

Before the

ADDITIONAL FACILITY OF THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mercer International Inc.,

Claimant,

v.

Government of Canada,

Respondent.

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

WITNESS STATEMENT OF ROBERT SWEENEY, P. ENG.

I, Robert Sweeney, hereby declare as follows:

1. My date of birth is [REDACTED], and I reside at [REDACTED]
[REDACTED].
2. I graduated from the University of Toronto with a Bachelor of Applied Science degree in Mechanical Engineering in 1952. I then worked for Consolidated Paper Corporation from April 1952 until February 1960 at the Wayagamack Division, starting as a junior engineer and ending as the Acting Divisional Engineer. I left Consolidated Paper to join Columbia Cellulose Company in March 1960 to work at their new mill (Celgar), which was under construction in Castlegar BC. Over the years I was working at Celgar, I progressed from Project Engineer, to Maintenance Engineer, to Maintenance Superintendent, to Chief Project Engineer, to Plant Engineer, to General Production Superintendent, to General Manager. In

1973, Columbia Cellulose was renamed Canadian Cellulose. In early 1974, I was transferred to the head office of Canadian Cellulose in Vancouver as Chief Engineer, until October 1975, when I transferred back to Castlegar as General Manager of Celgar. In 1986, the Celgar Mill was purchased by the Partnership of Power Consolidated Bathurst and CITIC, and I remained as the Mill's General Manager. When the Celgar Mill began planning for its modernization project in 1989, I moved on to become General Manager of the Celgar Pulp Modernization Project. I retired in February 1992, once the project received approval of the required environmental permits and construction got underway.

3. The Celgar Pulp Modernization Project was the culmination of my engineering career, thirty years of which were spent at Celgar. The Modernization Project was thus not only an important and significant project for Celgar, but also an important and significant project for me professionally. Because of my role as General Manager, I still remember well the major aspects of the Project. Despite my thorough knowledge of the Project, when I reviewed Exhibit R-097 (Celgar's Application for an Energy Project Certificate (the "Application")), I did not specifically remember that document. In light of the fact that I signed the Application, the only explanation I have for not remembering it specifically is that it must have been developed by others and presented to me as a document that was a routine submission for governmental approval that would involve very manageable and predictable follow up action by the Ministries to which the Application was submitted.
4. While I do not remember signing the Application, I remember the substance of the information in the document quite clearly. It described our vision of the Project and included our projections at the time about the work to be done to achieve the expansion, and it also included some of our operating assumptions. In this connection, an industrial project

of this magnitude has countless variables in its design, construction, and operation, which would require us to evaluate progress and make changes as needed as the plant was being tested and brought into operation. Among these variables are the physical condition of the equipment, supply and price of raw materials for production, changing market conditions, evolving regulatory frameworks, and labour issues, to name only a handful. In light of this reality, when filing the broad Application for a project of this nature and before the plant even became operational, we would not have committed to a specific level of self-generation of electricity.

5. Moreover, while the equipment we anticipated using for the Modernization Project was “state of the art” by 1990’s standards — it was not infallible.¹ An illustration of the fundamental problem raised by committing to a specific level of electrical self-sufficiency would be an attempt to drive a car between point A and point B at an average speed equaling the posted speed limit. One might be able successfully to complete the challenge, but unless one is able to drive far in excess of the posted speed limit (and numerous relevant conditions and variables (*i.e.*, weather, road conditions, construction, traffic, the vehicle’s maintenance history) would permit the driver to drive at the necessary speed), the chances of attaining the desired average speed are slim.
6. With respect to the statement in the Application regarding the energy requirements and generation capabilities (or self-sufficiency) of the Modernization Project, these would have

¹ I retired at the start of construction of the Modernization Project, but I visited the site frequently during construction. I was not present during start up. I have heard anecdotally that Celgar had problems with the lime kiln, which probably affected the energy use in that area. Another element that likely affected energy use was the brown stock washers. They were not as efficient as initially hoped, requiring the installation of additional washers to obtain the efficiency needed to get the bleach plant working effectively and maintain pulp quality. The wood room operation, which is a large energy user, was also a large variable, as it depended to a degree on the sawmill industry for chips, which is by its nature, quite cyclical.

been, quite simply, estimates.² As the Application plainly states, the energy requirements for the Modernization Project were *estimated* to be 50 megawatts. This estimate was determined by our consulting engineers after examining the information received as of that time from the suppliers of the various components and equipment. We used this information to determine the size of the turbo generator we would need to install. Therefore, 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.

7. Neither I nor, to my knowledge, any of the engineers I was supervising on the Modernization Project, believed that energy self-sufficiency was a Ministerial requirement as we were designing, planning, or implementing the project. As the supervisor of the project I certainly would have been informed about any such expectations or requirements. To my knowledge, this kind of requirement had not been imposed on other facilities in the province, and I heard no talk at the time or at any point until October 2014 that this was a possibility for Celgar. If any of us had believed there would have been such a requirement, we would have had numerous questions about the specific requirements and obligations we would be undertaking.

² See R-097 at 12-13 (“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. . . . 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.”) (emphasis added).

8. 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 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 that depended on burning natural gas uneconomical. No reasonable mill operator would blindly commit to self-sufficiency in light of these variables.
9. I understand that one of the documents that Canada produced in this proceeding is a letter that I sent in November 1990 to the Honorable Jack Davis, BC Minister of Energy, Mines and Petroleum Resources. In the letter, I advocated for the approval of the Celgar Application, and encouraged the Ministry to < [REDACTED] >³ In this letter, I provided two pages worth of specific features and benefits of the Celgar Modernization Project. For instance, I mentioned that < [REDACTED] > [REDACTED] > Among the specific examples of the measurable emissions reductions we were projecting were: < [REDACTED] >

³ See C-303, Letter from Minister J. Davis to R.W. Sweeney (5 December 1990) and Letter from R.W. Sweeney to Minister J. Davis (22 November 1990), at Bates No. 163870.

[REDACTED] >⁴ I

also discussed the < [REDACTED]

[REDACTED]

[REDACTED] >⁵ among other concrete

elements of the project. Notably, though I cited all of these examples (and more) of benefits and highlights of the project, I made no reference whatsoever to the alleged commitment to energy self-sufficiency. This is simply because, at the time, no one at the Mill was even thinking about energy self-sufficiency; we were focused almost entirely on the environmental components of the expansion.

10. More broadly, as the General Manager of the Celgar Pulp Modernization Project, I believe I would have been asked to address many questions about such a commitment if one was actually being made. A commitment along the lines that Canada now suggests — that Celgar was required to generate a given level of electricity (and be able to continue generating at this level for the indefinite future) and utilize that electricity to meet all of the pulp mill's load — would have had major consequences for our plant and would have therefore been a core element of my responsibilities. I would have needed to have been informed exactly what the requirements were and consulted accordingly with the Mill owners. Celgar would also have needed to know and understand the risks of not complying with any such commitment, including the risks of Mill shutdowns, interruption in service, and the ability to buy replacement power when needed. In this connection, I note that if

⁴ See C-303, Letter from R.W. Sweeney to Minister J. Davis (22 November 1990), Bates No. 163873.

⁵ See C-303, Letter from R.W. Sweeney to Minister J. Davis (22 November 1990), Bates No. 163873.

Celgar (or later, Mercer) committed to self-supply its entire load, and only buy replacement power when its self-generated electricity was unavailable (*e.g.*, during outages), Celgar would have been obliged to buy such power at a significantly higher cost than if it had a fixed agreement with the utility to purchase electricity. If I had been told about a possible energy self-sufficiency obligation, I would have certainly recommended that Celgar's owners engage the relevant provincial Ministries in a discussion regarding the exact scope and parameters of the commitment, and what kind of oversight we would be getting. None of this happened.

11. Furthermore, from the time we filed the Application in October 1990 until I retired in February of 1992, which includes the first nine months after the Ministers' Order was signed in May 1991, neither the Ministry of Energy Mines and Petroleum Resources, nor the Ministry of Forests and Environment, contacted me to discuss any supposed electricity-related commitments that would be binding upon Celgar based on the estimates set forth in the Application. Unlike with regard to the environmental obligations placed on the Mill (as to which we had to regularly report to the government), I do not recall receiving a single request for information on Celgar's generation levels; there were no monitoring or reporting requirements. In fact, the first time I heard any suggestion that the Application and approval allegedly created a binding electricity self-use commitment on Celgar was in October 2014, when counsel for Mercer contacted me and informed me that counsel for Canada was

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alleging that Celgar had made a commitment to 100 percent energy self-sufficiency based on the estimations set forth on pages twelve and thirteen of the Application.

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

In Castlegar, British Columbia, on the 5th day of December, 2014.

Robert Sweeney