *Methanex*, Part IV, Ch. B, ¶ 1 (describing the “potentially asymmetrical connection between these two Chapter 11 provisions” while noting that Article 1102 does not “require the demonstration of the malign intent”).

<sup>156</sup> RA-22, *Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (Award, 26 June 2003), ¶¶ 82–85, 96, 138 (Mason, Mikva, Mustill) (“*Loewen*”).

<sup>157</sup> RA-22, *Loewen*, ¶ 138.

<sup>158</sup> RA-22, *Loewen*, ¶ 139.

that “Article 1102 . . . proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality” as opposed to the mere appearance of bias.<sup>159</sup> Canada attempts to take this holding, involving only the degree of proof required to sustain an Article 1102 claim based on bias, and enlarge it beyond recognition into a holding on the degree of proof required to sustain *any* Article 1102 claim.<sup>160</sup> The decision supports no such reading.

141. Likewise, there is no merit to Canada’s argument concerning statements the NAFTA Parties have made in past disputes.<sup>161</sup> General statements that the national treatment obligation is designed to protect against discrimination on the basis of nationality in no way support adding a distinct requirement that claimants must prove an intent to discriminate based on nationality. Indeed, such a reading has been rejected by several NAFTA tribunals, which Canada fails to mention.<sup>162</sup>

142. An intent requirement not only lacks a basis in the text of Article 1102 or 1103 and past NAFTA jurisprudence, but also it is impractical. Adopting Canada’s intent-based standard would impose an impossible burden on NAFTA claimants, requiring that they divine the intent of

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<sup>159</sup> Counter-Memorial, ¶ 360; RA-22, *Loewen*, ¶ 139.

<sup>160</sup> Counter-Memorial, ¶ 360 n.707.

<sup>161</sup> Counter-Memorial, ¶ 360 n.707.

<sup>162</sup> See CA-6, *Feldman* (NAFTA), ¶ 181 (holding that although “the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality,” it is “not self-evident, as {Mexico} argues, that any departure from national treatment must be *explicitly* shown to be a result of the investor’s nationality”); CA-13, *Pope & Talbot Inc. v. Canada* (NAFTA), UNCITRAL (Award on the Merits of Phase 2, 10 April 2001) (Dervaird, Greenberg, Belman) (“*Pope & Talbot II* (NAFTA)”), ¶ 79 (rejecting “the approach proposed by the NAFTA Parties” to the extent that it “would tend to excuse discrimination that is not facially directed at foreign owned investments”); CA-15, *Thunderbird* (NAFTA), ¶ 177 (“It is not expected from {claimant} that it show separately that the less favourable treatment was motivated because of nationality.”).

a number of different types of governmental actors. For Mercer’s claims involving the BC Hydro 2009 EPA, whose intent does Canada contend is relevant? Would it be the intent of the BC Hydro negotiators? Would it be the intent of the officer who signed the EPA? What if their intentions differed?

143. For Mercer’s claims involving BCUC Order G-48-09 and its net-of-load standard, would Mercer be required to divine the intent of the three commissioners who signed the decision, and what if they all had differing intent? And as to the Ministry of Energy and Mines (“MEM”), is it the intent of the Minister at the relevant time? Or is it the intent of all of those responsible for writing, reviewing, and approving the briefing notes upon which ministers rely?

144. And what kind and level of intent is necessary? Is it sufficient for Mercer to show an intent to favor Tembec, or must Mercer show an intent to disfavor Celgar? Simply identifying the questions posed by Canada’s intent requirement underscore the undue burdens and impracticalities such a requirement would generate.

145. If implemented, Canada’s intent requirement would pose an insurmountable hurdle, and effectively limit Articles 1102 and 1103 to *de jure* measures that discriminate against particular nationalities on their face. Canada’s standard would largely eliminate all *de facto* discrimination claims, without basis or justification.

## **2. Canada’s Narrow Approach To “Like Circumstances” Also Is Without Basis**

146. Canada next makes a “like circumstances” argument that is both difficult to comprehend and internally inconsistent. On the one hand, Canada takes issue with the factors relied upon by Mercer to identify comparators in “like circumstances,” contending that Mercer

has ignored “other relevant factors,” including the “contractual particularities” of different mills, their service territory location, the types of energy products sold, etc.<sup>163</sup> According to Canada, each mill had “unique” circumstances.<sup>164</sup> This argument suggests, but Canada does not expressly contend, that there are no comparators to which Celgar can be compared, because all self-generators in BC are in such different circumstances that no fair comparisons possibly could be made.<sup>165</sup>

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<sup>163</sup> Counter-Memorial, ¶ 381.

<sup>164</sup> Counter-Memorial, ¶ 382.

<sup>165</sup> Chief among the factors Canada cites, is its alleged “policy objective” for differences in treatment. Canada alleges that its “treatment {of Howe Sound and Tembec} was not accorded in like circumstances” (Counter-Memorial, ¶ 376) because “{w}hile these mills may compete with Claimant’s pulping business, the treatment at issue relates to incentivizing incremental electricity from self-generators, regardless of whether that generation come from an NBSK pulp mill with self-generation capacity or some other type of mill with self-generation capacity.” Counter-Memorial, ¶ 379. To support this intent-based measure of like circumstances, Canada relies on an 1993 report by the Organization for Economic Cooperation and Development (“OECD”), and citations to it by subsequent tribunals, for the proposition that a “like circumstances” analysis should take into account “policy objectives pursued by the measure at issue.” Counter-Memorial, ¶ 359. Canada oversimplifies the OECD Report which insisted that policy objectives could be considered in the determination of “like circumstances” *only if* “those objectives are not contrary to the principle of {n}ational {t}reatment.” CA-81, Organisation for Economic Co-Operation and Development, *National Treatment for Foreign-Controlled Enterprises*, OECD: 1993, reprinted as Annex C in *National Treatment for Foreign-Controlled Enterprises* (2005 Edition), at 108. “The premise of national treatment is that “foreign and domestic investors should be subject to the same competitive conditions on the host country market, and therefore no government measure should unduly favour domestic investors.” RA-44, UNCTAD, “National Treatment,” IIA Issue Paper Series, UNCTAD/ITE/IIT/11 (Vol. IV) (2011), at 8, 65.(“UNCTAD– National Treatment”).

Accordingly, Canada’s professed objective to incentivize incremental electricity for economically struggling self-generators is contrary to the principle of national treatment and does not meet the OECD’s criteria for inclusion in an evaluation of like circumstances. The United Nations Conference on Trade and Development (“UNCTAD”) notes that where a government wishes to remedy such “economic asymmetry” by providing selective incentives it will require an explicit exception to the national treatment provisions in a treaty. RA-44, UNCTAD – National Treatment, at 2, 57. (“{W}here preferential treatment is sought regarding

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147. On the other hand, Canada contends that BC applied a common GBL standard to *all* self-generators, including all comparators Mercer has identified, and any resulting differences in treatment are explained by differences in circumstances.<sup>166</sup> Canada and its experts then go on to compare Celgar’s treatment to these comparators, and others, to argue that a uniform standard was consistently applied, and that all differences in outcomes are explained by the different generating histories of the mills and other factors incorporated in the standard.

148. Canada does not contest that the comparator mills identified by Mercer are subject to the same legal regime as Celgar, compete in the same business sector, and sell competing products.<sup>167</sup> The fact that a common standard could be applied, to which experts can compare Celgar’s treatment versus that of other self-generators, and that Canada derives meaning from these comparisons and relies upon them to contend that Celgar was not treated less favorably, directly contradict Canada’s implicit argument that self-generators all are so different that their treatment cannot be compared. That Canada can and does compare Celgar’s GBL/access treatment to the treatment afforded Tembec Skookumchuck, Howe Sound Port Mellon, Tolko Kelowna, and Canfor, of course, establishes that all of these self-generators are in like enough circumstances to be comparable.<sup>168</sup> The purpose of the like circumstances test thus is satisfied.

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eligibility for incentives for domestic investors, then exceptions to national treatment may be required.”).

<sup>166</sup> Counter-Memorial, ¶¶ 376, 382.

<sup>167</sup> See Counter-Memorial, ¶ 380 (admitting that these factors are “relevant to an analysis of whether {the mills} were accorded treatment in like circumstances”).

<sup>168</sup> In this connection, Mercer observes that in contending that the same uniform GBL standard was applied to Celgar and to BC Hydro self-generators, Canada concedes that the same “legal regime” applied in both FortisBC’s service territory and BC Hydro’s service territory. Canada

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149. For these reasons, Mercer does not understand Canada to be making a “like circumstances” argument that is distinct and independent of its “less favorable treatment” argument. It understands instead that Canada is contending that all differences in outcomes are explained by differing circumstances, and thus do not constitute less favorable treatment. This is an argument that the same treatment was afforded. Accordingly, Mercer addresses all of the differences in circumstances identified by Canada in the context of its less favorable treatment analysis below.

150. To the extent Canada does insist that every single factor that can affect a GBL must be identical for Celgar and any comparator for the two to be in “like circumstances,” the argument is wholly without merit. No tribunal has ever suggested such a narrow approach to the “like circumstances” analysis, and the result would be essentially to eliminate NAFTA’s investor protections against discrimination. As few if any investors or investments are ever in totally “identical” circumstances, Canada’s approach would wipe away Article 1102 and 1103 for protections for almost all qualifying investments.

151. The only “like circumstances” issue then remaining for the Tribunal is whether any of the comparators identified by Mercer or Canada are inappropriate. As in its Memorial, Mercer contends that the Tolko Kelowna sawmill is not an appropriate comparator, because it does not operate in the same business sector as Celgar. Given Canada’s insistence, Mercer nonetheless welcomes analysis of the treatment afforded to Tolko, and presents its analysis below. From 2001-2013, Tolko was afforded a GBL that provided it with a Below Load Access Percentage of

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makes no argument that different service territories constitute different legal regimes, and plainly they do not if, as Canada alleges, the same GBL standard was applicable in both.

57.4 percent. If Tolko is used as a comparator, Mercer's damages are higher as that percentage is even higher than Howe Sound's 54.1 percent, which Mercer had contended was afforded the best treatment.

### **3. Mercer Is Entitled to Best in Jurisdiction Treatment**

152. Canada also contends that it can disprove nationality-based discrimination by showing that BC treated another U.S.-owned pulp mill better than Celgar. It suggests that “{t}o demonstrate even further that there has been no discrimination in favour of nationals over non-nationals, the Tribunal need look only to the treatment accorded to the Domtar's mill in Kamloops, owned by an American company.”<sup>169</sup> Canada also suggests that it can defeat Mercer's discrimination claim by showing that it treated a Canadian-owned sawmill, Tolko Kelowna, eventually the same as Celgar (after first, twice, treating it better). Canada offers no authority in support of these two rather surprising arguments, and they have no merit. Canada does not acquire license to discriminate against some U.S. investors by treating one of its own nationals unfavorably or one American company favorably.

153. First, the plain language of Articles 1102 and 1103 cannot support Canada's argument. Articles 1102 and 1103, respectively, require comparisons of the treatment BC afforded to Celgar to the treatment BC afforded Canadian and third-country-owned comparators, respectively. These provisions do not support Canada's attempt to compare Celgar's treatment to that of another U.S.-owned mill. All Articles 1102 and 1103 require is that Mercer establish that

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<sup>169</sup> Counter-Memorial, ¶ 375.

a Canadian or third-country comparator in like circumstances to Celgar, received more favorable treatment than Celgar. Canada's analysis of Domtar thus is irrelevant.

154. Indeed, Canada may discriminate against some U.S. investors but not all U.S. investors — a possibility Canada's argument simply does not admit. Such conduct in no way means that those receiving the less favorable treatment lose their claims. Neither Article 1102 nor 1103 requires a showing that a Canadian measure has discriminated against *all* U.S. investors. They simply limit their protection so that those receiving the favorable treatment have no claim.<sup>170</sup> Put another way, Articles 1102 and 1103 do not give Canada license to discriminate against certain U.S. investors simply by providing favorable treatment to other U.S. investors.

155. Second, it does not serve NAFTA's purpose to immunize Canada from discrimination claims in industries with numerous American investors simply because it treats one U.S. investor favorably. Suppose the BC pulp industry was comprised of one Canadian producer, and 10 U.S. producers. It hardly serves NAFTA's goal of "ensur{ing} a predictable commercial framework for business planning and investment,"<sup>171</sup> and "increas{ing} substantially investment opportunities,"<sup>172</sup> to allow Canada, for example, to enact a measure that would permit the Canadian mill and the smallest U.S. mill to sell all of their below-load electricity, and hold the remaining U.S. mills to the highly restrictive net-of-load standard.

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<sup>170</sup> Once again, Canada appears to be arguing that only *de jure* discrimination claims are cognizable under NAFTA Articles 1102 and 1103. Canada's argument requires equivalent levels of discrimination against all U.S. investors in like circumstances, which would exist only where the measure on its face required differential treatment of U.S. and Canadian or third-country investments.

<sup>171</sup> C-1, NAFTA, Preamble.

<sup>172</sup> C-1, NAFTA, Art. 102.1.

156. Similarly, nothing in Article 1102 or 1103 requires Mercer to show that it was afforded less favorable treatment than *all* potential comparators, as Canada also suggests.<sup>173</sup> This is the implication of its argument regarding additional comparators. Such a requirement would present an impossible burden in cases involving large numbers of competitors in like circumstances, and finds no support in any NAFTA language.

157. To the contrary, Mercer's investment is entitled to "best in jurisdiction" treatment, and thus it need only establish that Celgar is treated less favorably than a single comparator. This conclusion is implicit in the language of Articles 1102(1), 1102(2), 1103(1), and 1103(2), which require "treatment no less favorable." The only way to provide treatment no less favorable than afforded to *all* comparators is to provide treatment equal or better to that afforded *the most favorable* treatment.<sup>174</sup>

158. Mercer's entitlement to "best in jurisdiction" treatment also is explicit in Article 1102(3). Article 1102(3) clarifies: "The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than *the most favorable treatment* accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part."<sup>175</sup> UNCTAD explains that "{i}n the light of the words, 'the most favourable treatment accorded' {in Article 1102(3)} the foreign

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<sup>173</sup> See Memorial, ¶ 475 n.559.

<sup>174</sup> Canada contends that Mercer "is not entitled to 'best in jurisdiction' treatment," Counter-Memorial, ¶ 358, but offers no authority for this proposition. In fact, its contention that Mercer instead is entitled to "treatment that is at least as favorable as the treatment of the relevant comparator," Counter-Memorial, ¶ 358, would appear to concede that Mercer is indeed entitled to the best treatment afforded any comparator, as that is the only way to provide treatment no less favorable than every relevant comparator.

<sup>175</sup> C-1, NAFTA Art. 1102(3) (emphasis added).

investor must be given the *best* available treatment offered to such local investors.”<sup>176</sup> Similarly, NAFTA Article 1104 requires each NAFTA Party to accord investors “the better of” the treatment required by Article 1102 and 1103.

159. It is incredible that Canada argues otherwise, and ignores Articles 1102(3). Yet again, Canada seeks to rely on selected portions of the *Methanex* award that it reads out of context, while ignoring the ultimate holding of the tribunal in that case. In *Methanex*, the claimant had argued that it was entitled to the “best, not the worst, treatment” received by other investors in the state of California, and the tribunal *agreed*: “In the Tribunal’s view, this is an entirely plausible reading of the provision: if a component state or province differentiates, as a matter of domestic law or policy, between members of a domestic class, which class happens to serve as the comparator for an Article 1102 claim, the investor or investment of another party is entitled to the most favourable treatment accorded to some members of the domestic class.”<sup>177</sup>

160. Because Celgar is entitled to “best in jurisdiction” treatment, the Tribunal can simply ignore Canada’s argument concerning BC’s latest treatment of the Tolko sawmill, which the BCUC in November 2013 subjected to a net-of-load access standard (only after Celgar complained of the more favorable GBL the BCUC gave to Tolko in 2001, and reaffirmed in 2011).<sup>178</sup> Putting aside the issues raised by Mercer as to whether comparisons to sawmills are appropriate when pulp mill comparators are available,<sup>179</sup> it simply does not matter that BC began

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<sup>176</sup> RA-44, UNCTAD – National Treatment, at 26 (emphasis added).

<sup>177</sup> CA-11, *Methanex*, Part IV, Ch. B, ¶ 21.

<sup>178</sup> See Memorial, ¶¶ 242–46, 373–74.

<sup>179</sup> While Canada is free to identify other potential comparators for analysis, it does not advance its case unless it can establish that they are *better* comparators than those Mercer has advanced.

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in 2013 to treat Tolko as poorly as Celgar. Celgar is entitled to best in jurisdiction treatment, which Canada hardly establishes with its lone example of another entity also treated less favorably.

161. These conclusions are buttressed with reference to a domestic-law discrimination example. Suppose a female police officer contends that she was discriminatorily denied a promotion because of her gender. If 100 men and 100 women were up for promotion, and the police department promoted 20 men and one woman, it is not a complete defense for the department to point out that another woman was promoted.<sup>180</sup> Nor does the woman have to prove

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As noted in Mercer's Memorial, past tribunals, including the *Methanex* tribunal upon which Canada so heavily relies, have recognized that some comparators are more appropriate than others, and that tribunals should analyze the best comparators ahead of those lower in the hierarchy. CA-11, *Methanex* (NAFTA), Part IV, Ch. B, ¶ 17. Canada has not contended, nor has it provided any factual basis for concluding, that any of its suggested additional comparators are better comparators than Tembec or Howe Sound. Canada's use of these other comparators therefore cannot defeat Mercer's claim that it was treated less favorably than Howe Sound or Tembec.

<sup>180</sup> This is the law in both Canada and the United States. In Canada, proof that another member of a protected class is not subject to discriminatory treatment is insufficient to demonstrate that the defendant has not discriminated against the plaintiff member of the protected class. See CA-56, *Janzen v. Platy Enterprise Ltd.*, (1989) 1 SCR 1252 (Supreme Court of Canada), 1288-89 ("The fallacy in the position advanced by the Court of Appeal is the belief that sex discrimination only exists where gender is the sole ingredient in the discriminatory action and where, therefore, all members of the affected gender are mistreated identically. . . . If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value.").

In the United States, proof that another member of a protected class is not subject to discriminatory treatment is insufficient to demonstrate that the defendant has not discriminated against the plaintiff member of the protected class. The United States Supreme Court ruled definitively on this issue, stating, "It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." CA-52, *Connecticut v. Teal*, 457 U.S. 440, 455 (U.S. Supreme Court, 1982); see also CA-53, *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (U.S. Supreme Court, 1978) ("A racially balanced work force cannot

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that she was more qualified than all 20 men.<sup>181</sup> She only need establish that she was as qualified as one of those promoted. If she does so, she has established gender-based discrimination.

**B. Canada Has Failed To Establish That Its Differential Treatment Of Celgar Is Reasonably Related To Any Legitimate Policy That It Could Not Achieve By Nondiscriminatory Means**

162. As Mercer established, and as Canada nowhere disputes, even if Canada could establish that the differences in outcomes for Celgar and the different mills examined resulted from the application of a uniform and consistently applied rule, Canada, in addition, must justify that its rule and the differences in treatment resulting from its application bear a reasonable nexus

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

immunize an employer from liability for specific acts of discrimination.”).

It is also consistent with the law in the United Kingdom, where the discrimination analysis requires comparison of the alleged victim to a comparator who *lacks* the protected characteristic, *e.g.* race, gender, physical ability, not one with the same characteristic. The UK House of Lords has ruled: “the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all respects as the victim save only that he, or she, is not a member of the protected class.” CA-57, *Shamoon v Chief Constable of the Royal Ulster Constabulary*, (2003) UK House of Lords 11, per Lord Scott.

<sup>181</sup> This, too, is consistent with the law in both the United States and Canada. In Canada, the courts require a plaintiff alleging discrimination to prove only that she was as qualified as the applicant who received the job, not more qualified than the successful applicant or applicants. CA-61, *Shakes v. Rex Pak Ltd*, 1981 Carswell Ont. 3407 (Ontario Board of Inquiry, 1981) (I. Hunter, Chair).

Similarly, in the United States a party alleging discrimination need not show that it was more qualified than the person or entity that received more favorable treatment. *See, e.g.*, CA-58, *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (U.S. Supreme Court, 1989) (holding that to prove a discrimination claim a plaintiff “might seek to demonstrate that respondent’s claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position {but} the District Court erred, however, in instructing the jury that in order to succeed {plaintiff} was required to make such a showing. There are certainly other ways in which {plaintiff} could seek to prove that respondent’s reasons were pretextual.”); CA-59, *Summerlin v. M&H Valve Co.*, 167 F. App’x 93, 95 (11th Cir. Court of Appeals, 2006) (holding “{plaintiff} Summerlin does not need to show that he was more qualified than the successful applicant as part of his *prima facie* case”).

to rational government policies that do not discriminate between U.S. owned and domestic or foreign companies.<sup>182</sup> Canada has failed to meet this burden.

**1. Canada's Various Economic Rationalizations Do Not Support BC's Actions**

163. Canada does not separately or comprehensively address the justification issue. Instead, it peppers its Counter-Memorial and expert reports with references to various self-generator policy objectives, none of which it analyzes in any detail. For example, one theme Canada stresses is that BC Hydro's procurement policy with regard to self-generators sought to "remove . . . barriers by incentivizing increases in self-generation . . . ."<sup>183</sup> This was part of a broader goal of increasing generation resources in the Province to achieve energy security and self-sufficiency. According to Canada, the Province, through BC Hydro, thus sought to "incentivize" "new or incremental" generation and "idle" generation, but not existing self-generation already on its system that did not require incentives.

164. A second and related theme is preventing harm to ratepayers, which Canada more precisely articulates as "facilitating incremental self-generation while preventing detrimental arbitrage {harming other ratepayers} by customers with self-generation."<sup>184</sup> Dr. Rosenzweig, who is not an academically credentialed economist, also identifies "economic efficiency" and "efficient resource acquisition" as additional policy objectives.<sup>185</sup>

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<sup>182</sup> See generally Memorial, ¶¶ 484–95.

<sup>183</sup> E.g., Counter-Memorial, ¶¶ 89, 145.

<sup>184</sup> E.g., Counter-Memorial, ¶¶ 122, 126

<sup>185</sup> Rosenzweig Expert Report, ¶¶ 7, 23, 45, 52, 58, 63–66, 69.

165. As all of these professed objectives are economic in nature, Mercer asked Dr. Peter Fox-Penner, a PhD economist with specialized expertise in electricity markets and regulation, to evaluate Canada's various policy objectives. Specifically, Mercer asked Dr. Fox-Penner and his team at The Brattle Group to analyze:

- i. whether these various policy objectives were appropriately reflected in the BCUC's regulatory orders directed at self-generators, and the professed "current normal" approach to establishing GBLs;
- ii. whether economic efficiency was a primary objective of these policies and regulatory orders, and whether the policies, orders, and decisions were designed to achieve economic efficiency;
- iii. whether the regulatory processes employed by the BCUC and BC Hydro were in keeping with best regulatory practice; and
- iv. finally, whether the policies and processes were applied equally to Celgar and other self-generating pulp and saw mills in BC during the period 2001-2010 at issue in this proceeding.

166. Dr. Fox-Penner's analysis and conclusions are presented in his separate report accompanying this Reply, and summarized below. Dr. Fox-Penner first concludes that both the Order G-38-01 historical usage standard and the now-professed "current normal" standard are far too general and vague to serve as a standard capable of ensuring an absence of discrimination.<sup>186</sup> The "current normal" standard, as Canada has articulated it — though never issued with sufficient guidance or accompanied by any oversight — affords far too much discretion to BC Hydro.<sup>187</sup>

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<sup>186</sup> See Expert Report of Dr. Peter Fox-Penner, The Brattle Group (16 December 2014), ¶ 91 (hereinafter "Fox-Penner Expert Report").

<sup>187</sup> Fox-Penner Expert Report, ¶ 51.

Dr. Fox-Penner observes, moreover, that the purported standard did not exist in writing at any time BC Hydro set the GBLs here at issue, and has never had any binding effect.<sup>188</sup>

167. With respect to BC's adherence to its stated policy objectives, Dr. Fox-Penner concludes that "the restrictions the BCUC and BC Hydro imposed upon Celgar cannot be justified by any of the ostensible governmental policy rationales discussed above."<sup>189</sup> With respect to the "harm to other ratepayers" argument, Dr. Fox-Penner observes that

the policy of avoiding "harmful arbitrage" requires that a self-generator not be afforded increased access to embedded cost power to meet its own load. Necessarily then the GBL must be set based on the levels of generation historically used to meet load. This was not done for Celgar, as BC Hydro based Celgar's GBL on its load (including purchases *from Fortis BC*) rather than self-generation applied to load. Celgar's ability to access embedded cost power to meet its load thus was reduced *instead* of maintained at *status-quo ante* levels, as the "harmful arbitrage" policy contemplates.<sup>190</sup>

168. With respect to the ostensible "incentivization" policy, Dr. Fox-Penner concludes that

the restrictions imposed upon Celgar cannot be justified by the BC policy of incentivizing only new and incremental generation. BC and BC Hydro could have subsidized new and incremental generation all they wanted, without restricting Celgar's ability to sell its self-generated electricity. The restrictions thus cannot be justified by the incentivization policy alone.<sup>191</sup>

Indeed, BC Hydro was not consistent even in the application of its purported policy. As noted, BC Hydro's 2008 Standing Offer Program, for small green energy producers, was open to

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<sup>188</sup> See Fox-Penner Expert Report, ¶ 93.

<sup>189</sup> Fox-Penner Expert Report, ¶ 110.

<sup>190</sup> Fox-Penner Expert Report, ¶ 110.

<sup>191</sup> Fox-Penner Expert Report, ¶ 111.

existing generators, through November 26, 2014.<sup>192</sup> Moreover, BC Hydro's Power Smart Program, through which it currently enters into Load Displacement Agreements, does not require the prospective self-generator to make any showing that it would not add the proposed generation capacity in the absence of the incentive from BC Hydro. All that is required in this connection is a commitment to load displacement, and BC Hydro's payment of part of the capital cost.<sup>193</sup> BC Hydro pays its incentive without regard to whether the self-generator could or would have installed the generation on its own.

169. Finally, with respect to energy security, Dr. Fox-Penner concludes that

the restrictions imposed upon Celgar cannot be justified by BC's goal of achieving energy security. If it was important for BC to retain Celgar's below-load power in the Province, then it could have contracted for it, through an LDA or an EPA, as it did, for example, with Canfor. . . . BC's actions here were simply aimed at saving ratepayers and BC Hydro money.<sup>194</sup>

170. Nor were the actions of the BCUC and BC Hydro consistent with the goal of improving or achieving economic efficiency, as Dr. Rosenzweig repeatedly and wrongly suggests.<sup>195</sup> As Dr. Fox-Penner explains, "Economic efficiency is a condition in which every person within an economic system cannot achieve higher utility without lowering the utility of someone else, a condition referred to as Pareto optimality. More generally, as is also pointed out

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<sup>192</sup> See *supra* n.3.

<sup>193</sup> See C-334, BC Hydro, Power Smart program for transmission level customers, <https://www.bchydro.com/powersmart/business/programs/project-incentives/transmission.html>.

<sup>194</sup> Fox-Penner Expert Report, ¶ 112.

<sup>195</sup> Rosenzweig Expert Report, ¶¶ 7, 23, 35 n.40, 45, 52, 63, 64, 66, 69.

by Dr. Rosenzweig, economic efficiency means that all resources are being put to their highest level use.”<sup>196</sup>

171. Dr. Fox-Penner concludes:

I find that the actions of BCUC and BCH clearly were explicitly and consciously NOT directed towards putting resources to their highest use. They were instead directed at a much narrower objective, minimizing the cost of electric service to BC Hydro customers other than self-generators. This is a cost minimization objective, not an efficiency objective. Achieving objectives at minimum cost to those pursuing the objective is “efficient” only in the sense that it minimizes one particular entities’ use of its own scarce resources to allow the rest of that entity’s resources to be used elsewhere. It is no guarantee whatsoever that all resources are being put to their highest and best social utility. When the prices at which goods are traded are not uniformly based on marginal costs and there are public goods and externalities, it can also result in policies that are discriminatory.<sup>197</sup>

172. Dr. Fox-Penner reaches this conclusion through an analysis of the underlying economics of the policy choices reflected in BCUC Orders G-38-01 and G-48-09. These orders did not provide the greatest market access to the most efficient self-generators, but instead awarded benefits and more favorable treatment to self-generators with economically idle self-generation capacity, that, by definition, were less efficient. As Dr. Fox-Penner explains, and demonstrates via a numerical example, “BC’s policy stands in the way of an increase in overall resource efficiency — greater output of electricity at lower costs. It certainly is not designed to enhance economic efficiency, and in fact, it has the opposite effect. It favors inefficient producers over the most efficient producers.”<sup>198</sup>

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<sup>196</sup> Fox-Penner Expert Report, ¶ 113 (footnote omitted).

<sup>197</sup> Fox-Penner Expert Report, ¶ 114.

<sup>198</sup> Fox-Penner Expert Report, ¶ 38 (footnote omitted).

173. Through economic analysis, Dr. Fox-Penner also discloses the true motivator of the BC self-generator policy of avoiding “harmful arbitrage”:

The Order G-38-01 “only let idle or new generation arbitrage” policy is motivated by BC Hydro protecting its profits and/or its rates at the expense of a more equitable and more economically efficient self-generator sales policy. The BCUC simply took a snapshot of the *status quo* prior to the policy and declared that any existing self-supply should continue; new sales of self-generated electricity at market prices could occur so long as self-generator’s demand for embedded cost power was not increased by the sale.<sup>199</sup>

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Awarding external sales opportunities only to {new or idle generation}, based on a rationale that this avoids “harmful arbitrage,” simply reflects a view that harm is relative to the *status quo*, in which {existing generators are} presumed to be entirely self-supplying and {new or idle generators are} not generating at all. It is not the least ‘harmful’ scenario in the sense that it does not lower rates as much as they could be lowered, it is just not worse than the *status quo* prior to the policy.”<sup>200</sup>

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Put another way, the fundamental self-generator regulatory issue confronting the BCUC was how to allocate the arbitrage profit that could be earned by selling electricity generated in BC at relatively low cost into higher-priced export or domestic markets. Most of this electricity was generated by BC Hydro, but some was produced by self-generators operating in the Province. These profitable sales were going to occur; the only question was who would reap the benefits. The actions and policies of BC and BC Hydro did not allocate all such profit opportunities to BC Hydro; they afforded some profit opportunities to certain self-generators, but only to the extent BC Hydro was protected against additional costs. This result was not guided or even influenced by any considerations of economic efficiency or fairness among self-generators; rather, the allocation was motivated principally by a desire to preserve electricity rates in the Province as they were alongside *ad hoc* circumstances.<sup>201</sup>

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<sup>199</sup> Fox-Penner Expert Report, ¶ 40.

<sup>200</sup> Fox-Penner Expert Report, ¶ 39.B.

<sup>201</sup> Fox-Penner Expert Report, ¶ 32 (footnote omitted).

174. The “harm to ratepayers” argument thus is circular, and assumes its conclusion that other ratepayers have some entitlement to a continuing benefit from the 52 MW generator Celgar installed in 1993, simply because the mill voluntarily used the generator mostly for self-supply. “Harm” resulting from Celgar’s desire to use its generating assets for another purpose can exist only if Celgar’s self-supply usage previously provided a benefit to those ratepayers. The question Canada never answers is why those ratepayers should have a continuing entitlement to that benefit? No BC Hydro provincial or federal funds went into Celgar’s 1992–94 revitalization project, no one paid Celgar for any load displacement commitment, and Celgar otherwise made no legally binding commitment to self-supply. Canada incorrectly castigates Celgar for wanting BC Hydro to purchase “something for nothing,” but, having argued that paying something for nothing is unfair, is perfectly content with imposing regulatory measures that require Celgar to provide something for nothing. But fairness is not a concept Canada ever addresses in explaining its regulatory objectives.

175. For the same reasons, Dr. Fox-Penner determines Dr. Rosenzweig’s “cost-causality” argument also to be circular. Indeed, Dr. Rosenzweig’s cost causality and harm to ratepayers arguments are one and the same.

176. In advancing his “cost-causality” argument, Dr Rosenzweig asserts that “BCH needed to protect customers from bearing costs due to the actions of other customers.”<sup>202</sup> But Dr. Fox-Penner points out that

This assertion embeds the implicit assumption regarding property rights that all power produced by self-generations is not really owned by the self-generator—if it was, it could be freely sold to others without affecting their entitlement to ECR

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<sup>202</sup> Rosenzweig Expert Report, ¶ 45.

power. Rather, it has a special status that requires it to be used only for self-supply. The benefits of off-system sale of that generation are held by the Province, which can decide through its public utility policies and ratemaking how the benefits of that generation are to be allocated. Dr. Rosenzweig's particular definition of the *status quo* then allows him to label as a "cost" any deviation from this *status quo* that reduces the allocation of the benefits of self-generation to the total system and raises them to the self-generator.<sup>203</sup>

177. Both the cost-causality and harm-to-ratepayers arguments start from the premise that Celgar's self-generated electricity is not really owned by Celgar, and that it must be used for self-supply. Only from this assumed *status quo* can Dr. Rosenzweig argue that a change imposes costs on others. Thus, neither argument can justify the existence of the self-supply requirement at issue in this proceeding, because both simply presume it to exist.

178. Dr. Fox-Penner also concludes that the BCUC delegated improperly broad discretionary authority to BC Hydro to establish GBLs,<sup>204</sup> failed to ensure that any well-defined standard was implemented province-wide,<sup>205</sup> haphazardly adopted different standards for BC

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<sup>203</sup> Fox-Penner Expert Report, ¶ 42.

<sup>204</sup> According to Dr. Fox-Penner, Order G-38-01 contains only "extremely general and vague guidance, and leaves BC Hydro with far too much discretion to choose who and how much it would allow to arbitrage. BC Hydro itself did not even attempt to put in place any written, mandatory guidelines or procedures after Order G-38-01 was issued to ensure its employees' fair and non-discriminatory implementation. The result is that BC Hydro was governed by only a non-specific 'high level' principle, incapable of ensuring non-discriminatory implementation." Fox-Penner Expert Report, ¶ 91.

<sup>205</sup> As Dr. Fox Penner observes, "Instead of adopting a single province-wide implementation policy, the BCUC proceeded on a case-by-case basis. . . . {I}n Order G-48-09, the BCUC, itself, admitted that:

a more global solution to the issue of reselling or "arbitrage" of power would be preferable and that a Commission "rule" or "regulation" might have been a viable way to proceed. However, in the end, the Commission Panel decided that the record in this proceeding and the limited number of parties participating, did not permit or support a more general solution or remedy.

[FOOTNOTE CONTINUED ON NEXT PAGE]

Hydro and Fortis BC Customers without explanation,<sup>206</sup> and generally failed to exercise proper regulatory oversight and review.<sup>207</sup> He finds that “the BCUC and BC Hydro’s regulatory process with respect to the treatment of self-generators did not follow a consistent process, and failed to apply a consistent method. It therefore does not meet the standards of good regulatory practice.”<sup>208</sup>

179. He finds that the BCUC did not even acknowledge that its decisions made distributional choices, and it made those choices without regard to any consideration of fairness:

The issue with which the Commission was faced at its core involved how to allocate the benefits created by self-generation of various types. The Commission failed to examine in any sort of refined or categorical manner the different kinds of benefits, and it failed even to give consideration to whether its allocation of

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Even though it recognized that the issue of power sales of customers with self-generator could and should have been dealt with more broadly at the province-wide level, the BCUC relied solely on the limited record and number of parties in the G-48-09 proceeding to depart from its past decisions. This is a remarkable admission by a regulator, because any regulator should have all the necessary authority to build precisely the record it needs to decide issues of policy and implementation on a non-discriminatory basis. Indeed, this is their traditional duty.” Fox-Penner Expert Report, ¶¶ 95-97 (footnotes omitted), quoting C-8, BCUC Decision in the Matter of British Columbia Hydro and Power Authority and Application to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement (May 2009), at 22

<sup>206</sup> Fox-Penner Expert Report, ¶¶ 103, 105. He observes, reviewing the Commission’s own Decision accompanying Order G-48-09, that “{i}t is thus painfully evident that the Commission was aware of the potential inconsistencies across policies, felt that it was preferable and viable to have a general rule applicable province-wide, but nevertheless allowed an overly discretionary and inconsistent process to continue indefinitely.” *Id.*, ¶ 106.

<sup>207</sup> Fox-Penner Expert Report, ¶ 97 (“the BCUC seems not to want even to inquire into BC Hydro’s individual GBL determinations, much less exercise the control and oversight necessary to monitor that BC Hydro is acting fairly and in a nondiscriminatory manner. Despite being invited by parties to do so, the BCUC steadfastly has refused to compare GBL treatment across self-generators. Prior to 2009, I see no evidence that the BCUC, or any other BC governmental entity, has taken any responsibility for ensuring that GBLs for self-generators across the province are set in a consistent and non-discriminatory manner.”).

<sup>208</sup> Fox-Penner Expert Report, ¶ 85.

these benefits was fair. Among the issues the Commission should have considered, but did not, are: (1) whether self-generators should be treated differently depending on whether other ratepayers contributed to the cost of their self-generation through grants and no-interest loans from BC Hydro; (2) whether policies should depend on the specific service area or customer arrangement; and (3) how to equitably share the benefits between the self-generator and other ratepayers. Regulation and ratemaking almost always involve distributional choices -- the allocation of benefits and burdens. In Order G-38-01, the Commission punted on these issues and simply preserved the *status quo* without any consideration of the fairness or distributional impact of such an approach. In Order G-48-09 it disturbed the *status quo*, by holding Celgar and the City of Nelson to an access standard that was even more restrictive than the *status quo*, eliminating any and all possible harmful arbitrage. The Commission was not consistent; its inconsistent policies for BC Hydro and FortisBC self-generators were overtly discriminatory. This too is deeply contrary to basic principles of consistency, fairness, and non-discrimination.<sup>209</sup>

180. British Columbia self-generator policy, as implemented by BC Hydro, dictated that BC Hydro should not purchase Celgar's below-load energy, or allow Celgar to sell it to a third-party, because BC was already receiving the benefits of such generation on the BC electric system for free. The province did not want to pay Celgar for load displacement, or to purchase its below-load energy, because it had grown used to getting a share of the benefits of that energy for free. It therefore paid others for that which it took from Celgar without compensation, simply because it knew it could. This is what BC Hydro told Celgar at the time, and this policy objective also is reflected in MEM internal briefing notes Mercer presented in its Memorial. Because of its efficiency as an energy producer, Celgar would continue to generate to meet its load, because its marginal benefit — the avoided cost of purchasing power from FortisBC — exceeded its marginal costs.

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<sup>209</sup> Fox-Penner Expert Report, ¶ 109.

181. This is not legitimate government policy. Under NAFTA, the Province is free to provide all the subsidies it wants to encourage new and incremental generation, and to subsidize all the inefficient producers it wants. Subsidies are exempt from challenge. BC also is free to purchase power from whoever it chooses, and can select the most inefficient producers if that is its desire. Procurement too is exempt from challenge under NAFTA. But BC did not want to take either or both of these permitted approaches, presumably because of the expense. Instead, it imposed discriminatory regulatory measures, to restrict both Celgar's access to embedded cost utility power more harshly, and its ability to sell its below-load self-generated electricity to anyone more restrictively, to take from Celgar load displacement that it paid others to provide. And, fortunately for Mercer, NAFTA does not exempt discriminatory regulatory measures.

182. Finally, Dr. Fox-Penner concludes that BC could have achieved its objectives of maintaining BC Hydro's electrical rates as they were (and thereby preventing harm to other ratepayers) and increasing self-generation levels in the province through mechanisms that were not discriminatory, and, indeed, fair, including:

- 1) Allowing all self-generators a *pro rata* share of embedded cost power, and *pro rata* arbitrage opportunities, rather than allocating these benefits based on historical usage;

- 2) Allowing all self-generation to be sold at market rates, and then taxing the proceeds so as to mitigate the impact on ratepayers;
- 3) Banning all arbitrage by self-generators, but require BC Hydro to share the profits it earns on its own export sales with self-generators, whose investments helped to provide BC utilities, and eventually BC Hydro, with the surplus power; and
- 4) Developing transparent public interest principles for allocating these two quantum (the amount of arbitrage profits and the amount of self-generation arbitrage permitted) and allowing each self-generators to make their case.<sup>210</sup>

183. In sum, even if the Tribunal were to conclude that the challenged measures were not discriminatory because BC consistently applied a uniform access standard to all self-generators in the Province, the resulting discriminatory impact cannot be justified because BC's approach failed to serve any legitimate governmental objective that could not have been achieved by nondiscriminatory means.

**2. The Federal PPGT Program, Celgar's Return On Investment On Its Second Generator, And Canada's Other Irrelevant Smokescreens**

184. In a further attempt to justify its actions against Celgar, Canada also raises issues concerning Celgar's participation in the Canadian Federal Government's Pulp and Paper Green Transformation Program (the "PPGT Program") and Celgar's return on investment in its Green Energy Project second generator installation, completed in September 2010. Mercer surmises that Canada has raised these issues to distract or confuse the Tribunal, because they are not relevant to any claim or defense raised in this case.

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<sup>210</sup> Fox-Penner Expert Report, ¶ 151.

185. Mercer thought it obvious, but perhaps it is worth stating that this dispute concerns the generator Celgar installed during its 1992–94 revitalization by prior owners, and the improvements comprising Mercer’s Blue Goose Project, completed in 2007. Those investments together provided Celgar with the 2007 generation capacity upon which BC Hydro based Celgar’s GBL, and also determined its load as of 2007. The revitalization project produced for Celgar an average of 264 GWh/year of electricity from 1994–2006, and Blue Goose enabled Celgar to increase its total generation from 290 GWh in 2006 to 351 GWh in 2007 and 374 GWh in 2008.<sup>211</sup>

186. Mercer’s Green Energy Project, which Mercer has explicitly acknowledged was paid for in substantial part by the federal government’s PPGT Program — a C\$ 1 billion nationwide program that was equally available to all kraft pulp mills in Canada based on their relative levels of black liquor production — is not at all in issue. The additional generation capacity provided by that investment only came on line in late 2010, and Celgar sold the resulting incremental electricity to BC Hydro in the 2009 EPA. As a theoretical and contractual matter, the Green Energy Project does not generate the electricity Celgar uses to meet its own load, and thus does not produce the below-load electricity that Celgar is restricted from selling under the challenged measures.<sup>212</sup>

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<sup>211</sup> See Merwin Witness Statement, ¶ 58 and Annex A. Mercer presented Celgar’s electricity generation, sales, purchase, load and other data, for the period 1990-2013, in its Memorial, at Annex A. Mr. Merwin subsequently discovered one error in the reported natural gas consumption data, also presented in the Annex. Merwin Second Witness Statement, ¶ 38 and Annex A. Accordingly, Mercer provides a corrected data table, at Annex A to this Reply (hereinafter “Reply Annex A”).

<sup>212</sup> Of course, Celgar does not segregate the electricity produced by each generator, and deliver to BC Hydro only electricity produced in its second generator. All its self-generated electricity is

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187. Mercer therefore fails to understand the relevance of Canada's and Dr. Rosenzweig's arguments concerning the PPGT Program subsidy, the pricing in Celgar's 2009 EPA, or Mercer's return on investment for the Green Energy Project.<sup>213</sup> Those investments and returns are not relevant because all pulp mills in BC are permitted to sell energy in excess of load to BC Hydro (in the case of new projects) or to third-parties.<sup>214</sup> All new projects were eligible to receive pricing from BC Hydro, as a result of the Bioenergy Phase I competitive bidding process, all were eligible for federal PPGT Program funding, and all presumably earn good returns. (We do not know for certain because Dr. Rosenzweig curiously analyzed only Celgar.) Indeed, both the PPGT Program and BC rulings allowing the sale at market prices of self-generation in excess of load are good examples of non-discriminatory measures, with published, clear criteria, that were applied in a uniform, non-discretionary manner, in contrast to BC Hydro's *post hoc* "current normal" standard.

188. This case, on the other hand, concerns below-load self-generated electricity, regarding which BC has promulgated no clear rules, no written standards, and has not treated everyone in a uniform manner. This likely explains why Dr. Rosenzweig fails to analyze Celgar's returns on its 1992–94 investment in generation, the returns actually at issue in this proceeding.

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

commingled, once again demonstrating the absurdity of Canada's power flow argument.

<sup>213</sup> Dr. Rosenzweig contends that Mercer's discrimination claim ignores the fact that Canada treated Celgar as well as others in the PPGT Program. Rosenzweig Report, ¶ 25. Mercer disclosed rather than ignored this fact, but it remains irrelevant. The fact that Mercer benefited from a non-discriminatory federal-level measure is no defense to a claim that BC discriminated against Mercer under provincial measures. *See* Kaczmarek Second Report, ¶ 148.

<sup>214</sup> *See, e.g.*, Counter-Memorial, ¶ 237.

**C. Assessing The Existence Of Less Favorable Treatment**

**1. The “Below Load Access Percentage”  
Is An Appropriate Metric**

189. Mercer has made *de facto* discrimination claims, one element of which is the existence of a discriminatory impact or effect.<sup>215</sup> Canada admits that the “practical impact” of a measure is the key to determining whether a State has subjected an investor to “treatment” under NAFTA.<sup>216</sup> Canada further concedes that the foundation for an Article 1102 claim may rest on a showing of “the existence of a significant benefit to nationals over non-nationals arising from that treatment.”<sup>217</sup>

190. As Mercer claims it was afforded less access to embedded cost utility electricity while selling below-load electricity than any other pulp mill in British Columbia, it has demonstrated a “practical impact” resulting in “a significant benefit to nationals over non-nationals arising from that treatment.” Mercer’s expert, Mr. Switlishoff, quantified and described this benefit through the calculation of a “Below Load Access Percentage,” which serves as an objective measure of the degree of below-load access afforded to Celgar and others. Mercer makes no claim for an “access percentage subsidy,”<sup>218</sup> as Mercer is not seeking any subsidy, but instead the removal of restrictions that requires it to use a higher percentage of its self-generated electricity to meet its own load than any other pulp mill in the Province, and to eliminate completely its ability to sell such below-load electricity to a third-party.

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<sup>215</sup> See Memorial, ¶¶ 481–83.

<sup>216</sup> Counter-Memorial, ¶ 357.

<sup>217</sup> Counter-Memorial, ¶ 374.

<sup>218</sup> Counter-Memorial, ¶ 29.

191. The “Below Load Access Percentage” properly enables the Tribunal to assess whether the challenged measures were neutral in their impact on different pulp mills. It measures the “practical impact” of the measures, which is what Canada contends is required to produce a breach of Article 1102.<sup>219</sup> It simply is a measurement tool for comparing one GBL to another.

192. The Below Load Access Percentage is no more a construct than the GBL construct on which it is based. The GBL restricts a self-generator’s ability to sell its below-load self-generated electricity, by imposing a self-supply obligation in the amount of the GBL. The Below Load Access Percentage quantifies the impact of that restriction, using the GBL as its key variable. It is a reasonable, relative measure of how much below-load self-generated electricity the comparator is permitted to sell while also purchasing embedded cost power from its utility to meet its own load. As Mr. Switlishoff points out, it could also be called “arbitrage percentage,” as it is a metric of the degree of arbitrage each comparator is permitted.<sup>220</sup>

193. As Mr. Switlishoff put it:

Simply because the Below-Load Access Percentage is a metric I arrived at when looking at the effects of discriminatory treatment does not mean the metric is flawed. Dr. Rosenzweig provides a laundry list of principles, issues, and processes that he claims I have somehow failed to apply or understand, but nowhere does he demonstrate the metric I have developed does not provide the measure of that which it was intended to provide — the percentage of a pulp mill’s electric load that could be met by self-generation that the pulp mill is permitted to meet with embedded cost utility electricity while it is selling self-generated electricity.<sup>221</sup>

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<sup>219</sup> Counter-Memorial, ¶ 357.

<sup>220</sup> Switlishoff Second Expert Statement, ¶ 14.

<sup>221</sup> Switlishoff Second Expert Statement, ¶ 13 (footnote omitted).

194. Canada inconsistently objects to Mercer’s measurement standard, while continuing to insist that its self-generator policy is aimed at precluding harmful arbitrage. Mr. Switlishoff has measured the differing extents to which BC actually has precluded arbitrage. It is understandable that Canada does not want to acknowledge these differences. But in the end, Canada offers no real substantive criticism,<sup>222</sup> and, more importantly, offers no alternative objective measure of the discriminatory impact of the challenged measures, or means to compare GBLs across different mills.

195. Instead, Canada launches directly into its argument that it applied a consistent “current normal operating conditions” standard to everyone. But Canada thereby conflates the issue of discriminatory impact that arises in the context of a *de facto* discrimination claim with the

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<sup>222</sup> In a footnote, Canada contends that the Below-Load Access Percentage fails to account for the “composition” of the mills. It points out that the generation from Howe Sound’s kraft mill, for example, serves not only that pulp mill, but also a thermo-mechanical pulp mill and a paper plant at the same site. Counter-Memorial, ¶ 399 n. 767. But these differences mattered not in BC Hydro’s GBL computations, and they do not affect the viability of the Below-Load Access Percentage as a measure of the extent to which the Province allowed different mills to access embedded cost utility electricity to enable the mill to sell self-generated electricity at market prices.

For example, in determining Howe Sound’s GBLs, both in 2001 and for its 2010 EPA, BC Hydro purported to look to the <<

>> Switlishoff Second Expert Statement, ¶ 82 n.48. Likewise, in evaluating Celgar’s load, BC Hydro considered not only the load at the pulp mill but all other load behind Celgar’s point of interconnection with FortisBC, and served by Celgar, which included the loads of an independent oxygen producer and the City of Castlegar’s water-pumping station. *See* Merwin Witness Statement, ¶ 91; R-127, Letter from Brian Merwin, Mercer, to BC Hydro re Bioenergy Phase I (7 May 2008), at 4.

In the same fashion, the Below Load Access Percentage measures the degree of a mill’s access to below-load embedded cost utility power to meet its load, while selling self-generated electricity, using the very same definition and measure of load used by BC Hydro in setting GBLs. The “composition” of a mill is irrelevant.

distinct issue of justification. Canada presents no rebuttal to Mercer's demonstration of discriminatory impact, which the Tribunal therefore should take as established. Indeed, Canada's argument here, skipping the impact analysis altogether, and its contention that Mercer needs to prove discriminatory intent, if accepted, each would have the effect of ruling out altogether the entire class of previously accepted and well-recognized *de facto* discrimination claims.

**2. The Below-Load Access Percentage Properly Measures The Impact Of The Measures At The Time They Were Imposed, And Ignores The Impact Of Subsequent External Events**

196. As Mercer also noted in its initial Memorial, the Below Load Access Percentage measurement purposefully was intended to measure the impact of each pulp mill's GBL at the time that GBL was established. Like BC Hydro and the BCUC in setting GBLs, Mr. Switlishoff considered only load, generation, sale, purchase, and related data available at the time the GBL was set, and ignored all subsequent changes in such variables. Such changes were not and could not have been considered in setting the GBL. The whole idea was to assess the practical impact of the GBL as of the time it was set.<sup>223</sup>

197. Canada nonetheless criticizes Mercer for not also considering the impact on its claims of BC Hydro's < [REDACTED] ><sup>224</sup> But as Mercer already has explained, < [REDACTED]

[REDACTED]

[REDACTED]

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<sup>223</sup> See Memorial, ¶ 500 and n.604.

<sup>224</sup> Counter-Memorial, ¶¶ 431, 444. See also Rosenzweig Report, ¶ 83.

[REDACTED]

[REDACTED] >>

198. Under its EPA with BC Hydro, Celgar was obligated to sell all energy generated above its GBL to BC Hydro. Under BCUC Order G-48-09, FortisBC was prohibited from selling Celgar any power to meet its load while Celgar was selling power. This meant Celgar had no way to fill the electricity gap between its GBL and its increased load, which materialized after the EPA. The parties therefore agreed to < [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ><sup>226</sup> As noted above, the very fact that BC Hydro < [REDACTED] > undercuts Canada's argument that BCUC Order G-48-09 did not impose a net-of-load standard on Celgar.

199. In no way does this < [REDACTED] > undercut Mr. Switliff's Below Load Access Percentage measurements, because, as noted above, that measure ignores post GBL changes in load or generation, not just for Celgar, but also for all other mills examined. It is a static measure of the degree of access afforded *at the time the GBL was computed*, and not a dynamic measure that takes into consideration later changes in the original variables.

200. Canada also contends that this < [REDACTED] > somehow eliminates any discrimination or that it reduces Mercer's damages, in respect of

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<sup>225</sup> Counter-Memorial, ¶ 257 ("Following the execution of the EPA, the Claimant's load at the Celgar pulp mill grew beyond the 349 GWh/year (or 40 MW) GBL in the EPA.")

<sup>226</sup> Merwin Witness Statement, ¶ 124 n.62.

Mercer's claim based on Order G-48-09's imposition of a net-of-load standard.<sup>227</sup> In making this argument, Canada appears to be distinguishing (1) harm caused by Order G-48-09, from (2) harm caused by the establishment of a discriminatorily high GBL for Celgar. Canada appears to contend that the < [REDACTED] > makes Celgar whole as to the effects of Order G-48-09, because < [REDACTED] [REDACTED] >

201. Mercer agrees, in part. Mercer disagrees that it is possible to separate the harm caused by the two Measures, because they are interrelated.<sup>228</sup> As explained in the Memorial, and detailed more fully below, Celgar's GBL-related provision in its EPA were negotiated and finalized while the Order G-48-09 proceeding was pending. Thus, Mercer contends that BC Hydro sought GBL terms in Celgar's EPA that would be consistent with the relief BC Hydro was seeking from the BCUC. If BC Hydro had not done so, it would have run the risk of agreeing to a contract that could not be performed.

202. Nonetheless, Mercer agrees with Canada, that, as a result of < [REDACTED] [REDACTED] > Mercer is entitled to, and Mercer has sought, only damages arising from its discriminatory, excessive GBL. Specifically, Mercer claims damages only based on Celgar's 349

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<sup>227</sup> Counter-Memorial, ¶¶ 431, 444, 503 (contending that < [REDACTED] [REDACTED] >); Rosenzweig Report, ¶¶ 83-84.

<sup>228</sup> < [REDACTED] [REDACTED] > Simply put, Order G-48-09 and Celgar's 2009 EPA do not work well together, as Order G-48-09 establishes a dynamic limit while the GBL established by the EPA is static.

GWh/year GBL, and not based on its higher current load [REDACTED]  
[REDACTED] Mercer claims no damages from not being able to sell power below its *current* load but above its 349 GWh/year GBL; it has capped its damages based on its GBL of 349 GWh/year, and the 2007 load on which it was based.

203. Mercer has been completely consistent in describing the challenged measures as restricting its sales of below-load energy, *tied to its 2007 load*, and in evaluating its damages using that *same 2007 load of 349 GWh/year* as reflecting the volume of energy it was restricted from selling. As Canada points out, [REDACTED]  
[REDACTED]  
[REDACTED]

204. In short, < [REDACTED] > in no way mitigates any harm suffered by Celgar from its inability to sell any of its below-GBL 349 GWh/year of electricity — the only electricity regarding which Celgar has made any claims. It only precludes Celgar from claiming *additional* damages from the restriction on its ability to sell incremental electricity < [REDACTED]  
[REDACTED] > — damages Celgar does not seek. If this is what Canada means when it contends that Celgar’s less favorable treatment under Order G-48-09 “disappears in the face of its < [REDACTED] > arrangement with BC Hydro,”<sup>230</sup> then Mercer agrees.

205. Put another way, as Mercer laid out in its Memorial, the Tribunal’s initial task with respect to damages is to determine the GBL Celgar should have received to afford it treatment

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<sup>229</sup> See Reply Annex A.

<sup>230</sup> Counter-Memorial, ¶ 431.

comparable to the best treatment afforded any comparator.<sup>231</sup> The difference between that GBL and Celgar's 2009 EPA GBL of 349 GWh/year will reflect the additional quantum of electricity Celgar should have been permitted to sell. Mercer's damages then are based on the diminution in Celgar's enterprise value resulting from the loss of that revenue stream (less Celgar's cost to procure replacement electricity). Mercer does not claim additional or separate damages resulting from Order G-48-09's net-of-load restriction, because, as Canada correctly contends, < [REDACTED]

[REDACTED]  
>

206. Nonetheless, Canada cannot have it both ways, using the < [REDACTED] > both as a shield and as a sword. In addressing damages, Dr. Rosenzweig also posits a scenario in which the Tribunal finds Order G-48-09 to be NAFTA-consistent, but Celgar's GBL to be NAFTA inconsistent. In that scenario, he contends that Celgar has no damages, because any additional electricity sales allowed by the reduced GBL would be precluded by the net-of-load restriction on purchasing replacement electricity from FortisBC in Order G-48-09.<sup>232</sup> Not so. The very same < [REDACTED] > that Dr. Rosenzweig argues negates damages under Order G-48-09 if the Order is NAFTA-inconsistent (< [REDACTED]

[REDACTED] >) *also* would permit Celgar to receive the same type of revenues for the same type of < [REDACTED] >, if Order G-48-09 is found to be NAFTA-consistent and if the Tribunal agrees with Celgar that it is likely that BC Hydro would have purchased the additional

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<sup>231</sup> Memorial, ¶ 691.

<sup>232</sup> Rosenzweig Report, ¶¶ 110, 129–31.

electricity. Canada is correct in arguing that < [REDACTED] >. Canada just needs to recognize that this remains true if the Tribunal determines Celgar’s GBL should have been lower than 349 GWh/year.

207. Finally, it is completely misleading of Canada to suggest that BC Hydro somehow is providing Celgar an advantage or discount because “< [REDACTED] >”<sup>233</sup> < [REDACTED] > < [REDACTED] ><sup>234</sup> Celgar is not in BC Hydro’s service territory, and BC Hydro has no BCUC-approved rate schedule that would cover any such sales to Celgar.<sup>235</sup> Instead, BC Hydro and Celgar have agreed < [REDACTED] >

208. < [REDACTED] ><sup>236</sup> Put another way, BC Hydro’s tariff rates include a capacity charge for its industrial customers intended to recover the system fixed costs necessary to generate and deliver electricity to the customer. < [REDACTED] >

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<sup>233</sup> Counter-Memorial, ¶ 119.

<sup>234</sup> In this context, “capacity” and “energy” refer to different services. Energy refers to the actual flow of electricity. Capacity refers to the generation resources BC Hydro must maintain to provide energy on an as needed basis, and typically would be based on a peak load. *See* Memorial, ¶ 63; Switlishoff Expert Statement, ¶ 221.

<sup>235</sup> Austin Expert Report, ¶ 40.

<sup>236</sup> Switlishoff Second Expert Statement, ¶ 63 (emphasis added).

[REDACTED]  
[REDACTED]  
[REDACTED] > They effectively view it as a BC Hydro resource, that BC Hydro should charge Celgar for using!

### **3. The Measure Of Damages For Less Favorable Treatment**

209. Canada also objects to the use of the Below Load Access Percentage in the measurement of damages, contending that the Tribunal should assess damages based on the treatment Celgar would have received under application of the common GBL standard.<sup>238</sup>

210. Mercer agrees that if Canada could demonstrate that BC had a uniformly articulated GBL methodology, which it consistently applied to all BC pulp mills offered as comparators,<sup>239</sup> without exercising discretion more favorably for some than for others (and assuming for present purposes that such measure was reasonably related to a legitimate government policy that could not be achieved by non-discriminatory means), then Mercer has no claim for damages, even though Celgar's Below Load Access Percentage is lower than for all

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<sup>237</sup> Switlishoff Second Expert Statement, ¶ 63.

<sup>238</sup> Counter-Memorial, ¶¶ 513–14.

<sup>239</sup> As discussed above, the “like circumstances” test does not require Mercer or Canada to proffer evidence concerning every single potential comparator. Mercer has identified those it considers to be the best comparators; Canada has identified the Tolko sawmill as another potential comparator, and it has generally discussed other pulp mills without providing any details of their actual GBL calculations or data or documentation relevant to assessing the GBL calculation methodology actually applied. In these circumstances, the Tribunal need not and indeed cannot evaluate all potential comparators, but must instead limit its analysis to the best comparators among which it has sufficient data upon which to evaluate their actual treatment.

other pulp mills. Governments are permitted to take measures that have differential impacts under those conditions.

211. Mercer also agrees that if Canada could demonstrate that BC had a uniformly articulated “current normal” GBL methodology, that it consistently applied to *all* BC pulp mills offered as comparators, without exercising discretion more favorably for some than for others (and assuming for present purposes that such measure was reasonably related to a legitimate government policy that could not be achieved by non-discriminatory means), but that it applied the different net-of-load standard only to Celgar, and/or made some error in applying its GBL methodology to Celgar, then the measure of damages would be based on the treatment Celgar would have received based on a proper application of that GBL methodology. As set forth in the Memorial, Mercer is entitled to be restored to the situation it would have been in absent Canada’s wrongful conduct.<sup>240</sup> The wrongful conduct in such circumstances would be the failure to apply to Celgar the standard BC applied to *everyone* else.

212. But here, as demonstrated below, BC had no consistently articulated “current normal” GBL standard, it had no consistently applied “current normal” standard, but instead it made a series of *ad hoc* discretionary determinations in which it treated Celgar less favorably than its comparators in setting Celgar’s self-supply obligation. In the absence of any uniform, non-discretionary, consistently applied standard — which Mercer establishes by showing that Celgar and *at least one* other comparator were treated inconsistently with the *post-hoc* standard — the measure of damages obviously cannot be based on the deviation from a non-existent or inconsistently applied standard. The wrongful act in such circumstances no longer is the failure

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<sup>240</sup> See Memorial, ¶¶ 686–89.

to apply an applicable standard; rather, it is the existence of differential impacts. Put another way, because Mercer is entitled to the best treatment afforded to any Canadian or third-country owned comparator, as established above, it is entitled to be treated as well as any comparator to which BC also did not apply its supposed standard.<sup>241</sup>

213. The proper basis on which to base damages in such circumstances, as well as in the case where the standard serves no legitimate governmental purpose that could not be achieved by non-discriminatory means, is to provide Celgar with the same relative self-supply obligation — the same effective impact — as BC afforded to BC’s best treated-comparator, *i.e.* to evaluate the value of the Celgar Mill as if, in 2009, it had received a GBL with the same Below Load Access Percentage as that of the highest relevant comparator. This in fact is one of the alternative damage analyses Mr. Kaczmarek has performed.

214. To recapitulate, the table below indicates the Below-Load Access Percentages computed by Mr. Switlishoff for Celgar and each comparator, and shows what the equivalent GBL for Celgar would be if it had been afforded the same access to utility embedded cost electricity while selling self-generated electricity. As Canada requests, we also take into consideration BC’s treatment of Tolko, and present the Below-Load Access Percentage the BCUC afforded to the Tolko sawmill from 2001-2013 when setting a GBL for Tolko in 2001. These calculations are presented in more detail in Section IV.F.2.c below.

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<sup>241</sup> See *supra* Section IV.A.3. See also Memorial, ¶ 478; CA-11, *Methanex*, Part IV, Ch. B, ¶ 21; RA-45, UNCTAD – National Treatment, at 26; C-1, NAFTA Article 1104 (requiring each NAFTA Party to accord investors “the better of” the treatment required by Article 1102 and 1103).

**Figure 22**  
**Celgar and Comparator Below-Load Access Percentages<sup>242</sup>**

Mill	Measure	GBL	Lower of Load or Generation	Saleable Below-Load Energy	Below-Load Access Percentage	Celgar GBL at Equivalent Below-Load Access Percentage	Additional Celgar Self-Generated Electricity Available for Sale
		A	B	C	D = C/B	E = (1-D)*349	F = 349 - E
Celgar	2009 EPA	349 GWh/yr	349 GWh/yr	0.0	0%		
Tembec	1997 EPA						
Tembec	2009 EPA						
Howe Sound	2001 Powerex						
Howe Sound	2010 EPA						
Tolko	2001 BCUC						

**D. BC Afforded Celgar Less Favorable Treatment In Taking Load Displacement Services From Celgar Without Compensation, Because It Provided Compensation To Others**

215. Before even reaching BC Hydro’s GBL methodology, Celgar’s first discrimination claim is that BC required Celgar to use its below-load self-generated electricity to provide load displacement services without compensation, whereas it secured the agreement of other pulp mills to use their self-generation for load displacement in exchange for substantial compensation.<sup>243</sup>

Put succinctly, BC took from Celgar services which it paid others to provide.<sup>244</sup>

<sup>242</sup> See Memorial ¶ 501 (Celgar 2009), ¶ 512 (Tembec 1997), ¶ 535 (Tembec 2009), ¶ 549 (Howe Sound 2001), ¶ 566 (Howe Sound 2010).

<sup>243</sup> As Canada does not dispute, BC Hydro provided Howe Sound with a << [REDACTED] >>

[FOOTNOTE CONTINUED ON NEXT PAGE]

216. BCUC Order G-48-09 effectively precludes Celgar from obtaining any energy from FortisBC while Celgar is selling self-generated electricity below its load, and the GBL-related provisions in Celgar’s 2009 EPA with BC Hydro preclude Celgar from selling that energy below its 2007 load to any third party. In combination, these measures strand Celgar’s below-GBL self-generated electricity, effectively requiring the mill to use that electricity to self-supply the first 349 GWh/year of its own load.

217. Canada provides no meritorious defense to this simple, straightforward claim. Canada first contends that Celgar was under a legal obligation to self-supply, under the 1991 Ministerial Order addressed in Section III above. Because Celgar made no such legally binding commitment, Canada’s argument fails. (And even if Celgar’s “estimate” in 1990 somehow created an obligation in perpetuity, it was limited to the actual levels of generation the mill achieved under its 1992–94 expansion, which never approached the 349 GWh/year baseline BC Hydro and the BCUC established as Celgar’s self-supply, load displacement obligation. As noted above, from 1994–2006, the Celgar Mill’s annual generation applied to load averaged 249.7 GWh/year.)<sup>245</sup>

218. Canada next contends that “it does not make sense for the Claimant to suggest that it should obtain a retroactive subsidy from BC Hydro for the load it displaces,” because Celgar is

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

interest free loan, and it paid Canfor << [REDACTED] >>. See Memorial, ¶¶ 191 n.233; 578–79; Counter-Memorial, ¶ 411.

<sup>244</sup> See Memorial, ¶¶ 578–87.

<sup>245</sup> Computed from data in Reply Annex A. The difference between Celgar’s 264 GWh/year average annual generation and its 249.7 GWh/year average generation-to-load reflects sales made to FortisBC.

a customer of FortisBC, and that it is not cost-effective for FortisBC to offer load displacement services in light of its load and resource profiles.<sup>246</sup> This argument fails as well, not only because Mercer is not seeking any retroactive subsidy,<sup>247</sup> but also because the cost-effectiveness of load displacement to FortisBC is irrelevant. Indeed, Canada's purported defense is a *non-sequiter*.

219. Canada does not dispute that the BCUC and BC Hydro each have required Celgar to provide 349 GWh/year of load displacement services without compensation. Canada also does not dispute that it is customary in BC for a utility to pay self-generators for load displacement services, and that BC Hydro has in fact paid other pulp mills for such services, in amounts of tens of millions of dollars each. Whether or not it is "cost-effective" for FortisBC to pay for Celgar to displace Celgar's load and thereby relieve FortisBC of that obligation, the point remains that BC lacked a non-discriminatory basis for compelling Celgar to provide load displacement without compensating Celgar for doing so.

220. If FortisBC did not want to pay for Celgar's load displacement because it was uneconomical for it to do so, and if BC Hydro did not want to pay because Celgar was not located in its service territory,<sup>248</sup> then the BCUC and BC Hydro had no justification for forcing Celgar by

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<sup>246</sup> Counter-Memorial, ¶ 418. *See also* Swanson Witness Statement, ¶ 27 (explaining that FortisBC does not offer load displacement incentives due to its lower marginal cost of new supply and greater resource options).

<sup>247</sup> *See* Memorial, ¶ 586 ("To be clear, Mercer does not contend that BC Hydro or the Province should have paid Celgar for the load displacement obligations imposed by Order G-48-09 and its GBL, and it is not seeking damages based on payments made to others. . . . Rather, Mercer contends that it is 'less favorable' treatment for the Province and BC Hydro to compel Mercer to provide load displacement services at all. Because the Province or BC Hydro did not obtain an LDA with Celgar, it cannot require Celgar to provide any load displacement services without treating Celgar less favorably than those whom it paid.").

<sup>248</sup> The irony of this argument should not be lost on the Tribunal. BC Hydro contends it has no reason to offer load displacement incentives to Celgar, because Celgar is not its customer. Yet

[FOOTNOTE CONTINUED ON NEXT PAGE]

regulatory action to provide such services for free. Not wanting to pay for something is not a justification for taking it.

221. Rather than providing a defense, Canada’s argument proves Mercer’s point — the Province required Celgar to displace 349 GWh/year of its own load without compensation, because neither FortisBC nor BC Hydro wanted to pay for it. To use Canada’s expression, BC preferred to pay nothing for something.

**E. BC Afforded Celgar Less Favorable Treatment Through BCUC Order G-48-09 Holding Celgar To A “Net-Of-Load” Access Standard While Other Pulp Mills Were Afforded Access Based On Historical Usage**

222. Celgar’s second discrimination claim is that, under Order G-48-09, the BCUC imposed a more restrictive net-of-load access standard on Celgar than it imposed on other pulp mills through Order G-38-01’s historical usage access standard.<sup>249</sup>

223. Canada’s response to this independently-stated claim is scattered throughout its Counter-Memorial, and thus is not entirely clear. In places, it joins its response with its defense to Celgar’s GBL, contending that BC Hydro applied a consistent methodology — its “current normal” methodology — to all investors.<sup>250</sup> In other places, it offers other defenses, contending, for example, that Order G-48-09 only “concerns the conditions under which Fortis BC can access

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

when Celgar proposed not to self-supply, BC Hydro ran to the BCUC to prevent such action, contending that Celgar’s self-supply decision would have an adverse impact *on BC Hydro customers*. BC Hydro wants it both ways — to avoid any obligation to compensate Celgar for the benefits its customers receive from Celgar’s application of its self-generation to self-supply its own load, while retaining the ability to penalize Celgar when it seeks to withdraw that benefit.

<sup>249</sup> Memorial, ¶¶ 588–98.

<sup>250</sup> See Counter-Memorial, ¶¶ 367–70.

BC Hydro’s Rate Schedule 3808 energy under the 1993 PPA,”<sup>251</sup> and that “BCUC Order G-48-09 has no effect on FortisBC’s ability to draw on its other resources to supply electricity to its self-generating customers . . . .”<sup>252</sup> Canada also appears to contend that the differing “historical usage” and “net-of-load standards” resulted not from BCUC action but from the independent decisions of BC Hydro and FortisBC to utilize different mechanisms to prevent arbitrage in their own service areas.<sup>253</sup>

**1. Canada’s Consistent Standard Argument Provides No Independent Defense**

224. None of these defenses withstands scrutiny. The consistent standard argument is addressed in detail in Section IV.F below, where Mercer examines the now professed standard and its supposed consistent application. In that Section, Mercer demonstrates that for Celgar and Celgar alone, BC Hydro set a GBL based on its baseline-year *load* (consistent with the net-of-load standard). For all others, it used *generation-to-load* (consistent with its professed “current normal” standard), and Celgar’s generation-to load was less than its load. It just is not true that BC Hydro applied the same standard, as it did not even use the same basic arithmetic. For Celgar, BC Hydro used a net-of-load formula, requiring Celgar to self-supply up to the level of its 2007 load, even though it had not met its 2007 load exclusively with self-generated energy.

225. That Order G-48-09 impacted the GBL terms in Celgar’s EPA and their implementation also is demonstrated by the Seller Consumed Energy arrangement discussed

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<sup>251</sup> Counter-Memorial, ¶ 435.

<sup>252</sup> Counter-Memorial, ¶ 436.

<sup>253</sup> Counter-Memorial, ¶¶ 442–44.

above. The unusual accounting arrangement exists for no one else, because no other self-generator with an EPA is subject to a net-of-load standard prohibiting it from purchasing power while selling power. That Celgar's small load growth has increased BC Hydro's costs under the EPA, because it does not take physical delivery of seller consumed energy, highlights that BC Hydro's costs for seller consumed energy would have been significantly higher if BC Hydro had established for Celgar a reasonable GBL that was lower than its 2007 load.<sup>254</sup>

226. But the key point for the Tribunal to understand here is that Canada's "consistent standard" argument does not provide Canada with any independent defense to Mercer's claim that BC discriminated against Celgar by employing a different access standard in Order G-48-09 than it had adopted for BC Hydro customers in Order G-38-01. Put another way, if the Tribunal rejects Canada's argument that there was a consistent standard, and that it was not applied to

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<sup>254</sup> Canada contends that Order G-48-09 could not possibly have impacted BC Hydro's GBL negotiations with Celgar, because BC Hydro settled on a GBL with Celgar in May-June 2008, at a time before it had filed its application to amend the 1993 PPA, and before it even knew that FortisBC was negotiating with Nelson and Celgar. Counter-Memorial, ¶ 437. Yet, Canada concedes that BC Hydro became concerned with the Nelson and Celgar arrangements as soon as they were filed on June 24, 2008 and August 26, 2008, respectively, causing it to file its application with the BCUC on September 16, 2008. *Id.*

Canada overlooks that BC Hydro's and Celgar's negotiations over the GBL-related provisions of the 2009 Celgar EPA continued throughout the summer and fall of 2008, and that the parties did not resolve their disagreement over the amount and import of the GBL until November 2008, when BC Hydro insisted on modifying the then-existing draft so as to prohibit Celgar from selling below-GBL energy to any third-party. *See supra* ¶¶ 38-39; Merwin Second Witness Statement, ¶¶ 7, *et seq.* It is this critical action, which tied Celgar to using its below-load energy to self-supply, and which precluded Celgar from making any energy sales other than on a net-of-load basis, that Celgar contends was made necessary by BC Hydro's application for a net-of-load standard. And, Canada does not dispute that if BC Hydro had refrained from inserting this restriction, the EPA would be inconsistent with the requirements of the Order BC Hydro had requested, and eventually obtained, from the Commission.

Celgar in any discriminatory fashion, then Canada's argument that Order G-48-09 was not discriminatory must also fail.

**2. The Restrictions BCUC Order G-48-09 Added To The 1993 PPA Directly and Foreseeably Restricted Celgar As Well As FortisBC**

227. Canada also attempts to avoid liability for BCUC Order G-48-09's highly restrictive and discriminatory "net-of-load" access standard by contending, erroneously, that the measure applied only to FortisBC and not to Celgar. The BCUC ruling at issue, later BCUC rulings, Canada's witnesses, Canada's own arguments, and BC Hydro's conduct at the time, all indicate that everyone understood that the restriction the BCUC imposed on FortisBC would directly and foreseeably cause FortisBC to refuse to supply Celgar with *any* embedded cost electricity, *including from FortisBC's existing resource stack*, while Celgar was selling its self-generated electricity. This is because FortisBC has no way to distinguish electricity it obtains from BC Hydro under its PPA with electricity it generates itself, and thus could never show that it was not relying upon PPA power to supply Celgar. The measure thus effectively imposed a net-of-load access standard *on Celgar*. Indeed, BC Hydro tried out this "it-only-restricts-Fortis-and-not-Celgar" argument before the BCUC, and the BCUC properly rejected it, holding explicitly that Order G-48-09 *did* hold Celgar to a net-of-load standard.<sup>255</sup>

228. The proof is in the pudding. Before BCUC Order G-48-09, FortisBC had been willing to supply Celgar with traditional embedded cost electricity while Celgar was selling its

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<sup>255</sup> See C-168, BCUC Order Number G-18-14 and Accompanying Decision (17 February 2014), at 21.

self-generated electricity, and FortisBC and Celgar had signed the 2008 PSA agreeing to precisely that. After Order G-48-09, through this date, FortisBC has been unable to do so.<sup>256</sup>

229. While Canada argues that the Order affected only BC Hydro power sold to FortisBC under the 1993 PPA, “while not changing FortisBC’s ability to draw on its other resources,”<sup>257</sup> like BC Hydro before it, Canada offers no explanation of how this would be possible. FortisBC’s load is dynamic, changing constantly. Canada contends, without citation to any supporting testimony, that “BCUC Order G-48-09 has no effect on FortisBC’s ability to draw on its other resources to supply electricity to its-self-generating customers if FortisBC was to agree to facilitate notional sales of their electricity.”<sup>258</sup> It argues that “{c}ontrary to the Claimant’s interpretation, BCUC Order G-48-09 did not ‘impose’ upon them a ‘net-of-load’ standard, but concerned the conditions under which FortisBC can purchase electricity from BC Hydro.”<sup>259</sup> This is a distinction without any practical difference.

230. *First*, the BCUC, in Order G-48-09, expressly explained the intended impact of its Order on Celgar and other self-generators in FortisBC’s service territory. It stated explicitly,

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<sup>256</sup> Since FortisBC withdrew its 2008 PSA with Celgar, it has been willing to supply Celgar with below-load replacement power not at traditional embedded cost rates, but at a rate that passes through to Celgar (and to no other customer) in the form of an “NECP Rate Rider” the full cost of electricity FortisBC must purchase from third parties under the “notional matching mechanism” compelled by BC Hydro’s amendment to the 1993 PPA. Unlike all other FortisBC customers, Celgar would receive none of the benefit of FortisBC’s existing, low cost generation assets. *See* Memorial, ¶¶ 359, 363; C-10, FortisBC Submission Regarding Non-PPA Power Entitlement (13 April 2012), at 10. Accordingly, there is no basis for Dr. Rosenzweig’s suggestion that the net-of-load standard does not prevent Celgar from accessing embedded cost electricity while selling electricity. Rosenzweig Expert Report, ¶ 83 n.123.

<sup>257</sup> Counter-Memorial, ¶ 439.

<sup>258</sup> Counter-Memorial, ¶ 435. *See also* Rosenzweig Expert Report, ¶ 82.

<sup>259</sup> Counter-Memorial, ¶ 354. *See also* Counter-Memorial, ¶ 435.

What will not be permitted is the supply of embedded cost power to service the domestic load, at any time when the self-generator is selling power into the market.<sup>260</sup>

The Commission's statement did not distinguish between BC Hydro power and FortisBC embedded cost power. It made clear that Celgar would have access to no embedded cost power to service its mill's "domestic load" while Celgar was selling its self-generated electricity.

Indeed, the Commission based its decision on an express finding "that a rate allowing for the sale of power by self-generators not in excess of their historical loads, is unjust and unreasonable and therefore contrary to the public interest . . . . The Panel is of the view that the general principles enunciated in Order G-38-01 ought to be extended to customers of FortisBC."<sup>261</sup> The Commission thus made clear by its findings and reasoning that it intended to impose a net-of-load restriction on *the self-generator's* access to embedded cost power generally, and not simply with respect to FortisBC's purchases of PPA power from BC Hydro, as Canada contends.

231. *Second*, Canada's own arguments support Mercer's contention that the Order subjected Celgar to a net-of-load access standard. Canada itself acknowledges that "the BCUC had *effectively prohibited the Claimant* from engaging in arbitrage by amending the 1993 PPA."<sup>262</sup> Canada's own depiction explicitly acknowledges the "prohibit{ion}" — Canada's word — *on Celgar*. Mercer fully agrees that Order G-48-09 "effectively" restricted Celgar from obtaining embedded cost utility electricity while selling self-generated electricity — Canada's

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<sup>260</sup> C-8, G-48-09 Decision, at 29.

<sup>261</sup> C-8, G-48-09 Decision, at 22.

<sup>262</sup> Counter-Memorial, ¶ 261 (emphasis added).

apparent definition of arbitrage. This constitutes the net-of-load restriction *on Celgar* of which Mercer complains.

232. *Third*, Canada provides no rebuttal to Mr. Switlishoff's testimony that BC Hydro's request to amend the PPA would have been meaningless unless it also was construed to restrict FortisBC's sales of energy from its own-resource stack to Celgar, and thus fully restrict Celgar to net-of-load sales. As Mr. Switlishoff explained:

Although BC Hydro had purported to seek only a restriction on FortisBC's resale of PPA power, such a restriction was intended to prevent an increase in power purchased from BC Hydro in response to a self-generator taking its generation to market rather than using it to serve its own load. The restriction BC Hydro had requested would have been ineffective and, indeed, meaningless unless the same restriction also was applied to FortisBC's sales of its own generated power. Whether FortisBC nominally supplied Celgar's load from PPA power or from its own resource stack, the overall effect on BC Hydro's system would have been the same. FortisBC would need additional power to supply Celgar's load, and diverting power to Celgar from its own resources would still have left a gap to fill for the customers previously served by those resources.<sup>263</sup>

233. *Fourth*, that is how FortisBC construed Order G-48-09. As Canada's own witness Mr. Swanson explains, Order G-48-09 "in our view, effectively meant that FortisBC was restricted from purchasing rate Schedule 3808 power when customers it supplied with PPA power were simultaneously selling their existing self-generation."<sup>264</sup> Mr. Swanson also explains that PPA power was a necessary resource for FortisBC, that the utility used to meet some 28 percent of FortisBC's overall electricity requirements.<sup>265</sup> FortisBC thus well-understood that Order G-48-09 meant that it could not supply Celgar with *any* embedded cost power from FortisBC's existing

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<sup>263</sup> Switlishoff Expert Statement, ¶ 66.

<sup>264</sup> Swanson Witness Statement, ¶ 88.

<sup>265</sup> Swanson Witness Statement, ¶ 21.

resource stack while Celgar was selling self-generation, and that the Order thereby eliminated Celgar's access to embedded cost utility power while Celgar was selling its self-generated power. Otherwise, FortisBC would have lost access to 28 percent of its electricity supply. And, since that time, FortisBC has refused to supply Celgar with *any* embedded cost power from its existing resource stack while Celgar is selling its self-generated electricity, holding Celgar to a net-of-load access standard.<sup>266</sup>

234. Lest any doubt remain, in a 6 October 2014 letter to Celgar, in which FortisBC responded to a complaint by Celgar regarding Celgar's lack of access to FortisBC Demand Side Management incentives, FortisBC explains that it would be inappropriate to provide any payment to Celgar to reduce its load, because Celgar is a "net-of load" customer. Making it crystal clear that FortisBC regards Order G-48-09 and subsequent Commission orders as imposing a net-of load standard *on Celgar*, FortisBC stated as follows:

Celgar is a customer served under the Company's Rate Schedule 31 on a net-of-load basis. That is, Celgar must first use its generation resources to serve its own load prior to making any power in excess of its load available for export to a third-party.<sup>267</sup>

FortisBC then went on to explain that, because of "the requirement to use self-generation where possible to serve Celgar's plant load," FortisBC cannot forecast that any conservation measures implemented by Celgar would reduce any load FortisBC served.<sup>268</sup>

235. *Fifth*, BC Hydro too understood that a direct consequence of Order G-48-09 would be that FortisBC would have to cease supplying Celgar while Celgar was selling self-generated

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<sup>266</sup> See Merwin Witness Statement, ¶ 121. See also *supra* n.256.

<sup>267</sup> C-342, FortisBC, Letter to Zellstoff Celgar Limited Partnership, Re: FBC Response to Celgar Complaint Alleging Rate Schedule 90 DSM Program Suspension (6 October 2014), at 2.

<sup>268</sup> *Id.*

power, as demonstrated by its own actions following Order G-48-09. Indeed, this was the reason for the < [REDACTED]

[REDACTED] ><sup>269</sup> < [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] > Canada agrees, noting that < [REDACTED]

[REDACTED]

[REDACTED] ><sup>270</sup>

236. *Sixth*, and lastly, Mercer observes that BC Hydro tried its “it-only-restricts-FortisBC-and-not-Celgar” argument before the BCUC, and the BCUC rejected BC Hydro’s overly narrow interpretation of Order G-48-09. Specifically, in November 2012, BC Hydro sought BCUC approval to amend its Tariff Supplement 74 (“TS 74”), which provided rules for the determination of customer baseline loads used in the application of stepped rates, so as to address customers with self-generation. Celgar sought to intervene in the proceeding, contending that it was affected by BC Hydro’s non-transparent GBL methodology, and that the Commission should require BC Hydro to file that methodology as part of TS 74 and have it approved by the Commission as part of a rate.<sup>271</sup>

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<sup>269</sup> See also Counter-Memorial, ¶ 259.

<sup>270</sup> Counter-Memorial, ¶ 257.

<sup>271</sup> C-168, BCUC Order Number G-19-14 and Accompanying Decision, Application to Amend the Tariff Supplement No. 74 Customer Baseline Load Determination Guidelines for RS 1823 Customers with Self-generation Facilities (17 February 2014), at 4–5, 22–23.

237. BC Hydro resisted Celgar’s application to intervene, contending that customers of FortisBC were unaffected by BC Hydro’s GBL policy, as FortisBC was free to develop its own mechanisms for determining the load of its self-generating customers it could serve from its own resource stack.<sup>272</sup>

238. The Commission rejected BC Hydro’s position, and permitted Celgar to intervene. Contradicting Canada’s argument here, the BCUC stated expressly that

{t}he practical effect of {Order G-48-09} was to require self-generating customers of FortisBC, of which Celgar is one, to service 100 percent of their load from self-generation, prior to engaging in export sales, to the extent their load would otherwise be served indirectly by BC Hydro, and the 1993 PPA (“net of load”). (Commission Order G-48-09, RS 3808 PPA Decision, pp. 28-29.) This “net of load” methodology is different than the GBL methodology approved for BC Hydro’s customers by Order G-38-01.<sup>273</sup>

The Commission further observed that “Celgar is currently only able to sell its self-generation on a net-of-load basis.”<sup>274</sup>

239. Canada may find it convenient for purposes of avoiding liability to argue that Order G-48-09 did not impose a net-of-load standard on Celgar, but the BCUC has described the “practical effect” of its own Order in a manner that flatly contradicts Canada’s argument. And, the BCUC’s statement that this net-of-load access methodology it imposed on Celgar is different than the methodology it approved for BC Hydro self-generators is an admission of discrimination,

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<sup>272</sup> C-302, BC Hydro Final Submission, Application to Amend Tariff Supplement No. 74 (26 June 2013) (“{I}n BC Hydro’s view this Application has no direct or indirect consequences for Celgar.”); *see also* C-168, BCUC Order Number G-18-14 and Accompanying Decision (17 February 2014), at 5.

<sup>273</sup> C-168, BCUC Order Number G-18-14 and Accompanying Decision (17 February 2014), at 21.

<sup>274</sup> C-168, BCUC Order Number G-18-14 and Accompanying Decision (17 February 2014), at 4.

from the very “independent regulatory commission” that Canada suggests somehow is above discrimination.<sup>275</sup>

240. Finally, it is necessary to bring the Tribunal up to date on regulatory developments pertaining to Celgar, in the TS 74 proceeding. This year, the BCUC went on to rule that “the GBL mechanism . . . is a rate within the meaning of the UCA.”<sup>276</sup> “Consequently, BC Hydro is directed to file an application with the Commission as soon as is practicable, but no later than 6 months after the date of the Order issued concurrently with this Decision for approval of Contracted GBL guidelines to be incorporated into TS 74.”<sup>277</sup>

241. Upon BC Hydro’s subsequent request for reconsideration, the Commission maintained the requirement that BC Hydro file its GBL Guidelines for Commission approval, because a GBL functions as a limitation on BC Hydro’s obligation to serve an eligible customer and thus is part of a rate, but extended the filing deadline to November 1, 2014.<sup>278</sup>

242. Thus, some 13 years after it first authorized and ordered BC Hydro to establish what have become known as GBLs, in Order G-38-01, the Commission finally took action to require the filing and application of uniform GBL-setting guidelines, to subject BC Hydro’s methodology to oversight and scrutiny, and otherwise to reassert its authority over GBLs as rates

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<sup>275</sup> Counter-Memorial, ¶ 354 (“It is a serious matter to allege that an independent regulatory commission has engaged in nationality-based discrimination; such allegations call into question the integrity of the body and its members.”).

<sup>276</sup> C-168, BCUC Order Number G-18-14 and Accompanying Decision (17 February 2014), at 26.

<sup>277</sup> C-168, BCUC Order Number G-18-14 and Accompanying Decision (17 February 2014), at 27.

<sup>278</sup> C-284, BCUC Order No. G-106-14 and Accompanying Reasons for Decision (25 July 2014), app. A, at 6, 8.

— all actions BC Hydro steadfastly has resisted. Unfortunately, the Commission’s belated action in asserting its authority over GBLs, requiring transparency, and demanding defined standards came too late for Celgar.<sup>279</sup>

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<sup>279</sup> BC Hydro complied with the Commission’s Order, in part, on 31 October 2014. On that date, BC Hydro advised the Commission that its consultations with affected parties were continuing, and requested an extension to 15 December 2014 to file its final guidelines. BC Hydro nonetheless included preliminary draft guidelines “to facilitate further consultation,” including both guidelines applicable to BC Hydro customers and separate guidelines applicable to FortisBC self-generation customers under Section 2.5 of the 2013 BC Hydro-FortisBC PPA. C-288, BC Hydro Contracted GBL Guidelines and Rate Schedule 3808 New PPA Section 2.5 Guidelines (31 October 2014) (filing with the BCUC).

Though 13 years have passed since BC Hydro began establishing and applying GBLs under BCUC Order G-38-01, BC Hydro still has not prepared or filed final guidelines governing how it sets GBLs, and the BCUC has yet to approve any such guidelines. And the draft guidelines BC Hydro did file, while adopting the generation-to-load under “current normal operating conditions” standard Canada offers in the instant proceeding, and purporting not to have changed BC Hydro practice, offer few new details and one apparent change — the filed guidelines nowhere provide for special consideration for prior EPAs and other electricity sales arrangements that Canada describes in its Counter-Memorial.

On 6 November 2014, the BCUC responded by writing to BC Hydro, stating it was “disappointed “that BC Hydro did not ensure that the necessary consultation had taken place in order to file the Guidelines as directed by Orders G-19-14, G-60-14 and G-106.14. Further, the Commission admonished that BC Hydro should have filed a request for an extension in advance of the filing deadline to give the Commission sufficient time to respond to BC Hydro’s request. C-299, Letter from BCUC to BC Hydro re Contracted Generator baseline Guidelines and Rate Schedule 3808 New Power Purchase Agreement Section 2.5 Guidelines (6 November 2014), at 2. BC Hydro’s unapproved delay set the BCUC back to square one, with the Commission in its letter next requesting comments from the parties on how to proceed. *Id.* On 15 December 2014, BC Hydro filed its proposed final guidelines. Mercer, however, has not yet had a full opportunity to review BC Hydro’s proposals.

**3. The BCUC Imposed Different Standards; FortisBC And BC Hydro Did Not Elect Different Standards**

243. Finally, with respect to Canada's argument that the different access standards reflect different elections by BC Hydro and FortisBC to address the issue of self-generator arbitrage that simply were approved by the BCUC, we note first that Canada here contradicts its own jurisdictional argument that BC Hydro is not exercising any delegated authority because the BCUC sets all rules and makes all final decisions. Canada inconsistently argues both that the BCUC set the self-generator rules and that the utilities set the rules.<sup>280</sup>

244. Be that as it may, the evidence demonstrates that the standards in place governing self-generator access to embedded cost power while selling electricity, in both BC Hydro's service territory and in FortisBC's service territory, at all relevant times were imposed by the BCUC. As to FortisBC, it is absurd to suggest that FortisBC proposed the net-of-load standard, and the BCUC accepted FortisBC's proposal. It was *BC Hydro* that requested application of a net-of-load access standard to FortisBC self-generators, with the support of the BC Ministry of Energy.<sup>281</sup> (Even while BC Hydro rejects the application of the net-of-load standard to everyone else.)

245. FortisBC never proposed the net-of-load standard at the time, or, as of the date of this filing, any distinct self-generator standard to the BCUC. Quite to the contrary, in the G-48-09 proceeding, initiated by BC Hydro, in which the BCUC imposed a different self-generator access

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<sup>280</sup> Canada's confusion on this point is perhaps understandable, as it is Mercer's position that BC Hydro followed no well-defined rules.

<sup>281</sup> C-6, BC Ministry of Energy, Mines and Petroleum Resources, Final Argument Submission, BCUC Proceeding to Amend Section 2.1 of Rate Schedule 3808 (23 January 2009), at 1, ¶ 1 ("The Ministry supports BC Hydro's application to amend section 2.1."), and 4, ¶ 15.

standard than the historical usage standard it imposed in BC Hydro's service territory by Order G-38-01, FortisBC *opposed* BC Hydro's proposal *and argued for a uniform standard applicable province-wide*.<sup>282</sup> The separate standards arose not due to the actions of private parties but at the request of a BC state enterprise, with the support of the BC Ministry of Energy, and through an Order issued by a BC regulatory commission. Under NAFTA, that makes Canada responsible.

246. This explains why, in making its argument, Canada ignores Order G-48-09 and the rules in place for FortisBC self-generators when Celgar was precluded from selling its below-load self-generated electricity and accessing replacement electricity at embedded cost rates. Instead, Canada focuses on a much more recent, May 2014 BCUC Order, which requires FortisBC to propose its own self-generator rules by the end of 2014.<sup>283</sup> But as discussed above,

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<sup>282</sup> C-273, FortisBC, Final Argument Submission, BCUC Proceeding to Amend Section 2.1 of Rate Schedule 3808 (23 January 2009), at 23, ¶¶ 80–81 (contending that “{t}he over-arching issue {concerning the treatment of self-generation} is properly a matter for government policy-makers to resolve on the basis of policy developed on a province-wide basis.”).

<sup>283</sup> Counter-Memorial, ¶ 443. Specifically, by Order dated 6 May 2014, the BCUC required FortisBC to develop and file by December 31, 2014, for Commission approval, a Self-Generation Policy Application, establishing “high-level” principles governing self-generators for its service territory, separate and distinct from the BC Hydro guidelines which the Commission had ordered to be filed in the TS 74 proceeding. R-221, BCUC Order No. G-60-14 and Accompanying Decision (6 May 2014), *In the Matter of British Columbia Hydro and Power Authority Application and Approval of Rates Between BC Hydro and FortisBC Inc. with Regards to Rate Schedule 3808*, Decision, at 104.

This was the proceeding in which the BCUC approved the 2013 PPA between BC Hydro and FortisBC. As Mercer had noted in its Memorial, BC Hydro had proposed in Section 2.5 of the New PPA to replace the net-of-load restriction on FortisBC self-generators it had had the BCUC insert the 1993 PPA with historical-usage-based GBLs, to be set by FortisBC and BC Hydro (without involvement of the self-generator), applying BC Hydro's June 2012 GBL Guidelines. Memorial, ¶ 376. In December 2013, the BCUC expressed its concerns regarding that provision, including concerns that “the self-generator customer is virtually excluded from having any meaningful input,” and that the proposed GBL Guidelines “are fairly general, subject to considerable interpretation, not necessarily transparent and have not been approved by the Commission.” C-229, Letter from Erica Hamilton, BCUC Secretary, to Janet Fraser, Chief

[FOOTNOTE CONTINUED ON NEXT PAGE]

the Commission's actions in 2014 have yet to come to fruition, and, in any event, come far too late for Celgar, which is restricted by its 2009 EPA from selling below-2007 load electricity for a

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

Regulatory Officer, BC Hydro (13 December 2013), at 1.

On April 9, 2014, after the period for supplemental submissions concerning Section 2.5 had expired, BC Hydro submitted a letter to the BCUC proposing to substitute a new and different Section 2.5 from that on which the parties had submitted evidence and argument. (BC Hydro apparently was concerned that the BCUC would reject Section 2.5 and with it the entire 2013 PPA, so it took the procedurally unusual step of seeking to amend the 2013 PPA after the evidentiary record had closed, and after the comment period had closed.) BC Hydro proposed to revise Section 2.5(a)(ii) of the 2013 PPA to provide that FortisBC self-generator customers would have their GBLs set, apparently by BC Hydro and FortisBC, based on Commission-approved guidelines and “in consultation” with the customer. C-286, Letter from Janet Fraser, Chief Regulatory Officer, BC Hydro, to Erica Hamilton, Commission Secretary, BCUC (9 April 2014), at Attachment.

On May 6, 2014, the Commission issued its Decision, approving the 2013 PPA with Section 2.5 as amended by BC Hydro. R-221, BCUC Order No. G-60-14 and Accompanying Decision (6 May 2014), *In the Matter of British Columbia Hydro and Power Authority Application and Approval of Rates Between BC Hydro and FortisBC Inc with Regards to Rate Schedule 3808*. In its Decision, the Commission stated expressly that its “preferred solution would be to immediately remove the restrictions from section 2.5 as it finds that due to the characteristics of the New PPA BC Hydro’s ratepayers no longer require the protection, especially in the short-term.” Decision, at iii. Nonetheless, despite this and other express findings that the restrictions were not needed under current circumstances and in the foreseeable future (Decision, at 88), the Panel accepted BC Hydro’s amended Section 2.5, subject to BC Hydro filing New PPA Section 2.5 {GBL} Guidelines, and the Commission approving these GBL guidelines. R-221, Order G-60-14, ¶ 2; Decision, at iv, ¶¶ 71–72, 97–99, 108–09.

In the interim period, which continues through the date of this filing, the Commission left in place the more restrictive net-of load restrictions it had imposed in 2009, under Order G-48-09, upon Celgar and other self-generators in FortisBC’s service territory — restrictions that were never proposed in the application before it, and thus had not been a subject of the proceeding. R-221, Order G-60-14, ¶ 3; Decision, at 109.

As noted, the Commission also directed FortisBC to develop and submit by December 31, 2014 for Commission approval a separate and distinct Self-Generation Policy Application. Decision, at 104. The Commission did not explain how this FortisBC policy would operate in conjunction with BC Hydro’s GBL policy, which also would govern FortisBC self-generators access to electricity, under section 2.5 of the 2013 PPA.

Celgar has appealed this decision to the BC courts.

period of 10 years. Thus, whatever changes, if any, come about in the rules governing self-generator access to embedded cost power in the FortisBC service territory — and nothing to disturb the net-of-load standard imposed through Order G-48-09 has yet to be filed as of this date, reviewed by the BCUC, or given effect — Celgar will not be able to utilize any such change to sell below-load electricity until at least September 27, 2020.<sup>284</sup> And what that change may be at this point in time is speculative, although BC Hydro’s preliminary proposal, which it filed on 31 October 2014, would not change anything for Celgar.<sup>285</sup>

247. Even as to BC Hydro, there is no evidence that BC Hydro proposed the historical usage access standard, or that the BCUC’s actions in Order G-38-01 reflect the Commission’s acceptance of BC Hydro’s proposal. To the contrary, BC Hydro *resisted* Howe Sound’s attempts to market energy it already had committed to BC Hydro to use for self-supply under the terms of the parties’ 1989 Generation Agreement. Canada simply fails to mention at all BC Hydro’s 28 February 2001 submission to the Commission in that proceeding, in which BC Hydro

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<sup>284</sup> This is the expiration date of the 2009 EPA — 10 years from the Commercial Operation Date of the EPA.

<sup>285</sup> As noted above, BC filed only preliminary guidelines on 31 October 2014, requesting more time to complete its consultations with stakeholders. In its preliminary guidelines to implement Section 2.5 of the 2013 PPA, BC Hydro notes that FortisBC self-generators can only sell below-load electricity if FortisBC offers them a service to enable the simultaneous purchase and sale of electricity. If that occurs, then BC Hydro proposes to impose its “current normal operating conditions GBL standard, on an hourly basis. C-288, BC Hydro Contracted GBL Guidelines and Rate Schedule 3808 New PPA Section 2.5 Guidelines (31 October 2014)(filing with the BCUC), Attachment 3, page 1 of 3, and page 2 of 3 § B. The draft guidelines also provide that if the customer has a firm long-term sales agreement (like Celgar’s 2009 EPA), the applicable GBL “will not be updated during the term of such sales agreement.” *Id.* at page 3 of 3 § B.2.1. Thus, BC Hydro has proposed nothing that would change the restrictions on Celgar.

characterized Howe Sound’s proposal to sell idled generation as “send{ing} the wrong signal to self-generating customers,” and raising “substantial fairness issues.”<sup>286</sup>

248. Moreover, even if the two utilities had proposed different standards, and the Commission had accepted different standards, Canada still would be required to show that the BCUC could not have applied a consistent, non-discriminatory standard province-wide and still accomplished its professed objectives. Canada has not even attempted such a showing. Like BC Hydro, it does not explain why it was necessary to employ different mechanisms for avoiding arbitrage for BC Hydro and for FortisBC, or why the BCUC could not have developed common GBL guidelines when the issue first arose in 2001, and ordered both FortisBC and BC Hydro to apply them. At the very least, the BCUC could have issued the same direction to FortisBC that it issued to BC Hydro in Order G-38-01. The BCUC simply made no effort to apply a common standard province-wide, notwithstanding FortisBC’s urging in the G-48-09 proceeding that the Government do so.<sup>287</sup>

249. Accordingly, the Tribunal should determine that Canada has violated its obligations under Articles 1102 and 1103 by affording multiple Canadian and third country-owned pulp mills access to embedded cost utility power while selling power under a standard that

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<sup>286</sup> C-157, Letter from Ray Aldeguer, Senior Vice-President Legal Regulatory Affairs and General Counsel, BC Hydro, to Robert J. Pellatt, Commission Secretary, BCUC (28 February 2001). *See also* Memorial, ¶¶ 208–11.

<sup>287</sup> *See* Fox-Penner Expert Report, ¶¶ 95-96 (“In Order G-48-09, the BCUC, itself, admitted that . . . . the issue of power sales of customers with self-generator could and should have been dealt with more broadly at the province-wide level, the BCUC relied solely on the limited record and number of parties in the G-48-09 proceeding to depart from its past decisions. This is a remarkable admission by a regulator, because any regulator should have all the necessary authority to build precisely the record it needs to decide issues of policy and implementation on a non-discriminatory basis. Indeed, this is their traditional duty.”).

is less restrictive than the net-of load standard that the BCUC imposed on Celgar in Order G-48-09, which restriction continues through this date. The application of a different, more restrictive regulatory standard, *ipso facto* demonstrates less favorable treatment.

**F. BC Afforded Celgar Less Favorable Treatment In Setting Its GBL**

**1. The Inconsistencies In Canada’s Tale Of The “Consistently” Applied *Post Hoc* “Current Normal Operating Conditions” Standard**

**a. There Has Been No Consistently Articulated GBL Standard**

250. Although Canada contends that BC has consistently implemented a uniform “current normal operating conditions” GBL standard since 2001, remarkably, it can point to no document in which the standard is articulated, until BC Hydro’s June 2012 Information Report to the BCUC on its GBL policy. Even then, that document does not use the term “current normal operating conditions” that Canada contends always has been the standard, but it does express a similar concept.<sup>288</sup> Thus, the “uniform” policy that BC ostensibly has “consistently applied” beginning in 2001 is not set out in any internal BC Hydro document, such as a written policy or set of procedures, and it is not set out in any public document, until June 2012 — years after GBLs were set in 2001–2010 for Howe Sound, Tolko, Celgar, and Tembec.

251. Perhaps to fill this hole in Canada’s argument, Mr. Dyck in his testimony contends that “{t}he BCUC staff report appended to Order G-38-01 describes ‘incremental’ self-generation

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<sup>288</sup> The Information Report indicates that “The annual GBL represents a reasonable estimate of the annual self-generated energy normally used by the customer for self-supply under current conditions and in the absence of a contract.” C-26, BC Hydro, Information Report (June 2012), at 10.

as the electricity generated by the customer above what it generates under current normal operating conditions.”<sup>289</sup> But Canada provides no citation to any specific page in that Staff Report, and Mr. Dyck’s assertion is not supported by the document he cites. Neither the term “current normal operating conditions” nor anything like it is used anywhere in the Order or Staff Report. Indeed, the Staff Report largely comprises a summary of the positions advanced by the various parties to the proceeding rather than statements of BCUC policy.<sup>290</sup>

252. Canada not only invents statements neither the BCUC nor its Staff made, but also it downplays the statements BC Hydro did make. In its first power call for customer-based generation following Order G-38-01, in 2002, as BC Hydro’s Mr. Scouras explains, BC Hydro indicated it would be interested in purchasing only “new or incremental” power.<sup>291</sup> For suppliers with existing generation capability, BC Hydro indicated it would need to compute a GBL reflecting the “historic generation capability,” which generation BC Hydro would not purchase.

253. But Mr. Scouras fails to mention that BC Hydro provided a form for the applicant to submit the data BC Hydro then found necessary for computing that GBL. BC Hydro required “historical operating data for each electric generator in MWh as a daily average listed by month for a minimum of 3 years that represent *long-term normal operating conditions* . . . .”<sup>292</sup> Thus, in

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<sup>289</sup> Lester Dyck Testimony, ¶ 37.

<sup>290</sup> R-19, Commission Staff Report, app. A to BCUC Order G-38-01.

<sup>291</sup> Scouras Witness Statement, ¶ 28.

<sup>292</sup> C-134, Compendium of GBL Documents, 2002 CBG Generator Baseline (GBL) Application, at 020190 (emphasis added). *See also* Counter-Memorial, ¶ 135. The document, moreover, makes no mention of existing contracts or other facts BC Hydro would consider, nor does it state that BC Hydro would evaluate generation capability prospectively as of the time the application was filed. To the contrary, BC Hydro indicated it would rely upon historical data “for a minimum of 3 years.”

the early years of the GBL, BC Hydro represented its standard much differently than it does to the Tribunal now. BC Hydro stated that it considered “long-term” as opposed to merely “current” operating conditions. These are fundamentally different concepts. BC Hydro has not even consistently described its supposedly consistent standard.

254. Even in the Bioenergy Call for Power Phase I process, in which Celgar was a winning bidder, and through which it negotiated its 2009 EPA, BC Hydro did not describe the GBL standard the way Canada now characterizes it. Then, as in 2002, BC Hydro indicated that it was interested in purchasing only new or incremental power, and not existing generation. Consistent with this objective, BC Hydro’s initial Request for Proposals described the GBL very generally as necessary “to confirm eligibility.”<sup>293</sup> There was no mention of any “current normal operating conditions” standard,<sup>294</sup> or that the GBL would constitute a self-supply obligation precluding below-GBL sales to any third-party.

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<sup>293</sup> R-25, BC Hydro Bioenergy Call for Power — Phase I, Request for Proposals (6 February 2008), ¶ 13 (“Customers intending to submit a Proposal involving incremental self-generation servicing their industrial load must have their existing generation base line (“GBL”) determined by BC Hydro to confirm eligibility. Customers must provide data required by BC Hydro to determine the Customer’s GBL for the applicable industrial facility or facilities.”). *See also* ¶ 13 (describing “Eligible Projects” as including “New self-generation, or incremental self-generation, in any event excess of the Customer’s GBL at a Customer’s facility to serve the Customer’s industrial load at the facility (i.e. load displacement) and/or effect net energy export to the System (i.e. Customer Projects), but excluding generation projects, where the current output is under contract through a load displacement or demand side management agreement with BC Hdyro {sic}.”). *See also* Scouras Witness Statement, ¶ 41 (“Where customers intended to submit a proposal that involved incremental self-generation, they were required to have a GBL determined by BC Hydro *to confirm their eligibility.*”) (emphasis added).

<sup>294</sup> This is not only Mercer’s view. On 10 March 2009, while Tembec was negotiating a new EPA, Tembec’s Project Engineer and Energy Coordinator, responsible for negotiating a GBL with BC Hydro, wrote to BC Hydro observing that << [REDACTED]

>> Pöyry-54, Letter

[FOOTNOTE CONTINUED ON NEXT PAGE]

255. The information sessions held by BC Hydro in February/March 2008, described by Mr. Scouras in paragraph 42 of his testimony, provided no more clarity on the GBL standard. The PowerPoint presentation slide deck used by BC Hydro in February 2008 contains a single slide on GBLs. That one slide states that “{t}he purpose of the GBL is to define incremental generator output that can be considered for a prospective energy sale.”<sup>295</sup> Again, BC Hydro advertised the GBL as an eligibility criterion, defining a level above which BC Hydro would purchase self-generated energy. BC Hydro did not describe the GBL as establishing a self-supply obligation and delimiting electricity that could not be sold to a third-party.<sup>296</sup>

256. The slide went on to note that “{t}he GBL start point is the same as the CBL establishment year,” and that “{t}he GBL may then need to be adjusted for unique customer circumstances (existing LD contracts, EPAs, market sales, 1880/ad hoc purchases etc.)” Yet

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

from Christian Lague, Tembec, to Matt Steele, Key Account Manager, BC Hydro (10 March 2009), at 3. *See also* Merwin Second Witness Statement, ¶ 15 (“I understand that Canada now contends that, since 2001, the applicable standard for BC Hydro’s GBL determinations has been that of “current normal operating conditions.” I do not understand how Canada could make such an assertion, in light of (1) the fact that BC Hydro never articulated (either in writing or orally) such a standard to Celgar at any point during entire course of the BioEnergy Phase I process and EPA negotiations, and (2) the information that BC Hydro did provide concerning its GBL determination standards gave the impression that BC Hydro would consider a number of years — what seemed like an average of three years of operational data — not simply one year of data or only “current” data.”).

<sup>295</sup> R-116, BC Hydro’s Bioenergy Call, Kamloops, BC February 20, 2008, slide 22.

<sup>296</sup> *See* Merwin Second Witness Statement, ¶ 7 (“In this arbitration proceeding, Canada appears to define GBL in a variety of different manners. But in 2007 and 2008, when Celgar was registering and submitting a proposal for BioEnergy Power Call Phase I, (i.e., during the BioEnergy Power Call Phase I Request for Expressions of Interest), BC Hydro had provided no definition of a GBL or how it would be determined. All they had told us was that a GBL expressed a demarcation point above which BC Hydro would consider a generator’s electricity eligible for sale. Nothing more.”).

again, the phrase “current normal operating conditions” or an analog is not present. To the contrary, the reference to the CBL establishment year, as Mr. Scouras confirms, is a reference to 2005.<sup>297</sup> BC Hydro thus told Celgar and other participants in Bioenergy Phase I that the base year for setting GBLs would be 2005.

257. Mr. Scouras next testifies that the slide states “that the initial estimated GBL was expected to reflect a 365-day annual period of *normal operations*.”<sup>298</sup> But this is not what the slide to which he refers states. It states only that “{t}he initial customers’ ‘estimated GBLs’ should reflect a 365 day annual period.”<sup>299</sup> The addition of the phrase “normal operations” by Mr. Scouras is pure spin.

258. BC Hydro’s March 26, 2008 second public presentation is no more enlightening, and no more revealing of any “current normal operating conditions” GBL standard. Once again, BC Hydro makes no reference to “current normal operating conditions,” or, indeed, to any standard governing the determination of GBLs.<sup>300</sup>

259. On February 26, 2008, without yet identifying any GBL standard, BC Hydro issued RFP Addendum I, which included a Preliminary GBL data sheet for companies to complete. It asked for information on generation levels, but without specifying any time period, and on contracts that provide for the sale of energy. Moreover, the form notes it is applicable to

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<sup>297</sup> Scouras Witness Statement, ¶ 43.

<sup>298</sup> Scouras Witness Statement, ¶ 42 (emphasis added).

<sup>299</sup> R-116, BC Hydro’s Bioenergy Call, Kamloops, BC February 20, 2008, slide 22. There simply was no reference to “normal” operations or operating conditions at all, much less “current normal” or even “historical normal.”

<sup>300</sup> R-117, slides 63–64.

proponents served by BC Hydro under Rate Schedule 1823, which would not have included Celgar.<sup>301</sup>

260. As Mr. Scouras then explains, on May 7, 2008, BC Hydro issued a further addendum, clarifying that incremental generation could include generation that had previously been sold to third-parties, provided such third-party contracts could be terminated.<sup>302</sup>

261. “Current normal” is entirely a *post hoc* rationalization. Going into the negotiations with Celgar, BC Hydro (i) had not identified “current normal operating conditions” as the GBL standard, (ii) had advertised the GBL only in terms of defining power that would be eligible for sale to BC Hydro, (iii) had indicated that it would use 2005 as the baseline year, and (iv) had advised Celgar that its contracted power sales — which then would have included Celgar’s sales to FortisBC and NorthPoint<sup>303</sup> — were eligible for sale and should not have been included in the GBL. And the 349 GWh/year GBL BC Hydro established for Celgar is inconsistent with all of the above.

**b. The *Post Hoc* “Current Normal” Standard Is A Highly Subjective Standard Bearing None Of The Indicia Of A Uniform Standard Even Capable Of Being Applied Consistently**

262. Before addressing Canada’s contention that BC consistently applied its “current normal” standard, Mercer directs the Tribunal’s attention to the standard itself, and asks whether

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<sup>301</sup> R-113, at 5–8.

<sup>302</sup> Scouras Witness Statement, ¶ 44.

<sup>303</sup> Mr. Merwin describes the 12 July 2006 agreement with NorthPoint, Merwin Witness Statement, ¶¶ 50–52, and the contract was provided at C-213. Mr. Merwin also describes the 2000 and 2006 brokerage agreements with FortisBC, Merwin Witness Statement, ¶¶ 45, 47, 51. The 2000 Agreement is provided at C-193; the 2006 Agreement is provided at C-269. *See also* Memorial, ¶ 283; Merwin Second Witness Statement, ¶¶ 24–30.

it even constitutes a well-defined, objective standard capable of being consistently applied without discretion. The answer plainly is no. Indeed, it bears none of the indicia of an objective standard.

**(i) The Standard Did Not Exist In Writing At Any Relevant Time**

263. The first problem is that the “current normal” was not written down anywhere at the time BC Hydro purports to have applied it, and, as demonstrated in the preceding section, has been described by BC Hydro differently at different times. Canada begins its consistent methodology argument by simply asserting a standard, without identifying any source.<sup>304</sup> The Counter-Memorial simply references Mr. Dyck’s testimony, which, at paragraphs 44 through 46, likewise describes a standard without reference to any source.

264. The standard Mr. Dyck propounds in his testimony for this proceeding exists there and not in any contemporaneous document in existence at the time BC Hydro and the BCUC made any of the GBL determinations at issue. It was created for this proceeding, and it contradicts certain of BC Hydro’s previous articulations of the standard, such as its reference in 2002 to “long-term normal operating conditions.” Too, the standard is not referenced in any of the GBL determinations at issue.

265. But even putting aside BC Hydro’s inconsistent *written* descriptions of the standard, Canada has no alternative but to argue implicitly that BC consistently applied an unwritten standard. That simply is not a credible position, for the reasons Mr. Switlishoff explained and which Canada did not even attempt to rebut:

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<sup>304</sup> Counter-Memorial, ¶ 367.

The very purpose of written policies and procedures is to ensure consistency and uniform treatment, so that each new case can be handled under the same rules and the results tested against those rules. The existence of written rules, policies, and procedures constrains the discretion of the decisionmaker. This narrowing of discretion simply is not possible, and does not occur, with unwritten policies and procedures.<sup>305</sup>

266. The utter absence of any written standard, written policies, or written procedures necessarily meant that BC Hydro approached each new GBL determination with complete discretion, with no common data request, with no common, comprehensive list of factors to examine, with no uniform documentation of its determinations, and with no means to validate that each determination followed its standard requirements, much less that it was consistent with past determinations. These latter validations, critical to ensuring consistent treatment, not only were not performed by BC Hydro or any BC governmental entity contemporaneously, but they also were not even possible.

267. To understand this point, the Tribunal need look no further than BC Hydro's very first GBL determination — the << [REDACTED] >> MW GBL it determined for Howe Sound in 2001 immediately after the BCUC issued Order G-38-01 starting GBL determinations. BC Hydro provides no contemporaneous documentation showing its derivation of that GBL, and it is unable today to replicate its computations. Mr. Dyck asserts simply that "BC Hydro looked at Howe Sound's hourly generation levels,"<sup>306</sup> to arrive at "an estimate of what was considered idle."<sup>307</sup> He is unable to explain, however, any precise time frame over which hourly data were considered, how such data were considered, or even whether BC Hydro performed any calculations at all or

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<sup>305</sup> Switlischoff Expert Statement, ¶¶ 56–57.

<sup>306</sup> Dyck Witness Statement, ¶ 40.

<sup>307</sup> Dyck Witness Statement, ¶ 40.

how it arrived at its “estimate.” He likewise cannot show that the figure reflects expected generation over a 365 day period, as the current normal standard ostensibly requires.

268. Indeed, Canada had to drag Mr. Lamarche out of his retirement from Howe Sound to provide the contemporaneous monthly generation data for the mill in the period leading up to the setting of the GBL.<sup>308</sup> Neither Mr. Lamarche nor Mr. Dyck, however, is able to tie any of these data to the << [REDACTED] >> MW GBL actually determined. No one — not Mr. Dyck, not Mr. Lamarche, not Canada’s expert mathematician from NERA, and not its pulp mill expert from Pöyry — can replicate, much less validate, the derivation of Howe Sound’s 2001 << [REDACTED] >> MW GBL.

269. Canada, in short, has no way of proving that it consistently applied a uniform methodology, because BC had no written standard, no written procedures, no written policies, no common template for gathering data, no practice of reviewing or even recording its individual determinations, and thus no means to validate any determination much less to compare any determination against previous determinations. This is no way to “ensure” non-discriminatory treatment, as NAFTA Article 1502(2) requires.

270. Finally, there is a further problem in assuring consistent application of an unwritten standard arising from the fact that the setting of GBLs in BC was not within BC Hydro’s exclusive purview. In 2001, the BCUC itself determined a GBL of 2 MW for Tolko. The BCUC could not possibly have applied BC Hydro’s unwritten standard. BC applied no common standard province-wide.

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<sup>308</sup> Lamarche Witness Statement, ¶ 24.



the Mill was losing money, when its EPA was being negotiated, because BC Hydro did not know, and Celgar had no reason to know these factors were relevant to its GBL determination.

274. BC Hydro considered economic and market factors for Tembec and Howe Sound that it did not consider for Celgar, because the “current normal” standard was not transparent.

**(iii) The Standard Lacks Clearly-Defined Objective Criteria**

275. Canada’s third problem is that its standard is subjective, and lacks clearly-defined objective criteria. It purports to require an assessment of a self-generator’s application of generation to meet load during “normal” operating conditions as of the time the operator approached BC Hydro.

276. But as Mr. Switlishoff observes, the phrase “current normal operating conditions” is something of a misnomer.<sup>309</sup> Operating conditions imply conditions internal to the pulp mill. Such internal conditions as mechanical failures, other equipment or system failure, and other unplanned outages, can be identified and adjusted for so as define “normal operations.” But the “current” conditions BC Hydro appears principally to take into consideration are in fact external — economic and market conditions (*e.g.*, pulp prices, hog fuel prices, natural gas prices, and utility prices for embedded cost power) — “as to which there are no ‘normal’ levels, and which BC Hydro does not attempt to ‘normalize.’”<sup>310</sup>

277. As Mercer and Canada both agree, the economics of electricity generation at kraft pulp mills depend on a large number of economic, market, and operational variables that are highly dynamic. As Mercer explained, “The key point is that the electricity generation level

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<sup>309</sup> Switlishoff Second Expert Statement, ¶ 30.

<sup>310</sup> Switlishoff Second Expert Statement, ¶ 30.

achieved by a kraft pulp mill can vary significantly from year to year, and is affected by a variety of factors some of which are within the mill’s control (*e.g.*, level of investment in self-generation assets) and many of which are exogenous (*e.g.*, the relative prices of natural gas, hog fuel, purchased electricity, and biomass-based electricity) and subject to sharp change.”<sup>311</sup> Canada likewise notes the relevance of “thermal balance,” “the avoided cost of purchasing electricity,” “installation and long-term maintenance costs of a new condensing turbine and generator,” “the cost of fuel to burn in the boiler,” and “the costs related to improving this equipment.”<sup>312</sup>

278. As Mr. Switlishoff now concludes after reviewing Canada’s submission, the “current normal” standard is flawed conceptually because it is a static measure of generation levels that are highly dynamic and thus seeks to measure something that does not exist — a “normal” level of generation.<sup>313</sup> “Normal” is hardly self-defining, and the conditions under which pulp mills operate and affect generation levels — including pulp prices, wood chip prices, hog fuel prices, utility electricity prices, green energy prices, costs of capital, assets deployed, equipment conditions and failures, etc. — all are dynamic and not static.<sup>314</sup> As Mr. Switlishoff puts it, “Choosing a single period of time as being representative of “normal” for all these

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<sup>311</sup> Memorial, ¶ 84 (citing Switlishoff Expert Statement, ¶ 51).

<sup>312</sup> Counter-Memorial, ¶¶ 76, 78–80.

<sup>313</sup> Switlishoff Second Expert Statement, ¶ 32 (“I conclude that the “current normal” standard is conceptually flawed because it is a static measure of generation levels that are highly dynamic and influenced by both internal and external factors that do not remain constant. A ‘normal’ level of generation does not exist until one first defines a set of “normalized” conditions.”).

<sup>314</sup> Switlishoff Second Expert Statement, ¶ 32.

variables is a fool's errand."<sup>315</sup> Changing internal and external conditions is why the generation levels of all pulp mills are never consistent over time.

279. The absence of any objective measure of "normal" conditions is demonstrated by Canada's purported explanation of why a << [REDACTED] >> period was appropriate for purposes of assessing Howe Sound's normal operations, but a 12 month period was appropriate for Celgar.

For Howe Sound, Canada tells us, << [REDACTED]

[REDACTED]

[REDACTED] >><sup>316</sup> The evidence supporting this assertion is that the

mill << [REDACTED] >><sup>317</sup> In light of this variability, Canada

explains, " << [REDACTED]

[REDACTED] >> ",<sup>318</sup>

280. But as Mr. Switlishoff explains, this reasoning makes no sense methodologically.<sup>319</sup> If << [REDACTED] >> was agreed to have been << [REDACTED] >>, it should not have been used in the baseline calculation at all. << [REDACTED]

[REDACTED] >><sup>320</sup> << [REDACTED]

[REDACTED]

[REDACTED]

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<sup>315</sup> Switlishoff Second Expert Statement, ¶ 32.

<sup>316</sup> Counter-Memorial, ¶ 401.

<sup>317</sup> Counter-Memorial, ¶ 401.

<sup>318</sup> Counter-Memorial, ¶ 401.

<sup>319</sup> Switlishoff Second Expert Statement, ¶ 83.

<sup>320</sup> Switlishoff Second Expert Statement, ¶ 84.

[REDACTED]

[REDACTED]

[REDACTED] >> Its GBL was lower than it should have been.

281. For Celgar, on the other hand, 2007 was used as a one-year baseline, even though Celgar’s generation levels that year were the highest on record, and far higher than in each of the prior two years. The fact that the prior two years were dramatically different (lower) was not considered by BC Hydro to be evidence that 2007 was an abnormal year, << [REDACTED]

[REDACTED] >> The “test” BC Hydro used for “normal” for Howe Sound was not used for Celgar, and, if it had been, it would not have supported BC Hydro’s result. Instead, because Celgar had just finished its Project Blue Goose improvements — the reliability of which had yet to be established — BC Hydro simply declared 2007 to be normal.

282. There is no consistency in the baseline periods used, or the reasons given for using some years and not others. Indeed, an internal BC Hydro memorandum dated 9 April 2009 — eight years after BCUC Order G-38-01, and after all Bioenergy Phase I GBLs and EPAs had been finalized, notes in the context of determining a GBL for Tembec for its 2009 EPA that << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] >><sup>321</sup> While Canada contends here that BC Hydro has followed a clear and consistent standard since 2001, in April 2009, well after-setting Howe

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<sup>321</sup> Pöyry-8, Memo from David Keir, BC Hydro, to Lester Dyck et al, BC Hydro (8 April 2009), at 3 (emphasis added).

Sound's 2001 GBL and Celgar's 2009 GBL, BC Hydro admitted internally that its methodology

<< [REDACTED] >>

283. "Current normal" is an abstract concept that BC Hydro has not defined or applied objectively. At best, it is a high-level principle that requires more detailed, refined, substantive guidelines, before it is capable of serving as a standard that can be meaningfully and consistently applied. It is not sufficiently robust, substantive, or limiting. As articulated by Canada, the "current normal" standard affords so much discretion that BC Hydro is free to cherry-pick the data it wants to use.

284. In its Memorial, Mercer identified criteria adopted by international agreement for assessing the existence and exercise of discretion in the context of government subsidies that also are applicable in the instant context. These criteria included (1) the existence of objective criteria, (2) whether such criteria are clearly spelled out in an official document, (3) whether such criteria are strictly adhered to, and (4) whether adherence is capable of verification.<sup>322</sup> Canada's *post hoc* "current normal" standard fails every single one of these tests.

285. Not every formulation of a broad principle qualifies as a standard or methodology that can be consistently applied so as to ensure that parties in comparable circumstances receive comparable results. If Canada had argued that BC Hydro consistently applied a "do-the-right-thing" standard, the Tribunal would easily reject the argument, because that does not qualify as a well-defined standard capable of ensuring consistent treatment. It is a high level principle, subject to wide-variations in interpretation, incapable of guaranteeing that similarly situated entities received similar treatment.

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<sup>322</sup> Memorial, ¶¶ 623–26.

286. The “current normal” standard is no different. It simply is too general to ensure that similar conditions are treated by BC Hydro similarly, that the same factors are considered in all cases, and that approaches to data used in one case are applied in all cases. As the BCUC already has observed, with respect to the June 2012 GBL guidelines BC Hydro filed and which purport to be the same guidelines as the “current normal” standard, the guidelines “are fairly general, subject to considerable interpretation, not necessarily transparent and have not been approved by the Commission.”<sup>323</sup> The BCUC, which has authority to approve any GBL standard, rejected BC Hydro’s current formulation and ordered BC Hydro to provide “more detailed guidelines.”<sup>324</sup> It ordered, for example, that BC Hydro provide “{d}efinitions for Incremental Generation and Idle Generation.”<sup>325</sup> This Tribunal should not accept that which the regulatory body with ultimate authority over GBL determinations, and with a duty to ensure nondiscriminatory treatment, already has rejected as not providing a sufficiently well-defined or refined standard.

287. Perhaps the best example demonstrating the lack any rigor or objectivity in defining what constitutes “current normal operating conditions” is BC Hydro’s treatment of Tembec’s Skookumchuck pulp mill. As Mercer recounted in its Memorial, Tembec, like Celgar,

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<sup>323</sup> C-27, Letter from Erica Hamilton, Commission Secretary, to Janet Fraser, Chief Regulatory Officer, BC Hydro (13 December 2013) (Exhibit A-17 to BC Hydro PPA - RS 3808, TS No. 2 & 3 Proceeding), at 1.

<sup>324</sup> C-168, BCUC Order Number G-19-14 and Accompanying Decision, Application to Amend the Tariff Supplement No. 74 Customer Baseline Load Determination Guidelines for RS 1823 Customers with Self-generation Facilities (17 February 2014), Decision, at ii.

<sup>325</sup> C-168, BCUC Order Number G-19-14 and Accompanying Decision, Application to Amend the Tariff Supplement No. 74 Customer Baseline Load Determination Guidelines for RS 1823 Customers with Self-generation Facilities (17 February 2014), Decision, at 27.

submitted a bid in BC Hydro’s BioEnergy Phase I tender, and BC Hydro determined a GBL for it in 2008 of << [REDACTED] >>.<sup>326</sup> By March 2009, in the midst of the economic downturn, Tembec idled its Skookumchuck mill temporarily, << [REDACTED] [REDACTED] >><sup>327</sup> It then turned to BC Hydro to renegotiate its EPA, obtaining a << [REDACTED] >> GBL of 14 MW, equivalent to 122.6 GWh/year — some << [REDACTED] >> than the GBL BC Hydro had itself calculated for Tembec months earlier. The very conditions that ostensibly constituted << [REDACTED] [REDACTED] [REDACTED] >>.

288. A second good example is provided by FortisBC’s attempt in mid-2012 to propose a GBL for Celgar, which it asserts it computed applying BC Hydro’s methodology as set forth in BC Hydro’s June 2012 GBL guidelines.<sup>328</sup> As of 2012, FortisBC — another BC utility with authority to negotiate GBLs with its customers — read BC Hydro’s guidelines and Order G-48-09 as “requiring it to review the historical generating profile and historical customer load in order to determine what *excess power would be available on a ‘net of load’ basis.*”<sup>329</sup> FortisBC thus

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<sup>326</sup> Memorial, ¶ 517 (citing C-143, Letter from BC Hydro RFP Administrator to Christian Lague, Tembec Enterprises Inc., *BC Hydro Bioenergy Call for Power (Phase I)* (2 May 2008)). See also Switlishoff Expert Statement, ¶ 153.

<sup>327</sup> C-34, Email from Lester Dyck to Leon Cender, Judy Baum, and Matt Steele (15 September 2009).

<sup>328</sup> See Swanson Witness Statement, ¶ 133.

<sup>329</sup> R-266, FortisBC Reply to Submissions in the Matter of a Filing by FortisBC for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11)(4 July 2012), at 23 (emphasis added).

agrees with Mercer that the BCUC and BC Hydro have required that Celgar's GBL be "net-of-load."

289. Beyond that, FortisBC used a three-year period for averaging Celgar's load and generation data, as opposed to BC Hydro's one-year period, and did not use as its starting point the most current completed calendar year (then 2011), but instead used the period 2007-2009 to preserve for Celgar the benefits of its most recent investment in incremental energy, the Green Energy Project.<sup>330</sup> Thus, applying the same supposed standard, FortisBC applied a methodology that bears no resemblance to BC Hydro's one-year approach, and gave no consideration to Celgar's recent investment.

290. At bottom, the *post hoc* "current normal" standard Canada now touts as its gold standard of consistent treatment is subjective, not objective. "Normal" is no more a definitive, consistent concept in the pulp mill self-generation context than it was in Warren G. Harding's 1920 U.S. presidential campaign, in which, post World War I, he promised a "return to normalcy." It was a successful slogan precisely because it was such a malleable concept, and meant different things to different voters. At bottom, what is "normal" is what BC Hydro says is normal — nothing more and nothing less.

291. Canada does not dispute that the *post hoc* "current normal" standard vests BC Hydro with enormous discretion. BC Hydro certainly could have taken a less restrictive approach for Celgar, by measuring generation to load, or using a three year period to determine normal

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<sup>330</sup> R-266, FortisBC Reply to Submissions in the Matter of a Filing by FortisBC for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11)(4 July 2012), at 24 ("Considering the Celgar situation, the Company would examine the most recent years of operation prior to the adding of the new generation in 2010.").

operating conditions, or even looking at a period prior to Celgar's Blue Goose Project that increased both pulp production and electricity generation, as the BCUC had done in setting Tolko's GBL in 2001. The approach BC Hydro chose was not mandated by any statute, regulation, policy, procedure, or *post hoc* "current normal" standard. BC Hydro simply chose to exercise its discretion in ways less favorable to Celgar than it did with others.

292. Likewise, no statute, regulation, policy, procedure, or *post hoc* "current normal" standard required BC Hydro to eschew Tembec's actual performance data for a hypothetical computation affording Tembec greater access to embedded cost utility power than it had in over a decade to facilitate increased "notional" sales of below-load power by Tembec back to BC Hydro.

293. Sure, Canada now has a different story to tell for each self-generator. BC Hydro had its stated and unstated reasons for affording different treatment; Mercer does not contend it happened by serendipity. But the issue for the Tribunal is not whether Canada has a *post hoc* story — Governments always do to explain away discriminatory treatment. Rather, the issue is far simpler under NAFTA — did the BCUC, at BC Hydro's request, establish a different regulatory standard for Celgar than it did for any other pulp mill in BC, and/or did BC Hydro, with the approval of the BCUC, in the exercise of their vast discretion in establishing GBLs, treat Celgar less favorably than others. The answer is yes.

294. The BCUC, MEM, and BC Hydro all had multiple opportunities to formulate and formalize consistent and more clearly defined rules for self-generators, and to narrow or eliminate the discretion afforded to BC Hydro's GBL czars, as the BCUC, belatedly, now appears ready to do under TS 74. States can avoid discrimination claims relating to their regulatory actions by formulating clear written rules and policies, and then rigorously applying them on a consistent and transparent basis. BC instead chose to do otherwise.

**(iv) Canada’s “Experts” Could Not And Did Not Independently Validate That BC Consistently Applied Its *Post Hoc* Current Normal Standard**

295. In view of the lack of any written GBL standard, guidelines, or procedures at the time GBL determinations were made, the absence of consistent data-gathering forms or templates, the lack of consistent documentation of GBL determinations, and the very general and subjective nature of the “current normal” standard, it simply is not possible independently to verify that the now-professed methodology was applied in particular cases. Canada’s “experts” prove this point as their “analysis” is utterly devoid of any defined much less coherent methodological framework.

296. One way to verify the application of consistent principles to different self-generators is to provide an independent expert with the standard and with the raw data and related information for each mill, have the expert determine the proper GBL, and then compare the expert’s result to the GBL BC determined. Canada’s experts did not provide any such blind study.

297. Another way to verify consistent application of BC’s professed principles is to review the actual contemporaneous workpapers, to determine if the same types of data and related-information were gathered for all mills, if common templates for data or analysis were used, and to identify specific issues, like the existence of third-party energy sales, and determine if they were handled the same way across all mills. Canada’s experts did not follow this approach either.

298. Indeed, Canada’s experts appear to have followed no pre-defined methodology at all (much like BC Hydro’s approach to setting GBLs). Dr. Rosenzweig purports to have reviewed

“the GBL setting process,”<sup>331</sup> but he provides no explanation of what that review entailed, as there was no defined or required process. Did he review written procedures? Did he review workpapers? What data did he review, and who determined what data he was provided? Did he perform any calculations on his own? Did he do anything more than talk with the BC Hydro personnel involved? Dr. Rosenzweig’s report answers none of these questions, and thus the Tribunal has no idea what he did.

299. Dr. Rosenzweig presents a table on page 27 of his report that purports to have analyzed what he considers to be the four “elements” of BC Hydro’s methodology, but he analyzes only whether the element was considered or not — as if the calculation of a GBL did not involve data and computations but instead only a checklist of factors to be considered. He analyzes the GBL approach used for each of the various mills only abstractly and generally and not comprehensively, concretely, or quantitatively, and thus does not even attempt to validate or replicate the individual GBLs actually determined. He does not even explain the methodology he employed to determine whether or not each of his four factors was in fact considered.

300. Dr. Rosenzweig’s Appendix 2, which purports to present his more detailed mill-by-mill analysis, is no more transparent, informative, or robust. The Appendix consists of a series of individual memoranda Dr. Rosenzweig prepared regarding Celgar, Tembec Skookumchuck, Howe Sound Port Mellon, and Canfor Prince Georges, again following no defined or disclosed methodology, and no transparent analysis. One still has no idea what he reviewed in reaching his conclusions, what data he was provided, whether he was provided the same types of data for all

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<sup>331</sup> Rosenzweig Expert Report, ¶ 52.

mills, and the extent to which his analysis was influenced by discussions he had with BC Hydro personnel involved in making the determinations.

301. By all appearances, Dr. Rosenzweig avoided analyzing BC Hydro's exercise of discretion, and, indeed, avoided independent analysis altogether. He utterly failed to consider much less answer the key question — did a precise methodology exist that in each case compelled the result arrived at by BC Hydro, or did BC Hydro exercise its discretion less favorably for Celgar? He developed no independent analytic methodology, applied no independent analysis to the relevant data, performed no independent fact gathering, and did not recalculate GBLs on his own to see if he arrived at the same result as BC Hydro, and as a “consistent” methodology would require. He did not even examine the same *types* of data for all the mills he compared, and thus appeared only to have considered information Canada wanted him to consider. By all appearances, he simply reviewed what BC Hydro told him BC Hydro did, based on data BC Hydro selected for his review, and then blessed the analysis he was provided as reasonable. Such homework-checking adds no value to the Tribunal's analysis.

302. For example, Dr. Rosenzweig purports to examine as one of his four factors whether BC Hydro complied with its policy that “{t}he annual GBL figure should be determined based on the level of self-generation used by the customer/facility to self-supply over a period of a year.”<sup>332</sup> In his analysis of Celgar, he appears completely unaware of key facts relevant to this issue, including the fact that in the baseline year of 2007 used by BC Hydro, Celgar had export sales of electricity to both FortisBC and NorthPoint *pursuant to contracts it had with each of*

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<sup>332</sup> Rosenzweig Expert Report, ¶ 52.

*those companies.*<sup>333</sup> He asserts — wrongly — that “Celgar did not have a contract so no adjustment to the GBL level was appropriate,”<sup>334</sup> and fails even to address BC Hydro’s decision not to base Celgar’s GBL on its generation-to-load, by deducting its sales from its generation level, or its purchases from FortisBC from its load. This is a key point of contention, and Dr. Rosenzweig does not recognize it as an issue much less opine on BC Hydro’s approach.

303. Similarly, with respect to the << [REDACTED] >> MW GBL BC Hydro set for Howe Sound in 2001, Dr. Rosenzweig eschewed analysis and data review altogether, even of the incomplete form he used for Celgar. In a footnote, he simply accepts the testimony of other witnesses as to the soundness of the GBL calculation, pointing out that Howe Sound’s generation at the time ranged from about << [REDACTED] >> MW.<sup>335</sup> But Howe Sound’s generation in 2000–01 << [REDACTED] >><sup>336</sup> Dr. Rosenzweig cannot explain, and does not even try to explain, how the data support a GBL that Dr. Rosenzweig himself testifies is to reflect “the level of self-generation used by the customer/facility to self-supply over a period of a year.” No one — not Mr. Lamarche, not Mr. Dyck, not Dr. Rosenzweig — can explain what data were used to compute Howe Sound’s 2001 GBL.

304. The Pöyry Report prepared by Mr. Stockard suffers from all the same flaws and inadequacies as Dr. Rosenzweig’s report. Mr. Stockard’s review of the GBLs set for Celgar, Howe Sound, Tembec, and Canfor again follows no defined methodology or analytic framework,

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<sup>333</sup> Memorial, ¶¶ 283–85; Merwin Statement, ¶¶ 47, 50–52.

<sup>334</sup> Rosenzweig Expert Report, at app. 2, at 3.

<sup>335</sup> Rosenzweig Expert Report, at app. 2, at 12 n.8.

<sup>336</sup> Lamarche Witness Statement, ¶ 24.

contains no disclosure of the data relied upon, and no disclosure of the nature of the work he undertook. He too appears simply to have reviewed incomplete data provided to him by Canada.

305. For example, for Celgar, Mr. Stockard too does not address the load versus generation-to-load issue. He relies only on the fact that Celgar “self-generated sufficient energy in 2007 to meet its mill load in this year.”<sup>337</sup> He also asserts that “[t]he information provided also confirmed that the existing 52 MW self-generation facilities were being used to meet Celgar’s entire mill load.”<sup>338</sup> But, as explained above, Celgar had significant purchases of electricity that year from FortisBC, and thus its self-generated electricity was not in fact used to meet Celgar’s “entire mill load.” Mr. Stockard has no explanation for why BC Hydro did not subtract Celgar’s purchases from its load to arrive at generation-to-load, and, like Dr. Rosenzweig, Mr. Stockard does not even appear to recognize that this is even an issue.

**c. BC Hydro’s “Current Normal” Standard Co-Opts  
The BCUC Order G-38-01 Historical Usage Standard  
To Fulfill Different Policy Objectives**

306. The “current normal” GBL standard BC Hydro adopted under color of the BCUC’s Order G-38-01 has, as of yet, never been reviewed or accepted by the BCUC, and is in fact inconsistent with the purpose and language of that Order in significant respects.

307. As set out in detail in the Memorial, the BCUC adopted Order G-38-01 in 2001, at the time of the California Energy Crisis, as a short-term measure specifically to authorize BC self-generators to sell power from then economically idle generation, or subsequently added

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<sup>337</sup> Pöyry Report, ¶ 93.

<sup>338</sup> Pöyry Report, ¶ 93.

generation capacity, to California to take advantage of high market prices.<sup>339</sup> The BCUC adopted a historical usage standard, pursuant to which self-generators were permitted to continue their access to embedded cost utility power at then-existing levels, but were not permitted to arbitrage additional power by taking *increased* quantities of embedded cost power to replace and thereby facilitate sales of self-generated power.<sup>340</sup>

308. The Commission twice directed BC Hydro to base its baseline determinations upon “historical” data, referring both to “historical energy consumption of the customer” and the “historical output of the generator” as two applicable guideposts.<sup>341</sup> “Historical” as noted earlier, means “having once existed.”

309. The policy was intended by the Commission, and according to the Commission, as “in fact the preservation of the *status quo*, such that BC Hydro’s obligations to serve was limited to the load served at a particular time and self-generators were required to continue to serve that portion of their own load which they had served in the past.”<sup>342</sup> To preserve the *status quo*, the BCUC’s measure necessarily required that each self-generator’s historical levels of generation and consumption be assessed at the same time, and thus under the same underlying market and economic conditions.

310. The policy served three ostensible governmental objectives. First, by precluding *increased* arbitrage, the policy preserved the then-existing *status quo* in terms of BC Hydro’s obligation to serve self-generators, and thus prevented “harm to other ratepayers,” in the form of

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<sup>339</sup> See generally Memorial, ¶¶ 204–32.

<sup>340</sup> C-5, Order G-38-01, ¶ 1.

<sup>341</sup> C-5, Order G-38-01, ¶ 1.

<sup>342</sup> C-21, *Kelowna Decision*, at 7.

rate increases from the *status quo* rates that would be necessitated if BC Hydro suddenly had to replace the power previously used by self-generators to serve their own loads.<sup>343</sup> Second, by allowing all subsequent investment in self-generation to reap market-based pricing, the Commission allowed market price signals to govern future investments in self-generation, and thereby removed the economic disincentive created by restricting self-generation to self-supply.<sup>344</sup> (Indeed, if this had not also been a policy objective, there would have been no reason to limit BC Hydro's obligation to serve only to historical levels rather than requiring all self-generators fully to self-supply their own loads.) Third, as Canada explains, Order G-38-01 helped potentially to mitigate energy shortages in the Pacific Northwest and California.<sup>345</sup>

311. The “current normal” GBL standard departs from the BCUC's historical usage standard in numerous respects, serves different governmental objectives, and leads to different GBL outcomes. Most importantly, instead of preserving the *status quo*, and requiring self-generators to maintain their self-supply levels as of around 2000-01, the “current” aspect of the new standard presents self-generators with a continually advancing target — the baseline is fixed as of the time one approaches BC Hydro for an EPA. The standard thus not only requires an EPA with BC Hydro, which the historical usage standard did not, but also it dramatically alters the competitive landscape by locking in self-supply obligations for different mills under different market and economic conditions — a result the BCUC did not contemplate.

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<sup>343</sup> See Memorial, ¶¶ 213–14; C-119, BCUC, Order Number G-27-01 (28 February 2001), at 5; Counter-Memorial, ¶ 118

<sup>344</sup> See Counter-Memorial, ¶ 164.

<sup>345</sup> Counter-Memorial, ¶ 118.

312. Canada and its experts explain the purpose of this ever-eroding “current” baseline approach in terms of a desire not to “incentivize” existing generation.<sup>346</sup> Through its EPAs, BC Hydro apparently only wanted to purchase at market prices self-generation resources that would not exist but for that market-price incentive. Therefore, if the self-generator had already made the investment as of the time it approached BC Hydro for an EPA, and was already generating the power for its own use, BC Hydro would not purchase it, because BC Hydro reasoned it did not need to provide any such price-incentive to obtain that generation capacity on its system.

313. Canada’s proffering of this “limiting BC Hydro incentives” rationale proves that the “current normal” standard differs from the “historical usage” standard. Such a rationale was never even suggested at the time of Order G-38-01, and is nowhere embodied in that Order. Indeed, the “limiting BC Hydro incentives” rationale is exclusively a BC Hydro procurement-related policy, and Order G-38-01 and the self-generator policy it embodies had nothing whatsoever to do with BC Hydro procurement much less limiting the volumes of biomass-based green energy BC Hydro would have to purchase from self-generators. The policy was developed originally to enable Howe Sound to sell its idle generation not to BC Hydro but into the California market.

314. Moreover, by tying the GBL standard to a BC Hydro EPA, BC Hydro also negated another policy objective of Order G-38-01 — mitigating energy shortages in other markets. Through the new standard it developed for setting GBLs, and the exclusivity provisions in its EPA’s utilizing those GBLs, BC Hydro succeeded in preventing self-generators from exporting

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<sup>346</sup> Counter-Memorial, ¶¶ 389, 410, 413; Rosenzweig Expert Report, ¶¶ 8–9, 14–16; *see also* Stockard Expert Report, ¶¶ 29, 49.

power on their own, and thereby competing with Powerex, or selling power to third-parties within BC, and thereby competing with BC Hydro. Through its manipulation of the GBL standard, BC Hydro also was able to solidify its market position as the predominant if not exclusive purchaser of electricity within BC as well as the predominant exporter of electricity from BC. These too were not objectives of BCUC Order G-38-01.

315. Without BCUC approval, yet under color of the authority it was given in Order G-38-01 to determine GBLs, BC Hydro co-opted the GBL standard articulated by the BCUC to serve its own pecuniary interests.

316. As Mr. Switlishoff explains, there are other important differences between the BCUC's "historical usage" standard and BC Hydro's "current normal" standard, as summarized in the table below:<sup>347</sup>

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<sup>347</sup> Switlishoff Second Expert Statement, ¶ 23.

**Figure 23**  
**Differences Between G-38-01 Historical Usage Standard**  
**And BC Hydro’s *Post Hoc* Current Normal Standard**

	<b>Historical Usage</b>	<b>Current Normal</b>
Stated Purpose	Preserve the <i>status quo</i> ; intended to allow new and incremental generation to access market rates; protect ratepayers from harm resulting from increases in purchases by self-generators of embedded cost power above 2000-1 levels	Identify “new and incremental” self-generation eligible for BC Hydro power calls so as only to incentivize new power; prevent arbitrage
Unstated Impacts		Eliminate competition for BC Hydro/Powerex from self-generators in export markets and third-party purchasers in BC
Time Perspective	Retrospective — requires analysis of “historical generation” and “historical consumption”	Prospective — predicts future self-supply levels based on current normal operating conditions <sup>348</sup>
Time Frame Considered	2000-01	Current as of time of application for BC Hydro EPA
Generation Economic Conditions Considered	As all mills evaluated as of a common <i>status quo</i> , all GBLs based on same time economic parameters ( <i>e.g.</i> , pulp prices, natural gas prices, hog fuel prices)	No uniformity of conditions. Each mill’s “normal” condition is based on what was “normal” as of time of application for EPA.
Trigger	GBL set upon application to BCUC or application to own utility	For contractual GBL, must apply for an EPA with BC Hydro
GBL Based on Levels of Generation Actually Used to Meet Load	Yes	No. Generation levels used can be theoretical
Requires a BC Hydro EPA	No	Yes

<sup>348</sup> See Counter-Memorial, ¶ 390 (Celgar’s GBL “represented normal operations *going forward.*”) (Emphasis added.)

	Historical Usage	Current Normal
Treatment of Past Energy Commitments	Not Mentioned	Considered
Permits Energy Sales to Third-Parties	Yes (G-38-01 enabled energy sales to California)	No (GBL-related exclusivity provisions in EPAs prohibit sales to third-parties)
Considers economics of self-generation	Only indirectly, insofar as economics affected historical generation and self-supply levels	Directly. Uses theoretical models to assess the level of generation that would be economic without the EPA
Duration of GBL	Contemplates one time setting of GBL, but does not prohibit adjustment if conditions change	Life of EPA

**2. The *Post Hoc* “Current Normal” Standard Has Not Been Consistently Applied To All Self-Generators In BC, And Was Not Applied To Celgar**

317. Canada’s central substantive defense to liability under NAFTA Articles 1102 and 1103 hinges on the Tribunal’s acceptance of its argument that BC consistently has applied the same unwritten, inconsistently described, GBL standard to all self-generators in the province, and that Celgar was not treated more restrictively due to BC Hydro’s application for, and the BC Hydro’s acceptance of, a net-of-load standard on Celgar. Canada’s expert contends instead that, “coincidentally,” Celgar’s GBL was the same under both a net-of-load standard and “current normal” standard.<sup>349</sup>

318. Mercer asked its expert, Mr. Switlishoff to review both the “current normal” standard as described by Canada,<sup>350</sup> as well as all available information at the time GBLs were

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<sup>349</sup> Rosenzweig Report, ¶ 86.

<sup>350</sup> Canada explains that “BC Hydro worked with each mill in the context of EPA negotiations to determine the amount of self-generated energy it used to self-supply in the course of normal operations, on an annual basis, as of the time of the negotiations. The amount of energy used to

*[FOOTNOTE CONTINUED ON NEXT PAGE]*

set, including all contemporaneous workpapers, information provided by Canada in its document production, and information provided by Mercer, to determine whether BC Hydro in fact applied the methodology it now describes. Mr. Switlishoff examined (1) whether he could validate that the “current normal” standard Canada espouses was in fact the one applied, by searching for a reference to the standard in BC Hydro’s workpapers, (2) whether distinctions Canada and its witnesses have drawn in the treatment of different mills is consistent both with the standard and its purposes, and (3) whether that methodology compelled the GBL BC Hydro determined or whether alternative GBLs also would have been consistent with the methodology.<sup>351</sup>

319. Mercer asked Mr. Switlishoff to perform such review for Celgar and for all mills he originally offered as comparators, including Howe Sound’s 2001 GBL, Tembec’s GBL under the 1997 EPA with BC Hydro, Tembec’s GBL under its 2009 EPA with BC Hydro, and Howe Sound’s 2010 EPA GBL. In addition, in light of Canada’s vociferous yet unprincipled objection to Mercer’s omission of the Tolko sawmill, mentioned by Mercer in its Request for Arbitration, Mercer asked Mr. Switlishoff to review the BCUC’s establishment of a 2 MW GBL for Tolko in 2001, as well as the BCUC’s actions in rescinding that GBL in November 2013.<sup>352</sup>

320. Mr. Switlishoff reviewed Mr. Dyck’s and Mr. Scouras’s testimony, as well as the analyses offered by Dr. Rosenzweig and Mr. Stockard. Unlike Dr. Rosenzweig and Mr. Stockard, he was not guided by BC Hydro, nor were his data sources limited by BC Hydro. He was

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

self-supply was assessed in the absence of the prospect of the currently negotiated EPA, and accounted for the unique operations of each mill.” Counter-Memorial, ¶ 367.

<sup>351</sup> Switlishoff Second Expert Statement, ¶ 41.

<sup>352</sup> See Memorial, ¶¶ 374–75; C-21, *Kelowna Decision*, at 21.

provided full access to the document database provided by Canada, including all workpapers provided by BC Hydro, as well as hourly generation, purchase, sale, and load data for each mill. He also was provided access to Canada's Counter-Memorial, witness and expert statements, and all exhibits. His analysis and conclusions are provided in his Second Expert Statement, and summarized below.

**a. Tembec Skookumchuck's 1997 EPA**

321. Mr. Switlishoff first concludes that the treatment BC Hydro afforded Tembec's Skookumchuck mill, through the 1997 Purcell Power EPA, implemented by Tembec in 2001, is inconsistent with the "current normal" GBL standard.<sup>353</sup>

322. As detailed in Mercer's Memorial, prior to the 1997 EPA, put into effect in 2001, the mill had an installed turbine generator, that it used to help meet the mill's load, running at about 12 MW.<sup>354</sup> BC Hydro nonetheless entered into an EPA in 1997 that contained no self-supply obligation. The mill instead was permitted to arbitrage *the* << [REDACTED] >> 10.8 MW of self-generated electricity by accessing embedded cost power from BC Hydro<sup>355</sup> and selling self-generated electricity back to BC Hydro.<sup>356</sup> No GBL, based on "current normal" operating conditions or otherwise, was applied, and the Mill was allowed to operate and sell its self-generated electricity with no self-supply obligation.<sup>357</sup>

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<sup>353</sup> Switlishoff Second Expert Statement, ¶ 44.

<sup>354</sup> Memorial, ¶ 508.

<sup>355</sup> See R-188, Electricity Supply Agreement Between BC Hydro and Tembec Industries, Inc (14 September 2001), at §§ 2(a), 6(a); Switlishoff Second Expert Statement, ¶ 44.

<sup>356</sup> Memorial, ¶¶ 197–203; C-107, 1997 Tembec EPA, §11.2, at app. 1.

<sup>357</sup> As Poyry's Mr. Stockard agrees, "the 1997 EPA did not require the self-generator to serve

[FOOTNOTE CONTINUED ON NEXT PAGE]

323. Canada does not dispute this depiction of the EPA,<sup>358</sup> which BC Hydro entitled an Electricity Purchase Agreement,” and which specifically provided that BC Hydro would purchase “electricity” from the Skookumchuck Mill.<sup>359</sup> It is therefore odd, and inconsistent with the agreement, for Mr. Dyck to characterize the agreement as << [REDACTED] >><sup>360</sup> However Mr. Dyck elects to re-characterize the agreement after the fact, it is undisputed that the agreement allowed Tembec to sell *the* << [REDACTED] >> 10.8 MW of its self-generated electricity to BC Hydro and, through a related Electricity Supply Agreement (“ESA”) to purchase embedded cost power from its utility to meet the << [REDACTED] >> 10.8 MW of its load.

324. This is precisely the sort of arrangement Celgar had sought, first from FortisBC and later with BC Hydro, which Canada disparages as requiring BC Hydro to pay “something for nothing.”<sup>361</sup> It is evident, however, that BC Hydro had agreed to purchase such below-load electricity previously, even though, before its EPA, Tembec had been generating to meet a portion of its load, to pay significant consideration for such purchases, and to characterize the arrangement as involving the purchase of electricity.

325. More importantly here, the arrangement concluded with the Tembec Skookumchuck Mill is flatly inconsistent with the “current normal” GBL standard, and no

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

part of its mill load with self-generation before it could sell electricity to BC Hydro.” Stockard Expert Report, ¶ 125

<sup>358</sup> See, e.g., Dyck Witness Statement, ¶¶ 96–98.

<sup>359</sup> C-107, 1997 Tembec EPA, § 11.2.

<sup>360</sup> Dyck Witness Statement, ¶ 98.

<sup>361</sup> See Switliff Second Expert Statement, ¶ 4.

Canadian witness testifies otherwise — not Mr. Dyck, not Dr. Rosenzweig, and not Mr. Stockard. Mr. Rosenzweig avoids analyzing this EPA altogether, and Mr. Dyck concedes that “the 1997 EPA did not require the Skookumchuck mill to serve part of its mill load with self-generation before selling electricity to BC Hydro.”<sup>362</sup>

326. Rather than argue that this treatment was consistent with the treatment afforded to Celgar, Canada instead first makes a baseless “like circumstances” argument that Celgar’s treatment cannot be compared to Skookumchuck’s treatment because Skookumchuck’s 1997 EPA treatment is “unique.”<sup>363</sup> In other words, because Skookumchuck was treated differently, it should not be compared to Celgar. To state the argument is to reject it. Canada does not identify any relevant “circumstances” that render a comparison between Celgar’s treatment and Tembec’s treatment “inapt.” Instead, it bases its argument entirely on the differences in treatment. Differences in treatment alone cannot support any conclusion that Celgar and Tembec were not in like circumstances, and thus not comparable.

327. Canada next argues that the 1997 EPA antedates BCUC Order G-38-01 and its new GBL legal regime, and is thus “not treatment accorded in like circumstances.”<sup>364</sup> This argument too does not withstand scrutiny.

328. While it certainly is true that BC Hydro’s original 1997 EPA with Purcell Power Corp. antedated BCUC Order G-38-01, BC Hydro entered into its ESA with Tembec — the

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<sup>362</sup> Dyck Witness Statement, ¶ 96.

<sup>363</sup> Counter-Memorial, ¶ 421 (“The 1997 EPA structure is unique, and its embodiment of characteristics of both of BC Hydro’s modern EPAs and LDAs renders it an inapt basis for comparison.”).

<sup>364</sup> Counter-Memorial, ¶ 421.

agreement under which BC Hydro supplies replacement power to Tembec at embedded cost rates — and which implemented the 1997 EPA that otherwise had expired as discussed below — on 14 September 2001, months *after* the Commission issued Order G-38-01 on 5 April 2001.

329. It thus appears that BC Hydro’s original counter-party, Purcell Power Corp., was unable to implement the 1997 EPA, that it did not do so prior to the Commercial Operation Date << [REDACTED] >> specified in the EPA, yet BC Hydro permitted an agreement plainly inconsistent with Order G-38-01 to be assigned and implemented after the date of that Order, including by concluding necessary supplemental agreements, like the ESA, well after the date of Order G-38-01, and without re-negotiating the EPA so as to apply the principles of Order G-38-01.

330. Moreover, Canada has not explained why, once the “legal regime” changed in 2001, BC Hydro waited until 2009 to change its treatment of Tembec to be consistent with the new legal regime. BC Hydro should have renegotiated the 1997 EPA once the legal regime changed, and not continue what Canada admits was more favorable treatment.

331. Finally, Canada’s argument that it conformed Tembec to the new legal regime implicates not only the 1997 EPA but, even more importantly, Tembec’s subsequent, 2009 EPA. Canada’s argument with respect to the 1997 EPA is that it occurred under a prior legal regime, when the rules for self-generators were different, and that its more favorable treatment of Tembec became irrelevant once Tembec was transitioned to the new legal regime with its 2009 EPA. Putting aside the question of why BC Hydro continued its more favorable treatment of Tembec for eight years after it acknowledges the legal regime changed, Canada’s argument is valid on its own terms only to the extent BC Hydro evaluated Tembec in 2009 on a clean slate, ignoring the impact of the more favorable treatment embodied in the 1997 EPA.

332. This BC Hydro did not do. Instead of eliminating the impact of the 1997 EPA’s more favorable treatment, BC Hydro expressly considered and preserved it. As explained in more detail in Section IV.F.2.e below, in setting Tembec’s GBL in the 2009 EPA, BC Hydro considered the 1997 EPA to be a prior agreement << [REDACTED]

[REDACTED] >><sup>365</sup> << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

>>. Thus, rather than abandoning the old, inconsistent legal regime, BC Hydro in 2009 in effect grandfathered Tembec’s more favorable treatment under the 1997 EPA.

333. Accordingly, it simply is not true that BC Hydro, in 2009, abandoned its admittedly more favorable treatment of Tembec. Rather than eliminating the impact of that earlier “inconsistent” agreement, BC Hydro preserved it.

334. Yet again, Canada seeks to have it both ways. It wants to contend that Tembec’s 1997 EPA does not provide a valid comparator because it occurred under a “prior” legal regime, yet Canada also wants the Tribunal to take into account the 1997 EPA under the “new” legal regime as a justification for preserving for Tembec aspects of treatment afforded under the old legal regime. Canada’s argument that BC Hydro transitioned Tembec to the new legal regime

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<sup>365</sup> See also Rosenzweig Expert Report, app. 2, at 5, 6–7 (noting that BC Hydro did not consider Tembec’s actual current generation levels in setting its 2009 GBL in part because recent generation levels were impacted by the 1997 EPA. “In this way, discretionary generation (above operational levels), which was incentivized by the 1997 EPA, was not considered.”).

fails once Canada admits that it << [REDACTED] >>.

**b. Howe Sound's 2001 GBL, And BC Hydro's Failure To Re-Compute A GBL In Each New Annual Contract**

335. Mr. Switlishoff next concludes that Howe Sound's 2001 arrangement with BC Hydro, and its renewals of that arrangement each year from 2002-2006, also are inconsistent with the "current normal" GBL standard.<sup>366</sup>

336. To reiterate briefly, BC Hydro established a << [REDACTED] >> MW GBL for Howe Sound in early 2001 for purposes of a << [REDACTED] >> Consent Agreement finalized on 12 April 2001, that permitted Howe Sound to sell any self-generated electricity above that level through Powerex.<sup>367</sup> That Agreement was effective for the period << [REDACTED] >>. The parties then renewed their agreement annually through 2006, without ever revisiting or modifying the << [REDACTED] >> MW GBL.<sup>368</sup>

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<sup>366</sup> Switlishoff Second Expert Statement, ¶¶ 45-47.

<sup>367</sup> Memorial, ¶ 233; Dyck Witness Statement, ¶ 38; C-122, Letter from Bev Van Ruyven, Vice President - Marketing and Sales, BC Hydro, to Russ Fulton and Al Loewen, ¶3(b).

<sup>368</sup> See C-123, Letter from Bev Van Ruyven, Vice President, Power Smart, BC Hydro, to Russ Fulton and Al Loewen (28 February 2002); C-124, Letter from Richard Marchant, Power Smart, BC Hydro, to Russ Fulton and Joan Hutchinson (31 March 2003); C-125, Letter from Bev Van Ruyven, Senior Vice President, Distribution, BC Hydro, to Al Loewen and Pierre Lamarche (31 March 2004); C-126, Letter from Bev Van Ruyven, Senior Vice President, BC Hydro, to Al Loewen and Pierre Lamarche (31 March 2005); C-127, Letter from Pierre Lamarche, Manager, Energy, HSPP, to Lester Dyck, BC Hydro (28 August 2006) and Letter Agreement between BC Hydro, HSPP, and Powerex (26 April 2006); C-128, Letter from Bev Van Ruyven, Senior Vice President, Distribution, BC Hydro, to Pierre Lamarche and Al Loewen (16 August 2007). See also Dyck Witness Statement, ¶ 41 (noting that << [REDACTED] >> MW GBL).

337. Canada provides no contemporaneous workpapers revealing the data on which the << [REDACTED] >> MW GBL was based, no first-hand testimony of anyone at BC Hydro involved in establishing that GBL,<sup>369</sup> and, notwithstanding the continued current availability of Howe Sound's relevant load and generation data from 2000-2001,<sup>370</sup> Canada is unable even to provide any *post-hoc* calculation supporting a << [REDACTED] >> MW GBL.<sup>371</sup> BC Hydro apparently kept no record of the data on which it based the GBL, if in fact it based the GBL on any data at all, and is unable to replicate any calculations that it may or may not have performed.

338. In these circumstances, Mr. Switlishoff concludes that BC and Canada — which alone have access to all the witnesses, pertinent documentation, and relevant data — cannot demonstrate that the << [REDACTED] >> MW GBL was consistent with *any* methodology much less the “current normal” methodology.<sup>372</sup> As he notes, “[a] methodology that cannot be replicated cannot have been applied.”<sup>373</sup>

339. Mr. Switlishoff also independently reviewed the monthly generation data provided by Mr. Lamarche for 2000-01, and concludes that one cannot derive an annual average GBL of

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<sup>369</sup> Mr. Dyck testifies as to his understanding of how the GBL was decided, Dyck Witness Statement, ¶¶ 39–40, but Mr. Dyck was not the Key Accounts Manager for Howe Sound at the time, and thus was not actually involved in establishing Howe Sound's GBL. Dyck Witness Statement, ¶¶ 38–39. In any event, Mr. Dyck provides only a generalized abstract discussion of the issue, providing no data whatsoever to support the << [REDACTED] >> MW GBL.

<sup>370</sup> See Lamarche Witness Statement, ¶ 24.

<sup>371</sup> Howe Sound's Mr. Lamarche states that Howe Sound proposed a threshold of << [REDACTED] >> MW that he believed were at or near design operating rates, Lamarche Witness Statement, ¶ 37, but he gives no indication of the data that supported that GBL, or even that any data were presented to BC Hydro to justify the GBL.

<sup>372</sup> Switlishoff Second Expert Statement, ¶ 46.

<sup>373</sup> Switlishoff Second Expert Statement, ¶ 45.

<< [REDACTED] >> MW from such data,<sup>374</sup> in light of the fact that a GBL must reflect normal operating conditions “on an annual basis.”<sup>375</sup> Monthly data for less than 12 consecutive months cannot be used for such purpose, because different months have different numbers of days, and Mr. Switlishoff cannot discern whether any outages or other anomalies occurred in any given month.<sup>376</sup>

340. Accordingly, Canada has not met its burden of proving that BC applied any “current normal” methodology in computing Howe Sound’s GBL in 2001. It is also clear that BC did not apply the “current normal” methodology in any of the << [REDACTED] [REDACTED] >>.

341. As Mr. Dyck explains, under the “current normal” standard, “A GBL is a contractual term and has no ongoing effect after the contract expires. If a proponent wishes to renew or enter into a new EPA, the circumstances at that time would have to be considered when setting the new GBL.”<sup>377</sup> Yet BC Hydro failed to revisit Howe Sound’s GBL << [REDACTED] [REDACTED] >>, even though there was every reason to believe that “normal operating conditions” would have changed.

342. As Howe Sound, BC Hydro, and Mercer all agree, Howe Sound << [REDACTED] [REDACTED] [REDACTED] >><sup>378</sup> However, by September 2001, natural gas prices had fallen back to their pre-

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<sup>374</sup> Switlishoff Second Expert Statement, ¶ 45.

<sup>375</sup> Counter-Memorial, ¶ 367.

<sup>376</sup> Switlishoff Second Expert Statement, ¶ 45.

<sup>377</sup> Dyck Witness Statement, ¶ 66.

<sup>378</sup> Lamarche Witness Statement, ¶¶ 23–25; Dyck Witness Statement, ¶ 39; Memorial, ¶ 204.

crisis levels, and remained low through mid-2002, as data provided by both Mercer and Canada show.<sup>379</sup> Thus, when the agreement between Howe Sound and BC Hydro << [REDACTED] >>, there would have been every reason to believe that it would have been economical for Howe Sound to resume burning natural gas and generating electricity at pre-2000 levels, without the incentive of its market-price arrangement with Powerex. At the very least, under its own articulation of its GBL standard, BC Hydro should have considered and modeled the new conditions. Inconsistently with its own standard, it did not do so.

343. Mr. Dyck anticipates this criticism, for he tries to distinguish the circumstances. He avers that Howe's agreements are unlike an EPA, because the Powerex contract involves << [REDACTED] >> electricity sales, and BC Hydro's EPAs involve << [REDACTED] >> commitments to purchase electricity for a number of years.<sup>380</sup> But Mr. Dyck does not explain why these technical distinctions should matter under the "current normal" methodology, and Mr. Switlishoff explains that they plainly do not.<sup>381</sup>

344. Mr. Switlishoff rejects this rebuttal as contrary to the description of the standard, which does not anywhere distinguish between firm and non-firm electricity, and contrary to Canada's own purported justifications for the "current normal" standard.<sup>382</sup> In terms of both preventing increased arbitrage, and incentivizing only new generation, there is no difference between non-firm and firm electricity, or a one-year agreement and a multi-year agreement.

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<sup>379</sup> See Memorial, at 35, Figure 2; Stockard Expert Report, at 19, Figure 6.

<sup>380</sup> Dyck Witness Statement, ¶ 41.

<sup>381</sup> Switlishoff Second Expert Statement, ¶ 47.

<sup>382</sup> Switlishoff Second Expert Statement, ¶ 47.

345. Regardless of whether the electricity is firm or non-firm, BC Hydro permitted Howe Sound to export electricity it previously had used to meet its own load, and to obtain replacement electricity from BC Hydro, thereby increasing Howe Sound's arbitrage. It allowed such pre-existing generation, previously used to meet load, to receive market price incentives, in subsequent years without analyzing each year whether such incentives remained necessary and whether the generation would otherwise have remained "economically" idle.

346. Particularly in light of the 1989 Generation Agreement that remained in force, which ostensibly obligated Howe Sound to utilize *all* of its self-generation to meet its own load, it is particularly egregious, as a matter of BC self-generator policy, that BC Hydro allowed Howe Sound to continue to export electricity in 2002 that likely would have been economical for Howe Sound to generate for self-supply, without analyzing anew whether such generation remained "economically" idle,<sup>383</sup> as the "current normal" standard required it to do.<sup>384</sup>

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<sup>383</sup> Canada cannot and does not contend that once it has provided incentives for certain self-generated electricity, it must be permitted to continue to provide incentives, in perpetuity, after those incentives expire and a new EPA is negotiated or GBL otherwise set. Like Mr. Dyck testifies, any new EPA or GBL would have to be based on the circumstances at that time, and not the circumstances that justified the original incentive. Dyck Witness Statement, ¶ 66. Indeed, the rationale Canada offers for excluding only new and incremental generation from the GBL is that BC Hydro needs to limit incentives, and only wants to incentivize power that would not otherwise be generated absent the incentive. Here, BC Hydro continued Howe Sound's GBL in subsequent << [REDACTED] >> without ever examining whether that generation would cease to exist (*i.e.*, be idled because it remained uneconomic) without the incentive of the Powerex Agreement. BC Hydro did not follow its "current normal" GBL standard, and acted inconsistently with the professed rationale for that standard.

<sup>384</sup> Perhaps the fact that Powerex retained << [REDACTED] >> of the sales proceeds caused BC Hydro to abandon the methodology it now says it applied, if in fact that methodology existed at the time.

**c. Riverside/Tolko's 2001 GBL**

347. To respond to Canada's comments concerning Tolko, Mr. Switlishoff examined the next mill chronologically for which BC established a GBL — the BCUC's establishment of a 2 MW GBL for Tolko (Kelowna) on 25 October 2001, through BCUC Order G-113-01.<sup>385</sup> Notwithstanding Canada's complaint that Mercer omitted Tolko in its comparisons, Canada provides no analysis of whether Tolko's GBL was computed using the "current normal" standard, nor does Dr. Rosenzweig or Mr. Stockard.

348. Contrary to Canada's suggestion, Mercer welcomes a comparison of Celgar's treatment with that of Tolko. No such comparison was presented in Mercer's Memorial, because there are better comparators under the standards earlier Tribunals have articulated, and these tribunals have decided always to use the best comparators. Tolko is a sawmill, not a pulp mill, and it is a distribution level electricity customer rather than transmission level like Celgar.

349. Nonetheless, Mr. Switlishoff did perform an analysis of Tolko's GBL applying the "current normal" standard, and he concludes that the 2 MW GBL is not consistent with the "current normal" standard because it is based on normal operating conditions during a time frame years earlier than the date on which Tolko approached the Commission to establish its GBL.<sup>386</sup>

350. As Mercer explained in its Memorial, Tolko applied for its GBL on 29 May 2001. In 2000 — the calendar year preceding its application — the mill's monthly average hourly generation was 4.7 MWh, and it used all such electricity to meet its own load. Tolko's load was

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<sup>385</sup> See generally Memorial, ¶¶ 240–47.

<sup>386</sup> Switlishoff Second Expert Statement, ¶ 49.

around 5 MW. The mill's generation levels during the first four months of 2001 were even higher, and also were used exclusively to meet load.<sup>387</sup>

351. Mr. Switlishoff observes that nothing in the record of that proceeding indicates that these generation levels were anomalous, or otherwise not reflective of Tolko's then "current normal" operating conditions. He concludes that a GBL of 4.7 MW would have been consistent with the "current normal" methodology, and that the GBL actually set of 2 MW is inconsistent with the "current normal" standard.<sup>388</sup> Because Tolko's generation level was 4.7 MW, and its GBL was 2 MW, Mr. Switlishoff also notes that its Below Load Access Percentage was 57 percent.<sup>389</sup> Tolko was permitted to access 2.7 MW of power at embedded cost rates, and sell 2.7 MW of power, out of total generation of 4.7 MW.

352. Based on his review of the submissions in that proceeding, and the BCUC's decision, Mr. Switlishoff concludes that neither the parties to that 2001 proceeding nor the BCUC appear to have been guided by any "current normal" GBL determination standard.<sup>390</sup> Indeed, because Tolko was then an electricity customer of the City of Kelowna, and not BC Hydro, and because BC Hydro had, as of 2001, not yet written down its "current normal" standard much less notified it to the BCUC, the BCUC presumably would have been unaware of the standard BC Hydro says it was applying at the time.<sup>391</sup> And neither the Commission nor anyone else in the BC

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<sup>387</sup> Memorial, ¶¶ 242–43.

<sup>388</sup> Switlishoff Second Expert Statement, ¶ 49.

<sup>389</sup> Switlishoff Second Expert Statement, ¶ 50.

<sup>390</sup> Switlishoff Second Expert Statement, ¶ 52.

<sup>391</sup> See Switlishoff Second Expert Statement, ¶ 52.

Government made any effort to determine whether the Commission's approach to setting GBLs was consistent with that of BC Hydro.

353. Finally, Mr. Switlishoff concludes that Tolko's GBL was set more consistently with Order G-38-01's historical usage standard, as the GBL did not include the incremental generation that resulted from Tolko's installation of a new 10 MW steam turbine in April 2000. In allowing Tolko to sell at market prices new or incremental generation resulting from a recently completed investment, the Commission prevented harm to ratepayers resulting from *increased* arbitrage above historical levels, and adhered to its policy that recent and new investment would not be subject to a self-supply obligation. Put another way, Kelowna's other ratepayers, or BC Hydro's ratepayers through the BC Hydro-FortisBC 3808 Agreement, had no continuing entitlement to the rate-mitigating benefits of the short-term load displacement Tolko had provided for a year.<sup>392</sup>

354. The 2001 Tolko GBL, which the Commission then reaffirmed in 2011, after approving the Celgar and Tembec GBLs, and after Order G-48-09, demonstrates that there was no consistently applied "current normal" standard in British Columbia for setting GBLs.

355. The BCUC's subsequent action in 2013 terminating Tolko's GBL, and holding it to a net-of-load standard, likewise fails to show that Canada has not discriminated against Celgar. First, it demonstrates once again that not all self-generators in BC are governed by the same "current normal" GBL standard. In effect, Tolko's GBL now is its load, which is higher than its historical generation levels, and thus inconsistent with the "current normal" standard.

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<sup>392</sup> Switlishoff Second Expert Statement, ¶ 51.

356. Second, the BCUC's termination of Tolko's GBL validates Mercer's contention that the net-of-load standard the Commission applied to FortisBC customers in Order G-48-09 leads to different, and worse, outcomes than the historical usage standard it applied to BC Hydro customers in Order G-38-01. And the fact that the Province eventually treated one small sawmill as restrictively as it treated Mercer's pulp mill does not negate the fact that the Province still afforded other Canadian and third-country pulp mills and self-generators more favorable treatment, in violation of Canada's NAFTA obligations.

357. As discussed above, a State does not immunize itself from discrimination claims by treating one of its own nationals (here, the smallest) poorly, and the rest more favorably than a NAFTA Claimant, just as it does not immunize itself by treating some U.S. parties more favorably than others. The goal of NAFTA — to ensure equality of treatment for investments from other NAFTA countries — is achieved only if Canada is precluded from treating *any* of its national or third-country investors more favorably than Celgar.

**d. Celgar's 2009 GBL**

358. Mr. Switlishoff next turns to BC Hydro's establishment in 2008-09 of Celgar's GBL of 349 GWh/year, embodied in the 2009 EPA and related to provisions in Section 7.4(b), discussed above, that preclude Celgar from selling its below-GBL self-generated electricity not only to BC Hydro but also to any third-party.<sup>393</sup> He concludes that BC Hydro did not follow its

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<sup>393</sup> See *supra* n. 24.

*post hoc* consistent normal methodology in setting Celgar's GBL, identifying multiple inconsistencies.<sup>394</sup>

359. There does not appear to be any dispute as to how BC Hydro determined Celgar's GBL. Starting from the time Celgar approached BC Hydro to sell power in 2008, pursuant to the BioEnergy Phase I power call, rather than from the time Celgar had first approached its own utility, FortisBC, about selling power in mid-2007, BC Hydro landed on calendar year 2007 as Celgar's baseline period. Mr. Dyck looked at Celgar's total generation that year (350.6 GWh/year), compared it to its total load (349.2 GWh/year), and determined that, because Celgar's generation was sufficient to cover its load, the GBL should be set at the level of Celgar's load.<sup>395</sup>

360. Mr. Dyck confirms that he was aware that Celgar had engaged in power sales that year (to NorthPoint and FortisBC pursuant to contracts in place before discussions began with BC Hydro of 23.9 GWh/year, and purchases from FortisBC of 22.6 GWh/year),<sup>396</sup> which he testifies he took into account by "adjusting total generation for the net exports."<sup>397</sup> The formula Mr. Dyck says he used to compute Celgar's GBL thus was Generation - Net Exports.<sup>398</sup>

361. "Net exports" is an odd phrase Mr. Dyck developed to reflect the net difference between Celgar's total annual energy sales and its total annual energy purchases.<sup>399</sup> Thus, in computing the amount of self-generation actually applied to meet load, for Celgar and Celgar

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<sup>394</sup> Switlischoff Second Expert Statement, ¶ 54.

<sup>395</sup> Dyck Witness Statement, ¶¶ 83, 87.

<sup>396</sup> Dyck Witness Statement, ¶ 78.

<sup>397</sup> Dyck Witness Statement, ¶ 87.

<sup>398</sup> Dyck Witness Statement, ¶ 87.

<sup>399</sup> See Dyck Witness Statement, ¶ 83.

alone, BC Hydro's formula bizarrely was  $\text{Generation} - \text{Sales} + \text{Purchases}$ . As Mr. Switlishoff explains, Mr. Dyck's formula was  $\text{Generation} (350.6 \text{ GWh}) - \text{Sales} (22.2 \text{ GWh}) + \text{Purchases} (22.6 \text{ GWh}) = 349 \text{ GWh/year GBL}$ , which is nothing more than the formula for Load.<sup>400</sup> BC Hydro determined the amount of *self-generation* Celgar applied to meet its load *by adding in Celgar's electricity purchases from Fortis BC*. Plainly, Celgar did not self-generate FortisBC electricity.

(i) **BC Hydro Incorrectly Used A Formula For Calculating Load Rather Than Self-Generation Applied to Load**

362. As Mr. Switlishoff explains, Mr. Dyck's GBL formula for Celgar is not consistent with the *post-hoc* "current normal" standard Mr. Dyck and Canada have articulated.<sup>401</sup> That standard is intended to measure "the amount of self-generated energy normally used by the customer to self-supply in the course of normal operations, on an annual basis, as of the time of the negotiations,"<sup>402</sup> and taking into account prior contracts so as not to include generation that would not exist going forward but for the incentives in the contract. It is not a measure of generation. It is not a measure of load. As Canada's own witnesses explain, it is a measure of self-generation actually applied to meet load ("generation-to-load").<sup>403</sup>

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<sup>400</sup> Switlishoff Second Expert Statement, ¶ 58.

<sup>401</sup> Switlishoff Second Expert Statement, ¶ 58.

<sup>402</sup> Counter-Memorial, ¶¶ 364, 367.

<sup>403</sup> Dyck Witness Statement, ¶ 44 ("The goal is to define the amount of self-generated energy normally used by the customer to self-supply under current conditions . . ."); Counter-Memorial, ¶ 367 ("BC Hydro worked with each mill in the context of EPA negotiations to determine the amount of self-generated energy it uses to self-supply in the course of normal operations, on an annual basis, as of the time of the negotiations.").

363. Because a self-generator can either use its self-generation to meet its own load or sell it, and it can meet its own load through a combination of self-generation and electricity purchases, Mr. Switlishoff in his initial report explained there are two equivalent formulae for measuring generation-to-load: (1) Load - Purchases, and (2) Generation - Sales.<sup>404</sup> Canada does not dispute these formulae. BC Hydro in fact used formula (2) in computing Howe Sound's GBL in 2010, as its straightforward spreadsheet formulae reveals.<sup>405</sup> Yet for Celgar, BC Hydro measured load, not generation-to-load, and thus used neither formula.

364. The point can be made very clearly by dissecting the formula used by Mr. Dyck. He starts with generation applied to load (Generation - Sales) but then, bizarrely, for Celgar and Celgar alone, Mr. Dyck adds in Celgar's electricity purchases from FortisBC. BC Hydro determined the amount of **self-generation** Celgar applied to meet its load **by adding in Celgar's electricity purchases from FortisBC**. Plainly, Celgar did not self-generate FortisBC electricity.

365. Canada dances around this fundamental and irreconcilable inconsistency between its stated methodology and the calculations BC Hydro actually applied to Celgar by arguing that "Celgar's GBL reflected its current use of self-generation."<sup>406</sup> But this clearly is not so. In 2007, Celgar actually used its self-generation as follows: (1) it sold 23.9 GWh to FortisBC and NorthPoint, and it used only the remainder, 326.7 GWh, to service its own load.<sup>407</sup> Indeed, the sales to FortisBC and to NorthPoint were not "deemed" sales of electricity that actually flowed to

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<sup>404</sup> Switlishoff Expert Statement, ¶ 190 and n.48.

<sup>405</sup> See Memorial, ¶ 572 and Figure 18.

<sup>406</sup> Counter-Memorial, ¶ 370.

<sup>407</sup> See Reply Annex A.

meet Celgar's own load. These were actual electricity flows onto FortisBC's transmission network that were not used to meet Celgar's load.<sup>408</sup>

366. Canada also contends that "the *ad hoc* sales of Celgar's excess energy thus formed part of the mill's normal operations."<sup>409</sup> But this argument is inconsistent with Mr. Dyck's calculation as well as with the "current normal" methodology. With respect to the standard, "current normal" does not measure "the mill's normal operations," *i.e.*, its total generation, as Canada erroneously contends. Rather, it is intended to measure, in Canada's own words "the amount of self-generated energy *it uses to self-supply in the course of normal operations.*"<sup>410</sup> Electricity Celgar sold to NorthPoint or FortisBC is not electricity Celgar "uses to self-supply."<sup>411</sup>

367. With respect to Mr. Dyck's calculations, as noted above, Mr. Dyck *did* deduct Celgar's sales to NorthPoint and FortisBC, as a part of his adjustment for "net exports." He subtracted Celgar's sales from its total generation, but then added back its purchases. If it was not appropriate to deduct Celgar's sales in this fashion, then what was the purpose of the adjustment for "net exports"?

368. In any event, Celgar's sales to both NorthPoint and FortisBC were not one-off "*ad hoc*" transactions, but periodic sales made pursuant to express contractual arrangements. As Mr.

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<sup>408</sup> See Merwin Second Witness Statement, ¶¶ 24, 27.

<sup>409</sup> Counter-Memorial, ¶ 407.

<sup>410</sup> Counter-Memorial, ¶ 367.

<sup>411</sup> See Switliff Second Expert Statement, ¶ 59 ("I see no justification under the 'current normal' standard for BC Hydro's failure to deduct from Celgar's total generation the full amount of Celgar's electricity to FortisBC and NorthPoint. Indeed, the sales to FortisBC and to NorthPoint were not 'deemed' sales of electricity that actually flowed to meet Celgar's own load. These were actual electricity flows onto FortisBC's transmission network that were not used to meet Celgar's load.")

Merwin explains, moreover, absent the contracts, Celgar would not have generated the electricity. Rather than provide free electricity, Celgar would have [REDACTED] [REDACTED].<sup>412</sup> Celgar thus meets BC Hydro's "current normal" prior contract standard, which asks whether the electricity would be generated but for the contract. The answer is no, and thus such electricity should not have been included in Celgar's GBL. Celgar should have been permitted to continue to sell it, to BC Hydro or a third-party.

369. Indeed, Celgar's sales to NorthPoint and FortisBC were no more *ad hoc* or otherwise different than << [REDACTED] [REDACTED] >>. Both Celgar and Howe Sound made occasional sales to third-parties, pursuant to written contracts, to take advantage of a revenue opportunity provided by those contracts.

370. Mr. Dyck tries a slightly different tack than Canada. He posits that Celgar was using its existing generation "to serve the mill's entire load,"<sup>413</sup> thereby justifying the use of a load-based GBL. But this too is demonstrably untrue. Celgar in 2007 purchased 22.6 GWh of electricity from FortisBC, needed to meet its load.<sup>414</sup> Its existing generation was not sufficient to meet its mill load all of the time, and thus Celgar's self-generation did not "serve the mill's entire load."

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<sup>412</sup> Merwin Second Witness Statement, ¶¶ 27-29.

<sup>413</sup> Dyck Witness Statement, ¶ 70.

<sup>414</sup> Reply Annex A.

371. As Mr. Switlishoff explains, what occurs at a pulp mill on an hourly basis, in real time, is not reflected in total annual data.<sup>415</sup> While the Celgar Mill had in 2007 generated sufficient electricity to meet its load *at most times*, it had never succeeded in doing so *all of the time*.<sup>416</sup> On an hourly basis, in some hours it generated more than its load, and sold the excess to FortisBC or NorthPoint. However, in some hours, it generated less than its load, and covered the shortfall with purchases from FortisBC.

372. As Mr. Switlishoff explains, “on an annual basis, *in every single year* up to and including 2007, which year BC Hydro used as its baseline, Celgar *always* fell significantly short of meeting its total annual load through self-generation, due to the planned and unplanned mill outages, planned and unplanned generator outages, and poor operating performance occurring on a real time, hourly basis.”<sup>417</sup>

373. An examination of hourly data confirms just how far BC Hydro strayed from its professed consistently applied methodology. Mr. Switlishoff analyzed Celgar’s actual performance on an hourly basis in 2007, to make the point with hard data. In 2007, Celgar took some power from FortisBC in 3,239 hours. As there are 8,760 hours in a year, this meant that Celgar did not generate sufficient power to meet its own load 37 percent of the time.<sup>418</sup>

374. In 63 percent of hours in 2007, the Mill generated electricity at or in excess of its load, and in 37 percent of hours it did not generate enough electricity to meet its load. This mattered not to BC Hydro, which improperly fixated on the annual totals. So, in an hour in

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<sup>415</sup> Switlishoff Second Expert Statement, ¶ 57.

<sup>416</sup> *Id.*, ¶ 58. *See also* Reply Annex A.

<sup>417</sup> Switlishoff Second Expert Statement, ¶ 57.

<sup>418</sup> Switlishoff Second Expert Statement, ¶ 57.

which, for example the mill generated 46 MW while its load was only 41 MW, and Celgar sold 5 MW to FortisBC, BC Hydro effectively treated Celgar for GBL purposes as having supplied almost 46 MW to its load, and thus included almost 46 MWh in Celgar's GBL.<sup>419</sup> That is a neat trick, as Celgar's load was only 41 MWh.

375. Celgar *in every single year* had to buy power from FortisBC to meet its load, and it had a firm power purchase agreement in place with FortisBC to do so. The *maximum* annual level of self-generation actually used by Celgar to serve the Mill's load, in 2007 or before, was 326 GWh/year.<sup>420</sup> Yet BC Hydro, with the approval of the BCUC, set Celgar's GBL at 349 GWh/year. Celgar was held to a net-of-load standard, as BCUC Order G-48-09 required, and not the generation-to-load standard required by both Order G-38-01 and even the *post hoc* "current normal" standard. And the fact that Canada's "experts" Dr. Rosenzweig and Mr. Stockard do not even recognize much less address this issue speaks volumes about the breadth, depth, and "independence" of their analyses.

376. To be consistent with BC Hydro's *post hoc* current normal standard on this issue standing alone, BC Hydro should have set Celgar's GBL at 326.7 GWh, year, calculated alternatively as Celgar's 2007 generation minus its sales to FortisBC and NorthPoint (350.6-23.9) or Celgar's 2007 load minus its purchases from FortisBC (349.3-22.6).<sup>421</sup>

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<sup>419</sup> BC Hydro did not use the full 46 MWh, because it capped the GBL at Celgar's load. As Celgar's total generation was 350 GWh, and its load 349 GWh, instead of 46 MWh BC Hydro used  $46 \times (349/350)$ , or 45.87 MWh.

<sup>420</sup> See Reply Annex A.

<sup>421</sup> Switlishoff Second Expert Statement, ¶ 57. See also Reply Annex A.

**(ii) BC Hydro Used An Inappropriate Baseline Year**

377. Mr. Switlishoff also concludes that BC Hydro acted inconsistently with BC self-generator policy and its *post hoc* “current normal” methodology in using calendar year 2007 as Celgar’s baseline year for purposes of determining a GBL.<sup>422</sup>

378. Mr. Switlishoff observes that BC Hydro should have evaluated the “current” period based upon the date on which Celgar *first approached FortisBC* about selling its power — in June 2007 — rather than the date in 2008 on which it approached BC Hydro to participate in its BioEnergy Phase I power call. That would have made 2006 the appropriate baseline year rather than 2007.<sup>423</sup>

379. As noted earlier, BC self-generator GBL policy as has been articulated by the BCUC and the MEM, has never been solely about selling self-generator power to BC Hydro, and it does not apply just in BC Hydro’s service territory. Rather, the GBL defines the self-supply obligation of the self-generator, and thus functions as a limitation on the supplying utility’s obligation to serve.

380. As such, the Commission always has discussed the GBL as a baseline to be negotiated between the self-generator *and its supplying utility*. This policy began with Order G-38-09, in which the BCUC ordered *BC Hydro* to negotiate customer baselines with “Rate Schedule 1821 customers” — that is, *BC Hydro customers*. It was confirmed by the Commission in its 2013 *Kelowna Decision*, in which the BCUC stated that “the notion of a GBL, representing in its most basic form, the load a self-generator must serve, should be tied to an agreement *with*

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<sup>422</sup> Switlishoff Second Expert Statement, ¶¶ 60-61.

<sup>423</sup> See Switlishoff Second Expert Statement, ¶ 61.

*the utility.*<sup>424</sup> And the Commission again reiterated this policy in its most recent decision on the 2013 BC-Hydro - FortisBC PPA requiring FortisBC for the first time to develop and file by 31 December 2014, for Commission approval, a Self-Generation Policy Application, establishing “high-level” principles governing self-generators for its service territory.<sup>425</sup>

381. Canada agrees with Mercer on this point. It admits that “{t}he BCUC has consistently held that any GBL or other arbitrage-preventing mechanism should be tied to an agreement with the customer’s utility.”<sup>426</sup> Canada then goes on to argue that Celgar’s failure to reach agreement on a GBL, or other mechanism to prevent arbitrage with FortisBC, is not Canada’s fault.<sup>427</sup> But Canada ignores the rather obvious fact that BC Hydro stepped into FortisBC’s shoes, and set a GBL for Celgar in Celgar’s 2009 EPA. This GBL not only defined BC Hydro’s energy purchase obligation (which was within BC Hydro’s purview), but also it imposed a self-supply obligation on Celgar, by precluding below-GBL sales to third-parties, to prevent arbitrage (which Canada itself concedes was for FortisBC to resolve with Celgar). Canada’s own argument establishes that BC Hydro overreached in its EPA with Celgar, as ***BC Hydro had no authority to set a self-supply obligation for Celgar.***

382. In this context, although BC Hydro describes its “current normal” methodology as being keyed off the date on which a self-generator approaches BC Hydro for an EPA, this depiction reflects BC Hydro’s practice of computing GBLs (i) for its customers (2) that enter into EPA’s with BC Hydro. Because GBLs can be set by other utilities (and should have been for

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<sup>424</sup> C-21, *Kelowna Decision*, at 20 (emphasis added).

<sup>425</sup> See *supra* n.283.

<sup>426</sup> Counter-Memorial, ¶ 443.

<sup>427</sup> Counter-Memorial, ¶ 443.

Celgar) and by the BCUC, and because there is no requirement to obtain a GBL by first negotiating an EPA with BC Hydro, BC self-generator policy under Order G-38-01 cannot be construed as exclusively keying off the date on which a self-generator first approaches *BC Hydro* seeking an EPA.

383. As explained in detail in the Memorial, shortly after Mercer acquired the Celgar Mill, and began the Project Blue Goose capital investments that would improve pulp mill production and enhance and make more reliable the Mill's electricity generation, Celgar in early 2007 approached FortisBC seeking to sell more of its self-generated electricity to FortisBC.<sup>428</sup> [REDACTED] it was interested in facilitating sales by Celgar to third-parties, and entered into the 2008 PSA to supply Celgar's own load so that Celgar could make sales to third-parties.<sup>429</sup>

384. Celgar thus did what BCUC Order G-38-01 (read as not limited to BC Hydro customers) then required it to do, as the Commission confirmed in the *Kelowna Decision*, and as Canada concedes was the proper course. Celgar approached *its own utility*, FortisBC, in early 2007, prior to completing capital improvements to increase generation, and asked it to facilitate its sales of self-generated electricity. It effectively asked FortisBC to determine its level of access to FortisBC embedded cost electricity, and the level of self-generated electricity it could sell. Celgar's GBL thus should have been set based on the timing of *that* approach, which would have resulted in a GBL based on 2006 data at the latest, when Celgar's total load exceeded its total

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<sup>428</sup> Memorial, ¶ 290; Merwin Witness Statement, ¶ 66. Discussions began early in 2007, but the execution of a Non-Disclosure Agreement in June 2007 led to more formal discussions. *See* C-188, Confidentiality Agreement between Celgar and FortisBC (6 June 2007).

<sup>429</sup> *See* Memorial, ¶¶ 292–94.

generation, and its generation-to-load was only 268 GWh/year.<sup>430</sup> Celgar certainly had no notice that it first needed to approach BC Hydro before attempting to sell its self-generated electricity.

385. The adoption of a 2006 baseline also would have been more consistent with BCUC Order G-38-01, which had required self-generators to continue to self-supply at historical levels, but allowed them to sell at market prices additional electricity resulting from new investments. Celgar's Project Blue Goose was made after Order G-38-01, and thus was a new investment.<sup>431</sup>

386. No legitimate purpose of BC self-generator policy is served by BC Hydro's action in restarting the GBL-setting clock for Celgar, one year later, based on the timing of BC Hydro's power call. BC Hydro's use of a 2007 baseline was not neutral, but penalized Celgar for being a FortisBC customer instead of a BC Hydro customer, and approaching its own utility first, *as Celgar was supposed to do*.

387. Canada cannot contend that BC Hydro's use of a 2007 baseline year was justified by BC Hydro procurement policy to incentivize only new or incremental generation sources. As detailed above, Mercer is not contending that BC Hydro was required to purchase Celgar's electricity — in this case the 81 GWh/year difference between the GBL BC Hydro determined

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<sup>430</sup> See Reply Annex A. Such a GBL effectively would remediate both the generation-to-load inconsistency and the baseline year inconsistency, as it captures the level of Celgar's generation-to-load in a more appropriate baseline year.

<sup>431</sup> Canada seeks to avoid treating Celgar's Project Blue Goose as a new investment, by characterizing Mercer's post-acquisition improvements merely as a return to "normal" operations. For example, Mr. Stockard contends that Celgar's C\$ 27 million Project Blue Goose investment and resulting improvements "should be largely considered as normalization of Celgar operations after being investment constrained financially and by obligations and objectives of bankruptcy trustees." Stockard Expert Report, ¶ 75. But a C\$ 27 million new capital investment, that leads to significant performance improvements, and levels of pulp production and electricity generation the Mill had never before achieved, hardly qualifies as a return to anything historical or normal. Once again, Canada demonstrates that "normal" is a highly malleable concept that BC can define any way to wants to justify its GBL determinations.

(349 GWh/year) and the 268 GWh/year GBL that would have resulted from use of a 2006 baseline. Rather, Mercer contends that instead of conflating BC Hydro procurement policy and BC self-generator policy, BC Hydro could have implemented both, independently.

388. Specifically, BC Hydro could simply have agreed to purchase Celgar's self-generated electricity above a 349 GWh/year baseline based on 2007 data, without establishing any self-supply obligation for Celgar (as this was FortisBC's prerogative). Or, even if it was appropriate for BC Hydro to establish a self-supply obligation for a non-customer, Celgar, it could have done so at the 286 GWh/year level, or some other level established consistently with BC self-generator policy set by the BCUC in Order G-38-01. There is no reason the two baselines — one demarking the point above which BC Hydro wanted to purchase electricity and the other defining the self-generator's self-supply obligation — serving different purposes — have to be the same. And Celgar should have been allowed to sell the difference to third-parties.

389. Canada's inability to acknowledge this "excluded middle" possibility — or otherwise to allow for sales of electricity by self-generators with BC Hydro EPAs to parties other than BC Hydro — stems from BC Hydro's distorted view that any self-generator resource once used to meet load is a BC Hydro resource. BC Hydro's Mr. Dyck expresses this viewpoint bluntly as follows, and Canada adopts it approvingly:<sup>432</sup>

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<sup>432</sup> Counter-Memorial, ¶ 97.

BC Hydro has no interest in paying a customer for electricity that it already self-generates under normal operating conditions. Paying for such “existing” electricity would add nothing to BC Hydro’s resource base, and would merely transfer wealth from BC Hydro and its customers to one self-generator in exchange for nothing in return.<sup>433</sup>

390. As Mr. Dyck makes clear, BC Hydro views Celgar’s first 349 GWh/year of self-generated electricity as part of “BC Hydro’s resource base.” Even though BC Hydro contributed nothing to its installation or operation, even though BC Hydro did not contract for its use through a Load Displacement Agreement or other contract, even though BC Hydro did not agree to purchase such power, and even though Celgar is not a customer of BC Hydro, BC Hydro acts as if Celgar’s 52 MW generator is a BC Hydro resource that BC Hydro is entitled to control to some extent (by compelling Celgar to use it to supply its own load) and thereby benefit from (through reduced takes of PPA electricity by FortisBC). In BC Hydro’s view, it is not Celgar’s resource, it is BC Hydro’s resource. This is an astonishing proposition, and goes to the heart of the instant dispute.

391. When Canada and its witnesses contend that they do not want to “incentivize” existing self-generated electricity, all they mean is that BC Hydro does not want to pay for it. But BC Hydro wants the electricity to remain on its system, just as if it were generated by a BC Hydro resource. It wants the self-generator to use its generation assets to meet its own load. It wants the continuing benefits for its ratepayers arising from the fact that BC Hydro does not have to meet that load using high marginal cost electricity. It just does not want to pay anything for these benefits. It wants to continue receiving something for nothing.

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<sup>433</sup> Dyck Witness Statement, ¶ 43.

392. If BC Hydro had used a baseline year of 2006 for Celgar, based on Celgar's early 2007 approach to FortisBC, Celgar's GBL under the "current normal" methodology would have been much lower than the 349 GWh/year used by BC Hydro. Specifically, using a calendar year 2006 baseline, Celgar GBL would have been 268.2 GWh/year, calculated alternatively as generation minus sales (290.4 - 22.2) or load minus purchases (329.7 - 61.5).<sup>434</sup> Celgar's total generation did not exceed its load that year; accordingly, Hydro's arguments for using load as the basis for Celgar's GBL are inapplicable if 2006 is used as the baseline year.

393. Mr. Switlishoff also observes that even if BC Hydro had properly refused to use the timing of Celgar's approaches to its own utility, FortisBC, for purposes of establishing the appropriate baseline year, reliance upon the first year of operations following the Blue Goose investments and process improvements was inappropriate as one year is not sufficient time to establish the mill's performance. As Mr. Switlishoff states, "{t}he consistency, reliability, and effectiveness of new equipment and processes require a longer time than one-year to establish."<sup>435</sup> Accordingly, Mr. Switlishoff concludes that << [REDACTED] >> would have been more appropriate.<sup>436</sup>

394. If the 2004-06 baseline period had been used (the three years prior to when Celgar first approached FortisBC), then Celgar's GBL should have been set at 266.5 GWh/year. Over the 2005-07 period, Celgar's average generation-to-load was 289.6 GWh/year.<sup>437</sup>

**(iii) BC Hydro Failed To Evaluate The Economics**

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<sup>434</sup> Switlishoff Second Expert Statement, ¶ 61; Reply Annex A.

<sup>435</sup> Switlishoff Second Expert Statement, ¶ 62.

<sup>436</sup> Switlishoff Second Expert Statement, ¶ 62.

<sup>437</sup> See Switlishoff Second Expert Statement, ¶ 62; Reply Annex A.

**Of Celgar's Below-Load Self-Generation**

395. The crux of BC's ostensible "incentivization" policy is BC's desire to pay for, *i.e.* to incentivize, self-generation that would not be built or operated but for the payment, because it would be uneconomic, and not to pay for self-generation that is economic on its own.

396. The legitimacy of this policy, and the inconsistencies in BC's application of its professed policy, are discussed above. But in assessing BC Hydro's consistency in the application of its supposed consistent *post hoc* "current normal" GBL standard, it is important to note that BC Hydro nowhere evaluated the economics of Celgar's generation as of the time the 2009 EPA was being negotiated.

397. In discussing the considerations that influenced the GBL set for Tembec in its 2009 EPA, Mr. Dyck goes to great lengths to show how he considered recent << [REDACTED]

[REDACTED] >><sup>438</sup> The 2008-09 financial crisis originated in the U.S. housing market, and the resulting economic downturn included a deep slump in housing construction, leading to what Mr. Dyck refers to as "the downturn in the {Canadian} forest industry."<sup>439</sup>

398. Sawmills produce not only lumber but also wood chips and hog fuel as by-products. As Mr. Merwin explained, and as Canada's Mr. Stockard confirms, as Canadian sawmills shut down, due to reduced demand for lumber, the available supply of wood chips and hog fuel declined. As supply dropped, prices increased. All pulp mills thus experienced not only

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<sup>438</sup> Dyck Witness Statement, ¶¶ 100, 117.

<sup>439</sup> Dyck Witness Statement, ¶ 100.

hog fuel cost increases but also cost increases for the wood chips they use as the raw material for both pulp production and black liquor/electricity generation.<sup>440</sup> In addition, the downturn caused pulp prices to drop, from US\$ 900 per ADMT in the months of April-June 2008 to around US\$ 648 per ADMT at the end of the year, and US \$ 580 in March-April 2009.<sup>441</sup>

399. Tembec began losing money, and temporarily shut down the Skookumchuck pulp mill, not only ceasing to produce pulp and generate electricity but also laying off workers and impacting the community. << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

>><sup>443</sup>

400. But these deteriorating economic and market conditions were not unique to Tembec. Celgar too was squeezed by rising wood costs and falling pulp prices, and it too was losing money at the time. As Mr. Merwin explained, Celgar's EBITDA was [[ [REDACTED] ]] in the second quarter of 2008, [[ [REDACTED] ]] in Q3, [[ [REDACTED] ]] in Q4, [[ [REDACTED] ]]

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<sup>440</sup> Merwin Witness Statement, ¶ 98 (noting that Celgar's cost for wood chips increased from an average of [[ [REDACTED] ]] in 2006 to an average of [[ [REDACTED] ]] in 2008 — a [[ [REDACTED] ]] percent increase). *See also* Stockard Expert Report, ¶ 41.

<sup>441</sup> Memorial, ¶ 104. *See also* Memorial Figure 6, at 45. Canada's pulp mill expert, Mr. Stockard, agrees that pulp prices dropped dramatically during this period. Stockard Expert Report, ¶ 81.

<sup>442</sup> Dyck Witness Statement, ¶ 106.

<sup>443</sup> Dyck Witness Statement, ¶ 117.



402. BC Hydro thus did not robustly or comprehensively apply its “current normal” standard to Celgar. It failed to gather or evaluate any economic data from the Mill, and thus lacked a sufficient basis to conclude that the 2007 mill generation data on which it relied reflected normal operating conditions *going forward* in light of the much worse economic and market conditions prevalent from mid 2008 through early 2009, when Celgar was negotiating its EPA.

403. This failure undercuts BC Hydro’s use of 2007 as a baseline year for Celgar. 2007 was no more an appropriate baseline for Celgar than it was for Tembec, as it reflected completely different economic and market conditions than those present at the time of the EPA negotiations in the second half of 2008. It is a hallmark of discrimination to consider different factors in setting GBLs for different mills, and to apply different tests and rationales.

404. It is difficult for Mercer to predict how BC Hydro would have approached Celgar’s GBL had BC Hydro known Celgar’s generation then was uneconomic. However, as detailed in the next Section, when BC Hydro faced this issue with Tembec a few months later, it based Tembec’s GBL not on any historical generation data, << [REDACTED]

[REDACTED]

[REDACTED] >>. Mr. Merwin estimates that at <<

[REDACTED] >>, the Celgar Mill would have generated [[ [REDACTED]

[REDACTED] ]].<sup>449</sup> Depending on the proper baseline year, these figures then would have provided Celgar’s GBL under the “current normal” approach used for Tembec.

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<sup>449</sup> Merwin Second Witness Statement, ¶ 29.

**(iv) Celgar Summary**

405. For Celgar, BC Hydro departed from its “current normal” GBL standard by (1) using load rather than generation-to-load as the basis for the GBL, (2) using 2007 and not 2006 as a baseline year, and (3) not considering Celgar’s financial losses as a basis for concluding that historical generation levels therefore would not reflect current conditions going forward. If BC had consistently applied its “current normal” approach to every other comparator, then the measure of damages as noted above would be the GBL Celgar would have obtained had BC Hydro properly applied its methodology. To summarize, these figures, including scenarios analyzed in Mercer’s memorial, are as follows:

**Figure 24**  
**Impact of Just “Current Normal” Inconsistencies**

<b>Departure from Standard</b>	<b>Celgar Revised GBL</b>	<b>Additional Celgar Self-Generated Electricity Available for Sale</b>
use of load rather than generation-to-load <sup>450</sup>	326.7 GWh/yr	22.3 GWh/yr
use of 2007 baseline instead of 2006 <sup>451</sup>	268.2 GWh/yr	80.80 GWh/yr
use of one year baseline instead of three year average <sup>452</sup>	289.6 GWh/yr	59.4 GWh/yr
failure to use 2001 baseline year as per Order G-38-01 <sup>453</sup>	186.1 GWh/yr	162.9 GWh/yr

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<sup>450</sup> See *supra*, ¶. 376.

<sup>451</sup> See *supra*, ¶. 392.

<sup>452</sup> See *supra*, ¶. 394.

<sup>453</sup> See Memorial, ¶ 612.

**e. Tembec's 2009 GBL**

406. Mr. Switlishoff next concludes that BC Hydro did not correctly apply its *post hoc* “current normal” standard in setting an annual average GBL for Tembec (Skookumchuck) of 14 MW (122.64 GWh/year) in Tembec’s 2009 EPA. In contravention of its own supposed standard, BC Hydro treated a large portion of Tembec’s pre-existing generation as economically idle when in fact it was not idle, and actually was being used to meet the mill’s own load.

**(i) BC Hydro Departed From The “Current Normal” Standard By Setting A GBL For Tembec Not Based On The Mill’s Actual Generation-To-Load Usage**

407. In its Memorial, Mercer contended that the primary problem with Tembec’s 14 MW GBL was that this level was lower than the level of self-generation Tembec actually had been using to meet its 26 MW load in recent years, as well as in the months leading up to the EPA,<sup>454</sup> which levels had averaged << [REDACTED] >> MW over the period 2005-2007,<sup>455</sup> and << [REDACTED] >> MW in 2008.<sup>456</sup> The unreasonably low 14 MW GBL — unrelated to Tembec’s historical

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<sup>454</sup> Mercer also took issue with the highly unusual seasonal shaping of Tembec’s GBL. Memorial, ¶¶ 536–38.

<sup>455</sup> In 2005, Tembec generated at an average level of << [REDACTED] >> MW. Memorial, ¶ 517. See also C-112, Tembec Skookumchuck CBL/GBL Analysis (6 April 2009), at 3. In 2006, the level was << [REDACTED] >> MW, and in 2007, << [REDACTED] >> MW. Switlishoff Expert Statement, ¶¶ 154–55; C-163, Skookumchuck Generation - External (Restricted Access) (2006–2011). The three-year average was thus << [REDACTED] >> MW. Under the 1997 EPA, the << [REDACTED] >> 10.8 MW of generation was sold to BC Hydro, meaning that over this three year period, Tembec actually had been using roughly 21.7 MW of self-generated electricity to meet its load. << [REDACTED] >>

>> C-34, Email for Lester Dyck to Leon Cender, Judy Baum, and Matt Steele (15 September 2009).)

<sup>456</sup> Calculated based on actual total generation << [REDACTED] >> kWh, divided by 8760 hours/year, minus << [REDACTED] >> MW. See C-163, Skookumchuck Generation - External (Restricted Access) (2006–2011).

usage of its self-generation to meet load — permitted Tembec to increase its firm energy sales to BC Hydro from the 10.8 MWh volume permitted under the 1997 EPA, to an annual average of << [REDACTED] >> MWh (a << [REDACTED] >> increase), without Tembec making any new or incremental investment in generation assets, or achieving any actual increase in total generation.<sup>457</sup> BC Hydro was providing EPA “incentives” not for “new or incremental generation,” but for existing generation, already on its system, and already being used to meet load, in contravention of virtually every rationale Canada offers for BC self-generator policy.

408. Indeed, Tembec generated no more energy after the November 2009 Commencement Date of its 2009 EPA than it had under its 1997 EPA (if anything, it generated less), yet Tembec was able to increase the energy sold to BC Hydro by << [REDACTED] >>. The following table shows Tembec’s self-generation levels in the years leading up to the 2009 EPA, and in the years following:

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<sup>457</sup> Memorial, ¶¶ 522, 529; C-145, 2009 Tembec EPA, at app. 2.

**Figure 25**  
**Tembec Skookumchuck Total Generation**  
**Before and After 2009 EPA<sup>458</sup>**

Year	Total Generation (GWh)	Average Generation (MW) <sup>459</sup>
2005		
2006		
2007		
2008		
2010 <sup>460</sup>		
2011		

409. Tembec’s increased EPA sales to BC Hydro, at higher prices, plainly did not come from any increased generation. Instead, Tembec’s increased sales to BC Hydro came from increased arbitrage of BC Hydro embedded cost power. Tembec’s incremental sales were made possible by BC Hydro affording Tembec increased access to RS 1823 embedded cost power. Tembec purchased an average of << [REDACTED] >> GWh/year of embedded cost electricity from BC Hydro in the three years before the 2009 EPA took effect, which volume tripled to << [REDACTED] >> GWh/year in 2010, and << [REDACTED] >> GWh/year in 2011.<sup>461</sup> This arrangement was made in apparent violation of the express BCUC Order G-38-01 policy, and MEM policy, which increased

<sup>458</sup> Source: C-163, Skookumchuck Generation - External (Restricted Access) (2006–2011) (“Self-Generation (gross) row); C-112, Tembec Skookumchuck CBL/GBL Analysis (6 April 2009), at 3; Switlshoff Second Expert Statement, ¶ 77.

<sup>459</sup> Total Generation (kWh) / 8760 hours/year / 1000 kWh/MWh.

<sup>460</sup> Tembec’s generation data indicate that the mill was idled from around April 30, 2010 to around July 30, 2010. C-163, Skookumchuck Generation - External (Restricted Access) (2006-2011) (TemData tab).

<sup>461</sup> Memorial at 262, Figure 19.

sales had to come from increased generation, and not increased arbitrage through increased access to embedded cost utility power.<sup>462</sup>

410. Indeed, BC Hydro agreed to purchase more electricity from Tembec, than Tembec even theoretically was capable of transmitting to BC Hydro, as the interconnection point between BC Hydro and Tembec includes a transformer with a maximum capacity below the amount BC Hydro committed to purchase.<sup>463</sup> Although power contracts are based on notional power flows, purchasers typically require that the power they purchase theoretically could be delivered to them.<sup>464</sup> BC Hydro agrees to purchase more power from Tembec than Tembec physically can deliver, yet complains that Celgar could not have sold electricity it could theoretically deliver. Canada's own arguments highlight the discriminatory treatment.

411. BC Hydro simply had agreed to purchase more power from Tembec, at higher prices than under the 1997 EPA, starting at a Firm Energy Price of \$<< [REDACTED] >>/MWh.<sup>465</sup> Moreover, such purchases largely involving "deemed" transactions, in which most of the power actually would stay with Tembec to meet its mill load, of the sort Canada disparages. As noted, Tembec's mill load was around 26 MW. The 14 MW GBL meant that Tembec would supply 14 MW of its 26 MW load with self-generated electricity. The remaining 12 MW would be notionally supplied by BC Hydro at embedded cost rates, but in fact would actually flow from

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<sup>462</sup> Memorial, ¶¶ 530–32.

<sup>463</sup> Switliff Second Expert Statement, ¶ 7 (<< [REDACTED]

[REDACTED] >>) (footnote omitted).

<sup>464</sup> Switliff Second Expert Statement, ¶ 7 ("It is unusual for a utility to permit deemed power flows to exceed the capability of the underlying infrastructure.").

<sup>465</sup> C-145, 2009 Tembec EPA, at app. 3, Schedule A.

Tembec’s own self-generation, with BC Hydro simultaneously selling Tembec embedded cost power to meet the 12 MW of load not covered by the 14 MW GBL at embedded cost rates. This is precisely the type of arbitrage BC Hydro and Canada criticize Celgar for requesting.

412. Tembec’s increased sales to BC Hydro came from increased arbitrage of BC Hydro energy. Under the “current normal” methodology as Canada has articulated it, because Tembec had not installed any new generation capacity, this result is permitted only to the extent that incremental generation Tembec was authorized to sell to BC Hydro otherwise was idle. As Canada consistently declares throughout its Counter-Memorial, BC Hydro does not purchase pre-existing generation; it only purchases new or incremental/idle generation.

413. For Tembec, however, neither BC Hydro nor any of Canada’s experts examined Tembec’s actual generation data to determine if in fact any of its generation capacity actually was idle, economically or otherwise. Instead, BC Hydro afforded Tembec more favorable treatment by abandoning the mill’s actual generation and load data to compute the GBL, << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] >><sup>466</sup>

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<sup>466</sup> Counter-Memorial, ¶¶ 388–89; Stockard Expert Report, ¶¶ 131–33; Switlishoff Second Expert Statement, ¶ 66.

414. Relying on this model alone, and no actual generation data, Canada concludes that “[g]iven the prevailing high hog fuel prices, Tembec would have purchased electricity from BC Hydro at the same rate that it currently purchases under the EPA.”<sup>467</sup>

415. Canada does not dispute Mercer’s original portrayal of any of these facts in its Counter-Memorial, except in two respects. First, Canada objects to Mr. Switlishoff’s original characterization of the steam analysis as (1) being based on Skookumchuck’s << [REDACTED] >>, and (2) using pre-2001 data. After reviewing the documentation cited by Canada, Mr. Switlishoff and Mercer both concede that << [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] >><sup>469</sup>

416. << [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>467</sup> Counter-Memorial, ¶ 395.

<sup>468</sup> See Switlishoff Second Expert Statement, ¶ 64. Mr. Switlishoff had relied upon a statement in the Tembec Justification Report in which BC Hydro stated that “[t]o define the GBL, << [REDACTED] >> C-99, Tembec Justification Report, at 2 of 13. As Tembec had idled that generator in 2001, the language suggested that BC Hydro was relying upon << [REDACTED] >> data. Switlishoff Second Expert Statement, ¶ 65.

<sup>469</sup> Dyck Witness Statement, ¶¶ 107–09.

[REDACTED]

[REDACTED]

[REDACTED] >>

417. Second, after reviewing BC Hydro’s explanation for the seasonal GBL, Mr. Switlishoff and Mercer also concede that the seasonal shaping issue of which Mercer complained involved different GBL-related elections made by Tembec and Celgar such that it raises no discrimination issue separate and distinct from the primary issue concerning the level of Tembec’s GBL and how it was set.<sup>470</sup>

418. Nonetheless, neither the << [REDACTED] >> nor the seasonal shaping issue detracts from Mercer’s basic argument that BC Hydro afforded Tembec more favorable treatment than Celgar, in the form of a much lower relative GBL, and thus a much higher Below Load Access Percentage, that cannot be justified as based on the application of any consistently applied standard or policy. In this case, BC Hydro abandoned reliance on historical generation-to-load data in computing the GBL (without any clear or consistently applied criteria in its *post hoc* “current normal” standard for doing so), and set Tembec’s GBL at a lower level than the mill actually had been using to self-supply, based on a theoretical model using a plant configuration that never existed. As Mr. Switlishoff notes, << [REDACTED]

[REDACTED]

[REDACTED] >><sup>471</sup> This violated Order G-38-01 for

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<sup>470</sup> Switlishoff Second Expert Statement, ¶ 68.

<sup>471</sup> Switlishoff Second Expert Statement, ¶ 66.

the reasons set out in the Memorial, and it also violates Canada's *post hoc* "current normal" GBL standard.

419. Canada's two explanations for these differences in treatment as compared to Celgar do not withstand scrutiny, and thus appear to be little more than a pretext for affording Tembec more favorable treatment in permitting Tembec to engage in increased and thus "harmful" arbitrage.

**(ii) The 1997 EPA Does Not Justify Abandonment of Actual Generation-to-Load Data**

420. Canada's first argument is that "Claimant . . . ignores the fact that, where Skookumchuck had a pre-existing agreement that affected its normal operations, Celgar did not."<sup>472</sup> According to Canada, << [REDACTED]

[REDACTED] >><sup>473</sup> For this reason, Dr. Rosenzweig contends, << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] >><sup>474</sup>

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<sup>472</sup> Counter-Memorial, ¶ 387.

<sup>473</sup> Counter-Memorial, ¶ 389.

<sup>474</sup> Rosenzweig Expert Report, app. 2, at 6.

421. Canada and Dr. Rosenzweig both are mistaken. First, as discussed above, Celgar's generation level at the time of its EPA negotiations *was* affected by prior contracts, with both FortisBC and NorthPoint. Although these were periodic sales, the fact remains that, but for the contracts, Celgar would not have generated the surplus electricity used in those sales. If it had not had agreements with FortisBC and NorthPoint to buy that electricity, Celgar would not have supplied it for free. Instead, [REDACTED], as Mr. Merwin explains.<sup>475</sup> That electricity, like Tembec's and Howe Sound's, was discretionary and Celgar would not have generated it without the financial incentive provided by the brokerage and sales agreements.

422. Second, Canada and its witnesses ignore completely the structure and terms of Tembec's 1997 EPA, purporting to justify BC Hydro's actions based on supposed preexisting "incentives" that simply do not exist. BC Hydro and Canada's experts assume without analysis that all of Tembec's "discretionary generation" was "incentivized," by the 1997 EPA, and thus fail to establish that it was. In fact, it was not.

423. As the Tribunal will recall, the 1997 EPA was negotiated between BC Hydro and Purcell Power Corp., a Tembec predecessor for purposes of that EPA. In that agreement, Purcell had agreed to install a new 14 MW generator and a new hog fuel boiler at Skookumchuck, in exchange for << [REDACTED] >> payments for the << [REDACTED] >> 10.8 MW it generated.<sup>476</sup> The "incentive," in the form of the energy purchase contract, was necessary to help Purcell to pay for

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<sup>475</sup> Merwin Second Witness Statement, ¶ 28.

<sup>476</sup> C-107, 1997 Tembec EPA, § 4.1; Pöyry-54, Letter from Christian Lague, Tembec, to Matt Steele, Key Account Manager, BC Hydro (10 March 2009), at 3 (noting that Tembec invested C\$ 55 million in 2000-01 "to commission a Hog Boiler and to install {a new steam turbine generator} STG2.").

the acquisition and installation of the 14 MW generator, hog fuel boiler, and related capital investments.

424. However, at the time the 2009 EPA was negotiated, Tembec had taken over the 1997 EPA and had already installed, in 2001, a much larger 43.5 MW generator, instead of the 14 MW generator contemplated by the 1997 EPA, as well as the new hog fuel boiler. At the time it was negotiating its 2009 EPA, Tembec was thus in the same situation as Celgar with respect to Celgar's first generator. Tembec had already installed its generation equipment and new boiler, the associated capital costs already were sunk, and no incentive was needed to induce Tembec to install a generator and hog fuel boiler it already had installed and which already was operating.<sup>477</sup> Thus, the 1997 EPA provides no blanket justification for continuing in 2009 any incentives contained in the 1997 EPA.<sup>478</sup>

425. As the "current normal" methodology requires, previously installed generation used to meet load had to be included in Tembec's GBL, unless it was wholly or partly idle.

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<sup>477</sup> See Switliff Second Expert Statement, ¶ 71 (Tembec and BC Hydro "conflate{d} two issues that should properly be kept separate: <<

[REDACTED] >>)

<sup>478</sup> BC Hydro itself has elsewhere recognized that, where an initial EPA or LDA compensates a self-generator for installing its generation capacity, any follow-on EPA does not require an incentive to cover that sunk investment. In its 2013 Integrated Resource Plan, the successor to its Long Term Resource Plans, BC Hydro stated its expectation that it would renew about 50 percent of its then-existing bioenergy EPAs. It also noted that the incentive structure of those renewed agreements could change: "Due to the fact that these are existing projects where the IPP's {Independent Power Producer's} initial capital investment has been fully or largely recovered over the initial term of the EPA, BC Hydro expects to be able to negotiate a lower energy price." C-298, BC Hydro, 2013 Integrated Resource Plan (November 2013), Chapter 4, at 4-15.

Under BC Hydro's GBL terminology, as of the 2009 EPA negotiations, Tembec's generation was all pre-existing generation and not new and incremental generation. No incentive was necessary in 2009 to get Tembec to install a turbine generator and a hog boiler it already had installed in 2000-01.

426. Moreover, the 1997 EPA never incentivized *all* or even most of Tembec's generation, nor were its incentives in any way related to the thermal balance requirements of the mill. As noted, in the 1997 EPA, Purcell had agreed only to install a 14 MW generator, and to sell the first 10.8 MW of self-generation to BC Hydro. When Tembec took over from Purcell in 2001, *and with no additional "incentives" from BC Hydro*, Tembec, on its own, decided instead to install a 43.5 MW generator.<sup>479</sup> If indeed 14 MW reflects the level of non-discretionary generation the mill achieves simply to meet the pulp mill's thermal balance requirement, as BC Hydro agreed with Tembec,<sup>480</sup> then the 1997 EPA incentivized no "discretionary generation" at all. Tembec, like Celgar, installed its discretionary generation capacity on its own.

427. The structure of the 1997 EPA also disproves BC Hydro's unfounded assumptions in attempting to justify the 14 MW GBL. As described above, the 1997 EPA required BC Hydro to pay Tembec only for the << [REDACTED] >> 10.8 MW of electricity it generated (referred to herein as "Tranche 1 Energy"), and BC Hydro was deemed to have purchased that amount (even though it actually flowed to meet Tembec's own load). << [REDACTED]

[REDACTED]

[REDACTED]

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<sup>479</sup> Stockard Expert Report, ¶ 126.

<sup>480</sup> Lester Dyck Witness Statement, ¶¶ 108-09; Counter-Memorial, ¶ 389.

[REDACTED] >> Thus, *the 1997 EPA did not incentivize at all self-generation Tembec was deemed to use to meet its own load.*

428. There is thus no basis whatsoever for BC Hydro's conclusion, in setting Tembec's extraordinarily low 14 MW GBL, that << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] >> This is simply an assumption unsupported by any analysis or evidence.

429. The evidence, in fact, proves otherwise. In every year since at least 2005, and including 2008, the year prior to the 2009 EPA, Tembec << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] >>:



generated electricity Tembec had been using to meet load at issue simply had never been incentivized by BC Hydro, and it was economic on its own (like Celgar's below-load generation).

432. Moreover, as discussed above, it was entirely improper for BC Hydro << [REDACTED]

[REDACTED]

[REDACTED] >> Canada defends the 1997 EPA, which it concedes afforded Tembec more favorable treatment, on the grounds that it was agreed to under a prior legal regime. That argument requires BC Hydro, in the 2009 EPA, totally to have abandoned the 1997 EPA's incentives, which, as demonstrated above, it did not do. << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] >>

**(iii) Supposed Conditions Impacting << [REDACTED] >> Prices Do Not Justify Abandoning << [REDACTED] >> In Favor Of An Unfounded Assumption That The Mill << [REDACTED] >>**

433. BC Hydro's second purported justification for abandoning Tembec's actual generation-to-load data, and reducing its GBL far below what it would have been using such data, is a *force majeure* type argument. << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] >><sup>484</sup> However, Tembec’s actual conduct under the 1997 EPA, which both BC Hydro and Mr. Rosenzweig scrupulously avoid analyzing, disproves this rampant speculation.

434. First, the facts about the shutdown, which Canada omits. On 3 February 2009, Tembec announced it would temporarily idle the Skookumchuck mill, beginning in late February, for a period of six weeks. Tembec also announced the temporary idling of its canal Flats and Elko sawmills and a finger-joint facility. Its press release noted that “[t]hese shutdowns are in response to depressed markets for lumber, pulp and newsprint.”<sup>485</sup> << [REDACTED]

[REDACTED]

>><sup>486</sup>

435. As Mr. Switlishoff explains, the Skookumchuck mill hourly generation data provided by Canada indicate << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] >>

436. This can be seen first in BC Hydro’s exaggerated contentions. Mr. Dyck, for example, begins his explanation of BC Hydro’s reasoning << [REDACTED]

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<sup>484</sup> Rosenzweig Expert Report, at 6 (emphasis added).

<sup>485</sup> Pöyry-53, RISI Press Release (3 February 2009), at 1.

<sup>486</sup> C-34, Email from Lester Dyck to Leon Cender, Judy Baum, and Matt Steele (15 September 2009). *See also* Counter-Memorial, ¶¶ 383, 389; Lester Dyck Statement, ¶ 101.

<sup>487</sup> Switlishoff Second Expert Statement, ¶ 73.

[REDACTED]

[REDACTED] >>:

If Tembec terminated the 1997 EPA and stopped producing power as a result of high fuel costs, << [REDACTED]

[REDACTED] >>

437. But as Mr. Switlishoff explains, this professed concern was totally without basis.<sup>489</sup> To begin with, the mill shutdown as announced was to last but six weeks. It ended around 18 April 2009, and thus lasted seven weeks. The 2009 EPA was executed on 13 August 2009 (some four months after Tembec had resumed operations), and approved by the BCUC on 13 November 2009 (some seven months after Tembec had resumed operations). Mr. Dyck's reliance upon the mill's temporary idling, that had ended four months before the 2009 EPA was signed, as grounds for assuming that the mill would not resume generating any electricity, is absurd on its face.

438. Moreover, even if the Tembec Mill had remained idle, because it could not recover its cash costs of producing pulp, then its electricity consumption would have been << [REDACTED] >><sup>490</sup> Pulp mills do not require their full load of electricity when they are not operating; they require only such electricity as is needed to

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<sup>488</sup> Dyck Witness Statement, ¶ 102.

<sup>489</sup> Switlishoff Second Expert Statement, ¶ 73.

<sup>490</sup> Pöyry-8, Memo from David Keir, BC Hydro, to Lester Dyck *et al*, BC Hydro (8 April 2009), at 3; Dyck Witness Statement, ¶ 100 n.112.

protect the plant.<sup>491</sup> The burden on BC Hydro's other ratepayers of supplying the mill its << [REDACTED] >> would have been insignificant.

439. On the other hand, once pulp prices improved sufficiently for the Mill to reopen (as it did on April 18), then the mill necessarily would resume generating *some* electricity. As Mr. Switlishoff explains, there is no basis whatsoever for Mr. Dyck's concern << [REDACTED] >><sup>492</sup>

440. As Mercer explained in its Memorial, and as Canada does not contest, a kraft pulp mill typically will burn in its recovery boiler all of the black liquor it produces, with the resulting steam production from the recovery boiler setting the floor for the amount of electricity the mill will generate.<sup>493</sup> Black liquor is a by-product of the mill's pulp production, and thus there is essentially no incremental cash cost to a kraft mill from burning black liquor to produce electricity. The mill in fact needs to burn the black liquor to recover the pulping chemicals. Moreover, in BC, black liquor has no alternative uses. If the mill did not burn it, it would have to pay to dispose of it.<sup>494</sup>

441. Irrespective of hog fuel, the Skookumchuck mill thus would have burned all the black liquor it produced, and it would have generated electricity using the resulting steam. (Hog fuel is burned in a separate boiler.) *Even without an EPA with BC Hydro*, Tembec would have burned all its black liquor and avoided the costs of purchasing electricity from BC Hydro to the

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<sup>491</sup> Dyck Witness Statement, ¶ 100 n.112.

<sup>492</sup> Switlishoff Second Expert Statement, ¶ 73.

<sup>493</sup> Memorial, ¶ 80.

<sup>494</sup> See Switlishoff Expert Statement, ¶42; Switlishoff Second Expert Statement, ¶ 73.

extent of the amount of electricity produced from the resulting steam.<sup>495</sup> As Mr. Switlishoff explains, these avoided costs would have far outweighed any minor incremental maintenance costs Tembec would have incurred from running its generator.<sup>496</sup> << [REDACTED]

[REDACTED]  
[REDACTED] >>

442. Additionally, the evidence indicates that BC Hydro's professed concerns about the << [REDACTED] >> on Tembec's "normal" operations also were highly exaggerated, if not entirely misplaced. Canada's Counter-Memorial itself contains no facts supporting BC Hydro's conclusion regarding << [REDACTED]

[REDACTED] >><sup>497</sup> << [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] >><sup>498</sup> Yet Canada offers no evidence supporting this contention. In fact, the very sawmills upon which the pulp mill relied for its raw material, wood chips, depended on Tembec to dispose of their sawmill wood waste (hog fuel) by burning it in their hog boiler and hence generating steam in order to continue operating.

443. Canada also presents no criteria in its depiction of the *post hoc* "current normal" standard to guide decisions concerning when it is appropriate to rely upon historical data and

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<sup>495</sup> Switlishoff Second Expert Statement, ¶ 73.

<sup>496</sup> Switlishoff Second Expert Statement, ¶ 73; Stockard Expert Report, ¶ 32.

<sup>497</sup> See Counter-Memorial, ¶ 389.

<sup>498</sup> Dyck Witness Statement, ¶¶ 115, 117.

when it is appropriate to abandon them in favor of hypothetical models of the electricity that could be generated using steam levels far below those ever utilized at a mill. This too, apparently, is entirely within BC Hydro's discretion, without any defined criteria.

444. << [REDACTED]

[REDACTED] >><sup>502</sup>

445. << [REDACTED]

[REDACTED] >> Tembec is a

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<sup>499</sup> See Counter-Memorial, ¶ 389; Rosenzweig Expert Report, ¶¶ 128–31 (<< [REDACTED] >>); Lester Dyck Statement, ¶ 106 (<< [REDACTED] >>).

<sup>500</sup> Mr. Stockard is wrong when he asserts that BC Hydro performed its own analysis. Stockard Expert Report, ¶135. BC Hydro relied exclusively on Tembec's analysis. BC Hydro did not even have the software necessary to run the model.

<sup>501</sup> Poyry-54, Letter from Chris Lague, Tembec, to Matt Steele, BC Hydro (10 March 2009), at 3 (<< [REDACTED] >>)

<sup>502</sup> *Id.*

diversified forest products company, and it owned and operated two large sawmills in close proximity to its Skookumchuck pulp mill. Tembec’s Canal Flats sawmill was located 45 km from the pulp mill, and its Elko mill, 105 km from the pulp mill.<sup>503</sup> The pulp mill thus had significant, captive sources for hog fuel — the two sawmills would continue to ship all hog fuel to the pulp mill. As Dr. Fox-Penner observes, “To the extent that Tembec has its own captive sources of hog fuel that could be burned in its own hog fuel boilers, its internal generation operations were insulated from hog fuel price changes.”<sup>504</sup> There was no increase in overall cost to the enterprise as a whole.

446. It thus appears that BC Hydro concocted the << [REDACTED]

[REDACTED] >>

447. The conclusive proof is in Tembec’s actual generating behavior — the data on which BC Hydro is supposed to rely in establishing a GBL — which Mr. Dyck, Canada’s experts,

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<sup>503</sup> See C-145, 2009 Tembec EPA, p. 139807, at app. 5–3.

<sup>504</sup> Fox-Penner Expert Report, ¶ 61.

and Canada all fail to analyze. These data show that, << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] >>

**Figure 27**  
**Tembec Monthly Actual Generation Data 2008-09<sup>505</sup>**

Month	Total Self-Generation (kWh)	Average in MW/h <sup>506</sup>
January 2008		
February		
March		
April		
May		
June		
July		
August		
September		
October		
November		
December		
January 2009		
February		

448. Again, all such generation above 10.8 MW presumably must have been “economical,” or else Tembec would not have produced more than its 10.8 MW requirement under the 1997 EPA. And, even if some of this generation had become “uneconomic,” that

<sup>505</sup> See Skookumchuck Generation - External (Restricted Access) (2006–2011).

<sup>506</sup> Computed by dividing Total Self-Generation by the number of hours in each month.

<sup>507</sup> << [REDACTED] >> C-163, Skookumchuck Generation - External (Restricted Access) (2006–2011) (TemData tab).

<sup>508</sup> To be conservative, we used a 28-day month to compute the average even though the mill shutdown on February 24. The average self-generation over 23 days was << [REDACTED] >>.

should not have mattered under the “current normal” standard, just as it did not matter when BC Hydro evaluated Celgar’s generation of around the same time. As long as a mill is generating, BC Hydro’s methodology seems to presume it to be economic. Tembec’s actual generation data, << [REDACTED] >>, simply cannot support a GBL of 14 MW. This likely explains why Canada neither presents nor analyzes any actual generation data for Tembec, while purporting to apply a standard that ostensibly relies upon such data.

449. The sheer absurdity of Canada’s argument becomes even more manifest when one examines the period *after* the temporary idling of the mill from 24 February - 18 April. In the three first full months following the plant’s resumption of operations — May-July 2009 — the Tembec Skookumchuck Mill’s average monthly generation levels << [REDACTED] >>

**Figure 28**  
**Tembec Monthly Actual Generation Data *After* 2009 Shutdown<sup>509</sup>**

Month	Total Self-Generation (kWh)	Average in MW/h <sup>510</sup>
May 2009	[REDACTED]	[REDACTED]
June	[REDACTED]	[REDACTED]
July	[REDACTED]	[REDACTED]

450. In each month after its shutdown, Tembec not only generated the 10.8 MW it was required to provide to BC Hydro, but also it generated a minimum of << [REDACTED] >>

<sup>509</sup> Switlishoff Second Expert Statement, ¶ 73; C-163, Skookumchuck Generation - External (Restricted Access) (2006–2011).

<sup>510</sup> Computed by dividing Total Self-Generation by the number of hours in each month.

[REDACTED] >> This actual behavior contradicts BC Hydro’s unsupported speculation that, absent new and greater incentives, the Skookumchuck mill “may” only generate its required 10.8 MW of electricity. It also shows the falsity of Canada’s argument that “{g}iven the prevailing high hog fuel prices, Tembec would have purchased electricity from BC Hydro at the same rate it currently purchases under the 2009 EPA.”<sup>511</sup> This conclusion cannot be reconciled with the fact that, << [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] >>

451. As Mr. Switlishoff observes:

Tembec’s actual generation data conclusively establish << [REDACTED]  
[REDACTED]  
[REDACTED] >> The hypothetical model provided a pretext for BC Hydro to establish a more favorable GBL than its “current normal” methodology, properly applied, could possibly have allowed.<sup>512</sup>

452. BC Hydro had no factual basis upon which to reject the mill’s actual generation data in favor of an entirely speculative modeling exercise that ignored Tembec’s hog fuel boiler and used a steam level far below anything the mill actually had achieved in any recent year. The mill’s generation capacity that it had been using to meet load was not idle. The mill was generating not only to supply BC Hydro under the terms of the 1997 EPA but also to produce discretionary energy not incentivized by that EPA, and which it was not required to do. Under

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<sup>511</sup> Counter-Memorial, ¶ 395.

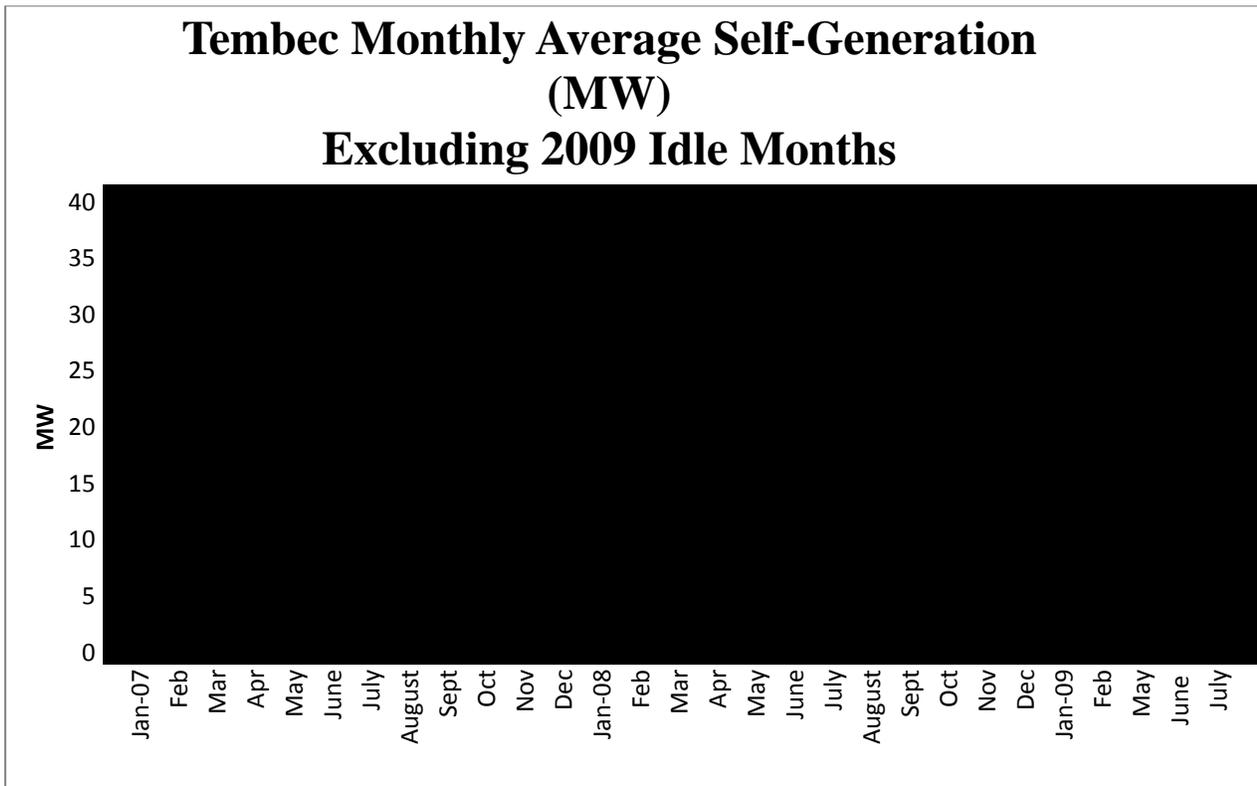
<sup>512</sup> Switlishoff Second Expert Statement, ¶ 76.

any reasonable application of BC Hydro’s professed “current normal” methodology, there is no justification for a GBL of 14 MW. << [REDACTED]

[REDACTED]

[REDACTED] >>:

Figure 29



453. BC Hydro’s “analysis” cannot be reconciled with these data, because BC Hydro applied very little analysis and relied upon no actual data, in contravention of its own *post hoc* GBL standard.

454. << [REDACTED]

[REDACTED]

[REDACTED] >> but there is no evidence at all to support that

assumption. In every single month leading up to the temporary idling and after — months in which hog fuel prices were high — Tembec actually had generated << [REDACTED]

[REDACTED] >><sup>513</sup>

455. The “current normal” GBL standard as articulated by Canada and its witnesses requires all generation previously used to serve load to be included in the GBL, and permits BC Hydro to exclude only new and incremental generation. Here, BC Hydro treated all but 14 MW of Tembec’s generation as economically idle without one shred of evidence grounded in Tembec’s actual generating behavior.<sup>514</sup>

456. The 14 MW GBL was inconsistent with the “current normal” GBL standard, inconsistent with BCUC Order G-38-01, and inconsistent with BC self-generator policy as articulated by the MEM. As Canada explains, MEM had explained in 2008 that “they were ‘{n}ot looking at re-pricing electricity,’” and “‘{n}ot looking for a solution that just pays more for what is already being produced.’”<sup>515</sup> While Canada trots out these non-binding statements of policy that lack the force of law to assert that “Mercer fully understood the anti-arbitrage position

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<sup>513</sup> << [REDACTED] >>

<sup>514</sup> There is one additional problem with BC Hydro’s whole modeling exercise, alluded to above.

<< [REDACTED] >>

<sup>515</sup> Counter-Memorial, ¶ 305 (quoting R-387, Pulp & Paper Task Force on Self-Generation, Draft Meeting Notes (7 February 2008) at 1).

of BC, BC Hydro, and the BCUC,”<sup>516</sup> Canada cannot explain why Tembec was permitted to re-price its electricity, get paid more for what it already was producing, and sell more electricity to BC Hydro solely through increased arbitrage of BC Hydro embedded cost power. BC plainly did not apply its “anti-arbitrage position” consistently, and Tembec was afforded far more favorable treatment than Celgar.

457. In this regard, Mercer stands by its contention in the Memorial that, in its Justification Report filed with the BCUC for the 2009 Tembec EPA, “BC Hydro neither acknowledged nor explained the fact that Tembec’s access to embedded cost power (and its opportunity for arbitrage) would increase under the 2009 EPA, to facilitate {increased} sales of self-generated electricity at market rates. To the contrary, BC Hydro submitted energy flow diagrams to the BCUC as part of its Justification Report for the EPA that appeared to show that Tembec’s access to embedded cost power would decline under the new EPA.”<sup>517</sup>

458. Mr. Dyck ignores and thus does not dispute the first, more important portion of Mercer’s contention. Indeed, there is nothing in the Justification Report disclosing much less justifying Tembec’s *increased* access to embedded cost power and *increased* arbitrage of such power. To the contrary, the Report represents to the BCUC that “{t}o avoid arbitrage, the 2009 EPA requires the establishment of a generator baseline (GBL) which represents the amount of electricity supplied by the generator that had historically been used to partially or completely

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<sup>516</sup> Counter-Memorial, ¶ 307.

<sup>517</sup> Memorial, ¶ 533.

meet the energy demand of the industrial load.”<sup>518</sup> As demonstrated above, the GBL BC Hydro actually established did nothing of the kind.

459. Mr. Dyck instead disputes Mercer’s characterization of BC Hydro’s energy flow diagrams as “disguising the fact that that BC Hydro had agreed to afford Tembec increased access to embedded cost power.”<sup>519</sup> He contends that the energy flow diagram contained << [REDACTED] [REDACTED] >><sup>520</sup> But as the Justification Report itself states, the diagrams “illustrate Tembec’s energy flows under three scenarios: (a) before the 1997 award, (b) after 1997 EPA execution and post-COD, and (c) after the 2009 EPA.”<sup>521</sup> These were not hypothetical scenarios; they were supposed to illustrate power flows before and after the two EPAs so as to justify the GBL. And BC Hydro presented them in a misleading way such that it failed to disclose that the 2009 EPA permitted Tembec to sell more power to BC Hydro only because it afforded Tembec greater access to BC Hydro power to arbitrage.

460. My. Dyck’s response simply begs the question of why BC Hydro did not show << [REDACTED] >>? What was the point of using << [REDACTED] >> instead of recent << [REDACTED] >> (at least for the 1997 EPA post-COD scenarios) and post-2009 expected energy purchases, if not to disguise that Tembec would be allowed to << [REDACTED] >> its purchases of BC Hydro embedded cost power?

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<sup>518</sup> C-99, Tembec Justification Report, at 2 of 13.

<sup>519</sup> Memorial, ¶ 534.

<sup>520</sup> Dyck Witness Statement, ¶ 116.

<sup>521</sup> C-99, Tembec Justification Report, at 2 of 13.

461. The temporary idling of the Tembec Skookumchuck mill *due to poor pulp prices* provided Tembec with a pretext to request, and BC Hydro to provide, a better deal than Tembec had under the 1997 EPA, including a ridiculously low GBL unrelated to Skookumchuck’s actual generation-to-load history. That GBL contravened BCUC Order G-38-01 and it contravened the “current normal” standard, both of which require the use of actual generation data, and prohibit BC Hydro from treating as idle, generation capacity Tembec actually was using to meet its load with no BC Hydro incentive.

**f. Howe Sound’s 2010 GBL**

462. As Mr. Switlishoff concludes, “the GBL calculations performed by BC Hydro for Howe Sound’s 2010 EPA come closest to following the general ‘current normal’ standard as Canada now describes it.”<sup>522</sup> There is a documented, straightforward, transparent GBL calculation, embodied in a spreadsheet.<sup>523</sup> BC Hydro computed generation applied to load, using the formula << [REDACTED] >> Such self-generated electricity had not been used by Howe Sound to meet its load. BC Hydro did not add in Howe Sound’s purchases of energy from BC Hydro. << [REDACTED]

[REDACTED] >><sup>524</sup> And, as Mr. Dyck

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<sup>522</sup> Switlishoff Second Expert Statement, ¶ 81.

<sup>523</sup> Switlishoff Second Expert Statement, ¶ 81. There is no dispute between Mercer and Canada over the methodology used. The spreadsheet was provided in the Memorial at Figure 18 on page 248, and described at ¶¶ 569–72. There are no material differences between Mercer’s description and Mr. Dyck’s description. *See* Dyck Witness Statement, ¶¶ 127–31.

<sup>524</sup> Mr. Dyck explained that this was done because << [REDACTED] >> Dyck Witness Statement, ¶ [REDACTED]

[FOOTNOTE CONTINUED ON NEXT PAGE]

explains, BC Hydro adjusted << [REDACTED]  
[REDACTED] >><sup>525</sup> In short, it looks nothing like the methodology BC Hydro applied to Celgar.

463. Mr. Switlishoff nonetheless observes that if BC Hydro’s objective was to determine mill performance under “normal” conditions, it was not appropriate for BC Hydro <<

[REDACTED] >><sup>526</sup> Mr. Dyck testifies that << [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] >><sup>528</sup>

464. Moreover, Mr. Switlishoff notes that the specific methodology BC Hydro applied in determining Howe Sound’s GBL buttresses Mercer’s contention that the “current normal” standard affords BC Hydro essentially unbounded discretion in selecting the data on which it wants to rely. Nothing in the professed standard compelled BC Hydro to use a << [REDACTED]

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

129. BC Hydro did not apply this test to Celgar, for which it also is true << [REDACTED]  
[REDACTED] >> See Switlishoff Second Expert Statement, ¶¶ 82, 85.

<sup>525</sup> Dyck Witness Statement, ¶ 130 n.139.

<sup>526</sup> Switlishoff Second Expert Statement, ¶ 83.

<sup>527</sup> Dyck Witness Statement, ¶ 128.

<sup>528</sup> Switlishoff Second Expert Statement, ¶ 84.

[REDACTED] >> The use of a << [REDACTED]  
[REDACTED] >> all would equally have been “consistent”  
with the professed standard. The GBL BC Hydro determined ultimately resulted not from the  
application of a well-defined standard, but instead from BC Hydro’s exercise of discretion.<sup>529</sup>

465. Indeed, a comparison of the Tembec and Howe Sound methodologies highlights  
the glaring inconsistencies in how BC Hydro treated even similar circumstances, thereby  
highlighting the lack of any “teeth” in the standard as a limit on BC Hydro’s discretion. << [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] >>

466. Yet Howe Sound too experienced << [REDACTED]  
[REDACTED] >> But instead of embracing these conditions as part of the “normal”  
operations of the plant, BC Hydro instead << [REDACTED]  
[REDACTED] >> Presentation slides discussing the GBL calculation, after the fact in  
August 2011, state that << [REDACTED] >><sup>530</sup>  
In other words, BC Hydro defined “normal” conditions so as to << [REDACTED]  
[REDACTED] >>

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<sup>529</sup> Switlshoff Second Expert Statement, ¶¶ 85-86.

<sup>530</sup> R-201, Howe Sound Pulp and Paper, GBL Overview Presentation to the CBL Governance  
Committee (3 August 2011), at slide 4. *See also* Dyck Witness Statement, ¶ 130 n.139.

**g. Summary**

467. In summary, Mr. Switlishoff concludes that BC has had no uniformly articulated, clearly defined, GBL standard that it consistently applied, even since the issuance in 2001 of BCUC Order G-38-01. At best, BC Hydro had a general “high level” principle, inconsistent with the BCUC’s Order G-38-01 that the Commission has applied in establishing GBLs, that was so non-transparent and general that it afforded BC Hydro virtually unfettered discretion in establishing GBLs for individual self-generators. BC Hydro could and did use historical data at times and theoretical data at other times with no clear standard governing its choice. It could use any << [REDACTED] >> period of its selection, and it used << [REDACTED] >> periods for some and << [REDACTED] >> for others, and calendar years for some, and other periods for others, essentially cherry-picking the data on which it wanted to rely. It could test << [REDACTED] [REDACTED] >>, to determine if the year was “normal.” << [REDACTED] [REDACTED] [REDACTED] >> BC Hydro could pick whatever starting date it wanted. It could consider the mill’s economics, or not. It could negotiate with some, and dictate to others. It could adjust for *force majeure* events, or it could consider them to reflect “normal” conditions. It had the discretion to discriminate, and it did.<sup>531</sup>

468. Canada does not dispute that the *post hoc* “current normal” standard vests BC Hydro with enormous discretion. BC Hydro certainly could have taken a less restrictive approach for Celgar, by measuring generation to load, or using a three year period to determine normal

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<sup>531</sup> Switlishoff Second Expert Statement, ¶ 87.

operating conditions, or even looking at a period prior to Celgar’s Blue Goose Project that increased both pulp production and electricity generation, as the BCUC had done in setting Tolko’s GBL in 2001. The approach BC Hydro chose was not mandated by any statute, regulation, policy, procedure, or *post hoc* “current normal” standard. BC Hydro simply chose to exercise its discretion in ways less favorable to Celgar than it did with others.

469. Likewise, no statute, regulation, policy, procedure, or *post hoc* “current normal” standard required BC Hydro to eschew Tembec’s actual performance data for a hypothetical computation affording Tembec greater access to embedded cost utility power than it had in over a decade to facilitate increased “notional” sales of below-load power by Tembec back to BC Hydro.

470. There were no reviews, internal controls, regulatory oversight, or other controls. And the “current normal” standard has never been approved by the BCUC (in fact it was rejected as too general), or otherwise made binding in any way, shape or form. Canada asks the Tribunal blindly to accept the wide variation not just in outcome but in methodology and arithmetic based on an argument amounting to little more than BC Hydro did the right (the “current normal”) thing. The “current normal” standard on which Canada relies to establish consistent treatment simply is too vague, general, and discretionary to meet the requirements of NAFTA Article 1503(2).

471. To reiterate, Canada was required to

Ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party’s obligations under Chapter 11 (Investment) . . . .

472. Neither Canada nor BC “ensured” anything regarding BC Hydro’s setting of GBLs, and they provided no nominal much less effective “regulatory control,” “administrative

supervision,” or “other measures.” As a result, BC treated Celgar in 2009 less favorably than it treated Tembec Skookumchuck in 1997, Tembec Skookumchuck in 2009, Howe Sound in 2001, Howe Sound in 2010, and even Tolko in 2001.

**V. CANADA HAS VIOLATED ITS OBLIGATIONS UNDER NAFTA ARTICLE 1105(1) BY DENYING MERCER FAIR AND EQUITABLE TREATMENT IN ACCORDANCE WITH INTERNATIONAL LAW**

473. Finally, Canada breached its obligations under NAFTA Article 1105 by denying Mercer the Minimum Standard of Treatment under customary international law. Specifically, BC Hydro and the BCUC failed to accord Mercer the Minimum Standard of Treatment by effectively blindfolding Celgar to the regulatory rules and standards that would apply to Celgar as it attempted to sell its self-generated electricity, and, indeed, failing to establish or apply any transparent, uniform, consistent regime or well-defined rule governing self-generator access to embedded cost utility electricity power. BC Hydro, in its discretion, then treated Celgar more restrictively than all other self-generators, while never fully revealing the supposed reasons, rules or standards that substantiated the treatment Celgar received. BC Hydro assured Celgar that the treatment it was receiving was “fair”, while ensuring that Celgar would have no access to information that could indicate otherwise, including a written articulation of its GBL standard, or public summaries of how other self-generators were treated. Once Celgar began to suspect that BC Hydro was treating it differently, and brought this to the attention of the Ministry of Energy, Celgar was met with non-responsiveness. Concurrently, the BCUC provided no regulatory oversight, required no filing of GBL guidelines, avoided requests that it analyze and compare BC Hydro’s treatment of different self-generators, and otherwise made no effort to ensure fair and

consistent treatment. Canada’s treatment of Celgar has been non-transparent, unjust, unfair and idiosyncratic, arbitrary and discriminatory, in violation of the protections Article 1105 affords.<sup>532</sup>

474. In response to Mercer’s claims, Canada presents a three-pronged defense. First, as regards the applicable standard, Canada argues that Article 1105 encompasses an “objective standard”<sup>533</sup> that requires acts of an “egregious and shocking” nature,<sup>534</sup> and that Mercer “submits no evidence of state practice or *opinio juris*” concerning the evolution of the standard since the time of the *Neer* decision in 1926.<sup>535</sup> Second, as regards the discriminatory, non-transparent, arbitrary and idiosyncratic determination of Celgar’s GBL, Canada argues that the Minimum Standard of Treatment does not include any State obligation to act transparently, or to refrain from acting discriminatorily, arbitrarily, unjustly or idiosyncratically.<sup>536</sup> Should the Tribunal determine that the minimum standard does encompass such obligations, however, Canada claims that its defenses to Mercer’s Article 1102 and 1103 claims are applicable to Mercer’s Article 1105 discrimination claims,<sup>537</sup> that “BC Hydro provided the Claimant with reasons and . . . {its decision} was not arbitrary,”<sup>538</sup> and that the regulatory actions to which it subjected Mercer cannot “be described as anything other than fair and consistent.”<sup>539</sup> Last, as regards the BCUC’s

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<sup>532</sup> See Memorial, ¶¶ 652–83.

<sup>533</sup> Counter-Memorial, ¶ 456. Notably, Canada provides no support for its assertion that Article 1105 is an “objective standard.”

<sup>534</sup> Counter-Memorial, ¶ 453.

<sup>535</sup> Counter-Memorial, ¶ 464.

<sup>536</sup> See Counter-Memorial, ¶¶ 480, 485, 487.

<sup>537</sup> Counter-Memorial, ¶ 478.

<sup>538</sup> Counter-Memorial, ¶ 485.

<sup>539</sup> Counter-Memorial, ¶¶ 478, 485, 471.

measures, including Order G-48-09, the Tolko GBL, and its approval of Celgar's and other's GBLs, Canada argues that administrative decisions are beyond the scope of Article 1105.<sup>540</sup>

475. Canada's defense fails for three fundamental reasons. First, as in previous arbitrations brought against it,<sup>541</sup> Canada here attempts yet again to elevate as the applicable standard what was articulated by the 1926 *Neer* tribunal, and to mischaracterize as Mercer's own "fabrication" the standard articulated by virtually every NAFTA tribunal since 2001. Canada's recycled argument is unsound, and, if adopted, would reduce the Minimum Standard of Treatment under Article 1105 to meaninglessness. As such, every NAFTA tribunal, save one, has rejected it.

476. Second, when applying its antiquated standard to the specific measures to which Mercer has objected, Canada's approach amounts to little more than ignoring all evidence of BC's arbitrary, non-transparent, discriminatory and unjust treatment of Celgar, while asserting that its treatment of Mercer should be accorded enormous deference.<sup>542</sup> British Columbia's measures go well beyond the bounds of permissibility, even under the standard Canada itself proffers in its Counter-Memorial. The deference for which Canada so zealously argues must be rejected; it leaves foreign investors with no protection from the unfair and inequitable conduct against which Article 1105 was meant to guard.

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<sup>540</sup> Counter-Memorial, ¶ 489.

<sup>541</sup> CA-68, *S.D. Myers Inc. v. Canada (UNCITRAL)* (Government of Canada's Counter-Memorial on the Merits, UNCITRAL (5 October 1999), ¶ 289; CA-69, *Pope & Talbot v. Canada (NAFTA)*, UNCITRAL (10 October 2000), Canada's Counter-Memorial on the (Phase Two), ¶¶ 258, 261, 266, 309 ("*Pope & Talbot II (NAFTA)*"); CA-66, *Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada (NAFTA)*, ICSID Case No. ARB (AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) (van Houtte, Janow, Sands) ("*Mobil*"), ¶ 126.

<sup>542</sup> Counter-Memorial, ¶¶ 457, 461.

477. Third, Canada mischaracterizes Mercer's Article 1105 claim as a denial of justice claim against BCUC decisions when, in fact, Mercer has made no such claim, in form or in substance. Mercer claims that Canada breached its Article 1105 obligations through the unfair and inequitable actions of BC Hydro principally — actions which occurred under the broad, highly-discretionary authority to establish GBLs delegated by the BCUC. Mercer's Article 1105 complaints against the BCUC (and the MEM) are not for their decisions, but rather for what they failed to do: (1) establish a binding rule governing self-generation applicable province-wide, (2) review and approve GBL guidelines, (3) require transparency in BC Hydro's GBL determinations, and (4) exercise substantive oversight over BC Hydro GBL determinations, or (5), in the case of the MEM, examine the merits of Celgar's claims of discrimination.

478. After delegating enormous discretion to BC Hydro to determine and assign GBLs to self-generators in British Columbia, the BCUC and the Ministry of Energy failed to exercise their regulatory authority to establish clear and transparent GBL rules or guidelines or otherwise to monitor or oversee BC Hydro's decisions to ensure fair and consistent treatment. Put the other way, they both failed to prevent BC Hydro's arbitrary, discriminatory, non-transparent, and unjust actions. Canada thus has failed to respond to Mercer's Article 1105 claim as it pertains to the BCUC and the Ministry of Energy.

**A. Canada Mischaracterizes The Legal Standard**

**1. The Article 1105(1) Standard Has Moved on from *Neer***

479. Canada’s defense relies largely on its argument that Article 1105 encompasses an “‘objective’ standard” that “requires” acts of an “egregious and shocking” nature to find a breach.<sup>543</sup>

480. Canada does not claim, at least expressly, that the applicable standard is defined by the *Neer* decision. That would hardly be a reasonable position, in light of the consensus view against *Neer* that has emerged,<sup>544</sup> and given that Canada itself has recognized (along with the

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<sup>543</sup> Counter-Memorial, ¶¶ 453, 456. Canada’s use of quotation marks around the term “objective,” presumably invoking a higher authority for its inclusion, is mysterious, because Canada provides no citation and none of the decisions it cites actually uses the term “objective” in that manner. Moreover, Canada’s mere introduction of the term does little to assist the Tribunal in applying the standard.

<sup>544</sup> See CA-40, *Chemtura Corp. v. Government of Canada* (NAFTA), UNCITRAL (Award, 2 August 2010), (Kaufmann-Kohler, Brower, Crawford) (“*Chemtura* (NAFTA)”), ¶ 121 (noting that conduct does not have to be outrageous to violate the minimum standard); CA-13, *Pope & Talbot II* (NAFTA), ¶ 118 (recognizing that the fairness standard is an ordinary one, “without any threshold limitation that the conduct complained of be ‘egregious’, ‘outrageous’ or ‘shocking’, or otherwise extraordinary); CA-15, *Thunderbird* (NAFTA), ¶ 194 (“{T}he minimum standard should not be rigidly interpreted and it should reflect evolving international customary law.”); CA-4, *Cargill* (NAFTA), ¶ 284 (recognizing the dynamic nature of the minimum standard); CA-1, *ADF Group Inc. v. United States of America* (NAFTA), ICSID Case No. ARB (AF)/00/1, Award (9 January 2003) (Feliciano, deMestral, Lamm), ¶ 179 (“*ADF* (NAFTA)”) (recognizing that customary international law “is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 {sic} when the Award in the *Neer* case was rendered”); CA-54, *Mondev International Ltd. v. United States of America* (NAFTA), ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) (Stephen, Crawford, Schwebel), ¶116 (“To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious”); see also CA-36, *GAMI Investments v. United Mexican States*, UNCITRAL (15 November 2004) (“*GAMI* (NAFTA)”), ¶ 95; CA-39, *Waste Management v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/00/3 (30 April 2004) (“*Waste Management II* (NAFTA)”), ¶ 93.

CAFTA Tribunals have similarly rejected the *Neer* standard. See, CA-37, *Railroad*

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other NAFTA Parties) that the Article 1105 standard has evolved since 1926 to something beyond *Neer*.<sup>545</sup> As the *ADF* tribunal stated:

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*Development Corporation v. Republic of Guatemala* (CAFTA-DR), ICSID Case No. ARB/07/23 (Award, 29 June 2012) (Sureda, Eizenstat, Crawford) (“*RDC* (CAFTA-DR)”), ¶¶ 216–18 (interpreting the minimum standard as incorporated in CAFTA-DR); CA-38, *Teco Guatemala Holdings LLC v. Republic of Guatemala*, (CAFTA-DR), ICSID Case No. ARB/10/23 (Award, 19 December 2013), (“*Teco* (CAFTA-DR)”), ¶¶ 449-55 (rejecting Guatemala’s contention that conduct must be “extreme and outrageous” to violate the minimum standard of treatment); see also CA-35, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2 (Award, 31 October 2012) (Hanotiau, Khan, Williams) (“*Deutsche Bank*”), ¶¶ 419–20 (interpreting BIT but citing *Waste Management II* (NAFTA)). One arbitrator, Stephen Schwebel, takes particular issue with the United States, Canada, and Mexico relying on the *Neer* award “as setting a standard for the interpretation of NAFTA Article 1105.” Schwebel states “[t]he {Neer} Claims Commission was an international tribunal. Why should its terse, barely reasoned opinion — which examines no State practice at all — be the fount of customary international law as respects what is an international delinquency, while the judgments of contemporary international tribunals do not influence the content of customary international law in that regard? How is it that the governments of these States in their pleadings in the International Court of Justice invoke prior judgments of the Court, and, if my recollection is correct, awards of international arbitral tribunals, but hold them of no account in the evolution of customary international law in the NAFTA Context?” CA-65, Stephen M. Schwebel, *Is Neer Far From Fair and Equitable?*, Int’l Arb. Club, London (5 May 2011), at 557-58 (“Schwebel, *Is Neer Far From Fair and Equitable?*”), ¶¶ 557-58; see also CA-15, *Thunderbird* (NAFTA), ¶ 194 (recognizing that “[t]he content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law” and that the minimum standard is no longer what it was at the time of *Neer*); CA-10, *Merrill & Ring Forestry L.P. v. Government of Canada* (NAFTA), UNCITRAL (Award, 31 March 2010) (Orrego Vicuña, Dam, Rowley) (“*Merrill & Ring* (NAFTA)”), ¶ 204 (noting that “[n]o general rule of customary international law can thus be found which applies the *Neer* standard, beyond the strict confines of personal safety, denial of justice and due process”).

<sup>545</sup> See CA-1, *ADF* (NAFTA), ¶ 179; see also CA-65, Schwebel, *Is Neer Far From Fair and Equitable?*, (“Apparently {Canada} no longer contends that {the *Neer* standard} is ‘frozen in amber’; it accepts that what may be seen in 2011 as egregious may differ from the perception of 1926.”), at 557; CA-43, OECD, “Fair and Equitable Treatment Standard in International Investment Law,” September 2004, at 11–12 (quoting Canada’s second submission in the *ADF*: “Canada’s position has never been that the customary international law regarding the treatment of aliens was ‘frozen in amber at the time of the *Neer* decision.’ Obviously, what is shocking or egregious in the year 2002 may differ from that which was considered shocking or egregious in 1926.”).

{I}t is important to bear in mind that the Respondent United States accepts that the customary international law referred to in Article 1105(1) is not “frozen in time” and that the minimum standard of treatment evolves. The FTC Interpretation of 31 July 2001, in view of the United States, refers to customary international law “as it exists today”. It is equally important to note that Canada and Mexico accept the view of the United States on this point even as they stress that ‘the threshold {for violation of that standard} remains high.’ Put in slightly different terms, what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 {sic} when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.<sup>546</sup>

481. Doing its best not to rely expressly on *Neer*, Canada instead turns to the *Glamis Gold v. United States* decision, which provides that striking word-pairing, “egregious and shocking.”<sup>547</sup> But this puts Canada in a difficult position. The *Glamis* formulation of the Article 1105 standard is convenient to Canada’s position, but that formulation depends entirely on the *Glamis* tribunal’s conclusion that absent “sufficient evidence to establish a change in the custom {of State practice}, the fundamentals of the *Neer* standard thus still apply today.”<sup>548</sup>

482. Canada thus strives to have it both ways. Canada recognizes, if only tacitly, that the Article 1105 standard has evolved since *Neer*, but Canada also claims, via *Glamis*, that the standard just has not evolved that much. Under Canada’s formulation, then, the standard of Article 1105 would be *Neer*, more or less.

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<sup>546</sup> CA-1, *ADF* (NAFTA), ¶ 179.

<sup>547</sup> Counter-Memorial, ¶ 458.

<sup>548</sup> CA-22, *CA-22, Glamis Gold, Ltd. v. United States of America* (NAFTA), UNCITRAL (Final Award, 8 June 2009) (Young, Caron, Hubbard) (Redacted version) (“*Glamis Gold*, (NAFTA)”), ¶22.

483. Attempting to resurrect *Neer* is not new for Canada (or for the other two NAFTA parties). As one author describes it, the effort to bring back the *Neer* standard began as a simple rumor:

{T}ogether the United States, Canada and Mexico would start a rumour. It would involve an uncorroborated statement that the 1926 *Neer v. Mexico* decision represents the customary international law minimum standard of treatment. Such statement would subsequently be disseminated to a wide international investment law audience, whereby the *Neer* case would be circulated again as representing the one and only minimum standard. ***Whether we call it gossip, a fabrication, a scandal, or just bad law, the effect is remarkable and far-reaching.***<sup>549</sup>

484. Canada has perpetuated this rumor in numerous arbitrations, including *SD Myers*<sup>550</sup> and *Pope & Talbot*.<sup>551</sup> Canada's arguments in the *Pope & Talbot* arbitration are particularly helpful in understanding Canada's persistence in attempting repeatedly to convince arbitration tribunals to follow the *Neer* standard. As described by one scholar,

Canada argued {in *Pope & Talbot*} that the “test in *Neer* was applied consistently by the United States-Mexico Claims Commission” and “other international bodies.” In support of the former contention, Canada cited *Faulkner*, *Chattin*, *Roberts*, and *Way*. As noted above, the *Chattin* case narrowed the *Neer* decision to cases involving a denial of justice case; *Roberts* employed a more liberal standard based on the ordinary standards of civilisation; and *Faulkner* only relied on *Neer* to reinforce the notion that international delinquency is measured by international rather than domestic standards. The only case that applied *Neer*-like language was in the *Way* case, which involved a denial of justice. In regard to the latter contention, Canada relied on the *Chevreau* case and *Amco Asia v. Indonesia* case, where neither case cited *Neer* nor relied on the *Neer* standard to define the minimum standard of treatment. It is doubtful therefore that the *Neer* case “continues to be the seminal statement on the meaning of the minimum

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<sup>549</sup> CA-67, Heather L. Bray, *The Neer Rumour*, 25 HAGUE Y.B. INT'L L. 1, 202 (2012) (“Bray, *The Neer Rumour*”).

<sup>550</sup> CA-68, *S.D. Myers v. Canada* (NAFTA), UNCITRAL (5 October 1999), Canada's Counter-Memorial on the Merits, ¶ 289 (“*S.D. Myers*, (NAFTA)”).

<sup>551</sup> CA-69, *Pope & Talbot II* (NAFTA), ¶¶ 258, 261, 266, 309.

standard.”<sup>552</sup>

485. In short, what Canada accomplishes in this case is a presentation of the same argument that it has tried (without success) in numerous other cases. The Tribunal here likewise should reject Canada’s attempts to resurrect the *Neer* standard in any shape or form.

**2. Tribunals May Turn to Relevant Jurisprudence to Inform Their Understanding of Customary International Law**

486. NAFTA’s baseline of treatment under customary international law instead is articulated in Article 1105(1), as later clarified by the NAFTA Free Trade Commission, and as expounded in over 20 years of NAFTA (and, more recently, CAFTA) Tribunal Decisions. Article 1105(1) provides that each Party “shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

487. When presented with a claim alleging a violation of Section 1105(1), a NAFTA tribunal therefore must determine how to ascertain whether treatment of an investment by a State has violated the customary international law standard. Hence, the decisions of NAFTA and CAFTA tribunals on Minimum Standard of Treatment claims — both before and after the 2001 Commission Interpretation Notes — seek to identify and articulate the Minimum Standard of Treatment under customary international law. NAFTA and CAFTA Tribunals, like investment treaty tribunals for the last fifty years, have sought to analyze relevant protections by looking to (i) the text of the Chapter, (ii) prior decisions under Chapter 11 or similar protections under other

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<sup>552</sup> CA-67, Bray, *The Neer Rumour*, at 212 (quoting *Pope & Talbot*, Canada Counter-Memorial, ¶ 266) (citations omitted).

investment treaties, (iii) scholarly discussions of investment protections, and (iv) other sources, to ascertain the relevant international law protections.

488. Canada takes umbrage at Mercer’s observation that the minimum standard of treatment has evolved, as evident in the relevant jurisprudence, to encompass protections against (1) discriminatory, (2) arbitrary, (3) grossly unfair, unjust or idiosyncratic, or (4) non-transparent treatment, where the standard can be breached with a single act or in a cumulative manner involving more than one of these types of impermissible treatment.<sup>553</sup> According to Canada, such an observation is devoid of value unless accompanied by “evidence of State practice and *opinio juris*.”<sup>554</sup>

489. In light of the reality that investment tribunals do, in fact, use prior decisions to determine the contours of customary international law, Canada charges that judicial decisions cannot make customary international law.<sup>555</sup> This is a sound observation, but one that betrays the sophomoric nature of Canada’s argument. To suggest that a tribunal cannot turn to relevant jurisprudence to inform its understanding of the specific parameters of customary international law, is to deny the very realities of the development and determination of international law that Lauterpacht — to which Canada only partially cites — himself recognizes.

490. Canada selectively quotes Lauterpacht as stating that “{d}ecisions of international courts are not a source of international law . . . {t}hey are not direct evidence of the practice of

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<sup>553</sup> Memorial, ¶ 650.

<sup>554</sup> Counter-Memorial, ¶ 466. It is unclear from Canada’s argument what (if anything) would satisfy it by way of “proof” of the standards of international law necessary to demonstrate a claim under 1105(1).

<sup>555</sup> Counter-Memorial, ¶ 465.

States or of what States conceive to be the law.”<sup>556</sup> The first set of Canada’s ellipses excised the words “in that sense” — an important excision, as Lauterpacht was comparing the import of international court decisions to that of municipal courts, explaining that the decisions of the latter are *direct* (as opposed to *subsidiary*) evidence of international custom.<sup>557</sup> What Lauterpacht goes on to clarify, in the next page of text (of which Canada only revealed two phrases), is that while international tribunal decisions may not be direct evidence of international law, “[t]hey state what the law is.”<sup>558</sup> Therefore, contrary to Canada’s contention, Lauterpacht stands for the proposition that international tribunal decisions indeed constitute a critical source of, and are largely identical with, the rules of international law.<sup>559</sup>

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<sup>556</sup> Counter-Memorial, ¶ 465 (quoting RA-21, Lauterpacht, Sir Hirsch, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* (Rev. ed. 1958)), at 20-21.).

<sup>557</sup> *See* RA-21, Lauterpacht, at 20 (“The authority . . . of decisions of international tribunals is in a different category from that of municipal courts. The part played by the latter as a source of international law in the international sphere results from the fact that municipal courts are organs of the State. Their decisions within any particular State, when endowed with sufficient uniformity and authority, may be regarded as expressing the *opinio juris* of that State. When, further, a point of international law is covered by a series of concordant and authoritative decisions of municipal courts of various States, such decisions may properly be regarded as evidence of international custom. In that sense, those decisions are not merely a subsidiary means for determining rules of international law in the sense of Article 38 (4), but also “evidence of a general practice accepted as law” in the meaning of Article 38 (2) of the Statute.”).

<sup>558</sup> RA-21, Lauterpacht, at 21.

<sup>559</sup> What follows — to avoid misinterpretation — is a more complete Lauterpacht quotation:

Decisions of international courts are not a source of international law in that sense. They are not direct evidence of the practice of States or of what States conceive to be the law. International tribunals, when giving a decision on a point of international law, do not necessarily choose between two conflicting views advanced by the parties. ***They state what the law is. Their decisions are evidence of the existing rule of law. That does not mean that they do not in fact constitute a source of international law. For the distinction between the evidence and the source of many a rule of law is more speculative and less rigid***

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491. The International Court of Justice, to which Canada also cites, itself recognizes the role its jurisprudence plays in the determination of international law.<sup>560</sup> In its *Nuclear Weapons*

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***than is commonly supposed.*** Witness the animated, but highly unreal, controversy as to whether judges create the law or whether they merely reveal the rule already contained *in gremio legis*. Witness the indifference with which lawyers are prepared to accept the paradoxical assertion that judges are at the same time docile servants of the past and tyrants of the future. ***The imperceptible process in which the judicial decision ceases to be an application of existing law and becomes a source of law for the future is almost a religious mystery into which it is unseemly to pry.*** We recall the reply of Dürer to Pirkheimer's remark that the Last Supper cannot be painted: "It should not be thought." In fact, the legal profession is not unduly troubled by the phenomenon of the mysterious birth of an authoritative source law out of what is supposed to be no more than evidence of the existing law. It can afford such indifference seeing that the exact definition of the process is of insignificant practical importance.

The position is the same with regard to courts generally, including international tribunals. ***It is of little import whether the pronouncements of the Court are in the nature of evidence or of a source of international law so long as it is clear that in so far as they show what are the rules of international law they are largely identical with it.***

RA-21, Lauterpacht, at 21 (emphasis added).

<sup>560</sup> Cf RA-40, Statute of the International Court of Justice, Art. 38.1.d (includes judicial decisions as a "subsidiary means for determination of the rules of law"). Although judicial decisions are considered "subsidiary means" of proving international law, "the ICJ refers frequently to its own past decisions and most international tribunals make use of past cases as a guide to the content of international law, so it would be a mistake to assume that 'subsidiary' indicated a lack of importance." CA-70, Christopher Greenwood, Outline to Lecture on The Sources of International Law, § 5, available at [http://legal.un.org/avl/pdf/ls/Greenwood\\_outline.pdf](http://legal.un.org/avl/pdf/ls/Greenwood_outline.pdf). Indeed, the International Court of Justice has decided cases of customary international law by basing its analysis on decisions of international tribunals. See, e.g., CA-71, *Land Island and Maritime Frontier Dispute* (El Sal. v. Honduras.; Nicaragua Intervening), 1992 I.C.J. 350 (Sept. 11), at 397–401, 563–65, 589–93, 597, 600–01, 607–09 (considering decisions of international courts and tribunals in deciding an issue of customary international law); CA-72, *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6 (Feb. 3), at 23–25 (basing judgment in part on international judicial decisions); see also CA-73, A. Mark Weisburd, *The International Court of Justice and the Concept of State Practice*, 31 U. Pa. J. Int'l L. 295, 316–20 (2009) (reviewing ICJ cases that rely upon international judicial decisions for a rule of international law).

*Advisory Opinion*, for example, the Court, explaining that “it states the existing law and does not legislate,” echoed Lauterpacht’s observations and clarified that “this is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.”<sup>561</sup>

492. Contrary to the position Canada attempts to advance, it is not only appropriate but also necessary to refer to the jurisprudence of other investment tribunals to assist the Tribunal in its determination of the applicable Minimum Standard of Treatment under customary international law. As elaborated by McLachlan in his treatise on international law,

{There is a convergence} between treaty practice and custom, in which the modern understanding of the content of the customary right is being elaborated primarily through the treaty jurisprudence. As the Tribunal put in *CMS v. Argentina*, “the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule. ***This process of cross-fertilization in the development of the customary standards through the treaty jurisprudence saves general international law from being cast in aspic at some earlier point in time; and saves treaty tribunals from isolation and inconsistency.*** It reflects the fact that the general standards are of their nature evolutionary.” ***The Tribunal in Mondev described this process . . . responding to a submission advanced by Canada that the customary international law standard incorporated into Article 1105 of NAFTA was to be determined by reference to Claims Commission awards of the inter-war years, in particular the Neer case.*** It held: “Secondly, *Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be . . . . Thirdly, the vast number of bilateral and regional investment treaties (more than 2000) almost uniformly provide for fair and equitable treatment of foreign investments, and largely provide for full security and protection of investments. Investment treaties run between North and South, and East and West, and between States in these spheres *inter se*. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal’s view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.” ***It is this “body of concordant practice”***

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<sup>561</sup> CA-74, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), ¶ 18.

***which serves as the central, and defining, feature of modern investment law, and which may in the end provide the most satisfactory explanation for the extensive application of precedent in the recent treaty jurisprudence.***<sup>562</sup>

493. There is, in fact, no NAFTA or CAFTA tribunal that has accepted Canada's position that the Minimum Standard of Treatment can only be proven through state practice and *opinio juris*, without reference to or reliance on investment tribunal decisions examining customary international law.<sup>563</sup>

494. Ironically, Canada is unable to follow its own stated beliefs with respect to what sources can be relied upon to prove a rule of customary international law. Canada itself utilizes investment law jurisprudence to argue its position regarding the import of the Minimum Standard of Treatment.<sup>564</sup> In its now cliché attempt to resurrect *Neer*, Canada cites to three NAFTA tribunal awards, *Cargill*, *Thunderbird* and *Mondev*.<sup>565</sup> Nevertheless, these three tribunals departed from *Neer*. And, from what robust body of evidence concerning State practice and *opinio juris* did they surmise the contents of the “objective” standard as it currently existed then? These tribunals all considered relevant jurisprudence and scholarship to inform their decisions.<sup>566</sup>

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<sup>562</sup> CA-75, McLachlan QC, C., Shore, L. and Weiniger, M, INTERNATIONAL INVESTMENT ARBITRATION (2007), at 20-21 (emphasis added).

<sup>563</sup> See *infra* Figure 30.

<sup>564</sup> See Counter-Memorial, ¶¶ 457–60.

<sup>565</sup> See Counter-Memorial, ¶¶ 459–60.

<sup>566</sup> CA-4, *Cargill* (NAFTA), ¶¶ 268, 281-85 (analyzing NAFTA awards discussing the minimum standard of treatment, including *Waste Management II*); CA-15, *Thunderbird* (NAFTA), ¶¶ 193–94 (citing to NAFTA awards for the proposition that “{t}he content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law”); CA-54, *Mondev* (NAFTA), ¶¶ 105–06 (considering the *Pope & Talbot* decision in its analysis of the minimum standard of treatment).

495. The *Neer* case itself demonstrates the falsity of Canada’s argument. Even the *Neer* Commission did not formulate its characterization of the minimum standard of treatment by analyzing state practice and *opinio juris*; rather, it did so “[a]fter reviewing commentaries by J.B. Moore, De Lapradelle and Politis.”<sup>567</sup> Indeed, the *RDC* tribunal noted the cognitive dissonance inherent in the NAFTA and CAFTA state parties’ insistence on *Neer* as a true articulation of the Minimum Standard of Treatment:

It is ironic that the decision considered reflecting the expression of the minimum standard of treatment in customary international law is based on the opinions of commentators and, on its own admission, went further than their views without an analysis of State practice followed because of a sense of obligation.<sup>568</sup>

As that Tribunal correctly concluded, “By the strict standards of proof of customary international law applied in *Glamis*, *Neer* would fail to prove its famous statement.”<sup>569</sup>

496. Thus recognizing the propriety and necessity of relying upon prior investment tribunal decisions, the *RDC* tribunal, in characterizing a current formulation of the minimum standard of treatment, “refers to and adopts the conclusion reached by the tribunal in *Waste Management II*,” which itself reviewed and surveyed numerous NAFTA arbitral awards.<sup>570</sup> Likewise, the *Merrill & Ring* tribunal, in formulating the evolving standard of the minimum standard of treatment, recognized that the standard must be interpreted in light of all available sources of international law.<sup>571</sup> The *Merrill & Ring* tribunal in particular determined that the

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<sup>567</sup> CA-37, *RDC* (CAFTA-DR), ¶ 216.

<sup>568</sup> CA-37, *RDC* (CAFTA-DR), ¶ 216.

<sup>569</sup> CA-37, *RDC* (CAFTA-DR), ¶ 216.

<sup>570</sup> CA-37, *RDC* (CAFTA-DR), ¶ 219.

<sup>571</sup> CA-76, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Max Plank Institute for Comparative Public Law and International Law, on-line edition, Oxford University Press,

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minimum standard of treatment and the contemporary notions of fair and equitable treatment are one and the same.<sup>572</sup>

497. As a last note, Canada argues that Mercer has failed to “meet its burden”<sup>573</sup> of proving the minimum standard of treatment under customary international law. Canada confuses the factual burden of proof, which Mercer does not dispute that it must carry, with a fictional claimants’ burden to prove what the law is. It is the parties’ responsibility to assist the tribunal with its burden of determining the law.<sup>574</sup> Canada’s argument is mere fabrication, anchored in nothing more than jurisprudential misrepresentation.<sup>575</sup>

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entry on Minimum Standards by Hollin Dickerson, October 2006, ¶ 6 (recognizing that the minimum standard of treatment has developed “through customary international law, judicial and arbitration decisions, and treaties”); CA-10, *Merrill & Ring* (NAFTA), ¶¶ 198–210 (reviewing numerous sources, including judicial decisions and scholarly articles, in defining the contours of the minimum standard of treatment).

<sup>572</sup> CA-10, *Merrill & Ring* (NAFTA), ¶¶ 209–11. As the *Merrill & Ring* tribunal stated: “The situation is . . . one in which the customary law standard has led to and resulted in establishing the fair and equitable treatment standard as different stages of the same evolutionary process. A requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*. In the end, the name assigned to the standard does not really matter. What matters is that the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.” CA-10, *Merrill & Ring* (NAFTA), ¶¶ 209–10.

<sup>573</sup> See Counter-Memorial, ¶ 470.

<sup>574</sup> See CA-36, *GAMI* (NAFTA), ¶¶ 92, 94 (“The challenging task for this Tribunal is to apply these abstractions {of Article 1105(1)} . . . . The duty of NAFTA tribunals is rather to appraise whether and how preexisting laws and regulations are applied to the foreign investor.”); CA-38, *Teco* (CAFTA-DR), ¶¶ 447, 454 (recognizing that it is the tribunal that must “define the applicable standard”).

<sup>575</sup> Of disturbing note is Canada’s willingness to misrepresent the sources it cites for its unsound claim that claimants bear the burden of proving the applicable law. Canada begins by stating, “The burden of proving the existence of a rule of customary international law rests on the party

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that alleges it.” Counter-Memorial, ¶ 463. Canada then partially quotes a 1952 ICJ case: “the Party which relies on a custom of this kind must prove that this custom is established in a manner that it has become binding on the other party.” Counter-Memorial, ¶ 463. Canada’s clear implication is that the “custom of this kind” is a rule of customary international law. Not so. The following is the unedited quotation from the ICJ case:

The second consideration relates to the question of proof. *This Court*, in the Asylum Case (I. C. J. Reports 1950, pp. 276-277), *when dealing with the question of the establishment of a local custom peculiar to Latin-American States, said* : “The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom ‘as evidence of a general practice accepted as law’.”

CA-63, *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, Judgment of August 27, 1952 {1952} I.C.J. Rep. 176, at 200.

The ICJ case thus does not support the proposition that claimants bear the burden of proving the existence of a rule of customary international law. Nevertheless, Canada continues with the same line of misrepresentation, as it then cites to one treatise and declares, “Scholars agree on this principle.” Counter-Memorial, ¶ 463. This one treatise, however, merely cites to the same 1952 ICJ opinion regarding the burden of proving a local custom peculiar to Latin American states. See RA-32, Nguyen, Quoc Dinh, Dallier & Pellet, *Droit International Public*, 6<sup>th</sup> ed. (L.G.D.J. 1999), at 330.

Canada then asserts that “NAFTA tribunals have confirmed the same,” citing the Awards in *ADF*, *UPS*, *Glamis*, and *Cargill*. Counter-Memorial, ¶ 463, n.891. This too is incorrect. The *ADF* Tribunal began its analysis of the evidence presented regarding the minimum standard of treatment by pointing to the *fault of both parties* in demonstrating the parameters of customary international law. See CA-1, *ADF* (NAFTA), ¶ 183. Far from supporting Canada’s position that the minimum standard of treatment can only be proven by evidence of state practice and *opinio juris*, the *ADF* tribunal actually held (noting its agreement with *Mondev*) “that any general requirement to accord ‘fair and equitable treatment’ and ‘full protection and security’ must be disciplined by being based upon State practice and *judicial or arbitral caselaw or other sources of customary or general international law*.” CA- 1, *ADF* (NAFTA), ¶ 184.

The next award that Canada cites is *UPS*. Far from declaring that claimants bear the burden of proving the existence of a rule of customary international law through state practice and *opinio juris*, the cited passage merely speaks to a claimant’s burden in proving the elements of an Article 1102 claim, not, as Canada claims, a burden to prove the existence of a rule of customary

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### 3. The Minimum Standard Of Treatment Under Customary International Law

498. As set forth in Mercer’s Memorial, the standard of fair and equitable treatment under customary international law has evolved to include protections against discriminatory, arbitrary, grossly unfair, unjust or idiosyncratic, or non-transparent treatment, where the standard can be breached with a single act or in a cumulative manner involving more than one of these types of impermissible treatment.<sup>576</sup> These protections are evident in the consensus of views expressed by numerous NAFTA and CAFTA international tribunals.<sup>577</sup> These protections can

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international law. See CA-16, *United Parcel Service of America Inc. v. Government of Canada* (NAFTA), UNCITRAL (Award, 24 May 2007) (Keith, Cass, Fortier) (“*UPS II* (NAFTA)”), ¶¶ 83–84.

Finally, the last two awards Canada cites for support, *Glamis* and *Cargill*, do, in fact, state that claimants bear the burden of proving the existence or contours of a rule of customary international law. See CA-22, *Glamis Gold* (NAFTA), ¶¶ 601–03; CA-4, *Cargill* (NAFTA), ¶ 273. Neither case, however, cites any support for this proposition. Moreover, both *Glamis* and *Cargill* rejected Canada’s claim that the minimum standard of treatment can be proven only through state practice and *opinio juris*. Like the *ADF* tribunal, both the *Glamis* and *Cargill* tribunals recognized that investment tribunal decisions can “serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.” CA- 22, *Glamis Gold* (NAFTA), ¶ 605; see *id.*, ¶ 611 (“The Tribunal therefore holds that it may look solely to arbitral awards — including BIT awards — that seek to be understood by reference to the customary international law minimum standard of treatment, as opposed to any autonomous standard.”); CA-4, *Cargill* (NAFTA), ¶¶ 278, 281–85 (concluding that investment tribunal decisions that examine issues of customary international law — including decisions regarding BITs — can serve as evidence of customary international law and then determining the parameters of the Minimum Standard of Treatment through analysis and application of various NAFTA tribunal decisions, particularly *ADF*, *Mondev* and *Waste Management II*).

<sup>576</sup> See Memorial, ¶¶ 648–50;

<sup>577</sup> See CA-39, *Waste Management II* (NAFTA), ¶ 98 (“the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic . . .”); CA-36, *GAMI*

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also be gleaned from their inclusion in the myriad investment protection treaties in existence across the globe,<sup>578</sup> and the opinions of publicists of international law.<sup>579</sup>

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(NAFTA), ¶ 94 (“Each NAFTA Party must to the contrary accept liability if its officials fail to implement or implement regulations in a discriminatory or arbitrary fashion.”); CA-21, *S.D. Myers* (NAFTA), ¶¶ 262–63 (“The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”); CA-10, *Merrill & Ring* (NAFTA), ¶ 187 (recognizing that good faith, the prohibition of arbitrariness, and discrimination are “to a large extent the expression of general principles of law and hence also a part of international law”); CA-23, *Metalclad* (NAFTA), ¶ 76 (recognizing that Article 1105 includes “the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party”); CA-66, *Mobil*, ¶ 152 (“the fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to section or racial prejudice”); CA-80, *Pope & Talbot Inc. v. Canada*, UNCITRAL (Award in Respect of Damages, 31 May 2002) (Dervaird, Greenberg Q.C., Belman), ¶¶ 63-64 (recognizing that arbitrary actions can violate Article 1105) (“*Pope & Talbot*, Damages”); CA-1, *ADF* (NAFTA), ¶ 191 (same); CA-15, *Thunderbird* (NAFTA), ¶¶ 193–94 (same); *Glamis Gold*, (NAFTA), ¶¶ 22, 616 (recognizing that arbitrary and discriminatory treatment violate Article 1105); CA-4, *Cargill* (NAFTA), ¶ 283–85 (a violation of Article 1105 “may arise in many forms. It may relate to a lack of due process, discrimination, a lack of transparency, a denial of justice, or an unfair outcome.”); CA-38, *TECO* (CAFTA-DR), ¶ 454 (“the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety”); CA-37, *RDC* (CAFTA-DR), ¶ 219 (adopting the formulation of the minimum standard of treatment under customary international law as expressed by the *Waste Management II* tribunal); see also *infra* Figure 30.

<sup>578</sup> CA-54, *Mondev* (NAFTA), ¶ 125 (“In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for ‘fair and equitable’ treatment of, and for ‘full protection and security’ for, the foreign investor and his investments.”).

<sup>579</sup> See generally CA-49, Dumberry, P., THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA (Kluwer Law International, 2013) Case Law on Article 1105 The Substantive Content of Article 1105 (Chapter 3) (identifying protections against discriminatory, arbitrary,

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499. For ease of reference, the following table synthesizes all post-FTC interpretive note NAFTA and CAFTA determinations regarding the contours of the minimum standard of treatment under customary international law. The table below aids in demonstrating the many aspects of convergence amongst the awards, and the limited areas of disaccord.

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grossly unfair, unjust or idiosyncratic, or non-transparent treatment as part of the minimum standard of treatment and collecting scholarly writings on the topic); CA-51, Schreuer, C., Protection against Arbitrary or Discriminatory Measures (Chapter 10), in *THE FUTURE OF INVESTMENT ARBITRATION*, (C.A. Rogers, R.P. Alford eds., 2009), at 183–84, 189–90 (“In a number of cases, tribunals have dealt with the prohibition of unreasonable or arbitrary measures in close conjunction with the fair and equitable treatment standard. This tendency is particularly pronounced with tribunals apply the NAFTA. It may be explained, at least in part, by the fact that the NAFTA does not contain a separate provision on arbitrary or discriminatory treatment.”); CA-48, Newcombe, A. and Paradell, L., Minimum Standards of Treatment (Chapter 6), in *LAW AND PRACTICE OF INVESTMENT TREATIES* (Kluwer Law International, 2009), § 6.10. Discrimination (“discrimination may occur where the state makes an arbitrary or unreasonable distinction between similarly situated investors or investments.”).

Figure 30

**TABLE OF ARBITRATION DECISIONS INTERPRETING MINIMUM STANDARD OF TREATMENT UNDER CUSTOMARY INTERNATIONAL LAW<sup>580</sup>**

Year	NAFTA Arbitral Award	Applies CIL?	Rejects <i>Neer</i> ?	Proof of CIL Through Jurisprudence	Influence of Other Treaties ?	Minimum Standard of Treatment Articulated
2002	<i>Pope &amp; Talbot</i>  (Award on Damages)	Y	Y	Y	Y	Asking whether “the decision by the Tribunal {was} based on an interpretation different from that made by the Commission? At one level this might appear to be so since the Tribunal expressly referred to the fairness elements as being additions to the requirements of the international law minimum and interpreted by Article 1105 to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries without any threshold limitation.”
2002	<i>Mondev</i>	Y	Y	Y	Y	“{T}he question is whether, at an international level, and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to ‘unfair and inequitable treatment’.”

<sup>580</sup> This chart was recreated from a similar chart included in the claimant’s reply in the *RDC v. Guatemala* proceedings. See CA-77, Claimant’s Reply to Respondent’s Counter-Memorial on the Merits, *RDC*, at 168–70. Counsel for Mercer has updated and modified the chart for inclusion here.

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Year	NAFTA Arbitral Award	Applies CIL?	Rejects <i>Neer</i> ?	Proof of CIL Through Jurisprudence	Influence of Other Treaties ?	Minimum Standard of Treatment Articulated
2003	<i>ADF Group</i>	Y	Y	Y	-	“{A}ny general requirement to accord ‘fair and equitable treatment’ and ‘full protection and security’ must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law.” The <i>ADF</i> tribunal would consider conduct that is “grossly unfair or inequitable,” “something more than simple illegality {under domestic law},” or that is “flawed by arbitrariness” to violate the minimum standard of treatment.
2003	<i>Loewen</i>	Y	-	-	-	“Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough” to violate 1105(1). Also quotes standard from <i>Mondev</i> .
2004	<i>Waste Management II</i>	Y	Y	Y	-	“{A}rbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety — as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. {I}t is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”

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Year	NAFTA Arbitral Award	Applies CIL?	Rejects <i>Neer</i> ?	Proof of CIL Through Jurisprudence	Influence of Other Treaties ?	Minimum Standard of Treatment Articulated
2004	<i>GAMI</i>	Y	Y	Y	-	Uses standard found in <i>Waste Management II</i> and notes four pillars
2006	<i>International Thunderbird</i>	Y	Y	Y	-	“For the purposes of the present case, . . . acts that . . . {when} weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.”
2009	<i>Glamis Gold</i>	Y	N	Y	N	“{S}ufficiently egregious and shocking — a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons — so as to fall below accepted minimum standards . . . The idea of deference is found in the modifiers ‘manifest’ and ‘gross’ . . . {and is not additive to that standard}.”
2009	<i>Cargill</i>	Y	Y	Y	Y	A violation of Article 1105 “may arise in many forms. It may relate to a lack of due process, discrimination, a lack of transparency, a denial of justice, or an unfair outcome.”
2010	<i>Merrill &amp; Ring</i>	Y	Y	Y	Y	“{E}xcept for cases of safety and due process, today’s minimum standard is broader than that defined in the <i>Neer</i> case . . . provid{ing} for the fair and equitable treatment of alien investors within the confines of reasonableness. The protection does not go beyond that required by customary international law.”

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Year	NAFTA Arbitral Award	Applies CIL?	Rejects <i>Neer</i> ?	Proof of CIL Through Jurisprudence	Influence of Other Treaties?	Minimum Standard of Treatment Articulated
2010	<i>Chemtura</i>	Y	Y	Y	Y	“In line with <i>Mondev</i> , the Tribunal will take account of the evolution of international customary law in ascertaining the content of the international minimum standard . . . {Regarding} whether the protection granted . . . is lessened by a margin of appreciation . . . . This is not an abstract assessment . . . circumscribed by a legal doctrine about the margin of appreciation of specialized regulatory agencies. It is an assessment that must be <i>conducted in concreto</i> .”
2012	<i>Mobil</i>	Y	Y	Y	Y	Uses standard found in <i>Waste Management II</i> and notes four pillars
2012	<i>RDC</i> (CAFTA-DR)	Y	Y	Y	Y	Uses standard found in <i>Waste Management II</i> and notes four pillars
2013	<i>Teco</i> (CAFTA-DR)	Y	Y	Y	Y	Uses standard found in <i>Waste Management II</i> and notes four pillars

500. Canada’s attempts to discredit Mercer’s articulation of the minimum standard of treatment under customary international law are nothing more than Canada’s insistence on resurrecting *Neer* and the sole modern-day investment law decision to follow it, *Glamis*. However, as the above table reveals, *Glamis* is an outlier. The *Glamis* tribunal itself recognized

as much.<sup>581</sup> This Tribunal thus need not apply or consider its formulation of the *Neer* standard in order to find a violation of the minimum standard of treatment.

501. Moreover, even *Glamis* supports Mercer’s position. While invoking the *Neer* adjectives “egregious and shocking,” the *Glamis* tribunal made clear that the types of conduct it considered to be “egregious and shocking” — and therefore violative of Article 1105 — include “a gross denial of justice, manifest *arbitrariness*, blatant *unfairness*, a complete lack of due process, evident *discrimination*, or a manifest *lack of reasons*.”<sup>582</sup> *Glamis* itself thus joins the other NAFTA and CAFTA tribunals in articulating a test involving the four pillars, and the fact that *Glamis* maintains that the *Neer* standard is still relevant, becomes more a distinction without a difference.

502. The *Glamis* tribunal concluded that the application of the *Neer* standard should be evolutionary: “[I]t is entirely possible that, as an international community, we may be shocked by State actions now that did not offend us previously.”<sup>583</sup> That arbitrary, unfair, discriminatory and unreasoned conduct violates the minimum standard of treatment under customary international law is part of that evolution.

503. Because it cannot rely on its limited view of the *Glamis* decision alone, however, Canada also parades a selection of *Neer*-like words plucked out of all context from three decisions

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<sup>581</sup> See CA-22, *Glamis Gold* (NAFTA), ¶ 8 (“[I]t is our view that the tribunal should indicate its reasons for departing from a major trend of previous reasoning. This reasoning is partially apparent in this Award’s evidentiary approach to the requirement of fair and equitable treatment under Article 1105.”).

<sup>582</sup> See CA-22, *Glamis Gold* (NAFTA), ¶ 22 (emphasis added).

<sup>583</sup> See CA-22, *Glamis Gold* (NAFTA), ¶ 22.

other than *Glamis: Cargill, Thunderbird* and *Mondev*.<sup>584</sup> Canada conveniently ignores the recognition in all of these cases of the four pillars around which investment tribunals have coalesced to articulate the minimum standard of treatment — namely, conduct that is “arbitrary,” “discriminatory,” “non-transparent,” and “idiosyncratic, unfair or unjust.”<sup>585</sup> Thus, the jurisprudence cited by Canada proves Mercer’s case.

**B. Canada’s Treatment Of Mercer Breached Article 1105**

**1. Canada’s Failure to Provide a Stable Regulatory Environment**

504. Canada argues that “Claimant is not entitled to a ‘stable regulatory environment’ under NAFTA Article 1105.”<sup>586</sup> Canada is incorrect. Article 1105 does protect investors from unstable regulatory environments. The one case Canada cites in its favor, *Mobil*, explains as much: Article 1105 provides protection against “changes that give rise to an unstable legal and business environment” to the extent that those changes are characterized as “arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard.”<sup>587</sup>

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<sup>584</sup> See Counter-Memorial ¶¶ 459–60. Canada focuses on the *Neer* or *Neer*-like adjectives of “egregious,” “shocking,” “gross,” “blatant,” “complete,” and “willful.” See Counter-Memorial ¶ 461.

<sup>585</sup> See CA-15, *Thunderbird* (NAFTA), ¶ 194 (recognizing that “acts that ... {when} weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards” violate Article 1105); CA-4, *Cargill*, ¶ 283–85 (a violation of Article 1105 “may arise in many forms. It may relate to a lack of due process, discrimination, a lack of transparency, a denial of justice, or an unfair outcome.”)

<sup>586</sup> Counter-Memorial, § D.1.

<sup>587</sup> RA-29, *Mobil* (NAFTA), ¶ 153.

505. In this respect, the non-transparent, arbitrary, unfair and discriminatory conduct to which British Columbia subjected Mercer by uniquely prohibiting Celgar from all access to embedded cost utility electricity while selling self-generated electricity, and taking from Celgar valuable load displacement services it paid others to provide, violates Article 1105. Indeed, Mercer is not even complaining that BC changed its self-generator regulatory regime over time, Mercer's complaint is more fundamental — that no defined, consistent regime existed at any point in time. BC's GBL regime was so rife with non-transparency and arbitrariness, that there was no semblance of a regulatory environment, much less a stable one. There was no binding rule applicable province wide. There was no written GBL standard or guidelines. There was no disclosure. There was no consistency. The only constant in BC Hydro's GBL determinations was inconsistency. As Mr. Switlishoff explains:

BC has had no uniformly articulated, clearly defined, GBL standard that it consistently has applied, even since the issuance in 2001 of BCUC Order G-38-01. At best, BC Hydro had a general "high level" principle, inconsistent with the BCUC's Order G-38-01, that it purports to have applied in establishing GBLs, that was so non-transparent and general that it afforded BC Hydro virtually unfettered discretion in establishing GBLs for individual self-generators. BC Hydro could and did use historical data at times, and theoretical data at other times, with no clear standard governing its choice. It could use any << [REDACTED] >> period of its selection, and it used << [REDACTED] >> periods for some and << [REDACTED] >> for others, and calendar years for some, and other periods for others, essentially cherry-picking the data on which it wanted to rely. It could test << [REDACTED] >>, to determine if the year was "normal." << [REDACTED] >> BC Hydro could pick whatever starting date it wanted. It could consider the mill's economics, or not. It could negotiate with some, and dictate to others. It could adjust for force majeure events, or it could consider them to reflect "normal" conditions. It had the

discretion to treat some more favorably, and Celgar less favorably, and it did.<sup>588</sup>

506. Canada attempts to characterize its unstable GBL regulatory regime as merely “changing the rules.”<sup>589</sup> As the *Mobil* tribunal points out, “Governments change, policies change { } and rules change. These are facts of life with which investors and all legal and natural persons have to live with.”<sup>590</sup> Mercer agrees. Nevertheless, Mercer never has claimed that Article 1105 prohibits BC from effecting regulatory change. Mercer’s grievance instead is that BC has permitted the persistence of a completely non-transparent, idiosyncratic, and arbitrary regulatory regime — one that had no lacking written rules or standards governing self-generators’ access to embedded cost utility power, and where the BCUC and BC Hydro made arbitrary GBL decisions *ad hoc*, case by case, in a process utterly lacking in transparency.

**2. Canada Violated Article 1105 By Treating Mercer’s Investment In A Non-transparent, Arbitrary, Grossly Unfair, Unjust Or Idiosyncratic, And Discriminatory Manner**

507. Canada’s Article 1105 violations have manifested through the non-transparent regulatory regime that Canada fostered while subjecting Celgar to arbitrary, unjust, unfair and idiosyncratic and discriminatory restrictions on its access to embedded cost utility power and Celgar’s sales of below-load self-generated electricity. Mercer covered the discrimination pillar of the minimum standard in Section IV above, and focuses on the remaining pillars here.<sup>591</sup>

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<sup>588</sup> Switlishoff Second Expert Statement, 87.

<sup>589</sup> Counter-Memorial, ¶ 473.

<sup>590</sup> RA-28, *Mobil*, ¶ 153.

<sup>591</sup> In its response, Canada simply asserts that Celgar failed to provide evidence that BC Hydro’s treatment was grossly unfair, unjust or idiosyncratic. *See* Counter-Memorial, ¶ 487. This is a bit

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508. When, in 2007, Celgar first began exploring opportunities to sell the more reliable, new and incremental electricity resulting from its Blue Goose project investments, it faced a regulatory regime beset with non-transparency and arbitrariness. There was no province-wide binding rule of law — by statute, regulation, rule or otherwise — which governed self-generators and their access to embedded cost utility power while selling their self-generated electricity. The one piece of general guidance that existed at that time, BCUC Order G-38-01, only regulated BC Hydro and the self-generators in BC Hydro’s territory.<sup>592</sup>

509. Given the legal void beyond BC Hydro’s utility service territory, Celgar — following the general notion of BCUC Order G-38-01 that a self-generator should engage with its utility regarding simultaneous electricity purchases and sales — approached its utility, FortisBC, and ultimately entered into a Power Supply Agreement, providing that Celgar would become a full-load customer while selling its self-generated electricity. Celgar could not have known at the time that, in order to protect its generation assets (in order for BC Hydro to set Celgar’s GBL at a lower level, based on Celgar’s pre-2007 generation levels), Celgar would have had to approach BC Hydro instead of its own utility, Fortis BC.

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like Dr. Rosenzweig’s labeling every aspect of Mr. Kaczmarek’s damages model as “speculative,” without providing or analyzing any evidence. The evidence on which Mercer relies, outlined below, speaks for itself.

<sup>592</sup> With respect to Canada’s assertions that its regime was transparent, Counter-Memorial ¶¶ 482–85, Mercer simply asks the Tribunal to review the various general pronouncements to which Canada points, sit with Celgar’s generation and load data provided in Reply Appendix A, and see if the Tribunal can replicate Celgar’s 349 GWh/year GBL applying them. Canada’s own experts did not even attempt any such blind study in which they followed these pronouncements and independently recalculated any GBL BC Hydro set, and for good reason.

510. Around the same time, Celgar reached out to BC Hydro for assistance in the sale and export of its self-generated electricity. BC Hydro’s “guidance” to Celgar was limited to instructing Celgar that its electricity was, in its words, “stranded.”<sup>593</sup> Of course, this was false; Celgar’s self-generated electricity was not stranded, and Celgar was able to export its self-generated electricity for sale in Alberta and the United States through its power broker NorthPoint.<sup>594</sup> Unfortunately for Celgar, BC Hydro’s initial informal attempts to single Celgar out for arbitrary and *ad hoc* restrictions on the export of its self-generated electricity did not end there.

511. The next time Celgar would be subject to British Columbia’s non-transparent, ill defined regulatory regime (and BC Hydro’s exploitation of it) was in the context of the assignment of its GBL for the BioEnergy Phase I Call to Power. Of course, this happened in the highly idiosyncratic context of a *negotiation* over a *regulatory* action that would be applied to Celgar. Indeed, Canada cannot even reconcile its argument that BC consistently applied a uniform GBL standard with its argument that BC Hydro negotiated GBLs. Did BC Hydro rigorously apply a standard, or did it negotiate? Canada cannot seem to make up its mind.

512. The standard-applying-negotiation-process also was non-transparent. As Mr. Merwin explains, “Of course, it was Celgar’s first time negotiating with BC Hydro, and we had no idea what BC Hydro’s unwritten GBL rules and standards might be. *We were negotiating*

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<sup>593</sup> See Merwin Witness Statement ¶ 49.

<sup>594</sup> See Merwin Witness Statement ¶ 50.

*under an invisible standard.*<sup>595</sup> It is idiosyncratic and unfair for negotiations to occur under a rule that only one side knew.

513. Despite the fact that BC Hydro would need to assign a GBL to every BioEnergy Phase I bidder, neither BC Hydro nor the Provincial Government issued any binding guidelines or rules as to how a GBL would be determined. No rules existed regarding the applicable baseline period, how long a period would be considered, how prior sales contracts would be treated, or any of the other countless factors taken into account when calculating a self-generator's GBL. Indeed, to this day, the BCUC has not reviewed or approved any such guidelines. The BC regulatory regime for self-generators lacked a controlling statute or regulation, written guidelines or procedures of any kind, featuring instead *ad hoc* discretionary determinations not subject to any substantive oversight or review. Lacking any provincial guidelines, BC Hydro failed to develop its own written internal standards or procedures to constrain its discretion. The problem was not, as Canada contends, that the rules changed; the problem was that there were no rules.

514. It was in this context that Celgar engaged with BC Hydro regarding the assignment of its GBL. Celgar completed and submitted the requisite GBL forms, with no knowledge regarding the standards and methodologies that BC Hydro would apply to determine Celgar's GBL. Notably, BC Hydro initiated talks regarding Celgar's GBL by suggesting that, contrary to the modest written guidance provided in the BioEnergy Phase I documents, it would be interested in assigning a dynamic net-of-load GBL to Celgar, or purchasing only the electricity that Celgar generated in excess of its load in any given hour.<sup>596</sup>

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<sup>595</sup> Merwin Second Witness Statement ¶ 19.

<sup>596</sup> See Merwin Witness Statement, ¶ 86.

515. BC Hydro eventually backed down from this unique-to-Celgar proposal,<sup>597</sup> inconsistent with the little information it had provided regarding GBLs, but that did nothing to cure the absence of transparency in the GBL determination process. Even if it were possible for Canada’s now proffered “current normal operating conditions standard” to have existed in 2008 (when the standard was not articulated until 2012), such standard was never communicated to Celgar. BC Hydro’s entire GBL determination process was *ad hoc* and non-transparent, providing BC Hydro with virtually unbounded discretion.<sup>598</sup>

516. It is unsurprising that out of this *ad hoc* and non-transparent process results would emerge that were arbitrary, discriminatory, unjust, unfair and idiosyncratic. BC Hydro arbitrarily used different arithmetic for Celgar than it used for Howe Sound and others, measuring load instead of generation-to-load. It considered a host of material factors for others that it did not consider for Celgar, which allowed it to arrive at GBLs that were relatively more favorable (*i.e.*, GBLs that permitted a higher percentage of below-load access to embedded cost utility power) to those self-generators than the GBL it would assign to Celgar. BC Hydro rejected << [REDACTED] >> for Howe Sound because << [REDACTED] >>, but adopted a << [REDACTED] >> for Celgar, notwithstanding the fact that the << [REDACTED] >>. It

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<sup>597</sup> See Merwin Witness Statement, ¶ 87.

<sup>598</sup> Canada seems sincerely to believe that BC Hydro’s June 2012 informational-only GBL Guidelines (subsequently rejected by the BCUC for their vagueness) and the “current normal” standard first seen by Celgar during these arbitration proceedings, somehow can retroactively fill the void that existed at the time BC Hydro was determining Celgar’s GBL and those of its comparators. See, *e.g.*, Counter-Memorial, ¶ 164; Dyck Witness Statement, ¶¶ 133, *et seq.* Any guidelines first issued after BC Hydro established Celgar’s GBL were not accessible to Celgar at that time, and therefore, were inexorably not transparent.

considered the << [REDACTED] >> request or examine similar data for Celgar. It ignored Tembec's actual generation data. And the BCUC assigned a GBL to Tolko that far exceeded the amount of generation it was using at the time to meet its own load.

517. BC Hydro made a continuing series of *ad hoc* determinations, unfettered by any written rules or even guidelines, in secrecy, and without accountability. BC Hydro provided no public disclosure of its general methodology or its specific determinations. Even allowing for the need to safeguard business proprietary information to which Canada points, there is no reason BC Hydro could not have disclosed something. Instead, it kept its methodology, its baselines, its baseline durations, its calculation formulas, its models, and everything else from public comment and scrutiny. Canada has provided no justification for BC Hydro failing to disclose anything.<sup>599</sup> In those few instances where BC did not exempt BC Hydro's GBL determinations from BCUC review, BC Hydro provided no information to the BCUC whatsoever regarding the specifics of its GBL determinations. Neither the BCUC nor the MEM substantively reviewed any GBL determination

518. What BC Hydro orchestrated for Celgar — by ignoring the historical generation-to-load metric that it took into account for other pulp mills — was not quite the exceedingly

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<sup>599</sup> Canada's contention that BC Hydro only kept secret party-related information that it was bound to keep confidential — barely deserves a response. The core of Mercer's complaint is not that specific outcomes were not disclosed, but rather that the methodologies used, standards applied, and factors considered were never made available. Canada effectively concedes that BC Hydro's conduct was non-transparent, as its defenses regarding the supposed transparency of its conduct are nonresponsive to Mercer's claims. The Tribunal should reject them as such.

restrictive dynamic net-of-load GBL it had first attempted. Instead, it was the next best thing — a fixed, load-based GBL, based on one calendar year of data.

519. BC Hydro’s non-transparent and arbitrary approach established a GBL for Celgar that was higher than any historical generation-to-load level Celgar had ever achieved. In contrast, BC Hydro and the BCUC, respectively, assigned Tembec and Tolko GBLs that were *lower* than their “current” generation-to-load levels.

520. And even more fundamentally, BC Hydro established a GBL for Celgar that did more than just demarcate the amount of power BC Hydro would purchase. Instead, it expressly precluded Celgar from selling its below-GBL electricity to any third party. This was a singularly idiosyncratic and arbitrary action, as the BCUC had made it clear in numerous decisions that a self-supply obligation was to be set between the self-generator and its utility, and BC Hydro was not Celgar’s utility. While BC Hydro could determine how much electricity it would purchase from Celgar, it had no authority to set a self-supply obligation for Celgar. It did so nonetheless, without consequence. In fact, BC Hydro penalized Celgar for first approaching FortisBC to buy its electricity, by utilizing a baseline period tied to the timeframe in which Celgar approached BC Hydro, rather than when it approached FortisBC. How Celgar could have known it needed to approach BC Hydro to learn how much self-generated electricity it could sell to others, Canada nowhere explains.

521. In the context of BC Hydro’s non-transparent, arbitrary, unfair and discriminatory determination of Celgar’s GBL, BC Hydro thus also arbitrarily and discriminatorily required

Celgar to provide load displacement services that it paid Canfor, Howe Sound, and other pulp mills to provide.<sup>600</sup>

522. Celgar could not know at the time that it was being treated differently than other mills, as BC Hydro’s supposed “methodologies” applied to other pulp mills were never revealed to Celgar. Nevertheless, based on the little written information that was available about other mills, Celgar challenged BC Hydro’s fundamentally unfair and arbitrary approach to calculating Celgar’s GBL.<sup>601</sup> BC Hydro would not move from its arbitrary decision, and was not forthcoming with explanations for why Celgar was singled out for an approach that strayed from the historical usage standard that BC Hydro was charged to apply to its own customers under BCUC Order G-38-01.<sup>602</sup>

523. The non-transparent, idiosyncratic, arbitrary, and unfair GBL determination process resulted in an unfairly high GBL for Celgar, and unfairly low GBLs for Tembec, Howe Sound, and Tolko — at least under the *post hoc* “current normal standard BC says it always applied.

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<sup>600</sup> See Memorial, ¶¶ 578–87.

<sup>601</sup> See Merwin Witness Statement, ¶ 91.

<sup>602</sup> See Merwin Witness Statement, ¶ 92. Canada argues that its conduct was not arbitrary, because BC Hydro provided Claimant with reasons why Celgar was assigned the GBL. Those reasons, apparently, are that BC Hydro applied its “current normal” methodology to the calculation of Celgar’s GBL, and BC Hydro did not want to pay for load displacement services that it had been receiving for free. See Counter-Memorial, ¶ 485. But, as demonstrated above, BC Hydro had not disclosed its “current normal standard” at the time Celgar was negotiating its GBL, or, indeed, at any time prior to June 2012. And, contrary to Canada’s assertions, as demonstrated in Section IV.E above, BC Hydro applied no uniform standard consistently to Celgar, Howe Sound, Tembec, and Tolko.

524. Canada cannot deny that (i) the regulatory regime regarding the determination of GBLs was completely devoid of written regulations, standards, rules or guidelines, (ii) whatever standards or methodologies (if anything other than *ad hoc* decision making) were being applied to Celgar were kept secret, (iii) different standards were applied to Celgar in restricting its access to embedded cost utility power, and (iv) Celgar is being treated differently than other BC pulp mills.

As Mr. Fox-Penner explains,

I find that the BCUC and BC Hydro's regulatory process with respect to the treatment of self-generators did not follow a consistent process, and failed to apply a consistent method. It therefore does not meet the standards of good regulatory practice. . . . BC Hydro {had} far too much discretion to choose who and how much it would allow to arbitrage. BC Hydro itself did not even attempt to put in place any written, mandatory guidelines or procedures after Order G-38-01 was issued to ensure its employees' fair and non-discriminatory implementation. The result is that BC Hydro was governed by only a non-specific "high level" principle, incapable of ensuring non-discriminatory implementation. . . . None of the treatment at issue was governed by any BCUC-approved rules, regulations, or guidelines. The regulator left the decision-making in the hands of the regulated utility, and provided no binding or well-defined, detailed guidance. The BCUC allowed BC Hydro to act at its own discretion. And, in the absence of any monitoring, compliance, and transparency rules, this order allowed for and gave rise to discriminatory treatment. Although one may view this lack of BCUC GBL guidance as providing flexibility to the parties that could yield an efficient outcome, a negotiation process without sufficient direction and independent monitoring can, and in this case did, give rise to discriminatory treatment across self-generators."<sup>603</sup>

525. The Ministry of Energy then failed to provide Celgar with any relief from BC Hydro's arbitrary and discriminatory actions. Once Celgar brought BC Hydro's arbitrary and discriminatory treatment to its attention, the Ministry of Energy completely failed to address the fundamental fact that Celgar was being treated differently than other BC pulp mills. The Ministry of Energy made no effort whatsoever to examine and compare the details underlying Celgar's

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<sup>603</sup> Fox-Penner Expert Report, ¶¶ 85, 91, 93–94.

GBL treatment with those of other pulp mills in the Province, including those Celgar called to the Ministry's attention.<sup>604</sup>

526. Similarly, since the time it issued Order G-38-01 in 2001, some thirteen years ago, the BCUC has failed to provide BC Hydro with any meaningful oversight or remedy the complete lack of regulations or guidelines with respect to determining self-generators' GBLs. The BCUC waited eight years, until 2009, to request written guidelines from BC Hydro, which BC Hydro filed for information purposes only in 2012. Only in 2014 has the Commission even attempted to reassert its regulatory responsibility by recognizing that GBLs function as part of rates, requiring BC Hydro to re-file GBL guidelines with more detail, and finally subjecting BC Hydro's guidelines to a BCUC review and approval proceeding.

527. In this manner, the BCUC and the Ministry of Energy permitted BC Hydro's conduct, which is itself a breach of the minimum standard of treatment under Article 1105, as the BCUC's and Ministry of Energy's inaction permitted the discriminatory, arbitrary, non-transparent and idiosyncratic conduct to continue.

## **VI. DAMAGES AND COSTS**

### **A. Mercer Suffered Damages Resulting From The Measures**

528. The breaches of NAFTA Articles 1102, 1103, 1105 and/or 1503 detailed above resulted in significant and ascertainable damages to Celgar. As Mercer explained in its Memorial, and as reiterated above, BC afforded Celgar less favorable access to embedded cost utility electricity to meet its mill load while selling self-generated electricity than it afforded comparator

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<sup>604</sup> See Merwin Witness Statement, ¶ 131.

mills in like circumstances, and Celgar was denied fair and equitable treatment. BC did so through both the BCUC's imposition of a "net-of-load" standard on Celgar alone among pulp mills, and BC Hydro's discretionary GBL calculations that resulted in a less favorable GBL for Celgar than for other pulp mills. As access to below-load embedded cost utility power enables a self-generator to engage in arbitrage, and to sell at market prices electricity it otherwise would have used to meet its own load, Mercer sustained damages because Celgar was unable to sell at market prices self-generated electricity it wrongly was forced to use to meet its own load. BC deprived Celgar of additional profit it could have earned, based on the difference between the value of those additional electricity sales and the cost of embedded cost replacement electricity.

529. As also explained above, the Tribunal's first task in assessing damages is to determine the GBL that Celgar should have received absent its less favorable, unfair, and inequitable treatment. The difference between that GBL and the GBL of 349 GWh/year that has governed Celgar's energy sales will reflect the additional amount of electricity Celgar would have been able to sell each year at market prices absent Canada's wrongful measures. The impact of this lost profit stream on Celgar's valuation reflects the monetary impact on Celgar, and is the amount necessary to restore Mercer to the position it would have been in but for BC's NAFTA violations. Because of the Seller Consumed Energy Adjustment put in place to effectuate the 2009 EPA, Mercer does not claim — and has never claimed — that there are separate and independent damages resulting from Order G-48-09 not already included in the GBL-based damages calculation it proposes.

530. Mr. Kaczmarek presents in his Second Expert Report, dated 16 December 2015, updated damages calculations based upon several alternative GBL scenarios for Celgar.<sup>605</sup> These scenarios are based on different possible determinations of the NAFTA violations that occurred. The lowest GBL scenario, and thus the scenario capturing the greatest additional energy sales, utilizes a GBL of zero. If the Tribunal agrees with Celgar’s first claim of discriminatory treatment — that the Province treated Celgar less favorably than Howe Sound and Canfor by requiring Celgar to provide load displacement services when the Province, through BC Hydro, had secured the agreement of others to provide such services in exchange for substantial compensation — this is the appropriate measure of damages. Such a measure eliminates the impact of the discriminatory load displacement requirement BC Hydro imposed directly in the 2009 EPA, and the BCUC imposed indirectly through the net-of-load restriction in Order G-48-09. A GBL of zero may be justified alternatively as consistent with the treatment BC Hydro provided to Tembec in Tembec’s 1997 EPA, << [REDACTED] >>, and instead permitted Tembec to sell to BC Hydro its first MW of self-generated electricity, without any requirement that Tembec first meet any portion of its own load.

531. A second category of GBL scenarios Mr. Kaczmarek presents in his analysis reflect GBLs Celgar should have received under a non-discriminatory application of the “current normal operating conditions” GBL standard as Canada has articulated that standard, as well as under the historical usage standard the BCUC articulated in its 2001 Order G-38-01. As explained above, these alternatives are appropriate only if the Tribunal concludes that BC applied one or both of these standards in a consistent and even-handed manner to *everyone* except Celgar.

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<sup>605</sup> Kaczmarek Second Expert Report, ¶¶ 173, *et seq.*

In such circumstances, putting Mercer in the position it would have been in but for the wrongful conduct requires the Tribunal to compute a proper GBL for Celgar under the standard applied to everyone else. These scenarios include use of a generation-to-load calculation, use of a 2006 baseline (corresponding to the timing of Celgar's 2007 approach to FortisBC), and use of a 2002 baseline (corresponding to the timing of BC's enactment of the Heritage Contract in 2003).

532. The third category of GBL scenarios is appropriate if the Tribunal rejects the notion that BC had adopted and consistently applied a uniform GBL standard. In such circumstances, Celgar is entitled to the best treatment afforded any other appropriate comparator. Because the predicate for these alternatives is that no uniform standard existed or was consistently applied, the measure of damages cannot be based on returning Celgar to the position in which it would have been under a proper application of a standard. Instead, Celgar is entitled to the same relative level of access to embedded cost utility electricity, and the same relative ability to sell below-load self-generated electricity, as the best treated comparator in BC.

533. The Tribunal has several options in identifying the best treated comparator. First, as noted above, it can look to Tembec's 1997 EPA, in which BC Hydro << [REDACTED] >> As BC Hydro << [REDACTED] >> to self-supply any electricity to meet its own load, the effective GBL in the 1997 EPA is << [REDACTED] >>. Likewise, the Below Load Access / arbitrage percentage is << [REDACTED] >>, and affording Celgar the same treatment would require a GBL for Celgar of << [REDACTED] >>.<sup>606</sup> This alternative is appropriate if the Tribunal rejects Canada's

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<sup>606</sup> See Figure 22 above.

argument that the 1997 EPA was awarded under a different legal regime whose more favorable treatment BC Hydro discontinued after the BCUC issued Order G-38-01 in 2001.

534. Second, the Tribunal can look to Howe Sound's 2010 EPA, which allowed Howe Sound to arbitrage << [REDACTED] >> percent of the below-load electricity it generated. This would correspond to a GBL for Celgar of << [REDACTED] >> GWh/year.<sup>607</sup>

535. Third, if the Tribunal accepts Canada's argument that a sawmill is an appropriate comparator, because the product at issue here is electricity and not pulp, the Tribunal can look to the GBL the BCUC set for Tolko Kelowna from 2001-2013, under Order G-38-01. That 2 MW GBL reflects a Below Load Access / arbitrage percentage of 57.4 percent. This would correspond to a GBL for Celgar of 148.7 GWh/year.<sup>608</sup>

536. The following table outlines the various alternative GBL scenarios Mr. Kaczmarek has evaluated:

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<sup>607</sup> See Figure 22 above.

<sup>608</sup> See Figure 22 above.

**Figure 31**  
**Alternative Damages Scenarios**

	Scenario	GBL	Lower of Load or Generation	Saleable Below-Load Energy	Below-Load Access Percentage	Celgar GBL at Equivalent Level	Additional Celgar Self-Generated Electricity Available for Sale
		A	B	C	D=C/B	E = (1-D)*349	F = 349 - E
1	No Load Displacement Without Contract and Payment << [REDACTED] >>	None		All	100%	0	349.0 GWh/yr
2	[REDACTED]						
3	Tolko 2001 BCUC GBL	2 MW	4.7 MW	2.7 MW	57.4%	148.7 GWh/yr	200.3 GWh/yr
4	[REDACTED]						
5	Order G-38-01 approach, using 2001 baseline year	186.1 GWh/yr			46.7%	186.1 GWh/yr	162.9 GWh/yr
6	[REDACTED]						
7	Celgar's self-generation consumption at time of 2003 Heritage Contract (2002 baseline)	220.0 GWh/yr			37.0%	220.0 GWh/yr <sup>609</sup>	129.0 GWh/yr
8	Ministers' Order <sup>610</sup>	249.7 GWh/yr			28.5 %	249.7 GWh/yr	99.3 GWh/yr
9	Celgar 2009 EPA but using 2006 baseline	268.2 GWh/yr			23.2%	268.2 GWh/yr	80.8 GWh/yr

<sup>609</sup> In. Mr. Kaczmarek's First Report, an erroneous value of 200.0 GWh/year was used. Compare Memorial, ¶ 640 with Kaczmarek Expert Report at 75, Table 14.

<sup>610</sup> This scenario assumes that Celgar is held to a commitment to self-supply consistent with the levels it achieved under its 1992–94 Revitalization Project, and is discussed below.

	Scenario	GBL	Lower of Load or Generation	<u>Saleable Below-Load Energy</u>	Below-Load Access Percentage	Celgar GBL at Equivalent Level	Additional Celgar Self-Generated Electricity Available for Sale
		A	B	C	D=C/B	E = (1-D)*349	F = 349 - E
10	Before Blue Goose (average usage over 2005-6, after Mercer acquired Celgar but before it implemented Blue Goose)	271 GWh/year			22.3%	271 GWh/yr	78.0 GWh/yr
11	Celgar 2009 EPA but using generation-to-load	326.7 GWh/yr			6.4%	326.7 GWh/yr	22.3 GWh/yr

537. Canada does not appear to dispute Mercer’s depiction of the compensation standard. The parties agree with the *Chorzow Factory* standard,<sup>611</sup> under which “reparations must, as far as possible, wipe-out all of the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>612</sup> The parties also agree that Mercer bears the burden of proving damages,<sup>613</sup> based on a preponderance of the evidence standard.<sup>614</sup>

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<sup>611</sup> Counter-Memorial, ¶ 493.

<sup>612</sup> CA-24, *Case Concerning the Factory of Chorzow (Claim for Indemnity) (Germany v. Poland)*, Judgment of 13 September 1928 P.C.I.J., ser. A, No. 17, at 47 (“*Chorzow Factory*”).

<sup>613</sup> Counter-Memorial, ¶ 494.

<sup>614</sup> Counter-Memorial, ¶ 495 (citing RA-36, Ripinsky, S., with Williams, K., DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), at 162-63). According to Ripinsky, “the ‘preponderance of evidence’, also known as the ‘balance of probabilities’, applicable in civil litigation” is “the prevalent standard in international arbitration” and “is discharged if the tribunal considers on the basis of the evidence produced, that the fact is more probable than not, but not discharged if the probabilities are equal.” RA-36, Ripinsky, at 163.

538. Canada's main focus is on the certainty of damages, with its damages expert Dr. Rosenzweig dismissing virtually every number on which Mr. Kaczmarek relies as "speculative" simply because it is uncertain. But the damages standard does not require certainty. Instead, it requires an examination of the available evidence to evaluate the alternatives proposed by both sides, and a determination as to whether a proposed alternative is more likely than not. Dr. Rosenzweig, however, avoids analysis of the evidence, avoids providing alternatives, and avoids assessing whether Mr. Kaczmarek's assumptions are supported by a preponderance of the evidence.

539. Mercer has met its burden. Mr. Kaczmarek, in his Second Report, addresses every criticism Dr. Rosenzweig and Canada level, under the Ripinsky standard. Mercer also addresses below certain of the more significant objections made by Canada not requiring the application of expert judgment, including Canada's arguments that BC Hydro would not have bought additional electricity from Celgar, and that it is not likely to renew Celgar's EPA.

**B. Canada's Argument That Mercer Has No Damages Because It Committed To Be 100 Percent Electricity Self-Sufficient Is Without Merit**

540. Mercer fully addresses the merits of Canada's arguments invoking the 1991 Ministers' Order in Section III above and will not repeat those arguments here. Canada's argument, based on that Order, that Mercer has no damages from measures requiring it to self-supply to the level of its 2007 load because Celgar is under an independent legal obligation to be energy self-sufficient, fails for the reasons stated above.

541. Should the Tribunal nonetheless credit Canada's argument that the Order created some kind of self-sufficiency obligation, the alleged commitment by Celgar would, *at most*, cap the amount of Mercer's damages (*i.e.*, the amount of below-load energy that Mercer should be

able to sell, while still obtaining embedded-cost power from its local utility) by the industrial load that Mercer would be required to self-supply *from the generation assets and Mill configuration it described in 1990*. The purported commitment would not extend to: (1) increased generation resulting from subsequent investments and process improvements, such as Mercer's 2005-07 Project Blue Goose, or (2) increases in the Mill's load resulting from subsequent investments and process improvements. Simply put, by purportedly committing to use the generation assets and plant configuration and operations proposed in 1990, Mercer did not commit (and could not have committed) to using any incremental electricity generation resulting from subsequent investments and improvements it had not yet conceived or designed, which would have been outside the scope of the revitalization project reviewed by Ministers in the early 1990s.

542. Assuming, *arguendo*, that the Ministers' Order created a legally binding commitment on Mercer to use its self-generated electricity to meet its Mill load, then the relevant generation level subject to that obligation should be calculated from 1994 — the year in which the generation assets and mill configuration described in the application came online — to 2006 — the Mill's last year without the improvements attributable to Mercer's Blue Goose Project investments. The average annual generation-to-load (*i.e.*, total self-generation, subtracting energy sales) for that period (1994 to 2006) was 249.7 GWh/year, or an average of approximately 28 MW/hour.<sup>615</sup>

543. Accordingly, if the Tribunal determines that Celgar is entitled to a GBL less than the 349 GWh/year GBL set by BC Hydro, but equal to or greater than 249.7 GWh/year, then Celgar is entitled to full damages. However, if the Tribunal determines that Celgar is entitled to a

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<sup>615</sup> See Reply, Annex A.

GBL that is lower than 249.7 GWh/year, but that the Ministers' Order obligates Celgar to self-supply up to the generation-to-load levels achieved under the Mill as rebuilt in the revitalization Project, then Mercer's damages are capped based on the additional revenues and enterprise value that would result from a GBL of 249.7 GWh/year.

544. As also discussed above, there is no merit to Canada's argument that BC Hydro's < [REDACTED] > adjustment somehow eliminates or reduces Celgar's damages. As demonstrated in Section IV.C.2 above, < [REDACTED] > in no way affects damages suffered by Celgar with respect to its inability to sell any electricity below its 2007 load-based 349 GWh/year GBL. It only mitigates additional harm that could have resulted under Order G-48-09 from Celgar's increasing load had BC Hydro not provided the adjustment.

**C. Canada's Argument That There Was No Market In 2009 For Celgar's Below-Load Energy Is Without Merit**

545. Canada next argues that BC Hydro would not have purchased Celgar's below-GBL electricity, and that Celgar has failed to prove non-speculative harm because it cannot identify with specificity the customers who would have purchased such electricity, the terms of the contracts it would have entered into, and the availability of transmission service, among other things.<sup>616</sup> Canada's damages argument fails because it ultimately is predicated on the notion that neither BC Hydro nor the BCUC has treated Celgar wrongly, and requires a level of certainty regarding damages not required under international law.

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<sup>616</sup> Counter-Memorial, ¶¶ 504-509.

**1. Canada's "No-Market" Argument  
Contradicts BC's Premise for Imposing  
the Very Measures at Issue**

546. First, Canada's argument that there was no market for Celgar's below-load electricity in 2009 contradicts the very premise of the regulatory measures BC Hydro sought and the BCUC imposed in Order G-48-09, as well as the express findings and conclusions the Commission made in issuing that Order. The very reason BC Hydro went to the Commission in February 2009 was its express fear that Celgar and Nelson would sell their self-generated electricity, and thereby require BC Hydro to supply replacement electricity to FortisBC under the terms of the 1993 PPA. BC Hydro estimated its costs for Celgar alone to be C\$ 15.4 million annually. This reflected BC Hydro's projected costs to procure replacement energy, less the revenues it would earn selling the electricity to FortisBC.<sup>617</sup> The BCUC Staff performed an alternative calculation, yielding an annual cost of C\$ 11.4 million.<sup>618</sup>

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<sup>617</sup> C-281, BC Hydro Responses to BCUC Information Request No. 1, *In Matter of British Columbia Hydro and Power Authority, Application to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement* (30 October 2008), Section 8.0, Response to Request 1.8.1.1. BC Hydro had argued it would cost \$16.7 million to purchase the incremental energy required by both Celgar and Nelson, which it calculated as the difference between BC Hydro's long term opportunity cost of new supply (7.36 cents/kWh) and the PPA energy sell price (2.952 cents/kWh), multiplied by the required annual energy sales of 378 GWh/year. *Id.* Thus, (7.36 cents/kWh - 2.952 cents/kWh) x 378 GWh = C \$16.67 million. Elsewhere in its information request response, BC Hydro indicated that its 378 GWh/year estimate of energy sales was comprised of 28 GWh/year for Nelson and 350 GWh/year for Celgar. *Id.* at Section 7.0, Response to Request 1.7.1. Thus, BC Hydro pegged the cost to provide incremental supply to Celgar at (350 GWh / 378 GWh) x \$ 16.67 million = C\$ 15.4 million. Canada in its Counter-Memorial uses a figure of C\$ 16.7 million, Counter-Memorial, ¶ 433, but this figure includes both Celgar and the City of Nelson.

<sup>618</sup> In the G-48-09 proceeding, The BCUC Staff had requested FortisBC to provide an alternative calculation, using FortisBC's price for non-firm energy instead of a BC Hydro price. This calculation resulted in a cost to provide incremental supply to Celgar of C\$ 11.4 million. C-282, FortisBC Responses to BCUC Information Request No. 3, *In Matter of British Columbia Hydro*

[FOOTNOTE CONTINUED ON NEXT PAGE]

547. In justifying its decision to amend the 1993 PPA, the BCUC stated it was “persuaded that if the City of Nelson and Zellstoff Celgar are permitted to sell all of their respective total generation capacity into the available markets, there would be some fairly large negative impact on BC Hydro.”<sup>619</sup> But that “fairly large negative impact” could arise only to the extent Celgar and Nelson could, in fact, sell their below-load self-generated electricity.

548. Indeed, one reason BC Hydro acted so quickly after FortisBC filed its agreements to supply Celgar and Nelson, was that Nelson *had already begun selling its self-generated electricity, in May and June 2008, through Celgar’s broker NorthPoint*, after Nelson had signed an agreement with FortisBC and before the BCUC had acted on the agreement.<sup>620</sup>

549. BC Hydro having argued to the Commission that sales by Celgar would cost it C\$ 15.4 million annually, and the BCUC having expressly found that if Celgar were permitted to sell its energy, there would be some “fairly large negative impact on BC Hydro,” it is inequitable and unjust under international law to permit Canada now to argue the opposite on their behalf.<sup>621</sup>

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

*and Power Authority, An Application to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement* (31 December 2008), Response to Request 1.8.1. Again, Canada provides a slightly higher figure in its Counter-Memorial of C\$ 12.3 million, Counter-Memorial, ¶ 433, because Canada’s figure includes both Celgar and Nelson. *See also* C-7, BCUC, Order Number G-48-09 (6 May 2009), § 5.3, at 27 (referring to the C\$12.3 million figure as a BCUC staff estimate) (“BCUC Order G-48-09”).

<sup>619</sup> C-7, BCUC G-48-09 Decision, at 27.

<sup>620</sup> C-294, FortisBC, Response to Information Requests, *In Matter of British Columbia Hydro and Power Authority, An Application to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement* (14 August 2008), at 2 (noting that the City of Nelson exported 2 MWh of its self-generated electricity in May 2008 and 231 MWh in June 2008, through access to the wholesale transmission network by NorthPoint).

<sup>621</sup> CA-78, Brownlie, I, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (7th ed. 2008), at 643–44; CA-79, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA), Interim Award

[FOOTNOTE CONTINUED ON NEXT PAGE]

Canada is in effect arguing that the harm arguments BC Hydro made to the Commission, and which the Commission accepted as the basis for its actions, were baseless.

550. Even if the Tribunal were to determine that it is not unjust or inequitable for Canada to contend that Celgar had no market for its below-GBL self-generated electricity in light of BC's professed reasons for the G-48-09 Order, the Tribunal should accord substantial weight to the BCUC's contemporaneous findings, and the fact that Nelson had already found customers for its power by May 2008. It defies credibility to believe that BC Hydro and the Commission both acted to preclude Celgar from selling its electricity when it was unlikely that Celgar would have been able to do so, or that Nelson could sell its electricity but Celgar could not.

**2. If The Discriminatory Measures Had Not Been Imposed, And Celgar Had Been Permitted To Sell Any Portion Of Below-Load Self-Generated Electricity, BC Hydro Would Have Purchased It Under Long-Term Contract**

551. Second, contrary to Canada's hyperbolic arguments about Mercer's "fantasy," it is indeed highly likely that BC Hydro would have purchased all below-load energy that Mercer would have been able to sell had the measures applied to it not been discriminatory or otherwise inconsistent with Canada's NAFTA obligations.

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*[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]*

(26 June 2000), ¶ 111 ("In international law, it has been stated that the essentials of estoppel are (1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorized; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement."). Brownlie notes that "before a tribunal the principle {of estoppel} may operate to resolve ambiguities and as a principle of equity and justice."

552. Canada’s damages argument assumes that BC Hydro computed Celgar’s GBL properly and in a non-discriminatory fashion, consistent with the Minimum Standard of Treatment.<sup>622</sup> But the Tribunal will only reach the issue of damages if it concludes that Celgar’s GBL violates Canada’s NAFTA obligations and is excessive. The issue thus is not, as Canada portrays it, whether BC Hydro would have paid for electricity *already on the BC system*, but rather whether BC Hydro would have paid for electricity that Celgar *would have been permitted to sell* and that otherwise *would have left BC’s system*. The evidence is overwhelming that it would have, based on BC Hydro’s power needs, its own stated policies, and its conduct in buying all power available for sale from other self-generators.

553. To the extent BC Hydro set Celgar’s GBL too high even under the “current normal standard,” then the difference between that GBL of 349 GWh/year and Celgar’s proper GBL reflects “new and incremental” electricity that would have been eligible for sale to BC Hydro under the terms of BC Hydro’s Bioenergy Phase I power call. This electricity would have been *above-GBL* electricity but for BC Hydro’s discriminatory measure in establishing an excessive GBL for Celgar. It would no longer be *below-GBL* electricity. As Celgar was the second lowest bidder in that power call, BC Hydro certainly would have purchased all of Celgar’s above-GBL energy.

554. Indeed, BC Hydro did in fact purchase all of Celgar’s above-GBL energy, under the terms of the 2009 EPA, just as it did for the other successful bidders, both in that power call, in its 2009 EPA with Tembec, and in its 2010 EPA with Howe Sound. Thus, if Celgar’s

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<sup>622</sup> See, e.g., Rosenzweig Expert Report, ¶ 120 (concluding that BC Hydro under its procurement policies would have provided no incentive to Celgar).

nondiscriminatory GBL should have been lower, it is all but certain that BC Hydro would have done what it did in every other EPA with a BC self-generator, and purchased all above-GBL electricity on a firm basis. In its EPAs with self-generators, BC Hydro typically not only has purchased *all* available above-GBL firm energy, but also includes exclusivity provisions that preclude sales to third-parties.<sup>623</sup> Canada has presented no evidence to support a conclusion that BC Hydro would have treated Celgar any differently, and has offered no reason why BC Hydro would not have purchased all electricity above a corrected Celgar GBL.

555. Even if the Tribunal rules in Mercer’s favor on another basis, including the absence of any uniform and consistently applied GBL standards, it still remains highly likely that BC Hydro would have purchased all electricity Celgar would have been able to sell, before BC Hydro would have allowed such electricity to be exported out of the Province. In such circumstances, the Tribunal would have had to conclude that BC Hydro followed no consistent GBL policy, and in fact purchased from other self-generators electricity that did not meet its professed “new and incremental” definition. This evidence of BC Hydro purchases in 2009 and 2010 EPAs of pre-existing self-generation output from others that was not “new and

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<sup>623</sup> See C-23, BC Hydro and HSPP, Electricity Purchase Agreement, Integrated Power Offer (7 September 2010), § 8.4(b); C-145, BC Hydro and Tembec Electricity Purchase Agreement (13 August 2009), § 7.4(a); C-239, Electricity Purchase Agreement between BC Hydro and Canfor Pulp Limited Partnership (4 February 2009), § 7.4(b); C-277, BC Hydro and Cariboo Pulp and Paper Company Electricity Purchase Agreement (13 December 2010), § 7.4(b); R-136, BC Hydro and Domtar Pulp and Paper Products Inc., Electricity Purchase Agreement, Bioenergy Call for Power – Phase I (27 January 2009), § 7.4(b); C-279, BC Hydro and Catalyst Paper Electricity Purchase Agreement (18 February 2011), § 7.4(b); C-280, BC Hydro and Nanaimo Forest Products Ltd. Electricity Purchase Agreement (7 December 2011), § 7.4(b). See also C-221, 2009 Celgar EPA, § 7.4(b).

incremental,” from Tembec in particular, provides a more than adequate basis for the Tribunal to conclude that BC Hydro also would have purchased such electricity from Celgar.<sup>624</sup>

556. Indeed, as Canada itself repeatedly explains, BC Hydro’s policy was to “incentivize” all self-generated electricity that would not otherwise have been used to meet the self-generator’s own load. Once the Tribunal determines that Celgar should have been permitted to sell, and should not have been required to use for self-supply, some additional quantum of below-load self-generated electricity, then that same quantum of electricity would qualify for purchase by BC Hydro under the very procurement policies in effect at the time and Canada’s stated rationales. It is electricity that Celgar would not otherwise use to meet its own load, and electricity that would not otherwise be part of BC’s electricity supply.<sup>625</sup>

557. BC Hydro bought *all* of Celgar’s above-GBL firm energy because Celgar was a low-cost supplier of the biomass-based green electricity the Province was keen to purchase. If Celgar had been eligible to sell more electricity, there is no reason why BC Hydro would not have purchased it, if the alternative was to see it leave the Province. Canada’s own witnesses consistently testify that BC Hydro sought to procure electricity efficiently and as cheaply as possible. Does Canada contend that if Celgar had more biomass-based green electricity available for sale, BC Hydro would instead have purchased from a more expensive supplier?

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<sup>624</sup> Indeed, as noted *supra* n.3, BC Hydro did not at the time even have a consistent policy of purchasing only new or incremental generation. Existing generation was eligible for its Standing Offer Program.

<sup>625</sup> *See, e.g.*, Counter-Memorial, ¶ 365 (Canada contends that “BC Hydro has no interest in purchasing existing self-generation because that would add no electricity to its resource pool . . . .” It follows that if some portion of Celgar’s below-load self-generation could be exported and thus not otherwise be part of the Province’s “resource pool,” BC Hydro would be interested in purchasing that electricity.)

558. Canada itself notes that BC energy policy since at least the 2002 Energy Plan encouraged BC Hydro to purchase electricity from clean energy independent power producers in the Province under long-term contracts.<sup>626</sup> As Canada itself describes it, this policy culminated with the Province's 2007 Energy Plan and its resulting 2008 Bioenergy Strategy, which sought to increase the use of renewable energy, make the province energy self-sufficient, and address the impacts of the mountain pine-beetle epidemic by encouraging the use of wood biomass as a fuel source.<sup>627</sup> The 2007 Energy Plan specifically directed BC Hydro to seek proposals for electricity from sawmill residues, logging debris, and beetle-killed timber, which criteria covered BC kraft pulp mills.<sup>628</sup> It thus would have been inconsistent with stated BC policy for BC Hydro *not* to have purchased Celgar's additional electricity and instead allow it to be exported.

559. Indeed, at the time of its negotiations with Celgar over the 2009 EPA, BC had forecast a large and a growing need for such electricity to meet expected load growth and to eliminate the large and growing gap between expected load and expected resources. As noted in Mercer's Memorial, in its June 2008 Long Term Acquisition Plan ("LTAP"), BC Hydro had forecast an energy load/resource gap of -3,000 GWh/year in 2012, increasing to -8,500 GWh/year in 2016, -14,000 GWh/year in 2020, and -21,700 GWh/year in 2028.<sup>629</sup> The following chart, from BC Hydro's own LTAP, shows its projection of the growing gap as of June 2008:

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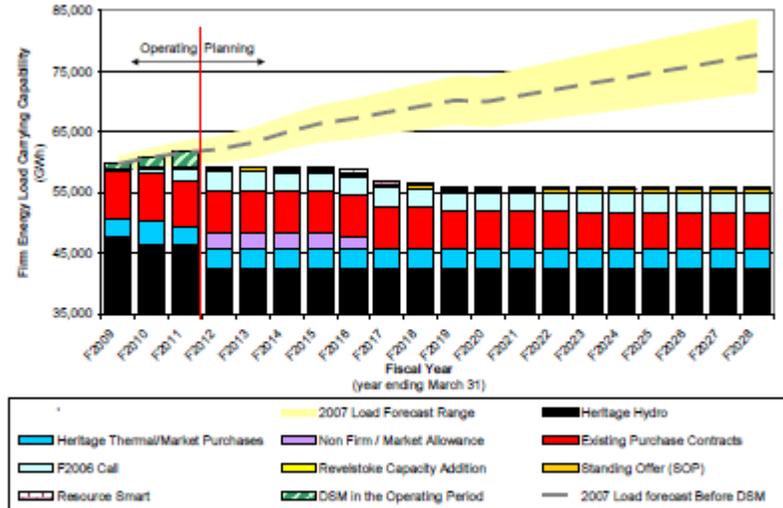
<sup>626</sup> *E.g.*, Counter-Memorial, ¶ 133.

<sup>627</sup> Counter-Memorial, ¶ 137.

<sup>628</sup> Counter-Memorial, ¶ 139.

<sup>629</sup> C-289, BC Hydro, British Columbia Hydro and Power Authority 2008 Long Term Acquisition Plan (12 June 2008), at I-3 Table 1-1. *See also* C-63, BC Hydro, Report on Bioenergy Call Phase I: Request for Proposals (17 February 2009), at 24.

**Figure 32**  
**BC Hydro 2008 Projected Load/Resource Balance<sup>630</sup>**



560. Under Provincial energy policy since 2002, BC Hydro has been prohibited from constructing new power generation plants.<sup>631</sup> Thus, it must meet its projected resource shortfalls through demand reduction measures and purchases. BC Hydro's 2008 LTAP contemplated power calls seeking up to 5,000 GWh/year of firm, clean energy.<sup>632</sup> And BC Hydro thereafter continued to purchase large quantities of clean, firm electricity within BC, under long-term contracts, for years after Bioenergy Phase I. After concluding Bioenergy Phase I, in which it purchased 579 GWh/year of firm electricity under long-term contracts<sup>633</sup> (including 238

<sup>630</sup> C-289, BC Hydro, British Columbia Hydro and Power Authority 2008 Long Term Acquisition Plan (12 June 2008), at 2-18 Figure 2-5.

<sup>631</sup> R-21, British Columbia Ministry of Energy, Mines and Petroleum Resources, Energy For Our Future: A Plan for BC (2002), at 29.

<sup>632</sup> C-289, BC Hydro, British Columbia Hydro and Power Authority 2008 Long Term Acquisition Plan (12 June 2008), § 6.2.6.1.

<sup>633</sup> See C-63, BC Hydro, Report on Bioenergy Call Phase I: Request for Proposals (17 February 2008) [FOOTNOTE CONTINUED ON NEXT PAGE]

GWH/year from Celgar),<sup>634</sup> BC Hydro continued throughout 2009, 2010, and 2011 buying additional bioenergy. Its various electricity purchase programs are detailed in the Memorial, and include (1) the Standing Offer Program, (2) the Integrated Power Offer, and (3) its Bioenergy Phase II power call, not to mention its 2009 EPA with Tembec negotiated outside any established power purchase process.<sup>635</sup> Bioenergy Phase II, which concluded in August 2011, alone involved BC Hydro concluding four long-term contracts to purchase 745 GWH/year of firm energy under long-term contracts.<sup>636</sup>

561. As of May 2011, BC Hydro had at least 10 biomass-related EPAs in place, representing energy commitments of 2,285 GWh/year, with call processes in place expected to involve an additional 2,300 GWh/year.<sup>637</sup> This total was short of the target BC Hydro had set for itself in its 2008 LTAP. In light of all of these power calls, programs, and purchases, most of which were entered into *after* Celgar's 2009 EPA, and which in aggregate still fell short of BC Hydro's 2008 acquisition target, it is ludicrous for Dr. Rosenzweig and Canada to contend that BC Hydro would have purchased none of Celgar's below-load electricity if the alternative was to have it leave the Province.

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

2009), at 2.

<sup>634</sup> Memorial, ¶ 332; C-221, 2009 Celgar EPA, at app.2, Part II.

<sup>635</sup> Memorial, ¶¶141-147.

<sup>636</sup> See C-86, BC Hydro, Bioenergy Phase 2 Call Request for Proposals: Report on the RFP Process (10 February 2012), at 1.

<sup>637</sup> C-88, BC Hydro, Information Note, Economic Impact of BC Hydro's Bioenergy Initiatives (11 May 2011).

562. In sum, had BC properly permitted Celgar to sell additional self-generated electricity, as a finding of liability necessarily implies, the likely scenario would have been for Celgar to have sold such electricity to BC Hydro, in 2009, as part of its 2009 EPA. As Mr. Merwin explains, this additional amount of electricity, below Celgar's 349 GWh/year, was available immediately, and BC Hydro would have begun taking it as soon as the BCUC approved the EPA on 31 July 2009.<sup>638</sup> Indeed, BC Hydro's 2009 EPA with Tembec provided that << [REDACTED]

[REDACTED] >><sup>639</sup>

563. For this reason, in his updated damages analysis, Mr. Kaczmarek has revised the start date from which damages run, from 6 May 2009 (the date on which the BCUC issued Order G-48-09) to 31 July 2009. This is a more conservative assumption — one that reduces Mercer's damages.<sup>640</sup> Even though Canada did not challenge Mercer's use of the May 2009 date, upon analyzing Canada's other damages arguments, and giving further consideration to the most likely scenario for Celgar's sale of any additional electricity that should have been allowed for sale, Mr. Kaczmarek agrees that 1 August 2009 is a more appropriate starting date.<sup>641</sup>

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<sup>638</sup> Second Merwin Witness Statement, ¶ 31.

<sup>639</sup> << [REDACTED]

>> C-145, 2009 Tembec EPA, at 14. << [REDACTED]

>> *Id.* § 5.2. The EPA also provides a << [REDACTED]

>> *Id.* at app. 1-9.

<sup>640</sup> See Kaczmarek Second Expert Report, ¶¶ 133-136.

<sup>641</sup> See Kaczmarek Second Expert Report, ¶ 133-136.

**3. Celgar Also Had Other Market Opportunities For Its Self-Generated Electricity**

564. Third, even if BC Hydro, contrary to BC government policy prevailing at the time, would not have purchased Celgar's below-load electricity, Celgar should not have been required to use such electricity for self-supply, and thus should have been permitted to sell it. Celgar had other market opportunities available for the sale of its below-load electricity. BC Hydro was Celgar's preferred customer, due to its proximity and thus lower transmission costs and line losses, but it was by no means Celgar's only actual or potential customer.<sup>642</sup>

565. Beginning in 2006, NorthPoint acted as Celgar's electricity sales broker.<sup>643</sup> Initially, Celgar focused on selling on an hourly basis only self-generated electricity that was surplus to its load.<sup>644</sup> However, as the improvements from the Blue Goose Project investments came fully on line in 2007, Celgar's practical electricity generation capacity increased and became more reliable.<sup>645</sup> Consequently, in 2007 Celgar began exploring [REDACTED]

[REDACTED]

566. As Brian Merwin has testified, one of the opportunities Celgar identified was selling its below-load electricity to [[REDACTED]].<sup>647</sup>

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<sup>642</sup> See Merwin Witness Statement, ¶¶ 82, 90, 139, 145.

<sup>643</sup> See Merwin Witness Statement, ¶ 50; Second Merwin Witness Statement, ¶ 24 Friesen Witness Statement, ¶¶ 4-5.

<sup>644</sup> See Merwin Witness Statement, ¶¶ 52, 59; Second Merwin Witness Statement, ¶ 24; Friesen Witness Statement, ¶ 6.

<sup>645</sup> See Merwin Witness Statement ¶¶ 58-60.

<sup>646</sup> See Merwin Witness Statement, ¶¶ 60, 66; Second Merwin Witness Statement, ¶ 24.

<sup>647</sup> See Merwin Witness Statement, ¶ 82.

NorthPoint also identified other sales opportunities for Celgar's below-load self-generated electricity.<sup>648</sup> As Robert Friesen, Director of Energy Trading at NorthPoint from 2001 to 2010, and responsible for overseeing Celgar's brokerage agreement, confirms:<sup>649</sup>

In order to maximize the benefit both parties realized from the Marketing Services Agreement, I would regularly identify electricity sales opportunities for Celgar. At the beginning of the Marketing Services Agreement, Celgar was able to supply electricity that was [REDACTED]. In other words, Celgar was able to provide an [REDACTED]. As time passed, and Celgar made investments to improve its self-generation capacity and reliability, Celgar's ability to provide firm energy for sale to third parties increased. As a consequence, I began identifying longer-term [[REDACTED] [REDACTED]] electricity sales opportunities in the spot and forward markets that NorthPoint could broker for Celgar, based on Mid-C prices at the time.<sup>650</sup>

567. As Celgar realized the potential to enter into longer-term electricity sales contracts of increasing levels for its self-generated electricity, Celgar entered into talks with FortisBC to become a full-load customer while simultaneously selling its entire electrical output.<sup>651</sup> By the time Celgar and FortisBC were finalizing their Power Supply Agreement in mid-2008, Celgar began consulting with NorthPoint in order to arrange for longer-term sales of its total electrical generation.<sup>652</sup> At this point, NorthPoint advised Celgar that it could obtain [[REDACTED] [REDACTED]]<sup>653</sup> Celgar planned, with FortisBC, to execute such contracts for a trial period, by the end of the summer of

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<sup>648</sup> See Merwin Witness Statement, ¶ 82.

<sup>649</sup> Friesen Witness Statement, ¶¶ 1, 3.

<sup>650</sup> Friesen Witness Statement, ¶ 7.

<sup>651</sup> See Merwin Witness Statement, ¶ 66.

<sup>652</sup> See Second Merwin Witness Statement, ¶ 25; Friesen Witness Statement, ¶¶ 7-8.

<sup>653</sup> Merwin Witness Statement ¶ 83; Friesen Witness Statement, ¶ 8.

2008, as such electricity sales would serve as sample transactions that would take place under the finalized Power Supply Agreement.<sup>654</sup>

568. Mr. Friesen confirms the testimony of Mercer's Brian Merwin that Celgar had actual sales opportunities for its below-load electricity, at the time of the challenged Measures, and transmission availability, through NorthPoint:

By mid-2008, there were [[ [REDACTED] ]] that we were planning to broker for Celgar. At the time, I did not believe that we would have any difficulty selling all of Celgar's self-generated electricity, as the quantity was very small compared to the market demand. . . . I understand that in the arbitration proceeding, Canada has called into question whether transmission access would have been available for sales of Celgar's self-generated electricity outside of British Columbia and whether Celgar would have been able to enter into electricity sales contracts that would have been economically efficient. I disagree with Canada's position, and can confirm that [[ [REDACTED] ]]

[REDACTED] ] for Celgar's self-generated electricity were very real electricity sales opportunities, with transmission access that would have allowed for both Celgar and NorthPoint to profit.<sup>655</sup>

569. On the specific point of transmission availability, Mr. Friesen further clarifies that Canada's expert, Mr. Rosenzweig, misrepresents transmission access out of British Columbia: "I note that Mr. Rosenzweig in his expert report states, 'I have been informed that firm transmission access out of BC is 100% subscribed and has been 100% subscribed for several years.' Mr. Rosenzweig has been misinformed. From the time I began working with Celgar to broker its electricity sales until present day, there has always been firm transmission access available out of British Columbia for periods of up to twelve months."<sup>656</sup>

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<sup>654</sup> Second Merwin Witness Statement ¶ 25.

<sup>655</sup> Friesen Witness Statement, ¶¶ 8-9.

<sup>656</sup> Friesen Witness Statement, ¶ 11.

570. Finally, Mr. Friesen disputes Canada's assertion that Mercer might not have been able to obtain required export permits from the National Energy Board.<sup>657</sup> As Mr. Friesen testifies, "Canada's claim is inapt in the context of electricity exports that Celgar executes through NorthPoint, as NorthPoint would take possession of Celgar's electricity at the KI interface, and NorthPoint possessed the necessary National Energy Board and British Columbia permits to engage in electricity exports from British Columbia. Therefore, Celgar would not be required to obtain a separate electricity export permits for electricity sales made via NorthPoint."<sup>658</sup>

571. Navigant also researched the issue of transmission access, and provides with its Second Expert Report published data indicating that access was available. Navigant reviewed hourly transmission capacity utilization at the British Columbia Intertie, as reported by the Bonneville Power Administration.<sup>659</sup> The data show that there was at least 50 MW of excess north-to-south transmission capacity (*i.e.*, exports from BC) in every hour in 2008 and 2009, with an average hourly availability of over 1,100 MW.<sup>660</sup>

572. The conduct of all parties at the time also buttresses the conclusion that Celgar could have exported its below-load electricity, profitably, beginning in 2008 or 2009. Celgar entered into its 2008 PSA with FortisBC, which it would have had no reason to do unless it

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<sup>657</sup> See Counter-Memorial, ¶507.

<sup>658</sup> Witness Statement of Robert Friesen, ¶ 12.

<sup>659</sup> The Bonneville Power Administration is a non-profit U.S. federal agency that is part of the U.S. Department of Energy. The BPA markets wholesale electrical power from U.S. federal hydro projects in the Columbia River basin, as well power from non-federal power plants. The BPA also operates and maintains much of the high-voltage transmission within its service area (all or a portion of the States of Idaho, Oregon, Washington, Montana, California, Nevada, Utah, and Wyoming). See NAV-123, Bonneville Power Administration, About Us.

<sup>660</sup> See Second Expert Report of Brent Kaczmarek, ¶¶ 75-76; see also NAV-124, Bonneville Power Administration, Rolling 30 Days and Monthly History for Interties and Flowgates.

believed it could sell its own, self-generated electricity. FortisBC expended resources negotiating the agreement, which it would not have done if it thought Celgar lacked export options. Nelson negotiated its own agreement with FortisBC, concluded on 14 May 2008, and actually began exporting electricity.<sup>661</sup> BC Hydro went to the Commission to amend its 2008 PPA with FortisBC so as to preclude Nelson and Celgar from exporting below-load electricity, and drawing replacement electricity from FortisBC, including electricity supplied by BC Hydro under the 3808 Agreement. And BC Hydro continued to fight with Celgar through the end of 2008 over whether Celgar should be permitted to sell its below-load electricity to third-parties.

573. In short, the testimony of all witnesses addressing Celgar's electricity export opportunities as of 2008-09 is consistent, which testimony also is consistent with the conduct of all the parties at the time. And Canada offers no controverting evidence. Canada simply has Dr. Rosenzweig assert that everything is speculative, without any attempt to investigate or analyze the facts.

#### **4. BC Hydro Is Likely to Renew Celgar's EPA**

574. Finally, Canada takes issue with the assumption in Mr. Kaczmarek's damages model that BC Hydro would renew Celgar's EPA, when it expires in September 2020, and otherwise continue to purchase Celgar's self-generated electricity into the future. Canada

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<sup>661</sup> R-247, FortisBC, Filing of Umbrella Agreement for Short-Term Firm or Non-Firm Point to Point Transmission Service Agreement dated April 18, 2008 between FortisBC Inc. and the Corporation of the City of Nelson; and Power Coordination Agreement dated May 14, 2008 between FortisBC Inc. and the Corporation of the City of Nelson (24 June 2008).

contends that “it is highly speculative to assume that BC Hydro will both need and be willing to re-contract with the Claimant at the end of its current EPA term.”<sup>662</sup>

575. The evidence demonstrates otherwise. First, the 10-year term of Celgar’s 2009 EPA was elected by Celgar. The Bioenergy Phase I power call permitted proponents to propose terms of 5-20 years.<sup>663</sup> Indeed, during Celgar’s negotiations with BC Hydro, BC Hydro requested that Celgar agree to a 20-year term.<sup>664</sup> When Celgar declined, BC Hydro proposed a 10-year term with a renewal option,<sup>665</sup> which Celgar also declined to provide.<sup>666</sup>

576. Thus, BC Hydro itself had, from the time of the original EPA negotiations, sought a longer-term supply commitment from Celgar. Celgar declined to agree to a 20-year term, as Mr. Merwin explains, because it was confident that it could obtain renewal of the EPA when it expired, and that pricing for biomass based energy would be higher at that time than could be obtained through an extended-term EPA in 2009, in which future price increases would be inflation-based only, tied to the Consumer Price Index.<sup>667</sup>

577. Second, and more recently, BC Hydro’s long-term resource plan projects that 50 percent of its bioenergy EPA’s will be renewed, and Celgar is likely to meet the criteria BC

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<sup>662</sup> Counter-Memorial, ¶ 506.

<sup>663</sup> See R-117, BC Hydro, Bioenergy Call Phase I: Proponent Information Session (26 March 2008), at 49.

<sup>664</sup> Merwin Second Witness Statement, ¶ 35.

<sup>665</sup> Merwin Second Witness Statement, ¶ 35; C-296, Letter from BC Hydro to Celgar (15 August 2008), ¶ 5.

<sup>666</sup> Merwin Second Witness Statement, ¶ 35.

<sup>667</sup> Merwin Second Witness Statement, ¶ 32-34. See also C-297, Memorandum from Brian Merwin to Jimmy Lee (Mercer CEO) and David Gandossi (Mercer CFO) re BC Hydro Bid Price and Terms (7 June 2008), at Recommendation # 4 (proposing that Celgar in its bid propose a term of 8-10 years do as to capture full value of future price increases for green power).

Hydro has indicated it would apply for renewal. On 15 November 2013, BC Hydro submitted its 2013 Integrated Resource Plan (“IRP”) to the BC Government, which approved the plan on 25 November 2013. The IRP has replaced the LTAP as the long range needs and resources planning document for BC Hydro, and the 2013 IRP is BC Hydro’s most recent. The document sets out BC Hydro’s current plans for EPAs, and is the best evidence of whether or not BC Hydro intends to renew some or all of the bioenergy EPAs it entered into in 2009 and thereafter.

578. The IRP states that, “[f]or planning purposes, BC Hydro now estimates that about 50 per cent of the bioenergy EPAs will be renewed, about 75 per cent of the small hydroelectric EPAs that are up for the renewal in the next five years will be renewed, and all remaining EPAs will be renewed.”<sup>668</sup> BC Hydro explained that, “[a]s EPAs expire for projects already in operation, BC Hydro is targeting renewal of the contracts for those facilities that have the lowest cost, greatest certainty of continued operation and best system support characteristics.”<sup>669</sup>

579. Celgar is likely to qualify as one of the EPA’s that would be renewed under these criteria. First, it is a low-cost electricity producer, and was the second lowest bidder in BC Hydro’s first competitive power call for bioenergy. Second, because Celgar produces the vast majority of its electricity by burning black liquor, its fuel supply and pricing, and thus the reliability of its electricity production, is much more certain than that of mills like Howe Sound and Tembec that must rely in significant part on burning purchased natural gas or hog fuel. Even Celgar’s supply of hog fuel is more certain than others, for it largely produces hog fuel itself, in

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<sup>668</sup> C-298, BC Hydro, 2013 Integrated Resource Plan (November 2013), Chapter 4, at 4-15.

<sup>669</sup> C-298, BC Hydro, 2013 Integrated Resource Plan (November 2013), Chapter 4, at 4-15.

BC Hydro also surmises that it will be able to renew these EPAs at lower prices, but it provides no pricing estimates that could form the basis for analysis. *Id.*

its upgraded wood room where it chips whole logs itself. And Celgar is one of the most modern pulp mills in the Province, and thus has a longer expected life span than older mills in the Province. Third, the Celgar Mill has flexibility in shifting its load and generation over a 24-hour period, so as to be highly responsive to BC Hydro's system support needs.<sup>670</sup>

580. Finally, it is reasonable for Mr. Kaczmarek to assume that Celgar's EPA would be renewed at the price then in effect under its current EPA. Such an assumption is consistent with BC Hydro's behavior at the time the EPA was being negotiated in seeking a 20-year deal from Celgar. BC Hydro at the time plainly was betting that its future costs for acquiring bioenergy in the Province would be the same or higher than current prices in real terms. If BC Hydro thought its costs would be lower, it would not have sought a longer-term contract from Celgar. The assumption also is consistent, and indeed, conservative, when viewed against Celgar's conduct, as Celgar was betting that bioenergy prices would increase in real terms.

581. As Mr. Merwin explains, prices for bioenergy can be expected to rise due to expected declines in the availability of wood fiber and thus an increase in pulp mill raw material costs. At the time the original EPA's were negotiated, there was an abundance of wood available in the Province, largely due to the mountain pine beetle infestation. This created a large volume of timber that needed to be harvested, and a large supply of wood chips. However, the Province's long-term forecasts for wood supply point to diminished availability and thus higher prices for wood chips.<sup>671</sup> As Mr. Merwin explains, this points to increasing costs and increasing prices for

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<sup>670</sup> See Merwin Second Witness Statement, ¶¶ 41-43.

<sup>671</sup> See Merwin Second Witness Statement, ¶ 34 ("Although the mountain pine beetle infestation in British Columbia led to a considerable amount of timber that required harvesting (and a concomitant short-term increase in wood supplies and decrease in wood prices), forecasters

[FOOTNOTE CONTINUED ON NEXT PAGE]

bioenergy.<sup>672</sup> Indeed, the prices paid by BC Hydro in Bioenergy Phase II were higher than those it paid in Bioenergy Phase I.<sup>673</sup>

582. Mercer acknowledges that BC Hydro, in its 2013 IRP, suggests that it will be able to renew its bioenergy EPAs at lower prices. BC Hydro contends that “[d]ue to the fact that these are existing projects where the IPP’s initial capital investment has been fully or largely recovered over the initial term of the EPA, BC Hydro expects to be able to negotiate a lower energy price.”<sup>674</sup> Mercer disagrees with this contention, which is little more than wishful thinking. The available evidence points to increasing rather than decreasing bioenergy prices, as indicated above.

583. Moreover, BC Hydro’s assumption that the capital costs of new self-generation projects would already have been recovered over the initial term of an EPA is not correct. For Canadian financial accounting purposes, turbine generators typically are depreciated over a 20-year period, and Celgar used a [[REDACTED]]

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

expected the wood supply in the mid-term to decline, leading to higher prices for wood.”); C-333, British Columbia Committee on Timber Supply, *Growing Fibre, Growing Value* (2012) (“Over the next decades the timber supply in the interior will continue to decrease. When beetle-killed pine is no longer salvageable, the province’s overall supply of mature timber will be reduced, and 10 to 15 years from now it is forecast to be 20 percent below the pre-infestation levels, a reduction that may last up to 50 years.”); *see also*, C-329, *Timber Supply and the Mountain Pine Beetle Infestation in British Columbia 2007 Update*, available at [http://www.for.gov.bc.ca/hfp/mountain\\_pine\\_beetle/Pine\\_Beetle\\_Update20070917.pdf](http://www.for.gov.bc.ca/hfp/mountain_pine_beetle/Pine_Beetle_Update20070917.pdf).

<sup>672</sup> Merwin Second Witness Statement, ¶ 34.

<sup>673</sup> *See* Memorial, ¶ 138 (average adjusted levelized price in 2009 Bioenergy Phase I was C\$ 112/MWh), ¶ 147 (average adjusted levelized price in 2010 Bioenergy Phase II was C\$ 115/MWh).

<sup>674</sup> *See* C-298, BC Hydro, 2013 Integrated Resource Plan (November 2013), Chapter 4, at 4-15.

<sup>675</sup> Merwin Second Witness Statement, ¶ 36.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ]]

584. Indeed, the history of EPA renewals to date disproves BC Hydro's supposition.

<< [REDACTED]

[REDACTED]

[REDACTED] >> In 2004, BC Hydro entered into an LDA with Canfor in which BC Hydro agreed to cover << [REDACTED] >> percent of the cost of installing a new << [REDACTED] >> MW turbine generator in exchange for a load displacement commitment.

Nevertheless, in 2009 BC Hydro agreed to replace the LDA with a new EPA that provided Canfor with a << [REDACTED] >> for its bioenergy.<sup>676</sup> And the pricing in Howe Sound's 2010 EPA was << [REDACTED] >> than under its 1989 Generation Agreement.

585. To Mercer's knowledge, in every case in which BC Hydro has renewed a bioenergy EPA, or replaced a bioenergy LDA with an EPA, with a kraft pulp mill, BC Hydro's cost of acquiring the self-generated electricity has increased. Mercer is aware of no example in which it has decreased. This evidence buttresses Mr. Kaczmarek's assumption regarding future bioenergy prices.

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<sup>676</sup> See Memorial, ¶¶ 579–82.

**D. Navigant’s Updated Quantification  
Of Damages Is Correct**

586. Finally, Dr. Rosenzweig raises various objections to Mr. Kaczmarek’s damages calculations, ranging from discount rates to debt-equity ratios. As these are technical issues requiring expertise and judgment, Mr. Kaczmarek addresses them in his Second Report.

**VII. THE TRIBUNAL HAS JURISDICTION OVER ALL  
CHALLENGED MEASURES AND CLAIMS**

587. Canada raises various jurisdictional arguments concerning aspects of Mercer’s claims based on actions taken by BC Hydro in establishing a GBL for Celgar and imposing self-supply obligations and third-party sales restrictions in the GBL-related provisions of Celgar’s 2009 EPA. It raises no jurisdictional objection to Mercer’s claims concerning measures taken by the BCUC. Canada’s arguments concerning the GBL-related restrictions imposed by BC Hydro, and approved and made effective by the BCUC, do not withstand even cursory scrutiny, and thus Mercer addresses them last.

**A. In Restricting Celgar’s Below-GBL Sales To Third-  
Parties, BC Hydro Was Exercising Delegated  
Governmental Authority**

588. Canada first takes the position that BC Hydro was “not exercis{ing} delegated governmental authority in negotiating a GBL with the Claimant.”<sup>677</sup> Canada disputes both that the BCUC directed BC Hydro to negotiate and establish GBLs with electricity self-generators, and that setting of GBLs is a governmental, rather than a commercial, act.<sup>678</sup>

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<sup>677</sup> Counter-Memorial, ¶ 327.

<sup>678</sup> Counter-Memorial, ¶ 327.

**1. The BCUC Provided BC Hydro  
With Wide Discretion And Thereby  
Delegated Governmental Authority**

589. First, as explained in Mercer’s Memorial, through Order G-38-01, the BCUC expressly “direct{ed}” BC Hydro to negotiate and thereby determine GBLs with its customers.

In particular, such Order provides:

*The Commission directs B.C. Hydro to allow Rate Schedule 1821 customers with idle self-generation capability to sell excess self-generated electricity, provided the self-generating customers do not arbitrage between embedded cost utility service and market prices. This means that B.C. Hydro is not required to supply any increased embedded cost of service to a RS 1821 customer selling its self-generation output to market. The Commission recognizes that considerable debate may ensue over whether a self-generator has met this principle, but the Commission expects B.C. Hydro to make every effort to agree on a customer baseline . . . .*<sup>679</sup>

590. Canada contends that, in so doing, the BCUC was not delegating authority but instead setting out a “rule” for BC Hydro to follow. In Canada’s view, the determination of whether the GBL prevented harmful arbitrage remained with the BCUC, and the BCUC exercised ultimate authority in approving the EPA.<sup>680</sup>

591. This rather formalistic argument, which inexplicably focuses on arbitrage in the abstract instead of the setting of the GBL and its consequences, ignores the facts. Canada neglects the fact that neither BC Hydro nor anyone else in BC had set GBLs before Order G-38-01, and that BC Hydro went to the Commission in February 2001 in that G-38-01 proceeding seeking both authority and guidance to address the desire of self-generators to sell electricity to

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<sup>679</sup> C-5, BCUC, Order Number G-38-01 and Accompanying Commission Staff Report (5 April 2001), ¶ 1 (emphasis added) (“Order G-38-01”).

<sup>680</sup> Counter-Memorial, ¶ 330.

the market. The Commission then established a very general principle, conferring BC Hydro with enormous discretion to apply that principle in individual cases.

592. BC Hydro's role in implementing the Commission's directive was *not* simply ministerial, as Canada's argument implies. Rather, the BCUC effectively provided BC Hydro with discretion to refine the general principle, to develop more detailed guidelines, and to determine GBLs in individual cases. Indeed, as demonstrated below, BC Hydro, not the BCUC, developed the "current normal" GBL standard BC Hydro contends it applied in all cases. This conferral of discretion that the BCUC itself otherwise would exercise is the essence of delegated governmental authority.<sup>681</sup>

593. Canada further ignores the fact that BC Hydro, not the BCUC, established each GBL and established the contractual provisions defining the effect of the GBL. The Commission played no role in setting any of the GBLs at issue, except with respect to the Tolko sawmill.

594. Indeed, many of the GBL-related measures here at issue — including the 1997 Tembec EPA, the 2001 Howe Sound Consent Agreement, and the 2010 Howe Sound EPA — were not even subject to BCUC approval due to various rate freezes and exemptions the BC Government implemented. BC Hydro was *de jure* the final arbiter and approver, and thus, under Canada's own argument, the responsible party exercising governmental authority. Canada completely fails to respond to Mercer's argument that "once the Province acted to remove that

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<sup>681</sup> The Commission recently has recognized as much, in the TS 74 proceedings, in which it held that "the GBL mechanism . . . is a rate within the meaning of the UCA," (C-168, BCUC Order Number G-18-14 and Accompanying Decision (17 February 2014), at 26), and ordered BC Hydro to prepare and file "more detailed" GBL guidelines for Commission review and approval. The guidelines and GBL determinations serve a regulatory function, and the Commission finally is acting to reclaim some of the broad authority it delegated to BC Hydro by allowing it to set GBLs without Commission-approved guidelines.

{approval} authority by exempting certain EPAs from BCUC review, the delegation of authority to BC Hydro was full and unconditional.”<sup>682</sup>

595. Even as to arrangements subject to BCUC approval, including Celgar’s 2009 EPA, the BCUC in fact conducted no substantive review of the GBL-related provisions, made no determination in approving the EPA that the GBL established by BC Hydro was necessary to prevent harmful arbitrage, and otherwise exercised none of the authority over GBLs Canada ascribes to it except perfunctory approval. All of Canada’s witnesses describing how GBLs were set for individual self-generators are from BC Hydro or the self-generator; none is from the BCUC. *De facto*, BC Hydro exercised delegated authority fully to set GBLs and to define their import.

596. And even if Canada were correct that the relevant State action is the BCUC’s approval of the EPA, the BCUC in fact approved Celgar’s 2009 EPA, and its GBL provisions, on 31 July 2009, confirming the Tribunal’s jurisdiction over claims involving Celgar’s GBL and related provisions of the EPA. Canada’s argument simply cannot support any conclusion that the Tribunal lacks jurisdiction over Mercer’s claims involving the GBL-related provisions of Celgar’s 2009 EPA. Even if BC Hydro’s actions in establishing Celgar’s GBL are not State action, there is no dispute that the BCUC’s actions in approving and making effective those GBL provisions do constitute the requisite State action.

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<sup>682</sup> Memorial, ¶ 414.

**2. BC Hydro Was Not Acting In A Purely Commercial Capacity In Imposing A Self-Supply Obligation On Celgar And Restricting Its Sales To Third-Parties**

597. Canada's second argument — that the establishment of a GBL is a purely commercial act, and not a governmental act — is even weaker than the first, and equally as irrelevant to any issue of jurisdiction. Canada concedes that State action still occurred by virtue of the BCUC's approval of Celgar's EPA and its GBL, such that the Tribunal has jurisdiction over claims relating to Celgar's GBL regardless.

598. Canada's commercial actor argument is that “[i]f another commercial actor was required to supply electricity in BC's regulated market and it had an opportunity to purchase incremental self-generated electricity, it would almost certainly negotiate a term of condition serving the same purpose as the GBL in order to avoid adverse financial impact to its bottom line. In setting a GBL, BC Hydro is thus behaving as any commercial actor would in similar circumstances.”<sup>683</sup>

599. This argument misses the point. Mercer has no doubt that any number of commercial companies would like to restrict their competitors, or prevent their suppliers from supplying their competitors. The issue is whether they would have the legal authority to do so absent governmental authorization. Canada has provided no evidence of private parties agreeing to restrictions of the sort BC Hydro imposed upon Celgar, requiring it to self-supply, and

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<sup>683</sup> Counter-Memorial, ¶ 333.

precluding below-GBL sales to third parties, or rebutting Mercer's argument that such an agreement would violate Canadian competition law.<sup>684</sup>

600. The evidence all is to the contrary. Here, the BCUC provided BC Hydro with the legal authority to establish GBLs for its customers, and thereby impose a self-supply obligation and restrict its access to utility power. Absent that authority, BC Hydro could not do so and had not done so. This is why BC Hydro went to the Commission in February 2001.<sup>685</sup> It also explains why the BCUC did not terminate those proceedings, resulting in Order G-38-01, even after BC Hydro advised the BCUC in March 2001 that it had reached an agreement with Howe Sound.<sup>686</sup> The Commission continued its proceeding, and provided its explicit authorization for BC Hydro to negotiate GBLs with its customers.

601. FortisBC too operates in BC's regulated electricity market, both purchasing and selling electricity. When Celgar approached FortisBC seeking increased access to embedded cost utility power, FortisBC too took the position that it lacked authority on its own to restrict Celgar's access, unless and until the BCUC directed otherwise. As Mr. Swanson, FortisBC's Director of Regulatory Affairs, testifies, when Celgar and Nelson approached FortisBC around June 2007 seeking to purchase power from FortisBC to meet their own needs, and to sell their self-generated electricity, "we believed we needed to supply our customers (*i.e.* Celgar and Nelson) with

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<sup>684</sup> Memorial, ¶ 419 n.516.

<sup>685</sup> Memorial, ¶ 204.

<sup>686</sup> Memorial, ¶¶ 204, 216.

additional power (or more precisely, to ‘deem’ a supply of additional power absent a clear restriction preventing us from doing so.)”<sup>687</sup>

602. Indeed, in the G-48-09 BCUC proceeding itself, FortisBC explicitly took the position that it could not restrict its customer’s exports of self-generated electricity, and that “[p]ursuant to section 28 of the British Columbia Utilities Commission Act (the “Act”), FortisBC has a statutory duty as a public utility to supply power to customers located within its service territory . . . .”<sup>688</sup> FortisBC thus has understood that only a governmental entity — the BCUC — had the authority to direct it to restrict Celgar’s access to embedded cost utility power, and that it could not do so on its own, as a private party.

603. Finally, Mercer’s economist and public utility regulation expert, Dr. Peter Fox-Penner, testifies that BC Hydro’s actions in setting GBLs, establishing self-supply obligations, and restricting sales to third-parties all are governmental and regulatory in nature, and not commercial. Dr. Fox-Penner notes that

I also have been asked to comment on Canada’s argument, that, in establishing GBLs for individual self-generators, BC Hydro was acting purely in a commercial capacity and not exercising delegated governmental authority. Based on my understanding as a regulatory practitioner rather than a lawyer, I do not agree. The power to establish GBLs is an essential part of a process designed to determining generation policies and province-wide rates. These all are regulatory, and thus governmental functions that private parties do not otherwise possess. As shown above, BC Hydro was afforded great discretion in the exercise of these powers through both explicit and implicit (through exclusion from review and inaction of review) delegations of authority from the BCUC.<sup>689</sup>

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<sup>687</sup> Swanson Witness Statement, ¶ 61 (footnote omitted).

<sup>688</sup> C-294, FortisBC Responses to Information Requests, BCUC Proceeding to Amend Section 2.1 of Rate Schedule 3808 (14 August 2008), at 3, 7.

<sup>689</sup> Fox-Penner Expert Report, ¶ 98 (footnote omitted).

**B. The Earliest Date From Which The NAFTA Limitations Period Can Run For BC Hydro's GBL Measure Is The Date On Which Celgar's Restriction On Below-GBL Third-Party Sales Took Effect**

604. In its final argument regarding jurisdiction, Canada briefly argues that Mercer's claims are time-barred under NAFTA Articles 1116(2) and 1117(2).<sup>690</sup> These arguments all are based on a series of proffered alternative and inappropriate starting dates for the limitations period ("trigger dates") occurring before the measures taken against Mercer were effective, and, indeed, before any final governmental action had been taken.

**1. The NAFTA Requirement**

605. NAFTA Article 1116(2) provides that:

An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.<sup>691</sup>

Article 1117(2) contains the identical three-year time limit in relation to a claim by an investor of a party on behalf of an enterprise.<sup>692</sup>

606. The predicate for a claim thus is a "breach" of a NAFTA obligation. Put another way, the earliest possible trigger date is the date on which the breach occurs. It may, however, fall later if the investor first acquires knowledge of the breach and of loss or damage at a later point in time. This reflects the common-sense principle that claims cannot be triggered until a

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<sup>690</sup> Counter-Memorial, ¶ 340.

<sup>691</sup> C-1, North American Free Trade Agreement, U.S.-Can.-Mex., 17 December 1992, 32 ILM 289, 605 (1993), Art.1139 ("NAFTA"), Art. 1116(2) (emphasis added).

<sup>692</sup> C-1, NAFTA, Art. 1117(2).

measure takes effect, as a State can always repeal or modify potential or prospective measures. Only after a measure takes effect and leads to actual present harm is a claim “ripe.”

607. In *Glamis Gold v. United States*, the NAFTA tribunal explicitly recognized that the NAFTA parties incorporated precisely such a ripeness requirement. That tribunal explained, in the context of a jurisdictional challenge to an expropriation claim, that “{t}hrough the language of Article 1117(1), the State Parties conceived of a ripeness requirement in that a claimant needs to *have* incurred loss or damage in order to bring a claim for compensation under Article 1120.”<sup>693</sup> The tribunal went on to explain that “{c}laims only arise under NAFTA Article 1110 when actual confiscation follows, and thus mere threats of expropriation or nationalization are not sufficient to make such a claim ripe; for an Article 1110 claim to be ripe, the governmental act must have directly or indirectly taken a property interest resulting in actual present harm to an investor.”<sup>694</sup> This is so, the tribunal explained, because “{w}ithout a governmental act that moves beyond a mere threat of expropriation to an actual interference with a property interest, it is impossible to assess the economic impact of the interference.”<sup>695</sup>

608. Canada overlooks this common-sense ripeness principle, and the “breach” requirement of Articles 1116(2) and 1117(2) — which are not limited exclusively to expropriation claims — in proposing various trigger dates, all of which precede the effective dates of the measures of which Mercer complains. Indeed, none of Canada’s proposed dates even reflects final State action.

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<sup>693</sup> CA-22, *Glamis Gold* (NAFTA), ¶ 328 (emphasis in original).

<sup>694</sup> CA-22, *Glamis Gold* (NAFTA), ¶ 328.

<sup>695</sup> CA-22, *Glamis Gold* (NAFTA), ¶ 331.

609. Moreover, with respect to Mercer's discrimination-based claims, a breach of the obligation to afford treatment no less favorable can occur only after Canada *both* affords treatment to Mercer, *and* it affords more favorable treatment to a Canadian national or a third-country national. BC Hydro's GBL-related treatment of both Tembec in its 2009 EPA and Howe Sound in its 2010 EPA both occurred later than its treatment of Celgar. Put another way, the *earliest* trigger date is the date on which treatment was afforded to Celgar, but if treatment was afforded to a comparator at a later date, the trigger date would be that date with respect to a claim involving that comparator.

**2. None of the Dates Canada Proposes Reflects Final Action Much Less Any Measure That Had Yet Taken Effect**

610. There is no dispute concerning the trigger date for Mercer's claim based on BCUC Order G-48-09. The Commission issued that Order on 6 May 2009, and Mercer filed its Request for Arbitration on 30 April 2012, within the three-year limitations period.

611. Instead, Canada disputes the trigger date for Mercer's claims based on the GBL-related provisions of Celgar's 2009 EPA with BC Hydro. Canada's proposed dates all occur before the challenged measure on Celgar even took effect, and thus before any breach of a NAFTA obligation could possibly have occurred.

612. Canada argues first that the trigger date should be 30 May 2008, which it contends is the date on which BC Hydro set the GBL for Celgar, and after which it remained unchanged.<sup>696</sup> But BC Hydro's calculation of a GBL did not establish any breach of any NAFTA obligation. It

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<sup>696</sup> Counter-Memorial, ¶ 339.

just established a number, the legal effect of which remained to be negotiated, as part of an agreement which had not yet gone into effect. As BC Hydro itself has argued to the BCUC, a GBL by itself is “basically just a number,” and “the context in which the GBL mechanism is used is key.”<sup>697</sup>

613. Second, Canada contends that the trigger date is 10 June 2008, which is the date on which Celgar submitted its formal proposal under the Bioenergy Phase I power call, to BC Hydro, containing the GBL BC Hydro had told Celgar it must use in its proposal.<sup>698</sup> While Mercer disputes that it “agreed” to any GBL by submitting an application using a number BC Hydro directed it to use, the fact remains that the legal implications of that number remained unresolved, and it as yet had no legal effect.<sup>699</sup>

614. Third, Canada contends that the trigger date occurred when “the EPA was signed by both BC Hydro and the Claimant on January 27, 2009, still more than three months before the

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<sup>697</sup> C-168, BCUC Order Number G-19-14 and Accompanying Decision (17 February 2014), at 23 (citing C-285, BC Hydro Reply Submission, Application to Amend Tariff Supplement No. 74 (17 July 2013), at 4–5).

<sup>698</sup> Counter-Memorial, ¶ 340.

<sup>699</sup> Celgar never “agreed” to the self-supply imposing GBL BC Hydro imposed on it, as is apparent from Celgar’s insistence on executing the 2009 Side-Letter, which left resolution of Celgar’s below-GBL sales to the BCUC. *See* Memorial, ¶¶ 330-31. In light of the full history of Celgar’s GBL-related negotiations with BC Hydro, it strains credulity for Canada to argue that Celgar agreed to this GBL, or that Celgar’s claim for damages somehow is limited by other GBL’s Celgar proposed during the negotiations, including data it presented using forms and calculations required by BC Hydro. *See, e.g.*, Rosenzweig Report, ¶ 117 (contending that the highest damages should be based on the 34.3 MW GBL Celgar put forward in a March 6, 2008 registration form at the very beginning of the Bioenergy Phase I process, asking for its “annual energy output” and ignoring completely the energy commitments to NorthPoint and FortisBC that Celgar had identified on the very same page.). *See* NERA-28, Celgar Registration Form (6 March 2008). BC Hydro certainly was not constrained by any of these figures, and neither is the Tribunal. Indeed, the obligation to afford treatment no less favorable is Canada’s obligation to provide, not Celgar’s obligation to request.

cut-off date.”<sup>700</sup> But while the implications of the GBL and related restrictions were known to Mercer on that date, there still was no measure that had taken effect, much less breach of a NAFTA obligation. Canada proves this point itself, when it argues elsewhere that a “GBL, however, *remains of no force* until it, like the other EPA terms and conditions, receives the approval of the BCUC.”<sup>701</sup>

615. In short, no measure affecting Celgar was yet in effect on any of the dates Canada proposes, and thus no breach could yet have occurred. The GBL and related terms of Celgar’s 2009 EPA remained “of no force” until the BCUC approved the EPA, on 31 July 2009, and the more favorable treatment afforded to other mills mostly occurred even later. All such dates are within the three year limitations period. Indeed, upon closer consideration, Mercer believes the correct trigger date could not have occurred before 27 September 2010. < [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ><sup>704</sup>

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<sup>700</sup> Counter-Memorial, ¶ 339.

<sup>701</sup> Counter-Memorial, ¶ 339 (emphasis added).

<sup>702</sup> C-221, 2009 Celgar EPA, § 7.1

<sup>703</sup> C-221, 2009 Celgar EPA, app. 1-7, ¶ 67 and § 5.

<sup>704</sup> By letter dated October 13, 2010, BC Hydro confirmed that Celgar had met its contractual requirements and that < [REDACTED] > C-290, Letter from Olha Lui, BC Hydro, to Brian Merwin, Celgar (13 October 2010).

**C. BC Hydro’s Actions In Precluding Below-Load Sales By Celgar To Third Parties Constitute Regulatory Measures, Not Procurement Measures**

616. Canada next devotes a substantial portion of its Counter-Memorial to its argument that the “procurement exclusion {contained in NAFTA Article 1108} applies to the measures challenged by the Claimant,”<sup>705</sup> and that as such, the Tribunal lacks jurisdiction over Mercer’s claim under NAFTA Articles 1102 and 1103. But Canada’s procurement argument, once again, is premised upon a mischaracterization both of Mercer’s claim and of the GBL-related provisions of the EPA, and therefore does not withstand scrutiny.

617. Canada simplistically contends that Celgar’s GBL-based restrictions fall within the procurement exception in NAFTA Article 1108(7)(A), because “BC Hydro sets a GBL in the context of an EPA to establish the amount of energy it will purchase from a self-generator under this Agreement.”<sup>706</sup> Mercer agrees that if in fact that was all its GBL did — nothing more than defining BC Hydro’s purchase obligation — such a measure would fall within the procurement exception.

618. But, as established above, the GBL-related provisions of Celgar’s 2009 EPA are not so limited. As detailed above, Section 7.4(b) restricts Celgar’s below-GBL sales to third parties — *parties other than BC Hydro*. It is this restriction that provides the basis for Mercer’s claim, and this restriction cannot be justified as a procurement-related term establishing the amount of energy BC Hydro will purchase.

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<sup>705</sup> Counter-Memorial, ¶ 341.

<sup>706</sup> Counter-Memorial, ¶ 345.

619. Moreover, the restriction on below-GBL sales to third parties was not otherwise necessary to BC Hydro’s Bioenergy Phase I procurement, as demonstrated both by the fact that BC Hydro had at least, at one point in the EPA negotiations with Celgar, agreed not to include the restriction,<sup>707</sup> and the fact that the BCUC set a GBL for Tolko in 2001 that restricted below-GBL sales completely outside the context of any procurement.<sup>708</sup> As the Tribunal will recall, the GBL concept originated in BCUC Order G-38-01 to address Howe Sound’s desire to sell power to California. It has no necessary relationship to any BC or BC Hydro procurement.

620. Mercer agrees with Canada and the *ADF* tribunal that “procurement” refers to “the obtaining by purchase by a governmental agency or entity of title to . . . possession of, for instance, goods, supplies, materials and machinery.”<sup>709</sup> But BC Hydro did not obtain any good or service through the challenged restriction on sales to third-parties. At issue is Celgar’s below-load self-generated electricity that BC Hydro *declined* to buy. The measures restricted Celgar from *providing*, to anyone. Under Canada’s preferred definition, that is not procurement.

621. The *ADF* case does not suggest otherwise. In *ADF*, a cabinet-level agency of the Commonwealth of Virginia (the Department of Transportation) was responsible for “the construction of a multi-phased project designed to improve the safety and efficiency of” a major highway system in the area of Springfield, Virginia, near Washington, DC.<sup>710</sup> The project included the construction of ramps and bridges curving above the relevant highways, as well as of

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<sup>707</sup> See *supra* ¶ 38 and n.28.

<sup>708</sup> See Memorial, ¶¶ 240–47.

<sup>709</sup> CA-1, *ADF* (NAFTA), ¶ 161; Counter-Memorial, ¶ 342. See also CA-16, *UPS II* (NAFTA), ¶ 135 (concluding that a Postal Imports Agreement in which the Canadian customs authority obtains materials handling, data entry, and duty collection services, is a procurement).

<sup>710</sup> CA-1, *ADF* (NAFTA), ¶ 45.

lane dividers, among other things.<sup>711</sup> The project was partially funded by the U.S. Government. One of the conditions of such funding was a “Buy America” clause, which mandated that steel and other products be purchased and manufactured in the United States. ADF, as a foreign investor and contractor in the project, brought a claim against the United States alleging that the “Buy America” requirements violated Chapter 11 of NAFTA.

622. The *ADF* tribunal correctly determined that the claim was barred because the challenged measure involved government procurement.<sup>712</sup> But these facts are readily distinguishable from the instant case. The crux of the claim in *ADF* was that the claimant was barred from selling goods to a state agency. The crux of the claim here is that Celgar is barred from selling electricity service not to BC Hydro or a Canadian state entity but to third parties, and that it is restricted from *purchasing* embedded cost electricity from FortisBC, a non-governmental, private utility. The former circumstances involve government procurement; the latter circumstances do not.

623. Finally, it cannot be the case that a State can avoid responsibility for discriminatory measures not themselves involving procurement by tucking them into procurement contracts. That would elevate form over substance. Tribunals in other contexts have consistently evaluated the applicability of jurisdictional exceptions by examining the substance of the state action at issue, rather than how the government chose to label it.

624. For example, in the recent decision, *Yukos v. Russia*, the respondent had argued that certain measures were exempted from the substantive protections of the Energy Charter

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<sup>711</sup> CA-1, *ADF* (NAFTA), ¶ 45.

<sup>712</sup> CA-1, *ADF* (NAFTA), ¶ 199(3)–(5).

Treaty (“ECT”) because they constituted “taxation measures” that were the subject of a jurisdictional carve-out. The tribunal rejected this assertion, holding “that, in any event, the carve-out of Article 21(1) can apply only to *bona fide* taxation actions, *i.e.*, actions that are motivated by the purpose of raising general revenue for the State. By contrast, actions that are taken only under the guise of taxation, but in reality aim to achieve an entirely unrelated purpose (such as the destruction of a company or the elimination of a political opponent) cannot qualify for exemption from the protection standards of the ECT under the taxation carve-out in Article 21(1).”<sup>713</sup>

625. The *Yukos* tribunal reasoned that if “the mere labeling of a measure as ‘taxation’ would be sufficient to bring such measure within the ambit of Article 21(1) of the ECT, {it would} produce a loophole in the protective scope of the ECT.”<sup>714</sup> Put differently, “a State could, simply by labeling a measure as ‘taxation’, effectively avoid the control of that measure under the ECT’s other protection standards.”<sup>715</sup>

626. Similarly, the tribunal in *Quasar de Valores v. Russia* explained: “It is no answer for a state to say that its courts have used the word ‘taxation’ . . . in describing judgments by which they effect the dispossession of foreign investors. *If that were enough, investment protection through international law would likely become an illusion, as states would quickly learn to avoid responsibility by dressing up all adverse measures, perhaps expropriation first of*

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<sup>713</sup> CA-54, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, ¶ 1407 (“*Yukos*”).

<sup>714</sup> CA-54, *Yukos*, ¶ 1433.

<sup>715</sup> CA-54, *Yukos*, ¶ 1433.

*all, as taxation.* When agreeing to the jurisdiction of international tribunals, states perform accept that those jurisdictions will exercise their judgment, and not be stumped by the use of labels.”<sup>716</sup>

627. In the instant case, Canada simply is “labeling” the restrictions imposed by the 2009 EPA on Celgar’s ability to sell below-GBL self-generated electricity, and its effect of imposing a self-supply obligation on Celgar, as procurement-related because they were imposed through a procurement agreement. But in substance these are regulatory measures, and the vehicle through which Canada imposed them is irrelevant.

628. In summary, the Tribunal has jurisdiction over all of Mercer’s claims.

### **VIII. RELIEF REQUESTED**

629. For the reasons explained herein, as well as in its Memorial of 31 March 2014, Mercer respectfully requests that the Tribunal:

- a. find that Canada has breached its obligations to provide Mercer the substantive protections under NAFTA articles 1102, 1103, and 1105, and award to Mercer damages with interest;
- b. order Canada to pay all costs of the arbitration, including Mercer’s legal and expert fees and expenses, fees and expenses of the Tribunal, as well as the costs charged by the Centre; and,

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<sup>716</sup> CA-55, *Quasar de Valores SICAV S.A. et al. v. The Russian Federation*, SCC Arbitration, Award, 20 July 2012, ¶ 179 (emphasis added).

- c. award to Mercer any such additional relief as it may consider appropriate.

Respectfully submitted,



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16 December 2014

Reply Annex A (Revised)

Celgar Mill Historic Data																	
A		B		C		D		E		F		G		H		I	
										A+B+C-E							
Year	Turbine Generator #1 Output (MWh/year)	Turbine Generator #2 and Turbine Generator #3 Output (MWh/year)	Annual Purchases from FortisBC (MWh/yr)		Physical Export Power Sales (MWh/yr) (before losses)	Celgar Annual Mill Load (MWh/yr)	Natural Gas Used for Steam Production (GJ/yr)	Pulp Production (ADMT/Yr)	Electricity Intensity (MWh/ADMT)								
1990	15,949	-	114,161		-	130,110	713,923	174,235	0.75								
1991	13,890	-	122,320		-	136,210	708,154	151,695	0.90								
1992	10,583	-	129,746		-	140,329	1,926,553	132,570	1.06								
1993	5,866	31	190,905		-	196,802	2,342,843	183,335	1.07								
1994	-	236,253	98,256		-	334,509	2,187,618	356,654	0.94								
1995	-	308,810	22,303		20,100	311,013	2,272,132	374,054	0.83								
1996	-	287,352	28,599		25,597	290,354	2,182,835	352,173	0.82								
1997	-	251,348	57,712		12,250	296,810	2,084,008	381,576	0.78								
1998	-	231,310	28,306		10,985	248,631	1,859,556	295,647	0.84								
1999	-	301,600	19,824		22,470	298,954	2,071,780	396,096	0.75								
2000	-	278,780	31,878		17,892	292,766	1,932,904	410,414	0.71								
2001	-	190,507	88,704		4,384	274,827	1,360,898	352,263	0.78								
2002	-	223,970	93,702		3,948	313,724	1,038,254	402,458	0.78								
2003	-	258,666	71,400		4,914	325,152	946,846	422,504	0.77								
2004	-	271,326	59,220		14,028	316,518	769,525	434,117	0.73								
2005	-	300,192	54,432		26,202	328,422	655,373	444,694	0.74								
2006	-	290,413	61,523		22,213	329,723	629,254	438,855	0.75								
2007	-	350,641	22,560		23,926	349,275	303,006	476,242	0.73								
2008		374,359	24,636		36,470	362,525	432,937	485,893	0.75								
2009		359,897	26,259		35,372	350,783	472,353	466,855	0.75								
2010								502,107									
2011								488,007									
2012								490,018									
2013								447,935									